

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

RSA.No. 1357 of 2004 (C)

AS.NO. 86/1997 OF ADDL. DISTRICT COURT, THALASSERY DATED 16-09-2003
OS.NO. 336/1993 OF PRINCIPAL SUB COURT, THALASSERY DATED 12-12-1996

APPELLANT/1ST RESPONDENT/1ST DEFENDANT :

THAYILAKANDY MARIYUMMA, D/O.PATHOOTTY,
THAYILAKKANDY HOUSE, VADIKKAKAM DESOM, THALASSERY.

BY SENIOR ADVOCATE SRI.T.KRISHNAN UNNI
BY ADV. SRI.K.J.KURIACHAN

RESPONDENTS/APPELLANTS & RESPONDENTS/PLAINTIFFS & DEFENDANTS :

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- 1. *C.O.T. HAJIRA,**
W/O.LATE AHAMMED,
HAJIRA MANZIL, KAYYATH ROAD
THALASSERY AMSOM, VADIKKAKAM DESOM,
THALASSERY. (*DIED) LR'S ARE RECORDED.
 - 2. C.O.T. BASHEER,**
S/O.LATE AHAMMED,
HAJIRA MANZIL, KAYYATH ROAD
THALASSERY AMSOM, VADIKKAKAM DESOM,
THALASSERY.
 - 3. C.O.T. BEEBI,**
D/O.LATE AHAMMED,
HAJIRA MANZIL, KAYYATH ROAD, THALASSERY AMSOM
VADIKKAKAM DESOM, THALASSERY.
 - 4. C.O.T. FAIZAL,**
S/O.LATE AHAMMED,
HAJIRA MANZIL, KAYYATH ROAD, THALASSERY AMSOM
VADIKKAKAM DESOM, THALASSERY.
 - 5. C.O.T. SAIDA, D/O.LATE AHAMMED,**
HAJIRA MANZIL, KAYYATH ROAD, THALASSERY AMSOM
VADIKKAKAM DESOM, THALASSERY.

6. C.O.T. REFEEQUE, S/O.LATE AHAMMED,
HAJIRA MANZIL, KAYYATH ROAD, THALASSERY AMSOM
VADIKKAKAM DESOM, THALASSERY.
7. C.O.T. RASHEEDA, D/O.LATE AHAMMED,
HAJIRA MANZIL, KAYYATH ROAD
THALASSERY AMSOM, VADIKKAKAM DESOM,
THALASSERY.
8. C.O.T. AFSATH, D/O.LATE AHAMMED,
HAJIRA MANZIL, KAYYATH ROAD, THALASSERY AMSOM
VADIKKAKAM DESOM, THALASSERY.
9. C.O.T. HARRIS, S/O.LATE AHAMMAD,
HAJIRA MANZIL, KAYYATH ROAD, THALASERY AMSOM
VADIKKAKAM DESOM, THALASERRY.
10. THAYYILAKKANDY AMINA, D/O.ABU,
THAYILAKKANDY HOUSE, VADIKKAKAM DESOM, THALASSERRY.
11. THAYILAKKANDY NAZAR, S/O.ABU,
THAYILAKKANDY HOUSE, VADIKKAKAM DESOM, THALASSERRY.
12. KURUVANKANDY MOOSA,
N.A.COTTAGE, CHITTAMKOON, THALASSERRY.
(THROUGH POWER OF ATTORNEY HOLDER, NOORDHEEN
S/O.T.P. THARIKUTTY).
13. K.P.ABDURAHIMAN, S/O.MAMMU,
SUHARA MANZIL, MAIN ROAD, THALASSERY
KANNUR DT.

***THE RESPONDENTS 2 TO 9 ARE RECORDED AS LEGAL HEIRS OF
DECEASED 1ST RESPONDENT AS PER ORDER DATED 27/2/2012 IN IA
NO. 3151/2011.**

**R1 TO R9 BY SENIOR ADVOCATE SRI.M.C.SEN
BY ADV. SRI.GRASHIOUS KURIAKOSE
R2, R4, R8 & R9 BY ADV. SMT.CELINE JOSEPH
R11 TO R13 BY ADV. SRI. M.C. RATNAKARAN**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 04-12-2014, THE COURT ON 25-05-2015 DELIVERED THE FOLLOWING:**

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A.V. RAMAKRISHNA PILLAI, J.

R.S.A. No. 1357 of 2004

Dated this the 25th day of May, 2015

J U D G M E N T

The 1st defendant in OS No.336/1993 on the file of the Sub Court, Thalassery, is the appellant.

2. The aforesaid suit was instituted by one Thayilekandy Ahamed as the 'karnavan' of 'Thayilekandy Tavazhi' of Muslim joint family governed by the Mappila Marumakkattayam Act (XVII of 1939) for setting aside a document and also for recovery of possession of certain properties. He died during the pendency of the suit. Additional plaintiffs 2 to 10 were impleaded as the legal representatives of the deceased original plaintiff. They are respondents 1 to 9 in the appeal. Respondents 10 to 12 are the defendants 2 to 4 in the original suit. Respondent 13 is the supplementary 5th defendant, who was impleaded subsequently.

