Kana Edathil Veettil Lakshmi Amma and Others Vs Kana Edathil Veettil Rajalakshmi and Others

Court: High Court Of Kerala

Date of Decision: April 6, 1994

Acts Referred: Hindu Minority and Guardianship Act, 1956 â€" Section 12, 6, 9
Travancore Nair Act, 1912 â€" Section 10

Citation: (1994) 2 KLJ 149

Hon'ble Judges: K.P. Balanarayana Marar, J

Bench: Single Bench

Advocate: P.G.K. Wariyar and K.B. Menon, for the Appellant; M.C. Sen, for Respondents Nos. 1 to 5 and 7 to 10, for the Respondent

Judgement

K.P. Balanarayana Marar, J.
Defendants 1, 2 and 4 to 8 in a suit for partition are the Appellants. Respondents 1 to 4 are the Plaintiffs and

Respondents 5 to 19 are the other Defendants.

2. Plaint B schedule properties originally belonged to the tarwad of the parties and in a partition of the tarwad properties of the year 1944, these

properties were allotted to Lakshmi Amma, the 1st Defendant, and her descendants. Some of the properties were since then assigned and the

remaining properties are described in the plaint B schedule. Plaintiffs claimed separation of their shares. The partition deed entered into on 1st June

1974 is not binding on the Plaintiffs since the partition is not fair and equitable. Plaintiffs 1 to 4 and Defendants 1 to 17 are the members of the

tavazhi. Defendants 18 to 22 were impleaded since they were found to be in possession of a small portion of the properties.

3. The suit was resisted by Defendants 1, 2 and 4 to 8 who contended that a division of the properties had taken place as per the partition deed

dated 1st June 1974. They further contended that the partition was fair and just and that the Plaintiffs mother had represented them as their

guardian. Defendants 3, 10, 11, 12, 13, 16 and 17 supported Plaintiffs. Defendants 18 to 22 claimed to be bona fide purchasers for value from the

persons to whom those properties were set apart in partition.

4. Documents were produced on both sides. The father of Plaintiffs, was examined as P.W. 1. Three witnesses were examined on the side of

Defendants. The Court below on a consideration of the documents and appreciation of evidence held that the partition deed dated 1st June 1974

is unfair and inequitable. That partition was permitted to be re-opened as far as Plaintiffs were concerned. They were found entitled to 4/21 shares.

The properties covered by Exts. B-1 and B-2 purchased by Defendants 18 to 22 were directed to be reserved to the share of Defendants 8 and 2

respectively. The question of reservation and other equities and the quantum of profits were relegated to the final decree stage. Aggrieved by that

decision Defendants 1, 2 and 4 to 8 have come up in appeal.

5. The main grievance of the Appellants is that the Court below has committed an error in finding Ext. A-2 partition to be unfair and inequitable

and in re-opening the same as far as the Plaintiffs are concerned. The quantum of shares allotted to the Plaintiffs is also disputed on the ground that

a disruption in status had taken place in 1974 and persons born thereafter are not entitled to get any share.

6. On the contentions raised by the Appellants the following points arise for consideration:

1. Whether the partition is liable to be re-opened for any of the reasons mentioned in the plaint and whether the Court below was right in directing

division of the properties alloting shares to Plaintiffs, and

2. In the event of partition, what are the correct shares to which Plaintiffs are entitled.

7. One of the reasons alleged by the Appellants in support of the partition deed Ext. A-2 is that Plaintiffs were represented by their mother as

guardian and the representation was proper, according to law. The natural guardian of a Hindu minor in respect of the minor''s person as well as

his property excluding his/her undivided interest in joint family property is the father and after him the mother in the case of a boy or unmarried girl

u/s 6 of the Hindu Minority and Guardianship Act. The section is not applicable to the undivided interest of a Hindu minor in joint family property.

It is also clear from the preamble that the Act is intended to amend and codify certain parts of the law relating to minority and guardianship among

Hindus. The provisions of the Act are therefore made applicable only to matters relating to minority and guardianship in respect of the minor''s

property excluding his/her undivided interest in joint family property. That is manifested not only from Section 6, but also from Sections 9 and 12 of

the Act. Section 9 relates to testamentary guardians and their powers. A Hindu father entitled to act as the natural guardian of his minor legitimate

children may by will appoint a guardian for any of them in respect of the minor''s person or in respect of the minor''s property other than the

undivided interest referred to in Section 12 of the Act. Section 12 states that no guardian shall be appointed for the minor in respect of such

undivided interest where a minor has an undivided interest in joint family property and the property is under the management of an adult member of

the family. The reason why a guardian cannbt be appointed by the Court of the undivided interest of the minor in joint family properties is that the

interest of the minor is not separate or individual property. Such cases are therefore governed by the general prdinciples of law relating to joint

family property.

