
(1966) 05 KL CK 0001

In the High Court Of Kerala

Case No : Second Appeal No. 560 of 1962

Narayani Amma Kalliyani Amma and Another

APPELLANT

Vs

Naravani Amma Lekshmi Amma

RESPONDENT

Date of Decision : 24-05-1966

Acts Referred:

Citation : AIR 1967 Ker 90

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

Bench : Single Bench

Advocate : V.G. Sankaranarayana Pillai, for the Appellant; K.N. Narayanan Nair and G. Raghava Panicker, for the Respondent

Final Decision : Allowed

Judgement

T.S. Krishnamoorthy Iyer, J.—Defendants 1 and 2 are the appellants and the appeal arises out of a suit filed by the plaintiffs for redemption and recovery of possession of the plaint property outstanding on mortgage.

2. The facts alleged in the plaint are stated below. The plaint property 52 cents in extent is the separate property of Narayanan Kesavan, having been acquired by him along with other properties under Ext. C sale deed dated 5-9-1066. The property comprised in Ext. C is 26 parahs 3 edangazhies of paddy land. Narayanan Kesavan executed Ext E mortgage dated 26-12-1068 and Ext. E purakadam dated 19-7-1084 in respect of the property comprised in Ext. C in favour of Narayanan Unni. Narayanan Unni assigned the mortgage right over the plaint item after receiving the proportionate mortgage money to Narayanan Krishnan under Ext. III, dated 7-8-1084. The mortgage right of Narayanan Krishnan devolved on defendants 1 and 2. An assignee of the mortgage from Narayanan Krishnan had executed a sub-mortgage which right devolved on the first plaintiff who is the husband of the second plaintiff Defendants 1 and 2 filed O. S. 441 of 1118 to redeem the sub-mortgage and recover possession of the properly from the first plaintiff The suit was decreed and defendants 1 and 2 got delivery of the plaint item under the delivery kychif Ext. AM pending the present

suit. In 1101, Narayanan Kesavan executed Ext. G in favour of his sons and some of his nephews. The plaint property was given to Raman Nair and Padmanabhan Nair. On the death of Padmanabhan Nair, his heirs and Raman Nair executed Ext. C gift deed giving the plaint property to the first plaintiff. The first plaintiff conveyed his rights to the other plaintiffs who filed the suit for redemption.

3. The first defendant contended that the plaint property is not the separate property of Narayanan Kesavan, the properties acquired under Ext. C were acquired by him when he was the karnavan of the sub-tarwad of the defendants with sub-tarwad funds and Narayanan Kesavan was therefore not competent to execute Ext- G. and the plaintiffs have no title to redeem.

4. The trial Court found that Ext. C properties were acquired by Narayanan Kesavan when he was the karnavan of the sub-tarwad of the defendants and the properties comprised in Ext. C including the plaint item are the sub-tarwad properties of the defendants and the plaintiffs have no title based on Ext. G to redeem the mortgage, and that the suit was barred by res judicata on account of Ext. VI the decision in O. S. No. 111 of 1099 on the file of the District Court of Quilon But the appellate Judge decreed the suit reversing the findings of the learned Munsiff. The appellate Court was of the view that Ext. C properties were the separate properties of Narayanan Kesavan , and he is therefore competent to execute Ext. G. regarding these properties, and that the suit is not barred by res judicata on account of Ext. VI decision in O. S. No. 111 of 1099.

5. The finding of the appellate Judge that the properties acquired under Ext. C were the separate properties of Narayanan Kesavan, was based on two grounds. The first ground mentioned by the learned Judge was that there is no reliable evidence to show that on the date of Ext. C surplus tarwad funds were available with Narayanan Kesavan by reason of his management of the tarwad during the 11 months after the date of Ext. D. The second ground mentioned by the learned Judge was based on the subsequent conduct of Narayanan Kesavan and some members of the tarwad evidenced by some registered documents and also judgments of Courts. I am satisfied that the approach made by the subordinate Judge in deciding the question whether the properties in Ext. C are sub-tarwad properties or the separate properties of Narayanan Kesavan is wrong and the learned Judge has to be directed to reconsider the matter. The acquisition of properties under Ext. C was subsequent to the partition deed Ext. D. It is seen and it is also admitted that under Ext. D properties included in the 3rd schedule were allotted to the sakha of Narayanan Kesavan and the defendants. It is also admitted that prior to the date of Ext. C Narayanan Kesavan became the karnavan of the sub-tarwad and was in possession of the properties got under Ext. D The learned Judge himself has pointed out that the property comprised in the third schedule in Ext. D covered an extent of 93 paraahs of paddy land and 11 items of garden lands. It is also seen that Narayanan Kesavan prior to the date of Ext D had his own self acquisitions. The extent of the properties acquired by

