

(1953) 07 KL CK 0006
In the High Court Of Kerala
Case No : A.S. No. 74 of 1124

Kochukutti Amma and Others

APPELLANT

Vs

Bhavani Amma and Others

RESPONDENT

Date of Decision : 09-07-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1954 Ker 169

Hon'ble Judges : V.S. Subramanya Iyer, J;K. Sankaran, J

Bench : Division Bench

Advocate : P.K. Achan, for the Appellant; K.P. Abraham, for the Respondent

Final Decision : Allowed

Judgement

Subramania Iyer, J.—This is a Plaintiffs' appeal, their suit, O.S. 34 of 1118 filed in the District Court of Kottayam having been dismissed by the Second Judge of that Court on 19-7-1120 on the preliminary grounds of res judicata and absence of cause of action.

2. The facts are short. In Lalum Pakuthy and Muri of the same name, there is a Nair tarwad called Kallanakunnel. In 1037 and 1057 the members of that tarwad entered into agreements evidenced by a plain cadjan and registered document respectively whereunder they resorted to separate residences, arranging for separate maintenance by allotment of specific properties providing for the appropriation of the income thereof in that behalf. The members split up into four groups for the above purpose. The documents themselves are not before Court. There is controversy as to whether the later arrangement is or is not a deed of outright partition. That question does not, however, fall to be decided in this case, which relates to a dispute between the members of one of the four groups called the Naduthotti sakha and concerns one of the items of property entrusted to it. In 1078 the members of this sakha entered into an arrangement under which, they provided for their separate residences and maintenance allotting specific properties for the appropriation of income.

The sakha at that time consisted of Lekshmi Amma, her son Easwaran who was the Karnavan, her daughters Pappi and Karthiyayani as also two grandsons through a deceased daughter. Allotments of property were made for the aforesaid three male members and Pappi and Karthiyayani, providing that the mother should be maintained by her son. The three male members and Lekshmi Amma died and Pappi and Karthiyayani begot children. The properties in, the possession of the deceased were taken possession of and enjoyed by the sisters but not under any agreement or based upon any proportion. Naturally disputes arose between them. In the year 1088 the Travancore Nair Act, 1 of 1088, was passed which "inter alia" provided for and regulated the rights of members of Nair tarwads to maintenance from out of tarwad properties. No provision was made in that Act for compulsory partition which was done only in the later Act, 2 of 1100. Partition was, however, then permissible by the consensus of" all the members under the customary law whose operation, except to the extent expressly provided by the Act, was saved by it.

In 1095 the members of this sakha entered into an agreement (Ex. A) whereunder arrangements were made for the peaceful enjoyment of the properties by the thavazhies of Pappi and Karthiyayani. Whether this arrangement is an outright partition or is merely an arrangement for maintenance and enjoyment is one of the two points arising in this case. If it is a partition as was found by the District Judge,, the Plaintiffs who are members of Pappi's tha vazhi have no cause of action in respect of the alienation impugned by them which was one granted by a member (D. 1) in fact, the sole surviving member of Karthiyayani's thavazhi If, on the other hand, it be an arrangement for maintenance albeit permanent, the Plaintiffs would have a cause of action.

3. The other point raises the question of res judicata and that arises on account of the adjudication made in O.S. 746 of 1101 of the Meenachil Munsiffs Court which was a litigation started on behalf of the Plaintiffs" thavazhi impugning an alienation of Anr. slice of property also allotted to Karthiyayani's tha vazhi.

4. The Munsiff found that the aforesaid arrangement (Ex. A), of 1095 was one of outright partition and the District Judge of Kottayama in appeal confirmed that finding.

5. Learned Counsel for both sides read and dealt with Ex. A and stressed the various parts thereof supporting their respective positions. Various decisions regarding the construction of similar documents were also referred to, the latest of which was - "Krishnan v. Narayanan" AIR 1952 Trav-C 277 (A) We are clearly of opinion that Ex. A is merely an arrangement for maintenance.

6. The true test of partition of property is, as observed by the Privy Council in - "Appovier v. Rama Subba Aiyan" 11 Moo Ind App 75(PC) (B),

The intention of the members of the family to become separate owners. Intention being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property in defined shares "as separate

owners" operates as a partition, although there may have been no actual division of the property by metes and bounds.

