

(1970) 09 KL CK 0022

High Court Of Kerala

Case No: S.A. No. 1308 of 1965

Subhadra Amma and
another

APPELLANT

Vs

Viswanatha Bose Asan
and another

RESPONDENT

Date of Decision: Sept. 24, 1970

Acts Referred:

- Travancore Ezhava Act, 1100 - Section 19

Citation: (1971) KLJ 155

Hon'ble Judges: P. Subramonian Poti, J

Bench: Single Bench

Advocate: Kalathil Velayudhan Nair and V.S. Moothathu, for the Appellant; S. Easwara Iyer and C.S. Rajan for Respondent 1, C.K. Sivasankara Panicker, N. Govindan Nair and T.A. Narayanan Nair for Respondents 6 to 10, 14 to 29, 31 and 32, for the Respondent

Final Decision: Allowed

Judgement

P. Subramonian Poti, J.

This is a Second Appeal by defendants 43 and 44 in the suit. That was a suit for partition, after setting aside udambady executed by defendants 1, 43 and 44. The first defendant is dead and defendants 43 and 44 are his legal representatives, being his wife and son. According to the plaintiff, he and defendants 1 to 42 form an undivided Ezhava tarwad of which first defendant is the karanavan. Plaint A schedule properties were Makkathayam properties obtained by the tarwad by Ex. P-2, plaint B schedule properties were obtained in the partition in the common tarwad in 1104 and C schedule were properties acquired by first defendant in his name with funds of the tarwad. So partition was claimed in respect of these properties. First defendant set up a case of an oral partition in regard to A and B schedule properties and sought to justify the conveyance of properties by him in favour of defendants 43 and 44 under an udambady, on the strength of the oral

partition. There were also several claims raised by certain other parties to the suit, but for the purpose of this appeal I am concerned only with one such. That relates to the claim by defendants 43 and 44, under the first defendant to the building in B schedule item 1, said to have been put up by the first defendant with his own funds. The trial court found that the oral partition pleaded by the 1st defendant was not true. It found that the tarwad did not have nucleus, which could be said to be ample to form a source of acquisition of C schedule items. Therefore it was found that C schedule properties were acquired by the first defendant with his own funds. The building in the B schedule item 1 was found to belong to the first defendant as having been put up by him. On these findings, plaintiff was given a decree for partition in regard to plaint A and B schedules with an equitable direction that B schedule item 1, 20 cents in extent, will be allotted to the first defendant, adjustment being made for that purpose in the final decree. The matter was taken up in appeal by the plaintiff who challenged the finding in regard to C. schedule properties and also the finding that the building in B schedule item 1 belonged to the first defendant. Defendants 43 and 44 also filed an appeal and that was one challenging the finding of the court negating the case of oral partition of A and B schedule properties. The appellate court also found that the oral partition alleged by the first, defendant was not true and therefore the appeal by defendants 43 and 44 was dismissed. In the appeal by the plaintiff the appellate court concurred with the finding of the trial court that the C schedule was the self-acquisition of the first defendant. But in regard to the building in item, 1, B schedule, it was found that it must have been put up with the materials of an old building situate in an item of property allotted to the branch of the parties and therefore first defendant was not entitled to any preference in regard to that building or to have that building treated as his. The appeal was therefore allowed to that extent. In this second appeal by defendants 43 and 44 two points are raised. One of these, is that the court below ought to have found the oral partition alleged by first defendant and also defendants 43 and 44 to be true and the other is that the court below was not right in finding that B schedule item 1 building did not belong to the first defendant.

2. The first of these contentions urged, namely that there was an oral partition in regard to plaint A and B schedules, does not require any answer because the finding on this question is concurrent and there is no justification for interference in second appeal.

3. The only other question which remains to be considered in this appeal relates to the claim in respect of the building in B schedule item 1.

4. The trial court found that this building has been put up by the first defendant. The appellate court modified this and held that though put up by the first defendant it was put up with the old materials of a building which remained in another item of property allotted to the branch in the earlier partition. That finding is seriously challenged by learned counsel for the appellants.

5. Though the plea of oral partition has been found, against by the courts below, it is necessary to notice that plea here. That is because there is evidence in this case which would indicate an attempt on the part of the first defendant to treat himself as a divided member of the tarwad. His branch consisted of himself and another male member and possibly if division of properties was to be per stirpes, first defendant would get more properties. Not that the first defendant is entitled to such division but the attempt was to claim that by conduct his branch had become entitled to half of the properties. Payment of tax half and half by the branches was relied upon to support this case.

