r§ITEM NO.101-PH COURT NO.6 SECTION XIA

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NO. 2955 OF 2000

RADHA AMMA & ANR. A ppellant (s)

VERSUS

C. BALAKRISHNAN NAIR & ORS. R espondent(s)

(With office report)

Date: 02/08/2006 These Appeals/petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE B.P. SINGH

HON'BLE MR. JUSTICE ALTAMAS KABIR

For Appellant(s) Mr. T.L. Viswanatha Iyer,Sr. Adv.

Mr. T.G. Narayanan Nair,Adv.

For Respondent(s) Mr. M.P. Vinod,Adv.

Mr. Ajay K. Jain,Adv.

Mr. Sajith P.,Adv.

Mr. Ramesh Bbu M.R.,Adv.

UPON hearing counsel the Court made the following

O R D E R

The appeal is allowed. The judgment and order of the High Court is set aside and that

of learned Single Judge is restored in terms of the signed Judgment placed on the file. There will be

no order as to the costs.

(Ajay Kr. Jain)
(Vijay Dhawan)

Court Master
Court Master

(Signed non-reportable Judgment is placed on the file)

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2955 OF 2000

Radha Amma & Anr. ... Appellants

Versus

C. Balakrishnan Nair & Ors. .. Respondents

J U D G M E N T

B.P.SINGH,J

This appeal by special leave is directed against the judgment and order of the High Court of

Kerala at Ernakulam in AFA No. 103/1992 whereby a Division Bench of the High Court while setting aside

the concurrent findings recorded by the courts below partly allowed the appeal. While confirming the

preliminary decree for partition in respect of properties at Item Nos. 1 to 7 and 17 to 20 of the suit properties,

it modified the preliminary decree for partition so far as it related to Item Nos. 8 to 16, and setting aside the

decree granted by the Trial Court and confirmed by the learned Single Judge, passed a preliminary decree

for partition of those items into four shares and directed allotment of one out of four shares each to

defendants 1, 2, 3 and 4 only.

The facts necessary for the disposal of this appeal are the following :-

One Narayanan Nair and his wife Cheethamma had 3 daughters, namely, Bhargavi (Defendant

No. 1), Kalliyanikutty and Lakshmikutty. In the instant appeal we are only concerned with the branch of

Bhargavi, the eldest of the daughters. She had 2 sons - defendants 2 and 3 and a daughter-defendant No. 4.

Her daughter-defendant No. 4 had 5 daughters and 3 sons, who were defendants 5 to 11 in the suit, the

youngest daughter being the plaintiff. The daughter-defendant No. 5 had 3 daughters, namely, defendants 12

to 14 while the plaintiff had one daughter who was plaintiff No. 2 in the suit. The parties were governed by

Marumakkathayam law. The plaintiffs filed a suit for partition claiming 3/17th share in the family properties.

The family properties consisted of 3 sets of properties. Item Nos. 1 to 7 were the family properties inherited

by the grandmother of the plaintiffs, on partition. Items 8 to 16 were taken on lease on 9.6.1943 from the

family of 15th defendant for a sum of Rs. 100/-. The third set consisted of the properties shown as Item Nos. 17

to 20 in the schedule to the plaint which were taken on lease from the family of the 16th defendant. In the

instant case we are really not concerned with the suit schedule properties Items 1 to 7 and 17 to 20. The

dispute is only in relation to Item Nos. 8 to 16 of the suit schedule properties. The plaintiffs claimed 3/17th

share in the suit property, which included the share of the child in the womb of the second plaintiff. Since

Marumakkathayam law provided for devolution of interest per capita,each member of the tavazhy was

entitled to share equally. In this manner defendant No. 2, who was the real contesting defendant, was also

entitled to only one share out of 17.

The plaintiffs were supported by the remaining defendants except defendant No.2. The

aforesaid defendant No. 2 pleaded that so far as properties shown as Item Nos. 8 to 16 in the plaint were

concerned they were his self-acquired properties and were not tavazhy properties. Thus, Items 8 to 16

belonged exclusively to him and the remaining defendants as well as the plaintiffs had no partible interest

therein.

Defendant No. 2 also pleaded that he was never Karanavan of the tavazhy and that he was

never in management of the family properties. Thus he acquired the properties at Items 8 to 16 out of his own

self-earnings which were wholly unrelated to the income of the family. The Trial Court framed the following

issues in the suit :-

"1. Whether items 1 to 7 of A schedule are thavazhi properties?

2. Whether D2 had ever been in possession and manageme

nt item 1 to 7

either as Karanavan on behalf of the thavazhi or on his individual behalf?

3. Whether items 8 to 20 and 23 of A schedule and the building in item 15

belong to the thavazhi and are available for partition.

4. Whether B schedule movables belong to the thavazhi?

5. What is the quantum of profits?

6. Whether the suit is bad for partial partiion?

Addl. Issue No. 7. Whether the 2nd defendant has any independent tenancy right

over the plaint schedule item No. 8 to 16 and 17 to 20?"

