

T. Kunhammad and Ors. Vs. M. Narayanan Nambudiri's Son Narayanan Nambudiri and Ors.

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Court : Kerala

Decided On : Jul-22-1963

Reported in : AIR1964Ker8

Judge : M.S. Menon, C.J.,; S. Velu Pillai and; M. Madhavan Nair, JJ.

Acts : Limitation Act, 1908 - Sections 6 and 7 - Schedules - Articles 142 and 144;
Madras Nambudiri Act, 1933 - Sections 5

Appeal No. : A.S. No. 491 of 1959

Appellant : T. Kunhammad and Ors.

Respondent : M. Narayanan Nambudiri's Son Narayanan Nambudiri and Ors.

Advocate for Def. : D.H. Namburipad, Adv. for 1st Respondent,; K. Narayanan, Adv. for 4th Respondent,;

Advocate for Pet/Ap. : V.P. Gopalan Nambiar and; K.P. Madhava Menon, Advs. (Nos. 13 to 19)

Judgement :

Madhavan Nair, J.

1. This appeal has arisen in a suit for partition of a Nambudiri Illom ignoring certain alienations executed by its karnavan, the 1st defendant, in favour of defendants 6 to 156. At the time of the suit, the illom consisted of six members, namely, the 1st defendant, his wife the 2nd defendant, and their children the 3rd defendant, the plaintiff and the defendants 4 and 5 in the order of seniority. In passing the preliminary decree for partition the Court below has found the oral lease claimed by the 1st defendant not true and many of the impugned alienations unsupported by illom necessity or benefit, and set them aside. Among the alienations so set aside were:

. Ext. B-33 dated March 28, 1950, in favour of the 13th defendant;

Ext. B-34 dated February, 28, 1950, Ext. B-36 dated October 14, 1946 and Ext. B-36 D/- July 3, 1944, the interests whereunder have devolved on the 17th defendant;

Ext. B-39 dated November 13, 1936, in favour of the 19th defendant; and

Ext. B-75 dated May 28, 1938, to the predecessor-in-interest of defendants 151 and 152. This appeal is by the disappointed alienees defendants Nos. 12, 13, 17, 19, 151 and 152.

2. Section 5 of the Madras Nambudiri Act, 21 of 1933 before its amendment in 1951, provided;

'(1) Except for consideration and for illom necessity or benefit and with the written consent of the majority of the major members of the illom, no karnavan shall sell immovable property of the illom or mortgage with possession or lease such property, for a period exceeding twelve years.

(2) No mortgage with possession or lease with premium returnable, wholly or in part, of any such property executed by a karnavan for a period not exceeding 12 years shall be valid unless such mortgage or lease is for consideration and for illom necessity or benefit.'

It then, follows that aa alienation, being an assignment or a mortgage with possession or lease with returnable premium, of illom land would not be valid unless it was for illom necessity or benefit. Counsel for the appellants was not able to make out illom necessity or benefit in respect of any of the aforesaid alienations and therefore the finding of the Court below in regard thereto has to be accepted.

The alienations evidenced by Exts. 8-33- to B-36 were within a period of 12 years prior to the institution of the suit. No bar of limitation arose in regard to them, the Nambudiris being governed by Hindu Law, though modified by well established customs of their own, as has been held in *Narayanan v. Varanasi*, AIR 1947 Mad 76 (FB). Their cancellation decreed by the Court below has therefore to be affirmed.

3. But different questions arise as regards Exts. B-39 and 6-75.

Though this suit was instituted on March, 16, 1953, there was then no prayer to set aside Ext. B-75; nor were the concerned parties or property included in the plaint. It was by an amendment on October 24, 1956, that defendants 151 and 152 were impleaded, the concerned property included as item 80 in the plaint B-1 schedule, and a praye; to set aside the alienation, Ext. B-75, added. By that time, the plaintiff was over 21 years of age, and therefore, the benefit of Section 6 of the Limitation Act was exhausted. Under Section 22 of the Limitation Act, where, after the institution of a suit, a new defendant is added, the suit, as regards him, has to be deemed instituted when he was so made a party. The suit in regard to Ext. B-75 has therefore to be held barred by limitation.

4. in regard to Ext. B-39, executed more than 12 years before date of suit, a question of limitation urged before, but repelled by, the Court below was strongly pressed by the learned Advocate-General; and it is that, though the plaintiff was within three years of his attainment of majority on the date of the suit, the 3rd defendant his elder sister, who had not joined in the alienation and could therefore have sued for its cancellation, had attained majority more than three years before the date of suit, and by her inaction had brought about a bar of limitation to avoid the alienation. In support of that contention several rulings of this Court, of the Travancore-Cochin High Court, and of the Travancore and Cochin High Courts

were relied on, which will be presently adverted to.

5. Limitation in regard to suits instituted by quondam minors is governed by Sections 6 and 7 of the Indian Limitation Act IX of 1908. Section 6 allows them a period of three years, or if the normal period allowed by law for the suit is less, that period, - after attainment of majority. Section 7 is a proviso to Section 6 restricting its scope. It reads :

"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and discharge can be given without the concurrence of such person, time will run against all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.'

Identical was the wording of Section 8 of the Travancore Act, VI of 1100 (1925), and of Section 8 of the Cochin Limitation Act, XII of 1112 (1937).

It is admitted that the question of limitation urged here will depend upon the clause of Section 7 applicable to the plaintiff. Keeping that in view, the rulings cited at the Bar may now be analysed.

