
(1918) 04 MAD CK 0035
In the Madras High Court

Vatavatta Nair

APPELLANT

Vs

Kenath Puthen Vittil Kuppassan Menon and Another

RESPONDENT

Date of Decision : 08-04-1918

Acts Referred:

Citation : 51 Ind. Cas. 740 : (1919) 36 MLJ 630

Hon'ble Judges : Seshagiri Aiyar, J;Abdur Rahim, J

Bench : Full Bench

Judgement

Abdur Rahim, J.—The plaintiff in the suit from which this appeal has been preferred is the senior anandravan of the tarwad of which the 2nd

defendant is the karnavan. The 1st defendant holds a kanom, Ex. II in the case, executed on the 24th August 1914. The object of the suit is to

have that kanom set aside on the ground that it was an imprudent transaction and was injurious to the interests of the tarwad. The 1st defendant

who is the karnavan of a rich tarwad has had dealings with the 2nd defendant's tarwad for a long time prior to the suit. He holds kanoms and

melcharaths on large properties belonging to the 2nd defendant's tarwad including the property in dispute.

2. In order to understand the questions arising in the case it is necessary only to go back to Ex. XX which is a melcharath in favour of the 1st

defendant in respect of the property comprised in Ex. II executed in May 1916. The melcharath therefore, which is a sort of second charge, would

expire in 1908. In 1902 the 2nd defendant's predecessor executed in favour of the 1st defendant's predecessor a puramkadam--that is a second

charge--on receiving a fee of about Rs. 1,350. That document contains a stipulation for renewal of the melcharath Ex. XX. Then, disputes arose

between the parties not merely with respect to this property but also with respect to properties belonging to the 2nd defendant's tarwad in

possession of the 1st defendant. A notice was given by the 2nd defendant in 1914 to the 1st defendant asking the latter to surrender the property

comprised in Ex. XX. There had been two suits instituted with respect to other properties of the 2nd defendant's tarwad in possession of the 1st

defendant. All these disputes, it appears, were arranged to be settled by the mediation of certain pleaders practising at the Palghat Bar, and in the

result, Ex. II and Ex. III were executed. It appears that altogether Rs. 3 000 was paid by the 1st defendant to the 2nd defendant out of which Rs.

1,000 was the fee for renewal. The case of the plaintiff is that Ex. II is a renewal of Ex. XXI which was to expire only some time in 1920.

3. It was strongly contended by Mr. Ananthakrishna Aiyar for the appellant that we must ignore Ex. XXI altogether as that was disputed by the

parties and as Ex. II was executed under an arrangement arrived at by way of compromise. But the whole case tried before the Court was that Ex.

II was executed before the expiry of the term mentioned in Ex. XXI and therefore it was invalid unless the 1st defendant was able to show that the

transaction was for the benefit of the family or was entered into for a necessary purpose. The document, Exhibit II, itself states that, "Though a

period of 5 years and 8 months has yet to expire of the former puramkadam demise for 12 years (meaning thereby Ex. XXI), yet we have to-day

given you this demise for 12 years as we are pressed for payment of the amount on the pronote with interest thereon executed to M.K. Krishna

Menon." The written statement of the 1st defendant, paragraph 9, also proceeds on the same basis and the evidence of the 1st defendant himself is

to that effect. And the question raised by the first issue, the issue bearing on the point, "whether the demise Ex. II was valid and binding on the

tarwad in view of the fact that the 1st defendant has surrendered his prior demise before he took this demise." By the prior demise here is meant

the puramkadam Ex. XXI. I think it would be altering the entire case if we were now to accede to Mr. Ananthakrishna Aiyar's contention that Ex.

XXI must be ignored altogether and that we must hold that since the term in Ex. XX expired in 1908 Ex. II should not be treated as a transaction

entered into before the expiry of an existing demise.

