Velumpi Kunji Vs Velayudhan Gopala Panickan

Court: High Court Of Kerala

Date of Decision: Jan. 13, 1958

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 1, 100, 9
Limitation Act, 1908 â€" Article 127, 144, 47, 28
Travancore Ezhava Act, 1100 â€" Section 28, 29, 30

Citation: AIR 1958 Ker 178

Hon'ble Judges: P.T. Raman Nayar, J; K. Sankaran, J; G. Kumara Pillai, J

Bench: Full Bench

Advocate: T.K. Narayana Pillai and D. Narayanan Potti, for the Appellant; T.N. Subramonia Iyer, S. Subramonia Iyer, T.K. Surien and K.N. Narayanan Nair, for the Respondent

Final Decision: Dismissed

Judgement

K. Sankaran, J.
This second appeal arises out of a suit for partition which was instituted in the year 1103 M. E. The parties to the suit are

members of the Ezhava community and are governed by the Travancore Ezhava Act (Act III of 1100). As per the case put forward in the plaint,

plaintiffs 1 to 8 and defendants 1 to 114 were members of an undivided Ezhava Marumakkathayam tarwad on the date of the suit. This tarwad is

known by the name of Kollasseril or Kollasseril Kizhakkethu. The 1st defendant was the karanavan of this tarwad on the date of the suit. He died

during the course of the suit and no additional party was brought on record as his legal representative.

On the other hand, defendants 2 to 114 who were the other members of the tarwad excluding the plaintiffs who had attained a divided status with

the institution of the suit, were recorded as the legal representatives of the 1st defendant. A genealogical table showing the relationship of the

several members of the tarwad was prepared by the plaintiffs and appended to the plaint as the A schedule. As per this genealogy the plaintiffs and

defendants 1 to 114 trace their descent to one Chakki who was the female ascendant in the tarwad.

Chakki had two daughters, Kunjuneeli and Velumbi, who represented the two main tavazhies in the tarwad. Defendants 90 to 114 are the

members of Velumbi"s branch while plaintiffs and defendants 1 to 89 are members of Kunjuneeli"s branch. Kunjuneeli had four daughters Kojnali,

Karumbi, Nangeli and Chakki who represented four thavazhies in the branch of Kunjuneeli. Plaintiffs and defendants 1 to 50 are members of the

thavazhi of Kojnali, defendants 51 to 54 are members of the thavazhi of Karumbi, defendants - 55 to 62 are members of the thavazhi of Nangeli

and defendants 63 to 89 are members of the thavazhi of Chakki.

The names of the sons of Kunjuneeli are also shown in the genealogical taible produced by the plaintiffs. Kunjuneeli''s sister Velumbi had a son

Krishnan and two daughters Nangeli and Kochupennu. Kochupennu''s daughter Kurumba left no issues so as to project a thavazhi of her own,

with the result that defendants 90 to 114 are members of the thavazhi of Nangeli. Krishnan or Krishna Panicken of this branch was the common

karanavan of the tarwad till the year 1074. He was succeeded by Pappu Panicken who was the elder brother of the 63rd defendant.

Since Pappu Panicken was a sickly person, the de facto management of the tarwad during his period of karanavanship was, with his consent,

conducted by the 63rd defendant. On the death of Pappu Panicken in the year 1089, he was succeeded by Velumban Panicken of the thavazhi of

Kojnali as the de jure karanavan, but since he was an incompetent karanavan, he was not able to oust the 63rd defendant from actual

management. The disputes between them about the possession of the tarwad properties led to a summary case (S. C. No. 4/1091 of the First

Class Magistrate''s Court at Kayamkulam) and by the decision in that case possession of the properties was declared in favour of the 63rd

defendant.

Thus he continued to be the de facto karanavan of the tarwad and Velumban Panicken died towards the close of the year 1102 without being able

to exercise his powers of management at any time. The 1st defendant succeeded him as karanavan of the tarwad and within a short time after that,

the present suit was instituted by the plaintiffs. Out of the B schedule items, the building in item 21 was stated to have been put up by the 55th

defendant with his own funds and as such belonging to him exclusively. Similarly, it was stated that the 6th plaintiff has a mortgage right over items

33 to 35 and that these items are to be partitioned subject only to the rights of the 6th plaintiff under the mortgage in her favour. All the other

documents which have been brought into existence in favour of some of the defendants in the case were repudiated by the plaintiffs as conferring

no rights in favour of these defendants in respect of the plaint items.

2. In the written statement filed by defendants 7, 16, 34, 36, 43, 44 and 45 to 50 they supported the case of the plaintiffs and admitted the

correctness of the relationship of the parties as shown in the genealogical table filed by the plaintiffs. Defendants 92, 96, 103 and 111 also

accepted this geneology as correct, but disputed the plaint claim that all the items in the B schedule belong to the common tarwad. They claimed

special and exclusive rights in respect of items 62 to 64 and items 66 to 68 and 74 and 75. The real contest in the suit was by defendants 63, 64,

65 and 74.

They questioned the correctness of the geneology as shown in plaint A schedule and contended that plaintiffs and defendants 1 to 62 are not

members of the Kollasseril or Kollasseril Kizhakkethil tarwad and that they have no right to claim any share out of the B schedule items 1 to 21

and 24 to 75. It was further contended that this tarwad consists of two thavazhies, one represented by defendants 63 to 89 and the other

represented by defendants 90 to 114. Plaintiffs and defendants 1 to 62 were stated to be members of a different tarwad known by the name of

Kollasseril Padeettathil, and items 22 and 23 were stated to belong to this tarwad.

However, it was conceded that these two tar-wads were known to have remained joint originally and to have become divided in Interest some

time prior to 1000 M. E. and to have conducted as separate tarwads for more than a century prior to the date of the suit. Special rights were also

set up by these defendants in respect of items 1, 3 10, 15, 16, 36 to 43 and 46 to 50. The special right conceded in the plaint in favour of the 55th

defendant in respect of item 21 was denied by these contesting defendants.

