

(1962) 01 KL CK 0003
In the High Court Of Kerala
Case No : A.S. 576 of 1957

Kunhi Amma and Others

APPELLANT

Vs

Appu Nair and Others

RESPONDENT

Date of Decision : 24-01-1962

Acts Referred:

Travancore Nair Act, 1912 — Section 40

Citation : (1962) KLJ 943

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : C.K. Viswanatha Iyer, for the Appellant; V.P. Gopalan Nambiar for Respondents 1, 2, 46 to 56, 79, 84, 85 and 90 and T.L. Viswanatha Iyer for Respondents 5, 42 to 45, 80 to 83 and 86 to 89, for the Respondent

Judgement

M. Madhavan Nair, J.—This appeal is by the plaintiffs who sued for partition of a marumakkathayam family, known as Kizhakke Madhom tarwad, comprising them and defendants 1 to 74. The defendants contended that the said tarwad had become divided on June 4, 1943 by the partition embodied in Ext. B14 and that this suit instituted more than 20 years after such division, as if the tarwad were undivided, was not maintainable. The Subordinate Judge found Ext. B14 to be a valid partition binding on the plaintiffs, but held suit items 29 and 30, which stood in the name of the 1st defendant, really belonged to the tarwad, and not having been included in Ext. B14 were to be partitioned among the parties. Items 25 to 28, 31 and 32 claimed by the 2nd defendant as his self-acquisitions were found to have been acquired with the surplus of the income of the tarwad properties in his management, but held "2nd defendant had the right to enjoy the surplus and as such out of the surplus if he had made acquisitions they are his own and the tarwad has no rights therein." Hence this appeal by the plaintiffs and cross-objection by the heirs of the 1st defendant.

Counsel for the plaintiffs argued strenuously that a partition in a marumakkathayam tarwad before the enactment of the Marumakkathayam Act

could only be by consent of all the adult members thereof, and that the 1st plaintiff and defendants 6, 8, 63 and 64 have not executed Ext. B14 which was therefore incompetent as a partition of the tarwad and void. Counsel for respondents contended that the tavazhi of the plaintiffs and defendants 62 to 72 was legally and effectively represented in Ext. B14 by the 62nd defendant, the karanavan of their tavazhi and therefore the partition evidenced by it bound the plaintiffs also. 2. The question then is whether partition of a tarwad into tavazhis could be effected by the karnavans of the respective tavazhis only.

In Hindu Law, the principles of which necessarily apply to marumakkathayees also, except where they are in conflict with the Marumakkathayam system, the rule is, as stated by Mayne in his treatise on "Hindu Law and Usage" 1953 Edn., p. 561,

Where the partition is claimed as between branches of the family only, the heads of all the branches alone need be made parties.

See also Mulla's Hindu Law, para 333(2).

3. In Subba Rao v. Subba Rao (A.I.R. 1936 Mad. 689) Venkataramana Rao J. observed:

There can be no doubt that a father is entitled to and competent to represent his sons in a partition with his brothers, and a partition effected by him will be binding on the sons unless it is shown that it was fraudulent or unfair or prejudicial to their interest.

Ramanathan v. Veerappa (A.I.R 1956 Mad. 89) observes :

The proposition is undisputed, as stated in Mayne on Hindu Law and Usage, that if the division is between branches inter se without the individuals claiming their separate shares, then it is sufficient to make the heads of the branches alone parties.

AIR 1932 641 (Lahore) has held :

The pleadings of the parties show beyond doubt that the suit is not for partition of the properties between all the alleged coparceners inter se, but what is prayed for is a division between the two branches of the family, i.e., Badri Parshad and his son Bishamber Das and grandsons on one side and the descendants of Sheo Dayal on the other. It is settled law that to such a suit the really necessary parties are the heads of each branch of the family and it is not obligatory on the plaintiffs to implead all the members of the two branches.

See also Raja Nil Kanth Narain Singh Vs. Niharan Chandra Sarkar and another ; and observations of Sadasiva Aiyar J. and Spencer J. in an unreported decision cited and followed in Parukutty Amma v. Janaki Amma (1957 1 M.L.J. 29). Thus the position seems to be well established that for a division of a Hindu family into its several branches the heads of the different branches only need join. It then follows that for a division of a Marumakkathayam tarwad into its several tavazhis

(tavazhi is the name of a branch in a Marumakkathayam tarwad) the heads of the different tavazhis only need join.

