A P. MUTHAYYA (DEAD) BY L.RS.

v.

CHELLAPPAN PILLAI AND ORS.

MAY 13, 1994

B [KULDIP SINGH AND YOGESHWAR DAYAL, JJ.]

Hindu Law : Tarward (H.U.F.)—Karanavan (Kartha)—Mortgage deed—Execution of—Senior Member of Tarward—Claimed to have died prior to the mortgage deed—No evidence adduced to the contrary—Held : Mortgage
C *deed executed by Junior member as Karanavan valid.*

A suit for partition and redemption of mortgage deed filed by M came to be dismissed. But it was set aside on appeal and his share was determined as 5/6th share in his 2/3 share. The share of defendant No.1
D **was determined as 1/6th share out of the 2/3rd share. The other defendants were also to get some portion of the shares. The appellate court passed a preliminary decree for partition and remanded the matter to the trial court for determining the shares, and for deciding the amount due under the mortgage deed of which redemption was allowed and the value of improvements, if any, to be paid by the mortgagor.**

E **On appeal, the High Court set aside the redemption of mortgage on the ground that the Karanavan in whose favour the mortgage deed was executed was junior member when the senior member of the Karanavan was alive and it was beyond his powers.**

F **The present appeal has been filed against the High Court's order.**

Allowing the appeal, this Court

HELD : 1.1. It is not a case of any liability being undertaken on
G **behalf of the Tarward by M. He was acting as a mortgagee. Besides, when transactions are so ancient, the date of death of R. the elder Karanavan was within the special knowledge of the Tarward of defendants 2 to 19. They led no evidence to depose as to when he died. It will be too much to place something in special knowledge of defendants 2 to 19 to be proved by the plaintiff to a successor-in-interest of the mortgagee. It is clear from**
H **the recapitulation of M's statement referred to as Ext. 'G' before the Court**

which decided the suit (O.S. No. 731 of 1112) that R died in 1079 M.E. or beginning of 1089 M.E. [124-D-E-F] A

1.2. It is true that the district Munsif who decided the said suit discussed the question of "*defacto*" or "*de jure*" Karanavan but that judgment was not appealed from. This was the litigation which was started by the predecessors of defendants 2 to 19 and it was their evidence which the B **District Munsif was discussing and was relied upon by the lower appellate court. It cannot be said, in the circumstances, that the evidence by way of Ext. A.14 was no evidence at all about the death of R. the elder brother, towards the close of 1079 M.E. (equivalent to 1904). The mortgage in dispute was executed in 1088 M.E. which is practically 9 years after the** C **death of R, the earlier Karanavan. [124-F-G-H]**

2. The High court could interfere with the finding of the lower appellate court about the validity or the mortgage deed Ext. A.1 only if it could come to a finding that at the relevant time when Ext. A1 was executed, R was alive. No such evidence had been led on behalf of defen- D **dants 2 to 19 and thus the High Court erred in law in setting aside the finding of fact recorded by the lower appellate court relying on Ext.A.14. [125-A-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 583 of 1981. E

From the Judgment and Order dated 16.6.80 of the Madras High Court in Second Appeal No. 799 of 1976.

M.N. Krishnamani and K.V. Mohan for the Appellant.

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K. Sukumaran, Ms. Baby Krishnan and K. Prabhakaran for the Respondent Nos. 3-5 & 6-8.

T.P. Sunderjain for the Respondent No.1.

