

Raghavan Vs. Soumini Amma

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Court : Kerala

Decided On : Apr-01-1957

Reported in : AIR1957Ker178

Judge : Sankaran and; Varadaraja Iyengar, JJ.

Acts : [Evidence Act, 1872](#) - Sections 17; Marumakkathayam Law; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 20, Rule 12

Appeal No. : A.S. No. 1149 of 1953 (M)

Appellant : Raghavan

Respondent : Soumini Amma

Advocate for Def. : V.P. Gopalan Nambiar, Adv.

Advocate for Pet/Ap. : P. Sreedhara Menon and; V.G. Bhaskaran Nair, Adv.

Judgement :

Varadaraja Iyengar, J.

1. This appeal is by the sole defendant and arises out of a suit for partition in a Malabar Tarwad which has been decreed by the court below.
2. The plaintiffs 1 to 4 and the defendant comprises a Marumakkthayam thavazhi governed by the Madras Marumakkathayam Act. The defendant is the Karnavan

and 'Manager of the thavazhi, The 'first plaintiff is his deceased sister's daughter and the plaintiffs 2 to 4 are the children of the 1st plaintiff. The plaintiffs claim partition by metes and bounds of their 4/5th share in the two schedules of property B and C attached to the plaint. B schedule consists of two items of immovable property.

Item 1 of the B schedule is the subject of a controversy between the parties. For, while the plaintiffs claim it to be a puthravakasam gift in favour of the thavazhi, the defendant claims that it was a joint acquisition by way of tenancy-in-common in the names of himself, his mother and his sister, viz., 1st plaintiff's mother and with the death of his mother one-half of the property belonged to him, the other half of the 1st plaintiff's mother and it was only this half that the plaintiffs could claim. Item 2 of the B schedule is admittedly thavazhi property. The C schedule consists, of certain movables valued at Rs. 200/- on the whole.

The plaint averred that on the retirement of the first plaintiff's husband in July 1949, as Deputy Controller of the Southern Railways, himself and the plaintiffs settled-down in item 1 of the B schedule and continued to live there until February 1950 when they left on account of differences with the 1st defendant's wife. During the interval the 1st plaintiff's husband put up fresh constructions in item 1 of the B schedule by way of office room, bed room, store room, kitchen, etc., at an expense of Rs. 3743-13-3.

This was done with the help and co-operation of the defendant and in the expectation held out by him that that item will be allotted to the plaintiffs' group in the partition in the thavazhi. The claim was therefore made in the plaint that in the partition of the properties a reservation may be made of the new structures in favour of the plaintiffs. The plaintiffs also claimed mesne profits for the three years before suit and for the future until actual division.

3. The suit was contested by the defendant mainly on the question already noticed of the title of the thavazhi to item 1 of B schedule and on the claim for reservation of the improvements therein in favour' of the plaintiffs. According to the defendant all the improvements in item 1 were effected by him at his own expense and riot at the instance of the 1st plaintiff's husband and the reservation to be made must be

rather in his favour than otherwise. As regards the C schedule movables the defendant objected that item 3 bureau did not exist at all and as regards the rest the plaintiffs had removed their share when they left the house in February 1950. He also disclaimed liability for mesne profits.

4. The court below found that item 1 of the B schedule was thavazhi property and partible as such and that it was the 1st plaintiff's husband and not the defendant who effected the improvements in that item and that too in the circumstances alleged by the plaintiffs and the plaintiffs were accordingly entitled to the reservation thereof in the partition allotment. The actual allocation of item 1 of B schedule was however left for later consideration at the stage of final decree.

As regards movables the court below found that except as regards item 3 the rest of the movables did exist in the possession of the defendant and the plaintiffs were entitled to their share. The court below also granted mesne profits to plaintiffs for three years before suit and also for the future at the rate to be settled later. In the result the court below granted a preliminary decree for the partition of the plaintiffs' 4/5th share in the B schedule immovable properties and C schedule movables except item 3 thereof. The costs of the parties were directed to come out of the estate.

5. Learned counsel for the appellant-defendant canvassed before us practically every question raised by his client in the court below and we will deal with them in their order.

6. First in regard to the thavazhi character of item 1 of the B schedule. This question depends upon the construction of Ext. A 32 deed of acquisition in respect of the item and also the subsequent conduct of the parties. Ext. A 32 stands in the name of the plaintiffs' mother's mother Makkam and her minor children Raghuvan (the defendant) and Damayanthi the plaintiff's mother. It was conceded by the defendant examined as Dw. 1 that his father, Kannan paid the consideration for purchasing the property. The court below relied on this admission to hold that the acquisition was in the nature of a puthravakasam gift in favour of Makkam and her descendants in the female line.

For, the law alike in Malabar, and Travancore, though differently from Cochin is well-settled that the presumption in cases of gift of this character is that the property enures to the thavazhi and is not in the nature of a tenancy-in-common as among the donees. Learned counsel for the appellant has, on this aspect, only to say that his client being only a child at the date of Ext. A32 could not be expected to speak from personal knowledge when he made the admission in the box. But this clearly is not a circumstance referred to in Section 17 of the Evidence Act which will hinder a statement from being regarded as an 'admission' under law.

The defendant had also executed Ext. A2 mortgage of B schedule item 1, so late as 23-6-1947 in his capacity as thavazhi karnavan and manager and as if for meeting thavazhi necessities. No doubt the recital in the document as to title was rather inconsistent but that does not deprive the document of its overall effect from the instant point of view. There is no reason in the circumstances to differ from the conclusion of the court below that item 1 of B schedule is thavazhi property of the parties.

