Kerala High Court
Dhirajlal Hemchand vs State Of Kerala on 7 June, 2004
Equivalent citations: AIR 2005 Ker 42, 2004 (3) KLT 829
Author: A Basheer
Bench: A Basheer
JUDGMENT A.K. Basheer, J.

1. The short but interesting question that arises for consideration in this Original Petition under Article 226 of the Constitution relates to the stamp duty payable on a registered document executed by the co-owners of an immovable property. While the co-owners/executants insisted that the document in question was a deed of partition, the registering authority took the view that it was a release deed and as such stamp duty was payable under Article 48(b) of the Kerala Stamp Act, 1959 (for short 'the Act').

2. The petitioners were co-owners of an immovable property having an extent of 1 acre 11 cents in Nellikkode Village of Kozhikode District. The petitioners decided to effect partition of the co-ownership property. Petitioner No. 2 wanted his share to be separated. But he agreed that in lieu of his share being allotted to him in specie, he may be given the money equivalent of his share in the property. His share value was fixed at Rs. 15 lakhs. Accordingly, a deed of partition was executed and registered on the 1st day of February, 1998, a true photo copy of which is on record as Ext.P4. A sum of Rs. 5,000/- was paid towards stamp duty on the document.

3. A reference was made to the District Registrar (General), Kozhikode for adjudication on the question of sufficiency of stamp duty as provided under Section 31 of the Act. The District Registrar by his order dated March 31,1998 held that the document was not a deed of partition as claimed by the petitioners, but on the contrary, it was a release deed as provided under Article 48(b) of the Act. According to the Registrar, respondent No. 2, the document ought to have been drawn up on a stamp paper worth Rs. 2,50,500/- (Rupees Two lakh Fifty Thousand and Five hundred). Therefore, the petitioners were directed to remit the balance amount of Rs. 1,97,500/- in the Government Treasury. The above order is on record as Ext.P3.

4. In this Original Petition the prayer is for issuance of a writ of certiorari to quash Ext.P3 order. There is a further prayer that the respondents be directed to refund the amount of Rs. 1,97,500/- remitted by the petitioners towards the alleged balance stamp duty.

5. In the counter affidavit, the District Registrar has stoutly defended his order. It is pointed out that the document in question is not a deed of partition. From the recitals of the document itself, it is clear that no partition had been effected and that it would take place only on a later date. Petitioner No. 2 was paid Rupees Fifteen Lakhs purporting to be his share in the immovable property. Therefore, it was apparent that petitioner No. 2 had only relinquished or released his right in the co-ownership property. Thus, it is contended that the document ought to have been charged with the duty payable for a release deed as provided under Article 48(b) of the Act.

6. Learned counsel for the petitioners submits that Ext.P3 partition deed was executed after it was decided by the co-owners to divide the property in severalty. It was also agreed among them that petitioner No. 2 be given his share in the property in cash in lieu of the proportionate extent of land. By execution of the document, the status of the parties had changed. There was disruption of the status of co-ownership. By such disruption and division of the property, the co-owners had become individual sharers in the property. As such, the document had changed the whole character of the rights of the parties as co-owners. In other words, petitioner No. 2 had ceased to be a co-owner. He had got his respective share in the property. Thus, in the above circumstances, it is puerile to contend that there was no partition of the co-ownership property.

7. In this context, it may be profitable to refer to two of the relevant clauses in the deed of partition.

"AND WHEREAS we have agreed to partition the schedule property allotting a separate share to number 2 among us, namely Kiran Dhirajlal and a common share to petitioners 1, 3, 4 and 5 among us, postponing division of their common share by metes and bounds to a future date.

AND WHEREAS Kiran Dhirajlal has expressed his desire not to own any portion of the schedule property but receive his share of Rs. 15,00,000/- (Rupees fifteen lakhs only) in cash and numbers 1, 3, 4 and 5 have agreed to his desire".

8. It is contended by the Revenue that the above clauses unambiguously indicate that there was no partition of the property at all. Heavy emphasis is made on the recital in the document to the effect that division of the common share of petitioners 1, 3, 4 and 5 was being postponed to a future date. It is contended by the learned Government Pleader that petitioner No. 2 had only relinquished or released his right in the co-ownership property by accepting Rupees Fifteen lakhs as his share. The co-ownership property remained as it was and the only obvious result of the exercise was that petitioner No. 2 had released his entire right over the property. Is this contention tenable?

9. A Full Bench of the Madras High Court had occasion to consider the distinction between the partition and release in The Chief Controlling Revenue Authority, Board of Revenue, Madras v. B.A. Mallayya, 1971 (1) MLJ 177. In the above decision, the document in question was executed by the parties purporting it to be a release deed. One of the sharers was not allotted any joint family property in specie, but he was paid adequate value for his share by other sharers. Accordingly a registered document was executed by the lone sharer in favour of the other co-sharers/co-owners which was styled as a "release deed" relinquishing his entire right over the property. However, it was contended by the Revenue that having regard to its terms and true intention, the document was in fact a deed of partition and not a release deed as contended by the executants.

10. The relevant facts in the above case may be briefly noticed. Deceased B.S. Mallayya had two sons, viz., Sundararaj Mallayya and Banrwal Anand Mallayya. Sundararaj Mallayya passed away leaving behind him his two sons, viz., Sanjeeva Mallayya and Srinivasa Mallayya. Bantwal Mallayya had also two sons. The children of deceased Sundararaj Mallayya expressed the desire to get their separate share in the joint family property. After prolonged negotiations, it was agreed that Sanjeeva Mallayya and Srinivasa Mallayya should be allotted their share in the net assets in cash, free from

any further obligation to discharge the family debts. Accordingly, a "deed of release" was executed by the parties, the operative portion of which read as hereunder:

"Now this deed of release witnesseth that in consideration of these presents and in consideration of the sum of Rs. 1,15,750.....paid to each of the releasers herein, the receipt of which sum of Rs. 1,15,750 each of the releasers hereby acknowledges the releasers hereby release and relinquish in favour of the releases all their interests in the properties mentioned in Schedule II....."

