

(1953) 06 KL CK 0002
In the High Court Of Kerala
Case No : A. S. No. 531 of 1123 (T)

Kamakshi Amma and another

APPELLANT

Vs

Gangadharan Pillai and others

RESPONDENT

Date of Decision : 22-06-1953

Acts Referred:

Travancore Nair Act, 1912 — Section 41

Citation : AIR 1953 Ker 60

Hon'ble Judges : Subramania Iyer, J;Sankaran, J;Govinda Pillai, J

Bench : Full Bench

Advocate : N.K. Narayana Pillai, for the Appellant; M. Madhavan Nair for No. 1, K.T. Ninan for No. 5, S. Narayanan Potti for No. 6 and M. Krishnan Nair for No. 7 for Respondents, for the Respondent

Judgement

Govinda Pillai, J.—Plaintiffs 1 and 2 are the appellants. Defendant 2 is the mother of plaintiff 1 and defendant 1. Plaintiff 2 is plaintiff 1's daughter. Plaintiffs and defendants 1 and 2 are members of a Nair sub-tarwad. The plaintiffs stated that the plaint properties belonged to that sub-tarwad and that certain encumbrances were created on the same by defendant 2. Though defendant 1 was the de jure Karnavan, two decrees had been obtained on two of the debts created by defendant 2. In execution of these decrees tarwad properties had been sold and delivered over to the auction-purchasers. The suit was to avoid the alienations, the encumbrances and the decrees and execution proceedings. The plaintiffs' allegations were as follows: Defendant 1 became the Karnavan of their sub-tarwad in 1096. Defendant 2 the mother was in management before that. Defendant 1 was a man of extravagant habits and of bad character. Defendant 2 was under his influence and control.

Since plaintiff 1's marriage in 1098 was conducted without the approval of defendants 1 and 2, the latter persons began to encumber or alienate the tarwad properties so as to defeat the plaintiffs' claim to the same. The alienations were: (i) Ex. A dated 2-10-1106, a mortgage by defendant 2 to defendant 3 for 700

fanams for a portion of plaint item 1. (ii) Ex. B dated 30-11-1106, a mortgage by defendant 2 to defendant 4 for 700 fanams for another portion of item 1, (in) Ex. C dated 1-10-1106, a hypothecation bond by defendant 2 to defendant 5 for 2100 fanams for portions of items 1 and 2. This was recited in a subsequent mortgage deed Ex. D dated 24-12-1107 for 2550 fanams. (iv) A hypothecation bond had been executed by defendant 2 in 1099 for 1000 fanams for portions of items 1 and 2 in favour of defendant 6, and defendant 6 had obtained a decree in O. S. 1104 of 1105 of the Padmanabhapuram Munsiff's Court. Ex. E is the copy of the File Book in that case. The hypothesis, the extent of which was 3 acres and 23 cents had been sold in court auction and the sale was confirmed on 18-4-1110 and obtained delivery of possession on 12-7-1110. Exhibit XVIII is the sale certificate and Ex. XXV the delivery kychit. (v) Defendants 1 & 2 had executed a promissory note in favour of Thanuvan Parameswaran Thampi, for the benefit of defendant 7. Parameswaran Thampi obtained a decree in O. S. 1698 of 1104 on that promissory note. The decree was assigned over to defendant 7 who got herself impleaded in execution and attached and brought to sale items 1 and 2 for Rs. 376-12 Chs. on 13-7-1110. She obtained delivery of possession of the properties on 28-5-1111. Exhibit XIX is the decree and Ex. XX is the delivery kychit. (vi) Exhibit J dated 8-10-1109 is a mortgage deed by defendant 2 to defendant 9 for portions of the plaint properties for 400 fanams.

2. The plaintiffs stated that defendant 2 was not competent to execute the mortgages mentioned above, that they were also not supported by consideration and tarwad necessity, that the decrees in O. S. 1104 of 1105 and 1698 of 1104 were not binding on the tarwad, that the documents on which they were obtained were not supported by consideration and tarwad necessity and that the decrees and execution proceedings were liable to be set aside. The yield from the plaint properties would be 1050 fanams. The plffs., therefore, prayed for avoiding the alienations & execution proceedings mentioned above and for recovery of possession of the properties with mesne profits from the parties in possession.