4. Mr. Ananthakrishna Aiyar has next argued that since there were disputes between the parties as to the validity of Ex. XXI and also about other transactions and as Ex. II was executed in settlement of those disputes no question of necessity or benefit to the tarwad arises in connection with Ex. II at all. But the suit raises the question not whether Ex. II is binding on the 2nd defendant but whether it binds the tarwad of which the 2nd defendant is the karnavan. Ex. II was executed long before the expiry of the term of Ex. XXI. The contention on behalf of the plaintiff is that the 1st defendant must prove either necessity or benefit to the tarwad. I do not think that the fact that the 2nd defendant executed Ex. II under the mediation of some persons would, by itself, relieve the 1st defendant in the circumstances of the case from making out that this is a transaction which is binding on the tarwad. The defendant did not attempt to make a case before the trial Court that the transaction should be upheld on the ground that it was part of the terms of a bona fide settlement of disputes. If he had setup such a defence the nature of the entire dispute would have to be looked into. All facts which will show that it was a bona fide settlement should have been placed before the Court.

5. It has been ruled in more than one case that if a melcharath is granted before the expiry of the term of the kanom the melcharath-holder must prove necessity or benefit to the tarwad. See *Raman Nambiar Vs. Raman Nambiar*, *Karayar Condly Puthupurayil Cheria Chirikandan and Others Vs. Aylliath Kushikath Krishna Nambiar and Others*, and *Chambozil Moidin Kutti Vs. Achutambal Kunhi Koyan Muth Haji and Others*, In the first two cases Sundara Aiyar and Sadasiva Aiyar, JJ., who had considerable experience of Malabar Law and litigation took part. In fact Mr.

Ananthakrishna Aiyar has not seriously contended that those rulings are wrong. But his argument, upon which he has insisted a great deal, is that the rule regarding the grant of a melcharath has no application to the renewal of a kanom. A melcharath is what is granted to a person other than the Kanomdar or tenant while if a kanom is renewed to the holder of the kanom himself, that is a case of renewal. The ground upon which the rule relating to melcharath has been based is two-fold: firstly, if a karnavan grants a melcharath before the expiry of the term of the kanom he is practically fettering the discretion of the person who may hold the office at the time of the expiry of the kanom; secondly it is not possible always to

ascertain beforehand what would be fair and reasonable terms for the melcharath before the kanom has expired. Both these considerations seem to apply with equal force in the case of renewal i.e. where a kanom is renewed before the expiry of its term. Mr. Ananthakrishna Aiyar argues that there is no rule prohibiting the surrender of a portion of the term of a kanom and that in fact such a surrender would be beneficial to the tarwad. I am not prepared to say that the surrender of a portion of the term must necessarily be beneficial to the tarwad; but even supposing it to be so, the grant of another kanom which would expire after the date of the expiry of the term of the original kanom would come within the purview of the ruling relating to melcharath and the same considerations would apply. The question shortly put is, why should a karnavan be in a hurry to renew a kanom before its term expires? If he can show that there was necessity to renew the kanom at that stage or that it was for the benefit of the tarwad that he should do so, that should be sufficient justification. I think, therefore, that the principle of the rulings above cited applies to this case, and this is also the view of the Subordinate Judge who is presumably familiar with the Malabar Law.

6. Then remains the question whether Ex. II is a valid transaction. The 1st defendant has not been able to prove actual necessity, but his real case has been that he made bona fide enquiries before obtaining Ex. II and that he was satisfied after such enquiry that necessity existed for the transaction in question. What are the exact limits of the enquiry which a person obtaining a transfer or advancing money to a person in the position of a karnavan whose position is very much analogous to that of a manager of an ordinary Hindu family, is required by law to make are not capable of being defined for all cases. But I think it is amply clear from the authorities that it is not owing enough for the alienee to show that he made enquiries of the karnavan himself and that he was satisfied with the statements made by him. If that was all that was wanted there would be hardly any case in which it would not be possible for the alienee to satisfy the letter of the law. In *Kameswar Pershad v. Run Bahadur Singh* ILR (1880) Cal. 843 Sir James Colville delivering the judgment of the Judicial Committee says that: "Their Lordships in no degree depart from the principles laid down in the case of *Hanooman Pershad Pandey v. Mussammat Baboocc Munraj Koonwarrce* (1856) 6 M.I.A. 393 which has been so often

