

## APPELLATE CIVIL.

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

ABDULKADAR (DEFENDANT), APPELLANT,

v.

MAHOMED (PLAINTIFF), RESPONDENT.\*

1890.  
Dec. 11.  
1891.  
April 27, 28.  
Sept. 11.

*Specific Relief Act—Act I of 1877, ss. 42, 56—Consequential relief—Civil Procedure Code, s. 53—Amendment of plaint.*

The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached thereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office, and for further and other relief. It appeared, on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of Specific Relief Act, s. 42 :

*Held, on appeal by the defendant* that the Court of First Instance should take evidence and try an issue specifically directed to this question.

It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its emoluments :

*Held*, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration.

The plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 37 of 1888.

The plaintiff averred in the plaint that he was the Sheik of Kallai being solely entitled to that office and all the properties attached thereto, that on the death of his father and predecessor in office the defendant had obtained a certificate for the collection of his debts and subsequently "pretending that he is the Sheik, "has been trying to obtain possession of the properties belonging "to the stanom" and added "I have not been able to ascertain "the loss caused to the stanom by such pretensions and acts of "the defendant."

The prayer of the plaint was "that a decree may be passed "declaring that the defendant has no right either to the office of "the Sheik of Kallai or to the properties . . . and that a per-

\* Appeal No. 114 of 1889.

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“petual injunction be granted restraining him . . . from dealing with the properties in any way . . . and from further doing anything inconsistent with plaintiff’s right to the office, and granting other reliefs which may be prayed for and legally granted during the pendency of the suit.”

The defendant pleaded that he was the Sheik and in possession of the properties referred to in the plaint and added further pleas as follows:—“The suit is not sustainable under Specific Relief Act, section 56, and it is not within the purview of section 54 for the plaintiff to apply for the injunction prayed for” and “the relief claimed by the plaintiff is irregular and one that cannot be granted.”

The first issue related to the sufficiency of the stamp duty paid, the next three issues were framed with reference to the opposing claims of the plaintiff or defendant to be Sheik and the last was as follows:—“Whether the suit for an injunction will properly lie under Specific Relief Act, section 56.”

The Subordinate Judge passed a decree declaring “that the plaintiff and not the defendant is the rightful Sheik . . . and as such entitled to the properties, &c., belonging to the stanom.” And issued an injunction in the terms of the prayer of the plaint.

The defendant preferred this appeal on the ground, among others, that the suit was not maintainable without a prayer for possession.

*Bhāshyam Ayyangar and Govinda Menon* for appellant.

*Sankara Nayar and Byru Nambiar* for respondent.

JUDGMENT.—It is argued that the defendant, as alleged in paragraph 4 of the written statement, has been in possession of the mosque and its endowment and that the suit for a declaration of title and an injunction without seeking possession is not maintainable under section 42 of the Specific Relief Act. No specific issue has been framed as to this; and the fifth issue appears to have been framed on a special application with reference to the question whether a suit will lie for an injunction under section 56 of the Specific Relief Act. Some evidence as to possession appears to have been given by the defendant and considered by the Subordinate Judge under that issue. If, as some of the witnesses assert, the defendant is in possession of the mosque and some of its emoluments, and if the tenants have attorned to him or paid rent to him and executed fresh marupats and agreed to hold under him,

we should be inclined to hold that plaintiff must sue for possession. As plaintiff had to begin, and, as there was no specific issue on this point, he had no opportunity of producing evidence.

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We shall therefore ask the Subordinate Judge to take evidence and try the following issue and to submit a distinct finding within two months, viz., whether the mosque and mukham and properties attached thereto and the office of Sheik and its emoluments, or any, and which of them, were in possession of defendant, at the date of the suit, and, if so, what is the value of such property.

Seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted his finding as follows:—

“My finding is that the mosque and mukham at Kallai and certain properties attached thereto, as shown in the subjoined list, were in the possession of the defendant on the date of the suit; that there is no reliable evidence that he was at the time in possession of the office of Sheik or of any of its emoluments over and above the sum of Rs. 22 and 150 dangalies of paddy a year, as deposed to by his seventeenth to nineteenth witnesses, and that the value of such property is Rs. 12,910 as shown below.”]

This appeal having come on again, the Court delivered judgment as follows:—

JUDGMENT.—The finding of the Subordinate Judge, on the issue referred to him for trial, is that the mosque and mukham at Kallai and certain properties attached thereto were in the defendant's possession at the date of the suit and that they are of the value of Rs. 12,910. After referring to the evidence we are satisfied that it warrants the conclusion at which he has arrived. We are further of opinion that there is sufficient proof that the defendant is also substantially in possession of the office of Sheik and of its emoluments. The evidence adduced for the plaintiff only shows that he has received Nircha in two cases, and we do not consider it sufficient to justify a finding that neither party was in possession of the office. Upon these facts we think that a suit for a declaration of the plaintiff's right to the office cannot be maintained under section 42 of the Specific Relief Act without praying for possession of the mosque and its endowments. Though the plaint prays for a perpetual injunction restraining the

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defendant from interfering with the exercise by the plaintiff of his right to the office of Sheik, and, though an injunction is a form of consequential relief, yet it is clearly not sufficient, when the defendant is in possession, to meet the requirements of section 42. As observed by this Court in *Chokalinga Peshana Naicker v. Achiyar*(1), no suit will lie under that section unless there is no attempt either to evade the stamp law or to eject parties in possession under colour of a mere declaration of title. The reasonable construction of section 42 is that the further relief which the plaintiff is bound to claim is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration.

Another contention urged upon us is that the plaintiff may be allowed on appeal to pay additional stamp duty and to amend the plaint so as to include a prayer for recovery of possession, and our attention is drawn to *Limba Bin Krishna v. Rama Bin Pimplu*(2), *Chomu v. Umma*(3). It was held in those cases that, where the objection that the suit for a mere declaration of title was not maintainable was not taken in the Court of First Instance, the plaint might be allowed to be amended on appeal. Though in the present suit the defendant denied, in his written statement, that the plaintiff, was in possession either of the mosque or of its endowments and contended that the relief claimed was irregular and ought not to be granted in the suit, yet he did not ask for a distinct issue at the first hearing as to whether the suit was maintainable under section 42 of the Specific Relief Act.

The Subordinate Judge, however, in dealing with the fifth issue, incidentally discussed the evidence as to possession and came to the conclusion that neither party was in possession; but he now finds that defendant was in possession of properties to the extent of Rs. 12,000 and odd. But for the original finding of the Subordinate Judge on the question of possession, the plaintiff would have had an opportunity of amending the plaint in the Court below. Under the circumstances, we think we may allow the plaint to be amended. We allow the respondent-plaintiff three months' time to amend the plaint and to pay the additional stamp duty on the plaint so amended.

This appeal having come on again, after the plaint had been

(1) I.L.R., 1 Mad., 40. (2) I.L.R., 13 Bom., 548. (3) I.L.R., 14 Mad., 46.

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

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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.

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## 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 of the previous karnavan as alleged, and that the previous karnavan had followed the