

(1958) 07 KL CK 0027

High Court Of Kerala

Case No: A.S. No. 45 of 1956 (E)

Neelakanta Pillai

APPELLANT

Vs

Madhavi Amma and Others

RESPONDENT

Date of Decision: July 8, 1958

Acts Referred:

- Travancore Nair Act, 1912 - Section 18

Citation: (1958) KLJ 916

Hon'ble Judges: K.T. Koshi, C.J; C.A. Vaidialingam, J

Bench: Division Bench

Advocate: T.K. Narayana Pillai N D. Narayanan Potti, for the Appellant; M. Madhavan Nair, for the Respondent

Judgement

Koshi, C.J.

Defendant 1 in O.S. No. 24 of 1952, on the file of the now defunct District Court of Mavelikara, has brought this appeal against the judgment and decree passed in that suit on 28th March, 1955 whereby a sale deed, Ext. II, dated 30--9--1117 in his favour and in favour of his brother, defendant 2, has been set aside on certain terms. Some time prior to the suit defendant 2 had made over his rights under Ext. II to defendant 1 and the latter alone contested the suit. The property conveyed as per Ext. II belonged originally to one Puthu-parampu tarwad in Amichakari Muri, Champakkulam Pakuthy, Ambalapuzha Taluk. That tarwad first got itself divided into different branches as per a partition deed in 1099 M.E. Later, on 25--10--1107 one of the branches effected a further division and we are in this appeal mainly concerned with that branch. Ext. D and Ext. II are copies of the partition deed in that branch. Another branch of the Puthuparampu tarwad which got the property in question as per the partition of 1099 assigned the same to P.W. 2 on 4--5--1109 (Ext. A, copy), but on 18--2--1112 P.W. 2 sold the property to one Chellamma, a divided member of the branch first referred to--vide Ext. B, copy. Chellamma, defendant 3, Gopalan Nair and defendant 4, Janaki Amma were the children of one Nani Amma. The three

plaintiffs in the suit are the daughters of defendant 4. At the time of the partition in their branch (1107), besides these six members there were two other members in the branch. They were Nani Amma's mother Kalyani Amma and the latter's son Krishnan Nair (Nani Amma's brother). Krishnan Nair renounced his rights in the branch tarwad properties in lieu of money compensation and Kalyani Amma was content with a provision for her maintenance. The properties of the branch tarwad were therefore divided into six shares and each member took a separate share. Chellamma did not survive long after she took the sale deed of the property concerned in this litigation. She was unmarried at the time of her death and she died intestate. According to the (sic) charged on this property as well. All the three plaintiffs were minors when Ext. II was executed and their mother, defendant 4 besides acting on her own behalf also acted as the guardian of her children.

2. The plaintiffs sought to set aside Ext. II on the ground that the alienation evidenced by it was not supported by consideration or tarwad necessity and they therefore claimed to recover possession on behalf of their grand-mother's thavazhi, together with mesne profits. Defendant 1 the appellant contended that there was consideration for the document, that there was tarwad necessity for the alienation and that there was no ground whatever to set it aside. He disputed his liability for mesne profits and further contended that he had effected various improvements on the property whose value he claimed in the event the court directed him to surrender the property. After an elaborate trial, the learned Additional District Judge, Mavelikara passed a decree setting aside Ext. II and permitting the plaintiffs to recover the property on behalf of their grand-mother's thavazhi. The terms of the decree are set out below:-

1. Ext. II or F sale deed is hereby set aside.

2. Plaintiffs will recover possession of the plaint schedule properties on behalf of plaintiffs' grand-mother Nani Amma's thavazhi on deposit of Rs. 380 the consideration for Ext. I found to have been binding on plaintiffs plus the value of improvements of Rs. 786 as. 14 ps. 7 from defendants 1 and 2.

3. 1st defendant will draw the amount from court.

4. Plaintiffs are allowed mesne profits at the rate of Rs. 78 as. 12 from the date of deposit of the consideration and value of improvements, for 3 years from the date of decree or till recover whichever even happens earlier.

