
(1956) 08 KL CK 0002
In the High Court Of Kerala
Case No : A.S. No. 275 of 1952

M. Govtada Pillai and Others

APPELLANT

Vs

Lekshmikutty Amma and Others

RESPONDENT

Date of Decision : 07-08-1956

Acts Referred:

Citation : (1956) 08 KL CK 0002

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

Bench : Full Bench

Advocate : M. Narayana Menon and A. Krishna Menon, for the Appellant; T.S. Venkiteswara Iyer and O.S. Anathakrishna Iyer, for the Respondent

Judgement

Varadaraja Iyengar, J.—This appeal is by the Defendants 1 to 4 in, a suit for partition and the question is how far the rule as to the nature and incidents of putravaka sam property enunciated in Krishnan Nair v. Cheethamma, 10 Ker LR 401, (A) and since" followed in the erstwhile Cochin jurisdiction is applicable to the case and if so whether it could not , now be adopted. In view of the importance of the question raised this case has been referred to the Full Bench. .

2. The Plaintiffs 1 to 6 and the Defendants 1 to 13 are the members of the Thavazhi of Mjfc-dhavi Amma deceased. The 1st Plaintiff and Defendants 1 to 5 are the children of Madhavi Arnica, through her husband Parameswaran Pillai. Plaintiffs 2 to 5 are the children of the 1st Plaintiff Lekshmikutty and the 6th Plaintiff is the child of the 2nd Plaintiff Thankamma alias Malathi. Defendants 6 to 13 are the children of the 5th Defendant Naraynan, Parameswaran Pillai belonged to Kottayam in Travancore and had a flourishing practice as a lawyer attached to the District Court on Cochin.

He had considerable properties both in Travancore and in Cochin and these he disposed of by his Est. A will dated 11- 5-1904 which came into effect -soon after, on his death in the month of that same .year. We are concerned in this suit with the bequest of item 13 under the will. That bequest was in favour of his wife Madhavi

Amma and his children through her then existing and to be born and also the offspring of the female children. The Plaintiffs claimed that the bequest was in favour of the Thavazhi as a whole and laid this; .suit accordingly for partition by metes and bounds; and their 6/19 share over the A Schedule immovable property and the B schedule movables which were alleged to comprise the item 13 aforesaid. The Defendants 14 to 18 were the wife and children of the 2nd Defendant and were impleaded as persons in possession for purpose of effective relief.

3. Defendants 1 to 4 and 5 to 13 contested the suit. The contention of Defendants 1 to 4 was that on proper construction the bequest under Ext. A was only in the nature of a Putravakasam gift in favour of the wife and children of the test or which they took absolutely and as tenants-in common.. The Plaintiffs 2 to 6 and the Defendants 6 to 13 who represented the grandchildren were in this view not entitled to get any share in the properties concerned.

The contention was also raised that the Plaintiffs would in any event be entitled only to 5/16 share since division of .status must be deemed to have been attained long previously in 1105 when Ext. D partition took place as regards the Travancore properties. They further questioned the availability of B schedule movables for purpose of partition and also the right of the Plaintiffs to mesne profits as claimed. They also put forth a claim by way of improvements. Defendants 5 to 13 supported the Plaintiffs in regard to the Thavazhi character of the bequest hut they claimed that the distribution should be on the basis of a divided status on intermediate date in 1121, so as to exclude some of the grandchildren.

4. The Court below upheld the Plaintiffs" case that the grand-children also could claim as devisees under the will and that the allotment should be had as between 19 members comprising Plaintiffs 1 to 6 and Defendants 1 to 13. It accepted however the contentions of the Defendants 1 to 4 In regard to the movables available for division. It ultimately granted a preliminary decree declaring the shares of the parties and also the right of the Plaintiffs on the, one side to mesne profits and of the 2nd Defendant on the other to improvements postponing the respective ascertainment to stage of final decree. Hence this appeal by the Defendants 1 to 4.

