

**(1959) 01 KL CK 0021**  
**In the High Court Of Kerala**  
**Case No : A.S. No. 366 of 1954 (M)**

Krishnan Namboodiri and Others

APPELLANT

Vs

Cheria Kesavan Namboodiri and Others

RESPONDENT

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**Date of Decision :** 27-01-1959

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 12

**Citation :** AIR 1959 Ker 336

**Hon'ble Judges :** Koshi, C.J;Varadaraja Iyengar, J

**Bench :** Division Bench

**Advocate :** D.N. Namburipad, A. Madhava Pisharady and P.R. Nambiar, for the Appellant; A. Achuthan Nambiar, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Varadaraja Iyengar, J.—This appeal is by the defendants 2, 3 and 11 against the judgment and decree of the lower court in a suit for partition in a Malabar Namboodiri family called Mankolathillam in Cheruthazham Amsom in Chirakkal Taluk and comprising the 1st plaintiff and defendants 1 to 10 except the 3rd defendant. Of these parties and the 11th defendant, defendants 1 to 3 are brothers. The 6th defendant is the wife of the 1st defendant and the 11th defendant is the wife of the 3rd defendant. Plaintiff 1 and defendants 4, 7, 8 and 9 are the children of the defendants 1 and 5 and the 6th defendant is the wife of the 4th defendant. The 10th defendant is the son of the defendants 4 and 6. The defendants 4, 6 and 10 were transposed as plaintiffs 2, 3 and 4 pending suit.

According to the plaintiff, the 3rd defendant had separated from the family under registered release Ext. A-6 dated 24-3-1939 but he was allowed to deal with the family properties and income by the 1st defendant karanavan though to the presedice of the illom. The plaintiffs repudiated the claim to a share by the 3rd defendant; similarly by the 11th defendant who was married by the 3rd defendant long after Ext. A-6 date. The plaintiffs further denied that defendants 2 and 3 were entitled to any special interest in any of the properties of the illom.

They accordingly claimed their 4/10 share in the properties scheduled, free of the special rights alleged by the defendants 2 and 3 or of the claim to shares put forth by the defendants 3 and 11. The suit was contested by the defendants-2, 3 and 11 on various grounds but the court below disallowed them all and decreed the suit almost as prayed for. We are concerned with two only of those contentions, viz., (i) that the defendants 3 and 11 were entitled each to a separate share in the illom properties, and (ii) that the suit as originally laid with 1st plaintiff, then minor, as the sole plaintiff was defective to the extent it had not been proved to be for his benefit.

2. Taking up first, the question of the 3rd defendant's share. According to the 3rd defendant he had no doubt executed Ext. A-6 in 1939 but it was merely sham and had not come into effect. Alternatively there was a subsequent reunion among the members of the family under Ext. B-11 karar dated 8-2-1950. This alternative contention has not been persisted in before, us and so need not be further considered. The court below in dealing with the main aspect found that Ext. A-6 release by the 3rd defendant did not stand by itself; there was for instance an earlier release Ext. A-5 dated 5-12-1938 by Govindan, brother of the 3rd defendant, and a later release Ex A-7 dated 3-1-1941 executed by Draupadi widow of Iswaran, elder brother of defendants 1 and 3, all of them valuing alike the share released at Rs. 400.

And just as Govindan did not figure among the members of the illom when the 3rd defendant executed his release Ex. 6, the 3rd defendant's name did not appear in Draupadi's release Ext. A-7. Exhibits A-5 and A-7 had not also been repudiated by the respective releasers. There was therefore according to the court below prima facie no reason why Ext. A-6 alone of the releases Exts. A-5 to A-7 should have come into effect.

On the terms of Ext. A-6 the court below found that it was executed in pursuance to demand made on the rest of the members by the 3rd defendant himself for partition and allotment of his share in all the movable and the immovable properties belonging to the illom and that a sum of Rs. 400 was settled as the value thereof and that amount, was paid in part to the extent of Rs. 226-10 as by adjustment as against a promissory note of specified date executed by the 3rd defendant to the then Sridharan Namboodiri, the balance of Rs. 173-6 as being paid in cash. The 3rd defendant examined as D. W. 3 while swearing that he did not receive consideration under Ext. A-6 was willing to admit that the karnavan undertook to and did pay off Rs. 400 to a creditor of the 3rd defendant who had just before the release obtained a decree against him and that he had also executed to the karnavan a pro-note as stated in Ext. A-6.

