

Avvammada Pathummabi and ors. Vs. Avvammada Sarommabi and ors.

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Court : Kerala

Decided On : Jul-27-1991

Reported in : AIR1992Ker56

Judge : K.P. Balanarayana Marar, J.

Acts : Marumakkathayam Law; Madras Marumakkathayam Act, 1933 - Sections 38 and 40

Appeal No. : A.S. Nos. 346 and 358 of 1986 and C.M.P. No. 1340 of 1991

Appellant : Avvammada Pathummabi and ors.

Respondent : Avvammada Sarommabi and ors.

Advocate for Def. : S.N. Poti,; S. Ramesh Babu,; P.K. Balasubramanyam,;

Advocate for Pet/Ap. : T.P. Kelu Nambiar and; P.G. Rajagopalan, Advs.

Judgement :

K.P. Balanarayana Marar, J.

1. These two appeals arise from the judgment and decree in O.S. 2/1976 Sub Court, Kavarathi in Lakshadweep. The suit is one for partition of 36 items of immovable properties, a boat and amount received by way of compensation for land acquired by Government. Some items are claimed by plaintiffs and

defendants 1 to 19 and the remaining items by plaintiffs and defendants 1 to 22. Defendants 20 and 22 resisted the suit and contended that they belong to a different tarwad and claimed some of the plaint schedule properties as belonging to their tarwad. There was also dispute inter se between plaintiffs and defendants 1 to 19. Defendants 20 to 22 were found to be members of a different tarwad and the properties in their possession were found to be not available for partition. A preliminary decree was passed for division of the properties found available into 24 shares and for allotment of one share to plaintiffs. Other consequential reliefs were also granted. Aggrieved by that decision plaintiffs have come up in appeal in A.S. 358/1986. The other appeal is filed by defendants 1 to 9, 11 to 14, 34 and 39. Since both these appeals arise out of the same judgment, they were heard jointly and are being disposed of by this common judgment.

2. The plaint contains the following averments : Plaintiffs and defendants 1 to 22 are members of an undivided marumak-kathayam tarwad called avvamada. The plaint B and C schedule properties belong to that tarwad. The properties are in the management of the 1st defendant who is the seniormost female member as Karanavathi assisted by 21st defendant. The geneology is shown in plaint A schedule. Plaint B schedule items 1 to 25 and 29 to 34 belong to the tarwad. Items 26 to 28 of B schedule and the boat described in C schedule belong to Avvamada thavazhi of plaintiffs and defendants 1 to 19. Plaintiffs therefore claim one out of 24 shares in items 1 to 25 and 29 to 34 of the B schedule and 1 / 24 share over the remaining items in B schedule and the C Schedule boat. The D schedule contains the amount received towards compensation for land acquired and that also has to be divided among plaintiffs and defendants 1 to 27. Defendants 23, 24 and 39 are children born to the family members of the thavazhi since the filing of the suit. Defendants 24 to 26 are assignees from defendants 1 and 3. Defendants 27 to 33 are the legal representatives of previous kara-navan Koya and defendants 35 to 38 are the legal representatives of 27th defendant. 40th defendant was impleaded as a person having some right over the property. Additional plaintiffs 6 to 8 born subsequent to the filing of the suit were also impleaded. Items 35 and 36 were also included in the plaint schedule by way of amendment.

3. The suit was mainly resisted by defendants 20 and 22. According to them defendants 20 to 22 are members of a different tarwad by name Maneth and are not in any way related to Avvamada tarwad. They deny the management of the 21st defendant who died before the filing of the written statement. They claim rights over some of the plaint B schedule properties as properties of their tarwad. The names of those properties are shown in the written statement. Dispute was also raised regarding the correctness of the genealogical table.

4. Defendants 1, 5 and 8 in their joint written statement contended that the claim for partition by plaintiffs is not sustainable during the life time of the 1st defendant since plaintiffs are claiming through her. They further contended that the tarwad properties had been partitioned into four thavazhies who are in enjoyment of the respective properties allotted to each. First defendant is not the Karanavathi of the tarwad and she is not managing the tarwad properties. The allegation that 21st defendant was helping her was denied. The tarwad properties are to be divided on stirpal basis and not per capita. There is no custom in the island permitting division of tarwad properties on per capita basis. The compensation amount had been distributed among the four thavazhies. Plaintiffs are not entitled to get a share over that amount and the claim is barred by limitation. Item 26 and 27 are Thinkalazhcha properties over which tarwad has no right. Item 28 also is not available for division. First defendant is not liable to pay profits. The tarwad has no right over the boat mentioned in the C schedule.