6. The decisions of this Court relied on by counsel for the appellant are Rajamma v. Karthi-yani Amma, 1959 Ker LJ 554 : (AIR 1960 Kerala 46), Gopalakrishna Pillai v. Narayanan, 1958 Ker LT 562 : f AIR 1959 Kerala 406) and Sivanandan v. Bhagvathi Janaki, AIR 1958 Kerala 228. 1959 Ker LJ 554 : (AIR 1960 Kerala 46) and 1958 Ker LT 562 : (AIR 1959 Kerala 406) contain little discussion on the question, but follow Ram-chandran Potti v. Narayanan Sekharan, AIR 1950 Trav-Co 57 (FB). AIR 1958 Kerala 228 made no reference to any authority, but assumed that a suit instituted on behalf of the tarwad by a junior member who became a major only within three years prior to its institution would not be saved from the bar of limitation if there were other junior members who were minors on the date of the transaction but attained majority more than three years before the date of the suit.

Thus, the prior decisions of this Court have merely followed the view expressed by the Travancore-Cochin High Court, without noticing that in the area that came to the State from the State of Madras the law has been otherwise. It was that conflict of views that caused the reference to this Full Bench.

7. The Travancore-Cochin High Court preferred the decisions of its predecessor Courts, viz., the Travancore High Court and the Cochin High Court, to those of the other High Courts in India.

Radhakrishnan, Menon v. Chandrasekhara Menon, AIR 1956 Trav-Co 78 followed AIR 1950 Trav-Co 57 (FB) and Kumara Pillai Thiruvikrama Nair v. Gopala Pillai, 1954 Ker LT 590 (TC). The view expressed by other High Courts on the matter was noticed and dissented from as it expressed :

'There is no doubt authority in other jurisdictions for holding that in the case of Hindu Mitakshara families only the manager can give a valid discharge under Section 7, Indian Limitation Act, so as to bind other members of a family and that therefore it is only in case the person, who omits to sue within the statutory period, was the manager of the family that the first part of the Section 7 will apply so as to make the period of limitation run against all the members of the family.

But these and other cases were fully reviewed and refused to be followed in a recent case of this Court involving the very same question in 1954 Ker LT 590 (TC) as they were opposed to the principle laid down in the Full Bench case in AIR 1950 Trav-Co 57, already referred to.

So far as this Court is concerned, the matter must be taken to be quite settled that the right to bring an action to set aside an improper alienation made by a Karnavan is a right of the Tarwad and if competent adult members allowed the alienation to go unchallenged for over 12 years, the Tarwad's right to sue becomes thereby barred. We therefore hold that the Court below was right in holding that the suit is barred by limitation.'

In 1954 Ker LT 590 (TC) it was contended on the strength of *Jawahir Singh v. Udai Prakash*, 53 Ind App 36 : (AIR 1926 PC 16) that the first part of Section 7,

Indian Limitation Act, would apply only if the person who omitted to sue within three years of his attaining majority was the Karnavan of the tarwad; but it was repelled as opposed to the principle laid down in the Full Bench decisions *Nani Pankajakshi v. Kunjan Krishnan*, 1947 T av LR 320, *Ikkanda Warriar v. Parameswaran Elayath* 38 Cochin 379 (FB) and AIR 1950 Trav-Co 57 (FB) and to the uniform tread of rulings of the Travancore High Court in *Govindan Parameswaran v. Chandra Pillai*, 4 Trav LR 34, 12 Trav LR 99, *Aiyappan Keshavan v. Kananku Nilakantan*, 21 Trav LR 174 (FB), *K. Mathevan Krishnan v. K. Marthandan Krishnaa*, 23 Trav LR 139, *Subramonia Pillai v. Kumara Pillai*, 31 Trav LJ 159 and 1947 Trav LR 544.

8. in Travancore, the dictum in 4 Trav LR34 was the leading authority that was followed throughout, without noticing that the Limitation Regulation, III of 1040 (passed on 26th July 1865) under which it was rendered, contained no provision parallel to Section 7 of the present Indian Limitation Act, but such a provision was included in the Limitation Regulation II of 1062 (passed on July 8, 1887) and the subsequent enactments which were the statutes relevant when the subsequent decisions beginning with 12 Trav LR 99 were rendered. As the dictum in 4 Trav LR 34 has held the field long and is pressed into service by the learned Advocate-General it deserves investigation here. The suit there was one filed in 1058 M. E. by two junior members of a tarwad, who attained majority in 1056, to set aside a sale of their tarwad property made in 1041.

The judgment in that case was as follows: 'Ormsby, J. (After stating the facts) I think this suit proceeds upon a misconception of the meaning of para IX of the Limitation Regulation. The plaintiffs in this suit cannot, sue for any personal rights in this property sold some 15 years before date of suit. They can only sue on behalf of the whole tarwad including every individual member thereof. If they recover the property, it must go to their Tarwad in which, as was admitted at the hearing, there are some seven male members senior to the plaintiff. Now when the sale was made in 1041, the period of limitation began to run against the Tarwad. I would, therefore, put this case on the broad ground that where, in a Malabar Tarwad, there are adult Members competent to contest an alienation of Tarwad property, and they neglect to do so for a period of 12 years, it is not competent to a

member who happened to be a minor at the date of the alienation to re-open the question of its validity after the expiry of that period. The provisions of the Limitation Act already referred to, are not applicable to such a case. The senior members of the Tarwad, now represented by the defendants other than the eighth, are barred beyond all question, and plaintiffs have no right on the property separate from them.

For these reasons, I am of opinion that the decision of the Court of first instance is correct, and that its decree, dismissing plaintiff's suit, should be affirmed with costs. Ordered accordingly.