6. The tarwad did not have possession of properties which would have yielded any income worth mentioning. There were a number of members in the tarwad whose maintenance could certainly not be met out of the income from the properties. Therefore it was not a case of the tarwad with any a surplus income coming into the hands of the karanavan. This fact was noticed in deciding the question of the right to the acquisitions in regard to C schedule properties claimed by the first defendant. First defendant, it was noticed, was a man who had funds of his own and who was carrying on a trade in his own name. He put up the building in 1105 or thereafter in B schedule item 1 and after pulling up the building, himself and his wife and children resided in the building. There is no case for the plaintiff that at any time the building so put up served as a residence for the members of the tarwad or the tarwad members were, at any time, treating it as a building put up for their residence. In the partition, Ex. P-4, of the year 1104 properties allotted to the branch of the plaintiff and defendants 1 to 42 included an item where there was an old building which had to be removed. The case of the plaintiff is that the said, building was removed and a fresh building was put up in B schedule, utilising those materials. There has been no attempt to show that the materials of the building are old or those which could have been the materials of an old building. The learned Judge of the court below seems to think that the burden of showing that the building in B schedule item 1 is not the building put up with the materials of the old building which stood on another item of property on the date of partition is on the defendants. This certainly is a wrong approach. The building was not in existence in 1104. It came into existence thereafter. It was put up by the first defendant. In these circumstances, if anybody wanted to contend that the building, though really put up as a new one, was one so put with the materials of an old building which stood on another item of property, the burden was on that person. The learned judge seems to think that the first defendant should have taken out a commission to show that the materials were not old. I would say the case ought to be just the reverse. It is for the plaintiff to take out a commission to show that the materials used were of the old building. In the present case there is absolutely no reliable evidence to show that the building is not one put up with new materials. Evidence of Pws. 2 and 3 is no doubt referred to by the learned judge. Pw. 2 is said to be a participant in the partition of 1104. Pw. 3 is said to be a carpenter. They are not in a position to say

exactly what are the materials of the old building used. Their evidence according to me, is not sufficient to show that the materials of the new building are really that of the old building. Having gone through the evidence I am not impressed that they are speaking the truth. Even the court below, which decided this question in favour of the plaintiff, does not seem to think that on their evidence it could have found so. Only because of a mistaken notion as to burden of proof the court below appears to have found in favour of the plaintiff on this question. Even then what the learned judge says is:

The entire evidence which I have already dealt with will only go to show that the probability is that the building in B schedule item No. 1 was constructed by removing the old building referred in Ext. P3 partition deed.

In paragraph 12 of the judgment the learned Judge himself, later on, assumes that the building is put up with the funds of the first defendant. Whatever that be, I am not prepared to agree with the finding of the court below if that be the finding, that the building was put up with the materials of the old building. If so, it follows that the building in B schedule item 1 is an item which has been constructed by the first defendant with his own funds. It could not have been with tarwad funds as no tarwad funds would have been available in view of the limited income from the properties of the tarwad.

7. The real controversy in this case is whether, in the circumstances stated above, the building could be said to belong to the first defendant. Learned counsel for the appellant approaches this question in two ways. According to him a building put up by a member of a tarwad is a property belonging to the tarwad would belong to that member as it would be really, an immovable property which could be separately owned. Secondly it is urged that, in any case, when a member puts up a building in a tarwad property, in a suit for partition of the properties of the tarwad the site of the building could be allotted to the member who has so put up the building without reckoning the value of the building.

8. Possibly there is an answer to the contention of learned counsel for the appellant which may be sufficient to meet both the contentions of the learned counsel. It is that, even if the building put up in tarwad property does not become property of the tarwad, in a case where a karanavan so puts up a building, it may be treated as a case of blending, with the result that it would become tarwad property due to the relinquishment or waiver of his separate rights in such property. I will consider that question before I go into the question urged by the appellant's, counsel.

9. Whether the separate property of a member blends with the property of the tarwad is a question of intention on the part of the member. This intention may be evidenced by the conduct of the member, conduct which may be positive or which may be passive such as one of acquiescence. But necessarily this is a question of fact, the decision on which would depend upon the circumstances of each case. The

first defendant here was the karanavan of a tarwad which had very little properties. He was a karanavan in whose hands there was no surplus income of C the tarwad left at any time, a karanavan who was carrying on a small trade of his own from out of the income of which he was acquiring some properties for himself. There is also the fact that the first defendant was one who, at least by the evidence afforded of conduct a few years after the construction of the building, was attempting to lay claim to the properties of the tarwad as a divided member in derogation of the interests of other members. His conduct was not that of one who was acting in the interests of the tarwad or its members. Therefore it is very unlikely to expect such a person to be generous enough to construct a building in the tarwad properly so as to enrich the members of his own tarwad. That building was constructed so that he may live in the property. He along with his wife and children continued to live in that building. The tarwad members are not seen to have treated the building as their residence at any point of time. Evidence of conduct, if it means any thing, necessarily indicates absence of any intention on the part of the first defendant to blend his own resources expended by way of construction of the building with the assets of the tarwad.

