

(1979) 01 KL CK 0015

In the High Court Of Kerala

Case No : Second Appeal No. 621 of 1974

Vayyerintekath Avirammentevide Mammen and Another

APPELLANT

Vs

Panikkarekath Mariyamma and Others

RESPONDENT

Date of Decision : 17-01-1979

Acts Referred:

Cochin Marumakkathayam Act, 1113 — Section 10

Citation : AIR 1979 Ker 216

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

Advocate : A. Achuthan Nambiyar, T.P.K. Nambiyar and P.G. Rajagopalan, for the Appellant; T.M. Krishnan Nambiyar and T.V. Ramakrishnan, for the Respondent

Final Decision : Allowed

Judgement

T. Chandrasekhara Menon, J.—The plaintiffs have come up in appeal here. The suit was one for arrears of maintenance from 1141 to 1144. The short facts of the case are as follows:

2. The first plaintiff married the second plaintiff on 29th March 1948, At that time, one Ponmankai Ahammad, husband of the first defendant and father of defendants 2 to 9 and the then Karnavan of the second plaintiff's tavazhi tarwad had agreed to pay 400 seers of paddy per year by way of maintenance to the plaintiffs. Though it was so declared by the said Ahammad at the time of the marriage and the same was recorded in the registers maintained by the mosque, as per this promise maintenance was being paid up to 1134 only and thereafter there was default of payment. Therefore the plaintiffs filed O. S. 556 of 1965 for realisation of the arrears of maintenance from 1135 to 1140 against Ahammad, The suit was decreed. Though Ahammad went in appeal, the appeal was dismissed. Pending the appeal Ahammad died and his legal representatives, defendants I to 9 were impleaded in that appeal But as pointed out earlier the appeal was dismissed confirming the judgment and decree of the trial Court. That amount has not yet been realised and the subsequent arrears of

maintenance from 1141 onwards were again defaulted. This led to the present suit. The plaint proceeds on the basis that Ahammad is personally liable for the amount of maintenance but as he is dead his assets are sought to be made liable for the said amount. Defendants I to 9 would be liable to the extent that they are in possession and enjoyment of the assets of Ahammad. Defendants 10 and 11 are the present Karnavans in the tarwad and tavazhi and they are sought to be made personally liable for the arrears accrued due after the death of Ahammad.

3. In the suit the present Karnavans of the tarwad and tavazhi remained ex parte. Defendants 1 and 7 and 2 to 6 filed separate written statements whereby they contended that the suit was not maintainable and the plaintiffs were not entitled to any relief. They denied even the allegation regarding the agreement to pay the maintenance to the plaintiffs stated in the plaint. In any view, according to them, the assets of deceased Ahammad would not be liable for the maintenance and defendants 10 and 11 who are the present Karnavans of the tarwad and tavazhi alone would be liable for the maintenance due to the plaintiffs. It had been alleged in the written statement that Ahammad was not taking the income from the tavazhi properties during the period for which this suit was filed, It was also contended that a portion of the plaint claim was barred by limitation, The plaintiffs would be entitled to get only the arrears that have accrued due for the past three years immediately preceding the date of suit.

4. The trial Court held that the claim from 1141 is barred by limitation and gave a decree for the amount due up to Ahammad's death from defendants I to 9 out of the assets of the deceased Ahammad in their hands and for the balance against defendants 10 and 11. The tavazhi tarwad properties were decreed to be proceeded against only after exhausting the remedies against the defendants and against the assets of the deceased Ahammad,

5. In appeal filed by defendants 1 to 9 the lower appellate Court had allowed the appeal to the extent that defendants 1 to 9 are held not liable to pay out of the assets of the deceased Ahammad. It is in these circumstances that the plaintiffs have approached this Court in the second appeal.

6. In *Kottal Kunhalikutti Haji v. Malikkaravida Kottal Kunhmayan* ILR (1923) Mad 567 Chief Justice Schwabe speaking for the Division Bench of the Madras High Court consisting of himself and Justice Wallace after pointing out that the decree was passed by the lower Court for arrears of maintenance personally against the Karnavan in the following terms "that the first defendant personally and as Karnavan of his tarwad do pay" said that this form of decree may not be right. The Chief Justice said that he saw no reason for a personal decree against the Karnavan which would involve the right of the junior members of the tarwad to arrest him if he did not pay forthwith, although it may be he may have none of the property in his hands available for immediate payment. The Chief Justice also pointed out that several decrees which had come before that Court he had looked up and he had found none in which that form of decree had been used. According to the learned Judge, how this decree was to be met, how the

maintenance of these junior members for the future was to be paid was a matter for the Karnavan to decide and he could, if he thinks it right, look into the position of every member of the tarwad and he would be perfectly justified in saying that one member was getting too much and another member was getting too little and he could alter and readjust the incidence of the burden of the expenditure of this tarwad.