cited. They have applied these principles in recent cases not only to the case of a manager for an infant, which was the case there, but to

transactions on all-fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his

son under the Mitakshara Law, has made an alienation of ancestral family estate."" The principle broadly laid down is, that although the lender is not

bound to see to the application of the money, and does not lose his rights if, upon a bona fide enquiry, he has been deceived as to the existence of

the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things. The words of the judgment

in that case are, "" Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can,

with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate; but they think

that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent

to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money.""... ""Their

Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived."" The same

principle was applied in Ravaneshwar Prasad Singh v. Chandi Prasad Singh ILR (1911) Cal. 721 which was confirmed by the Privy Council on

appeal. At page 751, it is pointed out that the enquiry was wholly insufficient and could not be said to be bona fide on the ground, among others,

that the Maharaja of Dharbhanga, who was the alienee there, merely satisfied himself with the enquiries made of his servants and did not make

enquires of the creditors and the heirs, and that it was not sufficient merely to ask the debtor if he was borrowing for necessity and to be satisfied

with his answers. In this case it is alleged that there was a debt of Rs. 3,000 outstanding on a promissory note executed by the, 2nd defendant to

one Kutti, Krishna Menon. The evidence is that the 1st defendant and his pleader made enquiries of the 2nd defendant as well as of Kutti Krishna

Menon. The promissory note was for Rs 3,000 and part of the amount, at any rate, is alleged to have been borrowed for the purpose of repairing

a temple belonging to the 2nd defendant's tarwad and for the performance of the purification ceremony after the repairs. This Kutti Krishna

Menon is a close relation of the 2nd defendant being his son's first cousin. The note was executed shortly before Ex. II. The 1st defendant is a neighbour of the 2nd defendant and as he had money dealings with him he may well be presumed to have some knowledge of his affairs. Now, the real point as regards this is, that the plaintiff, the senior anandravan of the tarwad, a few days, before the transaction had given a notice (Ex. C.) to the 1st defendant that the 2nd defendant was trying to execute document to the injury of the tarwad and to raise money for the purpose of his own extravagance. He also sent him a notice which he had published in a vernacular paper, and there it was stated that the 2nd defendant wanted to execute a renewal which was not for the benefit of the tarwad nor was there any necessity for it. In spite of these notices, the 1st defendant who is a pleader of considerable experience and standing in the profession, does not think it worth his while to refer to the plaintiff and ascertain how far the allegations made by him were well-founded or not. The repairs of the temple were alleged to have been met by subscription from the tenants and there was no necessity, therefore, for borrowing any money. It ought to have also struck the 1st defendant that Kutti Krishna Menon being a near relation of the 2nd defendant it would be safer to require some independent proof of the bona fides of the promissory note. It is difficult to understand why the 1st defendant; should have refrained from taking what would appear to anybody, and especially to a pleader, obvious steps for securing his position. He ought to have gone to the plaintiff and ascertained what was the true state of affairs. The tarwad of the 2nd defendant consists of a large number of adult male persons and he ought to have asked some of them whether there was any necessity for the 2nd defendant to raise any money. I think if he had made proper enquiries he would have learnt that the repairs of the temple were met by subscriptions from the tenants and I must hold that he should not have placed implicit reliance on the statement of the 2nd defendant or of Kutti Krishna Menon. I think there is great force in the argument of Mr. Ramchandra Aiyar that this payment of Rs. 3,000 or of Rs. 1,000 as renewal fee for Ex. II could not have been for purposes of necessity and it was more or less an after thought that struck the 1st defendant to get hold of a promissory note in favour of Kutti Krishna Menon. Kutti Krishna Menon is a wealthy man and his evidence is that he obtained Rs. GO out of this Rs. 3,000 as