10. Having found that the first defendant is not shown to have intended that the tarwad should benefit by the construction of the house, the next question, naturally is whether irrespective of any intention on his part, the legal incidents arising from the construction of such a building in the tarwad property is that of passing the property in the building to tarwad. The question whether a building constructed by the member of a tarwad or a member of a joint Hindu family in the property of the tarwad or the family, as the case may be belong to that member is not without difficulty. In fact, in cases arising under the Hindu Law, courts have often resolved in favour of the member who has constructed the building in the property of the family. In a case before the Madras High Court reported in [A.L.P.R. Periakaruppan Chetti Vs. R.M.P.R. Arunachalam Chetti and Another](#), this question arose more or less directly. The sole member of a joint family put up a building in an item of family property. There was an addition to that family later by adoption. When a creditor proceeded to attach the building so put up, in execution of the decree against such adopted member, the member who put up the building objected to this and when that objection was dismissed he filed a suit to establish his claim in regard to the building. The question whether a building put up by a member in joint family property belonged to that member arose for consideration in that context. It would appear from the discussion in the judgment that the building so constructed could be claimed to be the property of the joint family only on proof of a plea of intention to treat the building as joint family property. If such intention is not proved, the building will have to be considered to be that of the person who put up the building. In this context I may cite a passage from that decision.

I do not think that by building with self-acquired funds on the ancestral site worth a few rupees a superstructure costing several thousands the house became joint

family property.

The learned Judge assumed that it is possible to conceive of cases where buildings put up on joint family property would remain that of the persons who so put up the same. The circumstance under which such buildings could be considered as belonging to the joint family is one of proof of waiver of the rights of such members to the building put up by him. The learned Judge refers to two earlier decisions in *Vithoba Bava v. Hariba Bava* (6 B.H.C. 54) and *Lahaso Kuar v. Mahabir Tewari* (37 All. 412 - 29 I.C. 15 - A.L.J. 555 F.B.). It would appear from what I have indicated above, it is possible to say that at least under certain circumstances the building put up by a member of a tarwad or a joint Hindu family belongs to member alone. That would be the case here. But I need not rest my decision on this since the same result is reached by other considerations which I propose to mention with presently. It is urged that in any view of the matter, in a partition, equitable considerations can weigh with the court in allotting the building to the member who has put up the building without reckoning the value of the building as a common asset. If I accept this contention that would be sufficient for the disposal of the appeal. Hence I proceed to consider this question.

11. In regard to the equitable directions to be made at partition in a case of this nature, there are two aspects that may have to be borne in mind. The provisions of the Nair Act of 1100 recognizes in S. 40 the right of a karanavan to obtain 1/4 of the acquisitions of the tarwad if such acquisitions are made during the period of his management with the aid of the income of the tarwad property. A person prudently managing the affairs of the tarwad and conserving its income so as to enable acquisitions to be made for the tarwad is rewarded by being allotted a fourth of the properties so acquired by him. There is no doubt no corresponding provision exists in the Ezhava Act of 1100. There is no such corresponding provision in the Madras Marumakkathayam Act, 1935 also. The question would be whether in the case of persons to whom the Nair Act would not apply the principle of S. 40 should be made applicable. This principle has, in a way, been recognised in S. 19 of the Ezhava Act though that relates not to tarwad property, but to Makkathayam properties. It will be to deny fair treatment to the karanavan of a tarwad in spite of prudent management and in spite of acting in the best interests of the tarwad and thereby enriching the tarwad considerably, he is denied any reward for his efforts. Courts had occasion to deal with such cases where there is no statutory provision like S. 40 of the Nair Act which would enable courts to recognise any equity in their favour. The Madras High Court has taken the view that half of the acquisitions made by the karanavans of the tarwad should be considered as that to which the karanavans may be recognised as entitled to in a suit for partition. This view of the Madras High Court has commended itself to this court also. I am referring to the decision reported in *Kunhi Amma v. Appu Nair* (1962 KLT 99, 1962 K.L.J. 943). *Madhavan Nair J.* referred to the decision in the Madras High Court in Appeal No. 1001 of 1952 and also to a later decision of that court in *Emu Amma Ammini* (1957, 2 M.L.J. 275). The

learned judge held:

Apart from a legislative provision, when the award of a reasonable compensation for the manager's exertions in making acquisitions out of tarwad income comes up for judicial consideration, it becomes necessary to fix the same in accordance with the circumstances of each case. Where the income was comparatively poor and the acquisitions large, the exertion on the part of the karanavan or the managing member must necessarily have been high and therefore merits a higher award than where the income was in large surplus and the acquisitions relatively not much.

