

**(1996) 06 KL CK 0022**  
**In the High Court Of Kerala**  
**Case No : S.A. No. 98 of 1988 C**

Kohnan Gopalan and Others

APPELLANT

Vs

Padmini and Others

RESPONDENT

**Date of Decision :** 24-06-1996

**Acts Referred:**

Malabar Tenancy (Amendment) Act, 1951 — Section 33

**Citation :** (1996) 06 KL CK 0022

**Hon'ble Judges :** P.K. Balasubramanyan, J;K.A. Abdul Gafoor, J

**Bench :** Division Bench

**Advocate :** R. Bhaskaran, for the Appellant; E.V. Nayanar, for Respondents 1 to 27 and 32 to 44, for the Respondent

## Judgement

P.K. Balasubramanyan, J.—Defendant No. 23 and the legal representatives of Defendant No. 24 in a suit for partition are the Appellants. According to the Plaintiffs, plaint B schedule item No. 1 belonged to the thavazhy of the Plaintiff and Defendants 1 to 24 and was hence available for partition among the members of the thavazhy. We are only concerned with that item in this Second Appeal. According to Defendants 23 and 24, though originally the said item belonged on tenancy to the thavazhy, the landlord had obtained a decree for arrears of rent in O.S. 575 of 1948 on the file of the Munsiff's Court, Tellicherry, in execution of which he was trying to sell the right, title and interest of the thavazhy over that item of property. At that stage, to save the property, the karanavan by himself granted a registered lease of the said item to one of his sisters, Chappila, the mother of Defendants 23 and 24. That document of lease was marked as Ext. B-19 dated 29th January 1951. According to Defendants 23 and 24, Chappila was in possession of the property pursuant to that lease and on her death, the right under the lease had devolved on Defendants 23 and 24. Defendants 23 and 24, members of the thavazhy, therefore pleaded that they were entitled to fixity of tenure in respect of plaint B schedule item No. 1 on the strength of the lease Exit. B-19. The Plaintiffs challenged the claim on the ground that the said lease was not valid or binding on the thavazhy and consequently did

not confer any right on Chappila or on Defendants 23 and 24 as her heirs. The essential question that fell for decision in the suit therefore was, whether Ext. B-19 was valid or binding on the thavazhy or whether the Plaintiffs could ignore the same and claim partition of the properties included therein on the basis that the property continued to be held on tenancy, by the thavazhy.

2. The Madras Marumakkathayan Act, Act 22 of 1930, came into force in terms of Section 5 of the Madras General Clauses Act having been first published in the Fort St. George Gazette, on 1st August 1933. Section 33 of that Act dealt with the alienation of immovable property by a Karanavan of a tarwad. Under the section as it stood, Sub-section (1) which related to sales, mortgages with possession and leases of immovable property for a period exceeding 12 years, could be granted only for tarwad necessity or benefit and with the written consent of the majority of the major members of the tarwad. Under Sub-section (2) of Section 33 of the Act, mortgages with possession or leases with premium returnable wholly or in part or for a period not exceeding 12 years, could be created by the Karanavan, provided there was consideration and tarwad necessity or benefit. Sub-section (3) provided that the Karanavan would continue to have powers to grant any lease without premium returnable wholly or in part or the renewal of an existing kanam for a period not exceeding 12 years, in the usual course of business. This section was amended by the Malabar Tenancy Amendment Act of 1951. The substituted Section 33 of the Madras Marumakkathayam Act after its amendment in 1951 read as follows:

33(1) No sale or mortgage of any immovable property and no lease of any such property either for a premium returnable wholly or in part or for a period exceeding 12 years shall be valid unless it is executed by the Karanavan for consideration, for Tharwad necessity or benefit and with the written consent of the majority of the major members of the Tharwad;

(2) No lease of any immovable property of a Tharwad in cases not referred to in Sub-section (1) shall be valid unless it is executed by the Karanavan and where the Malabar Tenancy Act, 1929, confers fixity of tenure on the lessee, unless also the written consent of the majority of the major members of the Tharwad has been obtained to the lease;

(3) Nothing contained in Sub-section (1) or (2) shall be deemed to affect the validity of any mortgage or lease executed on or before 27th July 1950 in accordance with the law at the time of such execution.

