

Parukutty Vs. Province of Madras

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Court : Kerala

Decided On : Oct-14-1960

Reported in : AIR1962Ker93

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

Acts : Malabar Law; [Evidence Act, 1872](#) - Sections 101 and 102

Appeal No. : A.S. No. 368 of 1955 (M)

Appellant : Parukutty

Respondent : Province of Madras

Advocate for Def. : Adv. General

Advocate for Pet/Ap. : K. Kuttikrishna Meon and; V. Balakrishna Eradi, Adv.

Disposition : Appeal allowed

Judgement :

Joseph, J.

1. This appeal was referred to a Full Bench for an authoritative decision of the question whether the last Sthani has absolute right to deal with sthanom properties. The Full Bench answered the question in the negative and remanded the suit for a finding on the question whether the property claimed by the appellant

was one attached to the sthanom or one belonging to the tarwad of the sthani.

2. The contentions of the parties and the decision on the question referred to above are stated in the order of remand a copy of which will be appended to this judgment. The plaintiff, the province of Madras sued for recovery of possession of 90 items of immoveable property alienated by KunhIRaman Moothavar, the last Sthani, who was also the last member of his tarwad, on the allegation that the properties were attached to the office of sthanom and that the alienations were invalid. The 64th defendant-appellant who was interested in item number 70 had a contention that this property did not belong to the sthanom but to the tar-wad and that KunhIRaman Moothavar who was the last surviving member of the tarwad was competent to alienate the same. This was the question on which a finding was called for. The finding submitted by the trial court is that the property belonged to the tarwad. It was also observed by the learned subordinate Judge that if the burden of proof in the case is on the 64th defendant, the finding should be in favour of the plaintiff.

3. The suit in effect is one in ejectment and the plaintiff can succeed only on proof that item number 70 was Sthanom property. The issue remitted for finding was: 'Did item number 70! of the A schedule to the plaint belong to the tarwad of the late KunhIRaman Moothavar as alleged by the 64th defendant.' It was urged on behalf of the appellant that whatever be the form of issue 'the burden of proof on the pleadings' is on the plaintiff and as the plaintiff did not prove that the property was attached to the sthanom, the suit should fail.

4. The question has to be decided in the light of Sections 101 and 102 of the Indian Evidence Act. The principles embodied in these sections are dealt with in Phipson's Manual of Evidence and we cannot do better than extract a few passages from the same.

'The expression 'burden of proof' has two meanings which are distinct, but frequently confused. One meaning' is the obligation, in a party to convince the tribunal of fact (whether by preponderance of evidence or beyond reasonable doubt) of the truth of some proposition of fact which is in issue and which is vital to his case. This obligation may bb called 'the burden of proof on the pleadings.' The

penalty for failure to discharge this burden is the certainty of failure in the whole or some part of the litigation. The other meaning, is the obligation to adduce sufficient evidence, on a particular fact to justify a finding on the fact in favour of the party who is under the obligation, which may be termed 'the burden adducing evidence,' or 'the evidential burden.' Failure to discharge the evidential burden carried the risk, but not the certainty, of failure in the whole or some part of the litigation. Success in discharging the obligation shifts the evidential burden on to the opposing party.' ...

'The general rule is that lie who asserts must prove, whether the allegation be an affirmative or a negative one and not he who denies. 'It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons.

The effect of this general rule is that the obligation of satisfying' the court on an issue rests upon the party (plaintiff, prosecutor or defendant) who, in substance, asserts the affirmative of the issue; that is to say, where a given allegation whether affirmative or negative, forms an essential factor of a party's case, the proof of such an allegation rests on him.'

After citing a few examples it is stated:

'From these examples, it will appear that the incidence of the burden of proof in the sense in which that expression is here used, is fixed as a matter of law at the beginning of the trial, either by the substantive law or by the pleadings, which show whether any particular allegation is admitted or denied, i.e., define the facts in issue.'

'This burden never at any stage shifts, but remains on the party on whom it was placed by the substantive law or the pleadings.'

The following passage from the judgment of Denning L. J. in *Dunn v. Dunn* is quoted by the commentator to show the interaction of the two burdens.

"In this case the legal burden throughout was on the petitioner to prove that his wife deserted him, without cause. In order to discharge that burden the petitioner

relied on the fact that he asked her to join him and she refused. That is a fact from which the court might have inferred that she had deserted him without cause, but It was not bound to do so. Once he proved the fact of refusal she might seek to rebut the inference of desertion by proving that she had just cause for her refusal and indeed it is usually wise for her to do so. But there is no legal burden on her to that effect. Even if she did not affirmatively prove just cause the court had still, at the end of the case, to ask itself. Has the legal burden been, discharged?'

