

(1916) 08 MAD CK 0020
In the Madras High Court

Ayiroor Swaroopathinkal Ayiroor Malika Kovilakath Randaman
Kunhunni alias Ravi Varma Rajah Avergal and Others

APPELLANT

Vs

Kannamkulath Madhathil Ramasubramania Pattar and Others

RESPONDENT

Date of Decision : 08-08-1916

Acts Referred:

Transfer of Property Act, 1882 — Section 59

Citation : (1916) 4 LW 576 : (1916) 31 MLJ 733

Hon'ble Judges : Sadasiva Aiyar, J;Ramachandra Aiyar, J;Oldfield, J;Mr.
Ramachandra Aiyar, J

Bench : Full Bench

Judgement

Oldfield, J.—This suit was brought by the plaintiffs appellants, to recover property on behalf of a Devaswom alleged to be the property or

to be under the management of themselves and defendants Nos. 9 to 11 ; and the main defence was that the property is held by the 1st defendant

on a valid mortgage, which is still outstanding.

2. The facts are that the property was first mortgaged by the predecessor of the 9 th defendant, the present Karnavan of the Kovilagam, in 1905

under Exhibit I ; and that 9th defendant compromised a suit, which he brought in 1908 to set Exhibit I aside on obtaining modifications of certain of

its terms, which are embodied in Exhibit L. The first contention before us is that Exhibit 1 superseded the original mortgage Exhibit I, but created

no fresh mortgage relation and that the property, thus freed, should therefore be restored to plaintiffs.

3. Exhibit 1 is executed only by the 1st defendant, the mortgagee ; and, if it purported to supersede Exhibit I and were relied on as constituting the

mortgage relation between the parties, Section 59 of the Transfer of Property Act

would no doubt negative the possibility of its doing so. But its terms preclude that argument. For they do not provide explicitly or implicitly for the supersession of Exhibit I, either entirely or by modification of any of its essential conditions.

4. First as to total supersession, some attempt has been made to show that the plaintiffs themselves assumed in their pleadings that Exhibit 1 was the only document, by which the suit property was bound. But this is unsustainable in view of the references to Exhibit I as well as Exhibit 1 in plaintiff paragraphs 5, 11 and 16. The arguments from the actual terms of Exhibit 1 rest on the verbatim translation of its recital that "" the 1st defendant is now holding the mortgage properties, which he was holding under Exhibit I, "" the implication suggested being that he has ceased to hold them under it. But there is no direct reference to his holding in future under any new document or under Exhibit L. On the contrary Exhibit 1 is hardly intelligible except on the assumption that some earlier document is still in force; and it refers expressly to Exhibit I in connection with an acknowledgment regarding the extent of the mortgage period, which has yet to run. The terms moreover of the compromise petition, Exhibit IV, filed contemporaneously with the execution of Exhibit L, included nothing regarding the cancellation of Exhibit I and provided for the dismissal of the suit for that relief. All this indicates that, consistently with the evident intention of the parties, the portion of Exhibit 1 quoted above really provides for the 1st defendant still holding the properties, which he was holding, under Exhibit I and involves no suggestion that he has begun to hold under any other document.

5. Then as to the particular terms modified, the plaintiffs' argument fails because the modifications do not amount to changes in the obligations of the mortgagor, to which his consent would be necessary, but only to an agreement by the mortgagee not to insist on his original rights in their entirety, the case being one of remission u/s 63, not of novation u/s 62 of the Indian Contract Act. The modifications consist in (1) a reduction of the principal amount secured as repayable to the 1st defendant (2) a reduction in the share of the annual produce, which he is entitled to retain, the nachavaram payable to the mortgagor being enhanced, (3) the release of one item of the mortgaged property. The effect is therefore that the

mortgagee foregoes rights for the mortgagor's benefit, not that the latter cancels an old or makes a new mortgage. Plaintiffs therefore must fail on this contention.

6. Their next argument is that the Lower Appellate Court erred in dealing with their objections to the mortgage based on the absence of proved necessity for it and of good faith on the part of the 9th defendant and his predecessor or due enquiry by the 1st defendant, because it considered only the circumstances immediately connected with Exhibit 1 and the those connected with Exhibit I and the validity of the objections to it, which under the compromise were withdrawn. The circumstances in question certainly bulked largely in the judgment of the District Munsiff; and the Lower Appellate Court conceded that the compromise would bind the Devaswom only if it was made bona fide and, finding that it was, did not deal with the question of the 1st defendant's enquiries. Its finding however was based on (1) the absence of evidence to prove the allegation of collusion and corruption and (2) the terms of Exhibit L. It referred to the validity of Exhibit I in two connections only, with reference to (1) the giving up by the 1st defendant of a large sum due under Exhibit I and (2) his failure to produce the original accounts, which would have supported the claim, in satisfaction of which Exhibit I is alleged to have been given.

