

(1931) 11 MAD CK 0022
In the Madras High Court

Paramal Bhatti and Others

APPELLANT

Vs

Narayanan Nambudripad and Others

RESPONDENT

Date of Decision : 11-11-1931

Acts Referred:

Citation : AIR 1932 Mad 701 : 137 Ind. Cas. 450 : (1932) 35 LW 452

Hon'ble Judges : Ramesam, J; Madhavan Nair, J

Bench : Full Bench

Judgement

Ramesam, J.—This appeal arises out of a suit filed for the recovery of Rupees 8,156-3-0 on a promissory note for Rs. 6,000 dated 11th

August 1920, executed by defendant 1. Defendant 1 is the only adult male member of a Nambudri illom known as Paramal Bhatti alias Bhatti. The

suit was originally filed against defendant 1. Defendants 2 to 8 were afterwards added as supplemental defendants upon their application I.A. No.

1340 of 1923 dated 20th September 1923. Of these, defendants 2 and 3 are step-mothers of defendant 1. Defendant 7 is the wife of defendant 1.

Defendant 8 is the wife of defendant 1's elder brother. These four, namely, defendants 2, 3, 7 and 8 are known as Anthar janams according to the

Nambudiri usage. Defendant 4 is the minor son and defendants 5 and 6 are the minor daughters of defendant 1. The supplemental defendants

complained that defendant 1 was mismanaging the affairs of the illom, that the suit debt was contracted for purposes not binding on the illom, and

that defendant 1 was not likely to defend the suit properly and prayed that they should be made parties. In the original plaint it was merely alleged

that the plaint transaction was bona fide and was effected after making inquiries and for the necessity of defendant 1's illom and that the amount has

been utilized for illom purposes and the illom has been benefited by it. Thereupon the defendants filed I.A. No. 1488 of 1923 in which they prayed

that the plaintiffs may be directed to state in detail the necessity for which the suit debt was contracted. The plaintiff filed a counter affidavit dated

16th October 1923, in which he stated:

The plaintiff transaction took place in order to redeem the properties after paying off the possessory mortgages which were executed by the

defendants' illom to the members of Thozhanur Podinbakkareh Vilakkathaleh house on 22nd June 1908, for Rs. 1,500 to the members of

Thozhanpur Vellot house on 10th March 1913 for a sum of Rs. 1,700 and Moidin Molla on 3rd July 1917, for a sum of Rs. 1,000 as well as to

pay off the sum of Rs. 2,000 and the interest thereon due to Padinhattu Kareh Narayanan Nambudiri under a promissory note.

2. The affidavit then proceeded to state that the mortgages were not as a matter of fact discharged and the amount obtained from the plaintiff

was used to pay off the debt due to the aforesaid Narayanan Nambudiri and to buy an elephant for the defendants' illom.

3. In the written statement of defendants 2 to 8 filed on 29th October 1923, it was stated in para 8 that the elephant was purchased in Dhanu 1096

(December 1920-January 1921), that the amount said to have been borrowed from the plaintiff was not utilised in purchasing it and that it was

purchased from the income of the defendants' illom. Issue 2 in the case is: "Is the illom of defendants liable?" Defendant 1 remained ex parte. The

Subordinate Judge of Ottapalam decreed the suit against the defendants' illom also. Defendants 2 to 8 file this appeal of whom defendant 2 has

since died.

4. The plaintiff-respondent 1 is himself the- manager of another well known and wealthy Nambudri illom known as Kudalur Mana. The first point

to which the learned advocate for the defendants, Mr. Govinda Menon, drew our attention is that defendant 1 was leading an extravagant and

reckless life. It appears from the evidence that defendant 1's father died in 1895-1896. Defendant 1's elder brother Itteeri Nambudri became

manager and he died in 1897 January when then defendant 1 was a minor. He became a major in the year 1902-1903. During his minority D.W. 5

was managing the affairs of the illom as Kariasthan. At the time when defendant

1 began to look after the affairs the illom had no debt whatever--

none requiring any payment of interest (vide D. W. 7's evidence). Defendant 1 began to manage in 1904. The next year he joined pantomine

theatrical (known as Kadhakali in Malabar and it is claimed for the appellant that he was ""spending money extravagantly in connexion with that

Kadhakali. It went on for three years and defendant 1 has not taken part in Kadhakali since 1912: vide D.W. 7's evidence. It may be that his early

extravagance was the cause of the necessity to execute the mortgage deed Ex. K dated 22nd June 1963, and the puramkadam Ex. 7 dated 17th

November 1911, in favour of D.W. 2's tarwad but it cannot be said that at the time of the suit debt, he took part in any Kadhakali for which the

debt might have been contracted. It is also said that the defendant was contracting several marriages. First there is a Nambudri wife, defendant 7.

Then he has got four sambandams with Nair women, the first Thozhanure Vellat (this is the tarwad of D.W. 1 in whose favour Ex. L was

executed), the second in Trichur the third in Ernakulam and the fourth in Perumanam. The first three are spoken to by D. Ws. 5 and 7. The last is

mentioned by D. W. 5 only. Probably all are true, but this sort of thing is common among Nambudris and though from the point of view of the

outside world it might strike one as extraordinary, it must be remembered that from the point of view of Nambudri customs it is" not unusual.

