

CASE NO.:
Appeal (civil) 8292-8293 of 2003

PETITIONER:
C.T. RADHAKRISHNAN

RESPONDENT:
C.T. VISWANATHAN NAIR AND ANR.

DATE OF JUDGMENT: 16/01/2006

BENCH:
B.P. SINGH & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

P.K. BALASUBRAMANYAN, J.

1. The parties to these appeals belong to Chokkura Thaliyadath tarwad, a hindu family governed by Marumakkathayam system of law as modified by the Madras Marumakkathayam Act, 1932. They belong to the thavazhi of Cheriyanmu Amma. Cheriyanmu Amma acquired the suit property under a deed of gift Exhibit A-1 dated 19.6.1905. On the death of Cheriyanmu Amma, the property devolved on her thavazhi, consisting of her two daughters, Ammini Amma and Kunhimalu Amma and two sons Appu Nair and Gopalan Nair. Appu Nair and Gopalan Nair having died, the property devolved on the thavazhi consisting of Ammini Amma and her son and Kunhimalu Amma and her children, of whom four survived. Ammini Amma died in the year 1944. On 19.9.1954, under Exhibit-B-9, Kunhimalu Amma acting for self and as guardian of her two minor sons, Narayanan Kutty and Radhakrishnan and her two major sons, Balagopalan Nair and Somasundaran Nair, surrendered, released or sold (this is one of the disputes in the litigation) the property to Viswanathan Nair, the son of Ammini Amma. Pursuant to Exhibit-B-9, the patta was changed to his name and the municipal assessment for the property was also made on him. Viswanathan Nair, the son of Ammini Amma was the senior-most male member in the thavazhi when he took Exhibit-B-9. He was in government service in the then State of Madras and was living in Madras. Kunhimalu Amma and her children continued to reside in the property which was a residential house in the town of Calicut in the district of Malabar in the State of the then Madras, until, the said district was added to the State of Travancore-Cochin to form the State of Kerala with effect from 1.11.1956. Kunhimalu Amma died in the year 1963. Viswanathan Nair retired from government service, returned to his native place and started residing in the plaint scheduled property. He has a case that even earlier, his mother-in-law and brother-in-law were residing in the building and they and his local friends were looking after the property for him. Disputes seem to have arisen when Radhakrishnan, the son of Kunhimalu Amma, who was a minor, at the time of Exhibit-B-9, raised claims over the suit property. Viswanathan Nair then filed O.S. No. 327 of 1984 on the file of the Munsiff's Court of Kozhikode,

originally for a permanent injunction restraining the defendants, three of the surviving sons of Kunhimalu Amma, from interfering with his exclusive possession of the suit property. Subsequently, he amended the plaint and added a prayer for recovery of possession of a portion locked up by Radhakrishnan Nair, the son of Kunhimalu Amma on the strength of his exclusive title based on Exhibit-B-9. The two sons of Kunhimalu Amma who were minors at the time of Exhibit-B-9 and on whose behalf the document Exhibit-B-9 had been executed by Kunhimalu Amma, their mother, resisted the suit essentially contending that the transaction Exhibit-B-9 entered into by their mother and brothers, was void in law, in view of the fact that the same was an assignment of undivided shares by the members of an undivided marumakkathayam tarwad or thavazhi and they had no right to convey such undivided shares. It may be noted that the transaction Exhibit-B-9 was dated 19.9.1954 and both the quondam minors had attained majority more than three years prior to the suit and consequently had lost their right to challenge the transaction Exhibit-B-9 as voidable as opposed to an available plea that it is void in law. Radhakrishnan, who was defendant No.1 in the above suit, in his turn filed O.S. no. 45 of 1985 for partition of the plaint scheduled property and delivery to him of his share therein on the plea that Exhibit-B-9 deed executed by his mother for herself and as guardian of himself and his brother Narayanan Kutty, and by her two major sons, Balagopalan Nair and Somasundaran Nair, was void in law. Viswanathan Nair resisted this suit by pleading that Exhibit-B-9 was a valid transaction being the surrender of rights by all the other members of the thavazhi in favour of himself, the only other member of the thavazhi and no infirmity was attached to such a transaction. Thus, in both the suits, the essential question that fell for decision, especially in the context of the only contention raised before us by learned Senior Counsel Mr. A.S. Nambiar, appearing on behalf of the appellant, was whether the transaction Exhibit-B-9 could be ignored by the sons of Kunhimalu Amma as a void transaction.

