
(1950) 07 KL CK 0001
In the High Court Of Kerala
Case No : A.S. No. 47 of 1124

Narayanan

APPELLANT

Vs

Kumaran and Others

RESPONDENT

Date of Decision : 27-07-1950

Acts Referred:

Cochin Thiyya Act, 1107 — Section 35

Citation : AIR 1950 Ker 11

Hon'ble Judges : M.S. Menon, J;K.T. Koshi, J

Bench : Division Bench

Advocate : A.S. Krishna Iyer, for the Appellant; T.M. Mahalingam Iyar, for the Respondent

Judgement

Koshi, J.—The Plaintiff is the Appellant. His suit was to enforce division of an item of immovable property and delivery to him of his share thereof and for other ancillary reliefs. Survey plot 30/1 in Tripunithura Village which is 1 acre and 12 cents in extent belonged originally to one Kunhan Konni. Under Ex. T dated 17-10-1089, he made a gift of that property in the name of his wife Khotha and all her children by him then living, The donor and his wife had then four children, two sons and two daughters, kumaran, Krishnan, Kalyani and Narayai. Afterwards they got another daughter, by name Karthiyani. The Plaintiff-Appellant is an assignee from Narayani and Karthiyani of their rights and has claimed a 2/5th share of the property, Prior to the institution of this suit 34 cents out of the extent of 1 acre and 12 cents were sold in execution of a decree (O. S. 722 of 1118) obtained against all the owners and the balance 78 cents alone remained available for division when the suit was filed. At the time of the Appellant's purchase there was another binding debt on the property which had ripened into a decree for sale in O. S. No. 168 of 1119, on the file of the Ernakulam District Munsiff's Court. That debt has since been discharged by the remaining owners and the Appellant has in this suit offered to pay his share thereof. He, however, claimed that he was entitled to an amount of Rs. 600 towards compensation for waste committed on the property by the other owners

and he claims a set-off of his share of the debt towards that amount. For the balance he asked for a charge on their shares in the property. There was also a claim for mesne profits.

2. Krishnan, the donor's second son died before any of the transactions referred to above took place. Defendant 1 is the other son (Kumaran). Defendant 2 is the mother (Kotha) and Defendant 3 the eldest daughter (Kalyani). These three Defendants sold their rights over 50 cents of the property to Defendant 4 who mortgaged his right to Defendant 5. It was by these transactions that the decree debt in O. S. 168 of 1119 was paid off. Since the institution of the present suit Defendant 4 transferred his interest to a stranger and pursuant to a joint application the original Defendant 4's name was struck off from the array of parties and his assignee substituted in his place as Defendant 4. The main contest in the suit was by the original Defendant 4 but after his name was removed from the plaint his substitute continued the contest.

3. The learned temporary Additional District Judge, Anjikaimal who heard and disposed of the suit gave the Appellant a decree for a 1/5 share in the 78 cents of the property available for division subject to a liability for a similar share of the decree-debt in O. S. 168 of 1119. The claims for compensation for waste and mesne profits have been negatived. The Court directed that costs of the litigation should come out of the estate and the Plaintiff has preferred this appeal challenging the correctness of the learned Judge's decision on points decided against him. Defendant 4 has preferred a memorandum of cross objections complaining that Plaintiff should have been made liable for his costs and also seeking correction of certain accidental errors in the lower Court's judgment and decree.

4. The main question for consideration is as to what share in the property the Appellant became entitled to under his purchase. As against his claim for a 2/5th share the lower Court has decreed to him one-fifth. Whether he could succeed to obtain the further 1/5 share must depend upon whether Kirthiyani the after born daughter of the donor had any right in the property. The argument that Ex. T was a gift in favour of Kotha's Tavazhi does not commend itself to us as sound. There is nothing in the language of the document to warrant it and if we were to accept it we are afraid we may have to hold that under the Cochin Thiyya Act (VIII [8] of 1107) his alienors Narayani and Karthiyarti had long ceased to have any interest in the property when they sold their rights to him in 1119. The only way in which we could hold that the after born daughter had any interest in the property is by construing the gift as a gift in favour of the Thivazhi but apart from the consequence arising from that view now adverted to, that case does not arise from the pleadings. The plaint refers to the gift as one under which the wife and children obtained distinct shares and we fail to see how a child not alive on the date of the gift can by her birth to those parents claim to have become a tenant in common with the donees mentioned in the document. We, therefore, concur in the view expressed by the learned Judge in the Court below that Ex. 1

was a gift in favour of the five persons named in the document and that Earthiyani not being one of them or even alive then was not entitled to a share. The claim for a 2/6th share on the ground that the appellant is alienee not only from Narayani but also from Karthiyani must, therefore, fail.

5. A further question is whether when Krishnan died Nirayani's share got augmented or whether Karthiyani got any interest over his share. Krishnan died in 1106 i.e., before the Tniyya Act was enacted. The line of devolution prescribed by Chap. IV of the Act will not, therefore, as such, apply to his estate. On his death it devolved on the tarwad and by virtue of Section 35 of the said Act that tarwad property must be considered to have been the property of the nearest common ancestress and to have descended according to the rules of succession contained in Chap. IV and to be partible among the persons so entitled. Under those rules so long as the mother, Defendant 2 remains alive none of her children would get any interest over Krishnan's share which under the ordinary Marumakkathayam Law had on his death lapsed to the tarwad. Neither Narayani or Karthiyani therefore could have conveyed any interest over it to the Appellant. The lower Court's decision that he is entitled to no more than 1/5th share has therefore to be upheld and we uphold it. Exhibit XI, the certificate of satisfaction filed in O. S. 168 of 1119 shows that on 20-1-1121 when the decree was satisfied the decree debt amounted to Rs. 766-6-6. The Appellant's share in the property will remain charged for a fifth share of that debt and that will have to be discharged before he enters on possession of the same. But he will have a right of set off as indicated herein below. [Rest of the judgment is not material for purposes of this report, Ed.]