APPELLATE CIVIL.

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

1893. Nov. 21. 1894. Feb. 19.

PADAMMAH AND OTHERS (DEFENDANTS NOS. 2 to 7), APPELLANTS,

v.

THEMANA AMMAH AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 42—Consequential relief—Suit by a member of a tarwad for a decree declaratory of the invalidity of a kanom granted to other members by the karnavan of the tarwad.

Where a kanom of tarwad property is granted by the karnavan to members of the tarwad and the property in question remains in the possession of the karnavan on behalf of the tarwad, all that is necessary for a junior member to do in order to prevent the possession becoming adverse to the tarwad is to obtain a declaration that the kanom which is relied on as the cause of adverse possession is invalid. But if the kanom is granted to a stranger to the family, who is in possession, possession must then be sought for as relief consequent on the declaration.

An attornment of tenants to the kanomdars does not operate as a transfer of possession from the tarwad to the kanomdars. *Subramanyan* v. *Paramaswaran*(1) followed; and *Bikutti* v. *Kalendan*(2), *Abdulkadar* v. *Mahomed*(3), and *Narayana* v. *Shankunni*(4) distinguished.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 562 of 1891, confirming the decree of O. Chandu Menon, Principal District Munsif of Calicut, in original suit No. 670 of 1890.

The first defendant was the karanavati of a tarwad. On the 4th August 1890 she granted a kanom of Rs. 479-10-0 in respect of 45 parcels of land belonging to the tarwad in favour of her younger daughters, second and third defendants, and her grand-daughter, fourth defendant.

The plaintiffs, who were the first defendant's eldest daughter and her children, contended that the kanom was not granted for proper purposes of the tarwad and sought for a declaration that it was null and void as against the tarwad. The suit was resisted by the defendants who contended that the grant was a proper and

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* Second Appeal No. 423 of 1893.

(1) I.L.R., 11 Mad., 116.
(2) I.L.R., 14 Mad., 267.
(3) I.L.R., 15 Mad., 15.
(4) I.L.R., 15 Mad., 255.

bonâ fide one, and that the suit was one in which consequential relief in the shape of possession of the properties comprised in the kanom grant ought to have been sought and the Court fee on the value of such properties paid. This point was decided by the lower Courts against the defendants, the Subordinate Judge holding that the possession of the properties was in the tarwad, of which the management vested in the first defendant as karnavati; that the plaintiffs had no objection to her possession as karnavati; and that if the second to fourth defendants had, since the grant of the kanom complained of, obtained attornment from tenants, it was an attornment on a title viciously acquired.

The defendants preferred this appeal.

Sankara Menon for appellants.

Sundara Ayyar for respondents.

JUDGMENT.—This was a suit to have it declared that a kanom granted by the first defendant to second and third defendants was not binding on the plaintiffs' tarwad. The first defendant, since deceased, was the karnavati of the tarwad and both appellants and respondents were her anandravars. It was contended for defendants, *inter alia*, that a suit for merely a declaratory decree could not be maintained and both the Courts below disallowed the contention. The District Munsif observed that as the first defendant was karnavati, the plaintiffs were not entitled to possession and that possession really remained where it was before the demise on kanom. The Subordinate Judge found that possession of the properties demised on kanom was held by the first defendant on behalf of the tarwad, that the plaintiffs had no objection to her possession, and that if second and third defendants obtained attornment from tarwad tenants subsequent to the kanom, it was inoperative as an attornment acquired 'on a vicious title.' The contention on appellants' behalf is that such attornment operates as a transfer of possession from the tarwad to the kanomdars and that the plaintiffs ought to have sued to recover possession, and not merely for a declaration, under section 42 of Specific Relief Act; but we do not consider that this view can be supported. So long as the property continues in the possession of the karnavan as a member of the tarwad, it is *primâ facie* that of the tarwad; and all that is necessary for a junior member to do in order to prevent its becoming adverse to the tarwad is to obtain a declaration that the kanom which is relied on as the