5. Defendants 2 to 4, 9 and 12 to 14 supported the contentions of defendants 1 and 2. In a separate written statement filed by defendants 10 and 15 to 19 it was contended that items 11, 24 and 26 had been set apart to Koya, Karanavan of Avvamada, who in turn had assigned the same to his wife and children who are in possession. Item 27 was claimed to be Thinkalazhcha property of the mother of 1st defendant. These defendants claim division on a per capita basis. Defendants 24 to 26 who are the assignees from defendants 1 and 3 wanted the items purchased by them to be excluded from partition and in case they are also found divisible they wanted value of improvements. Defendants 27 to 33, the legal representatives of the previous Karanavan Koya, claimed rights over the properties mentioned in their written statement which, according to them, were

obtained by their father Koya who had gifted those properties to them and their mother in the year 1955.

6. Counsel on both sides argued the appeals in detail. From the contentions advanced the following points arise for consideration:

1. Whether Maneth tarwad is an undivided branch of Avvamada or whether it is a separate tarwad?
2. In case Maneth is a separate tarwad, which of the properties shown in the plaint schedules belong to that tarwad and which of the properties to Avvamada tarwad?
3. Whether plaint B schedule items 11, 24 and 26 are self-acquired properties of 1st defendant and Koya? And
4. Whether the properties are to be divided per stirpes or per capita?

Points 1 to 3.

7. The coral islands in the Arabian sea adjoining the Malabar coast, now known as Lakshadweep and earlier as Lakkadives, Minikoy and Amindivi islands, were parts of Malabar and South Canara Districts prior to the State re-organisation in 1956. Though the name suggests that there are one hundred thousand islands, the achipelago consists of 37 islands of which 10 alone are inhabited. The islands lie directly on the trade route between Africa, Arabia and Malabar. These islands therefore were a landmark for the navigators. Probably that was the reason why the group of islands was called Lakshadweep, 'Laksha' meaning a mark or a direction.

8. The earlier colonisers were perhaps Hindus who migrated from Malabar and particularly Kolathunadu, parts of present Cannanore District. The earlier inhabitants of Minikoy islands may be Singhalese. Mr. R.H. Elly's I.C.S., who has prepared a short account of the Lakkadive islands and Minikoy is of the view that the islands supposed to have been peopled first are Amindivi, Kalpeni, Androth, Kavarathi and Agathi. According to him the upper classes of the first four of these islands still claim to trace their descend from Nair or even Namboodiri families on

the main land and these islands are known in consequence as tarwad islands in distinction to the other or Melacheri islands. Sri N. Section Mannadiar who edited the Gazetteer of India on Lakshadweep observes that by no stretch of imagination could it be conceived that Namboodiris who were noted for their leisurely and pleasure seeking life had migrated to Lakshadweep. The editor would not have noticed the ex-communication of female members of Namboodiri families who were suspected of unchastity. An enquiry in the nature of an inquisition known as 'Smartha Vicharam' was conducted in such cases and on proof of unchastity the woman as well as the persons who had connections with her were ex-communicated and banished from the area. There is every likelihood of those persons crossing the sea and inhabiting these islands. That appears to be the reason why many of the house names carry the word 'Illam'

9. Mr. Ellis is of the opinion that the islanders under the influence of Arab traders were converted to Muhammadanism at sometime, probably in the 14th century. Still the inhabitants of the island follow the maru-makkathayam system of inheritance which their forefathers had brought to the island at the time of migration. On this aspect Sri Ellis says thus:

'The island law is a curious mixture of the ordinary Muhammadan Law with the Marumakkathayam Law of Malabar. Property is regarded as either ancestral or self acquired. Ancestral property is known as Veltiaricha (literally Friday property), pronounced Belliaricha on the Amindivis. Self acquired property is known as Tingalaricha (literally Monday property) on the Malabar islands and as Belaricha on the South Kanara islands'.

Velliyazhcha properties are governed by the ordinary marumakthayam law i.e. descend through sister's children and devolution on the descendants in the female line. The editor of the Gazetteer of India is also of the same opinion. There is no codified law and the practices are governed by customs which differ from island to island. The tarwad properties can be partitioned only with the consent of all the members of the tarwad. In Androth and Kalpeni division of properties is between branches or tavazhies of the families whereas in Kavarathi and Agathi all the members of the joint family are eligible for one share. The editor further says that

self-acquired or personal property is governed by Muhammadan law of succession. Here also there are variations in different islands. In Androth island to which the parties to this suit belong succession to personal property is governed by marumakkathayam law unless it is specifically laid down in the will of the deceased that it should go to his wife and children. Self-acquired property can however be disposed of in any manner one likes. He further states that under the Muslim law followed in the islands the son is eligible for two shares in the property while the daughter gets only one share. The dispute involved in these appeals has to be resolved on the basis of these available materials and the judicial pronouncements by this court.

