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Court : Kerala

Decided On : Oct-18-1960

Reported in : AIR1961Ker130

Judge : M.S. Menon,; T.K. Joseph and; P. Govinda Menon, JJ.

Acts : Madras Marumakkathayam Act, 1932 - Sections 38 and 50

Appeal No. : Second Appeal No. 1278 of 1954 (M)

Appellant : Antherman

Respondent : Kannan

Advocate for Def. : V. Balakrishna Eradi, Adv. for Respondents 14 to 20 and; C.K. Viswanath Iyer, Adv. for Respondent 2

Advocate for Pet/Ap. : V.P. Gopalan Nambiar and; K. Sivaji, Advs.

Disposition : Appeal dismissed

Judgement :

M. S. Menon, J.

1. The 4th defendant in O. S. No. 345 of 1948 of the District Munsiff's Court, Badagara -- a suit for partition -- is the appellant before us. The properties concerned belonged to one Kunhi Chekkan in kanomkuzhikanom from the

Kauttmatath Mana.

2. On the death of Kunhi Chekkan the properties devolved on his children under his will, Ext. A7 dated 17-12-1908. The courts below have found that the children took the properties with all the incidents of a tarwad property under the Marumakkathayam system of law. That hinding is not challenged before us.

3. Kunhi, Kalliani and defendants 2 and 3, four of the children of Kunhi Chekkan, assigned their rights to one Kadungon by Ext. B1 dated 5-1-1943. Kadungon in his turn assigned his rights under the document to the appellant by Ext. B2 dated 26-11-1943.

4. It is common ground that the assignors under Ext. B-1 could have claimed partition if they had so desired under Section 38 of the Madras Marumakkathayam Act, 1932. It is also agreed that they had not done so, and that no severance of status had been effected prior to the execution of Ext. B-1.

5. It is not disputed that under the Marumakkathayam system of law as it stood prior to the Madras Mannnakkathayam Act, 1932, the undivided share of a member of a Malabar tarwad could not have been the subject of a valid alienation, voluntary or compulsory, and that the alienee got no right in pursuance of such a transaction. The question for determination is whether the Madras Marumakkathayam Act, 1932, has made any difference in that state of the law.

6. Section 38 of the Act conferred the right of tavazhi partition. That section reads as follows:

'(1) Any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad:

Provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to such tavazhi and to any other tavazhi or tavazhis of the tarwad, except with the consent of such ancestress; if she is a member of the tarwad.'

(2) The share obtained by the tavazlii shall be taken by it with the incidents of tarwad property. Explanation -- For the purpose of this chapter, a male member of a tarwad or a female member thereof without any living child or descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad'.

7. As already stated it is not disputed that the assignors under Ext. B-1 could have claimed a partition under Section 38. It is also admitted that they had not done so; but that according to the appellant is immaterial. The contention is that what they could have done, equity will permit the assignee to do and that the assignee can obtain that share in partition which his assignors could have claimed and obtained, if they were so minded.

8. A right to partition similar to the one conferred by Section 38 of the Madras Marumakkathayam Act, 1932, was granted by the Cochin Nayar Act of 1095. Similar contentions in respect of both voluntary and compulsory alienations were consistently negatived by the courts of the Cochin State.

9. In 19 Cochin, 207 the question was whether the share of an undivided member of a Marumakkathayam tarward in his tarward properties was capable of attachment before a severance in status was effected. The finding that no severance in status had as a matter of fact been effected was not challenged by the appellant. Varugis, C. J., said:

'The appellant has not attempted to challenge this finding but contends that, where a member of a Marumakkathayam tarwad is in a position to claim a share, his creditor may bring the undivided share to sale in execution of his decree. This position is supported by the analogy of Hindu Law and it is urged that that analogy, being in consonance with the justice of the case, should be followed. But there is another side to the question. The Rule of Hindu Law is only a late development, a sort of rider to the right of partition. However just and expedient, it is not a necessary ingredient of the right.

It is essential therefore to see how far this refinement of the law of partition is consistent with the Nayar Regulation. Section 53 of the Regulation shows that

except so far as the Regulation has expressly altered the Marumakkathayam law, it remains the same as before. There has been no express alteration of the law in favour of the creditors. On the other hand, the indication of Section 20 is that a Nayar has no disposing power except over his self-acquired and separate property until a severance in status has been attained. In these circumstances we do not feel justified in extending the rights and liabilities of shares in a Marumakkathayam tarwad in the direction sought by the appellant.'