It was further contended by these defendants that even if the plaintiffs and defendants 1 to 62 are found to be members of an undivided branch in

the Kollasseril tarwad, they were excluded from the possession and enjoyment of these properties by the 63rd defendant and the members of his

branch for more than the statutory period of time and on account of such adverse possession and limitation, the plaintiffs" branch lost all the rights

in these properties. The suit brought by a few of the members only out of the members in the thavazhi of Thevi, was contended to be not

maintainable in view of the restrictive nature of the right of partition recognised by the Travancore Ezhava Act.

3. As a result of the trial of the suit, the first court found that items 27, 29, 74 and 75 of the B schedule are the separate properties of the sakha of

defendants 90 to 104 and that the plaintiffs are not entitled to claim any share out of these items, The special rights put forward by these defendants

as also by the other contesting defendants in respect of some of the other items in the B schedule, were all negatived, with the result that all the

items excepting items 27, 29, 74 and 75 were held to be partible properties belonging to the common tarwad of Kollasseril.

The geneology shown in the plaint A schedule was found to be correct. The plea of adverse possession and limitation set up by the contesting

defendants was negatived and it was held that plaintiffs and defendants 1 to 114 continued to be members of the Kollasseril tarwad and that all of

them were entitled to their respective shares in the properties found to belong to this tarwad. The objection to the maintainability of the suit on the

basis of the relevant provisions of the Travancore Ezhava Act, was not pressed at the time of arguments and accordingly, the trial Court discarded

that objection and held that the plaintiffs" suit for partition is maintainable.

A preliminary decree for partition was passed in favour of the plaintiffs and provision was also made for payment of mesne profits due in respect of

their shares. Against that decree an appeal was preferred to the District Court by defendants 63 and 64. Both of them died during the pendency of

the appeal and by the order on C. M. P. 5149/1952 respondents 78 and 72 who are defendants 85 and 79 respectively, were allowed to

prosecute the appeal and they were accordingly transposed as additional appellants 3 and 4. Defendants 92 and 96 filed an objection

memorandum against the decision of the trial court negativing the special claims urged on behalf of their sakha in respect of items 10 to 14, 16 51

to 66 and 69 to 72.

4. The lower appellate court concurred in the trial court''s conclusions substantially on all the major questions involved in the suit and confirmed the

preliminary decree for partition subject to certain modifications. Over items 44 to 56 a mortgage right in favour of the thavazhi of the 63rd

defendant was upheld. In other respects, the points urged on behalf of the appellants were all negatived. The objection memorandum filed by

defendants 92 and 96 was also dismissed.

By the preliminary decree as confirmed by the lower appellate court, the items directed to be partitioned are items 1 to 26, 28, 30 to 32, 38 to 43,

57 to 73, the equity of redemption over items 33 to 35 subject to the mortgage in favour of the 6th plaintiff & the equity of redemption over items

44 to 56 subject to the mortgage in favour of the thavazhi of defendants 63 to 89. It is against this decree of the lower appellate court that the

present second appeal has been preferred by defendants 85 and 79 who were additional appellants 3 and 4 before the lower appellate court.

Defendants 92 and 96 have filed a memorandum of objections reiterating their special rights in respect of items 57 to 61, 66, 69 and 70.

5. The Division Bench which heard the second appeal in the first instance was of the view that a decision on the objection of the maintainability of

the suit on account of the limitations imposed by Sections 28 to 30 of the Travancore Ezhava Act is one of considerable importance and that it is

desirable that the question is decided by a Full Bench. The case was accordingly referred to a Full Bench and that is how it has come up before us.

6. If the appellants'' contention that the plaintiffs, and defendants 1 to 62 are not members of Kollesseril tarwad and that they belong to an entirely

different tarwad known as Kollesseril Padeettathil, is to prevail, the suit must fall on that ground alone and the further question whether the suit as

brought forward by the present plaintiffs alone is maintainable in view of the limitations contained in Ss. 28 to 30 of the Travancore Ezhava Act

may not arise for consideration. Hence the question as to the status claimed by the plaintiffs as members of the Kollasseril tarwad has to be

examined at the outset.)

This is essentially a question of fact on which the finding of both the lower courts is in favour of the plaintiff''s and against the contesting defendants.

This concurrent finding on a question of fact cannot again be allowed to be canvassed in second appeal. Conscious of this limitation, the learned

counsel for the appellants made a strenuous attempt to attack the above finding on the ground that it based on totally irrelevant and inadmissible

items of evidence. Except for the subtlety of this argument we are not satisfied that there is any real substance in it.

This will be apparent from a reference to a few items of evidence on which the lower court''s conclusion on the question of the plaintiff''s status is

based. The oral and documentary evidence bearing on that question is seen to be supported by certain outstanding circumstances. One such

circumstance is the admission made by defendants 63 and 64 in paragraph 2 of their written statement. There It is stated that the tarwad of

plaintiffs and defendants 1 to 62 and the tarwad of defendants 63 to 114 originally belonged to one common tarwad, but became separate with no

more community of interest between each other, some time prior to the year 1000 M. E.

When such a division was pleaded by these defendants, it was for them to make out by satisfactory evidence as to when and how exactly the

division took place and what were the properties allotted to each of the tarwads at the time of the alleged division. Such evidence is significantly

absent in this case. Then there is the further circumstance that it is categorically admitted by defendants 92, 96, 103 and 111 in their written

statements that plaintiffs and defendants 1 to 114 are members of an undivided Marumakkathayam tarwad consisting of two main branches one of

which is represented by plaintiffs and defendants 1 to 89 and the other by defendants 90 to 114.

This statement is quite in agreement with the relationship shown in the genealogical table filed by the plaintiffs. It is conceded even by defendants 63

and 64 that defendants 90 to 114 are members of a thavazhi in the Kollasseril tarwad. To keep out the plaintiffs and defendants 1 to 62 from this

tarwad, would have been to the manifest advantage of defendants 90 to114. The members of this latter thavazhi are seen to be very keen in

safeguarding their interests to the maximum extent possible. They have been fighting for the special rights of that branch over a series of items in the

E schedule, and the claim ia that direction is agitated by defendants 92 and 96 by preferring an objection memorandum in this second appeal also.

