

Privy Council Appeal No. 93 of 1947

Sha Shivaraj Gopalji - - - - - *Appellant*

v.

Edappakath Ayissa Bi and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL DELIVERED THE 28TH JULY, 1949

Present at the Hearing :

LORD SIMONDS

LORD RADCLIFFE

SIR MALCOLM MACNAGHTEN

[*Delivered by* LORD SIMONDS]

In this appeal, which is brought from a judgment and order of the High Court of Judicature at Madras setting aside a judgment and order of the Court of the Subordinate Judge of Cochin, the appellant claims that he is entitled to proceed in execution against certain properties of the respondents under circumstances which must be somewhat fully set out.

The respondents are Mappilla Mohammedans of Malabar in the Province of Madras and are governed by the Marumakkathayam law under which descent is traced in the female line. Their joint family like that of the local Hindus is known as a tarwad and the branches of the tarwad as tavazhi. Formerly the members of a tarwad had only a right of maintenance and could not enforce a partition of the family properties, but under the Mappilla Marumakkattayam Act, 1938 (Madras Act No. XVII of 1939), they can obtain a share of the properties by partition or alternatively have the tarwad properties registered as impartible.

The effect of the Act upon the property of a tavazhi is a question of difficulty upon which for reasons that will appear it is unnecessary for their Lordships to express any opinion.

On the 24th February, 1930, one Subbayya Ayyar in a suit brought in the Court of the Subordinate Judge of Cochin against the respondents and one Kunhammad Kutti Haji since deceased obtained a decree against them for Rs. 12,436 with interest and costs. In the course of the suit Subbayya Ayyar obtained an order for attachment of the immovable properties of the respondents, which notwithstanding their objection was subsequently confirmed by the Subordinate Judge.

Thereupon certain members of the family of the respondents put in petitions in the suit praying that the attachment might be raised on the ground that the respondents had no saleable rights in the attached properties. Upon these petitions they obtained no relief but were (in the terms of the note which is before their Lordships) "referred to an

original suit." Accordingly the respondents with other members of their family brought a fresh suit against Subbayya Ayyar in the same Court claiming that the properties in question were not liable to be attached or sold in execution of the decree in the first suit. The straight issue was thus raised, the defendant Subbayya Ayyar contending that the properties belonged absolutely to the respondents, while the plaintiffs, who included the present respondents, contended that they belonged to a tavazhi, of which the respondents and others were members, and were not liable to be attached.

In this suit the contention of the respondents and their co-plaintiffs was upheld by the Subordinate Judge of Cochin and his decision was affirmed by the Judgment, dated the 2nd March, 1938, of the High Court at Madras. Thus there was a clear decision in a suit to which Subbayya Ayyar, through whom, as will appear, the appellant claims, and the respondents were parties, that the properties in question were not liable to attachment.

On the 25th September, 1919, under circumstances which have not been made clear but, as is not to be disputed, for valuable consideration, the appellant obtained an assignment of the decree in the original suit from Subbayya Ayyar, and, having done so, on the 26th January, 1940, filed an execution petition in the Court of the Subordinate Judge of Cochin for recognition of the assignment of the decree in his favour and for attachment of the rents and profits of the same immovable properties belonging, as he alleged, to the respondents. To this they objected, contending that the petition was barred by the judgment of the High Court of Madras of the 2nd March, 1938. It had there been decided, they said, that the properties belonged to a certain tavazhi and could not be attached, and it followed that the rents and profits of the same properties could not be attached. Upon this petition the Subordinate Judge on the 16th September, 1940, made an order recognising the assignment of the decree but rejecting the prayer for attachment for the reasons given by the respondents. From this order the appellant appealed to the High Court of Madras and before that court for the first time relied on the provisions of the Mappilla Marumakkattayam Act, 1938, by virtue of which, as he alleged, the respondents had separate interests in the properties. The High Court, which consisted of Sir Lionel Leach, C.J., and Lakshmana Rao, J., after observing that the Subordinate Judge had rightly dismissed the application, upon the new point made this comment: "The learned Counsel for the appellant has however attempted to advance a new case. He says that under the provisions of the Mappilla Marumakkattayam Act, 1938, he has the right to attach and bring to sale the shares of the respondents in the tavazhi properties. In the Court below no mention was made of this Act and in the memorandum of appeal there is no mention of it. We are not prepared to allow the appellant to set up a fresh case. To do so would be most unfair to the respondents." It appears that counsel for the appellant had asked to be allowed to withdraw that application for execution and file a fresh one. As to this the Court said "The provisions of Order XXIII of the Code of Civil Procedure do not apply to such applications, but whether the appellant is in law entitled to file a new application is another matter. The question will be decided if and when such an application is made." Accordingly, the High Court by order of the 28th October, 1942, dismissed the appeal.