7. The next point is as to who effected the improvements in B schedule item 1 and on what basis. To begin with, the 1st plaintiff's husband retired from Erode as Deputy Controller of Southern Railways drawing a pay of Rs. 400 per mensem and with a provident fund of Rs. 20,000. His wife and children had been all along residing with him and soon after his retirement they settled down in item 1 of the B schedule at Tellicherry along with the 1st defendant and his family. The old building in that item was certainly not convenient or commodious enough for the two families to live in and move-about.

Renovation and additions were therefore called for. The permission to effect repairs was applied for and obtained from the Municipality by the 1st plaintiff. The husband of the 1st plaintiff examined as Pw. 1. testified also to his securing permit for purchase of cement which was then a controlled article and produced Ext. A3 his account book to show various advances made to the defendant for purpose of the construction. Pws. 2 and 3 who were timber and stone merchants gave evidence that they had been engaged by the defendant on behalf of Pw. 1 to supply timber and stone materials for the, construction and they had been paid by

Pw. 1.

There was, above all the evidence supplied by a number of chits passed by the defendant himself to Pw. 1 as to the expenses incurred by him as agent of Pw. 1 in the matter of collecting materials and incurring expenditure over the construction. The defendant on the other side no doubt gave evidence about the need he felt of renovating the building and effecting the improvements thereon on account of the occasional visits of his barrister son-in-law, from Madras and how his daughter had given him about Rs. 5000 in cash necessary for the construction and produced also Ext. B 1 account book in support.

On the consideration of the whole evidence the court below was able to find that it was Pw. 1 who spent the money in regard to the constructions and that again on foot of an understanding with the defendant as to an allotment in partition of item 1 of B schedule towards the share of his wife and children with credit for the improvements. On this part of the case learned counsel for the defendant strenuously contended that even though the defendant might have been unable to make out that the constructions were made by him with his own funds, there was still not enough evidence to hold in favour of the plaintiffs either in respect of Pw. 1's advances or the agreement with defendant for future allocation.

According to learned counsel the only possible inference was that the plaintiffs through Pw. 1 and the defendant for himself had indiscriminately contributed to the improvements effected upon the property and in any event the plaintiffs' husband had got no specific undertaking from the defendant in the matter. If so the reservation made by the court below in plaintiffs' favour, was clearly unjustifiable and learned counsel referred to *Kunjunni Pillai v. Bhaskaran Pillai*, 1954 Ker LT 340 : (AIR 1954 Trav-C. 459) (FB) (A), and *Ramakrishna v. Vishnumoorthi*, AIR 1957 Mad 86 (B).

It seems to us clear however that the court below has come to the correct conclusion on both the aspects. For, nothing could be plainer on the evidence than that as between the defendant and Pw. 1, the latter had the better capacity to and did actually spend, for the improvements. And again nothing is more probable to imagine than that the defendant entitled on his own to a fifth share only in B

schedule items 1 and 2 and also affectionately inclined towards the plaintiffs agreed with Pw. 1 to allocate item 1 towards the plaintiffs' share in the thavazhi properties and allowed him on such basis to improve it.

Nor do we find anything in the decisions cited by learned counsel in his support. The first of the cases cited, Kunjan Pillar's case, held no doubt that when a member of a tarwad is put in possession of tarwad property as such member for purpose of his maintenance he cannot make any claim for value of improvements effected by him on the property for, then he will be making a claim against himself. The decision recognised nevertheless the possibility that equitable considerations may prevail when a rearrangement or readjustment is brought about.

The latter decision in Ramakrishna's case also laid down that under Hindu Law money spent for renovating the family house by any junior member of the family cannot be claimed back by him at the time of partition. But the qualification was added that that was so, when there was no evidence whatever to show that, at that time, the repairs were effected with the expectation of getting compensation from the family funds. And the analogy was given of a co-tenant who was not entitled to compensation for making improvements in the common property unless the same is either necessary or is made with the concurrence of others.

So, when we find as here, that there was an agreement for reservation in favour of the junior member in respect of the improvements effected by him in tarwad property there can absolutely be no difficulty in making it good. We find nothing therefore to interfere with the reservation made by the court below in favour of the plaintiffs with respect to the improvements in B schedule item 1.

8. The third question relates to mesne profits. The court below seems to have thought in this connection that the defendant had been appropriating all the profits of the thavazhi properties to himself during all the previous periods. But it forgot to notice that the defendant could not be said to be in wrongful possession until the plaintiffs claimed their share by this suit. Learned counsel for the plaintiffs suggested that the claim for mesne profits may be viewed as one towards maintenance refused.

But even so there had been no complaint made by the plaintiffs till suit that they were kept out of any benefit of the enjoyment of the properties. Indeed the plaintiffs had been residents in thavazhi property from July 1949 till February 1950 and this suit was filed towards the close of 1950. We think that the grant of mesne profits for any period before suit is in the circumstances unjustified. We make it clear, however, that the plaintiffs are entitled to mesne profits from date of suit.

9. Lastly as regards the plaintiffs' share of the movables, the complaint here was that there was no evidence that the movables were available at all with the defendant and it was heard that the plaintiffs were allowed to work out their share. But in the nature of the pleadings the only question that arose for consideration was whether the plaintiffs had already taken their share of the movables. The non-existence of the movables was not raised except as regards item 3 of the C schedule. So once the court below found and in our opinion rightly, that the plaintiffs did not take with them any movable when they left B schedule item 1 in February 1950 the decree for the plaintiffs', share naturally followed.

10. It follows therefore that the preliminary decree passed by the court below is perfectly right except in regard to the grant of mesne profits to the plaintiffs for the three years before suit, which is hereby struck off. The appeal is allowed to the extent indicated and is dismissed otherwise.

11. The parties will take and pay proportionate costs of this court.