It could be seen that Section 33(1) prohibited the grant of any lease for a period exceeding 12 years unless it was executed by the Karanavan with the written consent of the majority of the members of the tarwad and Sub-section (2) provided that no lease of any immovable property referred to in Sub-section (1) shall be valid in a case where the Malabar Tenancy Act conferred fixity of tenure on the lessee, unless it was executed by the Karanavan with the written consent of the majority of the major members of the tarwad. Sub-section (3) of Section

33 saved leases granted by the Karanavan under the relevant provision of the Madras Marumakkathayam Act, 1933 prior to 27th July, 1950 in accordance with the law at the time of such execution. The amendment bill was published on 27th July 1950 and though the Amendment Act as such came into force on 23rd September 1951, Section 33 as it stood amended was intended to affect transactions entered into subsequent to 27th July 1950, the date of publication of the Amendment bill. The Madras Marumakkathayam Act as extended to Kerala was further amended in the year 1958 by Act 26 of 1958. The edition as amended reads as follows:

33. (1) No sale or mortgage of any immovable property of a tarwad and no lease of any such property shall be valid, unless it is executed by the Karanavan for consideration, for tarwad necessity or benefit, and with the written consent of the majority of the major members of the tarwad.

(2) Nothing contained in Sub-section (1) shall be deemed to affect the validity of any mortgage or lease executed before the commencement of the Madras Marumakkathayam (Amendment) Act, 1958, in accordance with the law in force at the time of such execution.

The 1958 Act curtailed the power of the Karanavan for the grant of any lease without the written consent of the majority of the major members of the tarwad. But, Sub-section (2) of Section 33, saved leases executed before the commencement of the Madras Marumakkathayam Amendment Act 1958 in accordance with the law in force at the time of such execution.

3. In the present case, the lease Ext. B-19 was executed on 29th January 1951. It was executed only by the Karanava. The written consent of the majority of the members of the tavazhy was not obtained. It was for a period of 12 years. Since it did not exceed the period of 12 years, u/s 33(2) of the Madras Marumakkathayam Act, 1932 as unamended, the written consent of the majority of the major members of the tavazhy or tarwad was not required. It had only to be, shown that it was for consideration and for tarwad necessity or benefit. But in view of Sub-section (2) of Section 33 of the Act as amended in the year 1951, the consent of major members of the tavazhy or tarwad was required, in view of the fact that the tenant thereunder, would have been entitled to fixity of tenure under the Malabar Tenancy Act. Going by the deeming provision under Sub-section (3) of Section 33 of the Act, any such lease executed after 27th July 1950 was hit by the amended Section 33(2) of the Act, even though the amending Act as such came into force on 23rd October 1951, about 9 months after the execution of Ext. B-19.

4. While the Plaintiffs claimed that the transaction was hit by Sub-section (2) of Section 33 of the Act as amended in the year 1951 and consequently invalid and not binding on the tavazhy, Defendants 23 and 24 contended that by virtue of Sub-section (2) of Section 33 of the Act as amended in 1958, the transaction Ext. B-19 should be deemed to be valid since it was saved by Section 33(2) of

