

Parukutty Amma Vs. Chellamma

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Court : Kerala

Decided On : Jan-07-1957

Reported in : AIR1957Ker69

Judge : Koshi, C.J. and; Kumara Pillai, J.

Acts : Travancore Nair Act, 1100 - Sections 10(1), 33, 35 and 36; Hindu Law; Marumakkathayam Law

Appeal No. : A.S. No. 324 of 1955 (E)

Appellant : Parukutty Amma

Respondent : Chellamma

Advocate for Def. : S. Narayanan Potti,; T.N. Subramonia Iyer and; S. Subram

Advocate for Pet/Ap. : M. Madhavan Nair, Adv.

Judgement :

Kumara Pillai, J.

1. This appeal arises out of a suit brought by a junior member of a Nair tarwad for cancellation of certain alienations of tarwad properties and a partition deed and for other allied reliefs. Ext. E is a copy of the partition deed sought to be cancelled. It was executed on 23-10-41 by the plaintiff's mother, Lakshmi Amma .who is now

deadi and defendants 1 and 5. Defendant 1 is Lekshmt Amma's eldest daughter.

Besides defendant 1 Lekshmi Amma had three more daughters, namely, the plaintiff and defendants 3 and 4. Defendant 2 is Lekshmi Amma's son and the brother of the plaintiff and defendants 1, 3 and 4. She had another son, named Sankara Pillai, who was younger to defendant 4, but he died before the institution of the present suit. Defendant 5 is Lekshmi Amma's husband and the father of the plaintiff and defendants 1 to 4 and the deceased Sankara Pillai.

At the time of the execution of Ext. E the plaintiff and defendants 1 to 4 and Sankara Pillai were minors and therefore defendant 5 also joined Lekshmi Amma and defendant 1 in the execution of Ext. E, participating in its execution as the father and the guardian of the minors; Lekshmi Amma's thavazhi had got divided from their main tarwad in 1104 under the partition deed Ext. A. In that partition Lekshmi Amma's thavazhi obtained the plaint schedule properties as their sub-tarwad properties.

Before any of her children came of age and while she was the only adult member of the sub-tarwad Lekshmi Amma sold some of the plaint schedule properties, executing three sale deeds. The earliest of these sale deeds was executed in 1108 and Ext. B is a copy of it. Ext. I dated 23-1-1112 and Ext. II dated 22-8-1114 are the other two sale deeds. The sub-tarwad properties remaining after the execution of these sale deeds were divided in 1117 under the partition, Ext. E, after defendant I became a major.

In that partition separate shares were allotted to Lekshmi Amma, defendant 1 and the plaintiff and a common allotment was made to defendants 2 to 4 and the deceased Sankara Pillai. Subsequently Lekshmi Amma and defendant 1 alienated the properties they got under Ext. E and on behalf of defendants 2 to 4 and Sankara Pillai defendant 5 executed an exchange deed in favour of defendant 9, taking another property in exchange of the property which defendants 2 to 4 and Sankara Pillai got under that partition.

The alienations sought to be set aside in the present suit are Exts. B, I and II and the alienations made by Lckshmi Amma and defendant 1 and the exchange deed

executed by defendant 5 subsequent to Ext. E. The lower Court upheld the validity of Ext. E and refused to set aside that partition deed. Consequently it upheld also the validity of the alienations subsequent to Ext. E which were made on the basis of that partition deed. Of the three alienations executed before Ext. E the lower Court set aside Exts. I and II and dismissed the suit so far as Ext. B was concerned.

The plaintiff has acquiesced in the finding regarding Ext. B and has filed this appeal against the portion of the lower Court's decree dismissing the suit so far as Ext. E and the subsequent alienations are concerned. Defendant 9 has filed a memorandum of objections as regards the portion of the decree setting aside Ext. II and allowing the plaintiff to recover possession of the properties comprised in that deed with mcsne profits.

2. The ground on which the appellant's counsel impugned the validity of Ext. E before us was that it was executed in contravention of Sections 10, 35 and 38 of the Travancore Nair Act of 1100. According to the learned Counsel the effect of the contravention of these sections would be to render the partition wholly void, and Ext. E has therefore to be set aside. At the time of the execution of Ext. E the plaintiff's tarwad consisted of Lekshmi Amma, defendant 1, the plaintiff and defendants 2 to 4 and Sankara Pillai. Of these persons, Lekshmi Amma and defendant 1 alone were adults, and the plaintiff and defendants 2 to 4 and Sankara Pillai were minors.

