

(1957) 07 KL CK 0001
In the High Court Of Kerala
Case No : S.A. 1089 of 1952 (M)

Koyyotan Sooppi

APPELLANT

Vs

Kallyani and Others

RESPONDENT

Date of Decision : 15-07-1957

Acts Referred:

Transfer of Property Act, 1882 — Section 2, 28

Citation : (1957) KLJ 862

Hon'ble Judges : K.T. Koshi, C.J;C.A. Vaidialingam, J

Bench : Division Bench

Advocate : K.P. Ramakisima Ayyar, for the Appellant; C.K. Viswaniha Ayyar for 1st Respondent, for the Respondent

Final Decision : Dismissed

Judgement

C.A. Vaidialingam, J

1. The plaintiff in O.S. 1062/45, District Munsiff's Court, Kuthuparamba is the appellant before us. The short point for consideration in the appeal is regarding the title to the properties comprised in the Stridhanam Gift Deed, Ext. B5 dated 30th June 1925. The following geneological table, as supplied by the appellant's counsel will help us to appreciate the relationship of the parties who will be referred to in this judgment.

It will be seen from the table that Pathumma and Mayan had a daughter Ummayya and four sons Avulia, Abooker, Moidu and Ahmad. Ummayya had a daughter Aliyumma and a son Ahmad. Aliyumma was married to Koyyotan Sooppi who is the plaintiff-appellant before us. Aliyumma's brother, Ahmed was the 2nd defendant in the suit. After Pathumma's death, her husband Mayan, along with his 2nd son Abooker and as guardian of his minor sons Moidu and Ahmed executed a document styled Stridhanam Gift Deed in favor of Aliyumma, grand-daughter of Pathumma and Mayan through their daughter Ummayya who was also by then dead. The legal effect of this document will be considered later

in the judgment. At this stage, it may be mentioned that the said document recites that the property comprised therein belonged to Pathumma and that after her death, it belongs to the executants and to Avulia, the eldest son of Pathumma and Mayan. It further states that it has been given as gift to Aliyumma to provide maintenance to her husband Koyyotan Sooppi. It makes certain further recitals as to the manner of enjoyment and as to the devolution of the property.

The property appears to have been demised on lease to one Govindan and another in favor of Avulia. Avulia, the eldest son of Pathumma and Mayan and who had not joined the original Stridhanam Gift Deed Ext. B5, executed on 27-4-1931 a registered Deed in favor of Aliyumma affirming the earlier Gift Deed executed in her favor by his father and other brothers. This consent deed has been filed and marked as Ext. B6 in these proceedings. Govindan, the original lessee appears to have died and the properties were in the possession of the 1st defendant as lessee. Aliyumma also appears to have died and her death gave rise to a dispute among the parties as to the ownership of the properties covered by Ext. B5 and B6.

2. Avulia filed O.S. 205/46 District Munsiff's Court, Kuthuparamba against the tenant as 1st defendant for recovery of arrears of rent from 1941 to 1946 as per the lease Deed in his favor in respect of the suit properties. In that suit, apart from the tenant as 1st defendant he made also Koyyotan Sooppi, husband of deceased Aliyumma, and Ahmad, brother of Aliyumma as defendants 3 and 4 respectively. The 2nd defendant was the plaintiff's brother Moidu who supported the plaintiff. Avulla contended that the properties belonged in Jenm to Kanumarath Tarwad, on Kanom Kuzhikanom right to his mother Pathumma. He as karnavan of his Tavazhi, renewed the lease of the property with the Jenmi and took Marupat from the tenant. He disputed the right of his father and his other brothers to grant the Stridhanam in favor of Aliyumma. He also contended that after Aliyumma's death, her rights, if any, lapsed to his Tavazhi and that he alone is entitled to collect the rents and profits from the land. The tenant contended in that suit that the property belonged to Aliyumma and after her, to her brother Ahmad, the 4th defendant and that the rents have been paid to the 4th defendant and that she had no liability whatsoever to the plaintiff.

