

(1897) 02 MAD CK 0012
In the Madras High Court

Vasudevan Nambudri and Others

APPELLANT

Vs

Sankaran Nambudri and Others

RESPONDENT

Date of Decision : 01-02-1897

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 30

Citation : (1897) 7 MLJ 102

Hon'ble Judges : Subramania Aiyar, J;Shephard, J;Davies, J;Arthur Collins, J

Bench : Full Bench

Judgement

Arthur Collins, Kt., C.J.—The question referred to the Full Bench is whether the decree, made in a suit in which the karnavan of a

Nambudri illom or a Marumakkatayam tarwad is in his representative capacity joined as a defendant and which he honestly defends, is binding on

the other members of the family not actually made parties. I take it that the word "" honestly"" means that the karnavan acted in good faith and in

what he believed to be the interest of the tarwad. The Karnavan of a Malabar tarwad is, except under certain circumstances, the eldest male

member of the tarwad;in him is vested actually all the property, moveable and Immovable belonging to the tarwad; he manages the. property of the

tarwad and can invest the money of the tarwad either on loans or other security as he may think fit. He can also grant, the. land on kanom or on

otti mortgage. No member of. the tarwad can call for an account of the income, nor can a suit be maintained against him for an account of the

tarwad property in the absence of fraud on his part. He can sue in his own name for the purpose¹ of recovering or protecting the property of the

tarwad and one of his acts in relation to the above: matter: can be questioned provided he has acted in good faith. He is restrained, it is true, from

alienating the lands of the tarwad in his capacity as manager except in certain instances, e. g., when a decree is in course of execution against the

tarwad property and against the karnavart, and he alienates such property in good faith, there being no other means available for doing so, and in

the ease where it is absolutely necessary to do so to pay arrears of revenue. The karnavan is not a mere trustee of the property of the tarwad; he is

the natural guardian of every member within the family, and it was well said by Mr. Holloway in appeal suit No. 120 of 1862; "" A. Malabar family

speaks through its head, the karnavan, and in Courts of Justice except in antagonism to. the head can speak in no other way. It appears that during

the time Holloway, J., was in. the High Court the proposition that the members of the tarwad were bound by the acts of the karnavan in cases in

which he sued or was sued in his representative capacity was never seriously disputed and the cases cited at the bar do not appear to ma to

overrule the proposition. I would adopt the view of the power of the karnavan as laid down in Varankot Narayana v. Varankot Namyana I.L.R.

(1880) M. 328 and there are many cases quoted by Mr. Wigram in his work on Malabar Law and Custom which support the proposition.

2. I would hold, therefore, that when a karnavan sues or is sued in his representative capacity and acts, in the terms of the order of reference,

honestly,"" the other members? of the tarwad are bound by the decision I answer the order of reference to the Full Bench in the affirmative

3. The sections of the CPC cited in the argument do not affect one way or the other.

Shephard, J.

4. The question. raised by the reference is one of considerable importance. Since 1880 it has constantly been discussed; n this Court. Different

views have been propounded, and it would not be easy to reconcile all the decisions. I propose first to examine these decisions and afterwards. to

consider the question from other aspects and also with reference to the arguments which are urged against the admission of the principle that a

karanavan, can properly represent his tarwad in suits professedly brought by or against the tarwad.

5. In Varankot Narayanan v.Varankot Narayanan and others I.L.R(1880) M. 328 the senior member of an Mom had been sued as such for the

recovery of land alleged by him to belong to the Mom. A decree having been passed against him, a junior member of Mom, alleging fraud, sued

for a declaration with regard to the same land as against the plaintiff in the first suit. It was held that the junior was properly represented by his

senior in the first suit, and that, therefore, having failed to prove fraud he could not succeed in the second suit. In *Kombi v. Lakshmi* I.L.R(1881) .

M. 201 a decree for money had been obtained against the karnavan and suit was brought by the anandravan to set aside the sale in execution of

the decree. It does not seem to have been proved that the karnavan was sued or sought to be made liable otherwise than in his personal capacity,

The Court distinguished the case of a debt from the case of land such as was under consideration in ILR M. 328 . It held that the junior members

were entitled to a decree on the creditor failing to prove that the debt was properly incurred for the purposes of the tarwad. It was in effect said

that If the creditor intended to make the tarwad liable he ought to have made them parties or applied u/s 30 of the Code.