Narayana Pillai, J. : The right to bring an action to set aside an improper alienation made by a Karnavan is the right of the Tarwad, and the Tarwad at the time of the alienation in question was represented by competent adult members, both male and female. They one and all allowed the alienation to go unchallenged for over 12 years and the Tarwad's right to suit became thereby thereby barred. (Clause 7 of Section II of the Limitation, Regulation). The plaintiff, who has no separate right in the property as distinguished from that of the Tarwad, cannot claim the benefit of Section IX of the Regulation, which applies to cases where the person suing has an individual right of his own and was under legal disability when the cause of action first accrued to him.

I, therefore, concur in holding that the suit is barred.'It was the dictum laid down by Ormsby, J., that came to be followed without a challenge in the subsequent decisions upto AIR 1958 Kerala 228.

Sections II and IX of the Limitation Regulation of 1040 referred to in the above judgment were as follows :

'II. No suit shall be maintained in any Court of Judicature within any part of the Territories of Travancore, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature; and the periods of limitations and the suits to which the same respectively shall be applicable, shall be the following, that is to say :

Clause 7. To suits for the recovery of immovable property, Or of any interest in immovable property, to which no other provision of this Act applies : the period of twelve years from the time the cause of action arose.'

'IX. If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability; the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if at the time when the cause of action accrues to any person he is not under a legal disability, no time shall be allowed on account of any subsequent disability of any person claiming through him.'

No other provision of the Limitation Regulation was considered in 4 Trav LR 34. It cannot therefore be regarded as a commentary on the Section of the Limitation Act now in issue.

9. in 1947 Trav LR 320 (FB) T. M. Krishna-swami Aiyar, C. J., expressed one line of reasoning, and Sankarasubba Iyer, J., another. Habeeb Mahomed, J., agreed, apparently with the latter. The suit was to set aside a partition deed on the ground of prejudice to the plaintiffs who were minors on its date. Krishnaswami Aiyar, C. J. observed : -

'The case of an unjustified alienation of tar-wad property is a spoliation and a breach of trust. It is a tort committed against the tarwad. The task of setting aside the wrongful alienation and to obtain judicial remedies for tarwad protection cannot be entrusted by law into the hands of the very tort-feasor who committed the wrong. The robust common sense of the law would abhor such a situation. The alienating karnavan or manager is necessarily relieved of his representative position in the matter of adjudication of the binding character of the alienation that is questioned. The alienation is either lawful or unlawful. If it is lawful a suit by any of the junior members questioning the alienation fails. if it is unlawful the alienation is set aside at the instance of any of the members of the tarwad, who for the purposes of questioning an unlawful alienation is permitted to occupy a

representative position quod the tarwad Under the law and the Marumakkathayam usage the karnavan loses his right to represent the tarwad only in respect of acts which are beyond his competence to do and any member of the tarwad may take on himself the karnavan's duty of protecting the affairs of the tarwad by establishing a justifiable claim to set aside an act of spoliation or an unwarranted alienation of the karnavan Where one member brings a suit to set aside an unequal partition or an alienation and a judgment is obtained on a fair trial, the decision becomes *res judicata* binding on all the members. The ground is that a common right was agitated and a fair decision has been obtained which will bind all persons having such right. Where no suit has been instituted at all but one available member of the tarwad who was *sui juris* and who could have challenged by suit the alienation or partition but did not file a suit in time and allows the cause of action to become barred, the loss of the cause of action and the right of suit is the loss of the entire tarwad and no subsequent suit could be brought by anybody else. The bar arises by virtue of the provision of substantive law which gives the right to any major member to represent the tarwad as against the breach of trust of the karnavan.'

Obviously, the learned Chief Justice made no reference to Section 7 of the Indian Limitation Act or to the corresponding Section 8 of the Travancore Limitation Act, but rested his decision on the competency of junior members to represent the tarwad in a suit to save it from the spoliation of the karnavan,

The reasoning of Sankarasubba Iyer, J., in that decision was thus :

'The right to impugn the partition deed was a joint right of all these persons. The word 'discharge' in the Section means any form of quittance by which the rights and liabilities of the parties can be put end to. All that is necessary is .that the quittance must be one which can be given without the concurrence of the plaintiffs. When the right is a joint right, the omission of any joint owner of that right to vindicate the same within the period of limitation, concludes the other joint owners also. Such omission operates as an effective discharge, for which the concurrence of the other joint owners is not necessary. (The learned Judge adverted to certain decisions of the Madras, Bombay, and Allahabad High Courts

and continued). It therefore follows that where the right of suit is vested in all the members of a joint Hindu family time would run against all the members, including minors also, if the manager who could give a valid discharge without the minor's concurrence fails to institute the suit within the ordinary period of limitation. For the applicability of the Section, it is immaterial whether a valid discharge was actually given by the person competent to give the same. The only question is whether he could give it.

Let us now examine how far the above principle will be applicable to Marumakkathayam tar-wads. In the case of some transactions, a Kama-van can give a valid discharge.

Where the karnavan and the other adult members have not exercised the right of suit within the period of limitation, a minor member cannot agitate the right. There may be transactions which are participated in by a karnavan alone or by a karnavan along with other members of the tarwad, to the detriment of the tarwad. By being parties, the karnavan and such of the members as have taken part in the transaction, disable themselves from taking steps for setting aside the transaction, for the benefit of the tarwad. Such right devolved on the other members of the tarwad. When these people do not exercise the right, the right is lost to the tarwad and no minor member who comes of age can challenge it by way of suit. The reason for this rule, though not stated so in those terms, appears to be that either the senior-most man in the tarwad, after the karnavan and those members who have disabled themselves from acting for the benefit of the tarwad, can be treated in law as the inchoate karnavan competent to act for the tarwad or he and the other adult members not parties to the transaction are competent to represent the tarwad.'