Ext. E was executed by Lekshmi Amma and defendants 1 and 5. Defendant 5 joined in its execution for and on behalf of the minors and describing himself as their father and guardian. Under Section 10 (1) of the Nair Act of 1100 the father is the legal guardian of the person and property of his minor children, but the proviso to that clause enacts that his guardianship shall not extend to their right and interest in their tarwad property. The clause and the proviso are in the following terms:

'The husband shall be the legal guardian of his minor wife, and save as regards married daughters under the guardianship of their husbands, the father is the legal guardian of his minor children in respect of their person and property :

Provided that the guardianship shall not extend to the right and interest of his wife or children in their Tarwad property.'

Since under this proviso the father's guardianship does not extend to the minor children's right and interest in their turwad property, the appellant's learned counsel contended that defendant 5 was not the guardian of the plaintiff and defendants 2 to 4 in respect of the, properties divided under Ext. E and that he was not therefore competent to represent them in the partition and execute the partition deed on their behalf.

It was urged that in view of the proviso to Section 10 (1) of the Nair Act the father had no authority to deal with the minor's interest in the tarwad property and so the partition deed executed by him on behalf of the minors as their guardian was void and of no effect at all Reliance was also placed in support of this contention on the decisions in Poonnoose v. Koruthu, 1951 Ker LT. 223: (AIR 1951 Trav-C 118) (A) and Vasu Pillai v. Prabha-karan Nair, 1955 Ker LT 270 (B).

In the former case the validity of an alienation of a Christian minor's property by his paternal uncle came up for consideration. The paternal uncle was not the guardian under the law applicable to the parties at the material time nor was he appointed guardian under the Guardians and Wards Act. The Full Bench which heard that case held that the alienation by the paternal uncle in these circumstances was an alienation by an unauthorised person and was absolutely void. In 1955 Ker LT 270 (B), the question for decision was the validity of two sale deeds in respect of properties given to certain minors by their father executed by persons who were not their legal guardians under the Nair Act. It was held in that case :

'Nairs are governed by the principles of Maru-makkathayani Law as modified by the provisions embodied in the Nair Act which contains special provisions specifying the persons who should represent minors as their legal guardians in respect of their separate property. Self-imposed guardianship or management by other persons will not confer on them any legal authority to deal with the minor's property. Such dealings will be absolutely void and will not in any way affect the minor's interest in such property. The general rule to that effect as enunciated in 1951 Ker LT 223: (AIR 1951 Trav-C 118) (FB) (A), is applicable to minors

governed by the Nair Act also.'

3. Both these cases relate to alienations of minors' properties in favour of strangers. The instrument which is impugned in this case is not such an alienation but a partition deed in a Marumakkathayam tarwad assented to on behalf of the minors by their father. The effect of Section 10 (1) of the Nair Act of 1100 in such a case has come up directly for decision by a Full Bench of the erstwhile High Court of Travancore in Krishna Pillai v. Govindari Nair, 33 Trav LJ 71 (C). Dealing with this question it has been said in that case:

"It was argued that Lekshmi could not be legally represented by her father in the partition deed because under the proviso to Section 10 of the Nair Act the guardianship of the husband or the father shall not extend to the right and interest of his wife or children in their tarwad property. All that this provision can mean is that in dealing with tarwad properties the father cannot act as legal guardian of his minor children. But it will not be reasonable to construe the provision to mean that when on a minor's behalf a partition in the tarwad has been done which is not prejudicial to the minor, he or she cannot be represented by the father as guardian. The argument based on Section 10 of the Nair Act is also unsustainable.'

According to the appellant's learned Counsel this decision is incorrect and requires reconsideration.

4. So far as partitions are concerned the position under the Marumakkathayam Law is that the adult members of a tarwad are competent to effect a partition of the tarwad properties and that a partition assented to by all the adult members of the tarwad will be binding upon the minors also in the absence of fraud, and prejudice to the minors. After an exhaustive review of the case law on the subject it was held by a Full Bench of the Travancore High Court in Bhagavathy Amma v. Ramalekshmi, 19 Trav LJ 1233 (D), that the adult members of a Marumakkathayam tarwad are competent to divide the tarwad properties and execute a partition deed and that in the absence of fraud it is binding on the minor members of the tarwad also.

