
Kalliani Amma Vs Parameswaran Namboodiripad and Another

A.S. No"s. 244, 274, 291 and 292 of 1958

Court: High Court Of Kerala

Date of Decision: Sept. 6, 1962

Acts Referred:

Cochin Nayar Act, 1113 â€” Section 54

Citation: (1963) KLJ 570

Hon'ble Judges: T.K. Joseph, J; P. Govindan Nair, J

Bench: Division Bench

Advocate: T.S. Venkiteswara Iyer, for the Appellant; P.C. Balakrishna Menon for 1st Respondent in A. S. 244, 274 and 291 of 1958, Memana Raman for 2nd Respondent in A. S. 244 of 1958, K.P. Madhava Menon for Respondents 5 to 7 in A. S. 244/58, Respondents 2, 3, 16 to 18 in A. S. 274/58, Respondents 2, 3, 5 to 7 in A. S. 291/58 and Respondents 16 to 20 in A. S. 292/58, M.K. Narayana Menon for 1st Respondent in A S. 292/1958 and P.K. Kesavan Nair for 13th Respondent in A. S. 292/58, for the Respondent

Judgement

Govindan Nair, J.

The main appeal in this group of appeals is A. S. No. 292 of 1958 and that is an appeal by the plaintiff in O.S. No. 13

of 1956. That was a suit for partition of several items of properties scheduled to the plaint as A and B. The allegation was that those properties

belonged to the tarwad of the second defendant, The 1st defendant is the son of the second defendant by her first husband, and defendants 3 to 8

and the plaintiff, are her children by her second husband, one Kunjukrishnan Nair, who has been examined in the case as P. W. 8. Defendants 10

to 12 are the children of the 4th defendant. The 13th defendant is the wife of the first defendant. The 14th defendant is an alienee of item No. 8 in

the A schedule in the plaint and defendants 15 to 17 are the Jenmis who are interested in item No. 3 of the A schedule. The suit was resisted by

defendants 1,13 and 14, who contended that alienation of item No. 8 is valid, and by defendants 15 to 17, who raised the plea that the release of

the leasehold right in item No. 3 by Ext. XXVIII is not liable to be set aside. The court below upheld these contentions and held that the only items

of properties partible are A schedule items 1 and 2 and granted a preliminary decree in favor of the plaintiff for an one-third share in those items.

Item No.3 in the A schedule was held to belong to the first defendant exclusively and it came to the conclusion that Ext. XXVIII release is valid.

Consequent on this finding, the suit O. S. No. 35 of 1955 (O. S. No. 45 of 1125 of the Irinjalakuda Munsiff's Court) from which the appeal, A.

S. No. 244 of 1958 is filed and which was a suit for an injunction restraining defendants 15 to 17 in O. S. No. 13 of 1956 from interfering with the

possession of A schedule item No.3 was dismissed. The appeal, A. S. No. 244 of 1958 is by the second defendant in O. S. No. 13 of 1956. The

parties will be referred to as they are arrayed in O. S. No. 13 of 1956. A. S. No. 291 of 1958 is an appeal by the second defendant from the

decree in O. S. No. 146 of 1955 dismissing her suit. That was a suit instituted by her to set aside an order passed by the District Registrar

ordering compulsory registration of Ext. XXVIII so far as she was concerned. It was consequent on the finding in O. S. No. 13 of 1956 that the

second defendant had no interest in item No. 3 of the A schedule that this suit was dismissed. The remaining appeal A. S. No. 274 of 1958 related

to the claim made by defendants 15 to 17 for arrears of michavaram due from A schedule item No. 11. This property was held to belong

exclusively to the first defendant. The discharge pleaded by defendants 2 and 8 was found against and the suit was decreed and the appellants in

A. S. No. 274 of 1958 are defendants 2 and 6. Counsel for the appellants in all these four appeals confined his arguments only to three items in the

A schedule items 3, 8 and 11. Since the evidence in all the four suits which gave raise to these appeals were recorded in O. S. 13, we are

disposing of these appeals by a single judgment and deal first with appeals A.S. 244 and 291 as well as A. S. 292 so far as it relates to item No. 3

of the A schedule.

