

(1972) 12 KL CK 0021

In the High Court Of Kerala

Case No : A.S. No's. 69, 113, 164, 169 and 394 of 1967 and 20 and 206 of 1968

S. Sankarappa Gounder

APPELLANT

Vs

K.C. Gopalan and Others

RESPONDENT

Date of Decision : 06-12-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Hindu Succession Act, 1956 — Section 7(3)

Kerala Compensation for Tenants Improvements Act, 1958 — Section 4

Citation : AIR 1973 Ker 149

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;N.D.P. Namboodiripad, J;K. Sadasivan, J

Bench : Full Bench

Advocate : K. Prabhakaran, for the Appellant;

Judgement

Krishnamoorthy Iyer, J.—These appeals arise out of O. S. 65 of 1956 on the file of the Subordinate Judge's Court. Ottapalam. The plaintiff, who filed the suit on 22-12-1956. was transposed as the 52nd defendant and the 18th defendant was transposed as the plaintiff by the order dated 8-6-1965 passed in I. A. 447 of 1965.

2. The suit as originally instituted, was for partition, and separate possession of the plaintiffs share in plaint BI to F schedule items based on the1 Madras Marumakkathayam (Removal of Doubts) Act (Act 32 of 1955). The plaintiff and defendants 1 to 13 are members of Kunnathat Matambil Swaroopam known as Mannarshat Nair Veedu. It is an ancient chieftain family. There are two sthanams attached to that family which are held by the two senior-most male members of the family and known as Moopil Sthanam and Elaya Sthanam, the incumbents being known as Moopil Navar or Valiya Nayar end Elaya Nair. There are properties attached to the two sthanams. The senior-most female member of the family is called Amma Nei-thiar who used to manage the properties of the tarwad. It is admitted that the members of the family are governed by the Madras Marumakkathayam Act, 1932 and the Madras Marumakkathayam (Removal of

Doubts) Act of 1955 (Madras Act 32 of 1955). The properties belonging to the tarwad of the parties have been partitioned in O. S, 51 of 1944 on the file of the Sub Court. Ottapalam. The plaintiff B schedule consists of immovable properties attached to the Moopil sthanam. The movables belonging to the Moopil sthanam are comprised in plaintiff D schedule. The amounts lying to the credit of Moopil sthanam in the Land Acquisition proceedings pending in the Sub Court. Palghat are comprised in the plaintiff F schedule. The holder of the Moopil sthanam on the date of the institution of the suit was the first defendant.

3. C schedule immovable properties are attached to the _ Elaya sthanam and the movables belonging to the Elaya sthanam are shown in plaintiff -E schedule. The Elava sthanee on the date of suit is the second defendant.

4. Under the Madras Marumak-kathayam (Removal of Doubts) Act, 32 of 1955 every sthanam possessing one or other of the three characteristics mentioned therein shall be deemed and shall be deemed always to have been the properties belonging to the tarwad. The suit when it was filed in 1956 was based on the provisions of the Madras Act. 32 of 1955. The validity of the Madras Act 32 of 1955 was challenged before the Supreme Court in Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, and the Supreme Court declared that the Madras Act 32 of 1955 is void and ultra vires the Constitution, The decision of the Supreme Court was rendered on 4th May, 1960. In view of that decision, the claim of the plaintiff based on Madras Act. 32 of 1955 could not have been legally sustained.

5. The first defendant, who was the Moopil sthanee died on 3-1-1960. The plaintiff then filed I. A. 163 of 1960 for emending the plaintiff claiming a share in plaintiff B. D and F schedule properties attached to the Moopil sthanam u/s 7(3) of the Hindu Succession Act. 1956. The prayer for amendment was allowed by the trial Court and that order was confirmed in revision by this Court. As a result of the amendment. C and E schedule items in the plaintiff which were properties attached to the Elava sthanam were deleted from the plaintiff. Thus, the suit confined itself to a partition of the properties which were attached to the Valiya sthanam. The personal heirs of the first defendant who are his wife and children were impleaded as defendants 31. 32 and 44 to 47. The D schedule in the plaintiff was also amended as DI schedule comprising the movable properties belonging to the Moopil sthanam.

6. The first defendant when he was the Moopil sthanee had executed leases, mortgages etc.. in respect of the private forests attached to the sthanam and also executed licences for cutting and removing trees from private forests belonging to the sthanam. These documents are referred to in paragraph 11 of the plaintiff. The plaintiff's case is that these documents are not binding on the Moopil sthanam and the plaintiff B schedule properties have to be partitioned free of those claims.

7. The learned Subordinate Judge upheld the plea of the plaintiff and passed a

preliminary decree and judgment for partition of the properties in the plaint B. DI and F schedule, item 80 in the D schedule which is an elephant and the house mentioned in the additional written statement jointly filed by defendants 9 to 18. 29 and 30 into 33 shares and for allotment of one share each to the plaintiff, defendants 2 to 17. 19 to 30, 48. 49, 52 and the share of the first defendant to defendants 31. 32 and 44 to 46 free from the rights under the documents mentioned in paragraph 11 of the plaint.

8. The appeals have been filed against the preliminary judgment and decree of the Court below.

9. A. S. 169 of 1967 is by the plaintiffs; A. S. 164 of 1967 is by the second defendant; and A. S. 394 of 1967 is by defendants 31. 32. 45 and 46; A. S. 113 of 1967 is by the 35th defendant; A. S. 20 of 1968 is by the 43rd defendant; and A. S. 69 of 1967 is by the 51st defendant.

10. The learned Judge has found that the lease in favour of the 33rd defendant (which document has not been produced in the case). Ext. A91 lease dt. 29-8-53 in favour of the 34th defendant, leases in favour of defendants 37 and 38 to 42 (which documents also have not been produced in the case) granted by the first defendant are not binding on the sthanam properties. These defendants have not objected to that portion of the decree against them which has now become final.

