APPELLATE CIVIL—FULL BENCH.

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

1892. February 5, 11. August 9. December 13.

KUNHACHA UMMA (APPELLANT IN APPEAL AGAINST APPELLATE ORDER No. 22 OF 1890), APPELLANT,

v.

KUTTI MAMMI HAJEE (RESPONDENT IN DITTO) RESPONDENT.*

Malabar Law—Gift of land to a wife and her children—Incidents of tarwad property.

Land, which originally belonged to one Tavurai, was given after his death to one of his wives and her children in accordance with a wish orally expressed by him. He had not expressed any intention as to how it should be held by the donees. It appeared that they were subject to the Marumakkatayam law :

Held, by the Full Bench, that they took the land with the incidents of property held by a tarwad :

Held, by the Division Court, accordingly, that a decree against the assets of one of the sons could not be executed against the land as a whole or against his share in it.

APPEAL under Letters Patent, s. 15, against the order of SHEPHARD, J. That order dismissed an appeal against an order of J. P. Fiddian, Acting District Judge of North Malabar, which modified an order made by the District Munsif of Pynad.

The appeal which came before Mr. Justice SHEPHARD and also the appeal under the Letters Patent were preferred by one who had preferred a petition, objecting, under Civil Procedure Code, s. 278, to the attachment of certain land in execution of the decree in original suit No. 485 of 1888. The petitioner's father (deceased) had been the owner of the land, but it appeared that it had been transferred, in accordance with a wish orally expressed by him to one of his wives and her children, including the petitioner and her brother Uthotti (deceased). The above-mentioned decree provided for the payment of the judgment debt out of the assets of Uthotti. The petitioner's family were admittedly governed by Marumakkatayam law, and the Munsif held that the property which was comprised in the gift should be regarded as property of a tarwad within a tarwad, and consequently was not liable to

* Letters Patent Appeal No. 13 of 1891.

KUNHACHA UMMA v. KUTTI MAMMI HAJEE.

satisfy the decree. The District Judge held that it was liable to the extent of Uthotti's share.

Sankaran Nayar for appellant.

Ryru Nambiar for respondent.

BEST, J.—The following are the facts of this case:

The present respondent obtained a decree for money to be paid "out of the assets of the deceased Uthotti" in the hands of defendants 2 and 3 in original suit No. 485 of 1888, on the file of the District Munsif of Badagara. In execution of that decree property was attached, and the present appellant objected to the attachment under section 278 of the Code of Civil Procedure.

The property so attached consisted of seven items. The Munsif allowed the appellant's objections with regard to all seven. The District Judge, on appeal, modified the Munsif's order to "the "extent of making the judgment-debtor's share in Nos. 2 to 6 "liable." He did this on the authority of the decision in *Narayanan* v. *Kannan*(1). This decision of the District Judge was upheld on appeal to this Court by SHEPHARD, J., who further referred to the decision in *Parvathi* v. *Koran*(2). Hence the present appeal, in which it is contended(1) that the properties in dispute are not

---

(1) I.L.R., 7 Mad., 315.

(2) S.A. No. 1066 of 1889. Before COLLINS, C.J., and SHEPHARD, J.:—

JUDGMENT.—There is no material difference between the facts in this case and those in *Narayanan* v. *Kannan* (I.L.R., 7 Mad., 315). Here a decree having been obtained against the first and second defendants, certain property was sold as being the share of the second defendant in lands given by his father to him and his sisters. The plaintiffs being the children of one of those sisters, now deceased, charge that the second defendant's share in the estate is not capable of being sold. According to the decision above cited, a share of property if obtained by a gift made to persons who are members of one tarwad, and even if made with the intention that the property should be impartible, descending to the heirs in the female line as tarwad property, it may be sold in execution of a decree against one of the donees. Whatever may be the intention of the donor he cannot, in our opinion, alter the fact that property acquired by gift is not in the hands of the original donees ancestral property to which the incident of impartibility attaches. The decision in *Narayanan* v. *Kannan* (I.L.R., 7 Mad., 315) was followed in *Kelappan* v. *Koran* (S.A. No 1328 of 1887, unreported), and it is not correct to say, as the District Judge observes, that a different view of the matter was taken in *Krishna* v. *Raman* (S.A. No. 708 of 1884, unreported), for in that case an entirely different question arose. The question then was whether the children of one of several donees, under a gift similar to that in the present case, was entitled to challenge a mortgage made by those of the surviving donees which was found to be merely colourable and collusive. It was held that they were so entitled, because a gift had been made to their mother and her brothers and sisters as to a tarwad. There was no decision, and it was not necessary to decide, as to the nature of the interests of the survivors. The decree of the District Judge is right, and we must, therefore, dismiss the appeal with costs.

assets of the judgment-debtor, and (2) that even in his life-time the judgment-debtor had not in these properties an interest liable to attachment and sale.

