KERALA HIGH COURT

Balakrishna Kurup

Vs

State (Kerala)

Civil Revn. Petn. No. 1517 of 1975

(P. Subramonian Poti, J.)

09.04.1976

ORDER

P. Subramonian Poti, J.

1. Can a child in utero be said to be a minor child? When a woman conceives could it be said that even before the delivery the unborn in the womb is a minor child of such mother? This interesting question arises in this case in the following circumstances :

2. Kerala Land Reforms Act 1963 (hereinafter referred to as the Act) provides, in Chapter III, for the determination of the ceiling area permitted to be held by a person and surrender of land in excess over the ceiling area. The ceiling is determined with reference to a family, an adult unmarried person, or any other person. The family as defined in the Act is an artificial unit consisting of a husband, wife and unmarried minor children. The properties of the members of the family are treated as that of the family for the purpose of determining the ceiling area. If any of the members of the family owns or holds land or a share in land which is joint property, that is treated as the land of the family for the purpose of Chapter III. It is not as if this provision is intended to alter the right of the individual members of the family to the lands assumed to be that of the family for the purpose of determining the ceiling area. The rights in the land continue as before. But the deeming provision in the Act by which the lands belonging to each one of the members of the family as defined in the Act are treated as that of the family is only for the determination of the extent of the land held by such family for the purpose of surrender and for directing surrender of excess land. Ceiling limit is fixed under Section 82 (1) of the Act for a family consisting of two or more but not more than 5 members as 10 standard acres. Where the members of a family consist of more than 5 the ceiling area in standard acres will be larger. Therefore the more the members the larger the ceiling area in standard acres. The property may belong to the father, to the mother or to one of the minor children and may continue to be so. But for the limited purpose of determining the area that is held by the family the property is taken to

be that of the family and if there is excess the family has to surrender. The question that has arisen for determination in this case is whether a family could claim that a child born after 1-1-1970 but conceived at that time could claim to be a member of the family so as to increase the ceiling area by one more standard acre. 1-1-1970 is the date notified under Section 83 of the Act, the date on which the surrender provision became operative. The Taluk Land Board, Tirur, against whose order this revision is filed has held the view that an unborn child is not a minor child who should be taken as a member of the family in determining the ceiling area of the land that could be held by a family. But learned counsel Sri T. Rule Govinda Warrier canvasses for the position that even an unborn child has a legal personality, that it has rights recognized by law and therefore must be treated as a child and so long as it has not attained the age of 18 it is to be further qualified as a minor child and if so it should be reckoned as a member of a family defined in Section 2 (14) of the Act as meaning husband, wife and unmarried children. Unmarried of course, it is, but is it a child and that a minor child?

3. I do not think the enquiry into this case should lead me to consider whether an unborn child is a legal personality. Not that it is difficult to answer, for, except for certain limited purposes law has not recognized an unborn child as the same in all respects as a child born. For certain purposes the existence of a child en ventre sa mere has been recognized in law. Under the Hindu law the right of a child born subsequent to a partition to reopen the partition under certain circumstances is recognized. So is the case with the right to have a share set apart even when the child is in the womb. This is a peculiar incidence of the Hindu law which recognizes a right by birth to children in ancestral property. (Vide para 473 at page 293 of Introduction to Modern Hindu Law by Derret, 1963 Edn., Article 309, Article 372 of Mulla on Hindu Law 13th Edn.). A gift in favor of a person who was not in existence on the date of the gift was not recognized under the Hindu Law (Vide *Tagore v. Tagore*[1], This has been altered by statute law. (Vide paras 359 and 360 of Mulla on Hindu Law). Under the Muslim Law a bequest to a person not yet in existence at the testator's death is void; but a bequest may be made to a child in the womb, provided it is born within six months from the date of the will. This is the only recognition under the Mohamedan Law of a child in utero. Unborn children have been considered to be capable of being benefited by gifts under the English law. This was the view expressed by the House of Lords in *Elliot v. Joicey*[2],

> "..... the potential existence of such a child places it plainly within the reason and motive of the gift'. These words are the words used by Leach V. C. in *Trower v. Butts*[3] and subsequently approved with a defined limitation by Lord Westbury in *Blasson v. Blasson*[4] Both these authorities have, as will appear, been accepted as correct in your Lordships' House."

