

**(1952) 07 KL CK 0023**  
**In the High Court Of Kerala**  
**Case No : C.R.P. No. 75 of 1124**

Parvathi Amma Janaki Amma

APPELLANT

Vs

Raman Pillai Govinda Pillai

RESPONDENT

**Date of Decision :** 22-07-1952

**Acts Referred:**

**Citation :** AIR 1952 Ker 241

**Hon'ble Judges :** V.S. Subramanya Iyer, J

**Bench :** Single Bench

**Advocate :** K. Sreedharan Pillai, for the Appellant; N.K. Narayana Pillai and M. Ramanath Pillai, for the Respondent

## **Judgement**

Subramania Iyer, J.—This revision arises out of an order passed by the Court below in O.S. 1053/1118 rejecting an application of the wife and children of the deceased Defendant 1 to be brought in as his legal representatives. The suit was for partition in a Nair tarwad. Plaintiff 1 was a sharer and Plaintiffs 2 and 3 are his children. The share to which Plaintiff 1 was entitled to was prayed to be delivered to the other Plaintiffs to provide for the contingency of the death of Plaintiff 1 pending the litigation. The anticipated event happened. Plaintiff 1 died pending the suit, he having been very old at the time of its institution.

2. Defendant 1 filed a written statement claiming his share separately from the rest of the members of the tarwad. In the preliminary decree that was passed, no provision was made for granting any share to Defendant 1. It was confined to the share claimed by the Plaintiffs on behalf of Plaintiff 1. Defendant 1 died after the preliminary decree. His wife and children who are his heirs sought to come in as his legal representatives in order that they may claim the share that the deceased Defendant 1 was entitled to. The application was opposed by the Plaintiffs. The Court below rejected the application on the ground that there having been no declaration of a share in favour of Defendant 1 in the preliminary decree, he was not entitled to any separate interest in the tarwad properties notwithstanding the claim made by him in his written statement for a share of

those properties. Reliance was placed for this position on a decision of the erstwhile Travancore High Court reported in - "10 TLT 778 (A)". Reference is made by the Court below to a later decision of the same Court in-"18 TLT 117 (B)", which would appear to be to the contrary effect, but the Court below got it over by stating that no final opinion has been expressed therein. The Court below in its order proceeded further to say:

Defendant 1 who had put forth a claim for his share was not present before Court on the date of preliminary decree and though he has not been declared ex parte it is stated in the decree that he did not appear before Court. Hence Defendant 1 did not press his claim and the Court did not declare his share by the preliminary decree. The Plaintiff alone has been" separated from the tarwad by the preliminary decree and hence the Petitioners have not acquired any heritable right over the tarwad properties as the legal representatives of the deceased Defendant 1.

The Plaintiffs, nor for that matter, any of the other Defendants do not appear to have opposed the claim made by Defendant 1 for a share. The impediment to the grant of the share claimed by him in his written statement is, therefore, his absence from Court on the date of the preliminary decree from which conduct the Court below infers that he did not press the claim for a share made by him.

3. On the question as to whether a declaration of intention unequivocally expressed by a person entitled to a share in the tarwad property would create a divided status between himself and the remaining members of the tarwad, thus Court has taken the view that it will, and that it is unnecessary that there should have been a declaration of his right to a share made by a preliminary decree to bring about that result. A Division Bench of this Court took the view in - "Janki Amma v. Padmavathi Animal" AIR 1951 TC 13 (C). A later Division Bench also took the same view in - "Kesava Pillai v. Krishna Pillai" AIR 1951 TC 155 (D). Indeed the position that a Defendant claiming a share in his written statement would become divided in status from the remaining members of the tarwad as a result of that declaration of intention to divide was not canvassed before me, in view of the aforesaid decisions of this Court, whatever might have been the view held by the erstwhile Travancore High Court.

4. If Defendant 1 became divided in status from the remaining members of the tarwad on account of his having filed a written statement claiming a share, then he had thereafter a separate interest in the tarwad properties which will devolve upon his heirs who are, in this case, the applicants before the Court below, and the Petitioners in this revision before this Court. In view of the fact that the claim for a share made by Defendant 1 was not opposed by the other members of the tarwad, there does not appear to have been any impediment to the grant of the relief-claimed by him. The order of the Court below shows that Defendant 1 was not declared ex parte on account of his not having appeared on the date of the preliminary decree. No reason why he was not given a decree as claimed by him is stated in the order passed by the Court below except the inference drawn by it

from the absence of Defendant 1 that he did not press his claim for a share.