10. In 19 Cochin, 338--a case of voluntary alienation -- Krishna Menon, J., dealt with the matter as follows:

'It is contended for the appellant that, inasmuch as his assignors were under the Nayar Regulation entitled to sue for a partition of the property, an assignment by them of their shares, operating as a declaration of their intention to divide, brings about an actual severance of those shares.

Under the Marumakkathayam Law, no member of a tarwad has an individual share in the tarwad properties and that is so even under the law as modified by the Nayar Regulation since the Regulation gives him only a right to claim partition and does not recognise the existence in him of any individual rights before partition. When therefore an undivided member purports to transfer his share in undivided tarwad property, he is doing an act which is not sanctioned by law and we do not think we shall be justified in giving effect to it indirectly by importing into it an implied declaration of intention to divide''.

11. In 34 Cochin 522 (FB), Section 38 of the Madras Marumakkathayam Act, 1932, came up for specific consideration. The court surveyed the Madras and Cochin cases and said ;

'So far as the division claimable by a thavazhi of a tarwad is concerned, the law thus appears to be identical and no distinction exists between the Madras Marumakkathayam Act and the Cochin Nayar Act, XIII of 1095. There is no provision enacted in distinct terms either in the Madras Marumakkathayam Act or in the Cochin Nair Act as to whether the right to claim a share of a thavazhi is attachable.

The right to claim partition is conferred by statute both in the Madras Presidency and in the Cochin State and the language of the statute is identical and there is no difference in this respect. The Madras High Court has interpreted the statute in a particular way and has held that the right to claim partition is attachable as following from the right of partition conferred by the Act. The Cochin High Court has taken a different view and has held that until there is a severance of status, the right to claim a share in partition is not attachable.

Considering the fact that this court was holding ever since the Cochin Nayar Act, XIII of 1095, came into force, that the right to claim partition was not attachable until a severance of status was effected, we are not disposed to depart from that interpretation of the section and give effect to the different interpretation of the Madras High Court.'

This judgment was endorsed by another Full Bench of the Cochin High Court in 37 Cochin 294.

12. Counsel for the appellant drew our attention to 33 Cochin 2-15, a case under the Cochin Thiyya Act, VIII of 1107. That case was fully discussed in 34 Cochin 522 (FB) and the discussion shows that it was based solely on the wording of that Act. Manjooran, J., who delivered the judgment on behalf of the Division Bench in 33 Cochin 245, was also a member of the Full Bench in 34 Cochin 522.

13. The original position under the Hindu Law was the same as that adopted by the Cochin Courts in respect of undivided shares in tarwad properties. In Suraj Bansi Koer v. Sheo Proshad Sing, ILR 5 Cal 148, the Privy Council said that 'there can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family.'

14. A distinction between alienations by private contract and conveyance and alienations under legal process, however, was an early inroad into this branch of the law, and on the basis of that distinction the rigour of the Hindu law has been relaxed in respect of compulsory sales throughout this country. In Deendyal Lal v. Jugdeen Narain Singh, ILR 3 Cal 198, the Privy Council dealt with the distinction as follows :

'However nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value,

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.'

The distinction was recognised by the Supreme Court in Sidbcshwar Mukherjee v. Bhubneshwar Prasal. AIR 1953 SC 487.

15. The view as regards voluntary alienations of undivided shares in Hindu family properties has by no means been uniform. The relaxation of the strict rule in favour of alienees for value has taken place only in Bombay, Madras and Madhya Pradesh. Mulla sums up the conflict of opinion as follows :

'According to the Mitakshara Law as administered in the Bombay and Madras States, a copar-cener may sell, mortgage, or otherwise alienate for value his undivided interest in coparcenary property without the consent of the other coparceners. The same rule applies to cases governed by the Mitakshara Law as administered in the Madhya Pradesh.

'According to the Mitakshara Law as administered in West Bengal and Uttar Pradesh no coparcener can alienate even for value his undivided interest without the consent of the other co-parce-ners, unless the alienation be for legal necessity, or for payment by a father of antecedent debts. The consent of the other

coparceners is necessary even if the alienation is made in favour of a coparcener. The same rule applies to cases governed by the Mitakshara Law as administered in Bihar and Orissa, the Punjab, and in Oudh'.

(Hindu Law, 12th Edition, pp. 386 and 387).

16. In States where the right to alienate an undivided share for value has not been recognised, such alienations have uniformly been held to be void and inoperative as against the property alienated and as giving the alienee no rights even as against the undivided shares of the alienors. In Madho Parshad v. Meharban Singh, ILR 18 Cal 157, the Privy Council said :

'Any one of several members of a joint family is entitled to require partition oT ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes',

17. In Amardayal Singh v. Har Pershad, AIR 1920 Pat 433, a case of a mortgage, Dawson-Miller, C. J., summed up the position as follows :

'The result of the authorities appears to me to be that a mortgage of the whole or a share of the joint family property of a Mitakshara family unless justified by legal necessity or by an antecedent debt or assented to by the other members of the family, is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share'.

