

**(1974) 12 KL CK 0003**

**In the High Court Of Kerala**

**Case No : Second Appeal No. 248 of 1971**

Vannarath Parvathi Amma and Others

APPELLANT

Vs

Vannarath Lakshmi Amma and Others

RESPONDENT

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**Date of Decision :** 18-12-1974

**Acts Referred:**

**Citation :** AIR 1975 Ker 147

**Hon'ble Judges :** G. Vishwanatha Iyer, J

**Bench :** Single Bench

**Advocate :** V. Bhaskaran Nambiar, C.R. Natarajan, M.K. Anandakrishnan and H. Sivaraman, for the Appellant; P.M. Balasubramoniam, A. Gangadharan Nair and T.C. Mohandas, for the Respondent

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## **Judgement**

G. Vishwanatha Iyer, J.—Defendants 4 to 14 are the appellants in this second appeal. Plaintiffs and the defendants are members of an undivided tavazhi tarwad and the suit is for partition of the B and C schedule properties. The appellants claim reservation of their rights under Exhibits B-10 which is an assignment of Exhibit B-2 kanakuzhikanom deed in respect of Item I and some trees in Item 2. There is no controversy regarding the validity of Ext. B-2 kanakuzhikanom deed. That was executed by a prior karanayan of the tavazhi in favour of a junior member by name Kamaran and a stranger by name Kannan. Kamaran was unmarried and died- On his death his half right devolved on the tavazhi, Kannan's right was transferred under Ext. B-6 to one Cheevvayi and the latter assigned under Ext. B-7 her rights to defendants 1 and 2. They subsequently transferred their rights to the 4th defendant who is the first appellant in this second appeal- The controversy relates to the character of Ext. B-7 assignment. The appellants contend that the acquisition was with the separate funds of defendants 1 and 2 whereas the other members of the tavazhi claimed it to be an assignment in the name of the present karanayan and for and on behalf of the tarwad. The trial Court upheld the appellants' contention. But the first appellate Court came to a different conclusion and hence this second appeal.

2. B schedule consists of two items. These and two other items were obtained under an earlier partition by two tavazhies jointly. These tavazhies were enjoying portions of the properties separately. While so, under Ext B-1 of 1910 the two tavazhies recognised their separate possession and also recognised the improvements effected by each. Though the improvements alone were recognised as belonging to the respective tavazhies separately, the arrangement under Exhibit B-1 was by the subsequent transactions treated for all effects as a partition between the two tavazhies. The tavazhy of the parties to this suit was always finding it difficult to make both ends meet. This tavazhy had to incur debts. It was to discharge game of the debts that Ext. B-2 kanakuzhikanom was executed, and an amount of Rs. 500/- borrowed. The income of the property included in Exhibit B-2 was not sufficient to cover the in-terest on the amount borrowed. So there was a separate undertaking in Ext. B-2 to pay the interest on Rs. 100/- out of Rs. 500/- borrowed.

I am referring to this to show the condition of the family and the family property. It was not possible for the members to manage their affairs with the family income; and naturally the male members went to work--defendants 1 and 2 were masons -- to earn a livelihood. The rights of the other tavazhi over Items 1 and 2 were taken assignment of in 1927 under Ext. A-1 for Rs. 1.500/-. For this the family had to sell away the remaining items- for Rs. 500/- and make good the balance otherwise. That shows that the position of the family did not improve even by 1927. It has come out in evidence that the female members of the family were residing in the building in Item 1 and that the family cannot get on with the yield from the old trees referred to in Ext. B-1. The income of the properties covered under Ext. B-2 was being taken by the kuzhikanomdars; and that arrangement continued until the death of Kamaran and the transfer of Kannan's right to defendants 1 and 2 under Ext. B-7. No doubt. Kamaran's half right was treated as haying devolved on the tavazhi; but there was hardly any time to make up anything out of the income of his share for defendants 1 and 2 to acquire Ext. B-7. There is nothing in Ext. B-7 to show that defendants 1 and 2 took the deed in their capacity of the karanavan and senior anandiravan of the tavazhi. The consideration is ready cash of Rs. 400/-; and it is difficult to presume that family funds were available with defendants 1 and 2 to acquire the rights under Ext. B-7. The evidence let in by the plaintiff is practically of no use to show that there was any tarwad nucleus for defendants 1 and 2 to acquire the rights under Ext- B-7. The respondents' counsel contended that there is a presumption that the acquisition under Ext. B-7 was for the tavazhi, because the assignees are the karanavan and senior anandiravan of the tavazhi; and in support of this reliance is placed on some of the observations of the Supreme Court in Achuthan Nair Vs. Chinnamu Amma and Others, . He referred, in particular to the following passage from it:--

"But it is settled law that if a property is acquired in the name of the karravan, there is a strong presumption that it is a tarwad property and that the presumption must hold good unless and until it is rebutted by acceptable

evidence : see M. Veeresalingam and Others Vs. P. Kondayya, ; AIR 1926 Mad 643 : AIR 1947 Mad 137."