Under these circumstances, they would not have admitted that the plaintiffs and defendants 1 to 62 are also members of the Kollasseril tar-wad

unless it was felt to be uneontrovertible truth. Even accepting as correct the suggestion put forward on behalf of the appellants that the relationship

between the members of the branch of defendants 90 to 11* on the one hand and the members of the branch of defendants 63 to 89 on the other

hand, has been far from being cordial it is difficult to believe that defendants 92, 96, 103 and 111 would have adopted an attitude prejudicial to

their own interest by supporting the claim of strangers.

The probability appears to be that these defendants thought that it would be futile to question the status of the plaintiffs and defendants 1 to 62 as

members of the Kollasseril tarwad. Exts, BF, BH, BK, BM, EC, BJ and BL are documents which came into existence long prior to the present

controversy and these documents make it clear that the members of the branch of plaintiffs and defendants 1 to 62 were conducting themselves as

members of the Kollasseril tarwad and that they were recognised as such by neighbours who could be presumed to know the status of these

persons. Items 33 to 35 of the B schedule were outstanding on mortgage under Ext. BF of the year 1056.

Under Ext. BH of the year 1072, Padmanabhan Sekhara Panicken the brother of the present 1st plaintiff, obtained a release of that mortgage. In

Ext. BH there is reference to the mortgage having been taken from the tarwad of Padmanabhan Sekharan Panicken. Ext. BC is an assignment

taken in the name of the same Padmanabhan Sekharan Panicken and therein also he is described as a member of the Kollasseril tarwad. In Ext.

BL of the year 1070 and Ext. BJ of the year 1080 also he is described in the same manner.

The 55th defendant Padmanabhan Kesavan is another member of the same branch and he appears to have been residing in Vakkesseril House

which is admittedly one of the houses belonging to Kollasseril tarwad. In Exts. BK and BM of the year 1084, to which this Padmanabhan Kesavan

is a party, he is described as a member of Vakkasseril House. We are unable to agree with the appellants'' contention that these documents and

the other circumstances already adverted to have no relevancy to the question of the status of the plaintiffs as members of the Kollasseril tarwad or

that the documents were wrongly admitted in evidence.

The lower courts were fully justified in draw-Ing the legitimate inference arising out of a due consideration of the abovementioned items of

evidence, as also the oral evidence adduced by the parties. The documents relied on by the contesting defendants in support of their contention

that the plaintiffs and defendants 1 to 62 are not members of the Kollasseril tarwad, have also been fully considered by the lower courts. It follows,

therefore, that the concurrent finding arrived at by the lower courts after a due consideration of all such items of evidence that the plaintiffs and

defendants 1 to 62 are also members of the Kollasseril tarwad along with defendants 63 to 114 and that the genealogical table shown in the A

schedule to the plaint, correctly indicates the relationship of these parties calls for no interference in this second appeal. That finding is accordingly

confirmed. The A schedule genealogy will be appended to the decree In this case and will be treated as part of it.

7. The finding that the plaintiffs are members of the Kollasseril tarwad necessitates a consideration of the further question whether the suit in the

present form is maintainable. The trial court answered this question in favour of the plaintiffs in view of the fact that the objection to the

maintainability of the suit was given up at the time of hearing of the suit by the defendants who had raised that objection. The lower appellate court,

however, was of opinion that these defendants were not bound by the concession made by their counsel in respect of that matter which involved a

pure question of law and accordingly proceeded to consider the question on its merits.

In the view of the lower appellate court the omission to claim the shares due to the entire thavazhi of the 1st plaintiff was a defect in the frame of the

suit, but that this defect was remedied with the death of the 1st plaintiff in the year 1118 while the appeal was pending in the lower appellate court,

because on her death the thavazhi consisting of her deughter the 2nd plaintiff and the latter''s children who are plaintiffs 3 to 5, could maintain the

claim for partition of the four shares due to the members of that thavazhi, just as plaintiffs 6 to 8 could sustain the claim for partition and recovery of

the three shares due to their thavazhi represented by the 6th plaintiff.

In challenging these findings, it is contended on behalf of the appellants that the trial court had no jurisdiction to entertain the suit which was

defective at its very inception, that the decree passed by that court was a void decree and that it could not be validated on account of the altered

situation brought about by the subsequent death of the 1st plaintiff. These objections proceed on the assumption that the limitations imposed by Ss.

28 to 30 of the Travancore Ezhava Act are such as to deprive the court of its jurisdiction to entertain a suit which does not strictly comply with the

requirements of these sections.

A perusal of these sections shows that there is no real basis for such an assumption. The ordinary Jurisdiction of a civil court to entertain a partition

suit instituted by one or more members of an Ezhava tarwad, which is essentially a suit of a civil nature, is not in any way barred by these sections.

On the other hand, all that is intended by the sections is to impose certain limitations and restrictions on the right of such members to compel a

partition of their tarwad against the will of the other members of the tarwad. This is obvious from the way in which these sections are worded. S.

28 states that

Except as hereinafter provided, no person shall claim or be compelled to divide from any other member of such person"s own thavazhi"". Section

29 states-

Except as hereinafter provided, no person shall claim or be compelled to divide from any other member of the thavazhi of such person"s lineal

ascendant in the female line during the lifetime of such ascendant.

Who all could compel a partition are mentioned in Section 30 which runs as follows:

After the death of the lineal ascendant referred to in Section 29, or with her consent,--

(1) each collateral thavazhee represented by the majority of the adult members thereof, or,

(2) the male children or female children without issue of such lineal ascendant and who are not included in the thavazhee referred to Clause (1),

may claim an outright partition of property over which the tarwad has the power of disposal.