3. Defendants 1, 3, 4, 5, 6, 7 and 9 contested the suit. Defendant 1 stated that the allegations against him by the plaintiffs were all unfounded, that though it was true that plaintiff 1 entered into a marriage alliance without his consent, he had no ill-feeling towards her, that the plaint properties belonged to the sub-tarwad as mentioned by the plaintiff, that he was never in management of the same, that as he was the Head clerk of the Electrical Engineer's office, Quilon, he was unable to attend to the tarwad affairs, that the management was left with defendant 2, that he was not aware of any of the alienations mentioned in the plaint, that if there were any such alienations they were not supported by tarwad necessity, that he had not executed any promissory note to Thanavan Parameswaran Thampi, that he was not liable for any amount which Parameswaran Thampi was said to have advanced on the promissory note mentioned by the plaintiff, and that he had no objection to a decree being given to the plaintiffs as prayed for in reliefs A to H. Defendant 3 stated that the properties with him were outstanding on mortgage even before his father's time,

that defendant 2 got the properties with the mortgage debts charged thereon, that defendant 2 had only renewed the old mortgage by Ex. A of 1106, that it was supported by consideration and tarwad necessity, and that the plaintiffs were not entitled to any reliefs.

Defendant 4, while admitting the relationship between the parties, contended that the plaint properties did not belong to the sub-tarwad of plaintiffs and defendants 1 and 2, that they belonged exclusively to defendant 2, that defendant 1 was never the Karnavan of the sub-tarwad, that there was no occasion for the same, that the plaintiffs and defendant 1 were incompetent to question the alienations by defendant 2, that the mortgage deed in his favour was for proper consideration and tarwad necessity, that the recitals in defendant 4's documents were on account of debts incurred even before plaintiff 1 and defendant 1 had attained majority, and that the plaintiffs were not entitled to any reliefs.

4. Defendant 5 admitted the hypothecation bonds and mortgage deeds in his favour. He stated that they were supported by proper consideration and bona fides, that for discharging the debts charged on the properties obtained by defendant 2, she had mortgaged the plaint properties in 1084 for 4500 fanams, that for a portion of that defendant 5's father had taken a sub-mortgage in 1087, that a Purakkadam had also been obtained from the original mortgagee, that while so, defendant 5's rights over the properties were surrendered to defendant 2 by defendant 5's father for and on behalf of defendant 5 who was then a minor after taking in turn the mortgage mentioned in the plaint, that the consideration thereof was for discharging the debts that were charged on the properties even before the plaintiffs were born, and that the plaintiffs were not entitled to any reliefs so far as he was concerned.

5. Defendant 6 stated that the plaint properties were the separate properties of defendant 2, that the others had no right to the same, that defendant 2 was fully competent to alienate or encumber the properties, that the plaintiffs were not competent to question the same, that the decree obtained by him was valid, that there was no necessity to implead defendant 1 or the plaintiffs in that case, that the amount was advanced for proper necessity, that he was prepared to give up his auction right over the property in case he was given the auction amount and discount and that he was in no way liable for the plaintiffs' suit.

6. Defendant 7 contended that the suit was barred by limitation, that the plaintiffs had filed the suit at the instance of defendants 1 and 2, that the plaintiffs had no sub-tarwad, that the plaint properties did not belong to any sub-tarwad of the plaintiffs, that the promissory note executed by defendants 1 and 2 to Parameswaran Thampi was for proper consideration, that for the money due from Parameswaran Thampi the decree was assigned over to her & that the plaintiffs were not entitled to any reliefs. Defendant 9 had also contended that the document in his favour was valid and supported by proper consideration, necessity and bona fides.

7. The plaintiffs by a replication stated that the plaintiff properties were obtained on gift from defendant 2's father before Act I of 1088 (Travancore), that defendant 2's father had also given a gift to her mother, that defendant 2's mother had executed a settlement deed in favour of her children, that all the properties belonged to the sub-tarwad of defendant 2 and that the plaintiffs had a right over the same.

8. The lower Court found that the plaintiff properties belonged exclusively to defendant 2 and not to her sub-tarwad, that defendant 2 was, therefore, competent to execute the several documents impeached in the plaint and that the decrees and execution proceedings were not liable to be set aside. The suit was accordingly dismissed with costs.

9. The plaintiff properties belonged to the tarwad of defendant 2's father. For the plaintiff and other properties he had executed two mortgages in the name of his children four in number. The children were defendant 2, her sister and her two brothers. The two mortgages were of the years 1073 and 1076. The copy of the mortgage of the year 1076 is Ex. O. Subsequently he executed a gift deed Ex. G on 26-12-1076 in favour of defendant 2's mother. In 1082, the mother surrendered her rights in the properties obtained under Ex. G by executing a sale deed Ex. II. The same day the four children entered into an Udampadi by which the properties were allotted separately to all the four children.