It is evident that though the learned Judge started with the construction of the word 'discharge in Section 7 of the Limitation Act, and found that a karnavan can give a valid discharge, his Lordship diverted to the capacity of a junior member to represent the tarwad in suits to save it from the acts of the karnavan and failed to consider who can give a valid discharge in such cases; and in that failure, I think, lies the defect in the decision.

10. The only decision of the Cochin High Court on the construction of Section 8 of the Cochin Limitation Act, corresponding to Section 7 of the Indian Limitation Act, is 38 Cochin 379 (FB). The suit was to set aside a court-sale of tarwad property instituted by junior members two of whom were minors even on the date of the suit. Krish-naswami Iyengar, C. J., with whom Koshi, J., agreed fully, observed:

'In Krishnan v. Ammu, 17 Cohin 164a Division Bench of this Court following the decision in Moidinkutty v. Krishnan, ILR 10 Mad 322 held that one or more junior members alone can maintain a suit on behalf of the tarwad, even without impleading the other junior members and that if such a suit is filed and disposed of on the merits, such decision will be binding on the tarwad, and therefore even on those members who have not been impleaded. A representative character had to be and was assigned to the member or members suing, in order to obviate the evil of successive suits. This is, it seems to us, to be an innovation as ordinarily the karnavan alone has the right to represent the tarwad, and it may be said with all respect, that it will not be less consonant with the nature of the right and the rules of procedure if the minority view of Kerran, J., in the Madras case had been accepted. However, that may be, the last mentioned decision has come to stay. In c (FB) decided by three learned Judges, of this Court, the principle was reiterated the Court observing :

'It (viz., the right of an individual member to sue) is an individual personal right possessed by every member of a tarwad in common with every other member, to be exercised in the interests and on behalf of the tarwad as a whole. In other words, the junior member exercising the right represents the tarwad to that limited extent.'

The recognition of such a limited right of representation in a junior member is not known to the Mitakshara Law, and appears to be due to the necessity of finding a way out of the anomalous position involved in giving every member of a tarwad a right of suit independently for himself with the consequence of the defendant being subject to harassment by successive suits until the tarwad succeeds, or the members are exhausted ...

The Madras cases dealing not only with a joint Hindu family but also with a Malabar tarwad have, uniformly proceeded on the view that the members of the family or the tarwad as the case may be are persons entitled to institute a suit within the meaning of Section 8 and that limitation will run from the date of the cause of action if at that time there was in the family or tarwad a person or persons who could give a discharge. In a joint family it is the manager who has the power and in the case of a tarwad either the karnavan or the karnavan and the adult male members or a majority of them acting together. If this principle is applied to the present suit, as I think it should be, it must be held to be barred

Krishna Menon, J., dissented and, after observing that 'as far as this High Court is concerned the question is really one of first impression', held :

'I feel it impossible to concede that a junior member of a Malabar family comes within the description 'one of the several persons jointly entitled to institute a suit'. That is not at least my conception of the rights of a junior member of a Marumakkathayam family. He has an individual right of his own which he can enforce ignoring all the other members of the family. Under our Marumakkathayam law a karnavan cannot by himself give a discharge The right thing to do is to hold that Section 8 is not applicable to cases of this nature.'

11. Now, to return to the Travancore-Cbchin decisions : AIR 1950 Trav-Co 57 (FB), concerned a Hindu Mithakshara family. The suit was by sons to set aside an alienation of their father who was made the 13th defendant to the action. Plaintiffs 1 and 2 were above 21 years of age, and plaintiffs 3 to 8 were either below that age or minors on the date of the suit. It was observed;

'The right of junior members of a joint family or an undivided tarwad to impeach alienations made by the Manager or Karnavan, as the case may be, is a right common to all such junior members. Any one of them is entitled to institute a suit on behalf of the joint family or the tarwad to set aside such alienations. The adult members in the joint family could effect, a, valid discharge of that right by either electing to institute such a suit or not to institute such a suit. The concurrence of the minor member in the joint family is not necessary for effecting such a valid discharge by the adult member or members in the family. It follows, therefore, that

the right of suit available to junior members of a joint family to set aside alienations made by the Manager is governed by the first part of Section 8, (Travancore) Limitation Act and that, when any of them is under no disability to institute such a suit, the period of limitation will run against all the members in the joint family. This matter is concluded by authority so far as this Court is concerned. (After referring to 1947 Trav LR 320 (FB) and 38 Cochin 379 (FB)). The question has been fully discussed in these two rulings, and we do not think that it requires reconsideration. On an application of the principle enunciated in these rulings to the facts of the present case, it is clear that the right of all the plaintiffs to impeach the plaintiff alienations has become barred on account of the failure of the plaintiffs 1 and 2 to exercise that right within the limitation period that was available to them.' This decision made to distinction between a Hindu Joint family and a ,Marumakkathayam tarwad and held the same principle applicable to both. But the construction put upon Section 7 was opposed to what was laid by the Privy Council in 53 Ind App 36 : (AIR 1926 PC 16) in the case of a Hindu Joint family and applied by the - Madras High Court to the case of a Marumakkathayam tarwad in Devaki v. Kannan, AIR 1941 Mad 678.

12. in 53 Ind App 36 : (AIR 1926 PC 16) Harbans Singh and his three sons constituted a joint Hindu family governed by the Mithakashara. Harbans Singh sold a piece of ancestral property in 1900. The second son, who attained his majority on July 9, 1919, sued on behalf of himself and his younger brother in the same year to set aside the alienation, impleading as defendants thereto his father and the elder brother who attained majority more than three years before suit. It was held that, as Harbans Singh was alive even on the date of the suit, and his first son had not been the managing member able to give a discharge of the cause of action, Section 7 part 1, Indian Limitation Act, did not apply, and the failure of the first son to sue in time did not render the suit by his younger brother barred by limitation.

