
(1990) 02 KL CK 0035
In the High Court Of Kerala
Case No : A.S. No. 257 of 1982

K.K. Padmavathi Amma and Others

APPELLANT

Vs

K.K. Padmanabhan Nair and Others

RESPONDENT

Date of Decision : 01-02-1990

Acts Referred:

Citation : AIR 1991 Ker 98 : (1990) 3 ILR (Ker) 689

Hon'ble Judges : P.K. Shamsuddin, J

Bench : Single Bench

Advocate : T.P. Kelu Nambiar, P.G. Rajagopalan and P. Devakikutty, for the Appellant; P.N.K. Achan, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Shamsuddin, J.—Defendants 1, 3, 4, 6 to 8, 10 to 14 and 17 to 20 in O.S. No. 127 of 1978 on the file of the Court of Subordinate Judge, Kozhikode are the appellants. Suit was for partition of plaint schedule properties.

2. Plaint schedule properties belonged to one Kannambath Narayanan Nair, father of plaintiff and 1st defendant. He executed a will Ext. A-1 dated 20-10-1956 bequeathing the plaint schedule property in favour of plaintiff and 1st defendant and their mother Ammalu Amma, now deceased, and the children of 1st defendant. Narayanan Nair died on 1-1-1957. The parties were governed by Marumak-kathayam Law. It is the plaintiffs case that on the death of Narayanan Nair, plaintiff became entitled to 1 / 3 share, that subsequently, plaintiffs mother died and her right became devolved on plaintiff and 1st defendant, that therefore plaintiff became entitled to 1/2 share and defendants 1 and 2 to 11, the children of 1st defendant together became entitled to the remaining 1/2 share, that a notice was sent by him demanding partition, to which a reply was sent contending that the plaintiff was entitled to only 1/13 share and that since the properties were "puthravakasam tavazhi properties", plaintiff was entitled to the share claimed in the plaint.

3. Defendants 1, 3 and 6 to 11 filed written statement denying that the plaint schedule property was a puthravakasam property and contending that the plaint property was bequeathed for the benefit of the tavazhi consisting of the plaintiff, 1st defendant and their mother and children of 1st defendant, that on the date of the will, the tavazhi consisted of only plaintiff's mother, plaintiff, 1st defendant and her children, namely, defendants 2 to 8 and that as per the stipulation in the will, all the members of the tavazhi were entitled to equal rights in the property. They also averred that the averment in the reply that the plaintiffs share was only 1/13 is a mistake and that the defendants were entitled to 21 shares out of 22 shares.

4. The 2nd defendant also filed a written statement raising similar contentions. Defendants 4 and 5 also filed a separate joint written statement adopting the same contentions.

5. The Court below found that in view of S. 48 of the Madras Marumakkathayam Act, the property had to be divided on the stirpital principle and in that view of the matter, it was held that the plaintiff was entitled to 1/2 share.

6. In this appeal, learned counsel for appellants challenged the finding of the lower Court. Learned counsel raised two contentions : (1) The bequest of the plaint schedule property was in favour of named individuals and not to the tavazhi and therefore proviso to S. 48 of the Act has no application and (2) Even assuming that the bequest was in favour of the tavazhi, the proviso to Section 48 has no application to the present case and the property has to be divided on per capita basis.

7. It is profitable to quote the relevant (portion) in Ext. A1:

(Matter in vernacular omitted--Ed.). Learned counsel for the appellants contended that the expression "(Matter in vernacular omitted-Ed.)" used in the will in respect of the bequest of item 1, which is plaint schedule property only means that the individuals named therein would enjoy the property as tenants-in-common and does not lead to the inference that the bequest is in favour of the tavazhi consisting of the plaintiff, 1st defendant and her children. He invited my attention to the expression "(Matter in vernacular omitted--Ed.)" and argued that it would mean that all the properties are to be enjoyed as individual properties of the legatees. He also contended that in the case of joint bequest in favour of plaintiff, 1st defendant and their mother and the children of 1st defendant, the legatees have to enjoy the property as tenants-in-common.