5. Under the circumstances, the inference is altogether unjustified. The result is that the order passed by the Court below rejecting the application of the wife and children of the deceased Defendant 1 to come in as his legal representative cannot be supported on the ground on which it is based.

6. Learned Counsel for Respondents 1 and 2 (Plaintiffs 2 and 3) contends that because a final decree has been passed subsequently in the year 1123, the revision is incompetent. The records had been called for by this Court in this revision petition. The records reveal the fact that the said final decree was not one passed on the merits of the claim but was the result of a compromise entered into between the parties to the litigation without reference to or the concurrence of the legal representatives of the deceased Defendant 1. That compromise cannot bind the said legal representatives. A decree of the Court below passed on the basis of such a compromise cannot in the eye of law be regarded as a final decree in the sense that it is one passed pursuant to the preliminary decree and binding upon all the parties to the suit. Even if the final decree had been passed on the merits but without the legal representatives of the deceased Defendant 1 on record, that final decree would not bind them, if they are really entitled to come in as legal representatives to represent the interest of the deceased Defendant 1. In the decree passed by the Court below it is expressly recited that an application made by the wife and children of the deceased Defendant 1 had been dismissed. This may be considered as a reservation made by that Court to provide for the contingency of a higher Court taking a different view of the matter and allowing the application. The decree passed by the Court below cannot, under the circumstances, be regarded as a final decree passed in ordinary course, but is one passed with a reservation to the effect that should a higher Court take a different view of the application of the legal representatives, then the decree passed would be subject to the result of that adjudication. I, therefore, consider that the passing of the final decree in this case on the agreement entered into between the other parties to the litigation without the concurrence or consent of the legal representatives of Defendant 1 is not a bar to this Court adjudicating upon this revision petition.

7. A person entitled to get a share may claim it either before the preliminary decree or even afterwards. The omission of a sharer to make the claim before the preliminary decree will not, preclude his coming in later on and claiming the share that he is entitled to. If a sharer does come and claim before the preliminary decree but for some reason or other the claim is not granted, (not on the merits i.e. on a view that the claimant is not entitled to a share) the party is entitled to claim the share subsequent to the preliminary decree. A decision of a Full Bench of the erstwhile Cochin High Court reported in. - "15 Mad 237 (FB) (E)", discusses this matter, in great detail with reference to the decided cases of the Indian High Courts. No decision to the contrary has been cited before us. I, therefore, consider that the Petitioners before, this. Court are entitled to come in

as the legal representatives of the deceased Defendant 1 and claim the share that the deceased was entitled to.

8. The order passed by the Court below is set aside and this revision allowed.

9. I send back the records to the Court below for proceeding with the suit on the basis that the deceased Defendant 1 was entitled to a share and that the Petitioners who are his wife and children, as his legal representatives are entitled to prosecute the claim made by him in the written statement for partition and delivery of his share with all consequential reliefs in respect of that share. The decree passed on 26-10-1123 on a compromise between the other parties to the litigation will not bind the legal representatives of the deceased Defendant 1. The Court below will try the suit in the ordinary course disregarding the decree passed on the compromise without the consent or concurrence of the Petitioners which will, therefore, be not binding on them.

10. The Respondents to this revision petition are Plaintiffs 2 and 3 and Defendants 5 to 9. The records show that Defendants 1, 2 and 3 are dead. Whether Defendant 4 is dead or alive does not appear from the records. No objection was taken before me that on account of the absence of Defendant 4 on record in this revision as a Respondent the revision is improperly constituted. In the absence of that objection I consider it unnecessary to investigate the question as to whether Defendant 4 is alive or dead for purposes of this revision petition.

11. A good deal of time of mine was occupied this morning by this case as the facts had to be ascertained by rummaging the records, as much assistance could not be rendered by those concerned by placing the facts before me. Under the circumstances I make no order as to costs in this revision.