Kerala High Court
Aravindakshi Amma vs Gopala Menon on 27 August, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

AS.No. 563 of 1999(A)

1. ARAVINDAKSHI AMMA
... Petitioner

Vs

1. GOPALA MENON
... Respondent

For Petitioner :SRI.T.K.VENUGOPALAN

For Respondent :SRI.A.BALAGOPALAN

The Hon'ble MR. Justice V.RAMKUMAR

Dated :27/08/2009

O R D E R

CR

V. RAMKUMAR, J.

.....

A.S. No. 563 of 1999
& Cross Objection No. 19 of 2009
&
R.F.A. 43 of 2008
& Cross Objection No. 18 of 2009

.....

Dated, this the 27th day of August 2009

JUDGMENT

Defendants 3, 4, 7 and 9 to 14 in O.S. No. 631 of 1993 on the file of the first Addl. Sub Court, Ernakulam are the appellants in A.S. No. 563 of 1999. Defendants 15 to 17 are the appellants in R.F.A. No. 43 of 2008. The aforementioned suit was one for partition and separate possession of the plaintiffs' 8/16 shares over two items of immovable properties described in the plaint. Plaint A

schedule item No. 1 is shown as having an extent of 70 < cents. Plaint A schedule item No. 2 lying comprised in two survey numbers has a total extent of 3.51 acres. Plaint A schedule item No. 1 is in Poonithura Village and item No. 2 A.S. No. 563 of 1999 and is in Thrikkakara North Village of Ernakulam District.

PLAINTIFFS' CASE

2. The case of the plaintiffs can be summarised as follows:-

Plaint schedule properties belonged to the Marumakkathayam tarvad of the plaintiffs 2 to 8 and defendants 1 to 14 known as Andipillil Tarvad. In the year 1950 a partition took place in the said tarvad as evidenced by Ext.A1 partition deed dated 1-11-1950 and plaint A schedule item No. I was allotted to the tavazhi of Parukutty Amma. The said partition was between defendants 1, 7 and 8 and Neelakanda Menon and their mother Parukutty Amma. The plaint A schedule item No. 2 was acquired by the tavazhi of Parukutty Amma as per Ext.A2 usfructory mortgage dated 7th Edavam 1096 (corresponding to the year 1921) executed by Parvathy Amma, the mother-in-law of Parukutty Amma. Plaintiffs 2 to 8 are the children of A.S. No. 563 of 1999 and Padmavathy Amma who was one of the daughters of the first defendant Narayani Amma who in turn was one of the daughters of Parukutty Amma. Parukutty Amma and Padmavathy Amma are no more. Defendants 2 to 4 are the other children of the first defendant, Narayani Amma. Defendants 5 and 6 are the children of the 2nd defendant. Thus, plaintiffs 2 to 8 and defendants 1 to 14 are the members of the tavazhi of Parukutty Amma who was the common ancestress of the tarvad. The plaint A schedule properties belonged to the said tavazhi. The properties are in the joint possession of the plaintiffs 2 to 8 and defendants 1 to 14. The plaintiffs were given their share of income from the properties up to December 1991. The assignment deed executed by defendants 2 and 8 in favour of strangers are void and not binding on the plaintiffs. Eventhough the plaintiffs demanded partition and separate possession of their share the defendants have not acceded to their demand. The properties will fetch an annual income of A.S. No. 563 of 1999 and Rs. 10,000/-. The plaint schedule properties may, therefore, be divided into 16 shares and the plaintiffs may be allotted 8 shares over the same with share of profits at the rate of Rs. 5,000/- per annum.

THE DEFENCE

3. The suit was resisted by defendants 1,3,4,7, 9, 11 and 12 raising the following contentions:-

The plaint allegation that the plaint A schedule item No. 1 property belonged to Andippillil Tarvad is false. It was the property belonging to Andippillil Krishnan Menon. The said Krishnan Menon gifted the property in favour of 11 persons as per a gift deed of the year 1099 ME (corresponding to the year 1924). Out of the 11 persons Ravunni Nair and Madhavi Amma died. The remaining 9 co-owners partitioned the properties as per Ext.A1 partition deed dated 1-11-1950. The plaint A schedule item No.I was allotted to defendants 1, 7 and 8 and their brother Neelakanda Menon and their mother Parukutty A.S. No. 563 of 1999 and Amma. It was not a tavazhi property and, therefore, subsequently born children in the Andipillil tarvad have no right over the property. Plaint A schedule item No. 2 also did not belong to Andippillil tarvad. The said item belonged to

