

(1952) 09 KL CK 0003
In the High Court Of Kerala
Case No : A.S. No. 288 of 1124 (T)

Kunjan Pillai Karunakaran Pillai

APPELLANT

Vs

Mani Pillai Devaki Pillai and Others

RESPONDENT

Date of Decision : 08-09-1952

Acts Referred:

Travancore Nair Act, 1912 — Section 25

Citation : AIR 1952 Ker 542

Hon'ble Judges : K. Sankaran, J;Gangadhara Menon, J

Bench : Division Bench

Advocate : N.K. Narayana Pillai, for the Appellant; P.K. Parameswaran Pillai and P. Govindan Nair, for the Respondent

Judgement

Sankaran and Gangadhara Menon, JJ.—This appeal has been preferred by the Plaintiff in O.S. No. 39 of 1121 on the file, of the Krishnapuram District Munsiff's Court. Himself and Defendants 2 and 3 are the children of Defendant 1. The suit properties belonged to their common tarwad and as per the partition deed executed by the members of the tarwad in the year 1103, these properties along with other items were set apart to the share of these parties who constituted a thavazhi or sub-tarwad with Defendant 1 as its head. Until the Plaintiff attained majority, his mother Defendant 1 was the only adult member in this sub-tarwad. On 30-9-1117 she sold the plaint items, which are paddy lands covering an extent of 62 cents, to Defendant 4 for a consideration of Rs. 675/-. On the same day she took Ex. II assignment of a mortgage right charged on certain other items of properties. On the Plaintiff attaining majority, he instituted the present suit to have the sale deed Ex. III set aside and for recovery of the plaint items from Defendant 4 with mesne profits at the rate of 90 paras of paddy per year.

The sale was impeached as a transaction unsupported by consideration and necessity binding on his sub-tarwad. It was also contended that the sale was highly prejudicial to the interests of the sub-tarwad. All these allegations were denied by Defendant 4 who resisted the suit. She in her turn contended that the

sale deed Ex. III is fully supported by consideration and necessity and that the sale was of undoubted benefit and advantage to the sub-tarwad. The trial Court upheld these contentions and dismissed the suit. Hence this appeal.

2. On the question whether the sale deed Ex. III is supported by consideration, the finding recorded by the Court below in favour of Defendant-Respondent 4 does not call for any interference. D.W. 2 swears to the payment of consideration under this document. Such payment was made before the Sub-Registrar who had certified the fact of such payment on the back of the document itself. There is also the further statement in Ex. II that the sum of Rs. 675/- obtained under the sale deed Ex. III formed the bulk of the consideration for obtaining the assignment under Ex. II. In the face of such evidence it is idle to contend that Ex. III is lacking in consideration.

3. The next and the more important question for determination in this appeal is whether Defendant 1 was acting within her rights when she executed the sale deed Ex. III. At the time of the execution of the document, she was undoubtedly the manager of the sub-tarwad, consisting of herself and her children. In that capacity she could execute a sale deed like Ex. III so as to bind the sub-tarwad, provided it is found that the sale is supported by consideration and necessity binding on the sub-tarwad. Since it has been proved that the sale has been for valuable consideration, the next aspect to be considered is whether it was to the benefit of the sub-tarwad, so that it may be said that the sale is supported by necessity binding on the sub-tarwad. Some more facts relating to the particular transaction have to be borne in mind in approaching this question.

4. The right taken assignment of under Ex. II was only a portion of the mortgage right, which belonged-in common to the executants of Ex. II and Ors. . Under an arrangement entered into by all these mortgagees, the properties covered by Ex. II were being enjoyed by the executants of Ex. II in lieu of their share of the entire mortgage right. For a redemption of this mortgage a suit had already been instituted as O.S. No. 165 of 1103 on the file of the District Court, Quilon, by the original mortgagor. Ex. A is copy of the first judgment passed in that case on 13-6-1110 by which redemption was decreed. However, that decree was subsequently reopened and the suit restored to the file. A decree for redemption of the mortgage was again passed in favour of the mortgagor on 12-12-1114. Ex. A(I) is copy of the judgment passed in that case. Defendant 1 to 10, 15 and 16 in that case were the mortgagees entitled to the mortgage amount deposited in Court. Exs. A and A(I) show that while decreeing redemption of the mortgage, it was directed that the mortgagees may settle their respective claims in respect of the mortgage amount, in a fresh suit or that they may jointly draw the amount deposited in O.S. No. 165 of 1103.