10. The main dispute is as to whether there is a separate tarwad by name Maneth or whether that is a tavazhi under the main tarwad Avvamada. According to appellants in A.S. 358/1986 the main tarwad consists of two tavazhies Avvamada and Maneth. On the other hand defendants 20 and 22 assert that Maneth is a separate tarwad independent of Avvamada owning and possessing properties separately. Both parties have produced documents in support of their respective contentions. The court below on a consideration of those documents held that Maneth is a different tarwad. On a careful consideration of the various documents produced by the parties this conclusion does not appear to be correct.

11. Three sets of documents are relied on by the appellants. One set consists of Exts. B1, B8, B9, B151, B152, B153 and B155. The other set consists of settlement records. Two powers of attorney form the third group.

12. The earliest of the first set is Ext. B151 dt. 21-8-1894. That is a petition by one Ayshomma and others against Awamada Attayikka and Maneth Kunhikoya. The dispute related to a boundary in respect of a property known as Aanam. Mention is made about a previous complaint and the pointing out of boundary by the Karanavans of the counter-petitioners. The next in the chronological order is Ext. B8 dt. 15-9-1895. That is a petition presented to the Amin Kacheri of Androth by Maneth Kunhikoya and his nephew Avvammada Attayikka. Attayikka is described as (Vernacular omitted -- Ed.) of Kunhikoya. The complaint was about trespass over trees belonging to petitioners in their land Aanam A joint petition was filed

since the 1st petitioner was not able to join the petition earlier on account of illness which resulted in the dismissal of that petition for the non-joinder of the Karanavan. It follows that Kunhikoya was the Karanavan of Attayikka though both of them were described by different house names, Maneth and Avvammada respectively. In 1943 a petition is seen to have been presented by Avvammada Koya to the Amin Kacheri of Androth. The counter-petitioners are Maneth Muthukkoya and four others. Muthukkoya is described as the 'tavazhi avakashi of the petitioner. The other counter-petitioners are members of Maneth tavazhi. The complaint was regarding a document executed by the counter-petitioners on 1-3-1943 in respect of tarwad properties. It is stated that no property can be transferred without the knowledge of the sharers as per island custom and rules relating to tarwad properties. Petitioner wanted that document to be set aside. It is further mentioned that the property dealt with in the document belonged to the tarwad as seen in that document itself.

13. The next document is Ext. B9 dt. 8-9-1954. That is a complaint by one Sayed Koya against four persons of whom two belong to Avvammada and the other two to Maneth. Here again the complaint is in respect of land known as Aanam. Counter-petitioners are alleged to have entered the property of the complainant and planted coconut plants. Mention is also made about the earlier complaint during the life time of the Karanavans of counter-petitioners. This complaint is seen to have been compromised in 1956. Ext. B152 is a joint petitioner by the petitioner and the counter-petitioners. They agreed to fix the boundary and to remove the coconut plants planted in the property of the other. Ext. B153 is the decision by the Kacheri Karanavan on accepting Ext. B152 compromise.

14. The above mentioned documents ranging from 1894 to 1956 would show that Avvammada and Naneth are not distinct tarwards whereas they form one tarwad. In the complaints presented before the Amin Kacheri it is noticed that seniormost members of both the tavazhies are made parties. Even in petition presented by the seniormost member of Avvammada tavazhi, the member of the other tavazhi is mentioned as a sharer and vice versa.

15. At the time of settlement the properties are seen registered in the joint names of Avvammada and Maneth. Copies of land register were produced. Exts. B131 to B137 and A3 to A6 are such copies issued in July 1970 and in 1981. If really Maneth and Avvammada are distinct tarwads, one fails to understand as to why both of them were shown as the registered owners in the settlement records. Learned counsel for defendants 20 and 22 would point out that revenue records cannot be taken as documents of title and reliance cannot be placed on these copies of land register. But the settlement took place years before the filing of the suit. The land registers would have been prepared on the basis of available prior records and after making proper enquiries. Both Maneth and Awammada tavazhies would have asserted rights over these properties. Such rights can be asserted only if both these tavazhies form part of a main tarwad. That there was such a tarwad which consisted of these two tavazhies is made clear from Exts. A7 and A8 which are two powers of attorney executed in favour of one Kunhiseethikoya Thangal on 28-3-1973. Ext. A7 is executed by Maneth Koya and his two sisters authorising the power-of-attorney to receive the amount due to them towards compensation for land acquired by Government. The power of attorney recites that the acquired land was entered in the survey records in the joint names of Maneth Koya and Awammada Koya. Petitioners wanted their share separately. The power-of-attorney was authorised to receive their share on their behalf. Ext. A8 is the power-of-attorney executed by Awammada Nallakoya, his brother and sisters to the very same person. The recitals in this document are identical. As late as 1973 i.e. about three years before the filing of the suit the parties claimed rights over some properties as if it belonged to a common tarwad registered in the joint names of Avvammada and Maneth.

