

## **Neelakantan Damodaran Namboori And ... vs Velayudhan Pillai Narayana Pillai And ... on 19 May, 1958**

**Equivalent citations: AIR1958SC832, AIR 1958 SUPREME COURT 832**

**Author: K. Subba Rao**

**Bench: P.B. Gajendragadkar, A.K. Sarkar, K. Subba Rao**

### **JUDGMENT**

K. Subba Rao, J.

1. These three appeals by certificate by the High Court of Travancore-Cochin are directed against the common judgment dated December 5, 1952, in A. Section 532, 535 and 540 of 1123 by which the High Court set aside the decrees of the District Court of Kottayam in O. Section 107 of 1114, 20 of 1116 and 72 of 1120 and dismissed the appellants' suits.

2. The result of these appeals turns upon the proof of the factum of marriage of the appellants, Damodaran Namboori and Nan-gayya Antharjanam, in sarvaswadanam form. Though the pleadings disclose a wider field of controversy, it would be enough if the facts and circumstances giving rise to the aforesaid question are briefly stated.

3. Vasudevan Namboori, his brothers, Adityan Namboori and Narayanan Namboori, his father, his father's brother's widow, and his daughter, Nangayya Antharjanam (the 2nd appellant) were the surviving members of Kopprathu Illom in the Malayalam year 1102. It appears that another member of the Illom, Sankaran Namboori, was treated as an out-caste in the year 1084 and, though for that reason ceased to be a member of the Illom, he persisted to continue to live in the family house. Nangayya Antharjanam, the second appellant, was married to Damodaran Namboori, the first appellant, on 25-6-1102. Thereafter, if the marriage had taken place in sarvaswadanam form, the second appellant would continue to be a member of that family, but she would cease to be so, if the marriage was in the ordinary form.

4. The aforesaid three suits were filed in respect of the properties of the family. Narayanan Namboori of Kopprathu Illom filed O. Section No. 20 of 1116 in the District Court of Kottayam for the recovery of the suit property from the first defendant and his assignee, Velavudhan Pillai Narayanan Pillai, the second defendant. It was alleged in the plaint that the first defendant acquired the land on kanom tenure under a compromise entered into by him with the previous karnavan and that the said compromise was not binding on him. With regard to the said property, the State enhanced the tax. Narayanan Namboori, therefore, instituted O. Section No. 107 of 1114 in the District Court of Kottayam for setting aside the order of the State enhancing the tax. To that suit, the

State was impleaded as the first defendant and defendants 1 and 2 in O. Section 20 of 1116 as defendants 2 and 3. On 9-4-1116 - it may be stated that by that time all the members of the family except the widow. Nangayya Antharjanam had passed away - the said widow, as the sole surviving member of the Kopprathu Illom, executed exhibit XXIX in favour of the second defendant in O. Section 20 of 1116 (Appellant) giving all the properties of the Illom to him. Damodaran Namboori and his wife, Nangayya Antharjanam, after obtaining a deed from Nangayya Antharjanam,- the last surviving widow of the family, filed O. Section 72 of 1120 for setting aside exhibit XXIX and for the recovery of the properties comprised therein, setting up the claim that they were members of the Kopprathu Illom by reason of their having been married in sarvaswadanam form. Meanwhile as the first plaintiff in O. Section 107 of 1114 and 20 of 1116 i.e., Narayanan Narayanan Namboori, died, Nangayya Antharjanam, the daughter of Vasudevan Namboori, and her husband, Damodaran Namboori, filed a joint petition for being impleaded as legal representatives of the deceased. It was also alleged in the petition that the marriage between Nangayya Antharjanam and Damodaran Namboori was performed in sarvaswadanam form. Pending that application the widow, Nangayya Antharjanam, died and the two petitioners were made the 2nd and 3rd plaintiffs in the said suits, subject to the final determination of the question whether they (the petitioners) were the members of the Kopprathu Illom by reason of the said marriage. The .three suits were contested by the defendants on the ground, inter alia, that the marriage of Damodaran Namboori and Nangayya Antharjanam did not take place in sarvaswadanam form. They also raised other pleas, which need not be particularized, as nothing turns on them in the appealSection The learned District Judge rejected all the pleas raised by the defendants and decreed the suitSection Velayudhan Pillai Narayanan Pillai, the second defendant in O. Section 107 of 1114 and O. Section 20 of 1116 and first defendant in O. Section 72 of 1120, preferred appeals to the High Court against the decrees of the learned District Judge. The High Court on a consideration of the evidence came to the conclusion that Nangayya Antharjanam and Damodaran Namboori were not married in sarvaswadanam form and therefore they were not entitled to be impleaded as the legal representatives of the deceased Narayanan Narayanan Namboori or to continue the suits O. Section NoSection 20 of 1116 and 107 of 1114 on behalf of the Illom and obtain any relief whatever in those suitSection As the appeals were dismissed on a preliminary ground, the learned judges of the High Court felt it unnecessary to consider the other questions raised or to express their opinion thereon. The result was that all the three suits were dismissed with costs in both the CourtSection The present three appeals were filed against the judgment of the High Court.