2. Item No. 3 of the A schedule is a garden land having an extent of 1.87 acres and was acquired in the name of the first and second defendants in

the year 1118 by Ext. XXVII lease deed which was executed by these defendants in favor of the Jenmis on 24-6-1118. The only other document

relating to this item is the release deed Ext. XXVIII dated 22-10-1124 purported to have been executed by the first and second defendants. The

contesting defendant, defendant 15, pleaded that though Ext. XXVII was executed by defendants 1 and 2 the lease was actually in favor of the

first defendant only. The plaintiff's contention, on the other hand, is that the lease was taken for the benefit of the tarwad consisting of the tavazhi of

the Second defendant and that the same enured to the benefit of the said tarwad.

3. The first question to be considered, therefore, is whether the lease deed enured to the benefit of the first defendant alone or whether it was in

favor of the tarwad of the second defendant. The court below has held that the first defendant alone was the lessee. We are unable to accept this

view. Ext. XXVII clearly shows that at least defendants 1 and 2 were the lessees. Even at the time when the release; was sought to be taken, the

parties did not proceed on the basis that the first defendant alone was the lessee. The document, Ext. XXVIII, proceeds on the basis that the

leasehold interest enured to the benefit of defendants 1 and 2 and a release was also sought to be taken from both of them. This attitude was

persisted in and culminated in Ext. A for compulsory registration. This order, however, ""was passed; only on 17-4-1951. Apparently confronted

with the position that the registration may be refused so far as the second defendant is concerned, a contention was raised in the written statement

(which is dated 9-4-1125 M. E. - 24-11-1949 A. D.) by the 15th defendant that the first defendant alone was the lessee. We are unable to

accept this contention. The further question is whether the leasehold right inured to the benefit of the tarwad of the second defendant. At the time of

the execution of Ext. XXVII, the second defendant had seven children by P. W. 8. Why she should have encumbered her own properties as she

has done under Ext. XXVIII for the benefit of the first defendant alone is not explained. According to her, the document was intended to be for the

benefit of the tarwad. Of course, the testimonies of the first and second defendants are interested. But the conduct of the members of this tavazhi

after the date of the execution of Ext. XXVII fairly clearly indicates that this property was being enjoyed, cultivated and the usufruct therefrom

taken by all the members of the tavazhi of the second defendant as if they were jointly entitled to it. The mother of the plaintiff, the second

defendant, as P.W. 2 has sworn that it was all her children who expended the labor of the property, P. W. 3 who used to live in the house in item

No. 3 has also sworn that it was the plaintiff and the 6th defendant who were raising catch-crops in the property and 4 neighbor, P. W. 7 has given

evidence that it was the plaintiff, the 6th defendant and a deceased son of the second defendant who were cultivating these properties. The

husband of the second defendant has unequivocally stated that the lease deed was for the benefit of the tarwad. There is also the evidence of D.

W. 8, a witness examined by the first defendant, who has sworn that the property was enjoyed by the mother of the first defendant. The evidence

of these witnesses indicates that the members of the tarwad have been in enjoyment of the property as if ail of then got an interest in this property.