2. The trial court tried the suits jointly. It held that the transaction Exhibit-B-9 was valid since it was not an assignment of undivided shares by the members of an undivided marumakkathayam thavazhi, who as per the decisions of the Kerala High Court binding on it, had no alienable right in the undivided thavazhi property and that the transaction was really a surrender of rights by all the other members of the thavazhi in favour of the only other member and such a transaction was valid in law. The trial court, therefore, upheld the exclusive title of Viswanathan Nair based on Exhibit-B-9 and decreed his suit granting the injunction and recovery of possession prayed for by him therein. It dismissed the suit for partition on the ground that the plaintiff therein, Radhakrishnan Nair and his brothers defendants 2 and 3 in that suit, had no subsisting right over the suit property as on the date of that suit. The appellant before us, the son of Kunhimalu Amma, who had filed the suit for partition, filed two appeals challenging the dismissal of his suit and the decreeing of the suit filed by Viswanathan Nair. The subordinate Judge, Kozhikode who heard the appeals jointly, agreed with the trial court that the transaction Exhibit-B-9 was valid in law and consequently, Viswanathan Nair had acquired exclusive title over the property and was entitled to the relief granted

to him in his suit and that the suit for partition filed by the son of Kunhimalu Amma was rightly dismissed by the trial court. Thus, both the appeals were dismissed.

3. Radhakrishnan Nair, the appellant before us, filed two second appeals before the High Court of Kerala challenging the decrees of the courts below. As is the practice in that High Court, the second appeals were admitted on the substantial questions of law formulated in the memorandum of second appeal of which the respondent in the second appeal had notice and disposed of on the basis of those substantial questions of law by answering them against the appellant in the second appeals and in favour of Viswanathan Nair. The High Court held that the transaction Exhibit-B-9 was valid in law since it could be treated as a partition among the members of the thavazhi to enter into which they had a right under the Madras Marumakkathayam Act, 1932, especially when all the members of the family acted together and that in a partition, it is not obligatory that property in specie should be allotted to all the sharers and it is quite possible for the sharers to take their shares in terms of money and that was exactly what was done by Viswanathan Nair, Kunhimalu Amma and her children, when they entered into Exhibit-B-9 transaction. Thus, upholding the finding of the trial court and that of the lower appellate court, that the transaction Exhibit-B-9 was not void in law, the High Court dismissed the second appeals. The decision in the second appeals is in challenge before us in these appeals by special leave.

4. Mr. A.S. Nambiar, learned Senior Counsel argued that Exhibit-B-9 was in fact an assignment of undivided shares by the members of a marumakkathayam thavazhi and such an assignment was clearly invalid in law in the light of the decision of the Full Bench of the Kerala High Court in Ammalu Amma & Others vs. Lakshmy Amma & Others [1966 K.L.T. 32]. He submitted, that a transaction of sale of undivided shares was not merely voidable but was void in law as held in Mathew vs. Ayyappankutty [1962 K.L.T. 61] and in the situation obtaining, the High Court ought to have held that notwithstanding the transaction Exhibit-B-9, the sons of Cheriyanmu Amma were entitled to shares in the property. He also relied on the decision in Achutha Menon vs. Jaganatha Menon & Others [1983 K.L.T. 939]. He further submitted that it could not be forgotten that Viswanathan Nair was the eldest male member of the thavazhi and hence the Karanavan of the thavazhi and in the context of the conflict between right and duty, as emphasized in Achuthan Nair vs. Chinnammu Amma & Others [AIR 1966 SC 411], the exclusive title claimed by Viswanathan Nair based on Exhibit-B-9, could not be upheld. Learned counsel submitted that on the terms of Exhibit-B-9, the transaction was clearly a sale of their undivided shares by Cheriyanmu Amma and her sons. Mr. T.L.Viswanatha Iyer, learned Senior Counsel appearing on behalf of the respondent, Viswanathan Nair, submitted that Exhibit-B-9 was only a release of their rights by all the other members of the thavazhi in favour of Viswanathan Nair, the only other member of the thavazhi and such a transaction was valid in law. He further submitted that the High Court was justified in holding that the transaction Exhibit-B-9 could be treated as a partition which again was valid since all the members of a thavazhi could always come together and

