NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.352 OF 2009

PANGU ALIAS APPUTTY (DEAD)
THROUGH L.Rs.& ORS. … **APPELLANTS**

Versus

NARAYANI & ORS. … **RESPONDENTS**

J U D G M E N T

V. GOPALA GOWDA, J.

This appeal is filed by the appellants against the final judgment and order dated 02.02.2005 passed in A.S. No. 678 of 1993(C) by the High Court of Kerala at Ernakulam, whereby the High Court has set aside the judgment and decree passed in the Original Suit No. 123 of 1990 on 26.11.1992 by the

Subordinate Court Judge, Tirur, holding that the judgment and decree under the appeal cannot be sustained and passed a preliminary decree directing the division of the suit schedule properties.

2. The relevant facts, in brief, are stated hereunder. For the sake of brevity and convenience the parties are referred to as per the rank assigned to them in the original suit proceedings.

3. The defendant Nos. 1 to 9 in the Court of the Subordinate Judge are the appellants herein and the plaintiffs and defendant Nos. 10 to 17 are the respondents herein who belong to the Perumkollam (blacksmith) community and are governed by customary law and Hindu law. As per the original suit, the suit schedule properties belonged to Valli, the mother of the plaintiff No. 1 and grandmother of plaintiff Nos. 2 to 4 and the defendant Nos. 1 to 17. Valli died in the year 1942 leaving behind her three sons namely, Kunhan, Ayyappan and Apputty and two

daughters, namely, Unniechi and Ammalukutty. The plaintiff No. 1 is Unniechi, the daughter of Valli, plaintiff Nos.2 to 4 are the children of deceased Apputty, defendants Nos. 1 to 7 are the children of the deceased Kunhan, defendant Nos. 8 and 9 are the daughters of deceased Ayyappan and defendant Nos. 10 to 17 are the children of deceased Ammalukutty. Kunhan expired in the year 1984 or 1985. Ammalkutty died in the year 1986 or 1987 and Ayyappan died in the year 1984 or 1985. Apputty died in the year 1945.

4. According to the case pleaded by the plaintiffs, after the death of Valli, her two sons, namely, Kunhan and Ayyappan were in possession and enjoyment of the suit schedule properties for and on behalf of the other legal heirs. Kunhan and Ayyappan were giving the income derived from the suit schedule properties to the shares of the plaintiffs upto their death.

It is also stated by the plaintiff No. 1, Unniechi and Ammalukutty that the daughters of the

deceased Valli were residing in their matrimonial home and frequently used to come and reside in their ancestral home. That, after the death of Apputty, plaintiff Nos. 2 to 4 were also residing in the suit properties and their marriages were also conducted there.

5. The plaintiff No. 1 (Unniechi d/o Valli) requested the defendant No. 1 on several occasions and finally as per the notice dated 30.08.1990 to allot the share of plaintiff No. 1 by dividing the suit schedule properties by meets and bounds.

6. The defendant No. 2 approached the plaintiff No. 1, offering Rs.500/- towards the value of her share and requested her to be content with the same. But she did not accede to the request made by him.

Thereafter, defendant No. 1 sent a reply notice stating therein that the plaintiff No. 1 was not a co-sharer of the suit schedule properties and that

the properties were not available for partition as prayed by her in the original suit.

7. On the other hand, it is stated by defendant Nos. 1 to 9 that after the death of Valli, the suit schedule properties were partitioned between Kunhan and Ayyappan by a registered partition deed of the year 1953, as per Ex-B1, considering that they are co-owners of the said properties. During their life time, they were in continuous, uninterrupted, open and hostile possession of the suit schedule properties from 1953 onwards against the entire world including the plaintiffs and defendant Nos. 10 to 17 and after their death, their children, defendant Nos. 1 to 9 have been in continuous uninterrupted possession of the suit schedule properties.

8. It is stated by the defendant Nos. 1 to 9 that they have constructed building and made permanent valuable improvements in the suit schedule properties. The said defendants prayed for the value

of improvements made upon the suit schedule properties which is valued around Rs.3,50,000/- in the event, if a decree of partition of the properties is passed, along with the entitlement of their share on equity basis. It is also stated by them that the rights of the plaintiffs, if any, on the suit schedule properties have been lost by them on account of adverse possession of the properties by defendant Nos. 1 to 9 as the same is barred by limitation and ouster from the properties. Further, it is pleaded that the suit filed by the plaintiffs without any prayer for recovery of possession of properties from defendant Nos. 1 to 9 is also not maintainable in law. It is further stated by the defendants that the plaintiffs are not entitled to inherit the suit schedule properties as per the customary law prevailing in the community.

9. It is also stated by the defendant Nos. 1 to 9 that Apputty predeceased his mother in the year 1938, hence, plaintiff Nos. 2 to 4 are not entitled to

inherit the properties left behind by Valli. The defendant Nos. 8 and 9 (daughters of deceased Ayyappan) filed a joint written statement separately before the Trial Court on the similar lines of defence taken by the defendant Nos. 1 to 7 in their written statement.

10. It is further stated by the above defendants that even before the death of Valli, her daughter Unniechi, the plaintiff No. 1 and the other daughter namely, Ammalukutty (the mother of the defendant Nos. 10 to 17) were given ornaments, utensils and dowry in their marriage as Streedhana which is in accordance with the customary rights recognised in the community. According to them as per the customary rights of the parties and law, on the death of Valli, the suit schedule properties were devolved on her surviving sons, namely, Kunhan and Ayyappan exclusively by succession. Both the plaintiff No. 1 and her sister, Ammalukutty were aware of this.