4. I have also held in S.A. No. 453 of 1956-M:

The arrangement of partition Ext. B 282 is not among the individual members of the family but only among the three branches thereof. In the nature of that arrangement a valid partition could be entered into by the senior male member (Kartha) of the respective branches alone. Admittedly in the branch of the plaintiff and defendants 6, 7 and 9, the 6th defendant was the senior most male member and being the Kartha of that branch, he alone was competent to represent the entire branch in the partition, so as to make it binding on the entire branch inclusive of the plaintiff.

5. Mr. Viswanatha Iyer, counsel for the plaintiffs, contended that partition implying separation from the common stock and exclusion from the joint properties (except the few set apart) of all the members of a tavazhi cannot be in the power of the senior member alone of the tavazhi but requires the consent of all the adult members thereof. The argument is certainly attractive and ingenious; but does not seem agreeable to me.

Partition is a transaction among co-sharers. If the co-sharers be individuals, all the individuals concerned must join it; but if the co-sharers be branches of a family, only the branches concerned need participate in it. In a division between branches, the individuals in a branch have no locus standi. Under the Marumakkathayam system the karnavan of a tarwad or tavazhi is its accredited representative, its "head, manager and mouthpiece." He represents the tarwad or the tavazhi as the case may be; and it is represented only by him. Hence, when tavazhis or branch-tarwads are to partition the common tarwad, only the karnavans of the different tavazhis being the co-sharers at partition can and need join. Of course, as the karnavan participates in the partition as the representative of a group of persons constituting the tavazhi, if he has betrayed the group and acted to their prejudice it is open to them to impeach his act and set aside the partition. If in a partition among tavazhis the adult members of a tavazhi, apart from the karnavan thereof, join, it can only be to express their approval of the karnavan's part in it. It cannot therefore be said that without the junction of all the individual members a partition of a joint family or tarwad into its different branches cannot take place.

6. At the time of the partition under Ext. B14 the plaintiffs and defendants 62 to 72 formed a tavazhi in which the 62nd defendant was the karnavan; and he had admittedly joined the partition. Ext. B14 was in 1943, and this suit was instituted in 1954 only. Abstention from impeachment for a period of 11 years is apt to indicate an acquiescence on the part of the persons entitled to question the partition. Earlier defendants 64 to 72 had instituted O.S. No. 83 of 1952 for partition ignoring Ext. B14, but it was abandoned by them and dismissed. The husband of the 64th defendant has sworn as D.W. 1 in support of the partition

under Ext. B14, and none of the defendants 6, 8 and 62 to 72, has challenged the partition in this suit. It then follows that the partition under Ext. B14 has the clear acceptance of all the members of the tarwad except the plaintiffs of whom the 1st plaintiff was a major on its date. As the partition under Ext. B14 was into tavazhis only the junction in it of the 62nd defendant, the karnavan of the tavazhi of the plaintiffs and defendants 62 to 72, binds normally the entire tavazhi. It is not made out that the allotments therein are in any way unfair or prejudicial to the interests of the plaintiff's tavazhi. The complaint is only about the exclusion of certain properties standing in the names of defendants 1 and 2 from the partition; and for that adequate relief can be made without disturbing the arrangements made in Ext. B14 which has been followed and acted upon by the parties for all these long years. The court below was therefore right in holding Ext. B14 as binding on the plaintiffs.

7. Plaintiff item No. 25 has been included in Ext. B14 as a tarwad property and was allotted in partition to the 2nd defendant. As Ext. B14 has been upheld no further consideration is required in regard to item No. 25.

8. The plaintiffs claim plaintiff items 26 to 32 as having been acquired by defendants 1 and 2 with the aid of tarwad funds and as such enuring to the tarwad. The court below has accepted that plea in regard to items 29 and 30 which stood in the name of the 1st defendant, and decreed partition thereof. Defendants 80, 81 and 86 to 89, being the children of the 1st defendant, challenge that finding and claim those items to be self-acquisitions of the 1st defendant enuring to them under his assignment.

