

(1923) 03 MAD CK 0073
In the Madras High Court

Meenakshi Nethiar Amma

APPELLANT

Vs

Cheriya Parvati Nethiar and Others

RESPONDENT

Date of Decision : 19-03-1923

Acts Referred:

Trusts Act, 1882 — Section 63

Citation : AIR 1924 Mad 174

Hon'ble Judges : Oldfield, J

Bench : Division Bench

Judgement

Oldfield, J.—In accordance with the opinion of the Full Bench we proceed to deal with the merits. The first ground on which the appeal has been argued is that the case, which the District Munsif and the lower appellate Court eventually considered and on which they decided against the 14th defendant, appellant was not that relied on by the plaintiff in the plaint and that on this account the 14th defendant was greatly prejudiced and refrained from giving evidence on facts which weighed materially with the lower appellate Court.

2. The plaintiff's case as set out among the charges in paragraph 11 (c) of the plaint was that the 1st defendant joined a Kuri on behalf of the tavalī, gave the amount of his prize to and got executed a panayam deed Ex-XVI by defendants 11 to 13 in favour of the 14th defendant, his daughter, instead of getting it in his own name, and that the tavalī has a right to recover this amount thus lent, the 14th defendant having no right to it. The relief asked for in this connection in paragraph 18 was to decree that the amount regarding Exhibit XVI belongs to the tavalī of the plaintiffs and the 1st defendant and to direct the 14th defendant to deliver up the said document and other documents relating to it, to the 2nd plaintiff or to any other plaintiff whom the Court thinks proper." That case was put by the 14th defendant in paragraph 7 of her written statement. The lower courts regarded her as putting forward alternative cases therein. That may have been the case, though it was not clear that it is so for it is possible to read the plaint as alleging that she had private money in Pangi Achan's and Achuta

Menon's Kuri, that she left it in the 1st defendant's hands and he spent it on the tarwad, that he had replaced what he spent by his prize money in Raman Nair's Kuri, the Kuri referred to by the plaintiff and that on his repaying it, she invested the amount in Exhibit XVI. On these pleadings the argument is that the plaintiff's case in the plaint was put forward as being that the money was invested by Exhibit XVI as the 1st defendant's money throughout, the document being taken in the name of 14th defendant benami. This differs materially from the case, which the second of the District Munsifs concerned and the lower appellate Court found established; that the money lent under Exhibit XVI was tarwad money misappropriated by the 1st defendant as the Karnavan and given by him to the 14th defendant, his connection with the money ceasing when it came into her hands and was used by her. As the money being thus trust money in her hands with notice of its character she is bound to restore it. It is we think clear that there was very little attempt by the parties or their advisers in the lower Courts to put forward and adhere to any very accurate contentions. The issue framed on this part of the case was general in she extreme. It was: "Are the plaintiffs entitled to get any declaration in regard to B. schedule properties." On that ii-sue a considerable amount of evidence was adduced on both sides. The first District Munsif concerned no doubt found on the material point that the money was the property of the tarwad. But we have not been able to follow the remainder of his judgment on this part of the case. The second District Munsif and the lower appellate Court have as already stated found that the money belonged to the tavali and it was misappropriated by the 1st defendant and was given to the 14th defendant. Having given the matter the best consideration we can, we do not think that any surprise or misapprehension has been established on the 14th defendant's behalf. The plaint alleged tarwad ownership of the money; but it did not say distinctly whether Exhibit XVI was taken in the 14th defendant's name benami or the money was given to her. It submitted the general facts to the Court without specification of their exact legal implications. We observe that whether the plaintiff proved the narrower case of gift by the first defendant of what was found to be trust money or the wider case of benami, the evidence required would be the same and the conclusions from it would differ, only because in the second case referred to a further and different inference from the evidence would be necessary. In either case the duty of the 14th defendant to give evidence as to the manner in which the money was in her hands, and as to her knowledge of its character must have been equally clear; and we cannot hold that she has been in any way prejudiced in this respect. There is further the fact that although the case before the second District Munsif and the lower appellate Court was argued fully the second District Munsif in his judgment said explicitly that no allegation or argument relating to benami was addressed to him and there is nothing in the lower appellate Court's judgment to suggest that the case of benami was ever mentioned or that objection was taken to the case of gift of trust money. There is further no ground of appeal relating to this matter in this Court. In these circumstances, we disallow this objection and pass to the merits.

3. On the merits the first point taken is that the 1st defendant as karnavan was not a trustee and that any application of trust law to his conduct is inadmissible. To support this *Eravinni Revivaram v. Ittapu Revivarman* [1876] 1 Mad. 153 and *Mankoothi Chattukutti Nair v. Kommappan Nair* [1918] M.W.N. 144 have been relied on. Those decisions no doubt say that the Karnavan is not a mere trustee. But in the first that was said in connection with the principles on which the Court would deal with him when his removal was asked for, and in the second, the question was as to the power of a person who gave a mortgage in order to pay a barred debt. The point was that the Karnavan was not a mere trustee like the officer of a corporation but his position was fully recognised as that of a manager of an undivided Hindu family. That the Karnavan in the present case has that position is sufficient and justifies the lower appellate Court's conclusion.

4. Next it is said that Section 63 of the Trust Act on which the lower appellate Court has relied is not applicable to the 14th defendant. There is first the explicit finding of the lower appellate Court that she knew the money was the property of the tavalali. Next it is said that the last Clause of Section 64 excludes the case from Section 63, but the answer is that the money did not come to her in circulation, but reached her by means of payment made ostensibly on her behalf to the 11th to 13th defendants under Exhibit 16. The reference to money coming in circulation, in the Section means and includes in our opinion, the passing of money in the ordinary-course of business by which it might have reached either the defendants or any other stranger and not the transfer to the 14th defendant by a specific act such as is now in question.

5. The remaining argument is against the finding that the money was the property of the tavalali. The lower appellate Court reached that finding because it held that the money could be traced to tavalali funds, and there was evidence to support its conclusion. That finding relates to a question of fact and is therefore binding on us. It is urged that the lower Court disregarded the fact that the 1st defendant has private funds and that even if he took the money in the first instance from tavalali funds he might have restored it from his own funds, the suggestion being that no conclusion against his private ownership of the money could be valid, until a full account of the tavalali funds is taken and the fact has been ascertained. We cannot accept that. As already stated there was evidence on which the lower appellate Court could reach this conclusion. It was for the 14th defendant, if she desired to rebut the evidence by taking an account or in any other manner to do so. We cannot find that she made any attempt to submit an account of the funds in her father's possession. In fact, the contention that an account was essential was never put forward until now.

6. The result therefore is that the appeal is dismissed with costs.