APPELLATE JURISDICTION. (a)

Regular Appeal No. 120 *of* 1870.

ERAMBAPALLI KORAPEN NÁYAR and 2 others. } *Appellants.*

ERAMBAPALLI CHENEN NÁYAR and 9 others. } *Respondents.*

In Malabar the word "taverai" has several distinct meanings. In the families of the princes all the houses have separate property and the senior in age of all the houses succeeds to the Royalty with the property specially devoted to it. This mode of succession may be regarded as rather due to public than to private law. Private families have sometimes adopted the same customs, but there is the strongest presumption against the truth of this in the case of a private family. Families becoming very numerous have often split into various branches; in the language of the people 'there is community of purity and impurity between them, but no community of property.' In the only sense of the word with which Courts of Justice are concerned, people so related are not of the same tarwád. Where there are several houses bearing the same original tarwád name, but with an addition, and there is no evidence of the passing of a member of one house to another: there is the strongest ground for concluding that separation has thistaken place.

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THIS was a Regular Appeal against the Decree of F. C. Carr, the Acting Civil Judge of Calicut, in Original Suit No. 1 of 1870.

The Suit was brought to obtain a decree declaratory of the plaintiffs' right to be considered members of the Erambapalli tarwád.

The main defence set up was that the plaintiffs belonged to a separate family called strictly the Erambapalli Parasherri tarwád, whereas the defendants' family was strictly called the Erambapalli Vadakanjerri tarwád, and that though they were descended from a common stock, yet that these were in reality separate tarwáds, to whom although they [the defendants] acknowledged that there was community of pollution [Pula Samandham], they asserted that there was no community of interest [Mudalsamandham], and consequently that although the plaintiffs had the name of Erambapalli, they were not entitled to be declared anandravans of their family, viz., the Erambapalli Vadakanjerri.

The issue settled was—

(a) Present: Holloway and Innes, JJ.

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Whether the plaintiffs had a right to a share of the property belonging to the "Erambapalli tarwád," as alleged in the plaint.

The Civil Judge was of opinion that the plaintiffs had made out their title to be considered members of the Erambapalli tarwád, and that as anandravers of the tarwád they had a claim upon the tarwád land, in accordance with the law of Malabar.

The defendants appealed.

At the 1st hearing of the appeal the High Court, in referring certain issues, delivered a judgment from which the following is extracted :—

"The decision that the plaintiffs are of the same tarwád does not settle the question. It may be that they are of the same tarwád and of different taverais, and that each has perfectly separate property. We see no reason for dissenting from the view that the tarwád is the same and we feel it necessary to refer the issues :—(1). Do they belong to different taverais of the same tarwád and what taverais ?

(2). Has each taverai a right to separate enjoyment of property, or is the whole property of the family in joint enjoyment ?

(3). Over what property, on the result of these findings, have the plaintiffs a claim to enjoyment as family property ?"

The Civil Judge (G. R. Sharpe) in returning findings upon these issues said :—

"Using the word Taverai in its strictest meaning there is no doubt, and plaintiffs themselves must admit that they and defendants are not the same taverai, *i. e.* are not children of the same mother. It is necessary in this suit, however, to go further back than the mother, and plaintiffs point to one Ittiada Amah as the common ancestress of themselves and of defendants through her two daughters Unniperi Amah and Inbichi Amah. Defendants on the other hand deny any such common descent and state that "no community of interest has existed between them and plaintiffs'

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ancestors from a very remote time." The evidence appears to me to be in favor of defendants' contention. [He then commented at length upon the evidence and arrived at the conclusion—] "That no community of interest exists between plaintiffs and defendants, or, in other words, that they belong to different taverais, possessing a right to the separate enjoyment of property, that of the former being called by distinction the Erambapalli Parasherri and that of the latter the Erambapalli Vadakanjerri Taverai." "Consequently I also find the non-existence of any family property to which plaintiffs have any claim in common with defendants."