If the claim for partition is by members falling under any of these categories, it cannot be successfully resisted by the other members of the tarwad

or thavazhi as the case may be. The right to compel a partition and thus to go out of the tarwad or the thavazhi is conferred on the members of an

Ezhava tarwad only to this limited extent. Where the claim for partition falls outside the categories mentioned in Section 30, the members of the

tarwad who are interested in maintaining the integrity" of the tarwad can oppose and defeat the claim for compulsory partition.

This is a personal right available to the members of the tarwad and it is open to them to assert that right or to waive the same. If the right is asserted

and the claim for partition is opposed, by those members who are not agreeable to a disintegration of the tarwad, the court is bound to go into the

question and to give a decision whether compulsory partition can be decreed or not. Where there is no such objection, the court is not bound to go

into the question of the maintainability of the claim for partition, because Sections 28 to 30 do not impose any restriction on the jurisdiction of the

court to entertain a suit for partition by the members of an Ezhava tarwad. As already pointed out, the restrictions and limitations imposed by the

section are only on the right of such members to compel a partition against the will of the other members of the tarwad. There is nothing in these

sections or In any of the other sections of the Act to prevent a partition being effected in an Ezhava tarwad with the consent of all the members of

that tarwad. If they could effect such a partition out of court, there is no reason why the court should not decree a similar partition where it is not

opposed by any member of the tarwad.

No objection by any member must amount to consent by all. The court will only be exercising its normal jurisdiction in passing a decree for

partition in such a situation. The court will be exercising a similar jurisdiction in passing a decree after considering the objection to the claim for

partition where such an objection is raised. Thus in any view of the matter the appellants'' objection that the trial court acted without jurisdiction in

passing the preliminary decree for partition and that it was a void decree, is unsustainable. The rulings in Madhevan v. Salini Amma 1947 TLR 167

(A) & Baman v. Lakshmi AIR 1952 Trav Co. 563 (B), relied on by the appellants do not in any way lend support to their contention.

In those cases the plaintiff''s claim for partition was opposed by the defendants on the ground that they were not entitled to compel a partition

which did not fall u/s 30 of the Ezhava Act, and on the facts of those cases the objection was upheld. But it was not ruled in those cases that the

court will be acting without Jurisdiction in entertaining a partition suit not coming u/s 30 of the Ezhava Act or that a decree passed in contravention

of the provisions of Sections 28 to 30 of the Ezhava Act can be ignored as a void decree.

8. The next aspect to be considered is whether the appellants who had given up their objections to the maintainability of the suit when it came up

for hearing, are entitled to agitate the matter again in the appellate court. The lower appellate court answered the question in favour of the

appellants. The two reasons which weighed with that court for taking up such a stand are: (1) that the contentions raised by defendants 63 and 64

related to a question of law, and (2) that their counsel had no authority to give up that contention.

These reasons do not appeal to us. No abstract question of law is involved in the objection to the maintainability of the suit. As we have already

explained the Court was bound to go into the question of the maintainability of the suit only if the contesting defendants persisted in their objection

to the plaintiffs'' claim for compulsory partition. It was perfectly open to these defendants to withdraw their objection and thus to agree to the

plaintiffs getting their shares and going out of the tarwad in case they succeeded in making out their claim as members of the common tarwad, At

the stage of the hearing of the suit, the contesting defendants chose to adopt such a course, as is obvious from paragraph 57 of the trial court

judgment. There it is stated that the objection that the suit is not maintainable under the Ezhava Act was not pressed at the time of arguments. It has

to be presumed that the defendants'' counsel gave up that contention as per instructions from them. There is nothing to show that the counsel acted

on his own, responsibility in that matter. No such complaint appears to have been raised before the lower appellate court by defendants 63 and 64

while preferring their appeal against the trial court''s decree.

There are other circumstances also to indicate that these defendants were nob serious in their objection to the maintainability of the suit. If they

were really serious about it, they would and should have pressed for a decision on that question as a preliminary issue in the case. If they were to

succeed on that issue, the consideration of the other numerous issues would have been unnecessary. But it is seen that these defendants were

concentrating their attention on those other issues and were anxious to get a verdict that the plaintiffs and defendants 1 to 62 are not members of

the Kollasseri tarwad.

That appears to have been the reason why they did not press the issue as to the maintainability of the suit. The other defendants had not objected

to the maintainability of the suit. In fact defendants 7, 16, 34, 36, 92, 96, 103 and 111 had all expressed their consent to the partition as claimed

by the plaintiffs and the contest by some of these defendants was only in respect of the items over which they have claimed special rights. Thus

when the suit reached the final stage in the trial court, there was no objection by any of the members on the question of the maintainability of the

suit and all the members were agreeable to a decree being passed in favour of the plaintiffs on their succeeding in their claim as members of the

Kollasseril tarwad.

It was only when defendants 63 and 64 found that they did not succeed In getting a decision that the plaintiffs and defendants 1 to 62 are strangers

to the Kollasseril tarwad that these two defendants wanted to reiterate their objections to the maintainability of the suit in the appeal against the trial

court decree. Such a change of front cannot be countenanced and they cannot be allowed to take up a contention which was consciously and

willingly given up in the trial court. It follows, therefore, that the trial court''s finding that the plaintiff''s suit is maintainable has to stand.

In this view of the matter it has become unnecessary to examine the correctness of the reasoning adopted by the lower appellate court in reaching

an independent conclusion to the same effect.

9. Then there is the plea of limitation and adverse possession set up by the contesting defendants, which was also overruled by the lower courts. It

is strenuously urged on behalf of the appellants that the lower courts have failed to grasp the full implication of the defendants'' plea of limitation in

all its aspects. The following facts have to be kept in mind in appreciating the plea of limitation urged by the defendants against the plaintiffs'' suit for

partition and recovery of their shares of the properties of the Kollasseril tarwad.