It is admitted on both sides that the properties in question belonged to one Taruvai, the father of the judgment-debtor Uthotti and also of the present appellant. As is seen from exhibit D, the truth of the statements contained in which is admitted by the respondent, these properties were given after Taruvai's death to his first wife Ayissumma and her children in accordance with his orally expressed wish. The appellant and Uthotti are two of the children of Ayissumma. Other properties were, at the same time, given to Taruvai's second wife and her children.

Appellant's contention is that the property thus given to Ayissumma and her children was given to them as joint tenants; that they thus became with regard to this property a separate tarwad; and that the property was held by them subject to the incidents of tarwad property, and that it is consequently non-partible, and, therefore, not liable to attachment or sale in satisfaction of a decree obtained against one of the members of the tarwad.

On the other hand, respondent's vakil refers to *Narayanan* v. *Kannan*(1) and to *Parvathi* v. *Koran*(2) as authorities justifying the dismissal of this appeal.

Parvathi v. *Koran*(2) merely follows the decision in *Narayanan* v. *Kannan*(1) and the correctness of this latter decision has been questioned in *Moidin* v. *Ambu*(3) by MUTTUSAMI AYYAR

---

(1) I.L.R., 7 Mad., 315. (2) See *ante*, p. 202.

(3) S.A. Nos. 647 and 648 of 1890. Before MUTTUSAMI AYYAR and SHEPHARD, JJ.:—

JUDGMENT.—The question argued in these appeals had regard to the nature of the title created by Mayan Kutty and others in favour of the plaintiff's father, Kathir Kutty. It was argued, on the one hand, that Kathir Kutty and the fellow donees took the property as tenants-in-common, each being entitled to deal with his own share of it, and in support of that view the case of *Narayanan* v. *Kannan* (I.L.R., 7 Mad., 315) and cases following it were cited. On the other hand it was contended that the Subordinate Judge was right in holding that the donees taking under exhibit I took the property as tarwad property, and that, therefore, no one of them could deal with any part of it as his own. We are disposed to think that the principle laid down in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (6 M.I.A., 526) and *Mahomed Shumsool* v. *Shewakram* (L.R., 2 I.A., 7) is applicable to the present case. The decision, however, in I.L.R., 7 Mad. appears to be in conflict with that principle, and we reserved judgment in order to see whether a reference to the Full Bench was necessary, but we think that the appeal may be

KUNHACHA UMMA v. KUTTI MAMMI HAJEE.

and SHEPHARD, JJ., who have pointed out that the decision in *Narayanan* v. *Kannan*(1) appears to be in conflict with the principle laid down in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(2), *Mahomed Shumsool* v. *Shewakram*(3).

The principal reason assigned by the learned judges who decided *Narayanan* v. *Kannan*(1) for arriving at the conclusion come to by them, namely, that the right of partition is "an incident of the estate given by Hindu law," is inapplicable to an estate under the Marumakkatayam law—of which estates impartibility and not partibility is the legal incident.

The case of *Renaud* v. *Tourangeau*(4), also referred to in that decision, is no doubt authority for holding to be invalid an absolute prohibition of alienation, *e.g.*, in the case dealt with in *Narayanan* v. *Kannan*(1), a prohibition of alienation by the tarwad itself, or by its karnavan acting on behalf of the tarwad; but it seems hardly authority for the proposition that in the case of property devised (as that was) to be held under the usual custom of Malabar, a prohibition of alienation of the share of any member (except with the consent of the tarwad or by its karnavan) is not valid against a creditor seeking to proceed against one member's interest in the joint property.

Finally, the mere fact of the property having been such that the grantor could have dealt with it as if it had been his self-acquisition, appears to be an invalid reason for holding it to be partible after it has been devised to a definite branch of the family for the purpose of being held jointly by that branch.

It is true that in the present case there is no express prohibition against alienation, nor is it stated in so many words that the property was to be held by the grantees as their tarwad property; but taking into consideration what are known to be the ordinary notions and wishes of persons in Malabar in the position of Taruvai, the grantor of the property, and also the ordinary incidents of property in the same district, and also bearing in mind that other

---

disposed of without any such reference. Even assuming that Kathir Kutti did take a share in the property which it was competent to him to deal with individually, his sons, claiming by gift under him, could not recover in the present suit, inasmuch as it is not in the nature of a partition suit, and the co-donees of Kathir Kutty are not joined.

We dismiss these appeals with costs.

(1) I.L.R., 7 Mad., 315. (2) 6 M.I.A., 526.
(3) L.R., 2 I.A., 7. (4) L.R., 2 P.C., 4.

property was similarly granted at the same time to the second wife and her children, there can be no doubt, I think, that the intention was that the property should be held by the grantees as joint tenants. The four unities of a joint tenancy are all found in this case, namely (1) of possession, (2) of interest, (3) of title, and (4) of the time of commencement of such title.

I would, therefore, allow this appeal were it not for the decision in *Narayanan* v. *Kannan*(1).