It has to be considered what the effect of the two mortgages of 1073 and 1076, and of the gift deed Ex. G would be in regard to the rights conferred on the executant's wife and children. If he intended by the mortgages to benefit only the children, and by the gift only his wife, then the children would take the properties as tenants-in-common as regards the mortgages, and the wife would take the properties absolutely as per Ex. G. On the other hand, if there was no evidence as to the existence of the said intention, the properties would be taken by the mortgagees and the donee for the benefit of their sub-tarwad.

The parties are Nairs and S. 41 of the Nair Act (Travancore) II of 1100 provided that the property acquired by gift or bequest from the father or husband before Act I of 1088 came into force shall, for the purpose of Chap. 7 (relating to partition of tarwad property) in the absence of evidence to the contrary, be treated as tarwad property of the donees of devisees and of their Thavazhee. So the descendants in the female line of the donees or devisees start with a presumption that the properties are tarwad properties unless there is evidence to the contrary. Thus, if these properties belong to the sub-tarwad of defendant 2 then it necessarily follows that the plaintiffs will be competent to impeach the several alienations mentioned in the plaint.

10. The plaintiffs sought to set aside the decrees and execution proceedings in two cases viz., O. S. 1104 of 1105 obtained by defendant 6 and O. S. 1698 of 1104 obtained by defendant 7's assignor. It was admitted by defendant 7 that the decree in O. S. 1698 of 1104, though it was obtained against defendants 1

and 2, was not obtained by Parameswaran Thampi making defendants 1 and 2, as representatives of their sub-tarwad. In that case the properties were sold on 13-7-1110 and in O. S. 1104 of 1105, the properties were sold on 18-4-1110. If the provisions of Art. 9 (a), Limitation Act (Travancore) were applied in the case of such sales, then the present suit filed on 6-6-1112, that is, more than one year after the date of the confirmation of the sale, would be barred by limitation. If the properties belonged to the tarwad, and if the decrees had been obtained against the Karnavan of the tarwad without making the proper representatives of the tarwad as parties, as provided for in S. 31 of the Nair Act, then those decrees would not be binding on the tarwad.

So far as the tarwad was concerned the decrees would be null and void, and so any steps taken in execution would be of no avail. But in such cases the opinion is divided whether a suit itself is necessary to avoid such void and null decrees. The rulings relating to the same will be considered hereafter. But because of the divergent opinions the matter will have to be referred to a Full Bench for decision if we arrive at the conclusion that the properties were taken by defendant 2's mother under Ex. G and by defendant 2, her sister, and brothers as sub-tarwad properties under the two mortgages of 1073 and 1076. We will, therefore, first consider the effect of the two mortgages and the gift deed Ex. G.

11. Defendant 2's father was one Nilacanta Pillai of Tharisuthala house in Ezhichal Desom. He asserted that he was the last member of his tarwad and on this assumption he had executed the documents in question. It would appear that he himself was apprehending trouble from a person who was advancing claim to his tarwad. Subsequently he was brought round and a consent deed obtained from him on 9-6-1088. Exhibit XXVII is copy of that document produced by the defendant in this case. It was stated there that the person who had executed Ex. G gift deed in favour of defendant 2's mother was the elder brother and that he consented to the donee enjoying the properties as the full owner. In this background we are to examine these documents.

12. Nilacanta Pillai first executed two mortgages in favour of all his children. He had recited payment of certain, items of consideration for the same and directed the executees to redeem the prior mortgages of the properties and to enjoy the same. One of the mortgages as mentioned already is Ex. O for 14000 fanams. The cash consideration for the same is 1512 1/2 fanams. It cannot be that the four children in whose favour the mortgages were executed have paid the consideration for the same in equal shares. On the other hand, Ex. O itself would show that one of the persons mentioned there was not in a position to pay any portion of the consideration unless the others paid the same on his behalf also. At the time of Ex. O one of his children by name Ramakrishna Pillai was a minor aged ten. So he could not have advanced any portion of the consideration for Ex. O, if consideration had been really paid. In order to give a colour to the transaction the father had described it as a mortgage deed and executed these mortgages in the name of his children. His intention could only be that the

children were to take the properties as their tarwad properties. We are to construe documents of this nature in the light of the surrounding circumstances, the conduct of the parties and the sentiments then of the community to which the parties belonged.

