

(2000) 03 KL CK 0001
In the High Court Of Kerala
Case No : S.A. No. 518/90/C

Lakshmy Sarojini and Others

APPELLANT

Vs

Narayani Lakshmi and Others

RESPONDENT

Date of Decision : 23-03-2000

Acts Referred:

Travancore Ezhava Act, 1100 — Section 32, 4(11)
Travancore Nair Act, 1912 — Section 22

Citation : (2000) 03 KL CK 0001

Hon'ble Judges : G. Sasidharan, J

Bench : Single Bench

Advocate : P. Sukumaran Nair and G. Unnikrishnan, for the Appellant; B. Suresh Kumar, for the Respondent

Final Decision : Allowed

Judgement

G. Sasidharan, J.—The Plaintiffs in O.S. No. 94 of 1981 on the file of the Munsiff's Court, Punalur are the Appellants. The Appellants filed the above suit for partition claiming that they have 8/11 share in the plaint schedule property. The case of the Appellants is that the plaint schedule property belonged to the Sub-tarwad since that property was allotted to the first Respondent and her mother Narayani under Ext. A-1 settlement deed executed in their favour by Govindan, the father and Nangeli, the mother of Narayani. Appellants 3 to 8 are the children of the first Appellant, Appellants 1 and 2 and Respondents 2 and 3 are the children of the first Respondent and Respondents 4 and 5 are strangers. Alleging that the plaint schedule property belonged to the Sub-tarwad and that there are 11 members in that Sub-tarwad, the Appellants claim 8/11 share in the plaint schedule property.

2. Respondents 1 to 5 raised the contention that the plaint schedule property was acquired by the deceased Govindan in the name of his wife Nangeli. It is the case of the Respondents that Nangeli. was only a name lender and that the property exclusively belonged to Govindan. Nangeli and Govindan jointly

executed settlement deed No. 587 of 1103 M.E. which is marked in this case as Ext. A-1 under the provisions of which the plaint schedule property was given to the first Respondent and her mother Narayani. The definite contention raised by Respondents 1 to 5 is that there was no Sub-tarwad as alleged by the Appellants and that on the death of Narayani, the first Respondent got absolute right over the plaint schedule property. The allegation of the Appellants that they were Marumakkathayam Ezhavas is disputed by the Respondents. It is also contended that the Appellants did not get any right in the plaint schedule property.

3. The trial Court on finding that the Appellants did not prove that they were governed by Marumakkathayam Law came to the conclusion that they are not entitled to any share in the plaint schedule property. It was also observed by the trial Court that Ext. A-1 settlement deed under the provisions of which the Appellants claim share in the plaint schedule property does not show that the parties were Marumakkathayam Ezhavas governed by Marumakkathayam Law. The suit was thus dismissed by the trial Court.

4. The present Appellants filed A.S. No. 8 of 1984. The appellate Court also found that the Appellants failed to establish that they are Ezhavas who were following Marumakkathayam system of inheritance. The appellate Court while dismissing the appeal held that there can be no presumption that Ezhavas residing in Travancore area are followers of Marumakkathayam system of inheritance. There is a statement in the judgment of the appellate Court that since the Appellants failed to show that there is a presumption that Ezhavas domiciled in Travancore area were invariably governed by Marumakkathayam system of inheritance, partition cannot be granted.

5. Five witnesses were examined on the side of the Appellants. The trial Court as well as the first appellate Court mentioned about the evidence available on record and it was after going through the evidence that the Courts below found that there is nothing to show that the parties to the suit were governed by Marumakkathayam Law. The following substantial questions of law were formulated for consideration:

(i) Is the finding of the Court below that Plaintiffs and Defendants 1 to 3 are not Marumakkathayee Ezhavas correct in law?

(ii) Are not Plaintiffs and Defendants 1 to 3 governed by the Travancore Ezhava Act, 1100 M.E. since their ancestors belonged to the Pathanapuram Taluk of the erstwhile Travancore State?

