that no exception is made in such cases. It is also difficult to see how the act of calling together a jury is more important than the decision as to whether the verdict of the jury is proper or the acceptance of any modification by them. If the latter duties can be performed by the Second-class Magistrate, there is no reason why he should not empanel the jury whose verdict he has power to dispose of.

I am of opinion that the words "the Magistrate" in section 139, clause 1, refers to the Magistrate to whom application has to be made under section 135, clause *b*, to empanel a jury and who under section 133 does so.

I set aside the order of the Lower Court and direct that the application be disposed of according to law.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

1919, August 19 and 26.

NEMANNA KUDRE (SECOND DEFENDANT), APPELLANT,

v.

ACHMU HENGSU AND NINE OTHERS (PLAINTIFFS AND FIRST DEFENDANT), RESPONDENT.*

Malabar Law—Karnavan, removal of, from office—Senior anandravan—Exclusion from succession to office of karnavan—Power of Court to declare senior anandravan unfit to succeed to office—Grounds of exclusion.

A Court can for good cause remove a karnavan and declare the senior anandravan to be unfit to succeed to the vacant office.

Kunhan v. *Sankara* (1891) I.L.R., 14 Mad. 78, followed;

Chindan Nambiar v. *Kunhi Raman Nambiar* (1918) I.L.R., 41 Mad. 577 (F.B.), referred to; dictum of SADASIVA AYYAR, J., in *Cheria Pangi Achan Nambiar* v. *Unnalachan* (1917) 32 M.L.J. 323, dissented from.

SECOND APPEAL against the decree of T. JIVAJI RAO GARU, the Subordinate Judge of South Kanara, in Appeal Suit No. 217 of 1917, preferred against the decree of M. ANANTHAGIRI RAO, the District Munsif of Udipi, in Original Suit No. 133 of 1916.

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* Second Appeal No. 1284 of 1918.

NEMANNA KUDBE v. ACHMU HENGSU

The suit was brought by plaintiffs as members of an Aliyasantana family to remove the first and second defendants, from the management fo the affairs of the family, as being unfit and to appoint first plaintiff as ejmanthi. First defendant was the karnavan, and second defendant was the senior anandravan. The lower Courts found that in 1905 the two defendants in conjunction with their mother, now deceased, had divided all the family properties among themselves by a registered partition deed, excluding the plaintiffs altogether and had dealt with the properties as their own, mortgaging them, etc.

The lower Courts further found that the first defendant had failed to look after the junior members of the family and to maintain them out of the income and that he had in collusion with the second defendant, and for the individual benefit of themselves, dealt with the family property so as to deprive the plaintiffs entirely of any benefit from it.

The lower Courts declared the first and second defendants unfit to be ejmans of the family and appointed first plaintiff ejmanthi in place of first defendant. The second defendant alone appealed.

K. P. Lakshmana Rao for appellant.

B. Sitarama Rao for first, second and ninth respondents.

SPENCER, J.

SPENCER, J.—The first point argued in this Second Appeal has not been taken in the appellant's grounds of appeal, but as it involves a question of principle, and as it strikes at the root of the jurisdiction of the Courts if the appellant succeeds on it, we have allowed it to be argued.

I agree with my learned brother that what the Courts were asked to do in this suit was not to frame a scheme, or to exercise any undefined authority of selecting the most suitable person to manage the affairs of this family, but to remove the present ejman for mismanagement and at the same time to declare that the next in order of seniority was unfit to hold the vacant office, and I fail to see any reason for supposing that Civil Courts have not power to grant such a declaration.

Speaking for myself, I am averse to putting any narrow limitations on the power of Courts to do all that is needful to settle the disputes of the parties in all Civil matters that come up to be adjudicated upon. To hold otherwise would be to

NEMANNA KUDRE *v.* ACHMU HENGSU.

SPENCER, J.

deprive these tribunals of authority to make a final settlement of opposing contentions. In *Chindan Nambiar* v. *Kunhi Raman Nambiar*(1), the Full Bench had no doubt about the Civil Court's power to remove from the karnavanship for misfeasance a person who had attained that position by a course different from the ordinary course, namely by a family agreement.

In *Kunhan* v. *Sankara*(2), acts of misfeasance, committed before the appellant became de jure karnavan, were held to be a sufficient cause for removing him, the learned Judges observing:

"whether the misfeasances were committed either solely or in conjunction with another; in either case the interest of the tarwad requires that the management of its affairs should not be entrusted to him."

Moral unfitness seems to me to be an equally good reason for exclusion as mental or physical deficiencies.

