

and will determine whether it will in whole or in part assent or refuse compliance with the request, and in so doing, it will be doubtless guided by the consideration whether the Commissioners have used due diligence to carry out the Act. On the question as to the right of the plaintiff to maintain suit and to recover damages, we are in accord with the opinion of the learned Judge by whom the suit was tried.

We regret we are unable to agree with him that the plaintiff is entitled to an injunction. No case has been cited to show that where a public body has received by statute a discretion to determine on the levy of a rate and an obligation to collect it, it is competent to the Court to deprive the public body of such discretion or to prohibit it from the discharge of its obligation.

[212] We must, therefore, allow the appeal so far as to reverse the order for and dissolve the injunction. In other respects we affirm the decree and dismiss this appeal. We direct that each party bear his own costs of this appeal.

Solicitors for the Appellants :—Messrs. *Barclay and Morgan*.

Solicitors for the Respondent :—Messrs. *Branson and Branson*.

NOTE.—Act V of 1878 (Sections 141 and 211) has been amended by Madras Act III of 1881 (8th April 1881).

NOTES.

[See (1879) 2 Mad. 362 F. B.]

[3 Mad. 312.]

APPELLATE CIVIL.

The 2nd May, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE HUTCHINS.

Kanara Paniker.....(First Defendant) Appellant

versus

Ryrappa Paniker.....(Plaintiff) Respondent.*

Self-acquisition by member of tarwad—Adverse possession by branch of tarwad.

When a member of a tarwad in possession of lands acquired by former members of his taverai (branch) openly sets up an dependent title to those lands, his possession becomes hostile to the tarwad, and Limitation begins to run against the tarwad from that time.

THE plaintiff in this case, as Karnavan of *Valayamprath* Tarwad, sued the first defendant and his mother the second defendant as members of the tarwad, to recover certain parcels of land in their possession; and as to other parcels in the possession of tenants, prayed for a declaration that they were the property of the tarwad, inasmuch as the defendants, who denied that plaintiff belonged to the *Valayamprath* Tarwad, claimed them as their own. The lands claimed were numbered 1-20 in the plaint.

* Second Appeal No. 829 of 1880 against the decree of the Subordinate Judge of North Malabar, modifying the decree of the District Munsif of Badagara, dated 23rd August 1880.

The District Munsif decided in plaintiff's favour, except as to items 1, 2, 7, 10, 14, 15 and 16. As to these items the claim was dismissed as barred by *Limitation*.

Both plaintiff and first defendant appealed against this decree. The Subordinate Judge gave the plaintiff a decree as prayed for in the plaint. The first defendant appealed to the High Court.

[213] The facts found by the Lower Courts were as follows :—

The plaintiff and defendants were members of the *Valayampurath* Tarwad, being descendants of two uterine sisters. The parcels claimed by plaintiff, but disallowed by the Munsif, were the self-acquired property of deceased members of the tarwad, *Kanaran* and *Kannan*, which according to law would, upon the death of the acquirer, revert to the tarwad. Upon the death of *Mathai* and *Kannan*, second defendant's mother and brother in 1034 (1858), the plaintiff and other members of the tarwad applied to the Revenue authorities to have their names registered as successors of the deceased. This application was opposed by *Rayiru*, another brother of second defendant, who claimed the land as the exclusive property of his own branch, alleging that the plaintiff and his branch had no right to the lands until the extinction of his (*Rayiru's*) branch.

On the 15th June 1859 the names of second defendant and *Rayiru* were registered in accordance with the order of the Collector, which states that the transfer was without prejudice to the title of plaintiff's branch, and that the then Karnavan of the tarwad, *Kelu*, did not object to the assessment being paid by *Rayiru*. From 1859 to 1877 the plaintiff's branch took no steps to vindicate their title. *Kelu* was succeeded by *Emman*, plaintiff's uncle, as Karnavan in 1865, and *Emman* was succeeded by plaintiff in 1875. *Rayiru* died in 1877, and upon his death both plaintiff and first defendant claimed to have the lands registered in their respective names. Hence this suit in 1878.

