

(2001) 05 KL CK 0013

In the High Court Of Kerala

Case No : A.S. No. 550 of 1983 and connected cases

Sainabi

APPELLANT

Vs

Aboobackerkoya

RESPONDENT

Date of Decision : 30-05-2001

Acts Referred:

Citation : AIR 2001 Ker 331

Hon'ble Judges : S. Sankarasubban, J; Kum. A. Lekshmikutty, J

Bench : Division Bench

Advocate : C.S. Ananthakrishna Iyer and K.K. Mohammed Ravuf and Sajan Varghese, for the Appellant; S.V. Balakrishna Iyer, K. Jayakumar, A.A. Abdul Hassan, V.M. Kurian (Jr.), N.J. Johnson, M. Ashraf, M.A. Khadirakunju, N. Viswanatha Iyer, K. Jayakumar and K.A. Easwari Amma, for the Respondent

Final Decision : Allowed

Judgement

S. Sankarasubban, J.—These three appeals are filed against the judgment and decree in O.S. No. 9 of 1974 of the Subordinate Judge's Court, Lakshadweep, Kavarathi. In A.S. No. 550 of 1983, the appellant are the plaintiffs, while A.S. No. 554 of 1983 is an appeal filed by defendants 4, 5 and 8 to 13. A.S. No. 11 of 1984 is filed by the first defendant. The suit, O.S.No. 9 of 1974 was filed by four plaintiffs. Plaintiffs 1 to 3 are the daughters of one Ponthinoda Ummubee and the forth is the son of Ponthinoda Attakoya, who is the brother of plaintiffs 1 to 3. The suit was filed for declaration of title and for recovery of possession of the plaint schedule properties with mense profits after setting aside the compromise dated 24.7.1961. The suit was dismissed. However, certain findings were entered and the plaintiffs were declared to be entitled to 1/3rd share. It was found that all the necessary parties were not impleaded and a right to file a fresh suit for partition was reserved. It is against the above judgment and decree that the appeals have been filed.

2. The case of the plaintiffs is as follows: The parties in the suit belong to Agathi Island of Lakshadweep and the properties are situate in the said Island. The suit

properties consist of six items of immovable properties including a Mosque and a residential building in item NO. 1. According to the averments in the plaint, these properties belonged in jenmam to one Ahammed Koya (hereinafter referred to as Ahammed Koya NO.1) of Vadakilapura. The said Ahammed Koya No.1 married Ayshabee, who belonged to Aliyankunhamada. They had a daughter by name Kunhubee (No.1). According to the plaintiffs, Ahammed Koya gifted these properties to Kunhubee and the properties are Thinkalazhcha properties of Kunhubee. By subsequent devolution, these properties vested in Hassankutty Haji as his Thinkalazhcha properties. After his death, the properties devolved on his stariat heir, i.e., his daughter Ponthinoda Ummubee. The plaintiffs are the children of the said Ponthinoda Ummubee through their father Cheriya Koya. On the death of their mother Ummubee, the plaintiffs claimed the entirety of the properties as having devolved on them as her Shariat heir. The case of the plaintiffs is that even during the life time of Hassankutty Haji and after his death, the properties were being managed by their father Cheriya Koya, who is also a grand nephew and power of holder of Hassankutty Haji. So long as Cheriya Koya was alive, these properties were in their possession and enjoyment. Cheriya Koya died in 1951. Thereafter, his brothers Mohammed Koya and Ahammed Koya II attempted to trespass and take possession of the properties illegally. Thus, the mother of the plaintiffs, Ummubee filed a suit as C.S. No. 48 of 1952 against Ahammed Koya II, Mohammed Koya and Kunhubee II. As per the direction of the Court, on the death of Ummubee, plaintiffs 1 to 3 along with their brother Attakoya filed another suit, C.S. NO. 95 of 1959 against Ahammed Koya II and Kunhubee II. While that suit was pending, a compromise was brought into existence fraudulently and collusively by the second defendant and others. The plaintiffs were not parties to the compromise nor were the plaintiffs aware of the same. As per the compromise, the properties made to vest a being reverted to Aliyankunhimada tarwad as their Velliyazhcha properties. According to the plaintiffs, the compromise is wholly void and ineffective. The plaintiffs' suit was dismissed on the basis of the compromise with a direction to file a fresh suit against the persons in possession of the property. Then the plaintiffs filed O.S. No. 83 of 1961 before the Ameen, Agathi. After several proceedings, O.S. NO. 7 of 1974 was filed. The plaintiffs had prayed for declaration of their title to the suit properties, setting aside the Razi and for recovery of possession of the properties with mesne profits.

