PAPAYYA v. CHELAMAYYA.

The Court (Kernan and Muttusami Ayyar, JJ.) delivered the following

JUDGMENT.—The Munsif allowed after notice a review of an order under s. 629 and fixed a day to hear the case. There was an appeal to the Judge, and he confirmed the order under s. 629. Section 588 does not allow a second appeal against an order under s. 629. The order is not itself a decree. *Thaw Singh* v. *Chundun Singh* (1). We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

1888. Feb. 24. Aug. 30 Nov. 16.

ALAMI (DEFENDANT No. 2), APPELLANT,

and

KOMU AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

THE SECRETARY OF STATE FOR INDIA (DEFENDANT No. 1), APPELLANT,*

and

KOMU (PLAINTIFF), RESPONDENT.

Malabar Law—Will—Testamentary dispositions of tarwad property by last surviving member of tarwad, valid.

The last surviving member of a Malabar tarwad can make a valid testamentary disposition of the tarwad property.

APPEALS from the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in suit No. 21 of 1885.

Plaintiff Palatholathil Komu Menon sued (1) The Secretary of State for India in Council and (2) Pullayil Mommath for a decree declaring that a will, dated 24th November 1878, executed by Chindarama Pisharodi, was genuine and valid, and that under the said will plaintiff was entitled to the lands mentioned in schedules A and B of the plaint.

It was alleged that some of the lands were in plaintiff's possession, and that defendant No. 2 was in possession of the rest under a lease obtained from the Collector of Malabar, who had

(1) I.L.R., 11 Cal., 296.

* Appeals Nos. 80 and 105 of 1886.

taken possession thereof on the death of the testator under a claim of escheat.

The defendants pleaded, *inter alia*, that the testator who was governed by the Marumakkatayam law could not make a valid will.

The Subordinate Judge decreed in plaintiff's favor.

Appeal No. 80 was preferred by Pullayil Alami, the representative of defendant No. 2, and appeal No. 105 by the Secretary of State.

One of the principal questions argued was as to the right of the testator, the last surviving member of his tarwad, who died on the 8th November 1883, to dispose of the tarwad property by will.

The Acting Government Pleader (*Subramanya Ayyar*) for appellant in No. 105 and *Mahadeva Ayyar* for appellant in No. 80.

Bhashyam Ayyangar, *Sankaran Nayar* and *Sankara Menon* for respondents.

On this question the judgments of the Court (Kernan and Muttusami Ayyar, JJ.) were as follows :—

The next question necessary to be considered on the second issue is, had the plaintiff's father a legal right to dispose of the tarwad property by his will. The Hindu Wills Act passed on the 19th July 1870 does not apply in Madras except within the town of Madras. It is, therefore, necessary to see what was the legislation on the subject affecting the mufassal. The second sub-section of section III of the Regulation 16 of 1802 recognized the right of a Hindu to make a will of his property. But by Regulation 5, 1829, the prior regulation was modified as regards wills made by Hindus by declaring (section 4) that wills left by Hindus should have no legal force whatever except so far as their contents should be in conformity with the provisions of the Hindu Law according to the authorities prevalent in the respective provinces of the Presidency.

Upon these regulations and having regard to the decisions of the Privy Council in *Mulraz Lachmia* v. *C. V. R. Jaganadha Rau* (1) and in *Nagalatchmee Ammal* v. *Gopoo Nadaraja Chetty*(2), it was held in *Vallinayagam Pillai* v. *Pachche*(3), on appeal from Tinnevelly, that a Hindu without male issue might dispose of his

(1) 2 M.I.A., 54. (2) 6 M.I.A., 309. (3) 1 M.H.C.R., 326.

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property by will. That was a case of a Hindu governed by the ordinary Hindu Law.

In this case the parties are Hindus but subject to the special law of Marumakkatayam prevalent in South Malabar, under which the property of the tarwad is in the members jointly with right of survivorship. According to that law, the plaintiff's father could not dispose of the tarwad property or any part of it by will, nor could he make a gift of it *inter vivos* while there was any other member of the tarwad in existence, and such gift or will would in such circumstances be invalid.

Even of his own self-acquired property, though he might dispose of it *inter vivos*, he could not dispose of it by will against the tarwad, while any other member existed (*Ryrappan Nambiar* v. *Kelu Kurup*(1.)