On the second point, the findings of the lower Courts, as I understand them, are that the second defendant was guilty of fraud and collusion, and as these are findings of fact which we must accept, the result is that the declaration of unfitness follows as a natural consquence. The Second Appeal is dismissed with costs.

KRISHNAN, J.

KRISHNAN, J.—This Second Appeal arises from a suit brought by the plaintiffs as members of an Aliyasantana family to remove as unfit, the first and second defendants from the management of the affairs of the family, and to appoint the first plaintiff as ejmanthi, and give her possession of the family properties. Defendants had denied that plaintiffs were members of their family and had in 1905 in conjunction with their mother, now deceased, divided all the family properties among themselves by a registered partition deed, excluding the plaintiffs altogether and had dealt with them, each with his share as his own. Though the first defendant was the ejman and the second defendant was the senior anandravan of the family, at the date of suit, they did not look upon themselves as members of an undivided family at all, but each managed the properties he obtained on partition. Hence the form of the prayer to remove both of them from management.

(1) (1918) I.L.R., 41 Mad., 577 (F.B.). (2) (1891) I.L.R., 14 Mad., 78.

NEMANNA KUDRE v. ACHMU HENGSU.

KRISHNAN, J.

The learned Subordinate Judge gave the decree prayed for. The second defendant alone has appealed to us, and it is contended on his behalf that Courts have no power to interfere with the right of the senior anandravan to succeed when the karnavan is removed, and that in any case there are no proper grounds for excluding the second defendant from ejamanship in this case.

The first contention is a general one and it is sought to be supported by an observation of SADASIVA AYYAR, J., in *Cheria Pangi Achan* v. *Unnalachan*(1) where the learned Judge quoted with approval some passages from an article in the Madras Law Journal(2). The effect of the passages is no doubt to show that the Court has no power to exclude the eldest anandravan from succeeding when a karnavan is removed. But it may be pointed out that the learned Judge's remarks are obiter dicta, and with all respect to the learned Judge I am unable to accept his view.

To understand the bearings of the question raised it may be useful to consider how the Court acts in removing a karnavan. That a Court can remove a karnavan for good reason is well established by numerous decisions, beginning from the decision of the Sadr Adalat in 1 Sud Dec. 118, and is not now disputed. The authorities do not however make it clear on what basis the power is founded. It seems to me however that it is based on the theory that the institution of karnavanship in a tarwad is intended for the benefit of the tarwad, and the continuance of a karnavan in office is dependent on a proper discharge by him of his obligations to the family. When he fails to do his duties and his retention in office becomes injurious to the interests of the tarwad, he forfeits his office. But as he could not be removed by act of parties without his own consent the aid of the Court is sought to do it by its decree. If the right to karnavanship is an absolute right inherent in the eldest member and is independent of his obligations, it is difficult to see how the breach of those obligations can affect the right, whatever other remedies there may be. I do not consider that the removal of a karnavan for his misdeeds is by way of punishment at all. The Civil Court will hardly be the tribunal for it. The Court adopts the remedy of removal as necessary to protect the interests of the tarwad.

(1) (1917) 32 M.L.J., 323, at 332. (2) (1901) 11 M.L.J., 129, at 136.

It is true that it is not every failure to perform an obligation that would lead to the removal of a karnavan but only such misconduct as would make it necessary in the interests of the tarwad to have him removed. As observed in *Kunhan* v. *Sankara*(1) the question to be kept in view is whether the interests of the tarwad require that the management of its affairs should not be entrusted to him. The jurisdiction to remove him seems to me really to be founded upon his forfeiture of his office in gross misconduct rendering him unfit for it.

If this view is right, I do not see any difficulty in Courts declaring, on the prayer of the parties, that the next person is unfit to assume the office of karnavan. If circumstances exist which show that he could not or would not perform his obligations to the family, why should not the Court prevent him from assuming office if it is in the interests of the family to do so?

It is easy to suggest conditions when the senior anandravan may be totally unfit to become a karnavan. He may be an idiot or a lunatic, or in the words of Dr. Ormsby, in his " Outlines of Marumakkattayam Law ", 'a person physically or mentally incapable of conducting the affairs of the tarwad,' or he may be of so depraved a mortal character that the interests of the tarwad may require that its affairs should not be entrusted to him. Is the Court then to tie its hands and allow him to become the karnavan? I think not. To hold that the Court has no power, in such a case to exclude him will be to nullify the very object of removing the obnoxious karnavan. I consider, that in the same manner that the Court can remove a karnavan it can in the same suit declare the next man to be unfit and pass on the succession to his junior.

