

(1932) 09 MAD CK 0030
In the Madras High Court

Karingali Thendambalath Karnavan and Others	APPELLANT
Vs	
Karlingali Thendambalath Govindan Nambi and Others	RESPONDENT

Date of Decision : 07-09-1932

Acts Referred:

Citation : AIR 1933 Mad 265 : (1933) 37 LW 354

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—This second appeal arises out of a suit brought by the plaintiff as a member of a Makkathayam family, of which

defendant 1 is the karnavan, for the recovery of a lump sum of money as arrears of maintenance due for six years eight months at the rate of Rs. 20

per mensem. The claim was hotly contested by defendant 1 and the first Court decreed the plaintiffs suit by awarding arrears of maintenance at the

rate of Rs. 16 a month. The lower appellate Court modified the first Court's decree by reducing the rate of maintenance to Rs. 12 per mensem. In

this second appeal preferred by defendant 1, the main contention urged is that the lower Courts should have inferred waiver or abandonment of the

right to arrears of maintenance on the part of the plaintiff from all the circumstances of this case. The claim for maintenance relates to a period of six

years eight months commencing from June 1920 and the registered notice of demand was sent by the plaintiff only in January 1927. It is settled law

that mere delay in the matter of claiming maintenance and the mere omission to make demands would not be sufficient to draw an inference as to

waiver or abandonment. Over and above these factors it must be clearly shown in each case that there are justifiable grounds for inferring that the

claim for arrears of maintenance was abandoned.

2. The learned Subordinate Judge observes that there is hardly any evidence worth the name to prove that the plaintiff waived his right. Several

decisions have been relied on by the learned Counsel for the appellant, in which the question of waiver has been considered. As far as I can see,

those decisions do not support the appellant in the contention that mere delay and omission to make demands are enough to give rise to an

inference about waiver. In the present case, there is no justification for holding that the plaintiffs' conduct was such as to mislead defendant 1 into

the belief that the plaintiff would not set up any claim for the arrears of maintenance. There being no tangible basis for presuming that there was

justification for defendant 1 to suppose an abandonment of the claim by the plaintiff, I am of opinion, that the ground of attack based on waiver

must fail. The observation in the judgment of a Division Bench of this Court reported in *Muthu Amma v. Gopalan* (1913) 36 Mad 593 is to the

effect, that if a man is rich and able to provide properly for his wife and children, and if no demand for maintenance is made on the tarwad for a

long time, the Court would be justified in inferring an intention to abandon the claim, but the question whether there was really a waiver should be

decided on the circumstances of each case. This observation does not materially help defendant 1 in this case, in the absence of some special

circumstances giving rise to an inference in favour of abandonment.

3. The next question for consideration is whether the rate of maintenance awarded by the lower appellate Court is liable to reduction. The net

income available for maintenance as taken by the lower appellate Court would be Rs. 1,430-8-0 per annum. Though a higher amount was fixed by

the first Court as the annual income of the tarwad the Subordinate Judge thought fit to proceed on the admitted annual income and arrive at a lower

estimation by way of caution. Taking the members of the family as eight majors and two minors, he fixed the allowance at Rs. 12 per mensem for

each member. In arriving at this rate the learned Subordinate Judge has failed to take into consideration some material circumstances. It has been

held in the decision in *Ekanat Thayu Kunji Amma v. Ekanat Shangunni Yalia Kyamal* (1882) 5 Mad 71. which was followed in *Kunhalikutti Haji v.*

Kunhamayan AIR 1923 Mad. 230 that the circumstance of each member in

respect of his private acquisitions should be taken into account by the karnavan in fixing the maintenance allowable to that member if the income of the tarwad would not be sufficient to provide a suitable subsistence for all the members. The method of dividing the total net income by the number of members in the tarwad without due regard to the real necessities of the several members thereof would not be always a correct method. If there is income sufficient enough for providing a suitable subsistence for all the members then the fact of a particular member having other and independent means would not affect the question.

4. In this particular case I am of opinion that the income of the tarwad is not sufficient to provide a suitable subsistence for all the members. That being so, we have to see whether the plaintiff has any other source of income which would be an important factor for consideration in fixing the rate of maintenance awardable to him. It is clear from the evidence in this case that the plaintiff had been employed in some department which procured him an income of Rs. 40 per mensem on an average.

5. We may take it that he was deriving this income from about August 1922, i.e. for a period of four years six months out of the period for which arrears of maintenance are claimed. This independent income derived by the plaintiff is more than thrice the rate of maintenance which each member in this tarwad could get out of its income. In making the allotment among the members on account of maintenance, it would be reasonable to take into consideration the fact of the plaintiff getting an extra income of Rs. 40 per mensem. It is urged on behalf of the appellant that in the course of two years eight months during the period in question the plaintiff and his wife and children were the recipients of several presents in the shape of cash and cloth from the karnavan and that fact also should be taken into account in fixing the rate of maintenance. These appear to be the customary presents which any member of the tarwad would be ordinarily entitled to. I do not think there is any basis for holding that these presents have any manner of connexion with the maintenance otherwise due to a member. Even if a member of the tarwad was actually living in the family and fed on its income, he would still be entitled to such customary presents. There is no good reason to take this circumstance into account in fixing the rate of maintenance due to the plaintiff. For the other reason already set

forth, it seems to me that the plaintiff should not be allowed the rate of Rs. 12 per mensem arrived at by the lower appellate Court without having regard to any of the circumstances which should be taken into consideration.

6. When the plaintiff claims a lump sum on account of arrears of maintenance for more than six years, a discretion is vested in the Court in the matter of fixing the rate. The point of view would not be the same as in the case where future maintenance is to be declared and fixed. In view of the discretionary power vested in the Court and taking into account the fact of the plaintiff getting Rs. 40 per mensem as an independent source for his livelihood, I think fit to reduce the rate of maintenance decreed by the lower appellate Court to Rs. 6 per mensem for the period of four years six months during which the plaintiff was getting the said extra income.

7. One other question remains to be considered. The Courts below have made defendant 1 personally liable for the amount decreed to the plaintiff.

There are no satisfactory grounds in this case to deviate from the general principle that the karnavan as manager of the tarwad is bound to maintain

the other members from out of the family income only. In the absence of proof of malversation or misappropriation of the income by the karnavan,

it would be most unreasonable to make him personally liable for such dues. I feel it necessary to observe that the considerations which prevailed in

the present case for reducing the rate of maintenance decreed to the plaintiff are confined to his claim viewed as one for a lump sum as arrears of

maintenance for more than six years. The discretion vested in the Court in dealing with such claims has been exercised in this case. These

considerations may not be taken as the guiding factors in any claim for future maintenance to be made by the plaintiff or by any other member of

the family. A claim of that kind will depend upon proof of circumstances relating to the family and the member claiming it.

8. In the result, the decree of the lower appellate Court is modified by awarding to the plaintiff maintenance at the rate of Rs. 12 per mensem for

the first period of two years and two months and for the remaining period of four years and six months at the rate of Rs. 6 per mensem. Defendant

1 will not be personally liable for this amount, but he should pay the same from out of the income of the tarwad properties and also from the

properties of the tarwad. The parties will give and take proportionate costs in all the Courts.