The application of the above dictum is well illustrated in Subbarao v. Pattabhiramayya, AIR 1945 Mad 498 :

'It seems to us well established that although a suit by the younger of two brothers filed within three years of his attaining majority would be barred by limitation if the elder brother had failed to sue within three years of his majority, if the former (latter?) was manager of the family; Section 7, Limitation Act, would not operate as a bar if the adult brother was not the manager of the family during the relevant period.'

Again, in AIR 1941 Mad 678 where a karnavan made a gift of tarwad property in 1913 to which he induced his niece also to join, and the suit to set aside the gift was instituted in 1930 by another junior member of the tarwad who attained majority in 1927, relying- on Section 7 of the Indian Limitation Act to save the bar of limitation.

it was held that, whatever might be the conditions before 1919, the limitation started to run in 1919, when, on the death of the karnavan, his niece became the de jure and de facto karnavan in which capacity she was in a position to give, a discharge of the cause of action on behalf of the tarwad, 'and the sands had run out before the suit was filed', (It may be noted here that a suit to set aside an unauthorised alienation of tarwad property by the karnavan thereof is governed by the six years' rule under Article 120 of the Indian Limitation Act, Article 126 being confined to cases of Mithakashara family only.)

13. One other decision that found acceptance in AIR 1956 Trav-Co 78 was Varamma v. Gopa-ladasayya, AIR 1919 Mad 911 (FB) which was obviously before the Privy Council decision in 53 Ind App 36 : (AIR 1926 PC 16) rendered on December 4, 1925. There, the principle of Section 7, Limitation Act, was stated to be that

'if there are some persons in existence who are adults who could have safeguarded the common rights of themselves and all others similarly situated, the failure of the persons who ought to litigate the right will start the cause of action not only against themselves but also against person in similar circumstances.'

I do not see how this decision can stand after the pronouncement of the Privy Council in 53 Ind App 36 : (AIR 1926 PC 16). The test under Section 7 is not

whether any or all the persons jointly interested could have safe-guarded the common rights or sued for their enforcement, but whether he or they could have given a full discharge of the common right. It is commonplace that a joint creditor -- the word creditor being' understood in its widest sense denoting a person in whom a right inheres -- can sue to enforce the right for the benefit of all the creditors, impleading the - other creditors either as co-plaintiffs or as defendants, and acting himself as a next friend of those under disability or getting for them a guardian ad litem appointed by the Court. It is therefore obvious that, if the right to institute a suit be the criterion, Section 7 will have no occasion to operate, a case of all the joint creditors under disability being well covered by Section 6 of the Act. The fact seems to be that, where a joint creditor sued, on behalf of all the creditors, the discharge of the total liability that a debtor may get in that suit is the result of the order of the Court, and not by the act of the party. What is material under Section 7, Limitation Act, is the competency of a party to give a discharge of the right and not of his capacity to cause a discharge by the Court. The ruling, of the Privy Council in 53 Ind App 36 : (AIR 1926 PC 16) is clear authority that the competency to give a discharge is quite different from the capacity to institute a suit. In AIR 1950 Trav-Co 57 (FB) the Travancore-Cochin High Court seems to have assumed the two things identical when it said :

'The adult members in the joint family could effect a valid discharge of that right by either electing to institute such a suit or not to institute such a suit.'

The competency of a legal, guardian (let alone a next friend) to sue on behalf of a minor has never been recognised as his competency to give a discharge to the minor's claim so as to affect the period of limitation available to the minor.

14. The right of a junior member to challenge an unauthorised alienation of property by the head of the tarwad or joint family is conceded under both' the Marumakkathayam law, and the Hindu Mithakshara law administered in Bengal and Uttar Pradesh where no co-parcener is deemed to have an alienable interest in the property until partition. This right has been described as a right of the tarwad or family in the rulings of the Tra-vancore and of the Tfavancore-Cochin High Courts cited above and in 1959 Ker LJ 554 : (AIR 1960 Kerala 46), and as an

individual personal right in 28 Cochin 388 (FB) and 38 Cochin 379 (FB).

In my opinion, it is a right of the tarwad or family which, as every other right of the tarwad or family, may be exercised either by the head of the tarwad or family; or, if he be negligent in exercising it or has made himself incapable of exercising it, by any other member of the tarwad or family. The tarwad, though not a legal person as such, is a legal entity, a corporate body, to adopt the expression used by the Supreme Court in *Bhagwan Dayal v. Mt. Reoti Devi*, AIR 1962 SC 287, capable of holding rights and liabilities, as other legal entities not being legal persons (e. g., firms) are conceded to do. The difference between a legal person and a legal entity not being a legal person is that while a legal person is independent of the natural persons who constitute it, the other legal entity is not so independent but is only the group of persons taken collectively. Junior members of tarwad have therefore been described as co-proprietors of its properties having equal rights with all other members of the tarwad, subject of course to well-known restrictions in the exercise of such rights in the common interest of all concerned. (See *Kochuni v. States of Madras and Kerala*, AIR 1960 SC 1080 at p. 1100; and *C.A. Cheriyan v. A. Menon*, AIR 1963 SC 128 at p. 131). Tarwad or family properties are those that belong, to the tarwad or family as a corporate body. The right to sue in regard to them must therefore be a right of the tarwad or the family in whom the property is vested. To the extent every member is interested in the tarwad property he must be equally interested in the right to sue in regard to them. If that be reckoned as his individual or personal right, it is only a right to move a right of the tarwad. In 38 Cochin 379 (FB) *Krishnaswami Iyengar*, C. J., though he followed the dictum in 28 Cochin 388 (FB) characterising the junior member's right to sue in regard to the tarwad property' as an individual personal right, did not appear to be happy in that expression, but did not demur to it as it 'had come to stay'. If the right to avoid an unauthorised alienation of tarwad property be a right of the tarwad, its discharge can be given only by the karnavan who is 'the accredited representative, the head and the mouthpiece of the tarwad'.