One Krishna Panicken of the branch of defendants 90 to 114 was karanavan of this tarwad, till the year 1074. The next person to succeed him as

the karanavan was Pappu Panicken of the other sakha of the plaintiffs and defendants 1 to 89. He was the elder brother of the 63rd defendant. On

account of illness and other causes, Pappu Panicken was not able to carry on the management of the tarwad affairs, with the result that the actual

management was entrusted to the 63rd defendant. Thus the 63rd defendant functioned as de facto karanavan even during the life time of Pappu

Panicken.

When Pappu Panicken died in the year 1089, the next in order of age to succeed to the karanavanship was Velumban Panicken, the elder brother

of the 1st defendant who belonged to a collateral branch in the main sakha of the plaintiffs and defendants 1 to 89. Velumban Panicken asserted

his rights as karanavan and tried to oust the 63rd defendant from de facto management and to secure from him possession of the tarwad

properties. This move was stoutly resisted by the 63rd defendant and the consequent disputes about possession of properties led to the initiation of

proceedings u/s 128 of the Travancore Criminal Procedure Code which was then in force and which corresponds to Section 145 of the Code now

in force.

The case was taken up by the First Class Magistrate at Kayamkulam as Summary Case No. 4/1091 on the file of his court. The first petitioner in

that case was Velumban Panicken already referred to and the first counter-petitioner was the 63rd defendant. The Magistrate by his order dated

23-12-1091 declared possession of the properties involved in that case in favour of the 63rd defendant (first counter-petitioner) and prohibited

disturbance of such possession except on the strength of a decree of a competent civil court. Ext. 1 is copy of the order in that case. Under Article

47 of the Limitation Act the period of limitation prescribed for a civil suit to recover possession of the property from the party whose possession

was upheld by the criminal court, is three years from the date of the final order of the criminal court. No such civil suit was instituted by Velumban

Panicken or by any other member of his own thavazhl. On account of their failure to do so the defendants contend that the members of that branch

have lost all their rights in the properties of Kollasseril tarwad by virtue of the operation of Section 28 of the Limitation Act.

10. Before proceeding to examine the sustainability of the plea of limitation urged by the appellants defendants, it is necessary to understand the

exact scope and limitation of Article 47 and Section 28 of the Limitation Act. The person who is bound by the order of the criminal court and who

is therefore obliged to institute the civil suit contemplated by that Article is specified in column 1 of that Article which runs as follows:

By any person bound by an order respecting, the possession of immovable property made under the Code of Criminal Procedure ..... or

by anyone claiming under such person to recover the property comprised in such order.

A person coming under this category has to. institute the suit to recover possession of the property from the party whose possession was upheld

by the criminal court, within three years from the date of the order. The consequence resulting from the failure to do so is that enacted in Section

28 which states as follows:

At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall

be extinguished.

There can be no doubt that the Magistrate"s order evidenced by Ext. I is an order to which Article 47 applies. The questions for consideration are

whether the present plaintiffs are bound by that order and, if not, who was bound by that order and whose right and to what extent was.

extinguished on account of the failure to institute a suit for recovery of possession of the property within the period of three years prescribed by

Article 47.

11. The normal period within which a person who obtains possession of immovable property and holds it adversely as against the true owner, can

perfect his title to such property is 12 years-as prescribed by Article 144 of the Limitation Act. If, within a period of 12 years from the

commencement of such adverse possession, the true owner does not institute a suit for recovery of possession of the property from the party in

wrongful possession, the title of the real owner will be extinguished and the party in wrongful possession will acquire a title to such property by

prescription on the completion of the said period of 12 years.

The effect of Article 47 read with Section 28 of the Limitation Act, is to recognise an exception to this normal rule. In a case governed by Article

47 and Section 28 the shorter period of three years is sufficient to extinguish the title of the true owner of the immovable property concerned and

to enable the opposite party in actual possession of the property to acquire a title for himself. The provisions providing for such an exception to the

general rule have necessarily to be construed strictly. The suit contemplated by Article 47 is a suit for recovery of possession of the immovable

property comprised in the order of the criminal court,

The person whose claim of possession was negatived by that order is undoubtedly a person bound by that order, and he will be entitled to Institute

a suit as contemplated by Article 47. In other words, such a person who is eo nominee a party to the order of the criminal court, is hound to

institute a suit within the period prescribed by that Article if he wants to get rid of the effect of that order and to secure possession of the property

covered by it. None of the present plaintiffs can be said to be a person falling under this category.

12. The further question is whether any of the plaintiffs can be said to be a person claiming under Velumban Panicken whose claim of possession

was negatived by the order Ext. I passed by the criminal court. The answer to that question can only be in the negative. It is settled law that the

junior members of a Marumakkathayam tarwad do not derive their right to or interest in the properties of the tarwad from or under the karanavan

of the tarwad. The karanavan and every other member of the tarwad acquire their rights in the properties of the tarwad solely on account of the

fact of their having born as members of the tarwad.

The seniormost among the adult male members of the tarwad and, in the absence of such adult male members, the seniormost adult female member

of the time being, will be the karanavan and in that capacity such person will have the additional right or privilege to be in management of the affairs

of the tarwad. Subject to this additional right or privilege attached to the office of karanavanship, every member of the tarwad has the same or

equal rights in the properties of the tarwad. On the death of a karanavan his special right to be in management of the tarwad passes on to the next

senior member entitled to succeed to that office.

This does not in any way affect the rights of the other junior members of the tarwad. Their rights were already in existence even from the time of

their birth and it cannot be said that they acquired those rights from any karnavan in the tarwad. The rights thus possessed by individual members

of an undivided tarwad in respect of the common properties of the tarwad come to an end with their death and no question of devolution of their

rights can arise in such a situation. When any member claims separation from the tarwad, the extent of his rights in the properties of the tarwad will

be determined on the basis of the total number of members in existence in the tarwad at that time.

Viewed in the light of these aspects, it is clear that the plaintiffs in the present suit are not claiming any right under Velumban Panicken, the

karanavan of the tarwad and against whom the order Ext. I was passed by the criminal court. The rights claimed by them are their independent

rights as junior members of the tarwad. It follows, therefore, that the plaintiffs do not come under the latter category of persons referred to in

Article 47 of the Limitation Act.

