

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

MOORIYAT PEETIKAYIL KUNHAMINA AND OTHERS
(DEFENDANTS NOS. 1 TO 3), APPELLANTS,

1908.
December
7, 16.

v.

MOORIYAT PEETIKAYIL KUNHAMBHI AND OTHERS
(PLAINTIFFS NOS. 1 TO 7), RESPONDENTS.*

Marumakattayam Law—Validity of gift, excluding male issue, to wife and daughter—Right of last surviving daughter—Construction of gift.

A person, governed by the Marumakattayam Law, executed a deed of gift in favour of his wife and three daughters under which they and their female descendants were to enjoy the properties hereditarily, males being excluded. The last surviving daughter made a gift of the properties to her own female descendants. In a suit by the female descendants of another daughter:

Held, (1) that the condition excluding males was invalid.

(2) That the wife and daughters did not, on the construction of the deed, take as joint tenants in the English sense, so as to vest the whole property in the last survivor, or as tenants in common.

(3) That the deed created a sort of Thavazi which was not different from an ordinary Thavazi in respect of descent so long as there remained any female descendant of any of the donees.

(4) That the last surviving daughter had no interest which she could validly convey.

SECOND APPEAL presented against the decree of R. D. Broadfoot, District Judge of North Malabar, in appeal Suit No. 551 of 1915, presented against the decree of T. V. Venkateswara Ayyar, District Munsif of Kuttuparamba, in Original Suit No. 636 of 1904.

Suit for a declaration that a deed of gift executed in favour of defendants Nos. 1 to 5 by their deceased grandmother B was invalid.

The properties in suit belonged to one V who, in 1877, executed a deed of gift of them in favour of his wife P and her three daughters A, B and V. A died without issue, V died next, leaving daughters and granddaughter who were the plaintiffs. B died last, leaving female descendants, defendants Nos. 1 to 5. Prior to her death B executed a deed of gift of the plaint properties to the defendants Nos. 1 to 5. The plaintiffs sued to have the

* Second Appeal No. 797 of 1906.

MILLER deed of gift by B declared invalid and to recover possession of the
AND properties.
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— The Court of First Instance gave a decree for plaintiffs and
KUNHAMINA this was confirmed on appeal
v.

KUNHAMBI The defendants Nos. 1 to 3 preferred a second appeal to the
High Court.

J. L. Rosario for appellants.

Dr. S. Swaminadhan for *T. Richmond* for respondents.

JUDGMENT.—The gift by Mammi (exhibit A) under which items 1 to 4 were held by Biyyathamma is a gift to his wife and his three surviving daughters to be enjoyed by them and their female descendants hereditarily, males being excluded.

It was not contended on either side that the condition of enjoyment can stand so far as it excludes males altogether, and the gift must therefore be taken as gift, without that condition, to Kunhipathamma and her three daughters.

Riyyathamma, having survived her mother and sisters, the question is now whether she had a right to give the property to her own descendants or whether the plaintiffs, who are descendants of one of her sisters, Uppennu, have joint rights in it and the gift is consequently bad and must be set aside.

It is contended, on the one hand, that the property became the absolute property of Biyyathamma as the survivor of the four donees, or, if the donees held as tenants in common, the gift cannot be set aside, because Biyyathamma was competent to transfer her own interest.

On the other hand, it is contended that the donees must be taken to hold the property with the ordinary incidents of tarwad property and that Biyyathamma had no interest which she could transfer to her descendants. To this it is replied that the intention of the donor must be looked to to determine the incidents of the property held under the gift, and that here the donor's intention was clearly not to give the property with the incidents of tarwad property, but to create a perpetual succession confined to females, a course of devolution equally unknown to the Marumakkatayam and to the Muhammadan law, though from the District Judge's judgment it seems that attempts to create a similar course are not unknown in Malabar.

The intention of the donor was, beyond any doubt, to provide for his wife and daughters and their female descendants; his

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attempt to carry into effect this intention fails, so far as the attempt is to effect the exclusion of males altogether, but that does not affect the intention. There is nothing to indicate any intention to exclude the female descendants of any of the donees in any event, and we should be doing that which the donor never intended, were we to decide that the descendants of one daughter are excluded by the death of their ancestor before her sisters---and we have the authority of the Privy Council for declining to presume a gift creating a joint tenancy in the English sense (*Jogeswar Narain Deo v. Ramachandra Dutt*(1)). Here the donees are followers of Marumakkatayam usage and the gift is, but for one condition, an ordinary gift from a husband to his wife and her descendants, such as we find commonly in Malabar Tarwads; the one unusual condition is the exclusion of males from the enjoyment, but that is not a condition of any real importance: the inclusion or exclusion of males makes no difference to the devolution of the property; unless there is a partition or it happens that the last surviving member of the group is a male, the difference is only in the number of mouths to be fed. It seems therefore to us that the lower Courts have taken the right view of the gift; it was intended to create a "sort of thavazi" as the District Judge puts it, and a thavazi not differing in regard to the course of descent from an ordinary thavazi so long as there remained any female descendant of any of the donees.

We find it easier to attribute this intention to the donor than to believe that he intended the donees to take as tenants in common, the share of each to descend to the female descendants respectively of each. If it had been his intention to give each a share exclusively, we think he would have probably given separate plots to each donee.

We cannot, in our opinion, simply because the donor attached to the gift a condition of enjoyment to which effect cannot be given, infer that he intended to depart entirely from Marumakkatayam usage, seeing that, as we have already observed, the gift but for that condition is entirely in accord with that usage.

In this view of the case Biyyathumma had no interest in items 1 to 4, of the property given, which she was competent to give away.

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Items 5 to 7, which were the acquisitions of Kunhi Pathumma, descended at her death, if the decisions are right, to her tarwad. The karnavan has not claimed them and they have been held by Biyyathumma. But the District Munsif finds, and the District Judge does not differ, that she held them for the thavazi. There is nothing to suggest, he says, that she held them adversely to the plaintiffs, and there is evidence that she maintained the plaintiffs. If then the karnavan has lost his rights, it is the thavazi not Biyyathumma alone that has acquired them.

In our opinion the decision of the Courts below is right and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908.
November
18.

JAMMALAMADAKA SUBBA LAKSHMAMMA (PLAINTIFF),
APPELLANT,

v.

JAMMALA VENKATARAYADU AND OTHERS (DEFENDANTS,
Nos. 2 to 8, 10 to 25, 27, 31, 28 to 30), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, ss 562, 591—An order of remand on appeal cannot be reviewed by same Court subsequently—An order of remand not appealed against cannot be objected to in second appeal from the final appellate decree.

A decree was reversed on appeal and the case was remanded for retrial. Against the decree passed at the remanded trial, an appeal was preferred and the Judge of the Appellate Court, who was the successor of the Judge who originally remanded the case, held that the previous order of remand was wrong, and allowed the appeal :

Held, on Second Appeal, that the original order of remand could not be reviewed by the lower Appellate Court, and could not be questioned on the second appeal under section 591 of the Code of Civil Procedure as such order was not appealed against.

SECOND APPEAL presented against the decree of S. P. Rice, District Judge of Guntur, in Appeal Suit No. 15 of 1906, presented against the decree of M. Viswanatha Ayyar, District Munsif of Guntur, in Original Suit No. 289 of 1901.

* Second Appeal No. 669 of 1906.