Dr. C. Annacheriam and Another

Vs

Achotha Menon and Others

Civil Appeal No. 426 of 1960

(K. Subha Rao, J. R. Mudholkar, A. K. Sarkar JJ)

03.05.1962

JUDGMENT

MUDHOLKAR, J. –

This is an appeal from a decree of the High Court of Kerala by a certificate granted by it under Art. 133(1) of the Constitution.

The appeal arises out of a suit instituted by a Karnavan of a tarwad along with two minor member of the tarwad for setting aside a registered assignment deed (hereafter referred to as sale deed) executed by his Mukthiar Karanakara Menon, who is junior member of the tarwad and by all the other adult member of the tarwad on 17.6.1117 (M.R.). We have not been able to ascertain the correct date according to the Gregorian calendar; but it has been accepted before us that the document was executed in the month of February, 1942. Nothing, however, turns on the precise date of the execution of the document. This document is in fact a sale deed and thereunder certain property belonging to the tarwad was sold to the first defendant to the suit, who is appellant No. 1 before us, for a consideration of Rs. 8,000/-. Out of the amount of Rs. 8,000/-, a sum of Rs. 5,250/- was required for discharging the debt due under a mortgage decree against the tarwad.

The grounds on which the sale is challenged by the plaintiffs are briefly theses :

> (1) That the sale outright of the suit properties for Rs. 8,000/- was not justified for satisfying the decretal debt of Rs. 5,250/- because the prevailing price of immovable property would be Rs. 40,000/- or so.
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> (2) That the sale was effected by a collusion between the first defendant and the third defendant Karunakara Menon who was the Mukthiar of the plaintiff No. 1.
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> (3) That upon a proper construction of the power of attorney the Mukthiar could execute a sale deed only if the Karnavan in his discretion thought it to be necessary for meeting the pressing needs or for the benefit of the tarwad to effect it and that as the Karnavan had not consented to the execution of the sale deed it is not binding upon the Tarwad.
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> (4) That if the power of attorney is construed as having vested in the third defendant with the discretion and judgment of the Karnavan regarding the necessity and expediency of alienating the tarwad property such a delegation is beyond the powers of the Karnavan and would be void and imoperative in law. An act purporting to be

done under the colour of such authority is not valid and cannot bind the tarwad.

(5) That the plaintiffs 2 and 3 were not represents by their legal guardian, that is, the Karnavan, and the purported representation by their mother the 5th defendant as their guardian is ineffective because she could not in law act as guardian in this transaction. The sale deed is, therefore, null and void.

(6) That the defendants 2, 4 and 5 who had joined in the sale deed had obviously done so on the footing that it was an intended conveyance of the rights of the tarwad and that if the deed is not legally effective to pass the rights of the tarwad as not being a valid act of the Karnavan, it cannot be regarded as having been intended to be executed by those three defendants. Further, that these defendants did not apply their minds to the property or necessity of the transaction but were merely misled by the statements and representations of the third defendant as to the necessity for executing the deed.

The transaction was challenged on three other minor grounds in the plaint but it is not necessary to refer to them because no arguments were advanced before us with regard to them.

The first defendant who is a woman doctor contended that the transaction was valid and operative and was not liable to be set aside on any of the grounds on which it was challenged by the plaintiffs. She contended that apart from the decretal debt there were other outstanding debts of the tarwad which had to be satisfied and that the properties in the suit were attached in execution of a decree obtained against the tarwad in some other suit. The defendant believed, after making due enquiry and on the faith of the representations made by the assignors, that the whole of the amount of Rs. 8,000/- was required for discharging debts binding on the tarwad, entered into the transaction bona fide. The price paid by her for the property was the prevailing market price for similar lands in the locality. Further, according to her, she had spent Rs. 8,000/- after the purchase of the property for levelling the land and for strengthening the bonds. According to her it is because the value of the land has now gone up considerably that the plaintiffs and other members of the tarwad are attempting to defeat her just rights.

Then again, according to her, on proper construction of the power of attorney it would appear that the third defendant was authorised by the plaintiff No. 1 as Karnavan to act on his behalf in all matters relating to the tarwad. She also contended that it was wrong to construe the power of attorney as amounting to a delegation of the whole of the power of the Karnavan. She, however, admitted that at the time of the execution of the sale deed it was not possible to get the written concept of Karnavan, the plaintiff No. 1 Reference was made by her to several similar transactions entered into be the defendant No. 3 in which the other adult members of the family has joined and it was pointed out that none of them has been challenged by the plaintiffs, suggesting thereby that they accepted the validity of transactions of a similar kind.