Kandangad Sankaran Padmanabhan, the husband of Parukutty Amma and the father of defendants 1, 7 and 8 and deceased Neelakanda Menon. On the death of Sankaran Padmanabhan, the half share he had over the property devolved upon his wife Parukutty Amma and children, Narayani Amma (D1), Karunakara Menon (D8), Neelakanda Menon and Ammukutty Amma (D7). The other half share devolved on Sankaran Padmanabhan's mother Parvathy. She gifted her share to the wife and children of Sankaran Padmanabhan as per document No. 3177/1096 M.E. of S.R.O. Alangad. The plaintiffs have no right over the said property. The share of Neelakanda Menon in the suit properties was assigned in favour of the 8th defendant as per Ext.B1 sale deed of the year 1116 and B2 sale deed A.S. No. 563 of 1999 and dated 21-10-1955. Parukutty Amma died in the year 1972. Thereafter as per Ext.B3 partition deed dated 28-10-1981 of S.R.O. Tripunithura, defendants 1, 7 and 8 partitioned the properties among themselves. 8th defendant Karunakara Menon assigned 10 cents of property in favour of the 15th defendant and his wife the 16th defendant as per sale deed. By his will dated 15-7-1989 Karunakara Menon bequeathed his property to his children who are defendants 10 to 14. The first defendant gifted her share over the properties to her daughter Kamalakshi @ Thankam the 2nd defendant as per Ext.B4 gift deed dated 4-3-1983. The 2nd defendant in turn assigned the same to her children namely defendants 5 and 6. Defendants 5 and 6 assigned the property to strangers. The plaintiffs have no right over the plaint schedule properties. The plaint allegation that the plaintiffs were given their share of income from the properties till December 1991 is false. The properties will not fetch Rs. 10,000/- per annum as alleged. At the most they may fetch A.S. No. 563 of 1999 and Rs. 100/- per annum. The suit may be dismissed with costs.

4. The 5th defendant filed a written statement supporting the plaint averments and praying for partition and separate allotment of her share with profits from the suit properties.

5. The 13th defendant who is the daughter of the 8th defendant Karunakara Menon filed a written statement raising the very same contentions raised by defendants 1, 3, 4, 7 , 9 and 12. She further contended that plaintiffs 1 to 3 and Padmavathy Amma the wife of the first plaintiff and mother of the other Plaintiffs were aware of the execution of Ext.A1 partition deed and, therefore, the rights, if any, of the plaintiffs have been lost by adverse possession and limitation and that in the event of partition she may be given the value of improvements effected by her.

6. Defendants 15 to 17 filed a joint written statement raising the defences set up by other contesting defendants A.S. No. 563 of 1999 and and further contended as follows:-

Defendants 15 and 16 have purchased 10 cents of land from 8th defendant Karunakara Menon and 17th defendant has purchased 6.5 cents of land from the 2nd defendant Kamalakshy Amma @ Thankam as per document No. 3191 of 1991. The properties are not partible. In case the suit is decreed, the assignment in favour of defendants 15 to 17 may not be set aside. They have effected valuable improvements in the properties purchased by them. In the event of partition, they may be given the value of the improvements. The suit is barred by limitation and is to be dismissed with costs.

THE TRIAL

7. The court below framed the following issues for trial:-

i) Whether the suit is time barred ?

ii) Whether the suit is bad for non-joinder of necessary parties ?

iii) Whether the plaint schedule first item property A.S. No. 563 of 1999 and was the property of Andippillil Taravadu ?

iv) Whether the plaint schedule second item property was the property of Andippillil Taravadu ?

v) Whether the alienations made by Neelakanda Menon are valid ?

vi) Whether partition Deed No. 6143/1981 is binding on the plaintiffs ?

vii) Whether the alienations made by defendants 1 and 2 are binding on the plaintiffs ?

viii) Whether the alienation made by the 8th defendant is binding on the plaintiffs ?

ix) What is the share (if any) to which each of the co-owners is entitled in the plaint schedule properties ?

x) What is the amount (if any) to which defendants 13 and 15 to 17 are entitled as value of improvements ?

xi) What is the order as to costs ?

8. On the side of the plaintiffs the 6th plaintiff was examined as P.W.1 and Exts.A1 to A4 were got marked. On the side of the defendants the 3rd defendant was examined as DW1 and Exts. B1 to B10 were got marked. A.S. No. 563 of 1999 and

9. The learned Subordinate Judge, after trial as, per judgment and decree dated 8-1-1999 passed a preliminary decree for partition as follows:-

i) The plaint schedule properties will be divided by metes and bounds into 15 shares.

ii) Defendants 1 to 7 and plaintiffs 2 to 8 are entitled to one share each. Additional defendants 9 to 14 together are entitled to one share.

iii) The plaintiffs will be put in possession of their joint 7/15 share.

iv) The fifth defendant will be put in possession of her share.

v) The plaintiffs and fifth defendant are allowed to realise their share of income out of the shares of the other co-owners who will be liable proportionate to their shares.

vi) The quantum of the share of income will be decided in the final decree proceedings.

vii) The costs shall come out of the estate.