But upon the death of all the other members of the tarwad the property of the tarwad vested in plaintiff's father as the only survivor of the tarwad. There was no other tarwad or person who had community with him, and the property became absolutely his. It is not doubted that if the property was his absolutely, he might have disposed of it, by act *inter vivos*, during his lifetime. It seems to me that the property was his absolutely. The law empowered the plaintiff's father to make a will subject to the limitation that its contents should be in conformity with the provisions of the Hindu Law according to the authorities prevalent in South Malabar. The Subordinate Judge has pointed out that in 1802 within a few years after South Malabar was taken possession of by the British, Major Walker, an eminent authority on the customs of South Malabar, reported to Government "that a Jemmakkaren (proprietor) having no legal heir may by his will leave his jenmam to such of his friends or acquaintances he may think proper; but if he should die intestate, the property becomes forfeited to the Rajah. In disposing of his jenmam by will, the testator, whether of high or low caste, may select his heir from any caste he pleases" (page 62, Edition of 1870, Cochin). The Subordinate Judge has referred to many cases which have from time to time been before the Courts in South Malabar and on appeal to this court, in which the question has been whether a member of a Malabar tarwad could by will dispose of property of a Malabar tarwad and also as to the

(1) I.L.R., 4 Mad., 150.

effect to be given to and the construction of such will. (See the document J, a will on which suit No. 268 of 1839 was brought). K is the petition and evidence and judgment in that suit.

L is another will, and M is the record of a suit No. 519 of 1875 in respect of the property given thereby to a devisee. N. is record of an appeal suit No. 308 of 1876 in respect of a will.

O is the judgment of the District Judge in that appeal, 22nd August 1876.

P is a document called a deed of settlement, dated 12th Kanni 1015 (26th September 1839).

Although the document is called a deed of settlement, it is in effect a will as it was not to operate until after the death of the executant.

Q is another document similar to R which is a will, dated 23rd April 1871, by a Vakil of the Munsif's Court at Calicut.

F is a will, dated 21st Medom 1031 (15th May 1856.)

G is a suit involving a question in respect of a will.

I is a judgment in suit G. I do not doubt that wills were well known to and used in South Malabar from the beginning of the century, although from the nature of the Malabar tarwad they could not be in such general use as amongst Hindus following the ordinary Hindu Law. I am unable to see that any of the provisions of the will in question in this suit are contrary to any provisions of Hindu Law prevalent according to the authorities in South Malabar, and I agree with the Subordinate Judge that it is a valid will according to the law by whichthe parties are bound.

MUTTUSAMI AYYAR, J.—The substantial question for decision in this appeal is whether document A is a will, and if so, whether it is valid. That it is a will, there is no room for doubt. It is designated to be a will, and the dispositions which it embodies, whether they are all valid or not, are clearly testamentary. The appellant's pleader questions its validity on two grounds, viz., (i) that according to Marumakkatayam usage by which the testator's tarwad was governed, he was not at liberty to make a will, and (ii) that the testamentary dispositions mentioned in document A are legally inoperative. With reference to the Marumakkatayam usage, it was urged further that testamentary power was unknown to it, and that if it were not regarded as inconsistent with such usage, it could not, at all events, include a power to disinherit

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attaladakam heirs or divided kinsmen. I now proceed to deal with these questions, and I take the last question first.

Assuming for a moment that a person governed by Marumakkatayam usage can make a will when he can alienate his tarwad property by gift *inter vivos*, I do not think that the existence of attaladakam heirs or divided kinsmen will make any difference. They might be entitled to succeed as divided kinsmen if the last survivor of a tarwad died intestate, and they might also stand between him and the Crown seeking to interfere by right of escheat; but as they have no community of interest with the testator, they are not entitled to question his alienation *inter vivos*. So early as 1855, Mr. Justice Holloway considered the question when he was the Subordinate Judge of Malabar, and said "If the deceased was the sole remaining direct heir of the common ancestor in the preferable line, the whole joint tenancy merged in her person, and she would be as to the right of alienation in precisely the same position as the absolute acquirer of the property, seeing that she is the final legal representative of such acquirer (Wigram on Malabar Law and Custom, page 84)."

