
(1961) 10 KL CK 0018
In the High Court Of Kerala
Case No : S. A. No. 1037 of 1957

Chandrasekhara Pillai and Others

APPELLANT

Vs

Koshy Kochu Koshy and Another

RESPONDENT

Date of Decision : 27-10-1961

Acts Referred:

Contract Act, 1872 — Section 64, 65

Citation : (1961) KLJ 1226

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : P.G. Parameswara Panicker, for the Appellant; T.S. Krishnamoorthy Iyer, Respondent No. 1, for the Respondent

Judgement

M. Madhavan Nair, J.—This second appeal is by the plaintiffs in a suit to set aside a sale of their tarwad property. The facts are as follow: Plaintiffs 1 and 2 and the 3rd defendant are the children of the 2nd defendant, and plaintiffs 3 to 5 the children of the 3rd defendant. They thus constituted one tavazhi. To this tavazhi was allotted the suit property, being one-half of 2 acres 95 cents in S. No. 29/4 in Thripperunthura village, at the partition of their main tarwad held in the year 1102 M. E., the other half of the property being allotted to the tavazhi of a sister of the 2nd defendant. On 15-9-1117 defendants 2 and 3, who were then the only adult members in 2nd defendant's tavazhi, executed a sale of the suit property to the 1st defendant for a consideration of Rs. 8621/2, in conjunction with the other tavazhi who sold their share also to the same buyer, the common deed of sale being Ext. I in this case. According to the plaintiffs the sale of the suit property belonging to their tavazhi was not supported by consideration or tarwad necessity and therefore was invalid. The plaintiffs therefore prayed that the sale be set aside and the property allowed to be recovered with mesne profits. The alienee contended that the sale was to the manifest advantage of the plaintiffs' tavazhi and supported by adequate consideration and therefore binding on the plaintiffs. The Munsiff found the sale not supported by tarwad necessity and therefore decreed the suit, allowing recovery of property with mesne profits at

70 paraahs of paddy per annum. The Subordinate Judge, on appeal by the 1st defendant, reversed the same and dismissed the suit with costs throughout. Hence this second appeal by the plaintiffs.

2. The consideration for sale of the suit property as per Ext. I was Rs. 8621/2 made up of a cash consideration of Rs. 10/- and a sum of Rs. 7891/4 to be advanced for an assignment, Ext. II, in the name of 2nd defendants tavazhi, of a mortgage on a property belonging to Velayudha Kurup the husband of the 2nd defendant, and Rs. 631/4 for paying for a puravaippa Ext. III taken from Velayudha Kurup in regard to the same property. It is thus seen that excepting the cash consideration of Rs. 10/- the rest of the price was for investment on a mortgage of property that belonged to Velayudha Kurup, the husband of the 2nd defendant and the father of plaintiffs 1 and 2 and the 3rd defendant. The Munsiff held:

Ext. I property was larger in extent and was yielding adequate profits. To part with that property and go in for a mortgaged property under Ext. II is not, in my opinion advantageous to the plaintiffs" sakha tarwad.

The Subordinate Judge was of the view:

The property covered by Ext. II is less in extent than the plaint property. While the plaint schedule property measures 1 acre and 471/2 cents, the property covered by Ext. II is only 1 acre and 6 cents. But the evidence adduced in the case shows that the income from the property covered by the mortgage deed was greater than that from the plaint property. The evidence of D. W. 1 shows that whereas the plaint property is 4 miles away from the tarwad house of the plaintiffs, the property covered by Ext. II was only 2 miles away ... From the date of execution of Exts. I to III defendants 2 and 3 and their children were in possession of the property covered by Ext. II and they were taking the income therefrom. The plaintiffs have enjoyed the benefits on account of the execution of Ext. I. ... I find that Ext. I is fully supported by consideration and necessity binding upon the tarwad of the plaintiffs and defendants 2 and 3.

3. Counsel for the alienee relied on *Gourikutty Pilla Thankachy v. Velayudhan Pilla* (1957 K. L. T. 577) and contended that the sale of tavazhi property for the purpose of acquiring a mortgage interest was for a legal necessity binding on the tavazhi and supported the reasons accepted by the Subordinate Judge to find its validity.