5. It will be useful before we proceed further to refer to the actual terms of Clause (5) of Ext. A dealing with the bequest in question:

a. * * * * *

That is to say, the legacy was made of item 13 and all the movables contained therein. The legatees were the testator's wife Madhavi Amma, their six children already born and existing, all mentioned by name and in order of their ago, their children to be born and finally the offspring of the three daughters, among the children mentioned. And the legatees were: directed to take and a. The original in Malayalam omitted enjoy the properties in a state of union and from,

generation to generation and with absolute powers.

6. Sri Achutha Menon appearing for the Appellants contends that apart from the expression (in a state of union and (from generation to generation) there was nothing in the terms of the bequest as extracted above to indicate either expressly or by necessary implication that the gift was intended to endure not to the wife and children alone in absolute right but to the Thavazhi of the wife as an entity and so far as those expressions themselves were concerned they were in no way conclusive the other way.

According to him" the reference to the "children"s offspring" and enjoyment "from generation" to generation" should rather be taken as words of, limitation employed to mark, out the freehold " nature of estate; conferred upon the wife and children and not as words of purchase pointing out the later generations as entitled to any definite interest in the property. Learned Counsel invited our attention to the long line of cases commencing with 10 Cochin LR 401 (A) which established the rule in the erstwhile Cochin jurisdiction as contrasted with they rule which prevailed elsewhere in Madras and Travancore, viz, that there was no presumption in favour of the Thavazhi as donees under a gift by the father to the mother and her children and referred to the reasons for this as stated in the words of the majority Judges in 10 Cochin LR 401 (A) as follows;

The basis of the decisions that Puthravaka-sam property is the joint property of the donees held with the ordinary incidents of "the properties" Of a Marumakkathayam tar wad is that with reference to such property there is a presumption"] that the donor, in the absence of anything to the contrary intends that the donees should take it fall property acquired by their branch or as the excilusive property of their own branch with the usual incidents of tarwad property in accordance with the Marumakkathayam usage which governs the donees.

This presumption is not sound according for law or according to consideration of equity and good conscience and should not, therefore, be made. In the absence of this presumption the donees of Puthravakasam property, in the absence of an expressed or necessarily implied intention to the contrary, can only be regarded as co-owner or tenants in common with regard to the same.

Learned Counsel"said that the testator Pa meswaran Piliyai, Cochin lawyer as he was, m, have been well aware of the law as settled Cochin and must be deemed to have expressed himself in the light of that rule.

7. Learned Counsel for the Respondents questioned the basis of reasoning adopted in -1 Cochin L. R. 401 (A) and said that it consisted only in a restatement of the arguments advanc by Sankaran Nahy"J. in his order of reference, Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veettil Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others, which ho ever were sufficiently answered in the jud of Wallis, C.J. in the Pull Bench in of the prior Full Bench decision in Kunt Umma v. Kuttli Mammi Hajee, ILR 16 Mad; (FB)

(C), where it was held:

That among the followers of the makkathayam law when a gift is made by father to the mother and her children thereat presumption that they are intended to take properties as the exclusive properties of the branch or Thavazhi consisting of the motif and her children that is to say, with the incidents of tarwad property. In the absence express provision the presumption is that property is to be enjoyed by the mother and her issue in the way in which the property is oustomarily held and enjoyed among the followers of Marumakkathayam Law.

Learned Counsel drew our attention to the¹ subsequent cases in Madras where the principle of the decision in ILR 39 Mad 317 : Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veettil Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others, was affirmed and followed. Learned Counsel said that Parameswaran Pillai hailing from Kottayam in Travancore could not have been unaware of the law as settled in Travancore conformably to the rule prevailing in Madras and there was no reason to suppose that he preferred to accept the Cochin rule in regard to Puthravakasam gift.

8. We may say at once that we have found it unnecessary on the facts and circumstances of this case to discuss the correctness or otherwise of the scope of the presumptions in regard to gifts and devises made during pre-Nair Act days as settled in the Cochin jurisdiction. 1U our judgment the words of Ext. A do indicate by necessary implication even within the meaning! of 10 Cochin L. B. 401 (A), that the gift made thereby was intended to enure to the entire thavazlri constituted by Madhavi Amma and her children and children's children in the female line how low so ever. In our opinion in the extension of the gift in favour of the grandchildren through daughters, combined with the expressions connoting unity of ownership, possession and enjoyment in perpetuity, makes it perfectly clear that the gift was intended not to the wife and children alone but to the whole.