3. Koyyotan Sooppi, the 3rd defendant contended that the plaintiff has no rights and that he and Aliyumma's brother Ahmad are alone entitled to the properties under Mohammadan law and that had already filed O.S. 1062/45 District Munsiff's Court, Kuthuparamba for arrears of rent against the tenant. Aliyumma's brother, the 4th defendant adopted the contentions of Koyyotan Sooppi the 3rd defendant and also admitted receipt of rent from the tenant.

4. O.S. 1062/45 which has come up before us in this Second Appeal, was a suit filed by Koyyotan Sooppi, husband of deceased Aliyumma against the tenant as 1st defendant for recovery of arrears of rent for 12 years in respect of the suit properties. The 2nd defendant in this suit was his wife's brother Ahmad. The

plaintiff's case was that the suit properties had been given as Stridhanam to his deceased wife under the document dated 30th June 1925 and later on accepted also by Avulla. After Aliyumma's death, he and the 2nd defendant are the heirs of Aliyumma under Mohammadan Law and therefore, he is entitled to the full rent till the date of death of Aliyumma and thereafter to half the rent on the basis that the other half will enure to the benefit of Ahmad.

5. The 1st defendant contended that the 2nd defendant alone is the sole heir of Aliyumma and she also pleaded discharge by payments of rent already made to the 2nd defendant. The 2nd defendant supported the 1st defendant and also admitted the receipt of rent.

6. As the main question in both the suits related to the title to the properties covered by Ext. B 5, by consent of parties both the suits were tried together and evidence was recorded in O.S. 205/46. It will be seen that Avulla the plaintiff in O.S. 205/46 was not a party in O.S. 1062/45. Otherwise the parties in the two suits were substantially the same.

7. Before the learned District Munsiff, as could be seen from paragraph 14 of the judgment, Avulla evidently did not dispute the right of Aliyumma and her husband to be in possession and enjoyment till Aliyumma's death in 1935-36. The learned District Munsiff has observed that there is a legal presumption that the Maphlas in North Malabar are governed by the Marumakkathayam system of inheritance. The trial court also proceeded on the basis that gifts by way of Stridhanam can be made by a Marumakkathayam family. The trial court took the view that the Stridhanam grant as per Ext. B 5 and consented to and adopted by Avulla as per Ext. B 6 cannot be deemed invalid for the reason that all persons entitled to the property had not joined the document. After a consideration of the recitals in Ext. B 5 the learned District Munsiff came to the conclusion that an absolute gift of the property was given to Aliyumma under Ext. B 5 and that any doubt as to the validity of Ext. B 5 has been put beyond question by the acceptance by the plaintiff as per the consent Deed Ext. B 6. In this view, the trial court held that Aliyumma was absolutely entitled to the properties and that the Tavazhi claim put forward by Avulla cannot be accepted. The trial court also held that the only heirs of Aliyumma are, under the Mohammadan law, her husband the plaintiff in O.S. 1062/45 and her brother Ahmad, the 2nd defendant in O.S. 1062/45. He also held that these two persons take the property in equal moities.

8. Regarding the plea of discharge set up by the tenant, by payment to Aliyumma's brother, the trial court held that any payment to Aliyumma's brother Ahmad over and above his share will not bind Koyyotan Sooppi. But on the merits, the trial court held that the plea of discharge by payment to the brother of Aliyumma set up by the tenant was not true.

9. In this view, the trial court dismissed Avulla's suit O.S. 205/46 and decreed Koyyotan Sooppi's suit O.S. 1062/45 as prayed for.