3. The suit was resisted by the first defendant contending that the properties are not Thinkalazhcha properties in the hands of Hassankutty Haji. According to him, it was their thavazhy Velliyazhcha properties in the hands of Hassankutty Haji and it devolved on the marumakkathayee heirs through his sister Beekuttybee. The properties devolved on the daughter of Beekuttybee, viz., Attabee and her children Cheriya Koya, Mohammad Koya and Ahammed Koya II and Kunhubee II. Kunhubee II died without any heirs and as Cheriya Koya and Mohammed Koya also died, Ahammed Koya II was the last surviving member of Vadakilapura. Hence, Ahammed Koya II is entitled to these properties and it is his

Thinkalazhcha properties. The first defendant is the eldest son the Ahammed Koya II. He was living along with his wife with Ahammed Koya II. While so, Ahammed Koya II orally gifted the entire plaint schedule properties to him and he is therefore entitled to the whole of the properties. While so, the properties were taken possession of from him by received and on the cancellation of the appointment of receiver, the receiver handed over possession of the properties to other defendants on the basis of the Razi. He had also filed a suit before the Amin's Court, which was tried along with the suit filed by the plaintiff and according to him, the entire properties belong to him under the oral gift of his father.

4. Defendants 4,5 and 7 also resisted the suit. They contended that Vadakilapura is a thavazhi of Aliyankunhimada and that the plaint schedule properties are the tarwad properties in the possession of thavazhi and therefore, Hassankutty Haji has no alienable right in the properties and the properties after the death of Hassankutty Haji devolved on his Velliyazhcha heirs, i.e., Cheriya Koya, Ahammed Koya II, Mohammed Koya and Kunhubee II. This Kunhubee died issueless and the thavazhi became extinct and of the death of Ahammed Koya II as he was the last surviving member, the entire properties reverted back to the original tarwad, i.e., Aliyankunhimada tarwad. According to the defendants, the compromise is valid and the plaintiffs are not entitled to challenge the same. Further, they raised a contention that the rights of the plaintiffs, if any, are lost by adverse possession.

5. After raising the necessary issues, both oral and documentary evidences were adduced. The trial court found that those properties belong to Ahammed Koya I and there is no community of interest in properties between the Vadakilapura and Aliyankunhimada and as such the properties are not Aliyankunhimada properties which have come into the hands of Vadakilapura and therefore the Aliyankunhimada peoples have no reversionary right over the plaint schedule properties on the extinction of Vadakilapura tarwad. The trial court found that the properties were not the Thinkalazhcha properties of Hassankutty Haji, but they are Velliyazhcha properties of Vadakilapura thavazhi. It is also found that the plaintiffs have to title through their mother and they are not entitled to recovery of possession. The Court held that the Razi, Ext.A19, is void and not binding. It found that the properties being thavazhi Velliyazhcha properties of Vadakilapura, it developed equally on Cheriya Koya, Mohammed Koya and Ahammed Koya II as their Thinkalazhcha properties on the extinction of Vadakilapura thavazhi and the plaintiffs as the descendants of Cheriya Koya are entitled to 1/3 share in the properties. But it was found that the plaintiffs could not be given a decree, because all the parties were not before the court and therefore the plaintiff was directed to file a separated suit. The case of the first defendant and the contention based on oral gift and exclusive right over the properties on Ahammed Koya II were repelled. It is against the above judgment and decree that these appeals are filed.