11. The learned Judge has also found that the licence for cutting trees granted by the first defendant to the 38th defendant in respect of 2000 acres in Attappadi Malavaram is within the competence of the sthanee and cannot be set aside. Since the period of the licence has expired the learned Judge has directed a partition of the property free from the rights created by this licence. This part of the decree is not also challenged before us.

12. Though the 34th defendant has assigned his right under Ext. A91 for a part of the property therein viz.. 100 acres to the 35th defendant by Ext B152 dated 29-8-1960 based on a contract of purchase dated 23-12-1956. the 35th defendant has not sought to uphold the validity of Ext. A91 in A. S. 113 of 1967 which the 35th defendant has filed.

13. Thus, the validity of Exts. A88. B28. All. B36. A24. B149. B170 and A9 alone are challenged in A. S Nos. 69 113. 394 of 1967 and A. S. 20 of 1968. Of these documents, Ext. A9 is a mortgage with possession and Ext. A24 is a licence granted for the cutting of trees from private forests belonging to the Moopil sthanam. The other documents are leases granted by the first defendant in respect of private forests attached to the Moopil sthanam for a term very much in excess of 12 years.

14. Ext. A88 dated 12-4-1950 is the lease deed executed in favour of the 37th defendant by the first defendant for 800 acres of private forests attached to the Moopil sthanam. The 37th defendant was on the relevant date the Karva-sthan of the Moopil sthanam. Ext. A-19 dated 23-6-1954 is the notice issued by the 31st

defendant, the wife of the first defendant to the 37th defendant demanding a transfer of the property comprised in Ext A-88 on the ground that Ext. A-88 is benami for her. The 37th defendant subsequently assigned his rights in Ext A-88 to the 31st defendant by Ext. B-167 dated 20-10-1955. In respect of GOO acres out of 800 acres in Ext. A-88, the 31st defendant assigned her right to the 51st defendant by Ext. B-164 on 24-9-1962 after the filing of the suit.

15. Ext. B-28 dated 23-7-1950 is the lease to defendants 32, 42, 44 and 45 who are children of the first defendant in respect of 2000 acres of private forests in Attappadi Malavarm. Exhibit A-II dated 15-6-1951 is a lease to the 31st defendant in respect of 600 acres of private forests. Ext. B-36 dated 5-5-1956 is a mining lease to the 32nd defendant, a son of the first defendant. It was agreed before us that in pursuance to Ext. B-36, no mining operations were done in the noncrty comprised therein and that the 32nd defendant is not claiming any rights over the property comprised in Ext. B-36. In view of this submission, it is not necessary to go into the validity of Ext. B-36.

16. Ext. A-9 dated 2-4-1954 is a possessory mortgage by the first defendant in respect of properties outstanding with the tenants from the sthanam. Ext. A-24 dated 30-5-1955 is a licence granted by the first defendant to the 32nd defendant, his son for cutting and removing trees from 20,000 acres of Private forests for a period of 10 years. Ext. B-26 dated 24-6-1955 is a licence granted by the 32nd defendant to the 35th defendant for cutting trees from 2,000 acres out of 20,000 acres comprised in Ext. A-24. During the pendency of the suit, the period of licence had expired. The Court "below granted a decree for recovery of possession of the property from the licensees on the basis that the licensees are in possession. There is no objection to this part of the decree of the learned Judge.

17. In A. S. 394 of 1967, we are, therefore, concerned with the validity of Exts, A-88, B-28, A-II and A-9. A Part of the property comprised in Ext. A-28 is conveyed to the 51st defendant by Ext. B-164. The appeal by the 51st defendant is A. S. 69 of 1967.

18. A. S. 113 of 1967 is by the 35th defendant and the subject-matter of that appeal is Ext. B-149 dated 24-6-1956 in respect of 2001 acres of private forests.

19. Defendants 31, 32, 35, 43, 46 & 51 apart from supporting the validity of the transactions in their favour, had a common contention based on Section 7(3) of the Hindu Succession Act, 1956 as amended by Section 27 of the Kerala Sthanom Properties (Assumption of Temporary Management and Control): and Hindu Succession (Amendment) Act, 1958 (Act 28 of 1958). Before advertng to the said contention, it will be advantageous to extract Section 7(3) of the Hindu Succession Act and also the said provision as amended by the Kerala Act. 28 of 1958 in its application to the State of Kerala. Section 7(3) of the Hindu Succession Act reads:

"Notwithstanding anything contained in sub-section (1), when a sthanamdar dies

after the commencement of this Act. the sthanam property held by him shall devolve upon the members of the family to which the sthanamdar belonged and the heirs of the sthanamdar as if the sthanam property had been divided per capita immediately before the death of the sthanamdar among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the sthanamdar shall be held by them as their separate property.

Explanation: For the purposes of this sub-section, the family of a sthanamdar shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of sthanamdar if this Act had not been passed.

Explanation II: The devolution of sthanam properties under sub-section (3) and their division among the members of the family and heirs shall not be deemed to have conferred upon them in respect of immovable properties any higher rights than the sthanamdar regard-ins eviction or otherwise as against tenants who were holding such properties under the sthani."

The amendment of Section 7(3) of the Hindu Succession Act in its application to the State of Kerala, was necessitated to provide for the devolution of properties attached to a sthanam in respect of which by the customary law of Mala-bar females are entitled to succeed as sthanis and also to bring within the ambit of legislation the Mappila Marumak-kathayam tarwads.

