
(1953) 03 KL CK 0020
In the High Court Of Kerala
Case No : A. S. No. 480 of 1123

Neelamma and others

APPELLANT

Vs

Perumal Pillai Ananchi Pillai and another

RESPONDENT

Date of Decision : 27-03-1953

Acts Referred:

Citation : AIR 1953 Ker 40

Hon'ble Judges : Koshi, C.J;Subramania Iyer, J;Sankaran, J

Bench : Full Bench

Advocate : N. Varadaraja Iyengar, for the Appellant; T.S. Krishnamurthy Iyer, for the Respondent

Final Decision : Allowed

Judgement

Subramania Iyer, J.—This is an appeal made by defendants 1. 3 and 4 against the preliminary judgment and decree of the Second Judge, Nagercoil District Court, dated 28th Vrischikam 1122 (13-12-1946) directing partition and delivery of a half-share in some of the properties described in the schedule to the plaint to the plaintiff (respondent 1) setting aside a deed of settlement (Ex. A) executed by defendant 1 in favour of defendants 3 and 4 and their mother (respondent 2) who was defendant 2 in the Court below.

2. The parties are Hindus. They belong to a special sect called "Krishnan Vaka". It is admitted that they are governed by Mitakshara Hindu Law. The sub-joined genealogical table shows the relationship of the parties.

3. Marthanda died in the year 1096, leaving him surviving his widow Neelammal (D. 1), two sons, Perumal and Kulasekhara and a daughter, Perumal Pillai (D. 2). Plaintiff is the widow of the elder son Perumal who died issueless in the year 1100. The younger son Kulasekhara died in the year 1103.

4. On 5-8-1119 defendant 1 executed a deed of settlement (Ex. A) in favour of her daughter Perumal Pillai (D. 2) and the two grand-sons (Ds. 3 and 4). Within three months of this deed, that is on 26-10-1119, the suit out of which this

appeal arises, was filed. In the plaint the plaintiff averred that after Perumal's death she. pursuant to the custom prevalent in the community, lived with Kulasekhara as his wife till his death whereupon she, as the widow of the last surviving coparcener of the family and in whom vested the family properties succeeded thereto as his heir, in which capacity she was in possession. Defendant 1 was at best entitled only to a claim for maintenance from out of the properties as the Widow of a predeceased coparcener. The deed of settlement executed by her as though she had title to and right to possession of the properties is invalid being beyond her competence which was accordingly sought to be set aside. Defendant 1's possession of the properties was accounted for by attributing it to trespass committed in plaintiff's absence. Recovery of possession of all the properties with mesne profits was claimed. The mortgage right over item No. 2 in the deed of settlement as also in the schedule to the plaint was claimed by the plaintiff as her own.

5. Defendant 1 denied the averment that plaintiff lived with Kulasekhara as his wife. It was stated that soon after Perumal's death the plaintiff abandoned her husband's house, went back to her father's house and lived there thereafter, without having ever come to or having had any enjoyment of the family properties which were in defendant 1's possession ever since Marthanda's death as at that time both the sons were minors. It was contended on these facts that the suit was barred by limitation and adverse possession. Whether any of the sons attained majority is not clear upon the evidence nor is it material for purposes of this case. That there was no division between the sons is the common case of both the parties. Plaintiff's claim to the mortgage right over item No. 2 as her own was admitted.

6. The learned Judge found that though the custom alleged by the plaintiff prevailed among the community, the plaintiff's claim to having lived as the wife of her husband's brother had no foundation in fact. The relief that was sought as Kulasekhara's widow was therefore refused.

7. The plaintiff filed a memorandum of objections against this part of the decree but it was not pressed at the hearing. The finding by the Judge therefore remains and Kulasekhara should be taken to have died unmarried.

8. The relief that the learned Judge granted to the plaintiff was, as already stated, one for partition and delivery of a share of the family properties. This relief, however, was neither sought in the plaint nor was it even consistent with the only ground on which the relief's sought were based. Kulasekhara's full ownership of the family properties as the sole surviving coparcener was and was the only ground on which the relief's in the plaint were sought. The primary relief was for recovery of possession of the properties with mesne profits, setting aside the deed of settlement, denying any manner of right or claim to defendant 1. Should defendant 1 be found to have any claim, the alternative relief asked for on that basis was prayer (c) to the effect that her claim can only be to receive maintenance from the plaintiff for which proper directions may be given by the

Court.