Defendants 6 and 7 in that case are the executants of Ex. II assignment in favour of the present Defendant 1 in the year 1117. This assignment was taken by Defendant 1 more than three years after the decree in Ex. A(I) case, directing surrender of the properties, had been passed against the assignors and the other

co-mortgagees and at a time when the rights of these assignors to any specific portion of the mortgage amount deposited in Court had not been settled or defined so as to enable them or their assignees to draw such amount from Court. It is also seen that soon after the execution of Ex. II assignment, the redemption decree in Ex. A(I) case was put into execution and the properties were recovered by the mortgagor decree-holder in the year 1119. This fact is proved by Ex. B which is copy of the delivery kychit in O.S. No. 165 of 1103. Thus the present Defendant 1 has lost possession of the properties obtained by her on the strength of Ex. II assignment and she is also not in a position to draw any portion of the mortgage amount as representing the share of her assignors out of the entire mortgage amount. The plaint items over which her sub-tarwad had absolute rights, have also been surrendered to Defendant 4 under the sale deed Ex. III.

The question is whether there was any justifiable necessity so far as the Plaintiff's sub-tarwad was concerned, to enter into a transaction like Ex. III.

5. An outright sale of the properties belonging to such tarwad, governed by the principles of Marumakkathayam law, does not ordinarily come within the normal course of the management of the tarwad by its karnavan. The powers of the karnavan in respect of the management of the affairs of the tarwad are subject to certain well defined limitations. So far as the Nair community, to which the Plaintiff belongs, is concerned the limitations and powers of the managing karnavan of a tarwad have been defined by the provisions of Act 2 of 1100 of Travancore. Section 25 of that Act states that

except for consideration and tarwad necessity and with the written consent of all the major members of the tarwad, no karnavan or other managing member shall sell tarwad immovable property or mortgage it with possession for a period of more than twelve years, or lease it for a period of more than twelve years.

It is clear from the section that the sale of tarwad properties can be held valid only when all the three conditions stated in the section are satisfied viz., that it should have the written consent of all the major members of the tarwad, that the sale should be for consideration and also for tarwad necessity.

The scope of this section has come up for consideration in a series of cases and it has been settled by the decisions in those cases that when the alienation in question has been effected with the written consent of all the adult members of the tarwad and has been proved to be supported by consideration, a presumption of necessity will arise. The question whether the alienation of immovable properties of the tarwad for the purpose of acquiring other properties for the tarwad can be said to be a justifying necessity, has also come up for consideration in a series of cases and it has been decided that even though such alienations do not normally come within the course of management of the tarwad they may be upheld where the fresh acquisitions are shown to have been to the manifest advantage of the tarwad. The decisions in - "Bhagavathy Pillai v.

Kumaran" 19 Trav LJ 300 (A); - "Parukutty Amma v. Krishna Panicker" 24 Trav LJ 1128 (B); - "Koyakunju v. Bharathi Channati" 25 Trav LJ 703 (C) and --"Sankararu Thanthri v. Krishnar Pandarathil" 28 Trav LJ 920 (D), are to that effect. In the last of these cases the principles governing alienations of the kind already referred to have been stated as follows:

(i) Where an alienation of tarwad property is effected by all the adult members of the tarwad for the purpose of acquiring other property for the tarwad and where such acquisition is to the manifest advantage of the tarwad, it will be presumed that such alienation and acquisition were for necessity binding on the tarwad.

(ii) It would nevertheless be open to the other members of the tarwad to establish that such alienation and acquisition were not in the best interests of the tarwad and should therefore be regarded as not a necessity binding on the tarwad.

In the earlier decision in - "24 Trav LJ 1128 at p 1136 (B)", it was further pointed out that

the discretion exercised by all the adult members of a tarwad in entering into a transaction regarding tarwad properties ought to be respected and upheld, irrespective of any untoward consequences that may result later on.

It is mainly on the strength of this observation that the lower Court has upheld the sale under Ex. III. It is pointed out that the validity of that sale deed executed by Defendant 1, who was the only adult member in the sub-tarwad at that time, cannot be questioned by any other member of the sub-tarwad merely because the property acquired with the consideration obtained under Ex. III was subsequently lost to the sub-tarwad. The view taken by the lower Court is not correct.

The weight of the presumption of necessity attaching to an alienation effected by all the adult members of the tarwad will not be available in the case of an alienation effected by a single member of the tarwad even though such single member might happen to be the only adult member in the tarwad at the time. Where the alienation is by a single member of the tarwad it cannot be said that it has the same advantage of a proper discretion by several members of the tarwad and of the consensus of opinion among them that the alienation is to the advantage and benefit of the tarwad. If there is only one adult member in the tarwad, his or her position will be merely that of a karnavan in management of the tarwad. Any alienation effected by such a member has to be viewed as an alienation effected by the managing karnavan of the tarwad and as such the alienation will be liable to all the attacks usually available as against such alienations. But this does not mean that such an alienation cannot be upheld under any circumstance. If the alienation is shown to be fully supported by consideration and has been to the manifest advantage of the tarwad, it will be upheld as a transaction binding on the other members of the tarwad also who were only minors at the time of the alienation.

