

(1988) 08 KL CK 0016
In the High Court Of Kerala
Case No : A.S. No. 133 of 1982

Kochara Panicker Sekhara Panicker and Others	APPELLANT
Vs	
Sekhara Panicker Vasudeva Panicker and Others	RESPONDENT

Date of Decision : 05-08-1988

Acts Referred:

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

Citation : (1988) 2 KLJ 311

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

Bench : Division Bench

Advocate : N. Venkitarama Iyer, for the Appellant; P.N. Ramakrishnan Nair, K.V. Sadananda Prabhu and R. Harikrishnan, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Menon, J.—This appeal by defendants 1, 3, 4, 9 and 10 is directed against the decree of the court below removing the first defendant from management of the Payikulangara Devaswom and allowing the plaintiff to recover the Devaswom and its properties on behalf of the Mootheri Kottaram tarwad of which the plaintiff and defendants 1 and 9 are members. Defendants 1 and 4 died pending the appeal and the third defendant is recorded as the legal representative of both these defendants. The suit was filed on 18-11-1975 by the plaintiff as an indigent for removal of the first defendant from management of the Payikulangara Devaswom belonging to the Mochtheri Kottaram tarwad. The first defendant is the Karanavan of the tarwad. The plaintiff is the next in seniority and the 9th defendant is another member of the tarwad. The Devaswom is a private Devaswom of the tarwad. The plaintiff sought also the recovery of the Devaswom and its properties from the first defendant and his alinees defendants 2 to 6, 8 and 10. Paragraph 5 of the plaint enumerates the various alienations effected by the first defendant and those alienations, according to the plaintiff are without consideration, necessity or benefit to the Devaswom or the tarwad and are therefore void. The first defendant has

alienated the properties to his close relatives, he is guilty of mismanagement and is therefore not entitled to continue in management of the Devaswom and its properties. Relief of recovery of possession is sought on behalf of the tarwad which owns the Devaswom. The 4th defendant is the son of the first defendant. The 3rd defendant is the wife of the 4th defendant. The second defendant is the brother of the third defendant. The 5th defendant is the son-in-law of the first defendant. The 6th defendant is the first defendant's uncle's daughter. The 7th defendant is a kudikidappukaran. The 8th defendant is a close relative of the first defendant and the 10th defendant is the son of the 4th defendant. The impugned alienations are all in favour of defendants 2 to 6, 8 and 10 who are all close relations of the first defendant.

2. The defendants raised the following contentions: The suit on behalf of the tarwad is not maintainable without impleading all the members of the tarwad. The tarwad has ceased to exist with effect from the date on which the Kerala Hindu Joint Family System (Abolition) Act 1975 came into force, and no suit will lie on behalf of the erstwhile tarwad. The alienations effected by the first defendant and impeached in the plaint are all supported by consideration and were for the necessity or benefit to the Devaswom. The first defendant being the senior-most member of the tarwad is entitled to be in management of the Devasom and its properties.

3. The Court below found that the alienations effected by the first defendant in favour of defendants 2 to 10 were not supported by consideration, necessity or benefit to the Devaswom. The first defendant was guilty of mismanagement and is liable to be removed from management of the Devaswom and its properties. The plaintiff is held entitled to sue on behalf of the tarwad but being an indigent person, the decree granted in his favour for recovery of the devaswom and its properties on behalf of the tarwad was subject to the condition that either the plaintiff or any other member of the tarwad has to file a suit for the framing of a scheme for management of the temple and its properties and the decree can be executed only after such a suit is filed. The plaintiff has filed a memorandum of cross objections against the above restriction imposed on him as a condition precedent for executing the decree.

