declaration that some property not alienated is subject to her claim for maintenance, and dates her cause of action from the alienation of some other property. She does not state that her husband is about to alienate this particular property, or that she has any legal lien specially upon it, but merely that her husband has alienated other properties with a view to defraud her of her maintenance. SAMINATHA v. RANGATHAMMAL.

It is urged that the right to have maintenance made a charge upon immovable property is an equitable relief only and not a real right. This contention cannot be supported after the Full Bench decision in *Ramanadan* v. *Rangammal*(1), though in any case, s. 43, Civil Procedure Code, would operate as a bar to such a suit.

We are constrained to hold that plaintiff has alleged no cause of action which would entitle her to the declaration prayed.

The decrees of the Courts below must be reversed, and the suit dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

MALLAN AND OTHERS (PLAINTIFFS), APPELLANTS IN S.A. 730 OF 1888, 1889. Feb. 22.

v.

PURUSHOTHAMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

PURUSHOTHAMA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS IN S.A. 1040 OF 1888,

v.

MALLAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Land dedicated to family idol—Land excluded from partition of family property and declared inalienable—Subsequent purchase from Escheat Department of Government—Sale in execution.

By a partition deed by the six members of a Hindu family it was provided that part of the land of the family should be set apart for the maintenance of the family idol and should be inalienable and the rest of the land was divided equally.

Subsequently the Government claimed the dedicated land as an escheat, and sold it to the members of the family jointly, of whom one built a house on part of

(1) See ante, p. 260. * Second Appeals Nos. 730 and 1040 of 1888.

MALLAN v. PURUSHOTHAMA.

it—less than one-sixth—with the consent of the others. The house and its site was sold in execution of a decree against the builder:

Held, that the other members of the family were not entitled to have the house removed or the sale cancelled.

SECOND APPEAL against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 265 of 1887, modifying the decree of S. Raghunatha Ayyar, District Munsif of Tellicherry, in original suit No. 294 of 1886.

Suit to cancel the sale of certain land, described as a house-site, sold to defendants Nos. 1 and 2 in execution of a decree obtained by them against defendant No. 3 in small cause suit No. 1216 of 1884 on the file of the Subordinate Court of North Malabar, and praying that a house built by defendant No. 3 thereon be removed.

The land in question was described in the plaint as the property of a tarwad of which plaintiff and defendant No. 3 were members. The plaintiffs' case (which had also been set up in a petition (dismissed) filed by them objecting to the execution of the decree referred to above) rested on a deed of partition (exhibit A) executed in 1863 by the father (Krishna Mallan) and the five uncles of the plaintiffs including the father of defendant No. 3.

Exhibit A was as follows:—

"We six have with full will agreed to divide in the undermentioned proportion the properties consisting of those which are ancestral to us six and of those which were acquired by me Krishna Mallan by my efforts with the assistance of the ancestral money.

"The paramba called theruvath thazhe in which we raised (*sic*) and which is to the west of the road in the said vatikkakem, the upstair patinhantta house (house facing east) therein, and theruvathathaya vatteri paramba which is to the east of the road, were acquired as jenmam by me Krishna Mallan. The upstair thekkini house, padi [gate], cow-shed and vatikkini, which are in the said first paramba and the upstair kizhekkini house in the second paramba, were built by Krishna Mallan.

"It is agreed that the said two parambas which are worth Rs. 2,000 shall, without being divided, be reserved to us six with equal rights, that all incomes annually arising from the said two parambas be collected by me Krishna Mallan as long as I am alive and, after me, by my sons, and that with those incomes the

worship of the family god and Easwara savas [divine worships] which are being performed from time of old for the prosperity of all the members of the tarwad, be performed for ever and ever.

"It is agreed that Krishna Mallan, Gopala Mallan and Atchutha Mallan shall with their respective families live separately in the upstair patinhantta house in the above-mentioned first paramba, that Rama Mallan, Lekshmana Mallan and Anantha Mallan shall with their respective families live separately in the upstair kizhekkini house in theruvath thazhe vatteri paramba, the eastern and southern verandahs thereof being excluded, and that the upstair thekkini house, padi, cow-shed and vatikkini which are in the first paramba, and the eastern and southern verandahs of the upstair kizhekkini house in the second parambas shall for ever and ever remain in the exclusive possession of Krishna Mallan and his children and be enjoyed by them.

"It is agreed that neither the said six persons jointly nor each one severally can give under a document or alienate the said two parambas and the houses therein to any other person on any right, whatever, whether on kanom or on mortgage and that, if done so, it shall not be valid.