13. It is, however, strenuously urged on behalf of the appellants that the plaintiffs come under the category of persons referred to in the earlier part

of Article 47 or, in other words, that these plaintiffs are persons bound by the order Ext. 1. The plaintiffs were not eo nominee parties to the

proceedings which culminated in the order Ext. I. The argument is that they must be deemed to have been constructive parties to such proceedings.

Extending the application of Article 47 to persons who are not directly parties to the order of the criminal court, but who may be said to be

constructive parties to that order, is itself a debatable question.

A definite pronouncement on that question will become necessary in this case, only if it is found that the plaintiffs could be deemed to have been

constructive parties to the order Ext. I. This latter aspect of the question may therefore be examined at the outset. If Velumban Panicken was in

fact and in law representing these plaintiffs and the other members of his tarwad also and was putting forward a claim on their behalf also in the

criminal proceedings evidenced by Ext. I, it may be possible to contend that he was representing the tarwad in such proceedings.

Any question of his acting in such a representative capacity could arise only if the dispute was one between his tarwad and a stranger. If the dispute

was one between the members of the tarwad inter se, the contending parties can only be said to have been acting in their individual capacity and no

one of them could be said to have been acting as the representative of the tarwad. It has already been found that the parties to the proceedings

evidenced by Ext. I were all members of the Kollasseril tarwad. The chief contesting parties were Velumban Panicken on the one hand and the

present 63rd defendant on the other. This 63rd defendant was already in possession of the tarwad properties in his capacity as the de facto

manager even during the lifetime of the prior karanavan Pappu Panicken.

It was the attempt of Velumban Panicken, who became de jure karanavan after the death of Pappu Panicken to take possession of the properties

from the 63rd defendant that led to the criminal proceedings. Possession of the properties with one or the other of these contesting parties could

not in any way affect the rights of the other members of the tarwad in those properties, because either of them could hold the properties only for

and on behalf of the tarwad. The rival claim of possession put forward by the de jure karanavan and the de facto manager of the tarwad was a

matter of no conern for the other members of the tarwad.

What Velumban Panicken was asserting was essentially his personal right as de jure karanavan of the tarwad to get possession of the tarwad

properties and this is clear from Ext. I itself. His move was successfully resisted by the 63rd; defendant who was in possession of the properties as

de facto manager of the tarwad. In such a contest it cannot be said that the tarwad''s right to the properties was in dispute. No doubt in resisting

Velumban Panicken''s attempt to get possession of the properties, the 63rd defendant had gone to the extent of contending that Velumban

Panicken and the members of his thavazhi had no rights to the properties of Kollasseril tarwad.

The criminal court was not competent to give a decision on that matter. It is also clear from Ext. I that it was possible for the Magistrate to uphold

the possession of the 63rd defendant without going into the question whether Velumban Panicken was a stranger to Kollasseril tarwad. After

upholding the possession of the 63rd defendant, the Magistrate has expressly stated at the closing portion of his order that ""the other issues raised

by the contention of the parties appear tome quite irrelevant to the scope of this inquiry and need not therefore be considered at all.

Such being the nature of the order passed by the Magistrate, it cannot be said that it has in any way affected the rights of the present plaintiffs and

the other members of their thavazhi. The only effect of that order was to uphold the 63rd defendant''s possession of the properties in dispute and

thus to negative the claim of possession put forward by Velumban Panicken as de jure karanavan. It is also clear from Ext. 1 that the 63rd

defendant was claiming possession not in his individual capacity, but only as the de facto manager of the Kollasseril tarwad.

Thus the order in his favour enures to the benefit of the Kollasseril tarwad. We have already found that the plaintiffs and defendants 1 to 02 are

also members of this tarwad, Just as defendants 63 to 114. Under these circumstances, there is no scope for contending that the rights of the

Kollasseril tarwad were Involved in the criminal proceedings evidenced by Ext. 1 or that Velumban Panicken was asserting any right for and on

behalf of the tarwad. As already pointed out, he was only asserting his personal rights to get possession of the properties in his capacity as de jure

karanavan of the tarwad.

The order which went against him, cannot be said to be an order against the tarwad. If the order against Velumban Panicken could be said to be

an order against the tarwad, the same order which was in favour of the 63rd defendant must be deemed to be in favour of the tarwad, because he

was claiming possession as the de facto manager of the Kollasseril tarwad. In this view of the matter the plaintiffs or the other members of the

tarwad were under no obligation to institute a civil suit as contemplated by Article 47 of the Limitation Act.

The appellants" contention that Velumban Panicken must be deemed to have represented these plaintiffs also in the criminal proceedings and that

they must be deemed to be constructive parties to the order Ext. 1, must therefore fail. It follows, therefore, that they cannot be said to be persons

bound by that order.

14. Prom the finding recorded above it is clear that the plaintiffs do not come under either of the categories of persons mentioned in Article 47. A

suit contemplated by that Article could be instituted only by persons having a right to claim recovery of possession of the properties covered by the

order of the criminal court. In the case of an undivided Marumakkathayam tarwad possession of the properties could be claimed only by the de

jure karanavan or by the de facto manager. As against either of them the junior members of the tarwad have no right to claim possession.

The order Ex. 1 was in favour of the de facto manager of the tarwad and hence the plaintiffs and the other junior members of the tarwad could not

institute a suit for recovery of possession of the properties from him. So long as they had no right to institute such a suit, Article 47 could operate

(sic) as against them. The failure to exercise a non-existing right in that direction cannot also result in an extinguishment of their rights in the

properties concerned as contemplated by Section 28 of the Limitation Act.

Velumban Panicken, the de jure karanavan of the tarwad, was the only person bound by the order Ext. I, and it was open to him to sue for

recovery of possession of the properties from the de facto manager whose possession was upheld by the criminal court. The effect of his failure to

institute a suit for possession within the period prescribed by Article 47, was only to extinguish his right in the properties as karanavan and not the

rights of the other members of the tarwad. In Lalit Mohan v. Lachmi Raj Kuer AIR 1946 Oudh 213 (O), a similar question arose for

consideration.

