

(1916) 11 MAD CK 0007
In the Madras High Court

Puthisseri Maniannoor Puthamvittil Narayana nair	APPELLANT
Vs	
Thozukkat Pullaniyil Narayanna Nambier and Another	RESPONDENT

Date of Decision : 29-11-1916

Acts Referred:

Citation : (1917) 32 MLJ 489

Hon'ble Judges : Sadasiva Aiyar, J;Phillips, J;Oldfield, J

Bench : Full Bench

Judgement

Sadasiva Aiyar, J.—The plaintiff is the appellant. The suit was brought for redemption of a registered usufructuary mortgage for Rs. 250

dated 13th June 1905 executed by the representative of the five thavazhies which had branched out from1 a single tarwad called Pudusheri

Maniannoor tarwad. The defendants three to eight are members (along with the plaintiff) of one of these five thavazhies. The plaintiff has not made

the members of the other four thavazhies parties to this suit though it is conceded that the mortgage of 1905 was executed on behalf of all the live

thavazhies. Now the plaintiff is the karnavan of his own thavazhi only which consists of eight members there being about 31 members in the other

four thavazhies. As far as I could gather from the plaint, the plain. tiff ignores the other four thavazhies and sues for redemption as the karnavan of

his own thavazhi alone.

2. One question raised in the suit was whether the plaintiff's thavazhi and the four connected thavazhies had become divided in interest long before

the date of this suit and had thus become separate tarwads. (A thavazhi or branch of a tarwad after the branch got divided from its sister

thavazhies could be called a tarwad though when mentioned in relation to its

sister thavazhies and its parent tarwad, it could be continued to be spoken of as a thavazhi, which would literally mean the line of a particular mother.)

3. The question of division has been answered in the affirmative by the Lower Courts and we ought to accept that finding of fact in Second

Appeal. Now, if all the five connected thavazhies represented together the owner of the equity of redemption in the plaint lands, the plaintiff's

tarwad is entitled to redeem the whole as one of five mortgagors who were tenants in common of the equity of redemption.

4. The plaintiff knew very well before the suit that the other four tarwads who were common owners with the plaintiff's tarwad of the plaint lands

had sold their shares in the common equity of redemption to the second defendant by the two deeds Exhibits XVI and X, dated 1906 and 1907

and that seven out of the then ten members of the plaintiff's own tarwad had also sold their shares in the equity of redemption to the second

defendant's vendor. (The second defendant has also purchased the right of the mortgagee, the first defendant.) The plaintiff artfully omitted all

mention in his plaint of the other four tarwads and of the sale deeds in favour of the second defendant's vendor.

5. The second defendant in his written statement (paragraph 9) contended that the plaintiff was, in any event, entitled to redeem only the plaintiff's

1/40th share in the properties and was not entitled to redeem the whole. He further contended in paragraph 7 of his written statement that though

three members out of the then ten existing members of the plaintiff's tarwad were not parties to either Exhibit XVI or X, the plaintiff's tarwad

including thdse three members (of whom the plaintiff is one) are bound by the said sales.

6. The Lower Appellate Court held (a) that the members of the plaintiff's tarwad were entitled in accordance with the rule of division per capita

each to 1/40 share in the equity of redemption on the dates of Exhibits XVI and X. The ten members then existing would be entitled on this basis

to 10/40th share in the equity of redemption; (b) Exhibits XVI and X taken together were binding on the plaintiff's tarwad including the plaintiff

and others who were not parties to either of those two documents. The plaintiff's suit was therefore wholly dismissed.

7. The defendant's own documents Exhibits XVI and X admit that the then (ten) members of the plaintiff's tavazhi were each entitled to 1/40 share

in the equity of redemption, seven of them having (according to the recitals) received each his 1/40th share in the purchase money and the

remaining 3/40th shares being left with the purchaser. The finding of the Lower Appellate Court that the members of the plaintiff's tarwad were

entitled to 10/40th share is thus supported by the defendants' own documents.

8. Mr. K.P.M. Menon for the plaintiff consented to accept the position which was suggested by the respondent's vakil Mr. T.R. Ramachandrier

(though not adhered to by him till the end) that the plaintiff's tarwad as one of five sister tarwads was entitled to 1/5th share in the equity of

redemption. I think we are entitled to proceed on the footing that the plaintiff's tarwad is entitled at least to redeem 1/5th share of the mortgaged

properties if Ex. XVI and X are not binding on the plaintiff's tarwad. Now it seems to me to be clear law that the 1/5th share of the plaintiff's

tarwad in the equity of redemption being the joint property of the members of the plaintiff's tarwad, the sale of the whole of that property by only

seven out of ten members cannot bind the other members or the plaintiff's tarwad as a whole unless it was made for consideration and was

beneficial to the family as a whole and unless the karnavan as representing the tarwad joined in it. See Arayalprath Kunhi Pocker v. Kanthilath

Ahmad Kutti Haji ILR (1905) Mad. 62. The Lower Appellate Court has not found that the sale of the share of the plaintiff's tarwad was beneficial

to the tarwad. Further the plaintiff was and is the karnavan of his tarwad and I cannot accept the Lower Court's view that because the fourth

defendant was the senior lady and the real manager and because the plaintiff was absent from the place, the sale by her of the joint property of the

plaintiff's tarwad is binding on the tarwad. I am therefore of opinion that the title to the plaintiff's tarwad's 1/5th share in the equity of redemption

was subsisting in the plaintiff's tarwad on the date of this suit and that it can be redeemed by the plaintiff.