(iii) Is not plaint schedule property Makkathayam property divisible as per the provisions of Section 32 of the Travancore Ezhava Act, 1100 M.E.?

6. Learned Counsel appearing for the Appellants would argue that even in the absence of evidence to prove that the parties are governed by Marumakkathayam Law, there are sufficient materials which would indicate that the Ezhavas in Thiruvananthapuram and Kollam Districts are governed by

Marumakkathayam system of inheritance. The submission made by the learned Counsel appearing for the Appellants is that even before the advent of the Travancore Ezhava Act, the Ezhavas in Thiruvananthapuram and Kollam Districts were following the Marumakkathayam system of inheritance as could be seen from various judicial pronouncements. Ext. A-1 was executed in respect of property comprised in Vilakudy Village in Pathanapuram Taluk in Kollam District. That shows that the parties to the suit are those who are residing in Kollam District. It is maintained by the learned Counsel that Ezhavas in Thiruvananthapuram and Kollam Districts were governed by Misravazhi system of inheritance and the only difference between Mishravazhi system of inheritance and Marumakkathayam system of inheritance is that in Mishravazhi system the wife and children of a male member will get right in the self acquisition of the male member. The principles relating to Marumakkathayam system of inheritance are applicable to Mishravazhi Ezhavas subject to the variation therefrom recognised by judicial pronouncements of the Court.

7. In Velayudhan Madhavan and Anr. v. Parvathy Chellamma XX T.L.J. 266 (F.B.) a Full Bench of the Travancore High Court had occasion to consider the system of inheritance applicable to Misravazhi Ezhavas. In the above decision, it was held that so far as the rule of law applicable to Misravazhi Ezhavas is concerned, the principles relating to Marumakkathayam system of inheritance are wholly applicable to them except with reference to various modifications recognised by judicial pronouncements of this Court. In the above decision, it was observed that there are two theories put forward regarding the special custom of rights prevailing among those who were following Misravazhi system of inheritance. Misravazhi system essentially is Marumakkathayam system and by reason of the practice of custom among them, the wife contributing her labour also along with her husband in the acquisitions by the husband, a right was recognised in her and her children to a moiety of the same. In Misravazhi system of law, there is also a custom which modifies the system of inheritance giving right to children also. As stated in the decision referred to above, the foundation of the custom relating to childrens rights is to have a moiety by way of small allowances in the self acquisitions for meeting marriage expenses, purchase of jewels, etc., to children. What is to be understood, on a reading of the above decision, is that the earliest decisions on this point recognise the right of a moiety only with respect to self acquisitions made by an Ezhava during the life time of the mother of the children. In paragraph 16 of the judgment, it is stated that in Quilon District, especially in the Taluks of Quilon and Kottarakkara, the right of "Vatsaravakasam", i.e. to take the yield from the properties for a year after his death, based upon the fiction of the widow having contributed her labour for the purpose of acquisition, had been recognised. In certain cases, a small allowance by way of share in the self acquisitions seems to have been made towards "Cheru Thettum" for meeting the marriage expenses, purchase of jewels, etc., to the children. What can be gathered from the above decision of the Travancore High Court is that among Misravazhi Ezhavas, Marumakkathayam system of

inheritance was being followed except with reference to variations therefrom recognised by judicial pronouncements of this Court.