11. The defendant Nos. 10 to 17 had filed their written statements before the Trial Court supporting the plaint averments and they have also claimed allotment of their separate share by dividing the suit schedule properties by metes and bounds and put them in possession of their share of the properties, that would be allotted by the Court in the final decree proceedings that will be drawn.

12. The Trial Court has framed 9 issues on the basis of pleadings and conducted the trial. On behalf of the plaintiffs, two witnesses were examined as PW-1 and PW-2 and their documents were marked as Exs. A-1 to A-3 and on behalf of the defendants, three witnesses as DW-1 to DW-3 were examined and marked their documents as Exs.B-1 to B-10 to justify their respective cases in the original suit proceeding.

13. The Trial Court on the basis of pleadings and on appreciation of both oral and documentary evidence on record has answered the contentious issues against

the plaintiffs and in favour of the defendant Nos. 1 to 9 and consequently, held that the plaintiffs and defendant Nos. 10 to 17 are not entitled for partition vide its judgment and decree. Consequently, the suit was dismissed with no costs.

14. Aggrieved by the judgment and decree of the Trial Court, the plaintiffs filed Appeal Suit No. 678 of 1993(C) before the High Court of Kerala. During the pendency of the appeal, the plaintiff No. 1 died and additional appellant Nos. 5 to 16 were impleaded as the legal representatives of the plaintiff No. 1 vide order dated 10.8.2004 passed in C.M. Application No. 895, I.A. Nos. 2202, 2203 and 2004. The plaintiffs have questioned the correctness of the findings recorded on the contentious issues framed by the Trial Court urging various legal contentions *inter alia* contending that Valli died long before the commencement of the Hindu Succession Act, 1956 and also stated that the suit schedule properties in question are "Streedhana" properties and the Trial

Court has misdirected itself to hold that the plaintiffs are not entitled for a decree of partition of the properties. The averments made in the plaint are that as per the customary law of the community and Hindu Law, all the children of Valli are the heirs of Valli and all of them have equal shares and are in joint possession of the suit schedule properties. In the absence of the plea in the plaint that both the daughters of Valli namely, Unniechi and Ammalukutty were not given the dowry and other properties at the time of their marriage and their marriage was not performed in Kudivaippu form, and therefore, they are entitled to their share over the properties.

15. The plaintiffs have pleaded that Apputty died subsequent to the death of Valli. No doubt, the said plea is denied by the contesting defendants as no concrete evidence was adduced on either side of the parties. It is urged on behalf of the plaintiffs before the High Court that so far as the findings

recorded by the Trial Court on the contentious issue No. 4 in favour of the defendant Nos. 1 to 9 is concerned, by placing reliance on Ex.-B1, the partition deed dated 06.05.1953 between Kunhan and Ayyappan, who had partitioned the suit schedule properties, as the same belong to them exclusively, and Ex.-B9, the gift deed made in favour of defendants Nos. 8 and 9, by their father is not only erroneous but also suffers from law.

16. On the contrary, the defendant Nos. 1 to 9 have specifically pleaded that the marriage of daughters of Valli was performed in Kudivaippu form but they have not proved the same by producing cogent evidence. They had pleaded that the daughters of Valli had been given ornaments, utensils and dowry at the time of their marriage. However, it was urged on behalf of them that it was upto the plaintiffs to prove that their marriage was not performed by following the Kudivaippu form of marriage prevalent in the community but their marriage was performed by

following Sambandam to justify their claim upon the suit schedule properties. In support of their case, they placed reliance upon the judgment in ***Kochan Kani Kunjaraman Kani*** *v.* ***Mathevan Kani Sankaran Kani***[1], wherein the Kerala High Court has laid down the law with regard to the requirements for accepting a valid custom in the community. The plea in that regard should be so specific and clear that the opposite parties are not taken by surprise. Valli died at Ramanattukara in the erstwhile Malabar area, therefore, the decisions of the Madras High Court alone are binding between the parties in relation to the suit schedule properties, hence the decisions of the erstwhile Travancore & Cochin cannot be applied to the fact situation of the case on hand. Further, it is stated that a custom modifying the pristine Hindu Law entitles the married daughters to their share in the properties of their deceased mother which has also been judicially recognized. No doubt, no such custom has been pleaded in the plaint by the

[1] 1971 K.L.T. 609

plaintiffs. Even then, if it is the Hindu Mithakshara Law which governs the parties, then the plaintiff No. 1 who was the surviving daughter of Valli and defendant Nos. 10 to 17 who are the children of Ammalukutty, the other daughter of deceased Valli, cannot get any share over the properties.

17. Further, the alternative submission made on behalf of plaintiffs that since the suit schedule properties were acquired by Valli as per Ex.-A1 "Panayam Theeradharam" during coverture, therefore, the same could be treated as her Streedhana properties of deceased Valli as opined by **N.R. Raghavachariyar on Hindu Law, under Section 468, Chapter XIII, at Page 530 of the 7th Edn. of his Commentary**. Therefore, the daughters of Valli alone would be entitled to the suit schedule properties and since they were excluded from possession of the properties by their brothers for more than 50 years after the death of Valli, their rights, if any, are lost by adverse possession and barred by limitation.

