

(1964) 09 KL CK 0001
In the High Court Of Kerala
Case No : A.S. No. 689 of 1960

A. T. Menon alias Theyyunni Menon

APPELLANT

Vs

Dr. A. R. Menon and Others

RESPONDENT

Date of Decision : 14-09-1964

Acts Referred:

Citation : (1965) KLJ 171

Hon'ble Judges : T. K. Joseph, J; T. C. Raghavan, J

Bench : Division Bench

Advocate : V. Balakrishna Eradi and K. P. G. Menon, for the Appellant; T. S. Venkiteswara Iyer and R. C. Plapilly For Respondents 2, "10, 17, 18, 39, 40 to 42 and 52, N. Sundara Iyer and V. R. Venkitakrishnan For Respondents 12, 22 to 25 and 47, C. Unicanta Menon For 13th Respondent and M. Ramanatha Pillai For Respondents 43 to 46, for the Respondent

Judgement

Raghavan, J.—The appeal arises out of a suit for partition; and the sole question for consideration is whether the plaintiff-appellant is not entitled to maintenance. The lower court has refused to award maintenance to him on its finding that he had waived his claim for the same. In fact, there is no plea of waiver in the written statements of the contesting respondents, the 2nd defendant and the 14th defendant; nor does it appear in the written statements of any of the other defendants. Nor is there an issue regarding waiver. The lower court has however drawn the inference of waiver from the so-called admissions made by the plaintiff in the witness box. He admits that though he was living away from the tarwad house, he did not send any letter demanding maintenance; that his separate income was sufficient for the maintenance of his wife, child and himself; that he was actually saving about Rs. 200/- per month; and that no member of the tarwad living outside did ever make any claim for maintenance. From the mere delay or omission to claim maintenance, no inference of waiver can be drawn. Nor is the possession of separate income by a junior member a ground for refusing maintenance to him. Again, where waiver is neither pleaded, nor an issue raised thereon, waiver cannot be presumed. (Vide Ammalu Kutti Amma v

Ramunni Menon (A.I.R. 1934 M. 508); Panchakshara Chetty v Pattammal (A.I.R. 1927 M. 865; and Dandamudi Ramarayudu Vs. Dandamudi Sitalakshamma and Another, . Therefore, the refusal of the lower court to award maintenance to the plaintiff on the finding that he waived his claim is clearly wrong. The amount claimed is also not excessive, considering the income and status of the tarwad and the number of members therein.

2. Objection is then taken that the plaintiff should not be awarded maintenance after his severance of status in 1950. If so, he will have to be given his share of the profits of the tarwad properties. That is evidently more than the amount of maintenance claimed; and therefore, we do not think that this contention need be seriously considered.

3. There is a memorandum of cross objections by respondents 2, 10, 17 and 18. Two points are raised in this memorandum: one is against the share awarded to the 1st defendant; and the other is directed against the share decreed to the plaintiff. Each of these two persons is given one share out of 46; and it is this that is being challenged in the memorandum of cross-objections. The other members are given one share each out of 52 of the balance.

4. The 1st defendant issued Ext. A 1 to all the members of the tarwad on 12th October 1950 when there were only 46 members in the tarwad; and the recitals therein clearly expressed his intention to separate from the tarwad. Therefore, the objection against the share awarded to the 1st defendant has no substance.

5. The plaintiff sent the reply, Ext. B1, to Ext. A1 on 26th October 1950 to the 1st defendant. Therein he unequivocally said that he was separate from the date of receipt of Ext. A1. But the contention of the cross-objectors is that since Ext. B1 was not communicated to all the members of the tarwad or at least to the managing member or karnavan, it could not have created any severance in status; and therefore the severance could have resulted only on the filing of the suit.

