

(1987) 03 KL CK 0045
In the High Court Of Kerala
Case No : S.A. No. 1110 of 1981-A

Kalyani Amma and Others

APPELLANT

Vs

Sankara Raman Namboodiri and Others

RESPONDENT

Date of Decision : 18-03-1987

Acts Referred:

Kerala Joint Hindu Family System (Abolition) Act, 1975 — Section 4(2)

Citation : AIR 1988 Ker 166 : (1986) 2 ILR (Ker) 614

Hon'ble Judges : P.C. Balakrishna Menon, J

Bench : Single Bench

Advocate : P.G.P. Panicker and P.B. Mohankumar, for the Appellant; S. Narayanan Poti, S. Sankara Subban and B.V. Deepak, for the Respondent

Final Decision : Allowed

Judgement

P.C. Balakrishna Menon, J.—The two questions arising for decision in this second appeal by the plaintiffs are --

1. Whether on the repeal of the Travancore Nair Act (sic) by the Kerala Joint Hindu Family System (Abolition) Act (Kerala Act 30 of 1976) the proceedings pending at the commencement of the repealing Act for recovery of property on behalf of a Marumakkathayam family can be continued as if there was no repeal, and

2. Whether a decree for recovery of possession of property no longer held as tarwad property can be granted in favour of the 1st plaintiff, a co-owner on behalf of all the co-owners of the property.

2. The suit was instituted by the 1st plaintiff to set aside Ext. P1 sale deed executed by the plaintiff and defendants 2 to 9 conveying item 1 in the plaint A schedule to the 1st defendant and for recovery of possession of the same. The plaintiff and defendants 5 to 8 were minors represented by their father the 9th defendant as guardian in executing the sale deed Ext. P1. The plaint A schedule item 1 according to the plaintiff, was obtained by the tavazhi of the 2nd

defendant and her children in partition of the main tarwad in 1100 ME. The sale deed Ext. P1 is attached as executed without consideration and family necessity. The plaintiff and defendants 3 to 8 are the children of the 2nd defendant and the 9th defendant is her husband. The 1st defendant contended that the sale as per Ext. P1 is fully supported by consideration and was also for family necessity. He raised a further contention that the entire item 1 in the plaint A schedule did not belong to the tavazhi. What the tavazhi obtained under partition of the main tarwad was only a portion of item 1, 34.75 cents in extent, and the remaining extent of 25.25 cents was the self-acquisition of the 2nd defendant. She could therefore convey that part of the property without the junction of the plaintiff and defendants 3 to 8 and the plaintiff is not entitled to challenge the assignment Ext. P1 to the extent it relates to the self-acquired property of the 2nd defendant.

3. The suit was instituted as early as in 1962. It was at the first instance dismissed by the trial court on 8-9-1967 on the finding that the plaintiff had failed to prove that Ext. P1 was not supported by necessity. In appeal by the plaintiff the decree of the trial court was set aside and the case remanded for fresh disposal after considering also the 1st defendant's case that an extent of 25.25 cents is the self-acquisition of the 2nd defendant. The trial court after remand passed a fresh judgment on 20-11-1973 setting aside the sale deed Ext. P1 to the extent it related to the tavazhi property 34.75 cents in extent. The trial court found that the remaining extent of 25.25 cents was the self-acquisition of the 2nd defendant and the plaintiff has no right to challenge the transfer by the 2nd defendant to the extent it relates to her self-acquired property. The 10th defendant impleaded in the suit had claimed a tenancy right under the 1st defendant. His plea of tenancy was found against. There were three appeals against the decision of the trial court before the lower appellate court. -- A.S.9/1977 by the plaintiff. A.S. 10/1977 by the 1st defendant and A.S. 12/1977 by the 10th defendant. A.S.12/1977 was dismissed confirming the decision of the trial court that the appellant (10th defendant) had not succeeded in proving the tenancy right in the suit property. A.S.Nos. 9 and 10 of 1977 were allowed setting aside the judgment and decree of the trial court and the case was remanded for fresh disposal after considering the effect of the Kerala Joint Hindu Family System (Abolition) Act. 1975. After the second remand as aforesaid the other members of the tavazhi got themselves impleaded as plaintiffs 2 to 25. The trial court by judgment dated 31-7-1978 found that only an extent of 34.75 cents in item 1 in the plaint A schedule belonged to the tavazhi of the plaintiffs and defendants 2 to 8. The remaining extent of 25.25 cents belonged to the 2nd defendant separately and she was competent to convey title in that portion of the property to the 1st defendant. It was found that the sale deed Ext. P1 is invalid as regards the aforesaid 34.75 cents for the reason that it is not supported by consideration, nor was there any necessity to effect a sale of the tavazhi property. Since, however, there was no tarwad after the coming into force of Kerala Act 30/1976, the trial court held that the 1st plaintiff who had instituted

