amended and stamp duty paid, in accordance with the foregoing order, the Court delivered judgment as follows:—

JUDGMENT.—The respondent has now amended the plaint and paid the necessary stamp duty. We must therefore set aside the decree and remand the suit to the Subordinate Court in order that a revised decree may be passed in accordance with the amended plaint after such further inquiry as may be necessary.

The costs hitherto incurred will be provided for in the revised judgment.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

BYATHAMMA (DEFENDANT No. 71), APPELLANT,

v.

AVULLA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 35), RESPONDENTS.*

1891. Aug. 10, 11, 12, 13, 18.

Malabar Law—Customary Law of Mapillas—Multifariousness—Suit by Karnavan—Limitation—Evidence—Evidence Act—Act I of 1872, *s.* 35*—Petition and order.*

The plaintiff sued as the karnavan of a Mapilla tarwad to recover lands in the possession of the defendants who were a donee from and the descendants of a previous karnavan and their tenants. It appeared that the alleged previous karnavan had died less than twelve years before the suit was filed, but more than twelve years before the joinder, as a supplemental defendant, of one to whom he had conveyed certain property by way of gift five years before his death. An issue was raised as to whether the rights of the parties were governed by Makkatayom or Marumakkatayom law, and an order of a District Munsif reciting a petition to which the alleged previous karnavan was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karnavan of a Marumakkatayom tarwad. The rough draft of a plaint which had been filed by the alleged previous karnavan was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad:

Held, (1) that on the allegations in the plaint the plaintiff was entitled to maintain the suit alone, and that the suit was not bad for multifariousness;

(2) that the order and draft plaint were admissible in evidence for the above-mentioned purposes;

(3) *on the evidence*, that the plaintiff had succeeded to the office the previous karnavan as alleged, and that the previous karnavan had followed the

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* Appeal No. 125 of 1889.

BYATHAMMA v. AYULLA.

Marumakkatayom rule, although it was shown that other members of the family had dealt with property, described as self-acquired, under the precepts of Muhammadan law:

(4) that the suit was barred by limitation as against the donee above referred to, her possession having been adverse to the tarwad since the date of the gift.

Observations as to documents marked as exhibits without proof.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 31 of 1886.

The plaintiff sued as karnavan of a tarwad of Mapillas following the Marumakkatayom law to recover properties described in the plaint as "belonging to my and my karnavan's (the deceased Rayaroth Kunhi Soopi Haji) tarwad and acquired by Kunhi Soopi Haji with the profits of the tarwad." The defendants were persons in possession of the properties sought to be recovered and some of them in their written statements raised the plea (*inter alia*) of multifariousness. Soopi Haji was found to have died on 24th August 1874: the plaint in this suit bore date 13th August 1886; defendants Nos. 69, 70 and 71 were subsequently joined as supplemental defendants. Defendant No. 71, the donee from Soopi Haji above referred to, was not joined until after 15th December 1886. The further facts of the case appear sufficiently for the purposes of this report from the judgment.

Exhibit K, the admissibility in evidence of which is discussed by the High Court, was as follows:—

Extract taken from the diaries of the District Munsif's Court of Katathnad in the Tellicherry district, dated 3rd August 1864 and 30th September 1864.

M.P. No. 593 of 1864.

The petition presented by Chettayil Raman Nair, Vakil for Vazhelpitikayil *alias* Rayaroth Kunhi Soopi Haji and (2) Anandravan Rayaroth Cheriya Soopi Haji on the 18th Karkadagom 1039 (1st August 1864) states the following as the reasons for not selling Kayalavalappa paramba No. 6, the paramba No. 10 wherein a tiger's pen was built, Kattila *alias* Parambath paramba No. 11, Thanniyullathil paramba No. 12, Prachala paramba No. 13, Puthanpurayil paramba No. 14, and Koranthoti Kandi paramba No. 15 which were attached in satisfaction of the decree in suit No. 927 of 1830.

Of these, No. 6 is the first petitioner's self-acquisition and the remaining parambas were purchased by the petitioners' karnavan

the deceased Jakkian Soopi in jenm a very long time ago. With the exception of paramba No. 6, the assessment of all the parambas was in the name of the said karnavan who was paying the Government revenue and leasing them to tenants and was causing them to be held. After the death of karnavan, the first petitioner leased the parambas Nos. 11 to 15 and was causing them to be held and obtained Marupats under which the second petitioner received the purapad and was paying the Government revenue according to the old assessment from 1014 to 37 and, afterwards, according to the assessment in his own name and is enjoying them.