The trial court held that the sale in favour of the first defendant was binding on the tarwad and dismissed the suit. It may be mentioned that in addition to the claim for possession of the property in the suit the plaintiffs had asked for mesne profits. Naturally, that claim also was dismissed by the trial court in view of its finding on the main issue. For the same reason it did not give any finding on the question of improvements alleged to have been made by the first defendant.

On appeal the High Court reversed the decree of the first court. Before the High Court the validity

of the alienation was challenged on three grounds :

(1) The non-joinder of the Karnavan in the execution of the sale deed;

(2) The inadequacy of consideration for the transaction;

(3) Want of legal necessity for the transaction.

While it held that the sale was justified on the grounds of necessity and that the consideration was adequate, the High Court came to the conclusion that the transaction was not binding on the tarwad because the Karnavan had not joined in it. According to the High Court the power of attorney executed by the first plaintiff on March 22, 1939 in favour of the third defendant cannot be effective as delegation to the third defendant of the first plaintiff's power with respect to the tarwad property and, therefore, the transaction must fail as an act of the tarwad. While reversing the decree of the trial court and decreeing the suit the High Court ordered that the plaintiff would be entitled to the possession of the property on depositing Rs. 8,000/- which was the amount of consideration paid by defendant No. 1 and of which the tarwad had received benefit and, in addition, depositing Rs. 2,530/- in respect of the money spent by defendant No. 1 for improving the property. the High Court, however, ordered that the plaintiffs would be entitled to mesne profits from the date of suit at 1200 paras of paddy per annum till recovery of possession.

It is not contended before as on behalf of the plaintiffs-respondents that the transaction was not supported by necessity or that the consideration was inadequate and, therefore, the only question which we have to consider in relation to the validity of the transaction is whether it was competent for the defendant No. 3, acting as the Mukthiar of the Karnavan, to effect the sale in associating with the other adult members of the tarwad. On this part of the case the contention of Mr. N. K. Nambiar for the appellants who are defendant No. 1 and defendant No. 6, a person cultivating the lands under the defendant No. 1, are these :

(1) Where all members of the tarwad join in the execution of a sale deed the question of delegation by the Karnavan does not arise.

(2) Where a Karnavan challenges a sale on the ground that his Mukthiar had not obtained his consent for effecting it that sale cannot be set aside unless the Karnavan proves the terms of the power of attorney and also proves that he did not assent to the transaction.

(3) When a Karnavan impugns a sale because it was effected by virtue of a power of attorney which according to him amounts to a delegation of his powers as Karnavan the sale cannot be set aside unless the power of attorney is itself produced.

The last two grounds are based upon the fact that the power of attorney has not been produced in this case and no explanation is given for its non-production. It would appear from the averments made by the defendant in the written statement that she had taken out summonses both against the plaintiff No. 1 and defendant No. 3 to produce the power of attorney in court but they neither produced it not made a statement on the point.

Relying upon certain passages in the late Mr. Justice Sundara Aiyar's "Treatise on Malabar and Aliyasanthana Law" (1922 ed). Mr. Nambiar contended that where all the members of the tarwad join in transaction that transaction is binding on the tarwad. A Karnavan is of course entitled to

alienate the tarwad property for family necessity but where a transaction is entered into by all the members of the tarwad the existence of such necessity need not be established. This, according to Mr. Nambiar, is the common law of Malabar. The family being resident in the part of Kerala which was formerly part of the Province of Madras, is governed by the common law as modified by statute. The main stature bearing on the point is the Madras Marumakkattayam Act, 1932 (Madras Act. No. XXII of 1933). This act has been amended by some later Madras Acts and Central Acts but which those amendments we are not concerned in this appeal. Under the common law of the Karnavan had complete power of alienating the tarwad property for necessity and in this regard he was the sole judge of the necessity. Section 33 of the Act, however, restricts that power and provides that for certain transactions, including a sale for the tarwad's necessity of benefit, the written consent of the majority of the major members of the tarwad must be obtained by the Karnavan. According to Mr. Nambiar this provision does not in any was derogate from the right of all the members of the tarwad acting together to partition the tarwad property amongst themselves or to alienate it any manner the choose. Thus according to him, s. 33 of the Act deals only partly with the subject of alienation of tarwad property and not the whole of if.