6. In *Vasudeva v. Narayana* I.L.R(1882) . M. 121. Mr. Justice Innes., who was a party to the last decision, expressed the same view again. That

was a case in which a member of an Mom, apparently the eldest, was defeated in a suit brought against him for redemption of certain lands. In the

second suit brought by his brother to recover the same land, it was held by Innes, J., that, although no fraud was alleged, the brother was not

bound by the former decree. Mr. Justice Kernan, who had taken part in the judgment in I.L.R., 2 M., 328 considered that it was unnecessary to

decide the question whether the case of a Malabar tarwad was an exception from the ordinary rule that all persons sought to be affected by a suit

should be made parties to it. The learned Judges agreed that the case was distinguishable from that in I.L.E. 2 M. 328. With all deference I must

say that, assuming that the elder brother in *Vasudeva v. Narayana* was sued in his representative capacity, I can see no material distinction

between the two cases. The circumstance that, in the earlier case the plaintiff alleged fraud and left it to be assumed that " otherwise he was bound

by the decree is suggestive as indicating the opinion entertained by him and his advisers as to the position of the head of a Malabar family. But I do

not understand why, because he failed to prove the alleged fraud, he should not have had relief on the simple ground that he was not duly

represented in the former suit if that ground was considered tenable.

7. It appears to me that the judgment in I.L.E., 2 M., 328 was clearly intended to show that that ground was tenable. In *Thenju v. Chimmu* I.L.R.

(1881) M. 114 the two extreme views are stated. First, "a judgment is only binding inter partes and the judgment against the karnavan is in no

case binding on the anandra/vans;" second, "a karnavan is the head and representative of the family, and the judgment against him binds the

anandravans unless he was guilty of fraud or collusion." It was not necessary in that case to attempt a reconciliation of the decisions.

8. In *Haji v. Atharaman* ILR 7 M. 512 it appears to have been assumed that a decree against the karnavan for a debt alleged to be the tarwad

debt was binding on the tarwad. There was no actual decision. In *Ittiaehdn v. velappan* ILR 8 M. 484 the question came before a Full Bench with

reference to decrees for debt. The question stated in the judgment was as follows :--" Under what circumstances a decree passed against karnavan

of a Malabar tarwad will be binding on the other members of the tarwad, who may not have been made parties to the suit, so that a sale in -

execution will convey the rights of the tarwad in the property in execution to a purchaser? As might have been expected no definite answer was

given to this question. The general effect of the observations may in the first part of the judgment seem to be that, in the opinion of the Court, the

admitted practice of treating the karnavan as a sufficient representative of the tarwad was not strictly regular, but that notwithstanding, it must be

tolerated without certain bounds. In dealing with the particular cases under reference, the Court treated the circumstance that the karnavan had or

had not been sued in his representative character as the cardinal point on which to decide whether or not the tarwad was bound by the decree.

The next case (*Sri Devi v. Kelu Erad* ILR 10 W. 79) is of importance, because in deciding it, the Court considered the Full Bench decision and

acted upon their view of it. At the same time it must be said that, having regard to the facts found by the District Judge, the observations made on

the general question of the force of decrees against a karnavan were not strictly necessary. The District Judge on appeal held that the karnavan had

in the first suit in which he was impleaded as defendant fraudulently admitted the plaintiff's title. But the Court decided the case on the ground that

apart from fraud the anandravam were entitled, notwithstanding the decree, to have the question of title examined. and to show that the decree was

erroneous in point of fact. They considered that they were precluded by the Full Bench decision from holding that the cmandravans were bound by

the decree against their karnavan unless they proved mala fides on his part.

9. The next case (Siibrahmanyam v. Gopala ILR 10 M. 223 was heard by a Court composed of the same judges as those who took part in the

last-cited case. This case differs from the former cases in the circumstances that the manager of the family had figured as plaintiff in the former suit.

It was found that she had sued not on her own account, but on behalf of the tarwad and that she had contested the suit honestly and with due

diligence. On this finding returned in answer to questions sent down by the Court on the first hearing of the second appeal, the Court dismissed the

suit brought by the junior members of the tarwad, founding their judgment on the fact that the manager had been the plaintiff in the first suit and thus

distinguishing the case in I.L.E., 10 M., 79 .