3. For convenience of discussion, the parties can

be referred to as they are arrayed in the original suit.

4. The deceased original plaintiff alleged that the suit property belongs to the 'tarwad' of the plaintiffs and the defendants; and they have been in possession and enjoyment of the same. He was the senior most male member and 'karnavan' of the 'tavazhi'. There was a partition as per OS No.6/46 on the file of the Sub Court, Thalassery. However, some of the properties were excluded from partition. The 'tarwad house' and the land having an extent of 65 cents comprised in Sy.No.82 (Old Sy.No.46/1) of Thalassery Amsom, Vadikkakam Desom, where the house is situated, was excluded from partition. In the previous decree, it was shown as Re.Sy.No.81. The 'tarwad house' was occupied by the members of the 'Thayilekandy Tavazhi'. Defendants 1 and 2 were also residing in the 'tarwad house'. Sri.Mammed, the uncle of the defendants, was also residing in the house along with others. The final decree for partition in OS No.6/46 was passed on 21.01.1954. The original plaintiff was given to

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understand that the 1st defendant has executed a document as document No.1664/92, in favour of the 2nd defendant, by which 2.43 acres of land was assigned to her. She is claiming right over an extent of 65 cents of land on the basis of a registered document No.1952/52. She had also assigned another portion of the property to defendants 3 and 4. The aforesaid Mammed has no right whatsoever over the property to lease or otherwise transfer in favour of others. He had no right to lease or otherwise assign the property in favour of the 2nd defendant during the pendency of OS No.6/46. Therefore, the assignment deed, lease etc. are not binding on the members of the 'tavazhi' or 'tarwad' and the same is a void document. The 1st defendant has also executed a gift deed in respect of a portion of the property in favour of the 2nd defendant. Therefore, the original plaintiff alleged that he is entitled to recover possession of the property from strangers for and on behalf of the 'tavazhi'.

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5. In the joint written statement filed by defendants 1 and 3, it was contended that the original plaintiff was one of the several members of the 'tavazhi' and cannot act as 'karnavan' and the court has no jurisdiction to set aside document no.1664/92 until the registered document no.1952/52, the assignment in favour of the 1st defendant, is set aside. It is also contended that the original plaintiff is not entitled to get document no.1952/52 of SRO, Thalassery, set aside. They admitted that Item No.48 was the subject matter of partition in OS No.4/46, wherein the 'tavazhi house' was situated. But, it is not correct that it was occupied by the members of the 'Thaylakandy Tavazhi' and that the original plaintiff was one of the members of the 'tavazhi'. They had never visited the 'tarwad house' and the property. After the assignment, the 1st defendant had been in possession and enjoyment of an extent of 43 cents of land without any objection or interference by any other member of the 'tavazhi' including the original plaintiff.

The 1st defendant has effected improvement in the property and she alone had been taking income therefrom. She was paying taxes and has acquired absolute right and possession and enjoyment of an extent of 43 cents of land ever since the registered document no.1952/52. All members of the 'thavazhy' were aware of the assignment deed executed in favour of the 1st defendant. Unless and until assignment deed no.1952/52 was declared null and void, the suit is not maintainable. They also contended that an extent of 43 cents of land assigned in favour of the 2nd defendant was excluded from the purview of the final decree in OS No.6/46. They also contended that the suit is barred by limitation.

6. The 5th defendant filed a statement in support of the contentions raised by defendants 1 and 3.

7. The trial court, after raising proper issues for trial, permitted both parties to adduce evidence. At the trial, PW1 as well as DWs1 to 3 were examined. Exts.A1 to A5 and Exts.B1 to B99 were marked. The trial court,

after considering the evidence, found that the plaintiffs are not entitled to any relief as prayed for and dismissed the suit.

8. The plaintiffs took the matter in appeal as AS No.86/1997 before the Additional District Court, Thalassery, which, after re-appreciating the evidence, allowed the appeal and decreed the suit. It is with this background, this appeal has been preferred.

9. I have heard Mr.T.Krishnan Unni, the learned senior counsel for the appellant and Mr.M.C.Sen, the learned senior counsel for the respondents.

10. As pointed out at the outset, the suit was instituted by the 'karnavan' of the 'tavazhi' of a Muslim joint family governed by the Mappila Marumakkattayam Act (XVII of 1939) (for short, "the Act") for setting aside a document, for injunction against transfer and also for recovery of possession of certain properties as the 'karnavan' of the 'tarwad'. The subject matter of the suit is about 65 cents of property comprised in Old Sy.No.46/1

(New Sy.No.82), which is the 'tarwad house' of a Muslim Marukakkathayam Tavazhi. Previously, in the year 1946, there was a suit for partition before the Sub Court, Thalassery, in which a preliminary decree was passed on 03.04.1947. Ext.B2 is the copy of the judgment. The final decree in that case was passed on 21.12.1964. The case of the plaintiffs is that the suit property was set apart to be enjoyed by the 'tavazhi' and the 1st defendant had executed a document transferring a part of the property to the 2nd defendant in 1952, i.e., before the passing of the final decree; and the 2nd defendant has assigned the property to strangers.