Defendant 1's father himself had married four times.

5. It is also said that the defendant was given to playing at cards and two or three kinds of dice and was probably losing money in connexion with

the gambling habits. But here again, there is nothing to show that the suit debt was connected with his gambling. If the case arose in connexion with

a Mitakshara family in the East Coast, undoubtedly the burden of proof would be on the contesting defendants to show that the debt was

contracted for illegal and immoral purposes and if they fail to do so the creditor would be entitled to obtain a decree even if it appears from the

record that defendant 1 was a man of extravagant habits. The Subordinate Judge in para 7 of his judgment says:

Unless it is alleged and proved that defendant 1 borrowed and spent the moneys for illegal and immoral purposes (for which there is no evidence)

the debt has to be found to be binding upon defendant 1's illom composed of his

children mainly.

6. This sentence correctly states the law as applicable to a Mitakshara Hindu family on the East Coast but does not state the law correctly as

applicable to Nambudris. The Subordinate Judge then; says:

The case comes under the principle of the decision in Hanuman Prasad's case [1854-57] 6 M.I.A. 393 as already noticed.

7. Here again the Subordinate Judge-seems to think, or at any rate the manner in which he has written the two sentences produces the impression

that wherever illegality or immorality is not proved Hanuman Prasad's case [1854-57] 6 M.I.A. 393 applies. This is certainly not correct. The

liability of a Hindu son for the debt of his father which is not illegal or immoral rests upon an entirely different footing from the liability of a minor or

a member of a joint family for debts contracted by a guardian or manager of the family (not being the father) where the debt is contracted for

purposes binding on the minor or the family, It is the basis of the latter liability that was the subject of consideration in Hanuman Prasad's case

[1854-57] 6 M.I.A. 393 and it was there said that the pressure on the estate, the danger to be averted or the benefit to be conferred must be

looked to. It may be that the Subordinate Judge wished to rest his judgment on more than one or two distinct grounds. But the form in which he

has expressed them certainly mixes them up with a certain amount of resulting confusion. If; the plaintiff proves necessity no doubt he can obtain a

decree, but the view that the; defendants have got to prove the illegality or immorality of the debt is erroneous. In Kunhu Kutti Ammah v.

Mallapratu AIR 1915 Mad. 696. Miller and Sadasiva Ayyar, JJ. held that:

A Nambudri illom differs in many respects from an ordinary joint Hindu family on account of the impartibility of its property and its close

resemblance to a Nair tarwad. The rule of Hindu law which imposes the duty on a son to pay his father's personal debts, neither illegal nor

immoral, is not applicable to Nambudris, and the mere fact that there are no other members in the illom besides the sons and grandsons of the

Nambudri debtor, cannot affect the principle.

8. Only in the matter of succession does the Nambudri illom differ from the Nair tarwad, the former being governed by the law of Makkathayam

and the latter by Marumakkathayam. The Subordinate Judge's statement of the

law is quite opposite to what is laid down in this case and the suspicion naturally arises that his approach of the case was influenced by this fundamental mistake. We have now to see how far the plaintiff has established the case of necessity for the defendants' illom within the meaning of Hanuman Prasad's case [1854-57] 6 M.I.A. 393. (His Lordship then discussed the evidence about the mortgage for the satisfaction of which the debt was alleged to be incurred and the evidence of the inquiry and proceeded). All this becomes significant when we find that the mortgage debts were not as a matter of fact paid off. It is true that it is not the creditor's duty to see to the application of the purchase money. If we can believe the evidence on behalf of the plaintiff as to enquiries the fact that the mortgages were not paid off is irrelevant and cannot affect the plaintiff, but the fact that the mortgages were not as a matter of fact paid off has a bearing on the question as to whether we should believe the story given by the plaintiff as to his making inquiries, especially when the story is otherwise very improbable. We find that the rate of interest in Exs. K, L and M are 5½ or 6½ per cent and 10 paras of paddy per cent respectively. Though in Exs. K and L the rate of interest is stated at so many paras per cent elsewhere in the document the value of para is indicated. We have not got the price of para in Ex. M and probably the price of para at the date of Ex. M was much higher than at the time of Exs. K and L. The rate of interest in the suit promissory note is 12 per cent per annum. This is certainly higher than the rate of interests in Exs. K and L.

The Subordinate Judge says, at p. 15 of his judgment:

Plaintiff's witnesses 1 to 3 swear that when the contract mortgage to plaintiff was executed to plaintiff he was to charge paras 7 per Rs. 100 alone as interest. This reduction is certainly beneficial to the illom.

