[3 Mad. 169.]

APPELLATE CIVIL.

The 26th April, 1880.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE MUTTUSAMI AYYAR.

Ponambilath Parapravan Kunhamod Hajee and others.....(Plaintiffs) Appellants

versus

Ponambilath Parapravan Kuttiath Hajee.....(First Defendant), Respondent,

and A. L. Tod.....(Second Defendant)

versus

Ponambilath Parapravan Kunhamod Hajee and others.....(Plaintiffs) Respondants.*

Karnavan of Malabar tarwad, mismanagement by—Lease by, for 99 years—Removal of.

The grant of a very improvident lease following on a course of conduct pursued for some years, in which the interests of the tarwad were persistently disregarded, is sufficient ground for removing a Karnavan from the management of the tarwad property.

Eravanni Revivarman v. *Ittapi Revivarman* (I. L. R., 1 Mad., 153) approved.

[170] Incidents of property held by tarwad and by joint Hindu family distinguished.

A Court has no power to confer on Karnavans larger powers than such as are sanctioned by usage. If such powers are insfficient to secure to tarwads the full enjoyment of their estates, or if they are so limited as to interpose obstacles to the establishment of new industries, the extension of such powers must be sought from the Legislature.

THE suit out of which these appeals arose was brought by the junior members of the *Ponambilath* tarwad to remove the first defendant from the office of Karnavan, and to set aside a lease made by the first defendant to the second defendant.

The grounds upon which the plaintiffs sought to remove the first defendant from the Karnavanship were that, in breach of a razinama entered into by him in 1868, when a similar suit was brought against him by the plaintiffs, he had incurred further debts; that he had alienated tarwad property, allowed the Government revenue to fall into arrears, and failed to conduct suits with diligence; and lastly, that he was "by nature of a fickle and changing disposition."

The lease granted to the second defendant was for 99 years, and was alleged to be detrimental to the tarwad.

The Subordinate Judge found that the first defendant was not of unsound mind, the only evidence on the point being that in the morning he was anxious for prayers, and in the evening equally anxious to dispense with them. As to mismanagement, the Subordinate Judge considered that the granting of the lease to the second defendant was a serious malfeasance on the part of the Karnavan, but that, as his conduct, considering the hostility displayed towards

* Appeals 4 and 108 of 1880 against the decree of the Subordinate Judge of North Malabar, dated 25th August 1879.

him by the plaintiffs, had been creditable up to the date of that transaction, it was sufficient to cancel the lease without punishing the Karnavan by removal from office.

The plaintiffs appealed (Appeal 4) against this decree so far as it disallowed their claim to have the first defendant removed from the Karnavanship, and the second defendant appealed (Appeal 108) against the decree cancelling his lease.

The appeals were heard together.

Mr. *Normandy* and *A. Ramachandrayyar* for Appellants.
Mr. *Wedderburn* for Respondent. } In Appeal 4.

Mr. *Shephard* for Appellant.
A. Ramachandrayyar for the Respondent. } In Appeal 108.

[171] The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following **Judgments.**

JUDGMENT IN APPEAL No. 4 OF 1880:—The appellants are the Anandravans, and the respondent is the Karnavan of the *Ponambilath* tarwad, and the question raised in this appeal is whether or not the appellants, on the facts admitted or proved, have made out a sufficient case to justify the Court in removing the respondent from the office of Karnavan.

It appears that in the year 1868 the appellants filed a suit—Original Suit No. 25 of 1868—in which they alleged that the respondent had mismanaged the affairs of the tarwad, had improperly demised and mortgaged portions of the tarwad estate, and, among other demises, had demised one portion of the property for the term of 99 years; that he had unnecessarily contracted debts for the benefit of his own family and for purposes other than the benefit of the tarwad; and that he had neglected to provide sufficiently for the maintenance of the members of the tarwad; and they prayed that certain specified mortgages and demises might be declared void as against the tarwad, and that the respondent should be removed from the office of Karnavan.

Through the intervention of mediators this suit resulted in a compromise, whereby it was agreed that the respondent should retain the office of Karnavan; that he should make over to each of the Anandravans, for their maintenance, lands yielding an income equal to an amount agreed; that he should hold possession of the tarwad properties and pay the revenue on the whole estate, including the lands assigned to the Anandravans for maintenance, defray the expenses of his office and of the special ceremonies connected with the tarwad, and employ the surplus funds for the benefit of the tarwad. It was further agreed that Rs. 6,000 should be raised on kanom on the tarwad property in the possession of the respondent to pay debts theretofore incurred by him, and that he should repay this sum out of the profits of the tarwad estate; that thereafter he should continue to hold the tarwad property and should not contract any debts in respect thereof; and that, if any debts should be contracted by him, they should be invalid.