7. This investigation of the good faith of and necessity for the compromise must be held inadequate. For it cannot be assumed that, because one party withdraws a large proportion of his original claim, the result is advantageous to the other, unless the prospects of the contest regarding the balance are considered and found unfavourable: and the reference to the 1st defendant's surrender of his accounts overlooked the facts that the burden of proof regarding the propriety of the compromise was on him and that the copies he produced as secondary evidence were subjected to severe criticism. Certainly the good faith of and necessity for a compromise can be upheld, although proof may be wanting that its terms represent those, which would have been secured, had the matter been litigated fully. But the decision as to good faith and necessity must be reached, as it was the parties' duty to reach it, on a comprehensive survey of the circumstances, Such a survey of the Lower Appellate Court failed to make, since it attempted no conclusion as to the foundation of the whole dispute, the

validity of Exhibit I or as to the 1st defendant's prudence in abandoning his claim for its cancellation in toto.

8. The foregoing disposes of the defendants' contention regarding the Lower Appellate Court's decision as to the good faith of the compromise.

They have further argued that the decision was unnecessary, because the 9th defendant and his predecessor were under no special obligation and

the compromise must be upheld in the absence of proof of any of the reasons, for which contracts are ordinarily set aside. There is a question, to

be dealt with later, as to the character, in which the 9th defendant and his predecessor carried out these transactions, whether they did so as

[Trailer Trustees of the Devaswom, a public temple, or merely as karnavans of the Kovilagam, of which the temple was the private property. But it

is unnecessary to decide at present in which capacity they acted, since the authorities show that a karnavan's transactions can be upheld in the

absence of the consent of other members of the tarwad, only if they were effected in good faith and for necessity ; and it is unnecessary to cite

cases to show that as much must be proved, if trust property is in question. It is true that in *Eravanni Revivarman v. Ittappa Revivarman* ILR

(1876) M. 153 and in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* ILR (1880) M. 328 the Court refused to describe the

karnavan as a trustee but it fully recognised his special responsibility to other members of the tarwad, in the one case comparing him with the father

of a Hindu family and in the other reiterating his obligation to act in good faith. Vide also *Kombi Achen v. Lakshmi Amma* ILR (1882) M. 201 and

Ramunni v. Kerala Varma Raja ILR (1881) M. 166 Authority accordingly justifies the Lower Appellate Court's opinion that proof of good faith

and necessity on the part of the 9th defendant and his predecessor is necessary. It follows that in its absence the 1st defendant must prove that he

made due enquiries. The case must therefore go back to the Lower Appellate Court for rehearing on this point.

9. Lastly the defendants support the Lower Appellate Court's decision on the ground that the plaintiffs had no right to sue, because, the trust being

of a public temple, they are not the Urallars ; and they rely on *Appu Pattar and Another Vs. Sri Kurumba Bhagavati Devaswom Uttama*

Panampalli Kurumba Umma and Others, and Chathappa Nambiar v. Komman

(1911) 2 L.W. 61. The plaintiffs in reply allege that they never pleaded and do not admit the public character of the Devaswom. The facts are that in the plaint the establishment was described as a Devaswom without further qualification ; and it might be a question whether that description is compatible with private ownership. Though however the 1st and 9th defendants in paragraphs 14 and 3 of their respective written statements raised the objection now under consideration, no issue was framed and no argument on it was attempted in either of the Lower Courts. The Lower Appellate Court in fact made the first reference to the 9th defendant and his predecessor as Uraller in its judgment. In the circumstances, there is no reason for allowing defendants to rely for the first time at this stage on an objection, to substantiate which fresh evidence would be necessary. The result is that the Lower Appellate Court's decision must be set aside and it must be directed to rehear the appeal in the light of the foregoing. It will in particular deal with the question whether the compromise between the 9th defendant and the 1st defendant can be sustained with reference, not only to Exhibit L. and its immediate circumstances, but also to the validity of Exhibit I and the 9th defendant's prospects of success in his suits for its cancellation. If it finds that the 9th defendant and his predecessor acted in bad faith it will further decide whether the 1st defendant acted in good faith and after due enquiry in dealing with them.