"After deducting the properties which are reserved undivided as said above, the remaining properties which are agreed upon to be divided are those which were acquired by Krishna Mallan by his efforts with the assistance of the ancestral money."

The document then proceeded to set out the separate share of the six executants.

The land in question was admittedly part of the two parambas with regard to which the provisions of the partition deed are given above: and the plaintiff claimed that by reason of those provisions it could not be sold in execution of the decree against defendant No. 3, &c. It appeared that in 1871 the Government claimed the land as an escheat, but before it was declared to be such, the surviving executants of exhibit A and the representatives of the others jointly purchased from Government the jenm right therein, the price being paid in six equal shares and the sale-deed being executed in the name of the six persons. Under these circumstances the District Munsif finding that the land in question was less than the one-sixth share of defendant No. 3 dismissed the plaintiff's suit.

On appeal the District Judge said:—

MALLAN v. PURUSHOTHAMA.

"I accept Munsif's finding that the ground forms part of a paramba which is the undivided common property of all the six co-parceners of a family governed by Hindu Law, but I cannot understand how in this view he upheld the sale. So long as the six co-parceners continue undivided each and every one of them has a joint interest over every inch of the ground; how then this particular portion of the paramba could be sold as the debtor's sole share I cannot see. Munsif's argument is that the portion sold is less than what would fall to the debtor's share, but his share is not ascertained, and therefore any fractional part of an unascertained portion cannot be sold. The right of all the co-parceners is co-extensive over every portion of the ground and no one particular portion, therefore, could be sold as exclusively belonging to the judgment-debtor. All that could have been sold is the debtor's right, title and interest to a one-sixth share of the entire undivided property and the purchaser in auction may sue for a partition of his share. The debtor had no exclusive saleable interest in the portion sold, it being common to all the six co-parceners, of whom plaintiff is admittedly one. He has therefore a right to set aside the sale so far as the ground is concerned.

"As for the house it is the exclusive property of the debtor. He built it and it is saleable for his debt. I cannot see what right the plaintiff has to compel the purchaser to remove it.

"The result is that the sale of the ground is set aside as against plaintiff and his suit allowed so far dismissing it otherwise.

"Costs in these circumstances will be borne by each party throughout. Decree is modified accordingly."

Against this decree the plaintiffs preferred second appeal No. 730 of 1888, and defendants Nos. 1 and 2 preferred second appeal No. 1040 of 1888.

Subba Rau for plaintiffs.

Mr. *Gantz* for defendants Nos. 1 and 2.

The arguments adduced on these second appeals appear sufficiently for the purpose of this report from the judgment of the Court (Muttusami Ayyar and Shephard, JJ.).

JUDGMENT.—The paramba on which the house stands was no doubt set apart by the partition deed (exhibit A) for the use of the family idol, excluded from partition and declared to be inalienable. But in 1871 the Government claimed the paramba by right of escheat and the appellant's family purchased it from the Govern-

ment, each of the six co-parceners paying a sixth part of the price. Since that time defendant No. 3 built the house now in dispute on a portion of the paramba with the consent of the plaintiffs and the other members of the family. The Government was entitled by right of escheat to put an end to the arrangement contained in exhibit A in favor of the family idol, and defendant No. 3 was therefore at liberty as a purchaser to elect either to conform to or to repudiate the original trust. Having regard to his conduct and that of the family in regard to the house-site in dispute subsequent to 1871, it is impossible to reconcile it with an intention to continue the original trust, at least in regard to the house and its site. We are unable to adopt the suggestion that the original trust continued to attach to the house-site in dispute after 1871.

It is next urged that the house-site must be treated at all events as joint family property, that although defendant No. 3 might be entitled to one-sixth share in it, yet he had no specific property in the whole site on which he built the house and that on this ground the plaintiff's prayer that the respondents should be directed to remove the superstructure should be allowed. It is no doubt true that defendant No. 3 had no exclusive property in the house-site, but under the circumstances of this case it would be equitable to infer an understanding among the parties that the site was to be deducted from the one-sixth share to which defendant No. 3 might be entitled if a partition were to be effected. It was certainly not the plaintiff's intention when they granted permission to defendant No. 3 to build a house that he should be evicted from it. Although they now desire to eject the respondents Nos. 1 and 2 because they are of a different caste, we are unable to hold that the equitable consideration which would be available to defendant No. 3 would not be equally available to the purchasers.

We are therefore of opinion that the decree of the Subordinate Judge ought to be set aside and that of the District Munsif restored, but we direct each party to bear his costs both in this Court and in the Lower Appellate Court.