[172] Unfortunately this arrangement did not restore harmony in the tarwad: the respondent declined to abide by it, and the appellants were obliged to institute a suit—Original Suit No. 43 of 1871—in the Court of the Principal Sadr Amin of *Tellicherry* to obtain assignments of lands in pursuance of the compromise; and, inasmuch as the respondent refused to comply with the

order pronounced in the decree, the Court itself proceeded to make the assignments. Nor did the respondent's opposition to his Anandravans even then terminate. One of the Anandravans instituted a suit—Original Suit No. 68 of 1873—on the file of the District Munsif of *Chavacherry* against the respondent's son to recover the rent of a plot of land which had been assigned to him; the son pleaded he held this plot with other lands as security for a lien of Rs. 1,000 created in his favour by the respondent, and the respondent, who was also impleaded, denied he was aware of the assignment and contested its legality.

The respondent then instituted Original Suit No. 215 of 1877 to set aside the assignment, but his suit was dismissed.

Meanwhile the affairs of the tarwad have fallen into confusion; revenue has remained unpaid till processes have been issued for its recovery, and, in execution of decree, property of considerable value has been sold for insignificant sums. It is true the first appellant has interfered with the collections, but he explains, and his explanation appears true, that he has done so to prevent loss arising from the inaction of the respondent and to meet demands for revenue.

On the 16th April 1878 the respondent received a promissory note for Rs. 1,000 from Mr. *A. L. Tod*, and granted to Mr. *Tod* and his assigns the sole right to fell timber on all the lands of the tarwad at the rate of Rs. 2-4-0 for each tree.

The Subordinate Judge has pronounced the license improvident and as derogating from the rights of the Anandravans, in that it permits the contractor to denude the forest and other lands, even the enclosures occupied by the tarwad of every tree, and secures no right to the Anandravans to cut timber for their personal use.

The contract is certainly open to some of these objections, but as no term is expressed for its duration, it may be terminated as **[173]** soon as a sufficient number of trees have been cut to satisfy the advance.

It is also open to the objection that, by taking a considerable sum as an advance, the respondent has violated the spirit, if not the letter, of the agreement of 12th August 1869, that he should hold the tarwad property without creating any debt in respect thereof.

On the 20th April 1878 the respondent, in consideration of Rs. 500, which was also paid by a promissory note, demised to Mr. *A. L. Tod* for a term of ninety-nine years a tract of forest land, estimated in the plaint to contain 120 square miles, for coffee or other cultivation, at an annual rent of Rs. 200, to be payable on and after 31st December 1879.

This demise, which the appellants protest is highly injurious to the interests of the tarwad and is unauthorized by the powers enjoyed by the respondent as Karnavan, if it be not also prohibited by the terms of the agreement of 1869, has induced the appellants again to have recourse to the Courts to protect their property from the acts of the respondent.

They contend that he has shown himself altogether unfit for the office of manager, and they pray that he may be removed from it and the office conferred on the first appellant; that the lease may be set aside, and the first appellant be placed in possession of the property demised by it; and they asked also for mesne profits.

The Subordinate Judge has declared the lease granted to Mr. *A. L. Tod* invalid, and ordered the restoration of the demised lands to the tarwad; he

has also awarded mesne profits in respect of those lands, to be ascertained in execution of decree, but he has refused to remove the respondent from office.

In this appeal the Anandravans urge that sufficient grounds have been shown to entitle them to that relief. The respondent, on the other hand, contends that, assuming the lease granted to Mr. *Tod* was as imprudent as the Subordinate Judge has found it to be, no sufficient ground has been shown for depriving him of his office, and reliance is placed on the ruling of this Court in *Eravanni Revivarman* v. *Ittapu Revivarman* (I. L. R., 1 Mad., 153).
[174] We have fully considered the observations made by the learned Judges by whom that case was decided, and we agree that the Court should remove from office a Karnavan only when a strong case is made out to show his unfitness for the office. But the circumstances to which we have adverted appear to us to establish such a case. For the reasons recorded in the connected appeal, we have arrived at the same conclusion as the Subordinate Judge as to the invalidity of the lease to Mr. *Tod*; and although, if this lease had stood alone, we might have considered its extreme improvidence did not justify us in depriving the respondent of his position, yet, when taken with the conduct he has for some years pursued, it affords the strongest evidence that he is unfit for his position, and that the management of the tarwad estate can no longer be left in his hands with due regard to the interests of the family. The granting of the lease is not an isolated act; it is a wilful misuse of his powers, following on a course of conduct in which he persistently displayed disregard for the interests of the tarwad and violated the contract which had been imposed on him to restrain his irregularities.

We must therefore decree the appeal, and, reversing so much of the decree of the Court of First Instance as dismissed this portion of the relief claimed, declare that the respondent be, and is, removed from the office of Karnavan, and that the first appellant, as the Anandravan next in seniority, be appointed in his place.