20. The submission on behalf of the appellants claiming under the documents executed by the first defendant was threefold. The first was that Section 7(3) of the Hindu Succession Act as amended by the Kerala Act. can apply only to those sthanams where all the members of the family whether male or female are entitled to become sthanees. The provision now in force, it is argued, cannot apply to a case where among the members of a family either the male or female member has got the exclusive right to become sthanee. In our view, there is little substance in this contention. Section 7(3) deals with sthanam properties and provides for their devolution among the members of the family of the sthanamdar and his personal heirs. In view of the customary law in Malabar whereby it is open to a female member of a family to become a sthanee. it was felt that Section 7(3) of the Hindu Succession Act was incomplete in the matter of providing for devolution of all sthanam properties. It was this reason that prompted the amendment of Section 7(3) of the Hindu Succession Act by Kerala Act 28 of 1953. If the plea advanced on behalf of the appellant is accepted almost all the sthanams in existence in Malabar will fall outside the operation of Section 7(3) of the Hindu Succession Act as amended in its application to the State of Kerala and thereby the purpose of the Act itself will be defeated. We. therefore, feel no hesitation to repel this ground.

21. The second submission was that in view of the legal fiction embodied in Section 7(3), only those sthanam properties held by the sthanee immediately

before his death are liable to be divided. It was argued that, according to the said provision, a notional partition has taken place among the sthanamdar and the other members of his family in respect of the then existing properties alone and if so. the parties can get only a share subject to all the alienations or leases granted by the sthanamdar prior to the date of the notional partition. The fiction of a notional partition in Section 7(3) of the Hindu Succession Act is only for the ascertainment of the per capita share which the members of the family and the personal heirs of the sthanamdar will be entitled to. In interpreting Section 7(3) of the Hindu Succession Act, a Full Bench of this Court in *Asst. Controller v. Ealakrishna Menon* 1967 KLT 148 = AIR 1907 Ker 210 FBI observed at page 154:

"The first portion of Sub-section (3) of Section 7 clearly shows that what passes on the death of a Sthanamdar is the whole of the Sthanam property held by him. It says:

"When a sthanamdar dies after the commencement of this Act. the sthanam property held by him shall devolve upon the members of the family to which the sthanamdar belonged and the heirs of the sthanamdar."

The second portion of that sub-section has nothing to do with the extent of the property that passes on the death of a sthanamdar. It only deals with the distribution of that property, the distribution directed being "as if the sthanam property had been divided per capita immediately before the death of the sthanamdar among himself and all the members of his family then living." The device of the "as if" should be confined to the purpose for which it was intended."

The above decision was confirmed in appeal by the Supreme Court in the decision reported in *M.K. Balakrishnan Menon Vs. The Assistant Controller of Estate Duty-cum-Income Tax Officer, Ernakulam*, where their Lordships held that the statutory fiction embodied in Section 7(3) of the Hindu Succession Act, 1956 should be confined for the purpose of choosing the heirs and it cannot be extended further. In *The Inspector Assistant Commissioner of Agricultural Income Tax and Sales Tax, Kozhikode Vs. V.K. Ramunni Panikkar, Receiver of Zamorin's Estate*, their Lordships of the Supreme Court following the decision in *M.K. Balakrishnan Menon Vs. The Assistant Controller of Estate Duty-cum-Income Tax Officer, Ernakulam*, observed at page 855:

"Section 7(3) of the Hindu Sucr-es-sion Act embodies a fiction. The purpose of that fiction was to gradually abolish the sthanams and to provide for the devolution of the sthanam properties on the members of sthanom tarwad except as regards one per capita share which the personal heirs of the sthanam- dar are to inherit as the heirs of the sthanamdar."

In view of these decisions, we cannot accept the contention that S. 7 (3) only provides for the devolution of those properties of the sthanam which the sthanamdar had immediately before his I death.

22. The next submission was based on the words "sthanam property held by

him", in Section 7(3) of the Hindu Succession Act. It was argued that when a property is alienated or leased by a sthanee even in excess of his powers such property cannot be considered to be sthanam property held by sthanamdar and that property falls outside the scope and ambit of Section 7(3) of the Hindu Succession Act. We cannot agree, as in our view it is not necessary that because of the words "held by him" in Section 7(3) of the Hindu Succession Act the sthanee should have actual control over the sthanam properties at the time when the devolution based on Section 7(3) of the Hindu Succession Act opens.

23. The plea of the counsel for the appellant that the words "sthanam property held by him" in Section 7(3) include only those sthanam properties which are in the actual or constructive possession of the sthani or at least those which can be dealt with by him cannot be accepted. Those words do not indicate that the ascertainment of the sthanam properties has to be lost before the death of the sthanamdar. The scope of Section 7(3) of the Hindu Succession Act is not to validate all the unauthorised alienations or imprudent transactions of sthanam properties by a sthani. The effect of accepting the submission of the appellant is to give a charter to the sthanis in office on the date of the Hindu Succession Act to unlawfully deal with the sthanam properties and thereby deprive the statutory heirs of their legitimate shares therein. We do not think that is the intention of the legislature when it used the words "sthanam property held by him" in the section. The word "held" only connotes the existence of a legal title in the properties of the sthanam and nothing more.

24. The estate taken by a sthani in the sthanam property is not absolute. He has no unlimited power of alienation of the sthanam property, though he is entitled absolutely to the income accruing therefrom during his life-time. But it has been judicially recognised that he has however the power of charging the sthanam property or alienating the same when it is necessary or beneficial to the sthanam. The fact that by an unauthorised alienation, the alienating sthani becomes incapable of deriving from his grant by applying the principle of estoppel does not mean the extinguishment of the right of the sthanam over the sthanam property. The disability of the alienating sthani to get back the property overlooking the alienation is because of the operation of the principle of estoppel, which cannot apply to the statutory heirs u/s 7(3) of the Hindu Succession Act as they do not claim through the sthani. So long as the right of the sthanam over the sthanam property is not extinguished by an unauthorised alienation, the said property continues to be sthanam property held by the sthani within the meaning of Section 7(3) of the Hindu Succession Act. The improper alienation will not divest the sthanam or the successor sthanees of their right over the sthanam property. This principle can be well brought out by a simple illustration. Suppose a sthani alienates only his right of enjoyment over the sthanam property during his lifetime after the Hindu Succession Act came into existence. It will not be possible then to contend because the sthani is not in possession of the property at the time of his death it is not a property held by him within the meaning of Section 7(3) of the Hindu Succession Act. The very fact that he has alienated

only his life-interest shows that after his death, the property comes back to the sthanam IP be enjoyed by the successor sthani.

