

(2018) 02 KL CK 0093
In the High Court Of Kerala
Case No : 34 of 1995

KALANDIYIL SOMANATHAN

APPELLANT

Vs

PONNAMBATH KALANDY LAKSHMANAN

RESPONDENT

Date of Decision : 06-02-2018

Acts Referred:

[Evidence Act, 1872](#), [Section 18](#) -
Madras Marumakkathayam Act, 1932, Section 48

Citation : (2018) 02 KL CK 0093

Hon'ble Judges : V.Chitambaresh, Sathish Ninan

Bench : Division Bench

Advocate : B.KRISHNAN??T.R.RAVI, P.RAMA WARRIYAR, T.R.G.WARIYARR,?
P.G.RAJAGOPALAN, K.S.DILIP, ?SAJU N.A, G.LEKHA, P.J.FLONY, S.AMBILY,
UMA.G.KRISHNAN

Final Decision : Allowed

Judgement

1. A preliminary decree for partition is under challenge in these appeals. A.F.A No.35 of 1995 is at the instance of the second defendant, and

A.F.A No.34 of 1995 is at the instance of defendants 5 and 6.

2. The first defendant is the wife of one Kanaran. The first plaintiff and defendants 2 to 4 are their children. The plaint schedule property belonged

to the family of Kanaran, of which he was the Karanavar. The said Kanaran along with his mother Manikyam and his brothers, Kunkar and

Kunhiraman, executed Ext A1 Kanam deed in favour of first defendant (wife of Kanaran) and one Edakkattu Lekshmi who is the wife of Kunkar,

the brother of Kanaran. The rights of Edakkattu Lekshmi was conveyed by her in favour of the second plaintiff as per Exts A2 and A3 assignment

deeds. The rights of the first defendant was gifted by her to the second defendant as per Ext B9. Pending the suit, 2nd defendant assigned half out

of his rights over the property to defendants 5 and 6 as per Ext B11. The claim for partition is made contending that, the acquisition under Ext A1

in the name of the first defendant, was by her husband, which enures to her thavazhi. Defendants 1, 2, 5 and 6 challenge the claim for partition

contending that, it is the self acquisition of first defendant and Edakkattu Lekshmi, whereas defendants 3 and 4 support the plaintiffs case.

3. The trial court held the acquisition under Ext A1 to be self acquisition and that it does not enure to the benefit of the thavazhy. On appeal by the

plaintiff, the learned Single Judge reversed the finding and held that the acquisition enures to the benefit of the thavazhy.

4. Heard Shri M. Gopikrishnan Nambiar and Parthasarathy learned counsel for the appellants, Shri T.R.Ravi and Shri K.S. Dilip learned counsel

for the respondents.

5. Section 48 of the Madras Marumakkathayam Act reads thus:

48.Construction of bequests, gifts etc. to wife or wife and children.- Where a person bequeaths or makes a gift of any property to, or purchases

any property in the name of his wife alone or his wife and one or more of his children by such wife together, such properties shall unless a contrary

intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons

and daughters by such person and the lineal descendants of such daughters in the female line;

Provided that in the event of partition of the property taking place under Chapter VI, the property shall be divided on the stirpital principle, the wife

being entitled to a share equal to that of a son or daughter.

In terms of Section 48 of the Madras Marumakkathayam Act, if the acquisition is by the husband in the name of the wife, there arises a

presumption that the acquisition was for the benefit of the thavazhy. The presumption, as is evident from the section itself, is rebuttable. The

contention of the plaintiffs is that the acquisition under Ext A1 was by Kanaran, the husband of the first defendant in her favour, and hence it enures

to the Tavazhy. Therefore, the question for determination is, ""whether the presumption under Section 48 of the Madras Marumakkathayam Act

applies to the acquisition under Ext A1 by the first defendant, and if it applies, whether the presumption is rebutted"".