The law on the subject has been laid down in the same terms by the Privy Council in *Lakshmanan v. Venkateswarlu*, AIR 1949 PC. 278 :

'(43) What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as 'shifting.' The burden of proof on the pleadings never shifts, it always remains constant (see *Pickup v. Thames Insurance Co.*, (1878) 3 QBD 594 : 47 LJQB 749). These two aspects of the burden of proof are embodied in Sections 101 and 102 respectively of the Indian Evidence Act Section 101 states:

'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.'

Section 102 states:

'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.' '(44) This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced,

the tribunal feels it cannot make up its mind as to which of the versions is true it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background.

(45) How the above rules relating to onus operate in a case is thus described by Lord Dunedin in *Robins v. National Trust Co. Ltd.*, (1927) AC 515 at p. 520: 96 LJPC 84): 'Their Lordships cannot hold thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he was born on a certain date if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.'

Viewed in the light of these principles it is clear that the plaintiff must fail. No evidence was adduced by either party after remand; both sides agreeing to have the case decided on the evidence already on record. Such evidence does not disclose how or when the property was acquired or whether the property was treated at any time as one attached to the office of the sathanom.

5. The learned Advocate General who appeared for the State raised two points in this connection. The first is that the form in which the issue was framed cast the burden of proof on the defendant and that it is not open to the defendant to contend at this stage that the plaintiff ought to have adduced evidence on the point. There is no substance in this point. As pointed out by the Privy Council in

Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddy, 49 Ind App 286; (AIR 1922 PC 292) 'when the entire evidence on both sides is once before the court the debate as to onus is purely academic.' Further, the form of the issue cannot affect the 'burden of proof on the pleadings.'

The other point raised is that though there is no evidence to show that item No. 70 was attached to the office of sthanom, there is evidence in the case that whenever the last sthani dealt with tarwad properties, reference was made in the documents to that fact. Exts. A184, A189 and A209 were referred to in this connection and it was argued that in conveying item No. 70 to the appellant, Kunhiraman Moothavar did not refer to the property as belonging to the tarwad and that it should therefore be presumed to be Sthanom property. Ext. A184 is copy of a statement filed by the Sthani before the Collector of Malabar, on 27-5-1927. He stated that he was the sole Sthani. The other documents show that when dealing with properties belonging to the tarwad, he described himself as sole member and that at least in one document the consideration is described to have been received for discharging a debt incurred as Sthani.

Kunhiraman Moothavar does not appear to have maintained any distinction in his dealings with property whether belonging to the tarwad or attached to the Sthanom. These documents do not conclusively show that the argument of the respondent's counsel is correct. We are able to see why the plaintiff was not able to adduce better evidence on the point. Revenue records and other documents relating to the property must have been available with the State to show the nature of the property but none was produced. In these circumstances the finding of the trial judge that the plaintiff failed to prove that the property belonged to the sthanom must be accepted. It follows that the suit must fail in respect of item No. 70.

We therefore allow the appeal, set aside the decree regarding item 70, and dismiss the suit in respect of the same, In the circumstances of the case We direct both sides to bear their costs.

APPENDIX

Copy of judgment in A. S. No. 3G8-55M.

This is an appeal by the 64th defendant in O. S. No. 79 of 1953 of the court of the Subordinate Judge of Tellicherry. The suit was by the Province of Madras for the recovery of possession of the properties specified in the A schedule to the plaint with past and future profits and the costs of the suit. The appellant is interested only in one of the 90 items in the said schedule, namely, item No. 70 which she purchased from the late KunhIRaman Moothavar by Ext. A200 dated 21-10-1934.

2. The trial court accepted the plaintiff's contentions that the item belonged to the Koothali Sthanom of Payyormala in North Malabar, that KunhIRaman Moothavar had no right to execute Ext. A200 and that on his death on 8-7-1936 all the properties of the stanom accrued to the State by escheat. In Appendix III to the 11th Edition of Mayne's Treatise on Hindu Law and usage it is stated:

'When a sthanom ceases to exist by the extinction of the tarwad, the members of which were entitled to succeed to the office, the property passes by escheat to the Crown, and the last holder's personal heirs cannot take the property by inheritance' (page 994).

