

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

FRIDAY ,THE 08TH DAY OF FEBRUARY 2019 / 19TH MAGHA, 1940

WP(C).No. 3819 of 2019

PETITIONER/S:

ABDUL RAHIMAN, AGED 48 YEARS
S/O.ABOOBACKER, ANJILIMOOTTIL (H) , ERUMATHALA,
ASOKAPURAM.P.O, PIN-683101.

BY ADVS.
SRI.K.G.CLEETUS
SRI.N.V.PAUL

RESPONDENT/S:

- 1 STATE OF KERALA,
REPRESENTED BY SECRETARY TO REVENUE
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM-695001.
- 2 THE LAND REVENUE COMMISSIONER,
PUBLIC OFFICE BUILDING, MUSEUM JUNCTION,
THIRUVANANTHAPURAM, PIN-695001.
- 3 THE DISTRICT REGISTRAR GENERAL,
ERNAKULAM DISTRICT, ERNAKULAM, PERUMPILLY
BUILDING, OPP. MAHARAJAS COLLEGE GROUND,
ERNAKULAM, PIN-682011.
- 4 THE SUB-REGISTRAR, OFFICE OF THE SUB-REGISTRAR,
ALUVA, PIN-682101.

OTHER PRESENT:

SMT.PRIYA SHANAVAS, GOVT.PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
08.02.2019, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ALEXANDER THOMAS, J.

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W.P.(C).No. 3819 of 2019
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Dated this the 8th day of February, 2019

J U D G M E N T

The petitioner is deeply aggrieved by the proceedings of the 4th respondent Sub Registrar in ordering for the impounding of the subject deed and the consequential Ext.P-3 order dated 13.6.2018 issued by the 3rd respondent District Registrar as affirmed by the 2nd respondent Commissioner for Land Revenue (appellate authority), whereby the benefit of lower stamp duty applicable for partitioning among family members as per Clause (a) of Art.42 of the schedule appended to the Kerala Stamp Act, 1959, has been denied to the petitioner and whereby, it has been ordered therein that the petitioner should pay higher stamp duty thereof along with penalty, etc. The prayers in the above Writ Petition (Civil) are as follows:

- “i) Call for the records leading to Exhibits P-3 and P-4;*
- ii) To issue a writ of certiorari or any other appropriate writ, order or direction, to quash Exhibit P-3 and P-4.*
- iii) To declare that the petitioner is entitled to the lower rate of stamp duty under Article 42(1) of the schedule under Stamp Act;*
- iv) To issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to register Exhibit P-2 partition deed at the lower rate of stamp duty envisaged under Article 42(1) of Schedule under Stamp Act.*
- v) To grant such other reliefs which are just and proper in the facts and circumstances of the case.”*

2. Heard Sri.K.G.Cleetus, learned counsel appearing for the

petitioner and Smt.Priya Shanavas, learned Government Pleader appearing for the respondents.

3. The petitioner's father, Sri.Aboobecker was the owner in possession and enjoyment of 78 cents of property on the basis of Ext.P-1 registered partition deed 657/78 dated 21.2.1978 of SRO, Aluva. Both the abovesaid Aboobecker and his wife Aisha had died on 17.7.1996 and 18.4.2013, respectively. At the time of the death of Aboobecker, an extent of 43 cents were remaining in his possession, after alienation, it is averred. That after the death of said Aboobecker and Aisha their children as well as the LRs of their deceased children became co-owners of the property. Thereafter, the said LRs have executed Ext.P-2 deed of partition dated 17.3.2018 for partition of the subject property by allotting respective shares to the co-owners concerned. When Ext.P-2 partition deed was presented before the 4th respondent, Sub Registrar, Aluva, he had taken up the view that since two sons of late Aboobecker have also died, and the LRs of deceased sons are also executants of Ext.P-2 deed, the executants may not be entitled for the benefit of lower stamp duty as envisaged in clause (a) of Art.42, as the executants may not satisfy the definition of "family" as understood in *Explanation* appended to Art.42 of the schedule to the Act, as it stood at the relevant time (ie. prior to 1.4.2018) and hence accordingly the 4th respondent Sub Registrar, had referred the matter to the 3rd respondent Registrar (General) under Sec. 37(2) of the Kerala Stamp Act,

