
(2010) 03 KL CK 0025
In the High Court Of Kerala
Case No : A.S. No. 615 of 1999

Varambamuriyantakath Katheesumma and Another	APPELLANT
Vs	
Kalarikkal Pullaikudi Anandan Nambiar and Others	RESPONDENT

Date of Decision : 24-03-2010

Acts Referred:

Mappila Marumakkathayam Act, 1939 — Section 13A, 14

Citation : (2010) 03 KL CK 0025

Hon'ble Judges : Harun-UI-Rashid, J

Bench : Single Bench

Advocate : K.V. Sohan and B. Premnath, for the Appellant; E.V. Nayanar and Kodoth Sreedharan, for the Respondent

Judgement

Harun-UI-Rashid, J.—Defendants 1 and 2 in O.S. No. 258 of 1995 on the file of the Sub Court, Payyannur, are the Appellants. Suit is filed for partition claiming 36/128 shares in the plaint schedule property. The court below passed a preliminary decree declaring the share claimed by the Plaintiff. The parties are hereinafter referred to as the Plaintiff and Defendants as arrayed in the suit.

2. The suit is for partition of the plaint schedule property in to 128 equal shares and to allot 36 such shares to the Plaintiff with future mesne profits. The plaint schedule property with the house therein originally belong to Kattikoottathil Ammad. Plaintiff also claimed damages from the Defendants on the allegation that the Defendants cut and removed a jack tree situated in the property. The plaint schedule property herein is the A schedule property in the registered Will dated 21-2-1918 marked as Ext. B-1 in this case. A schedule property in Ext. B-1 Will is bequeathed in favour of his first wife Pathumma, his daughter Ayisumma and in favour of the children of Ayisumma born to Ali, her husband. Pathumma died and her daughter Ayisumma also died later. Ayisumma has got three children by name, Muhammed Kunhi, Kathisumma and Nafisumma. Katheesumma is the first Defendant Muhammed Kunhi is no more. Muhammed Kunhi has got five children. Defendants 3, 4 and 5 are the three children of

Mohammed Kunhi, there are 34 members in the family.

4. The Defendants 1 and 2 contested the suit. Defendants 3 to 5 supported the case of the Plaintiff. The case of the contesting Defendants in short is that plaintiff A schedule property was bequeathed by late Kattikottathil Ammad in favour of tavazhi consisting of his first wife Pathumma and only daughter Ayisumma and the lineal descendants through Ayisumma. According to the Defendants the house and the property described in the plaint schedule which includes the tarwad house and that belongs to the tavazhi of the Defendants. It is admitted that the property originally belonged to Kattikottathil Ammad. As per Ext. B-1 Will the property was bequeathed in favour of tavazhi of Pathumma and Ayisumma; that Ammad and Defendants are governed by the Mappila Marumakkathayam Act and other statutes governing succession and testamentary disposition relating to Mappilas of North Malabar. The crux of the contentions raised by Defendants 1 and 2 is that the bequeath is in favour of tavazhi and that the tavazhi consists of several members including Muhammed Kunhi.

5. Evidence consists or oral testimony of P.W. 1 and D.W. 1 and Exts. A-1, A-2 series and Exts. B-1 to B-7 were marked.

6. It is not disputed that late Ammad was a member of marumakkathayee tarwad. His wife and daughter are also marumakkathayees. Defendants and their predecessors are persons hailing from North Malabar and are governed by the Marumakkathayam Law. Kattikottathil Ammad, a marumakkathayee by birth, executed Ext. B-1 Will in favour of his wife, daughter and their lineal descendants. I have examined Ext. B-1 Will. It is the contention of Defendants 1 and 2 that the plaint schedule property belongs to tavazhi by virtue of bequeath in favour of the tavazhi and therefore the members of the tavazhi have no right to assign the tarwad property to third parties and therefore the Plaintiff did not acquire any right in the plaint schedule property. The important question which arises in the suit is as to the nature of bequeath under Ext. B-1 Will. I have already stated that bequeath by Ammad is in favour of his wife, daughter and lineal descendants. Learned Counsel for the Plaintiff submitted that the bequeath is in favour of the named persons in Ext. B-1 Will and therefore the property devolved on the named persons in Ext. B1 Will and subsequently, by devolution Muhammed Kunhi has got alienable right over the property. It is not disputed that the plaint schedule property is the self acquired property of late Ammad. Late Ammad is a marumakkathayee by birth. Ext. B-1 shows that the property belongs to him on kuzhikkanam right. Ext. B-1 further shows that he bequeathed the property not in favour of the named persons in Ext. B-1, but, in favour of a class of persons. The legatees in Ext. B-1 are his wife Pathumma, daughter Ayisumma and lineal descendants of Ayisumma born to her through her husband, Ali. It is also recited that the bequeath enures to the children to be born to his wife Pathumma. The recitals in Ext. B-1 unequivocally make clear that bequeath is in favour of tavazhi and therefore the property assumes the