5. Those appeals raised a simple question of fact, namely, whether the appellants, Damodaran Namboori and Nangayya Antharjanam, were married in sarvaswadanam form.

6. No material has been placed before us to show precisely the necessary ceremonies accompanying such a marriage and the legal incidents flowing from it. Neither before the High Court nor before the learned District Judge any attempt was made to contend that, though the marriage was ostensibly performed in sarvaswadanam form, the necessary ceremonies were not performed and therefore the marriage in that form was invalid.

7. In the circumstances, we do not propose to express our opinion on the customary incidents of such a marriage. In the Courts below, the parties proceeded on the basis that in a sarvaswadanam

marriage the daughter retained all the rights in the family properties in spite of her marriage, in the same way as a son did and if there was an agreement to that effect the son-in-law also would become a member of the family. We would, therefore, proceed to dispose of these appeals on the same basis.

8. It is common case that the appellants were married on 25-6-1102, at Sivolli Thekke Mana in Vayalu Kara in Parur Taluk, the Illom of Vasudevan Namboori's father-in-law. Exhibit C is alleged to be an agreement dated 25-6-1102 executed by Vasudevan Namboori in favour of Damodaran Namboori and Nangayya Antharjanam. In that document, Vasudevan Namboori narrated the circumstances of the family obtaining at the time of the execution of the document. He stated therein that at that time the members of his family were himself, his two younger brothers, Adithyan Namboori aged 65, Narayanan Namboori aged 64, Nangayya Antharjanam aged 84, wife of his paternal uncle, and Nangayya Antharjanam, his daughter, besides one Sankaran Namboori, who was declared an out-caste. The document proceeded to state that as his family was likely to become extinct, Nangayya Antharjanam was given in marriage to Damodaran Namboori in sarvaswadanam form and, as agreed to by both parties, ornaments and streedhanam of Rs. 2,000 in ready cash were given. It was declared in the document that the couple and their children would be members of the Kopprathu Illom. The document was attested by Hareeswaran Narayanan Namboori of Peringara Illom and Narayanan Narayanan Namboori of SivoUi Illom. This document was registered on 19-9-1102. The High Court stated that the two attesting witnesses, though alive, were not examined. It is clear from the evidence that the said two witnesses were not alive at the date of the suit. There cannot be any doubt that this document must have been executed before 19-9-1102. The recitals in the document also appear to be natural; for what is more natural than a karnavan of a family, when he found that the family was likely to become extinct, celebrating the marriage of his daughter in sarvaswadanam form to maintain its continuity? The appellants' case in respect of this document is that the marriage between Damodaran Namboori and Nangayya Antharjanam was performed in sarvaswadanam form on 25-6-1102 and the exhibit C was executed on the same date with the consent of the other members of the family. The respondent's version is that the marriage took place only in the ordinary form, that Vasudevan Namboori was not managing the Illom - it is common ground that Narayanan Namboori was the de facto manager of the family - and that he got up this document behind the back of the other members to benefit his daughter. The question is which version is true.

