

In the High Court of Travancore-Cochin.
Before
The Hon'ble Shri P.K. Subramania Iyer, Judge.
The Hon'ble Shri M. S. Menon, Judge.

Appeal Suit No. 16 of 1954.

O.S.No. 155 of 1950, Kottayam District Court.

Appellant: Philipose Markose, Naifmuttathu Padinjaraethal,
residing at Kollamkulangara, Vakathanam Muri,
Puthuppalli Pakuthy, Changana-cherry Taluk-Plff.

By advocate Sri M.U. Isaac.

Respondents: 1. Thoma Chacko, Ayiram Mala, Veroor Muri,
Vazhappally Kizhakkumbhagom Pakuthy - Changana-
cherry Taluk - 1st defendant.
2. Thomman Kurien, Puliyankunel Kochupurackal,
Do. Muri, do. Pakuthy, Do. Taluk-2nd defendant.
3. Mami Mami, Kochuparambil, Do. Muri, Do. Pakuthy,
Do. Taluk - 3rd defendant.
4. Mathan Mathai, Kuthukallungal, residing at
Ayiram Mala, Do. Muri, Do. Pakuthy - 4th deft.
5. Chacko Thoma, Pulachirakannuparambil, Do. Muri,
Do. Pakuthy, Do. Taluk - 5th defendant.
6. Kurien Thoma, Kochupurayil, residing at
Umbackattu, Do. Muri, do. Pakuthy, Do. Taluk.
6th defendant.

(No appearance).

This appeal having been finally heard on 23.1.

1955 the court on the same day delivered the following

Judgment.

(Delivered by Subramania Iyer J.).

4-2-10/2-1
The Hon'ble Shri F.K. Subramania Iyer & the Hon'ble
Shri M.S. Menon, JJ.

Appeal Suit No. 15 of 1954.

Judgment.
(Delivered by Subramania Iyer J.).

Mr. Isaac on behalf of the appellant placed all the facts before us very clearly. The attention of the court below nor of the parties appears ^{not} to have been focussed upon the two questions on which the decision of the case depends. They are (a) the character of the acquisition of the properties in the names of the five brothers and (b) the date of the acquisition. The Travancore Nair Act, I of 1938, ^{and 66} provide in section 17 that

"Property obtained from the husband or father by the wife or widow and child or children by gift or inheritance, shall, unless in the case of gift a contrary intention appears from the instrument of gift, belong to the wife or widow and each of the children in equal shares with right to individual partition"

and section 41 of the Travancore Nair Act, II of 1900, provide as follows:

"Property acquired by gift or bequest from the father or husband before Regulation I of 1938 ^{came into} force shall, for the purpose of this Chapter, in the absence of evidence to the contrary, be treated as the ~~father's~~ property of the donees or devisees and of their ^{Tavashee}".

The earliest ^{act} Act had no retroactive operation whereas the later Act provided for a rebuttable presumption in respect of acquisitions made prior to the date of the ^{previous} earlier Act. Plaintiff's case is that the five brothers were co-owners having separate interests and the case of the contesting defendant is that the tenure under which the five brothers took the property was as members of a thavazha. If this acquisition be after the Act of 1938 then the plaintiff succeeds. He will also succeed even if the acquisition be before the Act of 1938 if he establishes that the acquisition

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was by the five brothers as co-owners. The presumption regarding acquisitions before 1088 provided for in section 41 of the Act of 1199 is a rebuttable presumption. There is no evidence at all in the records to come to a conclusion on either of the two aforesaid points. The plaintiff may also succeed if he is able to establish a severance of status between the acquirers even though they acquired it originally as members of a ~~thavashi~~. There is no evidence at all on the record which would enable us to come to a definite conclusion on any of the aforesaid points. In view of this situation we set aside the decree of the court below and remand the case to that court for fresh disposal after affording - opportunity to the concerned parties to adduce whatever evidence they may have, both oral and documentary. Costs of the appeal except court fee which will be refunded to the appellant's counsel will abide the result and will be provided for by the court below in its decree.

28. 1. 1955.

Sd. P.K. Subramania Iyer, Judge.
Sd. M. S. Menon, Judge.

(True copy)

By Registrar for Registrar.

Compared by
[Signature]
D. G. M. M. M.

Received