

(1925) 11 MAD CK 0064
In the Madras High Court

K. Dasa Naicken and Another

APPELLANT

Vs

Pulikalath Kunha Ahamad Koya and Another

RESPONDENT

Date of Decision : 20-11-1925

Acts Referred:

Citation : AIR 1926 Mad 648 : (1926) 24 LW 231 : (1926) 51 MLJ 69

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The only question in this Letters Patent Appeal is whether Ex. DD, gift deed dated the 7th September, 1884 is valid. Mr. Justice Krishnan held that the donor purported to create an estate unknown to Muhammadan Law and therefore the gift failed. The relevant portion of the document is as follows:

As it is you, our mother that have brought us up, we have given to you on Ochara Udama, gift of proprietary right as tarwad property, the schedule-mentioned moveable and Immovable properties. Therefore we have executed this deed to you with our free will and consent granting the said properties to be occupied as tarwad property for ever by children existing now and by those who will be born to them by the aforesaid Avarankutti, Aullakoya and Ummar and their children.

2. The donors made a gift of their property to their mother and to their three brothers to be enjoyed by them as a tarwad. It is admitted before us that the word used is " children " and therefore the contention that was raised before Mr. Justice Krishnan that only the sons and their sons were entitled to be benefited by the gift has been given up. The question is whether a Muhammadan who is governed by the ordinary Muhammadan Law can create, by a deed, a tarwad with the incidents of a Malabar tarwad. The clause in the Will makes a gift of the property to the mother as a tarwad property and provides that it should be occupied as tarwad property for ever by "the children existing now and by those that will be born hereafter." The document contains also the following recitals:

The seniormost male member being the manager at the respective times and the rest are to abide by his orders. It is hereby agreed that these properties which are set apart as tarwad property should never be partitioned or sold or mortgaged and that if any such thing is done it will not be valid.

Kulichit (rent agreement) in respect of the above mentioned shops should be obtained in the name of the seniormost female members at the respective times.

3. From these clauses it is quite clear that the intention of the donors was to create a tarwad consisting of their mother and her children and that the tarwad should have all the incidents of a Malabar Marumakkathayam tarwad. The parties are Muhammadans and under the Muhammadan Law a gift to a person enures for his benefit and the creation of a tarwad with all the incidents of a Marumakkathayam tarwad is opposed to the ordinary Muhammadan Law. But in the case of the Moplahs of North Malabar the Customary Law by which property could be held by a tarwad applies to them. In other words, the North Malabar Moplahs follow the Marumakkathayam Law. But such a custom does not obtain among Moplahs of Calicut and they are governed by the ordinary Muhammadan Law and are not entitled to make a gift of property to a woman and her children to be held as tarwad property. That devolution of property under a bequest or gift which is repugnant to the personal law of the testator or donor is invalid, as was held in the well-known Tagore case.

4. The contention of Mr. K.P.M. Menon is, that the clause providing for restraint on alienations and other clauses should not be considered in construing the clauses by which the gift was made and that the gift being to the mother and her children they have acquired a right to the property as ordinary donees. But this argument overlooks the fact that it was the intention of the donors that the property should be enjoyed by the mother and her children as tarwad property. We cannot dissociate the intention that the property should be enjoyed as tarwad property from the intention to make a gift. In other words the clauses relating to the gift should be read as a whole and the Court would not be justified in treating the gift which was intended for the benefit of the tarwad as a gift to persons, individually.

5. If it is treated as a gift to the mother and sons, then they would take as joint tenants but the intention of the donors was not that they should take the property as free gift to them but should hold it as members of a tarwad without right of alienation so that their children and their children's children may be benefited. There are cases where bequests were made with conditions superadded with regard to alienation, and it was held that such subsequent conditions would not invalidate the gift. But where the gift itself is hemmed in by limitations and if the limitations are not those sanctioned by law then the gift must fail. The observations of their Lordships of the Privy Council in (1885) L.R. 12 I.A. 103 (Privy Council) apply to the provisions of this gift "it is true the bequest had been of rents and profits and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it, but what

their Lordships have to do is to find the intention looking at the whole of the provisions of the Will, and they gather from those words that it was his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation, in which case the clause against alienation would be void but the provision here against alienation is confirmatory of the other part of the Will."

6. It has been contended by Mr. K.P.M. Menon for the appellants that the word "tarwad" is not used in the ordinary sense. It is difficult to follow this argument in the light of the recitals in the documents. The word "tarwad" is not only used in more places than one but the restraint on alienation and the recital that " the Kulichit agreement in respect of the abovementioned shops should be obtained in the names of the seniormost female members at the respective times" clearly indicate that the donors intended by the word "tarwad" an ordinary Marumakkathayam tarwad.

7. The donors intended to create by the gift-deed a tarwad which a Moplah governed by the ordinary Muhammadan Law is not entitled to do. In this view of the document it is unnecessary to consider whether a custom prevails among the Calicut Muhammadans by which property should be enjoyed by them as tarwad property. The mere fact that they adopt the customs of their neighbours, the Nairs, is no ground for holding that they are governed by a valid custom by which property could be held as tarwad property. The Moplahs of South Malabar are not governed by the Marumakkathayam Law or the Aliyasanthana Law of inheritance but are governed by the ordinary Muhammadan Law.

8. We therefore hold that the clause in the deed of gift creates an estate repugnant to the Muhammadan Law and therefore invalid. The judgment of the learned Judge is right and the Letters Patent Appeal is dismissed with costs.