6. As already stated, an alienation of immovable properties of the tarwad by competent persons and for the purpose of acquiring other properties for the tarwad, can be upheld only if such acquisition has been to the manifest advantage of the tarwad. This leads on to the further question as to the nature of the acquisition contemplated by the rule. Can such acquisition include acquisition of mortgage rights, lease-hold rights, etc., or should such acquisition be necessarily acquisition of immovable properties? We think that the acquisition contemplated by the rule is the acquisition of immovable properties because otherwise the rule intended to conserve the interests of the tarwad could be easily defeated by alienating immovable properties of the tarwad and utilising the consideration for acquiring other rights which, though property in the eye of law, may at the same time be only precarious and doubtful rights. If the property acquired is only a mortgage right or a leasehold right, the karnavan alone could give a valid release of the rights under such mortgage or lease and the consideration thus obtained under it will be at his complete control. If he does not invest such money in any immovable property, but utilises it for his own benefit or otherwise squanders it away, the tarwad will not be able to trace that amount and to recover the same.

Thus by adopting such a circuitous method, the interests of the tarwad could be easily defeated. To make an acquisition with such potential dangers cannot certainly be said to be an acquisition to the manifest advantage of the tarwad. On the other hand, such an acquisition will clearly be to the manifest disadvantage of the tarwad and as such the making of such an acquisition cannot be said to be a valid necessity binding on the tarwad. Where immovable properties of the tarwad are alienated by competent persons for the purpose of acquiring other properties, the fresh acquisitions should also be necessarily immovable properties so that the alienation of such properties also could be made subject only to the limitations imposed by Section 25 of the Nair Act and consistent with the dominant intention underlying Section 25 of protecting the interests of the tarwad. Judged by this test, it is clear that the taking of Ex. II assignment of a mortgage right can in no sense be deemed to have been of any advantage to the Plaintiff's sub-tarwad so as to accept it as a valid necessity justifying the sale under Ex. III of the immovable properties over which the tarwad had absolute rights.

Defendant 4, who is the vendee under Ex. III, was fully aware that the consideration paid under that document was meant merely for taking an assignment of a mortgage right in the (sic) of Defendant-vendor 1. It is so stated in Ex. III itself and ordinary prudence should have dictated to the vendee that the avowed object of the sale could not be deemed to be a valid necessity supporting the sale.

7. It is urged on behalf of Defendant-Respondent 4 that the properties sold under Ex. III are situated more than a mile away from the sub-tarwad house of the Plaintiff and Defendant 1, while the properties covered by Ex. II assignment are

considerably larger in extent and capable of yielding a larger income and are situated close to that house. It is obvious that the suggested benefits and advantages could only be imaginary and not real, because the properties covered by Ex. II were liable to be redeemed by the mortgagor at any moment. In fact it is seen from Ex. A (1) that the decree for redemption had already been passed more than three years prior to the dates of Exs. II and III. Ex. B further shows that in execution of the redemption decree the mortgagor decree-holder actually recovered possession of the properties covered by Ex. II from Defendant 1 in the year 1919 and thus the danger and the risk latent in Ex. II even at its inception became real and effective. The result has been that the plaint items which were the only paddy fields owned by the sub-tarwad were disposed of by Defendant 1 without deriving any advantage or benefit to the sub-tarwad as a result of such sale.

Thus it had been clearly established in this case that the sale under Ex. III was absolutely without any necessity binding on the sub-tarwad and the consideration obtained under it was not utilised for any benefit or advantage not to speak of manifest advantage - to the sub-tarwad. The Plaintiff's suit to have the sale deed set aside has therefore to be allowed.

8. On behalf of Defendant-Respondent 4 it was contended that in view of the fact that consideration has been proved to have been paid under Ex. III, the vendee is entitled to recover this amount as a charge on the plaint properties if the sale deed is set aside. We do not see our way to accept this contention as valid. As already found, the consideration paid under Ex. III has not benefited either Defendant-vendor 1 or her sub-tarwad. The amount was utilised for taking the mortgage right under Ex. II and the properties covered by Ex. II were subsequently redeemed by the mortgagor. The redemption price is already in deposit in Ex. A(I) case. By taking appropriate steps Defendant 4 may be able to recover the consideration paid by her under Ex. III, out of the amount in deposit in Court in that case. Her remedy lies in that direction since the sale deed Ex. III is found to be not valid and binding on the plaintiff's sub-tarwad. The consideration paid under that document cannot be made a charge on the plaint properties. Defendant 4's possession of these properties can only be deemed to be wrongful and as such she is answerable for the mesne profits due in respect of those properties.

The rate of such mesne profits has been fixed by the lower Court at 60 paras of paddy per year. Defendant 4 has submitted to this finding. The Plaintiff's claim for mesne profits at a higher rate has not been substantiated. Hence the rate of mesne profits as fixed by the lower Court is left undisturbed.

9. In the result this appeal is allowed and in reversal of the decree of the lower Court, the Plaintiff's suit is decreed in terms of the plaint subject to the modification that the rate of mesne profits will be calculated at 60 paras of paddy per year. The Plaintiff-Appellant will get his costs throughout from Defendant-Respondent 4.