12. No doubt it is true, that the decision of the Madras High Court or this Court may not, as such, apply to this case because those were cases of claim to properties acquired by the karanavan out of the income of the tarwad and we are concerned here not with the acquisition of any property by the karanavan but of construction of a building by him. Learned counsel contends that even the construction of a building is an acquisition of property. But I am not prepared to agree with him since the term "acquisition" so long as it is not defined, has to be understood as in common parlance. The construction of a building in a tarwad property by a karanavan cannot be characterised as an acquisition of a property by him. Though the case before me is not one of acquisition by a karanavan, I do not see any reason why the principle recognised in regard to acquisition of property could not be applied to a case where a karanavan puts up a building in the property of the tarwad. I may not be taken as laying down generally that in every such case the karanavan will be entitled to claim part of its value or allotment of the same to his share. That will depend upon several considerations. The case of a karanavan who has put up such a building not with funds of tarwad but with funds of his own must certainly be in a better position than that of a karanavan acquiring property with the income of the tarwad property or putting up a building with tarwad funds.

13. Courts have recognised from time to time claims by members of families who have constructed building in properties belonging to the family to have the building set apart for them in partition along with the sites there of without such building being valued for the purpose of partition. Normally, when a member of tarwad puts up a building in a property belonging to the tarwad and such building has been put up in good faith, in a partition he is entitled to have the property allotted to him as far as possible without the value of the building being taken into account as a common asset. I said "in good faith" because there may be cases where such building might be put up with a view to avoid the allotment of such sites to other members. It may be put up so that division may be impracticable. Those are cases where a court may deny any such relief. Those are case where equitable considerations must work out against such members. Barring such instances, as a rule, it has to be found that the members of a tarwad who have expended monies on properties of tarwad by way of constructions thereon are entitled, if prejudice would not be caused to the other parties, to allotment of such properties to

themselves. To hold otherwise would be to give unfair advantages and unconscionable gain to other members of the tarwad who will be enriching themselves by the funds of other members, funds which were not intended to be treated as common funds. In this context I think it is pertinent to refer to a passage in the decision of the Calcutta High Court reported in *Dwijendra Narain Roy v. Purnendu Narain Roy* (11 C.L.J. 189) At page 196 Justice Mookerjee said:

A co-tenant who has thus spent money is not entitled, as pointed out in *Leigh v. Dickeson* (5), *Brickwood v. Young* (6) to call upon his co-sharers to compensate him for the expenditure, but he has a defensive equity which attaches to the land and passes to a purchaser, which is enforceable in the event of a partition or a distribution amongst the tenants in common of the proceeds of sale of the land.

The same principle has been reiterated in [Upendra Nath Banerjee and Another Vs. Umesh Chandra Banerjee](#). It was held:

.....it is in recognition of such equitable right that to the co-owner who has made the improvements is assigned that portion of property on which the improvements have been made the division being made on the basis of the unimproved value. This method is adopted whenever the nature of the property and the improvements, and situation of the latter are such as to render such distribution practicable, and it can be done without injury to the other co-tenants *Story v. Johnson* (35) *Ward v. Ward* (36). The equity of a co-tenant to have the part of the common property which he has improved allotted to him on a partition, is not founded upon the theory that he made the improvements with the consent, expressed or implied, of his cotenants; the principle rather is, that if the right of one joint owner, to effect an improvement for which he will ultimately be entitled to claim allowance, were denied, beneficial user of the joint property might in many instances become impracticable. It is not necessary for us to consider what the position would be, if a joint owner purposely covered the whole of the estate with valuable improvements in such a manner as to render it impossible to assign the shares of others without including part of such improvements.

Kumaraswami Sastri J. in the decision reported in *Periakaruppan v. Arunachalam* (A.I.R. 1927 Mad. 676) has referred to this Calcutta view and has noticed that the correct rule has been laid down by the Calcutta High Court.

I have earlier found that the building was put with the separate funds of the first defendant. Even if the title to the building does not vest with the first defendant in a partition it is open to the first defendant to claim, on equitable considerations, allotment of such building to himself. If it would be possible to allot the site of the building without considerable detriment to the tarwad it could be so done and in so allotting, it is only the value of the site without the building that would be taken into account in determining the share to be allotted to him. In other words, the value of the building will not be taken into account when allotting such share. I see no

reason why such an equitable direction could not be made in this case also.

In the result, while dismissing the second appeal with regard to the claim of oral partition, I allow the second appeal in regard to the claim for the building in B schedule item I. The site namely 20 cents in extent, referred to in the judgment of the trial court, on which the building stands, will be allotted to defendants 43 and 44 towards their shares. The building will not be valued as an asset available for partition. Only the site value would be taken into account. If, to make up the share of defendants 43 and 44, any amount has to be paid by defendants 43 and 44, they will be directed to do so in the final decree. The appeal is allowed to this extent. In the circumstances of the case, I direct both parties to suffer costs in this appeal.