6. Let us first consider the question whether Ext.A19 compromise dated 24.7.1961, which attempted to settle the disputes between Ahammed Koya and Aliyankunhimada people. In the suit, the plaintiffs as well as the first defendant seriously challenged the validity of Razi. The trial court after considering the evidence on this aspect, held that Ext. P19 is void and not binding on the plaintiffs. Ext. A19 compromise happened to be filed in the following circumstances. Aliyankunhimada tarwad filed a suit on 2.4.1953 against Mohammed koya, Kunhubee and Ahammed Koya II before the Amin's Court. The above suit is marked as Ext. B4. It was filed by 12 person representing Aliyankunhimada tarwad. According to the plaintiffs in that suit, the Vadakilapura house and property and Pazhayappally property are the Velliyazhcha house and properties of the plaintiffs - Aliyankunhimada and according to them, the defendants have divided the coconuts from the tarwad properties without the knowledge of the plaintiffs and prayed for appropriate orders restraining the defendants from partitioning the Velliyazhcha properties. In the above suit, they have filed an application for an interim injunction and the Amin's Court passed an order restraining the defendants from partitioning the properties, till the disposal of the suit. In that suit, the plaintiffs along with their brother deceased Attakoya filed an application for impleadment and also joint trial along with C.S. No. 48 of 1952 and the application is marked as Ext.A24 in the above suit. The suit was conducted by the Aliyankunhimada karnavar, Muthukoya on behalf of the tarwad. While the suit was pending, out of the three defendants, two defendants (Mohammed Koya and Kunhubee) died and the only remaining defendant was Ahammed Koya II. Ext. A19 compromise is seen signed by DW5 one Shamsuddin on behalf of Ahammed Koya II. So far as the validity of the compromise is concerned, it is attacked on the ground that out of the three defendants, two defendants were dead on the date of the Razi. The only remaining defendant was lying unconscious and he also dies within seven days. The karnavan of Aliyankunhimada tarwad Muthukoya also dies on whose behalf the alleged Razi was purported to have executed. The second defendant has no Mukthiyar on behalf of one of the defendants, viz., Mohammed Koya. Both the mukthiyars, who have signed the Razi on behalf of the parties, were highly interested in the defendants as they have married from Aliyankunhimada tarwad. The power of attorney did not authorise the Mukthiyar to enter into any compromise. Ahammed Koya, who according to the second defendant was conscious on the date of the Razi, had not signed the Razi. The Amin and the Karnavan who inspected Ahammed Koya reported that he was not conscious. The important allotments were made in favour of the second defendant, who had signed the Razi on behalf of Vadakilapura tarwad.

7. It is now clear from the evidence that Ahammed Koya was unconscious on the day on which the Razi was signed. Ext. B43 certificate shows that Ahammed Koya was not conscious. Ahammed Koya died on the seventh day of the compromise. Ahammed Koya did not sign the compromise and then the other two parties, viz., Mohammed Koya and kunhubee were not alive. It is seen that

the compromise was signed by the second defendant. Exts. B22 and B41 are the documents executed by Ahammed Koya I, Ahammed Koya and Kunhubee in favour of the second defendant, under which authority, the second defendant claimed to have executed the compromise. This does not in any way authorise the second defendant to enter into a compromise. He is only to conduct or defend the cases. There was no authorization from the deceased. On behalf of him also, the second defendant has signed. Mohammed Koyan died seven days before the compromise. Even if it is conceded that the Mukthiyar may authorize to enter into compromise, the person who gave Muthiyar was not alive. One of the circumstances, which weighed with the lower court was that Mukthiyars, who signed ext. A19, are persons, who had married from the Aliyankunhimada tarwad. The haste in which the compromise was effected creates shrouds of suspicion. Further, as rightly recorded by the court below, the terms of the compromise also show that there has been some foul play. Exts. A17 and A18 are the undertakings filed by Ahammed Koya, Mohammed Koya and Kunhubee before the Amin's Court on 4.4.1953 in which an order of injunction was passed by the Amin's Court restraining them from partitioning the property until further orders. In the light of the above, Ext.A19 is admittedly in violation of Exts. A17 and A18.