Till the Nair Act of 1088 was passed, no member of a sub-tarwad which got properties from that member's father or husband, as the case may be, took it as his or her own property, the practice being to treat all the properties as belonging to the donee's sub-tarwad. This has been judicially recognised in several rulings of the High Court of Travancore such as - " 5 Trav LR 116 " (A); - " 11 Trav LR 139 " (B); - " 13 Trav LR 72 " (C); - " 22 Trav LR 239 " (D); - " 25 Trav LR 58 (E); - " 18 Trav LJ 1258 (F)"; - " 21 Trav LJ 562 (G)"; - " 22 Trav LJ 585 (H)": - " 24 Trav LJ 308 (I)": - " 24 Trav LJ 1257 (J)" and - " 30 Trav LJ 793 (K). This was the position accepted even in - "Sankaran Nair Padmanabhan Nair v. Narayani Amma Kalyani Amma", AIR 1951 TC 83 (L). It was mentioned there that it did not matter if the gift was in favour of the wife, or any one or more, or all the children, that as a general rule the property acquired by such gift would be treated as tarwad property of the donees and of their Thavazhi, that the persons mentioned in the document do not derive any special interest under the document, that they only took the property as tarwad property as contemplated in S. 41 of the Nair Act of 1100, that this general rule was subject to exceptions in which there was evidence to show that the donees or devisees mentioned in the document were alone intended to be benefited by such gift or sale.

There is, therefore, very little difficulty in holding that the mortgages in favour of the children were executed as gift deeds, but that they were described as mortgages for the reasons already mentioned. The gift deed Ex. G by Nilacanta Piliai to defendant 2's mother was long before 1088, so that ordinarily the gift would enure to the benefit of the sub-tarwad consisting of the donee and her children. It was argued for the respondents that if this was the intention, there was no necessity for the mother to execute a sale deed Ex. II in favour of the four children, for even without the sale deed, they along with the mother would have taken the properties as belonging to the sub-tarwad.

On carefully reading Ex. II it could be seen that this sale deed, by which the mother surrendered all her rights in the property, was really executed without any consideration at all. In Ex. II she mentioned that she got these properties under Ex. G gift and under Ex. XXVII consent deed and that she was selling her rights over the properties to the four children for 30100 fanams of which 26600 fanams had been given credit to on account of the two mortgages in favour of her children. Out of the balance she is said to have received 1400 fanams from her eldest son Nilacanta Piliai and the balance of 2100 fanams from all the four children. This is only in continuation of the scheme that the father had, to transfer all these properties to his children for being enjoyed by them under the then existing Marumakkathayam law. Each case has to be decided with reference to the evidence adduced and the circumstances disclosed regarding the intention

of the donor. The expression of an opinion in - "Lakshmy v. Kunju-kutty", 57 Trav LR 913 (M) regarding the document considered there should not be taken to be laying down any general rule.

13. It would be seen that on the same day the children took Ex. II, they divided the properties by executing an Udampadi Ex. M. It was not stated there that the properties were divided into four equal shares or that they alone were entitled to the properties. They had only stated that as joint possession would in future lead to dissension and loss the properties were grouped under four schedules, each group being allotted to one or the other of the executants absolutely. It was mentioned that no compulsory partition was allowed and that even when there was a Thavazhi partition, it was not usual for the male children to be given a share absolutely in the properties. No doubt, in those days when partition was optional, what was generally resorted to was the Thavazhi partition. But it was not unusual for the male members being given some properties absolutely when the Thavazhi partition itself was resorted to. If the properties when acquired had the characteristic of tarwad properties they will not lose such characteristic even after a partition so far as the properties taken by the females are concerned.

As regards the properties obtained by a childless female under an individual partition as provided for in the Nair Act of 1100, the question was recently considered by a Bench of this Court in - "Janaki Amma v. Varghese", 1950 Trav-C LR 477 (N). It was held that the properties obtained in family partition separate by a childless female member form and continue in her hands as Thavazhi properties, that no doubt, so long she remains the sole member of the Thavazhi she will have in respect of those properties absolute powers of management and disposal, that however, the moment a child is born to her she and her child together will constitute that tarwad or thavazhi and that in respect of the properties of that tarwad or thavazhi her erstwhile powers of absolute disposal become completely extinguished and are replaced by those of a family Karnavan or manager. So the taking of some properties absolutely by the, male members of the sub-tarwad would not change the characteristic of the properties taken by the female members and they can take it only as properties belonging to that female member and her descendants. Thus the properties taken by defendant 2 under Ex. M could only be sub-tarwad properties belonging to her and her descendants in the female line.

There is practically little or no evidence in the case to show that the intention of the donor, i.e. defendant 2's father, was to give these properties to his children as tenants-in-common. He could have contemplated only the succession to these properties according to the Marumakkathayam law as it stood then. The subsequent partition among the children also will not change the characteristic of the properties taken by the donees. It has, therefore, to be held that the properties obtained by defendant 2 under Ex. M belong to defendant 2's thavazhi. The finding of the Court below to the contrary could not be upheld. It necessarily follows that plaintiff 1 who is the daughter of defendant 2, and

plaintiff 2 who is plaintiff 1's daughter are both entitled to the properties obtained by defendant 2 under Ex. M. They have, therefore, every right to question the binding nature of the alienations impeached in the suit.