16. The documents referred to in the foregoing paragraphs would conclusively show that there is a common tarwad by name Awammada consisting of two tavazhies viz. Awammada and Maneth and the tarwad is owning and possessing common properties.

17. I will now refer to the documents produced by the contesting defendants. Ext. B33 is a complaint dt. 12-7-1897 by Maneth Muhammed against Maneth Kunhikoya. The complaint only says that the parties have equal shares. The

complainant wanted division of coconut trees. There is nothing in this document to suggest that the properties over which share is claimed belong to a different tarwad. Maneth has been found to be a tavazhi under the main tarwad. The members of that tavazhi would be in possession of some coconut trees. A division of those coconut trees alone was requested for in that complaint. In Ext. B1 dt. 10-8-1901 mention is made about his karanavan by Maneth Kunhikoya. Similar reference is made in Exts. B37 and B40. Ext. B37 is a document executed by Maneth Thanga Koya in favour of his wife and children. That refers to an Udampady of properties Nos. 80 to 82 in the name of his karanavan Kunhikoya. Ext. B40 dt. 3-3-1943 is a joint petition presented by Maneth Muthukoya and four others wherein mention is made about a property by name Mundarathukadu as belonging to their tarwad. Mention about Maneth tarwad is made in Ext. B43 dt. 2-3-1955. That is a petition by Maneth Muthukkoya against Maneth Bam-bathibi and another. It is stated therein that petitioner is a half-owner of Maneth tarwad. That dispute was compromised by Ext. B44 wherein also mention is made about coconut trees belonging to their tarwad. In a petition presented on 17-8-1929, a copy of which is Ext. B38, mention is made about possession by Karanavan Thangakoya. Reference to karanavan in these documents is of no assistance to the contesting defendants in support of their contention that there is a different tarwad in view of the overwhelming evidence on the side of the plaintiffs about which reference has been made already. Moreover, Maneth is one of the tavazhies under the tarwad. Merely because one of the members is referred to as the karanavan of the tarwad in some of the documents, the parties would have meant only karanavan of the tavazhi. Ext. B37 relates to Udampady Bhoomi in Sy. No. 80 and 82A. That refers to a partition between Thangakoya and his nephews. His share had been settled under that document. From Ext. B42 dt. 8-2-1953 it would appear that the properties mentioned in Ext. B 37 are Thinkalazhcha properties of Maneth people. Properties comprised in Sy. Nos. 80 and 82A are not seen included in the plaint schedule. Those properties might have therefore been dealt with under Ext. B37 and Ext. B42 as if they belonged to the Maneth people as their individual acquisitions.

18. Considerable reliance was placed by the counsel on Ext. B46 dt. 5-2-1935. That is an assignment by Avvamada Pookoya and his sister Kulsubi to one Sayed

in respect of Thinkalazhcha property. The boundaries on the east and south are shown as property belonging to Maneth. This according to counsel is suggestive of the existence of a different tarwad by name Maneth. Evidently Maneth people have got separate properties or Thinkalazhcha properties as revealed from Ext. B37 and B42. The boundary mentioned in Ext. B46 may be one of such properties. In the absence of other evidence it is unsafe to rely on the description of a boundary in a document to find the existence of a separate tarwad.

19. Three other documents relied on by the contesting defendants are Exts. B39, B48 and B49. They are karars or agreements entered into between Maneth Sheku Koya and one Sayed. The right to take income from some coconut trees is seen to have been granted under these documents wherein it is stated that the coconut trees are situated in the property wherein the tarwad house stood. This recital is relied on to contend that there was a separate tarwad and tarwad house for Maneth. But there is indication in the land register to show that Maneth tarwad house was not existing at the lime of settlement. Survey No. 160/1 is described as the land where Maneth house stood. Similar is the description contained in Exts. B39, 48 and 49. It is therefore clear that by the time these three documents the tarwad house was not in existence. The use of the word 'tarwad' for the house occupied by Maneth people will not confer any special rights on them so long as they are found to be members of a tavazhi under the main tarwad. The documents produced by the contesting respondents are therefore of no assistance to them to prove that a separate tarwad by name Maneth existed and that defendants 20 to 22 are members of that tarwad.

