
(1950) 10 MAD CK 0020
In the Madras High Court
Case No : Second App. No. 1847 of 1947

Puzhakkal Kannan

APPELLANT

Vs

Kakkatta Keezhalan Ambu Kurup and Others

RESPONDENT

Date of Decision : 24-10-1950

Acts Referred:

Citation : AIR 1951 Mad 810 : (1951) 64 LW 318 : (1951) 1 MLJ 493

Hon'ble Judges : Raghava Rao, J

Bench : Single Bench

Advocate : C.S. Swaminathan, for the Appellant; V.P. Gopalan Nambiar, Amicus Curiae, for the Respondent

Judgement

Raghava Rao, J.—A rather interesting point has been debated by counsel before me in this second appeal & that is as to the effect Of the admitted division by metes & bounds of certain items of the property of the family of deft. 10 & his deceased brother, upon the status of the family in relation to certain other items admittedly unpartitioned.

2. The suit out of which this appeal arises was instituted by the applt. before me as. the assignee of the kanom right of deft. 10 & his deceased brother. The contesting defts. 1 to 9 are sub-kanamdars of the property who are resisting the pltf.'s right to redeem anything more than a half of the kanom right which alone belonged to deft. 10 at the inception. It is their case that that half interest which so belonged to deft. 10 did not become enlarged by "jus accrescendi" on the death of his brother because under Ex. P. 4 the two brothers became divided in status in regard to the suit items & one other item with which we are not concerned here. The learned Dist. Munsif of Badagara dismissed the suit altogether. On appeal the learned Dist. J. of North Malabar has decreed the suit in favour of the pltf. as the assignee of a half share from deft. 10 & of defts. 11 to 14 as the heirs of the deceased brother of deft. 10. The learned Dist. J., however, has not made any direction that the value of the improvements claimed by the contesting defts. 1 to 9 should be reduced by a set off of the arrears of

rent claimed on behalf of the pltf. & defts. 11 to 14. Nor has the learned Dist. J. awarded interest on the amount of arrears claimed in the suit. The pltf. accordingly appeals to this Ct.

3. It is not disputed by Mr. Gopalan Nambiar appearing as "amicus curiae" for the resps. that even if only the half interest of deft. 10 should be made the subject matter of the decree for redemption, the pltf. is entitled to the set off of the arrears & to the interest as claimed by him to which reference has just been made.

4. The real & only question for determination, therefore, is as to whether the pltf. is entitled to have redemption decreed in respect of the entirety of the suit item in his favour on the basis that with the death of deft. 10's brother, deft. 10 became entitled to the whole of the item & entitled, therefore, to make an assignment of it in favour of the pltf. That turns upon the construction of Ex. P. 4, the partition deed, as it is called, executed by deft. 10 & his deceased brother which is as follows:

"In the properties which belonged to our tarwad & which are being enjoyed by us with equal rights as we are the only existing members now, Mooli Nilam has been assigned away this day & the rights over Kotarath paramba & Mingili Nilam have been kept without being partitioned. It has been decided to partition the rest of the properties belonging to us & the details are as follows. Out of the properties described in Schs. A & B below the properties in Sch. A are allotted to No. 1 & those in Sch. B are allotted to No. 2. In future from this day No. 2 has no manner of right or claim to the Jenm, kuzhikoor, reclamation etc. rights in the properties in Sch. A & No. 1 has no manner of right or claim to jenm, kuzhikoor, reclamation etc. rights in the properties in Sch. B." It may be mentioned that the Kotarath paramba referred to in the document is the item with which we are concerned in the present suit. We are not concerned with the Mingili Nilam referred to in the document as also left unpartitioned.

5. Mr. Swaminathan, learned counsel for the applt. contended that the reference to Kotarath paramba as an item of property "which has been kept without being partitioned" suggests that the undivided status of the brothers continued in respect of it notwithstanding the division of other items belonging to the family. He also stresses the comparative smallness in value of the items divided as against the items actually left unpartitioned as a circumstance showing the intention of the parties not to get divided in respect of the unpartitioned item. In support of his contention he places reliance on a passage in "Malabar & Aliyasanthana law" by P. R. Sundara Aiyar, p. 19. The learned author there observes as follows:

"It sometimes happens that while some properties are divided, the rest are undivided. In most cases, the properties divided from the bulk of the family properties & the property left undivided is so left merely to maintain a quasistanom or to meet the expenses of the common family ceremonies &

charities. But it sometimes happens that the property left undivided is very considerable & difficult questions arise for determination as to the status of the family & the rights "inter se" of the branches. These problems are not dissimilar to the problems arising in similar circumstances under the Hindu Law. There is no textual authority in the Marumakattayam law as there is in the Hindu Law, viz., "Once is a partition made" which has given rise to the presumption in favour of a complete partition in the absence of proof to the contrary. As such & having regard to the general prohibition of partition under the former system a presumption of that nature is possibly out of place."

The learned author then proceeds to quote certain observations in a judgment of the H. C. in S. A. No. 1815 of 1911 as adequately summing up the position & winds up with the remark made at p. 20 which is in these terms:

"Where there is substantially the Intention to be divided the mere fact that some property is left undivided, would not make the family undivided in status even in respect of the property left undivided. Where the property divided bears an inconsiderable proportion to the family property or where attempt is made to keep up a nominal unity of the family merely to enhance its dignity & whatever property is left undivided is ear-marked solely for that purpose the status of the family is in substance a divided one."