The real question then is, whether as divided kinsmen, attaladakam heirs take by right of survivorship or of succession, and in *Katama Natchier's* case(1) it was held by the Privy Council, that when the property in dispute was self-acquired and as such separate property, there was no right of survivorship, that such right was the result of joint tenancy or coparcenary as regards the property in dispute and that self-acquired property, therefore, devolved on the widow or daughter in preference to the coparcener under the Mitakshara law. Again, in *Ryrappan Nambiar* v. *Kelu Kurap*(2) the self-acquired property of a person governed by Marumakkatayam usage was held to be liable for the debts of the deceased acquirer in the hands of the members of his tarwad. That decision proceeded on the view that self-acquired property was taken by the tarwad as the acquirer's heirs, because during his life it was at his absolute disposal, and I see no reason why the same principle is not applicable to the separate property of the sole surviving member of a Malabar tarwad. The only ground on which the appellant's pleader can rest his contention is that tarwad property is a perpetual entail and that there is no

(1) 9 M.I.A., 543. (2) I.L.R., 4 Mad., 150.

disposing power either *inter vivos* or testamentary except for the necessity, or the preservation of the tarwad, or for its benefit. There was an allusion made to such theory in regular appeal No. 10 of 1884. The denial of disposing power as the incident of a perpetual entail and of absolute property either in the collective tarwad, or in its sole surviving representative cannot be recognized as it introduces a theory of perpetuity in its most objectionable form. Though the appellant contends that the members of the Andale house are members of the testator's tarwad, yet the contention was negatived by the decision in appeal suit No. 49 of 1879 in which it was held that there was no community of interest between them. The conclusion then I come to is that the Subordinate Judge was right in not raising an issue as to whether the Andale people were attaladakam heirs.

* * * * *

The next question is whether a testamentary power can be recognized under the Marumakkatayam usage. That such a power has been recognized in the case of those who follow Hindu Law is clear from the course of legislation and of decisions in this country. I do not see my way to decline to recognize a similar power in Malabar subject to conditions similar to those prescribed with reference to Hindu wills, viz., first, that there is power to give *inter vivos* according to Marumakkatayam usage, secondly, that there is evidence of usage showing that testamentary power has long been exercised in Malabar, and, thirdly, that it does not override the right of survivorship which takes effect at once on the testator's death.

It appears from exhibits J, P, L, F and R that wills have been made in Malabar from 1826. There is an allusion to the practice in Major Walker's report in 1802. There is a similar allusion to wills in the 5th report of the Select Committee on the affairs of the East India Company, Volume II. In 1840 Mr. Strange thought the acquirer might alienate his self-acquisitions by will, but the Provincial Court objected to his decision and referred the matter to the Court of Sadr Adalat. The Sadr Court observed that the disposition could not be set aside unless some title was proved to the testator's property during his life, and that the mere circumstance of death could not originate a title which had previously no existence. (See Proceedings of the Sadr Court, dated the 25th September 1843).

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In original suit No. 467 of 1837 a will bequeathing self-acquired property to near heirs to the exclusion of the more remote was upheld on the strength of the opinion expressed by the law officer attached to the Court of Sadr Adalat. (See new document admitted in appeal.)

In 1854 the late Sadr Court admitted a special appeal from the decree in the Civil Court of Tellicherry in appeal suit No. 247 of 1852 on the ground that a karnavan had no authority to will away property to other than his heirs. (See Proceedings of the Sadr Court, dated 13th February 1854.)

In second appeal No. 534 of 1878, Mr. Justice Innes and myself held that self-acquired property which was not validly disposed of by the acquirer during his lifetime was not validly disposed of by will. In *Kallati Kunja Menon* v. *P. E. Menon*(1) it was contended by eminent Counsel that the self-acquisitions of land by a member of a Malabar tarwad were his separate property, that after his death, they lapsed into the tarwad, but if accepted by the members, they carried their obligations along with them. The Court, consisting of Sir Colley Scotland, Chief Justice, and Mr. Justice Holloway, observed that "when it is once established that the property was self-acquired, we are perfectly satisfied that an alienation, charge or other disposition *to take effect at once* will be perfectly valid." Though the validity of a testamentary alienation was not then in question, the decision was considered to contain a dictum that it could not take effect after the acquirer's death (if it was so intended) on the ground that the property was then merged in the tarwad. Though this dictum was followed in second appeal No. 534 of 1878, it was held that the self-acquired property remained in the hands of the tarwad liable for the debts of the deceased acquirer and thereby suggested that the tarwad took as heir and not by survivorship.