20. Sri Balasubramaniam, learned counsel for defendants 20 and 22, strenuously contended that defendants 20 to 22 have not been proved to be members of a common tarwad. The pedigree table produced by the plaintiffs is not correct according to him. It appears that the genealogical table produced along with the plaint does not contain the names of defendants 20 to 22 and their ancestors. But a revised pedigree table was since then produced. According to that table the common ancestress was one Kulsubi who had two daughters, Ishabi and Muthubi. Plaintiffs and defendants 1 to 19 are the descendants of Muthubi whereas defendants 20 to 22 are the descendants of Ishabi. The 2nd plaintiff as P.W. 1

stated that the revised genealogical table is correct. But 4th defendant who is none other than this grand-uncle as D.W. 2 deposed that the table is not correct. The court below has observed that there is no documentary evidence to show that Kulsubi was the common ancestress. True the correct genealogical table of the two tavazhies has not been produced. But it is not open to defendants 20 and 22 to contend that they belong to a different tarwad. The plaint no doubt does not make mention of two tavazhies whereas there is only a bald averment that plaintiffs and defendants 1 to 22 are members of a common tarwad. Defendants 20 and 22 disclaimed any connection whatsoever with the tarwad. When once that plea is found to be unsustainable and in view of the materials available on record, the only conclusion possible is that these defendants form a tavazhi under the main tarwad. The failure of the plaintiffs to produce a correct genealogical table and to establish the relationship of defendants 2 to 22 with the common ancestress is of no consequence. The fact that Maneth is an ancient house about 100 to 125 years old is also of no help to them to contend that there is a different tarwad. At some distant past a house might have existed in the property known as Maneth. But the documents would suggest that the house was not in existence at least from 1941 onwards. There could not therefore have been a separate tarwad by name Maneth thereafter. On the other hand there are documents to show that both Avvammada and Maneth people joined in documents relating to common properties. The only inference possible is that these two tavazhies continued to be joint as forming part of a common tarwad. The finding of the court below that Maneth is a different tarwad is unsustainable and has to be set aside.

Point No. 3.

21. Defendants 1 to 9, 11 to 14, 34 and 39 challenged the finding of the court below on issues 3 and 4 in respect of some of the properties which were found to be not available for partition. They wanted ground Nos. 10 to 13 in the appeal memorandum relating to these issues to be deleted. The reason alleged is that the finding on these issues was rendered in their favour and against plaintiffs. C.M.P. 1340/1991 filed for this purpose is allowed and ground Nos. 10 to 13 in A.S. 346/1986 are deleted.

22. The grievance of plaintiffs is that the court below has erred in holding that the properties covered by Ext. B2 are not available for partition. The finding that the properties dealt with under Ext. B2 are Thinkalazhcha properties of Koya and Kunhibi is challenge in A.S. 358/1986. According to them items 11, 24 and 26 belong to the tavazhi constituted by plaintiffs and defendants 1 to 19 and are divisible among them. The contesting defendants would have it that these properties belonged to Koya and Kunhibi in co-ownership rights and after partition they were possessing the allotted properties separately. The court below upheld this contention and found those properties not available for division among the tavazhi members. On a consideration of the documents and evidence a different conclusion is not possible.

23. Ext. B2 is a petition by Avvam-mada Koya and his sister Kunhibi to Amin Kacheri. That is dt. 29-3-1959. By that petition the properties belonging to them jointly as Thinkalazhcha properties were divided between them. Six items of properties are seen divided thereunder. It is seen that one of these properties viz. 97/45 Udampadi land was registered as Kowl land in the name of Avvammada Aattayikka. He got that property as per partition. By Ext. B51 petition dt. 18-3-1906 he gave one-half to his son Aattak-koya and the remaining half to his niece Pathummabi to take effect after his death. The properties set apart to the share of Koya under Ext. B2 were made over to his wife and children under Ext. B87 dt. 31-3-1955 to take effect after his death. In 1966 a compromise was entered into among Kunhibi and 3 others. The dispute was in respect of 97/45 Udampadi land. That was divided into four portions and one portion allotted to each. Subsequently three of the allottees executed assignments in respect of the portions allotted to them under Ext. B6, B7, B8 and B50. The properties were therefore dealt with as if they are individual properties. The contention is that these properties belonged to the tarwad and Koya and Kunhibi are not competent to get them divided between them. But Ext. B2 specifically mentions that the properties belong to the two executants equally as Thinkalazhcha properties. There was no legal bar in dividing such properties between the co-owners. As observed by the court below Ext. B2 was executed more than 20 years before suit. Several transactions in respect of those properties took place since then. The parties had not chosen to question Ext. B2 for a continuously long time. No document was also produced to show that

the properties partitioned under Ext. B2 belonged to the tarwad as Velliyazhcha properties.

