**(1953) 09 KL CK 0024**

**In the High Court Of Kerala**

**Case No :** A.S. No. 81 of 1950

Thevi Amma and Others APPELLANT

Vs

Subbarayayen Krishna Iyer and Another RESPONDENT

**Date of Decision :** 22-09-1953

**Acts Referred:**

**Citation :** AIR 1954 Ker 462

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

**Bench :** Single Bench

**Advocate :** N. Raman Unnithan, for the Appellant; P.H. Sankaranarayana Iyer and G. Velu Pillai respectively, for the Respondent

## Judgement

Govinda Pillai, J.—Defendants 2, 3 and the additional 7th Defendant are the Appellants. Defendants 1 to 3 and 7 are members of a Nair tarwad. Defendants 4 to 6 are distant Koottukars. The 1st Defendant''s elder brother Kumaran Narayanan was stated to be the Karnavan of the tarwad after the death of previous Karnavan Velayudhan Velayudhan in 1097. Narayanan''s next younger brother was one(SIC) Parameswaran. Plaint items 1, 2 and 4 belonged their tarwad and under an Udampady Ex.-A in the tarwad and also a release Kumaran Narayana has a special right over these properties to the extent of I. Rs. 4750-7 Chs. 8 cash. Kumaran Narayanan and Kumaran Parameswaran executed a hypothecation bond in favour of the Plaintiff charging the properties for Rs. 1500/-1. Ex. B is that bond executed on 12-10-1100. In that bond there was a term of 3 years for the repayment of the amount. It was also mentioned therein that, if interest was left in arrears, the same would be considered as principal and interest on that also will be paid. The amount was advanced for tarwad purpose. A portion of the interest had been paid after 1100 and the balance, as shown in the statement appended to the plaint, would come to Rs. 5091/3/8.

The Plaintiff would say that in view of the economic depression and for easy termination of the litigation, he would confine his right to Rs. 2000/- so that the suit could be filed in the Munsiff''s Court. The suit was, therefore, for the realisation of the said sum of Rs. 2000 with interest and costs. The 1st Defendant was stated to have filed a suit for partition in O.S. 94 of 1112 of the District Court, Alleppey. He has thus become divided from the tarwad after the execution of the hypothecation bond. The properties he obtained on partition were also sought to be made liable. The decree asked for was against the tarwad of Defendants 1 to 3 and 7 and against the estate of Kumaran Narayanan and Kumaran Parameswaran. The legal representatives of these two persons were not, however, impleaded and the question of a decree against their estate does not at all arise for consideration.

2. The 1st Defendant contested the suit and stated that the document Ex. B was not supported by consideration and tarwad necessity and that the Plaintiff was not entitled to any relief against the tarwad properties. He also stated that he had become divided from the tarwad and he got 1/5 share in the properties. He pressed for the dismissal of the suit.

3. The lower court found that Ex. B was supported by consideration and tarwad necessity and that the Plaintiff was entitled to a decree as prayed for. The special rights of the executants of Ex. B pleaded had been found against. Direction was given to the Plaintiff to proceed against the share allotted to the 1st Defendant only in case the decree was not satisfied by the sale of the other items. It is against this decree that the present appeal was filed.

4. It has to be mentioned at the outset that these Appellants had remained ex parte in the lower court. They had not filed any written statement there. They would, however, say that they were relying on the contentions of the 1st'' Defendant and that they were satisfied with the evidence record. They attacked that Ex. B was not supported by consideration and tarwad necessity.

5. There are three recitals in Ex. B and the binding nature of these recitals on the tarwad has to be considered. Ex. B was for Rs. 1500 and the lower Court had found that it was supported by consideration. The evidence in the case would show that this finding of the lower Court would not be impeached. The Plaintiff as P.W. 1 had spoken to the passing of consideration with reference to the accounts kept in his family. He appears to be a respectable person and there is no reason to discard his evidence. So we confirm the finding of the lower Court that Ex. B is supported (SIC) consideration.

