

(1966) 02 KL CK 0011

In the High Court Of Kerala

Case No : Second Appeal No's. 1395 of 1961 and 55 of 1962

Rev. Fr. K.M. John and Another

APPELLANT

Vs

Kanakku Narayanan Divakara Menon and Others

RESPONDENT

Date of Decision : 14-02-1966

Acts Referred:

Citation : AIR 1967 Ker 28

Hon'ble Judges : S. Velu Pillai, J; Anna Chandy, J

Bench : Division Bench

Advocate : K.C. John, M.C. Mathew, T.S. Venkiteswara Iyer and R.C. Plappilly, for the Appellant; T.K. Narayana Pillai and N. Govindan Nair, for the Respondent

Final Decision : Allowed

Judgement

Anna Chandy, J.—These appeals are by respondents 3 and 5 in A. S. 48 of 1960 on the file of the Sub-Court, Alleppey. Divakara Menon the respondent in these two appeals had filed the suit for setting aside Ext. E sale deed executed by his mother and one Kutten Menon for the suit property. The property which was 82 cents of vacant land, was allotted along with other items to the branch of the plaintiff and his mother in the tarwad partition of the year 1106. The plaintiff was then a minor and Kutlen Menon, a member of another branch, was directed to be in management of the properties allotted to the plaintiff's branch. The validity of the sale was questioned on various grounds. It was alleged that Kutten Menon was acting against the interest of the plaintiffs branch, that the plaintiff who was a major was represented as a minor and that his mother was fraudulently induced to be a party to the sale of the property for a grossly inadequate price. It was also alleged that the document is supported by consideration and necessity, as the hypothecation debt for the discharge of which the sale deed was executed had earlier been discharged out of the income of the properties allotted to the branch of the plaintiff and in any view there was no pressing need to justify an outright sale of the property.

2. The case that the plaintiff was a major on the date of sale has been found

against by the trial court as also the first appellate court. The trial court also found that the sale deed is supported by consideration and necessity and dismissed the suit. In appeal the learned Subordinate Judge, while upholding the finding that the document is supported by consideration, set it aside and allowed recovery of possession accepting the case of absence of necessity. The factors that contributed to that finding are (i) there was no pressing need to discharge the debt; (ii) the document was brought about by Kutten Menon to facilitate the sale of the adjacent property belonging to his sister to the same vendee; (iii) the sale was for a grossly inadequate price; (iv) the debt could well have been discharged out of the income of the properties allotted to the plaintiff's branch; and (v) there was no justification for an outright sale of the suit property which was in the actual possession of the tarwad. The correctness of all these findings is questioned in these appeals.

3. The consideration for the impugned sale is Rs. 600/- out of which Rs. 595/- went towards the discharge of Ext. VII hypothecation bond of the year 1109, which itself was executed to discharge the principal and Interest payable under an earlier hypothecation of the year 1097 executed by the tarwad and directed to be discharged by the plaintiff's branch in the partition deed and Rs. 5/- was paid before the Sub-Registrar to Kavukuttt Amina, a member of another branch of the tarwad. The contention of the plaintiff that the said debt had already been discharged otherwise, having been found against, it follows that practically the entire consideration for the sale went in the discharge of a debt of the year 1097 charged on tarwad property. Hence the first question to be answered is whether this binding and long outstanding debt could have been discharged by other means. It is well proved that the income of the properties was hardly sufficient to meet the running expenses of the tarwad and that no surplus could be found to be utilised for the discharge of the several debts recited in the partition. The plaintiff has practically no knowledge of the income of the property prior to the year 1114. P. W. 3, a member of another branch of the tarwad admits in unequivocal terms that the income was hardly sufficient to meet the expenses of the tarwad and no surplus was available. Pws. 4, 5 and 6 are not consistent in their estimate of the income of the properties. According to their evidence, at the time of partition the plaintiff's branch was getting the yield from 40 paras of paddy land and 200 to 300 coconut trees besides rent of Rs. 150 to 230 from the properties outstanding on lease. Paddy was at the time selling at the rate of about 8 annas per para and according to the witnesses the value of coconuts ranged from Rs. 15 to 20 per 1000 and Pw. 6 would admit that it had gone down even to Rs. 10. Even this income could not have been available throughout as admittedly Kutten Menon had to alienate several items of properties to discharge the debts recited in the partition deed. The inability on the part of the plaintiff to specify the income of the tarwad properties or the amount necessary for meeting the expenses and the balance if any available for the discharge of the debts either in the pleadings or in his evidence only supports the admission made by Pw. 8 that there was hardly anything left of the income for the discharge of the

tarwad debts. This inference is strengthened by the fact that several items of properties had to be alienated by Kuttan Menon for the discharge of the debts and even after the plaintiff had come of age he had in his turn, as admitted by him, executed three or four sale deeds. So it can be taken as well established, that it was not possible to discharge any debts out of the income of the tarwad properties and it was only by either encumbering or alienating the properties that the debts could be discharged and were being actually discharged and the disputed sale is only one among several such transactions.