10. Avulla did not file any appeal against the dismissal of his suit O.S. 205/46. But the tenant the 1st defendant and Ahmad the brother of Aliyumma the 2nd defendant in O.S. 1062/45 filed A.S. 54/49 to the court of the Subordinate Judge of Tellicherry against the decision in O.S. 1062/45. The learned Subordinate Judge has also observed in paragraph 7 of his judgment that there is a presumption in law as observed by the trial court that the Maphlas of North Malabar are governed by Marumakkathayam law in the absence of evidence to the contrary. He has also observed that there is no evidence in the case to the effect that Pathumma was governed by Mohammadan law and not by Marumakkathayam law. As Pathumma had died before the Mappila Marumakkathayam Act (Act 17 of 1939) her interests must be deemed to have devolved on her Tavazhi consisting of Avulla and his brothers and her granddaughter Aliyumma. The learned Judge took the view that as is well known among the Maphlas of North Malabar following the Marumakkathayam law it is customary to make Stridhanam grants on the occasion of the marriage of the family members of the Tarwad and that such grants are in the nature of a contribution made by the Tarwad for maintenance of the family member and the children that might be born. Though the husband enjoys the income to be utilized for the maintenance of his wife and children, according to custom the gift will revert back to the family on the death of the lady without issues. On the construction of Ext. B5, the learned Judge took the view that the said document had all the incidence of a Stridhanam grant under Marumakkathayam law and he also held that as Aliyumma died without any issue, the property would ordinarily revert to the Tavazhi. But as in this case the document provided that the property should devolve on her brothers and sisters, the learned Judge held that Ahmad the 2nd defendant and brother of Aliyumma is the sole heir to the properties. He held that as the grant was no more than a maintenance grant with its customary incidence under the Marumakkathayam law, there was no residuary interest of Aliyumma which could devolve on her death on her Mohammadan law heirs. In this view, the learned Judge held that the 2nd defendant was absolutely entitled to the property and also the arrears of rent and reversed the judgment and decree of the trial court. In view of his finding that the plaintiff had no right in the properties after Aliyumma's death, he did not think it necessary to go into the question regarding the plea of discharge raised by the tenant.

11. As stated already, the plaintiff has come up in Second Appeal to this Court. The main contention of the learned counsel for the appellant Mr. K.P. Ramakrishna Ayyar is that the parties are governed by the Mohammadan law and that as under Ext. B5 Aliyumma got an absolute right in the properties, the plaintiff as husband of Aliyumma is a joint heir along with the 2nd defendant. He also contended that the decree in O.S. 205/46 which had become final, operates as res judicata in these proceedings as against Avulla and persons claiming under him.

12. Mr. C.K. Viswanatha Ayyar, the learned counsel for the respondent has

contended that the parties are governed by the Marumakkathayam law, the document Ext. B5 is only a maintenance arrangement executed according to the customary law and the incidence of such customary law apply to the same. He also contended that in view of the provisions contained in the document itself, the plaintiff will have no rights to the property.

13. The legal effect of Ext. B5 and B6 depends upon as to whether the parties were governed by the Mohammadan law or by the Marumakkathayam law. The parties are Maphlas of North Malabar. Mr. Ramakrishna Ayyar contended that the presumption must be that they are governed by Mohammadan law. In support of this contention, he referred us to the observation of the Privy Council in Muhammad Ibrahim Rowther and another v Shaikh Ibrahim Rowther and others (I.L.R. 45 Mad. 308). In that case, their Lordships had to consider a special custom pleaded among Lubbayi Mohammadans of Coimbatore District. Their Lordships observed that it is for those alleging among Mohammadans a custom of inheritance at variance with Mohammadan law to prove by clear and unambiguous evidence an ancient and invariable custom. This by itself does not support the contention of the appellant's counsel. Further, at p. 314 of the Report their Lordships observed as follows:-

In India, however, custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mohammadan law governing the succession in a particular community of Mohammadans. But the custom must be proved."