24. A contention is raised that the property allotted to Koya reverts back to the tarwad on his death. But he has purported to transfer the properties to his wife and children by means of Ext. B87 which had come into effect on his death. The transferees are admittedly in possession since then. There cannot therefore be any reversion of the properties to the tarwad. The finding that the properties covered by Ext. B2 are not tarwad properties is therefore justified and does not call for interference.

Point No. 4.

25. Appellants in A.S. 346/1986 contend that the properties are divisible on per capita basis and not on stirpital basis. Plaintiffs are the children of 1st defendant. Evidently the mother has not joined as one of the plaintiffs. On the other hand plaintiffs assert that per capita division is the rule and there is no legal bar in claiming their shares separately. There is no codified law in Lakshadweep regarding inheritance. Mr. Elis observes that the island law is a curious mixture of the ordinary Mohammadan law with the marumakkatha-yam law of Malabar. Property is regarded as either ancestral or self-acquired. According to the editor of the Gazetteer ancestral or tarwad property is governed by the marumakka-thayam law of inheritance prevalent on the Kerala coast. There is no codified law in the islands and the practices are governed by customs which differ from island to island. Property right descends through female line, the male members having right only for sustenance during their lifetime. The editor further says that the property is enjoyed by the joint family consisting of brothers, sisters and sister's children. The children are not entitled to any share in the joint family property of their father. It is further stated that self-acquired or personal property is governed by Muhammadan Law of Succession. In the island of Androth to which the parties to this suit belong succession to personal property is also governed by marumakkathayam law unless it is specifically laid down in the will of the deceased that it should go to his wife and children. As far as tarwad properties are concerned the pristine maru-makkathayam law is applicable in the case of partition. Impartibility

was an essential feature of that law. No partition could be effected without the concurrence of all the members of the tarwad. But a division could be made among the tavazhies consisting of the tarwad. This was recognised by the Madras Marumakkathayam Act, 1933 whereby tava-shi partition was statutorily recognised. Section 38 of that Act as it then stood enables any tavazhi represented by the majority of its major members to claim its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad. The only condition imposed is that no tavazhi could get divided during the life time of the common ancestors. Section 40 of the Act provided that the tavazhi shall be entitled to such share of the tarwad properties as would fall to the tavazhi if a division per capita is made among all the members of the tarwad then living. A member who can claim partition shall also be entitled to such share as would fall to him if a division per capita were made among all the members of the tarwad then living. The last stage is the amendment of the Madras Marumakkathayam Act by Act 26/1958 by which an individual member can claim partition. The consent of the common ancestors was dispensed with. Consequently Section 40 and 41 of the Act were omitted and Chapter 7 on impartible tarwads was also omitted by that legislation. In Travancore also the position till the Nair Regulation of 1100 M.E. was the same. That regulation gave right of individual partition though with certain safeguards. Section 38 of the Regulation provided that division is per capita and not per stirpes. Partition is therefore a transaction among the members of the tarwad who are co-sharers. Even if the partition is among the branches of the tarwad, all the members of the branches should participate in such transaction. The seniormost member of the tavazhi alone is not competent to represent the tavazhi when the division is among the tavazhies [see *Kuriako v. Ouseph*, 1963 Ker LT 61: (AIR 1963 Ker 354)]. In order to effect a partition of tarwad properties all the members have to join. The question arises whether an individual member or some of the members by themselves can get themselves separated from the tarwad.

26. Since there is no codified law regulating the management of the tarwads and the inhabitants in respect of tarwad properties in Lakshadweep, the pristine marumakkalha-yam law which was prevalent there has to be applied. At page 98 of the Gazetteer of India the editor says:

'In Androth and Kalpeni on the other hand division of properties is between branches or ' tavazhis of the family. A tavazhi does not possess the right to mortgage or sell the Tarwad property so divided and has only the right to enjoy the income from property during the lifetime of the members of the tavazhi.'