Upon these findings the case came on again for final hearing.

The Advocate-General, for the appellants, the defendants.

J. H. S. Branson, for the 1st and 2nd repondents, the 1st and 2nd plaintiffs.

O'Sullivan, for all the repondents, the plaintiffs.

The Court delivered the following judgments :—

November 27.

HOLLOWAY, J.—The question is whether we can come to a conclusion adverse to that of the Civil Judge that these plaintiffs and defendants are not of the same tarwád ; using that word in the sense of a body of persons with community of property and common rights of the eldest to succeed to the management of it. It was scarcely attempted to show that the Civil Judge's opinion of the worthless character of the oral evidence is unfounded. The document A is really susceptible of a double explanation, and the undisputed facts that there have long been separate houses, that there have been dealings as persons with separate proprietary interests, are strong in favor of his conclusion. The management of Chandu, a male of a distant branch, and the restoration of the management to one of the defendants' branch when old enough to assume the post, is really in favor of the same conclusion ; for it is undoubtedly the accepted popular view of tarwád property, that, on the extinction of a

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particular house, it goes over to other houses traditionally connected, but long severed in point of rights of property.

In Malabar this word "taverai" has several distinct meanings. In the families of the princes and notably in that of the Samutiripad Rájah, all the houses have separate property, and the senior in age of all the houses succeeds to the royalty with the property especially devoted to it. Other princely houses follow the same rule, and this mode of succession may be regarded as rather due to public than to private law.

With that mimicry of the customs of the great as common elsewhere as in Malabar, private families have sometimes adopted the same customs. The more common case, however, is of their having pretended to have adopted them, when some ambitious and unscrupulous junior member sees a pecuniary benefit in setting up such a case. It may be safely asserted that in the case of private families there is the strongest presumption against its truth. As in all Hindu law, so in the archaic form of it which exists in Malabar, the first conception of a family is of an indissoluble unity, a mere aggregate with no separate rights, living under one head, united more especially by their connexion with the same sacra. In Malabar, as elsewhere, the inconvenience of this state of things has made itself felt, and families becoming very numerous have split into various branches, have, in fact, become new families. The common speech of the people is the best evidence of customary law, and when they speak out of Courts of Justice they are often truthful enough. Every man who has conversed much with Malayalis must have heard the very common expression in answer to the question—Is such a man of your tarwád?—"There is com-"munity of purity and impurity between us, but no com-"munity of property." In one sense of the word people so related are still of the same tarwád; in the only sense with which Courts of Justice are concerned they are not. Where there are several houses bearing the same original tarwád name, but with an addition, and there is no evidence of the passing of a member of one house to another; there is the

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strongest ground for concluding that this separation has taken place. Where, as in a case recently decided by the Chief Justice and myself from the same Court (a), an attempt is made to set up a family rule, and more especially by contract, excluding the karnavan from all management of property, although the senior of the houses invariably becomes karnavan, such an attempt can scarcely ever succeed. The presumption of unity and of the existence of the ordinary rule is too strong.

It seems to me that the evidence shows precisely the case of severance which I have described. One of the several branches having become better off than another, that other, by virtue of the ambiguity of a word, is seeking to reap that which it has never sown, and to which, on the true understanding of the customs of the people, it is wholly unentitled. I would declare that the plaintiffs and defendants were originally of the same tarwád, but that there has ceased to be community of rights of property between them. The plaintiffs should, I think, pay the costs throughout.

INNES, J.—I have felt some difficulty in coming to an opinion on the evidence of this case from a want of familiarity with the customs of Malabar. On consideration I am not prepared to dissent from the opinion of the present Civil Judge, formed on a careful weighing of the evidence, and concur in the judgment of my learned brother and the declarations proposed to be made. I agree that plaintiffs should pay the costs throughout.

Appeal allowed.

(a) The case referred to would appear to be that reported at p. 401 of this Volume.—[*Ed.*]