Therefore, suit filed by the plaintiffs is liable to be dismissed *in limine*, since the suit for partition will lie only against co-owners in joint possession in view of Section 37 of the Kerala Court Fees and Suits Valuation Act, 1959 (in short "the Act"). The defendant Nos. 1 to 9, in such a case would be strangers in possession of the properties and the suit as against them without a prayer for recovery of the possession of the suit schedule properties as provided under Section 30 of the Court Fees Act will not lie. The plaintiffs have paid court fee only under Section 37(2) of the Court Fees Act and there is neither a prayer for recovery of possession of the suit schedule properties nor payment of court fee paid under Section 30 of the Court Fees Act. Therefore, the original suit filed by the plaintiffs is liable to be dismissed as the same is not maintainable in law.

18. The High Court has held that as per the custom of the Hindu Law, the suit schedule properties of the

deceased Valli are not Streedhana and after her death, her daughters and sons have inherited the suit schedule properties. Therefore, there was no reason for the Trial Court to hold that the daughters of Valli were excluded from partition of the suit schedule properties which are not binding on the plaintiffs and defendant Nos. 10 to 17. Therefore, claiming share by them after 50 years of death of Valli upon the suit schedule properties cannot be a ground for the contesting defendant Nos. 1 to 9 to take the plea that they have perfected their title to the suit schedule properties by adverse possession and ouster as specifically pleaded by them, which plea is accepted by the Trial Court and the findings recorded by it on the contentious issue No. 4 is not only erroneous but also suffer from error in law.

The High Court has held that the defendant Nos. 1 to 9 have not proved the fact that Apputty (3rd son of Valli) has predeceased his mother Valli to deny the rights claimed by the plaintiff Nos. 2 to 4 who

are his heirs. On the other hand, from the evidence of DW-2, it could be certainly inferred that Apputty died after the death of his mother.

19. It is further observed by the High Court in the impugned judgment that with reference to the findings recorded in the judgment of the Trial Court that even assuming that the plaintiffs and defendant Nos. 10 to 17 were co-owners, the open and exclusive possession of the suit schedule properties by the contesting defendant Nos. 1 to 9 to their hostile interest is a strong circumstance to draw an inference of their ouster from the suit schedule properties and findings recorded in this regard by the Trial Court by accepting their case on the basis of facts pleaded and evidence on record and the decisions of this Court in ***Amrendra Pratap Singh*** *v.* ***Tej Bahadur Prajapati & Ors.***[2] is not only erroneous in law but also suffer from error in law and therefore it has

[2] (2004) 10 SCC 65

set aside the finding and reasons recorded in the impugned judgment.

20. The contentions urged on behalf of the contesting defendant Nos. 1 to 9 contending that the Trial Court being a fact finding court, on proper appreciation of pleadings, documentary and oral evidence on record has held that Valli died during the life time of the fathers of the defendant Nos. 1 to 9 and they have been in possession and enjoyment of the properties exclusively as the owners. Therefore, they have perfected their title to the suit schedule properties by adverse possession and ouster of the plaintiffs and hence, the same could not have been interfered with by the High Court in exercise of its appellate jurisdiction and granted decree for partition in favour of the plaintiffs and defendant Nos. 1 to 9, is also not sustainable in law.

21. The High Court has passed the impugned judgment dated 02.02.2005 in A.S. No. 678 of 1993(C) by reversing the findings recorded on the contentious issues framed by the Trial Court against the plaintiffs and defendant Nos. 10 to 17 and directed the division of the plaint schedule properties by meets and bounds by allotting the plaintiffs 1/5 share to the first plaintiff, 1/5 share to plaintiff Nos. 2 to 4 jointly. The High Court further held that any of the other sharers can apply for separation and allotment of their share on payment of the requisite court fees. It is further held by the High Court that any of the other sharers can apply for separation and allotment of their share on payment of the requisite court fees. The High Court further held that the plaintiffs shall be entitled to *mesne* profits, the quantum of which shall be determined in the final decree proceeding. Such *mesne* profits shall be payable by defendant Nos. 1 to 9 from the date of suit till delivery of their respective share

properties to the plaintiffs. Further, the High Court has awarded the costs of the Appeal.

The correctness of the said judgment is challenged by the defendant Nos. 1 to 9 before this Court by filing this Civil Appeal and by raising certain substantial questions of law and urged grounds in support of the same.

22. It is contented by the learned counsel on behalf of the appellant-defendant Nos. 1 to 9 that the custom of the parties is at variance with the Mitakshara Law, regarding succession to the properties and it is for the parties who have pleaded the custom to prove it affirmatively by adducing evidence on record in order to secure a decree for partition of the suit schedule properties.

23. It is further contented that the High Court erred by placing the burden of proof on the defendants to prove that the marriage of the

plaintiff No. 1 and Ammalukutty took place in the Kudivaippu form and not Sambandam form.

24. The further contention urged on behalf of the defendant Nos. 1 to 9 was that the High Court erred by not considering the fact that plaintiffs have not established all the ingredients necessary for the type of marriage celebrated by the daughters of deceased Valli by producing cogent evidence to get a decree of partition of the suit schedule properties and the burden was on them to plead and establish the form of marriage of the daughters.

25. It is further contended by the learned counsel on behalf of defendant Nos. 1 to 9 that the High Court has erred in exercising its jurisdiction by reversing the findings of fact recorded by the Trial Court on the relevant issues on the basis of the pleadings and evidence on record. Therefore, the findings recorded by the High Court in the judgment on the contentious points that arose for its

consideration are not only erroneous in law but also suffer from error in law.