9. In the first place, the intended mortgage was never executed and until it was executed with a lower rate of interest the transaction cannot be said to be beneficial to the defendant's illom. The suit promissory note which was according "to the original intention of the parties a temporary transaction stipulates a higher rate of interest 12 per cent but as the intended mortgage never came off, it remained the final transaction and of course it is not beneficial to the defendant's illom. Simply because a mortgage with a lower rate of interest was intended, I do not see how it can

be said that the transaction is beneficial to the defendants illom when the intended mortgage did not take effect and the only thing that remained in force carried a higher rate of interest. Secondly, the story that the intended mortgage was to carry interest at a lower rate does not by itself seem to be acceptable. (The Judge considered evidence on the point and held). It seems to me that what originally happened was a loan on a promissory note at a high rate of interest. The defendant made a further request that it should be converted into a mortgage with a lower rate of interest; but this never materialized and the promissory note transaction remained. Certainly this transaction cannot be beneficial to the illom. Again, if inquiries were made at the time of the loan and if the plaintiff's Kariasthan Narayana Moosad, P.W. 4 was really sent to inquire, a story which I have already said seems to be improbable, one cannot understand why the necessity was not recited in Ex. A itself. It is usual for a creditor when dealing with a debtor with limited powers of alienation to insist on the recital of the necessity for the loan. Such recitals are usually made when a guardian borrows on behalf of a minor or when a manager of a Hindu family acts on behalf of the joint family, or when a widow borrows so as to bind her estate in the hand of the reversioners. The practice has become so well established in the country that its omission in Ex. A itself is enough to make one suspect the plaintiff's story but when we add to it the other improbabilities one finds it difficult to accept it. (The Judge discussed evidence and proceeded.) In my opinion the plaintiff has not shown that he made any inquiries or that he ascertained about the existence of the encumbrances Exs. K.L. M and VII or that he lent the money he was told that it was required for the purpose of paying off those documents. Another comment on the plaintiff's story also suggests itself, namely, if the money was required for paying off those mortgages, he would himself have paid off those mortgages and kept the documents as vouchers.

10. There is only one other point which requires to be noticed. Even if the alleged representation at the time of the loan is not made out, if it is at least shown that a part of the loan was utilized for the benefit of the illom to that extent it may be binding on the illom. (The judgment discussed the evidence on the point and proceeded). The result is I am unable to find that the illom received any benefit out of the suit transaction, Mr.

Ramchandra Ayyar contended that it is for the defendants to show by production of accounts that no part of the suit amount was actually received

by the illom. He referred to a number of cases in support of this position. If it is shown that the defendants have accounts and that they have not

produced them, these cases would certainly apply. In such a case it is not proper for the defendants (who were summoned to produce the

accounts) to rely merely on the burden that rests on the plaintiff, if they are in possession of the best evidence they ought to produce it. But in the

present case the evidence shows (1) that the accounts kept in the illom relate only to the income and expenditure of paddy and cash and that the

accounts do not relate to the amounts borrowed by defendant 1 or spent by him: vide D.W. 7 and (2) that these amounts were destroyed by the

Moplahs during the rebellion. This seems to be likely there is no evidence to the contrary. Under these circumstances I cannot attach any weight to

the argument based, on the non-production of accounts, by the plaintiff. The appeal will be allowed with costs throughout so far as defendants 2 to

8 are concerned but the plaintiff will have a decree against defendant 1 only with costs in the Court below.

11. From one point of view I regret I have come to this conclusion because undoubtedly the debt is true. Defendant 1 certainly had the benefit of

the loan of Rs. 6,000 but we are not dealing with defendant 1 but only with the question how far the illom is liable. From another point of view I do

not regret this conclusion. The plaintiff must thank himself if in his anxiety to lend money to some needy person--he does not make the necessary

inquiries so as to make the debt binding on the illom. The way in which the promissory note is drawn up suggests that he never looked forward to

any further liability than that of defendant 1. If lenders dealing with persons of limited authority ultimately find that the loan is lost, they must thank

themselves for the recklessness with which they entered into the transaction. If lenders in the plaintiff's position will be more wary hereafter in

dealing with borrowers, I do not think there is any necessity to regret this decision.

Madhavan Nair, J.

12. I agree, and have nothing very useful to add; but I would however refer briefly to one argument of Mr. Ramachandra Ayyar, that at any rate

the defendant's illom should be made liable on the suit note to pay the plaintiff the amount used by him in discharging the admitted illom debt from the money realized by the sale of the elephant. As a proposition of law, this position does not seem to me to be tenable. For the purpose of this argument it is conceded that the suit debt is a personal debt of the karnavan and that it is not binding on the illom in any shape or form. The question is if the money borrowed by the karnavan solely for himself is used by him for the discharge of a debt binding on the illom, can the person who lent the money to the karnavan say that he is entitled to realize from the tarwad of the karnavan the amount of the loan used by him in discharging the admitted tarwad debt? I think not. No authority in support of the proposition has been brought to our notice. As between the karnavan and the tarwad he may be able to recover it from the tarwad as one who has made a loan to the tarwad if he is to establish his claim; but that in my opinion can form no ground for the creditor of the karnavan to proceed against the tarwad for the realisation of his debt; for when he lent the money to the karnavan he certainly did not lend it for any tarwad purpose, but lent it only to the karnavan personally. In these circumstances however much one may sympathise with the plaintiff in this suit, I regret with my learned brother that his suit as against the illom of the defendants has to be dismissed with costs.