8. In the above circumstances, we are of the view that the lower court was right in holding that Ext. A19 compromise is not valid.

9. The next question to be considered is whether Vadakilapura was the thavazhi of Aliyankunhimada tarwad. This point was considered by the court below and has held that Vadakilapura thavazhi is the Aliyankunhimada tarwad. Additional defendants 18 to 30 in the suit took the contention that Vadakilapura was the original tarwad and Aliyankunhimada was a branch. The lower court discussed the difference between the thavazhi and tarwad and we agree with the court below that Vadakilapura was the thavazhi of Aliyankunhimada tarwad.

10. The next question to be considered is whether the plaint schedule properties were Thinkalazhcha properties in the hands of Hassankutty Haji. There is no dispute in the case that Kunhubee I obtained that plaint schedule properties as per the gift deed executed by Ahammed Koya I. The court below has taken the view that since the gift deed was in favour of a female, as per the Marumakkathayam law, it should enure to the benefit of the thavazhi of the family. The court below after discussing issues Nos.2 to 4, held as follows: " the properties were obtained by a Marumakkathayee female, namely, Kunhubee from her family and she was having female descendants. The parties are admittedly marumakkathayee and in the absence of anything contrary in the document the property obtained by a marumakkathayee female from her father will enure to the benefit of her thavazhi. During the time of Hassankutty Haji also this was the position of the scheduled properties and so Kunhubee's brother's and their sons did not get any right in the properties and so they either voluntarily gave up their claims on negative by the Amin's Court. It can be seen from the above, that

Hassakutty Haji was also treating the properties as the Marumakkathayam properties of his grand mother's thavazhi and that is why he did not create any document in respect of the scheduled properties. As there were female descendants in the thavazhi during the life time of Hassankutty Haji, he did not get any specific right in the scheduled properties and he did not claim also. So the scheduled properties are the Marumakkathayam the vazhi properties or Vellivazhcha in the hands of the thavazhi. It follows therefore that the scheduled properties were not in Aliyankunhimada tarwad properties in the hands of Vadailapura thavazhi nor the self acquired properties of Hassankutty Haji but the thavazhi Villiyazhcha properties of Vadakilapura.

11. Learned counsel Sri. C.S. Ananthakrishna Iyer appearing for the plaintiffs submitted that the presumption made by the Court below is not correct. According to the learned counsel, the Marumakkathayam Law that is applicable to the Islanders is the pristine Marumakkathayam Law and not the Marumakkathayam Law as codified by the customs or statutes appearing in the other parts of the country. Learned counsel submitted that the presumption that a gift in favour of a female enure to a thavazhi was not the law. This was the law that was brought out by the statutory amendments. Learned counsel also cited certain decisions of this Court.

12. Shri. S.v. Balakrishna Iyer, learned counsel appearing for the appellants in A.S. No. 554 of 1983 submitted that in so far as there were female descendants in the family it will enure to the benefits of the thavazhi. He also submitted that the documents produced in the case also show that both Kunhube and Hassankutty Haji treated the properties as thavazhi properties.

13. In Gazette of India, Union Territory of Lakshadweep at page 97, it is stated as follows:

"Property in the islands is either ancestral or self acquired. Ancestral property is known as Velliazhecha (literally Friday property) pronounced as Belliazhcha in the Amindivis. Self acquired property is known as Thinkalazhcha (literally Monday property) on the Laccadives and Belascha on the Amindivis.

Ancestral or Tarwad property is governed by the Marumakkathayam Law of inheritance prevalent on the Kerala coast. However, there is no codified law and the practices are governed by customs which differ from island to island. Broadly speaking, property right descends through the female line, the male members having only right for sustenance during their lifetime. (Self-acquired or personal property is governed by Muhammedan Law of Succession).