9. Prima facie the document supports the appellants' version. But a scrutiny of the evidence discloses that the respondents' case is true. The circumstances of the family before the date of the marriage would afford a background for appreciating the evidence in this case. Though Vasudevan Namboori was the eldest member of the Kopprathu Illom and therefore its de jure karnavan, it is common case that he left his family house along with his daughter and shifted his residence to Sivolli Illom, the place of his father-in-law. Vasudevan Namboori admitted in his evidence in O. S. No. 448 of 1106 that the Illom affairs were not attended to by him, at any rate, from the year 1099. Cash receipts exhibits AC and AD and the michavaram receipts ranging from 1101 to 1104 are in the name of Narayanan Namboori. Indeed it is not disputed that Narayanan Namboori, the junior member of the family, had been in actual management of the family and its properties till he died.

10. There had been protracted litigation between Vasudevan Namboori and the other members of his family for a number of years and it appears that they came together only at the time of the celebration of the marriage. Some days before the alleged marriage, i.e., on 5-6-1102, all the male members of the Illom borrowed a sum of RSection 2,500 by executing exhibit IX, the Otti deed, in favour of Mathew Korah. It was recited in the document that the said amount of RSection 2,500 was required for dowry, ornaments and expenditure for marrying Nangayyakutty, the daughter of Vasudevan Namboori. It is said that if the members of the family intended that the marriage should take place in saravaswadanam form, they would have mentioned that fact specifically in the document. Though the High Court accepted the suggestion as indicative of the fact that the marriage was not celebrated in that form, we do not think that any such irresistible inference can be drawn from the non-mention of that fact in that document. One would not expect in a mortgage deed a recital to that effect for the simple reason that it was not germane for borrowing money from third parties. Nor can we draw an inference from the execution of the mortgage deed that the brothers were re-united in the sense that all the younger brothers began to repose implicit confidence in their elder brother, Vasudevan Namboori, so as to] enable him to execute documents bringing in new members within the family fold behind their back. What must have happened was nothing more than all the members of the family joining together in borrowing the money to discharge the family obligation and even after the marriage, Vasudevan Namboori continued to live in Sivolli Illom, as he was doing before and Narayanan Namboori continued to be in de facto management of the entire family properties as he was doing before. But what is material is that if the marriage was intended to be performed in sarvaswadanam form, was it likely that the family would have borrowed a large sum of RSection 2,500 to be given as dowry or streedhanam, when the bride and the bride-groom would become sharers in the family property. It is argued on behalf of the respondents that the payment would be inconsistent with the marriage being in sarvaswadanam form. On the other hand, it is said that, among Namboori families, the word 'streedhanam' is also used for 'vara-dakshina' & the use of the word 'streedhanam' is not decisive of the question whether the marriage was in sarvaswadanam form or not. Even exhibit C, wherein it is definitely stated that the marriage was in sarvaswadanam form, it is mentioned that streedhanam of RSection 2,000 was given. Nothing, therefore, turns upon the use of the word 'streedhanam'. But as, we have already stated, borrowing of a large sum on the eve of the marriage is more consistent with the fact that the marriage was intended to be in the ordinary form rather than in sarvaswadanam form. The antecedent conduct of the parties before the marriage namely, Vasudevan Namboori's taking residence in a different Illom, the de facto management of the family and its properties by Narayanan Namboori, the protracted litigation between Vasudevan Namboori and other members of the family, the borrowing of a large amount on the eve of the marriage by members of the family, indicate that the marriage could not have been in sarvaswadanam form. If it was really intended to be in that form, it is not likely that the other members of the family particularly, Narayanan Namboori, the de facto manager, would not have joined in executing exhibit C, if it was executed on the date it was purported to have been executed.

11. The conduct of the parties, subsequent to the date of the marriage and the execution of exhibit C, throws a flood of light on the question of the form of marriage. If the appellants became members of the family by reason of the form of marriage, one would expect them to enjoy the income of the family property or at any rate, if they were deprived of their share illegally, to make a demand on the

manager at one time or other for the share. Damodaran Namboori as P. W. I says that after his marriage he lived at Malabar for certain period, then at Sivolli Illom and for the rest of the period he lived at Kopprathu Illom. He admits that he lived at Kopprathu Illom for 10 or 15 days, and that he or his wife did not receive any maintenance from Kopprathu Illom at any time. If really he was inducted into the family fold along with his wife, would they have behaved in the manner they did as if they had no connection with the Kopprathu Illom?

