

(1957) 07 KL CK 0023

In the High Court Of Kerala

Case No : Second Appeal No. 662 of 1953 (E)

Krishan Nair Sivasankaran Nair

APPELLANT

Vs

Sankaran Krishnan Namboori and Others

RESPONDENT

Date of Decision : 19-07-1957

Acts Referred:

Limitation Act, 1908 — Article 44
Travancore Nair Act, 1912 — Section 10, 13, 17

Citation : AIR 1958 Ker 30 : (1957) 1 KLJ 719

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

Bench : Full Bench

Advocate : T.S. Krishnamurthy Iyer, for the Appellant; P. Govindan Nair and N.D.P. Nambooripad, for the Respondent

Final Decision : Dismissed

Judgement

Koshi, C.J.—This second appeal must fail on the short ground that the lower appellate Court was right, in our view, when it reversed the trial Court's judgment and decree and held that the suit was barred by time. The lower appellate Court also found that the plaintiffs' claim to recover possession of their half share of the plaint properly was also barred by adverse possession, but in the view we take on the question of limitation it is unnecessary for us to go into the question of adverse possession.

2. To confine ourselves strictly to the facts that are relevant for purposes of the second appeal, the plaintiffs, two in number, claimed a half share of the plaint schedule property as two out of the four heirs of their deceased father, one Sankara Pillai. The latter died in Meenam 1095 leaving as his heirs his widow (defendant 5) two sons (defendant 4 and plaintiff 1) and a daughter (plaintiff 2).

On 28-3-1111 defendants 4 and 5, the latter acting also as the guardian of the two plaintiffs who were then minors, sold the property to defendant 1. In the suit giving rise to this second appeal the plaintiffs claimed their one-half share after avoiding the alienation in favour of defendant 1. Admittedly both the plaintiffs

had become majors before 1113, but the suit was instituted only on 24-3-1123. The lower appellate Court found that the suit was hit by Article 44, Limitation Act, which prescribed a period of three years for a ward from the attainment of his majority to set aside a transfer effected by his guardian.

The trial Court took the view that the mother, defendant 5, was not the legal guardian of the plaintiffs and that they had therefore 12 years to sue for the recovery of their half share in the property. According to the trial Court the plaint property constituted the thavazhi property of defendant 5 and her children. The question for our decision therefore is whether in the hands of Sankara Pillai's heirs the plaint property constituted their separate property or thavazhi property and whether defendant 5 was really the legal guardian of the plaintiffs.

3. As succession to Sankara Pillai's property opened in 1095, the law governing the succession was the Travancore Nair Act, 1 of 1088. It is common ground that the plaint property constituted the separate property of Sankara Pillai and that as he had left no undivided marumakkathayam heirs his widow and children were his sole heirs -- vide Section 12. Section 17 provided that the widow and each of the children shall take the property in equal shares with right to individual partition.

Mr. T.S. Krishnamurthy Iyer, learned counsel for the plaintiffs-appellants urge that by virtue of the provisions of Section 13, until a division is effected the property would be thavazhi property and that the widow and children did not take the same as tenants-in-common. We are afraid Section 13 has no application to this case inasmuch as that contemplates a case where a deceased Nair male leaves both makkathayam and marumakkathayam heirs alone. Even otherwise that section only states that until a division is effected the senior male member, or in the absence of a male member, the senior female member among the heirs shall have possession of the property.

This provision cannot, in our opinion, affect the legal character of the property that devolved on the widow and children on the death of a Nair male. To find out that we have to look to Section 17 and when that section states that the heirs shall take the property in equal shares with right to individual partition, we do not hesitate to hold that what the law enacts is that these shares would constitute the separate property of the heirs, or in other words they take the property as tenants-in common. We are fortified in taking this view by the authority of a Full Bench decision of the Travancore High Court reported in *Achuthan Pattan v. Kalyani Amma* 26 TLJ 284 (A). For our purpose it would suffice if we quote here the head-notes to that case which reads:

"(i) In regard to Makkathayam acquisitions of members of Nair community, after Regulation I of 1088 came into force, dealt with in Section 17 of Regulation I of 1088 and Section 22 of Regulation II of 1100, each donee or devisee takes a separate, heritable and alienable share, in the absence of a contrary intention appearing in the instrument of gift or bequest.

(ii) Such donees or devisees form tenants-in-common in respect of such acquisitions. They do not form a sub-tarwad with incidents of Marumakkathayam properties attaching to such acquisitions.

(iii) Section 39 of the Nair Regulation II of 1100 does not apply to such acquisitions."

Mr. Krishnamurthy Iyer conceded before us that in case we hold that the shares which Sankara Pillai's widow and children obtained in his property constituted the separate property of each of them u/s 10(c) of the Nair Act, II of 1100 the mother was the legal guardian and that the time to question the alienation effected by her as the guardian of her minor children was that prescribed by Article 44. The impugned sale took place after Act II of 1100 replaced Act 1 of 1088 and the right to the guardianship is governed by the later Act. As the suit was brought only in 1123, admittedly more than 6 years after plaintiffs 1 and 2 came of age, the suit was rightly held to be barred by the lower appellate Court.

4. We confirm that decision and dismiss this second appeal with costs. Order accordingly.