

(1944) 02 MAD CK 0010
In the Madras High Court

Indo-Commercial Bank Ltd.

APPELLANT

Vs

K. Narayanan

RESPONDENT

Date of Decision : 17-02-1944

Acts Referred:

Madras Nambudiri Act, 1932 — Section 2, 25

Citation : AIR 1944 Mad 400 : (1945) ILR (Mad) 129 : (1944) 57 LW 267

Hon'ble Judges : Mockett, J; Bell, J

Bench : Full Bench

Judgement

Mockett, J.—The appellant, the Indo-Commercial Bank Ltd., was the petitioner 2, assignee decree-holder, in the lower Court. The

respondent was defendant 2 in the suit and respondent 2 in the lower Court. The petition before the Court was by the assignor and the assignee to

record an assignment of the decree and to attach the share of defendants 2 and 3 in the illom properties. The learned Subordinate Judge made an

order of attachment against the share of defendant 3 but refused to make such an order against the share of defendant 2. Hence this appeal by the

Indo-Commercial Bank Ltd. Defendants 2 and 3 are Nambudiri Brahmins and members of an illom. Their legal position is defined by the Madras

Nambudiri Act (21 of 1933). The following dates are relevant. On 2nd September 1932 the decree was passed. On 1st August 1933 Act 21 of

1933 came into force. Sometime in 1937 defendant 2 married a Nambudiri woman. On 18th March 1940 there was a partition in the illom and in

the words of para. 4 of the counter statement of the respondent ""this defendant 2, his legally wedded wife and children and defendant 3 are living

as a separately divided branch of the mana."" By para. 7 of the same statement he denied the liability of his share for attachment, he himself ""not

being entitled to ask for partition save with the consent of his legally wedded wife." It maybe stated at once that no question of a Nambudiri wife's

consent arises. What we have to decide is whether the plea that, the respondent being married, he himself has no right to claim partition and

consequently neither has an execution petitioner is a good answer to an execution petitioner seeking to sell his share. The learned Subordinate

Judge of South Malabar held that the plea was good and that the respondent's share could not be attached. The decision of this civil miscellaneous

appeal depends upon a construction of Sections 2, 23, 24 and 25, Madras Nambudiri Act. Section 2 deals with definitions, but the explanation to

the definition of "illom" is important. It reads thus, "A female shall on her marriage cease to be a member of the illom in which she was born and

become a member of the illom of her husband." It follows that on their marriage the respondent and his wife were both members of the husband's

illom, he by birth, she by marriage. This must be borne in mind in view of the wording of the proviso to Section 23. Section 23 is as follows: "(1)

Any member of an illom, male or female, may claim to take his or her share of all the properties of the illom over which it, has power of disposal

and separate from the illom: Provided that where a male member of an illom whose wife is also a member thereof claims to separate from the illom,

he shall do so on behalf of himself and his wife and the shares of the husband and wife shall be allotted to them jointly; and save as provided in

Section 24, neither the husband nor the wife shall be entitled to claim partition from the other. (2) (a) A member of an illom separating from it under

Sub-section (1) shall be entitled to such share of the illom properties as would fall to him or her if a division per capita were made among all the

members of the illom then living. (b) A husband and wife separating from an illom under the proviso to Sub-section (1) shall be entitled to such

share of the illom properties as would fall to them if a division per capita were made among all the members of the illom then living.

2. Sub-section (3) is not relevant. The section gives every member, male or female, of an illom a right to claim partition. But under the proviso

when a male member having a wife who is also a member of the illom, as is the case before us, claims for partition, he does so on behalf of himself

and his wife and the allotment of the shares is made to them jointly. The concluding sentence is of great importance as it expressly denies to the

husband and the wife the right to claim partition from each other. The result is that though separate from the rest of the illom and in effect forming a

new illom consisting of each other, neither is permitted to claim the right to partition his or her share, the shares being joint and indivisible. Marriage

does not prejudice either the husband or wife from receiving their share: vide Section 23 (2) (b). The prohibition against partition by a husband or

wife is almost emphasised by the fact that they are expressly allowed to claim partition only if either of them should change his or her religion (S. 23

(1) proviso read with Section 24). The proviso to Section 25 does not assist in the determination of this appeal. It would appear to make the

provisions of Chap. 2 applicable to shares obtained by a husband and wife separating under the proviso to Sub-section (1) of Section 23. The

position therefore is clear beyond doubt, namely, a married man is entitled to claim a partition but must do so on behalf of himself and his wife.

They receive their respective shares jointly and apart from the circumstance of a change of religion arising, neither of them may claim partition from

the other. That, in my view, places an insuperable obstacle in the way of a decree-holder seeking to execute his decree against a married member

of an illom who has partitioned , from the rest of the family. The reason is that by the terms of the statute the only remedy by a decree-holder,

namely, to attach and sell the right, title and interest of a cosharer and having purchased, to compel partition as against the other cosharers, is

expressly denied. This remedy, as laid down by the Judicial Committee in *Deendayal v Jugdeep* (1977) 3 Cal. 198 is always available to an

executing creditor in cases where the judgment-debtor himself has a right to claim partition; but when, as in the case before us, there is no right to

compel partition, it seems to me that the purchaser acquires nothing if he purports to buy the right, title and interest of a married Nambudiri

cosharer who has partitioned from the family. It has however been argued that in *In Re Narayanan Nambudiri* AIR 1941 Mad. 23, Patanjali Sastri

J. has generally decided that there is no restriction at all on the right (in that case) of the Official Assignee, to bring the interest of an insolvent

member of an illom to sell on behalf of his creditors. It is clear from the judgment that the only point argued before the learned Judge was whether

from a reading of the Madras Nambudiri Act it could be derived that there was a general restriction on the right of execution by sale of the interest

of an insolvent member. That was all that was decided and with that decision I am in complete agreement. It was argued however in the lower

Court that an investigation of the record in the case before Patanjali Sastri J. showed that in fact the insolvent was married. I have consulted my

learned brother, Patanjali Sastri J., and he confirms, what I think is evident, that this aspect was never mentioned in Court and was never in the

minds of any one concerned in the case. The decision in *In Re Narayanan Nambudiri* AIR 1941 Mad. 23 is therefore authority, with which I am in

complete agreement, only for the general proposition contained in the headnote and in the judgment. The learned Subordinate Judge before whom

the above case was cited rightly formed the view that the point before him relevant to the marriage of the judgment-debtor was not considered by

Patanjali Sastri J. and held that the share of the respondent, "defendant 2 was not attachable. The effect of Section 23 is [that in the circumstances

of this case there was nothing to sell as the only remedy open to an executing creditor, namely, the right to compel a partition could not be

enforced under the provisions of Section 23. The result is that this appeal must be dismissed with costs.

Bell, J.

3. I agree.