Privy Council Appeal No. 83 *of* 1914.

Sulaiman - - - - - - - - *Appellant,*

v.

Biyaththumma and Others - - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER, 1916.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

The plaintiffs and Mammad, the first defendant, who has died since the institution of this suit, were descendants from a common stock. It is the plaintiffs' case that they were members of an undivided Mopla Tarwad governed by Marumakkaththayam law, and that this Tarwad possessed considerable properties, including those in the suit. Mammad, it is alleged, was the senior and Karnavan of the whole Tarwad; and it is charged that he dealt with Tarwad property in fraud of the plaintiffs, and improperly alienated portions of it to Sulaiman, the second defendant.

The plaintiffs accordingly pray by their plaint that the first defendant be deposed from the management of the plaint properties, or in the alternative that the plaintiffs' right thereto be declared free of any encumbrance made by the first defendant. They further seek a declaration that the alienations in favour of the second defendant specified in the plaint are invalid and not binding against the plaintiffs.

By way of defence it is denied that the plaintiffs and first defendant were members of an undivided Mopla Tarwad, or that the first defendant was the senior and Karnavan of the whole Tarwad. On the contrary, the allegation in the written

statement is that the branch of the plaintiffs and of the first defendant with seven others, became divided as far back as 1837–38, and that each branch has been living separately and enjoying and dealing with the properties separately and independently of the other branches. The suit was heard in the Court of the Subordinate Judge of South Canara, and was dismissed on the 14th September, 1904.

On appeal this decree was reversed by the High Court of Madras on the 20th August, 1909, and it was declared that the alienations made by the first defendant in favour of the second defendant of certain specified properties were invalid and not binding against the plaintiffs. From this decree of the High Court the present appeal to His Majesty in Council has been preferred.

Though by the law which governs a Mopla Tarwad there cannot be a partition unless all the members consent, yet it is common ground that there has been a partition of the properties of the original Tarwad in this case. The point in dispute is as to the character and extent of this partition.

To understand the rival contentions regard must be had to the history and state of the family, and this is compendiously shown in the tabular statement appended to the plaint. Descent under the law by which this family is governed is always traced through the female line to a female ancestor. It will thus be seen that the three stocks to which descent is traced were three sisters who left descendants—Bavumma, Kunhi Kathiya, and Thaki. There were two other sisters, but they can be left out of consideration as they apparently left no issue. Bavumma left four descendants, and Thaki two; of Kunhi Kathiya's descendants only three left issue. It is with the line of Kunhi Kathiya alone that this litigation is concerned.

The plaintiffs' contention is that the partition which was effected was only between the three branches of Bavumma, Kunhi Kathiya, and Thaki, and that the allotment made to the nine branches tracing from the several descendants was not by way of complete partition, but was merely a division for convenience of enjoyment.

The case made by the defence is that there was a complete partition between the nine branches, and that thereby nine separate and independent shares were constituted.

The last view was affirmed by the Subordinate Judge, and no dissent from it is expressed by the High Court; on the contrary, such inference as is suggested by that Court's meagre and inconclusive judgment is that it accepted the finding of the Subordinate Judge on this point, for the course followed by the High Court seems to assume partition into nine shares. In these circumstances, it might be enough for their Lordships to say that they are not satisfied that the Subordinate Judge was wrong in his view of the status of the family; but as the evidence has been examined and discussed before them in considerable detail, they think it right to indicate briefly the

reasons that have led them to the same conclusion as that of the Subordinate Judge.

In 1856 a suit was commenced by Kunhi Paththuma, a descendant of Kuttyacha, against Moidin and Hasnar, the nephew of Kunhammad, who respectively represented the lines of Pathe and Biyathu. In other words, it was a suit between the representatives of the three lines descended from the common ancestress, Kunhi Kathaiya, one of the three sisters already mentioned. The suit is described as one to establish the plaintiffs' right in property "after the first defendant." It ended in a compromise in the terms set forth in a Razi Petition, Exhibit XLII, in this suit.

It runs as follows :—

> "All the properties belonging to the plaintiff and defendants on the hereditary right and acquired from the time of Recha Baithan up to the time of Amanath were divided into nine shares, with the consent of all members of the family, in the presence of respectable men, in 1013 (1837–38), and two of those nine shares were allotted to Baithan and his nephew Sanna Baithan, the descendants of Thaki (female); four others were allotted to Bavumma's descendants, viz., one to Kalandu, one to Assan, one to Moidin Kutti, and one to Alimasa; and three shares to the descendants of Kunhi Kiriya (Kadya), viz., one to the first defendant, one to the plaintiff's uncle Kunhi Hassan, and one to second defendant's uncle Kuttiamad—thus they were separately enjoying the nine shares and paying the assessment."