Narayanan Kesavan prior to the date of Ext D is not very clear though the learned Judge relying on Ext T judgment arrived at some conclusion the correctness of which it is not necessary for me to examine at this stage. In Appalaswamy v. Suryanarayana Murthy. AIR 1947 PC 189 the Judicial Committee of the Privy Council enunciated the principles applicable in the case of persons governed by Hindu Law thus;

"The Hindu law upon this aspect of the case is well settled Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family properly."

In Abhimanyu v. Kumaru. 1964 KIT 1088 the above principles were held to be applicable to persons governed by Marumakkathayam Law. In Achuthan Nair Vs. Chinnamu Amma and Others, it was observed:

"When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law. But the said principle has not been accepted or applied to acquisition of properties in the name of a junior member of a tarwad (anandravan). It was held that there was no presumption either way; and that the question had to be decided on the facts of each case. But it is settled law that if a property is acquired in the name of the karnavan, there is a strong presumption that it is a tarwad property and that the presumption must hold good unless and until it is rebutted by acceptable evidence."

6. It cannot be gainsaid that the properties included in the 3rd schedule in Ext. D of which Narayanan Kesavan was in possession as karnavan of the sub-tarwad constituted sufficient nucleus. There is therefore a strong presumption that the properties included in Ext. C are tarwad properties. This presumption no doubt can be rebutted by the plaintiffs.

7. The position is not in any way different because it is seen that Narayanan Kesavan before he became the karnavan had his own separate properties. In Govinda Panikkar v. Madhava Panikkar 1943 TLR 731 it was held:

"Where a person was the karnavan of a tarwad and he had separate funds of his own and there were also tarwad funds available and a transaction was put through with funds which could have been drawn from either source, in the absence of definite evidence the law steps in with a presumption and the party to

the transaction is presumed to have acted for the benefit of the tarwad whose interests he was under a duty to protect rather (but that he acted for his own benefit ")

8. The law is summarised by Sumatra Iyer, in his Treatise on Malabar Law 1922 edition, at page 179 thus:

"When there is a mixing up of the family funds and separate funds the presumption is that the latter is merged in the former ")

9. The Privy Council pointed out in *Rajanikanta Pal v. Jagamohan Pal*. AIR 1923 PC 67 that if the members of a joint Hindu family confuse the income of their joint properties with their separate properties, their intention presumably is, that the properties acquired with such mixed up funds are for the joint family.

10. The above principles were accepted by this Court in *Narayanan Nair v. Parukutty Amma* 1960 KLT 1366. It can therefore be seen that the view taken by the learned Judge that the availability of surplus funds in the hands of Narayanan Kesavan at the time of the acquisition of Ext. C has to be established by the defendants is wrong and the question has to be approached in the light of the principles contained in the decisions mentioned above.

11. The view taken by the learned Judge regarding the subsequent conduct of Narayanan Kesavan and some of the members of the tarwad on the question of the nature of the acquisition in Ext. C cannot also stand. The defendants are not parties to the various documents referred to by the learned Judge. No question of estoppel is raised by the plaintiffs as a bar to the defendants' contention that Ext. C acquisitions are tarwad properties. The documents referred to cannot in any way affect the contention of the defendants that Ext. C properties are tarwad properties. The judgments and decrees in various litigations referred to by the learned Judge have no bearing on the question in issue. None of those litigations related to the properties comprised in Ext. C. The evidentiary value of such documents in this suit has not been properly kept in view by the learned Judge, Exts. H and G cannot in any way affect the rights of the defendants to Ext. C properties. It will therefore be seen that the approach of the lower appellate court on the question of the nature of the acquisition of properties in Ext. C was fundamentally defective and the matter has to be remanded for a fresh consideration.

12. In the result, the judgment and decree of the lower appellate Court are set aside and the case remanded to the lower appellate Court for fresh consideration in the light of the observations made above. The parties will bear their costs in this Court. The institution fee paid on the memorandum of appeal will be refunded to the appellants' advocate.