The observation of the court below that the circumstances of the case indicate that the first defendant was dealing with this property as his own is

unsustainable. There are no such, circumstances whatever. Counsel for the 15th defendant referred to paragraph 4 of the plaint and urged that the

case pleaded was that it was the income from the tarwad properties and funds supplied by the plaintiff, the 6th and 7th defendants and the income

from the personal properties of the second defendant that were utilized for acquiring the plaint schedule properties. This was the only case,

according to counsel for the 15th defendant, that was pleaded by the parties. He invited our attention to a ruling in *Narayanan Nair v.*

Parukuttyamma (1960 K. L. J. 44) and said that the normal rule is that a property must be presumed to belong to the person in whose name the

document stands and that in order to rebut that presumption, it must be established that the tarwad had nucleus out of which this property could

have been acquired. This rule can apply only where consideration had to be paid for the acquisition. Admittedly no amount was paid for taking

Ext. XXVII. In such cases, we do not think that there is any obligation on the part of the tarwad to establish the existence of a sufficient nucleus.

Counsel for the 15th defendant is perfectly right when he says that even in cases where no amount has been expended for acquiring a property, if

the document of acquisition stands in the name of certain persons it must normally be presumed to belong to them alone. But if he goes further and

contends that the only way the presumption can be rebutted is by establishing a sufficient nucleus, we cannot accept that contention. We think,

there is enough material in this case to rebut the normal presumption that the property belonged to defendants 1 and 2 alone. The attendant

circumstances, viz., that all the members were living together in the family house, that item No.3 of the A schedule is lying contiguous to the family

house, that all the grown-up children were expending their labor, cultivating the property and enjoying the usufruct therefrom, the statement of the

mother that the lease was taken for the benefit of the tarwad, that it was her own property that was secured for the rent and the absence of any

reason why she should have preferred the first defendant alone to her other seven children indicate that the intention at the time of taking Ext.

XXVII lease was to benefit the tarwad of the second defendant. We, therefore, hold that the leasehold rights in relation to item No.3 of the A

schedule belonged to the tarwad of the plaintiff.

4. The next question to be considered is about the validity of Ext. XXVIII, a release of Ext. XXVII. According to the 15th defendant, release was

executed because the pattom for this property as provided in Ext. XXVII had fallen into arrears and because a demand was made that pattom

should be paid on the basis of the coconut pattom provided in section 5 (2) of the Cochin Verumpattomdars Act, VIII of 1118 and the lessee had

no means to pay the arrears. The properties that were secured for the payment of pattom under Ext. XXVII, it is alleged, were therefore, in

jeopardy. These items secured by Ext. XXVII are two properties gifted to the second defendant by her husband, P. W. 8. It was the fear that

these properties would be lost and the inability to pay the pattom which was demanded on the basis of section 5 (2) that prompted, according to

the 15th defendant, the first and second defendants to execute Ext. XXVIII. In assessing the truth or otherwise of this case of the 15th defendant,

it will be necessary to understand the rights of the tenant at the time when Ext. XXVIII was executed. It is not disputed, neither can it be, that

legislature had conferred fixity of tenure on the lessee. By a Proclamation VI of 1124, it was provided that a tenant shall not be evicted and that the

Provision in section 5 (2) of the Tenancy Act which enabled the landlord to claim additional amount by way of pattom shall be kept in abeyance.

The release was alleged to be executed on 24-10-1124 while this provision was in force. It is too much to believe that any lessee in his senses

would have released his rights in these circumstances. The property released is a valuable one and admittedly yields appreciable income. D. W. 4,

the 15th defendant, has sworn that there will be an yield of 4000 coconuts per year from this property. The value of coconuts in the year 1124 was

substantial and this was therefore an item which was yielding appreciable income to the persons who were in possession. Compelling reasons will,

therefore, have to be established to persuade us to come to the conclusion that the fixity of tenure conferred on the tenants was surrendered. It

was, perhaps, confronted with this, that the plea was put forward that there were arrears of rent and that it accumulated to a big amount. No such

case is found mentioned in Ext. XXVIII, the release deed, that has been executed. In fact, there is no documentary evidence to show that there

was any such arrears. D. W. 4 swears that his Mana has not been in the habit of keeping any accounts. Admittedly, there was no pressure for the

payment of the arrears. His explanation that he did not insist on payment is most unconvincing, and there is no explanation offered why a totally

inconsistent case has been stated in Ext. XXVIII. What is stated in Ext. XXVIII is that there has been a complete settlement of accounts. It is,

therefore, difficult to accept the evidence of D. W. 4 that there has been arrears of pattom on that day. A fortiori we are unable to accept the case

that it was waiving of the claim for arrears that persuaded the lessee to execute the release. And the 2nd ground urged that the lessees were unable

or unwilling to pay the coconut pattom also stands disproved because the right to collect coconut pattom has been kept in abeyance by