7. It would appear from the judgment of Schwabe, C. J. that the brother Judge, Justice Wallace pointed out to him that it might be too general a statement to say that a personal decree against a Karnavan could never be given. The Chief Justice also stated that he could conceive of cases where it would be right that there should be a personal decree against the Karnavan. All he meant to convey was that ordinarily the decree in the first instance in the absence of special circumstances should be a decree in the form suggested by him.

8. I find it difficult to agree with the reasoning of the learned Judge as such because as it was argued in that case by counsel for the plaintiffs a personal decree might be proper especially when the Karnavan had not only not paid maintenance but must be supposed to have collected and retained their income. No doubt in passing a declaratory decree for maintenance such declaration could be made only making the Karnavan liable only in his capacity as Karnavan and the maintenance should come out of the tarwad income. But where there is a default on the part of the Karnavan in the matter of payment of maintenance, in spite of his receipt of the whole tarwad income I think it would only be proper to saddle the Karnavan with personal liability for the maintenance. He will have to disgorge himself of the personal benefit he may have made by non-payment of maintenance to members of the tarwad.

9. I may in this connection refer to the following observations of late Sri Sundra Aiyar in his well-known Treatise on Malabar & Aliyasanthana Law.

"Maintenance is primarily a charge on the family income and the Karnavan would not in the absence of special circumstances be entitled to encumber or alienate family property for the purpose of paying the maintenance. The onus must be heavily on the alienee to prove that he satisfied himself by proper enquiries that the Karnavan could not meet the charge out of the current income. A junior member that has a decree has the power to proceed against the family property at least in the last resort or otherwise it would be in the power of the Karnavan to render the decree wholly nugatory. The Court should however in fairness to the family proceed against the family property only in the last resort after exhausting all the remedies against the person of the Karnavan or the income of the family."

10. It might be noted that the decision of the Madras High Court referred to above had come up for consideration before a learned Judge of this Court in *Assankutty v. Abdulla* 1957 KLJ 1059 where Justice Varadaraja Iyengar before whom the case had come up referred to Section 10 of the Mapilla

Marumakkathayam Act which runs as follows :

"No immovable property of the tarwad shall be liable to attachment or sale in execution of any decree obtained by an Anandravan for maintenance, until after the decree-holder has exhausted his remedies, if any, against the personal property of the Karnavan or the income of the tarwad property."

The learned Judge states :

"Now the object of Section 10 is clearly to avoid all process against the corpus of the immovable properties as far as possible, in execution of a maintenance decree in favour of a Junior member of the tarwad. The direction is accordingly given to proceed against the income and also the personal property of Karnavan in the first instance. Only on failure to realise the whole or part of the decrea amount should execution be sought against immovable properties. Process against the Karnavan's personal property is indicated in recognition it would appear, of the personal liability of the Karnavan notwithstanding Kunhali Kutty v. Kunhu Maryam, ILR (1923) Mad 567. So far as the arrears are concerned, in any event, the Karnavan can be made personally liable as he has received and appropriated the income of the tarwad properties as Karnavan without discharging one of his important duties as such. The provision is thus designed for a certain purpose and must accordingly be held to be mandatory in character, any breach of which will make illegal the attachment or sale in execution."

I have no hesitation in expressing my complete agreement with these observations.

11. Mr. Ramakrishna, the learned counsel for the respondents invited my attention to the allegations made by the defendants in the written statement that Ahammad was not taking the income from the tavazhi properties during the period for which this suit was filed. But absolutely no evidence on this aspect has been brought to the notice of the Court. The defendants had not adduced oral or documentary evidence to prove that Ahammad was not in receipt of such income, It is also contended by the learned counsel for the respondents that Ahammad as such cannot be made liable in respect of the maintenance for the year 1141. The trial Court itself had exonerated his assets from such liability. The respondents could have no grievance in the matter because the trial Court had specifically stated that Ahammad's assets will be liable for Rs. 603.29 and proportionate costs and Interest of 6% per annum on the principal amount Rs. 531.05 from date of suit till realisation. Maintenance for the year 1141 had not been charged on Ahammad's assets. Defendants 1 to 9 are personally made liable for the said amount to the extent they are in possession and enjoyment of the assets of Ahammad. Defendants 10 and 11 are personally liable for Rs. 292.72, with proportionate costs and interest at 6% per annum on the principal amount Rs. 281.25 from date of suit till realisation. The Court had also said that the tavazhi or tarwad properties be proceeded against only after exhausting the remedies against the defendants and against the assets of deceased Ahammad.

This is perfectly correct.

12. To this view I set aside the Judgment and decree of the lower appellate Court and restore that of the Munsiff's. The appellants will be entitled to the costs in this Court.