These observations clearly show that their Lordships are fully alive to the fact that particular sections of Muslims may follow by custom, a law other than the Mohammadan law in certain respects. Mr. Ramakrishna Ayyar also referred us to the several Madras enactments as supporting his contention that Mohammadan law will apply to Muslims, in all cases and that Marumakkathayam law is not applicable at all to them. Those enactments are (1) The Mophla Succession Act (Act 1 of 1918), (2) Mopla Wills Act (Act 7 of 1928) and (3) Mopla Marumakkathayam Act (Act 17 of 1939). We cannot accept this contention either. Parties are Mophlas of North Malabar. In Justice Sundara Ayyar's Malabar and Aliyasantanam Law at p. 4 it is stated:

Marumakkathayam law obtains not only amongst the Hindus but also amongst the Mophlas, a class of Mohammadans, in North Malabar, who speak Malayalam.

Further at p. 231 the learned author states:

Mohammadans of North Malabar also mostly follow the Marumakkathayam law of inheritance and adopt the rule of non-division.

The learned Author in the subsequent pages discusses the reasons for this practice. In Machikandi Parhum Maramittath Tharuvil Mootha Chettiam Veettil Chakkara Kannan v Varayalankandi Kunhi Pokker and four others (I.L.R. 39 Mad. 317 F.B.) the Full Bench observes at p. 336 as follows:

Mophlas of North Malabar generally follow the Marumakkathayam system.

In view of these authoritative pronouncements, the presumption as stated by both the lower courts is that the Mophlas in North Malabar are governed by the Marumakkathayam law in the absence of evidence to the contrary. In this particular case no such evidence to the contrary appear to have been placed before the court. Further, even in the enactments referred to above, the statement of objects and reasons clearly show, that the Mophlas of North Malabar have been following the Marumakkathayam law. In fact Act 17 of 1939 was passed with the avowed object of defining and amending in certain respects.....among the Mophlas following the Marumakkathayam law. Therefore, these enactments clearly contemplate that the Mophlas of North Malabar follow the Marumakkathayam law.

14. Reference may also be made to the latest judgment of the Madras High Court in Puthiya Purayil Abdurahiman, Karnavan and Manager of the tavazhi tarwad and Another Vs. Thayath Kancheentavida Avoomma and Others, . In that case, their Lordships the Chief Justice and Mr. Justice Panchapakesa Ayyar have referred to all the enactments referred to above and also to two new enactments namely Madras Act 18 of 1949 and Central Act 26 of 1937 and ultimately held that the last two Acts did not purport to, nor did they abolish the rights and incidence of a Mophla Marumakkathayam Tarwad, That the Mophlas.of North Malabar are followers of Marumakkathayam law is also evident from the two Full Bench decisions of the Madras High Court in Kunhacha Umma v Kutti Mammi Hajee (ILR 16 Mad. 201) and Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkra Kannan v Varayalankandi Kunhi Pokker and four others (I.L.R. 39 Mad. 317). In view of what is stated above, it follows that Pathumma and her children and grandchildren are Mophlas governed by the Marumakkathayam law. The legal effect of the document Ext. B 5 has to be considered in the light of the findings that the parties are followers of Marumakkathayam law. Ext. B 5 clearly states that it has been given as a gift to Aliyumma to enable her to provide maintenance to her husband Koyyotan Sooppi. It is also stated that the executants have no further rights over this property and that the property is to be enjoyed by Aliyumma and her husband on her behalf as owner and it is also stated that Aliyumma and her children should enjoy the property and income. It is very clear from the document that the sole object of the gift was to make provision for Koyyotan Sooppi to enjoy the income and maintain his wife and children. By executing the consent document Ext. B 6, whatever defects there may have been originally in Ext. B 5 by the non-joining of Avulla has been cured. Avulla, the Karnavan of the Tarwad has unequivocally accepted the Stridhana Adharam granted in favor of Aliyumma under Ext. B 5. In discussing the characteristics of the Mophlas of North Malabar it is stated in Sundara Ayyar's Malabar Law at p. 237 as follows:

here is also the practice for the relations of the wife to make what is called a Stridhanam Gift to the husband to enable him to maintain her. The gift ordinarily

reverts to the family thought not invariably on death of the wife without issue or on divorce.