25. The attempt of learned counsel for the appellants in A. S. 394 of 1967 to interpret the words "sthanam property held by him" in Section 7(3) of the Hindu Succession Act in the light of the decision in Mangal Sineh v. Rattno. AIR 1967 SC 1786 cannot stand scrutiny. That was a case which Interpreted Section 14(1) of the Hindu Succession Act. the wording of which is entirely different from that of Section 7(3) of the Act.

26. It was then contended relying on Explanation II to Section 7(3) introduced by Act. 28 of 1958 in its application to the State of Kerala that the statutory heirs u/s 7(3) of the Hindu Succession Act cannot have any higher rights in the property than what the sthanamdar had at the time of his death and if at the time of the death the sthanamdar had no right to get rid of his own alienations and recover possession of the property, the statutory heirs u/s 7(3) cannot exercise that right. We do not think that this submission is justified by the wording of Explanation II to Section 7(3) of the Act The said Explanation reads:

"The devolution of sthanam properties under sub-section (3) and their division among the members of the family and heirs shall not be deemed to have conferred upon them in respect of immovable properties any higher rights than the sthanamdar regarding eviction or otherwise as against tenants who were holding such properties under the sthani."

The ambit of the above Explanation Is not so wide as it is attempted to be construed by counsel for the appellant. It deals with the right of the successors to evict tenants who are holding the sthanam properties under the sthani. If on the basis of a prudent lease granted by a sthani during his lifetime on account of any statute legislation the lessor sthani was prevented from recovering possession of the property from the tenant, the disability may be there in the case of the statutory heirs also. It is not necessary to express a final opinion on that aspect for the purpose of this case. Suffice it to say that Explanation II of Section 7(3) of the Hindu Succession Act has nothing to do with the rights of the statutory heirs to get rid of unauthorised alienations or imprudent leases executed by a sthani in respect of a sthanam property when he was the sthanam holder. We. therefore, repel all the contentions based on Section 7(3) of the Hindu Succession Act.

27. We shall now take UP the validity of Ext. A-9 mortgage with possession and also the leases. Exts. A-88, B-28. A-II. B-149 and B-170. Before considering the validity of these documents. it is necessary to note the financial position of the sthanam at about the time when these documents were executed. It is brought out in evidence that the sthanam possessed of more than a lakh and odd acres of forest lands, besides other properties which yielded an annual income of 16000 parabs of paddy and Rs. 60,000/- every year, Ext. A-48 is the partition deed in the 31st defendant's tarwad in which she has been allotted only a sum

of Rs. 500/- in cash. This shows that the 31st defendant was not possessed of any immovable properties of her own.

28. Now we shall take up Exhibit A-9. the usufructuary mortgage with possession dated 8-7-1954 in favour of the 31st defendant, the wife of the first defendant for Rs. 18,000/- in respect of certain properties which are outstanding with tenants on the date of Ext. A-9. The rent due from the tenants for the properties comprised in Ext. A-9 was 1955 paraahs of paddy. The 31st defendant has been directed to collect these amounts and appropriate 1260 16 nazhi [paraahs towards interest on the sum of Rs. 18,000/-. She is also directed to pay Rs. 300/- -by way of revenue of the pro- perty every year for which she has been directed to appropriate 300 paraahs of paddy. The purappad payable under Ext. A9 to the first defendant is 395 paraahs of paddy per annum. Exts. A27 and A34 are the account books of the sthanam for the years 1-4-1952 to 31-3-1953 and 1-4-1953 to 31-3-1954 produced to show that there has been substantial balance standing to the credit of the sthanam at the end of these years and to prove that there was no necessity to borrow any amount for the benefit of the estate by charging the corpus of the sthanam property. It is not necessary for considering the validity of Ext. A9 to examine the question whether there was any surplus remaining with the sthanam on the basis of Exts. A27 and A34. It is significant that the necessity for the borrowing is not mentioned in Ext. A9. It was also not proved by any evidence as to the necessity for the borrowing under Ext A9. The interest for the amount due under Ext. A9 as per the terms in the document will come to about 30 to 35% per annum. There is also no evidence to prove the source from which the 31st defendant could have made up the amount mentioned in Ext. A9. There was an attempt to prove that this amount was advanced by 31st defendant from the sthanam on the basis of promissory notes executed by her. But in the absence of any evidence to show that the 31st defendant had any independent source of money and also because of the absence of any case that any income from the sthanam property had been gifted to the 31st defendant by the first defendant, we need not examine the question whether any consideration was really paid under Ext. A9. Assuming that Ext. A9 is supported by consideration, it is necessary that benefit to the estate has to be proved. The law is well settled in view of the decision of the Supreme Court in Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, . that to uphold an alienation by a sthani of immovable property belonging to the sthanam. there should be legal necessity or benefit to the estate. In Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, . Subba Rao, J. speaking for the Court has observed at page 1102 thus:

"The legal position of a sthanee is equated to that of a Hindu widow in that he represents the estate for the time being and he can alienate the properties for necessity or for the benefit of the estate. Unlike a Hindu widow, the successor to a sthanee is always a life-estate-holder."