the Act, as it was executed by the karanavan prior to 23rd October 1951, the date of the coming into force of the Amendment Act, 1951. In other words, Defendants 23 and 24 contended that Sub-section (2) of Section 33 as amended by Act 26 of 1958 saved the validity of a lease granted by a karanavan between 27th July 1950 and 23rd October 1951, the date of commencement of the Amendment Act of 1951 since the law in force at the time of execution should be taken as the law as it stood prior to 23rd October 1951, the date of the Amending Act of 1951 and that law was Section 33 of the Act as it stood prior to its amendment in the year 1951. According to counsel for Defendants 23 and 24 therefore, the transaction was valid at the time of its execution, namely, on 29th January 1951 which was a date preceding the coming into force of the Amendment Act. This is met by counsel for the Plaintiffs by pointing out that what Sub-section (2) of Section 33 saves, are only leases granted prior to 27th July 1950 by virtue of Sub-section (2) of Section 33 of the Act as it stood prior to its amendment in the year 1958 and by virtue of the deeming provision, Ext. B-19 entered into on 29th January 1951, which was subsequent (to 27th July 1950, was not valid in accordance with the law then in force. He contended that the Amendment Act of 1951 operated on all transactions subsequent to 27th July 1950 and there is nothing in Section 33(2) of the Amendment Act in the year 1958, which would save the transaction entered into subsequent to 27th July 1950, which was otherwise hit by Section 33(2) of the Act as it then stood. While the trial Court accepted the position canvassed for by Defendants 23 and 24, the lower appellate Court accepted the position canvassed for by the Plaintiffs. The appellate Court consequently held that the lease was not binding on the tavazhy and consequently that item was available for partition. The Second Appeal by Defendant No. 23 and the legal representatives of Defendant No. 24 challenging the view of the appellate Court was heard by the learned Single Judge who felt that since it involved an important question of the scope of Section 33 of the Madras Marumakkathayam Act, the case deserved to be decided by a Division Bench. It is on a reference being made by the learned Single Judge that the Second Appeal has come before us.

5. It is clear from the history of the legislation and the amendments attempted, that the intention was to curtail more and more, the power of the Karanavan of a tarwad to deal with the tarwad property, by himself. This was obviously with a view to safeguard the interests of the tarwad and curtail the power of the Karanavan to benefit his wife and children or other favourites at the cost of the tarwad. Fixity of tenure had been conferred by the Malabar Tenancy Act on tenants and provision had been made for payment of fair rent. This necessarily affected the rights of the lessor-tarwads. It is in that context, that further restrictions were imposed on the power of the Karanavan of a tarwad-who was the sole representative and spokesman of the tarwad according to Marumakkathayam Law-by the amending Act of 1951. It is significant that the amendment to Madras Marumakkathayam Act was effected by the Malabar Tenancy Amendment Act of 1951. As per that amendment, intended to take

effect from 27th July 1950, the date of publication of the Amendment Bill, no lease attracting fixity of tenure under the Malabar Tenancy Act could be validly granted by a Karanavan acting by himself. The qualified power given to the Karanavan to act by himself in that behalf by the Madras Marumakkathayam Act as amended in the year 1951, was taken away by the amendment brought about in the year 1958 which provided that no lease at all could be granted by a Karanavan without the written consent of the majority of the major members of the tarwad. The intention of the 1958 amendment to the Madras Marumakkathayam Act is then, to further restrict the power of the Karanavan and not to enlarge it.

6. In the case on hand, if the Amendment Act of 1958 had not come into force, the lease executed on 29th January 1951 would have been invalid in view of the fact that it was executed by the Karanavan alone, after 27th July 1950 and the lessee would have been entitled to fixity of tenure under the Malabar Tenancy Act. While further restricting-actually completely taking away the right to act by himself-the power of the Karanavan, it certainly could not have been the intention of the legislature to give efficacy or validity to a transaction which was already invalid, in the light of the 1951 Amendment Act. The argument, therefore, that though the transaction was invalid prior to the Amending Act of 1958, it became valid by virtue of Section 33(2) of the Act as amended in 1958, militates against the legislative scheme and the intention of the legislature clearly expressed, to curtail altogether the power of the Karanavan to grant a lease by himself.

7. The argument on behalf of Defendants 23 and 24 is based on the wording of Sub-section (2) of Section 33 of the Act, as amended in 1958. What is pointed out is that all transactions of a similar nature executed prior to the 1958 Act are saved with reference to the law in force at the time of the transaction and the law in force on 29th January 1951, when the lease was granted, permitted such a lease, since the Amending Act of 1951 came into force only on 23rd September 1951 and it is only by virtue of that Amendment, that the lease in question became invalid. It is contended that since Sub-section (3) of Section 33 of the Act as amended in 1951 is repealed by the 1958 Act, the retrospective effect given to the amendment of 1951 from 27th July 1950 has disappeared. In other words, the contention is, what was invalid prior to the 1958 amendment has been validated by the 1958 amendment. The acceptance of the argument would really be going against the legislation(sic) scheme referred to earlier. The transaction Ext. B-19 had already been invalidated by the Act as amended in 1951. There is, clearly, no intention discernible from the 1958 amendment to validate a transaction which had already been invalidated.