Reliance was also made on the attestation, indicative of approval, of the impugned transaction by Velayudha Kurup, who was very much interested in the welfare of his wife and children as has been proved by the gift; Ext. VII, he made in their favor on 11-2-1124, two years after the institution of the present suit. That Velayudha Kurup is interested in the welfare of the 2nd defendant's tavazhi or that he approved and attested the alienation is of little relevance in Considering the validity of the alienation for which specific tests have been enunciated by statute.

Section 25 of the Travancore Nair Act says that no sale of tarwad property would be valid unless supported by consideration, tarwad necessity and the written consent of all adult members of the concerned tarwad. Absence of any one of these factors would therefore invalidate the alienation. It is not disputed before me that the impugned alienation was by all the adult members of the tavazhi and was supported by consideration. So the only question is whether the alienation was supported by tarwad necessity. Even the ruling cited by counsel for the alienee, 1957 K. L. T. 577, has held "the vendees are bound to prove consideration as well as necessity" to sustain the alienation. It then follows that, if the impugned sale was not supported by tarwad necessity, whatever be its virtue otherwise, it has to fall invalid.

4. The only necessity for executing Ext. I sale was to advance money for obtaining a mortgage right in certain properties of Velayudha Kurup. Counsel contended that this amounted to a legal necessity according to the dictum in 1957 K. L. T. 577. That precedent does not, in my reading, support the proposition advanced by counsel for the alienee.

5. It is trite say that every judicial dictum must be appreciated in the light of the facts in relation to which it was made and the generality of expressions found therein should be taken not as absolute propositions of law, but as circumscribed and qualified by the circumstances in which such expression came to be. See *Narayanan v. State* (1961 K. L. T. 835).

In the 1957 K. L. T. case the property of a Marumakkathayam tarwad was sold for Rs. 100, out of which Rs. 75 were received in cash "for providing livestock for the cultivation of the rest of the properties" of the tarwad, and Rs. 25 were "reserved for redemption of a mortgage" but subsequently collected by the vendor, the plaintiffs' mother, as "she urgently required money for the treatment of her children who were ill." On these facts the learned Judge held "... there is no difficulty in holding that the sale transaction was bona fide, one fully supported by legal necessity. It may be mentioned that this court has held that even the sale of tarwad property for the purpose of acquiring mortgage interest may in certain cases amount to legal necessity binding on the tarwad."

It is not laid down there that the acquisition of a mortgage interest may be a legal necessity for a sale of tarwad property in all cases. The learned Judge was cautious to say that it may amount to legal necessity in certain cases only. When an "acquisition of a mortgage interest" may be a tarwad necessity has not been indicated in that case. On the facts of that case, a portion of the consideration was reserved for redemption of a mortgage and all the rest of the consideration was meant for purchase of buffaloes. So the only reference to a mortgage was the provision for redemption recited therein. Raising funds for redeeming a mortgage on a tarwad property may be a tarwad necessity that would justify alienation of another tarwad property. But redemption of a mortgage is not, strictly speaking, acquisition of a mortgage right; it is really extinction of a mortgage encumbrance.

Perhaps, equity of redemption may in a way be regarded as property minus the mortgage carved out of it and granted to another, and redemption may then be characterized as acquisition by the tarwad of the mortgage right which was till then outstanding with the mortgagee. Such an acquisition of mortgage right may be justifying necessity for a sale of tarwad property. The provision in the deed that was challenged in the 1957 K. L. T. case was one of the above kind; and in that context the observation of the learned Judge was, if I may say so with respect, justified.

But, if the expression of the learned Judge is construed as a general proposition as submitted by Shri Krishnamoorthy Iyer-which I am sure was not what the learned Judge meant when he limited it to "certain cases" only - it would apparently be in conflict with the dicta in *Sreedharan v. Chellappan* (1959 K. L. J. 688) and *Kochukunju Kurup v. Chandramathi Amma* (1959 K. L. J. 946). These later decisions adopted the view of a Bench of the Travancore-Cochin High Court in *Karunakaran Pillai v. Devaki Pillai* (1953 K. L. T. 482) to the effect that, where immovable properties of a tarwad are alienated for the purpose of acquiring other properties, the fresh acquisitions should also be properties subject to the limitations on alienation that the original properties were subjected to, lest the interests of the tarwad conserved by legislation be defeated by ingenious devices of scheming karnavans. Agreeing with the dicta in those later rulings of this Court, I hold that acquisition of a mortgage right in a property, the equity of redemption whereof does not belong to the tarwad, cannot be a necessity of the tarwad to alienate any of its properties.

