

(1967) 11 KL CK 0004
In the High Court Of Kerala
Case No : Second Appeal No. 225 of 1962

Krishna Pillai Raghavan Pillai and Another	APPELLANT
Vs	
Karthiayani Amma Sarasamma and Others	RESPONDENT

Date of Decision : 27-11-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 44
Travancore Nair Act, 1912 — Section 31

Citation : AIR 1969 Ker 26

Hon'ble Judges : P.T. Raman Nair, J; Mathew P. Muricken, J

Bench : Division Bench

Advocate : K. Velayudhan Nair, V.S. Moothathu, T.K. M. Unnithan and K.J. Joseph, for the Appellant; M.P. Ramakrishna Pillai, for the Respondent

Final Decision : Allowed

Judgement

Raman Nayar, J.—We think that the first Court was right in dismissing the respondent plaintiff's suit in the view that it was barred by res judicata and that the lower appellate Court was wrong in decreeing it in the view that it was not so barred,

2. The five items of property in suit admittedly belonged to a Nayar joint family (governed by the Travancore Nayar Act) known as the Akkaravaram family and were, along with the other properties of the family, in the possession of its Karanavan, Velayudhan, until his death in 1103 M. E. (1927-28 A. D.). Plaintiffs 1 and 2 are the daughters of the 18th defendant, Karthiyani by name; plaintiffs 3 to 6 are the minor children of the 1st plaintiff; and the 7th plaintiff is the minor daughter of the 2nd plaintiff. It is their case that the 18th defendant's mother, Lakshmi, was a sister of Velayudhan. Velayudhan had another sister by name Narayani, and he and the the Vazhees of these two sisters constituted the Akkaravaram joint family to which the suit properties belonged. Soon after Velayudhan's death, there was a partition in this joint family by means of Ext. IV

dated 10-11-1103 (23-6-1928) and, in this partition, the suit properties were allotted to the 18th defendant's thavazhee, then consisting of herself and her minor daughter, the 1st plaintiff. Velayudhan's son, the 1st defendant, however, managed to obtain possession of the properties and hence this suit for a declaration of the plaintiffs' title, for possession and for other reliefs.

3. According to defendants 1, and 2, the appellants herein, Velayudhan was the sole surviving member of the Akkaravaram joint family. The Narayani and Lakshmi, to whose thavazhees the plaintiffs and defendants 10 to 21 claim to belong, were not sisters of Velayudhan (who had no sisters but had two distant cousins by name Narayani and Lakshmi whose thavazhees have become, long since, extinct) but utter strangers, and the plaintiffs and these defendants are mere pretenders. The properties of the Akkaravaram joint family belonged exclusively to Velayudhan as its last surviving member, and, on his death, his children, defendants 1 and 2, succeeded to them as his heirs.

4. We are here concerned only with the claims of the thavazhee of the 18th defendant to which the plaintiffs belong -- they are undivided from the 18th defendant -- and need not concern ourselves with the claims of defendants 10 to 17 and 19 to 21. The matter directly and substantially in issue between the plaintiffs, on the one hand and the contesting defendants, defendants 1 and 2, on the other, is whether, at the time of Velayudhan's death, this thavazhee of the 18th defendant belonged to his joint family. This, it seems to us clear, was the matter directly and substantially in issue in a former suit O. S. No. 276 of 1106 (of the very Court in which the present suit was brought so that no question of the competency of the court which tried that suit to try the present suit arises) between, as we shall presently show, the same parties litigating, as is quite apparent, under the same title.

5. O. S. No. 276 of 1106 was a suit brought by the present 1st defendant in respect of item 1 of the properties in suit. This item had been bought by the present 9th defendant in execution of a money decree he had obtained against the 18th defendant and her sister Kamalakshi in O. S. No. 428 of 1104. The present 9th defendant was the first defendant in that suit while the 18th defendant was the 2nd defendant. The suit was for a declaration of the present 1st defendant's title to and possession of the property there in suit and (rather unnecessarily) for a cancellation of the decree and execution proceedings in O. S. No. 428 of 1104 to which the 1st defendant was in no sense a party.

The suit was decreed in favour of the plaintiff therein (namely, the present 1st defendant) as representing the personal heirs of Velayudhan who it was held became entitled to this property on his death, Velayudhan being--so it was found--the last surviving member, of the Akkaravaram joint family and, therefore, the property being exclusively his. This decree was affirmed by the District Court in appeal and by the High Court in second appeal.

6. As we have already observed, the question directly and substantially in issue

in O. S. No. 276 of 1106 between the present 1st defendant and the present 18th defendant (the plaintiff and the 2nd defendant respectively therein) was whether the 18th defendant and, therefore, the members of her thavazhee, were members of the Akkaravaram joint family to which Velayudhan belonged at the time of his death. The finding was in the negative.

7. It is pointed out that, while the 1st defendant's case then, as now, was that the 18th defendant and the other members of the thavazhees of Narayani and Lakshmi were utter strangers to Velayudhan and sheer impostors the finding of the District Court (as affirmed by the High Court in Second Appeal) in the former suit, O. S. No. 276 of 1106, was that these persons were members of a divided branch of a common tarwad to which that branch and Velayudhan's branch at one time belonged. But that is of no consequence whatsoever, for, the question was, and is whether the members of the thavazhees of Narayani and Lakshmi were members of Velayudhan's joint family at the time of Velayudhan's death, not whether they bore kinship to him. So long as they were not members of Velayudhan's joint family, it matters nought whether they were utter strangers or were related to him by ties of blood. And, whether what was found in the former suit, could properly be found on the pleadings and the evidence therein, is not a matter for us to consider.

