

(1963) 10 KL CK 0019
In the High Court Of Kerala
Case No : A.S. No. 261 of 1963

Dhanalakshmi Bank Ltd., Trichur

APPELLANT

Vs

Neelakantan Numbudiripad and Another

RESPONDENT

Date of Decision : 31-10-1963

Acts Referred:

Hindu Succession Act, 1956 — Section 30, 4, 4(1), 7, 7(1)

Citation : (1964) KLJ 42

Hon'ble Judges : P.T. Raman Nayar, J

Bench : Single Bench

Advocate : K.V. Surianarayana Iyer, K. Narayana Iyer, N.N. Venkitachalam and C.M. Devan, for the Appellant; P. Govinda Menon, P.K. Krishnankutty Menon, P. Raman Menon and P. Narendra Menon for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

Raman Nayar, J.—I see nothing in the Hindu Succession Act, 1956, which affects section 62 of the Cochin Nayar Act by which this case is governed, except to the extend to which that section says that the interest of a member of an undivided farward in the farwad property is not heritable. Nor do I see how, even if I am prepared to subscribe to it, the proposition stated on the authority of Muneswari v. Jugal Mohini (A. I. R. 1952 Calcutta 368) that "an attachment of an undivided share of a member of a Mitakshara Joint family during his lifetime operates as a division of interest and causes a severance of status" can be of any assistance to the appellant decree-holder seeing that the question we have to consider is not what would be the effect of such an attachment if made, but whether such an attachment can be made at all having regard to what section 62 of the Cochin Nayar Act and section 60 of the CPC say. Section 62 of the Cochin Nayar Act runs thus:

62. Until partition, no member of the farward shall be deemed to have a definite share in the tarwad property liable to be seized in execution nor shall such member be deemed to have any alienable or heritable interest therein.

The "provisions of the Hindu Succession Act which are put forward as affecting this section, and, therefore, by reason of section 4 of that Act, repealing it, are section 7(1) and 30. But, section 7(1) says nothing whatsoever as to the nature of the interest held by a marumakkathayee Hindu in the property of his tarwad during his lifetime. Neither does section 30. What section 7(1) does is to provide for the devolution of that interest on the death of the member concerned, whether by testamentary or intestate succession. This devolution is to be according to the provisions of the Act and not according to marumakkathayam law; and, for this purpose the explanation to the sub-section defines the interest of the member as the share that would have fallen to him if a partition had been made on a per capita basis immediately before his death. The fiction goes no further and it in no way implies that the interest held by him during his lifetime is anything other than an undefined, undivided interest. Section 30 only says that a Hindu may make a testamentary disposition, in accordance with law, of property which is capable of being so disposed of by him and that the interest of a Hindu in coparcenary property or the interest of the member of & tarwad in tarwad property is property capable of being so disposed of within the meaning of the section. About the nature of that interest during the lifetime of the member, the section is silent.

2. The discussion in paragraph 4 of the judgment in *Bank of New India Ltd. v. Ponnamma* (1960 K. L. T. 698F. B. =1960 K. L. J. 880 FB) makes it clear that there is no contradiction between sections 7 and 30 of the Hindu Succession Act on the one hand and section 62 of the Cochin Nayar Act on the other and no supersession of the latter provision by the two former provisions, excepting, I must qualify as I have already done (but shall not here after) in so far as section 62 of the Cochin Nayar Act says that the interest of a member in the farward property is not heritable-the statute considered in the Full Bench case namely, the Travancore Kshatriya Act, section 46 contains no such provision. There is therefore nothing in section 62 of the Cochin Nayar Act on which the repeal in section 4 of the Hindu Succession Act can operate. The provision in sections 7(1) and 30 of the latter Act for succession to the interest of a member of a tarwad in farward property on his death is not provision with regard to the nature of that, interest during his lifetime, or with regard to its liability to seizure in execution of a decree obtained against him personally, so as to bring clause (a) of section 4(1) of the Hindu Succession Act into play; nor is there anything in section 62 of the, Cochin Nayar Act inconsistent with any of the provisions of the Hindu Succession Act so as to bring clause (b) into play.