6. The fact that the mortgage rights acquired under Exts. II and III were in respect of a property that belonged to Velayudha Kurup, the husband of the 2nd defendant, does not affect the position. Suffice it to say that that was not a property whose ownership belongs to the plaintiffs' tavazhi. Velayudha Kurup, in spite of his attestation to Exts. I, II and III, was free to give his properties to anybody he pleased. In the present case it is in evidence that he did sell away the properties covered by Exts. II and III to a stranger, under Ext. C directing him to pay the mortgage amount under Exts. II and III to the plaintiffs' tavazhi. To a claim by that vendee for a surrender of the property on receipt of the mortgage amount, the plaintiffs' tavazhi cannot have any valid answer. Thus, the result of Ext. I alienation was ultimately to convert immovable property in possession of the plaintiffs' tavazhi into mere cash for no necessity of the tarwad. Thus, the result apprehended has really happened in this case.

7. I would therefore agree with the Munsiff in setting aside Ext. I as regards the sale of suit property. 8. Counsel for the alienee contended that, in the event of rescission of the sale, the plaintiffs' tavazhi should be directed to surrender the mortgage rights they have acquired with the consideration of the impugned sale. He relied on Sections 64 and 65 of the Indian Contract Act which enunciates a principle of equity that may well be adopted to cases like the present. These sections are as follows:

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding avoidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

These sections require only that when a transaction is avoided, or found to be void, the party, who had received any benefit or advantage thereunder, shall restore the same to the person from whom he received it. The benefit or advantage received by the plaintiffs' tavazhi under the impugned sate was only the sum that the tavazhi received as consideration for the sale, namely the sum of Rs. 8521/2, leaving out of account the cash consideration of Rs. 10/-, not shown to have been utilized for the tavazhi. The plaintiffs' tavazhi is bound to restore the same to the 1st defendant before they recover the property from him.

The further contention that the plaintiffs' tavazhi should surrender the mortgage right which they acquired with that amount does not appear to be warranted by law. The acquisitions of the mortgage rights under Exts. II and III were not benefits received under Ext. I, but were benefits derived by a further investment which the plaintiffs' tavazhi made with that amount. As observed by the Privy Council in *Murlidhar v. International Film Co.* (A. I. R. 1943 P. C. 34, 40):

Sections 64 and 65 do not refer by the words "benefit" and "advantage" to any question of "profit" or "clear profit", nor does it matter what the party receiving the money may have done with it.

Whether the investment made by the vendor with the consideration paid under the impugned sate ended in a profit or a loss, is of no consequence to the alienee. He can neither claim the benefit of the investment or be bound by the loss resulting therefrom. He is concerned only with what he paid, and nothing more. I would therefore repeal the claim for a surrender of the mortgage rights taken by the plaintiffs' tavazhi with the price paid under Ext. I, and direct the plaintiffs' tavazhi to restore the sum of Rs. 8521/2 only to the 1st defendant before they take the property from him.

9. I may mention here that there is a dispute between the parties as to the acquisition of the mortgage rights by the plaintiffs' tavazhi. Plaintiffs aver that their tavazhi never came in possession of the properties mentioned in Exts. II and III, which were all along with Velayudha Kurup only. 1st defendant contended that those properties were in possession and enjoyment of the plaintiffs' tavazhi under Exts. II and III. As I have held that in any case the 1st defendant is not entitled to a surrender of the mortgage taken by the plaintiffs' tavazhi the above dispute does not arise for adjudication herein. In the result,

this appeal is accepted; and in reversal of the decree of the Subordinate Judge, the decree of the Munsiff is restored subject to the modifications that the plaintiffs" tavazhi shall pay Rs. 8521/2 to the 1st defendant before the property is taken out of his possession, and that the 1st defendant shall be liable for mesne profits only from the date of payment or of notice of deposit in court for payment to him of the above said amount. In the circumstances, the plaintiffs will have their costs in the court of first instance, and the rest of the costs will be borne by the respective parties.