10. Costs to date will abide the result of the further hearing and will be provided for in the decree to be passed.

Sadasiva Aiyar, J.

11. Twelve out of the fifteen plaintiffs are the appellants before us. It is necessary to set out the following facts to understand the points for decision.

12. The plaintiffs' tarwad owns a private family temple called Thichukavu Ayyappan Devaswom. The Karnavan of the family was as usual the trustee of this private religious trust.

13. Eleven items of land belonging to this trust were mortgaged in September 1905 by the then karnavan to the 1st defendant under Exhibit I for

Rs. 360 for a term of 24 years, it being mentioned in the document that Rs. 300 out of the consideration of Rs. 360 was the amount found due to

the 1st defendant on a settlement of the account of the sums spent by the 1st

defendant in managing the temple affairs as manager under the karnavan.

14. Soon after the death of that karnavan, the 9th defendant became the karnavan of the plaintiff's tarwad and the trustee of the temple. As such, he brought O.S. No. 258 of 1908 to set aside the mortgage of 1905 as not binding on the Devaswom. But the 9th defendant and the 1st

defendant compromised that suit of 1908 and filed a joint petition, Exhibit IV, in the District Munsif's Court to the following effect: "" The plaintiff

(the present 9th defendant) ""having now been convinced that the amount due under the suit mortgagedeeds"" (of 1905) "" is really due, the parties

(the present 9th defendant and the present 1st defendant) ""have settled the matter on the following terms "" viz.,

(1) the defendant released item 10 of the 11 mortgaged items from the mortgage ;

(2) the 9th defendant was to recover the same with arrears of rent, Rs. 8-7-0, from the 1st defendant;

(3) the remaining items were to be charged with a mortgage debt of Rs. 288-7-0 only instead of Rs. 360 ;

(4) the defendant was to hold them for the period mentioned in Exhibit I, the document of 1905 ;

(5) the porapadrent, paddy and cash, were to be slightly increased;

(6) the 1st defendant was to give up his alleged kuzhikanam right to nine cocoanut trees standing inside the walls in item 1 ;

(7) the 1st defendant was to pay the 9th defendant interest at 12 per cent. per annum on the arrears of rent ;

(8) the 1st defendant was not to claim the value of improvements in respect of eighteen cocoanut trees belonging to the 9th defendant in item 9 ;

(9) the 1st defendant was to execute a kaichit to the 9th defendant on the terms set forth above and

(10) the Suit No. 258 of 1908 was to be dismissed as the parties had thus compromised their disputes.

15. On this petition, that suit was accordingly dismissed. The 1st defendant in accordance with the terms mentioned in the above petition, Exhibit

IV, executed a registered kaichit, Exhibit L, in favour of the 9th defendant on the 12th October 1908 in which the 1st defendant acknowledged

that only Rs. 288-7-0 was due to him as mortgagee, that he had to pay the higher porappad mentioned in the compromise and that he had to enjoy

the property for the 21 years still remaining under the document Exhibit I of 1905 (which mentioned a term of 24 years)....

16. The present suit (O.S. No. 731 of 1910) out of which this second appeal has arisen was brought to set aside both the mortgage of September

1905 (Exhibit I) and the kaichit, Exhibit L, of 1908, on the contention that they were not binding on the plaintiffs" tarwad.

17. The District Munsif decreed the suit substantially in plaintiffs" favour on the following findings:

(1) It is not proved that the Devaswom owed the first defendant Rs. 360 as mentioned in Exhibit I of 1905. Exhibit I is not a bonafide transaction,

especially as the improvements belonging to the Devaswom on the date of Exhibit I are not specified in it.

(2) The compromise, Exhibit IV and the kaichit, Exhibit L, are also not binding on the plaintiffs" Devaswom. (The District Munsif seems not to

have kept the question of the binding nature of the first mortgage of 1905 and the question of the binding nature of the compromise and of the

kaichit of 1908 distinct in his mind when he wrote his judgment. I also find that no separate issue was raised about the compromise and the kaichit.

The first issue, viz., "" Is the mortgage in question not binding on the plaintiffs "" was evidently treated in the District Munsif s Court as covering that

question also).