4. Another relevant question is whether it was necessary to alienate the property outright to discharge the debt. Apart from the general assertion that the debt could as well have been discharged by alienating some other items which were outstanding on lease and not in the direct enjoyment of the tarwad the plaintiff has no information to give as to which are those items, whether it was feasible to effect a sale of such items and what is the amount that could be realised by the sale. These are facts within the knowledge of the plaintiff and of the members of the tarwad who were cited as his witnesses and yet he has not made available any data which would enable the court to assess the comparative feasibility, much less the advantage of efficacy of such an alternative mode of discharging the debt. As it is, we have to assess the merits of the alienation by ascertaining what was the income the property was yielding and whether it was sold for a fair price. The sale was effected during the prevailing economic depression. Pw. 2 admits that the property was a sandy waste (Malayalam omitted). To the same effect is the evidence of Pw. 5 who also says that it was on a lower level than the road. Out of 82 cents which is the total area of the property 40 cents were outstanding on a lease of the year 1110 for ten years on a rent of 8 Rs. per year and on the date of sale the leasehold right was released in favour of the fourth defendant on payment of Rs. 20 (vide Ext. VI). At that time, but for the six or seven non-bearing coconut plants in the portion leased out, the rest of the property was still a sandy waste. It was such a property yielding no income, that was sold for Rs. 600 i.e. at the rate of Rs. 7 per cent. Mortgaging such a property without income was out of question and a sale alone could be thought of.

Pw. 3 admits that it was a fair price for the property and the adjacent property belonging to his sister was sold for the same price.

Ext. B is that sale deed to which all the sixteen members of that branch, including eight major members were parties and it has not been called in question by any of the minors. The learned Judge relies upon Ext. V sale deed and the evidence of Pw. 5 for inferring that the price fetched for the suit property was inadequate. Pw. 5 says that in 1108, he had sold a property to the west of the suit property to one M. C. Abraham at the rate of Rs. 10 or so per cent. The sale deed is not before court and the witness himself admitted that he is not able to remember the price for which he sold the property. We are also left in the dark as to the nature of the property. The consideration in Ext. V no doubt works at the rate of Rs. 10 but then there is no evidence regarding the nature of the

property or the circumstances under which the sale came to be executed. If we go by the document the property is inclusive of a chira and the actual amount that was paid in cash was only Rs. 101. It is not possible to get over the definite evidence of Pw. 3 corroborated as it is by Ext. B by acting on the vague and indefinite evidence referred to above. No wonder the learned Judge himself was only able to arrive at the halting finding, that there is some force in the argument that the suit property was disposed of for an inadequate price. It is also relevant to note that by the sale of this item the charge over four other items in Ext. VII was released.

5. The learned Judge was also inclined to accept the suggestion of the plaintiff that the suit property was disposed of to oblige the sister of Kutten Menon as the vendee insisted as a condition precedent to the sale of Ext. B property, that the suit property which is in between property and the Mission Hospital was sold to him. This is a mere inference unsupported by any acceptable evidence. No doubt there is such an allegation in the plaint, but that was refuted in the written statement and there is only the interested evidence of the plaintiff who admittedly could not have had any direct knowledge about it. Not even a suggestion to that effect was made to Pw. 3 or 4 the members of the tarwad who might have been in the know of things. There is the fact that both documents for adjoining properties came to be executed in favour of the mission on the same day. The probabilities are that it was the result of an attempt on the part of Kutten Menon and the plaintiff's mother to take advantage of the situation and get as fair a price for the property as possible, as suggested by the learned counsel for the defendants.

6. Now that it is found that the property was sold for the discharge of a binding debt which in effect was outstanding from the year 1097, and for the payment of which there was no other feasible means and the sale itself was for a fair price, the only other question to be considered is, whether the sale can be held to be not binding on the tarwad on the ground that there was no pressing need at the moment to discharge the debt. The theory of a "pressing need" is evidently based on the decision of the Privy Council in *Hunoomanprasad Pandey v. Mst. Babooee Mundraj Koonweree* (1854) Moo Ind App 383 where in dealing with the power of the Manager for an infant heir to charge an estate not his own under Hindu Law their Lordships had occasion to observe that:

"Where the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement and the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

In *Vembu Iyer v. Srinivasa Iyengar* (1912) 28 MLJ 638 Sundara Aiyar, J. while meeting an argument advanced that the discharge of a debt cannot be regarded as a necessity binding on the minor unless the creditors pressed for the debt or at least demanded payment had occasion to observe as follows:

"No case has been cited nor have we been able to find any, which has laid down that a demand is necessary to justify an alienation to discharge a debt. It is impossible to lay down any such broad proposition. The creditors may be quite content to allow their debts to run on if they carry heavy interest. They might wait until the whole estate might be swallowed up by their debts. It would be unreasonable to say that a guardian in such circumstances cannot sell a portion of the estate so that the remainder may be saved for the minor's benefit."