26. It is further contended that the Hindu Mitakshara law applies to the family of Valli in the absence of any proven customs practiced in the community, thus the High Court should have held that under the Hindu law, daughters are not entitled to any share in the properties of deceased Valli. Therefore, it is urged by the learned counsel that the High Court erred in holding that the daughters of deceased Valli are also entitled to share in the estate of the deceased and has committed a grave error in reversing the judgment of the Trial Court. Therefore, the impugned judgment is vitiated in law and liable to be set aside.

27. Further, it is contended that the question of law raised regarding adverse possession of the defendant Nos. 1 to 9 would certainly arise in this appeal for the reason that the High Court has

erroneously reversed the finding of fact recorded by the Trial Court on the issue of adverse possession of the suit schedule properties of defendant Nos. 1 to 9 by ouster, which is contrary to the admitted pleadings and finding of fact in the instant case regarding their possession. Therefore the defendant Nos. 1 to 9 have prayed to allow the appeal.

28. On the basis of the above said rival legal contentions, the following points would arise for our consideration: -

(1) Whether the plaintiff No.1 and Defendant Nos. 10-17 have proved that the suit schedule properties of Valli are Stridhan properties in view of Ex.-A1, "Panayam Theeradharam" which properties were acquired by her, as per the said document?

(2) (i)-Whether the plaintiff No. 1 and defendant Nos. 10 to 17 are entitled for partition of the suit schedule properties as they have been excluded from the possession of the properties by ouster by

the sons of deceased Valli namely, Kunhan and Ayyappan for more than 50 years from the date of her death and (ii) whether they have lost their right by adverse possession of the defendant Nos. 1 to 9 by ouster and their claim is barred by limitation?

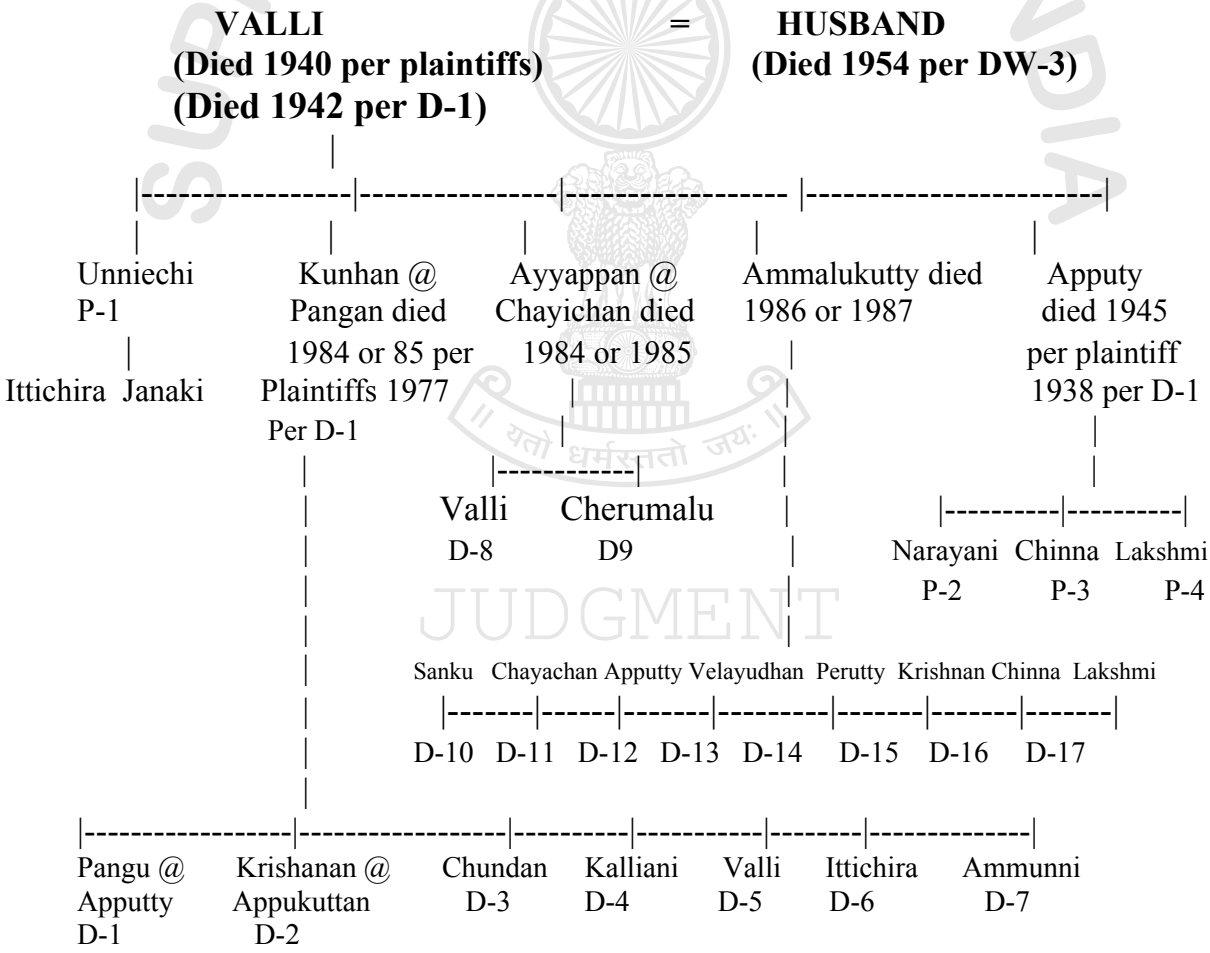
(3) In the absence of averments in the plaint regarding custom followed in the marriage of the daughters of Valli and that their marriage was not in Kudivaippu form therefore, can their rights be excluded upon the suit schedule properties of Valli as per customs prevalent in their community under the Hindu Law?