Fletcher Moulton L. J. in the decision in *De Pass v. Sonnenthal*[5], expressed the same idea thus :

> "..... a child en ventre sa mere is only to be treated as a born child where such

construction is necessary for the benefit of that child."

In the same decision *Farewell L. J. quotes Trower v. Butts*[6], and observes :

[1](1872) 9 Beng LR 377) (PC) [3]((1823) 1 S and S 181) [5](1908) 1 Ch D 4
[2]1935 AC 209 [4](1864-34 LJ Ch 18) [6]((1823) 1 S and S 181)

> "The basis of the rule is that "the potential existence of such a child places it within the reason and motive of the gift."

I may notice here that Leach V-C in *Trower v. Butts*[7], himself notices-

> "It is now fully settled, that a child en ventre sa mere is within the intention of a gift to children living at the death of a testator; not because such a child (and especially in the early stages of conception) can strictly be considered as answering the description of a child living."

4. I have yet to see a decided case where an unborn child has been treated as having a legal personality for all purpose. G. W. Paton in his Text Book of Jurisprudence (4th Edn.) deals with this at page 395 thus :

> "Most systems lay down the rule that, in cases where legal personality is granted to human beings, personality begins at birth and ends with death.
> In the case of birth most systems require complete extrusion from the mother's body-the child in the womb is not a legal personality and can have no rights. For some purposes, however, the maxim 'nasciturus pro iam nato habetur' takes effect. In the civil law the fiction was invented that in all matters affecting its interests the unborn child in utero should be regarded as already born, but English law applies this fiction only for the purpose of enabling the child if it is born to take a benefit."

In spite of the above state of authority I was referring to the contention of counsel that a child conceived but not born has a legal personality in such detail only to do justice to argument of counsel Sri Warrier.

5. A family, as I said, is defined as constituted by the husband, wife and unmarried minor children. 'Minor' is a term defined in the Act in Section 2 (36A) to mean a person who has not attained the age of eighteen years. Can it be said that a child not yet born is a child below the age of 18 years? Age is reckoned only from birth. To say that a child not yet born is of the age below 18 appears to be quite inappropriate. That itself must be sufficient to negative any case that an unborn child should be reckoned for the purpose of calculating the number of members of the family. The argument that if an unborn child is left out of reckoning it will suffer harm is, I am afraid, to strike a false note. The provision in Section 82 and particularly sub-sections (2) and (3)

of that section are not intended to confer rights on any particular member of the family. It is not intended to divest ownership from one member and vest it in another member of the family. Ceiling has to be determined in terms of extent and for that purpose even the extent to be held by an individual is determined on the basis of owning or holding of property by an artificial unit. It is in the calculation of that extent that the membership of the family is relevant. It does not mean that once a person becomes a member of a family he would get the right to property which otherwise, he has not. The right of no person *inter se* is affected by this determination. Hence it cannot be said that an unborn child would be losing some right to property when it is born if it is left out of account. If it would obtain any right to the property

[7]((1823) 1 S and S 181)

on birth that would continue to be so irrespective of any determination for the purpose of ceiling Whatever that be, on the plain language of the term 'family' as defined in the Act one sees no reason to style a child conceived but not born as an 'unmarried minor child'. Hence the contention of the petitioner that it should be so designated and the ceiling area fixed accordingly must necessarily fail.

6. A contention said to be urged in the alternative in the revision memorandum is pressed before me and that is that one Chandrasekharan Nair, one of the sons of the first petitioner is to be treated as a member of the family since his date of birth was 2-1-1952 and therefore he was a minor on 1-1-1970. If so calculated one more standard acre will have to be added to the ceiling area of the family. This plea was not accepted by the Taluk Land Board evidently for good reason. The file shows that before the Land Board the Secondary School Leaving Certificate of Rajan C and Sarada C, brother and sister of Chandrasekharan Nair had been produced. Those certificates showed the date of birth of the younger brother of Rajan C to be 15-7-1952. If he was born on 15-7-1952 his elder brother could not have been born on 2-1-1952. There is no case that he was born to another wife. Even in the objection filed by the petitioner the specific case is that Chandrasekharan Nair was a major on 1-1-1970. The contention now raised in the revision petition is against the case in the objection petition. There cannot be any complaint that a case contrary to that in the objection was not considered by the Taluk Land Board. Hence there is no complaint available to the petitioner to be urged in revision in this matter. The Original Petition is dismissed. In the circumstances of the case, parties are directed to suffer costs.

Revision dismissed.