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**(1953) 02 KL CK 0001**

**In the High Court Of Kerala**

**Case No :** Second Appeal No. 209 of 1951

Nilakantan Nayar Velayudhan Nayar — APPELLANT

Vs

Chirutha Amma Gouri Amma and Others — RESPONDENT

**Date of Decision :** 05-02-1953

**Acts Referred:**

**Citation :** AIR 1953 Ker 438

**Hon'ble Judges :** G. Kumara Pillai, J

**Bench :** Single Bench

**Advocate :** T.R. Subramania Iyer, for the Appellant; S. Boothalingon Iyer, for the Respondent

## Judgement

Kumara Pillai, J.—This second appeal is filed by the first Defendant in a suit for redemption of a mortgage. The mortgage sought to be redeemed, Ex. A, was executed by a family of blacksmiths in 1066. Plaintiffs have obtained the equity of redemption and brought the suit, for redemption. In the plaint they admitted; that in addition to Ex. A these were two purakadams charged on the plaint property, Ex. B of 1070 and Ex. C of 1072, and that they were liable, to pay the amounts thereunder also. The, first Defendant who has obtained the mortgage, right contended that in addition to Exts. A, B and C, there was Anr. purakadam for Rs. 47/-, Ex. I of 1085, and that he was entitled to get the amount under it also. Plaintiffs opposed the claim for the money under Ex. I on the ground that the executant thereof was not the head and manager of the mortgagors'' family and that Ex. I was not supported by family necessity and consideration. The trial Court assumed that the mortgagors were governed by Marumakkathayam Law, and finding that the executant of Ex. I was not the karnavan it held that he was not competent to execute Ex. I and that it was therefore invalid and not binding on the mortgagors and their assignee. Consequently, it decreed the suit. No finding was recorded by the trial Court on the question of family necessity and consideration for Ex. I. An appeal which the first Defendant filed in the Alleppey District Court against the trial Court''s decree was dismissed subject to certain

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directions regarding production of prior documents before the mortgage amount could be drawn from Court. So the first Defendant has filed the second appeal.

2. The Courts below were wrong in assuming that the mortgagors were Marumakkathayees and were governed by the Marumakkathayam Law. Although in stating the Plaintiff case the trial Court has said that Ex. A was executed by the then karnavan of the family and two other junior members, all that Plaintiffs had stated in the plaint was that was executed by Narayanan and other persons Plaintiffs had not used the words ''karnavan'' and ''tarwad'' in the plaint and their replication. Their case was that the executant of Ex. I was not the head and manager of the family. Even fern the sale deed, Ex. E, it can be seen that the parties are not Marumakkathayees. Ex. B was executed by six persons. The first four executants were brors., and the daughters of their deceased elder brother were executants Nos. 5 and 6. These six persons described themselves in Ex. E as constituting one family. Such a family could never be a Marumakkathayam family, for father and children could never be members of the same Marumakkathayam family. In Ex. C purakkadom, the mortgagors said that they were blacksmiths and Hindus. In the other documents, they described themselves as blacksmiths. Blacksmiths are Kammalas and are ordinarily governed by the Hindu Law and not by the Marumakkathayam Law, (see M.P. Joseph''s book on the Principles of Marumakkathayam Law, page 451; and the Travancore State Manual, Vol. I - 1940 Edition - by Sri T.K. Velu Pillai, page 848). If any section of that community is governed by Marumakkathayam Law because of custom, that fact must be specifically alleged and proved. There is no such allegation or proof in this case. According to the Mitakshara Law as administered in Madras a coparcener can sell or mortgage his undivided interest in the family property (see Mula''s Hindu Law, Eleventh Edition, pages 312 and 313). As the Courts below failed to take note of these aspects of the case and wrongly assumed, without any allegation of the parties and without proof, that the mortgagors were governed by the Marumakkathayam Law the suit has to be remanded for a fresh trial and disposal. It has also to be pointed out that even a junior member of a Marumakkathayam family can alienate tarwad property for pressing necessity and adequate consideration when the kamavan is not available or is acting against the interests of the tarwad and does nothing to meet such necessity.

3. For the reasons stated above, this second appeal is allowed. The decrees of the Courts below are get aside and the suit is remanded to the trial Court for a fresh trial and disposal according to law and in the light of the observations made above. The Court fee paid on the memorandum of second appeal will be refunded to the Appellant. Other costs will be costs in the cause.

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