consideration for an agreement not to press for the loan. There is absolutely nothing to show any sort of necessity why only a few days afterwards money had to be raised by Ex. II in order to pay off this loan. It is pointed out by the learned Subordinate Judge that the money alleged to have been repaid to Kutti Krishna Menon was not invested in any better security or to any greater advantage but in fact it was lent to a bank at a lower rate of interest than under Ex. I. I think the conclusion of the Subordinate Judge was amply justified that necessity is not proved or that any benefit accrued to the tarwad from Ex. II. It appears that the 2nd defendant is an old man and it is not at all unlikely, having regard to the fact that there are several tavazhis in this tarwad that he wasted to enrich his own family at the expense of the tarwad of which he was the karnavan. It seems to me that if the 1st defendant had made proper enquiries he would have found out that there was no necessity whatever for executing Ex. II. On the other hand, it seems to me extremely probable, as suggested by Mr. Ramachandra Aiyar that this transaction was really a term of the settlement of certain disputes with respect to other properties in respect of which suits were pending and that it was not a transaction entered into for purposes of tarwad necessity. As already pointed out," it was not sought to be proved that apart from the question of benefit or necessity, the settlement was binding on the tarwad.

7. There has been much discussion before us as to the recital in Ex. II in respect of the value of certain improvement amounting to Rs. 400 to Rs. 800 which is made payable along with the mortgage money secured by Ex. II. Those improvements, it is abundantly clear, had already been paid for by the 2nd defendant's tarwad and therefore nothing was due on that account. The 1st defendant when in the witness box gave up this claim, saying at the same time that he was not satisfied that the improvements had been paid for. I think there can be no doubt whatever that the case of the plaintiff on this point is perfectly true and is borne out by Ex. D, the draft of which, Ex. E, was corrected by the 1st defendant himself. It is however possible that at the time of the execution of Ex. II the 1st defendant has forgotten what was stated in Ex D, and, therefore, it is unnecessary for me to hold that the recital regarding improvement⁹ in Ex. II was deliberately false. However in view of my finding that there was no

necessity for the execution of Ex. II at all, I do not think it necessary to refer to this part of the case any further, I agree with the finding of the

Subordinate Judge that Ex. II is not valid and binding on the 2nd defendant's tarwad and the appeal must be dismissed with costs.

Seshagiri Aiyar, J.

8. I would have simply expressed my concurrence with my learned brother's judgment had it not been for the fact that I am unable to agree

unreservedly with what he says regarding the conduct of the 1st defendant. Therefore I shall say a few words on the two questions of law argued

by Mr. Ananthakrishna Aiyar with special reference to the conduct of the 1st defendant. I entirely agree in thinking that the document should not be

regarded; solely as the result of a compromise. There is no issue upon that question. If that question had been raised, there would have been a

necessity to go into the evidence as to whether the 1st defendant was acting honestly in putting forward the claim that Ex. XXI is not binding upon

the tarwad. Therefore it is not open to the defendants now to set up that case.

9. Upon the further question argued by Mr. Ananthakrishna Aiyar that there was a surrender of the previously existing kanom and that the renewed

kanom which dates from the date of the surrender is not affected by the same mischief which affects a melcharath or renewal which is to take effect

on the expiry of the existing kanom, I fail to see how on principle the two questions are different. The reason why melcharaths are discountenanced

under the Malabar Law is this: There is an existing contract which the karnavan has made which is binding on the tarwad. It has a particular term to

run. It is not, therefore, open to a karnavan to anticipate the term and to get a new contract executed without showing that there was necessity for

making a new contracts When the old kanom expires there may be a new man who will be able to apply his mind to the circumstances arising at

the end of the period. He may probably think that the old tenant should not be given the kanom again; or he may also think that it would be

necessary in the interests of the tarwad that fresh terms should be imposed upon the old tenant. Therefore it is not ordinarily open to a karnavan to

anticipate what is going to happen some years after. It is a well-known fact in Malabar that Melcharaths and renewals are given mostly in the

personal interests of the karnavan for the time being who is anxious to enrich

himself at the expense of the tarwad. Those are the grounds on which these transactions have been discountenanced by courts and I fail to see how the fact that there is a surrender of the existing period and the kanom is made to date from the date of the surrender could make any difference in the principles to be applied. Therefore I agree with my learned brother in thinking that, as in this case there was some time still to run for Ex. XXI, the fact that the period was surrendered and a new kanom was taken on that date, should not make any difference in considering the question.

