GANESHA ROW v. TULJARAM ROW.

on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of his son.

Their Lordships are of opinion that there should be a declaration in this case that the agreement of the 21st November 1897 and the satisfaction entered thereunder are not binding on the plaintiff and that he is remitted to his original rights under the decrees in the suit of 1886.

Their Lordships will, therefore, humbly advise His Majesty that the decree and judgment of the High Court should be set aside, that a declaration should be made in the terms stated, and that the case should be returned to the High Court to deal with the other questions covered by issues Nos. 6 and 7 arising between the parties.

The respondent Tuljaram will pay the costs of the appeal to the High Court in its Appellate Jurisdiction and the cost of this appeal. The costs of the trial on the Original Side of the High Court, and those which will be incurred in the future proceedings, will abide the result of those proceedings.

Appeal allowed.

Solicitor for the appellant: *Douglas Grant.*

Solicitor for the respondent Tuljaram Row—*John Josselyn.*

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. March 15.

P. T. GOVINDA PANIKKER AND NINE OTHERS (NOS. 2 TO 10, LEGAL REPRESENTATIVES OF THE DECEASED FIRST APPELLANT: PLAINTIFFS NOS. 1, 2 AND 4 TO 11), APPELLANTS,

v.

T. P. V. NANI *alias* NARAYANI NANGIAR AND NINE OTHERS (DEFENDANTS NOS. 1 TO 6 AND 8 TO 11), RESPONDENTS.*

Presumption as to ownership of property acquired in the name of junior member of tarwad—Presumption of fact and not of law.

No presumption of law can be raised as to whether properties acquired in the name of a junior member of a tarwad belong to him or to his tarwad. Any presumption to be raised is one of fact.

SECOND APPEAL against the decree of L. G. MOORE, the Acting District Judge of South Malabar in Appeal No. 229 of 1907, presented against the decree of M. MUNDAPPA BANGERA, the

* Second Appeal No. 153 of 1909.

Subordinate Judge of South Malabar at Calicut, in Original Suit No. 48 of 1905.

The following statement of facts is taken from the judgment of the lower Appellate Court:—

"Plaintiffs are members of the Panhanampalli Tekkevittil tarwad, first plaintiff being the karnavan. One Sankunni Panikkar, husband of first defendant and father of Defendants Nos. 2 to 5, was admittedly the karnavan of plaintiffs' family from 1887 till June 25, 1895, when he was removed in consequence of the decree in Original Suit No. 6 of 1894. Sankunni Panikkar executed a deed of gift, Exhibit I, on November 15, 1893, in favour of his wife and children in respect of plaint items 1—33. Defendants Nos. 1—5 claim items 34—49 under a will Exhibit CXLVII, dated 28th March 1899, executed by Sankunni Panikkar. All the properties in suit, except items 45—49, were taken possession of by defendants Nos. 1—5. Plaintiffs accordingly sue to recover possession of plaint items 1—44, and for a declaration that defendants have no rights to items 45 to 49, which are in the possession of the plaintiffs.

"The case of defendants Nos. 1—5 was that Sankunni Panikkar had a right to bequeath the properties which belonged to him exclusively. They contend that some of the properties were obtained by Sankunni Panikkar from his dayadhi, Etakkazhikat Sanku Panikkar, who was not a member of plaintiffs' tarwad, and that the remainder were acquired by Sankunni Panikkar, partly by his own exertions and partly from the profits of properties which he obtained from Sanku. On the other hand plaintiffs' case was that the original acquirer Sanku was a member and karanavan of their tarwad and that certain of the plaint items were tarwad properties. They admitted that certain items were acquired by the deceased Sankunni Panikkar, but contended that the acquisitions were made from tarwad funds for the benefit of the tarwad. The main dispute between the parties is as to whether Sanku Panikkar was, as contended by plaintiffs, a member of their tarwad or whether, as defendants Nos. 1—5 allege, he belonged to Etakkazhikat tarwad which had no community of interest with the Panhanampalli Tekkevittil tarwad."

The lower Appellate Court, agreeing with the Court of First Instance, found that the plaint properties were the private and separate properties of Sankunni Panikkar.

GOVINDA PANIKKER v. NANI.

BENSON AND SUNDARA AYYAR, JJ.

J. L. Rosario for appellants Nos. 2 to 10.

K. P. Govinda Menon for respondents Nos. 2, 4 and 5.

JUDGMENT.—Three points have been argued for the appellants in this second appeal. The first point is that the lower Court has wrongly presumed that properties acquired in the name of a junior member of a tarwad belong to him and not to his tarwad. It has no doubt been stated in several cases by this Court that the presumption is just the other way. See *Vira Rayen* v. *The Valia Rani, Calicut*(1), Second Appeal No. 1153 * of 1888 and Second Appeal No. 1549 † of 1902. We do not,

* ORDER (Second Appeal No. 1153 of 1888).—The Judge appears to us to have overlooked the evidence of Narayanan Mussad (defendant's witness) who speaks of the prior *kanom* and has also not considered the usual presumption that property acquired in the name of an *Anandravan* would ordinarily be acquired by tarwad funds unless he was in possession of separate means of his own [*Vira Rayan* v. *The Valia Rani, Calicut*(1)]. We will ask him to reconsider the issue with reference to these observations and state whether he still adheres to his present finding.

Finding to be returned in six weeks from the date of receipt of this order and seven days after posting of the finding will be allowed for objections.

