

**(1936) 04 MAD CK 0004**  
**In the Madras High Court**

Chathoth Govindan

APPELLANT

Vs

Kunnoth Kuntappu and Others

RESPONDENT

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**Date of Decision :** 01-04-1936

**Acts Referred:**

**Citation :** AIR 1936 Mad 917 : 165 Ind. Cas. 592 : (1936) 44 LW 612

**Hon'ble Judges :** Venkataramana Rao, J

**Bench :** Single Bench

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**Judgement**

Venkataramana Rao, J.—This is a suit by the plaintiff to recover possession of a house from the defendants. The plaintiff and his deceased

brother Kanari were members of a tarwad. At the intance of the plaintiff a sum of Rs 100 was borrowed on the security of a mortgage of the suit

house by both Kanari and the plaintiff by a deed of mortgage dated August 1, 1923 (Ex. A). The said sum of Rs. 100 was borrowed solely for the

purpose of the plaintiff. On the said date an arrangement appears to have been come to between both the brothers which was embodied in a

document, Ex. I bearing the said date. It is styled a settlement deed. In and by the said deed the plaintiff agreed to forego all his interest in the said

property in favour of his brother Kanari in case he failed to discharge the said mortgage debt within a period of two years from the said date. The

deed also provides that at the end of the said two years the said Kanari will hold the property absolutely free from all claims by the plaintiff, and the

said Kanari was at liberty to enjoy the property according to his own wishes. Within the said period of two years the plaintiff did not discharge the

said debt. After the expiry of the period of two years the said Kanari executed a mortgage Ex. VIII, dated March 8, 1926, wherein he recited that

there was a subsisting debt under the mortgage Ex. A which had to be discharged by him. Subsequently he died on November 19, 1926, leaving him surviving the defendants, his wife and children, having made his last will and testament, Ex. II, dated November 35, 1926, in and by which he bequeathed the said house to the defendants. On January 5, 1927, the plaintiff discharged the said mortgage and now sues for possession The defence was that the plaintiff having relinquished all his interest in the property under Ex. I is not entitled to maintain this suit. The learned District Munsif negated the defence and gave a decree in favour of the plaintiff. The learned District Judge reversed this decision holding that Ex. I was a valid and operative document.

2. It is contended by Mr. Sridharan that under Ex. I there could not be a valid release of the interests of the plaintiff in the suit house, and that the condition that the plaintiff should lose all his interests in the property must be held to be a penal clause and should not be given effect to and in any event he could not be held to have relinquished his interest to succeed to the property as karnavan of the tarwad. Both the brothers were interested in the property though it vested in the plaintiff's brother Kanari; as the karnavan of the tarwad he was the person entitled to deal with the property. But the plaintiff had an interest therein in that he was entitled to be maintained out of the income of the said tarwad property. The right of a junior member to maintenance from the income of the properties of the tarwad is an incident of co proprietorship in the property of the tarwad. It has been held to be an assignable and transferable interest. Therefore, it seems to me that such interest can be relinquished. In this case the relinquishment was for consideration. A sum of Rs. 100 was borrowed for the benefit of the plaintiff and not for the benefit of the tarwad. In consideration of his brother having mortgaged the tarwad property and provided him with the said sum of money the arrangement under Ex. I was entered into by him. It would be a valid family arrangement binding between both. The relinquishment was only in favour of a member of the family. Therefore after the expiry of the said period of two years the property was taken by Kanari free from all claims by the plaintiff, and the plaintiff has no right to sue for recovery of possession thereof. Further on the strength of the said document Kanari executed a mortgage of the said property

and bequeathed the same to his wife and children. It was found by the learned District Judge that even at the time of the mortgage both the brothers were living together and Kanari seems to have acted on the basis that the property became his after the end of two years; and it would not be open to the plaintiff to resale from the arrangement entered into under Ex. I The learned District Judge is, however, not correct in refusing the plaintiff the relief in respect of the amount which he paid in discharge of the mortgage Ex. A; Both the Courts have concurrently found that the plaintiff paid Rs. 120 (Rs. 100 towards principal and Rs. 20 towards interest) in discharge of the mortgage. Under Ex. I Kanari was under an obligation to discharge the said mortgage in consideration of his taking the property free from the claims of the plaintiff. It would not be open to Kanari and, therefore, to the defendants to retain the property without paying the said amount. The plaintiff is, therefore, entitled to the said sum of Rs. 120, paid by him. I, therefore, direct the defendants to pay Rs. 120 to the plaintiff with interest on the said sum of Rs. 100 at ten per cent, per annum from January 5, 1927, up to the date of payment. I therefore, modify the decree of the lower Court by directing that the defendants to pay the said sum of Rs. 120 with interest as aforesaid within six months from this date and that in default thereof the plaintiff do recover possession of the property from the defendants. I direct each party to bear his or their own costs of this appeal. Leave to appeal refused.

3. This, case having been set down for ""to be spoken to"" on April. 1, 1936, the Court made the following.

#### ORDER

4. With regard to the amount to be paid by the respondents to the appellant, the respondents are at liberty, to set off Rs. 82-5-6 (being the balance of the costs of the two lower Courts payable to them by the appellant after giving credit for Rs. 25 due to the appellant for costs in C.M.P. No. 876 of 1933 on the file of the High Court) and the balance alone need be deposited by the respondents.