The respondent must bear the appellants' costs of this appeal.

Judgment in Appeal No. 108 of 1880:—The questions raised in this appeal are the following:—

Has the Karnavan of a *Malabar* tarwad power to make a lease of tarwad property for 99 years? If he has such power in certain circumstances, or under certain conditions, did such circumstances or conditions exist as to justify the Karnavan in the case before us in making such a lease to the appellant? and lastly, if the power is, in certain circumstances, possessed by a Karnavan, and the circumstances existed which ordinarily would have justified its exercise, was the Karnavan in the present case precluded from exercising it by a special contract made with his Anandravans? In comparing the incidents of property held by a joint Hindu family subject to the *Mitakshara*, with those of **[175]** property held by a *Malabar* tarwad, there are some marked distinctions. The law governing the property of a tarwad has not reached the same stage of development as the law regulating the joint property of a Hindu family. Not only in the former case is the succession traced through females, but the property is indissoluble, so that "the member of the family may be said rather to have rights out of the property than rights to the property (*Mayne*, H L., § 264). It is not an uncommon practice that the conveyance of lands purchased is taken not in the name of any members of the family, but in the name of the family deity. The family and not the individual is, what we may term, the social unit. The property acquired by any member of the tarwad, if undisposed

of in his lifetime, falls into and becomes part of the common stock, and descends neither to his offspring nor exclusively to those of the tarwad with whom by birth the acquiring member was most closely connected. The individual right of the members of the tarwad is so feeble that it is not competent to any one of them to insist on a partition. The males take interests in the tarwad property which endure only for their lives, and do not pass to their offspring, nor are available for the satisfaction of their private debts. Nevertheless, the management of the property is in *Malabar* ordinarily vested in the senior male, and hence (as is asserted to have happened in the tarwad whose property is the subject of this litigation) a natural feeling of paternal affection often conflicts with duty to the tarwad.

The respect for elders, which is a marked feature of all Hinduism, is nowhere stronger than in *Malabar*, and, consequently, although the individual interest of the manager of a tarwad in tarwad property is considerably less than that of a manager of a Hindu family, he has, in the management of the tarwad property, somewhat larger powers than are accorded to a Hindu manager. While, equally with a manager of a joint Hindu family, he is incompetent to aliene the estate without the consent of the other members of the tarwad, except to supply the necessities of the tarwad, or to discharge its obligations, he cannot only singly make leases at rack-rents ordinarily for the term of five years for cultivation, but leases with fines repayable on the expiry of the terms in the nature of mortgages (kanoms), and mortgages (otti), in which little more than a right to redeem [176] may be left to the family, *Edathil Itti* v. *Kopashon Nayar* (1 M.H.C. R., 123). We have not been able to ascertain that he has ordinarily power to make any other dispositions of the property than such as are sanctioned by local usage (1 M. H. C. R., 123) and although this Court ought, so far as it is justified in sodoing, to construe liberally the powers which managers are competent to exercise so as to enable them to deal with tarwad property as it would be dealt with by a prudent owner for the benefit of the family, and to interpose no unnecessary obstacles to the employment of property in new industries, in so doing it undertakes what in some cases may be no easy duty—the determination of what acts are and what are not beneficial—and it cannot lose sight of the fact that the office of Karnavan is fiduciary, *Koiloth P. M. Koran* v. *P. M. C. Nair* (2 Mad. Jur., 117), and that a Court has no authority to confer on Karnavans larger powers than such as are sanctioned by usage.

If those powers are insufficient to secure to tarwads the full beneficial enjoyment of their estates, or if they are so limited as to interpose obstacles to the establishment of new industries, the extension of such powers must be sought from the Legislature and not from the Courts. As to the question with which we are concerned—whether it is competent to a Karnavan to grant a lease for 99 years—no evidence has been adduced in this case which would warrant us in finding that by local usage the Karnanvan has such power, and the Subordinate Judge states he is not prepared to hold it to be within the ordinary powers of the Karnavan. Nevertheless, had the decision of the present appeal turned on this point, we should have been disposed, in view of the importance of the question, to direct further inquiry. Leases for long terms may be detrimental, if not to the present owners of an estate, at least to their successors. Leases whereby at the end of the term the properties are returned to the owners deprived of much that constituted their value, as by the denudation of forests or exhaustion of mines, may be highly detrimental. On the other hand, leases for long terms may not only be beneficial to the present owners of property, but equally or even more so to their successors, and, unless a long term is granted, it may be impossible to secure these benefits. Building leases are

[177] probably unknown in *Malabar*, but they afford an illustration. Ordinarily, a lessee will not take such a lease except for a long term of years, but conditions are introduced which not only secure to the owners rent as high or higher than would be paid for the use of the land for agricultural purposes, but to the successors of the owners the reversion of the property with its value greatly enhanced.