There, it was a case of a Hindu widow whose possession was negatived by an order u/s 145 of the Code of Criminal Procedure. She did not

institute a suit for possession within the time specified by Article 47 of the Limitation Act. In considering the effect of her failure to institute a suit, it

was ruled as follows:

Failure of a Hindu widow to institute a civil suit within three years of the Magistrate''s order u/s 145 of the Criminal Procedure Code, as

prescribed by Article 47 of the Limitation Act, can only operate to bar her right to file a suit subsequently. The reversioner not being a party to the

litigation, is not bound by it. Nor can he otherwise maintain the suit as his reversionary right is no better than a mere spes successionis till the

widow''s death. S. 28, Limitation Act, can therefore extinguish only the widows rights to the property after expiry of three years, but not those of

the reversioner.

By analogy the same position must hold good in the case of a de jure karanavan of a Marumakkathayam tarwad omitting to institute a suit for

recovery of possession of tarwad properties within three years of the order of the criminal court against him. In the present case Velumban

Panicken, the de jure karanavan, had the legal right to be in possession of the properties of the tarwad. It was this right that was negatived by the

order Ext. I. if he wanted to secure that right, he had to Institute the suit within three years of the date of that order.

His failure to institute the suit resulted in an extinguishment of his right. The right that was thus extinguished cannot be said to toe his title to the

properties. He was not the owner of the properties, and hence it cannot be said that he had title in that sense. Title to the properties vested in the

tarwad, and until partition no member of the tarwad -- not even the karanavan --could claim title to the whole or any portion of the properties of

the tarwad. But the karanavan, by virtue of his office, had a possessory right and such right alone could be said to have been extinguished by his

failure to institute the suit contemplated by Article 47.

The right that wag thus extinguished was a personal right of the karanavan. But the tarwad as a whole retained its ownership of the properties.

15. On behalf of the appellants strong reliance was placed on the decision in Alluri Venkatasomaraju and Others Vs. Alluri Varahalaraju alias

Ramabadri Raju and Others, in support of the position that an adverse order passed u/s 145 of the Code of Criminal Procedure against a Hindu

father is binding on his sons also though they were not parties to the proceedings. That was a case in respect of the properties which the father had

purchased for the joint family of himself and his sons.

His claim for possession of the properties was resisted by a stranger and such resistance led to proceedings u/s 145 of the Code of Criminal

Procedure and finally the stranger''s possession was upheld. No suit for recovery of possession was instituted against him within three years of that

order. Such a suit instituted by the sons after the expiry of the period, was held to be barred on the ground that they were also bound by the order

u/s 145. On the facts of that case it was definitely found that the father who was the manager of the joint family, was a party to the criminal

proceedings in his capacity as the manager of the Joint family and, as such, the Joint family as a whole was a party to such proceedings and that the

manager represented every member of the joint family.

Particular emphasis was laid on this aspect of the matter and the conclusion that the sons were also bound by the order against their father was

based solely on the finding that the real party to the criminal proceedings was the joint family and not the individual who happened to be the

manager for the time being. Jagathambal Anni and Others Vs. Periathambi Nadar and Others, is another case relied on by the appellants. The

question in that case was whether an order passed u/s 145 of the Code of Criminal Procedure against a trustee is binding on the trust. In dealing

with the question it was observed as follows:

If there is a bona fide dispute between a trust and a third person and the other conditions of the section are satisfied, there is no reason why it

should not fall within the cognisance of the Magistrate u/s 145, nor is there any reason why, to an order passed by a Magistrate in such a case

Article 47 should not be applied. There is no justification for holding that it is only the particular trustee who was a party to a proceeding under s.

145 that must be held bound by that order or by the limitation prescribed in Article 47. If the trustee purported to act on behalf of the trust, the

proper interpretation of the order will be that the trust itself was a party and must be held Abound by that order"".

Even these decisions make it clear that if the party against whom the order u/s 145 was passed was asserting only a personal right in his individual

capacity, he alone would be bound by that order. The orders considered in these two cases were held to have had a larger scope and effect

because, on the facts, it was definitely found that the real dispute was between a stranger and a joint family represented by the head of the family as

its accredited representative in the first case, and between a stranger and a trust properly represented by the trustee for the time being in the

second case.

The decisions in these cases cannot, therefore, afford any help to the appellants'' contention in the present case where the facts are entirely

different. We have already found that in the summary case evidenced by Ext. I there was no dispute about the rights of the Kollasseril tar-wad to

the possession of the properties involved in that case. The tarwad could not therefore be deemed to have been a party to that case. The fight was

between individual members of the same tarwad, one of whom was the de facto manager in actual possession of the properties, while his opponent

was the de jure karnavan asserting Ms right to the possession of the same properties.

The order setting such a dispute between members of the same tarwad, can in no sense be said to be an order against the tarwad so as to bind the

other members thereof and thus to attract Article 47 and Section 28 of the Limitation Act. The plea of limitation urged against the plaintiffs on the

strength of these provisions is clearly unsustainable and was rightly overruled by the lower courts.

16. Then there is the plea of adverse possession. Here again the proceedings evidenced by Ext. I cannot afford any support to the defendants''

plea of adverse possession, for the obvious reason that the chief contesting parties to such proceedings were claiming possession on behalf of the

Kollasseril tarwad, and not adverse to it. The plaintiffs were not parties to such proceedings, and hence it cannot be said that they had notice of

any move on the part of the 63rd defendant to hold the properties adversely to the plaintiffs and the other members of their branch on the strength

of the order Ext. I, which upheld his possession.

That order was passed on 23-12-1091 and the present suit by the plaintiffs for partition and recovery of their shares in the properties of the

tarwad was instituted within 12 years of that date, i. e., before the 63rd defendant could perfect his title on the strength of his exclusive possession

as declared by Ext. I order dated 23-12-1091, even if such possession could be deemed to be adverse to the members of the plaintiffs'' branch.