The relevant issues are Issue No. 3 and addl. issue No. 7.

The Trial Court held that the second defendant was in possession of the plaint Schedule Item

Nos. 8 to 16 properties as a tavazhy Karanavan and it was not taken on lease by the 2nd Defendant in his

individual capacity. Thus the claim of defendant No. 2 to the aforesaid properties was denied by the Trial

Court which passed a decree as prayed for by the plaintiffs. The court declared that the plaintiffs were

entitled to get 3/17th share after partitioning the plaint schedule properties by metes and bounds. Defendants

1 and 3 to 14 were also entitled to 13/17 share and the second defedndant was entitled to 1/17th share from the

the partible plaint schedule properties.

The Defendant No. 2 preferred an appeal before the High Court of Kerala being A.S. No.

215/1989 which came up for disposal before a learned Single Judge of the High Court. It appears from the

judgment of the learned Single Judge that the only point that arose for consideration before h

im was whether

the appellant-second defendant was the tenant of Item Nos. 8 to 16 of the plaint schedule properties. Having

so formulated the question which arose for his consideration, the learned Judge held after appreciating the

evidence on record that the leases were obtained in the year 1943 and in those days Rs.100/- was a substantial

amount and it was not probable that the appellant who was only a youngster in those days could have raised

Rs. 100/- by way of loan. The evidence of DW-1 (mother of the Defendant No. 2) which inspired confidence

appeared to be convincing and probable. So the amount of Rs. 100/- paid by way of munpattam for acquiring

plaint properties at Item Nos. 8 to 16 clearly supported the plaintiffs' contention that these items were

acquired for the purpose of the tavazhy. Subject to certain modifications, with which we are not concerned,

the appeal was disposed of by the learned Single Judge negativing the claim of defendant No.2.

An appeal was preferred by defendant No. 2 which came to be disposed of by a Division Bench

of the High Court. The High Court considered the evidence on record and came to the conclusion that at the

time when Item Nos. 8 to 16 were taken on lease in the year 1943 the defendant No. 2 was a youngster about

15 years old. According to the evidence of DW-1 (mother of defendant No. 2) a sum of Rs. 100/- which was

paid to the erstwhile tenant for taking the aforesaid items on lease was taken for and on behalf of the tavazhy.

The case of defendant No. 2 was that these items were taken on lease in his individual capacity which did not

find favour with the Trial Court and the learned Single Judge of the High Court. The Division Bench of the

High Court did not approve of the view taken by the Trial Court and the learned Single Judge observing that

the Trial Court and the learned Single Judge did not consider fully the clear evidence of the DW-1 (mother of

the defendant NO. 2) that the consideration of Rs.100/- proceeded from the funds provided by h er husband.

In view of the said statement made by DW-1, the leasehold over items 8 to 16 would enure to the

puthravakasam tavazhy of the first defendant and not to the entire tavazhy as such. If th at be the correct

legal position, the division has to be per stirps and not per capita in accordance with Secti on 48 of the Madras

Marumakkathayam Act, 1932. The Division Bench of the High Court rejected the objection on beh alf of the

respondents before it that it was not open to defendant No. 2 to raise the said contention at that stage. The

Division Bench observed that the matter had been remanded for decision on the issue whether the leasehold

belongs to tavazhy of defendant No. 1 and hence available for partition, or it belongs to defe ndant No. 2. The

finding was rendered by the land tribunal that it belonged to tavazhy of defendant N o. 1 and the claim of

defendant No. 2 that he took them on lease for himself was found against him. But while de ciding that the

leasehold belongs to the tavazhy of the first defendant, the question has to be necessarily a sked as to how the

property has to be divided in terms of the law governing the parties . The Division Bench held that the

provisions of Section 48 of the Madras Marumakkattayam Act provided that when a property is a cquired by

a male in the name of his wife and children, the same would enure to the puthravakasam tavazh y of the wife

and children and it has to be divided per stirps and not per capita. The High Court was of t he view that since

the question as to whether the leasehold belonged to the tavazhy was directed to be decided by the lower court

on remand, it must be held that this Court left it to the Trial Court to decide the nature of the acquisition of

the property and the shares to be allotted to the respective sharers. Thus, having found that the leasehold

belonged to the puthravakasam tavazhy of defendant No. 1, the court directed that the decree for partition of

Item Nos. 8 to 16 be modified and held that only defendants 1, 2, 3 and 4 were entitled to equal shares in

those properties. The appeal was, therefore, allowed to that extent.

Shri T.L.V. Iyer, learned senior counsel appearing on behalf of the appellants before us

submitted that the High Court has committed two clear errors. Firstly, the question as to whether the

leasehold of properties comprised in Items 8 to 16 belonged to the puthravakasam tavazhy of the Defendant

No. 1 was a question which did not arise for consideration at all. The case of the plaintiffs was that the

leasehold belonged to tavazhy of defendant No. 1 whereas the defendant No. 2 contended that the leasehold

did not belong to the tavazhy at all, since they were his self-acquired properties from his own earnings.