9. The presumption of Marumakkathayam law, as in Hindu Law, is that "When it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden is on the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property." See *Appalaswami v. Suryanarayanamurti* (A.I.R. 1947 P.C. 189), *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, and *Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others*, . Sufficiency of nucleus in this connection came up for consideration recently before me in A.S. No. 475 of 1957 when I held thus:

.....It may be that in the hands of a spendthrift this income would have been next to nothing. But in the hands of a thrifty or extra-thrifty man it can give rise to acquisitions. Ninety percent of the acquisitions of the middle class families, have arisen out of the acquirer's thrifty habits rather than out of a surplus in the income that compelled accumulation and resulting acquisitions. It is proverbial that a person who neglects the penny can seldom save the sovereign. Many a person earns by courting all sorts of miseries of penury, suffering many disrespects, and seeking their delight only in counting coins and reading documents of title. Sufficiency of nucleus therefore must be understood as resources out of which it is not impossible for a man of thrifty habits to make the

acquisitions, and not means sufficient for acquisitions in the hands of a person who makes liberal allowance for his own comforts.

10. Admittedly, items 1 to 24 are the ancestral properties of the tarwad. Under Ext. A1 dated February 4, 1927, defendants 1 and 2 were put in management of the tarwad and it is not disputed that plaintiff items 26 to 32 came to be acquired only thereafter. The evidence is that the above said properties yielded an income out of which the funds for the acquisitions of items 25 to 32 could have easily been drawn between the years 1927 and 1943. No evidence has been adduced of the exact funds out of which these items have been acquired.

The 2nd defendant, in his chief examination as D.W. 7 in the case, stated that the suit items 29 and 30 were acquired by the 1st defendant with the money got in sale of his wife's ornaments; and the husband of the 1st plaintiff, deposing as P.W. 1 on behalf of the plaintiffs, asserted with equal vehemence that the funds for the acquisitions have been drawn out of the funds of the tarwad. Oath to oath, there is nothing to choose between the two versions. No independent evidence has been adduced in the matter; nor is there any evidence regarding any ornaments belonging to the 1st defendant's wife, or of any sale of ornaments by the 1st defendant.

The 2nd defendant averred in his testimony that he was engaged in a trade from 1923 to 1941. No accounts have been produced to prove the same; nor any other evidence adduced in support thereof. Excepting his own interested testimony, which has been disbelieved by the trial court, there is nothing to show that he had any independent means at all.

The finding of the court below is that the funds for the acquisitions of defendants 1 and 2 could only have been the surplus of the income of the tarwad properties entrusted to their management under Ext. A1.

11. In *Gopalan Nair v. Lakshmi* (1955, 2 M.L.J. 36) it has been held :

It is not the fact of one being the senior most member of the family that is crucial in the decision regarding the nature of the property acquired but the deciding factor is the possession of funds belonging to the family from which the acquisition is made and even in the case of *Anandravans* any possession of sufficient family funds out of which the acquisitions could be made raises the presumption that the acquisition has been made for the benefit of the family.

There is no evidence that the other members of the tarwad knowingly agreed to their acquiring properties for themselves with the use of tarwad funds, in which case, according to *Narayanan Namboodiripad v. Kuberan* (1958 K.L.J. 489, 494), they would only be accountable to the tarwad to the moneys so utilised by them for their own purposes.

12. In the circumstances, the presumption in regard to acquisitions of a managing member of a tarwad is attracted to the acquisitions of defendants 1 and 2; and they have to be held to enure to the tarwad.

Suit item No. 32 is stated to be a mortgage right standing in the name of defendants 2 and 85, the latter being a daughter of the former. The relative deed of mortgage is not produced in the case. The non-production of the deed of acquisition disentitles the plaintiffs to claim an adjudication regarding the nature of the acquisition thereunder. The indication in the description of this item in the plaint schedule is only that it was acquired by defendants 2 and 85 in or after 1949. As the 2nd defendant became separated from the tarwad in 1943 by Ext. B14, his acquisitions made subsequent thereto cannot be held to enure to the tarwad.

13. The circumstance of this tarwad as disclosed in the recitals in Exts. A1 and B14 was not one of affluence. The acquisitions of defendants 1 and 2 must therefore have been the results of strenuous exertion on their part. Even though under the Marumakkathayam law, the acquisitions of a manager enures to the tarwad, a case arises for reasonable compensation being made to the manager for his "diligence, skill and labour" in making such acquisitions. Section 40 of the Travancore Nayar Act, II of 1100, provides : If a person was in management of his or her tarwad, one-fourth of the acquisitions, if any, made by such person during such management with the aid of the income from tarwad property, shall, on partition, be allotted to him in addition to the share which he would otherwise be entitled to get.