6. There is a line of decisions which take the view that a member who wants to separate from a joint family need not communicate his intention to separate to the other member or members of the family and need only declare his unilateral intention in a legally valid form. The Full Bench decision of this Court in Lekshmykutty Amma v Madhavan Pillai (1957 K. L. T. 1196) considers several decisions of different High Courts and some decisions of the Privy Council laying down this principle and applies that to a case of a Marumakkathayam tarwad. In the recent decision of the Supreme Court in A. Raghavamma v A. Chenchamma (A.I.R. 1963 S. C. 136) it is laid down that a member of a joint Hindu family can bring about his separation in status by a definite and unequivocal declaration of his intention to separate; but, he cannot declare or manifest his mental state in a vacuum; and that such declaration must necessarily be to those affected by it. This decision lays down further that the member seeking to separate will have to make known his intention to the other members of the family, though the

process of manifestation of the intention may vary with the circumstances. The Supreme Court also observes that the form that manifestation should take would depend upon the circumstances of each case.

7. In view of this decision of the Supreme Court, we have to hold that communication of the intention to separate to the other member or members of the family is an essential ingredient of the unilateral declaration of intention to separate. But, on the question as to when severance of status takes place, whether on the date of expression of intention or on the date when it is brought to the knowledge of the other members, the Supreme Court observes:

When once that knowledge is brought home—that depends upon the facts of each case—it relates back to the date when the intention is formed and expressed.

The Supreme Court also says that if between the two dates the person expressing the intention loses his interest in the family property, withdraws his intention to divide, dies before his intention is conveyed to the other members of the family with the result that his interest survives to the other members, or if the manager of the family sells away the entire family property for debts binding on the family, or if similar circumstances intervene, then the doctrine of relation back should be invoked only with some limitation thereon, so that vested rights so created might not be affected and settled titles might not be disturbed. Subba Rao J. observes:

Principles of equity require and commonsense demands that a limitation which avoids the confusion of the titles must be placed on it. What would be more equitable and reasonable than to suggest that the doctrine should not affect vested rights? By imposing such a limitation we are not curtailing the scope of any well established Hindu law doctrine, but we are invoking only a principle by analogy subject to a limitation to meet a contingency. Further, the principle of retroactivity, unless a legislative intention is clearly to the contrary, saves vested rights. As the doctrine of relation back involves retroactivity by parity of reasoning, it cannot affect vested rights. It would follow that, though the date of severance is that of manifestation of the intention to separate, the right accrued to others in the joint family property between the said manifestation and the knowledge of it by the other members would be saved.

8. What therefore emerges from this decision is that though communication of the intention to separate is an essential part of the unilateral declaration of the intention to separate, once the communication is made, the severance of status relates back to the date when the intention was expressed, with the limitation that rights accrued to others in the joint family property during the interval, as a result of the member claiming separation losing his interest in the family property, withdrawing his intention to divide or dying before his intention to separate is conveyed to the other members, or as a result of others purchasing family property from the manager of the family for debts binding on the family or other similar events intervening, should not be disturbed or unsettled. It is

evident that in the present case no such vested right or settled title has intervened. The plaintiff pursued his claim for share in Ext. A3 in July 1951 and ultimately filed the suit for partition. Therefore, if communication was essential only to one of the members, it was there in Ext. A1 and A3: if, on the other hand communication was essential to all the members, the filing of the suit was such communication. Severance of status then relates back to the moment when the intention to separate was formed and expressed in Ext. A1, though the communication to all the members was later. Since after the formation and expression of the intention and before it was conveyed to the other members of the tarwad no vested right or settled title was created in favour of others, the plaintiff is entitled to take his share as on the date of Ext. A1. In the result, the appeal is allowed and the plaintiff-appellant is awarded arrears of maintenance as claimed in the plaint. He will also get his costs of the appeal from the estate. Respondents other than respondents 2, 10, 13, 17 and 18, who do not oppose the claim for maintenance, will also get their costs from the estate. Respondents 2, 10, 13, 17 and 18, who oppose the claim, will suffer their costs. In the memorandum of cross-objections, the cross-objectors, namely respondents 2, 10, 17 and 18, will pay the costs of the plaintiff-appellant. The others will suffer their costs.