No act done by any member can operate as a partition unless it has been done with the "intention to put an end to his joint status and acquire a new status", that is, "the status of a separate owner". (See Mulla's Hindu Law, 1952, 11th edition, page 427, para. 326).

These remarks relating to joint Hindu families apply to Marumakkathayam tarwads as well.

A perusal of Ex. A would reveal that there was no intention either to alter the joint status of the members or to hold the properties severally as separate owners. The two thavazhies of Pappi and Karthiyani were living separately long before 1095 under the arrangement made in the year 1078 which is admittedly and indisputably one for the purpose of maintenance. The members of the two thavazhies continued to be undivided members of a tarwad notwithstanding their separate residence and its continuance. The transaction of 1095 does no more than perpetuate that residence with the additional allotment of properties which became available on account of the death of their allottees. Common mess and common worship are some of the several matters pointing to jointness. Either or both of them may cease without their necessarily leading to an inference of severance of status.

Common mess terminated a long time before, but the parties were still joint. Worship which is not less, if not more, important than mess continued joint, even after the cessation of common mess and that joint worship is arranged in Ex. A to be continued thereafter. The purported permanency of the arrangement is much relied upon by learned Counsel for the Respondents. The stipulation in that regard applies "with equal force to the continuance of common worship which is also to be therefore permanent, which is an indication of the intention of the parties not to sever their status. Indeed there is nothing in the document suggesting the contrary.

7. As regards the division of property it is significant that Ex. A recognises and maintains an unambiguous distinction between title to or ownership of the property, that is, the right to possess the property and the possession of the property. As regards the first, that is, the ownership of the property, it is stipulated that the revenue registry, which was its sole evidence and which was in the name of the karnavan of the undivided tarwad, must continue in his name, that is to say, there ought not to be a mutation of registry in the name of either of the two thavazhies. Then as regards encumbering or alienating any item of property dealt with in the arrangement, it is stipulated that none such should be done except by all the major members of both the thavazhies. The contravention of this provision is, by a positive provision, rendered actionable.

8. It is thus obvious that title to property was not intended to be affected by the arrangement. As regards actual possession on the other hand it is provided that

the two thavazhies are entitled to be in exclusive possession and enjoyment of the property allotted to each. A right is given to each thavazhi to cut and remove the trees standing on the property. A right to lease out is also conferred on each thavazi. The debt that the sakha owed at the time is directed to be paid by each thavazhi in equal moieties and the mode of finding funds in that behalf is indicated in the document as by leasing out the property. The powers and privileges thus conferred upon each of the two thavazhies relate to possession and that alone. There are express words to the effect that the scope of the enjoyment of the property is limited to taking the income or usufructs therefrom.

9. Permanency is an essential feature of an arrangement of outright partition. When the terms of a deed of arrangement are of doubtful import or are consistent with its being either one of outright partition or one merely for the purpose of enjoyment, the character of permanency has been and may well be regarded as more or less decisive. It, however, does not follow from this that every arrangement that is permanent must be one of partition as to say so would involve what in logic is called "The fallacy of the conversion of a proposition", a familiar instance of which is, "all men are mortal" which is a proposition and which does not admit of being converted into "therefore all mortals are men" which is obviously fallacious. It can only be said that some mortals are men and not all. Mortality is not a feature appertaining to human life alone but is one appertaining to all lives. Though it is true to say that every partition is a permanent arrangement, the converse of it, namely every permanent arrangement is a partition does not follow and is not true because permanency is a feature that can attach to non-partition arrangements as well.

10. Sundara Aiyar in his "Malabar Aliasan thana Law" says;

Arrangements for maintenance will not ordinarily be viewed as permanent arrangements though it is not impossible that there should be such arrangements. Divisions for enjoyment short of partition that are sometimes entered into are of this character. (p. 150)

Referring to the arrangements which are the result of binding family karars, the learned author classifies them as follows:

1. The arrangement may be one for separate management primarily and separate enjoyment only subsidiarily but may purport to be a permanent arrangement.
2. It might be for separate enjoyment and intended to be permanent.
3. It might be a permanent arrangement for the maintenance of the branch.
4. Objects of the arrangements might be any of the above but the duration be left indeterminate.