11. It was pointed out by Mr.Krishnan Unni, the learned counsel for the appellant/1st defendant, that the legal representatives of the deceased original plaintiff though entitled to have a share in the property, have not asked for partition, instead, they are seeking recovery only. It was argued that the heirs of the deceased original plaintiff shall be only the co-owners of the

property to claim share and they cannot be the members of the 'tavazhi'. The defence set up by the 1st defendant is that in Ext.B1 of 1952 executed by the then 'karnavan', there was an assignment of tenancy in favour of the 1st defendant. The property was subject to a 'kuzhikanam lease' (oral lease) in the year 1932. The 1st defendant made an assignment (settlement) by Ext.A4 in favour of the 2nd defendant. It was pointed out by the learned senior counsel for the 1st appellant/1st defendant that only Ext.A4 is sought to be set aside and there was no prayer for setting aside Ext.B1.

12. The argument advanced by the learned senior counsel for the appellant/1st defendant is that the plaintiffs have no title and they are only co-owners in possession. According to the learned senior counsel, a co-owner can only transfer his co-ownership right. It was argued that the legal representatives of the deceased 'karnavan' cannot step into the shoes of 'karnavan' to claim recovery. It was argued that the suit for recovery

can be filed only by the next 'karnavan' if any.

13. Mr.M.C.Sen, the learned counsel for the respondents, per contra, inviting my attention to the decisions reported in 1957 KLT 627, 1956 SC 958 & 1959 KLT 671, submitted that a co-owner can file a suit for setting aside a document. Inviting my attention to para 5 of the plaint, it was argued that the challenge is only regarding the assignment to the 5th defendant, who is a stranger. It was further submitted by Mr.M.C.Sen that though the appellant contends that the property was not the subject matter of the previous suit, Ext.B1 is hit by lis pendens as the same was executed when the previous suit was pending. It was argued that the 'tarwad house' was sought to be partitioned. However, when the decree was passed, the house was kept in common taking note of Section 16 of the Act. Therefore, according to the learned senior counsel for the respondents, the transfers made during the pendency of the suit can be ignored.

14. As rightly pointed out by the learned counsel

for the appellant, the plaintiffs, who are the legal representatives of the deceased original 1st plaintiff, are only co-owners and they are not members of the 'tavazhi', because, as per the definition of 'tavazhi' in the Act, it is a branch of a 'tarwad' consisting of a female, her children and her descendants in the female line. 'Tarwad' means, a joint family, which includes all its members with community of property governed by the Marumakkattayam law. 'Karnavan' means, the oldest major male member of a 'tarwad' or 'tavazhi' as the case may be, in whom the right to management of its properties vests or in the absence of such a male member, the oldest major female member; or where by custom or family usage, the right to such management vests in the oldest major female member, such female member.

15. In the original suit, the 5th defendant, who is alleged to be a stranger, was not a party. The original plaintiff and the other defendants are the members of the

'tavazhi'. As per the averment in the plaint, the document sought to be set aside is the one executed by one co-owner to another co-owner. The recovery was sought as the 'karnavan' of the 'tarwad'. Evidently, the present plaintiffs will not step into the shoes of the 'karnavan'. What was transferred as per Ext.B1 was the independent tenancy right. Though the alleged oral lease was of 1932, the statute came only in the year 1939. In the original suit filed in 1946, which was decreed on 03.04.1947 as per Ext.B2 judgment, the contention raised by the parties, as could be seen from para 6 of Ext.B2, is that the 30th defendant therein (Mammed), who is the uncle of the appellant, created a 'kuzhikanam right' over Item No.48 in that suit. This item was excluded from partition as could be discerned from Ext.B2. It is crucial to note that the appellant herein got assignment only in the year 1952. As rightly pointed out by the learned senior counsel for the appellant, only those properties, which were made available for partition shall the subject matter

of the final decree; and therefore, it cannot be said that the assignments made in the year 1952 are hit by lis pendens. As there is no prayer in the present suit for setting aside the document in favour of the appellant/1st defendant in the year 1952, the suit is bound to fail. Even a lesser decree for partition cannot be granted as all the heirs are not in the party array.

On a consideration of the materials now placed on record, this Court is of the definite view that the appellant is entitled to succeed. In the result, the appeal is allowed. The impugned judgment is set aside and the original suit, OS No.336/1993 on the file of the Sub Court, Thalassery, is hereby dismissed.

This judgment will not stand in the way of the respondents in filing a suit for partition with all the heirs in parry array and if they chose.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-

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PA to Judge