I am not satisfied that there is any distinction to be drawn between a Joint Hindu family under the Mitakshara law & a Malabar tarwad with reference to the principles governing a situation like the one with which we are concerned here. As pointed out in the headnote in "Kunchi Amma v. Minakshi Amma", 59 Mad 693: AIR 1938 Mad 155, which correctly brings out the decision of the Ct. (Burn & Menon JJ.),

"The change in the law introduced by the enactment of the Madras Marumakattayam Act XXII (22) of 1933, has made the doctrine of severance of status applicable to tavazhis under the Marumakattayam law, as it is to persons under the Mitakshara law & for precisely the same reason. Under the new law, every tavazhi in a joint undivided Marumakattayam family has an indefeasible right to demand partition of its own share in the joint family property, & all the other tavazhis must submit to it whether they like it or not. Section 38 of the Act indicates that so far as a tavazhi is concerned the separation from the tarwad is effected on its claiming to take its share of the properties of the tarwad. There is thus an express provision in the Act itself that severance of status is effected when a tavazhi claims to take its share of the tarwad properties. Such a claim must be deemed to have been made when a notice demanding its share is given, or at least when a suit is filed for that purpose."

That being so, the question is, whether under the document before me now, Ex. P. 4 although not one executed by members of a joint Hindu family, the admitted division by metes & bounds of certain items of property would necessarily make the parties divided in status, or keep them still joint in regard to the

unpartitioned items. On that my attention has been drawn by learned counsel for the applt. to a ruling of a D. B. of this Ct. (Sir Alfred Henry Lionel Leach, C. J. & Rajamannar J. reported in Appavu alias Lakshmanan Pillai and Another Vs. Manickam Pillai and Others, which related to a joint Hindu family. What is ruled by the Ct. in that case is correctly & succinctly brought out in the headnote in the following terms:

"The partition of some of the joint assets does not of itself imply a division in status. In deciding whether a joint family has become divided the Ct. must naturally have regard to the terms of any instrument bearing on the question &, if the wording is ambiguous, to the subsequent conduct of the parties. The division of the income of the agricultural lands may not in itself be sufficient to evidence a division in status. Nor is the division of the outstanding or other moveable property a clear indication of a division In status. The fact that the family owned a considerable amount of Immovable property & left that completely undivided is a strong indication that the members did not intend to effect a severance especially when they agree that two of the brothers were to have charge of the future management of the family & that no brother could Independently borrow money for a family necessity."

In support of the view taken In that case, the learned Chief Justice delivering the judgment of the Ct., refers to the entire case-law on the subject beginning with "Sonatun Bysak v. Sm. Juggatsoondaree", 8 MIA 66: 1 Sar 721 PC & ending with "Ramalinga Annavi v. Narayana Annavi", 49 IA 168: 45 Mad 489: AIR 1922 PC 201. Says the learned Chief Justice after the discussion:

"There is here ample authority for the statement that the partition of some of the Joint assets does not of itself Imply a division In status..... The division of the Income of the agricultural lands is not in itself sufficient basis for the defts" contention that there is in the agreement of the 30-9-1925, clear indication of a division in statusNow, does the fact that the brothers divided the outstanding & other moveable property make any difference? We consider it does not."

The learned Chief Justice thereafter makes reference to the subsequent conduct of the parties as revealed by the evidence in the case, & arrives at the conclusion that the agreement in that case did not effect a division in status because it was one made in order to meet the situation created by the three brothers living In different places & the illness of one of them. I have, on a careful consideration of the law as laid down in this ruling, arrived at the conclusion that it must apply to the construction of the document in the case before me.

6. The document is on the whole, in my opinion, perfectly clear & does indicate the intention that the suit property must remain joint property of the brothers. May be, if the document were ambiguous in its language I should have to determine & give effect to the rule of law laid down in Mulla's "Principles of Hindu law", Edn. 10, p. 417, which crossed my mind during the course of the

argument. That principle is this: where there is evidence to show that the parties intended to sever, the joint family status is put an end to & with regard to any portion of the property which remained unpartitioned the presumption would be that the members of the family would hold as tenants in common unless & until a special agreement to hold as joint tenants is proved. I do not find anything ambiguous about Ex. P. 4 such as would justify the importation into its construction of the presumption referred to in the passage cited above. Even if the presumption otherwise applied, I should think that a special agreement on the part of the brothers to hold the item in question as joint tenants which would exclude such a presumption may be taken as sufficiently proved in the case.

7. For the reasons indicated in the foregoing I must decree the suit for redemption in respect of the entirety of the suit property with the further directions as to set off & interest indicated in an early part of this judgment. I feel highly indebted to Mr. Gopalan Nambiar, who as "amicus curiae" has with his usual thoroughness brought before me all the considerations pertaining to the case of the resps. before me. Besides drawing my attention to the case in Elayat karthiyayini Kunchi Amma and Others Vs. Minakshi Amma and Others, above referred to, he has also referred me to a case in C.T. Ramanathan Chettiar Vs. A.R.L.N.L.N. Ramanathan Chettiar, . That case however does not assist the resps. because all that that ruling says is that if a division by metes & bounds of a certain portion only of joint family properties is possible in law it is equally possible in law for members of a joint family to effect a division not by metes & bounds, but merely in status in respect of that portion of the joint family properties only. As I have indicated, that is not the question with which we are concerned here. The question here is, what effect a division by metes & bounds admittedly effected by a partition deed in respect of some items, has upon other items which are kept unpartitioned at the division evidenced by the deed. The decree of the lower appellate Ct. will accordingly be modified in the manner indicated above. The applt. will have his costs from the resps. 1 to 9 in all the three Cts. Time for redemption will be extended by three months from this date. No leave.