18. On the 1st defendant"s appeal from the decision of the District Munsif, the Court of the Temporary Subordinate Judge of Palghat reversed the

District Munsif"s decision and dismissed the suit on the following conclusions.

(1) The compromise under Exhibit IV of the Suit 258 of 1908 made by the 9th defendant who was the then karnavan, is binding on the Devaswom

because the compromise was bonafide.

(2) The plaintiffs are not entitled to bring the suit because they are the junior members of their tarwad and because the 9th defendant alone is the

Urallan of the Dewaswom.

19. I think that the Subordinate Judge"s decision on the 2nd point on which also he based the dismissal of the plaintiffs" suit cannot be supported.

So long ago as in September 1893, Sir T. Muthuswami Aiyar, J. and Mr. Justice

Best assumed, without question, that the junior members of a tarwad to which a private temple belonged could bring a suit to protect the Devaswom against an alienation made by the karnavan trustee. See Appu Pattar and Another Vs. Sri Kurumba Bhagavati Devaswom Uttama Panampalli Kurumba Umma and Others, . The decision in Chathappa Nambiar v. Komman (1914) 2 L.W. 61 relied on by the 1st defendant related to a public temple and as regards such a temple, the junior members belonging to the tarwad of the trustee stand in no better position than any other member of the public and hence they cannot recover the properties on behalf of the public temple without bringing a suit u/s 92 of the CPC for removal of the trustee from his position as trustee and for the appointment of a new trustee, such new trustee so appointed being the proper person to be put in possession of the properties alienated by the previous trustee. That case, therefore has no application to a private temple belonging to a particular tarwad or to particular tarwads alone.

20. As regards the first point, the learned Subordinate Judge held the compromise under Exhibit IV to be a bona fide one for the following reasons

: (a) there was no evidence that the compromise was brought about by collusion between the defendants 1 and 9 or that the 9th defendant

received any illegal gratification (b) the porappad was increased; (c) a portion of the mortgage amount mentioned in the document of 1905 was

given up by the 1st defendant; (d) the fact that the improvements belonging to the plaintiff's tarwad are not specified in Exhibit L, was not very

material as it is not usual to insert all the improvements in such documents ; (e) the fact that a new mortgage was not taken from all the adult male

members and that the kaichit was executed by the 9th defendant alone is not against the bona fides of the compromise and the kaichit, because in

the case of a Devaswom, the Karnavan has the sole power and the Devaswom property was not tarwad property; (f) the defendants 10 and 11,

the junior members of the tarwad who managed the Devaswom, have consented to and ratified the terms of Exhibit IV.

Mr. Ramachandra Aiyar, J.

21. (if I understood him aright) argued

(1) That the compromise made by a trustee of a private Devaswom is not binding on the Devaswom even though the compromise was bonafide

unless it was also shown to be for the benefit of the trust.

(2) That the reasons given by the Subordinate Judge in support of the validity of the compromise are not legally sufficient;

(3) That the Subordinate Judge ought to have gone into the question whether the original mortgage of 1905 was binding upon the Devaswom, as a

conclusion on that question was of cogent relevancy in arriving at a proper decision on the bona fides of the compromise Exhibit IV.

22. Before considering these arguments, it would be convenient to dispose at once of another contention put forward by Mr. Ramachandra Aiyar,

viz., that raised in the second ground of Appeal, as follows:--""The plaint mortgage, not being in writing registered and attested as, required under

the law, is invalid and the mortgagee could acquire no right under it."" By ""the plaint mortgage,"" Mr. Ramachandra Aiyar stated that the kaichit of

October 1908 was intended. He argued that that kaichit was a fresh mortgage superseding the earlier mortgage of 1905 and that as it was not

executed by the mortgagor, (the plaintiff's tarwad), no new mortgage was legally created. He relied upon Section 59 of the Transfer of Property

Act which says "" that a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."" I

am at a loss to understand what benefit the appellants could hope to obtain even if this contention was upheld. If Exhibit 1 is invalid, then Exhibit I,

the mortgage of 1905, which contains the more onerous conditions which were sought to be modified by Exhibit L, remains without any such

modification. Further Exhibit 1 in my opinion is not a new mortgage at all. It is only a subsequent agreement by which the mortgagee, the 9th

defendant, agreed to give up in favour of the mortgagors some of the benefits which he obtained under Exhibit I, leaving the terms of that mortgage

in full force in other respects; in other words, the mortgage, Exhibit I, has not been cancelled by Exhibit 1 but only modified in favour of the

mortgagor. A document effecting such a modification is not a new mortgage and hence Section 59 does not apply.

