

## APPELLATE CIVIL.

*Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.*

ACHUTA (PLAINTIFF), APPELLANT,

and

MAMMAVU AND NINE OTHERS (DEFENDANTS), RESPONDENTS.\*

1886.  
Dec. 20.  
1887.  
April 21.

*Civil Procedure Code, ss. 335, 623—Limitation Act—Act XV of 1877, sch. II, art. 11—Order disallowing claim in execution proceedings—Review of judgment—Malabar law—Personal decree against karnavan.*

Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which arose in the case but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for his omission to bring the decision to the notice of the Court at the first hearing, and the application for review of judgment was granted.

A sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings, an objection petition was put in stating that the shops were sridhanam and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale:

*Held*, that upon the facts found the plaintiff acquired nothing under the Court sale.

*Per cur.* An order rejecting a claim petition under section 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree. *Veláyuthan v. Laksmana*, I.L.R., 8 Mad., 506, followed.

SECOND appeal against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Appeal Suit No. 342 of 1884, reversing the decree of B. D'Rozario, Acting District Múnsif of Cannanore, in Original Suit No. 462 of 1883.

This was a suit for possession of five shops, together with arrears of rent.

In Original Suit No. 473 of 1876 on the file of the District Múnsif of Cannanore, the present plaintiff obtained, on 20th October 1880, a personal decree against Puckroo Cutty, in execution of which he attached the shops in question, being the property of the Ayamandagath tarwad of which the judgment-debtor was karnavan. Objections were made to the attachment by the wives

\* Second Appeal No. 506 of 1885.

ACHUTA  
MAMMAVU.

of defendants Nos. 1 to 5 on the ground that the shops had been given away as *sridhanam* (exhibit L), but the objections were disallowed and the shops were sold in execution of the decree to Anantha Kamati, whose interest was afterwards assigned to the present plaintiff, possession not having been given under the execution sale. Defendants Nos. 6 to 10 were in possession as tenants of defendants Nos. 1 to 5.

The order rejecting the claim petition under section 335 of the Code of Civil Procedure, Act VIII of 1859 (re-enacted in section 335 of the Code of Civil Procedure of 1882) which was filed in this suit as exhibit L, was not appealed against within the period of a year.

The District Munsif decreed in favor of the plaintiff, but his decree was reversed by the Subordinate Judge on the ground that the decree in the previous suit was not passed against Puckroo Cutty as *karnavan*, and that the decree debt was not a *tarwad* debt.

The plaintiff preferred this second appeal which came on for hearing before Hutchins and Parker, JJ., on 21st October 1885 and was dismissed on the ground that the appellant claimed under a merely personal decree.

The appellant filed on the 17th December 1885 a petition for review of the judgment of Hutchins and Parker, JJ., on the ground that the case was governed by the decision of the High Court in *Veláyuthan v. Lakshmana*, I.L.R., 8 Mad., 506, of which the report had not been published until a month after the hearing of the second appeal. The review petition was admitted by Parker, J., on 6th March 1886 and now came on for hearing before Muttusámi Ayyar and Parker, JJ., Hutchins, J., having meanwhile resigned.

Mr. *Wedderburn* and *Srinivasa Rau* for appellant.

The order rejecting the claim petition (exhibit L) not having been appealed against within a year acquired the force of a decree under the ruling of the High Court in *Veláyuthan v. Lakshmana*, I.L.R., 8 Mad., 506. The then petitioners would accordingly be estopped from denying the title of the execution purchaser, and the respondents who claimed through them are subject to the same estoppel.

Mr. *K. Brown* and *Sankara Menon* for respondents objected that the subsequent publication of a decision by the High Court was not a sufficient reason for granting a review of judgment and

cited *Jonnemjoy Mullick v. Dassmoney Dasse* (I.L.R., 8 Cal., 700), but this objection was overruled.