The case is adjourned sine die".

It is the said preliminary judgment and decree which A.S. No. 563 of 1999 and are assailed in these appeals.

10. I heard Advocate Sri. T.K. Venugopalan the learned counsel appearing for the appellants in A.S. 563/99, Advocate Sri. N.K. Subramonian , the learned counsel appearing for the appellants in R.F.A. 43 of 2008 and Advocate Sri. Charles the learned counsel appearing for the respondents/plaintiffs.

ARGUMENTS OF THE CONTESTING DEFENDANTS

11. On behalf of the appellants in the two appeals the following submissions were made before me in support of the appeals:-

An extent of 1.56 acres of land including the plaint A schedule item No. 1 admeasuring 70 < cents belonged to Andippillil Krishnan Menon, a member of the plaintiff's tarvad. The said property was gifted by Krishna Menon in favour of the following 11 members of the tarwad:-

i) Madhavi Amma

ii) Ravunni Nair

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and

iii) Ayyappa Menon

iv) Parameswara Menon

v) Damodara Menon @ Govinda Menon

vi) Raghava Menon

vii) Parukutty Amma

viii) Narayani Amma (D1)

xi) Karunakara Menon (D8)

x) Neelakanda Menon

xi) Ammukutty Amma (D7)

The above gift was not in favour of any tavazhi but to the named donees who were tenants -in-common. The plaint A schedule item No. 1 is in the erstwhile Cochin area. In the case of such a gift, even if both the donor as well as donees are Marumakkathayees, contrary to the views of the Madras and Travancore High Courts, the Cochin High Court has always held that the donees take the properties as co-owners or tenants-in-common. (See Kalianikutty Amma v. Devaki Amma - 1950 KLT 705 A.S. No. 563 of 1999 and F.B.) Among the aforesaid 11 persons who were co- owners in respect of the plaint A schedule item No. I, Madhavi Amma and Ravunni Nair died. O.S. 77/1125 M.E. (corresponding to the year 1950) was a suit filed by Ayyappa Menon referred to above before the Anjikaimal District Court seeking partition of the aforesaid property. The surviving 8 co-owners were the defendants in the said suit. Ext.B9 is the preliminary judgment dated 11-8-1950 passed in the said suit. Pending the said suit the parties compromised and executed Ext.A1 partition deed dated 1- 11-1950. Ext.B7 compromise petition dated 15-11-1950 was also filed before Court. Ext.B8 final judgment and Ext.B10 final decree dated 17-11-1950 were passed by the court recording the compromise. Ext.B6 is the plaint in O.S. No. 77 of 1925 referred to above. In the said suit filed by Ayyappa Menon it was alleged that the property was purchased by the 11 co-owners referred to above and that defendants 1 to 3 therein viz., Parameswara Menon, A.S. No. 563 of 1999 and Damodara Menon @ Govinda Menon and Raghava Menon were mismanaging the property and were creating encumbrances over the property by mortgaging the same in favour of strangers and 3rd defendant Raghava Menon was fraudulently getting back the property from the mortgagee. It was pending the said suit that Ext.A1 partition deed was executed as per which Ayyappa Menon who was the plaintiff therein was allotted property worth Rs. 150/- as branch No. I, Parameswara Menon was allotted property worth Rs. 200/- as branch No. II, Govinda Menon was allotted property worth Rs. 200/- as branch No. III, Raghava Menon was allotted property worth Rs. 400/- as branch No. IV and Parukutty Amma and her children were allotted the present A schedule item No. I i.e.70 < cents worth Rs. 150/- as branch No. V. The B schedule to Ext.A1 partition deed enumerates the debts. It says that a sum of Rs. 300/- payable to Raghava Menon by virtue of Ext.A4 mortgage deed of 1120 M.E. is allotted to Raghava A.S. No. 563 of 1999 and Menon. B schedule to Ext.A1 further shows that a sum of Rs. 150/- expended by Ayyappa Menon for conducting Ext.B1 suit is allotted to him and Rs. 31/- is allotted to him towards payment made to the jenmi Devaswom and Rs. 324/- and Rs. 95/- to the children of Ayyappa Menon due under a decree. Ext.A4 is the mortgage executed dishonestly by Parameswara Menon, Govinda Menon and Madhavi Amma as alleged in Ext.B6 plaint. Ext.A4 recites that Parameswara Menon and two others are executing the mortgage for and on behalf of the tarvad. By virtue of Secs. 53 and 54 of the Cochin Nair Act , written consent of the major members of the tarvad was necessary for alienating the tarvad property by way of mortgage. No such written consent had been obtained. So Ext.A4 mortgage was invalid and not binding on the tarvad. That was the reason why the mortgage debt under Ext.A4 was not allotted to the 5th branch but to Raghava Menon. From the very fact that the other family members were not A.S. No. 563 of 1999 and made liable for the debts, it is clear that Ext.A4 mortgage was one executed dishonestly and not on behalf of the tarvad. The present suit is filed 43 years after Ext.A1. If as a matter of fact the plaint A schedule item No. I was a tavazhi property, Padmavathy Amma, the mother of plaintiffs