8. I am unable to agree with the contention of the learned counsel. Plaintiff, 1st defendant and her children form a natural tavazhi and there is a presumption under Marumakkathayam Law that such a bequest is in favour of the tavazhi. When a gift, bequest or purchase is made in favour of the wife, and all the children, there is a presumption in the customary Marumakkathayam Law as prevalent in the Malabar area, that the bequest, purchase or gift is to the tavazhi. Under the rules of customary Marumakkathayam Law in Malabar, prior to

the coming into force of Madras Marumakkathayam Act, it was only in cases where the gift, bequest or acquisition was made in favour of a Marumakkathayee woman and all her or in the names of all the children who by themselves constitute a tavazhi, the mother being dead, that a presumption would arise that the acquisition was for the benefit of the tavazhi and there was no scope for raising any such presumption in cases where the gift, bequest or acquisition is in favour of the wife alone or of the wife and some of the children alone leaving out the others. (See Smt. Seetha and Others Vs. Kayiyath Krishnan and Others, .

9. Section 48 of the Madras Marumakkathayam Act introduced a change in the customary law and provided that 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 persons and the lineal descendants of such daughters in the female line. Proviso to Section 48 also provides that in the event of partition of the property taking place under Chap. 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.

10. In Sivasankaran v. Lakshmi 1976 KLT 327 Raghavan, J., as he then was, held that once it is found, either by the provisions of the document or by the presumption under S. 48, that the property is bequeathed or gifted to the tavazhi, then the proviso to the section follows and partition of such property is on the stirpital principal. The contention that the proviso would be attracted only in cases where presumption under S. 48 is drawn to find out whether the property is bequeathed to certain individuals or to the tavazhi and not in cases where it was clear from the recitals that the bequest was to the tavazhi was repelled by the Court. It was further held that per capita division would apply only if the testator died prior to the commencement of the Act and per stirpes division would apply if he died subsequently.

11. Again, a similar question came up for consideration of a Division Bench of this Court in Kunju alias Thankappa Menon v. Vesamma alias Kannamma 1969 KLJ 475. The Division Bench held that once it is found that the bequest is in favour of the tavazhi, the proviso would apply and that division had to take place on per stirpes basis. Krishna-moorthy Iyer, J. in a separate judgment, said 1969 KLJ 479 :

"Section 48 of the Act enumerates only a rule of presumption in the matter of construction of documents of the type referred to in the Section. But the proviso to S. 48 deals with the mode of partition of the property given by a person to his wife and children as tavazhi property. When it is found either by applying the presumption under S. 48 of the Act or otherwise that a marumakkathayee has given property to his wife and children as tavazhi property the division of such property among the members of the tavazhi has to be only in accordance with

the proviso to that Section which enjoins a per stirpes division different from the per capita division in respect of tarwad property dealt with under Chapter VI of the Act. We should think that the effect of accepting the contention of the learned counsel for the plaintiffs would be to hold that there are two modes of division of the tavazhi property given by the father to his wife and children which will lead to absurdity."

The argument of the learned counsel for the plaintiffs in that case that the testator intended a per capita division based on the expression "(Matter in vernacular omitted- Ed.)" in the Will was repelled by the learned Judge.

12. A similar question arose before another Division Bench of this Court in *Lekshmi Amma and Others Vs. Anandan Nambiar and Others*, . The Division Bench referred to 1969 KLJ 475 and held that 1973 KLT 756 :

"With respect, we cannot regard S. 48 of the Madras Marumakkathayam Act, 1933 as declaratory of the law; nor the proviso thereto as embodying a substantive provision in itself. "Prior to the Marumakkathayam Act, the position under the customary Marumakkathayam Law was, that a presumption of the tavazhi nature of the gift or bequest or acquisition would be raised only if the same was in favour, or in the name/names, of the wife and all the children, or of all the children alone, who by themselves constitute a tavazhi. A gift, bequest or acquisition in the name or names of the wife alone, or of the wife and one or more of the children alone to the exclusion of the others, would not give rise to such a presumption AIR 1947 Mad 137 and 1960 KLJ 161. We are not in the circumstances prepared to regard S. 48 as declaratory of the law. As far as the proviso to S. 48 is concerned, its language will show that it is; linked with the main provision. It refers to "the property" dealt with under the main part of the Section. It would be anomalous to hold that the main part of the Section has no retrospective effect, but the proviso has. Prior to the Madras Marumakkathayam Act, the consensual partition that was recognised in the Malabar area was almost always on the per capita principle. See the decision of *Madhavan Nair and Ananthakrishna Iyer, JJ. in Sreedevi v. Peruvunni Nair* (ILR LVIII Mad 36). (In the Travancore area, there is authority that the division is stirpital). It is a per capita division that is recognised under S. 38 in Ch. VI of the Act. The modification or restriction on that right is provided by the proviso to S. 48; and neither on principle nor on authority would we be justified in giving the said proviso anything more than a restricted interpretation. We are therefore of the opinion that neither the main part of the Section nor the proviso thereto can be given any retrospective operation."