10. Some other cases were cited, but they have no immediate bearing on the point now under discussion. One negative proposition is clearly

established by the cases to which I have referred--a decree made against a karnavan is clearly not binding on the, tarwad, unless he sued or was

sued in his representative character. It is also difficult to avoid the admission that the cases justify this further proposition that, in some cases, a

decree against the karnavan may be binding on the tarwad and unimpeachable save on the ground of fraud. This limited proposition is admitted in

the case last cited ILR 10 M. 223 The distinction there insisted upon, I fail to understand or appreciate. If the tarwad may be adequately

represented by their karnavan in litigation promoted by him, I cannot see why this may not equally be represented by him in proceedings which are

directed against the tarwad. The distinction between the case of the karnavan sued for debt and the karnavan sued for property is also, I think, one

which cannot be" maintained. It is suggested in Kombi v. Lakshmi ILR 5 M. 205 but since then, does not seem to have been insisted upon. I

concede that distinctions founded on the nature of the right or the way in which it comes to be litigated may be material in considering whether the

karnavan really did represent the tarwad and honestly represent it; but

otherwise I fail to see how they can be material. There are, it appears to me, only two alternatives. We must either hold that the status of the karnavan has nothing in it to make a decree against him binding on the tarwad, or

that, in all cases in which he is sued or sues in his representative character, the tarwad is bound, cases of fraud or collusion only being excepted.

Having regard to the authorities already cited, I do not think we are precluded from affirming this latter proposition. The former proposition it

would not be easy to reconcile, with the Pull Bench decision which alone is binding on us.

11. I will now consider the question apart from the recent cases and with reference to the position of karnavan as understood in Malabar. I believe

there can be no doubt that prior to 1880 the theory that the tarwad was fully represented by the karnavan was universally admitted. (See ILR 2 M.

328; Wigram's Malabar Law). It is noteworthy that as long as Mr. Justice Holloway, who was intimately acquainted with Malabar Law was in this

Court, the theory does not seem to have been questioned. In the Travancore State, I find from a recent judgment of the Court there that it is

maintained to the present day, Narayana v. Narayana II Travancore L.R.P. 112. It is unnecessary to repeat at length what has been said in several

cases as to the rights and duties of the karnavan. He is the manager of the tarwad property; he is entitled to possession of it even against the

anandravans; he is authorised, subject to certain limitations, to alienate the family property and to pledge the credit of the family. He cannot be

removed from office at the instance of the junior members and dispossessed of the family property except on proof of gross maladministration.

Apart from this, the junior members have no other claims against him except for maintenance. No claim for division of the property is admissible

(Eravanni Bevarian V. Ittapu Bevarman ILR 1 M. 153 2 M. 328 Tod v. Kunhamod Hajee ILR 5 M. 1; Kannan v. Tenju. If the karnavan,

being so placed with regard to the tarwad, was for many years prior to 1881, universally regarded as the person through whom the tarwad should

speak in courts of law and was so treated by the Courts, the remaining question is whether the CPC forbids us to continue to treat him in the same

way. This is a question which ought to be argued without reference to considerations of convenience or expediency, which, however, in my opinion

favour the maintenance of the old practice rather than its abolition. The argument used in several of the cases seems to have been that, because the

CPC does not provide for the case of karnavans, as it does, for instance for the case of executors, and does contemplate the joinder of all parties

interested in the subject-matter of the suit, the anandravans of a tarwad cannot be affected by a decree to which they are not parties either actually

or constructively under the provisions of S. 30. The general proposition that all persons intended to be prejudicially affected, by a decree ought to

be joined as parties to the suit cannot be denied; but there are exceptions for this rule, and the question whether one person represents another is

rather a question of substantive law than of procedure. One of the classes of exceptions consists of the cases of which *Bissessur Lall v.*

Luohmessurh () ILR 61 A. 233 is an instance. Another consists of the cases in which the principle is admitted that the female heiress under Hindu

Law represents the estate in such a manner that a decree against her in a suit properly framed may bind the reversioner. These exceptions have

been allowed and maintained notwithstanding the provisions of the Civil Procedure Code. The sections of the Code to which we are specially

referred are the 30th and the 13th, explanation V. The 30th section is of a permissive character. So far as concerns the principle involved, there

was nothing new in the provision. It had been acted on before the Code of 1877 came into force (*See Srikhanti Narayanappa v. Indupuram*