In *P.K. Pakrichi v P.K. Kunhacha* (I.L.R. 36 Mad. 385) their Lordships Mr. Justice Benson and Mr. Justice Sundara Ayyar observed at p. 386 as follows:

It would appear that amongst the Marumakkathayam Mophlas of Malabar gifts are often made to the husband of a girl given in marriage apparently as a contribution towards the maintenance of the girl and her future children. It was held in *Mariam v Abdulla* (S.A. 1746 of 1896-unreported) that such a gift became void on the death or divorce of the girl. According to Marumakkathayam law, the Tarwad is bound to maintain the women of the Tarwad even after their marriage, and if the property is given to a husband for the support of his wife, it stands to reason that, when he divorces her he should give back the property to the donor.

Therefore, it is clear that there is a custom which has been judicially recognized among the Mophlas of North Malabar of executing a Stridhanam Gift Deed to enable the husband to maintain himself, his wife, and his children. One of the customary incidence of this gift is that it reverts back to the family of the donors if the woman dies without any issues. That means, the right of the husband to enjoy the property comes to an end on the death of his wife. In considering the present document Ext, B 5 in the light of what is stated above, we hold that it is only a Stridhanam Gift substantially in favor of Koyyotan Sooppi for the purpose of maintaining himself, his wife Aliyumma and their children- On the death of Aliyumma without issues ordinarily it would have reverted back to the family of the donors but for the special recital about devolution contained in the document.

15. The next contention of Mr. Ramakrishna Ayyar that the provision in the document Ext. B 5 providing for the ulterior transfer of the property to the brothers and sisters of Aliyumma on her death without any issue is not valid. For this contention he relied upon the statement in Mulla's *Mohammadan Law* 13th Edition at p. 165 to the effect that

when a gift is made subject to the condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no conditions were attached to it.

He pursued this argument by contending that such an ulterior transfer conditional on the happening or not happening of a specific event can be valid only under sec. 28 of the Transfer of Property Act. But according to him sec. 28 which is in Chapter 2 of the Transfer of Property Act will not apply in view of sec. 2 of the said Act. The relevant portion in sec. 2 of the said Act says that nothing in the 2nd chapter of this Act shall be deemed to affect any rule of Mohammadan Law. In view of our finding that Pathumma, her children and grand-children are Mophlas following the Marumakkathayam law, the above contention of Mr. Ramakrishna Ayyar cannot also be accepted. In *Govindaraja Pillai and others v. Mangalam Pillai and another* (63 M.L.J. 911) his Lordship Mr. Justice Sundaram Chetty held that where the grant of an absolute estate is expressly or impliedly

made subject of defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative. In that case, a settlement deed by a husband in favor of his wife stated that the properties are to be enjoyed by both of them and after them by their issues and in default of such issues, the brothers of the lady are to take the properties. In that case, His Lordship, after reviewing the authorities, held that such a condition was valid and that the brothers of the wife took the properties. The recital in the document Ext. B5 is almost similar to the one that the learned Judge had to consider in *Govindaraja Pillai and others v. Mangalam Pillai and another* (63 M.L.J. 911) and respectfully following that decision, we hold that the defeasance clause in this case is valid. Therefore, in this view, on the death of Aliyumma without issues, as stated in the document, the person entitled to the properties will be her brother the 2nd defendant herein.

Lastly, Mr. Ramakrishna Ayyar contended that the decision in O.S. 205/1946 operates as *res judicata* in these proceedings. As mentioned at the beginning of the judgment both O.S. 205/46 and 1062/45 were tried together and a common judgment was delivered. In view of the reasoning of their Lordships of the Supreme Court in *Narahari v. Sanker* (1950 I SCR 754 at 758), the last contention of Mr. Ramakrishna Ayyar also fails.

In the result, we confirm the decree and judgment of the learned Subordinate Judge and dismiss this appeal with costs.