9. The ground on which relief was granted by the learned Judge to the plaintiff was that Kulasekhara was not the full owner of the properties and that his interests were not such as could be transmitted to an heir but that the properties survived to the plaintiff and defendant 1 as members of a coparcenaries which continued and subsisted even after the death of Kulasekhara the last coparcener.

10. This case is a simple one and is not complicated by the birth of a posthumous natural son or by a son brought in by adoption made by a widow to a deceased coparcener pursuant to a power granted by him or any permission given by the reversioners after his death.

11. The question, the consideration of which occasioned a reference of this case to this Pull Bench relates to the nature of the interest of a sole surviving coparcener over the properties of the coparcenary.

12. The texts of the Mitakshara to be considered in this connection are the following :

(a)

(Chapter II, Section I Clause 2).

(b)

(Chapter II, Section 1, Clause 30).

These are translated by Colebrooke thus :

(a) The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all classes.

(b) Therefore the right interpretation is this : When a man, who was separated from his co-heirs and not re-united with them, dies leaving no male issue, his widow takes the estate in the first instance. For partition had been premised; and reunion will be subsequently considered.

13. Does the second of the above texts apply to the widow of a sole surviving coparcener and to coparcenary properties in his possession? There have been two views; one is that the text must be strictly interpreted and its applicability confined to the specific instance of an actual division in the coparcenary and the separation of a coparcener. The other view is that the situation of a sole surviving coparcener is as though he is divided and separated from the coparcenary, there being no coparcener from whom he can separate and that therefore the text applies.

14. In - "Nagalutchmee Ummal v. Goppo Nadaraja Chetty", 6 Moo Ind App 309 (PC) (A), the sole surviving coparcener executed a Will when his wife was

pregnant, providing for both the contingencies of the child in the womb being a male as also a female. Dispositions of properties were made for certain charity, besides providing for the marriage of an existing as also the prospective daughter as well as for the maintenance of the female members of the family. The child was born alive and was a girl. After the testator's death, questions arose as regards the truth and competency of the Will. It was held by the Judicial Committee, affirming the view taken by the two Judges from whose decree the appeal was presented, based on the opinion of the pandits to whom the question was referred that the testator was competent to execute the Will and the dispositions there under took effect. The case arose in Madras. The decision proceeded on the basis that the testator had a dispositive power and transmissible interest in the coparcenary properties as sole surviving coparcener which he would not have, had his interest been that of an undivided coparcener in a joint family. The same view was taken in - "Vallinayagam Pillai v. Pachche, 1 Mad H C R 326 (B).

In - "Katama Natchiar v. The Rajah of Shivagunga", 9 Moo Ind App 539 (C), the question as regards the devolution of the self-acquired properties of a coparcener who died undivided, arose. The contention urged that there being but one text in the Mitakshara regarding devolution of the properties of a coparcener and that text being confined to the case of a separated coparcener, the properties of whatever description of an undivided coparcener would be subject to the right of survivorship of the remaining coparceners and would not devolve on his heirs was repelled. On an examination of the text their Lordships found that it did not govern the case. They therefore looked to the principles of the law and applied them. They deduced a principle from the text relating to properties obtained by a coparcener on separation from the other coparceners and stated that if such property that is property which "becomes separate" would be inherited by his heir, there is no reason why the same rule should not apply to property which from its first acquisition has always been separate".

In - "Peddammattu Viramani v. Appu Rau", 2 Mad H C R 117 (D), the facts were similar to those of the present case. The suit was by the widow of a deceased coparcener against the survivor of the two widows of the last coparcener, alleging that the defendant had no special right to be in possession of the family properties as the widow of the last surviving coparcener but that on his death the properties would survive to the remaining members of the family who take them with equal rights. The claim was repelled by Scotland, C. J. and Frere J., holding that

there can be no doubt, the family being undivided, the Timaraya was the rightful heir entitled to succeed upon the death of his brother, the plaintiff's husband, and that the proprietary right became vested in him solely, and passed to his two widows successively for life as his immediate heirs.

This decision was given after consultation with the pandits which was necessary under the law then.