3. I might perhaps mention that there is no provision in the Travancore Kshatriya Act which, like section 62 of the Cochin Nayar Act, says that until partition a member of a tarwad has no alienable or heritable interest in his tarwad property and that he has no definite share therein liable to be seized in execution. The corresponding section, section 46, only says that until partition no member shall be deemed to have a definite share in the tarwad property. The Full Bench decision to which reference has already been made has therefore no application

to the present case. (See in this connection the order of Raghavan J. in C. R. P. No. 1015 of 1960).

4. This disposes of the only contention urged on behalf of the appellant decree-holder in the court below and in his memorandum of appeal to justify his attempt to attach the undivided interest of the 2nd respondent judgment-debtor (and surprisingly, of her children as well) in the property of her tarwad in execution of a money decree obtained against her in her personal capacity. But two other contentions have been urged before me, and, since these contentions involve only pure questions of law, I have thought fit to consider them.

5. The first, as I have already indicated, is that there is a division in status, and, therefore, a partition as soon as the interest of a member in his tarwad property is attached in execution of a decree. Thereupon that interest becomes a definite alienable and heritable share and can therefore be attached and sold in execution. But, as I have said, even accepting this proposition, I fail to see that bearing, the effect of an attachment made has in respect of the interest of a member in his tarwad property, can have on the question whether that interest is liable to attachment. u/s 60 of the Code only saleable property belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit is liable to attachment. If, before the attachment, the interest of a member in his tarwad property is not property answering to this description it is difficult to see how the fact that the result of an attachment would be to convert the interest into such property can justify the attachment. The doctrine of *factum valet* cannot operate against a statute, and, even if it be that the invalidity of an attachment can be ignored once attachment is effected, that can be no answer to the objection taken to effecting the attachment. And, if section 62 of the Cochin Nayar Act says, as I have no doubt it does, that, until partition, the interest of a member in his tarwad property is not liable to be seized in execution-and attachment is such seizure-so that attachment can be only after partition, I see no point in the argument that the attachment will itself operate as a partition. If attachment is prohibited, the circumstance that, once attachment is made, it will effect the division that makes attachment possible cannot operate retroactively so as to enable the prohibited attachment.

6. In this view it might not be necessary for me to say why, with great respect, I am unable to subscribe to the proposition stated in *Muneswari v. Jugal Mohini* (A. I. R. 1952 Calcutta 23) in the following terms:

In my opinion, it is clear from the decisions of the Judicial Committee referred to above that an attachment of the undivided share of a member of a Mitakshara joint family during his lifetime operates as a division of interest and causes a severance of status.

But, I might observe that the statement immediately following that,

"If the interest which passes to the purchaser is the share which the judgment-

debtor would get if a partition was made at the time of the sale, it follows that the interest would neither be diminished by an increase, nor increased by a diminution in the number of co-sharers,"

is not quite in keeping with the proposition stated. For, if attachment operates as a division of status, it would follow that what the purchaser would get would be the interest of the judgment-debtor at the time of the attachment, not at the time of the sale. The decision of the Privy Council in *Hardi Narain Sahu v. Ruder Perakash Misser* (I. L. R. X Calcutta 626) which is one of the two decisions on which the proposition is based, is clear on the point that what passes to the purchaser is only the share which the judgment-debtor would get if a partition were made at the time of the sale, not at the time of the attachment, and this itself seems to me sufficient to show that attachment cannot effect a severance in status.

7. The result of accepting the proposition would be that even if the attachment came to nothing as, for example, by the decree being satisfied, the judgment-debtor would remain divided from his joint family since the release of the attachment cannot have the effect of recalling the division in status.

8 The proposition is largely based on the following observation of Lord Watson in *Madho Parshad v. Mehrban Singh* (I. L. R. XVIII Calcutta 157 at page 161) as to when the interest of a member in the property of his joint family ceases to be indefinite so that he becomes the sole owner of a definite share with powers of disposal over it:

Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution.

I should think that what the second sentence in this extract means is that an agreement of the kind mentioned (which would undoubtedly effect a severance in status) will be regarded as sufficient to support the alienation of a member's interest in the estate, and the attachment in execution of his undivided share to support a sale under the execution. However that might be, the utmost that can be wrung out of this observation of Lord Watson is what Venkataramana Rao J. wrung out of it in *Subramanyan v. Naraina* (A. I. R. 1938 Madras 553 at 555):

It will be seen that the attachment of a member's undivided share in execution of a decree was put on the same footing as severance effected by an agreement by the members to hold the property in definite shares for the purpose of justifying a sale by a creditor x x x x x.