for determination of the correct stamp duty payable to Ext.P-2 partition deed. The 3rd respondent District Registrar by Ext.P-3 order dated 13.6.2018 has held that the executants do not fulfill the abovesaid statutory definition of “family” and that an amount of Rs.3,90,560/- towards stamp duty and another sum of Rs. 2000/- as penalty is payable by the executants. Thereupon the executants have preferred statutory appeal before the 2nd respondent Commissioner for Land Revenue, who in turn has now passed the impugned Ext.P-4 order dated 20.12.2018 dismissing the said appeal and thereby confirming the findings and orders in the impugned Ext.P-3 order. It is these proceedings at Exts.P3 and P-4 that are under challenge.

4. Going by the pleadings and materials on record, more particularly the basic factual aspects that are disclosed in the impugned Exts.P3 and P-4 proceedings, it is to be noted that the basic facts regarding the execution of the deed and the relationship among the executants are not in dispute. At the outset it is relevant to note that Ext.P-2 partition deed has been executed in February/March 2018 and on presentation, impounding order has been issued by the 4th respondent Sub Registrar as per the proceedings No.C-46/18 dated 19.3.2018 referred to as paper No.1 in Ext.P-3. Hence the provisions in the Kerala Stamp Act, more particularly Art.2 thereof, as it stood in February, 2018 are the applicable norms. This the Court would say so as some amendments have been made to Art.42 as

per the Kerala Finance Act, 2018, which has come into force w.e.f. 1.4.2018 which would be applicable to deeds executed on or after 1.4.2018.

5. Sec. 2(k) of the Kerala Stamp Act, 1959 defines "instrument of partition" as follows;

"Sec.2: Definitions.- In this Act, unless the context otherwise requires,-

(a)

xxx

xxx

xxx

(k) "instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severality, and includes also a final order for effecting a partition passed by any Revenue Authority or any Civil Court and an award by an arbitrator directing a partition;"

6. Art.42 of the schedule to the Kerala Stamp Act dealing with the stamp duty payable for partition instrument, as it stood prior to 1.4.2018 reads as follows:

"42. Partition-Instrument of as defined by Section 2(k) :

(a) Where the partition is among all or some of the family members -

(i) the extent of land involved in the property divided by the instrument is five acres or less

One rupee for every rupees the 100 or part thereof of the fair value of the separated share or shares of property and the value of other properties in such separated share or shares set forth in the instrument, or of the value of all the properties of the separated share or shares as set forth in the instrument, whichever is higher, subject to the maximum of rupees 1000.

(ii) the extent of land involved in the property divided by the instrument is above five acres.

One rupee for every rupees 100 or part thereof of the fair value of the separated share or shares of property and the value of other properties in such separated share or shares set forth in the instrument, or of the value of all the properties of the separated share or shares as set forth in the instrument, whichever is higher.

(b) in any other case

Six rupees for every rupees 100 or part thereof of the amount of the value or fair value of the separated share or shares of the property, whichever is higher.

Explanation.- Family means father, mother, grandfather, grandmother, husband, wife, son, daughter, grandchildren, brother, sister and legal heirs of the deceased children, if any as the case may be."

7. As per the Explanation appended to Art.42 is no longer res integra and is fully covered by the dictum laid down by the Full Bench of this Court in the reference order dated 16.10.2017 in the case in **Abdul Muneer v. SRO**, (2018 (1) KLT 238 (FB) and para 25 thereof reads as follows:

"25. Hence, to assess the eligibility for reduction of stamp duty in Article 42(1), what is to be seen is the relationship between the co-owners at the time of execution of the partition deed. If each of the co-owner is related to at least one of the other in the enumerated categories of relationships prescribed in the Explanation of Article 42, then the partition deed between them would become deserving of lower stamp duty under sub-clause (1) of the said Article. Considerations of common lineage, devolution of property etc., are all irrelevant for this purpose and all that becomes relevant for the purpose of Article 42(1) is the relationship of the co-owners at the time of execution and registration of the partition deed. If the coowners are several in number, then the benefit under this Article would flow only if each of such co-owner is related at least to one other through the specified category of relationships as is prescribed in the Explanation to Article 42. This, in our opinion, is the only way the explanation to the Article can be interpreted. Obviously therefore, the conclusions in Manuel (supra) and in Jose (supra) are not correct and we are, therefore, constrained to hold so. However, we do not propose to unsettle any rights that have been already created and vested prior to this judgment. We clarify that the findings in this judgment would only apply to partition deeds that are executed and presented for registration before the concerned Sub Registrars from this date onwards and that all such deeds registered prior to this date would not be affected by anything stated and found by us herein.