effect a partition even under the pristine Marumakkathayam Law and certainly after the coming into force of the Madras Marumakkathayam Act, 1932, which gave an individual member, the right to seek a partition. Learned counsel further submitted that the decision in Ammalu Amma & Others vs. Lakshmy Amma & Others (supra) did not lay down the correct law and this Court would be justified in overruling that decision especially in the context of Section 38 of the Madras Marumakkathayam Act, 1932 and the right to partition conferred on the members of an undivided Marumakkathayam tarwad or thavazhi. Learned counsel submitted that even in the decision in Achutha Menon vs. Jaganatha Menon & Others (supra) the Court has proceeded on the basis that a release by one of the members of the thavazhi in favour of the thavazhi was valid in law and the situation obtaining here was one where all the members of the thavazhi had released their rights in favour of the only other member of the thavazhi and such a transaction, even going by the customary Marumakkathayam Law, was valid. He submitted that there was no question of the theory of conflict between right and duty arising in this case as the circumstances show that Cheriyanmmu Amma and her sub-thavazhi was in need of funds at the relevant time and they had released their rights in the suit property in favour of the contesting respondent, for valuable consideration and the consideration that was paid was a substantial amount in the year 1954. He submitted that the transaction Exhibit-B-9 could not be held to be a void transaction and even if it was voidable, the children of Cheriyanmmu Amma had clearly lost their right to attack the transaction on the basis that it was a voidable document, they not having filed the suit within the time permitted by law in that behalf. He, thus, submitted that there was no reason to interfere with the decrees now passed in the suits.

5. Though, we find some merit in the submission that the correctness of the decision in Ammalu Amma & Others vs. Lakshmy Amma & Others (supra) can be seriously questioned in this Court, especially in the context of the dissenting judgment, we do not think it necessary to go into that question for the purpose of this case and in the context of the Kerala Joint Hindu Family System (Abolition) Act, 1975 which came into force on 1.12.1976. Similarly, we are also not inclined to accede to his prayer to reconsider the decision in Achutha Menon vs. Jaganatha Menon & Others (supra), as regards the view taken therein following the above decision and also regarding the question of estoppel feeding the grant negatived in that decision. We think that these appeals can be decided on a construction of Exhibit-B-9, the transaction entered into by Cheriyanmmu Amma and her children and Viswanathan Nair.

6. Exhibit-B-9 is termed a deed of release. Admittedly, at the relevant time, there were only six members in the thavazhi, Viswanathan Nair the sole representative of his mother Ammini Amma and Kunhimalu Amma and her four children and all of them are parties to the transaction. The document recites that the property was obtained by Cheriyanmmu Amma and on her death it devolved on her thavazhi which consisted of her children, including the two daughters Ammini Amma and Kunhimalu Amma through whom, the parties to the