Ramalingam () 3 M.H.C.R. 226 . If it were shown to have been involved in the case of the karnavan and his tarwad, it might be said that a decree

against a karnavan could, since the enactment of the Code, be no longer held binding on the tarwad unless the procedure prescribed by the section

were followed. But this is not so, and I do not think it can properly be said that a karnavan and his anandravans have "" the same interest "" in a suit

brought by or against the tarwad. The interest of the former with his right of management. and possession, and his obligation to maintain the junior

members is surely not indetical with the interest of a junior member who has a claim for maintenance only. The only contention in favour of the

view that the karnavan represents the tarwad rests on the fact that he is in a position of authority having obligations and duties to perform for the

discharge of which superior rights in the tarwad property are conferred upon him. With regard to Section 13, explanation V, if it has any

application to the case of a Malabar tarwad, it rather supports the view that the tarwad may be bound by a decree against the karnavan, bona fide

litigating on its behalf. I am disposed to agree with Kernan, J., in thinking that the explanation refers alike to claims made by a defendant and claims

by a plaintiff. The conclusion at which I arrive is that the CPC does not prevent our giving effect to the theory of the karnavan's representative

character. I cannot help thinking that learned Judges have been induced to discountenance the theory, on the ground that the interests of the tarwad

require that all their members should be joined in suits concerning their property or obligation. It was observed in some of the cases that to allow

the karnavan to represent the tarwad in suits would practically amount to allowing him to alienate tarwad property indiscriminately. No doubt½

the remedy by suit impeaching the decree against their karnavan on the ground of his fraud or collusion would not afford the anandravans a

complete indemnity against the possible misconduct of the karnavan But the inconvenience resulting is, I think, more than counterbalanced by the

evil consequences which have resulted from the departure from the old practice. The result has been that, although a man may have obtained a

decree for a debt or for property against the karnavan and some of his anandravans he has been exposed to successive suits by the remaining

members of the tarwad. It is always open to some unconsidered infant to re-open the litigation and insist on having the whole question retried. The

rule of impartiality, which prevails according to Malabar law, renders the consequences of an omission to join all the members of the tarwad, if they

are to be deemed necessary parties, much more serious than it is in a similar case under the ordinary Hindu Law. Whereas, according to the latter,

the creditor or the purchaser might, at least retain under his decree against the manager, the share of that manager in the family property; in

Malabar, he is deprived even of that consolation when the Court holds that a junior member of the tarwad may re-open a litigation which has been

fairly conducted by his karnavan and is persuaded to upset the former decree. In such a system it is not astonishing that a rule making the karnavan

the exclusive representative of the tarwad should find a place.

12. For these reasons I. am of opinion that the question must be answered in the affirmative.

Subramania Aiyar, J.

13. I have also arrived at the same conclusion, and in my opinion, that is the conclusion to which the principle governing the case leads, there being nothing in the CPC to preclude effect being given to that principle. The question here turns upon the peculiar characteristics of a Malabar family and the unique position which its karnavan holds. The family property is not liable to partition except with the consent of all; the right of the members other than the karnavan, being practically limited to claim maintenance and to prevent the karnavan from wasting or improperly alienating the family property, and the title to hold possession of the estate and to receive and expend its income is vested in the karnavan, not by sufferance of the other members, but of right, which is indefeasible so long as he exercises his functions without injury to the family. Therefore, according to the substantive law to which he is subject, a karnavan is necessarily the natural representative of the family in all matters concerning it as between it on the one hand and outsiders on the other.

14. The question is whether in litigation also, when it concerns the family, a karnavan is not entitled to represent all the other members so as to bring cases like the present within the exception to the general rule requiring all persons materially interested in the subject of a suit to be made parties to it viz., even those not actually before the Court are bound by the judgment given in a suit if their interest was sufficiently represented therein. Now it is conceded that when a karnavan sues on behalf of the family, he fully represents all its other members and an adjudication therein, if there is no fraud or collusion, is binding on the whole family. *Subramanyan v. Gopala* ILR 10 M. 228. It is obvious that in such cases it is not possible to maintain any other view. For the entire executive authority being exclusively vested in the karnavan it is not open to the party sued by him, to raise any objection to the action on the ground of the misjoinder of the other members. *Byathamma v. Avulla*. A defendant in that pI.L.R.

15 M. 19 position cannot, in common fairness, be allowed to be sued again and again by each and every member of the family after its suit instituted by a karnavan had been properly tried and adjudicated upon. By parity of reasoning then, it follows that a karnavan can be sued on behalf of the family. It is difficult to see how this conclusion can be avoided unless the

argument of the defendant based"" on the provisions of the CPC were correct.