15. The law as interpreted by the Privy Council is law for the Madras, Bombay, Calcutta, Allahabad and other High Courts, that is the law for the most part of India. The extension of the Indian Limitation Act to the whole of India in 1951 must

be assumed to have carried the interpretation put upon that statute by the Privy Council also to this State, though AIR 1950 Trav-C6 57 (FBJ) has held differently. If in a Hindu joint family the manager alone can give a discharge of a right, it is difficult to understand how anybody other than a karnavan can do so in Marumakkathayam tar-wads. The rule that in every suit concerning a tarwad the karnavan has to be impleaded to represent the tarwad lest the suit be held not maintainable also shows that he alone can give a discharge of the cause of action on behalf of the tarwad. In *Kanakku Raman Raman v. Kanakku Raman Kochu Sankaran*, 23 Trav LR 133 (FB) it has been observed :

'There is no principle underlying the Maru-makkathayam system that may be said to be violated by conceding a right of suit in exceptional cases where the interests of the Tarwad - require. It, provided the unwilling, negligent or fraudulent Karnavan is made a party to the suit so as to secure full representation of the Tarwad and finality to the litigation.'

If even in a suit, in which a junior member takes the cause of the tarwad and vigorously exercises the tarwad's right to sue, the karnavan alone can be the representative of the tarwad, how can a junior member remaining indifferent to the tarwad's interests be deemed to be a competent representative of the tarwad to give a discharge of the tarwad's rights? The dictum of the Privy Council in 53 Ind App 36 : (AIR 1926 PC 16) seems to me to apply with greater force to Marumakkathayam tarwads; and the adoption thereof has the added advantage of giving a consistent interpretation to the Section throughout India.

16. in the result, I would overrule the ratio in 1959 Ker LJ 554 : (AIR 1960 Kerala 46), 1958 Ker LT 562 : (AIR 1959 Kerala 406) and AIR 1958 Kerala 228, and hold that, in the case of a Marumakkathayam tarwad or a Hindu joint family, only the managing member thereof can give a 'discharge' within the meaning of Section 7 of the Limitation Act. As the first defendant is the karnavan of the family, and the 3rd defendant has never been the manager thereof, the latter could not have given a discharge of the illom's right to its properties. The case therefore comes within the second part of Section 7, Limitation Act. I hold that the suit to set aside Ext. B-39 is not affected by any bar of limitation.

17. in setting aside Ext. B-39, the Court below has found the transaction supported by consideration and necessity to the extent of Rs. 543.6 nP. and therefore declared the 19th defendant entitled to a charge for that amount with interest thereon on items 7 to 12 of the plaint B-1 schedule. The learned Advocate-General pointed out that in doing so, it has overlooked Ext. B-41 under which Rs. 300/- had also been paid to a creditor of the illom as per the recitals in Ext. B-39, and claimed a charge for that amount as well. Counsel for the respondent-plaintiff did not demur to this. The contention is accepted. The decree of the Court, below will be modified suitably.

The question of mesne profits has been -left open by the Court below for adjudication in the final decree. It is not impossible that in the final decree no mesne profits might be awarded against the alienee, in which case there will be no justification for the alienee to have, interest on the amounts found repayable to him. As the question of interest is intimately connected with that of mesne profits, I discharge the award of interest in the decree under appeal and leave that question open for adjudication in the final decree.

18. The appeal is thus allowed to the extent of reversing the decree in regard to the cancellation of Ext. B-75; enhancing the amount decreed repayable to the 19th defendant charged on items 7 to 12 of plaint B-1 schedule to Rs. 843.6 nP. Instead of Rs. 543.6 nP.; and discharging the award of interest thereon in the preliminary decree and directing it to be reconsidered along with the plaintiff's claim to mesne profits. In other respects, the appeal fails and is dismissed.

Velu Pillai, J.

19. I agree with my learned brother Madhavan Nair, J., but desire to add a few words. The early decisions of the Travancore High Court on this subject followed the dictum of Ormsby J., in 4 Trav LR 34. That dictum was not based on any provision in the Travancore Limitation Regulation of 1040 which was in force at the time, similar to Section 7 of the Indian Limitation Act. Such a provision came to be enacted for the first time in Travancore as Section 9 of the Travancore Limitation Regulation of 1062, and later as Section 8 of the Travancore Limitation Act of

1100. In 1947 Trav LR 320 (FB) Krishnaswamy Iyer, C. J., was of the view, that by the inaction of any adult member, the cause of action of the tarwad would be lost and that the substantive law gave a right to any major member to represent the tarwad as against 'breach of trust' committed by the karnavan. By inaction, what is lost can be only a right of suit, and whether this is so or not, depends upon the true interpretation and the application of the relevant provision in the statute of limitation. Assuming that the karnavan is a trustee and is guilty of breach of trust, what the substantive law does is to allow a junior member to sue in order to protect the interests of the tarwad. Sankarasubba Iyer, J., one of the other learned Judges, stated the principle to be, that the senior 'man in the tarwad, after the karnavan and those members who have disabled themselves from acting for the benefit of the tarwad, can be treated in law as the inchoate karnavan competent to act for the tarwad or he and the other adult members not parties to the transaction are competent to represent the tarwad.' I am unable to accept this concept of inchoate karnavanship; the statement seems to stress the competency of the senior member by himself or in association with the other adult members not disqualified to act by having accepted the impugned transaction. In 38 Cochin 379 (FB) decided by the Cochin High Court 'the right of representation in a junior member' was said to have been recognized on grounds of expediency to remedy the anomaly pointed out by him. In the leading Travancore-Cochin case AIR 1950 Trav. Co 57 (FB) after referring to Nani Pankajakshi's case, 1947 Trav LR 320 (FB) and Ikkankla Wanier's case, 38 Cochin 379 (FB) the Court treated the 'matter as concluded by authority so far as this Court is concerned'. Two of the decisions of this Court have followed. Ramchandran Potti's case, AIR 1956 Trav-Co 57 (FB). It appears to me, that these cases have not interpreted the term 'discharge can be given without the concurrence' occurring in Section 7 of the Indian Limitation Act.

