APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

SRI DEVI (DEFENDANT No. 10), APPELLANT,

and

KELU ERADI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1886. July 15. October 18.

Malabar law—Decree against karnavan and senior anandravan not binding on junior members—Civil Procedure Code, s. 13, expl. 5, s. 30.

A decree having been obtained against the karnavan and senior anandravan of a Malabar tarwad whereby the tarwad was dispossessed of certain land, the junior members of the tarwad who had not been impleaded in the suit sued to recover the land:

Held, that the plaintiffs were entitled to recover upon proof that the decree in the former suit was not substantially correct, and that they were not bound to prove *mala fides* on the part of their karnavan in defending the former suit as a condition precedent to recovery.

APPEAL from the decree of H. J. Stokes, Acting District Judge of South Malabar, reversing the decree of J. A. D'Rozario, Acting District Múnsif of Angadipuram, in suit 514 of 1883.

Suit by Kelu Eradi and seven others, junior members of the Patharikat Arikkare tarwad, against (1) their karnavan Unni, (2) their senior anandravan Manissa, (3) Sri Devi, Valia Thamburatti of the Puthia Kovilagam, and six others, to recover seven parcels of land.

In 1880, the predecessor of defendant No. 3 obtained a decree for the possession of this land in a suit to which defendants 1 and 2 were parties, and Krishnan, Cheria Thamburan of the Puthia Kovilagam (defendant No. 4), purchased this decree and obtained possession of the land.

Defendants 5—9 were tenants of defendant No. 4.

Defendant No. 3 having died, her representative was impleaded as defendant No. 10.

The Múnsif dismissed the suit. Plaintiffs appealed.

The District Judge decreed the claim. Defendant No. 10 appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

* Second Appeal 982 of 1885.

SRI DEVI v. KELU ERADI.

Gópálan Náyar for appellant.

The Acting Advocate-General (Mr. *Shephard*) for the respondents.

JUDGMENT.—The lands in suit originally belonged to the tarwad now consisting of the plaintiffs (respondents) and defendants Nos. 1 and 2, the karnavan and senior anandravan of the tarwad.

It is the case for the appellant that the jenm right was in 1839 sold to her predecessor in title the then Thamburatti of the Puthia Kovilagam; that at the time of this sale they were held on an outstanding kánam by one Unnian; and having been demised back on kánam by the Kovilagam to defendant No. 1 as karnavan of his tarwad, the latter in 1858 sued the tenants in occupation to eject them, on which occasion defendant No. 1 in his plaint sued as holding on a kánam demise, from the Puthia Kovilagam. This was in original suit 680 of 1858. The Kovilagam, in original suit 172 of 1879, sued the present defendants, Nos. 1 and 2, and others, tenants.

The defendants in that suit denied the alleged sale of the jenm right to the properties then and now in suit; and the present defendant, No. 2, pleaded that the admission of his karnavan (present defendant No. 1) in the suit in 1858 was false and fraudulent; and the junior members of the tarwad now sue to establish their jenm right.

In the suit in 1879 the appellant's jenm title was held proved, though the finding was that a document which was produced to prove it was not genuine: the admission of defendant No. 1 in 1858 coupled with other facts was, however, considered sufficient to entitle the Kovilagam to a decree: in execution of which the tarwad was dispossessed.

In the present suit the District Múnsif held that the admission of defendant No. 1 in 1858 was made in good faith, and is binding on the tarwad. A document, purporting to be the jenm deed of 1839, was produced in this case, and the District Múnsif thought it certainly was not a genuine document, but the introduction of a fabricated document was held not sufficient to prove that the admission of defendant No. 1 in 1858 was the result of fraud and collusion between the defendant No. 1 and the Kovilagam against the rest of the tarwad.

The District Judge held that the other members of the tarwad

are not bound, nor even affected, by the admission of their karnavan in 1858; and that that admission was false, there having been no sale of the jenm right to the Kovilagam in 1839, and that it was made by defendant No. 1 in fraud of his tarwad to oblige the representative of the Kovilagam whose kariasthan (agent or manager) he was, and at a time when he was not managing the affairs of the tarwad, nor living with the family. As showing that the Kovilagam did not acquire the jenm title in 1839, the Judge says the plaintiff in the suit of 1879 did not know on what grounds or on what documents to base the alleged title; and this alone (he says) is sufficient to show the alleged deed of sale to be a forgery. Decree was accordingly passed in favor of the respondents.

It is contended in appeal that it lay upon the respondents to prove affirmatively that the admission of defendant No. 1 in 1858 was made fraudulently; that a claim to set aside an admission as fraudulently made is barred by time; that it is not alleged that there was any fraud on the part of defendant No. 2 in the matter of original suit No. 172 of 1879, to which he was a party; that on the contrary, defendant No. 2 and the other defendants in that suit then pleaded that the admission of defendant No. 1 in 1858 was fraudulent, and the suit was fully contested in this respect; and that where a suit has been so defended, the tarwad should not be permitted to have the same issue tried over again on an allegation of fraud in respect of admission made by the karnavan in 1858, even if such suit be not barred by time.

For the respondents, it is contended that the District Judge finds fraud on the part of the karnavan established; and, as to the senior anandravan being a party, that this cannot estop the other members from suing, as the anandravan could not represent the tarwad.

We shall later on refer in more detail to the Full Bench case; *Ittiachan* v. *Velappan*.(1)

It was sought in the present appeal to distinguish the cases disposed of by the Full Bench from the present, as relating only to property attached or sold in execution of a decree; but we must not overlook the fact that regard was had in the cases then under consideration to the laxity of procedure which for many years

(1) I. L. R., 8 Mad., 484.