6. There is no direct evidence as regards the source of consideration for Ext A1. The circumstances and other materials available are to be looked into to arrive at a finding as regards the nature of acquisition. The contesting defendants (appellants) would rely on Exts B1, B2 and B3 which are the certified copies of depositions of Kanaran (husband of first defendant), Kunkar (husband of Edakkattu Lekshmi) and the father of the first defendant in an earlier litigation to contend that this is not an acquisition by the husband for the wife. In Ext B1, Kanaran has deposed that he had not advanced the amounts for acquisition of Ext A1. In Ext B2, Kunkar has deposed that he had not advanced the amounts for acquisition of Ext A1. As seen from Ext B3, the father of the first defendant deposed therein that he had advanced amount for the acquisition of Ext A1. The trial court relied upon Exts B1 to B3 while arriving at the conclusion that the property in question is the separate property of the first defendant and Edakkattu Lekshmi. The learned Single Judge found that Exts B1 to B3 depositions in an earlier suit could not be relied upon since it does not satisfy the essentials under Section 33 of the Indian Evidence Act. The learned counsel appearing for the appellants would contend that even if Section 33 of the Indian Evidence Act does not apply, it is an admission made by the predecessor in interest of the first defendant in an earlier proceeding in relation to the subject matter of the suit and hence would be admissions under Section 18 of the Evidence Act. We are afraid we cannot agree with the said submission. It might be possible to contend that the first defendant got interest under Kanaran and Kunkar who were also executants in Ext A1, and hence they are predecessors" in interest. However, Section 18 postulates that the admissions should be made during the continuance of the interest of the persons making the statements". It means that, the admission should be made when the interest was subsisting with the maker and before he parted with it. The assignment, Ext A1 was in the year 1943 whereas Exts B1 to B3 are the depositions in a suit of the year 1950, which is much subsequent to the transfer under Ext A1. Therefore, at the time of deposing, they did not have subsisting right. Hence the appellants would not be entitled to bank upon Section 18 of the Evidence Act. So, Exts B1 to B3 would not be of avail. The net effect is that we are left with no evidence as to the source of consideration for Ext A1. It is here that the circumstantial evidence, especially the

conduct of the parties assumes relevance.

7. Ext A1 took in two items of properties, of which one is the plaint schedule. The other item of property was alienated jointly by the first

defendant and Edakkattu Lekshmi in the year 1975 as per Ext B8 sale deed. In Ext B8, they have asserted their exclusive title over the property

which they acquired under Ext A1. If it was really an acquisition in favour of the thavazhy, there could not have been such an assignment. So also

as regards the acquisition of the property by Edakkattu Lekshmi under Ext A1, it would appear that there was no challenge that the acquisition by

her enures to the benefit of her thavazhy or that it was not her separate property. The rights of Edakkattu Lekshmi was conveyed by her in favour

of the second plaintiff under Exts A2 and A3 assignment deeds treating it as her separate property. The said Edakkattu Lekshmi was examined in

the suit as PW2. In her cross-examination, she practically supports the defendant's case that the source of acquisition was not from the husband of

the first defendant. Coupled with these such circumstances is the fact that Kanaran, the husband of first defendant had issued Ext B5 letter to The

Special Officer, District Board, Malabar on 21-4-1948, requesting for reemployment, wherein it is stated that he is in financial constraints. This

improbabilizes him having funded for the acquisition under Ext A1. The circumstances as noticed above, including the conduct of the parties, lead

to an inference that the source of acquisition was not provided for by the husband of the first defendant and at any rate, the parties never treated

the property as thavazhy property of the first defendant. Section 48 of the Madras Marumakkathayam Act does not apply and even if it applies,

the presumption under Section 48 thereof stands rebutted. We concur with the finding of the trial court. The decree and judgment passed by the

learned single judge is liable to be interfered with. Accordingly, the appeals are allowed. The decree and judgment in A.S.158 of 1989 are set

aside. The decree passed by the trial court is restored. No costs.