(1952) 11 KL CK 0013

In the High Court Of Kerala

Case No : A.S. No. 478/1124

Padmanabhan Kunjukunju and Others APPELLANT

Vs

Sankaran Padmanabhan and Others RESPONDENT

Date of Decision : 07-11-1952

Acts Referred:
Travancore Ezhava Act, 1100 — Section 28, 29, 3, 30, 32

Citation : AIR 1952 Ker 460

Hon'ble Judges : K.T. Koshi, C.J;Gangadhara Menon, J

Bench : Division Bench

Advocate : K.N. Narayanan Nair, for the Appellant; K. Narayana Panicker, for the Respondent

Judgement

Gangadhara Menon, J.—This is an appeal by the Plaintiffs from the judgment and decree of the learned District Judge of Quilon in O.S. 129

of 1120 of his Court. The Plaintiffs and Defendants 1 to 4 are members of an undivided Ezhava tarwad. Defendants 3 and 4 are the direct sisters

of Defendants 1 and 2. Plaintiffs 1 to 12 are the lineal descendants of the 3rd Defendant, while Plaintiffs 13 to 27 are the lineal descendants of the

4th Defendant. The common ancestress the mother of Defendants 1 to 4 was one Mochi Kochali who died on 2-5-1120. Items 1 to 5 in the plaint

schedule are the self-acquisitions of Mochi Kochali. On her death those properties devolved on her thavazhee consisting of Plaintiffs and

Defendants 1 to 4. Plaint item No. 6 is a property obtained on partition from the main ''tarwad''. Thus all the plaint items are ''tarwad'' properties to

which the Plaintiffs and Defendants 1 to 4 are equally entitled.

Ignoring the Plaintiffs, Defendants 1 to 4 executed a partition deed Ex. A in respect of plaint items 1 to 5 stating that they belonged to them exclusively. Pursuant to Ex. A the 2nd Defendant executed Ex. N mortgage in respect of a portion of item No. 5 in favour of Defendants 5 and 6.

The above documents are not valid and binding on the ''tarwad''. On these allegations the Plaintiffs have brought the suit to set aside Exs. A and N

and to recover their 27/31 share of the plaint properties on a partition by metes and bounds. Defendants 1 and 2 contended that plaint items 1 to 5

are acquisitions in the name of Mochi Kochali with the aid of the funds Supplied by her husband and that they constituted ''Makkathayam''

properties to which Defendants 1 to 4 were alone entitled. Thus, according to Defendants 1 and 2 the only property that was available for division

between the Plaintiffs and Defendants 1 to 4 was item No. 6.

In answer to the contentions of Defendants 1 and 2 regarding the source of the funds for the acquisition of plaint items 1 to 5, the Plaintiffs in their

replication shifted the position taken up by them in the plaint and pleaded that the funds for the acquisition of the properties proceeded not from the

husband of Mochi Kochali but from her father. The trial Court repelled this contention as also the case set up in the plaint that the plaint items 1 to

5 are the self-acquisitions of Mochi Kochali and upholding the contentions of Defendants 1 and 2 the learned Judge found that Exs. A and N are

valid and not liable to be set aside. Therefore, he passed a preliminary decree in favour of the Plaintiffs for partition, of plaint item No. 6 only.

2. It appears to us that on the basis of the findings of the learned Judge his decree dismissing the Plaintiffs'' suit in respect of plaint items 1 to 5

cannot stand. The learned Judge has found that the funds for the acquisition of plaint items 1, 2, 4 and 5 and for the putting up of item No. 3

building were supplied by the husband of Mochi Kochali the father of Defendants 1 to 4. These acquisitions were made long1 before the Ezhava

Act (Act III of 1100 of Travancore) came into force. Items 1 to 5 in the plaint schedule are therefore ''Makkathayam'' properties obtained before

the passing of Ezhava Act. Under the rules of Marumakkathayam Law governing the parties such ''Makkathayam'' properties have in the absence

of evidence to the contrary to be treated as the tarwad properties of the donees and of their thavazhee. There is absolutely no evidence to the

contrary in this case. Therefore as observed in - Aiyappan Raman v. Velayudhan Krishnan 13 Trav LJ 452 at p. 460(A):

The donees and the descendants of the female donees in the female line how-low-so-ever constituted a sub-tarwad partaking of the character and

incidents of an ordinary ''tarwad''. Naturally therefore all the members of such a ''tarwad'', including the children and grand-children, acquired-

vested rights in the property.