This passage, if taken out of the context, may be capable of an inference that any acquisition in the name of a karanavan will be presumed to be tarwad property even if it is not shown that the tarwad is possessed of sufficient nucleus with the aid of which the property might be acquired. But, Subba Rao, J. (as he then was) was referring to the presumption available in the case of an acquisition by the members of a joint Hindu family and the acquisitions in the names of members of Marumakkathayam tarwad. In the case of a joint Hindu family it is incumbent upon those asserting that an acquisition is a joint family property to establish it and if they prove that the family is possessed of sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This presumption was said to be not available in the case of an acquisition of properties in the name of a junior member of a tarwad. It was held that there is no presumption either way and the question has to be decided on the facts of each case. It is after stating this that Subba Rao, J. made the above quoted observation. In the context the availability of tarwad nucleus is assumed. His Lordship was distinguishing the presumption available in the case of a karanavan who is shown to be possessed of sufficient tarwad nucleus from the non-availability of such a presumption in the case of an acquisition by a junior member even if he was shown to be in possession of tarwad nucleus. The above observations cannot be understood to mean that those who claim an acquisition in the name of a karanavan need not prove that the karanavan was possessed of sufficient nucleus with the aid of which the property might have been acquired. In Kunhukuttan Nair v. Devaki Amma 1968 Ker LT 568 . Madhavan Nair, J., before quoting the above observations of Subba Rao, J. in Achuthan Nair Vs. Chinnamu Amma and Others, , observed thus at page 574 :--

"When a member of a tarwad, whether he be the karnavan or a junior member is proved to have been in management of tarwad properties yielding appreciable income, a presumption arises that his acquisitions enure to the tarwad. That rule of presumption has in no way been affected by Achuthan Nair Vs. Chinnamu Amma and Others, x x x". In Narayani Amma Kalliyani Amma and Another Vs. Naravani Amma Lekshmi Amma, Krishnamoorthy Iyer, J. after referring to the Supreme Court decision referred to above and referring to the earlier Hindu law cases requiring the proof of existence of a nucleus held that in that case there was sufficient nucleus for the karanavan to acquire the properties. That shows the existence of a nucleus has to be established before a presumption is drawn. Again, in R. Gopala Menon v. Rugmani 1969 Ker LR 1 a Division Bench of this Court had occasion to consider the scope of the above mentioned Supreme Court decision. Krishna Iyer, J, at P. 19 observed thus:--

"It may be observed in this context, that the leading case on the point at present is that of the Supreme Court reported in Achuthan Nair Vs. Chinnamu Amma and Others, . Their Lordships applied the presumption to the case of a manager of a tarwad who was not the karanavan under the law and also to the karanavathi of the tarwad provided that there was sufficient nucleus in his or her hands wherewith the acquisition could be made." (underlining is mine)

Again, another Division Bench in A. S. Nos. 414 and 419 of 1966 (see 1971 Ker LT 41) considered the effect of the abovementioned decision and held that the presumption is available if it is proved or admitted that the family possessed sufficient nucleus with the aid of which the member might have made the acquisition. Thus, according to me, it is well settled that a presumption will apply only if it is established that the karanavan had in his hands sufficient tarwad nucleus with the aid of which the acquisition might have been made. In this case I have tried to show that defendants 1 and 2 have not been shown to have had sufficient tarwad nucleus in their hands to raise a presumption. Therefore. Exhibit B-7 must be taken to be obtained with their own funds.

3. Then the further question is whether the claim of the 4th defendant for reservation of this one-half right of the kanakuzhikanom can be allowed. Defendants 1 and 2 are the karanavan and the senior anandiravan. The property belongs in jenmom to the tavazhi. One-half kanakuzhikanom right also devolved on the tavazhi on the death of Kamaran. There was no impediment in the karanavan paying off the kanakuzhikanom amount. It was really a mortgage transaction. He was bound to discharge the debt when tarwad funds came into his hands. He cannot claim a benefit to himself on his own default. He was taking the income of the property at least from 1932. He has stated as P. W. 1 that he was not paying anything out of the income to other members of the tarwad. He has a duty to protect the interest of the tavazhi. The amount that has come into his hands from out of the half right of the tavazhi for a period of 30 years will be much more than what was due to him for taking Ext. B-7. Therefore, though I have found that Ext. B-7 was taken with his own funds, the tarwad income which had come into his hands subsequently being more than the amount due to him, that liability must be deemed discharged. Therefore, the assignment deed Ext. B-10 does not avail to the 4th defendant-appellant to claim any separate allotment of any portion of, the property. Therefore, I agree with the learned Judge, though for different reasons, that the assignment deed Ext. B-10 does not confer any special right on the 4th defendant-appellant.

4. Another point pressed before me relates to the reservation of Ext'B-8 right claimed by the 4th defendant. That lease has been found to be invalid rightly; and since it is only of the year 1961, protection u/s 7-B of Act 1 of 1964 is not also available to the 4th defendant. She cannot be said to be holding the property bona fide believing herself to be a tenant. Therefore. I agree with the Courts below in holding that the 4th defendant is not entitled to get any reservation for Ext, B-8 lease.

5. No other point arises for consideration. Hence, I dismiss the second ap-peal. But in the circumstances. I make no order as to costs.