

(1926) 03 MAD CK 0047
In the Madras High Court

Vesu alias Lakshmi Amma and Another	APPELLANT
Vs	
Thekkedath Veetil Kannamma alias Kathyayani Amma and Others	RESPONDENT

Date of Decision : 26-03-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4

Citation : AIR 1926 Mad 991 : (1926) 51 MLJ 282

Hon'ble Judges : Wallace, J

Bench : Division Bench

Judgement

Wallace, J.—This C.M.S.A. is against the decision of the Lower Appellate Court in a matter of restitution reversing the decision of the first Court.

2. The restitution was applied for by the respondents on the strength of a decree of the High Court in second appeal reversing the decrees of both the Lower Courts and dismissing the plaintiffs" (appellants") suit. It appears that of the original appellants in the First Appellate Court, the 10th defendant, though dead before the second appeal was filed, was included as one of the appellants, and his legal representatives were not brought on record, and the 13th defendant was not included at all. The present appellant's contention in this matter of restitution has been that these errors vitiate the High Court's decree and render it void for want of jurisdiction since the necessary parties were not on the record and therefore no application for restitution under it can lie.

3. It will be noted that the objection that the High Court's decree is a nullity comes not from those defendants who were not made parties to the

appeal but from the plaintiffs who say that they are entitled to benefit thereby to the extent of having the decree dismissing this suit declared a

nullity. The plaintiffs' point is thus a purely technical one and there is nothing to commend it on the merits apart from the technical law, and I have

to see if the technical law will justify their contention.

4. The original suit was by the plaintiffs' tarwad against the defendants' tarwad-- the plaint and the written statement show that clearly. Instead of

putting the tarwads on record only by and through their karnavan or other representative all the members of the plaintiffs' tarwad were arrayed as

plaintiffs and all the members of the defendants' tarwad, thirteen in all, as defendants. On each side the actual kar-navan was of course one of the

parties to the suit 14th defendant on the plaintiffs' side and the 4th defendant on the defendants' side and on the defendants' side the de facto

manager, a woman (1st defendant) was also a party. These karnavans and this manager remained as parties throughout the whole of the litigation

and are now parties to the present proceeding. There has been throughout no flaw in the array of parties on the plaintiffs' side, but, as mentioned,

on the defendants' side there was in the second appeal a mistake in including the deceased 10th defendant as an appellant and not bringing on his

legal representatives and in omitting the 13th defendant. It appears that the 10th defendant died after the vakalat was given to the vakil for the

appeal, but before the appeal was actually filed. His legal representatives are said to include, besides the other members of the tarwad including the

omitted 13th defendant, a male infant. 10th defendant was even on the date of his death a minor and the 13th defendant was an infant when the

proceedings began and was about 5 or 6 years old at the date of the second appeal.

5. Now it goes without saying that no decree is binding on a party if he was a necessary party to the suit and he was not on record, and if the result

of the judgment in second appeal had been a decree against necessary parties not on the record undoubtedly the interests of those parties would

have been affected without their having had an opportunity of meeting the case against them, and in such circumstances the judgment against them

would have been void, and in certain circumstances when their interests were inseparable from those of other judgment-debtors under the decree,

the decree as a whole would have been void. This principle of law is laid down in several cases. [See *Bikramagit Rah v. Darohan Das* (1924) 82 I

C 26 , *Imdad Ali v. Jagan Lal* ILR (1895) A 478, *Imam-ud-din v. Sadarath Rai* ILR (1910) A 301 and *Subramania Aiyar v. Vaithinatha Aiyar*

ILR (1913) M 682 .]

6. The question then is, were these minor members of the tarwad necessary parties to the defendants' second appeal when their karnavan and

tarwad manager were throughout on record? It is argued that because the original suit was filed not against the tarwad as a unity represented by its

head, but against the tarwad through each of its individual members, each one of these is a necessary party to all subsequent proceedings. It is

contended that the second appeal in the High Court has abated so far as the 10th defendant was concerned and that as the 13th defendant also

never appealed, the Lower Appellate Court's decree is still enforceable against both of them, and that since their shares in the tarwad cannot be

partitioned and separated, the Lower Appellate Court's decree is thus enforceable against the whole tarwad. This argument assumes that 10th and

13th defendants were necessary parties to the second appeal. As I have already said and as the Lower-Court has found as a question of fact, it

was the tarwads which were opposed to each other in this litigation throughout, it was therefore the tarwads who were the necessary parties to

each step of the litigation and the tarwads who were the necessary parties in the second appeal. To that second appeal the plaintiffs' tarwad was a

party undoubtedly because every member of it was on record. But it seems to me that the defendants' tarwad was no less on the record as a

party, even though two of its minor members were not there because, as pointed out, the karnavan and the manager of the tarwad were on the

record.