2 to 8 who died in the year 1966 would have claimed partition. She not only did not claim partition but was not allotted any share in Ext.B3 partition dated 28-10- 1981. Similarly, the plaint A schedule item No. 2 altogether admeasuring 3.51 acres belonged to Kandangattu tarwad of which Sankaran Padmanabhan, the husband of Parukutty Amma was a member. After the death of Padmanabhan his half right devolved on his widow Parukutty Amma and children and the other half right to his mother Parvathy Amma. The said Parvathi Amma gave a gift of her half right to Parukutty Amma and her children as per document No. 3177/1096 of S.R.O., Alangad which was produced before the court below on 2- A.S. No. 563 of 1999 and 12-1996 but was not marked and has been marked in this appeal as Ext.B11. Ext.A2 is only a right to encumber the property for 630/- rupees given as a usufructury mortgage by Parvathy Amma to Parukutty Amma and her children. Since Sec. 22 of the Travancore Nair Act, 1100 M.E. as per which a gift or bequest by a Marumakkathayee husband to his wife and children will enure to the puthravakasam tavazhi of his wife and children has no application neither document No. 3177/1096 nor Ext.A2 can be treated as an acquisition by the tavazhi of Parukutty Amma so as to enure to the subsequently born members of the said tavazhi. Parvathi Amma who is the donor under document No. 3177/1096 M.E. and the mortgagor under Ext.A2 not being a father or husband the property dealt with under these documents will not enure to the puthravakasam thavazhi of Parukutty Amma and her children. The property will only enure to the named donees namely Parukutty Amma , the first defendant Narayani Amma, 7th A.S. No. 563 of 1999 and defendant Ammukutty Amma and 8th defendant Karunakara Menon. The finding recorded by the court below that plaint A schedule item No. 2 enured to the tavazhi of Parukutty Amma is, therefore, unsustainable. As per Ext.B3 partition deed dated 28-10-1981, Narayani Amma the grandmother of plaintiffs 2 to 8 was allotted 12 = cents from plaint A schedule item No. I and 63 cents in the property comprised in Sy. No. 691/2 of plaint schedule item No. 2 and 12 cents in the property comprised in Sy. Nos. 690/I C of plaint A schedule item No. 2. The first defendant had gifted certain items to her daughter the 2nd defendant as per Ext.B4 sale deed of the year 1993. From out of the said property the 2nd defendant sold 6.5 cents to the 17th defendant as per Ext.B5 sale deed dated 20-1- 1993. Likewise, the 8th defendant was allotted 45 < cents from the plaint A schedule item No. 1 and 2.03 acres from plaint A schedule item No. 2 as per Ext.B3 partition. He had sold 10 cents out of the property allotted to him and A.S. No. 563 of 1999 and comprised in Sy. No. 691/2 to defendants 15 and 16 (husband and wife) as per document No. 3107/1989 S.R.O. Edappally. Merely because plaint A schedule item No. 2 is given to Parukutty Amma and her children it cannot be held that the mortgage enures to the share of the tavazhi of Parukutty Amma so as to entitle plaintiffs 2 to 8 to claim a share. In (Kunju Ponnamma Gouri Amma v. Parvathi Amma - 1969 KLR 902) it has been held that the Ist defendant therein and her two minor children who were the other members of her tavazhi to whom properties were allotted on per capita basis and included under one schedule would take the properties were allotted on per capita basis and included under one schedule would take the properties as tenants -in- common and that the properties would not enure to the tavazhi. There is no presumption that properties acquired by a junior member are tarvad properties. (See Kalliani Amma v. Rugmini - 1999 (3) KLT 98). It is only if the A.S. No. 563 of 1999 and tarvad is possessed of sufficient nucleus with which the properties could have been acquired and the acquisition was made utilising the nucleus, can there be a presumption that the acquisition would enure to the tarvad (See Chenthamarakshan v. Kondath Damodaran - ILR 1970 (Kerala) 65). In case, this Court upholds the preliminary decree for partiion, since the impugned transfers were effected after 1-12-1976 they were not void attracting the decision

of the Full Bench reported in Ammalu Amma v. Lakshmy Amma - 1966 KLT 32 (FB). Hence, in the event of partition 10 cents purchased by D15 and 16 from D8 may be allotted to D8 and 6.5 cents purchased by D17 from D2 may be allotted to D2 or his son D6 so that the transferees can work out their equities in the final decree proceedings. Eventhough the 13th defendant had pleaded adverse possession and limitation, the court below has not recorded any finding in that behalf.