14. In the sub-tarwad of defendant 2 there were also plaintiff 1, her children and defendant 1. Of these defendant 1 was the only male member. His age is given as 35 in 1113, so that he must have been born in the year 1078. He would have attained majority in 1096. Till then the only adult member in the sub-tarwad was defendant 2. As soon as defendant 1 came of age defendant 2 would vacate her place as karnavathi of the tarwad and the management would automatically vest, in defendant 1. Defendant 1 would say that he was living elsewhere as a student and that after graduating himself he got an employment under Government so that he left the management of the sub-tarwad to his mother defendant 2. After 1096 therefore defendant. 2, even if she managed the affairs of the tarwad, could have been only the agent of defendant 1. She would not under the law be competent to represent the tarwad in any action. She was also not competent to encumber or alienate the tarwad properties. So all charges created by her after defendant 1 became "Sui juris" could not be binding on the sub-tarwad or its properties.

16. It follows from this that Ex. A dated 2-10-1166 to defendant 3, Ex. B dated 30-11-1106 to defendant 4 and Ex. J dated 8-10-1109 to defendant 9 are not binding on the sub-tarwad as they are executed by defendant 2 alone. Neither the consideration nor the necessity for the same had been proved by the defendants in order that an equitable relief could be given so far as these parties were concerned to the extent of the consideration that might have benefited the sub-tarwad. As regards Ex. C dated 1-10-1108 and its renewal Ex. D dated 14-12-1107 to defendant 4, it was admitted by the appellants' learned Advocate that tracing the history of these transactions it would be found that these amounts had been utilised to liquidate a debt mentioned in Ex. G itself. So the appellants agreed to treat Ex. D as a valid document thereby agreeing to pay the consideration for Ex. D (i.e., 2550 fanams) and the value of improvements in that property from the date of Ex. D i.e.. 24-12-1107. The plaintiffs will file a separate suit to redeem this mortgage. The plaintiff's suit as regards Exs. C and D will therefore stand dismissed.

16. Now we come to defendants 6 and 7. A hypothecation bond dated 24-6-1099 had been executed by defendant 2 to defendant 6 and a suit was filed by him on this bond in O. S. 104 of 1109. In execution of the decree. 3 acres and 23 cents out of items 1 and 2 had been purchased by him. He got delivery of possession of the same on 12-7-1110. That was a decree obtained against defendant 2 alone. She was not the person competent to represent the tarwad, and in para 11 this defendant had contended that it was unnecessary to implead defendant 1 or the plaintiffs as parties in his case and that there was no defect in this. In the view that we take that the plaint properties belong to the sub-tarwad of the plaintiffs no decree can bind the tarwad unless it was obtained against the

Karnavan as such and the senior Anandaravan. This decree is therefore, not binding on the sub-tarwad. Necessarily therefore the execution proceedings taken pursuant to that decree could also be not binding on the plaintiffs' sub-tarwad.

17. The next decree is O. S. 1698 of 1104 which is impeached by the plaintiff. Defendants 1 and 2 had executed a promissory note to one Parameswaran Thampi who thereupon filed this suit for the money due to him. He then assigned it to defendant 7. She executed the decree, copy of which is Ex. XIX, and purchased a portion of the plaint properties in court auction on 13-7-1110. She got delivery of possession on 28-5-1111. As regards defendant 1, her contention was that the plaint properties did not belong to the plaintiffs' sub-tarwad, that defendant 1 was not the karnavan of the sub-tarwad, that he had no management, that he had not been impleaded in the case as the karnavan of the tarwad mentioned by the plaintiffs, and that the decree also had not been obtained against defendant 1 as the karnavan (see paras 15 and 32 of her written statement). So it was admitted by her that the decree was not one obtained against, the plaintiffs' sub-tarwad or that defendant. 1 had been impleaded in the case as the karnavan as such of that sub-tarwad. This decree will, therefore, be not binding on the plaintiff's sub-tarwad and the properties attached and sold being sub-tarwad properties the execution proceedings also are invalid.

18. But in these two cases the court sale took place more than one year before the suit was instituted. It was contended for the respondents that the suit filed beyond one year to set aside the sale in execution of the decree of a civil Court by whomsoever brought on any ground other than that the judgment-debtor or his family or tarwad had no right, title or interest in the properties sold would be barred by limitation. The relevant portion of Art. 9(a), Travancore Limitation Act is as follows:

9. To set. aside any of the following sales :(a) Sale in execution of a decree of a civil Court by whomsoever brought on any ground other than that the judgment-debtor or his family or tarwad had no right, title and interest in the property sold.