Thus there was, as it appears to their Lordships, a second clear judicial decision in proceedings, to which the present appellant and respondents were parties, that the properties in question were not liable to attachment.

The appellant, however, did not give up hope and on the 12th January, 1943, filed a fresh petition in the Court of the Subordinate Judge praying for the attachment of the right, title and interest of the respondents in the properties. He relied on the provisions of the Act of 1938 to which reference has been made. To this petition the respondents objected. They claimed that the matter was res judicata between the parties and set up other defences based on the Act of 1938. On the 18th July, 1944, the Subordinate Judge passed a decretal order allowing the attachment

of the right, title and interest of the respondents in the properties. After noticing that the plea of *res judicata* had not been pressed but observing that in any case it was not a valid plea, inasmuch as the liability of the properties to attachment under the Act of 1938 had been raised for the first time in the High Court in 1942, which did not decide the question but left it for future decision, the learned Judge proceeded to examine the position created by the Act and came to the conclusion that under and by virtue of its provisions the respondents had the right to sever their share of *tavazhi* property and accordingly had an interest which could be attached by a creditor.

From this order the respondents appealed to the High Court of Madras and that Court on the 9th January, 1946, allowed the appeal and set aside the order of the Subordinate Judge. The judgment of the Court, which consisted of Horwill and Koman, J.J. was based solely on the ground that the plea of *res judicata* was a valid one. Taking the view from which their Lordships do not dissent, that the plea, being a plea in law, was open in the appellate Court, though it had not been pressed in the lower Court, the learned Judges expressed the opinion that it succeeded. "No doubt" they said, "the ground now urged that the assignee-decree-holder could proceed against the *tavazhi* properties under the Mappilla Marumakkattayam Act was not dealt with on merits in those previous proceedings, but that is a point which the appellant could have raised in his petition in those proceedings and he failed to do so. We are of opinion therefore that the dismissal of the execution petition filed in 1940 operates as *res judicata* in the present case." With these observations their Lordships fully concur. The Act of 1938 had come into operation (if that is a relevant fact) before the earlier petition was filed. Through his own default the appellant did not raise whatever plea he could found upon it until it was too late to do so. Apart from the provisions of Section 11 of the Civil Procedure Code it would be contrary to principle (see *Ram Kirpal Shukul v. Rup Kuari*, L.R. 11, I.A. 37) to allow him in fresh proceedings to renew the same claim, viz., that the properties in question were properties of the respondents liable to attachment or, as he would now put it, that the respondents had severable interests in the properties which are liable to attachment, merely because he neglected at the proper stage in previous proceedings to support that claim by an argument of which he now wishes to avail himself. Upon this ground, therefore, their Lordships would dismiss this appeal, and it is not necessary for them to examine or pronounce any opinion upon the question, which seems to them by no means free from difficulty, what is the nature of the respondents' interest in the properties in question in view of the provisions of the 1938 Act and the course which has been taken under it to have the *tarwad*, of which the *tavazhi* appears to form part, registered as impartible. They would be reluctant in any case to express any views upon such a matter without the assistance of the High Court.

In the circumstances it is sufficient to say that in their opinion this appeal cannot be sustained and they will humbly advise His Majesty accordingly. The respondents have not appeared before their Lordships' Board but the appellant must pay such costs, if any, as they have incurred in the appeal.

In the Privy Council

SHA SHIVARAJ GOPALJI

v.

EDAPPAKATH AYISSA BI AND OTHERS

DELIVERED BY LORD SIMONDS

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