Reliance was placed on this passage to contend that a division can be made only between branches and that too on a stirpital basis. Learned counsel for defendants 20 and 22 points out that the Gazetteer of India is only an official report and the opinions expressed therein are not conclusive. Counsel has cited the decision of Privy Council in Martand Rao v. Malhar Rao, AIR 1928 PC 10. It was held that official reports regarding the nature of any estate are valuable and in many cases the best evidence of facts stated therein, but opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be. But here is a case where no authentic document is available to show the system of inheritance applicable to the parties. M Rule Ellis who had occasion to visit the islands has stated that Velliyazhcha property (referring to tarwad property) is governed by the ordinary marumakkathayam law i.e. descend is through sister's children. That law can only be the pristine marumakkathayam law in the absence of any legislation. Mr. William Logan, Collector of Malabar District, in his Manual has stated that the inhabitants of Androth island compare favourably in physique with the people of the coast and in their customs and habits closely resemble the Mapillas of North Malabar. He has no doubt mentioned about the complexities of the Muhammadan rules of inheritance and marriage and the existence side by side of the Makkatayam and Marumakkathayam rules which give rise to frequent litigation. Anyway one thing is clear; Hindus and Mappillas of the Malabar and South Kanara coasts were the original inhabitants of the islands. They had carried with them their personal law. Muslims of North Malabar follow the marumakkathayam system of inheritance like Hindus. That may be the reason why the original inhabitants followed that system even after conversion of the Hindus into Muhammad anism. The division of tarwad properties can therefore be only in accordance with the marumakkathayam law as it stood before the Madras Marumakkathayam Act and the Aliyasanthana Act which were made applicable to the Malabar and South Kanara District of the erstwhile Madras Presidency.

27. Now regarding the division of properties. According to defendants 20 and 22 the division can only be on stirpital basis. Reliance was placed on a Division Bench decision of the Madras High Court in Nani Kutti v. K.P.P.P. Achuthan Kutti Nair, AIR 1919 Mad 573. It was held that a partition can only be effected with the consent of all the adult members of the tarwad and such partition should be on a stirpital basis. W. E. Ormsby who had been the Chief Justice of the Travancore High Court in his book 'Outlines of Marumakkathayam Law' says thus :

'Where division takes place it will usually be according to the Tai-varies or number of daughters of the original ancestress. Each Tai-vari may similarly be sub-divided should the members consent thereto, and so on until individual proprietorship is arrived at.'

It was further stated that the author was not aware that this rule has ever been questioned.

28. On the other hand learned counsel for appellants points out that per capita division is the rule. Reliance is placed on the passage contained at page 719 of Raghavachariar's Hindu Law, 7th Edn. Vol. II. The learned author says that every member of the tarwad being equally interested in the property, any partition arrangement should not be on the stirpital but on the per capita basis. The author gives an example of a tarwad consisting of a brother and two sisters and the issue of the sisters. One sister has 9 children and the other has 14. According to the author the property has to be divided into 26 shares, one share being allotted to the brother, 10 shares to the tavazhi of the sister having 9 children and 15 shares to the tavazhi of the sister having 14 children. Attention is also drawn to the following passage contained at page 878 of Mayne's Hindu Law and Usage, 12th Edn.-

'The mode of partition, whether it ought to be per stirpes or per capita, was the subject of conflicting judicial opinion. The accepted view is that partition should be per capita and this was affirmed by Section 40 of the Madras Marumakkathayam Act and also by Section 36 of the Madras Aliyanthana Act.'

Counsel has also cited the decision of the Madras High Court in *Sreedevi Nethiar v. Paruvunni*, AIR 1935 Mad 71. It was held that in fixing the number of shares, the division per capita is the principle. That is generally followed unless all persons interested agree to another mode of division. That was a case where a natural group of 16 persons claimed partition of their share in the tarwad properties. The contention that the division has to be made on a stirpital basis among the various tavazhies was repelled by the High Court. Madhavan Nair J. held that the law is well settled that the properties of a Malabar tarwad belong to all the members constituting the tarwad. Each member of the tarwad is a co-owner of the properties along with other members and on this co-ownership depends amongst other rights his right to be maintained by the karnavan and his right to a share of the properties if a partition were made and the tarwad is broken up by common consent. An individual member is entitled to claim maintenance for himself or herself and as a rule per capita share is allowed to him. The learned Judge visualised the difficulties in case the partition is made according to the tavazhi. The Madras High Court has relied on an article of Sundara Ayyar J. on Topics of Malabar Law which appeared in (1899) ILR 22 Mad 337. In that article the view propounded was that division is made not per stirpes but per capita. The decision of the Privy Council in *Sulaiman v. Biyathumma*, AIR 1916 PC 217 was brought to the notice of the Division Bench and in particular the following passage :

'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.'