15. In 1887 the Travancore High Court considered this question in a Full Bench of five Judges in - "Ramal Kooppoo Ammal v. Ammani Rukmani Ammal", 5 Trav LR 45 (E). By a majority of three against two, it was held, differing from the view taken in - 2 Mad H C R 117 (D) that the widows of all coparceners surviving the last coparcener, all take with equal rights because to them the property of the coparcenary survives as members thereof. The leading judgment of the majority was that of Krishnaswami Rao C. J-with whose view, Ormsby and Narayana Pillai, JJ. concurred. Dissenting judgments were those of Sitarama Iyer and Kunhiraman Nair, JJ. The important points that can be urged in support of the opposing views have been mentioned in the respective judgments. The decision of the Judicial Committee in - "Nagalutchmee's case, 6 Moo I A 309 (PC) (A) does not appear to have brought to the notice of the learned Judges, The points on which the learned Chief Justice mainly relies are that the death of the other coparceners except that last, cannot be considered to have a largest or more potent effect than their having relinquished their interests in the coparcenary without receiving any consideration. Relinquishment, of coparcenary interest for no consideration is and has been held to be bad and inoperative to constitute the release sole owner and that therefore the properties will continue to retain their coparcenary character notwithstanding the release or relinquishment. If so in the hands of the sole surviving coparcener the properties are coparcenary properties without the rights of the other coparceners therein being extinguished and if those rights subsist, the widows of the deceased coparceners come in for rights in respect of their shares.

There is no warrant for assimilating the death of a coparcener to a release "inter vivos" granted by him for no consideration. The proponents of the opposite view have never sought to support it on the basis that death would amount to a release. According to the law, on the death of a coparcener the properties of the coparcenary survive to the other coparceners, the widows of deceased coparceners being entitled only to maintenance. They would certainly be members of the family but they are not coparceners. The learned Chief Justice relies also upon the fact that on partition provision has to be made for the claims for maintenance of the widows as also for the marriage of daughters and that to posit that the sole surviving coparcener will become full owner of the coparcenary properties will be to negative the aforesaid rights of the female members of the family. The learned Chief Justice also says that the rights of sons to be born to the last surviving coparcener will also be negated if complete ownership is conceded to him. With great respect these considerations are adverted to without a proper understanding of the precise nature of the opposite view. What that view says is merely that the properties in the hands of the sole surviving coparcener will partake of the properties in the possession of a divided coparcener obtained at a partition. Suppose the partition does not make provision for the female members of the family. The partition would none-the-less be a partition and will take effect as such. The rights of the other members for which provision had not been made at the partition will however not be

jeopardised or affected thereby. A son born to a coparcener after partition will be a coparcener with his father and the properties obtained at the partition will be coparcenary properties of both of them. The principle underlying the text which expressly provides for devolution upon the widow in respect of separate property which is taken to belong in full ownership to a separated coparcener can, therefore, apply to the property in the hands of a sole surviving coparcener.

The learned Chief Justice also relies upon the circumstances that "Saraswathivilasa" which is a commentary upon the Mitakshara does not include the property of a sole surviving coparcener in the list of separate property. Saraswathivilasa however is not a work of authority in this part of the country - Sir Thomas Strange in the preface to his first edition of Hindu Law (pages 11 and 12) says that whatever authority it has is only over "the Northern Circars, a considerable portion of the Carnatic and generally speaking whole of the countries of which the Thailanga (Telugu) is at present the spoken language." The learned Chief Justice himself notes this circumstance in his judgment at page 43, but nevertheless relies upon it. This decision is seen followed in some later cases in the Travancore High Court. It is, however, not accepted as good law without protest even there because, we find in certain cases the majority view not followed. Being a decision of a Full Bench the Court could not openly refuse to follow it but the learned Judges got over it by saying that it is distinguishable and inapplicable to the facts. An instance is - " 20 Trav LR 35 (F)\\ The subsequent cases merely follow the earlier decisions and do not contain a fresh discussion of the conflicting points of view. In the latest decision of the Travancore High Court in - " 29 Trav L J 754 (G)", Sankarasubba Iyer J. in an elaborate judgment and on a consideration of the relevant texts, recorded his opinion contrary to the view taken by the majority in - "5 Trav L R 45 (E)" and agreeing with the view of the minority in that case.