But, although building leases may be unusual, if not unknown in *Malabar*, there might probably be found there, as are found in other parts of *India*, leases granted for long terms of years to secure the reclamation of land and the conversion of an estate which at present brings but small returns into an estate yielding a gradually increasing rental and reverting to the owners with its value greatly enchanced.

The lease which the appellant has obtained from the Karnavan is a lease for cultivation, and it is argued in support of it that it is beneficial to the family. There is no proof of any family necessity to justify it, and the sole ground on which it can be supported (if it be within the powers of the Karnavan to grant so long a term) is that it is such a lease as would be made by a prudent owner. If, on the face of it, and in reference to the circumstances, it appeared to be so, we should, as we have said, have directed further inquiry as to local usage. But the lease, on the face of it, is not such as any prudent owner would enter into. There are absolutely no conditions imposed on the lessee to secure the cultivation of the land. He may, if he pleases, leave the land untilled so as to bear no fruits from which the rent could be obtained and return it in the same condition in which he received it. The boundaries of the land are given, but there is no specification of its extent. It is, however, stated by the Subordinate Judge, and it appears to have been admitted in his Court that the land within the boundaries is in extent no less than 120 square miles or 76,800 acres. The Subordinate Judge, who has considerable local experience, estimates the renting value of land for coffee-planting at the least at one rupee per acre. Of course, in so large an area some, and it may be a great deal of, land is unfit for cultivation, and, although the appellant's Counsel is unable to state what is the extent of the land demised, he asserts it is less than the extent stated by the Subordinate [178] Judge. Assuming that it is considerably less, and that not one-half the extent estimated by the Subordinate Judge is culturable, can it be said that a fine of Rs. 500 paid by a promissory note, and a rent of Rs. 200 per annum, is such a return as it would be beneficial to the family to secure at the expense of deriving no other benefit from their property for a term of ninety-nine years? It is shown they obtain almost so much from forest produce.

It lay on the appellant to prove that this bargain, apparently so unconscionable, was for the interests of the tarwad or such as would be made by a prudent owner. He has failed to do so, and the Subordinate Judge rightly declared the lease invalid.

The appellant had, as we have stated in the connected appeal, previously obtained a license from the Karnavan, authorising him to fell timber on the estates of the tarwad. In setting aside the lease of the lands the Subordinate Judge has also declared invalid the license to cut timber. We have pointed out the effect of that license in the connected appeal. As soon as the advance is repaid, it will be competent to the tarwad to revoke it. But, although the respondents insisted on it as proof of the improvidence of their Karnavan, they did not, in this suit, seek relief in respect of it, and the observation of the

Subordinate Judge will not affect the appellant's right under the license. As the decree is limited to the relief sought, it is unnecessary to interfere with it. The decree is affirmed and the appeal is dismissed with costs.

NOTES.

[KARNAVAN—REPRESENTING THE TARWAD—

In a properly brought suit the Karnavan represents the members of the tarwad and they are bound by the decree :—(1896) 20 Mad. 129 ; (1901) 24 Mad. 658 ; (1903) 27 Mad. 375=16 M.L.J., 307=1 M.L.J., 183 ; (1905) 29 Mad., 390 F. B., where the principle was referred to for the case of Reversioners under Hindu Law.

[3 Mad. 178]

APPELLATE CRIMINAL.

The 27th April, 1881.

PRESENT :

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

In the matter of the Petition of Khaja Mahomed Hamin Khan and another.*

Criminal trespass by co-owner—Indian Penal Code, Act XLV of 1860, sec. 297.

A, B, C and D were co-owners of a plot of land in which they were accustomed to bury their dead ; A and B opened a saw-pit close to the graves of D's relatives, but did not disturb any of the graves.

[179] *Held*, that they were wrongly convicted under Section 297 of the Indian Penal Code.

THIS was a petition to the High Court under Sections 294 and 297 of the *Criminal Procedure Code*.

Mr. *Johnstone* for the Petitioners.

The facts and argument in this case appear in the following Judgment of the Court (TURNER, C.J., and HUTCHINS, J.)

Judgment :—We do not think that the offence has been established on the facts found.

We understand the Magistrate to find that the complainant, the accused, and one of the witnesses were co-owners of a plot of land of which a portion had been recently sold by them as a site for a market ; that in the portion of the plot remaining unsold they have been accustomed to bury their dead ; and that

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* Petition No. 132 of 1881 against the conviction and sentence of E. C. Johnson, Acting Joint Magistrate, Godavari District, in Case 57 of 1880, dated 8th January 1881.

†[Sec. 297 :—Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place or sepulchre or any place set apart for the performance of funeral rites, or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both.]

Trespassing on burial places &c.