6. It has now to be seen whether it is supported by tarwad necessity. There are three recitals (SIC) the document. The first is a sum of Rs. 200 the Plaintiff''s father under two promissory notes Exs. C and G. The Plaintiff''s father was said to have advanced the amount under Ex. G out of Varadakshina received by the Plaintiff at the time of his marriage. The second recital is a sum of Rs. 300 to be paid to P.W. 2 the foreman of a chitty as per a chitty security bond and the third recital is a sum of Rs. 1000 ready cash to conduct a trade in tobacco and rice. The lower Court was of the view that, when consideration was proved, the law would raise a presumption that the bond was supported by tarwad necessity as

 

well. If there was some necessity for the tarward to borrow money and if the amount was borrowed by the Karnavan, then the creditors were not bound to see to the application of the money for the particular necessity. When the purpose for which a loan was taken appears in the document itself then, it has to be seen whether the purpose mentioned there denotes a necessity that would be binding, on the tarwad.

The legal aspect of this had been considered in several decisions of the Travancore High Court and we would be satisfied by referring to two Pull Bench decisions among them. The first is - Swaminatha Sastrial v. Sankaran Nainaru 2S Trav. LJ 27 (PB) (A). Several of the cases decided before had been referred to there. It was held: there that the nature of the presumption as to tarwad necessity in favour of a ''bona fide'' creditor dealing with a Karanavan can relate only to the acts falling within the scope of the ordinary duties of a Karnavan and that on proof of passing of consideration a presumption would arise in favour of tarwad necessity but the weight to be given to such presumption would, however, vary according to facts made out in each case. Consent on the part of all adult members, however valuable it may be to lead to a reasonable presumption, cannot by itself constitute a tarwad necessity. In other words consent and tarwad necessity are not synonymous- terms nor are they interchangeable.

It was further laid down that it was well established by a long course of decisions that the consent of adult members can lead only to a reasonable presumption of tarwad necessity which if unrebutted would favour the creditor and that the strength of such presumption would vary with the nature and character of the admission made, the occasion where it was made and other attendant circumstances. On the question of the binding nature of a speculative trade or business by a Karnavan of a tarwad it was held that, unless, the business was one started and continued as a tarwad concern with the knowledge and assent of all the adult members of the tarwad and unless the said business being not of a speculative or hazardous nature attended with unforeseen risks and liabilities and was considered necessary to promote the general welfare of the tarwad as a whole or for'' the better and more efficient management of the tarwad affairs, the debts from such transactions could not be treated as binding on the minors in the tarwad.

It was however foreign to the recognised principles of Marumakathayam Law that the corpus of the tarwad should be charged with liability for anything other than what was strictly understood in law as a tarwad necessity. That is to say purposes within the scope of the ordinary management of the tarwad and transactions which are attendant with grave risks or of a speculative nature could not be classified as acts of management to the manifest advantage of the tarwad. In that case the Karnavan had borrowed money for the trade in copra and coir. The debts from the transaction mentioned, above were not held to be binding on the tarwad. The discharge of the debts connected with that business was also held not to constitute a tarwad necessity.

7. The next cage is Anr. Full Bench decision in - Nedungadi Bank Ltd. v. Govindan Potti 31 Trav. LJ 358 (B). There - '' 28 Trav. LJ 27 (F B) (A)was cited and followed. This Full Bench had further considered whether the starting of a new trade or business could be held to be a family necessity in non-trading communities. It was held, following the principles of Hindu law that it could not be a family necessity. So, the view expressed by the learned Munsiff reagrding the presumption of necessity when consideration was proved could not be applied and we have to mention that this view had vitiated to some extent the appreciation of the evidence in the case. It is common knowledge that Marumakkathayam tarwad would come under the non-trading communities. If the karnavan borrows money for starting a trade, the party, who advances money, would take the risk and the tarwad could not be made liable for the same.

The lower Court would think that, since some of the members of this tarwad had trade, the trade conducted by Kumaran Narayanan was also a tarwad concern. It is difficult to follow the logic of this reasoning. The Munsiff does not however say that the trade conducted by the junior members was also for the benefit of the tarwad so that the tarwad could be made liable for those trade debts also. Velayudhan Velayudhan was the Karnavan before Kumaran Narayanan. He died in 1099. It was stated by the 1st Defendant that even from 1091 onwards Velayudhan Velayudhan was not managing the affairs of the tarwad as his vision and power of hearing had become very defective. There is some evidence to show that Velayudhan Velayudhan had some trade or other from his younger days. In Ex. O, dated 14-12-1060, he is described as a trader. He could not have died in 1097, as mentioned by the Plaintiff, for he is a party to Ex. A, dated 14-7-1098. There he is described as having Grahabharanam. All the other members of the tarwad except Kumaran Narayanan are described as agriculturists. So, the conclusion of the Munsiff that most of the members in this tarwad were traders cannot be correct.