16. "5 Trav L R 45 (E)" was followed by the Cochin Chief Court (as it then was) in - " 3 Co. L. R. 125 (H). A Full Bench of that Court in - "Puthi Ammal v. Bagirethi", 18 Co. L. R. 505 (I), overruled the decision in - " 3 Co. L. R. 125 (H)", dissented from the Travancore decision in - "Ramal Kooppoo Animal's case (E)" and followed the decision of the Madras High Court in - " 2 Mad H C R 117 (D) Reference was made in that Full Bench decision to the relevant portions of the Hindu Law and to the - "Shivagunga case 9 Moo I A 539 (C)". "Ramal Keoppoo Ammal's case (E) referred to a decision of the Baroda High Court called "Bai Ujam v. Bai Rukshmani". Except the name, no reference is given to any report and we have not been able despite our best efforts, to get at a copy of that decision. We are hence not in a position to say anything about it.

17. In Mulla's Hindu Law, Edn. 11 (1952), the property held by a sole surviving coparcener is included in the list of separate property (see para 230, No. (7) at page 263). At pages 25-26, S. 34, No. 2(ii) reads thus:

If the deceased was at the time of his death the sole surviving member of a coparcenary, the whole of his property including the coparcenary property will

pass to his heirs by succession according to the order given in Section 43 and reliance is placed upon - "Nagalutchmee"s case Moo I A 309 (PC) (A)". The heading of. S. 43 is "Order of Succession among Sapindas.

18. In Mayne"s Hindu Law, Edn. 11 (1950), at page 351, para 285, it is stated as follows:

An examination into the property of the joint family would not be complete without pointing out what property may be held by the individual members as their separate property. All property which is not held in coparcenary is separate property, and Hindu Law recognizes separate property of individual members of a coparcenary as well as of separated members. (1) Property which comes to a man as obstructed heritage (saprati-bandhadaya) is his separate property. It is not self-acquired property within the meaning of Hindu Law, though in then-incidents, there may be no difference between the two species. In - "Muttayan Chetty v. Zemindar of Sivagari", 9 Ind App 128 (PC) (J), the Privy Council concurred with the Madras High Court in holding that inherited property was not self-acquired property. (2) Property may be self-acquired; such self-acquisition may be made by any one while even in a state of Union. (3) Property which a man takes at a partition will be his separate property as regards those from whom he has severed but will be ancestral property as regards his own male issue. (4) So too, family property vested in the last surviving male member of a coparcenary will be his separate property subject to its becoming at any moment coparcenary property when he has male issue or when an adoption is made to him or to a predeceased coparcener in the family. For the purpose of Hindu Law, a posthumous son of a coparcener is as much a coparcener as a son born before his death.

The Madras High Court affirmed their view in the earlier cases in - "Bodi v. Venkataswami Naidu", AIR 1915 Mad 1077 (K).

19. It is thus clear that except for the dissentient note stated in - " 5 Trav L R 45 (E)", the view is uniform that the sole surviving coparcener is the full owner of the properties subject of course to the rights of the other female members of the family and to those of the sons to be born or adopted just as in the case of property obtained by a coparcener on actual partition. In our judgment that is the proper and perhaps the only view that could be taken in the matter.

20. The result is that on the death of Kulasekhara the properties devolved upon deft. 1 his mother, he having died unmarried. The right of the plaintiff is only that of a widow of a predeceased coparcener, that is, to get maintenance. No claim for maintenance is made in this case and the case put forward is inconsistent with a claim for maintenance. The deed of settlement (Ex. A) executed by defendant 1 in favour of defendants 2, 3 and 4 is, therefore, good as regards defendant 1"s interests in the properties, i.e., her women"s estate, and can operate subject to the rights of the plaintiff as a maintenance holder.

21. Learned counsel for the plaintiff-respondent towards the end of the argument

made a request that should we find that the plaintiff is entitled only to maintenance, relief in that regard may be given to her in these proceedings. We are unable to accede to this request because, as already stated, the case put forward is inconsistent with a claim for maintenance and at any rate without amendment which is not asked for, it is not possible to grant any relief to the plaintiff by way of maintenance, especially in view of the plea of abandonment, limitation and adverse possession, raised by the defence.

22. The decree passed by the learned Judge cannot, therefore, be supported which is set aside and the appeal allowed with costs here and in the Court below.