
(1969) 01 KL CK 0004
In the High Court Of Kerala
Case No : A.S. No. 618 of 1963

Kunju alias Thankappa Menon

APPELLANT

Vs

Vesamma alias Kannamma and others

RESPONDENT

Date of Decision : 31-01-1969

Acts Referred:

Citation : (1969) KLJ 475

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;K. Sadasivan, J

Bench : Division Bench

Advocate : V. Bhaskaran Nambiar and C.R. Natarajan, for the Appellant; K.V. Suryanarayana Iyer and C.M. Devan for Respondents 1 to 4 and K.P.G. Menon for Respondents 8, 16 and 17, for the Respondent

Judgement

K. Sadasivan, J.—The devolution under the Madras Marumakkthayam Act (Act XXII of 1933 as amended) of a Puthravakasam bequest is the question before us. The testator is one Narayana Menon, a Marumakkathayee. By the will Ex. A-1, he bequeathed the scheduled properties to his wife Lakshmi and his children born to her (who have been mentioned by name in the document) and those if any, yet to be born and also to the children to be born to his daughters. The persons named in the will and those to be born in future as indicated in the document are to possess and enjoy the properties equally. . The learned Subordinate Judge on a construction of the document has been persuaded to the conclusion that the bequest is to enure to the Thavazhi of the wife and that the members constituting her Thavazhi are to take the properties with all the incidents of tarwad property including right to demand partition and liable to partition on "per capita" basis. This view of the learned Judge is challenged before us basing mainly on the proviso to Section 48 of the Madras Marumakkathayam Act. The section lays down :- Where a person bequeaths or makes a gift of any property to or purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by

such person and the lineal descendants of such daughters in the female line;

Provided that, in the event of partition of the property taking place under Chapter VI, the property shall be divided on the stirpital principle, the wife being entitled to a share equal to that of a son or a daughter.

The learned Judge has correctly found that the legatee under Ex. A-1 is the Thavazhi of the testator's wife, but he has gone wrong in his assumption that in the event of partition, the rule to be followed is "per capita" i.e., individual partition by which the property is to be divided equally amongst all the members of the Thavazhi, in existence at the time of partition. In other words, according to the learned Judge, the property would devolve not only on the members of the Thavazhi in existence at the time of the testator's death, but also on those born subsequently. This conclusion was reacted by the learned Judge on a construction of the provision in the will that the property shall descend on future-born children also i.e. children to be born to the testator's daughters. From this provision in the will, an inference was drawn by the learned Judge that the testator's intention was that the property should be enjoyed as an item of tarwad property subject to partition on "per capita" basis as provided in Chapter VI of the Act. The mode of division contemplated in Chapter VI is "per capita" among all the members of the tarwad or thavazhi, in existence at the time. But the position is different in the present case. Here we are confronted with a Makkathayam or Puthravakasam bequest i.e., property bequeathed by a Marumakkathayee in favour of his wife and children to be enjoyed by them in the female line. The devolution of such a property is controlled by the Proviso to Section 48. Such property shall descend on the legatees not in the same way as an item of tarwad property would devolve, on the members constituting the tarwad. In the event of partition the stirpital principle would have to be followed in the case of Puthravakasam property. It is no doubt true that the testator has evolved his own method of devolution in the will but in giving effect to his formula, the law governing the parties would have to be borne in mind. In other words, no member of a Marumakkathayam tarwad can create a thavazhi "ad hoc" or by act of parties. In the present instance, the will takes effect on the death of Narayana Menon, that is to say, succession opens on his death. Those members of the thavazhi who are alive at the time the succession opens, will alone be entitled to the property. Narayana Menon cannot make a bequest to be enjoyed by his children by the female line in perpetuity. In the case of tarwad property, every member gets a right in the property by birth. But in the case of Puthravakasam property, the gift or bequest can enure only to the members of the thavazhi in whose favour the gift or bequest is made and u/s 48 such gift or bequest will be presumed to be one made in favour of the thavazhi.

Property given by the father to a Marumakkathayam mother and children is ordinarily known as Makkathayam property. In British Malabar it is called Puthravakasam. The ordinary presumption in case of such gifts is that the donees take the property with the incidents of Tarwad property; the right of

management of the gift-property is vested in the senior male member among the donees. Persons subsequently born into the Tavazhi are entitled to be maintained. But they have no right to claim partition. (The principles of Marumakkathayam Law by M.P. Joseph.).