In - Sankaran Nair Padmanabhan Nair v. Narayani Amma Kalyani Amma AIR 1951 TC 83 (B) in which the parties were Nairs we had occasion

to consider the rules of Marumakkathayam Law relating to properties acquired by gift or bequest from the father or husband prior to the passing of

the Nair Acts of 1088 and 1100 and after discussing the case-law bearing on the subject we have come to the conclusion that the decision in - ''13

Trav LJ 452''(A) lays down the correct law in respect of Makkathayam properties. It is therefore unnecessary for us to consider in detail the

question over again in this case. The Ezhava Act (Act 3 of 1100) does not alter the above rules of Marumakkathayam Law in relation to

Makkathayam properties obtained before Act III of 1100 came into force. Section 32 of the Act relates only to ''Makkathayam'' property

acquired after the date of the passing of the Act as is evident from the section which provides:

Except where a contrary intention is expressed in the instrument of gift or bequest, if any, ''Makkathayam'' property acquired after the date of the

passing of this Act shall be liable to be divided among the wife and each of the children in equal shares.

It has also to be borne in mind that Section 3(b) of the Act makes it clear that nothing in the Act shall affect the existing rules of Marumakkathayam

Law, custom or usage, except to the extent expressly provided for therein. We are therefore of the view that items 1 to 5 in the plaint schedule are

the thavazhee properties of deceased Mochi Kochali and that Plaintiffs and Defendants 1 to 4 are equally entitled to those properties just like other

tarwad properties. It follows that Ex. A partition deed executed by Defendants 1 to 4 without junction of the Plaintiffs as well as Ex. N mortgage

deed executed by the 2nd Defendant in favour of Defendants 5 and 6 are invalid and are liable to be set aside. Therefore, we set aside those

documents.

3. But in regard to the prayer of the Plaintiffs for the recovery of their share of

the plaint properties on partition the prayer in the plaint as it stands is

not one in conformity with Sections 28 to 30 of the Ezhava Act. Under these provisions Plaintiffs 1 to 12 cannot get divided from their lineal

ascendant, the 3rd Defendant during her life time without her consent. So also Plaintiffs 13 to 27 cannot get divided from their leneal ascendant, the

4th Defendant during her life time without her consent. However, Section 30 provides that each collateral ''thavazhee'' represented by the majority

of the adult members thereof may claim an outright partition of property over which the ''tarwad'' has the power of disposal. Therefore, since the

majority of. the adult members in each of the ''thavazees'' of Defendants 3 and 4 have come as Plaintiffs praying for partition of the plaint properties

they can claim the shares that the respective ''thavazhees'' are entitled to on partition. In C.M.P. 1817 of 1952, the Plaintiffs seek to amend the

plaint accordingly. We think that in the circumstances of this case the prayer may be granted without driving the Plaintiffs to Anr. suit. Therefore,

we allow C.M.P. 1817 of 1952.

4. In the result while setting aside Exs. A and N we vacate the decree passed by the Court below and remand the case to that Court. The lower

Court will'' allow the Plaintiffs to amend the plaint as prayed for in C.M.P. 1817 of 1952. The Defendants will be permitted to file additional

written statements in respect of the points raised by the amendment and alter taking evidence, if necessary, the Court below will determine the

exact shares that the ''thavazhees'' of the 3rd Defendant and the 4th Defendant are entitled to and treating all the properties in the plaint schedule as

''tarwad'' properties liable for division the Court below will pass an appropriate decree in the case in accordance with law and in the light of the

above observations. The Plaintiff will get one-half of their costs incurred in the lower Court up till the date of the lower Court''s decree as also their

costs in this Court from Defendants 1 and 2 except the institution fee paid on the memorandum of appeal which will be refunded 10 the Appellants.

The appeal is allowed as indicated above.