10. Upon the second question I do not go the whole length which my learned brother has gone. I see nothing in the conduct of the 1st defendant to

show that he has not been acting honestly and bona fide. In my opinion he has been mistaken in judging of his rights and duties. There were two

suits, one in which he was himself the plaintiff and the other in which he was the defendant. A notice had been given by the second defendant

impeaching the validity of the Kanom by his predecessors; in these "circumstances, the 1st defendant asked his own vakil and the vakil for the 2nd

defendant to settle the dispute between the parties. He apparently relied upon their mediation and entered into this arrangement. Now, it may be

that he felt himself very sure of his position and did not make any further enquiries. But I do not think it can be said that he shirked any enquiry or

acted otherwise than honestly in this matter. In my opinion the evidence which has been given is entirely to his credit, and there is nothing suggested

in the cross-examination to show that he was acting fraudulently or was not behaving properly towards the 2nd defendant who is said to be an old

man. After all it must be remembered that the 1st defendant, although a vakil, was acting in the interests of his own tarwad which he was bound to

protect. In these circumstances I am not prepared to say that he was acting otherwise than honestly and bona fide in conducting the negotiations.

At the same time I am prepared to agree with my learned brother that the enquiry which he instituted was not sufficient in the eye of the law to

justify the transaction. As has been pointed out by my learned brother, at the time of the transaction two notices were sent to the 1st defendant, Ex.

C and Ex. L. Ordinarily it would be enough for a lender to be satisfied that there is a pre-existing debt, for if a lender is to be compelled to find out

that that debt also was one contracted for necessity, and if that is to be insisted

upon in the case of each loan, the result would be that the lender would have to go back a number of years and to investigate the affairs of the family from the outset. I do not think that is what the law requires of him to do. None the less when the 1st defendant had the notices from the 2nd plaintiff that the money he was going to lend to the 2nd defendant was for the latter's personal use and would not bind the tarwad, it was his duty to have gone to that person and made enquiries as to whether the representations made in the notices were true or not. His failure to make further enquiries was certainly wrong and certainly not legally justifiable; I think Ravancshwar Pershad Singh v. Chandi Prasad Singh ILR (1911) C. 721 lays down the principles applicable to the present case. I do not understand the decision to rule that, in all cases where a man is lending to pay off a pre-existing debt, the lender must not only satisfy himself that there is a debt but that the debt is also one binding on the family. As I said before, in my opinion the 1st defendant apparently believed that the mediation of the two vakils was sufficient to enable him to lend the money; I do not think that he can be said to have acted dishonestly or not to have acted bona fide in having taken the renewal.

11. As regards the question about the insertion of the further charge in the document for improvement, the same remarks would apply here also. I

am unable to agree with Mr. Rama"" chandra Aiyar that there was anything sinister in the conduct of the 1st defendant in getting this provision for a

further charge inserted in Ex. II. The first document which he attested (Ex.D) was in 1898 and 16 years later he took this document Ex. II, from

the 2nd defendant after the mediation of the two vakils. He says that he was under the impression that the money was not paid and he has sworn to

the fact that his karnavan Thoppan Nayar did not receive the money. I see no reason for not believing the evidence given by him in the witness

box. It is unnecessary to pursue this subject further because in my opinion if the matter rested only with Ex. II I would have come to the conclusion

that the two transactions were entirely separable. But as I have come to the conclusion that no necessity or benefit to the tarwad is proved by the

1st defendant in respect of Ex. II it is unnecessary to say whether the 2nd clause should be regarded as a clog on the equity of redemption and

whether it would be valid and binding upon the tarwad.

12. I agree in the conclusion come to by my learned brother that the appeal should be dismissed with costs.