A KOCHUKAKKADA ABOOBACKER (DEAD) BY LRS. AND ORS.

v.

ATTAH KASIM AND ORS.

JANUARY 16, 1996

B [K.RAMASWAMY AND G.B. PATTANAIK, JJ.]

Property Law :

Civil suit—Partition—Documentary evidence—Not considered in the C *proper prospective by the trial Court and lower appellate Court—High Court interfering with the concurrent finding of courts holding that title to suit property established and Passing preliminary decree directing parties to work out their rights—Held, High Court rightly interfered and passed the preliminary decree.*

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2701 of 1981.

From the Judgment and Order dated 13.2.79 of the Kerala High Court in Second Appeal No. 542 of 1975.

K.R. Rajasekaran Pillai and M.R. Ramesh Babu for the Appellants.

E Ms. Baby Krishnan and K. Prabhakaran for the Respondents.

The following Order of the Court was delivered :

Having perused the judgment of the High Court in Second Appeal No. 542/75 passed on 13.12.1979, we are of the view that the High Court has F rightly interfered with the concurrent finding of fact recorded by the trial Court as well as by the appellate Court and decreed the suit.

The trial Court had wrongly proceeded on the premise of burden of proof on the plaintiff which was corrected by the appellate Court. However, the appellate Court committed another error of not considering the documentary G evidence in proper perspective of the respective claims of the parties. Admittedly, the plaintiffs and the first defendant are children of Ahmmad Malmi through his first and second wives respectively. The only claim was with regard to one item, namely, Konchukakkada property. It is seen that the case of the plaintiffs was that it was left undivided to the extent of their 3/4th share H therein of their father and that, therefore, they are entitled to partition and

separate share. Ex. A-3 is a crucial document in establishing the title of the plaintiffs in the property. In those judicial proceedings it was declared that the defendants in that suit had no title to the trees. It would appear that in the island, the title to the trees is relatable to the title to the land. Under those circumstances, the High Court has proceeded on the basis that it was relatable to the title to the property. That finding gets corroboration from other judicial proceedings under Ex. A-4, A-8 and A-9. It would thus be clear that the title of the property which is the subject matter of the partition suit in favour of the respondents, stands established. The appellate Court had not considered these documents in proper perspective and the effect of those documents on the rights of the parties. Accordingly, the learned Judge reluctantly had reconsidered the evidence and, in our view, quite rightly since it is not a mere appreciation of evidence but drawing inferences from the admitted documents. Since proper construction of the documents and inferences have not legally been drawn by the appellate Court, the High Court has gone in detail and recorded the finding thus :

> "It is with extreme reluctance that I interfere with the concurrent finding on questions of facts. But the finding is totally without evidence and is, therefore, perverse. The finding is based on total misconceptions as to the nature of the documents relied upon. The finding is not reasonably supported by any evidence whatever. On the other hand the evidence to the contrary was ignored. Exts. A1 to A3 as well as Exts. A4, A6, A8, and A9, whatever their evidentiary value, were a pointer in the opposite direction. Exts. A1 to A3 showed that the suit properties were gifted in favour of the plaintiff. Ext. A4 showed that the authorities competent to decided on title to coconut trees considered that the trees standing in the suit property belonged to the plaintiffs. It would appear, as stated by the lower appellate court, that in the Island at the relevant time, disputes as to title to properties arose only in the form of disputes about trees. The dispute in regard to the trees in Ex. A4 proceedings was thus a dispute in regard to the ownership of the property in which the trees stood. Again the decision in Exts. A8 and A9 proceedings confirmed the validity of Ext. A3 and rejected the 1st defendant's contentions to the contrary. The statement of the 2nd defendant in his capacity as the power-of-attorney holder of the 1st defendant's contentions to the contrary. The statement of the 2nd defendant in his capacity as the power of-attorney holder of the Ist defendant to the effect that Attah

A Mohammad had rights in the suit property is also very significant. The Munsif as well as the Judge felt that there was a paucity of evidence and the pleadings were far from clear. As stated by them, the pleadings in the Island at the relevant time were not drafted by experts. The trial in this case was not conducted with the assistance of counsel, as the parties were represented by local Mikthiars who had B no legal training. Only at the appellate stage did counsel appear. But with all this infirmity and handicaps, it seems to me that one thing stands out clear, and that is, the property in question belonged to Ahmmad Malmi and his nephew Abdul Rahman and they were self-acquisitions of those persons. It is also clear that Abdul Rahman C transferred his share in the property to Pathumma and her children including the Ist plaintiff. Furthermore, the plaintiffs are the heirs of Ahmmad Malmi. The only defendant who was personally connected with Ahmmad Malmi was the Ist defendant who was born to him by his second marriage. The plaintiffs recognise the rights of defendants D 1, 2 and 5 to claim their share in the property in accordance with their personal law. The case of the plaintiffs appears to be reasonable, just and in the circumstances, well founded. In my view, they are entitled to a decree.

The Munsif after finding that the plaintiff did not discharge their E burden to prove that the suit property was available for partition, worked out the share to which the parties were entitled in the event of his finding on the question of partition being reversed in appeal. The allotment of shares by the Munsif has not been challenged, and I, therefore, accept it as final."

F Accordingly, a preliminary decree was passed by the learned judge directing the parties to work out their rights in furtherance thereof.

Having considered the totality of the facts and circumstances, we are of the considered view that the learned Judge had rightly interfered with the concurrent finding of fact recorded by the trial Court and appellate Court and G granted a preliminary decree for partition. We do not find any error of law much less substantial question of law, for interference.

The appeal is accordingly dismissed. No costs.

G.N. Appeal dismissed