9. Mr. Ramachandra Aiyar finally contended that as the plaintiff's suit is for the redemption of the whole, as he could not get possession of the

1/5th share without suing for partition and as he did not pray in the plaint in the alternative for partition and possession, the dismissal wholly of the

plaintiff's suit by the Lower Courts could be supported. He then referred to an incidental observation of mine in the judgment in Rathna Mudali Vs.

Perumal Reddy and Others, . In that case, the owner of a half share of the equity of, redemption insisted on redeeming the whole against the will of

the mortgagee who had purchased the other half in the equity of redemption. Sundara Aiyar, J. and myself held that he could not so claim to

redeem, the whole against the will of the mortgagee. The plaintiff-appellant, however, consented before us in that case to a decree being passed for

redemption of a half share on payment of half the mortgage money and to have a decree for partition and possession of that half. The mortgagee--

4th defendant also consented to that course. Mr. Justice Sundara Aiyar thought that whether the mortgagee consented or not, the plaintiff though

he sued for redemption of the whole could be given a decree for redemption, partition and possession of one-half. I held that, as the 4th defendant

consented to that course, such a decree could be passed and I threw out the observation relying on Thillai Chetty v. Ramanatha Ayyan ILR (1896)

Mad. 295, that, because in the Lower Courts, the 4th defendant had not given his consent, the decree of the Lower Appellate Court dismissing the

suit was correct as it stood. In Thillai Chetti v. Ramanatha Ayyan ILR (1896) Mad. 295 it was held that until a partition of the mortgaged property

among the several co-owners of the equity of redemption by metes and bounds had been first effected one co-owner cannot sue to redeem the

whole mortgage. In that case, it appears that the ascertainment of shares was a difficult operation and the result of the decree in the plaintiffs"

favour for redemption of the whole would have been to compel the first defendant and other co-owners and co-mortgagors to bring a suit or suits

for ascertainment of their shares and for the recovery of the same from the plaintiffs on payment of their contributions towards the mortgage

money. The decision goes on to say ""This is the very evil which was pointed out and guarded against by the learned Judges who decided the case

of Mamu v. Kuttu ILR (1882) Mad. 61. In this earlier case Mamu v. Kuttu ILR (1882) Mad. 61 the respondent was not represented and the

argument of Mr. Sankaran Nair. (afterwards a Judge of this Court) for the appellant that as the plaintiffs definite share was not ascertained by a

proper prior suit for partition, he cannot be allowed to redeem the whole of the mortgaged property prevailed. Mr. Justice Sundara Aiyar in

Rathna Mudali v. Perumal Reddi (1912) 23 M.L.J. 567 was not prepared to follow the two decisions in Mamu v. Kuttu ILR (1882) Mad. 61 and

Thillai Chetti v. Ramanathan Ayyan ILR (1896) Mad. 295. On further consideration, I am inclined to hold that if Mamu v. Kuttu ILR (1882) Mad.

61 and Thillai Chetti v. Ramanathan Ayyan ILR (1896) Mad. 295 are sound law on the question of the necessity for a prior suit for partition, the

principle of those decisions must be restricted to cases where the circumstances are similar to those dealt with by those decisions, in other words

restricted to cases where there is great difficulty in ascertaining the particular share to which the plaintiff was entitled. In the present case, the

plaintiff's learned Counsel having agreed to its being taken that the plaintiff's tarwad is entitled only to 1/5th share and the lower Courts having

found on the evidence that the members of the plaintiff's tarwad were each entitled to 1/40th share in the equity of redemption on the dates of

Exhibits XVI and X, there seems to be no such difficulty in passing a decree for both the reliefs for partition and redemption in the same suit. In the

result, I would direct the plaintiff to amend the plaint by praying for recovery in the alternative of 1/5th share and for partition and possession of

such 1/5th share on payment of 1/5th of the mortgage amount within 3 weeks. As the Lower Courts have not considered the 6th issue in the case I

would, on such amendment, remand the case to the Lower Appellate Court for a finding on the 6th issue on the evidence on record. Six weeks

are allowed for submitting the finding and seven days for filing objections. If the plaint is not so amended, the Second Appeal will stand dismissed

with costs.

Oldfield, J.

10. I agree and have nothing to add.

11. [In compliance with the order contained in the Judgment, the Subordinate Judge of South Malabar at Calicut submitted that plaintiff would be

entitled to claim credit as an item of account for 1/5th of the suit properties and that the mortgagee in possession committed waste by cutting and

wasting the suit trees.]

Oldfield and Phillips, JJ.

12. We accept the Lower Appellate Court's finding and, setting aside the decrees of the Lower Courts, grant plaintiff a preliminary decree for

redemption and possession of one-fifth of the suit property in the usual form. Time, six months. The case is remanded to the Court of the District

Munsif in order that a final decree may eventually be passed. No order as to costs in this Court.