
(1992) 10 KL CK 0006
In the High Court Of Kerala
Case No : A.S. No. 195 of 1985

Malathi Amma and Others

APPELLANT

Vs

Damodaran and Others.

RESPONDENT

Date of Decision : 28-10-1992

Acts Referred:

Cochin Thiyya Act, 1107 — Section 35

Citation : (1992) 2 KLJ 964

Hon'ble Judges : K.P. Balmurrayana Marar, J

Bench : Single Bench

Advocate : S.V. Balakrishna Iyer and K. Jayakumar, for the Appellant; O. Ramachandran Nambiar, K.S. Babu and N. Sudha, for the Respondent

Final Decision : Allowed

Judgement

K.P. Balanarayana Marar, J.—The appeal arises from a suit for partition. The husband of first appellants 2 to 7 filed O.S. 54/71 before Sub Court, Ernakulam against respondents 1 to 11 for partition and separate possession of their share over three items of properties. Item No. 1 is alleged to have been obtained by the mother of first appellant Kavuvu and her brother Krishnan. Defendants 1 to 3 and the mother of defendants 4 to 9 are the other children of Kavuvu. By an assignment deed of 1115 M.E. first plaintiff purchased the rights of Kavuvu's brother. He therefore claimed six out of 10 shares over item No. 1. The other two items were acquired by Kavuvu and after her death devolved on her children in equal shares. First plaintiff claimed 1/5 share over these items. Defendants 1 and 2 are alleged to be in possession of these properties. First plaintiff claimed separation of his share with profits. Pending suit he died. Plaintiffs 2 to 9 (appellants herein) were impleaded as legal representatives. The suit was resisted by the defendants who disputed the validity of the assignment in favour of first plaintiff and contended that all the three items are liable to be divided in equal shares. They further contended that first plaintiff was managing the properties as Karanavan and with the income therefrom had acquired some

properties. Partition of these properties was also claimed. The details of those properties are mentioned in paragraph 3 of the written statement.

2. A preliminary decree was passed by the court below on 28-2-1977. Defendants preferred an appeal before this court as A.S. 9/78. This court found that there is a fundamental defect in the pleading with regard to the personal law governing the parties as to whether it was Marumakkathayam Law that is applicable or the Cochin Thiyya Act (Act 8 of 1107 M.E.). The allegation in the plaint is that the parties are makkathayees. But the court found them to be followers of marumakkathayani. An opportunity was given to the plaintiffs to amend the plaint. After remand a petition was filed for amendment of the plaint alleging that the parties are governed by the Cochin Thiyya Act. No objection was filed to that application, and no additional written statement was also filed. An additional issue No. 13 was framed regarding the personal law governing the parties. Thereafter the court below considered all the issues and held that the parties are governed by the Cochin Thiyya Act. Items 1 to 3 of the plaint schedule were directed to be divided in accordance with the claim made in the plaint. The court further directed division of the properties mentioned in paragraph 3 of the written statement among the plaintiffs and defendants finding that they were acquired by deceased first plaintiff in his capacity as the Karavanan utilising the income of the family. Aggrieved by that decision plaintiffs 2 to 9 have come up in appeal.

3. The main grievance of the appellants is that the court below has committed a grave error in finding the acquisitions standing in the name of deceased first plaintiff as acquisition on behalf of the tarwad, the parties having been found to be governed by the Cochin Thiyya Act. The contention is that the court below has not correctly comprehended the provision contained in Section 35 of the Cochin Thiyya Act and the Principles applicable to decide the nature of acquisition by a Karavanan. On hearing the counsel and on a perusal of the documents and evidence in this case I am satisfied that the contention advanced by learned counsel for the appellants is justified and that the learned subordinate Judge was seriously in error in finding the properties described in paragraph (3) of the written statement as acquisitions on behalf of the tarwad and in directing division of those properties.

4. Before advertng to the contentions raised on both sides on the merits of the case it is only proper to refer to Section 35 of the Cochin Thiyya Act. That Act was enacted in order to define, regulate and amend the law of marriage, succession and partition of Thiyyas in the erstwhile State of Cochin. Section 35 of the Act reads:

The property of a Marumakkathayam tarwad will be considered to have been the property of the nearest common ancestress and to have descended according to the rules of succession contained in Chapter IV and to be partible among the persons so entitled.