8. As we have seen, the plaintiffs are not divided from the 18th defendant and their claim (which is for the entire property, not merely their share therein) is obviously made on behalf of the 18th defendant's thavazhee. The 18th defendant, as also all the other adult members of the thavazhees of Narayani and Lakshmi, were parties to O. S. No. 276 of 1106, and the question then is whether the 18th defendant was a party there only in her bare individual capacity or also as representing her thavazhee (then consisting of herself and her then minor daughter, the 1st plaintiff) of which she was the manager.

9. True, the plaint in O. S. No. 276 of 106 did not expressly aver that the present 18th defendant was being sued as the manager of her thavazhee. But the plaint did say that the 18th deft, and the other members of the thavazhees of Narayani and Lakshmi were made party defendants because they were laying claim to the property under the false pretence that they were members of Velayudhan's joint family. (The averment in the plaint that these persons, defendants 2 to 6 in that suit, wore pretending to be members of Velayudhan's joint family and his avakasis, can only mean that those persons were claiming to be entitled to the property as members of Velayudhan's joint family to which it was averred the property belonged, not that they were claiming as Velayudhan's heirs). This alleged claim by the present 18th defendant, which is precisely the claim the plaintiffs now put forward on behalf of her thavazhee, necessarily involved the claim that her thavazhee of which she was the manager after the partition under Ext. IV, belonged to Velayudhan's joint family and therefore had title to the property. There can therefore be little doubt that the 18th defendant was sued as representing her thavazhee being the manager thereof -- the averment that the

18th defendant was claiming as a member of Velayudhan's joint family necessarily implied the averment that the thavazhee of which she was the manager was claiming likewise -- and that she defended the suit in that capacity. And, even if it be that the 18th defendant did not actually represent the other members of her thavazhee. Explanation VI to Section 11 of the Code would, provided the conditions set out therein are satisfied, serve to make the other members, namely, the present plaintiffs, persons claiming under her.

10. When a person is, either by operation of law, or by act of parties, duly authorised to represent another in a litigation, that other is, we should think, in truth a party to the litigation even if not co nomine so. The case of a manager litigating on behalf of his joint family, which under their personal law he is competent to represent would, we think, satisfy the requirement of identity of parties in the body of Section 11 of the Code with regard to members of the family claiming as such in a subsequent litigation -- all the members of the joint family being represented by the manager are, in truth, parties to the suit. The case would, of course, fall within Explanation VI, but we do not think it really needs the aid of the explanation to satisfy the requirement of identity. The difference, from a practical point of view, is that, if the parties were really parties to the former suit (although only through a person competent to represent them) then, as indicated by Section 44 of the Evidence Act, they would have to show that the former decision was obtained by fraud or collusion to escape the bar of res judicata. But, if they were not, in truth, represented in the former suit and that suit is what is generally called a representative suit only because of the fiction in Explanation VI, then, on the wording of the explanation, they would not be required to show that the former decision was obtained by fraud or collusion. On the contrary, it would appear to be for the person pleading the bar of res judicata to show that the fictional representative litigated bona fide although bona fides being very much in the nature of a negative quality, would probably be presumed in the absence of at least suspicion to the contrary. In the present case it makes no difference whatsoever whether the plaintiffs were parties to the former suit through the 18th defendant, the manager of their thavazhee, or whether the bar of res judicata can be attracted only by resort to Explanation VI to Section 11 of the Code. For we are satisfied that, not merely was there no fraud or collusion, but that the 18th defendant litigated bona fide in the former suit.

11. We have been referred to Section 31 of the Nayar Act which says that "no decree shall bind a tarwad unless it is obtained against the Karnavan as such and the senior anandaravan of his thavazhee and of every thavazhee collateral to the same if any". This Section, it would appear, is concerned only with what decree shall bind the tarwad, (with the direct impact of the decree, not with the indirect consequences of the decision resulting in the decree) and not with the question of who is competent to represent a tarwad in a litigation. On that latter matter it does not seem to trench on the customary Marumakkathayam Law by which the Karnavan is competent to represent the tarwad. (It is to be noted that

the Section has nothing to say as to who can obtain a decree in favour of a tarwad). And if it did, it would mean that even a decision obtained in favour of the tarwad (for example by a kamavan suing on its behalf as he is undisputably entitled to) cannot operate as *res judicata* (except perhaps by resort to Explanation VI to Section 11 of the Code with the attendant requirement of *bona fides*) unless, not merely the Karnavan, but the senior anandaravans as well, were parties to the suit. However, the question does not really arise; in this case since at the time of O. S. No. 2761 of 1106, there was no senior anandaravan in the 18th defendant's *thavazhee* which, by reason of the partition under Ext. IV, was a tarwad by itself. Nor can the question arise in a case where the representation is a fictional representation under Explanation VI to Section 11 of the Code.

12. The present 18th defendant did not at first appear in the former suit, O. S. No. 276 of 1106. But she appeared at a later stage, had the order declaring her *ex parte* set aside, and filed a written statement setting up the very case which the plaintiffs in the present suit have now set up. She gave evidence proving all the documents on which the plaintiffs now rely, and she discountenanced the claims of the present 9th defendant, the 1st defendant in the former suit to the property therein. It might also be mentioned that, as Ext. R shows, she had had the court sale in favour of the present 9th defendant duly set aside. It might be that as observed in the judgment, Ext. 1, in that suit, she was brought to the scene by the present 9th defendant to make good the omissions in the pleadings which he and the other defendants in that suit had tiled, but neither that, nor the circumstance that she did not appeal against the decree but left it to the present 9th defendant to do so, betrays any want of *bona fides* on her part, far from establishing either fraud or collusion whether as between herself and the present 1st defendant, the plaintiff therein, or between herself and the present 9th defendant, the 1st defendant therein.

13. In the result we allow this appeal, set aside the decree of the lower appellate court, and dismiss the suit with costs throughout.