We thus answer the reference placed for our opinion by holding that there is no conflict in the views of the Division Benches in the judgments in Jose (supra) and Shibu (supra) and the latter is the correct and applicable law relating to release deeds under Article 48, while the former, though not laying the correct law, relates only to partition deeds under Article 42 of the Schedule to the Act.

We further declare that the conclusions in State of Kerala and Others v. Manuel (2013 (1) KLT 825) and State of Kerala v. Jose (2013 (3) KLT 412) of the Division Bench is not the correct law and we, therefore, overrule the same

and declare that the benefit under Article 42(1) of the Schedule to the Act would be attracted and available only to those partition deeds that are executed between its co-owners, if each of such co-owner is related to at least one other, in cases where there are more than two co-owners and in case there are only two co-owners, if they are related to each other, in the enumerated categories of relationships prescribed in the Explanation to Article 42 at the time of execution of the partition deed and not otherwise.

The reference is thus answered and the law relating to stamp duty payable under Article 42(1) of the schedule to the Act is thus declared."

(Emphasis supplied)

8. Hence it is now well settled and beyond the pale of any controversy, that in order to assess the eligibility for lower stamp duty as per clause (a) of Art.42 of the schedule appended to the Kerala Stamp Act, 1959, what is to be seen essentially is the relationship between the co-owners at the time of execution of the partition deed. If each of co-owner is related to at least to one of the other in the enumerated categories of relationship, as prescribed in the Explanation appended to Art.42, then the deed of partition would become deserving lower stamp duty under Clause (a) of Art.42. On the other hand, if each of the co-owner is not related at least one of the other in the enumerated categories of relationships, as per statutory definition of "family", then even if the instrument is one of partition of the subject property among the co-owners, still it will not be entitled for lower stamp duty under clause (a) of Art. 42, and the executants will have to pay higher stamp duty for such

partition instrument as per clause (b) of Art.42. However, it has been also held and reiterated by this Court in many judgments that the registration officials cannot insist that each of the co-owner should be related to all the others in the enumerated categories of relationship as per the statutory definition of “family” and that what is to be satisfied is only as to whether each of the co-owner is related to at least one of the other in the enumerated categories of relationship, as per the statutory definition of family.

9. In the instant case, there is no dispute that the subject property covered by Ext.P-2 partition deed is the property of the predecessor concerned and that the executants of Ext.P-2 partition deed are the LRs of the said deceased previous land owner and that Ext.P-2 is a deed to partition the subject property among the co-owners. Therefore, there is no dispute that Ext.P-2 deed would fulfill the definition of “instrument of partition” as per Sec. 2(k) of the Kerala Stamp Act. The only issue to be determined in this case is as to whether each of the executants of Ext.P-2 partition deed is related at least to one of the other in the enumerated categories of relationship of the statutory definition of “family”.

10. Now coming to the facts of this case, land owner Sri.Aboobeker and his wife had died. The living children of the

deceased predecessor are (1) Abdul Rehiman (petitioner), (2) Jameela, (3) Abidha, (4) Sainaba, (5) Ramla (6) Shemi and (7) Rejeena. Two of the sons of Aboobecker viz., Salim & Assey had died. The children of late Assi are (1) Muhammed Nooj, (2) Jamal Aboobecker Assi (3) Hasim Aboobecker (4) Fathima Aboobekcer and the widow of the said Assi is Reziya Beegam. The children of deceased Salim are (1) Nadiya Salim (2) Amina Salim and the widow of late Salim is Hazeena. The living children of the deceased predecessor are executants 1 to 7. The LRs of the deceased Assey are executants 8 to 12. The LRs of the deceased Salim are executants 13 to 15. There cannot be any dispute whatsoever that the executants 1 to 7 who are the siblings would certainly fulfill the definition of “family” and it goes without saying that each of the executants among executants 1 to 7 are related to one another as siblings. So also executants 8 to 12 are the LRs (children and widow) of late Assey, the son of the predecessor. It goes without saying that each of the executants among executants 8 to 12 are related to one another so as to satisfy the definition of “family”. In this context it can be seen that executants 8 10 11 are siblings and executant No.12 is their mother. So also, executants 13 to 15 who are the LRs (2 children and widow) of late Salim are also related to one another so as to constitute the