In second appeal No. 628 of 1884, a will made by the last owner of a tarwad in favor of an attaladakam heir was upheld in 1885.

Passing on to the documentary evidence in this case, five documents are referred to by the Subordinate Judge. The first of them is exhibit J. It purports to be a will, dated 28th March 1826, and it bequeaths what is said to be self-acquired property to one

(1) 2 M.H.C.R., 162.

branch of the acquirer's tarwad in preference to another, and the decision K upheld it against the disinherited branch. I am unable to accede to the suggestion made by the appellant's pleader that the document simply expressed the wish of the founder of a new tarwad as to how it was to be managed after his death. If it is intended to convey the impression that it was not a binding transaction, exhibit K sufficiently repels such inference.

The second document is exhibit P, dated the 26th September 1839. It is called a settlement, but it gives directions as to the management of acquired property after the testator's death. It states (paragraph 10) that "after my death, my brother Raman will have the same power that I now have in respect of properties mentioned in the fifth paragraph." Though it is called a settlement, it evidences an arrangement made in regard to management after the testator's death. The plaintiff's fifth witness proved that the provisions of the documents were accepted by the family.

The third document is exhibit L, dated the 26th May 1851. It purports to be a will, gives the testator's acquired property to the children of his sister's daughters, and contains directions in regard to its future management. It was upheld in 1876 when it was impugned by a person who claimed to be related to the testator.

The fourth document is exhibit F, dated the 1st May 1856. It purports to be a will and gives the property including his self-acquisition to his sisters and their issue and contains directions as to future management. It was recognized in exhibits G, H, I.

The fifth document R is dated the 23rd April 1871. It purports to be a will made by a vakil and states that "although it is not customary among Hindus to execute wills, as the wills of Hindus are considered valid by the Legislative Council, I make this will in regard to my self-acquired property." It then sets forth the testamentary arrangement made by him.

The foregoing documents show that from 1826 wills were made in Malabar in regard to self-acquired property generally regulating its future management and occasionally giving it to one class of heirs in preference to another. With these documents before me and with the opinions of writers on Malabar and the dicta of Courts of Justice, it is difficult to say that as a form of alienation, the practice of making a will was not in vogue at least from 1826. Although opinions have varied as to its validity,

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I do not see my way to holding that a will is not operative in Malabar unless some one of the conditions necessary to the validity of Hindu wills does not exist. Having regard to the decision of this Court in *Vallinayagam* v. *Pacheche*(1), I also think that if the testator is the sole owner of the property in suit, if he is competent to alienate it by gift *inter vivos*, and if no right of survivorship exists in any one else, and if all these requirements are satisfied as they are in the case before us, a testamentary power must be recognized. I come to this conclusion, not in the view that a testamentary disposition is the necessary logical extension of a power to give *inter vivos*, but on the ground that the leading case on Hindu wills is an authority for the application of the principle it embodies to the people of Malabar, a section of Hindus, though they follow a special usage, when there are traces in the evidence of the practice of making wills for more than fifty years.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1888.
October 16.
November 2.

NURDIN (PLAINTIFF), APPELLANT,

and

ALAVUDIN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Cause of action—Suit to cancel patta.

Plaintiff sued in a Civil Court to cancel a patta which he alleged was incorrect and fraudulently antedated by the defendant with a view to prevent plaintiff from taking steps to cancel it in a revenue court: a copy of the patta had been affixed to plaintiff's house:

Held, that the plaintiff had no cause of action cognizable by a Civil Court.

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge of Madura (West), confirming the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in suit No. 413 of 1886.

Plaintiff sued to cancel a patta which he alleged was not a proper one and was fraudulently antedated by the defendants with a view to prevent plaintiff from taking summary proceedings before the Revenue Courts under Act VIII of 1865 to compel

(1) 1 M.H.C.R., 326.

*Second Appeal No. 1271 of 1887.