The burden to prove that Ext. A9 is for necessity binding on the sthanam or for

the benefit of the sthanam is on the 31st defendant. We have to say that the evidence to prove benefit or necessity to the sthanam is absolutely wanting in this case. We, therefore, agree with the learned Judge in holding that Ext, A9 is not binding on the sthanam or the euc-cessors of the sthanam property.

29. Out of the leases that are questioned in this case. Exts. A88 and All are in favour of the 31st defendant while Ext. B28 is in favour of defendants 32. 44 and 45. As we have already said. 31st defendant is the wife of the first defendant and defendants 32. 44 and 45 are his children. Before we consider the question whether these lease deeds have been executed by the first defendant as a prudent manager of sthanam property, we have to make certain general observations which may be relevant in considering the validity of Exts. B149 and D170 also.

30. It is a general principle of law that, a person cannot confer a better title on another in respect of immovable property than what he himself possesses. Normally, therefore, a lease executed -by the sthani in office must terminate with his life and it cannot be binding on the successor sthani. The question whether when a lease deed is executed for a term in exercise of the right of prudent management of the sthanam properties and before the expiry of the said term, the lessor sthani dies, whether the remaining term will be binding on the successor [sthani need not engage our attention for I the purpose of this case. Ext. A88 which is dutcd 12-4-1950 is in respect of 800 "acres of private forests. Ext. All which is dated 15-6-1951 is in respect, of GOO acres of private forests executed in favour of the 31st defendant. Ext. All is for 24 years and the purpose of the lease is for effecting plantation such as rubber, tea. coffee, pepper and cardamom. Under Exf. All. there is a payment of Rupees 1200/- by way of premium. In Ext. A88, there is a term of 24 years coupled with an option of renewal for another term of 24 years. The document stipulates a payment of Rs. 4,000/- bv way of premium. Sanction from the District Collector is necessary for leasing private forests under the provisions of the Madras Preservation of Private Forests Act. The sanction obtained from the District Collector for the execution of Exts. All and A8 has not been produced in the case. In Ext. A8, there is no mention of any sanction having been obtained for the granting of the lease. But in Ext. All. it is stated that the necessary sanction has been taken from the Collector for the granting of the lease. The properties described in the schedule in Exts. All and A88 comprise a very large area from out of which the properties leased have to be ascertained after the necessary survey operations. There is no evidence to show that any such survey operation was done at the instance of the 31st defendant and the properties mentioned in Exts. A88 and All as having been leased have been demarcated. At about the time when these leases were granted, the first defendant was about 75 or 80 years old. The long term for which those leases have been granted coupled with the near relationship of the parties shows that these leases have not been granted in exercise of prudent act of management by the sthani. The periods mentioned in these documents are so long that they are more in, the nature of alienation of sthanam property with the

knowledge that those properties may not be available to the successor sthani for being enjoyed. We, therefore, agree with the learned Judge that Exts. A88 and All cannot be binding on the sthanam or the heirs u/s 7(3) after the death of the first defendant.

31. What we have observed in regard to Exts. A88 and All must apply to Ext. B28 also. We, therefore, hold that Ext. B28 also cannot bind the statutory heirs u/s 7(3) of the Hindu! Succession Act.

32. We shall now take up Ext. B149 in favour of the 35th defendant, end Ext. B170 in favour of the 43rd defendant. Ext. E149 is in respect of 2001 acres of private forests in the Attappadi Malavaram. Ext. B149 is dated 24-6-1956 and Ext. E170 is dated 24-3-1951. The schedule attached to these documents show that the properties leased have not been identified. The responsibility is cast on the lessees to survey these properties-end then demarcate the lands leased within a particular time mentioned in these documants. The purpose of those leases is also to effect plantation. At the time of the execution of these documents, it is not disputed that the first defendant was very old. But considerable stress was laid by the counsel appearing both for defendants 35 and 43 to show that these documents ere in the ordinary course of management of sthanam properties and some discretion has to be given to the sthani in the management of the sthanam property and in considering the question whether these leases are prudent acts of management, the Court should not scrutinise these transactions very closely. It was also pointed out that the properties covered by these transactions are so insignificant when compared to the properties which the sthanam was holding at the relevant time. It was also submitted that the only mode of enjoying private forests in Malabar area especially attached to sthanam is by granting permission to cut and remove trees or by leasing those lands. We do not think that these arguments are open to doubt.

33. But taking into account the recitals in the leases granted to the 35th defendant and the 43rd defendant, it will not be possible to hold that they are prudent acts of management. Some emphasis was laid on the fact that in the properties comprised in the leases in favour of defendants 35 and 43. the first defendant had already granted permission in favour of strangers to cut and remove trees. That license was in force on the date when leases were granted to the 35th defendant and to the 43rd defendant It was not contended -before US that the lessees in Ext. B170 will have no right to cut and remove trees from the property comprised therein. In the case of Ext. E149. there was a term of 9 more years for the licence to cut and remove trees to expire. In Ext B149 also after the expiry of that licence, the lessee therein will have the right to cut and remove trees. Even if the granting of leases and the licence to cut and remove trees from private forests are the normal mode of enioyment of private forests, it is necessary for the lessees to prove that in the circumstances in which these documents have been executed they ere prudent transactions executed by the

