

Narayanan Nair Vs. Narayanan Nair and ors.

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Court : Kerala

Decided On : Mar-26-1958

Reported in : AIR1959Ker116

Judge : G. Kumara Pillai and; M.S. Menon, JJ.

Acts : Travancore Nair Act, 1100 - Sections 40; [Code of Civil Procedure \(CPC\)](#) ,
[1908](#) - Sections 97 - Order 2, Rule 2 - Order 6, Rule 2

Appeal No. : S.A. No. 734 of 1955

Appellant : Narayanan Nair

Respondent : Narayanan Nair and ors.

Advocate for Def. : T.K. Narayana Pillai and; D. Narayana Potti, Adv.

Advocate for Pet/Ap. : C.K. Sivasankara Panicker, Adv.

Disposition : Appeal dismissed

Judgement :

G. Kumara Pillai, J.

1. In a suit for partition brought by some junior members of a Nair tarwad governed by the Travancore Nair Act, II of 1100, defendant 1, who was the karnavan of the tarwad, contended that some of the suit properties did not belong to the tarwad but

were his self-acquired and separate properties and that they were not, therefore, liable to be partitioned. He as well as several other members of the tarwad also claimed that their shares also should be partitioned in this suit itself.

The Court of first instance found that the disputed properties were not defendant 1's self-acquired and separate properties and that those properties also belonged to the tarwad and were liable to be partitioned like the rest of the suit properties. Consequently, that Court passed a preliminary decree for partition awarding to the plaintiffs, defendant 1 and other members of the tarwad who had claimed partition, shares in all the suit properties on a per capita basis and allowing them to recover possession of the same after partition by metes and bounds.

The preliminary decree also directed that defendant 1 and other members of the tarwad, except the plaintiffs, who had claimed shares should pay the necessary Court fees before they could recover possession of the properties allotted for their shares. After the disposal of the appeal and the second appeal filed against the preliminary decree and after the High Court confirmed that decree, defendant 1 filed a petition in the Court of first instance claiming that over and above the share which he was entitled to get like other members of the tarwad in the tarwad properties and was awarded to him by the preliminary decree he was also entitled to get one-fourth of the properties which he had originally claimed to be his self-acquired and separate properties and praying that the allotment of properties to him in the final partition should be made on this basis -- i.e., he should be given one-fourth of the properties which he had originally claimed to be his self-acquired and separate properties and he should also be given the ordinary share allotted to the other members of the tarwad.

The case which he put forward in this petition was that the properties which he had originally claimed to be his self-acquired and separate properties were acquired by him during his management of the tarwad with the help of tarwad properties and that he was, therefore, entitled to get one-fourth of those properties under Section 40 of the Travancore Nair Act of 1100. The first Court dismissed this petition holding that after the preliminary decree and after the confirmation thereof it was not open to defendant 1 to advance this contention, and the appeal which he filed

against the first Court's order was also dismissed by the lower appellate Court. Defendant 1 has, therefore, brought this second appeal.

2. Section 40 of the Travancore Nair Act of 1100 reads as follows:

'If a person was in management of his or her tarwad one-fourth of the acquisitions, if any, made by such person during such management with the aid of the income from Tarwad property, shall on partition, be allotted to him in addition to the share which he would otherwise be entitled to get'.

This section confers on the person in management of the tarwad the right to get one-fourth of the properties acquired during his management only if the acquisition was made by him with the help or aid of the income from tarwad property. It is not correct to say that the manager will have the right under this section to get one-fourth of the properties acquired by him with the help of the tarwad property.

If tarwad property was sold and with the proceeds of the sale another property was acquired or if other property was acquired by funds raised by hypothecating or mortgaging tarwad property, it would be a case of acquisition with the help of tarwad property but it would not be a case of acquisition with the help or aid of the income of tarwad property which is the condition prescribed by Section 40 of the Nair Act for entitling the manager who acquired the property to get one-fourth of it.

It is only when property has been acquired with the aid of the income of tarwad property that the manager can claim the right to get one-fourth of the acquisitions made by him, and that is a matter for definite pleading and evidence. Both sides admit that before the preliminary decree was passed defendant 1 had not pleaded or adduced any evidence that the properties in respect of which he claims the right under Section 40 were acquired by him during his management with the aid of the income of tarwad property.

It is also admitted that neither in the appeal preferred against the preliminary decree nor in the second appeal filed upon the dismissal of that appeal was there any contention that the properties now in dispute were acquired by defendant 1 during his management of the tarwad with the aid of the income from tarwad

properties. All that he had claimed before the preliminary decree, in the appeal and in the second appeal was only that the disputed properties were his self-acquired and separate properties.

He had no alternative case in those proceedings that if his contention that they were his self-acquired and separate properties and were not liable to be partitioned was negated he had a special right over them under Section 40 of the Nair Act and was entitled to get one-fourth of them as they were acquired by him with the aid of the income of the tarwad properties during his management of the tarwad. If he has any special right in those properties as is now claimed he should have either pleaded it before the preliminary decree or raised that contention in appeal or at least in the second appeal and got his right recognised before the confirmation of the preliminary decree.

Definite shares have been awarded by the preliminary decree to the members who had claimed partition in the suit including defendant 1 and, therefore, to allow defendant 1's present contention would be to nullify that decree which has been confirmed by the appellate Court and the High Court and to give him a larger share in the tarwad properties than what has been allowed to him by the preliminary decree. Section 97 of the Code of Civil Procedure says :

'Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such a decree, he should be precluded from disputing its correctness in any appeal which may be preferred from the final decree'.

