
(2000) 07 KL CK 0062
In the High Court Of Kerala
Case No : A.S. No. 317 of 1988

Kunhi Parambath Mariyumma and Others

APPELLANT

Vs

Aayissa and Others

RESPONDENT

Date of Decision : 31-07-2000

Acts Referred:

Citation : (2000) 07 KL CK 0062

Hon'ble Judges : A. Lekshmikutty, J.; S. Sankarasubban, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sankarasubban, J.—The above appeal is preferred by Defendants 18 to 21, 23, 26, 28, 30, 32 and 33 in O. S. No. 422 of 1982 on the file of the Subordinate Judges Court, Tellicherry. The suit was filed for partition. There are 36 Plaintiffs and 33 Defendants in the suit. The suit was filed on the following grounds.

2. Plaintiffs and Defendants 1 to 13, the deceased Assainar, Moidu and Abdulla were members of a Muslim Marumakkathayam family, called Arool Koliantavide Tarwad. The plaint "B" schedule properties and building therein belonged to one Kunhali of Puthalathu Thaliyan Thottoli. The aforesaid Kunhali was following the Marumakkathayam system of law. With regard to the properties belonging to Kunhali, he executed a Will dated 3rd March 1904 and it was registered on 4th June 1904. As per the Will, the plaint "B" schedule properties were bequeathed to the wife of Kunhali, viz., Pathumma and her children, Kunhamina, Assainar, Katheessa, Moidu and the first Plaintiff Ayisha and to the women members of that family. According to the Plaintiffs, after the death of Kunhali, the plaint "B" schedule property belonged to the Tarwad consisting of the wife and children of Kunhali. Accordingly, the property was in the possession of Thavazhi Karanavar, Assainar, till his death and after the death of Assainar, the next seniormost member, Moidu was in possession till 1974. Assainar was taking the income from the property as Karanavar. The present seniormost member of the family is the first Defendant.

3. As per the above Will, certain properties were given to Kunhali's brothers and sisters and the children of the sisters and accordingly, they are enjoying those properties. Plaintiffs 2 to 36 and Defendants 4 to 13 are the children in the female line of the first Plaintiff. Second Defendant is the son of the deceased Mariam, who is the sister of the first Defendant. Defendants 14 to 17 are the representatives of the deceased Assainar, Defendants 18 to 22 are the representatives of the deceased Abdulla and Defendants 23 to 32 are the representatives of the deceased Moidu. Before the first Defendant, Moidu was the Karanavar and died in 1974. The income from the properties was taken by the first Defendant and the representatives of Moidu, viz., Defendants 23 to 32.

4. Plaintiffs sent notice for partition of the properties with mesne profits. First Defendant and Moidu sent notices raising untenable contentions. Hence, the suit is filed for partition of 36/52 share in the plaint "B" schedule properties in favour of the Plaintiffs along with past and future mesne profits from the first Defendant and Defendants 23 to 32 and for other reliefs.

5. Separate written statements were filed by the Defendants. First Defendant filed a written statement as follows: He denied that the plaint schedule properties were Thavazhi properties. He admits the Will dated 21st March 1904, but submits that the properties belonged exclusively to the wife and children of Kunhali. It does not belong to the Thavazhi. Further it is stated that there was a partition among the heirs in 1968 and the parties are in possession of the properties as per the oral partition of 1968. In the written statement filed by Defendants 3 to 13, the following contentions are raised. The allegation that the parties belonged to Marumakkathayam family is denied. The execution of the Will in March, 1904 is admitted. It is also admitted that the properties belong to Thavazhi consisting of Defendants 1 to 13, Assainar Haji, Moidu, Kunhamina and Katheessa. These Defendants supported the Plaintiffs and they prayed that they should be given 11 shares out of 52 shares.