To the same effect is the observation found in Sundara Alyar's book on "Malabar and Aliyasanthana Law." At page 168, the learned author observes:

When there is a gift by a father in favour of his wife and children there is a presumption that the property is intended to be for the benefit of the branch to be held with the incidents of Tarwad property.....

In *Rugmini Amma v. Madhava Mannadiar* (A.I.R. 1947 Mad. 137), the learned Judge has observed:

Section 48 applies only to cases of gifts to or purchases by a person in the name of (1) the wife alone or (2) the wife and one or more of his children by such wife together..... The presumption will arise only if the gift was in favour of the wife and children or in favour of all the children who by themselves form a tavazhi.

In the present case there cannot be any doubt, on a reasonable construction of Ex. A-1 that the intention of the testator was that the property should be enjoyed as tavazhi property. The document reads: His idea therefore was that his wife and all his children and grand-children (only in the female line) should enjoy on an equal footing. No doubt in the case of a will the testator's intention should be given full effect to; but if as in the present case a mode of succession or devolution is envisaged in the will, that scheme of evolution can be given effect to, only if it is in conformity with the existing law. We have already seen from Section 48 of the Act that a Makkathayam or Puthravakasam gift or bequest can descend on the donees or legatees only on "stirpital basis." To this extent Section 48 must be understood as carving out an exception to the rule of succession or partition contemplated in Chapter VI of the Act.

2. The bequest in the present case having thus devolved on the thavazhi, the rule of partition can only be "per stirpes" as indicated in the proviso to Section 48. The learned Judge's finding, therefore, that the division shall be on "per capita" basis will have to be vacated. The property will devolve on "per stirpes" basis, on the members of the tavazhi who were alive at the time of the testator's death. The result will be that the plaintiffs will get the share in the plaint A schedule items 1 to 30.

3. The plaintiffs in their memorandum of Cross Objections have attacked, the learned Judge's finding regarding items 31 to 38 of the plaint A schedule. According to the learned Judge these items are not included in Ex. A-1 and as such they will not be available for partition. Items 31 to 38 of A schedule belonged originally to the assignors of Ex. A-8; but under Ex. A-9 they are assigned to Narayana Menon for a consideration of Rs. 3500/-. The fact is not disputed that this is an acquisition made after the date of Ex. A-1. In Ex. A-1

there is no provision that the legatees will be entitled to his future acquisitions as well. The learned Judge has also pointed out that the consideration paid was derived from a source which had been clearly excluded from Ex. A-1. At the time of Ex. A-1, there was only a mortgage transaction evidenced by Ex. A-24 under which Narayana Menon had to get from the assignors of Ex. A-9, besides the mortgage amount referred to as item I of Ex. A-1, the principal amount of Rs.2500/- and interest thereon. But in Ex. A-1 no reference has been made about the interest on the date of Ex. A-9, the principal and interest together had gone up to Rs. 3325/-; but that amount was adjusted towards the consideration fixed for Ex. A-9. Only the paltry sum of Rs. 175/- which was the original mortgage amount, was included in Ex. A-1. It can on no account be contended that the acquisition under Ex. A-9 is one made with Rs. 175/- mentioned in Ex. A-1, and therefore that the entire interest covered by Ex. A-9 should be made available for partition. The amount covered by Ex. A-1 being comparatively negligible we do not think it worthwhile to interfere with the learned Judge's finding. The learned Judge's finding, therefore, entered in paragraph 15 of the judgment is upheld and the Cross Objection is dismissed. In the result, the direction of the learned Judge that partition shall be on "per capita" principle will stand vacated, and the properties will be partitioned on "stirpital" principle among the members of the tavazhi as on the date of Narayana Menon's death, i.e. the date when the succession opened as indicated in paragraph 3 above. Subject to this modification the preliminary decree passed by the learned Judge is confirmed and the appeal and cross appeal are both dismissed. No costs in this Court.

Krishnamoorthy Iyer, J:

I agree; but I wish to add a few words in view of the importance of the plea of the first defendant based on the proviso to Section 48 of the Madras Marumakkathayam Act, 1932 (Madras Act No. XXII of 1933) as amended by the Madras Marumakkathayam (Amendment) Act, 1958 (Kerala Act 26 of 1958). It was contended for the first defendant that in view of the finding that the bequest under Ex. A-1 is for the tavazhi of Lakshmi Amma, widow of the testator, the partition of plaint A schedule items 1 to 30 should be on the stirpital principle applying the proviso to Section 48 of the Madras Marumakkathayam Act, 1932. Section 48 with the proviso reads thus:

48. Where a person bequeaths or makes a gift of any property to, or purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line:

Provided that, in the event of partition of the property taking place under Chapter VI, the property shall be divided on the stirpital principle, the wife being entitled to a share equal to that of a son or a daughter.