the suit is entitled to recover his 1/2d share in the 34.75 cents of land that belonged to the tavazhi. A preliminary decree was accordingly passed for partition of the aforesaid extent of 34.75 cents into 26 shares and for allotment of one share to the 1st plaintiff. The remaining plaintiffs were found not entitled to any relief for the reason that they were impleaded in the suit more than 12 years after the sale deed Ext.P1 and some of them were born after the date of the sale.

4. The plaintiffs appealed against the decree declining relief to plaintiffs 2 to 25 and also against the decision that the remaining extent of item I in plaint A schedule is the self-acquisition of the 2nd defendant. There was no appeal by the 1st defendant against the preliminary decree for partition of the tavazhi property based on the finding that Ext. P1 is not supported by consideration and necessity. The lower appellate court has confirmed the decision of the trial court and has dismissed the appeal holding that the 1st plaintiff who had instituted the suit in 1962 is not entitled to claim recovery of the tavazhi property alienated without consideration or necessity on behalf of the tavazhi which has ceased to exist with effect from 1-12-1976 when Kerala Act 30/1976 came into force. The decision of the trial court declining relief to plaintiffs 2 to 25 was also upheld. The lower appellate court concurred with the trial court that the tavazhi property is only a portion of item 1 measuring 34.75 cents in extent and the remaining extent belonged to the 2nd defendant.

5. Learned counsel for the appellants Sri. Parameswara Panickar submits that Kerala Act 30/1976 is not retrospective in operation and the suit instituted as early as in 1962 for recovery of possession of the property on behalf of the tavazhi of which the 1st plaintiff is a member can be continued even after the Act came into force. Under Sub-section (2) of Section 4 of the Act all members of the family holding joint family property shall with effect from the date of commencement of the Act hold the property as tenants in common as if a partition of such property per capita had taken place among all the members of the family living on that day. The effect of Sub section (2) of Section 4 is to convert the tavazhi property into property held in tenancy in common by all the then existing members of the tavazhi. The section is not retrospective.

It has only prospective operation. Sub-section (1) of Section 7 enacts that save as otherwise expressly provided in the Act. any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act. Sub-section (2) repeals the enactments mentioned in the schedule including the Travancore Nair Act 2/1100. The repeal is also prospective and Section 4 of the Interpretation and General Clauses Act would squarely apply to proceedings instituted prior to the commencement of the Act. A Division Bench of this Court in the decision reported in *Gopalakrishnan Nair Vs. R. Sarasamma*, at p. 111) --

"5..... When once the Nair Act is repealed and proceedings under the Act are

pending on the date of such repeal whether they could be continued under that Act has to be decided with reference to the provisions of the repealing statute read along with Section 4 of the Interpretation and General Clauses Act 1125 corresponding to Section 6 of the General Clauses (Central) Act 1897."

It was accordingly held that a petition for dissolution of marriage under the Travancore Nair Act pending at the commencement of Act 30/1976 should be disposed of in accordance with the provisions of the repealed Act. The Division Bench further stated at page 814 (of Ker LT): (at p. 112 of AIR) :--

"Unless a different intention appears, the repeal will not affect any legal proceeding or remedy in respect of any right and such proceeding or remedy may be continued or enforced as if the repealing Act had not been passed. It may be that the repealing statute indicates an intention expressly or impliedly to keep alive proceedings under the provisions repealed. It may be that it indicates an intention not to keep alive the proceedings which are pending. In either case there would not be any difficulty. The intention must necessarily be decisive. But there may be cases where the repealing Act is silent. No contrary intention appears in such a case. The silence in the repealing Act cannot be taken to be an indication of a contrary intention. Those are cases of simple repeal. In such cases if the court finds that no contrary intention is indicated in the repealing enactment, the position would be that pending proceedings would survive as if the repealing provision continued to be in force".