12. On 12th Karkadagam, 1104 Vasudevan Namboori executed a document in favour of his daughter authorizing her to collect michavaram in respect of certain properties. Narayanan Namboori filed O. Section No. 467 of 1106 against Vasudevan Namboori, Nangayya Antharjanam and others, questioning the validity of the said document. In the written statement filed by the defendants, they set up the defence that Nangayya Antharjanam was married in sarvaswadanam form and as member of the family she was entitled to be maintained out of the income of the Kopprathu Illom and therefore the document executed in recognition of her right to enjoy the property was valid. Narayanan Namboori filed an application stating that the marriage was only in the ordinary form. Exhibit XV is the judgment of the trial Court and exhibit XLIV is the judgment of the appellate Court confirming that of the trial Court. The judgment discloses that the Advocate appearing for Vasudevan and his daughter did not pursue the question of the form of marriage in the suit but reserved the right to seek the remedy elsewhere in respect of that matter. It is no doubt true that the suit and the appeal were disposed of on the ground that even if she was a member of that family, Vasudevan Namboori was not in management and he had no right to execute the document without the consent of the members of the family. But the fact that, though that question was specifically raised, neither Vasudevan nor his daughter was bold enough to press the issue, is indicative of the fact that they were not sure of their ground. Though the right was reserved, they did not make any attempt till the present dispute arose and till all the members of the family who could have spoken to the form of the marriage had passed away, to raise the question of the form of the marriage. So too, when another opportunity and an occasion arose to get a decision on the form of the marriage, the appellants adopted a lukewarm attitude. On 14-10-1112. Narayanan Namboori, his elder brother, Adithyan Namboori & their father's brother's widow, Nangayya Antharjanam, executed exhibit XI in favour of Nilakantan Namboori, whereunder 'A' Schedule properties described therein were settled on Nilakantan Namboori & 'B' Sch. properties were reserved to Narayanan Namboori. The execution of this document was a direct challenge to the title of the appellants, for if the marriage was in sarvaswadanam form, the members of the family could not have executed the document without the concurrence of the appellant. Though the respondent instigated the appellants to file a suit for setting aside the document, they did not take any steps to get that document set aside. Nilakantan Namboori sold away some of the properties settled on him and on 18-10-1117, he executed a document, exhibit X, surrendering the remaining properties to Narayanan Namboori and Nangayya Antharjanam. Even then the appellants did not take any steps to question the validity of either exhibit X or exhibit XI. For the first time they thought of their rights only when, after the death of all the male members of the family, Nangayya Antharjanam executed exhibit XXIX giving all her properties to the respondent. Then Damodaran Namboori took proceedings in the Magistrate's Court, took the old lady in his protection and then obtained a document from her cancelling exhibit XXIX wherein for the first time the marriage in sarvaswadanam form was admitted by her. It would, therefore, be seen that the conduct of Vasudevan Namboori when he was

alive and also of the appellants, was only consistent with the fact that the marriage was not in sarvaswadanam form.