Under the common law, according to him, property belonging to a Tarwad is the property of all the male and female members composing it and that the Karnavan has no greater personal right in the property than the junior members thereof. In fact the family consists of individuals with equal rights. No doubt the Karnavan has the exclusive right to manage the tarwad property but his power is no more than that of manager of a Mitakshara family. Nor again, does the property vest in the manager alone but in all the members of the family or the tarwad. The right of the Karnavan to manage the family property is also subject to regulation by the common consent of all the members of the family and that family karars restricting the rights of the Karnavan are a common feature in Malabar. Where a Karnavan's rights are so restricted by common consent which necessarily includes his own consent - he cannot ordinarily dispute the binding effect of the karar upon him.

The occasion for the execution of the power of attorney by the first plaintiff was admittedly the fact that the Karnavan left his native place for Borneo where he had taken up an appointment. The senior Anandaravan in the Tarwad was defendant No. 2 but he was holding a post which the Madras Government which required his being away from the family house during the whole of his service. Karunakara Menon, the third defendant was next in seniority and as he was residing in the family house the first plaintiff Achuta Menon executed the power of attorney in his favour. We may incidentally mention that Leelavathi Amma the 5th defendant in suit is the wife of one Dr. P.B. Menon of Calicut and as she lives with him there she could not have been able to look after the family property. Nor again could the forth defendant Govinda Menon attend to the work because he was also employed elsewhere. The family was clearly in difficulties and, therefore, according to Mr. Nambiar, it was essential for Achuta Menon to delegate as much authority to the person living in the family house as was permissible under law so as to enable his to manage the property in the best interests of the Tarwad. It was for this reason that the power to attorney was executed in favour of Karunakara Menon, the third defendant.

In its judgment the High Court has not said that there was no occasion for the execution of a power of attorney. But according to it even by executing such power of attorney in favour of the third defendant it was not legally competent for the plaintiff No. 1 to enable the third defendant to alienate family property except with his consent. The power of attorney not having been produced, the High Court considered the matter from two angles, full delegation and partial delegation. It first considered the matter on the assumption that the power of attorney conferred full power upon the defendant No. 3 to act for the Karnavan, the plaintiff No. 1, and alienate the property without

reference to him. The High Court, after referring to certain decisions of the Madras High Court, came to the conclusion that such an empowerment by the Karnavan amounted to a delegation not only of his rights as a Karnavan but also of his duties to the tarwad and was, consequently, invalid in law. The High Court pointed out that where the power of attorney confers such wide powers on the Mukthiar, it is nothing but a delegation of the Karnavan power and this is not permissible under the Marumakkattayam law which is the common law of Malabar. If, on the other hand, the delegation was not so extensive and if the power of attorney provided that the Mukthiar, the third defendant, was empowered to execute a sale deed on behalf of the tarwad as an agent of the Karnavan after obtaining the consent of the Karnavan - here admittedly no such consent was obtained - the transaction must be deemed to be beyond the competence of the Mukthiar.

It would be useful to consider the decisions in which some aspects of the question have been dealt with. In Cherukoman v. Ismala [(1871) 6 M.H.C.R. 145] Holloway J, who is regarded as an authority on Marumakkattayam law expressed the opinion that Karnavanship could not be renounced. But his view has not been accepted in Kenath Puthen Vittil Tavashi v. Narayanan [(1904) I.L.R. 28 Mad. 182]. In the course of their judgment the Full Bench pointed out that there is nothing in principle in the position of the Karnavan opposed to renunciation by him of his office of Karnavan. They say that just as trustee may renounce his trusteeship with the sanction of the court or assent of the beneficiaries a Karnavan, who, though he holds a fiduciary position and yet is not a trustee, can also renounce. But since a Karnavan is not bound to render any account or to pay to the tarwad any surplus in his hands the reasons which exist in the case of a trustee to obtain the concurrence of the beneficiary before renouncing trust do not exist in the case of a Karnavan. Then they point out at p. 196, "It is decidedly for the benefit of the tarwad that such power of renunciation should be recognised. An unwilling Karnavan usually makes a bad manager." In conclusion they held that it will be open to a Karnavan of a tarwad to renounce his Karnavanship including his right to manage tarwad affairs. This view has not since been departed from.