Here also there are variations in different islands. In Androth, succession to personal property is governed by Marumakkathayam Law unless it is specifically laid down in the Will of the deceased that it should go to his wife and children. The self-acquired property can, however, be disposed of in any manner one likes. In the decision reported in Padmavathi Amma v. Padmanabhan Nair 1990 (1) KLT 472 it was held thus:

"When a gift, bequest or purchase is made in favour of the wife, and all the children, there is a presumption is the customary Marumakkathayam Law as prevalent in the Malabar area, that the bequest, purchase or gift is to the thavazhi. Under the rule of customary Marumakkathayam Law in Malabar, prior to the coming into force of Madras Marumakkathayam Act, it was only in cases or in the names of all the children who by themselves constitute a thavazhi, the mother being dated, that a presumption would arise that the acquisition was for the benefit of the thavazhi and there was no scope for raising any such presumption in cases where the gift, bequest or acquisition is in favour of the wife alone or of the wife and some of the children alone leaving out the others".

In the above decision, Shamsuddin, J. after referring to the decision in Seetha & Ors. Krishnan & Ors. 1975 KLT 156, held that there is no presumption in the erstwhile Muhammadan Law that the gift in favour of a wife and some of the children will enure to the benefits of the thavazhi. This position coupled with what is stated in the Gazetteer shows that (property in this case belongs to Agathi Island) the gift was made in favour of Kunhubee. It cannot be said to enure to the benefits of the thavazhi.

14. We will next consider whether the property can be treated as thavazhi property. In Prabhakara Menon v. Gopala Menon & Ors. 1960 KLJ 161, it was observed as follows: "Prior to the Marumakkathayam Act, the position under the customary Marumakkathayam law was, that a presumption of the thavazhi nature of the gift or bequest or acquisition would be raised only if the same was in favour, or in the name/ names, of the wife and all the children, or of all the children alone, who by themselves constitute a thavazhi. A gift, bequest or acquisition in the name or names of the wife alone, or of the wife and one or more of the children alone to the exclusion of the other, would not have rise to such a presumption". The Full Bench in the decision in 1075 KLT 156 concluded as follows:

"The conclusion that emerges from the forgoing discussion is that under the rules of customary marumakkathayam law which were applicable is Malabar prior to the introduction of the Madras Marumakkathayam Act, it is only a case where the gift or acquisition is made in favour of a marumakkathayee women and all her children or in the names of all the children who by themselves constitute a thavazhi (the mother being dated) that a presumption would arise that the acquisition is for the benefit of the thavazhi. There is no scope for raising any such presumption in cases where the gift, bequest is in favour of the wife alone or of the wife and some of the children alone leaving out the others. The underlying principle is that the presumption would be attracted only in cases where the transaction is in favour of all the members of a group who constitute a natural thavazhi capable of acquiring and holding property."

On the basis of the above decision and on the basis of the observation made in the Gazetteer, it can be safely presumed that when Ahammed Koya executed the gift in favour of Kunhubee, his daughter, Kunhubee enjoyed it as the self-

acquired properties and not as thavazhi properties. The court below then referred to certain documents and held that Ahammed Koya treated those properties as thavazhi properties. According to us, this finding made by the court below is not correct. The court below especially refers to Ext.A6 dated 22.9.1900, which is a gift deed executed by Hassankutty Haji. It is stated in the gift deed that the properties possessed by Hassankutty Haji are the properties obtained by him from his parents and otherwise. Under the provisions of this gift deed, Hassankutty Haji purports to give to his sister's Beekuttybee's children and grand children and also to his own wife and daughter. This gift has been accepted by the donees and they were in possession and enjoyment of the gifted properties. Hassankutty Haji was in possession of the remaining property including the plaint schedule properties. Hassankutty Haji retained the plaint schedule properties alone. The court below took the view that the scheduled properties were not the self acquired properties of Hassankutty Haji. We are of the view that this conclusion cannot be upheld. Merely because these properties are included in Ext.A6, it cannot be held that they are not the self-acquired properties. There is no dispute that Kunhubee executed the gift and the property was given to Kunhubee. If that be so, the succession should be on the basis of Muslim personal Law and not on the basis of Marumakkathayam Law. Hence, we are of the view that the plaint schedule properties are not the thavazhi properties of Vadakilapura.