11. After considering the rival contentions and the recitals in the partition deed, the Full Bench took the view that the document was a deed of partition and not a release deed as contended by the executants. The following observations of the Full Bench are apposite:

"It is conceivable that in a partition between co-owners, one should go out of the co-ownership in lieu of a certain fixed sum to be paid to him by the others. If the test is applied from the standpoint of release in the sense that a person who has a claim against a person or property gives it up in consideration of something received by him, it may not be conclusive in deciding whether a document amounts to partition. In a partition of joint family property in a sense, there is a kind of release by one sharer of his interest in favour of the other who is allotted that interest. But the true concept of a coparcenary is that it is peculiar in its character. It cannot be said that when coparcenary exists any one of the persons has any particular or definite interest in the coparcenary. The entire property is owned by the entire coparcenary as such, though practical exigency has necessitated attribution of an interest as inhering in a coparcener, where for instance he purports to alienate his share and justice has to be done between him and a third party or even as between the coparcener. The essence of partition, as we mentioned, is that the assets in co-ownership as it were, as in the case of a coparcenary, is split up into severally, the process involving the destruction of the co-ownership and conversion of the same into several interests which are available for exclusive allotment to each sharer. Such allotment of the interests may be wholly in favour of one of the erstwhile coparcener without the other coparcener getting anything as and by way of share. That will be a partition and not a release. Release is not necessarily destruction of co-ownership. We think that those are the essential elements of distinction between a release and a partition of property owned in co-ownership. Merely because, as we said, in a sense a partition may involve release, it cannot on that account be said that what is partition is not that but only a release".

12. As mentioned earlier, the thrust of the argument of the Revenue in this case is that the fact that petitioners 1, 3, 4 and 5 had postponed the partition of the property among themselves to a future date would ipso facto indicate that there was no partition at all. What is in fact intended to be achieved by Ext.P4 document was only the relinquishment or release of the rights of petitioner No. 2 in the co-ownership property.

13. Section 2(k) of the Kerala Stamp Act defines instrument of partition as any instrument whereby co-owners of any property divide or agree to divide such property in severalty and includes also the final order for effecting a partition passed by a Revenue authority or any Civil Court and an award by an Arbitrator directing a partition. That the co-owners/petitioners in this case had taken a decision to divide the property among themselves cannot be questioned or disputed by the Revenue.

Such a decision is purely in the realm of the will and pleasure of the co-owners. It is the prerogative of the owners of the property how to deal with it. The division by itself may be on such terms and conditions as the co-owners may decide among themselves. Right of partition is an incident of property held jointly in co-ownership. Every co-owner has a right to get his share divided and separated. It is a matter of individual volition.

14. Partition is considered to be the ultimate evil resulting from co-ownership. If in the process of partition any one or more of the co-owners decide to relinquish their right over the property in favour of others and they put their rights in the common hotch potch to be divided among the other co-sharers, it cannot be said that the partition would be vitiated. Similarly, if the co-owners decided among themselves that one or some of them would take only a lesser share or that they will take money in lieu of adequate share in the movable or immovable properties, it cannot also be inferred that the partition would be inequitable or it is not a partition at all. By agreeing to any such terms or conditions, the nature or process of partition does not get affected in any manner. In the case on hand, petitioners 1, 3, 4 and 5 had decided to keep their individual shares in a group for the time being after giving the share of petitioner No. 2 to him separately. An unequivocal expression of an intention to separate the co-ownership right in the property is evident or discernible from the clauses of Ext.P4 document.

15. It is common knowledge that even in a partition through Court, the respective shares of the parties will be allotted to them separately only if the concerned sharers remit adequate court fee for such separate allotment. The shares of those who do not pay court fee for separate allotment will remain "unallotted". Therefore, there is nothing incongruous if four of the co-sharers decided to keep their shares as common or joint in a group for the time being. In such circumstances, it cannot be said that the recital in Ext.P4 indicating postponement of the partition amongst petitioners 1, 3, 4 and 5 would rule out a partition. In that view of the matter, I am inclined to hold that Ext.P4 was intended to be and it was in fact, a deed of partition by itself and not a deed of release. In similar circumstances the High Court of Karnataka had taken such a view in Nanjunda Setty v. State of Mysore, AIR 1964 Mysore 124. The Full Bench of the Madras High Court had referred to the above decision in Mallayya's case (supra).

16. In Pandivi Satyanandam and Ors. v. Paramkusam Nammayya and Anr., AIR 1938 Mad. 307, a Division Bench of the Madras High Court had also held that when specific sums of money are paid to individual members of the joint family and the payments are to be made out of the joint family funds or out of the proceeds of the joint family property, it is in effect partition of the joint family property.

17. Having regard to the entire facts and circumstances, I am satisfied that respondent No. 2, the District Registrar (General) was not justified in holding that the petitioners were liable to remit a further sum of Rs. 1,97,500/- towards stamp duty. Accordingly, Ext.P3 order passed by respondent No. 2 is quashed. The respondents are directed to refund Rs. 1,97,500/- to the petitioners within two months from the date of receipt of a copy of this judgment.

The Original Petition is allowed. No costs.