From the discussion, it is clear that the Division Bench took the view that Section 48 or proviso thereto had no retrospective effect and that once it was found that the gift, bequest or purchase by a person to his wife or children was in favour of the tavazhi subsequent to the coming into force, then the division must be on stirpal basis. In that respect, the Division Bench did not differ from the view taken in 1969 KLJ 475 or 1966 KLT 327 (supra).

13. Learned counsel for appellant next contended that Section 48 would apply only in respect of a bequest or gift or purchase by a person in the name of his wife or one or more of his children by such wife together, but not to a case, where the bequest or gift or purchase is in the name of daughter's children as well. In the instant case, the bequest is also in favour of the grandchildren of the testator. According to the learned counsel, such a provision in the will takes bequest out of the purview of S. 48 and also proviso to the said Section. There is no merit in this contention. Though proviso is linked with S. 48, the proviso would apply to all cases, where the bequest, gift or purchase is by a person for the benefit of a natural tavazhi consisting of his wife, children and daughter's children. That the donees in the instant case constitute such a natural tavazhi cannot be disputed. The circumstance that the grandchildren were also named as legatees did not deprive the bequest of its character as one made by the husband for the benefit of his wife and her tavazhi.

14. Learned counsel next pointed out that if division is made per stirpes principle, daughters of 1st defendant and 1st defendant together would be entitled to only 1/3 shares. Such a result, according to the learned counsel, would violate the intention of the testator. I am unable to accept this contention also. When the testator named all the persons who from a natural tavazhi consisting of his wife, children and the children of his daughter, it only means that the bequest is to the tavazhi. Once it is found that it is made by the husband for the tavazhi of his wife and children, the proviso to Section 48 is attracted and the division can only be on per stirpes basis since bequest is subsequent to the Act.

15. Learned counsel for the appellant invited my attention to the decision of the Supreme Court in *Gopala Menon Vs. Sivaraman Nair and Others*,) in support of his contention that the bequest is to the named persons and not to the tavazhi. In that case, the document came up for consideration of the Supreme Court recited that the property shall vest in wife with power of alienation. On the basis of this, the Supreme Court held that wife gets not limited estate, but absolute estate in property with right to dispose of that property by her own will. The recital in Ext.A1 is quite different. It only recited that the wife would keep possession of the property and take income and in the absence of the wife, the daughter would keep possession of the property and take income and that they would not encumber or effect any partition in respect of the property. Therefore, the above contention of the learned counsel has no force. Learned counsel also submitted that normally in a tavazhi, the eldest male member is the karanavar or manager of the property, but in Ext. A1, the direction is that the wife would keep possession and manage the property and in her absence, the daughter, 1st defendant herein, would keep possession and manage the property and that such a provision would indicate that the property had to be enjoyed by legatees as tenants-in-common. This contention of the learned counsel is also untenable. The direction that the wife or in her absence, the daughter would keep possession of the property is not in any way inconsistent with the enjoyment of the property as

tavazhi property. Nor is it such positive indication that the legatees would take the property as co-owners. In the Marumakkathayam system also, management by a female member is not unknown.

16. Based on Section 33 of the Madras Marumakkathayam Act, which states that no sale or mortgage of any immovable of a tarwad and no lease of any such property shall be valid, unless it is executed by the karnavan for consideration, for tarwad necessity or benefit, and with the written consent of the majority of the major members of the tarwad, the learned counsel for the appellants argued that the direction in Ext. A1 that the suit property will not be partitioned or encumbered is inconsistent with the above provision inasmuch as this direction would amount to a total prohibition of sale or mortgage. There is also no substance in this contention. Once it is found that the property is stamped with tavazhi character, a direction of the nature contained in Ext. A1 has to be read subject to the provision of Section 33 of the Act. In my view, such a direction cannot have the legal consequence or effect suggested by the learned counsel.

There is no merit in the appeal and it is accordingly dismissed. However, there will be no order as to costs.