present litigation claim. The document recites that the value of the undivided shares of Kunhimalu Amma and her four children who were in joint possession with Viswanathan Nair, the son of Ammini Amma was fixed at Rs. 2,500/- at the instance of mediators and Kunhimalu Amma and her children had decided to release their rights for that consideration in favour of Viswanathan Nair and they were doing so under the transaction, on receipt of the consideration which was received for incurring the educational expenses of the minor sons of Kunhimalu Amma. The document also recites that from the date of that transaction, Viswanathan Nair in whose favour the release is executed, was to enjoy the property as his own with the right to alienate the same according to his volition. As noticed, there were only six members in the thavazhi at the relevant time. The property belonged to the thavazhi. Five of the members of the thavazhi or the group consisting of Kunhimalu Amma and her children together released their rights in the property in favour of the only other member of the thavazhi, the son of the sister of Kunhimalu Amma. Such a release in favour of the thavazhi or of all the other members of the thavazhi by some of the members of the thavazhi or in favour of the sole other member of the thavazhi is recognized as valid in Marumakkathayam Law. [See for instance, Achuthan Nambiar Vs. Kunhircaman Nambiar & Others (1962) 1 K.L.R. 340, Sankaranarayanan Nair Vs. Achuthan Nair, 1982 K.L.J. 61]. In fact, Shri A.S. Nambiar, learned Senior Counsel did not argue otherwise. His contention was only that the transaction here amounted to an assignment of undivided shares and consequently void in law. On a true interpretation of the document Exhibit-B-9, we are not in a position to agree with the submission of Mr. Nambiar, learned Senior Counsel that the transaction must be understood as an assignment of the undivided shares of the members of a marumakkathayam thavazhi. It can only be understood as a release of the rights by all the other members of the thavazhi in favour of the only other member of the thavazhi. The transaction Exhibit-B-9 is therefore not void in law.

7. It is also possible, as was held by the High Court, to construe the transaction Exhibit-B-9 as a partition arrangement entered into by all the members of the thavazhi of the Chcriyammu Amma who were then alive. Ammalu Amma & Others vs. Lakshmy Amma & Others (supra) relied on by learned Senior Counsel Mr. Nambiar itself recognizes, that a partition by common volition was possible under the Marumakkathayam Law. The Full Bench has said, "Marumakkathayam tarwads were partible, before Statutes conferred on individual members or groups of members the right to claim partition, only by general consent of all the members." All the members of the thavazhi of Chcriyammu Amma then existing were parties to Exhibit B-9. Even otherwise, after the Madras Marumakkathayam Act, 1932, by virtue of Section 38 thereof, a partition could even be enforced. Though the sub-thavazhi of Kunhimalu Amma and her children did not take their shares in specie, they took their shares in terms of money leaving the property to be taken by the only other member of the thavazhi, in whose favour the document was executed. Satisfying the shares of some of the members of a family in a partition, in terms of money in lieu of shares in the property, is not unknown to law nor can such a transaction be held to be void in the eyes of law.

Marumakkathayam Law also does not interdict such a partition. Moreover, the subject matter of partition here, was a residential house and the convenience of enjoyment also justified such a transaction. Therefore, we are inclined to agree with the High Court that the transaction Exhibit-B-9 can be treated as a partition and since all the members of the thavazhi had participated in the transaction, the same would be valid even under marumakkathayam law before the intervention made by the Madras Marumakkathayam Act, 1932 which even conferred a right of individual partition on a member of a marumakkathayam tarwad or marumakkathayam thavazhi.

8. As we have noticed earlier, there was no occasion to consider the question whether the transaction Exhibit-B-9 was voidable or was vitiated for any of the reasons sought to be put forward by the sons of Kunhimalu Amma, since they had lost their right to challenge the transaction on the ground that it was voidable at their instance, not having filed a suit in that behalf within three years of attaining majority. Therefore, the only question that requires to be decided and that was rightly decided, was whether the transaction Exhibit-B-9 was void in law. As we have held in agreement with the courts below that the transaction cannot be held to be void in law, the decrees now passed in the two suits, are fully justified and no interference with the decision of the High Court, is called for.

9. We, therefore, confirm the judgments and decrees of the High Court and dismiss these appeals. Considering the relationship between the parties, we direct them to suffer their respective costs throughout.