

(1939) 01 MAD CK 0038
In the Madras High Court

Aryakkandi Kunhi Kannan

APPELLANT

Vs

Kottiath Vazhayil Devaki and Others

RESPONDENT

Date of Decision : 26-01-1939

Acts Referred:

Limitation Act, 1908 — Section 6

Citation : AIR 1939 Mad 907 : (1939) 50 LW 562 : (1939) 2 MLJ 619

Hon'ble Judges : Stodart, J

Bench : Division Bench

Judgement

Stodart, J.—This second appeal involves the decision of an interesting question of law. The appeal arises out of a suit to set aside alienations

of property belonging to a Malabar tarwad and to recover property. There were three such alienations, but at the hearing of this appeal only one

remains in controversy, namely, a gift to certain persons evidenced by a registered gift deed Ex. A in the suit. The persons who-executed that deed

were Arayakandy Kottiah Kannan executing, it as karnavan of the tavazhi, secondly his niece Arayakandi Kunhimani and lastly Kannan purports

to execute it on behalf of Kunhi Kannan the present plaintiff who was then a child of 4 years. That gift in form is a gift by all the existing members of

the tarwad or tavazhi. Kannan described in this document as the karnavan died in 1919 and his niece Kunhimani was left in sole management of

the tarwad property. The plaintiff came of age in 1927 and he filed the suit now under appeal in 1930 within three years of his attaining majority.

He files the suit in the capacity of karnavan of the tarwad and he impleads as the first defendant his aunt Kunhimani as being the only other member

of it and the suit is, as I have said, to recover the property on behalf of the tarwad. Both the Courts have held that the gift as such could not be

supported, but in the lower appellate Court the learned Subordinate Judge, differing from the trial Courts, held that the plaintiff's suit was barred

by time. This second appeal is that the lower appellate Court was wrong.

2. The gift was taken as having been effected on the date of Ex. A, namely, on the 14th January, 1913, and the time for filing a suit was taken as

being 12 years in accordance with the provisions of Article 142 of the Limitation Act; the suit therefore should have been brought before the 14th

January, 1925. But on that date the plaintiff was, as I have explained, a minor and u/s 6 of the Indian Limitation Act he was entitled to bring the suit

within three years of his attaining majority. There is no dispute about that. Other things being equal the provisions of Section 6 of the Limitation Act

certainly apply to the plaintiff. But the learned Subordinate Judge has held that the plaintiff's case is governed by Section 7. In other words, this

was a case where there was a person entitled to institute the suit jointly with the plaintiff who could give a discharge without the concurrence of the

plaintiff. That person according to the learned Subordinate Judge is no other than Kunhimani, the aunt of the plaintiff who was a party to the gift

deed, and who admittedly took no steps to set it aside.

3. The ground of this appeal is twofold. First, Kunhimani having herself executed the gift deed could not bring the suit on the same title as the

plaintiff. She could not file a suit as a junior member of the tarwad to set aside an alienation made by the karnavan without her consent. She would

have had to plead in addition that her consent had been obtained by, force or fraud or in some other way sufficient to avoid the contract so far as

she was concerned. The second argument is that Kunhimani could not give a discharge within the meaning of Section 7 of the Limitation Act

without the concurrence of the plaintiff.

4. I agree with the learned Counsel for the appellant in respect of the first ground. I do not see how Kunhimani and the plaintiff can be held to be

jointly entitled to file a suit when the position of Kunhimani relative to this gift is entirely different from that of the plaintiff. That to my mind is the

fundamental difficulty with which the respondent is faced in endeavouring to apply to the case the provisions of Section 7. Learned Counsel for the

respondent contends however, that in 1919 Kunhimani became the karnavathi herself and in that capacity, ignoring all together the fact that she had