It was also held in that case that the burden of proof of fraud or prejudice is upon those who set it up and that even if fraud or prejudice is proved the minor members are entitled only to have the partition deed re-opened so far as their share is concerned and to have their proper share set apart for them, but subject to this the partition is final as between those who were parties to it. Following this decision a Division Bench of the same High Court held in *Velu v. Velu*, 25 Trav LJ 1183 (E), that 'the law is well-settled that the adult members of a Marumakkathayam tarwad are competent to effect a partition of tarwad properties and that the partition deed so executed will be binding on the minor members of the tarwad unless the minors set up fraud and prove it.' In that case at page 1190 of the report (25 Trav LJ 1183) (E), it is said:

'If the minors succeed in establishing that the transaction agreed to by all the adult members of the tarwad is vitiated by fraud or is demonstrably to the prejudice of the minors, they would of course be entitled to invalidate the transaction to the extent of their share. The partition will, however, be final as between those who were parties to it. See *Parukutti v. Kalapan Nair*, 31 Mad LJ 879: (AIR 1917 Mad 845 (2)) (F) and *Bhagavathy Amma V. Ranialekshmi* (D)., But Courts show very great favour to family arrangements effected by all the adult members of a tarwad and would hesitate to disturb such arrangements except for grave and sufficient reasons, See *Padmanabha Pillai v. Lekshmi* 16 Trav LJ 531 '(FB) (G).'

This decision, has been quoted with approval and followed in *Ammukutti Pillai v. Padmanbha Pillai*, 30 Trav LJ 812 (H).

5. Such being,, the principles of law governing partitions in Marumakkathayam tarwads, when a partition deed is executed by all the members of a tarwad effecting a just and fair partition between the members thereof, including both adults and minors, 'the mere fact that the father of the minor members also has participated in the execution of the partition deed as their father and guardian cannot render the deed absolutely void and of no effect. Since in the absence of fraud and prejudice to the minors the partition deed assented to and executed by all the adult members of the tarwad would be binding upon the minors also, it is wholly unnecessary for any one to join in the execution of the partition deed as a

special representative or guardian of the minor members. So long as there is no fraud and the partition is just and fair the partition deed would be binding upon the minors even without any representative of theirs' taking part in its execution; and if in the execution of such a partition deed the minors' father, who under Section 10 of the Nair Act is the guardian of their person and property other than' their tarwad property, is allowed to participate as their father and guardian, it could only be by way of abundant caution to make it plain that the partition was finalized after consultation with, and with the assent of, the person who could legitimately be looked upon as the best person to see that the minors have obtained a square deal.

The father's participation in the execution of the partition deed is not necessary to render the partition valid, but ordinarily it will ensure a just and fair partition so far .as the minors are concerned. In fact the participation of the minor's father as their father and guardian in the execution of a partition deed which has been assented to and executed by all the adult members of a tarwad amounts to little more than attestation of the partition deed by the father and prima facie evidence of the fact that the partition is just and fair and has been made without any fraud or prejudice to the minors.

Section 10 of the Nair Act does not at all prohibit the minor's father from taking part in the execution of a partition deed in this manner. In the case of alienations such as sales, mortgages, etc., the guardian executes the deed on behalf of the minors in order to convey from the minors to the alienee the interest transferred or created..., .in other words, the interest in favour of the alienee is transferred or created only by the execution of the deed by the guardian, But in the cas'e of a partition deed assented to and executed by all the adult members of a Marumakkathayam. tarwad the father's participation in the execution of the dpcument does not create or transfer any interest in the property in favour of any one and amounts only to an attestation of the deed furnishing prima facie evidence that the partition is just and fair and has been made without any fraud or prejudice to the minors.

The execution by the guardian is one of the factors on which the validity of an alienation is dependent, whereas -the validity of a partition assented to and executed by all the adult members of a Marumakkathayam tarwad is not dependent upon the participation of the minors' guardian in its execution. It is in this light that the passage from the decision in 33 Trav LJ 71 (G), extracted in paragraph 3- above has to be understood.

We do not therefore think that the said decision requires reconsideration, Following that decision we hold that the participation of the father of the minor members of a tarwad as their father and guardian in the execution of a partition deed executed by all the adult members of the tarwad would not render that partition invalid.

6. In the present case Ext. E was executed by all the adult members in the plaintiff's sub-tar-vVad. At the time of the execution of Ext. E there were 'only 'two adult members in the sub-tarwad and both of them have joined in its execution besides the plaintiff's father. One of the adult members was the minors' mother herself. It is true that the plaintiff had alleged in the plaint that the partition was not just and fair and that it was executed with a view to advance the interest of defendant 5.

She had also brought numerous charges in the plaint against the father, alleging that he was a drunkard and a wastrel. But all those charges have been found against by the Court below, and they have not been repeated in this Court. The complaint that the partition is not just and fair is also groundless. That complaint too has been found against by the Court below, and although it has been repeated in this Court also it is clear from the partition deed itself and even the evidence of Pws. 1 and 2 that feo far as the property available in 1117 were concerned the partition was eminently just and fair and that, if at all, the minors have only received under it larger shares than what they were really entitled to get.