(4) Whether the partition deed (Ex.-B1) in the year 1953 is binding between the deceased Kunhan and Ayyappan in view of the litigation between them as per documents (B-2 to B-4) in respect to the suit schedule properties of Valli?

(5) Whether the plaintiff Nos. 2 to 4 are entitled for their share in the suit properties?

(6) What relief the parties are entitled to?

29. To answer the aforesaid points, it would be convenient for us to give the genealogy of Valli and her family for proper understanding of the claims of the parties, which is extracted as below :-



Answer to Point Nos. 1 & 2

30. The point Nos. 1 & 2 are to be answered against the plaintiff No. 1 and defendant Nos. 10 to 17 by assigning the following reasons.

The suit schedule properties are Streedhana properties of deceased Valli, as per the documentary evidence on record Ex.-A1 (Panayam Theeradharam) as opined by **N.R. Raghavachariyar on Hindu Law, under Section 468, Chapter XIII, at Page 530 of the 7th Edn. of his Commentary**., which is extracted below :-

> "S.468.**Definition of Stridhana-** During the voluminous discussions ancient and modern, which have arisen with regard to the separate property of woman under Hindu Law, its qualities, its kinds and its line of descent, the question has constantly been found in the forefront, what is Stridhana? Vijnaneswara's expanded definition of Stridhana in the Mitakshara, was accepted by the Benares(Viramitrodaya,V-1-2)and Mayukha Schools (iv-10-2 and 26) and generally by the Madras High Court, but was not adopted by the Mithila and the Dayabhaga Schools. The Bengal School of lawyers have always limited the use of the term narrowly, applying it exclusively or nearly exclusively, to the kinds of women's property enumerated

> in the primitive sacred texts the Smritis. The author of the Mitakshara and some other authors apply the term broadly to every kind of property which a woman can possess from whatever source it may be derived. The Privy Council in ***Sheo Shankar*** v. ***Debi Sahai***, confined the Stridhana proper to property classified as such by Manu and Katyayana and disapproved the extension given by Yajnavalkya. Stridhana must be confined to such property of a woman over which she possesses an unfettered power of disposal. This power depends upon the School to which she belongs, her status at the time of acquisition and the source of such acquisition.
>
> 469. **Source of acquisition.-** The source of acquisition of property in a woman's possession are the following:-
>
> 1. Gifts before marriage,
> 2. Wedding gifts,
> 3. Gifts subsequent to marriage
> 4. Self-acquisitions
> 5. Inheritance
> 6. Purchase
> 7. Partition
> 8. Adverse possession
> 9. Maintenance claim
> 10. Other sources"

Definition of Streedhana is adverted to by the High Court at para 12 of the impugned judgment which reads as under:-

> "12. Streedhana i.e., a woman's peculium is a property :-
>
> (i) given to a woman before the nuptial fire (adhyagni)
>
> (ii) given at the bridal procession (adhyavahanika)
>
> (iii) given in token of the love (dattam pritikarmini) and
>
> (iv) that is received from a brother, mother, or father or husband at the nuptial fire or presented on her supersession (adhivedanika) and the like (adi)"

31. The High Court referred to Vigneswara's expansion of the term "adi" which includes all those properties that a woman may acquire by inheritance, purchase, partition and seizure. The said expanded definition of "Streedhana" by Vigneswara was not accepted by the Privy Council in ***Sheo Shankar Lal*** *v.* ***Debi Sahai***[3] and ***Debi Mangal Prosad Singh*** *v.* ***Mahadeo Prasad Singh***[4]. The disapproval by the Privy Council of Vigneswara's expansion of "Streedhana" is confined to the Bengal or Dayabhaga and Banaras Schools. The said expanded

[3] (1903) ILR 25 ALL
[4] (1912) 14 BOMLR 220

definition of "Streedhana" has generally been accepted by the Madras High Court. It is thus evident from the pleadings and evidence on record that the properties of Valli are Streedhana properties in the absence of any other concrete documentary proof produced by defendant Nos. 1 to 9 before the Trial Court which would have generally entitled her daughters to have exclusive right over the suit schedule properties. Having said so, the learned Judge of the High Court did not record a finding that the Streedhana properties of Valli exclusively belong to her daughters and they have been out of possession from the said properties for more than 50 years which is evident from Exs.-B1 to B6. The undisputed fact is that the original suit was filed by the plaintiffs for partition in the year 1990. The concurrent finding recorded by the courts below is that the year of death of Valli, the mother of the plaintiff No. 1 and grandmother of plaintiff Nos. 2 to 4, was 1942. Undisputedly, the possession of the suit schedule