Proclamation VI of 1124. The document, Ext. XXVIII, therefore stands Unexplained. It is in this background that the evidence relating to the

execution of Ext. XXVIII by the second defendant should be considered. The second defendant refused to give consent for the registration of the

document on the 13th of Chingom 1125 when this was sought to be registered, hardly three months after its execution on the 22nd Edavom 1124.

The document was, therefore, registered only so far as the first defendant was concerned. According to D. W. 4, and those who have supported

him, the second defendant went all the way to the Mana of the 15th defendant for executing Ext. XXVIII. If she actually did so, we are unable to

understand why she changed her attitude on the 13th of Chingom 1125. The execution of the document on the 22nd Edavom 1124 is sought to be

proved; by the evidence of D. Ws. 9 and 10. D. W. 9 is the first attester to Ext. XXVIII and is a school teacher who, according to his own

showing, was residing in the Mana. He is a dependant of the Mana. He has said that the document was executed on the evening of the 22nd

Edavom 1124 and that he saw the first and second defendants affixing their signature to this document. The other witness is D. W. 10. He said that

he was present throughout the day - 22nd Edavom 1124 - at the mana. At one place he has sworn that Ext. XXVIII was executed as a result of

his mediation. According to him, it was P. W. 8 the husband of the second defendant, who approached him and it was in his presence that the

mediation took place. The request of P. W. 8 is said to have been made in Makaram 1124. Nothing happened for clearly four months. In chief,

examination, D. W. 10 has sworn that he went to the property, A schedule item No. 3, in the morning of the 22nd Edavom 1124 and the

discussion took place there with the first and second defendants and an agreement was reached there that the property should be surrendered.

However, in his cross-examination he says that the second defendant reached the Mana in the morning of that day and it was there that the

agreement was arrived at. D.W.9 on the other hand, says that it was the 1st defendant who went and fetched the second defendant and that was in

the evening of 22nd Edavom 1124. The Mana of the 15th defendant is about 2 1/2 miles away from the property where the tarwad house is

situated. The second defendant was 57 years old at that time. The husband of the second defendant is not an attester to Ext. XXVIII. D. W. 4

swears that he was present at the Mana at about 3. 30 P.M. on the 22nd Edavom but left the Mana because he wanted to attend to his children

who were ill. He was thus not present at the time of the execution of Ext. XXVIII. But D. W. 10 has gone further and given evidence that P. W. 8

was not in the Mana at all. According to the evidence of the first defendant, he shifted from the family, house somewhere in Dhanu 1124, took a

rented house and was staying there with his wife and children. This shift, it is alleged, is due to some differences that arose between the first

defendant on the one hand, and his mother and her other children on the other. It is difficult to believe that after defendants 1 and 2 fell out, the

second defendant would have been ready and willing, at the beck and call of the first defendant, to go and sign or execute any document which the

first defendant wanted her to execute and that without any reference to her husband. In these circumstances, we disbelieve D. Ws. 9 and 10 and

find that the second defendant had not executed Ext. XXVIII.