The Judgment of the Court was delivered by G

YOGESHWAR DAYAL, J. This appeal arises from the judgment of the learned Single Judge of the High Court of Madras dated 16th June, 1980. It arises out of a suit for partition and redemption of mortgage deed filed by one P. Muthayya. The trial Court had dismissed the suit. But, on an appeal by the plaintiff, the judgment of the trial court was set aside the H

A suit of the plaintiff for redemption was decreed and the share of the plaintiff was determined as 5/6th share in his 2/3rd share. Defendant No. 1 share was determined as the 1/6th share out of the 2/3rd share. Some portion of the balance of 1/3rd share was held to go to defendants 20 to 22 and defendants 2 to 19 were also held to get some portion by reason of the other sharers in not having instituted the suit for redemption within time. However, on request of the all the parties a preliminary decree for partition was passed but the matter was remanded to the trial court for determining the shares. The lower court was also directed to decide the amount due under the mortgage deed of which redemption was allowed and the value of improvements, if any, to be paid by the mortgagor.

The High Court in Second Appeal set aside the decree for redemption of mortgage vide mortgage deed Ext.A.1 on the ground that Karanavan in whose favour the mortgage deed was executed was Padmanabhan Pillai Mathevan Pillai (in short Mathevan Pillai) was junior member of the Karanavan and it was beyond his powers and that it was executed when the senior member of the Karanavan, namely, Raman Pillai was alive. The whole case turns round on the validity of Ext. A.1 having been executed in favour of the mortgagee, Mathevan Pillai.

The mortgagee under the suit mortgage deed Ext. A.1, namely, Mathevan Pillai belonged to the Tarwad of defendant Nos. 2 to 19. The plea of defendants 2 to 19 was that he was not the Karanavan of Tarwad and that he was only a junior member and as such he was disentitled to represent the Tarwad by figuring as mortgagee under Ext. A.1. The plaintiff/appellant's case was that mortgagee Mathevan Pillai was really the Karanavan of the Tarwad and he represented the Tarwad consisting of defendants 2 to 19. The plaintiff had relied upon the judgments in O.S. No. 678 of 1112 and O.S. No. 731 of 1112 (Ext. A.14) in support of his contention. Both those suits were filed by Raman Pillai Bhagavathy Pillai, the then Karanavan of defendants 2 to 19. The plaintiff in that suit alleged that he was the Karanavan and Manager of the Tarwad. O.S. No. 678 of 1112 was filed to set aside a gift deed executed by Mathevan Pillai the prior Karanavan. It was specifically admitted in the plaint in O.S. No. 678 of 1112 that the prior Karanavan was Mathevan Pillai. The second suit (O.S. No. 731 of 1112) was filed to set aside the Will executed by Mathevan Pillai and for declaration of title. Therein also it was alleged that the plaintiff therein, namely, Raman Pillai Bhagavathy Pillai was the next Karanavan of

the Tarwad after the death of Mathevan Pillai who was the prior Karanavan and that the said Mathevan Pillai died on 20.7.1112 (M.E.) (equivalent to 1937). It was specifically stated that the property in that case was purchased by Mathevan Pillai on behalf of the Tarwad.

The argument of the Plaintiff/appellant was that once it is admitted that Raman Pillai Bhagavathy Pillai, who filed O.S. No. 678 of 1112 and O.S. No. 731 of 1112 was Karanavan of the Tarwad consisting of defendants 2 to 19 and that the said Raman Pillai Bhagavathy Pillai filed the suits in his capacity as the Karanavan and on behalf of the Tarwad, the admission in the plaints that the prior Karanavan was Mathevan Pillai is binding upon defendants 2 to 19. It was urged that they must accept it that as Tarwad of defendants 2 to 19 admitted the fact that Mathevan Pillai was the Karanavan, it is not now open to defendants 2 to 19 to dispute the fact that Mathevan Pillai was really the Karanavan of the Tarwad. On the other hand the plea of defendants 2 to 19 before the lower appellate court was that there was no finding in O.S. No. 678 of 1112 and O.S. No. 731 of 1112 that Mathevan Pillai was the Karanavan. It was also pleaded on behalf of defendants 2 to 19 that the said judgment was also set aside in appeal but this contention was not accepted as there was no evidence to show that the judgment was set aside in appeal even though there was evidence to show that there was an appeal. The lower appellate court took the view that there was an admission that Mathevan Pillai was an earlier Karanavan and, therefore, it was binding upon defendants 2 to 19. The lower appellate court also took the view that the perusal of the judgment (Ext. A14) also shows that one Raman, who was senior member of the Tarwad was a live only till the close of 1079 (M.E.) (equivalent to 1904).