Though a Karnavan can thus renounce his office he cannot delegate or transfer that office. For, if he renounces his office the senior anandaravan has a right to succeed him as Karnavan and the rights of senior anandaravan would be jeopardised if it were open to a Karnavan to transfer or delegate his office. If, therefore, a Karnavan delegates all his rights and obligations either another members of the tarwad or to a stranger without reserving any power of revocation the Court will not give effect to such delegation as that would amount to transfer of his office as a Karnavan. But if it is possible to say that the delegation is not absolute in its character and is subject to resumption by the Karnavan the courts would treat it merely as a power of attorney. (see Cherukoman v. Ismala [(1871) 6 M.H.C.R. 145].

The question then is to what extent can a Karnavan delegate his right to manage the property to another. Referring to this question Muttusami Ayyar J., observed in Chappan Nayar v. Assenkutti [(1889) I.L.R. 12 Mad. 219].

> "There can be no doubt, and it is not denied for the respondent, that karnavanship as recognised in Malabar is a birthright inherent in one's status as the senior male member of a tarwad. It is therefore a personal right and as such it cannot be assigned to a stranger either permanently or for a time. If it can be delegated at all, it is capable of delegation only to a member of the tarwad, the principle being that the de facto manager thereby assists the karnavan during his pleasure, and is entitled to do so by reason of his connection with the tarwad and his interest in its property."

Then referring to the document which fell to be construed in that case the learned Judge observed :

> "If it is an assignment of the right of karnavanship, it is void, though for a term only, on the ground that the delegate is not a member of the tarwad; if on the other hand it is a power of attorney limited to management of specific property as an agent subject to the general control of the karnavan, it may be valid on the ground that the karnavanship is not the interest assigned or delegated."

In that case the karnavan of a Malahar tarwad having been sentenced to a term of imprisonment, delegated to his son all his powers as karnavan for being exercised during the period he was serving his sentence. The High Court held that the delegation was ultra vires and void having been made in favour of a stranger. For, though the delegation was in favour of the son he was in fact member of his mothers tarwad and was, therefore, a stranger vis-a-vis his father's tarwad. Referring to this decision Seshagiri Ayyar J., observed in Krishnan Kidaya v. Raman [(1916) I.L.R. 39 Mad. 918, 920].

> "The karnavan has two capacities - a temporal and a spiritual one. In the former he is the manager of the family properties, maintains the union members, represents the tarwad in transactions with strangers, etc. In his latter capacity he presides at the ceremonies and performs all the religious duties which are incumbent on him. A stranger cannot supplant him in this latter office : but I fail to see why his duties as manager could not be delegated to a stranger. If a receiver as appointed pending a suit for the removal of a karnavan, this officer will have all the rights of a karnavan so far as management is concerned. An agent who acts with the consent of all the members in managing the temporal affairs of a tarwad cannot be in a worse posit on."

For these reasons he held that a family karar which gave the management to a person who had ceased to be a member of the tarwad was good and effective. This decision has been referred to by the learned Judges of the Kerala High Court in their Judgment under appeal but they have apparently regarded the observation of Seshagiri Ayyar as obiter. On the other hand they have placed reliance on the decision in K. Ramankutty Mennon v. Seevi Umma [A.I.R. (1929) Mad. 286]. In that case the Karnavan of a tarwad executed a document in the first part of which he renounced his powers of management of the tarwad and in the second part delegated them to two of the junior anandravans for a consideration of Rs. 500 and future maintenance. The document recited that the said anandravans were to act as the representatives of himself, the Karnavan. The High Court held that the document must be held to operate as either renouncing the Karnavan's powers or as delegating them. If it was the former it was invalid because it did not amount to an out-and-out and unconditional renunciation, recognising the senior Anandravan's rights of succession. If it was the latter it was invalid because a karnavan has no right to delegate his powers. In support of its conclusion the High Court relied upon the decision in Chappan Nayar v. Assen Kutty [(1889) I.L.R. 12 Mad. 219] and distinguished the decision of the Full Bench in Kenath Puthen Vittil Tavashi v. Narayanan [(1904) I.L.R. 28 Mad. 182]. No doubt, as a deed of renunciation the document was invalid. Under the document the joint managers would not become Karnavans but only be the Mukthiars of the Karnavan having the right to manage the Tarwad property. That the Karnavan's power of management can be restricted by a family karar cannot be disputed. (see P. K. Govindan Nair v. P. Narayanan Nair [(1912) 23 M.L.J. 706]. It is however, not clear from the report whether the delegation by the Karnavan was by virtue of a family karar to which all members of the Tarwad were parties. The case is therefore, distinguishable from the one before us.