5. The result of the conclusions reached above would enable Us to dispose of A. S. No. 244 of 1958 and A. S. No. 291 of 1958. It is

represented to us that in accordance with an order on an Interlocutory Application the second defendant has been permitted to be in possession of

item No. 3 of the A schedule and this order passed by the trial court has been kept in force during the pendency of these appeals. (Vide order

dated 27-11-1958 in C. M. P. No, 1628 of 1958 in A. S. No. 244 of 1958). We have found that the 2nd defendant had not executed the release

deed, Ext, XXVIII. But this release or transfer of valuable rights in immovable properties would amount to an alienation falling within section 54 of

the Cochin Nayar Act, There has not been the consent of all the adult members of the tarwad for such an alienation and there has been no

consideration and no necessity for this alienation. We, therefore, hold that Ext. XXVIII release deed cannot affect the interests of the tarwad and

set aside the decree in O. S. No. 35 of 1955 of the Sub-Court, Irinjalakuda. We further grant an injunction against defendants 15 to 17 who are

defendants 1 to 3 in O. S. No. 35 of 1955 as prayed for in that suit. There will be no separate orders as to costs in this Appeal A. S. 244/58 and

our direction regarding costs will be made in A. S. No. 292 of 1958.

6. A. S. No. 291 of 1958 an appeal by the plaintiff in O.S. No. 146 of 1955, has also to be allowed. We have held that the second defendant has

not executed Ext. XXVIII. The order, Ext. A, of the District Registrar holding otherwise has, therefore to be vacated and we do so. There will be

no separate order as to costs in this appeal A. S. 291/58 either.

7. We allow appeal, A. S. No. 292 of 1958, to the extent of holding that item No. 3 of the A schedule is partible and pass a preliminary decree in

favor of the plaintiff for his 1/13th share in that item as well.

8. The further question to be considered in A. S. No. 292 of 1958 relates to the nature of the acquisition of the properties A schedule items 8 and

11. Item No. 8 of the A schedule is a property which was acquired by Ext. VII on 10-1-1122 for Rs. 1,500/-. The properties which belonged to

the tarwad were only two items and the evidence in the case shows that the annual income from those properties was only 40 paras of paddy and

Rs. 50/-. The income from Ext. XXVII property accrued to the tarwad only from 1118. Considering the number of members in the family, we are

not satisfied that these properties were capable of yielding income sufficient to provide a surplus of Rs. 1,500/-which is the consideration paid for

Ext. VII. We, therefore, confirm the finding of the court below regarding this item and hold that the plaintiff has not established that item No. 8 of

the A schedule was acquired with funds belonging to the tarwad. Item No. 8 is, therefore, not partible.

9. A schedule item No. 11 was acquired on 6-3-1112 by Ext. D which is a mortgage in the name of the first defendant. The consideration for the

same is Rs. 75/-, it was only six years after that under Ext. XXVII the tarwad had the benefit of item No. 3 of the A schedule. Before that, the

tarwad income was only 40 paras of paddy annually and Rs. 4/- per month. We are unable to hold that in these circumstances the tarwad could

have acquired Ext. D rights. We, therefore, confirm the finding of the court below that item No. 11 in the A schedule belonged to the first

defendant exclusively and that the tarwad had no right over it.

10. We have held in the above paragraph that A schedule item No. 11 belongs to the first defendant exclusively. The plea of discharge put forward

by the defendants 2 and 6 have been found against by the court below and no grounds have been made out in this court to interfere with that

finding. We, therefore dismiss this appeal, A. S. 274 of 1958, with costs of the respondents. We also dismiss A. S. 292 of 1958 in so far as it

relates to items 8 and 11 of the A schedule. In view of our finding that item No. 3 of the A schedule is also partible, we set aside the order of the

court below for payment of costs in the trial court 10 defendants 15 to 17. Since we maintain the contentions of defendants 1, 13 and 14 in regard

to the other items, we make no other alteration regarding the direction for costs made by court below. The contesting defendants 1, 13 and 14 will

each get a total of Rs. 75/- towards Advocate's fee from the plaintiff as costs here as well as in the court below. The plaintiff will be entitled to a

fourth of his costs in A. S. No. 292 of 1958 from the 15th defendant.