(1951) 12 KL CK 0002

In the High Court Of Kerala

Case No : A.S. No. 179 of 1124

Korulla Geeverghese APPELLANT

Vs

Krishnan Nair Raghavan Nair and Others RESPONDENT

Date of Decision : 06-12-1951

Acts Referred:

Nayar Act, 1088 — Section 17
Nayar Regulation, 1088 — Section 17
Transfer of Property Act, 1882 — Section 13, 14, 45

Citation : AIR 1951 Ker 89

Hon'ble Judges : Kunhiraman, C.J;Joseph Vithayathil, J

Bench : Division Bench

Advocate : T.K. Joseph, for the Appellant; M.K. Parameswara Kurup and N. Raman Unnithan, for the Respondent

Judgement

Vithayathil, J.—Defendant 4 is the Appellant. The suit is to set aside an alienation and to recover possession of the plaint properties on the ground that it is not binding on the tarwad of the Plaintiffs consisting of the Plaintiffs and Defendants 8 to 15. Defendant 8 is the mother of Plaintiffs 1 to 3 and Defendants 9 to 15. Plaintiff 4 is the daughter of Defendant 10. Defendant 5 is the husband of Defendant 8 and the father of Plaintiffs 1 to 3 and Defendants 9 to 15. Defendants 6 and 7 are the brothers. of Defendant 5. The suit properties belonged lo Defendants 5 to 7. They gifted the same to Defendants 8 to 15 on 3-10-1098 under the gift deed, Ext. A. Defendants 5 to 11 sold the properties to Defendant 1 and his deceased father on 4-12-1107 under Ext. B. Defendants 2 and 3 are the other heirs of the deceased father of Defendant 1. Defendant 1 and his father gifted the properties to the 1st Defendant''s wife in 1109 and these three persons sold them to Defendant 4 on 26-1-1113 under Ext. C. The suit was filed on 2-11-1119 to set aside the sale deed, Ext. B, dated 4-12-1107, Defendant 4 alone contested the suit.

2. The Plaintiffs case is that the gift deed, Ext. A was in favour of the Sub-tarwad of the Plaintiffs and Defendants 8 to 15 and that the sale deed, Ext. B, is not

supported by consideration and tarwad necessity. Defendant 4 contended, that the gift was in favour of the donees as tenants in common and not in favour of their Sub-tarwad and that the sale deed, Ext. B was supported by consideration. The lower Court held that the gift was in favour of the Sub-tarwad of the Plaintiffs and Defendants 8 to 15 and that the sale deed, Ext. B, is not supported by consideration and tarwad necessity. The learned Judge, therefore, set aside the sale deed and allowed the Plaintiffs to recover possession of the properties with mesne profits on behalf of their tarwad on payment of Rs. 1600 as value of improvements to Defendant 4.

3. The important question that has to be decided in this appeal is whether the gift deed Ext. A was in favour of the Sub-tarwad of the Plaintiffs and Defendants 8 to 15. The lower Court was of opinion that since the gift deed was not only by the husband of Defendant and but also by his two brothers. Section 17, Nayar Act of 1088 would not apply. Section 17 of that Act reads thus:

The property obtained from the husband or father by the wife or widow and child or children by gift or inheritance shall, unless, in the case of gift, a contrary intention appears in the instrument of gift, belong to the wife or widow and each of the children in equal shares with right to individual partition.

According to the learned Judge, if Section 17 will not apply it is the pre-existing law that should apply arid, therefore he drew a presumption in favour of the Sub-tarwad. We fail to see how the pre-existing law will apply after the coming into force of the Nayar Regulation of 1088. If that Act will not apply, it is the common law relating to transfer of property that should apply. Under the general law of transfer when a transfer is made in favour of more persons than one the transferees take as tenants-in-common in equal shares unless a contrary intention is expressed in the deed of transfer. This is clear from Section 45, T.P. Act. If u/s 17, Nayar Regulation, the presumption is in favour of tenancy in common in the case of a gift by the father or husband it must be all the more so when the gift is made by the father and his brothers..

4. Apart from the question of presumption, the terms of Ext. A make it clear that the gift was not in favour of the Sub-tarwad of the donees. Under the document the donees whose names are mentioned therein and their descendants are to enjoy the properties in equal shares. Even the descendants of the male donees, who will not be members of the tarwad, will also be entitled to share equally with the Ors. Then again, the donors who are not members of the tarwad are entitled to manage the properties during their lifetime and they can also lease out the properties for a particular period. It is also provided that for encumbering the properties the junction of the donors is necessary. These provisions are clearly inconsistent with the conception of tarwad property.

5. It was argued for the Respondents that the names of Plaintiffs 1 and 3 who were not in existence on the date of Ext. A are included in the sale deed, Ext. B. According to the learned Advocate, they cannot have any interest in the

properties unless the properties belong to their Sub-tarwad. We do not think that this position is correct. Under Ext. A, the unborn children of the donees are also entitled to share in the properties gifted. So long as this provision does not offend Sections 13 and 14, T.P. Act, there is no reason why Plaintiffs 1 and 3 should not be entitled to share in the properties. We, therefore, hold that the gift deed, Ext. A was in favour of the donees and their descendants who take the properties as tenants in common. In this view of the case, the Plaintiffs case impeach the alienation only to the extent of their shares. Plaintiff 4 who is the daughter of Defendant 10 was not born on the date of the sale deed, Ext. B. She is, therefore, not entitled to impeach the alienation. Plaintiffs 1 to 3 are entitled to 3/11th share in the properties. They were, minors on the date of the sale deed, Ext. B. The question whether the sale would affect their interests in the properties will depend upon the further question whether the sale was for their benefit. The learned advocate for the Appellants fairly conceded that the evidence in the case is not sufficient to prove that the sale deed was executed for their benefit. We, therefore, hold that the sale deed, Ext. B is not binding on the 3/11th share belonging to Plaintiffs 1 to 3 and that it is liable to be set aside to the extent.

6. It was argued that Defendants 12 to 15 were also minors on the date of the sale deed, Ex. B, and that, therefore, the document should be set aside so far as their shares also are concerned. But it is seen that Defendants 12 to 15 had completed the age of 21 on the date of suit, and since they had distinct shares in the properties they were bound to impeach the sale deed before the expiry of three years from the date of attaining majority. Therefore, their claims if any, have been barred by limitation.

7. We, therefore, modify the decree of the lower Court and pass a preliminary decree in favour of Plaintiffs 1 to 3 setting aside Ext. B to the extent of their 3/11th share and allowing them to recover possession of that share after partition by metes and bounds. The trial Court will appoint a commission to effect a partition and pass a final decree in the case. The question of the value of improvements to be paid to Defendant 4 in respect of the portion of the properties that will be allotted to the share of Plaintiffs 1 to 3 as also the question of mesne profits will be determined by the lower Court and provision will be made for the same in the final decree. The appeal is allowed in the manner stated above. The parties will pay and receive proportionate costs both here and in the lower Court. The Court below will, pass appropriate orders relating to costs in respect of subsequent proceedings.