ACHUTA  
v.  
MAMMAVU.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

JUDGMENT.—The property in dispute in this case consists of five rooms, which are used as shops by respondents Nos. 5—8 who claim to hold them under respondents Nos. 1—5, and which were similarly used also by defendant No. 7, since deceased. It is conceded that the shops originally belonged to a family in North Malabar called the Ayamandagath-tarwad. In Original Suit No. 473 of 1876, on the file of the District Múnsif of Cannanore, the appellant, Achuta Mallen, obtained a money decree against one Puckroo Cutty on the 20th October 1880, and, in execution of it, he attached the shops and some other property. Objections were made to the attachment by the wives of respondents Nos. 1 to 4, and defendant No. 3 since deceased, on the ground that the shops were given away as sridhanam or dower to the former; but their claim was disallowed by the District Múnsif upon investigation, and the shops were thereafter sold in execution. One Anantha Kamati purchased them for Rs. 500 on 25th October 1880, and upon his death his sons transferred their interest to the appellant. On Anantha Kamati proceeding to take possession by right of purchase, he was obstructed by respondents Nos. 1 to 5, and upon his application under section 335 of the Code of Civil Procedure, the District Múnsif referred him to a regular suit in September 1882. As the assignee of the purchaser in execution of the decree in Original Suit No. 473 of 1876, he instituted the present suit, his case being that the decree debt was incurred for tarwad purposes, that the execution-debtor, Puckroo Cutty, represented his tarwad, and that by virtue of the Court sale and of the transfer from the representatives of the purchaser he was entitled to possession. Respondents Nos. 1 to 4 and defendant No. 3 contended that the shops were given to them as sridhanam on the occasion of their marriage to the females of Puckroo Cutty's tarwad, that the decree in Original Suit No. 473 of 1876 and the Court sale did not bind them, that Puckroo Cutty was not the karnavan of the tarwad at the time of the Court sale, and that the decree debt was not contracted for tarwad purposes. It was found by the Subordinate Judge that the decree debt was not a tarwad

ACHUTA  
v.  
MAMMAVU.

debt, and that the decree was not passed against Puckroo Cutty, as the karnavan of his tarwad. He held also that the shops were given as sridhanam to several females of the tarwad, that they were occupied by their tenants (defendants Nos. 6 to 10), and that rent was collected for them by their husbands (respondents Nos. 1 to 4). On these and other grounds the Subordinate Judge dismissed the suit with costs in appeal, and a second appeal was preferred from this decision; but no objection was taken at the hearing of the second appeal in reference to the order (exhibit L) disallowing the claim preferred by the ladies, on whose behalf the respondents profess to hold the shops. The second appeal was dismissed on the ground that the appellant claimed under a personal decree against a karnavan, and that he could not make out a title except against the parties to the decree while the respondents were in possession, and it was found that they had a good title to hold the shops either in their right or in right of their wives.

Thereupon the appellant applied for review of judgment on the ground that the respondents did not contest the above order (exhibit L) within one year, and that by their omission to do so, the order acquired the force of a decree as ruled in *Veldayuthan v. Lakshmana*(1). As it appeared that that decision was not published till a month after the hearing of the second appeal, it was considered that the appellant was not to blame for his omission to bring the decision to the notice of the Court when the second appeal was argued, and the application for review of judgment was granted.

The second appeal comes on therefore for disposal again, and it is urged in its support that the shops in dispute are tarwad property, and that the claimants whose objections were disallowed are the wives of respondents Nos. 1—4 and defendant No. 3, and that the respondents themselves have no independent title. It is urged on the other hand for respondents that the objection now taken was not taken at the hearing of the second appeal, and that there was no sufficient ground for granting a review of judgment.

It appears from exhibit L and the written statements on the record, that the right asserted in June 1880 was that arising from a gift of the shops to the wives of respondents Nos. 1—4 and

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(1) I.L.R., 8 Mad., 506.

defendant No. 3, whereas the transaction relied upon in the suit was a gift as *sridhanam* to those respondents themselves made on the occasion of their marriage.

The finding of the Subordinate Judge is that respondents Nos. 5 to 8 and defendant No. 7 are in occupation and respondents Nos. 1—5 collect the rent due to their wives and that the title to which their possession and management are referable is that asserted and disallowed in June 1880. There can be no doubt that, as was held in *B. Krishna Redu v. Lakshmana Shanbhogue*(1), when a summary declaration of want of title in the objector is made in answer to a claim made to property under attachment, and when it is not set aside by a regular suit within one year it becomes equivalent to a final adjudication against his right, and the right ceases on the expiration of one year to be available as a ground either of attack or defence. But the parties in whom legal possession vests and who are really interested are, according to the facts found, *not* the respondents Nos. 1—4 or respondents Nos. 5 to 8, but the wives of the former; they are not parties to the suit before us, and if it were necessary to consider this objection to the decree, we might deem it fit to order a new trial after making them parties to the suit.

But upon the facts found by the Lower Appellate Court, the appellant acquired nothing by the Court sale. It is found that the decree debt was not a *tarwad* debt and that the decree itself was not passed against Puckroo Cutty in his capacity of *karnavan* and the shops which on appellant's own showing belong to the *tarwad* could not pass to him by the Court sale. Unless the appellant proved his own title we do not consider that he is entitled to succeed, though it may be that the respondents are in possession without title, and may be liable to be evicted at the suit of the true owner. This was one of the grounds on which the former decision in second appeal proceeded, and we consider that the decision so far as it rests on it is not open to question. Though the respondents cannot plead the title of their wives in favor of the claim, they are not in a worse possession than trespassers, and it is open to them as parties in actual possession to insist that it should not be disturbed until and unless the appellant proves his title.

On this ground we are of opinion that this second appeal must fail and we dismiss it with costs.

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(1) I.L.R., 4 Mad., p. 308.