4. Learned Counsel for the appellants Sri N. Venkatarama Iyer has strongly urged that a suit for recovery of the Devaswom properties alienated is not maintainable except on behalf of the deity and since the suit has not been filed on behalf of the deity, the same is liable to be dismissed. We see no force in this submission. The Payikulangara Devaswom is admittedly a private endowment belonging to the Mootheri Kottaram tarwad of the plaintiff and defendants 1 and 9. The private endowment is for the benefit of the tarwad and its members. The plaintiff being a member of the tarwad and a beneficiary is entitled to bring the suit for recovery of properties alienated without necessity or benefit. In *Mohammad Ataullah Vs. Ram Saran Mahto*, the Supreme Court observed at page 229:

It is well settled that under the Hindu law, however, it is not only permissible but also very common to have private endowments which though are meant for charitable purposes yet the dominant intention of the founder is to install a family deity in the temple and worship the same in order to effectuate the spiritual benefit to the family of the founders and his descendants and to perpetuate the memory of the founder. In such cases, the property does not vest in God but in the beneficiaries who have installed the deity.

Since, the properties do not vest in the deity, there is no need of the suit being brought in the name of the deity and on its behalf.

5. It is next contended that the suit on behalf of the tarwad is not maintainable after the coming into force of the Kerala Joint Family System (Abolition) Act 30/1976 and the suit in the absence of all the members of the erstwhile tarwad is liable to be dismissed. We see no force in this contention also. The suit was instituted prior to the commencement of the Act, the Act is not retrospective and it does not affect pending proceedings. One of us (Balakrishna Menon, J.) in *Kalyani Amma v. Sankara Raman* (AIR 1988 Kerala 166) stated at page 167:

5. Learned Counsel for the appellants Sri Parameswara Panicker 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-sec. (2) of Sec. 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-sec. (2) of Sec. 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-sec. (1) of Sec. 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-Sec. (2) repeals the enactments mentioned in the schedule including the Travancore Nair Act 2/1100. The repeal is also prospective and Sec. 4 of the interpretation and General Clauses Act would squarely apply to proceedings instituted prior to the commencement of the Act.

In *Kaiyani Amma's* case, it is also held that a suit by one co-owner for recovery of possession of property unauthorisedly alienated is competent and the co-owner obtaining recovery of possession will hold the property for the benefit of all the co-owners. Alienation of the devaswom properly belonging to the tarward is void unless it is for consideration and is supported by necessity or benefit. An invalid alienation does not convey title or right to possession of the land and the alienee is in the position of a trespasser. It is well established that a co-owner is entitled to bring a suit for ejectment of a 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.

6. 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-owner, 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 39 Mad 501 : AIR 1915 Mad, 1214 (I). 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.

7. A Division Bench of this Court in *Krishnan Nair Velayudhan Nair v. Karthiyani Janaki* (1957 Ker. LT 222) has noticed this principle at page 225; but the point did not however arise for decision on the facts of the case before the Division Bench. We 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.

8. The court below has found the alienations impugned in this case are void for want of consideration, necessity or benefit. The burden is on the alinees to prove that the alienations are supported by consideration as well as necessity or benefit. Except for the 4th defendant, none of the alinees has come forward to prove that the respective alienations in their favour are supported by consideration and are also for valid necessity or benefit. The 4th defendant examined as DW-1 is the son of the first defendant. His evidence was rightly disbelieved by the court below. Even the very right of management of the devaswom is seen assigned to him by the first defendant as per an agreement dated 29-12-1973 marked as Ext. B-19. The impugned alienations are all in favour of close relations of the first defendant. Under these circumstances, the court below was perfectly right in holding that the alienations impugned in the

suit are not valid and binding on the devaswom and its properties.

9. The plaintiff as a member of the tarward as well as, as a co-owner" is entitled to a decree for recovery of possession of the properties wrongfully alienated. On recovery he will, however, hold the properties on behalf of all the co-owners who own the devaswom. The filing of a scheme suit as a condition precedent for the execution of the decree for the reason that the plaintiff is an indigent person cannot be justified in law. The said condition imposed by the court below is accordingly vacated. For the aforesaid reasons the appeal fails and is dismissed. The memorandum of cross objections is allowed as indicated above. The parties will suffer their respective costs.