The same principle is followed in the later decisions of this court in Balasubramoniam v. Nalini 1983 KLT 998. Balakrishna Kurup v. Bhargavi Amma 1984 KLT 596 and in P. Kesavan Vs. B. Krishnamma, . The mere fact that on and after the commencement of Act 30 1976 tarwad or tavazhi properties are to be held by the members thereof as tenants in common does not stand in the way of the plaintiff recovering the property on behalf of the tarwad or tavazhi. On such recovery the members existing on the date of commencement of, Act 30 of 1976 will however hold the property as tenants in common.

6. The alienation Ext. P1 in so far as it relates to the tavazhi property is held to be void for the reason that it is not supported by necessity or consideration, the alienation is opposed to Section 25 of the Travancore Nair Act and it is totally void. The 1st defendant alienee does not get any title or right to possession of the land under the invalid alienation Ext.P1 in so far as it relates to the tavazhi property. The 1st defendant is therefore in the position only of a trespasser. It is well established that a co-owner is entitled to bring a suit for ejectment of the trespasser. He will however hold the property as a co-owner after he ejects the trespasser and obtains possession of the same. S. D. Mitra on Co-ownership and Partition, 6th Edn. states at page 192 :--

"It is undisputed that one co-owner is entitled to maintain a suit for ejectment of trespassers. The right of each coparcener or other co-owner extends to the whole property jointly with the others and the step taken to recover the property

is for the obvious advantage of all the co-owners. It is not necessary in such a suit to cause all other co-owners to be joined as parties although it is often desirable to join the other co-owners also as parties to the suit. The non-joinder of the other co-owners will not affect the suit, provided the plaintiff does not deny the other co-owner's right."

A Full Bench of the Gujarat High Court in *Nanalal Girdharlal and Another Vs. Gulamnabi Jamalbhai Motorwala and Others*, states at page 145 :

"The rule is well-settled that a co-owner can without joining other co-owners maintain an action to eject a trespasser. Trespass is a wrong against possession and since every co-owner is as much in possession of the whole of the property as the other co-owners, any co-owner can protect his possession against the trespasser by filing a suit to eject him. An act of trespass is an individual wrong against every co-owner and is therefore actionable at the instance of each co-owner. This would appear to be clear on principle but apart from principle there is ample authority in support of it. We may refer only to one decision, namely, *Shutari v. Magnasite-Syndicate Ltd.* ILR Mad 501 : AIR 1915 Mad 1214 It was held by a Division Bench of the Madras High Court in this case (that one of several co-owners can maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action.)"

A Division Bench of this Court in the decision reported in *Krishnan Nair Velayudhan Nair v. Karthiyam Janaki* 1957 KLT 222 has noticed this principle at page 225 of the reports. But the point did not however arise for decision on the facts of the case before the Division Bench. I have no doubt that even as a co-owner the 1st plaintiff is entitled to maintain a suit for recovery of possession of the property on behalf of all the co-owners.

7. The concurrent decision of the courts below that it is only 34.75 cents in item 1 of the plaint A schedule that belonged to the tavazhi and the remaining extent was the self-acquisition of the 2nd defendant being based on the finding on a question of fact, does not call for interference in second appeal.

8. The result of the foregoing discussion is : 1 set aside the judgments and decrees of the courts below and decree the suit for recovery of possession of 34.75 cent of land in item 1 of the plaint A schedule that belonged to the tavazhi of the 2nd defendant and her descendants with profits from the date of the suit. The 1st plaintiff is allowed to recover possession of the property on behalf of the erstwhile tavazhi. The 34.75 cents of land allotted to the tavazhi in partition of the tarwad in respect of which alone relief is granted in this suit out of the 60 cents of land in item 1 of the plaint A schedule will be demarcated in execution.

The second appeal is allowed as indicated above. There will be no order as to costs.