8. The parties to this litigation being Marumakkathayees in Malabar are govered by the Madras Marumakkathayam Act. Section 14 of that Act

contained in Chapter 3 relating to maintenance and guardianship states inter alia that the father shall be the guardian of his minor children. The

section contains a proviso that such guardianship shall not extend to the right and interest of the wife or children in respect of their tarwad or tavazhi

properties. Identical provisions are contained in Section 10 of the Travancore Nair Act. The position therefore is that in respect of tarwad or

tavazhi properties the father is not the guardian. It is contended that the karanavan who is in management of the tarwad or tavazhi properties will be

the guardian of the minors also. But there is nothing in the Madras Marumakkathayam Act preventing the mother from acting as guardian in respect

of the tarwad or tavazhi properties of her minor children. Plaintiffs were therefore properly represented by their mother as guardian in the partition

deed Ext. A-2. The document is not therefore liable to be challenged on the ground that the minors were not represented by the father as guardian.

9. Even if the father is the legal guardian to represent the minors, the mother is competent to represent Plaintiffs as guardian since the father had not

taken any interest in the management of the properties of the minors. As P.W. 1 he stated that he was aware of the deliberations and the partition

which resulted thereby. He did not intervene in the mediation talks, nor did he speak on behalf of the minor children in order to get their legitimate

share. It is therefore pointed out that the father has to be treated as non-existent though alive. Attention is drawn to the decision of the Supreme

Court in Jijabai Vithalrao Gajre Vs. Pathankhan and Others, The Supreme Court held that the position in the Hindu Law as well as u/s 6 of the

Hindu Minority and Guardianship Act is that normally when the father is alive, he is the natural guardian and it is only after him that the mother

becomes the natural guardian. It is further observed that where the father was alive but had fallen out with the mother of the minor daughter and

was living separately for several years without taking any interest in the affairs of the minor who was in the keeping and care of the mother, it was

held that in the peculiar circumstances, the father should be treated as if non-existent and therefore the mother could be considered as the natural

guardian of the minor''s person as well as property and had power to bind the minor by granting lease of her land in proper course of management

of the property. The mother was therefore competent to represent the minors in the partition deed.

10. That leads us to the next question whether the division was fair and equitable. There were 19 members in the tavazhi at the time of partition.

The common ancestress, the 1st Defendant, relinquished her share in favour of others and the properties were divided among executant Nos. 2 to

19 of Ext. A-2 karar whereunder a right to take income was reserved in favour of the 1st Defendant over two properties, one of which is item No.

2 of B schedule allotted to the group of Plaintiffs and the other is the property allotted to executant No. 9 of the document. The specific contention

of Plaintiffs before the Court below was that executant Nos. 3 and 10 to 19 which include Plaintiffs were not allotted their due share. This

contention was attempted to be substantiated before the Court below by referring to the total extent of the properties available and the properties

included in the various schedules and set apart to the respective shares as well as the rights available to executant Nos. 3 and 10 to 19 for

enjoyment. On hearing counsel on both sides and on a perusal of the judgment of the Court below I am of the view that the learned Subordinate

Judge has considered the matter in the proper perspective and has rightly held that the partition is unjust and inequitable.

11. The total extent of the properties divided under Ext. A-2 is 10.541/2 acres. The group consisting of executant Nos. 3 and 10 to 19 was

allotted only 991/4 cents whereas they would be entitled to an area of 6.44 acres if divided on per capita basis. The first executant had

relinquished her share and the properties were divided among executant Nos. 2 to 19. The group of Plaintiffs was therefore entitled to 11 out of 18

shares. It is on that basis the extent as mentioned above is calculated. The total extent of the properties allotted to the group of Plaintiffs is therefore

far short of their legitimate share. In this connection Sri P.G.K. Warrier, learned Counsel for Appellants, draws attention to clauses 2 and 12 of the

karar in support of his Contention that division was made on the basis of the income from the properties and not on the basis of the extent. Clause

2 says that partition was effected through mediators after looking into the nature of the soil, whether good or bad, and on the basis of income.