3. There was also no explanation offered by the 3rd defendant in the court below as to what exactly were the "exigencies of the situation at that time" referred to by him in his second written statement when he pleaded that Ext. A-6 was sham, On the other hand he appeared to have placed great reliance on a finding entered in Ext. 45 judgment dated 6-2-1942 in suit by his creditor against

Sridharan and himself, O. S. 32 of 1941 in the District Munsiffs Court of Taliparamba that Ext. A-6 had been executed in fraud of creditors and again on the recitals in Ext. B-11 dated 3-2-1950 Nischayareka among the adult members of the illom referring to the existence of the 3rd defendant's rights in the properties of the illom. But the court below found the former of not much consequence particularly in the light of the rest of the evidence to contrary effect and the latter to be not binding on the minor members of the illom and in any event inconclusive because it did not itself create any rights. There was the plaintiffs complaint also in connection with Ext. B-11 that the 3rd defendant had got into the good grace of the kamavan 1st defendant and got it executed so as to prop up a claim in himself to manage the illom properties. The court below, on all this evidence, disallowed the 3rd defendant's plea that Ext. VI was sham and that on the other hand it brought about his definite separation from the illom and he was accordingly not a co-sharer at date of suit. Having heard learned counsel for the appellant and gone through the evidence, we are satisfied that the finding entered by the court below as above is perfectly justified and there is nothing to induce us to depart from it.

4. Learned counsel then said that even assuming that Ext. A-6 is true the 3rd defendant's rights in the illom properties cannot be said to be altogether cut off by it and he relied on the recent decision of this Court in Kittu Naidu Vs. Krishnan Chetty Raman Chetty, But that case was concerned with the effect in law of an alienation by a member of a joint Hindu family of the whole of his interest in joint property to the rest of the members and it was held that the alienation did not put an end to the coparcenary and he continued to be a member, with rights of survivorship between himself and others in respect of all the family property. But that decision itself considered the effect of a renunciation as distinguished from mere alienation by one coparcener of his interests in the joint estate and held that such renunciation would bring about an extinguishment of his interest and so reduce the number of persons to whom shares would be allotted if and when a division of the estate took place. Reference may also be made to Mayne's Hindu Law 11th Edn. p. 556:

""Separation of a coparcener may be effected by renunciation of his interest in the family property .....In AIR 1936 264 (Privy Council) the Privy Council held that a coparcener's renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members quoad the family property and that they continue to be coparceners as before. The only effect of renunciation is to reduce the number of persons to whom shares would be allotted if and when a division of the estate takes place."

The present case is of this latter category. For by Erf. A-6 the 3rd defendant declared that he has thereby,

"surrendered to you the co-heirs, the entire rights and authorities of whatever description belonging to me over all kinds of movable properties found belonging to our illom, and also over our illom. It has been settled that I have no manner

of right and authority or entry, from this day onwards over the movable and immovable properties belonging to the illom or over the Mangolathillom".

We accordingly agree with the court below that the 3rd defendant is not entitled to a share.

5. We come now to the question of share to the 11th defendant. The court below disallowed his claim to a share inasmuch as her marriage took place after the 3rd defendant had ceased to be member. This is a perfectly proper ground. For as the Mitakshara said in the analogous case of renouncing members,

"The male issues of a coparcener who renounces also lose their claim."

Even adding to this the gloss in Mayne, 11th, Edn. at p. 556,

"But this can apply only to after-born sons unless at the time of renunciation, his sons and grandsons are adults and consent to it,"

it is clear, the position of the 11th defendant is not any better.

6. Finally on the second question that the lower court has failed to find that the suit was for the beneficial interest of the minor 1st plaintiff and on that ground the judgment was vitiated. There is no substance in this contention. For as the court below observed the 1st plaintiff had attained majority during the course of the suit. The necessity of the court's finding that the suit is for the beneficial interest of a minor plaintiff really arises only when the plaintiff is still a minor before decree is granted. As explained in Thavva Rangasayi and Others Vs. Thavva Nagarathnamma, :

"The exercise of the option by the guardian docs effect a severance but the severance so to speak remains in a state of suspended animation till the Court ratifies the act; the Court takes upon itself the task of deciding that which the minor if he were an adult would have done himself, namely, whether it is beneficial or not to become separate; it is not a fresh expression of volition by the Court; the volition was already expressed by the guardian on behalf of the minor; the Court puts the seal of approval on it in the place of the minor and for him. It is open to the minor on attaining majority to elect to abandon or continue the suit. If he elects to continue, he adopts the act of the guardian and puts his own imprimatur on it and the court is no longer called upon to pronounce its opinion upon it; the minor becomes separated from the date of the plaint. And if he elects to abandon the suit, the minor continues to be an undivided member of the family and he must be deemed to have revoked the intention to separate."

7. It follows there is no substance in this appeal. It is therefore dismissed with costs.