Mr. S. Srinivasa Iyengar's preface to the 10th Edition of the Treatise shows that Appendix III was prepared by Mr. P. Govinda Menon and revised by Mr. B. Sitarama Rao, the editor of Sundara Iyer's Malabar and Aliyasanthana Law. Mr. N. Chandrasekhara Aiyar's preface to the 11th Edition states that Mr. Govinda Menon scrutinised the Appendix again for the purposes of that edition.

3. We see no reason to differ from the statement of the law embodied in the passage extracted above. KunhIRaman Moothavar was the last member of his tarwad and the last sthani and we must hold that the trial court was right in its conclusion that on his death on 8-7-1936 the properties of the sthanom escheated to the State.

4. It is well settled that the estate taken by a sthani is a limited one and that he can encumber or alienate sthanom properties only for legal necessity like any other limited owner. Counsel for the appellant agrees that it is not possible to justify: Ext.

A200 on the ground of benefit or necessity. His contention is that even though the estate taken by a sthani is ordinarily limited in character, that estate in the hands of the last sthani is absolute and untrammelled.

5. That such is the customary law is a matter for proof and no such proof has been attempted in this case. As pointed out in *Krishnan Nair v. Demodaran Nair*, ILR 38 Mad 48: (AIR 1916 Mad 751) a custom cannot be extended by analogy and 'the particular custom applicable to any set of circumstances must be proved.'

6. In *Venkateswara Iyar v. Shekhari Varma*, ILR 3 Mad 384 (PC), the Privy Council compared the position of a sthani to that of a Hindu widow:

'The sthanamdar represents the corpus of his sthanam much in the same way as a Hindu widow represents the estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the sthanam.'

In *Raja of Palghat v. Raman Unni*, AIR 1918 Mad. 675, Seshagiri Aiyar J. said:

'The position of a sthani approximates more to that of an owner of an importable estate before the Act than to that of a widow.'

According to Bashyam Ayyangar J. in *Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami*, ILR 27 Mad 435 the sthanis of Malabar fall under the category of corporations sole.

7. These comparisons however interesting as excursions into comparative jurisprudence do not indicate that the incidents are by any means identical or that a rule of customary law can be established without proof by a process of deduction from the rights and powers of persons or institutions known to other branches of the law.

8. In order to understand the normal incidents of a sthanom it is unnecessary to go beyond *Nallappada Nair v. Chami Mannadiar*, AIR 1955 Mad 177. In that case *Rajammannar C. J.*, dealt with the matter as follows:

'The word 'sthanam' is of Sanskrit origin and means 'position' or 'place.' It acquired a secondary and special meaning in Malabar, namely, a position of dignity,

generally, property attached to the position for the maintenance of the dignity and for the fulfilment of the duties attached to the position. The holder for the time being of the position, is called the 'sthani.' The specific property attached to the sthanam passes with it to the holder for the time being. The office and property vest in the holder individually and not in his family. The succession to a sthanam is generally determined by seniority in age. It descends to the eldest male member of a family. Or sometimes to the eldest member in a number of families together. The estate taken by a sthani in the sthanom property is not absolute; he has no unlimited powers of disposition of the property, though he is entitled absolutely to the income accruing therefrom during his life time. He has, however, the power of creating a charge upon or alienating the sthanom property, where such charges or alienation is necessary or beneficial to the estate.'

9. As already stated there is no proof in this case that the powers of the last sthani are different from those of any other sthani and that the estate which he took from his predecessor becomes absolute on the disappearance of the possibility of succession. In these circumstances we must hold that if the property covered by Ext. A200 is sthanom property, then the sale not being one for necessity or benefit cannot be considered as valid or binding.

10. The appellant has an alternative contention that item No. 70 belonged not to the Koothali sthanom but to the tarwad of the late Kunhiraman Moothavar. This is a contention which has not been dealt with properly in the judgment of the court below and it was agreed that if we came to the conclusion, as we have done, that Ext. A200 cannot be supported on the assumption that item No. 70 was sthanom property, then a finding should be called for as to whether the said item belonged to the tar-wad of the late Kunhiraman Moothavar. We order accordingly.

11. The lower court will record a finding on the issue, namely,

'Did item No. 70 of the A schedule to the plaint belong to the tarwad of the late Kunhiraman Moothavar, as alleged by the 64th defendant?'

and submit it to this court within two months of the receipt of the records. The parties will be allowed an opportunity to adduce all relevant evidence, both oral

and documentary, in support of their contentions.

12. Time for objections; Two weeks.

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