joined in the gift, she could have filed a suit to set it aside. No case is cited in support of this interesting contention. There are cases in which it has been held that the position of a karnavan in a Malabar tarwad is not analogous to that of a trustee and I should hesitate to say that the karnavan in all cases has the power which a trustee has under the common law of suing to prevent injury to the trust property even when that injury has been caused by his own act. But taking the proposition as it stands, namely, that when a person comes into the position of a karnavan he can sue to set aside his contract made before he attained that position, without pleading that his consent was obtained by illegal means, there is, as I have said no authority, and I think that such authority would be available if the point had ever been decided in the sense contended for by the learned Counsel for the respondent. After all, much property is held in this country by senior members of Hindu families representing not only themselves but the junior members who have a joint interest in the property. If a suit had ever been filed by a family manager to set aside his own act done before he became the manager and if that suit had been decided in his favour otherwise than on the ground that he had been illegally induced to do the act the case I think would have reached one or other of the High Courts and would have been available in the law reports. On this first point therefore I hold that the plaintiff and Kunhimani were not jointly entitled to file a suit of this nature because Kunhimani, in addition to pleading that she was a junior member of the tarwad, would have had to plead that her consent to the gift was not voluntary but had been obtained by illegal means. The learned Subordinate Judge thought that because a suit of this nature could be filed by Kunhimani, therefore she was jointly entitled within the meaning of Section 7 along with the plaintiff to file a suit to set aside this gift. My finding on that point is that I am in entire agreement with the learned Counsel for the appellant that so far as the capacity to file a suit is concerned, the title of Kunhimani who executed the document and the title of the plaintiff who was not a party to it are not joint but separate and distinct.

5. The second ground is I think even more cogent. It is contended by learned Counsel for the appellant that Kunhimani could not, within the meaning of Section 7, have given a discharge without the concurrence of the plaintiff. The expression ""giving a discharge"" must I think mean with

reference to the facts of this case ""remaining silent until the time to question the gift by suit had expired."" There is no doubt that Kunhimani did this

but, as contended by the learned Counsel for the appellant, in doing so she cannot be held to have acted with the concurrence of the plaintiff nor

can her failure to take the necessary action be regarded by itself as sufficient to perfect the title of the donees. In the case reported in Ganga Dayal

v. Mani Ram I.L.R.(1908) 31 All 156, it was held that as between two brothers in a joint Hindu family the elder by failing to file a suit to set aside

an alienation had not thereby given a discharge which was binding on his younger brother. It was held on the contrary that the latter was entitled to

sue under Section 6 of the Indian Limitation Act within three years of his attaining majority. The learned Judges in that case (Mr. Justice Richards

and Mr. Justice Griffin) held that the elder brother was not capable of giving a discharge without the concurrence of the younger and if I may say

so with great respect, I agree with those Judges. Where there are joint owners of property each being entitled to the whole equally with the others,

I do not see how the negligence of one can take away the statutory rights of the rest. The Privy Council to which the case just cited was appealed

have not discussed the point in any detail. The respondent did not appear in the Privy Council and the decision was ""on the question of limitation

their Lordships concur with the High Court."" A case has been cited of a Bench of this Court consisting of Mr. Justice Sadasiva Aiyar as he then

was and Mr. Justice Napier in which the former construed Section 7 of the Limitation Act in the same sense as the learned Subordinate Judge has

done here. That case was even stronger than the present case. The first defendant in that case had executed the document as the karnavan of the

tarwad and Mr. Justice Sadasiva Aiyar held that provided that he alleged that his consent was fraudulently obtained he could have filed the suit to

set aside the alienation and on that account must be deemed to be a person jointly entitled with the plaintiff who was a junior member of the

tarwad. Mr. Justice Napier did not agree with that opinion and it is not apparent how the question u/s 7 of the Limitation Act came to be discussed

by Mr. Justice Sadasiva Aiyar, for it was not necessary to the decision of the case. With great respect I find it impossible to concur in that opinion.

Section 7 of the Limitation Act is a disabling section. Section 6 confers on persons who are entitled to property or interests in property and who

are incapacitated from suing out their rights in Court, the right to file suits within a reasonable period after the incapacity has disappeared. Section 7

so far as it takes away that right must I think be strictly construed and before dismissing the suit of a minor which is in time within the meaning of

Section 6 the Court should be quite certain that the disabling provisions of Section 7 apply to his case.

6. The second appeal in respect of the gift evidenced by Ex. A is allowed. In other respects the appeal has not been pressed and it is dismissed.

Each party will bear his or her own costs throughout.

7. Leave to appeal is granted.