20. On the meaning and implications of the two concepts, 'tarwad' and 'joint Hindu family', I have nothing to add to what I have stated in Mammad Keyi v. Wealth Tax Officer, 1961 Ker LT 905 : (AIR 1962 Kerala no), and I do not feel that the Supreme Court has said anything to the contrary in AIR 1962 SC 287. Even so, a tarwad, or joint Hindu family, meaning the group as defined in Mammad Keyi's case, 1961 Ker LT 905 : (AIR 1962 Kerala no), is capable of possessing rights of its own as distinguished from the personal rights of its members. The right to impeach or to

set aside an alienation of property belonging to that group is in essence a right of that group, which may be exercised on its behalf by any of its members; yet, for that reason, it does not seem proper to hold that the right so exercised is his personal or individual right. The loss of property by alienation is of the group, the suit to recover when laid is on behalf of the group, and the property when recovered goes back to the group; every member of the group has no doubt a proprietary right, but that right is in all the group's belongings, that it may well be said, that the right is of the group exercisable through any of its members.

21. if the right is of the group, 'it logically follows, that only that member who can represent the group under the substantive law, is competent to give a discharge without the concurrence of the others. That representative is the karnavan in the case of the tarwad, or the manager in the case of the joint Hindu family, for the time being; if the act impugned is that of the karnavan or of the manager, the competency to give discharge is that of the next Karnavan or of the next manager after he has assumed management.

22. This is the plain interpretation of Section 7 of the Indian Limitation Act, an interpretation which has been accepted by the Privy Council and by the other High Courts in the country. The effect of this interpretation may be, that certain rights which may till now have been considered to be barred by limitation in the Travancore and Cochin areas, might be found not to be so barred for some more time; but I feel that the question is one which falls to be answered on the true interpretation of Section 7 of the Indian Limitation Act, and not on a rigid adherence to a course of judicial decisions which were applicable to a particular area of the State until now.

M.S. Menon, C. J.

23. The main question for consideration is whether the suit from which this appeal arises is barred by limitation in so far as it relates to Ext.B-39, a sale-deed executed by the 1st and 2nd defendants in favour of the 19th defendant. The document is dated 13-11-1936. . It covers items 7 to 12 of the schedule marked B1 and attached to the plaint.

24. The items belonged to the illom of the plaintiff and defendants 1 to 5 The: plaitiff is the son of the 1st defendant and his wife, theand defendant. Defendants 3, 4 and 5 are his sisters. The 3rd defendant is bis elder sister and the 4th and 5th. defendants are sisters younger to him.

25. it is common ground that the suit was filed within three years of the plaintiff attaining his majority and more than three years after the 3rd defendant had attained her majority. The question for consideration is whether the Inaction of the 3rd defendant precludes the plaintiff from challenging the validity of Ext. B-39.

26. The answer depends on the scope and impact of Section 7 of the Indian Limitation Act, 1908. That section reads as follows:

'Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such' disability, and a discharge can be given without the concurrence of such person, tune will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Illustrations.

(a) A incurs a debt to a firm of which B, C and D are partners. B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(b) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them lintil either E or F becomes sane, or G attains majority.'

27. The words 'under any such disability' mean under any of the disabilities mentioned in Section 6 of the Act. They are minority, insanity and idiocy.

28. The words 'jointly entitled to institutea suit' came up for consideration in 38 Cochin 379(FB). Krishnaswami Iyengar, C. J., said:

'It should be borne in mind that while the words 'the several persons jointly entitled to institute a suit or make an application for the execution of a decree' 'occurring in the section may in a general sense be understood as referring to joint creditors and joint claimants; yet in the ultimatetest, the Court has to enquire not who are joint creditors or joint claimants but who are the per-sons 'jointly entitled' to institute the suit or makethe application. 'Joint creditors or claimants'were the words which occurred in Section 8 of theold Act of 1877 but were replaced by the wordsset out above when the Act of 1908 came to be passed. Joint creditors or claimants may be withinthe class of persons jointly entitled to institute asuit or make an application but the class may include others as well, provided, of course, all ofthem are jointly entitled to sue or apply. Who are to be deemed to be so entitled is to be determinedby a consideration of Order I, Rule I C. P. C.which and the Limitation Act should for a purposeof this kind be regarded as twin enactments in pari materia to. be read together for a correct understanding of these provision.'

29. Order 1; Rule 1 of the Code of Civil Procedure, 1908, reads, as follows :

'All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.'

It is clear from the rule that it allows several persons to join as plaintiffs in one suit even though their causes of action be separate and distinct, if : (a) the right to relief alleged to exist in them arises out of the same act or transaction or series of acts or transactions; and (b) the case is of such a character that if such persons brought separate suits, any common question of law or fact would arise.