There is also another Circumstance which would show that the partition has not caused any prejudice to the minors. Of the five minors who were olive on the date of Ext. E one is now dead and four arc alive. Out of these four it is only the plaintiff who now complains that the partition is ndf just and fair. The share she got under

Ext. E is by no means less than the share which defendants 2 to 4 would get under a per capita division of the property which was given to them and the deceased Sankara Pillai. Defendants 2 and 3 were minors on the date of the suit.

But after they attained majority they have filed a written statement accepting the validity of Ext. E and also effected a partition of the 'property they got by the exchange deed sought to be cancelled. According to the plaintiff, defendant 4 was ten years old on the date of suit, and so she too must have attained majority by 1180 M. E. But up to now defendant 4 also has not brought any complaint against the partition. , '

The conduct of defendants 2 to 4 is almost proof positive of the fact that Ext. E was in no way prejudicial to the minors. There is no independent evidence at all in support of the plaintiff's case of fraud. In the circumstances the attack on Ext. E based on S. 10 of the Nair Act -must fail.

7. The contention based on Section 35 also cannot prevail. Section 35 reads :

'When a Tarwad consists only of an adult member and minors, the adult member shall not be entitled to divide from the minors,'

This section can have no application to a case in which there were more than one adult member in the tarwad at the time of the partition. The section applies only to a tarwad consisting of one adult member and minors. In the present case at the time of Ext. E there were two adult members in the tarwad, namely. Lekshmi Amma and defendant 1, and both of them had joined in the execution of Ext. E. The object of the section is clear.

Since the father's guardianship does not extend to the minors' right and interest in their tarwad property, in the case of a tarwad consisting only of an adult member and minors there would be no person to look after the minors' interests in the partition if the sole adult member is given the right to claim partition as against them. Such a contingency is not likely to happen when there are more than one adult member in the tarwad,

Eacli would act as a check on the other or others at the time of the partition, and, .in the absence of fraud, the interests of all the members, including the minors, are likely to be adequately looked after. Hence the Legislature restricted the prohibition in Section 35 to tarwads consisting only of an adult member and minors and made no such prohibition in the case of tarwads consisting of more than one adult member and minors. In view, of the clear language of Section 35 the restriction in that section cannot be extended to tarwads consisting of more than one adult member.

8. -Section 36 of the Nair Act reads:

'Every female member who claims to get her share of the Tarwad properties shall also claim and shall also be entitled to get the shares of her minor children in such properties.' *

On the strength of this section it was contended by the appellant's counsel that no separate shares should have been allotted to Lekshmi Amma and the plaintiff and defendants 2 to 4 and Sankara Pillai under Ext. E and that since the plaintiff and defendants 1 to 4 and Sankara Pillai were minors on the date of Ext. E only one common allotment should have been made under Ext. E to Lakshmi Amma and these minor children.

The argument was that at the time of Ext. E there could have been a valid partition only between defendant 1 on the one hand and Lekshmi Amma and the minor children (i.e., the plaintiff, defendants 2 to 4 and Sankara Pillai) on the other and that since Ext. E has separated Lekshmi Amma from her minor children the partition contravenes Section 36 and is invalid. It is well known that before the enactment of Nair Act of 1100 compulsory partition was unknown to Nairs and that although all the members of a tarwad had equal rights to the properties of the tarwad no one could claim a specific share or demand partition as a matter of right.

Partition could take place only with the common consent of all the adult members of the tarwad or by a long course of conduct of severance. The Act of 1100 effected a change in the law and conferred for the first time a right on every adult

member of the tarward to claim partition and get his or her share separated. But this right conferred on individual members was made subject to certain conditions and restrictions. Section 33 of the Act which confers the right on each adult member of the tarwad to claim partition reads as follows:

'Subject to the provision of Sections 34, 35 and 36 every adult member of a Tarward shall be entitled to claim his or her share of the properties of the Tarward'.

Section 36 is therefore only a proviso to Section 33, imposing certain conditions on the right conferred by the latter section on individual members to demand partition as of right. From the context it is clear that Section 36 applies only to compulsory partitions and not to voluntary partitions. The section applies when a female member having mine* children demands partition as of right against other members who are unwilling to have the tarwad partitioned and does not apply when all the adult members of the tarwad agree to a partition and the partition is effected on their common consent.