One year.

When the sale is confirmed, or would otherwise have become final and conclusive, had no such suit been brought.

The corresponding provision in the Indian Limitation Act is in Art. 12 as follows:

12. To set aside any of the following sales: (a) Sale in execution of a decree of a civil Court.

One year.

When the sale is confirmed or would otherwise have become anal and conclusive had no such suit been brought.

19. It was mentioned in some cases decided by the Travancore High Court that as the wording of the Article was different in the Indian Dominion (then British India) the decisions elsewhere would be of no help to correctly understand the scope of the Travancore Article. The learned Judges who took part in the Full Bench ruling in - "Bhagavathi Pillai v. Srikantan Nair", 1949 Trav LR 14 (FB) (O) were even of opinion that it can be seen from the wording of the article itself that it is wider in scope than the corresponding article of the Indian Limitation Act. Vide " 1949 Trav LR 24 (P) and " 1949 Trav LR 25 (Q)". It will appear that is not so. The Indian Article is wider in scope without any restrictions, whereas, in the Travancore Article, suits of a particular category to set aside a court sale will not be governed by that article. In the "1949 TLR" cases most of the previous decisions were referred to and it was held that the one year rule will apply even if the suit was brought on the ground of the invalidity of the decree in execution of which the sale is held. This, it is stated with all respect to the Judges who decided that case, is not correct.

20. If a decree is null and void so far as a particular party is concerned it is not necessary for him to avoid that decree or the proceedings taken in execution of that decree, for a sale held in execution of a void decree will also be void. In - "Malkarjun v. Narhari", 27 Ind App 216 (PC) (R) it had been held that if a sale is really void or inoperative, a suit for a declaration that it is so, is not governed by Art. 12, Indian Limitation Act. If a property belonging to another is sold as if it belonged to the judgment-debtor the sale is a nullity - AIR 1935 139 (Privy Council) . A Court has no jurisdiction to sell the property of persons who are not parties to the proceeding or properly represented on the record. (Vide - "Ragho Prasad v. Mewa Lal". 39 Ind App 62 (PC) (T) and also - "Khiaajmal v. Daim", 32 Cal 296 (PC) (U).

In the Calcutta case it was further pointed out at page 312, that as against such persons the decree and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. To the same effect is the dictum in - Ram Ganu Ghadge Vs. Hari Sambhu Ghadge, and - "Lakshmadu v. Ramudu", AIR 1939 Mad 867 (W). In this latter case it was mentioned that Art. 12 would apply only if the sale is held to be binding on the plaintiff and that if the plaintiffs' interest is, on the other hand, found not to have been sold or the sale is held to be void against him this article cannot be permitted to stand in his way. The decision in " 32 Cal 296 (P C) (U)" was followed in - "Nanguja v. Kuruvilla", 26 Trav LJ 1361 (X) and the dictum that the Court has no jurisdiction to sell the property of persons who are not parties to the proceeding and that as against such persons the decrees and sales purporting to be made will be a nullity and will be disregarded without any proceeding to set them aside, was accepted.

21. If the correct position of law is as mentioned above, it has to be considered whether Art. 9(a), Travancore Limitation Act would stand in the way of the plaintiffs to avoid the two court sales. These two decrees were not against the

plaintiffs" sub-tarwad. The decrees will not bind the sub-tarwad as they were not obtained in conformity with the provisions of S. 31 of the Nair Act of 1100. The tarwad is a legal person and the mode of making it liable is laid down in the said section. If the decree is not obtained consistently with the provisions laid down in the Statute, it will be null and void so far as the tarwad is concerned. That was the dictum laid down in - "Nilakanta Piliai v. Govinda Piliai", 29 Trav LJ 1025 (Y). That was a case under S. 25 of Act 1 of 1088 corresponding to S. 31 of Act 2 of 1100. The decree obtained in violation of the provision of S. 25 and the proceedings in execution of such a decree were held to be void as against the tarwad.

There is another Full Bench decision - "Raman T. Krishnan", 7 Trav LR 137 (FB) (Z) even before the Nair Act of 1088, that the sale of tarwad property held in execution of a decree against the junior members cannot affect the interests of the tarwad in the property and that the limitation to set aside such a sale is not one year. The two decrees in question are therefore void as against the plaintiffs" tarwad and so the sales of the tarwad properties to satisfy those decrees should also be held to be void so that it is unnecessary for the plaintiffs to ask to set aside the sale. If that be so, then Art. 9(a) would not be a bar to the plaintiffs" suit which was brought more than one year after the sale. The plaintiffs" right would in such cases be affected only when the auction purchasers secured possession of the properties pursuant to void court sales. Their possession would be that of trespassers without any title to hold properties. With such dispossession of the properties of the tarwad, the plaintiffs" cause of action would arise.