In Ex. Q, dated 10-6-1079, Velayudhan has described himself as an agriculturist. That is the case with Ex. I and Ex. v. of 1084. In Ex. II of 1096 he has described himself as having Grahabharanam. In-Ex. I of 1084 Kumaran Narayanan''s profession is stated as agriculture. There is some evidence to show that till 1085 Velayudhan had some trade and that he was interested in the management of the tarwad affairs. At any rate it was evident that Kumaran Narayanan who succeeded Velayudhan as Karnavan had not inherited any assets from the trade conducted by Velayudhan. The business mentioned in Ex. B was one started by Narayanan. There is absolutely no evidence to show that the tarwad was in any way benefited by this or that it was necessary to start a trade to promote the general welfare of the tarwad as a whole or for the better and more efficient management of the tarwad affairs.

There can, therefore, be no doubt that the third item of consideration mentioned in Ex. B is one not binding on the tarwad of the Defendants. Though the third item was mentioned to be Rs. 1000, Rs. 30 out of this had to be paid to discharge the second recital of Rs. 300. We shall take that the second recital is Rs. 330 instead of Rs. 300. This sum was due to a chitty foreman examined in this case as P.W. 2. P.W. 2 had sworn that the said chitty had been prized by Kumaran Narayanan and with that a tarwad mortgage had been released. The tarwad got the benefit out of that. So the amount paid to P.W. 2 in partial discharge of a binding debt would certainly be binding on the tarwad. We, therefore, confirm the finding of the lower court regarding the second recital.

8. There is a building marked H in the second schedule attached to the plaint and this building had been constructed at the instance of Kumaran Narayanan. It was now claimed by the Defendant as a tarwad asset. So, the amount borrowed by Kumaran Narayanan under Exs. C and G promissory notes to put up the building has to be paid by the tarwad. Hence the first recital in Ex. B is also supported by tarwad necessity. Thus find that Ex. B is supported by consideration and, tarwad necessity only to the extent of Rs. 530/-. The Plaintiff can claim a decree only for the said sum of Rs. 530 and interest. The provision in Ex. B is that the hypothecatee should pay the interest once in six months and if default is made then such defaulted interest will be considered as principal and interest on the same will also be allowed. There is no provision that defaulted interest will be added on to the original principal and such sum would be the principal for future calculation. It is only stated there that, for purpose of calculating future interest, the defaulted interest will be considered as principal amount. It would, therefore, appear that the Plaintiff would be entitled only to Rs. 530 towards principal Rs. 265 towards interests on the principal up to a moiety. He will also be entitled to interest on defaulted interest.

The calculation made in the plaint would that a substantial amount had been paid as interest till 27-9-1107. So interest will be calculated on defaulted interest only subsequent to that date. The provision in Ex. B was to pay interest once in six months. It would appear to be reason able to restrict such interest on interest to a moiety of interest allowed, that is one-half of 265. Thus the principal on the date of the suit will be Rs. 530 and interest Rs. 265 plus Rs. 132-1/2 Rs. 397-1/2 (Rs. three hundred and ninety-seven and a half). The principal sum of Rs. 530 will carry interest at 6 per cent, from date of suit that is 10-10-1115 to 31-1-1116 and thereafter interest on the principal amount will be four per cent, till the decree of the lower Court passed on 14-4-1124. Thereafter the interest on the aggregate sum would be four per cent.

9. A direction had been given by the lower Court to proceed against the properties allotted to the 1st Defendant only last. It was admitted that the 1st Defendant had instituted a suit in 1112 and become divided from the other members of tarwad and that for his share he got 1/5 of the tarwad properties. He is also liable for the liabilities of the tarwad. The amount mentioned above is a liability of his tarwad, and hence he is liable to pay one-fifth of the amount as found above. The Appellants and the properties that remained with them after

 

allotting the 1st Defendant''s would be liable, only for four-fifth of the decree amount. The direction in the lower Court in? respect is cancelled and substituted as mentioned above. The Plaintiff will get his costs in the lower-Court only to the extent he has succeeded here In this Court, the Appellants and the Plaintiff will have proportionate costs. The 1st Defendant will bear his costs throughout.