15. The argument seems to be that only when the special procedure prescribed by Section 30 has been adopted, the members of a family not

actually parties to the suit, are bound by the decision pronounced, in it but not otherwise. Now, it must be remembered that section 30 provides

only for that class of cases in which, owing to the circumstance that the persons interested are too numerous to be all conveniently brought before

the Court, and therefore the rigorous application of the general rule as to parties would work injustice, the rule has, as pointed out by the Lord

Chancellor in *Mozley v. Alston* 1 Ph. at pp. 798 and 799 also Richardson y."Hastings L.J. 13 Eq. 144 been relaxed in comparatively, modern

times. It has also to be remembered that the representative under that section is constituted and appointed by the Court in the suit. But there are

instances where, even though the difficulty with reference to the application of the general rule has nothing to do with the fact that the persons

interested are numerous, yet the law does not allow, apart from statute, certain persons to prosecute or defend suits in their representative

capacity, eg, Hindu widows with reference"" to reversioners; other persons having an estate, analogous to that of a Hindu widow with reference, to

those entitled to take after such qualified owners, and so on. In the cases last men-, tioned the limited owners possess the representative capacity

to sue or defend by virtue of their position. This as already shown is eminently true in the case of the karnavan. Consequently he does not require

the aid of Section 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case.no conflict

between his own interest and that of the family.

16. Nor does Section 13, the only other provision relied upon, affect the validity of the conclusion arrived at. If the present case falls within

explanation V, that explanation fully sustains the view taken, since, with all deference to the opinion of Innes, J., In *Vasudev v. Narayana* ILR 6 M.

121. I think the explanation is certainly applicable to claims by a defendant as to those by a plaintiff. But if that explanation does not apply, the case

is one not strictly covered by any other part of the section. And, as. the section is not exhaustive as to res judicata, I " think it does not affect the

correctness of the view taken here. Therefore, unless it is shown in the words of Jessel, M.E., "fraud or collusion or anything of that sort, or that

the Court was cheated into believing, that the case was fairly fought or fairly represented when in point of fact it was not." (Commissioners. of

Sewers of the. City of London v. Gellatly 3 Ch. D.. 616 . A decision in a suit, defended by a karnavan in his representative capacity, must be held

to be binding upon all those represented by him.

17. The rule governing the present case being thus clear; arguments against it founded on expediency have no force. If it be said that to recognize

the right of a karnavan to represent his juniors in litigation would prove detrimental to the welfare of Malabar families it must be admitted it, would

be equally so in cases in which a karnavan sues as when he defends. Yet in the former case the objection has not been considered good enough to

hold that junior members are not bound by a decision obtained in the suit by the karnavan. How then can the argument prevail in the latter case?

No doubt, in particular instances, it is possible and not improbable that junior members might find them-selves; unable to establish fraud, collusion

or the like on the part of the karnavan. But I shall have no doubt that the hardship, likely to be so caused, will be small indeed compared with that

which would result from answering the question before us in the negative; since experience shows that, in the large majority of cases, the attempts

made to re-open litigation, once concluded after real and genuine contest are made by the same parties, the names of persons (possibly of those

who had been fully cognizant of and who had acquiesced in the karnavan's management of the previous litigation) who. unfortunately-for the

successful party, had not been actually impleaded being used for the promotion of such subsequent suits. No doubt representative litigation of the

kind under notice is attended with some degree of difficulty. The difficulty however may to some extent be met by a judicious exercise of the

discretion vested in the courts in the matter of adding parties. But the difficulty cannot afford any justification for discarding the principle applicable

to such cases. A departure from it, in some of the decisions of this Court which have been fully considered by my learned colleague Shephard, J.,

and which I therefore refrain from discussing, has, I am afraid, tended to foster unjust and vexatious litigation which can, I think, be stopped to a

considerable degree by again enforcing the principle accepted and uniformly acted up to 1880.

18. I concur therefore in answering the question referred to in the affirmative.

Davies, J.

19. I was at first disposed to adopt the view that all members of the tarwad ought to be impleaded either individually when few in number or under

the provisions of Section 30 of the CPC when numerous, for the simple reason that this course would have the effect of preventing any further

litigation in connexion with the same subject matter. But now having regard to the repressor tative character which the karanavan undoubtedly

holds in all other, affairs connected with the tarwad, it seems to me that if we overlooked; that character in our courts of law we should be unjustly

derogating from his status.

20. Moreover, the only litigation that would be possible upon the. judicial recognition of his representative character would be confined to: actions

founded in fraud on his part. The inconvenience caused thereby would in my opinion be far less than what would follow from an. inflexible rule

requiring that in every case in which a tarwad ""was, concerned all its members should be made parties, entailing in nine cases out of ten needless

trouble and expense. I, therefore, also concur in answering the question in the affirmative.

21. In accordance with the opinion of the Full Bench, a Division Bench consisting of Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar

concurred with the District Judge and dismissed the appeal, but without costs.