22. If the position taken above is the correct one, then there is no difficulty in deciding the question of limitation raised in the case. But the Full Bench ruling in " 1949 Trav LR 14 (FB) (O)" is in the way, and it may not be proper for us to ignore that case, particularly when there are some earlier Travancore decisions in support of that and a few against the same.

23. We would therefore refer the following questions to a Full Bench for decision:

1. (a) Is a decree obtained against a member or members of a Nair tarwad in contravention of the provisions in S. 31 of the Nair Act 2 of 1100 null and void so far that tarwad and its properties are concerned?

(b) If in execution of such a decree, properties belonging to the tarwad are sold will the court sale be null and void?

2 (a) If the decree and execution proceedings mentioned in question (1) are null and void is it necessary for the members of the tarwad to sue to avoid the court sale within the one year provided for in Art. 9(a), Travancore Limitation Act 6 of 1100?

(b) Is the decision in " 1949 Trav LR 14 (FB) (O)" correct?

3. If the auction purchaser secures possession of the properties of the tarwad

purchased by him in execution of a null and void decree, will Art. 9(a), Travancore Limitation Act be a bar to a suit by the members of the tarwad for recovering possession of those properties if it was brought more than one year after the confirmation of the sale, but within 12 years of the date on which possession was secured by the auction-purchaser?

The case will be boarded again before the Division Bench for final disposal, after the questions mentioned above are decided by the Full Bench.

Joseph Vithayathil, J.

24. I agree with the conclusions of my learned brother. I also agree to the reference to a Full Bench of the questions formulated by my learned brother. I do not however wish to express any opinion at this stage about the correctness of the decision in " 1949 Trav LR 14 (FB) (O)".

(OPINION OF THE FULL BENCH) (SANKARAN, GOVINDA PILLAI AND SUBRAMANIA IYER, JJ., D/- 22-6-1953).

25. The facts of the case are given in the order of reference and they are not mentioned here particularly when the questions referred relate to the abstract propositions of law. (Thereafter quoting questions referred to the Full Bench for its opinion their Lordships proceeded).

26. QUESTION 1 (a). Section 31 of the Nair Act 2 of 1100 laid down that no decree shall bind the tarwad unless it is obtained against the Karnavan as such, the senior Anandaravan of the karnavan's Thavazhi and the senior Anandaravans of all the Thavazhis collateral to the Thavazhi of the Karnavan. This section is practically a reproduction of S. 25 of the Nair Act 1 of 1088. There is a corresponding provision in S. 32 of the Cochin Nair Act 13 of 1095 to the effect that all the members of the tarwad should be parties to the suit in order that the Court could pass a decree against the tarwad. This is a rule of representation of the tarwad as such and that tarwad could be represented only in the way in which the provision is made in the Statute. The representation can be complete only when the necessary members as provided for in the Statute are made party-defendants. The debt conceived in such suits, is a single and indivisible entity and not either the members or Thavazhis composing it unless those thavazhis are properly represented. This was the purport of the decision in - "Palliath Raman Valiathan v. Ammunni Moopil Nayar", 22 C L R 652 (FB) (Z1), A decree obtained without due regard to the provision of S. 31 of the Nair Act would be void so far as the tarwad is concerned according to the decisions in - " 29 Trav LJ 1025 (Y)"; - "Velayudhan Piliat Padmanabha Piliat v. Vishnu Parameswaran Nambudiripad", 19 Trav LJ 1365 (Z2) and - "Meenakshi Kunjamma v. Janaki Amma", 1943 Trav LR 1035 (Z3). There is even an earlier Full Bench decision, - "Raman v. Krishnan", 7 Trav LR 1 (FB) (Z4) which held that a sale of tarwad properties in execution of a decree against the junior members cannot in any way affect the interests of the tarwad. The decree without proper parties on record as provided for in S. 31 of the Nair Act will not therefore be a decree

against the tarwad and the tarwad will not in any way be affected by such a decree. In other words that decree will be null and void so far as that tarwad is concerned. Thus it is our considered opinion that a decree obtained against a member or members of a Nair tarwad in contravention of the provisions in S. 31 of the Nair Act 2 of 1100 is null and void so far as that tarwad and its properties are concerned.