5. By virtue of Section 35 of the Cochin Thiyya Act the property of a marumakkathayam tarwad has ceased to be tarwad or joint family property and has to be deemed to have descended according to the rules of succession contained in Chapter IV of the Act and partible among them. In other words, the succession is regulated by Section 21 to 29 of the Act. There is no right by birth nor does the right of a member devolve on others by survivorship. In other words, the descendants are to share the property among themselves in the manner prescribed in the above mentioned sections. The system of Marumakkathayam Law has therefore ceased to exist as far as the Thiyyas of Cochin are concerned as and from the commencement of the Cochin Thiyya Act.

6. The Cochin High Court in the decision reported in 39 Cochin Law Reports 592-Mariam v. Karambi & others held that it is a misnomer to call the community governed by the Cochin Thiyya Act (VIII of 1107) as marumakkathayees. It is observed that the provisions of the Act make it clear that Marumakkathayam is dead to the Thiyya Community as a system of law governing them, and the Act no less than the history of the legislation embolden one to say that it would be untrue now to call any section of that community followers of Marumakkathayam Law.

7. The question whether the marumakkathayam tavazhi or tarwad contained after the commencement of the Cochin Thiyya Act was considered by the Full Bench of the Travancore Cochin High Court in Narayanan v. Raman (1953 KLT 216). The Full Bench held :

With the enactment of S. 35 the characteristic feature of joint tenancy with the necessary incidents of survivorship, disappeared completely in respect of properties of Thiyya tarwad and for purposes of partition and succession such properties have notionally to be considered as the separate properties of the nearest common ancestress, S. 35 has been deliberately so worded as to make the statutory change thus made in the character of the properties belonging to Thiyya tarwards retrospective in its effect.

It was further held that the property belonging to the tarward is statutorily converted into separate property of the nearest common ancestress of the members of the tarwad. On her death the property descends on her heirs. The proviso to Section 25 even recognises the principle of representation which enables the children to get the share of their predeceased father in his mother's property. This court in Lakshmi v. Sankunni (1964 KLT 876) held that the terms of Section 25 including the proviso to it and of Section 35 of the Cochin Thiyya Act leave no room for doubt that they have retrospective operation. The question whether these provisions have retrospective operation does not arise for consideration in this appeal since Kavuvu, the daughter of the nearest common ancestress died in 1115 and the half share of her brother Krishnan had been taken assignment of by the first plaintiff.

8. The position therefore is clear that the property belonging to a

marumakkathayam Thiyya tarwad in Cochin is statutorily converted into the separate property of the nearest common ancestress of the members of the tarward and is liable to be divided among her heirs as tenants in common. As observed by the Cochin High Court in Mariyam's case (supra) the marumakkathayam system is dead to the Thiyya community in Cochin as a system of law since the commencement of the Act. The property therefore ceases to have any legal character of a marumakkathayam tarwad and it necessarily follows that the senior most male member has no right to function as Karanavan. Along with the other heirs of the nearest common ancestress he becomes a co-sharer. The larger rights which the Karanavan of a tarward had cannot be exercised by the senior most male member and his rights are limited to those of co-sharer.

9. There is indication in the Kerala Joint Hindu Family System (Abolition) Act 1975 (Act 30 of 1976) to suggest that the joint family system as far as Thiyyas in Cochin are concerned had come to an end after the commencement of the Cochin Thiyya Act. Section 2 of the Act defines joint family. It means any Hindu family with community of property and includes a tarward or thavazhi governed by the various enactments mentioned in sub-section (1) of section 2. The Cochin Thiyya Act is not mentioned as one of those enactments. By subsection (2) of section 4 all members of a joint Hindu family other than an undivided Hindu family referred to in sub-section (1) shall with effect from the day on which the Act comes into force be deemed to hold it as tenants in common as if a partition of the property per capita had taken place among the members of the family living on that day. The Cochin Thiyya Act was not mentioned as one of the enactments in Section 2 for the reason that the joint family system had ceased to exist as far as Thiyya in Cochin are concerned by the Cochin Thiyya Act. The abolition of the system having taken place in 1107 M.E. there was no necessity to another abolition by Act 30 of 1976.