In compliance with the above orders, the District Judge submitted the following

Finding: The High Court have directed me to reconsider my finding on an issue in this case with reference to certain observations made by them. The first of these remarks is to the effect that I have overlooked the evidence of Narayanan Mussad (defendant's witness) who speaks of the prior *kanom*. As regards this question the District Munsif remarked (paragraph 6 of his judgment) that the similarity in the tarwad name of plaintiffs and the first defendant and Ittaman Nair and the admission of Narayanan Mussad that the tarwads were both in the same *amshom* made it probable that Ittaman Nair belonged to the same tarwad as the plaintiffs and the first defendant. With respect to this I observed in my appeal judgment that it was by no means clear that Ittaman Nair was a member of the first plaintiff's tarwad. What I find that Narayanan Mussad says on this subject is as follows: In examination-in-chief he stated that the plaintiff, first defendant and Ittaman Nair were not related to one another. In cross-examination he said that Ittaman Nair lived in Thodunal *amshom* (*i.e.*, the *amshom* in which item No. 1 of the plaint property is situated) and that his house name was Thiyokke Chembra. The house name of the plaintiffs and first defendant is Chembra and the similarity no doubt tends to prove that Ittaman was of the same tarwad with them. The witness however further on in his deposition stated that there was no community of pollution between the plaintiffs and Ittaman. If this be true, they cannot have belonged to the same tarwad and it was a consideration of this statement that was the foundation of the remark in my appeal judgment to the effect that it was by no means clearly shown that they were members of the same tarwad. If such were the case, I think that it is only reasonable to suppose that more cogent evidence to prove it would be forthcoming.

(1) (1881) I.L.R., 3 Mad., 141.

however, understand these cases as laying down that there is any presumption of law either way. The presumption is one of fact, see Mayne's 'Hindu Law' paragraphs 289 to 291, and whether a presumption in favour of the property being tarwad property should be drawn or not in any particular case would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of any family funds at the time of the acquisition which disappeared after the

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The second observation made by the High Court is that I have not considered the presumption that property acquired in the name of an Anandravan would ordinarily be acquired by tarwad funds unless he was in possession of separate means of his own. As regards this the pleader for the appellant acknowledges that it is impossible for him to show from the record as it stands at present that the first defendant was in possession of separate funds of his own. He however states that he could produce such evidence if permitted to do so. As the remand order of the High Court does not allow me to admit fresh evidence I cannot do so. In answer to a question put by me as to why the evidence that is now stated to be available on this point was not produced previously the pleader states that this was due to his being under the impression that the presumption was that property shown to have been acquired in the name of an Anandravan had been purchased with his own separate funds unless it was shown that tarwad funds had been used for the purpose. The pleader can not, however, draw my attention to any decision of the High Court in which it has been held that the presumption is as he states. Under these circumstances I must leave it to the High Court to decide if the request that further evidence on this point should be admitted is one that should be complied with or not.

This second appeal coming on again for hearing the Court delivered the following

JUDGMENT—We see no reason to call for any further evidence. The evidence which respondent now wishes to adduce might have been tendered on the original issue.

We reverse the decree of the Lower Appellate Court and restore that of the District Munsif. Appellants are entitled to their costs in this and in the Lower Appellate Court.

† JUDGMENT (Second Appeal No. 1549 of 1902).—The fact that a title-deed is in the name of a junior member of a family does not, by itself raise the presumption that the property to which the deed relates, in fact, belongs to him separately. In the present case the second defendant set up a certain case as to the source from which she obtained the money and failed to prove it. Further she has conceded that the property comprised in Exhibit H, although the deed stands in her name, belongs not to her but to the tarwad. As the judge's finding seems to be based on an erroneous view as to the onus of proof, we must set aside the finding and remand the case for a fresh finding on the issue as to whether the mortgage bond was in fact the property of the second defendant.

Finding should be submitted within six weeks from this date and seven days are allowed for filing objections.

Costs will abide the event.

GOVINDA PANIKKER v. NANI.

BENSON AND SUNDARA AYYAR, JJ.

acquisition, and any other facts that may throw light on the source of the money used for the acquisition. In this case the lower Court has found on a consideration of the evidence on record that the property in question belonged to the deceased Sankunni. On this view it is unnecessary to consider the second question argued by Mr. Rosario whether the finding against his clients that their title to particular items of property is *res judicata* is correct or not. The third point urged is that with respect to the title of Sankunni to the properties bequeathed by him to the defendants it is *res judicata* in their favour in consequence of the decision in Original Suit No. 6 of 1894, on the file of the Subordinate Court, Calicut. The appellate judgment, however, decided the case without adjudicating on that question, and the matter cannot therefore be regarded as *res judicata*. This Second Appeal must be dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. August 29 and September 6.

In re K. GANAPATHI BHATTA (ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898), sec. 403 (1), — Autrefois acquit— sec. 340 (4), scope of—Sanction to prosecute, sec. 195 — Indian Penal Code (Act XLV of 1860), secs. 182 and 211.

Sanction was obtained by the complainant to prosecute the accused for an offence under section 211, Indian Penal Code. Accused was tried and convicted but the conviction was quashed by the High Court in revision on the ground that the accused had not committed an offence under that section but under section 182, Indian Penal Code, for which no sanction had been granted. Complainant thereupon obtained sanction to prosecute the accused under section 182, Indian Penal Code. On accused pleading in bar of prosecution section 403 (1), Criminal Procedure Code, the Magistrate overruled the objection and his order was confirmed by the Court of Session. Accused petitioned the High Court.

Held, that the prosecution was barred by section 403 (1), Criminal Procedure Code.

Held further that section 403 (4) refers to the character and status of the tribunal when it refers to competency to try an offence and that a sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal but only a condition precedent for the institution of proceedings.

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* Criminal Revision Case No. 502 of 1910 (Criminal Revision Petition No. 413 of 1910).