30. Krishnaswami Iyengar, C. J., said that such being the rule of joinder, it is only necessary to point out that Section 7 of the Limitation Act lays emphasis on the liberty of joinder implied in the word entitled, and :

'The distinction to be kept in mind is that the several persons are entitled to sue together if they choose and not that they are under an obligation to do so. Of

course, where they are compellable to join all the persons of the group, it will be an a fortiori case of their being jointly entitled to do so. Ordinarily where the cause of action is one and the same as for example the wrongful act or omission of the Karnavan, every member of the tar-wad may have a right to sue. He may perhaps have even the right to do so without joining the other members, that is to say, the right of suit of each member may be distinct and individual, though similar, and therefore common. But this aspect of the matter is irrelevant in considering the meaning of the words jointly entitled whose significance is different from that of such words as 'jointly obliged or so compellable'. A single member may not be under an obligation to join with others having the same or a similar cause of action, but if he is one of a group of persons jointly entitled, i.e., possessing the right to sue or apply, he is brought within the section.'

The view adopted by Krishnaswami Iyengar, C. J., is the view that appeals to me.

31. The 3rd defendant attained majority on 21-11-1947. If she could have given a discharge without the concurrence of the plaintiff, then the suit instituted by the plaintiff on 16-3-1953 will certainly be barred by limitation.

32. The use of the word 'discharge' in Section 7 has given room for the argument that the section applies only to money claims such as debts, but does not extend to other rights such as the right to bring a suit impugning an alienation. The Courts have adopted a liberal interpretation of the word and has included within its ambit not only money claims for recovery of money but also claims for the enforcement of other rights including rights in immovable property.

33. The controversy is now at rest. In *Sarda Prasad v. Jumna Prasad*, AIR 1961 SC 1074 the Supreme Court said :

'The mere, fact that the two illustrations to Section 7 are in respect of debts is no ground for thinking that the provisions of Section 7 are limited to suits or decrees on monetary claims only. Nor can we see any reason to think that the word 'discharge' can refer only to debts. Discharge means, to free from liability. The liability may be in respect of monetary claims, like debts; it may be in respect of possession of property; it may be in respect of taking some order as regards

property; it may be in respect of many other matters.'

34. The discharge in this case must be a discharge from the liability of Ext. B-39 being questioned as an unauthorised alienation by the junior members of the plaintiff's illom. The question as to whether such an immunity will stem from the quiescence of the 3rd defendant will naturally depend on the character of the right of the junior members to question such alienations. If it is a personal right exercisable at the volition of each junior member -- as I think it is -- then the inaction of one cannot prevent the action of another.

35. in ILR 10 Mad 322 Muttusami Ayyar, J., said :

'The substantial question is whether the right which the respondents sought to enforce is an individual right or a right which vests in their family only in its collective capacity. Having regard to the family system that obtains in Malabar, I do not consider that a tarwad is a corporate body in the sense that no single member of it has an individual right to enforce. Each member of a tarwad has a right to be maintained in the tarwad house, and this is a personal right. He has also a right, if a male and not incompetent, to succeed to management in the order of seniority, and this is also a personal right. The tarwad property is not partible at the pleasure of any one member, and he cannot maintain a suit to enforce partition because no separate right to demand partition exists. The tarwad property is, however, a common fund for subsistence, and each member is entitled to see that the karnavan to whose management it is entrusted does not exceed his lawful authority and waste it, and this is an individual right vesting in every anandravan by reason of his position as such.'

17 Cochin 164 is also to the same effect. (It held that the right to question an improper alienation by the karnavan of a tarwad was 'an individual personal right of every member of the tarwad'. and that it is not 'a joint right which each of them has along with all the others, in the sense that if any of them does not join, the cause of action will not be complete or the right to get the relief on behalf of the tarwad will not arise'.) Kandan Narayanan v. Parameswara Menon, 25 Cochin 302 said :

'It is the undisputed right of every member of a Malabar iardwad to see that the properties of the iardwad are conserved for the benefit of its members.'

36. in Padmanatha Menon v. Krishna Menon 25 Cochin 766 the Court had to consider the question whether a junior member who was a pauper could institute a suit in forma pauperis when his iardwad was solvent. The Court said :

'In its nature, the right is personal in the sense that it is one attaching to each individual member as such, and capable of being exercised by him at his will'; and

'Such being the nature of the right, every member should be in a position to realise it, and his pauperism should not stand in his way. For, If, in spite of his pauperism, he were to be refused leave to sue in forma pauperis for the sole reason that his iardwad is solvent, that would be denying him the right itself. In regard to a suit of the kind, the question of the solvency or otherwise of the iardwad as such is irrelevant. The only relevant question is whether the junior member proposing to sue is or is not a pauper.'

37. Sub-section (1) of Section 3 of the Madras Nambudiri Act, 1932 (21 of 1933), an Act which applied to the parties at the time of the alienation, said :

'Every member of an illom, whether male or female, shall have an equal proprietary interest in its properties.'

Section 3 of the Kerala Nambudiri Act, 1958, is also to the same effect. If each member of a Nambudiri illom has an equal proprietary right in its properties, it should follow that no member can by his inaction destroy or affect the equal proprietary right of another.

38. in the view I take -- that the right of a junior member of an illom or iardwad to question, unauthorised alienations of illom or iardwad property is an individual and personal right of his -- I must hold that the 3rd defendant was not competent to grant a discharge within the meaning of Section of the Indian Limitation Act, 1908, and that the plaintiff's suit in the exercise of his individual and personal right to question Ext. B-39 within three years of his attaining majority is within time and is not barred by limitation. If the plaintiff was a party to a litigation in which the

alienation was questioned but approved, the position will be different and he may be stultified from pursuing the matter afresh. No such thing has happened in this case and all that can be pressed into service by the 19th defendant is the quiescence or inaction of the 3rd.

39. A agree with Madhavan Nair, J., that the appeal should stand disposed in the manner indicated in the concluding paragraph of his judgment.

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