8. In *Govindan Vasudevan and Ors. v. Ummini Narayani* ILR 1956 T.C. 701 the question regarding the law applicable to Ezhavas in Kollam and Trivandrum Districts were considered. Reference is made in that decision to the Ezhava Law Committee Report which was constituted to frame a draft bill for the Ezhavas. The said committee made a study about the system of inheritance which was being followed before the commencement of the Ezhava Act. There is a statement in the report that the Ezhavas in Thiruvananthapuram and Kollam Districts were following Misradayam system of inheritance and that they were not following Makkavazhi. In page 775 of Volume v. of the Regulations and proclamations of Travancore in which the opinion of the Ezhava Law Committee is given, it is stated that under the recognised usage among the Misradayams, the self acquisition left by a deceased Ezhava is shared between his wife and children on the one hand and his "Seshakars" on the other. It is also stated in the above report that the share which the wife and children get is generally a little more than one-half including what is known as "Valsaravakasam" and other rights. The property in which there is "Valsaravakasam", right is usually divided only after the lapse of one year from the date of death of the person who acquired the property. Until then, the whole of his self acquisition is enjoyed by his wife and children. The right of the wife and children to enjoy the property for one year is known as Valsaravakasam". They are also entitled to another customary right known as "Cheruthettum" which is a right to have a further share in the acquisition given towards performance of marriage and other ceremonies of minor children. As per the report of the Ezhava Law Committee, in certain cases, "Valsaravakasam" and "Cheruthettum" used to be commuted into an additional share at the time of partition thereby giving some increase in the share which the wife and children are entitled to get. It is clear from the above decision also that those who were following Misravazhi system of inheritance followed the principle relating to Marumakkathayam system of inheritance subject to certain modifications accepted by judicial pronouncements of this Court.

9. In the light of what has been stated above, it cannot be said that the finding of the trial Court as well as the first appellate Court that parties to the suit Were not governed by Marumakkathayam system of inheritance, is not correct. Parties to the suit being persons residing in Kollam District and the property over which they claim right also being situated in Kollam District, they were following Misravazhi system of inheritance which was essentially the principles of Marumakkathayam system of inheritance with modifications recognised by judicial pronouncements.

10. According to the Appellants, the property which Narayani and the first Respondent got as per the provisions of Ext. A-1 settlement deed is Makkathayam property and hence the right over the property devolved on the Sub-tarwad. Makkathayam property is defined in the Travancore Ezhava Act as

property obtained from the husband or father by the wife or child or both of them, by gift, inheritance or bequest. Here, the case of the parties is that the property was purchased by Govindan, grandfather of the first Respondent in the name of his wife Nangeli. That fact is mentioned in Ext. A-1 settlement deed. The consideration for getting the sale deed in favour of Nangeli proceeded from her husband Govindan and that is the reason for saying that the property was acquired by Govindan and that Ms wife was only a name lender. The contention raised by the Respondents in this appeal in the written statement filed by them before the trial Court is also that the property was acquired by Govindan and that his wife Nangeli was only a name lender. On executing Ext. A-1 settlement deed in which Nangeli also joined as one of the executants, the property which belonged Govindan was given to his daughter Narayani and grand-daughter the first Respondent. In view of the above, the property obtained by Narayani and her daughter, the first Respondent can only be said to be Makkathayam property.

11. Even if it is assumed that Nangeli was also having right over the property which was given to Narayani and her daughter, the position will be the same. Even though in the definition of Makkathayam property under the Travancore Ezhava Act mention is made only about the property obtained from the husband or father by the wife or child or both of them the property given by near relatives such as mother or brother was also considered as Makkathayam property even before the commencement of the Ezhava Act.

12. In *Lakshmi Gouri v. Lakshmi Narayani* 1958 KLT 310 the Trivandrum Bench of the Kerala High Court held that the ordinary presumption in the case of Makkathayam property acquired before the commencement of the Ezhava Act is that it belonged to the Thavazhy of the donee as a whole and it is taken by Thavazhy as Sub-tarwad property. In paragraph 8 of the judgment in the above case it is stated that even though a gift is not a gift by husband or father, if it is a gift to a Marumakkathayee woman by one of her near relatives, the presumption would be that the property comprised in the gift is to be held and enjoyed in the way property is customarily held and enjoyed in the Marumakkathayam law which was the system of inheritance followed by both the donor and the donee. In that case, the gift to a Marumakkathayee woman by one of the near relatives was considered to be a gift obtained by the Thavazhy and the property so obtained under the gift was considered as Sub-tarwara property. That being the position of law which was being followed before the commencement of the Ezhava Act, even if it is assumed that Nangeli was also having right over the property, the same obtained by Narayani and the first Respondent under Ext. A-1 settlement deed can only be Makkathayam property. The property obtained under Ext. A-1 goes to the Sub-tarwad in which the Appellants and Respondents 1 to 3 are members.