27. QUESTION 1 (b). The steps taken in execution of a void decree will in no way bind the party who is not a party to the decree and if in execution, properties of that party are sold then the court sale also will be null and void. AIR 1935 139 (Privy Council) , is a direct authority for this position. A Court has no jurisdiction to sell the properties of persons who are not parties to the proceedings and the decisions in - " 39 Ind App 62 (PC) (T)" and - " 32 Cal 29S (PC) (U)" referred to in para. 20 of the order of reference are other direct authorities for this position. In - "Parvathi v. Parameswaran", 24 Trav LJ 734 (Z5), there was a finding that even if the decree is void, the sale which took place in execution of that decree will not be void but only voidable. It was this view that found favour with their Lordships in - " 1949 Trav LR 14 (FB) (O)" referred to in Cl. (b) of the second question. With due respect to their Lordships we are not able to subscribe to this position.

" 1949 Trav LR 14 (FB) (O)" does not refer to - " 29 Trav LJ 1025 (Y)" which gave good reasons for taking a different view. In addition to the decisions referred to in para. 20 of the reference order we may also refer to - AIR 1933 61 (Privy Council) ; - Motilal Fulchand Marwadi Vs. Gita Rama Gunge, and - Karashiddaya Shiddaya Bennur Vs. Shree Gajanan Urban Co-operative Bank, Ltd., . for holding that the sale in execution of a void decree will also be void, and that a decree which is a nullity is incapable of execution. So we answer this question that if in execution of a void decree purported to have been obtained against the tarwad, properties belonging to the same are sold then the court sale also will be null and void.

28. QUESTION 2 (a) & (b). In a decree which was not against the tarwad, it cannot be said by any stretch of imagination that the tarwad is a party to the decree. It is a well-known rule of law that no party would be affected by proceedings taken in a case in which he is no party. In - "32 Cal 296 (PC) (U)" mentioned above, it was pointed out at page 312 that as against such persons the decree and sales purporting to be made would be a nullity and might be disregarded without any proceedings to set them aside. To the same effect is the dictum in - Ram Ganu Ghadge Vs. Hari Sambhu Ghadge, and - " AIR 1939 Mad 867 (W)", " 26 Trav LJ 1361 (X)" has also taken the same view. It is, therefore, unnecessary for the party who is not affected by the same to take any steps to avoid the sale. The decision in - " 1949 Trav LR 14 (FB) (O)" against this view is therefore not correct and we hold that it was unnecessary for the members of the tarwad to sue for avoiding the court sale within one year provided for in Art. 9 (a), Travancore Limitation Act 6 of 1100.

29. QUESTION 3. The opinion expressed by us on questions (1) and (2) would show that the tarwad is in no way affected by the sale and it is not necessary to bring a suit to avoid the sale. But if the auction-purchaser secures possession of the property sold, it will be an invasion on the rights of the tarwad and it will be necessary to take appropriate legal proceedings to safeguard its interests. If a civil suit is filed for the purpose, it will be a suit for possession of immovable property when the plaintiff while in possession of the property has been dispossessed or has discontinued the possession. Such a suit will be governed by Art. 130, Travancore Limitation Act and not by Art. 9 (a). Our answer to the third question is in the negative.

(JUDGMENT OF GOVINDA PILLAI AND JOSEPH VITHAYATHIL, JJ., dated 01.07.1953)

30. Based on our findings recorded above, and the opinion of the Full Bench, we reverse the decree of the lower Court and pass a decree in the following terms: we declare that the suit properties belong to the sub-tarwad of the plaintiffs and defendants 1 and 2. The originals of the mortgages Ex. A to the 3rd defendant, Ex. B to the 4th defendant and Ex. J to the 9th defendant are set aside. The decree and execution proceedings which culminated in court sale and delivery in O. S. 1104 of 1105 and O. S. 1698 of 1104 of the Munsiff's Court, Padmanabhapuram are set aside and declared to be not binding on the plaintiffs' sub-tarwad or the plaint properties. The plaintiffs' suit impeaching Ex. C hypothecation bond and Ex. D mortgage to the 5th defendant is dismissed. The plaintiffs are allowed to recover possession of the properties covered by Exs. A, B, J and the sale certificates in O. S. 1104 of 1105 and O. S. 1698 of 1104 of the Padmanabhapuram Munsiff's Court from the parties in possession with mesne profits from date of suit. The lower Court has not recorded any finding on the question of mesne profits and the execution Court is therefore directed to determine the same on a proper motion made before it. The plaintiffs will pay the costs of the 5th defendant here and in the lower Court. They will get their costs (except that would have been due from the 5th defendant) in both the Courts from defendants 3, 4, 6, 7 and 9. These defendants will be liable for costs only in proportion to their separate interest in the properties. They will also be liable for mesne profits for the properties in their possession.