

Narayani and ors. Vs. P. Sankunni Mannadiar and ors.

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Court : Chennai

Decided On : Mar-02-1936

Reported in : AIR1936Mad861; 165Ind.Cas.690; (1936)71MLJ545

Appellant : Narayani and ors.

Respondent : P. Sankunni Mannadiar and ors.

Judgement :

Venkataramana Rao, J.

1. The main question in this second appeal is whether an ex parte decree in O.S. No. 134 of 1926 on the file of the District Munsiff's Court at Palghat obtained by the second defendant against the third and fourth defendants and the first plaintiff is binding on the plaintiffs and the tavazhi to which they belong. The plaintiffs 1 and 2 and the fourth defendant are daughters of the third defendant; the third plaintiff is the daughter of the fourth defendant. They form members of a tavazhi, the third defendant being its manager. The suit property belongs in Jenm to the first and second defendants who are members of a tarwad. In 1912 the management of the tarwad was vested in one Ravunni Mannadiar since deceased and the second defendant. They gave a kanom demise of the said property by a deed dated 14th October, 1912, to one Ananthakrishna Pattar who assigned his interest to the tavazhi of the plaintiffs by an assignment deed dated 24th February, 1916. The parties to the said deed were Ananthakrishna Pattar on the one hand

and the third defendant and her minor children fourth defendant, first plaintiff and one Devaki since deceased. The said Ravunni Mannadiar died in October or November, 1923 and disputes arose between the first and second defendants as to the management of the tarwad property, the result of which was a suit by the first defendant against the second defendant to establish his right being O.S. No. 283 of 1923 on the file of the Additional District Munsiff's Court of Palghat. There was a decree in favour of the first defendant in or about 1924,. Subsequent to the decree the first defendant collected the michavaram due from the plaintiff under the kanom demise for 1099 and 1100. (Vide Exs. H and H-1.) Against the said decree the second defendant appealed, the decision of the Trial Court was reversed and the second defendant was declared the rightful manager. This was about March, 1925. There was a second appeal to the High Court against this decision by the first defendant. While the second appeal was pending the second defendant filed a number of suits against various kanom tenants of the tarwad including the plaintiff's tavazhi. The said O.S. No. 134 of 1926 was the suit instituted against the third defendant, fourth defendant and first plaintiff being a minor represented by the third defendant. It may be noticed that the term of kanom demise under which the plaintiff's tavazhi were holding expired in or about August or September, 1923, and the tarwad was entitled to sue for redemption. Ignoring the payments of michavaram made to the first defendant, the second defendant sued to recover the arrears of michavaram, and for redemption of kanom property, and possession thereof. It does not appear what specific pleas were raised on behalf of the defendants but from the evidence in the present suit it would appear that they pleaded that michavaram was paid to the first defendant and it ought to have been given credit to and that they are also entitled to the value of improvements on the property. Apparently a plea was also taken that the second defendant was not entitled to maintain the suit. After a number of adjournments there was an ex parte decree for redemption and surrender of possession on the second defendant depositing into Court a sum of Rs. 314-4-7 being the kanom amount less a sum of Rs. 90-8-0 the alleged arrears of michavaram and also costs of the suit. There was an application to set aside an ex parte decree but the same was dismissed by an Order dated 30th April, 1927. (Vide Ex. VIII.) Thereupon the third defendant filed a suit against the first defendant for recovery of the

michavaram paid to him. While the suit was pending the second appeal filed by the first defendant with regard to his right of management was allowed by the High Court, the result of which was the first defendant was declared the rightful manager. In consequence of this decision the third defendant withdrew the suit against the first defendant. Before the second appeal was decided in the High Court the second defendant executed the decree in the said O.S. No. 134 of 1926 and recovered possession of the properties from the plaintiff's tavazhi. This suit has been filed by the plaintiffs for a declaration that the decree in the said O.S. No. 134 of 1926 is not binding on them, and for recovery of possession of the suit properties with mesne profits or in the alternative for recovery of the michavaram and costs of redemption action illegally recovered from them. The grounds alleged were

(1) that the suit O.S. No. 134 of 1926 by the second defendant was incompetent in that he did not represent the tarwad;

(2) the suit against the plaintiff's tavazhi was not duly constituted in that the suit was not against the tavazhi as such and all the members of the tavazhi were not made parties

(3) the third defendant was guilty of gross negligence and fraud in the conduct of the said litigation. The first defendant at first supported the plaintiff but later on compromised the suit with the second defendant and ratified all that he did. The second defendant alleged that he duly represented the tarwad and filed the said suit bona fide and the third defendant was not guilty of any negligence or fraud and no loss resulted to the plaintiffs by reason of the failure of the defendants in the said litigation. The learned District Munsiff upheld the contentions of the plaintiff and gave a decree for possession and mesne profits but the learned Subordinate Judge reversed his decree. Against this decision the present second appeal has been filed.