This is made further clear by Section 44 of the Act. Even before the enactment of the Nair Act of 1100 tarwad partitions were recognised by Maru-makkathayam law although no member had till then a right to claim partition, i.e., to demand separation of his or her share as a matter of right. Under the law as it stood before the enactment of the Act of 1100 partitions could be effected either by the unanimous consent of all the adult members of a tar-wad or by a long course of conduct of severance; and as has been already pointed out in this judgment when a partition was effected by all the adult members of the tarwad and it was neither vitiated by fraud nor prejudicial to the minor members it was binding on the minors also.

If in the particular circumstances of a case the adult members were convicted that it was not prejudicial to the interests of a minor to allot a separate share to the minor and not to make a common allotment to the minor and the minor's mother, it was open to them to make a separate allotment, to the minor child. In most cases the allotment of a separate share to the minor would only be more beneficial to the minor than the allotment of a common share to the minor and the minor's mother, for when a common allotment is made the minor and the mother would be

taking it as constituting a sub-tar-wad and by subsequent births of other children to the mother the minor's share will get diminished.

There is no risk of a subsequent diminution of the minor's share when the minor is allotted a share separate from that of the mother at the time of the partition. The Nair Act of 1100 did not make any change as regards the right of the members of the tarwad to effect a partition by common consent, and only conferred a right on individual members to demand partition as a matter of right. Section 44 of the Act expressly says that nothing in the Act shall affect 'the existing rules of Marumakkathayam law, custom, or usage, except to the extent hereinafter expressly provided for'.

In view of this section all rules of Marumakka-thayam law existing before the Act of 1100 and not expressly altered by that Act continue to be in force even after its enactment. As Section 33 only confers a right on individual members to demand partition as of right and does not affect the right of all the adult members to effect a partition by their unanimous consent and as Section 36 is only a proviso to Section 33, Section 36 can have no application to cases of voluntary partition effected by the unanimous consent of all the adult members.

The allotment of shares to the minor members of a tarwad separately from their mother in a partition effected by the unanimous consent of all the adult members of the tarwad will not therefore render the partition invalid if it is not fraudulent or prejudicial to the minors.

9. In the circumstances the lower court was right in holding that Ext. E was a valid partition and was binding upon the plaintiff also. As the plaintiff has got separated from the other members of her sub-tarwad by Ext. E, and as the alienations executed by Lakshmi Amma and defendant 1 after Ext. E were in respect of the properties they got under that partition, the plaintiff can have no cause for complaint in regard to those alienations.

Ext. E being a valid partition, Lakshmi Amma and defendant 1 were perfectly competent to alienate their shares. So far as the exchange deed Ext. C is concerned the persons competent to complain about it are defendants 2 to 4. But

they have no complaint about Exts. G and V, and they have also divided among themselves the property which they got under Ext. G in exchange of the property which was allotted to them under Ext. E.

10. Defendant 9's memoranda of objections relates to the sale deed, Ext. II, executed in his favour by Lekshmi Amma on 22-8-1114 before the partition. The lower Court has set aside that sale deed solely on the ground that defendant 9 alone speaks to the consideration and necessity for it and that his evidence, being interested, cannot be accepted. It is true that so far as oral evidence is concerned defendant 9 alone speaks to the consideration and necessity for Ext. II.

But the circumstances of the case clearly show that his evidence must be true. Ext. II shows that part of the consideration for it was received by Lakshmi Amma for renovating the house in the property which she and her children got under Ext. E and that the balance was adjusted against an assignment taken by her from defendant 9. In the plaint the plaintiff denied that there was such an assignment. But the assignment deed itself has been produced as Ext. III.

To Ext. II defendant 5 who is the husband of Lakshmi Amma and the father of the plaintiff and defendants 1 to 4 is an attester. At the time of this partition defendant 1 who was then a major had no objection to Ext. II, and the property sold under Ext. II was therefore excluded from the partition. Defendants 2 and 3 also accepted the partition after they attained majority. If Lekshmi Amma had not received the consideration for Ext. II it is absolutely certain that defendants 1, 2 and 3 would not have thus acquiesced in it. In view of these circumstances we accept the evidence of defendant 9 and hold that Ext. II is supported by consideration and necessity and is not liable to be set aside.

11. For the reasons stated above the appeal filed by the plaintiff is dismissed and the memorandum of objections filed by defendant 9 is allowed. Insofar as it sets aside Ext. II sale deed and allows the plaintiff to recover plaintiff items 6, 7 and 9 from defendant 9 with mesne profits the decree of the lower court is set aside, and it is confirmed in other respects. Parties will bear their costs in this court.