definition of “family”. Therefore, a cursory glance of the undisputed factual aspects would make it clear like the blue sky that each of the executants among the 15 executants in Ext.P-2 partition deed, who are the LRs of the deceased predecessor are related to at least one of the other in the enumerated categories of relationships prescribed in the definition of “*family*” as per the Explanation appended to Art.42. As a matter of fact, many of the executants are related not just to one among the other executants, but to many other executants also in the degree of relationship of family, as per the above statutory definition. It appears that respondents 4, 3 and 2 have proceeded on the premise in the impugned proceedings as if each of the executants should necessarily be related to all the other executants so as to satisfy the statutory definition of “family” in order to secure the benefit of the lower stamp duty as per clause (a) of Art.42. The said premise of respondents 2 to 4 in the impugned proceedings is totally erroneous and illegal and is based on irrelevant considerations and appears to be based on a miscomprehension of the dictum laid down by the Full Bench of this Court in ***Abdul Muneer's case*** supra. Therefore the impugned proceedings of impounding and the consequential orders as per Exts.P-3 and P-4 are illegal and ultra vires and are liable to be interdicted, as the petitioners as the executants of Ext.P-2 partition

deed are entitled of the benefit of lower stamp duty as per clause (a) of Art.42 of the schedule appended to Kerala Stamp Act, 1959. This Court is not in a position to appreciate as to why respondents 2 to 4 have taken such a stand even after referring to the dictum laid down by the Full Bench in the abovesaid reference order in Abdul Muneer's case supra. If the factual aspects had been carefully evaluated and appreciated in the light of the clear dictum laid down by the Full Bench in para 25 of Abdul Muneer's case supra, then there was no necessity to take such a impugned view and the benefit of lower stamp could have been easily given to the executants without making to undergo the ardour and rigour of facing the impounding proceedings and consequential impugned proceedings. In that view of the matter, it is ordered that the impounding proceedings dated 19.3.2018 as per the proceedings of the 4th respondent Sub Registrar referred to as the 1st paper in Ext.P-3 and the consequential Ext.P-3 order dated 13.6.2018 issued by the 3rd respondent District Registrar (General) and Ext.P-4 appellate order dated 20.12.2018 issued by the 2nd respondent Commissioner for Land Revenue will stand set aside. The petitioner and the other executants may present Ext.P-2 partition deed for registration before the 4th respondent Sub Registrar upon which the 4th respondent will register the same as a instrument

of partition in terms of Sec. 2(k) of the Kerala Stamp Act and by giving the benefit of the lower stamp duty as per clause (a) of Art.42 of the schedule appended to the Kerala Stamp Act, 1959, without further delay, on remittance of the requisite stamp duty and registration fee, etc.

11. In the case the petitioner and other executants have paid any amounts in pursuance of the impugned Ext.P-3 and P-4 orders, then the competent authority among the respondents will take immediate steps to refund the same to them and in that regard the executants may file application of refund before the competent respondent authorities concerned along with certified copy of this judgment, upon the paid amounts, if any, will be refunded immediately.

With these observations and directions, the above Writ Petition (Civil) stands finally disposed of.

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Sd/-
ALEXANDER THOMAS, JUDGE

APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1** **TREU COPY OF THE PARTITION DEED BEARING
NO.657/1978 OF S.R.O.ALUVA.**
- EXHIBIT P2** **TRUE COPY OF THE DRAFT OF THE PARTITION DEED
GENERATED IN FEBRURARY 2018.**
- EXHIBIT P3** **TRUE COPY OF THE ORDER NO.INS(2)1061/2018
DATED 13.06.2018 OF THE 3RD RESPONDENT.**
- EXHIBIT P4** **TRUE COPY OF THE ORDER BEARING NO.L.R.(A)3-
35401/18 DATED 20.12.2018 OF THE 2ND
RESPONDENT.**