Order.

The claim set up in this must be proved within 8 days. 3*rd August* 1864.

Second order.

The petitioners have not produced any documents whatever to show that the properties claimed are their jenm. Neither Kunhali, who admits that the first plaintiff sold the jenm right to paramba No. 6, nor his tenant has preferred any claim in this Court. The abovementioned paramba is released from attachment on the evidence adduced by the claimant in No. 571. The plaintiff has by means of witnesses and documents proved that the plaintiffs as jenmis have demised other properties to tenants and are causing them to be held. From the evidence adduced by the claimant in No. 589, it appears that paramba No. 23 was obtained from the first petitioner and is (so) held. The attachment is therefore withdrawn; but the disputes, namely, that between these petitioners and claimant in No. 571 with regard to paramba No. 6 and that, owing to the claimants in Nos. 566 and 678 saying that paramba No. 10 appertains to paramba No. 9 and the petitioners denying the same, should be decided by a regular suit. 30*th September* 1864.

The Subordinate Judge passed a decree now appealed against as prayed in the plaint, except with regard to certain items of the property claimed, of which some of the defendants were found to have been in possession adverse to Soopi Haji.

Defendant No. 71 preferred this appeal.

Sankara Menon for appellant.

Sankara Nayar for respondents.

JUDGMENT.—The plaintiff alleging himself to be the present karnavan of the Rayaroth tarwad, sued to recover properties which

BYATHAMMA v. AYULLA.

he alleged had been acquired by a former karnavan, one Kunhi Soopi Haji, who died in 1874, and which are now in the possession of the descendants of the said Soopi Haji or tenants under them. The Subordinate Judge decreed in plaintiff's favor for certain of the properties sued for, and the Appeals Nos. 125, 126, 127, 128, 140 of 1889, and Appeal No. 12 of 1890 are preferred by some of the defendants, while plaintiff appeals in Appeal No. 141 of 1889 as to some of the plaint items disallowed.

Preliminary objections were taken as to (1) misjoinder of causes of action, (2) the right to a karnavan to sue alone, and (3) limitation. Upon the first point we entertain no doubt that plaintiff can implead the several defendants in one suit to recover the tarwad property—*Vasudeva Shanbhaga* v. *Kuleadi Narnapai*(1), *Mahomed* v. *Krishnan*(2)—upon the second the right of a karnavan to sue for the tarwad property is well established—*Subramanyan* v. *Gopala*(3)—while the question of limitation will, it appears to us, depend upon the date in each instance on which the possession of the several defendants became adverse to the tarwad. It was further alleged that the whole suit was barred, inasmuch as it was not instituted within 12 years of the date of Kunhi Soopi Haji's death. Upon this point, we are satisfied that exhibit A is not a copy, but is the duplicate register of deaths kept in the amshom in the ordinary course of official business, and it fixes the date of Soopi Haji's death as having occurred on 24th August 1874. We accept that date accordingly.

We pass, therefore, to the second and principal issue in the suit, viz., whether Kunhi Soopi Haji followed Marumakkatayom or Muhammadan law. The Subordinate Judge found that the Marumakkatayom system governed the descent of the tarwad property, but that the self-acquisitions of members of the family were governed by the Muhammadan law.

Kunhi Soopi Haji was the sister's son of Jokkian Soopi, who died about 1822, and who is alleged to have been the original karnavan of the Rayaroth tarwad, so far at least as it is necessary to go back for the purposes of this litigation. We find, however, that the revenue registry of the 28 nunjah lands and 77 parambas which stood in his name were continued in his name till Fasli 1270 (1860), *i.e.*, for about 38 years after his death. Exhibit 115

(1) 7 M.H.C.R., 290. (2) I.L.R., 11 Mad., 196. (3) I.L.R., 10 Mad., 223.

shows that the registry was then transferred, 14 out of the 28 nunjah lands and 55 out of the 77 parambas being transferred to the name of Rayaroth Cheriya Soopi Haji, who is represented by plaintiff to have been the fourth karnavan in succession from Jokkian Soopi, the first karnavan. The other lands and parambas were transferred to the names of eight other persons, and the Subordinate Judge states that it was conceded these were distant relations; but there is nothing in the evidence before us to show what the precise relationship was, and their names do not appear in the pedigree, as made out from the evidence of plaintiffs' witnesses.