23. Coming back then to the question of the bona fides of the compromise, Exhibit IV and its validity against the tarwad, Section 43 of the Trusts

Act says that "" two or more trustees acting together may... compromise, compound, abandon, submit to arbitration or otherwise settle any debt,

account, claim or thing whatever relating to the trust"" and that "" the powers conferred by this section on two or more trustees acting together may

be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is. authorised to execute the trusts and powers thereof.

This section was evidently copied from Section 30 of Lord Cranworth's Act which was reenacted in the wider Statute 53 and 57 Victoria chapter

33 (see Section 21). Though the Indian Trusts Act does not apply to public or private religious endowments, (see Section 1 of the Act), I think

that the principles embodied in Section 43 apply to a trustee or trustees acting on behalf of a private religious trust also. The powers of a trustee

embodied in that section are enunciated primarily to protect him when acting bona fide against suits for damages by the cestui que trust for loss

caused by the exercise of such powers. But the question whether property alienated to a third party by the trustee through an alleged breach of

trust can be pursued successfully by the cestui que trust depends on very similar considerations, namely, whether the third party acted bona fide

without notice of the breach and whether he was an alienee for valuable consideration. (See Lewin's Law of Trusts, 12th Edn., page 1113). Mr,

Ramachandra Aiyar relied upon the case in Bhogaraju Venkatrama Jogiraju v. Addepalli Seshayya ILR (1911) M. 560 decided by Benson and

Sundara Aiyar, JJ, in support of his contention contra. The judgment in that case contains the following passages : "" A decree passed against the

holder of a woman's estate on compromise between her and her creditor would be binding on the reversioners only in cases where the contract or

compromise itself entered into by her would bind them. An adjudication against her by a Court after a fair contest with respect to a matter relating

to the estate represented by her would no doubt be binding on the estate and all who succeed her as its owners, but a decree passed upon a

compromise into which she enters can have no higher effect against her successors than a contract entered into by her. Kambinayani Javvaji

Timmaji Amma Garu and Others Vs. Kambinayani Javvajee Subbaraju Nayanivaru and Others, Subbammal v. Avudaiyammal ILR (1906) M. 3

Roy Radhakissen v. Nauratan Lall (1907) 6 C.L.J. 490 and Appeal No. 193 of 1907 decided by this Bench."" Speaking for myself, I think that the

powers of a Hindu widow to compromise litigation launched against her as representative of her husband's estate so as to bind the contingent

reversioners have been rather too narrowly enunciated in the above passages. Subbammal v. Avudaiyammal 3 was not the case of a compromise

but was the case of a decree obtained against the widow without contest. I do not see how that case supports the view that a compromise decree

is not valid against the reversioners or that there should be a fair contest by the widow before an adjudication against her is binding on the

reversioners. I am inclined to hold that if the widow is sued as representative of the estate and if she bona fide enters into a compromise of that

litigation, that compromise is binding on the reversioners. However, that decision does not directly govern the present case and the analogy

between the case of a Hindu widow representing her husband's estate and the case of a trustee of a religious institution is rather remote.

24. In Tudor on Charities and Mortmain (4th edition, page 378), it is laid down generally "" A question relating to the interests of a charity may be

compromised. Thus in several cases a compromise of the question whether a charitable gift is good... has been confirmed by the Court."" But it is

said at page 379 ib. "" The Court will not act in accordance with an award in charity cases without the consent of the Attorney General."" In England

charitable trusts are mostly governed by the provisions of the numerous Charitable Trust Acts (enacted between 1353 and 1894) and the Attorney

General has large powers of advice and control and in the initiation of Court proceedings in the matter of charitable trusts. Similar provisions have

not been enacted by the Indian Legislature and it is therefore necessary for Courts in India to scrutinise alienations by compromise and awards out

of Court made in reference to properties relating to religious and charitable trusts with very great care before they are accepted as valid against the

trust. In the present case, the good faith of the 1st defendant and of the deceased trustee in the matter of the execution of Exhibit I and the good

faith of the 1st and 9th defendants in entering into the compromise Exhibit IV are in question and I agree with my learned brother that the case must

go back to the Lower Appellate Court for a fresh decision and I agree also in his order as to the costs incurred up to date.