7. The plaintiffs' contention, if I understand it aright, is that the fact that they chose to make each member of the tarwad a party to the suit

somehow deprived the manager and karnavan of their ordinary character as manager and representative of the tarwad, and that therefore the

tarwad cannot be on the record, even though its karnavan is, unless each member is also on the record. I am unable to accept the contention which

in effect is that the plaintiff has power to force on the tarwad whatever manner

of representation he pleases and prevent them from using any other that is ordinarily open to them. So that in a case like the present, the plaintiff could, by choosing the manner of representation by inclusion of all individual members and by gaining over any single member to his side, effectually burke any proceedings in opposition to his own. Obviously, such a contention is untenable. The only question I have to decide is whether, as a matter of fact, the tarwad was properly represented in that appeal. The karnavan was on record, and he is ordinarily sufficient to represent the tarwad and he does not lose his representative" character merely because the plaintiff chooses, from abundant caution, to make all the members parties. I find nothing to indicate that the karnavan had lost his representative character. Clearly, the karnavan is prima facie always clothed with a representative as well as an individual character, and I am unable to appreciate how it is open to the plaintiff to deprive him of that representative capacity. In that capacity he represents and defends the rights of the whole tarwad and all the members of it as well as his own individual rights. Any decree then, in favour of or against the karnavan was a decree in favour or against the tarwad as a whole.

8. It has been clearly laid down in *Manakat Velamma v. Ibrahim Lebbe* ILR (1903) M 375 and *Karakkattitathil Rayarappan Nambiar Karnavan and Manager of his Tarwad Vs. Koyotan Chalile Veetil Kamaran Karnavan of his Tarwad (dead) and Others*, , that a decree against the karnavan binds the tarwad if he was sued in his representative capacity and that the decision of the latter question is not so much a question whether he was specifically impleaded as representative of the tarwad, as whether he was as a matter of fact not conducting the litigation for the tarwad, and if it is found, as in this case, that he was, it does not matter if the other members were added or omitted to be added. The decree which the plaintiffs got in the Lower Appellate Court was a decree against the karnavan and therefore against the tarwad. The karnavan and therefore the tarwad appealed and got a decree in his favour and therefore in its favour. That decree enures for the whole tarwad, whether or not all the other members were on the record. Applying the test whether the original suit could have been maintained without bringing the 10th and 13th defendants on record, it appears to me quite clearly that it could. The plaintiff's tarwad is

therefore bound by the decree in second appeal.

9. The plaintiffs have relied specifically on two rulings to controvert this view Balaram Pal v. Kanysha Majhi (1919) 53 I C 548 and Ambika

Prasad v. Jhinak Singh ILR (1932) A 286. The former case, I confess I do not follow, where it is stated ""as the plaintiffs pleaded a joint title, the

right to sue was one which did not survive to the surviving plaintiff."" I do not see why it might not have survived. But if the Court meant that from

the other facts it was apparent that the right to sue did not survive this ruling has no application to the present case. The case Ambika Prasad v.

Jhinak Singh ILR (1932) A 286 purports to follow this case. But, with respect, I do not see why the decree against a deceased party should be a

nullity if the deceased party was properly represented in the decree and therefore all the necessary parties were on the record, and I doubt if that

ruling was intended to go so far.

10. In this view of the case I do not think it necessary to consider the application of Order 41, Rule 4 and the rulings under that rule; but I agree

with the plaintiffs' learned pleader when he contends that that rule can only apply when the fact of the omission of the parties is brought to the

notice of the Court and it consciously decides to apply the rule. If the rulings in Appanna v. Gavarappadu (1924) 48 M L J 601 and Chintaman v.

Gangabai ILR (1903) B 284 imply that Order 41, Rule 4 applies even if the Court is ignorant of the absence of the necessary parties, it may be

that they go too far. It is not necessary to go into this question further. In the present case, the High Court was not aware when it heard the appeal

that the 10th defendant was dead, although it might have been aware, if it had scrutinised the array of parties that the 13th defendant who was a

party in the Lower Appellate Court had not been added in the High Court. Nor is it a case for the application of Order 22, and the survival of any

right to sue or defend a suit. The whole of the defendants' party was embodied in the karnavan and the right to appeal never abated against him.

Thus, no possibility of conflict between the decisions of the Lower Appellate Court in the first appeal and the High Court in the second appeal

arises.

11. On the whole, therefore, I am not prepared to interfere with the order of the Lower Appellate Court and dismiss the appeal with costs.