

(1957) 06 KL CK 0014

In the High Court Of Kerala

Case No : A. S. No. 3 of 1956 (T) and 48 of 1956 (T)

Thiruvadinath Pillai and Others

APPELLANT

Vs

Savithrikutti Amma and Others
 Viswanathan Vs
Savithri Amma and Another

RESPONDENT

Date of Decision : 27-06-1957

Acts Referred:

Travancore Nair Act, 1912 — Section 22

Citation : (1957) KLJ 708

Hon'ble Judges : T.K. Joseph, J;K. Sankaran, J

Bench : Division Bench

Advocate : N. Krishnaswami Iyengar,s in A. S. 3 of 1956 T, R. Gopala Pillai, in A. S. 48 of 1956 T, for the Appellant; R. Narayana Pillai, For Respondents in A. S. 3 of 1956 (T) and for 1st Respondent in A. S. 48 of 1956 (T), for the Respondent

Final Decision : Allowed

Judgement

T.K. Joseph, J.—These appeals arise from the decree in a suit for cancellation of certain decrees and execution proceedings and partition and recovery of the plaintiff's 2/5th share in the properties with mesne profits. The plaintiffs and Defendants 7 and 8 are the children of the 6th defendant and Kesavan Pandalai who died in the year 1108. Defendants 4 and 5 are members of the 6th defendant's tarwad. The properties in schedule A appended to the plaint were acquired in the name of the 6th defendant in 1091. The properties in Schedules B and C are Michavaram Otties acquired in the 6th defendant's name in 1098 and 1099 respectively. According to the plaintiffs, all these properties belonged to their sub-tarwad, having been acquired by Kesavan Pandalai for the sub-tarwad. The 6th defendant had executed some hypothecation bonds on which the creditors obtained decrees and purchased the properties in execution. The properties in schedule A were hypothecated to the 1st defendant on 12-1-1098, who sued in O. S. No. 268 of 1104, obtained a decree and purchased the properties in court sale. Subsequently he sold the properties to the 2nd defendant. The 6th defendant had also executed two chitty hypothecation bonds

to the 3rd defendant and his Karanayan Ayyan Sankaran on 4-4-1098 and 23-4-1099 hypothecating A and B schedule properties as security for the prize amount of a ticket subscribed by her in the chitty conducted by them. Another chitty hypothecation bond was executed by her in their favor on 30-10-1099 in respect of a chitty subscribed by Defendants 4 and 5. Three decrees viz., O. S. Nos. 492 of 1106, 4 of 1106 and 23 of 1106 were obtained by the 3rd defendant and his Karanavan on the basis of these bonds. In execution of the decree in O. S. No. 4 of 1106, the properties in B schedule were sold and purchased by the decree-holders. The validity of these hypothecation bonds, the decrees obtained thereon and the execution proceedings were questioned by the plaintiffs on the ground that the properties belonged to the sub-tarwad, that the bonds were not supported by consideration and tarwad necessity, that the decrees were not properly obtained against the sub-tarwad and that the plaintiffs and Defendants 7 and 8 were not impleaded in the suits or execution proceedings. On these allegations they prayed for a decree for declaration that the properties belonged to their sub-tarwad, and for partition and recovery of their 2/5th share, after cancelling the decrees and execution proceedings in respect of such share. They also claimed mesne profits. Defendants 1, 2, 3 and 9 contested and their contentions were more or less similar. According to them the properties were acquired by the 6th defendant, the sub-tarwad had no rights over the same and the decrees and execution proceedings were valid. Even if funds for the acquisition of the properties were provided by Kesavan Pandalai, it was solely for the benefit of the 6th defendant and the properties were always treated as the separate acquisitions of the 6th defendant. The trial court found that the properties were acquired by Pandalai for the benefit of his wife and children who were entitled to the same as tenants-in-common, that the decrees and execution proceedings were not binding on the plaintiffs who were not made parties to the same, and that the plaintiffs were entitled to 2/5th share in the properties. The decrees and execution proceedings were cancelled to this extent and the plaintiffs were given a preliminary decree for partition and recovery of 2/5th share of all the properties. Defendants 2, 16 and 17 of whom the latter two claimed as donees of the 2nd defendant have preferred A. S. No. 3 of 1956 from the decree while the 9th defendant who claimed under the 3rd defendant is the appellant in A. S. No. 48 of 1956 (T). The question for decision in both the appeals is whether the plaintiffs have any right to the properties included in the suit. As stated earlier the view taken by the trial court is that the properties should be presumed to have been acquired by Kesavan Pandalai in the name of his wife for the benefit of herself and all her children. It was also found that the acquisitions having been made after 1088 when the first Travancore Nair Act was passed, the wife and children took the properties as tenants-in-common. If this view is correct the decrees and execution proceedings have to be set aside in respect of the 2/5th share of the plaintiffs as they were not parties to the suits or execution proceedings. The view taken by the learned Judge is based on the presumption that the properties standing in the name of the 6th defendant must have been acquired with funds provided by her husband. There are some