But to say that two things stand on the same footing for a particular purpose is not to say that they are the same for all purposes.

9. The proposition that attachment effects a severance was considered and

rejected by Raghavan J. in *Raman Nair v. Krishna Iyer* (1961 K. L. T. 879) with reference to both principle and authority especially with reference to the Full Bench decision in *Peramanayakam v. Sivaraman* (A. I. R. 1952 Madras 419); and it would appear that the view taken in *Muneswari v. Jugal Mohini* (A. I. R. 1952 Calcutta 368) has not found favour with text book writers-see Mulla, 12th Edn., page 945 and N. R. Raghavachari, 4th Edn., page 348.

10. In *Deendayal Lal v. Jugdeep Narain Singh* (I. L. R. III Calcutta 198) their Lordships of the Privy Council observed as follows (at page 209):

But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate, if the right of the purchaser at the execution-sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

And in *Hardi Narain Sahu v. Ruder Perakash Misser* (I. L. R. X Calcutta 626) they said at page 636 that what the execution purchaser gets is the right which the debtor would have to a partition and what he would get upon the partition being made as if the sale was to operate as a partition at that time. But how, in the face of section 60 of the Code, the undivided interest of a coparcener can be attached in jurisdictions where such an interest is not saleable property I find it difficult to follow. Unless, of course, by ordering the attachment the court exercises the judgment-debtor coparcener's right to demand a partition in which case the order would effect a severance of status converting the undefined share into a separate definite share belonging to the judgment-debtor. But no one has so far even suggested this as a possible basis.

11. So far I have assumed that the word, "partition" is used in section 62 of the Cochin Nayar Act in a sense somewhat different from its ordinary sense of a division of properties among co-sharers or joint tenants - I have borrowed this definition from the Full Bench decision in *Ramaswami Pattamali & Others v. Lakshmi &.....* (1962 K. L. J. page 364 at page 368, paragraph 10)-and as wide enough to include a mere severance in status with no actual division. (The observation of Lord Watson which I have already quoted also implies that a mere division of status does not amount to actual partition; and so does the

observation of the Judicial Committee in Venkatapathi Raju v. Venkatanarasimha Raju (I. L. R. 1937 Madras 1 at page 12) to the effect that, "a division of right or severance of joint status may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate though it may not partition the estate). This is indeed the basis on which the argument on both sides has proceeded. But 1 must not be understood as having decided that this is so. No doubt Mulla says at page 494 of his book on Hindu Law, 12th Edition, that, "partition is a severance of joint status". But, although this might be true in the sense in which the word, "partition" is used in Mitakshara Law I am by no means certain that it is the sense in which it is used in the Cochin Nayar Act or in the customary Marumakkathayam Law. In fact I doubt whether either the customary Marumakkathayam Law or the Cochin Nayar Act recognises the intermediate position of a mere division in status (converting the coparceners into tenants-in-common) between joint status and an out and out partition, unless we import the Mitakshara doctrine as a necessary incident of the statutory right to demand a partition, as was done in Karthiyayini Kunchi Amma v. Minakshi Amma (LXX M. L. J. 114). The Cochin Nayar Act does not define partition (compare section 46 of the Travancore Kshatriya Act, the section corresponding to section 62 of the Cochin Nayar Act, which says that a demand for a division u/s 43 or 45 will also constitute a partition for purposes of the section), but section 59, the marginal note to which reads "Any member can claim partition" and which says that the share which a member is entitled to claim shall be so much of the tarwad properties as will fall to him (which can hardly mean an undivided share) if a division per capita were made among all the members of the tarwad at the time, would seem to indicate that it uses the word, "partition" in its strict sense.

12. The second contention is that section 62 of the Cochin Nayar Act does not prohibit the seizure in execution of the share of a member in his tarwad property but only describes the nature of that share. I confess I am unable to understand this argument, for, it seems to me that, if a statute describes a certain thing as having a certain character, in this case describes the share of a member as having the character of not being liable to be seized in execution, it amounts to a declaration by the statute that it has that character. In other words, section 62 declares that the interest of a member in his tarwad property is not liable to be seized in execution until partition has taken place, and it seems to me idle to contend that the section does not mean that the interest cannot be lawfully seized in execution so long as there has been no partition. In the result I dismiss the appeal with costs.