The very same passage was brought to the notice of the Division Bench in *Nani Kutty's case* (AIR 1919 Mad 573) (supra). Sri Madhavan Nair, as he then was, appearing for the appellant explained this passage by saying this it only meant that division should be by tavazhies, but did not lay down that each tavazhi should have an equal share. Sri Ananthakrishna Ayyar J. who appeared for respondents in *Nani Kutty's case* (supra) was one of the Judges of the Division Bench along with Madhavan Nair J. In a concurring judgment Sri Ananthakrishna Ayyar J. held

that all members are equally interested in taking steps to preserve the tarwad properties and it would therefore seem to follow that prima facie when division has to take place, it should be per capita unless all persons interested agree to another mode of division. Agreeing with the remarks made by Sundara Iyer, J. in the article referred above Sri Ananthakrishna Ayyar J. stated that the observations to the contrary in AIR 1919 Mad 573 are merely obiter. In this connection attention is drawn to the decision of this Court in AS 231/1984. A learned Judge of this Court felt that there were no real distinguishing circumstances for the purpose of holding that the Privy Council had not accepted that the mode of division is not stirpital. It was also stated that the observation of Ananthakrishna Ayyar J. in his concurring judgment that the observations to the contrary in AIR 1919 Mad 573 are merely obiter is not justifiable on a careful reading of that decision. But the observation of Ananthakrishna Ayyar J. appears to be justified since the only question which was posed before the earlier Division Bench was whether the partition which was by consent can be upset at the instance of certain members of the tarwad who were minors on the ground that the division was per stirpes and not per capita. The observations were made by Ananthakrishna Ayyar J. in that connection. The Division Bench was also aware of the result of the litigation in case the contention of plaintiffs was accepted. That would be to set the partition aside and to restore the original state of unity. This the Court wanted to prevent. Sri Madhavan Nair (as he then was) appearing for the appellants had explained the passage in Sulaiman's case (AIR 1916 PC 217) (supra) by pointing out that the Privy Council mean that division should be by tavazhies, but did not lay down that each tavazhi should have an equal share. It is interesting to note that the two Judges who rendered the decision in Sreedevi Nethiar's case (AIR 1935 Mad 71) (supra) had appeared for the contesting parties in Nani Kutti's case (AIR 1919 Mad 573) (supra). Both the Judges are unanimously of the view that division can only be on a per capita basis. The reasons had also been given by the two Judges. Both the Judges were familiar with the system prevalent in Malabar and the Marumakkthayam Law. Since each member of the tarwad is a co-owner of the tarwad property, he is entitled to get a share like any other member. It necessarily follows that the division can only be on a per capita basis. Before the Madras Marumakkthayam Act partition could be effected only by all the adult members

joining together. A natural group, meaning thereby a mother and all her children and the descendants in the female line forming a tavazhi, can also get themselves separated. Even then each member of the tavazhi is entitled to one share. This has been made clear by the Privy Council in Sulaiman's case thus:

'.....division for the purpose of partition is stirpital, though, as between the members of any one class, it is capital.'

I am therefore inclined to follow the later Division Bench decision of the Madras High Court in Sreedevi Nethiar's case, AIR 1935 Mad 71 and hold that a division of the tarwad property can only be on a per capita basis.

29. That leads us to the further question whether an individual member can seek partition even though the division is on a per capita basis. This he cannot do, in the absence of any legislation conferring such a right. That there was no such right before the Madras Marumakkathayam Act is clear beyond doubt. A division then could be effected only between tavazhies. A natural group alone can get itself separated from the tarwad. In other words some of the members of a tavazhi by themselves are not competent to institute a suit for partition as per the then existing law. Having found that the parties to the suit are governed by the pristine marumakkathayam law, plaintiffs who are only some of the members of the tavazhi cannot maintain a suit for partition of tarwad properties. The suit has therefore to fail for that reason.

30. A.S. 346 of 1986 and A. Section 358 of 1986 are allowed in part and the finding of the Court below that Avvammada and Maneth are independent tarwads is set aside. It is found that they are two tavazhies of the common tarwad Avvammada. The relief of partition is denied for the reason that plaintiffs who are only some of the members of a tavazhi are not entitled to get their shares separated without the junction of the remaining members. In consequence the suit is dismissed.

31. The parties are directed to suffer their respective costs here as well as in the Court below.

