
(1959) 07 KL CK 0035
In the High Court Of Kerala
Case No : S. A. No. 491 of 1956-E

Kochukunju Kurup

APPELLANT

Vs

Chandramathi Amma

RESPONDENT

Date of Decision : 08-07-1959

Acts Referred:

Citation : (1959) KLJ 946

Hon'ble Judges : C.A. Vaidialingam, J

Bench : Single Bench

Advocate : K. Velayudhan Nair, for the Appellant; P. Kochukrishna Pillai, for the Respondent

Final Decision : Dismissed

Judgement

Vaidialingam, J.—The first defendant is the appellant before me. The suit was for setting aside a sale deed executed by the second defendant, the mother of the plaintiff, in favour of the first defendant, evidenced by Ext. A dated 7-1-1112. The sale was of 201/2- cents of garden land for a consideration of Rs. 145. The amount realised by the sale of this property was utilised for taking a mortgage of a plot of Nilam about 34 cents in extent on the same "day as Ext. A. The mortgage document is evidenced by Ext. 2. The transaction was sought to be set aside on the ground that it was not supported by consideration or tarwad necessity. The first defendant-vendee contended that the property belonged absolutely to the second defendant and that the transaction is supported by consideration and tarwad necessity.

2. The trial court accepted the contentions of the first defendant and held that the transaction is supported fully by consideration and also tarwad necessity.

3. But the trial court rejected the contention of the first defendant that the property belongs absolutely to the second defendant alone. But in view of its finding that it is tarwad property and a sale of it by the second defendant was supported by consideration and necessity, the trial court dismissed the plaintiff's

suit. The finding of the trial court that the property was tarwad property was confirmed by the District Court.

4. But, on appeal by the plaintiff, the learned additional District Judge of Kottayam reversed the decree of the trial court, mainly basing his decision on the decision of the Travancore-Cochin High Court reported in *Karunakaran Pillai v Devaki Pillai* (1953 KLT 452), a decision of Mr. Justice Sankaran (as he then was) and Mr. Justice Gangadhara Menon. The reasoning of the learned District Judge was to the effect that the decision of the Travancore-Cochin High Court lays down that it is not open to the karnavan of a tarwad to sell a tarwad property for the purpose of acquiring a mortgage right, and in this view, he held that the transaction in favour of the first defendant could not be sustained.

5. In this view, the learned Judge also held that the transaction cannot be said to be for the benefit of the tarwad and that the transaction ought to be set aside. On the question of improvements, though the first defendant appears to have made a claim for about Rs. 500 in his written statement, the learned District Judge says that there is nothing in his evidence to establish that he has effected any improvements on the property. Mr. Kalathil Velayudhan Nair, Learned Counsel for the appellant, contended that there was evidence before the learned Judge by means of a report of a commissioner regarding the improvements on the property. But when a party himself was not able to place before the court, when giving evidence, the details of improvements in respect of which he claims value, there is no point in relying upon a commissioner's report for this purpose. After all, the best evidence is that of a party, and no doubt, it may be corroborated or supported by the evidence of a commissioner also. In the absence of any evidence given by the first defendant to substantiate his claim for improvements, the learned Judge held that he is not entitled to the value of improvements either. The learned Judge has given certain directions regarding the payment of mesne profits and the rate at which the first defendant was liable to pay. In this view, the learned Judge reversed the decree and judgment of the trial court.

6. In the appeal before me, Mr. Kalathil Velayudhan Nair, Learned Counsel for the first defendant-appellant, contended that the observations of the learned Judges of the Travancore-Cochin High Court in the decision reported in *Karunakaran Pillai v Devaki Pillai* (1953 KLT 452) and relied upon by the lower appellate court to set aside the transaction in favour of his client, are rather too wide or at any rate, must be restricted to the particular facts of the case before the learned Judges. The Learned Counsel also contended that there may be cases where the sale of a property for taking a mortgage which would be more convenient from the point of view of tarwad in the matter of enjoyment may have to be considered. Whatever merits there may be in the contention of the Learned Counsel, the proposition laid down by the learned Judges in that case cannot be restricted only to the facts of the case before the learned Judges. At page 457 of the reports, the learned Judges have pointed out the desirability for laying down

such a principle and there, the learned Judges have also pointed out the manifest disadvantage which will result to the tarwad, if alienations of tarwad property are permitted for taking mortgages which may be redeemed by the mortgagor at any time. The learned Judges have also emphasised that in those circumstances, cash will come into the hands of the managing member and it would be easy to dissipate that cash without the knowledge of anybody, and the interests of the tarwad will suffer. I respectfully agree with the reasoning of the learned Judges.

7. Mr. Kalathil Velayudhan Nair finally contended that the decision of the Travancore-Cochin High Court may require consideration by the Kerala High Court. The only course open to me is to decide the case against Mr. Kalathil Velayudhan Nair on the basis of this judgment, and grant leave to appeal against my judgment in this second appeal, which I accordingly grant in his favour. All the contentions of the Learned Counsel fail, and the second appeal is dismissed with costs, but, as pointed out earlier, leave to appeal is granted.