character of tavazhi property in the hands of Pathumma and Ayisumma.

7. The trial court held that though Defendants 1 and 2 have stated that the plaint schedule property is a tavazhi property, there is no evidence to prove that aspect. Going by the recitals in Ext. B-1, I hold that the finding of the trial court that there is no evidence to show that the property is their tarwad property is not correct. Ext. B-1 itself conclusively prove that the plaint schedule property assumes the character of tavazhi property on the death of testator. The trial court further held that the recitals in Ext. B-1 is sufficient enough to arrive at a conclusion that the property bequeathed by the testator is his own self acquired property and therefore he cannot bequeath to the tavazhi. I do not know why the trial court arrived at such a conclusion. There is no bar for a marumakkathayee to execute testamentary disposition in respect of his self acquired property. A member of a tavazhi cannot deal with the tavazhi property until and unless the tarwad is divided and a division is made. Therefore, the finding that the self acquired property of a marumakkathayee cannot be bequeathed in favour of tavazhi cannot stand.

8. When the property is bequeathed in favour of a tavazhi it becomes the property of a tavazhi. Thereafter the property is owned by the tavazhi as a composite entity, the members of which fluctuate, i.e., the members increase or decrease. In a Hindu Mitakshara joint family a junior coparcener in Malabar can alienate his undivided share though he cannot make it the subject of a testamentary disposition. But, in the case of Mappila marumakkathayam tarwad there is no such thing. No member of a Mappila tarwad has till partition, a share in the property of the tarwad which devolved on his heirs on his death. The legal position is that when a junior member of a tarwad dies, his interest survives to the other members of the tarwad. In this case the bequeath is in favour of the tavazhi, the tavazhi owns and holds the property as a composite entity.

9. Section 14 of the Mappila Marumakkathayam Act, 1939 reads thus:

14. Right of tavazhi to claim partition.--Two or more members belonging to the same tavazhi, may claim to take their share of the properties of the tarwad over which the tarwad has power of disposal, separate from the tarwad, and enjoy the same jointly, with all the incidents of the tarwad property.

So if two or more members wanted to separate from the tarwad, they can demand for partition and on partition two or more member can own and hold the property separately with all the incidents of the tarwad property. In this case none of the members of the tarwad ever separated from the tarwad by demanding partition. Therefore the plaint schedule property remains tarwad property and still it retains such character.

10. The Mappila Marumakkathayam Act, 1939, recognizes the principle of intestate succession of a dead individual member of the tarwad. Section 13A reads as follows:

13. A Devolution of interest in the property of Tarwad.--When any member of Muslim Tarwad dies after the date of publication of the Mappila Marumakkathayam (Amendment) Bill, 1962, in the Gazette, namely 3rd September, 1962 having at the time of his or her death in interest in the property of the Tarwad, his or her interest in the property shall devolve according to the Muslim Personal Law (Shariat) and not according to the Marumakkathayam Law. Notwithstanding anything contained in this Act any person on whom such right devolves may claim to take his or her share of the properties of the Tarwad.

[Explanation.--For the purpose of this section the interest of a member of a Muslim Tarwad in the property of the Tarwad shall be deemed to be the share in the property of the Tarwad that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among the members of the Tarwad then existing, and such share shall be deemed to have been allotted to him or her absolutely.]

Section 13A enables the legal heirs of a member who died after 3-9-1962 to claim deceased member's share over the tarwad properties. Section 13A is relevant for the purpose of considering the right of the Plaintiff in this suit. The Plaintiff is claiming a share of some of the legal heirs of Muhammed Kunhi who was a member of tavazhi. His date of death is not known. It has come out in evidence that after his death out of the 6 legal heirs, three of them executed Ext. A-1 assignment deed in favour of the Plaintiff conveying their right over the property. Muhammed Kunhi as a member of the tavazhi died and his right devolved on his legal heirs in view of Section 13A of the Mappila Marumakkathayam Act. Therefore the suit filed claiming partition of the Plaintiff's share over the property is maintainable subject to other contentions which I shall refer in the following paragraphs.