properties has been with the deceased sons namely, Kunhan and Ayyappan during their life and thereafter defendant Nos. 1 to 9 for more than 50 years, therefore, their plea that they have perfected their title to the suit schedule properties by adverse possession as they are strangers to the properties in question for the reason that they are not entitled for a share of the Streedhana properties of Valli is valid and legal and therefore, the finding of fact recorded by the High Court is correct. In view of the said finding of fact recorded by the High Court the defendant Nos. 1 to 9 will not succeed to the properties as they are not the co-owners of the properties along with the plaintiff No. 1 and defendant Nos. 10 to 17. Their continuous possession of the suit schedule properties is adverse possession by ouster of them is proved by them on the basis of admitted facts and evidence on record. This finding of fact is recorded by the Trial Court on the relevant contentious issue No. 4 but the reasons

assigned by it on the said contentious issue are different from the reasons assigned by us, the same has not been accepted by the High Court and reversed the said finding by recording its own reasons at paragraph Nos. 11 and 13 of the impugned judgment which are not only erroneous in law but suffers from error in law. Therefore, we have to answer the point Nos. 1 and 2 in favour of the defendant Nos. 1 to 9 and against the plaintiff No. 1 and defendant Nos. 10 to 17.

32. The High Court has referred to the Ex.-A1 but did not record positive finding on this aspect of the case holding that the daughters of Valli are exclusively entitled to the suit schedule properties as the said properties are her Streedhana properties. The same has been referred to for the purpose of considering the adverse possession of ouster as pleaded by defendant Nos. 1 to 9 in their written statement. On this aspect of the case the finding is recorded by the High Court against them, after

referring to the provisions of the Kerala Court Fee Act. Further, there is neither any prayer made by the plaintiffs for recovery of possession of the suit schedule properties nor payment of court fee paid by them under the provisions of the Act. The said submission made on behalf of the defendant Nos. 1 to 9 was not accepted by the High Court by recording untenable reason at para 9 of the impugned judgment.

33. The Trial Court being a fact finding court, on proper appreciation of pleadings, documentary and oral evidence on record, has rightly come to the conclusion and held that Valli died during life time of her children. Thereafter fathers of defendant Nos. 1 to 9 were in possession and after their death they have been in possession and enjoyment of the suit schedule properties exclusively as the owners. Therefore, they have perfected their title to the suit schedule properties by adverse possession and ouster of the plaintiff No. 1 and defendant Nos. 10 to 17. Hence, the High Court should not have

interfered with the finding of fact recorded by the Trial Court on the relevant contentious issue No. 4 based on legal evidence on record, the said finding has been erroneously set aside by the High Court in exercise of its appellate jurisdiction and therefore, the impugned judgment is liable to be set aside.

34. The learned counsel for the defendant Nos. 1 to 9 have rightly relied upon the judgment of this Court in support of their contention in the case of ***Amrendra Pratap Singh*** *v.* ***Tej Bahadur Prajapati***[5] wherein this Court held as under :-

> ***"What is adverse possession?***
>
> 22. Every possession is not, in law, adverse possession. Under Article 65 of the Limitation Act, 1963, a suit for possession of immovable property or any interest therein based on title can be instituted within a period of twelve years calculated from the date when the possession of the defendant becomes adverse to the plaintiff. By virtue of Section 27 of the Limitation Act, on the determination of the period limited by the Act to any person for instituting a suit for possession of any property, his right to such property stands extinguished. The

[5] (2004) 10 SCC 65

process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner. A person, though having no right to enter into possession of the property of someone else, does so and continues in possession setting up title in himself and adversely to the title of the owner, commences prescribing title on to himself and such prescription having continued for a period of twelve years, he acquires title not on his own but on account of the default or inaction on the part of the real owner, which stretched over a period of twelve years, results in extinguishing of the latter's title. It is that extinguished title of the real owner which comes to vest in the wrongdoer. The law does not intend to confer any premium on the wrongdoing of a person in wrongful possession; it pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrongdoer and re-enter into possession, has defaulted and remained inactive for a period of twelve years, which the law considers reasonable for attracting the said penalty. Inaction for a period of twelve years is treated by the doctrine of adverse possession as evidence of the loss of desire on the part of the rightful owner to assert his ownership and reclaim possession.

23. The nature of the property, the nature of title vesting in the rightful owner, the kind of possession which the adverse possessor is exercising, are all relevant factors which enter into consideration for attracting applicability of the doctrine

> of adverse possession. The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognised by the doctrine of adverse possession as having been alienated involuntarily, by default and inaction on the part of the rightful claimant, who knows actually or constructively of the wrongful acts of the competitor and yet sits idle. Such inaction or default in taking care of one's own rights over property is also capable of being called a manner of "dealing" with one's property which results in extinguishing one's title in property and vesting the same in the wrongdoer in possession of property and thus amounts to "transfer of immovable property" in the wider sense assignable in the context of social welfare legislation enacted with the object of protecting a weaker section."

Further, he relied upon the judgment in the case of ***Sunder Das*** *v.* ***Gajananrao***[6]***,*** wherein it was held by this Court as under :-

> "The evidence of Defendant 1 when read in its correct perspective showed that he was informed by one Ganpati that the property belonged to King and the King of Datia had given it to the ancestor of the plaintiffs Mukundrao to stay therein and accordingly

[6] (1997) 9 SCC 701

> he thought that Defendant 6 would not be having title to the property. It must be kept in view that the plaintiffs' ancestor Mukundrao had died 60 years prior to the suit. Therefore, even if originally the property might have belonged to the King it was being occupied by the plaintiffs' ancestor Mukundrao and his descendants since generations as owners thereof and even by doctrine of adverse possession they would have perfected their title. It may also be kept in view that there was nothing on the record to suggest that the King of Datia had ever attempted to put forward any claim of ownership over the suit property. Even that apart it was not the case of the plaintiffs themselves that the suit property did not belong to their father or their ancestors. On the contrary their case is that the suit house did belong to their father jointly with them. Therefore, it is too late in the day for the learned counsel for the plaintiffs to submit that suit house did not belong to the plaintiffs and, their father or that at the time of the sale plaintiffs' father had no right, title or interest in the suit house. In our view the evidence on record clearly establishes that the defendants made all permissible efforts to find out the legal necessity which prompted Defendant 6 to enter into the said transaction in their favour."