2. The first contention advanced by Mr. Unnikanda Menon is that in view of the decision of the High Court declaring the first defendant to be the rightful manager of his tarwad, the second defendant had no right to represent it and take any action on its behalf; a suit instituted by him on behalf of the tarwad would therefore

be incompetent and the decree obtained therein inoperative and tantamount to a decree obtained by a stranger. I am unable to uphold this contention. The second defendant was himself a member of the tarwad and in certain circumstances he can himself file a suit for redemption on behalf of the tarwad but on the date the second defendant instituted the said suit O.S. No. 134 of 1926, he was declared to be the rightful manager by a decree of competent Court and the said decree until reversed in appeal was binding as between the second defendant and the first defendant. The second defendant was therefore the proper person to represent the tarwad and in any suit instituted by him a behalf of the tarwad it will not be open to a third party to set up the title of the first defendant. Therefore all actions taken by him will be binding on the tarwad unless it is shown that it was mala fide and against the interests of the tarwad. In this case when the said suit was instituted, the term of kanom demise expired and the cause of action for redemption accrued in favour of the tarwad and it has not been shown in this case that the suit for redemption was not sustainable. I asked Mr. Unnikanda Menon whether if the suit for redemption was filed by the first defendant, the plaintiffs would have had any defence and he was unable to say they would have had any. The second defendant therefore in bringing the said suit represented the tarwad and the decree obtained by him will enure to its benefit.

3. The next contention of Mr. Unnikanda Menon is that the decree in O.S. No. 134 of 1926 cannot bind the plaintiff's tavazhi as there was no representation of it in that all the members were not parties and the third defendant was not sued as representing the tavazhi. This contention also is untenable. The parties to the assignment deed were the third defendant, the fourth defendant, the first plaintiff and one Devaki. They represented the tavazhi in the deed and on the date of the institution of the suit, Devaki having died the remaining parties to the deed were made parties. They sufficiently represented the tavazhi. Further the third defendant was the eldest female member in management of the tavazhi. No doubt she was not specifically impleaded as such. But as pointed out by Wallace, J., in *Vesu v. Kannamma*¹, the question is not so much whether a karnavan was specifically impleaded as representative of his tarwad as whether he was as a matter of fact not conducting the litigation for the tarwad and if it is found that he was, it does not matter if the other members were added or omitted to be added.

There is nothing to indicate in this case that the third defendant was not conducting the litigation on behalf of the tavazhi.

4. The next contention urged is that the third defendant was guilty of gross negligence in allowing the suit to be decreed ex parte and in her failure to appeal against the same. It is a question how far it is open to a junior member of the tarwad to set aside a decree passed against a karnavan on the ground of negligence apart from fraud or collusion. In *Thenju v. Chimmu* I.L.R (1884) 7 Mad. 413 where the karnavan agreed to abide by the oath of the opponent, it was held that he acted in excess of his powers and failure to adduce evidence in the case prejudiced the tarwad and the decree was liable to be set aside. Muttuswami Aiyar and Hutchins,, JJ., observed at p. 416:

His position like that of a Hindu father is fiduciary, though his acts are binding on the anandravans as those of the head of the family, until they show that such acts are in excess of his authority, or negligent or fraudulent. A decree against him is binding on the tarwad, because it is a decree against the head, or representative of the family, but his power, as the head of the family, is a qualified power, qualified by his fiduciary position and the duties which, by the usage of the district, attach to such position It. . . . is enough to say that, when fraud or breach of duty as karnavan is shown, his act must be treated as a fraud upon his power, and as the karnavan's conduct in suit 19 of 1882 was negligent, if not fraudulent, the decision against him in that suit does not bind the respondents.

5. This decision seems to indicate that negligence would be a ground for setting aside a decree. It was so understood in *Moidin Kutti v. Krishnan* I.L.R (1887) 10 Mad. 322. In that case the junior members of a Malabar tarwad impeached a mortgage executed by their karnavan on the ground that the debt in respect whereof the said mortgage was executed was one in respect of a decree which was passed against the karnavan owing to his neglect to appear and state that it was not a binding debt. It was found that the debt was not binding and but for the negligent conduct of the karnavan the decree would not have been passed. It was therefore held that the mortgage was not binding. Brandt, J., with whom Muthusami Aiyar, J., concurred observed thus:

In the case of such gross neglect of duty it has been held in *Thenju v. Chimmu* (1884) I.L.R. 7 Mad. 413 and S.A. No. 982 of 1886 that the decision is not binding on the anandravans who were no parties to the suit.

6. In *Vasudevan v. Sankaran* : (1897)7MLJ102 a Full Bench laid down that a decree made in a suit in which the karnavan is sued in a representative capacity and which he honestly defended is binding on the other members of the family. 'Honestly' is explained by Collins, C.J., as meaning that the karnavan acted in good faith and in what he believed to be the interests of the tarwad. Shephard, J., who was a party to the said decision observes at page 137:

We must either hold that the status of the karnavan has nothing in it, to make a decree against him binding on the tarwad, or that, in all cases in which he is sued or sues in his representative character, the tarwad is bound, cases of fraud or collusion only being excepted. Having regard to the authorities already cited, I do not think we are precluded from affirming this latter proposition. The former proposition it would not be easy to reconcile with the Full Bench decision, which alone is binding on us.