11. Learned Counsel for the Appellant brought to my notice the decision reported in Puthiya Purayil Abdurahiman Karanavan and Anr. v. Thayath Kancheentavida Avoomma and Ors. AIR 1956 Mad 244 The Division Bench considered the scope and ambit of various statutes governing the mappilas of northern Malabar. The Division Bench held that no member of a mappila tarwad has, till partition a share in the property of the tarwad which devolves on any one on his death as on intestate succession and that it is not correct to say that when a junior member of a tarwad dies "his share" survives to the other members of the tarwad. The Division Bench also declared the legal position holding that the property belonging to the tarwad is owned by the tarwad as a composite entity, members of which fluctuates and that a junior member of a tarwad, has no separate interest in the tarwad property and therefore nothing is devolved on his death. Following the decision reported in Syed Mohiuddin Ahmed and Another Vs. Sofia Khatun and Others, and other decisions the Division Bench held that the scope of Shariat Act of 1937 is limited and does not cover the entire field of property rights. The Court further held that a member of a tarwad or tavazhi did

not have at the time of death any proprietary interest in the property which would descend to his heirs as on intestate succession, but would survive to other members of the family unit to which he belonged. In *Koyyatton Sooppi v. Vaniyath Kallyani* 1957 KLT 899 the principle of law is restated. The Division Bench of this Court held that the presumption is that the Mappilas in North Malabar are governed by the Marumakkathayam Law in the absence of evidence to the contrary.

12. The trial court proceeded on the basis that the plaint schedule property does not belong to the tavazhi and it is the individual property of the legatees mentioned in Ext. B-1 will and held that in the absence of convincing evidence the plaint schedule property is not a tavazhi property of Defendants 1 and 2. The court after examining the evidence on record held that by virtue of Ext. A-1 assignment deed the Plaintiff has obtained the share of wife and two children of Muhammed Kunhi over the plaint schedule property and therefore it follows that the Plaintiff is entitled to a decree for partition of the plaint schedule property and separate allotment of 36/128 shares together with mesne profits.

13. In the light of the discussions made above it is clear that the plaint schedule property is the tavazhi property of legatees and their lineal descendants. Muhammed Kunhi is a member of the tavazhi. His exact date of death is not known. After his death his legal heirs executed Ext. A-1 assignment deed on 29-1-1993. The date of death of Muhammed Kunhi also assumes importance. Being a member of the tavazhi his legal heirs are entitled to inherit his share as per Section 13A of the Mappila Marumakkathayam Act. What is the exact share of Muhammed Kunhi can be ascertained only with reference to his date of death. The legal heirs are entitled to the share over the plaint schedule property left behind by the Muhammed Kunhi. The date of death of Muhammed Kunhi has to be ascertained in order to find out how many members are there in the tavazhi as on the date of his death. For e.g., if the tavazhi consists of 20 members as on the date of death of Muhammed Kunhi, Muhammed Kunhi's legal heirs are entitled to 1/20 shares and the Plaintiff being an assignee of three out of 6 legal heirs of Muhammed Kunhi, he can claim partition and separate possession of the share devolved on his assignees. In that view, the Plaintiff can maintain a suit for partition. The Plaintiff should have adduced evidence regarding the date of death of Muhammed Kunhi and total number of members in the tavazhi and the quantum of share to which he is entitled. Since there is no proof regarding that respect, the matter requires reconsideration by the court below.

14. For Anr. reason also a remand is necessary. From the contentions raised by the Appellants it is clear that all the members of the tavazhi as on the date of the suit are not parties to the suit. The matter can be decided only in a properly instituted suit impleading all the members of the tavazhi.

In the result, the appeal is allowed. The case is remanded to the court below for fresh consideration on the basis of the findings and conclusions arrived at by this Court. Since the suit is of the year 1995, the trial court is directed to dispose of

the suit at an early date, at any rate, within a period of 9 months from the date of receipt of a copy of this judgment. There will be no order as to costs. The parties are directed to appear before the court below on 8-4-2010. The Registry is directed to transfer the records of the case to the court concerned, forthwith.