As the correctness of the decision in that case has been questioned by MUTTUSAMI AYYAR, J., one of the learned Judges who was party to it, and also by SHEPHARD, J., who was a party to *Parvathi* v. *Koran*(2) in which it was followed, I am of opinion that the reference to the Full Bench contemplated in *Moidin* v. *Ambu*(3) (but subsequently found to be unnecessary in that case) should now be made, as the allowance or disallowance of the present appeal depends upon the correctness or otherwise of the decision in *Narayanan* v. *Kannan*(1).

SUBRAMANIA AYYAR, J.—I concur in making this reference to a Full Bench. *Narayanan* v. *Kannan*(1) was decided in March 1884. *Krishna* v. *Raman*(4), which came from South Malabar, was decided in February 1885. There, a question similar to that raised here was considered. The finding in that case was that the gift was to a woman, her sisters and brother. It was contended that the donees did not take the property as tenants-in-common. With reference to this contention MUTTUSAMI AYYAR and BRANDT, JJ., stated that "In the absence of any direct evidence "that the intention of the donor was otherwise, we are of opinion "that it is consistent with the custom in such cases in Malabar; "and that we must assume that the gift was a gift to the brother "and sisters constituting them, as such, a tarwad, and rendering "the property conveyed by the gift subject to the ordinary inci-"dents of property held by a tarwd."

This question which I propose to refer is whether Ayissumma and her children took the properties in question with the incidents of property held by a tarwad.

This appeal came on for hearing before the Full Bench (COLLINS, C.J., MUTTUSAMI AYYAR, PARKER and WILKINSON, JJ.)

---

(1) I.L.R., 7 Mad., 315. (2) See *ante*, p. 202.
(3) See *ante*, p. 203. (4) Second Appeal No. 708 of 1884, unreported.

KUNHAUHA UMMA v. KUTTI MAMMI HAJEE.

Govinda Menon, for appellant, argued that the intention of the donor must be presumed to have been that the donees should take the property jointly as tarwad property, and that accordingly the attachment was illegal.

Mr. *Wedderburn* and *Ryru Nambiar* for respondent.

The reference by BEST, J., to the incidents of joint-tenancy is misleading, for, in the present case, the question is not as to a right of survivorship in the English sense, but as to the incidents of tarwad co-parcenary. No doubt the case must be determined according to the principles laid down in *Mahomed Shumsool* v. *Shewakram*(1), so far as they are applicable; but here there is no special circumstance from which the intention which the appellant argues should be presumed to have been that of the donor can be inferred. For it appears that he was a Muhammadan, and I am instructed that he was governed by Makkatayam law, while the wife and children were undoubtedly subject to the Marumakkatayam rule. Moreover they formed part of a tarwad to which the wife's sisters and their children also belonged. The donor cannot be presumed to have desired to benefit the whole of that tarwad, for that would diminish the benefit to be derived by his own wife and children; and it is submitted that the Court should so give effect to the gift as to benefit them as far as possible. The idea of separate self-acquired property has long been familiar in Malabar, and here the donees, if they took the property as self-acquisition, would be better off than if the gift was such as to leave the property fettered in the manner now so irksome to holders of tarwad property. Moreover the Court should be averse to extend further than the personal law of the parties clearly requires the stereotpyed rule of impartibility which will govern this property if it is tarwad property. If the property was taken by the donees as self-acquired, each of them could deal freely with his share, and consequently the share of each would be liable for his debts, and consequently the present attachment was legal.

JUDGMENT.—The properties in question originally belonged to one Taruvai, and they were given after his death to his wife Ayissumma and her children in accordance with his orally expressed wish. The question referred to us is whether Ayissumma and her children took the properties with the incidents of property held by

(1) L.R., 2 I.A., p. 14.

a tarwad. In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with Marumakkatayam usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(1) and *Mahomed Shumsool* v. *Shewakram*(2). The decision in *Narayanan* v. *Kannan*(3) was not followed in *Moidin* v. *Ambu*(4), and it appears to us to be in conflict with the rule of construction indicated by the Privy Council.

We answer the question in the affirmative.

This appeal came on for final disposal before the Division Bench, and the Court delivered the following judgment:—

JUDGMENT.—Following the decision of the Full Bench we set aside the orders of the District Court and of the learned Judge of this Court and restore that of the Court of First Instance.

There having been conflicting rulings on the subject, we make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMACHANDRA JOISHI (RESPONDENT IN APPEAL AGAINST ORDER No. 99 OF 1890), APPELLANT,

1892. February 29. April 15.

v.

HAZI KASSIM (APPELLANT IN APPEAL AGAINST ORDER No. 99 OF 1890), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 562—*Act VII of* 1888, *s.* 49—*Power of Appellate Court to remand suit—Preliminary point—Report of Select Committee referred to.*

It is competent for an Appellate Court to remand a case when the Court of First Instance records evidence on all the issues, and at the final hearing decides the suit

---

(1) 6 M.I.A., 526.
(2) L.R., 2 I.A., 7.
(3) I.L.R., 7 Mad., 315.
(4) See *ante*, p. 203.
* Letters Patent Appeal No. 16 of 1891.