7. This decision seems to suggest that the only ground on which the decree obtained against a karnavan can be attacked is fraud-or collusion but I find there is no expression of dissent from the view expressed in *Thenju v. Chimmu* I.L.R (1884) 7 Mad. 413 or *Moidin Kutti v. Krishnan* I.L.R(1887) 10 Mad. 322. In *Madhavaya v. Kerala Varma* (1902) 13 M.L.J. 68, Benson and Bhashyam Aiyangar, JJ., held that where a karnavan was sued in a representative capacity and the decree was attacked on the ground of gross negligence, the learned Judges apparently seemed to have negated the contention and held that unless there was fraud or collusion in the conduct of the suit the decree could not be attacked. There is no reference to either *Thenju v. Chimmu* I.L.R(1884) 7 Mad. 413 or *Moidin Kutti v. Krishnan* I.L.R (1887) 10 Mad. 322. Sundara Aiyar, J., in his book on Malabar and Aliyasanthana Law observes at page 92 referring to *Thenju v. Chimmu* I.L.R (1884) 7 Mad. 413 how much of this is good law after the Full Bench decision is not clear, but at page 98 says:

A minor is not precluded from bringing a suit to set aside a decree on the ground of the gross negligence of the guardian either by Section 11 or by Order 9, Rule 9, Civil Procedure Code. The same reasoning would apply to the case of junior members of a Marumakkathayam or Aliyasanthana family.

8. So long as the decisions in *Thenju v. Chimmul* and *Moidin Kutti v. Krishnan* I.L.R (1887) 10 Mad. 413 stand it must be taken that gross negligence of the karnavan would be a ground for setting aside a decree. The question is what would amount to gross negligence. It was held in *Punnayyah v. Viranna* (1921) 42 M.L.J. 429 : I.L.R. 45 Mad. 425

That a mere omission on the part of a guardian to appear at the trial would not amount to gross negligence if there was no good ground of defence to put forward on the minor's behalf, but it would be gross negligence not to defend the suit if there was a valid defence available.

9. Therefore there must be prejudice to the other members of the family by reason of his negligence. The prejudice that has been alleged in this case is that proof could have been adduced that michavaram was paid to the proper person and evidence of reclamation could have been given and by the omission to do so, the loss sustained was loss of the michavaram and the value of reclamation. It was also alleged in the plaint the plaintiff's tavazhi was ever prepared to take a renewed demise in respect of the properties on payment of the proper fees therefor'. So far as the reclamations are concerned, both Courts have concurrently found that no reclamations were made and the plaintiff's tavazhi was not entitled to any relief in respect thereof. So far as michavaram was concerned, the plaintiff's tavazhi had a good defence. It was paid to the first defendant and at a time when his right was declared by the Court. But what would be the result of the success of the said plea in regard to michavaram? The decree in so far as it credited the michavaram towards the kanom amount and awarded cost of redemption against the plaintiff is wrong.

10. Beyond this no other prejudice has been shown. In the matter of renewal, it has not been proved that there was a covenant for renewal, nor has it been shown that there was any attempt at renewal by the plaintiff's tavazhi which was

frustrated.

11. Again from the evidence on record it does not appear to be clear why the third defendant failed to appear. Fraud has been negatived in this case and from the Order refusing to set aside the ex parte decree, it appears that the third defendant was in Court. But neither she nor anybody who was in the conduct of the prior litigation has given evidence as to why she failed to appear, but I have already shown the detriment suffered by this default of appearance. Further, failure to appeal against the decree cannot be evidence of any negligence. Instead of doing so, she on the other hand filed a suit for recovery of michavaram paid from the first defendant. She was apparently advised this course because in a number of suits filed by the second defendant against the various kanom tenants of the tarwad similar pleas were negatived and redemption was decreed. (Vide Ex. III series.) That suit had to be withdrawn because of the decision in second appeal. Therefore the plaintiffs in my opinion had not established any prejudice caused by the action of the third defendant so as to entitle them to a declaration that the decree for redemption is not binding against them. But I think the last contention of Mr. Unnikanda Menon that the plaintiff is entitled to a refund of the michavaram and the costs of redemption action collected from them must prevail. A sum of Rs. 153-10-2 was claimed in respect of both in the plaint but the lower Appellate Court has given a decree for Rs. 90-8-0 being the michavaram collected. Costs of redemption action would not have been decreed against them if the third defendant had appeared and let in evidence as aforesaid. The second defendant has ratified the action of the first defendant. Therefore the tarwad will have to refund not only Rs. 90-8-0 but also the said costs. I therefore modify the decree of the lower Appellate Court by awarding them the sum of Rs. 153-10-2 instead of Rs. 90-8-0 with interest thereon at the rate of 6 per cent, from the 4th December, 1925, up to date of realization from the tarwad of defendants 1 and 2. In the circumstances of the case I direct each party to bear his or their own costs throughout.

(Leave refused.)