In the first case, no separate interest is created in favour of each of the branches and as an act the arrangement would bind only the actual parties to it and

children subsequently born would not be bound so far as their interests are adversely affected by it. Again, in the last case also, the Court might have power to interfere if having regard to the changed circumstances, it should prove inequitable to hold, parties to the original terms of the arrangement. In fact, it may well be presumed that it is an implied term of every such arrangement that it should continue only so long as the conditions are not substantially changed. The same however cannot be said of the other two classes of arrangements. In effect they amount to permanent alienation of the right of enjoyment and the Courts would not have the power to alter them without the consent of the parties. (Pages 162 and 163).

The learned author proceeds to say:

In the case of assignment of lands for the support of the branch till its extinction or a permanent division for enjoyment, possession could not be obtained for the tarwad till the branch became extinct, any clause against alienation notwithstanding. But if the allotment is only for management and not for the absolute enjoyment of the branch, obviously other considerations would apply and the alienations would be upheld only to the extent they are permitted by the terms of arrangement, if any or, in their absence, their validity should be examined by the ordinary tests of necessity and the properties could be recovered for the family by any member of the tarwad, if the alienation fails to satisfy those tests. (p. 164).

see also - "Kesavan Janardhanan v. Narayanan Janardhanan" AIR 1953 Trav-C 118 (C).

11. The true nature of the arrangement under Ex. A is no more than an arrangement for permanent enjoyment of the properties by the two thavazhis of Pappi and Karthiyani. The rights conferred on the thavazhis relate only to possession and enjoyment of the benefits of possession. Title or ownership is there as before and it vests in the entire undivided tarwad. Each of the thavazhis would be entitled to deal with possession and that act may not be assailed by the other thavazhi because being a permanent arrangement it is binding upon the thavazhi making the alienation and until that thavazhi is extinct, the right of the tarwad or of any member of the other thavazhi to possession does not arise. Members subsequently born in thavazhi or who are minors at the time may not be bound by the arrangement if it is shown to be prejudicial to their personal interest. But that question apart, "vis-a-vis" the parties the arrangement stands even as one for enjoyment and maintenance. If so, as in our judgment it is, then the 1st Defendant was entitled to deal with the properties allotted to Karthiyani's thavazhi of which she was the sole surviving member, in so far as her possession was concerned.

Exhibit B the impugned deed of sale is one executed by the 1st Defendant purporting to convey title to the property and not merely possession thereof. That part of the deed relating to title or ownership was clearly beyond her

competence and to that extent the deed is bad and would not bind the property or the other thavazhi, that is the thavazhi of the Plaintiffs. The 1st Defendant died pending the appeal, leaving no issue. That fact is recorded by this Court allowing an application in that behalf, C.M.P. 3475/1124, presented by the Appellants. The application was made in Mithunam 1124 and the order was passed the next month. The precise date of death does not appear. The possession of the alienee 2nd Respondent was rightful until the 1st Defendant's death as she was entitled to unquestioned right of enjoyment by herself or through her alienee during her lifetime. That right, however, terminated with, her death and thereafter the alienee was no more entitled to retain possession and was bound to restore it to the Plaintiffs. Not having restored possession, the 2nd Respondent-alienee has rendered himself liable for mesne profits from Mithunam 1124, the quantum of which will be ascertained by the trial Court in execution.

12. The question that remains to be considered is whether the adjudication evidenced by Exs. II and III would render the first point considered above, res judicata. Relevant facts must be recollected to consider this aspect of the case. A slice of property allotted to Karthiyani's thavazhi was alienated by it. The Plaintiffs' thavazhi impeached that alienation by instituting O.S. 746 of 1101 on the file of the Meenachil Munsiff's Court. The question of the nature of the arrangement of the year 1078, whether it was an outright partition or one merely for enjoyment and maintenance arose for decision for, upon that depended the Plaintiffs' cause of action. The Munsiff found it was an outright partition with which view the District Judge in appeal concurred. The nature of the action in the present suit is similar. There is however the all-important difference that the property the alienation of which is questioned in this case is valued at Rs. 2050/- in the plaint which necessitated its being instituted in the District Court being beyond the pecuniary jurisdiction of the Munsiff which is limited to Rs. 2000. The market value put on the property in the plaint was not questioned on behalf of the contesting Defendants. The Court below nevertheless found issue 3 relating to res judicata in favour of the contesting Defendants and against the Plaintiffs apparently for the reason that the final decision in the earlier litigation was that of the District Judge in appeal. This view of the learned Judge is clearly erroneous. Section 11, Code of Civil Procedure, which relates to res judicata provides that:

No Court shall try any suit or issue in which the matter directly and substantially in issue, has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in Court of law competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

It is the competency of the trial Court in the earlier litigation to try the subsequent suit that is material under the section and not the competency of the appellate Court. It is enough to quote the following passages from Mulla's Code

of Civil Procedure, 12th Edn. 1953:

The jurisdiction of the two Courts must be concurrent as regards the pecuniary limit as well as the subject-matter. The rule was laid down by Sir Barnes Peacock in - "Mt. Edun v. Mt. Bechun" 8 W R 175 at p. 179 (D) and it was approved by the Privy Council in - "Misir Raghobardial v. Sheo Baksh" 9 Ind App 197 at p. 204 (PC) (E). The learned Chief Justice said that there were in India many grades of Courts with different pecuniary limits of jurisdiction presided over by Judges whose qualification differed widely; that it would be improper that a finding as to the validity of an adoption or of a will in a petty suit in a Munsiff's Court, should be conclusive in a suit for a property of a large amount in a High Court, and that by taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided.

In - "Run Bahadoor Singh v. Lachoo Koer" 11 Cal 301 (PC) (F) the Privy Council said that "if this construction of the law were not adopted, the lowest Court in India might determine finally and without appeal to the High Court, the title to the greatest estate in the Indian empire." It is essential therefore that the first Court was a Court competent to try and decide not only the particular matter in issue but also the subsequent suit in which the issue is subsequently raised. (pp. 74-75).

It is the competency of the original Court which decided the former "suit" that must be looked into, and not that of the appellate Court in which that suit was ultimately decided on appeal or of the executing Court. A suit is instituted in a Munsiff's Court. An appeal from the decree in that suit is preferred to a District Court. A subsequent suit relating to the same matter in issue is brought also in a District Court. The decision in the first suit cannot operate as *res judicata* in the subsequent suit, for though the District Court that heard the appeal may have jurisdiction to try the subsequent suit, the Munsiff's Court, that is the Court which decided the former suit, is not a Court of jurisdiction competent to try the subsequent suit.

Though an appeal lies from a decision of a Talukdari Settlement Officer to the District Court, yet the decision does not operate as *res judicata* in a subsequent suit in the District Court, for a Settlement Officer is not a Court, competent to try a civil suit: he is merely an administrative officer. (p. 78).

13. Indeed the aforesaid position was not seriously canvassed before us by learned Counsel for the 2nd Respondent. His endeavour rather was to induce us to grant leave to amend the written statement by questioning the valuation made in the plaint, as in his view, the assessment of the market value of the property by the Plaintiff at Rs. 2050/- was just to put the subject-matter beyond the jurisdiction of the Munsiff and was resorted to for escaping the operation of the rule of *res judicata*. There may be something in the suggestion made by the learned Counsel but we are unable, at this, distance of time that is more than ten years after the suit was filed and eight years after it was disposed of, to allow

the prayer for leave to amend, as it would, in our view, not lead to any very satisfactory result, as the market value of the subject-matter of the suit that is material is at the time of the earlier litigation which was in 1101. The Munsiff's Court which decided the earlier suit was not competent to try, the present suit and the earlier decision rendered. by the Munsiff will not operate as a bar, to, the District Judge's considering and deciding the true nature of the arrangement evidenced by Ex. A, notwithstanding the fact that the Munsiff's decision in the earlier case has had the confirmation of the same District Court in appeal.

14. The result is that this appeal is allowed and in reversal of the decree of the District Judge, the Plaintiffs are given a decree, setting aside Ex. B (IV) executed by the 1st Defendant in favour of the 2nd Respondent in so far as it related to the title or ownership of the property, and directing the alienee 2nd Respondent to deliver possession of the property to the Plaintiffs with mesne profits from Mithunam 1124 at a rate which would be decided by the Court below in execution. As regards costs we consider it just to direct the parties to pay themselves their respective costs throughout notwithstanding the Plaintiffs' ultimate success in getting back possession of the property, in view particularly of the fact that the Plaintiffs claimed in the plaint immediate possession of the property on setting aside Ex. B to which they were clearly not entitled, though they became entitled to possession on account of the subsequent death of the 1st Defendant pending appeal which meant the extinction of her thavazhi.