Therefore, based on the above mentioned cases, it is clear that the plaintiff No. 1 and defendant Nos. 10 to 17 have lost their title to the suit schedule

properties essentially because of their default and inaction, which has stretched over a period of more than 50 years. Thus, their rights were lost by operation of law and doctrine of adverse possession.

35. The High Court held that the daughters of Valli alone would be entitled to the suit properties but the Trial Court has held on the basis of evidence on record that they were excluded from possession by their brothers for more than 50 years from the date of death of Valli. Hence, their rights, if any, are lost by adverse possession and by ouster and their claim is barred by limitation.

Answer to Point No. 3

36. The deceased plaintiff No.1 and defendant Nos. 10 to 17 have not pleaded the custom which was prevalent in their community under which the daughters of deceased Valli were governed, for performing their marriage. They have also not

pleaded that they were not given away in marriage in Kudivaippu form after payment of Streedhana to disentitle them from their share upon the intestate properties of deceased Valli. The High Court has gravely erred in not adverting to the aforesaid fact in its judgment. Therefore, the reliance placed upon the decision of the High Court in ***Kochan Kani Kunjurama Kani*** (supra) has been judiciously recognized which applies to the said principle regarding the valid custom prevalent in the community of Valli modifying pristine Hindu Law which entitles the married daughters share in the properties of their mother's Streedhana properties.

The prevalence of such approved custom of Kudivaippu in the community is accepted by the defendant Nos. 1 to 9, as they have taken that stand in their written statement contending that the daughters of deceased Valli were given Streedhana money at the time of their marriage and therefore, they are not entitled for share in the suit schedule

properties by way of partition which is an erroneous and untenable contention for want of legal evidence produced by them on record before the Trial Court.

In view of the pleadings and evidences of defendant Nos. 1 to 9 on record regarding custom of marriage prevalent and practiced in the family of plaintiff No. 1 and mother of defendant Nos. 10 to 17, the High Court recorded the finding of fact holding that the marriage of the two daughters of Valli were not celebrated in the Kudivaippu form and therefore, it has rightly held that the plaintiff No.1 and defendant Nos. 10 to 17 are entitled to their share in the suit schedule properties, which is left by Valli as the same were her Streedhana properties.

37. The High Court has come to the right conclusion by shifting the burden of proof on the defendant Nos. 1 to 9 to prove the fact of the type of marriage of the deceased plaintiff No. 1 and Ammalukutty. The

defendant Nos. 1 to 9 did not produce evidence to prove the fact that the marriage of the daughters of deceased Valli was performed by following Kudivaippu form but not in Sambandam form, to disentitle their claim upon the suit schedule properties of Valli and therefore, they are not sharers of the same. In view of the pleadings and evidence on record of defendant Nos. 1 to 9, we have to record the finding of fact that the marriage of daughters of deceased Valli was not in Kudivaippu form and therefore, the daughters of deceased Valli alone are entitled to succeed to her intestate properties who are her legal heirs. This finding we have recorded in this judgment on the basis of the judgments of Privy Council and the Madras High Court (supra) referred to in the impugned judgment by the High Court.

38. Further, under the pristine Hindu Law, it is the settled and admitted position of law that married daughters are not entitled to a share if their marriage was in Kudivaippu form after payment of

Streedhana to them at the time of their marriage. It has been established from the pleadings and evidence on record that the marriage of daughters of deceased Valli was not in the Kudivaippu form as the defendant Nos. 1 to 9 have failed to prove otherwise.

39. The plaintiff No.1 and defendant Nos. 10 to 17 have however, failed to establish other necessary aspects for getting the decree for partition of the suit schedule properties, as claimed by them in view of the findings and reasons recorded by us on the contentious point No. 2 framed by us in this case. In the absence of evidence on record to show that they were not ousted from possession from the suit schedule properties and that they have been in joint possession of the same with their deceased brothers during their life time and thereafter with their legal representatives as the co-sharers, the finding of fact recorded by the Trial Court on this aspect of the case cannot be disputed with. The defendant Nos. 1 to 9 have stated that the daughters of deceased

Valli were married in the Kudivaippu form. However, they have failed to prove the same. However, the Trial Court has recorded its finding on the contentious issue No. 4 in favour of the defendant Nos. 1 to 9 on the basis of undisputed facts and evidence on record, it has rightly held that the above defendants have perfected their title to the suit schedule properties by way of adverse possession by ouster of the plaintiff No. 1 and defendant Nos. 10 to 17 from the said properties, which finding of fact is accepted by us by recording our own reasons in this judgment. Therefore, we have to hold that the daughters of Valli are excluded from their rights upon the suit schedule properties of Valli and are not entitled for the share as claimed by them in their suit.

Accordingly, we answer the point No. 3 against the plaintiff No.1 and defendant Nos. 10 to 17.