JUDICIAL RESOLUTION

12. I am afraid that I cannot agree with the above A.S. No. 563 of 1999 and submissions made on behalf of the appellants.

13. Admittedly the parties belong to a Marumakkathayam tarvad by name Andippillil of Ponnurunni desom in Poonithura Village of Kanayannoor Taluk in Ernakulam District. . Item I of plaint A schedule is situated in Ponnurunni Desom and is known as Vadakke Andipilli paramba having an extent of 70 < cents comprised in Survey No. 573/1 of Poonithura Village. Ponnurunni was admittedly a part of the erstwhile Cochin State. Plaint A schedule item No. 2, having a total extent of 3.51 acres is lying at Edappally in Ernakulam District in two survey Nos. and is known as Kadangattu paramba. Edappally was admittedly a part of the erstwhile Travancore area. 1.03 acres out of the said 3.51 acres is comprised in survey No. 690/C and 2.48 acres is comprised in Survey No. 691/2 of Thrikkakara North Village and are lying contiguously. For a better comprehension of the contentions of the parties, it is necessary to know the relationship between the parties. The common ancestor of the parties was one Nangeli Amma of Andipallil tarvad. Krishna Menon, Madhavi Amma, Ravunni Nair, and Parukutty Amma A.S. No. 563 of 1999 and were the children of Nangeli Amma. Parameswara Menon, Govinda Menon and Raghava Menon were the children of Madhavi Amma. Karunakara Menon (D8), Neelakanda Menon, Narayani Amma (D1) and Ammukutty Amma (D7) were the children of Parukutty Amma whose husband was one Sankaran Padmanabhan. Karunakara Menon died pending suit and his legal representatives are his widow the 9th defendant and childrens defendants 10 to 14. Kamalakshi @ Thankam (D2), Aravindakshi Amma (D3), Ramachandran (D4) and Padmavathy Amma are the children of first defendant Narayani Amma. Defendants 5 and 6 are the children of 2nd defendant, Kamalakshy Amma @ Thankam . The 6th defendant died pending this appeal and respondents 12 and 13 in A.S. No. 563 of 1999 are his legal representatives. The first plaintiff is the husband of Padmavathi Amma who died prior to the suit and plaintiffs 2 to 8 are her children. The following is the genealogy showing the relationship between the parties:-

A.S. No. 563 of 1999 and GENEALOGY A.S. No. 563 of 1999 and While in the case of all the members of Andippillil tarvad there is evidence either oral or documentary to fix their ancestry and lineage, in the case of Ayyappa Menon I have not been able to fix his position in the genealogy except that he is admittedly a member of the tarvad. There was only a casual statement by DW1 Aravindakshy Amma to the effect that Ayyappa Menon was her uncle . But it is nobody's case that Ayyappa Menon was the son of Parukutty Amma so as to become DW1's uncle .

14. I will first consider the nature and character of plaint A schedule item No. I and the rival claims regarding the said item. As mentioned earlier the said item is situated in Ponnurunni Desom of

Poonithura Village and was part of the erstwhile Cochin State. The document as per which this item was acquired has not been produced before court by either of the parties. But there is intrinsic A.S. No. 563 of 1999 and evidence to show that this item was gifted by Krishna Menon of Andippillil Tarvad in favour of 11 members of the very same tarvad. Ext. B6 plaint in O.S. 77/1125 M.E. makes mention of the above gift deed as document No. 1223/1099 M.E. (corresponding to the year 1924). According to the appellants, this was an acquisition by 11 co-owners and the property was a co-ownership property. First of all, as mentioned earlier the document of acquisition is not before Court. Without having the opportunity to consider the terms and conditions and the recitals in the aforesaid gift deed it cannot be said that the property was co-ownership property or even tavazhi property. But then in Ext.B6 plaint in O.S. 77/1125 M.E. filed by one of the donees under the aforesaid document against the surviving 8 donees thereto, it is alleged that on the death of Madhavi Amma and Ravunni Nair (the two deceased co-donees) their rights devolved on the surviving donees. If it was a co-ownership property then A.S. No. 563 of 1999 and the rights of Ravunni Nair and Madhavi Amma would not have reverted to the surviving donees but would have devolved on the personal heirs of Madhavi Amma and Ravunni Nair. It was during the pendency of O.S. 77/1125 instituted by Ayyappa Menon against the other donees under the gift deed of 1099 seeking a partition and separate possession of the 1.56 acres of land including the present plaint A schedule item No. I scheduled thereto, that the parties to that suit came to a compromise. They executed Ext.A1 partition deed dated 1-11-1950 subsequent to the preliminary decree passed on 11-8-1950 as evidenced by Ext.B9 preliminary judgment. Ext.B7 compromise petition dated 15-9-1950 was filed stating that the parties have settled the dispute by executing Ext.A1 partition deed. Accordingly, Ext.B8 and Ext. B10 final judgment and final decree dated 17-11-1950 was passed recording the compromise. The executants to Ext.A1 partition deed are :