10. Sri. Ratnachandian Nambiar, learned counsel for the respondents contends that Section 35 of the Cochin Thiyya Act only regulates the succession to tarwad properties and not the powers of the Karanvan and his rights of management. It is pointed out that the Act docs not contain any provision abrogating the powers of a Karanavan under the pristine marumakkathayam law. The contention is that the Act docs not contain provisions similar to the provisions contained in Chapter V of the Madras Marumakkathayam Act which deals with tarwad and its management. As long as there is a marumakkathayam tarward the properties are to be managed by the Karanavan. Chapter V of the Madras Marumakkathayam Act only regulates his power and duties. Similar provisions cannot be expected in a statute dealing with makkathayam of Mithakshara system of Law. Section 2 of the Cochin Thiyya Act is made applicable to ail Thiyyas domiciled in Cochin other than those who follow makkathayam and to such Thiyyas or others whether so domicile) or not as have or shall have marital relation with them. Till then a section of Thiyyas was following the marumakkayam system of law. It is to put an end to that system that the Act

was enacted. By section 35 of the Act tarwad property is converted into separate property of the nearest common ancestress. When such a conversion has been statutorily made the properties ceased to be tarwad property as and from the commencement of the Act. The senior most male member who had been in management as Karanavan since then loses that right and becomes a co-sharer along with the other heirs of the common ancestress without any right of management.

11. Having found that first plaintiff was only a co-sharer along with the other heirs of the common ancestress the acquisitions made by him cannot be claimed to be on behalf of the tarwad. True first plaintiff was in management of the plaintiff schedule items upto 1954. Even if the income was appropriated by him his liability is only to account to the other sharers. No such accounting is claimed in the written statement nor was any evidence adduced to show the income obtained by the first defendant and the expenses incurred by him for the family. The acquisitions being by a co-sharer, a share over the properties cannot be claimed by the other sharers even if the income from the property is utilised for the acquisitions. Partition of the properties described in paragraph 3 of the written statement cannot therefore be claimed. Since no claim for accounting has been made the question of liability of first plaintiff or the appellants herein does not arise. Having found that first plaintiff was in management, only as a co-sharer and not in his capacity as Karanavan the nature of the acquisition of the properties described in paragraph 3 of the written statement does not require adjudication. Even if the acquisitions were made by first plaintiff utilising tarwad funds the burden is on the defendants to show that the Karanavan was in possession of sufficient nucleus which was utilised for these acquisitions. It is settled law that when it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisitions the law raises a presumption that it is a joint family property. Then the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. Oral evidence was adduced on the side of defendants to prove the income obtained from items 1 to 3. But even that evidence is not sufficient to find that first plaintiff was possessed of surplus income. First plaintiff was employed as a teacher and his wife also is a teacher. His brothers are labourers. They work in the fields, viz. items 2 and 3 of the plaintiff schedule. The income there from and the income from item No. 1 are utilised for their expenses. There is no evidence on record to show that there is any surplus income so as to enable first plaintiff to acquire these properties. Further more, first plaintiff had income of his own. He has spoken about various sources of income. There is no reason to disbelieve him on this aspect. Here is therefore a case where defendants were not able to establish possession of sufficient nucleus with the first plaintiff. On the other hand, first plaintiff was able to show that he had funds of his own. In any case therefore the acquisitions cannot be said to have been made by utilising tarwad funds. A serious error was committed by the court below in finding these properties as tarwad properties

and directing them to be divided among the parties to the suit.

For the aforesaid reasons the appeal is allowed and in modification of the preliminary decree passed by the court below a preliminary decree is passed in the following lines :

1. Item (1) of the plaint schedule shall be divided into 10 equal shares and 6 such shares shall be allotted to plaintiffs.
2. Items (2) & (3) shall be divided into 5 equal shares and one such share shall be allotted to plaintiffs.
3. Over item No. 1 defendants 1 to 3 are each entitled to one out of 10 shares and defendant-s 4 to 9 are together entitled to the remaining one share.
4. Over items (2) and (3) defendants 1 to 3 are each entitled to one out of five shares and defendants 4 to 9 are together entitled to the remaining 1/5 share.
5. The properties described in paragraph 3 of the written statement of defendants are not available for partition.
6. Respondents are directed to pay the costs incurred by the appellants in this appeal. The costs incurred by the parties in the court below shall come out of the estate.