The view taken by Seshagiri Ayyar J., in Krishnan Kidava's case [(1916) I.L.R. 39 Mad. 216, 920] is that the power of management could be transferred by the Karnavan with the consent of all the member of the Tarwad to another person so long of course as the transfer or delegation of power is revocable. According to the learned Judge a delegation of the power of management in favour of even a stranger would be valid. This view is not in consonance with that taken in Chappan Nayar's case [(1889) I.L.R. 12 Mad. 219] which the learned Judge has not chosen to follow. It is also opposed to that taken in certain other cases. For the purposes of this case it is not necessary to say which of the two views is correct because here delegation is in favour of an anandravan, though not the seniormost anandravan.

The decisions referred to above thus recognise that by a family karar a Karnavan's power of management can be restricted and also that a Karnavan's power of management can be delegated, so long as what is delegated is not the totality of the powers enjoyed by a Karnavan by virtue of his status. The question then is whether it follows from this that a Karnavan's duties arising in connection with the management of the Tarwad can be delegated. One more concept of the Malabar law has to be borne in mind. The concept is that the properties belong to all the members of the Tarwad and that apart from the right of management the Karnavan has no larger right or interest than the other members. This is clear from the decision of Seshagiri Ayyar, J., in Govindan Nair's case [(1912) 23 M.L.J. 706] and the decisions referred to therein. By virtue of his status the Karnavan owes certain duties to the members of the Tarwad and one of such duties is to manage the properties in the best interest of the members. Those to whom the duties are owed may find that in their own interest the duties can be best performed by anandravan in particular circumstances. These would be good reasons to justify the delegation of a Karnavan's power of management to an anandravan by family karar and to uphold such karar. Thus where for some reason the Karnavan is not able to discharge is duties in respect of management of the tarwad property such as in the case before us, that is, where the Karnavan has left the country for an indefinite period or taken up a job in another country which would keep him away for years from his mother country, there must be someone who could took after the family property and who would have the power to manage it. If delegation of the Karnavan's power of management is regarded as incompetent the necessary result would be that the interests of the family would suffer. It is by no means a practical proposition to expect the family members to approach the Karnavan, when he is at some far off corner, for his consent in regard to each and every transaction, be it sale, mortgage or lease. Again it may be too expensive for the Karnavan to come all the way back to his native place whenever an occasion arises for alienating or encumbering the Tarwad property for family necessity. No recognised concept underlying the Marumakkattayam law will be violated by holding that an agreement of karar entered into by the Karnavan and the members of the family by which the power of management of the tarwad carrying with it the duty to decide during the absence of the Karnavan whether a particular alienation should be effected for meeting a family necessity is delegated to Mukthiar so that he can exercise that power with the concurrence of the adult members during the absence of the Karnavan as and when occasion rises is a perfectly valid agreement. On the other hand to hold that this is permissible would be in consonance with the concept of joint ownership by all the members of the Tarwad properties and with the settled legal position that the powers of Karnavan could be restricted by, the consent of all, which, of course, includes the consent of the Karnavan himself. The execution of a power of attorney of this kind would, in effect, be a restriction placed by a family karar on the power of the Karnavan. The delegation merely of a power of management which is revocable cannot be regarded as a delegation of the office of the Karnavan. The Karnavan continues to be Karnavan but during his absence from the spot his managerial powers are exercisable by the Mukthiar. After he returns he can resume the management

and carry on the affairs of the tarwad. Or again, the delegation being through a power of attorney he can in a proper case put an end to it by revoking the power of attorney. Thus, despite the execution of such a power of attorney he does not fad out completely and, therefore, there is no question of its operation as renunciation.

The power of attorney given by the plaintiff No. 1 to defendant No. 3 has quite clearly been suppressed by them and we are, therefore, entitled to infer from this fact that, if produced, it would have gone against the interests of the plaintiffs and other members of the tarwad. It would, therefore, be legitimate for us to assume that the power of attorney empowered the third defendant to sell family property with the consent of the other adult members of the family for family necessity if he formed the opinion that it was necessary to do so. The fact that plaintiff No. I executed the power of attorney before leaving for Borneo and thereafter several properties were alienated by the Mukthiar in conjunctions with the other anandravans and none of the alienations except the one in suit has been challenged by the plaintiff No. 1 in all these years justifies the inference that these dispositions were in pursuance of the power of attorney and also that power of attorney was itself executed by the plaintiff No. 1 in pursuance of a family karar. Upon this view, therefore the appeal must succeed. The appellants costa shall throughout be borne by the plaintiffs-respondents.

Appeal allowed.

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