The importance of this statement can hardly be exaggerated; it confutes the plaintiffs' suggestion of a division into three Tarwads, followed by a subsequent incomplete sub-division into nine branches, merely for convenience of enjoyment; and it supports the defence contention that the division was not into three but into nine independent shares, and that the separation was complete.

It is true that for the purpose of arriving at the proper mode of division there is a reference to the three stocks of descent, Bavumma, Kunhi Kathiya, and Thaki, but this was so of necessity, and was merely an application of the rule that division for the purpose of partition is stirpital, though, as between the members of any one class, it is capital. Nor is the actual compromise effected without its significance. Moidin, it appears, was old and had no family members; he had executed a will in favour of the second defendant, and this will was set aside with the consent of the second defendant. He had also made gifts of certain properties to his children, who were not members of the family. By the compromise it is provided that, "excepting these, the remaining properties have been equally divided with details thereof by the first defendant between the second defendant and the

plaintiff's son Sooppi, so that they may enjoy the same from generation to generation according to Aliyasanthana law, and as he has delivered possession of those properties to them, these two persons may enjoy those properties as owners, paying the assessment separately which first defendant has been paying." This arrangement manifestly proceeds on the basis of a complete division in interest. But the matter does not rest there: the history of the family and the conduct of the parties, with an exception, to which reference will later be made, was in accordance with such a division. There was separate residence, separate assessment, and separate management. The Revenue proceedings, the statements in the Vakalaths, the alienations of property are all suggestive of separation, and this is the view that has been taken in earlier litigation in which this issue has been involved.

No doubt the litigation of 1886 and 1887 in some measure helps the plaintiffs' contention, for those suits were brought on the allegation that the plaintiffs and the first defendant were members of an undivided family, and Kunhammad and Mammad were among the plaintiffs in one of these suits and Mammad in the other. But the allegation was challenged and no judicial pronouncement was made in its favour, for each suit ended in a dismissal and a compromise. The terms of the compromise are to be found in Exhibit LL. The plaintiffs place much reliance on this document, and the High Court's decision in their favour is apparently based on its provisions.

It has been urged that on its true construction Exhibit LL shows that the only complete separation was into three shares and not into nine, and especial stress has been laid on the opening clause. But the document must be read as a whole, and so read its true meaning does not support the plaintiffs' view; in fact, the final provision appears to their Lordships to be conclusive to the contrary. Much has been made of the use of the word Tavazhi, and what is claimed to be its primary signification; but even the authority on which this claim is made shows that it is a word of equivocal meaning, and may fairly be used where the separation is complete. While, therefore, their Lordships recognise that the attitude of Kunhammad and Mammad in this litigation of 1886 and 1887 is worthy of consideration, it would be easy to attribute too much weight to it, and this they feel would be done if they allowed it to outweigh the clear statement in the compromise made in the suit of 1856, and the indirect evidence which from all sides converges to the conclusion that there was complete separation.

In fact, it may be fairly said that there are disclosed in the evidence all those incidents that would be present in the case of separation, and even after the compromise of 1887 there are dealings and conduct on the part of the plaintiffs which, in strictness, would only be consistent with the existence of two separate Tarwads in the sense for which the defence contends.

In the light of these several matters, their Lordships see no reason to think that the Subordinate Judge erred when he elected to be guided by the documentary evidence rather than by the oral testimony of the witnesses.

It only now remains to deal briefly with the use to which Exhibit LL was put by the High Court. The judgment apparently treats the document not merely as evidence, but as creating rights. The view of its operation taken by the learned Judges was that the income of the properties in the possession of each branch was to be enjoyed by the members of that alone till the extinction of that branch; but that they had no right of alienation.

The objection to this, however, is that the plaintiffs did not sue on this document. They did not produce it in Court when the plaint was presented, nor did they deliver it or a copy thereof to be filed with the plaint, and yet this is what the Code of Civil Procedure, § 59, directs as regards a document on which a plaintiff sues. Nor was the document treated otherwise than as a piece of evidence in the trial Court. And this is important, for had it been put forward by the plaintiff as creating rights then, apart from any difficulty as to its admissibility in the absence of registration—a point on which their Lordships express no opinion—it is manifest that a line of defence requiring evidence might have been adopted, which was unnecessary so long as the Razi petition was used merely as a piece of evidence.

Their Lordships therefore decline to deal with the Razi petition as a document which created a bar on Mammad's power of alienation, and they do this the more readily as it does not appear to them to bear the construction, or have the effect ascribed to it by the High Court.

The result, then, is that their Lordships hold that the suit was rightly dismissed by the Subordinate Judge, and they will therefore humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside, and that of the Subordinate Judge restored with costs in both Courts, and that any costs paid under the decree of the High Court must be returned. The respondents must pay the costs of this appeal.

In the Privy Council.

SULAIMAN

v.

BIYATHTHUMMA AND OTHERS.

DELIVERED BY

SIR LAWRENCE JENKINS.

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