Some confusion has been introduced into the case from the fact that the Subordinate Judge did not understand that the Rayaroth Cheriya Soopi, to whose name these lands were transferred in 1860, was not the Kunhi Soopi Haji whom he takes to have succeeded Jokkian Soopi as karnavan No. 2. Kunhi Soopi Haji was alive in 1860, and according to plaintiff was *de jure* karnavan; but he is said to have then been an old man, and we are asked to believe that the patta was issued in the name of Cheriya Soopi Haji as he actually collected the rents and paid the assessments on the property (see exhibit K). This document is objected to as not furnishing legal evidence of the contents of the joint petition by Kunhi Soopi Haji and Cheriya Soopi which it recites, and we were referred to the decision in *Subramanyan* v. *Paramaswaran*(1) (at page 122) in which the learned Judges stated that they followed the Full Bench decision in *Gujju Lall* v. *Fatteh Lall*(2). It is not clear what was the precise nature of the documents rejected in the Madras case, but we think the decision in *Parbutty Dassi* v. *Purno Chunder Singh*(3) is applicable to the present case, and is not inconsistent with the Full Bench ruling above referred to. We may point out that in *Gujju Lall* v. *Fatteh Lall*(2), the sole object for which it was sought to prove the former judgment was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favor on the same right claimed, and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. In the case before us, it is not the adjudication which it is sought to prove,—for the point was never adjudicated

(1) I.L.R., 11 Mad., 116. (2) I.L.R., 6 Cal., 171. (3) I.L.R., 9 Cal., 586.

BYATHAMMA v. AVULLA.

upon—but the judgment is tendered in evidence as proof that in a particular instance the plaintiff's predecessor acted in the capacity of karnavan of a Marumakkatayom tarwad wholly irrespective of the particular decision arrived at in the suit. This, we think, is a relevant fact, and the entry is therefore admissible under section 35 of the Evidence Act—See also *Ramasami* v. *Appavu*(1).

Exhibit AK is the revenue register of the 14 items of nunjah and 51 parambas which were entered in Cheriya Soopi Haji's name in Fasli 1290, and in coming to the conclusion that the Marumakkatayom rule governed the descent, the Subordinate Judge has been greatly influenced by the fact that several items of property which he enumerates are shown by exhibit 115 to have stood first in the name of Jokkian Soopi, that they were transferred to that of Cheriya Soopi in 1860 and were in the interval dealt with by Kunhi Soopi Haji under various documents. For the defendants it is not denied that Kunhi Soopi Haji came into possession of various properties which originally belonged to Jokkian Soopi, but it is contended that he took them as sister's son under Muhammadan law, and hence that from that fact alone no inference favorable to Marumakkatayom can be drawn.

We may here observe that there is no evidence to show that Kunhi Soopi Haji's mother, Biyathumma, survived her brother, Jokkian Soopi. If she did, and if the family followed the Muhammadan law, she would be a legal sharer, and we might expect to find traces of her having dealt with portions of the property and of her share being divided among her several children at her death. There are no such indications. If, on the other hand, (still assuming that Muhammadan law ruled the descent) Biyathumma did not survive Jokkian Soopi, Kunhi Soopi Haji as the sister's son, would have come under the head of distant kindred and have been altogether excluded by the brother's sons, the descendants of Jokkian Mammi and Jokkian Kutti Ali.

It is admitted, however, that Kunhi Soopi Haji did in fact succeed—whether under Marumakkatayom or under Muhammadan law—to a great deal of property which originally stood in the name of Jokkian Soopi. He was alive in 1860, and it is inexplicable if these properties were really governed by Muhammadan law, that he, and the descendants of his brothers and

(1) I.L.R., 12 Mad., 9.

sisters would have permitted the revenue registry to be transferred to the name of Cheriandi Soopi; Kunhi Soopi Haji was an old man, and his death could not be far distant; and his own nephews, who would be his natural heirs under Muhammadan law, would hardly have allowed the transfer to the name of a distant cousin, who was no heir at all. If, on the other hand, we accept the theory of Marumakkatayom and the explanation given by exhibit K, the situation becomes intelligible.