A.S. No. 563 of 1999 and

i) Ayyappa Menon

ii) Parameswara Menon

iii)Govinda Menon

iv) Raghava Menon

v) Karunakara Menon

vi) Neelakanda Menon

vii)Parukutty Amma

viii)Narayani Amma

ix) Ammukutty Amma The rank of the executants to Ext.A1 partition deed is shown above their names in the genealogy given above. The 1.56 acres of property including the present A schedule

item No. I (admeasuring 70 < cents) was divided and allotted to five branches. Ayyappa Menon, Parameswara Menon, Govinda Menon and Raghava Menon constituted branch Nos. 1 to 4. Parukutty Amma and her children namely Karunakara Menon, Neelakanda Menon , Narayani Amma and Ammukutty Amma together constituted branch A.S. No. 563 of 1999 and No. 5. The plaint A schedule item No. 1 was allotted to the 5th branch, that is, Parukutty Amma and her children. It is pertinent to note that the name of this property itself is Vadakke Andippillil paramba. Even assuming that this property was a co-ownership property, when it was allotted in partition to the 5th branch consisting of Parukutty Amma and her children, then in the hands of the progeny of Parukutty Amma the property became impressed with tarvad characteristics.

16. Under the Hindu Mithakshara Law the share which a co-parcener obtains on partition of ancestral property as regards his male issues is also ancestral in character and they take an interest in such property by birth whether they are in existence at the time of the partition or are born subsequently. The property in his hands has the incidents of right by birth and suvivorship. The same principle has always been applied in the case of a Marumakkathayee female obtaining property on A.S. No. 563 of 1999 and partition of ancestral property with the only difference that members in a joint Hindu Marumakkathayam family descent lineally from a common ancestress and by virtue of the matrilineal system of inheritance female members and their female descendants enjoy the status analogous to that of co-parceners under the Hindu Marumakkathayam Law. But the three degree rule of Mitakshara law founded on religious obligation is not applicable to Marumakkathayam law. Thus, the property of a Marumakkathayam tarvad enures for the benefit of its members who may be added in the future by births into the family in the female line, the new members getting forthwith a right by birth in the property. Therefore, under the customary Marumakkathayam law a subsequently conceived or born child gets a right by birth in the property obtained by its mother by way of her separate share in the partition of her ancestral properties. In other words, after partition of the ancestral property the A.S. No. 563 of 1999 and share allotted to a female in her hands continues to retain its character as tarvad property. Statutory intervention into the customary Marumakkathayam Law by the Madras Marumakkathayam Act, 1933, the Travancore Nair Act, 1100 M.E. , the Cochin Nair Act, 1113 M.E. etc. have not effected any change in the prestine Marumakkathayam law. See Mary v. Bhasura - 1967 KLT 430 - F.B., Parameswaran Pillai v. Ramakrishna Pillai - 1954 KLT 862 FB. Where property has been allotted to a natural group consisting of a Marumakkathayam mother and her children, they take such property as tavazhi property with all its incidents. (See Nullikkodan v. Ayisumma - 2002 (3) KLT 883). In Ext.B6 plaint O.S. 77/1125 M.E. filed before Anjikaimal District Court by Ayyappa Menon against the other eight surviving donees under the gift deed of 1099 M.E. it is averred that on the death of Madhavi Amma and Ravunni Nair, their share over the property devolved on the remaining 9 donees. If the 11 persons who A.S. No. 563 of 1999 and got the property from their senior member under the gift deed were tenants -in- common then, the interest of two of the deceased donees should have devolved on their personal heirs by virtue of Sec. 27 of the Cochin Nair Act, 1113. From the very fact that their shares were treated as devolved on the remaining 9 co-donees, it is crystal clear that even in the year 1950, the parties treated the property as tavazhi property. Ext.A 4 mortgage with regard to plaint A schedule item No. 1 executed by three senior members of the tarvad also recites that the property is their tarvad property. To crown all DW1 Aravindakshi Amma during her cross-examination clearly admitted as follows:-

? (Q) . A). Ext. A1 .