Answer to point No. 4

40. This point is also required to be answered in favour of defendant Nos. 1 to 9 for the following reasons :-

It is an undisputed fact that after the death of Valli partition of the suit schedule properties was made between the fathers of the defendant Nos. 1 to 9, they have been in continuous possession of their respective shares in terms of the partition deed by ouster of the deceased plaintiff No. 1 and mother of defendant Nos. 10 to 17 thereby they have perfected their title to the properties as owners. There was litigation between the fathers of the defendant Nos. 1 to 9 in relation to the said partition, no doubt, the father of the defendant Nos. 8 and 9 failed in the aforesaid civil litigation as per the documentary evidence-Exs.-B2 to B4. Therefore, the same is binding on the father of defendant Nos. 8 and 9.

Accordingly, we answer the point No. 4 in favour of defendant Nos. 1 to 7.

Answer to Point Nos. 5 and 6

41. The reliance has been placed by the legal representatives of Kunhan and Ayyappan i.e. defendant Nos. 1 to 9 on the basis of purchase certificate-Exs.-B5 and B6 as they have obtained purchase certificate from the competent Land Tribunal in respect of the partitioned properties, which have been in their possession as per Ex.-B1, partition deed and therefore, they have claimed that they are either cultivating tenants or deemed tenants in possession of the land in question under the provisions of Section 4A of the Kerala Land Reforms Act, 1963. The said stand of the defendant Nos. 1 to 9 is wholly untenable in law for the reason that their fathers were not the tenants of the suit schedule properties under their mother, in this regard there is no evidence adduced by them. Though

they obtained purchase certificate from the Land Tribunal on the claim made by their fathers that they were either cultivating tenants or deemed tenants as defined under Section 2(8) or under Section 4A (a) of Kerala Land Reforms Act, respectively and therefore, the application filed by the deceased Kunhan and Ayyappan for grant of purchase certificate before the Land Tribunal on the basis of their claim as aforesaid is not maintainable in law.

42. The plea urged by the above said persons that they were cultivating/deemed tenants of the suit schedule properties is wholly misconceived for the reason that provisions of Sections 2 to 71, 73 to 82, 84, 99 to 108 and 110 to 132 of Kerala Land Reforms Act, 1963, came into force with effect from 01.04.1964 i.e. after the death of Valli in the year 1942. Section 72 of the Kerala Land Reforms Act regarding vesting of landlord's rights upon the tenanted agricultural lands in the State was substituted by Act 35 of 1969, published in the

Kerala Gazette Extraordinary dated 17.12.1969 and came into force w.e.f. 01.01.1970. Section 4A of the said Kerala Land Reforms Act speaks of certain mortgagees and lessees of mortgagees to be deemed tenants. The aforesaid provisions of this Act have no application, to the claim of the deceased fathers of the defendant Nos. 1 to 9, as they could not have been deemed tenants under their deceased mother as the Act came into force from 01.04.1964 and certain other provisions of Section 4A of the Kerala Land Reforms Act were substituted w.e.f. 17.12.1969 and came into force w.e.f. 01.01.1970. Therefore, the aforesaid provisions have no application to the claim of the deceased fathers of defendant Nos. 1 to 9 in respect of the suit schedule properties. Therefore, the defendant Nos. 1 to 9 placing reliance upon the purchase certificates Exs.-B5 and B6 have no relevance to the fact situation. Therefore, the plea urged by them in this regard is wholly untenable in law for the reason that they are neither cultivating

tenants nor deemed tenants of the suit schedule properties as there is no evidence produced by them in this regard in the Original Suit. Therefore, the purchase certificates which were obtained by their deceased fathers from the Land Tribunal have no relevance to the facts of the case.

43. We have already answered the point No. 3 in favour of the defendant Nos. 1 to 9 by recording our reasons on the undisputed facts and evidence on record that they have perfected their title to the suit schedule properties by adverse possession from 1953 onwards by ouster of the daughters of Valli after her death.

44. Since we have answered point Nos. 3 and 4 in favour of defendant Nos. 1 to 9 and we hold that the plaintiff Nos. 2 to 4, the legal representatives of deceased Apputty (son of Valli), are not entitled for the share in the suit schedule properties by way of partition. The suit schedule properties are

Streedhana properties of Valli and after the death of Valli, the said properties have come into the possession of her sons namely, Kunhan and Ayyappan vide partition deed-Ex.-B1 executed between them. Therefore, we have to answer the aforesaid point against them as they are not entitled to the shares in the suit schedule properties and therefore, they are not entitled for partition of the suit schedule properties. Since, we have answered the point Nos. 1 to 4 against the plaintiff No. 1 and in favour of the defendant Nos. 1 to 9, the impugned judgment is liable to be set aside and we restore the judgment of the Trial Court, but for the reasons stated by us on the point No. 2 framed by us regarding adverse possession of the suit schedule properties of defendant Nos. 1 to 9. They have perfected their title upon their respective extent of the suit schedule properties. The plaintiffs and defendant Nos. 10 to 17 are not entitled for the relief as

prayed by them for the reasons assigned above on the contentious points.

45. For the foregoing reasons, we allow the appeal of the defendant Nos. 1 to 9 and set aside the impugned judgment and decree of the High Court and restore the judgment and decree passed by the Trial Court. But no costs awarded.

.....J.
[DIPAK MISRA]

.....J.
[V. GOPALA GOWDA]

New Delhi,
August 28, 2014