The learned Judge directed the division of plaintiff A schedule items 1 to 30 on per capita basis in accordance with Chapter VI of the Madras Marumakkathayam Act, 1932, as amended by the Madras Marumakkathayam (Amendment) Act, 1958 (Kerala Act 26 of 1958). Section 38 introduced by the Amendment Act 1958 confers the right on a member of a tarwad or tavazhi to claim his or her share of all the properties of the tarwad or tavazhi. Section 39 of the Act also introduced by the Amendment Act allows any member of a tarwad or tavazhi who has changed his or her share of all the tarwad or tavazhi properties and also allows any other member of the tarwad or tavazhi to compel the member who has changed his or her religion to take his or her share in the tarwad or tavazhi properties. Explanation 2 to Section 38 of the Act which prescribes for the ascertainment of the share of the dividing member is in these terms:

Section 38: Explanation 2. "The member or members who claim partition under this section (section 38) or the members who claims or is compelled to take his or her share u/s 39 shall be entitled to such share or shares of the tarwad or tavazhi properties as would fall to such member or members, if a division per capita were made among the members of the tarwad or tavazhi then living."

The amendment Act (Kerala Act 26 of 1958) did not introduce any change to Section 48 and the proviso thereto of the principal Act. If the proviso to Section 48 should govern the case the plaintiffs will be entitled only to 1/8th share in the plaintiff A schedule items 1 to 30. But according to their counsel the said proviso cannot apply because the interpretation of Ex. A1 is not based on any presumption u/s 48 of the Act. A marumakkathayee making provision for his wife or children or wife and children may intend that the same should be taken individually by the eo nomine parties mentioned in the document or by the natural marumakkathayam unit represented by such persons. Courts of law have to give effect to such intention. There can be no difficulty where such intention is clear and unambiguous upon the language of the instrument. Section 48 of the Act enumerates only a rule of presumption in the matter of construction of documents of the type referred to in the Section. But the proviso to Section 48 deals with the mode of partition of the property given by a person to his wife and children as tavazhi property. When it is found either by applying the presumption u/s 48 of the Act or otherwise that a marumakkathayee has given property to his wife and children as tavazhi property the division of such property among the members of the tavazhi has to be only in accordance with the proviso to that Section which enjoins a per stirpes division different from the per capita division in respect of tarwad property dealt with under Chapter VI of the Act. We should think that the effect of accepting the contention of the learned counsel for the plaintiffs would be to hold that there are two modes of division of the tavazhi property given by the father to his wife and children which will lead to absurdity. Because Ex. A.1 was in favour of the wife and all the then existing children of Narayana Menon there was a faint suggestion by the plaintiffs' counsel that Section 48 of the Act will not apply. The learned counsel would contend that the words "one or more of his children by such wife" in Section 48 will exclude gift or

will or purchase in favour of the wife and all the children then existing. We do not agree. But even if there is any force in the submission of the plaintiffs' counsel, that can only affect the applicability of the rule of presumption and cannot make the proviso inapplicable if it is found that it is tavazhi property. The proviso to Section 48 is really intended as a provision as to the mode of partition of the property given by a marumakkathayee in favour of his wife and children as tavazhi property. It is intended as a substantive provision forming part of Chapter VI of the Act dealing with partition. As was pointed out by Chagla, C.J. in *Keshavlal Premchand Vs. The Commissioner of Income Tax, Bombay*, "a Legislature may enact a substantive provision in the garb or guise of a proviso and if the Court is satisfied that the language used in the so-called proviso is incapable of making it applicable to the section, then the Court, if the proviso has a clear meaning, must look upon the proviso as a substantive provision enacted by the Legislature and give effect to it as such." The mode of partition of the tavazhi property given by the father to his wife and children also known as Puthravakasom property is contained in the proviso to Section 48 of the Act and the division can only be per stirpes. If so, the per capita division allowed by the learned Subordinate Judge in respect of plaint A schedule items 1 to 30 is wrong.

A further argument advanced on behalf of the plaintiffs was based on the following recital in Ex. A 1:

. In view of the expression "in the above provision it was argued that the testator intended a per capita division among the members of the tavazhi which must be given effect to. We have no hesitation to overrule the pleas for two reasons. The first is that the above clause does not indicate any such intention on the part of the testator. Secondly when once it is held that the gift is in favour of the tavazhi such an intention cannot be given effect to in the force of the proviso to Section 48 of the Act.