

(1963) 03 KL CK 0011
In the High Court Of Kerala
Case No : A.S. No's. 228 and 446 of 1959

Janardhana Kurup

APPELLANT

Vs

Saraswathi Amma and Others

RESPONDENT

Date of Decision : 27-03-1963

Acts Referred:

Contract Act, 1872 — Section 64, 65

Citation : (1963) KLJ 395

Hon'ble Judges : M.S. Menon, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : S. Nilacanta Iyer in A.S. 228 of 1959 and G. Viswanatha Iyer, P. Parameswara Kaimal in A.S. 446 of 1959, for the Appellant; K.A. Nayar for K. Sukumaran for Respondents 1 to 5, for the Respondent

Judgement

Madhavan Nair, J.—These two appeals have arisen in O.S. No. 34 of 1956 on the file of the Subordinate Judge, Attingal, A.S. No. 228 of 1959 by the 1st defendant and A.S. No. 446 of 1959 by the 3rd defendant. The suit is to set aside certain alienations of immovable property belonging to the tarwad of the plaintiffs, executed by the 10th defendant, their mother. Exts. P. 1 to P. 4 evidence sales to the 1st defendant of suit items 1 to 4; Exts. P. 5 to P. 7 evidence sales of items 5 to 8 to the 2nd defendant; and Exts. P. 8 and P. 9 are copies of deeds of exchange of suit items 9 and 10 with properties, not scheduled in the plaint, of the 3rd defendant and her late husband whose interests are now vested in defendants 3 to 8, All the alienations were impugned, u/s 25 of the Travancore Nayar Act, 1100, as wanting in consideration and tarwad necessity. The 1st defendant did not contest the suit. Defendants 2 and 3 asserted the alienations in their favor to be supported by consideration and necessity. The court below upheld Ext. P. 5, set aside Exts. P. 6 and P. 7 on condition of return of considerations found, and cancelled Exts. P. 1 to P. 4, P. 8 and P. 9 as not been supported by consideration and necessity. Defendants 1 and 3 have come up in appeal. The 1st defendant has not cared to discharge the burden on him to show the assignments in his favor, Exts. P. 1 to P. 4, to be

supported by consideration and tarwad necessity. The court below has on plaintiff's evidence found the alienations in his favor as not been supported by consideration and tarwad necessity. There is no material for us to differ therefrom. The prayer for remand to enable him to put forward his contentions hereafter cannot be allowed as it was indifference on his part not to have entered appearance at the proper time and contested the suit. His appeal has therefore to fail.

2. As regards the exchanges of tarwad properties with properties of defendants 3 to 8, the only necessity recited in the documents and relied at the Bar is convenience of enjoyment. Counsel for the 3rd defendant contended that section 25 of the Nayar Act deals with sales, mortgages and leases only and that exchanges do not come within its purview and therefore need not be shown to be supported by consideration and necessity to bind the tarwad. We do not feel persuaded by this nice distinction whose only merit is the ingenuity of the counsel. In the context in which the word "sale" appears in Section 25 of the Nayar Act, it is obviously used in a rather generic sense to mean an outright alienation. All alienations of tarwad properties are purported to be covered by Sections 25 and 26 of the Act, but the only words used therein are sales, mortgages and leases. It is not then clear that, in the context, the word "sale" covers all absolute alienations, "mortgage" means all encumbrances in favor of creditors, and "lease" denotes all grants of under-rights in immovable property. Exchanges are really a specie of sales, and the only difference between a sale *stricto sensu* and a sale in the form of exchange lies in the consideration which is money in one and equivalent property in the other. It is a very familiar principle in law that one cannot do that indirectly which one is prohibited from doing directly. If an absolute alienation for a price is prohibited, to an equal extent must an absolute alienation for another property be held prohibited. The fact that sales and exchanges are treated separately in the Transfer of Property Act is of no consequence in construing the Nayar Act, as the two enactments are not in *pari materia*. An exchange of tarwad immovable property for a property of another is well within the mischief of Section 25 of the Travancore Nayar Act, 1100. It follows that such an exchange cannot be made by a karnavan unless it be for adequate tarwad necessity. Mere convenience of enjoyment, which must necessarily vary according to the whims and fancies of particular individuals, cannot be a necessity of the tarwad. As has been pointed out in *Gangadharan Pillai v. Narayana Pillai* (1962 KLT 952) even a mere advantage to the tarwad cannot be a substitute for an outright alienation under the Travancore Nayar Act. The finding of the Court below that the impugned alienations, Exts. P. 8 and P. 9 are invalid has therefore to be upheld.

3. In decreeing cancellation of alienations of tarwad properties, the principles of equity embodied in Sections 64 and 65 of the Contract Act have been applied in *Chandrasekhara Pillai v. Koshi* (1961 KLT 1022) and ether decisions, and the benefit or advantage received under the invalid alienation been directed to be returned to the disappointed alienee. Such benefit in the cases of Exts. P. 8 and

P. 9 are the properties taken by the 10th defendant for the plaintiff's tarwad in exchange for its properties. The plaintiffs have instituted this suit and claim to recover the properties on behalf of their tarwad. It must then be that before defendants 3 to 8, in whom the rights under Exts. P. 8 and P. 9 are now vested, are ousted from the properties, they have to be given their properties exchanged for suit items 9 and 10. In the result, the decree of the court below is affirmed, subject to the condition that, before recovering suit items 9 and 10 from defendants 3 to 8, the plaintiff's tarwad will surrender back to those defendants whatever rights it has in the properties taken in exchange therefor. In the circumstances, the parties shall suffer their respective costs in these appeals.