
(1930) 11 MAD CK 0008
In the Madras High Court

V. Govinda Panikkar and Others

APPELLANT

Vs

Vilakkathala Parti's daughter Karthiyayini and Others

RESPONDENT

Date of Decision : 18-11-1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 46

Citation : AIR 1931 Mad 726 : (1931) 34 LW 365 : (1931) 61 MLJ 35

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—This is a Second Appeal against the decision of the Subordinate Judge of South Malabar, preferred by some of the

junior members of Nair tarwad, who sued for a declaration that an assignment of hypothecation debt, by the karnavan (2nd defendant) under the

original of Ex. A in favour of the 1st defendant is not valid and binding on the tarwad.

2. The Lower Appellate Court has found that Ex. A was fully supported by consideration, through there was no tarwad necessity for the

assignment. The mortgage debt assigned under Ex. A was due from one Kunhunni Thampan who executed a simple mortgage-deed for Rs. 2,000

on 15th May, 1914, in favour of the 2nd defendant and his sister, 3rd defendant. The plaintiff's suit was dismissed by the learned Subordinate

Judge on two grounds, namely, (1) the hypothecation bond which is the subject of the assignment in question has to be classed as one in the nature

of movable property; (2) it was competent for the karnavan to assign the hypothecation bond, even in the absence of any tarwad necessity, as he

has full power of disposal in respect of movables. The correctness of both these propositions is questioned by the appellants.

3. As regards the first point, we have to see, whether a hypothecation bond held by a tarwad, as part of the assets belonging to it, should be

treated as movable or immovable property, for the purpose of determining the powers of disposal over the same, possessed by the karnavan. If

the customary law of Malabar applicable to tarwads recognized in a karnavan larger powers of disposal in respect of movables than in the case of

immovables, it must first be ascertained whether a particular item of property should be regarded as movable or immovable.

4. A debt due under a hupothecation bond has been treated in the Civil Procedure Code, for purposes of attachment and sale in execution as

movable property. It has been held in *Nataraja Aiyar v. The Sourth Indian Bano of Tinnevely* ILR (1911) M. 51 : 22 M.L.J. 105 that such a debt

is movable property within the meaning of Order 21 Rule 46, CPC and Rule 54 is not applicable to it, though the General Clauses Act and

Transfer of Property Act speak of such debt as an interest in immovable property. In the aforesaid two Acts, even benefits to arise out of land are

included within the definition of immovable property. When the question to be decided was, whether a transfer of a mortgage bond when effected

by an unregistered document is valid and the document whereby the transfer is made is admissible in evidence, it had to be considered, in the light

of the definition of immovable property, given in the Transfer of Property Act and the Registration Act. The mortgage-debt was, for the purposes

of those Acts, treated as immovable property by Richardson, J., in the case reported in *Sakhiuddin v. Sonaula* (1918) 27 C.L.J. 453. These

decisions are, therefore, in my opinion, not in point, in the present case.

5. The main question in this case is, as I have already stated:

Should the hypothecation debt belonging to the tarwad be treated as its movable or immovable property, for the purpose of seeing whether the

karnavan has absolute or only restricted power of disposition in respect of it?

6. The pronouncement of their Lordships of the Privy Council in the case reported in 27 CWN 269 (Privy Council) is, in my opinion, exactly in

point. For a similar purpose, while referring to a contention in a suit by reversioners, that the widow of a deceased Hindu has larger power of

disposal over the movable property of her husband, than over the immovable property, their Lordships expressed their view, as regards a

mortgage decree debt, that

it would be carrying technicality to an excess to consider this property as immovable property.

7. Their Lordships add:

In the hands of the deceased and in the hands of the widow till the sale it was money secured by a mortgage on immovable property.

8. On this authority, I think fit to hold, that for the purposes of deciding the question at issue in the present case, the hypothecation debt, which was the subject of assignment under Ex. A is movable property.

9. As regards the second point, there is the decision of a Division Bench of this Court, reported in Subramania Pattar Vs. Krishna Embranderi and

Others, wherein Sadasiva Aiyar, J., considered this question and expressed his opinion with some emphasis. The learned Judge is of opinion that

the karnavan has absolute powers over movables and properties in the nature of movables, Including the power of realization of debts due to the

family in any manner he likes and of selling movables and converting them into money. He further states that a third person who purchases such

property for consideration is not bound to inquire into the necessity for the alienation or to see to the application of the purchase money. In Mr.

Justice Sundara Aiyar's treatise on Malabar Law, the learned author says at page 50 that a hypothecation debt may well be assigned over by the

karnavan, without proving necessity for the act.

10. It is, however, argued by Mr. Muthukrishna Aiyar for the appellants, that Courts should be slow in applying such a rule though traceable to

custom, and it would work great hardship in some tarwads whose bulk of property consists of movables alone, if an absolute power of the

karnavan over movables is recognised. This aspect of the matter should receive attention, when the unreasonableness of the customary right sought

to be set up is patent on the facts of a particular case. Perhaps, it may then be for consideration whether Sadasiva Aiyar, J., in the said case has

not gone too far in recognising the absolute : right of disposal in the karnavan, over all the movables, without any sort of. qualification or reservation

to safeguard the interests of the other members of the tarwad. In the said book on Malabar Law, the learned author seems to have felt this

difficulty, as would appear from the following passages at page 50:

This absolute power of disposition must be limited to cases where the customary mode of enjoyment is by disposal. It would be extraordinary if

such a power should be recognised in respect of family jewels.

11. As to acts of management, the karnavan has, doubtless, large and even uncontrolled discretion.

12. In the present case, the assignment of the hypothecation bond by the karnavan, though not strictly for tarwad necessity, is found to be fully

supported by consideration. There is no proof of fraud or collusion. It was open to the karnavan in the course of management to have collected the

amount of this hypothecation bond at his will and pleasure. If he wished to realise the amount, he could have demanded payment from the

mortgagor. If the debtor was refractory, the karnavan could have assigned the bond to another, and realized the money by that means. Such a

course would be more an act of management than a mere alienation. In the present case, the discharge of the kuri chit debt (found to be binding on

the tarwad) was one of the purposes for which the assignment was made, Instead of himself paying up the. kuri debt out of the amount received as

consideration for the assignment in question, the karnavan asked the assignee herself (1st defendant) to pay up that debt. In fact, she has even paid

three instalments of that debt, amounting to Rs. 480. No doubt, the discharge of some of the karnavan's own debts was also undertaken by the

assignee, on account of the consideration payable for the assignment (Exs. II, III and VII). I am of opinion that the assignment of the hypothecation

bond may even be viewed as a mode of realization of that debt, which the karnavan thought fit to adopt, whether quite prudently or not, in the

course of management. It cannot be; viewed as a bare alienation, ignoring all the surrounding circumstances.

13. For all the foregoing reasons, I find that the plaintiffs are not entitled to the declaration prayed for.

14. The Second Appeal is dismissed with costs of 1st respondent.