13. On the other hand, the conduct of the members of the Kopprathu Illom, other than Vasudevan Namboori, during their life time, was only consistent with the marriage having been performed in the ordinary form. It has been noticed that Vasudevan Namboori executed an agreement in favour of his daughter putting her in possession of certain properties belonging to the Illom for her maintenance. Narayanan Namboori instituted O. Section No. 467 of 1106 in the District Munsif's Court, Perumbavoor, questioning the said alienation. Vasudevan Namboori set up his defence to that suit that the agreement was executed in recognition of his daughter's share and consequently to enjoy the income from the Illom properties. Section On 14-12-1106, Narayanan Namboori filed an application in that suit denying that the marriage of the appellants was celebrated in sarvaswadanam form. It is said that though the marriage took place in 1102, Narayanan Namboori questioned the form of the marriage only after four years and therefore it is only an after-thought. This argument presupposes that exhibit C was executed with the knowledge and consent of Narayanan Namboori. The argument in effect begs the question to be decided in this case. There is nothing on record, except the oral evidence, which we will consider at a later stage, to attribute any knowledge of the existence of the document, exhibit C, to Narayanan Namboori. Therefore, immediately after the case of sarvaswadanam marriage was set up by Vasudevan Namboori, Narayanan Namboori denied that fact at the earliest point of time. The suit was disposed of reserving the right of Vasudevan Namboori or his daughter to establish the form of the marriage in suitable proceeding. Section Exhibit XIV is a copy of the deceased Narayanan Nam-boori's replication dated 14-12-1106 in O. Section 467 of 1106 on the file of the Munsif's Court, Perunbavoor, wherein he denied that the appellants were married in sarvaswadanam form. Exhibit XI is the settlement deed executed by Adithyan Namboori, Narayanan Namboori and Nangayya Antharjanam in favour of Nilakantan Namboori. This document was executed after the demise of Vasudevan Namboori. Under this document, having regard to the circumstances mentioned therein, the entire rights in 'A' Schedule properties were settled on Nilkantan Namboori and 'B' Schedule properties were reserved for Narayanan Namboori. It is said that this document was not intended to be given effect to and therefore the recitals found in the document are not of much evidence. Be that as it may, this document was executed on the basis that Adithyan, Narayanan Namboori and Nangayya Antharjanam were the only surviving members of the family and the appellants were not the members of the family. Exhibit X is an agreement dated 18-10-1113 and executed by Nilakantan Namboori and the aforesaid three members of the family. In and by that document, 'A' Schedule properties were reassigned to the Illom. This document was also executed on the basis that the appellants had no share in the Illom properties. Section Exhibit AH is an agreement dated 8-2-1112 executed by Adithyan Namboori in favour of Narayanan Namboori, whereby Adithyan relinquished his right to management in favour of Narayanan Namboori and authorised him to do the needful for the continuance of the lineage and for enhancing the prosperity of the family. This document also ignored the appellants and was executed on the basis that they were the only male members of the family. It is suggested that this document was not a real transaction, but was executed for ulterior purpose. Section It is pointed out when, as a matter of fact, Narayanan Namboori was in de facto management of the properties of the Illom long before the death of Vasudevan Namboori, there was no need or occasion for executing the document in the year 1112. On the other hand, it was brought

to our notice that by reason of the 'Malayalee Brahmins' Act, (Act III of 1106),' the right of management could be validly assigned only under a document and that therefore after the death of the karnavan Vasudevan Namboori, Narayanan Namboori thought fit to get this document from the succeeding de jure manager, Adithyan. Be that as it may, the point to be noted is that in this document also the members of the Illom, consistent with their previous conduct, ignored the appellants and their status as members of the family. Exhibit XXI is a copy of the plaint In O. Section No. 835 of 1114 filed in the Kottayam Munsif's Court by Narayanan Namboori and Nangayya Antharjanam to recover possession of one of the properties conveyed to Nilakantan Namboori under exhibit XI. In this plaint also the appellants were not treated as members of the family. It is manifest from the aforesaid documents that notwithstanding the execution of exhibit C, the members of the family, other than Vasudevan Namboori, never accepted the appellants as members of the family and when that fact was asserted in 1106, it was immediately denied by Narayanan Namboori.

14. Now let us consider the conduct of the respondents on which strong reliance is placed by the learned Counsel for the appellant. Section Exhibits H, J, K, M, N, O, P, Q, AP and AR are the letters alleged to have been written by the respondent wherein it is said that he admitted that the marriage of the appellants was performed in the sarvaswadanam form. Except letters marked as exhibits N, P, and Q which were admitted, others were not proved. Most of those letters were written to Narayanan Namboori at Sivolli Illom, that is the maternal grand-father of the second appellant. They were written after Narayanan Namboori of Kopprathu Illorn filed O. Section No. 1016 of 1112 against the respondent for the recovery of the suit property therein on the basis of a lease. In the written statement the respondent, in an attempt to non-suit him, alleged that the appellants were married in sarvaswadanam form and therefore the suit without impleading them as parties was not maintainable. He also tried by writing some of the aforesaid letters to persuade Narayanan Namboori of Sivolli Illom, i.e., the maternal grandfather of the second appellant, to take steps to get exhibits X & XI cancelled on the basis of the aforesaid marriage- But after the death of Narayanan Namboori, he was able to get a document, exhibit XXIX, from the surviving member of the family, the old lady, Nangayya Antharjanam, conveying all the properties to him. The appellants took immediate steps to get the document set aside. This made the respondent to change his front and deny the form of marriage in sarvaswadanam form. Admittedly, the respondent was not present when the marriage took place. His admissions therefore are only based on hearsay. They only show that he is a speculator in litigation and had no scruples to take inconsistent positions to achieve his end. Section Therefore, the admissions made by the respondent cannot afford a sound basis for holding that the marriage was in sarvaswadanam form.