Clause 12 recites that the executants are satisfied with regard to the extent allotted to each sharer since the properties were divided on the basis of

income. It is argued that the income from the respective properties was not ascertained and no evidence was adduced on the side of the Plaintiffs

regarding the income. Counsel for Appellants would therefore assert that the division cannot be said to be unjust or inequitable merely on the basis

of extent. This contention is unsustainable for reasons more than one. The group of Plaintiffs are the major sharers, they being entitled to 11 out of

18 shares. Executant Nos. 2 and 4 to 9 are entitled only to one share each. It is seen that some of the malts among the sharers are allotted

extensive properties. The A schedule allotted to executant No. 2 has an extent of 3.931/4 acres and E schedule allotted to the 6th executant has an

area of 2.181/2 acres. The 5th executant is allotted 1:251/2 acres. The other sharers are seen allotted 60 cents, 661/4 cents, 45 cents and 46

cents each. Majority of the properties are situated in Perur desom of Eramam amsom. The A schedule property is in Vellora desom of Kuttoor

amsom. All the properties are described as parambas or garden lands in the schedule to the document. It has not been shown that the extensive

properties allotted to executant Nos. 2 and 6 are waste lands unfit for cultivation. On a mere look at the extent of the properties allotted to the

respective sharers it is clear that the division was not made in a fair and equitable manner.

12. Even if the division was made on the basis of income from the respective properties, the group of Plaintiffs was denied the income for a

considerably long period. Two items of properties are seen allotted to them, the first item having an extent of 22 cents and the second item an

extent of 751/4 cents. The first executant-1st Defendant is given the right to take the income from item No. 2 during her life time. For the past 20

years she was appropriating the income from that property. In effect the group of Plaintiffs was denied the income from that item for two decades

and it is likely that they would be denied that benefit for some more years to come. In the circumstances it is meaningless to contend that the

properties were divided on the basis of income. One cannot support that division so long as the allottee gets the right to take the income from the

property allotted. The reservation of the income from item No. 2 of B schedule in favour of 1st Defendant by itself is sufficient to hold that the

partition is unfair.

13. Yet another contention raised by learned Counsel for the Appellants is that the joint family house, which is a substantial building, has been

allotted to the group of executants Nos. 3 and 10 to 19. Allotment of a substantial building may be a solace for that group in case they get

exclusive rights over the building. But what has been allotted is only 4/5 share over the building and the remaining 1/5th share is allotted to

executant No. 9 and included in the H schedule. What is more, the members of the family are also given a right of residence. The allotment of the

house is therefore subject to various restraints and what is allotted is only a moiety of the share even if that be a larger one. The partition is

therefore liable to be re-opened at the instance of Plaintiffs who were minors at the time of partition.

14. The Supreme Court in Ratnam Chettiar and Others Vs. S.M. Kuppuswami Chettiar and Others, held that a partition can be re-opened

whatever the length of time when the partition took place where the partition effected between the members of a Hindu undivided family which

consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors. In paragraph 19 of the decision the Supreme

Court has laid down the propositions on a consideration of the authorities and the law on the subject thus:

(1) A partition effected between the members of the Hindu Undivided Family by their own volition and with their consent cannot be reopened,

unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the Court should required a

strict proof of facts because an act inter vivos cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu Undivided Family which consists of minor coparceners it is binding on the

minors also if it is done in goods faith and in bona fide manner keeping into account the interests of the minors.

(3) Where, however, a partition effected between the members of the Hindu Undivided Family which consists of minors is proved to be unjust and

unfair and is detrimental to the interests of the minors, the partition can certainly be reopened whatever the length of time when the partition took

place. In such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just

and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and moveable properties but the two transactions are distinct and separable or have taken place at

different times, if it is found that only one of these transactions is unjust and unfair, it is open to the Court to maintain the transaction which is just

and fair and to reopen the partition that is unjust and unfair.

15. In the light of the aforementioned propositions laid down by the Supreme Court, the conclusion is irresistible that Ext. A-2 partition is unfair

and unjust and is detrimental to the interests of the Plaintiffs who were minors at the time of partition. The Court below was therefore right in

reopening the partition and in directing division of the plaint schedule properties and for allotment of four shares to Plaintiffs.

Point No. 2

16. The Court below has directed division of the properties into 21 shares. On the date of the suit there were 21 members in the tavazhi. They are

Plaintiffs and Defendants 1 to 17. There were only 19 members on the date of Ext. A-2 as seen from that document. It is therefore pointed out by

learned Counsel for the Appellants that the properties are to be divided into 19 shares, the children born after Ext. A-2 being not entitled to any

share. A division in status had already taken place by the partition deed of 1974. Persons born thereafter are not entitled to get any share.

Defendants 16 and 17 cannot claim a share over the properties. The result is that the properties are to be divided among Plaintiffs and defendants

1 to 15. Plaintiffs are therefore entitled to 4 out of 19 shares. The direction that the properties covered by Exts. B-1 and B-2 shall be reserved to

the share of Defendants 8 and 2 respectively shall stand since that is not disputed by any of the parties. The directions regarding profits, reservation

and equity will also stand.

For the aforesaid reasons the judgment and decree of the Court below are confirmed and the appeal is dismissed subject to the modification

regarding shares. The parties are directed to suffer their respective costs.