Explanation I to Section 19 of the Travancore Ezhava Act, III of 1100, also provided:

If the deceased person was in management of his or her Tarwad or of undivided Makkathayam property, one-half of the acquisitions, if any, made by such person during such management with the aid of the income from such Tarwad or Makkathayam properties as the case may be, shall be treated as that person's self-acquisition.

Though the Madras Marumakkathayam Act, 1933, has not made a similar provision, when the matter came up for consideration before the Madras High Court in Appeal No. 1001 of 1952, it was held:

We see no reason why a manager who augments the family assets by his own intelligence and exertions should not also have some share in the new acquisitions for himself. Had it not been for the fact that the defendant in the case was a prudent and an industrious person it would not have been possible for the acquisition of items 6 to 15..... It seems to us, therefore, that in the circumstances of this case the defendant is entitled to have some recompense for all his arduous exertions and labour in the matter of acquiring new items of properties and thus augmenting the family income. In our view the proper decision would be to allow the defendant a half share in items 6 to 15 and leave the other half to be treated as joint family properties acquired out of the surplus income from items 1 to 5.

When the matter came up again for consideration in *Emu Amma and Others Vs.*

Pollekkattil Ammini alias Kamalakshi Amma and Others, the learned Judges followed the above dictum and held:

Even in cases where the nucleus is small, on account of a variety of reasons if the property gets augmented the eldest member of such a tavazhi cannot claim them as his own self-acquisitions. As laid down in Appeal No. 1001 of 1952, he can claim compensation for his intelligence, industry and labour in improving and augmenting the family properties. In the present case we are completely in the dark as to how Govindan Nair could have got Rs. 4,000/- and odd and acquired the several items during a course of about 4 years of his management, except by inferring that he must have been a careful person who improved the little nucleus that came into his hands and raised funds out of it. Mr. Kuttikrishna Menon contends that the plaintiffs are not in a position to let in any evidence and, therefore, we must presume that there was no nucleus. That there were parambas which the tavazhi got at the partition cannot be denied, and even if Govindan Nair could not have saved much from cultivating the lands he must certainly have got something from the parambas land from cultivation. Moreover Govindan Nair at the time of his starting the kuri had the good will and reputation of his tarwad behind him. Otherwise nobody would have joined the kuri started by a man of no means. Considering all those circumstances, it seems to us that the principle enunciated in Appeal No. 1001 of 1952 ought to be applied to the facts of the present case. We, therefore, hold that the plaintiffs (who were the widow and children of the aforesaid Govindan Nair) are entitled to a half share in all the properties.....and they will also be entitled to a half share in the mesne profits from those properties.

The equitable principle laid in the above decisions has been followed by me in A.S. No. 475 of 1957 and other cases. Apart from a legislative provision, when the award of a reasonable compensation for the manager's exertions in making acquisitions out of tarwad income comes up for judicial consideration, it becomes necessary to fix the same in accordance with the circumstances of each case. Where the income was comparatively poor and the acquisitions large, the exertion on the part of the karnavan or the managing member must necessarily have been high and therefore merits a higher award than where the income was in large surplus and the acquisitions relatively not much.

Judged by the above principles, I find that a fair recompense for the exertions of defendants 1 and 2 would be one-fourth of their acquisitions, namely plaint items 26 to 31. The remaining ? of those items will only be partible among the members, in this suit.

In the result, the decree of the court below is affirmed subject to the modifications: (i) ?th of suit items 29 and 30 will be reckoned as the separate properties of the 1st defendant, enuring to his children as per his assignment in their favour;

(ii) ?th of the suit items 26 to 28, and 31 will be regarded as the separate

properties of the 2nd defendant; and

(iii) there will be a decree for partition of three-fourths of suit items Nos. 26 to 31 among the parties in the proportion declared by the court below.

As suit items 29 and 30 are represented to have been alienated, the court below will allot the same to the share of the 1st defendant if it can be done without material prejudice to the plaintiffs and other defendants. One other thing that may equitably be done in this case is to allot, as far as may fairly be done, the properties or part of properties on which substantial improvements have been effected by defendants 1 and 2 to their shares without valuing their improvements thereon.

In the circumstances, the parties shall bear their respective costs in this appeal and cross-objections.