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A.S. No. 563 of 1999 and Thus, the only witness examined on the side of the contesting defendants has admitted that gifts given by the uncle to his own nephews and nieces were to enure to the tavazhi and that in Ext.A1 partition that took place in the Andippillil tarvad, Parukutty Amma and her children separated as one tavazhi. Such being the position, it is futile for the appellants to contend that plaint A schedule item No. 1 allotted in partition to Parukutty Amma and her children does not enure to the tavazhi of Parukutty Amma and her descendants according to the tenets of the prestine Marumakkathayam Law. The finding recorded by the court below in this regard does not call for any interference.

15. What now survives for consideration is the nature of acquisition of plaint A Schedule item No.2. Ext.A2 is the usufructory mortgage dated 7th Edavom 1096 M.E. corresponding to the year 1921 executed by Parvathy Amma, the mother-in-law of Parukutty Amma in respect of A.S. No. 563 of 1999 and the plaint A schedule item No. 2 known as Kadangattu Paramba . Ext.A2 recites that the consideration for the document proceeded from Parukutty Amma. The document is in favour of Parukutty Amma and her minor children. This mortgage was never redeemed by Parvathy Amma. Under the Prestine Marumakkathayam Law acquisition of a property in the name of mother and children who form a natural group had always been presumed to be on behalf of the tavazhi and even the existence of an original nucleus was not considered essential. (Vide Karthiyayini v. Parukutty - AIR 1957 Kerala 27, Lakhsmi v. Anandan - ILR 1982 (2) Kerala 377, Sarojini Amma v. Aboobacker - 1986 KLT 944 and P. Kamalam and Others v. Devaki and Others - 2006 (2) KLT 499). The position is the same where a Marumakkathayee male makes a gift in favour of his nephews or nieces eventhough there is no statutoy presumption in that behalf - See Tazhath Valappil A.S. No. 563 of 1999 and Prasanth v. Kalliani and Others - 2007 (2) KLT 992. The statutory intervention in the from of Section 44 of the Travancore Nair Act corresponding to Sec. 74 of the Cochin Nair Act had not made any inroads into the rules of customary Marumakkathayam law which stands unaffected by the presumptions engrafted into the aforementioned enactments. In the decision reported in 1969 KLR 902 (supra) cited on behalf of the appellants, the intention that the gift ensured to the named donees only was gathered from the recitals in the document. Moreover, that decision is in line with the dissenting view of the learned Judge himself in the decision reported in 1967 KLT 430 (FB) (supra). The binding precedent is that of the Full Bench. Thus, it is not necessary that the gift or bequest in favour of the wife and children should invariably be made by a Marumakkathayee husband so as to draw the presumption that such gift or bequest enures to the puthravakasam tavzhi of such wife. Any acquisition by a natural group A.S. No. 563 of 1999 and constituting a tavazhi as known to the Marumakkathayam law will get impressed with all the tavazhi characteristics and the children born through the female line will get a right by birth over such properties. (See Mary v. Bhasura Devi - supra). DW1, the only witness examined on the side of the contesting defendants has unequivocally admitted that plaint A schedule item No. 2 was obtained by the tavazhi of her maternal grandmother, Parukutty Amma. This is what she has deposed to :-

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16. As for document No. 3177 of 1096 marked in this appeal as Ext.B11, the same has really no connection whatsoever with the property in question. Plaint A schedule item No. 2 is not the property dealt with under Ext.B11 and, therefore, the argument of the contesting defendants based on Ext.B11 gift deed is wholly untenable. That is presumably the reason why this A.S. No. 563 of 1999 and document although produced before the Court below was not attempted to be marked on the side of the defendants. Since the acquirers under Ext.A2 mortgage namely Parukutty Amma and her minor children formed a natural group, the property would enure to all the members of the tavazhi of Parukutty Amma. It is pertinent in this connection to note that in Ext.B3 partition dated 28-10- 1981 as per which Karunakara Menon , Narayani Amma and Ammukutty Amma are alleged to have divided the property to the exclusion of the other tavazhi members including the plaintiffs, the title which is traced to plaint A schedule item No. 2 is Ext.A2 mortgage and not Ext.B11 gift deed. This also re-inforces the plaintiffs' case that this item was acquired by Parukutty Amma and her children as per Ext.A2 mortgage. In Gopalan v. Rajendran Nair - 2000 (1) KLT 765 it has been held that a gift by a brother to his sister to whom children were born subsequently would not attract Sec. 22 of the Travancore A.S. No. 563 of 1999 and Nair Act 1101 M.E. and that it would enure to the tavazhi of the donee sister. I, therefore, endorse the conclusion reached by the court below with regard to the plaint A schedule item No.2 as well.