6. Separate written statements are filed by Defendants 15, 16 and 17. According to them, Defendants 14 to 17 are the representatives of the deceased Assainar. Assainar died in 1962. The properties were inherited by Kunhali's wife and children jointly and not as Thavazhi properties. They also prayed for partition of their share. In the written statement filed by Defendants 19, 21, 23, 24, 25, 28, 30, 31 and 32, the following contentions are raised. The allegation that the parties belonging to Tarwad or Thavazhi is denied. It is admitted that the plaint "B" schedule properties belonged to Kunhali. But it is denied that Kunhali was following the Marumakkathayam system. Kunhali was suffering from cancer. It was under such circumstances that the Will was executed. The Will was executed when he was not conscious and the Will has no legal validity. He died few days after the execution of the Will. In paragraph 4, it is stated that after the death of Kunhali, the plaint "B" schedule properties were obtained by the wife of Kunhali, Pathumma and her children. Moidu and Abdulla died. Defendants 23 to 32 are the representatives of Moidu and Defendants 18 to 22 are the representatives of

Abdulla. The share of Abdulla had been sold by Defendants 18 to 22 in favour of a stranger. Hence, Defendants 18 to 22 have not right over the properties. In paragraph 5, it is stated as follows: As per the Will, the properties were obtained jointly by the wife and children as co-owners and it is not found to be inherited as Thavazhi, Written statement has been filed by 23rd Defendant.

7. On the basis of the above pleadings, the Court below raised five issues. Exts. A-1 to A-7 were marked on the side of the Plaintiffs and Exts. B-1 to B-8 were marked on the side of the Defendants, D.Ws. 1 to 3 were examined on behalf of the Defendants. The Court below found that Kunhali was following the Marumakkathayam Law in North Malabar. So far as the Will is concerned, the Court below relied on the presumption under Section 90 of the Indian Evidence Act and held that the Will is valid. On the interpretation of the clause in the Will, the Court below held that the plaint "B" schedule properties were devolved on the wife and children of deceased Kunhali as Thavazhi and not as co-owners. Thus, the Court below granted a preliminary decree dividing plaint "B" schedule properties into 51 equal shares and granting 36 shares to Plaintiffs 1 to 36. Similarly, Defendants 1 to 13 are entitled to get 10 shares, Defendants 18 to 22 are entitled to get one share and 33rd Defendant is entitled to get one share. Those who have paid Court fee are at liberty to apply for passing of the final decree and to get separate allotment of their shares in the final decree proceedings, Plaintiffs and Defendants 3 to 13 are entitled to get past mesne profits for a period of three years prior to suit and future mesne profits from the date of plaint from Defendants 1 and 23 to 32. It is against the above judgment and decree that this appeal has been filed.

8. When the appeal came up for hearing, a learned Single Judge of this Court referred the appeal to be heard by a Division Bench. In the reference order, it is stated thus:

The main question which arises for consideration in this appeal is whether the property obtained by the wife and children under a gift made by one Kunhali will be Thavazhi properties. Parties are stated to be Marumakkathayees governed by Marumakkathayam Law of inheritance. Ext. A-1 is the registered Will executed by Kunhali. The interpretation of the document to find out the intention of the executant of the document and also the personal law applicable to the parties to the suit who are Muslims are matters to be decided in the appeal.

2. Taking into consideration the importance of the questions to be decided, these questions require to be decided by a Division Bench.

It is thus that the matter has come before us.

9. Learned Counsel for the Appallants submitted before us that the Court below has not properly considered the points and appreciated the evidence in this case. He submitted that Ext. A-1 Will has not been properly proved. There is nothing to show that the parties were governed by the Marumakkathayam Law and finaley he submitted that the interpretation given in Ext. A-1 by the Court below is not

correct. The first question to be considered is whether Ext. A-1 Will has been properly proved or not. Ext. A-1 Will is of the year 1904. It is more than 30 years old. That Will is registered. All the parties to the suit are admitting the execution of the Will. Of course, the Appellants and some other parties have taken the contention that the executant of the Will was laid up with cancer. The lower Court made use of the presumption under Section 90 of the Indian Evidence Act and held that the Will is genuine. Even though such a contention is taken by the Defendants that the executant of the Will was not well, no evidence has been adduced regarding that. So far as the question in issue is concerned, in the decision reported in *Munnalal v. Kashibai* A.I.R 1947 PC 15 it is observed as follows:

A party setting up a Will is required to prove that the testator was of sound disposing mind when he made his Will but, in the absence of any evidence as to the state of the testator's mind, proof that he had executed a Will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what was about. This presumption can be justified under the express provisions of Section 90, since a Will cannot be said to be "duly" executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of Section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about. The Court went on to hold that where the document emanates from an apparently lawful custody and where the document is such that it is likely to have been executed, having regard to the common course of human conduct, and there are no circumstances exciting suspicion, or evidence of artificiality and unnaturalness or interlineations or correction or tampering with the document, the presumption in favour of the due execution of the Will may be drawn. The degree of proof sufficient to establish a Will is not what is required to satisfy the mind of every sceptic, but what would appease, the conscience of the Court vide *Dhanapal v. Govindaraja* A.I.R 1961 Mad 262 . In *Chandi Vs. Kali Charan and Others*, it was held that if a document thirty years old shows that certain persons witnessed it in token of its execution by the maker of that deed, and it is produced from proper custody, the Court can presume "due" attestation, and if the proof of attestation is rendered necessary by reason of the requirement laid down by the Transfer of Property Act, presumption will go the whole length of the definition of attestation as given in Section 3 of that Act.

10. So far as the present case is concerned, in the Will produced by the first Defendant the son of Katheesa is one of the beneficiaries under the Will. Added to this, all the parties have admitted the execution of the Will and in fact, all the parties are also claiming under the Will. In the above circumstances, we are of the view that the Court below was right in presuming that Ext. A-1 Will has been properly proved on the basis of the presumption under Section 90 of the Indian Evidence Act.

11. The next question is whether the parties are governed by the Marumakkathayam Law. Ext. A-1 Will was executed on 3rd March 1904 by Kunhali. The Plaintiffs have definitely stated that Kunhali is following the Marumakkathayam Law and even though some of the Defendants had filed written statement denying the application under the Marumakkathayam Law, they have not set up any custom on the basis of which the persons were governing the Marumakkathayam Law. So far as the Muslims of Malabar are concerned, it has been held that they were governed by the Marumakkathayam Law in the absence of evidence to the contrary. In *Koyyottan Sooppi v. Vaniyathi Kalliani* 1957 K.L.T. 899 a Division Bench of this Court held as follows:

The parties are Mappilas of North Malabar. Mr. Ramakrishna Iyer contended that the presumption must be that they are governed by Mohammadan Law. In support of this contention, he referred us to the observation of the Privy Council in *Mohammed Ibrahim Rowther and Anr. v. Shaikh Ibrahim Rowther and Ors.* I.L.R.Mad 308. In that case, their Lordships had to consider a special custom pleaded among Lubbayi Mohammadans of Coimbatore District. Their Lordships observed that it is for those alleging among Mohammadans a custom of inheritance at variance with Mohammadan Law to prove by clear and unambiguous evidence an ancient and invariable custom. This by itself does not support the contention of the Appellant's counsel. Further, at page 314 of the Report their Lordships observed as follows:

In India, however, custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mohammadan Law governing the succession in a particular community of Mohammadans. But the custom must be proved.

These observations clearly show that their Lordships are fully alive to the fact that particular sections of Muslims may follow by custom, a law other than the Mohammadan Law in certain respects. Mr. Ramakrishna Ayyar also referred us to the several Madras enactments as supporting his contention that Mohammadan Law will apply to Muslims in all cases and that Marumakkathayam Law is not applicable at all to them We cannot-

Marumakkathayam Law obtains not only amongst the Hindus but also amongst the Mappilas, a class of Mohammadans, in North Malabar, who speak Malayalam. Further at page 231 the learned author states:

Mohammadans of North Malabar also mostly follow the Marumakkathayam Law of inheritance and adopt the rule of non-division. The learned Author in the subsequent pages discusses the reasons for this practice. In *Chakkara Human v. Varayalankandi Kunhi Pokker* I.L.R. Mad. 317 (F.B.) the Full Bench observed at page 336 as follows:

Mophlas of North Malabar generally follow the Marumakkathayam system. In view of these authoritative pronouncements, the presumption as stated by both the lower Court is that the Mophlas in North Malabar are governed by the

Marumakkathayam Law in the absence of evidence to the contrary.

In *Puthiya Purayil Abdurahiman Karnavan and Anr. v. Thayath Kancheentavida Avoomma and Ors.* A.I.R. 1956 Mad. 244 a Division Bench of the Madras High Court held as follows: "In our opinion, the Shariat Act did not purport to nor did it abolish the rights and incidents of a Moplah Marumakkathayam tarwad. The Shariat Act of 1937 by itself did not confer the rights of partition on the individual members of the tarwad" In this case there is nothing in the evidence adduced to show that the parties are following a different system of law contrary to the presumption. The Court below has also discussed this aspect in paragraph 11 of its Judgment. Thus, we are of the view that the parties are governed by the Marumakkathayam Law.