13. In *Mathew v. Kunjika Bharathi* 1967 KLT 133 this Court had occasion to consider about the gift executed for the benefit of one's wife and children to be born. The question which was considered by this Court was whether after born

children will also get share in the property gifted. Section 22 of the Nair Act says that the property shall belong to the wife or widow and each of the children in equal shares. On the other hand, what Section 32 of the Ezhava Act provides is that the property shall be liable to be divided among the wife and each of the children in equal shares. The distinction between Section 22 of the Nair Act and Section 32 of the Ezhava Act was pointed Out by this Court in the above decision by observing that Section 22 of the Nair Act deals with ownership of the property whereas Section 32 of the Ezhava Act deals with the shares to be taken by the parties on partition. Section 22 of the Nair Act deals with ownership of the property since the provision is that the property "shall belong". The phrase used in Section 32 of the Ezhava Act is "shall be liable to be divided". So, it is clear that Section 32 deals with a situation where the property is subsequently to be partitioned and hence the effect of such gift is that it has to be to the wife and her children to be born in future as a group and the shares of the donees will be defined only at the time of partition.

14. The Travancore Ezhava Act cannot be considered as an enactment by which the law applicable to the Aiarumakkathayee before commencement of the Act was totally changed and a new law was codified for the Ezhavas. That is clear even from the preamble of the Act which says that "whereas it is expedient to define and amend the law of marriage, succession, family management and partition among the Ezhavas, an act would be enacted". The intention of the Act appears to be to make provisions of law in the statute in accordance with the law which had been followed so far with certain modifications which was found to be necessary. The law which was being followed by the Ezhavas in respect of marriage, succession, family management and partition continued to be in force in so far as that law was not against the provisions of the Travancore Ezhava Act. Till the commencement of the Ezhava Act, as is seen stated in the decision reported in Lakshmi Gouri v. Lakshmi Narayani 1958 KLT 310, which has already been referred to, a gift to a Marumakkathayee woman by one of her near relatives will be considered as a gift made to the Sub-tarwad. Even though Makkathayam property is defined in Section 4(11) of the Travancore Ezhava Act as property obtained from the husband or father by the wife or child or both of them, by gift, inheritance or bequest, property gifted by a near relative to a Marumakkathayee women before the commencement of the Act can also be said to be Makkathayam property which would ensure to the Sub-tarwad of the Marumakkathayee woman. That being the position, even if it is assumed that the property belonged to Nangeli, the property obtained by Narayani and her daughter, the first Respondent can be treated as Makkathayam property. Once, it is found that the property obtained under Ext. A-1 settlement deed is Makkathayam property, it can be said that the Sub-tarwad of Narayani got right over the property which was given to Narayani and the first Respondent under Ext. A-1. The definite case of the Appellants, as is seen from the plaint, is that the plaint Schedule property is the property of an Ezhava Makkathayam tarwad consisting of the Appellants and Respondents 1 to 3. It follows that at the time

when the Kerala Joint Hindu Family System (Abolition) Act, 1975 (Act 30 of 1976) came into force, a notional partition is presumed to have taken effect and the members of the tarwad got definite share in the property. At that time, there were 11 members in the tarwad and each member got 1/11 share in the property. The Appellants, eight in number were members of the tarwad at that time and they are entitled to get 8/11 share in the property. The judgment and Decree of the trial Court as well as the first appellate Court will have to be set aside allowing partition of the property as prayed for by the Appellants.

In the result, this appeal is allowed on setting aside the judgment and Decree of the trial Court as well as those of the appellate Court and a preliminary decree for partition is passed allowing the Appellants to get partition of 8/11 share in the plaint schedule property.