As in the appeal filed by him against the preliminary decree defendant 1 had not challenged the correctness of the share awarded by that decree to him and the other members of the tarwad and had not claimed a larger share than what was awarded to him thereby he is precluded by this section from claiming any larger share or any special right in some of the properties in respect of which the preliminary decree has been passed.

3. The appellant's counsel urged that notwithstanding Section 97 of the Code of Civil Procedure defendant 1 was entitled to claim this right to one-fourth of the

disputed properties since the direction in Section 40 of the Nair Act is that 'one-fourth of the acquisitionshall, on partition, be allotted to him in addition to the share which he would otherwise be entitled to get'. His argument was that under Section 40 the additional share of one-fourth of his acquisitions could be allotted to defendant 1 only at the time of partition, that the word 'partition' in the phrase 'on partition' occurring in the section has reference to the actual division or partition by metes and bounds of the properties, and that as this division or partition by metes and bounds could be made only after the preliminary decree defendant 1 could raise his claim under Section 40 only after the preliminary decree.

We are unable to accept this contention. Section 40 of the Nair Act is not limited in its application to cases of partition effected through Court. It applies to all kinds of partition, whether effected through Court or brought about by consent of parties. In the case of partitions effected by consent of parties there cannot be stages like preliminary decrees and final decrees as in the case of partitions effected through Court. All that Section 40 says in effect is that if the manager of a tarwad had acquired properties during his management with the aid of the income from tarwad properties he should then be given at the time of partition of the tarwad not only the ordinary share which he would be entitled to get just like every other member of the tarwad but also one-fourth of the properties which he had acquired with the aid of the income from tarwad properties. Neither that section nor any other section in the Nair Act prescribes the procedure to be adopted in partition suits.

The procedure in partition suits is governed not by the provisions of the Nair Act but by the provisions of the Code of Civil Procedure, Even in cases of partition by common consent of parties without recourse to the Court the parties must first agree as to the number and extent of the shares and the claims which any member may have to special rights in respect of any property such as the right which can be claimed by a manager under Section 40 etc., and the actual division by metes and bounds can be effected only after an agreement is arrived at in respect of those matters.

In cases of partition effected through Court, the preliminary decree takes the place which the common consent or decision arrived at in matters pertaining to the

partition occupies in the case of partition effected by consent of parties without recourse to the Court. Before one-fourth of the properties claimed by the manager as acquisitions made by him during his management with the aid of the income from tarwad properties could be allotted to him the question has to be decided, if his claim is disputed, whether the properties in respect of which his claim has been made are really acquisitions made by him with the aid of the income from tarwad properties, and under the procedure prescribed by the Code of Civil Procedure for partition suits, this is a matter which has to be decided at the time of the preliminary decree when the shares of the several members in the tarwad properties are ascertained and defined.

The actual division by metes and bounds and the final decree should be in pursuance of the preliminary decree and cannot be made in violation of or contrary to the terms of that decree. If the preliminary decree does not award to the manager any share which he could have claimed under Section 40 of the Nair Act the defect cannot be cured by the commissioner in dividing the properties by metes and bounds or by the Court at the time of the passing of the final decree. The defect in the preliminary decree, if there be any, must be cured in the appeal which the aggrieved party has the right to file against it under the provisions of the Code of Civil Procedure.

4. It is also contended by the appellant's counsel that since the contention which defendant 1 had advanced in the suit before the preliminary decree, namely, that the properties in question were his self-acquired and separate properties and were not, therefore, liable to be partitioned at all, and his present contention which admits the liability of the properties to be partitioned subject to his right to get one-fourth share in them, are inconsistent, he could not have advanced his present contention at a time when he was urging the first contention and so he should be allowed to raise it after the preliminary decree.

To accept this contention would be to permit the defendant in a suit on a promissory note first to raise the contention that the promissory note is not genuine, and after that contention is found against and decree is passed in the plaintiff's favour, to allow him to re-open the decree and raise a new contention that the

promissory note is not supported by consideration, and after the second contention also is found against, and a second decree is passed in favour of the plaintiff to allow the defendant to re-open the case yet another time to put forward a third another contention that he had discharged the promissory note.

All defences which a defendant has in the subject-matter of a suit have to be raised in the suit itself before it is decreed or at least before the decree of the trial Court is made final by the appellate Court. If he has inconsistent contentions to make he must raise them by way of alternative contentions and he cannot be allowed to raise contentions piecemeal, raising them, one after the other, after each contention is adjudicated upon and the suit decreed as a result of the adjudication on it.

The case *In re Ayya Nadar*, AIR 1953 Mad 933 relied upon by appellant's counsel does not at all support his contention that a defendant can be allowed to raise a new plea after the suit is decreed on the ground that the new plea would have been inconsistent with the plea which he had put forward before the suit was decreed and could not have, therefore, been advanced along with it. All that was said in that case was that when a person has got different causes of action in respect of one property a second suit brought by him after the dismissal of an earlier one brought by him is maintainable if the causes of action in the two suits are different.

A defendant, if he has got more than one defence in respect of the cause of action upon which the suit is grounded, must put forward all his defences and cannot reserve any of those defences to be brought forward again after the defence which he had elected to put forward has been found against and the suit decreed.

5. For the reasons stated above we hold that the Courts below were right in dismissing the defendant's petition. The second appeal is, therefore, dismissed with costs.