It is quite true that the senior anandravan succeeds to the office of karnavan by virtue of his seniority, and not by any appointment to it. But his rights are no higher than those of the karnavan who is in office and who is entitled to continue in it till his death; nevertheless Courts have felt no difficulty in removing him from office. It is mere hypercriticism to say that the Court has no power to appoint a karnavan and therefore it cannot choose a person for the office. This is no doubt strictly so but what the Court does is not to appoint any person it likes, but the person next in rank to the karnavan and the excluded senior

(1) (1891) I.L.R., 14 Mad., 78, at 80.

NEMANNA KUDRE v. ACHMU HENGSU.

KRISHNAN, J.

member or members; that person really succeeds by virtue of his position, on the exclusion of his seniors and his appointment is really a superfluity. The question whether a power to exclude exists does not depend on the existence of a power to appoint, for it is conceded that a power to remove a karnavan exists though the power to appoint him may not.

The most important objection to excluding the senior man from karnavanship is that in doing so you judge from his conduct as a junior member his unfitness to be a karnavan, without allowing for the possibility that he may turn over a new leaf when he is given the responsibilities of the karnavan's office. No doubt there is force in this argument, but I do not consider that it necessarily applies in every case or that it necessarily tells against the existence of the power to exclude. It shows that great care should be taken in judging of such a person's unfitness and that the power of exclusion should be used only sparingly and only when it is clearly necessary to do so in the interests of the tarwad. Each case has to be judged on its own facts and no hard and fast rules can be laid down.

The Courts have in many cases exercised the right of considering the fitness of the person who will succeed on the removal of the karnavan and have barred his succession when there is good reason to do so. No doubt a senior man should not be passed over in favour of his junior, on any ground of preference on account of the greater fitness of the latter, but only on the ground of his own unfitness. Where, however, good grounds exist I am not prepared to say that the Courts have acted beyond their powers in barring the succession of the next senior man when removing the karnavan from office. The first contention of the appellant therefore fails.

The next contention is one on the merits. The second defendant is found to have conspired fraudulently with his brother in denying the membership of the plaintiffs and excluding them from all participation in the enjoyment of the tarwad properties. He has in fact by getting up the partition deed attempted to put an end to the family itself, and he has taken the family properties which fell to his share as his own, and subsequently alienated some of them to strangers. His conduct was thus entirely against the interests of the tarwad, and there is no indication that he is likely to behave properly in the future.

In these circumstances I am not prepared to say that the lower Courts were wrong in removing him along with his brother.

The Second Appeal is dismissed with costs.

K.R.

NEMANNA KUDRE v. ACHMU HENGSU.

KRISHNAN, J.

APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice Moore.

1919, September, 2.

RAMANATHAN PILLAI, APPELLANT (PLAINTIFF),

v.

DORAISWAMI AIYANGAR AND NINE OTHERS, RESPONDENTS (DEFENDANTS NOS. 1 TO 4 AND NOS. 6 TO 10).*

Civil Procedure Code (V of 1908), ss. 47 and 145—Third party executing surety bond for a judgment-debtor—Suit for a declaration that the bond is void for fraud and undue influence and for cancellation of the bond, maintainability of.

A person, not a party to the suit, who stands surety for a judgment-debtor for the due performance of a decree, has no independent right, under section 47 of the Civil Procedure Code, to apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud and undue influence. His only remedy is by way of suit. He is a party to the suit within the meaning of section 47, Civil Procedure Code, only for the limited purpose mentioned in section 145 of the Code, namely, for appeal.

SECOND APPEAL against the decree of F. A. COLERIDGE, District Judge of Madura, in Appeal No. 121 of 1917, preferred against the decree of K. V. KARUNAKARA MENON, Temporary Subordinate Judge of Madura, in Original Suit No. 6 of 1916.

The facts are given in the judgment.

B. Sitarama Rao and *S. R. Muttuswami Ayyar* for appellant.

A. Narasimha Achariyar for V. V. Srinivasa Ayyangar for respondents.

The JUDGMENT of the Court was delivered by

MOORE, J.

MOORE, J.—In execution of the decree in C.S. No. 34 of 1912 in the High Court, one Sayyed Muhammad Rowther was arrested. On 29th September 1914, the judgment-debtor and the present appellant as surety on behalf of the judgment-debtor, executed a security bond for Rs. 4,443-2-0 in favour of the District Court of Rāmnād, in which Court the execution proceedings were pending, and the judgment-debtor was released.

* Second Appeal No. 1061 of 1918.