17. Now coming to the plea of adverse possession and limitation raised by the 13th defendant who is one of the sons of 8th defendant Karunakara Menon, apart from the fact no plea of ouster had been raised, no issue was also framed by the court below in this behalf. The issues were framed one decade ago and no exception has been taken by the 13th defendant for the omission in framing an issue in this behalf. Moreover, in the light of the decisions of the Apex Court in E.T. Munichikkanna Reddy and Others v. Revamma and Others - (2007) 6 SCC 59 and Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and Others AIR 2009 SC 103 , the 13th defendant cannot succeed on the said plea. All that apart, in Ext.B3 partition, the title over the property is traced to A.S. No. 563 of 1999 and Ext.B2 usufructory mortgage. Ext.B3 partition was entered into only on 28-10-1981 and the present suit has been filed within 12 years of Ext.B3 partition. Hence, there cannot be any question of adverse possession or ouster.

WHAT IS THE CORRECT SHARE ?

MEMORANDA OF CROSS OBJECTIONS 18 AND 19 OF 2009

18. In both these appeals, the plaintiffs have filed cross-objections taking exception to the total shares arrived at by the court below. According to the plaintiffs/cross objectors there were altogether 16 sharers as on 1-12-1976 when the Kerala Joint Hindu Joint Family System (Abolition) Act, 1975 came into force. Those sharers are:-

i) Karunakara Menon (D8)

ii) Narayani Amma (D1)

iii) Ammukutty Amma (D7) A.S. No. 563 of 1999 and

iv) Kamalakshi @ Thankam (D2)

v) Aravindakshi Amma (D3)

vi) Ramachandran (D4)

vii) Padmavathy Amma

viii)Balan (D6)

ix) Radha (D5)

x) 2nd plaintiff

xi) 3rd Plaintiff

xii) 4th plaintiff

xiii) 5th plaintiff

xiv) 6th plaintiff

xv) 7th plaintiff xvi) 8th plaintiff The court below, however, directed division of the properties into 15 shares only. In my view the court below was right in fixing the total shares at 15. Plaintiffs 2 to 8 were not justified in treating their mother Padmavathy Amma as a sharer who was alive on 1-12-1976. She had A.S. No. 563 of 1999 and died in the year 1966. If so, the Memoranda of Cross Objections filed in these appeals are without any merit and are accordingly dismissed.

19. The only other surviving question is regarding the assignments effected by defendants 2 and 8 with regard to portions of the 2.48 acres of land which is a part of plaint A schedule item No. 2. As per Ext.B5 sale deed dated 20-1-1993 the 2nd defendant assigned 6.5 cents out of 2.48 acres to the 17th defendant who has constructed a two storied building by availing of a loan. As per I.A. No. 166 of 2009 D17 has produced the loan agreement and the site plan pertaining to the 6 = cents of land. Likewise, defendants 15 and 16 who are husband and wife had purchased 10 cents of land from out of the 2.48 acres from the 8th defendant as per a sale deed dated 24-4- 1989. They have constructed a single storied building in the 10 cents of land. Defendants 15 and 16 have filed I.A. No. 165 of 2009 producing the sale deed in their favour A.S. No. 563 of 1999 and and the site plan pertaining to the building. The Court below treated the aforesaid sale deeds as null and void on the ground that they were alienations of the undivided share by members of an undivided Marumakkathayam family. Reliance in this connection was made to Antherman v. Kannan - 1960 KLT 1313 (FB) and Ammalu Amma v. Lakshmi Amma - 1966 KLT 32 F.B. But then, the lower Court failed to note that as on 1-12-

1976 there was a statutory partition of all Joint Hindu Families in Kerala with the coming into force of the Kerala Joint Hindu Family System (Abolition)Act, 1975 converting the joint tenancies into tenants-in-concern. The alienations in this case were after 1-12-1976. Hence, there is nothing wrong in recognizing those alienations qua the respective vendors and feeding the grant in favour of the alinees by estoppal by invoking the principle discernible from Sec. 43 of the Transfer of Property Act and allotting the portions transferred to the share of the A.S. No. 563 of 1999 and transferors. As per the preliminary decree, both defendants 2 and 8 are each entitled to 1/15 shares over the 2.48 acres and that will work out to 16.53 cents per share. It is hardly necessary to mention that these assignees are entitled to equitable treatment at the hands of the court. Hence, the portions taken assignment of by D15 , D16 and D17 shall be allotted to the share of their respective assignors in equity in the final decree proceedings. Subject to the above, the preliminary decree passed by the court below is confirmed.

In the result, these appeals are dismissed confirming the preliminary decree passed by the court below subject to the equitable reservation to be made in the final decree proceedings in favour of D15 to D17, the assignees. No costs. The Memoranda of Cross Objections are also dismissed as indicated above.

Dated this the 27th day of August, 2009.

V. RAMKUMAR, (JUDGE) ani/ A.S. No. 563 of 1999 and V. RAMKUMAR, J.

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A.S. No. 563 of 1999 & R.F.A. 43 of 2008 ..... Dated, this the 27th day of August 2009 JUDGMENT