SRI DEVI v. KELU ERADI.

prevailed in Malabar, and to the extent to which concession might be made in such cases.

The substantial question then is, whether the defendants Nos. 1 and 2 sufficiently represented the respondents' tarwad in original suit 172 of 1879, and whether the decision therein bars the present suit. The issue whether the jenm title was in the appellant's Kovilagam or in the respondents' tarwad was also a material issue in the former suit, and the respondents' karnavan and senior anandravan were party defendants. The former decision would clearly be a bar if the respondents could be taken to have been parties to that suit, unless they showed that those who were actually parties did not defend the title of the tarwad *bonâ fide*. Whether this can be taken to be so in this case is the real question which we have now to consider.

The decision in *V. Naráyanan Nambudri* v. *V. Nárayanan Nambudri*(1) is a clear authority for the position that Explanation V of s. 13 of the Code of Civil Procedure is not limited to the case of a suit in which the provisions of s. 30 were complied with, and we should follow it if subsequent decisions did not throw doubt upon it. In that case it was also found as a fact that the plaintiff in the second suit assisted the karnavan in defending the first suit.

This decision was not followed in *Kombi* v. *Lakshmi*.(2) It was there held that the decree against a person who happened to be the karnavan of a tarwad is not necessarily binding on the tarwad in the absence of fraud, and that if it is sought to bind the tarwad, the procedure laid down in s. 30 must be followed. In that case, a sale in execution of a decree against one who was a karnavan was set aside at the instance of the other members of the tarwad.

The decision in *Gopalan* v. *Valia Tamburatti*(3) proceeded on the ground that a perpetual lease granted to a tarwad was forfeited by the denial of the landlord's title by the karnavan of the tarwad, and that, unless the karnavan was shown to have acted in fraud of the tarwad, in denying the title, the leasehold interest which was forfeited in law could not be restored at the suit of an anandravan. Alluding to s. 30 of the Code of Civil Procedure, the Court then observed that it might be doubted how far the

(1) I.L.R., 2 Mad., 328. (2) I.L.R., 5. Mad., 201. (3) I.L.R., 7 Mad., 87.

practice would be now upheld whereby the karnavan was recognized as representing the tarwad and entitled to sue or defend suits as such representative, without the association of the other members of the tarwad, who were nevertheless held bound by decrees passed in such suits unless they showed *mala fides* in their representative.

In this state of decisions, the legal effect of the procedure which had prevailed in Malabar was considered by the Full Bench in *Ittiachan* v. *Velappan*.(1) The grounds of decision unanimously adopted by the Court were (I) when the karnavan of a tarwad was not impleaded as such in a suit, and there was nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property could not be attached and sold in execution of a decree, even though it was proved that the decree was obtained for a debt binding on the tarwad, and (II) that, although the property of a tarwad might be attached and sold in execution of a decree when the karnavan was sued as representative of the tarwad, members of the tarwad who were not parties to the proceedings and had not been represented in the manner prescribed by the Code of Civil Procedure were not estopped from showing that the debt for which the decree was passed was not binding on the tarwad. The principles on which the grounds of decision were formulated are (I) that a decree can only operate *inter partes*; (II) that if it is desired to extend its operation to those who are not parties to the suit, or who do not claim under them, the procedure prescribed by s. 30 should be followed; and (III) that a concession can legally be made in view of the irregular practice in Malabar only to the extent indicated by the ruling of Privy Council in *Bissessur Lall Sahoo* v. *Maharaja Lachmessur Singh*.(2) In that case the Judicial Committee observed that, although there may have been some irregularity in drawing up the decrees then in question, they were substantially decrees in respect of a joint debt of the family, and against the representative of the family and might be properly executed against the joint family property. Hence it was held by the Full Bench that the intention to implead the karnavan as representative of the tarwad must appear from the proceedings in the first suit, and that the debt recognized by the decree must be binding on the entire tarwad.

(1) I.L.R., 8 Mad., 484. (2) L.R., 6 I.A., 237.

SRI DEVI v. KELU ERADI.

Applying these principles to the case before us, we do not see our way to saying that the respondents were bound by the decree in the suit of 1879, on the ground that their karnavan then in good faith opposed the appellant's claim. There can be no doubt that the association of karnavan and the senior anandravan may be taken to disclose an intention on the part of the appellant to implead the respondents' tarwad; but upon the facts found, we must hold that the respondents have shown that the former decree was *not* substantially correct. The Full Bench decision precludes our holding that the decision against a karnavan is binding on the members of the tarwad unless they prove *mala fides* in him, in a suit to which they were not actually or constructively parties; if they were so, it would be immaterial whether the karnavan acted in good faith or otherwise: if they were not parties actually or constructively, it is open to them to show that the former decree is substantially incorrect, and therefore is not binding on them.

It is urged that the Judge was in error in directing that the mesne profits be ascertained in execution. But it is provided by s. 212 of the Code of Civil Procedure that the Court may determine the amount of mesne profits by the decree itself, or may direct an inquiry and dispose of the same by further orders. This objection to the decree appealed against must then be over-ruled.

Another contention is that the suit is barred by limitation. The respondents sued to recover certain lands of which they lost possession subsequent to 1883. Assuming that they are entitled to recover possession, their claim is certainly not barred by lapse of time. In referring to the admission made by defendant No. 1 in 1858 as fraudulent, the respondents only intended to anticipate a plea on the part of the appellant and to avoid it.

As to the objection that the burden of proving fraud lay on the respondents, the question does not arise upon the facts found, inasmuch as both parties produced evidence in support of their several contentions, and the respondents are found to have proved the jenm title of their tarwad. The result is that the second appeal fails, and we dismiss it with costs.