15. There remains only the oral evidence adduced in this case. P. W. Section 2 and 3 have stated that the marriage was in sarvaswadanam form and exhibit C was written and signed on 25-6-1102. Both of them are related to each other and are also related to Damodaran Namboori. That apart, they had stated that a number of respectable elderly Namboories attended the marriage; but none of them was examined; nor any attempt made to examine the priest, who, according to them, officiated at the marriage. The learned Judges were not able to accept the evidence of P. W. Section 2 and 3. We have gone through the evidence and we do not think that we are justified in taking a different view. P.W. 1, Damodaran Namboori is obviously an interested party and therefore his evidence cannot be accepted.

16. To summarize, long before the marriage and the execution of exhibit C> Vasudevan Namboori and other members of the family were not on good terms and indeed there were protracted litigations between them. Vasudevan Namboori, with his daughter, left Kopprathu Illom, when Sankaran Namboori was treated as an out-caste in the year 1084 and began to live in his father-in-law's Illom. Though, Vasudevan was the karnavan from 1099, the actual management of the Illom affairs was in the hands of Narayanan Namboori. The members of the family joined together, borrowed an amount of RSection 2,500 and celebrated the marriage of the daughter of the family in 1102, as it was the legal obligation of the family. At the time of the marriage, streedhanam of RSection 2,000 was given to the bride. Exhibit C, the document recording the form of the marriage was not signed by the de facto manager or other elder members of the family. It did not see the light of day till 1106; when reliance was placed upon it, Narayanan Namboori denied that the marriage was in sarvaswadanam form. Narayanan Namboori and other members of the family, except Vasudevan Namboori, never treated the appellants as members of the family. They dealt with the property as if the appellants did not have any interest therein. The appellants also, notwithstanding the execution of exhibit C, never lived in the family house except for 10 daySection They never enjoyed the family income nor did they ever claim any share in it. They did not set up that they were married in sarvaswadanam form except in the document Nangayya Antharjanam executed cancelling exhibit XXIX. The respondent who admittedly did not attend the marriage, took up inconsistent positions to suit his convenience. The respectable people who attended the marriage were not examined to prove the form of marriage. The two witnesses that were examined are not only related to each other but are also related to the first appellant. In the circumstances, thought exhibit C was executed some time before it was registered, we hold on the evidence that it has not been established that the appellants were married in sarvaswadanam form.

17. It is then contended that even if the marriage was not in sarvaswadanam form, the last surviving member of the family conveyed the suit properties to the appellants under exhibit A. There are two obstacles in the way of sustaining the appellants' claim on the basis of exhibit A. If the marriage of the appellants did not take place in sarvaswadanam form, Nangayya Antharjanam had acted within her rights in settling her properties on the respondent under exhibit XXIX. Unless exhibit XXIX is displaced, exhibit A will not have any legal effect. The more insurmountable obstacle is that Nangayya Antharjanam did not create any interest in favour of the appellants under exhibit A. It is stated in exhibit A that, by reason of sarvaswadanam marriage, the appellants were entitled to all moveable and immovable properties belonging to Kopprathu Illom and therefore she was executing the release deed conferring all the rights and claims they have obtained over the Illom properties by the sarvaswadanam form of marriage. The document, therefore, in terms confirms the pre-existing rights of the appellants and as we hold that they had no pre-existing rights, the document did not convey any interest to them. In the result, the appeals fail and are dismissed with costSection