In Trilok Singh v. Dwarka Prasad, AIR 1958 Pat 262, the court said that no principle of equity has any application where the law is certain and endorsed the position as stated above.

18. In Bank of New India Ltd. v. Ponnamma, 1960 Ker LT 698 : (AIR 1961 Kerala 105), a Full Bench of this court adopted the unanimous view of the Indian High Courts in respect of compulsory alienations under the Hindu Law in a case governed by the Travancore Kshatriya Act of 1108. The question of voluntary alienations of undivided shares did not arise for decision in that case. It it did and had been dealt with in the same manner, we would certainly have referred this

case to a fuller Bench for decision.

Judicial decorum, the need for certainty in the law and the mandate of the Supreme Court in Alma Ram v. State of Punjab, AIR 1959 SC 519 and Mahadevlal Kanodia v. Administrator-General of West Bengal, AIR 1960 SC 936, would have compelled such a course.

19. The only case of a voluntary alienation of an undivided share in a Marumakkathayam tar-wad to which our attention has been drawn --other than 19 Cochin 338 -- was Kunjikrishnan v. Anantharaman, 1959 Ker LT 1160. In that case Venkatarama Iyer, J., of the Madras High Court, sitting alone, said :

'The position, therefore, is that a Marumakka-thayi has no such interest in the family properties as is capable of being transferred for his own personal purposes. Now the question is how far this has been altered or modified by the Madras Maru-makkathayam Act XXII of 1933.'

and

'It has been frequently observed that the object of the Madras Act XXII of 1933 was to assimilate Marumakkatbayam Law as far as possible to the position under Mithakshara Law and it will be in accordant with that object to hold that a Marumakkathayi is entitled to alienate his or her share for valuable consideration when he or she has got the right to demand a partition under Section 38 of the Act'.

20. According to the learned Judge the position under the Marumakkathayam law, once a right to partition has been conferred, should be the same as under the Mithakshara law as administered in Madras, Bombay and Madhya Pradesh in respect of voluntary alienations of undivided shares in a Hindu family. We must say, with respect, that we see no warrant for this conclusion.

The power of voluntary alienation is not an inevitable corollary of the right to compulsory partition. The statement that the purpose of the Madras Marumakkathayam Act, 1932, was to assimilate the Marumakkathayam law as far as possible to the position under the Mithakshara law also does not appear to be

justified either by the contents of the enactment or its Objects and Reasons and legislative history.

21. Two of the important features of the Act are the enforcement of monogamy and the conferment of a right of free divorce. These features, under no circumstances, could have bad their origin in any orthodox system of Hindu law.

22. The law -- in the language of Lord Hals-bury -- is not always logical and as pointed out by Sunclara Ayyar, J., in Krishnan Nair v. Damo-daran Nair, ILR 38 Mad 48 : (AIR 1916 Mad 751) (FB), a principle enunciated with respect to certain circumstances cannot always be carried out to its logical conclusions and applied to all analogous circumstances. In Gopala Nair v. Raghava Nair, AIR 1925 Mad 460, Madhavan Nair, J., said :

'It seems to me that Malabar law being essentially customary law, the process of solving questions, as they arise for decision, by extending the operation of a custom by analogy, or by applying 'inferences' from the Hindu Law, unless in the utter absence of evidence, as regards custom, is bound to create a divergence between the Court-made law and the customary law, as observed by the people'.

23. Section 50 (b) of the Madras Marumakkathayam Act, 1932, specifically provides that nothing contained in that Act shall be deemed to affect any rule of Marumakkathayam law, custom or usage except to the extent expressly laid down in that Act. We are unable to find anything in the Act which alters the customary law as regards voluntary alienations of undivided shares and we are not prepared to hold that such a change has been effected by implication by the mere grant of a right to partition and analogies drawn from the Hindu Law as administered in three of the States of this country.

24. Counsel for the appellant submitted that the pleadings in the case are insufficient to support the contention of the respondent (1st defendant). We have gone through the relevant papers and are not satisfied that this contention is justified.

25. It follows that no rights were conveyed under Ext B-1, that the appellant obtained no rights under Ext. B-2, and that this appeal has to be dismissed. Judgment accordingly. In the circumstances of the case, however, there will be no order as to costs.

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