

(1965) 06 KL CK 0021

In the High Court Of Kerala

Case No : Second Appeal No. 1238 of 1960

Krishna Pillai Balakrishna Pillai and Another

APPELLANT

Vs

Lekshmi Amma Gourikutty Amma and Others

RESPONDENT

Date of Decision : 21-06-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1, 47
Travancore Nair Act, 1100 — Section 31

Citation : AIR 1966 Ker 18 : (1965) KLJ 797

Hon'ble Judges : M.S. Menon, C.J;V.P. Gopalan Nambiyar, J;P.T. Raman Nair, J

Bench : Full Bench

Advocate : G. Viswanatha Iyer, for the Appellant; Minor Respondents 17 and 18 are represented by guardian 12th Respondent, K. Sukumaran, for Respondents No. 13 to 14, for the Respondent

Final Decision : Allowed

Judgement

Gopalan Nambivar, J.—This second appeal has been placed before a Full Bench as it was felt that it raised a question of far reaching importance, and involved a consideration of the correctness of the decision of a Division Bench of the Travancore-Cochin High Court in Kesavan Nair Gopalan Nair v. Lekshmi Amma Karthiyani Amma, 1955 Ker LT 157.

2. One Puthupurackal tarwad was a maru-makkathayam tarwad governed by the Travancore Nair Act II of 1100. In the year 1097 M.E. the tarwad executed a hypothecation deed in respect of the plaint item and 17 other items of properties to one Govinda Pillai. In 1104, a partition was effected in the tarwad which is evidenced by Ex. A, by which the plaint property was allotted to the sub tarwad of the 8th defendant in the suit, out of which the above second appeal arises (O. S. No. 716 of 1954, First Additional Munsiff Court. Neyyat-tinkara), Plaintiffs and defendants 9 to 12 in the said suit are the children of 8th defendant and constitute the said sub tarwad. The plaintiff's are The appellants in the second appeal.

3. Govinda Pillai filed O. S. No. 1169 of 1106 in the Munsiff Court, Neyyattinkara to enforce the mortgage and obtained a decree which is evidenced by Ex. B. The decree was assigned to the 1st defendant, who, in execution brought to sale the plaint property and purchased it himself.

4. In the suit evidenced by Ex. B, the representatives of the sub tarwad of the 8th defendant were not impleaded, but, only representatives of the main puthupurackal tarwad, Defendants 1 and 2 in the said suit were respectively the karanavan and the senior Anandiravan of the main tarwad. The 8th defendant who was the karanavathi of the sub tarwad. was impleaded as the 6th defendant, but not in her representative character, but only as a subsequent encumbrancer. The 2nd plaintiff, (also a female) the next senior in age and the senior "Anandiravan" of the sub tarwad was not joined at all, to the Ext. B suit. The 1st plaintiff, who is the present karanavan of the sub tarwad was a minor at that time, and was also not impleaded. The plaintiffs claimed that as their sub tarwad was not represented in the suit evidenced by Ex. B, the decree and the execution proceedings therein were not valid and binding on them and prayed for a cancellation of the same and for a declaration of their title to and possession of the plaint property. Both the courts below have dismissed the plaintiffs' suit holding, on the authority of the decision in 1966 Ker LT 167 that a creditor need not take into account any subsequent partition in the tarwad of which he had no notice, and the decree and the execution proceedings are valid and binding on the plaintiffs. It was further held that as, in the course of the execution proceedings, the 8th defendant had intervened with certain objections which had been overruled, the plaintiffs are estopped from contending that the execution proceedings are not valid and binding on their sub tarwad. Hence the second appeal, by the plaintiffs.

5. In 1955 Ker LT 157 it is stated as follows :

"The debt was incurred before 1107 and the creditor had advanced the money while the tarwad was undivided. The creditor could, therefore, consider only the entire tarwad as his debtor and he need not take into account a partition deed entered into in the tarwad after the debt was incurred. He was not a party to that partition deed nor had he any notice of the same"

Lower down, it is observed:

"As mentioned already, the creditor need not look into the subsequent developments in the tarwad of which he had no notice and so, he was to implead only persons competent to represent the tarwad. If the plaint properties had been alienated by the tarwad after the hypothecation bond, then certainly he would have to implead the alienee also. A partition in a tarwad is not considered to be an alienation."

6. With all respect to the learned Judges, who rendered the above decision, we are unable to accept the principle laid down therein as correct, We feel that the proposition that the creditor need not look into the subsequent developments in

the tarwad of which he had no notice has been too widely stated. We feel too, that the question as to the persons to be made parties to a suit in such circumstances, does not depend upon whether the creditor had notice of any change of circumstances in the tarwad. We entertain no doubt that the correct principle is that if a plaintiff in a suit in respect of property wishes to obtain a decree binding on the persons interested in the property, it is incumbent on him to see that all persons interested are impleaded. It seems to us to make little difference whether a devolution of ownership or interest in the property has been brought about by transfer, or by inheritance, or by bequest or by partition.

7-8. At the time of the Ex. B suit, the tarwad had been partitioned and the plaintiff property belonged to the sub tarwad of the 8th defendant. Without the representatives of the sub tarwad being made parties, we are of opinion, that the plaintiff property in the hands of the sub tarwad cannot be bound by the Ex.B decree or the execution proceedings in pursuance of the same.

9. Section 31 of the Travancore Nayar Act II of 1100, reads as follows:

"No decree shall bind a Tarwad unless it is obtained against the Karanavan as such and senior Anandiravan of his Thavazhee and of every Thavazhee collateral to the same, if any". As we have seen, neither the Karanavan as such nor the senior Anandiravan of the sub tarwad to which the property belonged was a party to the suit. It follows that neither Ex. B decree nor the execution proceedings in pursuance of the same are valid and binding on the said sub tarwad of plaintiffs and defendants 8 to 12.

The decision in 1055 Ker LT 157 cannot be accepted as correct and must be overruled.

10. But, it is argued, that in the course of execution proceedings in pursuance of Ex. B decree the 8th defendant intervened with certain objections evidenced by Ex. I. that these objections were overruled and that therefore the plaintiffs' sub tarwad is precluded from questioning the validity of the decree and execution proceedings. There are many fallacies underlying this argument. In the first place the 8th defendant, as noticed already, was impleaded in the Ex. B suit only as a subsequent encumbrancer and not as representative of her sub tarwad, and the objections filed by her and evidenced by Ex. I, cannot be regarded as objections on behalf of the sub tarwad. The sub-tarwad not being a party, the objections seem hardly to fall within the purview of Section 47 of the C. P. C. Again, assuming that the matter would fall within Section 47 of the C. P. C., the order overruling the objections will amount to a decree, in which event, there will be no decree against the sub tarwad by reason of the provisions of Section 31 of the Travancore Nayar Act II of 1100 We overrule Ibis objection.

11. No other point was argued before us.

12. We therefore hold that neither the decree evidenced by Ex. B nor the, execution proceedings in pursuance thereof are binding on the sub tarwad of the

plaintiffs and defendants 8 to 12. The second appeal is accordingly allowed, the judgment and decree of the courts below are set aside and the plaintiffs' suit decreed as prayed for with costs throughout.