It is objected by the defendant's pleader that many of the documents referred to in paragraphs 50 to 61 of the judgment of the Subordinate Judge were not proved, and that it is not shown they came from proper custody. With regard to his objection, we observe from the B diary in the suit that these documents were put in by the plaintiff's pleader, and may fairly be taken as having come from the plaintiff's custody, though the formality of examining plaintiff when they were put in was not observed. No objection appears to have been taken at the time; indeed the defendant's pleader was allowed to take precisely the same course with some of his documents. Many of these documents are judgments and public records as to whose genuineness there is no doubt,—while others (marupats and sale-deeds) purported to be more than 30 years' old and came from proper custody if the plaintiff is the karnavan of a Marumakkatayom tarwad. If he is not, his possession of them is unexplained, and no objection to their genuineness appears to have been taken at the proper time. We do not think it necessary to remand the appeal for further evidence on these points.

It is true that the items of property which the Subordinate Judge traces from Jokkian Soopi in this part of his judgment are not part of the property in suit,—but the evidence is relevant as showing that properties which originally stood in the name of Jokkian Soopi were afterwards dealt with by Kunhi Soopi Haji,—who would be the next karnavan if Marumakkatayom governed the descent,—but who is not proved to be the next heir under Muhammadan law, and that these properties were allowed without objection to be registered in the name of Cheriandi Soopi, who would be an heir under Marumakkatayom but not under Muhammadan law, there being no evidence whatever that he had acquired any title either by gift or purchase to Jokkian Soopi's property.

BYATHAMMA v. AYUMMA.

The litigation referred to in paragraphs 55, 56 and 60 of the judgment also support the plaintiff's case. It was argued that no connection was proved between the property sued for as shown by exhibit A with that demised in exhibits D and E,—but exhibit A B shows that this property was sued for in 1828 by Kunhi Soopi Haji. It was demised in 1863 by the same person (exhibit D) and again in 1875 by Cheriandi Soopi (exhibit E) to the plaintiff's eighth witness who admits holding under the tarwad. If the property was not tarwad property it is not explained why Kunhi Soopi Haji's descendants allowed this witness to attorn to Cheriandi Soopi instead of to themselves.

Exhibit A D shows that Kunhali who is represented to have been karnavan from 1874 to 1878 sued as karnavan in 1877 to recover property given on a demise by his former karnavan Kunhi Soopi Haji and got a decree. In that case the plaintiff was brought in as supplemental plaintiff. It is objected that Cheriandi Soopi was the next senior anandravan and not the plaintiff, but exhibit B executed on 2nd October 1877 shows that the plaintiff was given a power-of-attorney by Kunhali to manage the affairs of the Rayaroth tarwad during his absence in Arabia. The genuineness of this document is not disputed, and it is important as tending to show that Kunhali made separate arrangement for the management of his self-acquired property and of his tarwad property.

A suggestion was made by the defendant's pleader that several of the documents had been executed since the death of Kunhi Soopi Haji in 1874 with a view to create evidence. This however, cannot be said with regard to several marupats executed in the early part of the century, and it is clear that the alleged successors of Kunhi Soopi Haji have not shown themselves in any hurry to assert their rights. Kunhali went to Arabia, and his successor is alleged by plaintiff to have been negligent of the interests of the tarwad. The plaintiff himself—as far as the evidence goes—did not become responsible for the management till 1885 and the suit was brought in 1886.

It is next urged that the Subordinate Judge omitted to consider several documents which would have tended to show that the descent of property in this family was governed by Muhammadan law, and in particular we were referred to exhibits 120, 118, 123, 145 and 184.

In exhibit 120 the plaintiff is said to be the son of the brother of Kunhali (karnavan No. 3). He sued to recover property demised by his late brother, and the defence was that the land was held under his mother (fourth defendant). The District Munsif found that the document creating demise from the fourth defendant was a concoction, and observed that under Muhammadan law the plaintiff would have a right to succession in preference to the wife. The observation was a mere *obiter dictum*, and the question of Marumakkatayom or Muhammadan law did not arise in the suit. Exhibit 118 is a certified copy of a decree, but there is nothing before us by which we connect the parties with the parties to this suit. Exhibit 122 shows that in 1837 some relations of Kunhi Soopi Haji had obtained from him some share in some property; but there is nothing to show what was the nature of that property, or on what ground the share was given. Exhibit 140 is a patta which shows that a bit of land was transferred from Kunhi Soopi Haji's name in 1874 to that of Cheriya Soopi "with permission of son Ahmed Kutti Haji." This does not necessarily show anything more than that no objection was made by Kunhi Soopi Haji's son to the transfer and is consistent with the suggestion that the property may have been tarwad property. Exhibit 184 shows that Kunhi Soopi Haji purchased some property in 1844, but there is nothing to show how his vendors acquired a title, though it may have descended to them from their father.