"first defendant. It is admitted that the first defendant was very old and weak. Though there was an attempt to show that the first, defendant on the relevant date was of unsound mind, the learned Judge has not accepted that case. We also agree that evidence is wanting in this case to show that the first defendant was of unsound mind on the relevant date. But that does not mean that these transactions are valid. The first defendant was old, bald and infirm and surrounded by defendants 31, 32 and 42 to 46 who have taken advantage to get leases. The burden is heavy on defendants 35 and 46 to show especially because of the long term for which these leases have been granted that they are prudent acts of management. The submission on behalf of defendants 35 and 43 was that when the purpose of the lease was to effect plantation upon the property, normally there should be such long terms. But the condition in these leases is that after the expiry of these 48 years improvements will have to be paid to the lessee before the properties are surrendered. There is no evidence in this case to show that whether the first defendant was on the relevant date apprised of the quantum of improvements which the sthanam has to pay for taking back the property. In view of the large extent of the property in which the lessees have been given permission to effect improvements, the value of improvements will be enormous with the result that the successors of the first defendant will be effectively deprived of getting back the property as it is not pointed out that the sthanam will be in such financial position to redeem these properties. The clause in the lease deed is only to the effect that if the property is abandoned by the lessee, no value of improvements need be paid. There is no recital in Ext. B149 that after the expiry of the term therein, the lessee will not be entitled to any value of improvements if there is a demand by the lessor for surrender of possession of the property. The learned Judge has found that neither the 35th defendant nor 43rd defendant has conformed to the recitals in the respective lease deeds regarding the survey and identification of the properties leased under Exts. B149 and B170. The 35th defendant has produced Ext. B153, the survey plan alleged to have "been signed by the first defendant and handed over to the 35th defendant. In our view, it is not necessary to enter a finding as to the genuineness of Ext. B-153 as we have already expressed the view that Ext. B149 is not binding on the sthanam and the plaintiff and the other heirs in this case. Though it is not possible to hold that the first defendant has accepted the location of the property in Exts. B149 and B170, there is considerable evidence to prove that both the 35th defendant and the 43rd defendant have surveyed the [properties within the boundaries mentioned in the respective documents and have taken possession of portions of the same and effected improvements in some portions. P. W. 1 in his evidence has admitted that the officers of the 35th defendant had been to the property and conducted survey operations. D. W. 4, 43rd defendant, has also stated that he is in possession of the properties comprised in Ext. B170. Ext. A110 is the administration report for the year 1956 to 1957 of the 35th defendant. There is a short paragraph in page 15 of Ext. A110 to the effect that the survey operations for the purpose of identifying the 2001 acres in Ext. B149 have been almost completed. Probably, even though the

plan has not been accepted by the first defendant, the fact remains that the 35th defendant had demarcated the portion comprised in Ext. B149 and taken steps for improving the same even during the year 1956-57. Similar is the position regarding the 43rd defendant. In view of this, it was argued that these defendants have effected considerable improvements in the property the value of which they are entitled to get in case they are liable to be evicted. The learned Judge has disallowed the claim for improvements advanced by defendants 35 and 43 both on the basis of Section 51 of the Transfer of Property Act and under Act 29 of 1958. No doubt, in the appeal filed by defendants 35 and 43 though this finding of the learned Judge has been objected to, the claim of value of improvements had not been valued and court-fee paid. But we do not think that we should be so technical as to disallow the claim for improvements advanced by these defendants on the mere ground of non-payment of court-fee, if otherwise, their claim can be sustained under law.

34. Section 2(d) of Act 29 of 1958 defines "tenant," Section 4 of the Act provides that every tenant shall on eviction be entitled to compensation for Improvements which were made by him or his predecessor-in-interest. Section 2(d)(i) includes a person who, as lessee, sublessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee, or sub-mortgagee of land, is in possession thereof and clause (iii) includes a person who comes into possession of land belonging to another person and makes improvements thereon in the bona fide belief that he is entitled to make such improvements. The first defendant cannot during his lifetime recover possession of the properties comprised in the lease deeds in view of the term. Even if he is entitled to recover possession of those properties, he is answerable to the lessees for the improvements effected by them. In view of these circumstances, we can safely conclude that the improvements were made by defendants 35 and 43 in the bona fide belief that they are entitled to make such improvements in the properties comprised in Exts. B149 and B170. If so, they are entitled to be paid the value of improvements u/s 4 of Act 29 of 1958 at the time of eviction. But the leases in favour of these defendants were granted subject to the licences for cutting and removal of trees. If for the purpose of effecting plantations after the expiry of these licences, the lessees have cut and removed the trees from the properties they are liable to the sharers to account for such trees, and the net value from those trees received both by defendants 35 and 43 will have to be finally adjusted in their claim for improvements in the properties. We, therefore, hold that defendants 35 and 43 are entitled to claim value of improvements effected in the property subject to adjustments after rendition of accounts as stated above. This enquiry will be conducted in the execution proceedings after the passing of the final decree.

35. Counsel for the appellant In A. S. 113 of 1967 next contended that In the suit which is for partition and recovery of the plaintiffs share, the Impugned alienation and the leases can be set aside only in respect of 1/31 share belonging to the plaintiff and the decree for partition and the allotment of the shares to the

defendants free from these documents cannot be sustained, and in support of this proposition, relied on *Koraprolu Veerabhadrayya Vs. Jajala Seethamma and Others*, . The right of a co-tenant or a co-sharer to recover possession of the co-ownership property from a stranger in adverse possession to all the co-owners was not disputed at the Bar. On the other hand, the decision in *Koraprolu Veerabhadrayya Vs. Jajala Seethamma and Others*, . relied on by the appellant's counsel also confirms this proposition. In that decision, the learned single Judge of the Madras High Court observed at page 239:

"Where a tenant-in-common sues to recover possession of the entire property, it may be open to him to join; other tenants in common as parties to the suit and claim to recover joint possession on behalf of himself and the other co-tenants. But where a tenant-in-common only sues to recover possession of his share making the other co-tenants parties to the suit, the question is, will it be open to the other co-tenants to claim and recover possession of their shares? No doubt for the delivery of possession of one-sixth share a partition may be incidental and for that purpose the other tenants-in-common may be proper parties to the proceeding, the actual division to be effected -being ancillary relief to be given to the plaintiff. The suit against a stranger in adverse occupation of the property being in substance one in ejectment he would certainly be not interested in the claim for partition among the co-tenants. His defence against each of the tenants-in-common may be different. Some of the tenants-in-common may be adults and some minors. It may be that the claim on the part of the adults to recover their shares may be barred by limitation whereas the claim on behalf of the minors may not."