The Munsiff was of opinion that even if *Rayiru's* possession was permissive on the part of *Kelu*, there was nothing to show he continued the management as *Emman's* delegate; and that if he was to be considered a trustee for plaintiff's branch, *Limitation* began to run from the date he openly repudiated the trust in 1858.

The Subordinate Judge considered that the possession of *Rayiru* was not under the circumstances hostile to the tarwad, inasmuch as it was with the consent of *Kelu*, the Karnavan, and subsequently with the tacit consent of *Emman*, and was originally derived from *Kanaran*, who held under an arrangement made by the same Karnavan *Kelu* for the management of the property in 1855. This arrangement was the result of a dispute, and it was then agreed that the property was to be managed by *Kannan* without [214] interference from plaintiff's branch. The Subordinate Judge considered that the presumption of law was against the possession being hostile, and that the arrangement was revocable at any time by the Karnavan upon the authority of the *Ekanat* case (6 M.H.C.R., 401).

Mr. Shephard for the Appellant.

Mr. Branson for the Respondent.

The Court (TURNER, C.J. and HUTCHINS, J.) delivered the following

Judgment :—The contention that the properties Nos. 3 and 12 were self-acquired was not pressed at the hearing of this appeal; and the only question which we have to consider is whether the possession by first defendant's branch of Nos. 1, 2, 7, 10, 14, 15 and 16 was hostile from 1858.

The Munsif found that it was hostile, but the Lower Appellate Court came to the contrary conclusion.

It appears to us that the Subordinate Judge has overlooked one important consideration. It is true that the opinion that the self-acquisition of an individual member descended to his own representatives has now been held to be erroneous, but its very prevalence, so far from showing that the possession was not hostile, explains and accounts for the adverse position taken up by *Rayiru*, the Karnavan of defendant's branch. He distinctly asserted that these particular properties were not tarwad property, but the self-acquisitions of *Kannan* and *Kanaran* of his branch, and that they would not pass to plaintiff's branch until the extinction of his own branch. It was the old tarwad property which he said that he managed with *Kelu's* consent. As regards these particular numbers, therefore, he set up an independent title. And the statement made by *Kelu*, the Karnavan, was to the same effect. These properties, he said, had been acquired by *Kanaran* and *Kannan*, and after the latter's death had passed to *Rayiru*, who was the heir to the property acquired by *Kanaran*. It is true that in one place he stated that *Rayiru* was managing with his consent, but when the whole statement is considered, this seems merely to mean that he, as Karnavan, was the only person, if any, entitled to object, and that in his opinion *Rayiru* was the proper person to hold the property. It thus appears that *Kelu* [215] acquiesced in the claim set up by *Rayiru*, but it would make no difference whether he did or did not acquiesce. It is sufficient that *Rayiru* set up the claim and continued in undisturbed possession.

We think that the possession from 1858 was hostile, and as regards these Nos. 1, 2, 7, 10, 14, 15 and 16, we set aside the Subordinate Judge's decree and restore that of the Munsif with costs.

[3 Mad. 215.]

APPELLATE CIVIL.

The 13th June, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE KINDERSLEY.

Tamarasherri Sivithri Andarjanom.....(Plaintiff) Appellant

versus

Maranat Vasudevan Nambudripad.....(Defendant) Respondent.*

Contract with Namburi woman—Burden of proof as to knowledge of transaction discharged—Contract against public policy—In pari delicto potior est conditio possidentis—Specific Relief Act. Section 35—Contract Act, Section 65.

Where two Namburi females, a mother and daughter (plaintiff), executed a document in favour of defendant, a male relative (nephew of the former), which purported to divest the plaintiff and her mother of the entire property of the Illom of which they were the sole proprietors, and to vest it in the defendant in consideration of his promise to marry and raise up heirs to the Illom to which the plaintiff and her mother belonged, and to maintain the plaintiff and

* Second Appeal No. 679 of 1880 against the decree of H. Wigram, Officiating District Judge of South Malabar, confirming the decree of the Subordinate Judge of Calicut, dated 24th July 1880.