8. Learned Counsel on behalf of Defendants 23 and 24 contended that though by virtue of Sub-section (3) of Section 33 of the Madras Marumakkathayam Act as it existed prior to 1958, leases granted by Karanavan between 27th July 1950 and 23rd October 1951 stood eclipsed, the eclipse was removed by Sub-section (2) of

Section 33 of the Act as amended in 1958 validating all transactions upto 23rd October 1951 and consequently Ext. B-19 should be deemed to be valid. He relied on the decision of the Supreme Court in *Municipal Board, Bareilly Vs. Bharat Oil Company and Others*, in support of his contention. This argument raised by counsel, in our view, proceeds on the assumption that the law in force as on 29th January 1951, after 27th July 1950, was Section 33 of the Madras Marumakkathayam Act as it stood prior to the amendment of 1951. It is clear from the Amending Act of 1951 that in so far as it related to Section 33 of the Madras Marumakkathayam Act, the section was intended to operate from 27th July 1950. The transaction relied on by Defendants 23 and 24 was therefore always invalid and was not merely under the eclipse as contended by learned Counsel. As we have observed, there is clearly an intention discernible from the 1958 Act not to validate any unilateral act of the Karanavan, but clearly to restrict further, his power of dealing with the property of the tarwad. In that background, the above argument has no substance.

9. Section 33 of the Madras Marumakkathayam Act as amended in 1951, affected all transactions after 27th July 1950 Ext. B-19 was executed by the Karanavan after the publication of the Bill on 27th July 1950. That transaction is clearly hit by Section 33 of the Act as it stood. For the purpose of Sub-section (2) of Section 33 of the Act as amended in 1958, the law in force at the time of the transaction was Section 33 of the Act as amended in 1951, since, the 1951 amendment had operated on all transactions subsequent to 27th July 1950. The law in force at the time of the transaction Ext. B-19 must therefore be deemed to be Section 33 of the Act as amended in the year 1951. The fact that the Amendment Act of 1951 came into force on 23rd October 1951 would not affect the question. Sub-section (2) of Section 33 of the Act as amended in 1958 does not or cannot affect this scheme of things. We are therefore not in a position to accept the contention of counsel on behalf of Defendants 23 and 24 that what was otherwise invalid, has been validated by the 1958 Amendment Act.

10. The transaction Ext. B-19 was executed by the Karanavan after the publication of the Amendment Bill preceding the 1951 amendment. The bona fides of the transaction itself is questioned by the Plaintiffs. We do not consider it necessary to pursue this aspect in our view that on the legislative scheme, the transaction Ext. B-19 cannot be treated as valid in view of Section 33 of the Madras Marumakkathayam Act as it operated on the date of the transaction. In that view, Ext. B-19 cannot be treated to be validated by Sub-section (2) of Section 33 of the Act as it stands amended in the year 1958.

11. The lower appellate Court has come to the same conclusion as the one come to by us. We therefore find no reason to differ from the decision of that Court.

12. The argument based on an alleged certificate of purchase was not pursued before us obviously because the tavazhi was not a party to the proceeding leading to it and only the rights of the jenmi were assigned under it and not of the tavazhi as the intermediary. But, it was contended that the transaction Ext.

B-19 was only voidable and not void and a suit to set aside the transaction was necessary. We find that no such contention was raised before the Courts below. When the statute invalidated the transaction, it is difficult to hold that it only becomes voidable and not void as against the members of the tavazhi. On the suit for partition being filed, ignoring the transaction, the transaction is avoided by the tavazhi and then it becomes void as against the tavazhi in our view, no suit or prayer to set aside the transaction is necessary.

For the reason stated above, we affirm the decree and judgment of the lower appellate Court and dismiss this Second Appeal with costs.