The lower appellate court then took the view that it appears from Ext. A.14 that Raman Pillai was alive till the close of 1079 and was not there what the suit mortgage deed (Ext.A.1) was executed by Mathevan Pillai, who was not merely *de facto* Karanavan but in fact was the senior member of the Tarwad. The prior Karanavan Raman Pillai having died before the close of 1079 M.E., Mathevan Pillai was the Karanavan when Ext. A.1 was executed in the year 1088 M.E. by him. It also held that the prior mortgage Ext. B-15 was got merged in Ext. A.1 and was completely discharged by the execution of Ext. A.1.

The High Court in second appeal set aside the finding of the lower

A appellate court only to the extent that Raman Pillai had died before the execution of Ext. A.1 which was executed in the year 1088 M.E. by Mathevan Pillai and took the view that this finding of the lower appellate court was not supported by any evidence on record.

The whole thing turns round the evidence and discussion of the B District Munsif, Kuzhithurai who decided suit (O.S.No. 678 of 1112). The learned Munsif who decided the suit by judgment Ext. A.14 railed on Ext. 'G' which was a copy of deposition of Mathevan Pillai where he admits in clear terms that he became the Karanavan of the Tarwad in 1078 M.E. and ever since then he continued to be the Karanavan till his death. Mathevan C Pillai could have become the Karanavan of the Tarwad only if the senior member i.e. Raman Pillai had died. It was noticed in Ext. A14 regarding Mathevan Pillai deposing about the death of Raman towards the end of 1079 M.E. or the beginning of 1080 M.E.

It may be noticed that it is not a case of any liability being under- D taken on behalf of the Tarwad by Mathevan Pillai. He was acting as a mortgagee. Besides, when transactions are so ancient, like the one before us, the date of death of Raman, the elder Karanavan was within the special knowledge of the Tarwad of defendants 2 to 19. They led no evidence to depose when he died. It will be too much to place something in special E knowledge of defendants 2 to 19 to be proved by the plaintiff to a successor-in-interest of the mortgagee. In this state of the records it is clear from the recapitulation of Mathevan statement referred to as Ext. 'G' before the Court which decided suit (O.S. No. 731 of 1112) that Raman had died in 1079 M.E. or beginning of 1080 M.E.

F It is true that the District Munsif who decided suit (O.S. No. 731 of 1112) talked question of "*de facto*" or "*de jure*" Karanavan but that judgment was not appealed from. This was the litigation which was started by the predecessors of defendants 2 to 19 and it was their evidence which the District Munsif was discussing and was relied upon by the lower appellate G court in the present case.

It cannot be said, in the circumstances, that the evidence by way of Ext. A.14 was no evidence at all about the death of Raman Pillai, the elder brother, towards the close of 1079 M.E. (equivalent to 1904). The mortgage in dispute was executed in 1088 M.E. which is practically 9 years H after the death of Raman Pillai, who was the earlier Karanavan.

The High Court could interfere with the finding of the lower appellate court about the validity of Ex.t A.1 only if it could come to a finding that at the relevant time when Ext. A.1 was executed, Raman Pillai, the senior member was alive. No such evidence had been led on behalf of defendants 2 to 19 and thus the High Court erred in law in setting aside the finding of fact recorded by the lower appellate court relying on Ext. A14. A B

The result is that this appeal is allowed, the impugned judgment of the High Court dated 16th June, 1980 is set aside and the judgment of the lower appellate court dated 12th January, 1976 is restored. Parties are, however, left to bear their own costs of the present proceedings. C

G.N. Appeal allowed