Discussing the matter further, the learned judge observed:

"The language of the Privy Council in Hunoomanprasaud Pandey (1854) 6 Moo Ind App 393 does not in my opinion support the contention that unless there was a demand by the creditor, a sale for the discharge of his debt would not be justified. Their Lordships say "the actual pressure on the estate" the danger to be averted or the benefit to be conferred on it in the particular instance is the thing to be regarded. The words "actual pressure are relied on to support the argument that the person in possession as guardian must have been pressed by the creditor to pay the debt. I do not think that the language "pressure on the estate" necessarily signifies this. A debt may be a pressure on the estate even though the creditor has not yet demanded payment of it. Whether it is so in any particular case would depend on the circumstances.""

In that case, the circumstances that existed were, that there were other debts of the father at the time of his death, that other sales were made for their discharge and that the impugned sale took place shortly after the other sales and was part of a scheme for the discharge of the debts if possible. These were considered to be circumstances that justified the inference that there was a "pressure on the estate" to discharge the debt. Similar circumstances do exist in this case as well. As already stated at the time of partition, the debts of the branch amounting to about Rs. 2,500 including the present debt, were charged on the estate and had to be discharged by the branch. The income of the estate did not leave any surplus for the discharge of the debts, and from time to time alienations had to be effected for clearing the debts by Kutten Menon during the plaintiff's minority & by the plaintiff himself after he came of age. Ext. VII itself was a renewal, as it were, of the old debt of 1097. Ext. VII was not discharged till 1114. Even Pw. 8 the plaintiff could not say that there was sufficient income to pay the debt nor could he swear to any alternative mode of discharging the debt.

The view taken in (1912) 23 Mad LJ 638 was approved of in the later decisions of the Madras High Court in Nagammal and Others Vs. Varada Kandar and Others, and in Kesavalu Naidu and Another Vs. Nagarathnam and Others, . In the former case where the objection that there was no pressing need for the impeached alienation found favour with the Subordinate Judge, Justice Rajamannar observed:

"The learned Judge also erred in assuming that it was necessary to prove that

the creditors were actually making demands before it could be found that there was a pressure on the estate."

In *Kesavalu Naidu and Another Vs. Nagarathnam and Others*, their Lordships, while dealing with a case where a Hindu father had executed a usufructuary mortgage to secure a debt, and his widow as guardian of his minor sons, notwithstanding a stipulation in the deed that the mortgage was redeemable after a specified period, sold the property for discharging the mortgage even before the expiry of that period, held she could.

"Provided there were other circumstances present which showed that though there was no immediate pressure for repayment there were no other means or way of paying off the antecedent debts, including the mortgage debt of the deceased, even after the expiry of the specified period. Actual pressure in the sense of an immediate demand by the mortgagor is not conclusive of the question of necessity. In such circumstances it is not necessary for the sale to be binding on the sons that the purchaser should show that there was no alternative for the vendor but perforce to sell the property."

Though the theory of pious obligation of the sons to discharge an antecedent debt incurred by a father in Hindu Law does not arise in the case of alienation of tarwad property under Marumakkathayam law, still the principle that the existence of a pressing need by way of a demand for the money or the filing of a suit for its recovery is not a factor that should invariably exist in all cases before an alienation to discharge that debt is upheld can well apply.

7. The learned Judge has also fallen into an error in accepting the charge, that Kutten Menon was acting without bona fides and was Imprudent in selling the property which would have fetched a much higher price had he waited for some years and in not waiting until such time as the plaintiff attained majority. The question to be considered is whether in the circumstances that existed at the time of the alienation, the act could be regarded as a proper one by a man of ordinary prudence and

"the court will not set aside his act on the ground that years after the act has been done it appears to the court that the guardian might have done better".

Judged by that test it has to be held that it was a proper act of the plaintiff's mother and Kutten Menon to have sold the property at the time. The uniform evidence of Pws. 3 to 5 that Kutten Menon was an honest and respectable gentleman who was properly managing the properties of the plaintiff's branch also belies the unmerited charge hurled against him, that he was acting against the interest of the plaintiff to further his own selfish ends.

8. The alienation is of the year 1114 and within a month the Mission started the construction of buildings in the property which was completed within six months. The plaintiff was admittedly living close by and seeing the progress of the construction. Yet he preferred to wait for full 10 years to question the alienation

of the property. It is patent that the suit is only a much belated attempt on the part of the plaintiff to take advantage if possible of the rise in prices of properties in 1124.

(9) Hence these appeals are allowed and the suit is dismissed with costs throughout.