decisions of the High Court of Travancore which held that such a presumption existed. The earliest of these decisions is *Kaliamma Valliamma Pillai v. Kanakku Narayanan Raman* (10 T. L. R. 136). It was held that under Marumakkathayam law, the acquisitions of a woman, in the absence of the evidence to the contrary were to be presumed to have been made out of funds supplied by her husband for the benefit of his wife and children. There might have been justification for such a presumption in those days when ladies invariably used to reside in tarwad houses and had no independent sources of income. This decision was given at a time when the communities following Marumakkathayam system were governed purely by customary law. Twenty years after this, the Travancore Nair Act was passed in 1088 which made radical changes in the customary law which prevailed till then. Social conditions have also become changed considerably during the past six decades and ladies who are members of Marumakkathayam tarwads are no longer living under such conditions as existed at the time the above decision was given in 1068. The presumption might have been justifiable in 1068, but it cannot be held that the presumption was intended to or does govern for all times acquisitions made by Marumakkathayee ladies. There is no justification for thus discriminating against ladies of Marumakkathayam communities who are as advanced as members of other communities in the State. Our attention was drawn to the decision of the Travancore Cochin High Court in *Narayana Pillai v. Govinda Pillai* (A. I. R. 1952 T-C 141). It was held :

The presumption, in the case of Marumakkathayees was that acquisitions made by a female during coverture were with funds advanced by the husband for the benefit of herself and her children. This was recognized in S. 41 of the Nair Act, II (2) of 1100. It laid down that property acquired by gift or bequest from the father or husband before Act I (1) of 1088 came into force, shall, in the absence of evidence to the contrary be treated as the "tarwad" property.

The observations extracted above were made in respect of acquisitions prior to 1088 when the community was governed by customary law. What was actually recognized by section 41 of the Travancore Nair Act of 1100 was not that a presumption existed that all acquisitions made by Marumakkathayee ladies during coverture were with funds gifted by their husbands but that when such a gift before 1088 was proved, the properties thus acquired were to be treated as the tarwad property of the donees or devisees and of their thavazhies. A different view was recently taken by a Bench of the Travancore-Cochin High Court in *Kalyani Amma v. Raghava Kurup* (I. L. R. 1956 T-C. 1195), a decision to which one of us was a party. It was held there that the presumption cannot hold good in respect of acquisitions made after the customary law itself has been very much modified by statutes and that in respect of such acquisitions, the normal presumption under common law must prevail, ownership being determined in accordance with the apparent tenor of the title deed. We follow this view and hold that the presumption recognized in the earlier decisions no longer holds good and that cases of this nature have to be decided on the evidence adduced, without the aid of this presumption. Coming to the evidence in this case the 1st

plaintiff alone has deposed that these acquisitions were made by the 6th defendant with funds supplied by her husband. The 1st plaintiff was not even born on the date of the acquisitions and she cannot therefore have any direct knowledge regarding the same. In fact she admitted in her deposition her ignorance regarding these matters. It is seen that the 6th defendant was always treating the properties as her own. In several of the mortgage deeds executed by her, she described the properties as

(self-acquired). Her husband has either joined in the execution of such deeds or attested the same. If the funds for the acquisitions proceeded from him alone and the intention was that the 6th defendant's children also should get their shares in the properties, this expression would not have been used. In fact he took care to mention in Ext. H a release deed taken by the 6th defendant on 5-1-1110 in respect of C schedule properties that a sum of 3000 fanams out of the consideration was paid by him for the benefit of his wife and children. It is significant that such a reference is not made in any of the other deeds. In this state of evidence all that can be found in favor of the plaintiffs is that a sum of 3000 fanams out of the total amount expended for acquiring the properties was supplied by the 6th defendant's husband for obtaining a release of a mortgage subsisting on C schedule property.

2. This finding will not help the plaintiffs in getting relief even in respect of C schedule property. Assuming that the 6th defendant's husband provided funds for the acquisition, the plaintiffs who are born only later are not entitled to claim any share in the properties. What section 22 of the Nair Act of 1100 provides is:

Property acquired by gift or bequest by the wife or widow or child or children from the husband or father, as the case may be, after Regulation I of 1088 came into force, shall, unless a contrary intention is expressed in the instrument of gift or bequest, if any, belong to the wife or widow and each of the children in equal shares.

(2) The Rules for the devolution and distribution of the property of an intestate as hereinbefore provided shall, so far as they "may be, apply to property mentioned in sub-section (1), as also to property acquired under Regulation I of 1088 and u/s 21 of this regulation."

According to this section the wife and children take equal shares in the property gifted by the husband to the wife or child or children after Act 1 of 1088 came into force. The question is whether the children contemplated in this section include those born after the date of the gift. The answer would depend on the point of time when the children acquire shares in such properties. If they obtained shares at the time when the gift is made it is clear that after-born children will not be entitled to shares. The property would in such a case vest in the children as soon as the gift is made and such properties cannot be divested by the birth of other children later. Any child is entitled to obtain a partition of such properties and if after-born children are also to get shares, such partition

would have to be reopened every time a child is born to the mother after partition. In other words, the vesting of the shares would have to be postponed till the mother dies or passes the child bearing age. The wording of the section does not warrant such a conclusion. The plaintiffs who were born after the properties were acquired are not therefore entitled to shares therein, even if the properties be treated as a gift from their father. It necessarily follows that they are not entitled to question the validity of hypothecation deeds, decrees or execution proceedings and that they are not entitled to the reliefs sought for and granted by the lower court. The decree must therefore be set aside. In the result, the preliminary decree passed by the court below is set aside and the suit is dismissed. The appeals are allowed with costs.