APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

PUZHAKKATTOORAKAYIL KARUVAYUR RAMAN MOOSAD'S SON, KARNAVAN AND MANAGER STANAM NARAYANAN MOOSAD (FIRST RESPONDENT), PETITIONER,

1935 January 16

v.

PUZHAKKATTOORAKAYIL KARUVAYUR RAMAN MOOSAD'S SON RAMAN MOOSAD AND FOUR OTHERS (PETITIONER AND RESPONDENTS NOS. 2 TO 5), RESPONDENTS.*

Madras Nambudri Act (XXI of 1933), sec. 26—Previous law affecting Nambudri Brahmans—Applicability of, in cases where existing law has not been expressly altered—Right to sue for removal of karnavan not taken away by the Act.

The provisions of the Madras Nambudri Act (XXI of 1933) make it clear that except where the law has been expressly altered the previous law applies. Under the law previous to that Act, a Nambudri Brahman had the right to sue for the removal of the karnavan of his illom. There being no express provision in the Act abrogating that rule of "law, custom or usage," that right exists in spite of the Act.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Ottapalam dated 28th August 1933 and made in Original Petition No. 12 of 1931.

S. Venkatachella Sastri for petitioner.

B. Sitarama Rao as *amicus curiae.*

Cur. adv. vult.

JUDGMENT.

The respondent, a Nambudri Brahman, applied to the lower Court for leave to file the suit in

* Civil Revision Petition No. 1789 of 1933.

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question in *forma pauperis*, the object of the suit being the removal of the karnavan of his illom. The leave having been granted, the lower Court's order is attacked by the first defendant, the karnavan. The plaintiff (the respondent) is not represented in this Court, but at my request Mr. B. Sitarama Rao has argued the case as *amicus curiae* and I am indebted to him for his lucid and careful argument.

The karnavan objects that the plaint does not disclose a cause of action and that therefore under Order XXXIII, rule 5, of the Civil Procedure Code the lower Court ought not to have permitted the plaintiff to sue as a pauper. His learned Counsel's contention is that the right to demand partition, which a Nambudri Brahman possesses in virtue of the recent Madras Nambudri Act (XXI of 1933), is inconsistent with the continued existence of a right to bring a suit for the removal of a karnavan. He rests his argument on the well-known maxim, "The reason of the law ceasing, the law also ceases." True, the right to demand the removal of a karnavan was consequent upon, and resulted from, the incident of impartibility which attached to the property of a Nambudri illom. Says Mr. (Justice) Sundara Ayyar in his Treatise on the Malabar and Aliyasantana Law :

> "At the same time it ought not to be forgotten that the junior members not being entitled to partition or even to call upon the karnavan to account, it is but right they should be entitled at least to see that the tarwad affairs are managed by a proper person. Courts should not hesitate to exercise their jurisdiction, when it is clear that the interests of the tarwad require the removal of the karnavan." (Page 104).

But the question depends not upon any abstract principle but on the definite provisions of the Nambudri Act, which make it clear beyond doubt that except where the law has been expressly altered, the previous law applies. First, the preamble shows that only "in certain respects" the law has been amended, and it makes mention of the five topics with which the Act deals, viz : (i) family management, (ii) marriage, (iii) guardianship, (iv) intestate succession and (v) partition ; it is in regard to each of these matters that the preamble says that the law has been defined and amended "in certain respects" only. Secondly, section 26 provides :

> "Nothing contained in this Act shall be deemed to affect any law, custom or usage applicable to Nambudri Brahmans except to the extent expressly laid down in this Act."

Under the law previous to the enactment, the right to demand partition was non-existent, but there existed a right to sue for the removal of a karnavan, there thus being a deviation in both these respects from the Mitakshara law. The argument that, because the new Act restores one incident of the Mitakshara law, therefore it should follow that that law should be applied in its entirety, ignores the express provisions of the statute, and must be rejected. A perusal of the Act will show that the Legislature, far from applying bodily the Mitakshara law to the Nambudris, has preserved the many peculiar incidents of the Nambudri system in the case of each of the topics referred to above and dealt with by the Act. The very conception of an illom as consisting of both males and females, each of whom is entitled to a share in the family property, is repugnant to the notion of a joint family

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under the Mitakshara system. Each Chapter abounds in instances where the law under the Act is a deviation from the ordinary Mitakshara law and it is unnecessary to refer to them in any detail. I must therefore hold that, in the absence of an express provision abrogating the rule of "law, custom or usage" (by whatever name it may be called), which enabled a Nambudri Brahman to sue for the removal of a karnavan, that right exists in spite of the Act, and that the lower Court's order is right.

In the result the civil revision petition is dismissed.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice King.

1935, January 31.

SADAYA PADAYACHI AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

v.

CHINNASWAMI NAIDU (PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. IX, r. 13—Ex parte decree—Application to set aside—Dismissal for default of—Application to set aside order of, and for restoration of original application—Order dismissing, on merits—Appeal from—Competency of—O. XLIII, r. 1 (c), and sec. 141 of Code—Applicability and effect of.

An application under Order IX, rule 13, of the Code of Civil Procedure to have an *ex parte* decree set aside was dismissed for default and an application made thereafter to have that order set aside and the original application restored was dismissed upon the merits.

Held that no appeal lay from the order made on the subsequent application.

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* Appeal Against Order No. 347 of 1932.