We are unable, therefore, to hold that these documents in any material way assist the contention of the defendants.

Passing to the oral testimony, we find that the plaintiff's second witness is the grandson of Jokkian Kutti Ali, brother of Jokkian Soopi. His testimony that the family is governed by Marumakkatayom law is therefore clearly against his interest, as he would have been a nearer heir than Kunhi Soopi Haji in succession to Jokkian Soopi under Muhammadan law. The third and fourth witnesses have also opportunities of knowing the facts, and the evidence of the first witness called by the defendants was to the same effect.

Upon the whole, therefore, we are of opinion that the Subordinate Judge was right in his conclusion that Rayaroth Kunhi Soopi Haji was a follower of the Marumakkatayom rule, notwithstanding that it is shown that other members of this family have dealt

BYATHAMMA v. AVULLA.

with property which is described to be self-acquired under the precepts of Muhammadan law. We may point out that the very execution of such documents as exhibits F and G may tend to show the executants felt it necessary to make a special provision for their descendants to prevent the operation of the Marumakkatayom rule upon such property.

The next point is whether the plaintiff is the present karnavan of the tarwad. His seniority is disputed on account of the evidence of Kuruvangat Ahmed Kutti, first defence witness,—who alleged himself to be the plaintiff's senior and the eldest in the Rayaroth tarwad. We do not think much reliance can be placed upon the evidence of this witness. He was not called by the plaintiff, and the defendants complained that he had to be brought on a warrant and was hostile to them. It is difficult to reconcile his different statements. He at first declared that he belonged to the Kuruvangat tarwad, in which the plaintiff had no right, and then that he was the eldest in Rayaroth tarwad in which the plaintiff is undoubtedly a member. Had he really belonged to Rayaroth and been the eldest in it, we think he would have claimed the karnavanship on the death of Cheriya Soopi,—but he declares that he has no right to the property therein. We cannot give credit to the statement of this witness that he is the senior member of the Rayaroth tarwad.

It remains to consider whether the plaintiff is entitled to recover the property (item No. 55) from the appellant (71st defendant). The claim is resisted on the ground of limitation.

The 71st defendant was not a party to the suit till after the 15th December 1886, or more than 12 years after the death of Kunhi Soopi Haji. We think, however, we are bound to examine the original character of the possession, in order to see whether the 12 years' rule applies—*Byari* v. *Puttanna*(1). The contention is that the property was given to the 71st defendant by Kunhi Soopi Haji in 1869 and has since been held by her adversely to the tarwad. In proof of this contention we were referred to exhibits 81, 189, 190 and 191.

It was objected that exhibit 81 is inadmissible in evidence. We are satisfied that it is the rough draft of the plaint put in in original suit No. 270 of 1869 on the Badagara District Munsif's

(1) I.L.R., 14 Mad., 38.

file and is not a copy but an original rough draft. It has been kept for record in the Vakil's office, bears the number of the suit, and the decision in the suit has been endorsed upon it. The plaint actually put in was a copy of this draft. We hold therefore that it is admissible and shows that in August 1869 Kunhi Soopi Haji admitted having alienated the property in a manner which would be adverse to the claim of his tarwad.

The razi decree in that suit was in favor of the present appellant (exhibit 190, dated 6th November 1869) and on 2nd September 1869 the tenant attorned to her (exhibit 189). The evidence of the 70th defendant's second witness proves that the 71st defendant held possession since 1869.

We are of opinion, therefore, that the plaintiff's claim to item No. 55 is barred. The appeal of the 71st defendant must be allowed and the plaintiff's claim as against the property in her possession (item No. 55) be dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

CHENNAPPA (APPELLANT),

v.

RAGHUNATHA (RESPONDENT).*

1891. March 31. May 6.

Civil Procedure Code, s. 111—*Set-off—Character in which claim is made—Court Fees Act—Act VII of* 1870, *ss.* 6, 28—*Levy of stamp due.*

In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference:

Held, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly;

(2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded;

(3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court.

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* Referred Case No. 36 of 1890.