9. But it was argued on behalf of the Appellants that clauses 3 and 4 of the will dealing with the devises in favour of the testator's sisters and their descendants specifically used the word thavazhi and further had provided for a Karna-van to be in managment, whereas Clause 5 which referred to the wife and children did not only not provide for any Karnavanship but provided for absolute powers of aliention and enjoyment.

It seems to us however that these aspects do not imply any distinction seeing that the selection of the grandchildren in Clause 5 is limited to those born of the female children alone and the enjoyment there under is to be for generation after generation and in a state of non-division. These provisions in Clause 5, as we already pointed out, bring to the forefront the conception of a legal group or suhtarwad with a consequent negation of individual rights.

10. On similar grounds again we have to discard the arguments based on Ext. IX settlement of 1079 which came up for construction in Bala-krishna Menon v.

Trichur Lourd's Church, 34 Ker L.R. 898 (D). The relevant passage in Ext. IX ran as follows:

a. * * * *

That is to say, the gift was in favour of the wife, three female children then existing, children that may subsequently be born to him and their descendants. The learned Judges following 10 Ker L. R. 401 (A), decided against a thavazhi nature of the gift. Clearly there were no express words to that effect. Nor were there, as different from here, any indication by necessary implication of an intention on the part of the donor that the property should be enjoyed by the donees named therein as their thavazhi property. And there was a further fact in that case that in 1094 the three daughters divided the property in equal shares when two of them had Children born to them and this division was (The original in Malayalam omitted-Ed.) effected consultation with Fattathil Narayana Menon who as judge was a party to 10 Ker L. R. 401 (A).

11. It was then strenuously argued that the 6th Defendant who was actually horn before the date of Ext. A was not included in the enumeration of the legatees under it and this was a material circumstance in favour of the defence contention. It is wrong to say, however, that the 6th Defendant was intended in any way to be excluded merely because he was not mentioned by name. For he may still come in within the general description of children of the daughters inasmuch as the expression need not have any reference to time but was only descriptive.

The learned Judge got over the difficulty by saying that the 6th Defendant was then only an infant of four months and possibly unnamed. That also may account for the omission to specifically include the 6th Defendant. There is therefore no point in this argument either. We hold accordingly that Ext. A was intended to be a gift in favour of the thavazhi of the testator's wife Madhavi Amma so that the grand children of Madhavi Amma in the female line represented by Plaintiffs 2 to 6 and Defendants 6 to 13 are also entitled to their respective shares in this suit for partition.

12. The next question is in regard to the quantum of the shares of the parties. On this learned Counsel for the Plaintiffs expressed his willingness before us to accept the case of the Appellants that the division in status as between the parties must have been fully attained at date of Ext. D of 1105. The Plaintiffs would then be entitled to 5/16, the 5th Defendant and her children to 6/16 and Defendants 1 to 4 to 5/16. Told basis will be incorporated in the decree to be drawn up.

13. As regards the decree of the court below for mesne profits to the Plaintiffs and improvements to the 2nd Defendant, we do not think the circumstances of this case warrant such grants. The A schedule property consists of only the paramba and certain residential buildings there on. It is no doubt true that the property was in possession of Defendants 1 to 4 for some time till date of suit

but it is not the case of the Plaintiffs that they were at any time shut out from joint enjoyment. On the other side, it cannot also be denied that the 2nd Defendant could not have effected the improvements claimed from the surplus profits he had gathered from the property. We would therefore deny mesne profits and improvements either way.

14. We therefore dismiss the appeal and confirm the decree of the court below subject however to the; variations as regards the shares of the parties and the denial to the Plaintiffs and 2nd Defendant respectively of mesne profits and improvements as mentioned above. The parties will bear their respective costs in this Court.