Secondly, he submitted that the High Court was in error in holding that in the facts and circumstances of the

case Section 48 of the Madras Marumakkattayam Act, 1932 applied.

On the other hand learned counsel appearing for the respondents conceded that the question as

to whether the leasehold lands belonged to the puthravakasam tavazhy, was not pleaded by the defendant.

His plea was that he had himself acquired those properties out of his own earnings and therefore those

properties did not relate to the tavazhy of defendant No. 1 and belonged to him exclusively in which the

plaintiffs and other defendants had no partible interest. He further submitted that the High Court having

found in favour of defendant No. 2, this Court should not interfere in the interest of justic e because defendant

No. 2 otherwise will get only 1/17th share in the tavazhy properties, whereas that share woul d be enhanced if

item Nos. 8 to 16 of the plaint schedule properties are divided per stirps and not per capita.

Section 48 of the Madras Marumakkattayam Act, 1932 deals with property whic h is commonly

known as 'Puthravakasam'. Section 48 reads as follows :-

"48. Where a person bequeaths or makes a gift of any property to, or purchases

any property in the name of, his alone or his wife any one or more of his child ren

by such wife together, such property shall, unless a contrary intention appears

from the will or deed of gift or purchase or from the con duct of the parties, be

taken as tavazhi property by the wife, her sons and daughters by such person an d

the lineal descendants of such daughters in the female line :

Provided that, in the event of partition of the property tak ing place

under Chapter VI, the property shall be divided on the stirpital principle, the wife

being entitled to a share equal to that of a son or a daughter."

So far as the first submission is concerned it is not disputed before us th at the question as to

whether those items, namely, Item Nos. 8 to 16 belonged to the puthrava kasam tavazhy, never arose for

consideration in the suit or in the appeal. Defendant No. 2 never ra ised such a plea. No such issue was

framed. Neither any evidence was recorded on this aspect of the matter, nor were the courts called upon to

record a finding on that question. This position is not disputed by the counsel appearing for the respondents.

If such be the legal and factual position, we find no justification for the High Court to inte

rfere in appeal and

modify the decree of the courts below on a question which did not arise for its consideration. As we have

observed earlier, the case of the plaintiffs was that the entire suit lands belonged to the tavazhy of defendant

No. 1. The plaintiffs were supported by all the defendants except defendant No. 2. The plea of defendant No.

2 which was at variance with the case set up by the plaintiffs and other defendants was that the leasehold

properties Item Nos. 8 to 16 of the plaint were his self-acquired properties and, therefore, not partible. The

case of defendant No. 2 was not accepted by any of the courts including the High Court in appeal. Having

accepted plaintiffs case and rejected the claim set up by the defendant No. 2, the High Court had no option

but to decree the suit in its entirety.

So far as the argument based on Section 48 is concerned, on a plain reading of the said section

it is clear that it provides that where a person bequeathes or makes a gift of any property to, or purchases any

property in the name of his wife alone or in the name of his wife and one or more of his children by such wife

together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or

from the conduct of the parties be taken as tavazhi property by the wife, her sons and daughters by such

person and the lineal descendants of such daughters in the female line. Thus there are three types of

properties within the contemplation of Section 48, namely, property purchased by a person, gifted by a

person, or bequeathed by a person, in favour of his wife alone or in favour of his wife and one or more

children etc. The main part of Section 48 provides that unless a contrary intention appears from the will or

deed or gift or purchase or from the conduct of the parties, the properties shall be taken to be tavazhy

property by the wife, her sons and daughters etc. However, the proviso to Section 48 provides that in the

event of partition of the property, the property shall be divided on the stirpital principle, the wife being

entitled to a share equal to that of a son or a daughter.

It was rightly pointed out that in the instant case taking the facts as they are, the husband of

defendant No. 1 died in the year 1939. The leaseholds in question were taken in June 1943. It is no doubt

true that defendant No. 1 admitted in her deposition that she had acquired these leaseholds for the benefit of

the tavazhy from out of the amount of Rs. 1000/- left with her by her deceased husband. The question

remains as to whether a purchase by the wife of the deceased husband from out of the funds left behind by

him is covered by the provisions of Section 48. It was submitted before us, and rightly, that before Section 48

could be applied it must be shown that the property was either bequeathed, gifted or purchased by a person in

the name of his wife alone or in the name of his wife and one or more children together. That is not the case

here. The father of defendant having died long ago, the funds which were left with the mother must be

deemed to be her property. In any case, there is no evidence to show otherwise. In these circumstances,

though it is not necessary for us to go into this question, it is doubtful if Section 48 would have any

application in the facts of this casse.

We, therefore, allow this appeal, set aside the judgment and order of the Division Bench of the

High Court and restore that of the learned Single Judge. There will be no order as to the costs.

.....J.

(B.P. SINGH)

.....J.

(ALTAMAS KABIR)

New Delhi

August 02, 2006