

(1988) 07 KL CK 0059
In the High Court Of Kerala
Case No : S. A. No. 267 of 1980

Santhakumari Amma

APPELLANT

Vs

Kalyani Amma and Others

RESPONDENT

Date of Decision : 13-07-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 98
Criminal Procedure Code, 1973 (CrPC) — Section 11

Citation : (1988) 2 KLJ 445

Hon'ble Judges : P. K. Shamsuddin, J; P. C. Balakrishna Menon, J

Bench : Division Bench

Advocate : P.K. appa Nair and Mohan C. Menon, for the Appellant; C R. Natarajan, M. K. Ananaakrishnan and R. Bhaskaran, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Menon, J.—The plaintiff is the appellant The suit under Order 21 Rule 103 CPC is to set aside the summary order Ext. A12 passed under order XXI Rule 98 CPC. as it stood prior to the C.P.C Amendment Act, 1976. The suit property belonged in jenm to defendants 1 to 3. the jenmies had granted an out of the property in the names of Chiruthai Amma and her daughter Madhavi Amma, for and on behalf of their tavazhi as early as in 1924. Ext. A1 is the registration copy of the otti deed. After the death of Chiruthai Amma the otti was renewed in die name of Madhavi Amma as per Ext. A4 dated 8-5-1945.

2. There was a partition in the tavazhi of the mortgagees on 10-10-1940, as per which the suit property was allotted to the sub tavazhi of Madhavi Amma. There was a further partition Ext. A3 on 19-1-1961 among the 13: members of the sub tavazhi. As per Ext. A3 two members separated from the sub tavazhi. The suit property was item 16 in the A schedule to Ext. A3. Even though the suit property along with other items was allotted to, the remaining 11 members of the sub tavazhi, their separate shares in the properties were clearly defined and the document gives no room for doubt that the allotment was to the 11 persons as

tenants in common in a group. Thus, after Ext. A3 the suit property was held in tenancy in common by the 11 persons including the plaintiff.

3. Defendants 1 to 3 filed O.S. 599 of 1961 on 13-10-1961 for redemption of the mortgage Ext. A4 and for recovery of possession of the property. Madhavi Amma was the sole defendant in the suit and the suit was based entirely on Est. A4 as though the otti was to Madhavi Amma alone. Madhavi Amma died pending the suit and her children were impleaded as her legal representatives. The plaintiff, even though an allotted of the property under Ext. A3 was not impleaded in that suit. In fact that suit itself was instituted long after Ext. A3 partition allotting the property in separate shares to the 11 persons mentioned therein. The suit for redemption ended in a decree allowing the plaintiffs therein namely defendants 1 to 3 to redeem the mortgage and recover possession of the property. Ext. B1 dated 19-1-1965 is the judgment of the trial court granting a decree for redemption in favour of the present defendants 1 to 3. That decree was confirmed in appeal by the lower appellate court and in Second Appeal by this Court, as can be seen from Exts. B2 and B3. At the stage when that decree was put in execution, res rata nee was offered by the present plaintiff claiming and right to possession independently of Madhavi Amma, the sole defendant in O.S. 599 of 1961, and her legal representatives impleaded after her death. On application by defendants to 3 for removal of resistance by the plaintiff, the court below has passed Ext. A12 order directing removal of obstruction and delivery of the property to the decree holders in O.S. 599 of 1961. The present so to set aside Ext. A12 order was distressed by the trial court and the decision of the trial court was confirmed in appeal by the lower appellate court. It is against this that the plaintiff has come up in Second Appeal.

4. The trial court in paragraph 17 of its judgement summed up its reasons as follows:-

Thus, summing up the positions, I have no hesitation in recording a conclusion that although Exhibit A3 karar brought about severance in status, the right of management still remained with the tavazhi.

It is for that reason that the trial court held that the order of removal for resistance of the plaintiff cannot be set "aside in the present suit. The appellate court concluded that Madhavi Amma was impleaded in the suit as Karanavathi of the tavazhi, the omission to describe her as Karanavathi does not alter her character as Karanavathi and that there was nothing in evidence to show that defendants 1 to 3 had knowledge about Ext. A3 partition entered into among Madhavi Amma and others. It was accordingly held that there was no malafides on the part of defendants 1 to 3 in not impleading the other members of the tavazhi and the decree should therefore be binding on all the members of the erstwhile tavazhi. It is in this view of the matter that the decree of the trial court dismissing the suit was confirmed.

5. There is no dispute that the of obtained as per Ext. A1, was by the tavazhi of

Chiruthai Am ma and her children and that Ext. A4 was only a renewal of the of obtained by Madhavi Am ma on behalf of the tavazhi. A reading of Ext.A3 gives no room for doubt that there was a division in status among the members of the tavazhi as per the terms of the document as found by the trial court. The appellate court has also found that the members of the tavazhi had attained severance in status for the reason of Ext. A3 and they were holding the property as tenant in common. Construing a similar document, a Division Bench of this court in *Stnaammu Amma v. Narayanikutty Amma* (1967 K. L. T-521) stated at page 527:

The above-shows that though the plaint property was not divided by metes and bounds there is a definement of the shares among the members and the interest of each member in the plaint item is valued for giving the share worth Rs 3,000/- in all the tarwad properties. In view of the above, we agree with the two courts below in holding that under Ext. A3 there is complete division of the properties including the plaint item belonging to the tarwad and after the date of Ext. A3 the tarwad was not in existence.

6. In a suit for redemption all persons interested in the mortgage interest are necessary parties. A decree obtained against some alone will not ordinarily be binding on others who are not parties to the suit. In the context of a suit for enforcement of a mortgage, a Full Bench of this court in *Balakrishna Pillai v. Gourikutty Amma* (1965 K. L. T. 835). stated at page 837:

We find too, that the question as to the persons to be made parties to a suit in such circumstances, does not depend upon, whether the creditor had notice of any change of the circumstances in the tarwad. We entertain no doubt that the correct principle is that if a plaintiff in a suit in respect of property wishes to obtain a decree binding on the persons interested in the property, it is incumbent on him to see that all persons interested are impleaded. It seems to us to make little difference whether a devolution of ownership or interest in the property has been brought about by transfer, or by inheritance, or by bequest or by partition.

7. The decree obtained in the suit OS. 599/1961 against the legal representatives of Madhavi Amma after her death cannot, therefore, be said to be binding on the plaintiff who in her own right is entitled to a definite share in the mortgage interest. Madhavi Amma was not impleaded as the Karanavathi of the tavazhi. In fact, the tavazhi had ceased to exist after the partition Ext. A3. There is also no knowing whether the tavazhi before its partition had a Karanavan and in case there was a Karanavan, it was the Karanavan alone, who could have represented the tavazhi in litigations against the same. Under these circumstances Madhavi Amma would not have represented the interests of the other members of the erstwhile tavazhi. Madhavi Amma had only a 1/11 share in the property. Defendants 1 to 3 who are plaintiffs in O. S. 599 of. 1961 have no case that they had made due enquiries about the persons interested in the mortgagee's interest before a suit was filed for redemption against Madhavi Amma alone, nor have they raised any point based on explanation VI to Section

11 C. P. C. The fact that they impleaded only the personal heirs of Madhavi Aamma on her death pending suit is a clear indication that they were suing Madhavi Aamma alone in her individual capacity. For the aforesaid reasons, the decision of the court below cannot be sustained. We, therefore, set aside the judgments and decrees of the courts below and decree the suit as prayed for. The Second Appeal is allowed. This will not preclude the defendants 1 to 3 from filing a fresh suit for redemption against all persons interested in the mortgage rights. The parties will suffer their respective costs throughout.