PADAMMAH v. THEMANA AMMAH.

cause of adverse possession is invalid. When the kanom is granted to a stranger to the family and he is in possession, the doctrine of unity of possession is not applicable and possession must then be sued for as relief consequent on the declaration. Our attention is called to the decisions in *Subramanyan* v. *Paramaswaran*(1), *Bikutti* v. *Kalendan*(2), *Abdulkadar* v. *Mahomed*(3), and *Narayana* v. *Shankunni*(4). It was held in *Subramanyan* v. *Paramaswaran*(1) that where a title is in dispute, there may be third parties who are honestly in doubt and ready to acknowledge the title of either claimant, or who, having attorned to one, may be ready to acknowledge the person declared by the Court to have the title, and that in such a case, a suit for a declaratory decree will lie. This decision is against the appellants. In *Bikutti* v. *Kalendan*(2), it was held that according to the plaintiffs' case, the land being in the possession of strangers, it was clearly the right of the plaintiff, as of the other members of the tarwad, to have the land restored to the possession of the tarwad. The decision in *Abdulkadar* v. *Mahomed*(3) proceeded on the ground that the office of Sheik and its emoluments were in the possession of the defendant and the doctrine of unity of possession had no application. Nor is the decision in *Narayana* v. *Shankunni*(4) in point.

Another contention on appellants' behalf is that the consideration for the kanom was in part-payment of tarwad debts and our attention is drawn in this connection to exhibit IX and other documents. The Subordinate Judge observes in his judgment that if the appellants have paid any premium for the kanom grant, they may have a lien to that extent on the property. Though respondents may be entitled to have the kanom declared not binding on the tarwad, appellants are entitled to have any part of the consideration, which benefited the tarwad, or extinguished any of its debts, declared a charge in their favour. The Subordinate Judge has not come to any finding on this point. He is directed to try the following issue, viz., whether any, and what, debts due by the tarwad were discharged by the kanomdars from their private funds?

In compliance with the above order the Subordinate Judge

(1) I.L.R., 11 Mad., 116.
(2) I.L.R., 14 Mad., 267.
(3) I.L.R., 15 Mad., 15.
(4) I.L.R., 15 Mad., 255.

having returned a finding to the effect that tarwad debts had been discharged by the kanomdars to the extent of Rs. 695 from their private funds, the High Court delivered judgment as follows :—

JUDGMENT.—The finding being one of fact must be accepted. We, therefore, modify the decree of the Courts below by declaring the kanom by first defendant to defendants 2 to 4 to be invalid, but that these defendants have a charge on the property to the extent of Rs. 695 with interest thereon at 6 per cent. per annum from the several dates of payment particularized in the finding.

Plaintiffs must pay the costs of the defendants 2 to 4 on the issue sent for trial. In other respects, the appeal is dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

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

THAPITA PETER (PLAINTIFF), APPELLANT,

v.

THAPITA LAKSHMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1893. Nov. 23. 1894. Jan. 26.

Divorce—Divorce Act IV of 1869, s. 7—Nature of the marriages contemplated by the Act—Monogamous marriage.

The petitioner and his wife married according to the rites of the Hindu religion. The wife subsequently left her husband and lived in adultery with another man. Both the husband and wife subsequently became Christians, but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage :

Held that, having regard to section 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one. *Hyde* v. *Hyde*(1) and *Brinkley* v. *Attorney-General*(2) cited and followed. *Gobardhan Dass* v. *Jasadamoni Dassi*(3) dissented from.

CASE referred under section 17, Act IV of 1869, by G. T. Mackenzie District Judge of Kistna, for confirmation of his decree in original

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* Referred (Matrimonial) Case No. 5 of 1893.

(1) L.R., 1 P. & D., 130. (2) L.R., 15 P.D., 76. (3) I.L.R., 18 Calc.,