The definite stand that he had taken in that case was that he was in possession of the properties as the de facto manager of Kollasseril tarwad.

Hence his possession could not have been adverse to the plaintiffs who are also found to be members of that tarwad. Article 127 of the Limitation

Act indicates the circumstances under which a member of a joint family or tarwad may lose his right in the properties belonging to the joint family

or tarwad. That Article prescribes a period of 12 years for the institution of a suit by a person excluded from joint family property to enforce a right

to share therein, the period being computed from the time when the exclusion becomes known to such person.

The exclusion referred to in this Article must be understood in the light of the legal concept of a joint family or a Marumakkathayam tarwad.

Possession of the properties of an undivided Marumakkathayam tarwad will normally be with the karanavan or with the de facto manager. But that

does not mean that the other members of a tarwad are excluded from those properties. Possession of the properties by the karanavan or the

manager is possession on be half of all members of the tarwad and he manageg the properties for the benefit of all of them.

Mere non-participation in such benefits by any member will not also amount to exclusion within the meaning of Article 127, The exclusion

contemplated by that Article is a conscious and deliberate act amounting to a denial of the right of the particular member concerned to have any

benefits from the properties of the tarwad. As pointed out by the Privy Council in Nirman Singh v. Budra Partab Narain Singh ILR 48 All 529:

(AIR 1926 PC 100) (F), the exclusion must be a total exclusion of all the benefits that may normally be available to that individual by virtue of his

position as a member of the tarwad.

The member must also have notice of such an exclusion because the period prescribed under Article 127 will begin to run against him only from the

date when the exclusion becomes known to him. Unless all these conditions are satisfied, he is not obliged to institute a suit to enforce his right in

the tarwad properties. In the absence of an exclusion as explained above, every member of the tarwad will continue to retain his rights in the

tarwad properties, even though such properties may continue to be in the possession of the karanavan or the manager for the time being.

The other members of the tarwad may actually derive some benefit or they may even rest content with not insisting on getting any actual benefits

out of those properties. Mere non-parti-cipation of such benefits will not amount, to exclusion unless it be that the non-participation is the result of

a total denial of the right to have such benefits. In Radhoba Baloba v. Abu Rao Bhagwant Rao ILR 53 Bom 699: (AIR 1929 PC 231) (G), it was

ruled by the Privy Council that a mere refusal to partition the properties by metes and bounds does not amount to an exclusion unless it is based on

the ground that the claimant is not entitled to a share.

It was also pointed out that it is for the party pleading exclusion to prove the exclusion and denial of the title to the knowledge of the claimant more

than 12 years prior to the date of the suit.

17. The position of the plaintiffs in the present suit as members of the Kollasseril tarwad has to be examined in the light of the principles explained

above, to find out whether their rights to get a share of the properties of that tarwad have become barred under Article 127 of the Limitation Act.

Defendants 63 and 64 who have set up the plea that the plaintiffs" right to claim their shares in the properties of the Kollasseril tarwad had become

barred by limitation, have themselves admitted in paragraph 5 of their written statement that these plaintiffs and defendants 1 to 62 have possession

and enjoyment of items 22 and 23 of the B schedule.

These two items are also properties belonging to the Kollasseril tarwad. Thus the members of the plaintiffs'' thavazhi had possession and enjoyment

of a few items of tarwad properties even at the time of the suit. It has also come out in evidence that they have been residing in one of the houses

belonging to the tarwad. Under these circumstances, there is no scope for contending that the plaintiffs and the other members of their thavazhi

were totally excluded from the benefits of the properties of the tarwad. Since there has been no such exclusion, the question whether there was

exclusion to the knowledge of the plaintiffs does not arise for consideration.

It follows, therefore, that the plaintiffs'' right as members of the tarwad continued to be alive even at the time of the suit. The objection that such

rights have become barred by limitation and adverse possession -- either under Article 144 or under Article 127 of the Limitation Act -- is clearly

unsustainable and was rightly overruled by the lower courts.

18. The only other point that remains for consideration is whether the lower courts erred in repelling the contention raised by defendants 63 and 64

that items 1, 3, 15, 16 & 46 to 50 of the B schedule are the separate properties of their thavazhi and in holding that those properties also belong to

the common tarwad of the plaintiffs and defendants 1 to 114. At the outset, it has to be stated that the question whether those items belong to the

common tarwad or not, is essentially a question of fact on which the concurrent finding recorded by both the lower courts is in favour of the

plaintiffs and against defendants 63 and 64.

The same matter cannot be allowed to be agitated again in this second appeal, particularly when it is seen that the evidence and circumstances

relied on by defendants 63 and 64 in support of the exclusive claim put forward on behalf of their thavazhi have been fully considered by the lower

courts. The finding that the aforesaid items are common tarwad properties will therefore stand.

19. The objection memorandum filed on behalf of defendants 92 and 96 is directed against the finding that items 57 to 61, 66, 69 and 70 of the B

schedule are also common tarwad properties, and not the separate properties of the thavazhi of defendants 90 to 114 as contended by defendants

92 and 96. Here again, it has to be pointed out that on a full consideration of all the available evidence on record both the lower courts came to the

same conclusion that the exclusive claim put forward by defendants 92 and 96 on behalf of their thavazhi to the aforesaid items, has not been made

out and that these properties really belong to the common tarwad.

No further scrutiny in that matter is called for. It may also be mentioned that learned counsel appearing for defendants 92 and 96 who are

respondents 8 and 68 respectively, stated at the time of hearing that the objection memorandum is not pressed and that the same may be dismissed

without costs. Under these circumstances the lower courts'' finding that items 57 to 61, 66, 69 and 70 are also properties belonging to the common

tarwad, has only to be left undisturbed.

20. In the result the second appeal is dismissed with costs to respondents 1 to 7 who are plaintiffs 2 to 8. The objection memorandum filed by

defendants 92 and 96 is also dismissed but without costs.