5. In the circumstances of this case plaintiffs are allowed half the costs. Interest on mesne profits and costs 6%.

3. The plaint in the suit, the appellant's written statement, the trial and the lower court's judgment followed the familiar pattern we come across when the junior members of a Marumakkathayam tarwad institute a suit to set aside an alienation effected by the karnavan and the senior anandiravans. Indeed the memorandum of

appeal to this Court as also the argument before us until a certain stage followed that well-worn pattern. However subsequently Mr. T.K. Narayana Pillai (N), the Learned Counsel for the appellant gave a turn to the whole case by contending that the plaintiffs were incompetent to maintain a suit on behalf of Nani Amma's thavazhi inasmuch as that Marumakkathayam unit had got disintegrated by the partition deed of 1107 under which every member took his or her share separately. As a logical corollary of that proposition it was urged that on Chellamma's death her properties devolved on the members of Nani Amma's thavazhi as tenants-in-common and that as such the shares of Nani Amma (sic) absolutely to the vendees as cannot remain undivided with respect to some property left in common or which through ignorance or inadvertence happens to be omitted from the division. The Cochin and the Madras cases take the view that it was open to the members of a Marumakkathayam tarwad while dividing their properties to remain joint with respect to a portion left undivided -- vide the decision in Kittunni Nair v. Sankaran Nair-- (1122)38 CLR 180 -- where one of us had occasion to review the decisions in Cochin, Travancore and Malabar when each was separate. However here we are not confronted with the situation of the parties leaving some property in common or some properties happening to be otherwise omitted at the time of the division. As per the original of Exts. D and IV the branch tarwad had lost its jointness once and for all and thereafter properties that devolve on persons who were formerly joint are taken by them as tenants-in-common. That has been held to be the effect, of section 18 of the Travancore Nayar Act. II of 1100 when there had been a disintegration of thavazhi prior to the devolution of the property. See the decision of Varadaraja Iyengar, J. in Krishna Pillai v. Jagadeeshachandran Nair & Others -- 1957 K.L.J. 202 = 1957 K, L.T. 62. That decision followed a decision of the Travancore High Court reported in Neelakantan v. Varki -- 22 T.L.J. 1357 -- which related to the corresponding section (Section 15) of the Nayar Act of 1088 and an unreported decision of the Travancore-Cochin High Court in A.S. No. 540 of 1953 with reference to a similar provision in Section 17 of the Travancore Ezhuva Act (Act III of 1100). When Chellamma died there were six members in her mother's (divided) thavazhi and each of them was entitled to a separate one-sixth share in her properties. Three of those sharers joined Ext. II in their own rights and Mr. Narayana Pillai's contention that their full right passed to the vendees has therefore to be upheld.

4. Reference may here also be made to certain authorities in support of the position that after a tarwad or thavazhi becomes divided, a divided member cannot maintain a suit on behalf of the tharwad or thavazhi as such, to set aside an alienation effected before the division -- vide Velayudhan Nair v. Janaki and others -- 1957 K.L.J. 241 = 1957 KLT 222 and Bhavani Pillai v. Ammukutti Pillai -- 1958 K.L.J. 87. The latter case follows the decision in Krishna Pillai v. Jagadeeshachandran Nair and Others and the former case refers to practically all the Travancore cases dealing with the question of the effect of division of a Marumakkathayam unit on the status of its members.

Velayudhan Nair v. Janaki and Others makes no reference to the Cochin or the Madras case-law where a different note is struck that even after division jointness can be maintained with respect to a portion of the property left undivided. In the case on hand this difference in views is immaterial, but we venture to think that on an appropriate occasion it will have to be considered (sic). between the plaintiff's half share and the remaining half share the consideration which the lower court has found to be valid and binding.

5. In the circumstances of the case we do not consider that the parties should be driven to a fresh suit for partition. Accordingly in modification of the lower court's decree we pass a preliminary decree for partition of the property into two equal halves, one half of which should go to the plaintiffs and the remaining half should be retained by the 1st appellant. The lower court, as noticed earlier, fixed the value of improvements the appellant is entitled to as also the mesne profits he should pay if and when the amounts found due to him are deposited in court. In view of the decree we pass here value need be fixed only for the improvements on the half-share which the plaintiffs would get and mesne profits have also to be ascertained only with respect to that share. The provisions in those behalf in the lower court decree will therefore stand annulled. The lower court will in passing the final decree fix the value of improvements the appellant should get from the plaintiffs and also the quantum of profits he should pay. Mesne profits would become payable only from the date when the value of improvements are paid into court. The only question that remains for consideration is the question of costs. The lower court allowed the plaintiffs to realise one-half of their costs in that court from defendant 1. Regard being had to the turn the case took in this Court we consider that the proper order with respect to cost would be to make both sides to bear their respective costs through and we order accordingly.

The appeal will stand disposed of as above.