15. The next question is regarding the non-joinder of parties. The court below, in paragraph 36 of the judgment, dealt with this question. The defendants raised the contentions that the suit was bad for non-joinder of necessary parties in as much as all the members of the Aliyankunhimada tarwad and the children of Mohammed Koya, the deceased brother of Ahammed Koya II, who were also the beneficiaries in the impugned Razi and who were in possession of their respective shares under the Razi were not parties. The court below held that so far as Aliyankunhimada tarwad is concerned, the fifth defendant is the karnavan and he is the only person competent to represent the tarwad and hence, the court rejected the contention regarding the absence of the other members of the tarwad. So far as the other contention regarding the children of Mohammed Koya is concerned, it was held that they are the beneficiaries under the Razi and the persons in possession of portions of the scheduled properties. The court below relied on its finding on issue NO. 5 and held that since they also got right to the property, their absence in the party array is fatal to the suit. So far as the first aspect is concerned, the karnavan of the tarwad is already in the party array and it is trite law that the karnavan is the Muthavalli of the tarwad. Under the terms of the Razi, it is provided that the properties involved in the suit and other properties were to revert and to vest in the Aliyankunhimada tarwad. So much so it has become the tarwad properties of Aliyankunhimada tarwad and necessarily to be in the possession and management of the karnavan. It appears that Aliyankunhimada tarwad did not get possession of the properties as a receiver was appointed, who took possession of those properties. The appointment of the

receiver was challenged before this court and the appointment was set aside by this Court. The receiver gave possession of the properties to the fifth defendants, the karanavan of Aliyankunhimada tarwad. The fifth defendant-DW2 admits that the properties are in his possession and management and nobody else is in possession of these properties. He also says that the two items of properties dealt with under the Razi are in the possession of defendants 6 and 7. Same properties are in the possessio of T.P. Shamsuddin Koya. Those properties are admittedly the subject matter of this litigation. Thus, the properties, which are involved in the suit and in the Razi, are in the possession or control of the fifth defendant. Since he is in the party array, we agree with the Control below that there is no defect and the suit is properly filed. So far as non-joinder of Mohammed Koya's heirs is concerned, we don't think, it is necessary to implead the heirs of Mohammed Koya, as according to us, the properties are the self-acquired properties of Hassankutty Haji and the heirs of Mohammed Koya are not necessary parties.

16. Another question that was consider by the Court below is the contention raised by the first defendant. According to the first defendant, he and his wife, the third defendant were living with his father Ahammed Koya II in Vadakilapura and the father had orally gifted the entire scheduled properties to him in pursuance of which he was in absolute possession and enjoyment of the properties. As rightly observed by the court below, the first defendant did not adduce any independent evidence to provide the alleged oral gift. His residence in the house cannot be treated as a gift of the properties. Hence, we agree with the court below that the first defendant's contention regarding the gift cannot be accepted.

17. Thus, after considering the entire aspects, we are of the view that the plaintiffs are entitled to succeed. Hence, the plaintiffs are given a decree as follows: The Razi dated 24.7.1961 is not binding on the plaintiffs. There will be a direction declaring that the plaintiffs are entitled to recover the plaint schedule properties from the defendants. Since no definite amount has been claimed regarding the mesne profit and no evidence has been adduced to that effect, no mesne profit can be awarded.

In the result, A.S. No. 550 of 1983 is allowed and A.S. No. 554 of 1983 and A.S. No. 11 of 1984 are dismissed. There will be no order as to costs.