12. The next question for consideration is regarding the devolution of the property on the wife and children of Kunhali, whether they take it as co-owners or whether they take it as Thavazhi. The document states as follows:

According to the learned Counsel for the Appellants, by the above bequest, the wife and children became the co-owners and it does not enure to the benefit of the Thavazhi. It is difficult to accept this contention. Once it is accepted that the parties are governed by Marumakkathayam Law, then it will definitely follow that the bequest in favour of the wife and children will be in favour of the Thavazhi unless contrary intention appears. In *Seetha and Ors. v. Krishnan and Ors.* 1975 K.L.T. 156 a Full Bench of this Court held as follows: "Under the rules of customary marumakkathayam law which were applicable in Malabar prior to the introduction of the Madras Marumakkathayam Act it is only in cases where the gift or acquisition is made in favour of a marumakkathayee woman and all her children or in the names of all the children who by themselves constitute a thavazhi (the mother being dead) that a presumption would arise that the acquisition is for the benefit of the thavazhi. There is no scope for raising any such presumption in cases where the gift, bequest or acquisition is in favour of the wife alone or of the wife and some of the children alone leaving out the others. The underlying principle is that the presumption would be attracted only in cases where the transaction is in favour of the members of a group who constitute a natural tavazhi capable of acquiring and holding property". *Shamsuddin, J., in Padmavathi Amma v. Padmaabhan Nair* 1990 (1) K.L.T. 472 following the Full Bench decision, held that such presumption applies. In *A.M. Abbul Karim Vs. A.M. Mamoo and others*, , Balasubramanyan, J. had occasion to deal with such contention. His Lordship held as follows: It has been clearly laid down by the Full Bench in the decision reported in 1975 K.L.T. 156 that a gift made to a Marumakkathayee female and all her existing children would be presumed to be for the thavazhi.... In this case obviously the gift has been made to a marumakkathayee female and all her children and they were to take the property in joint rights and even though a grand child had been omitted while describing the donees it could still be presumed that the intention was to benefit the thavazhy of the mother in view of the junction of the mother and all her

children in the gift deed".

13. Learned Counsel for the Appellants brought to our notice the decision in *Gopala Menon Vs. Sivaraman Nair and Others*, . In that case, it is stated that "Will Ext. B-8, contains a recital that the property described therein shall vest in my wife, Sreedevi Amma, daughter of Moorkkath Madhavi Amma, with power of alienation". The question that came for consideration was whether the wife gets not limited estate or absolute estate. The Court was interpreting Section 48 of the Madras Marumakkathayam Act. The Supreme Court held that the wife does not take property as Thavazhi property on behalf of sons and daughters. Another decision cited was *Sankarankutty Nair v. Lakshmikutty Amma* 1983 K.L.T. 853 That was also a case where absolute power of alienation was given to the donee. In that circumstances, the Court held that the property does not vest in the Thavazhi. But so far as the present case is concerned, in Ext. A-1, it is stated thus:

Thus, according to us, there is nothing to show that the property was conferred absolutely on the wife and children. Learned Counsel for the Appellants tried to argue with the following clause:

According to the Appellants, the above clause does not apply to the bequest in favour of the wife and children, but only with regard to the bequest in favour of the brothers and sisters. Even if it be so, according to us, disposition in the Will show that it was in favour of the Thavazhi.

14. Shri Balakrishna Iyer then submitted that Ext. A-1 will appears to be not valid and hence, contended that it cannot be given effect to. He relied on a passage from *Theobald on Wills*, fourteenth edition at page 79, under the heading "Will mutilated at death". According to the passage, "A Will which has been in the testator's possession but which is found to be torn or mutilated at his death is presumed to have been torn or mutilated by the testator with the intention of revoking it in whole or in part." This passage cannot be of any help to the Appellants, because it is not shown that the Will was torn or mutilated at the time of death of the testator. Till that is shown, it cannot be presumed that the Will has been revoked.

15. Hence, after considering all the facts, we are of the view that the Appellants have not established anything to interfere with the judgment and decree of the Court below. Appeal is dismissed.

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