In a suit for partition, every sharer-defendant is in the position of a plaintiff. It is open to that sharer to claim his share in the suit without putting himself to the trouble of bringing a separate suit for partition of his share. In such circumstances, if a defendant-sharer in his written statement has avoided an alienation impugned by the plaintiff, we do not find any reason why relief should be disallowed to that defendant for a share free of the alienation. We find it difficult to accept the reasoning of the learned single Judge in *Koraprolu Veerabhadrayya Vs. Jajala Seethamma and Others*, . In the case before us, all the defendants-sharers have claimed their share in the property free from the documents challenged by the plaintiff. The sharers-defendants have also stated that the mortgages and the leases objected to by the plaintiff are not binding on the estate. We are therefore, of the view that the plea of the counsel for the appellant in A. S. No. 113 of 1967 is devoid of substance.

36. Counsel for the appellant in A. S. 394 of 1967 contended that his parties are entitled to benefit under S. 43 of the Malabar Tenancy Act and this has to be relegated to the final decree proceedings. The suit was instituted in 1956 when the Malabar Tenancy Act was in force. There was no contention based on Section 43 of the Malabar Tenancy Act, It has been founded by us and also by the Court below that the leases in favour of the appellants in A. S. 394 of 1967 are not

binding on the sthanam and they are not prudent acts of management. In such cases, there is no scope at all for applying Section 43 of the Malabar Tenancy Act.

37. Counsel for the appellants in A. S. 394 of 1967 then advanced special claims in the" house in Palghat belonging to the sthanam. His first complaint was that this property has not been scheduled to the plaint. The 18th defendant when he filed the written statement before he was transposed as the plaintiff had included the building in Palghat as a partible asset belonging to the sthanam. The submission by the appellants in A. S. 394 of 1967 was that even after transposition the 18th defendant had not chosen to include this property in the plaint schedule. We do not think that its non-inclusion in the plaint schedule is a ground to hold that this Palghat building is not a partible asset belonging to the sthanam. The appellants in A. S. 394 of 1967 advanced special rights over this building on the basis of a Mun-pattom Ext. A10 executed by the first defendant. Ext. A10 provides for a rent of Rs. 30/- per year. It is dated 4-9-1956. As we have already held in respect of other transactions Ext. A10 cannot have any force after the death of the first defendant. On the basis of Ext. A10, therefore, the 31st defendant cannot advance any special rights over this building in Palghat.

38. Lastly, the counsel for the appellants in A. S. 394 of 1967 advanced a contention that in the final partition, an equitable direction has to be given by this Court for allotment of this building to the share of the 31st defendant. This prayer was hotly contested by counsel for the plaintiff on several grounds including the one based on the improvements effected to this building by the Receiver in possession of the property by spending a substantial sum of Rupees 12,000/-. We do not want to express any final opinion on this matter except to permit the appellants in A. S. 394 of 1967 to raise their plea for an equitable direction for the allotment of the residential building in Palghat in the final decree proceedings. When such a claim is raised, the lower Court will dispose of the same on the merits after hearing objections of the sharers in the property. We make it clear that we are not expressing any opinion at all one way or other on the claim of the appellants in A S. 394 of 1967 for an equitable allotment of this building to their share.

39. The next ground raised by the appellants in A. S. 394 of 1967 relates to a High School in B schedule items 759 and 763. This is one of the grounds in A. S. 169 of 1967 by the plaintiff. The learned Judge has after finding that the school belongs to the sthanam left the question of management of the school to be decided by the committee which is now functioning to manage this school. The discussion of the learned Judge is in paragraph 123 of his judgment. The school is situated in the property belonging to the tarwad of the parties. A portion of the same was taken on lease by the then sthani. The leasehold right in respect of the remaining portion of the property was taken assignment of by the sthanam from strangers. It has been proved in this case that the school building was constructed in 1925 by the then sthani. In 1929. the school was surrendered to the Malabar District Board. After some time the District Board stopped

conducting this school. The first defendant then filed O, S. 199 of 1941 against the Malabar District Board in respect of the school which ended in a compromise. As a result of that compromise, the first defendant got back the school and started running the same. The above facts clearly show that the High School situated in B schedule items 759 and 763 belonged to the sthanam. During the lifetime of the first defendant, he had constituted a society consisting of himself, the 31st defendant and others including the Headmaster of the school evidenced by Ext. B64 memorandum of association for conducting the school. The society was registered in 1950. and the society was recognised by the Education Department. The first defendant was functioning as the correspondent for some time. Even during the lifetime of the first defendant, the 31st defendant was made the President and she was functioning as the correspondent But when once it is found that the school belongs to the sthanam the society which was constituted by the first defendant can have the legal status of only his agent for conducting the school and with the death of the first defendant, there is a termination of that agency and the conduct of the school must revert back to the statutory heirs u/s 7(3) of the Hindu Succession Act. The learned Judge, therefore, has to frame a scheme for the purpose of running the school. He should not have left the matter to be decided by the society constituted under Ext. B64. We, therefore set aside the directions given in paragraph 123 of the lower Court's judgment and direct the learned Judge to frame a scheme in the final decree proceedings for the conduct of the High School in plaint B schedule items 759 and 763 after taking into account all the objections of all the sharers.

40. In respect of the school, there is a claim by the 31st defendant that she had spent Rs. 75,000/- for effecting improvements. We do not find any acceptable evidence to support this claim.

41. Before leaving this part of the case, it is necessary to mention about the National Saving Certificates taken in the name of the first defendant which now stand in the name of the first defendant as President of the society and correspondent of the school in respect of a sum of Rs. 20,000/- which has been deposited with the Department as security for the conduct of the school. Those certificates which were originally in the name of the first defendant were produced in Court as a result of the inventory that was prepared in pursuance to the orders issued by the Court and those documents were got back by the 31st defendant and they were cashed and renewed in the name of the 31st defendant and produced back in Court. But it is seen that the 31st defendant has collected interest due on the National Saving Certificates - according to the plaintiff, this interest comes to BK. 8,000/-. while according to the 31st defendant it comes only to Rs. 5,000/-. One of the grounds in the plaintiff's appeal is that the 31st defendant should be called upon to account for the interest received on these National Saving Certificates. The learned Judge has found it unnecessary to give any direction regarding this matter, and he says that since this is a matter relating to the administration of the school this question also will be dealt with by the society. The discussion of the learned Judge is con-

tained in paragraph 124 of his judgment. We do not agree with the finding of the learned Judge. This question also will be considered afresh in the final decree proceedings along with framing of the scheme for the management of the school.

42. In view of our finding that the society constituted by the first defendant cannot have any legal existence after his death, counsel for the plaintiff prayed for some interim directions till the passing of the final decree by the Court below for the management of the High School. We give liberty to the plaintiff to move the lower Court for such interim directions. The lower Court will pass appropriate orders after hearing parties who are interested in this matter.

43. Another ground mentioned in A. S. 164 of 1967 relates to accountability of the several parties in possession of the sthanam properties on the basis of the documents executed by the first defendant. The finding on this matter by the learned Judge is not very clear. The claim of the plaintiff is that there should be a direction for accounting from 3-1-1960, the date of the death of the first defendant. Counsel for the appellants in A. S. 394 of 1967 objected to this claim for accounting on the ground that if at all accounting is directed, it can only be in respect of the plaintiff's share in the properties because against the decree of the Court below most of the sharers have not filed appeals and even in the appeals filed by some of the sharers, this decree of the learned Judge has not been contested. In view of Order 41, Rule 33, Civil P. C., we do not think that any elaborate discussion is necessary for the purpose of showing if the claim of the plaintiff is sustainable. The benefit of that finding must enure to all sharers in the property even though they have not filed appeals. *Nirmala Bala v. Balai Chand*, AIR 1065 SC 1874 on which counsel for the appellant in A. S. 394 of 1967 relies enunciates the principles for applying Order 41, Rule 33. It has been stated by their Lordships that if a finding is set aside on a ground common to the appellant as well as to the non-appealing parties, then the benefit of the decision must be available to all because of the wording of Order 41, Rule 33. This is made clear by the illustration to that provision itself. We therefore, take the view that even though appeals have been filed by other sharers, if it is found that there is a liability to account on the part of the person in possession of the property that must enure to the benefit of all the sharers. On the question of accounting, we have provided for defendants 35 and 43 to render accounts for the cutting and removal of trees from the properties belonging to the sthanam. Similarly we have to hold that the appellants in A. S. 394 of 1967 will be liable to render accounts for the income of the sthanam properties in their possession from 3-1-1960. This enquiry will be done in the final decree proceedings.

44. Then there remains only A. S. 169 of 1967 the appeal by the second defendant. This relates to the sum of Rs. 50,000/- which has been paid to the second defendant on the basis of the voucher Ext A70. The contention on behalf of the plaintiff is that this payment was made in view of the share of the second defendant in the properties attached to the Valiya Sthanam whereas according to the second defendant, it is an ex gratia payment given to him in consideration of

withdrawing the original petition that he had filed in the High Court The dispute between the parties in regard to this amount of Bs. 50,000/-has been discussed by the learned Judge in paragraphs 110 and 211 of his iudg-ment. We are constrained to observe that there is no proper consideration of this matter taking into account the various documents and also the oral evidence touching this question. That apart there was an application by the second defendant to be examined on commission. One of the reasons given by the learned Judge to bold this point against the second de-fendant was because of his Ron-examination. His application for being examined on commission was rejected. We have heard counsel at considerable length on this aspect We feel that an opportunity has to be granted to the second defendant for his being examined and we also feel thst a mere detailed examination of the question as to the circumstances in which the sum of Rs. 50,000/- was paid to the second defendant is necessary. Counsel appearing on behalf of the second defendant submitted before Us that in view of the ailment of the second defendant, he may be allowed to be examined on commission. We set aside the finding of the learned Judge in regard to the nature of the payment evidenced by Ext. A70 and we direct the lower Court to reconsider this question afresh in the final decree proceedings. The second defendant's counsel will file a statement in the lower Court mentioning a date for the examination of the second defendant on commission in his residence at Palghat within two months from the date of receipt of records in the trial Court. When such a statement is filed the lower Court will appoint a commissioner and will give necessary direction to the second defendant to deposit the batta and direct his being examined on commission in his residence at Palghat on the date mentioned in that statement.

45. Appellants in A. S. Nos. 69, 113 and 394 of 1967 and A. S. No. 20 of 1968 claimed benefit under Sections 7 and 7(d) of Act 1 of 1964 as amended by Act 35 of 1969. We do not express any opinion on this aspect at this stage. But we give liberty to the parties to raise this plea in the execution proceedings when they are sought to be dispossessed of the properties.

46. A. S. No. 206 of 1968 arises out of an order issued by the Court below for the sale of the building in Palghat about which we have already dealt with. The question whether the property has to he sold or not has to be decided only at the time when the properties are sought to be divided in the final decree proceedings. We. therefore, set aside that order and allow A. S. No. 206 of 1968. All the remaining appeals are disposed of in accordance with the directions that we have already given. We modify the decree and iudgment of the Court below as stated above. We direct all the Parties to suffer their costs in this Court.