

**Muttathil Kuppu Amma**

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**Court :** Chennai

**Decided On :** Nov-17-1941

**Reported in :** AIR1944Mad108

**Appellant :** Muttathil Kuppu Amma

**Respondent :** Muttathil Mamma Amma

**Advocate for Pet/Ap. :** Mr. Variar

**Judgement :**

**Somayya, J.**

1. The sole question in this appeal is whether Ex. 12 of 1896 evidences an out and out partition or only a maintenance arrangement. The suit is one for partition and is resisted on the ground that there was an out and out partition effected by Ex. 12 and that therefore the present suit is not maintainable. Both the lower Courts held that Ex. 12 evidences a partition and defendants 25 to 50 who support the plaintiff appeal.

2. Exhibit. 12 was executed on 6th October 1896. It is styled a Kudumba Nischaya Pathram on a deed of family arrangement and was executed by all the then existing members, adults and minors in all 41 in number. They were all members of the Muttathil tarwad. Sekhara Menon, the first executant, was the then karnavan and defendant 6 was the next anandravan. The document is a very lengthy one

and contains as many as 54 paragraphs. A number of clauses have a bearing on the question whether the document is to be treated as a partition deed or as a mere maintenance arrangement.

3. A number of decisions have been cited before me. Some reports of the Cochin Chief Court which were cited before the lower Court were also cited before me as well as some decisions of the Travancore High Court. As more than one Judge who has had to deal with such documents has remarked, ultimately the decision rests upon the reading of the particular document as a whole. Unlike documents in the rest of the Presidency, those on the West coast present this peculiar feature which was occasioned by the fact that until recently a right of partition was not recognized unless all the adult members of the tarwad agreed. The karnavan who is the manager of the tarwad was often mismanaging the properties and the attempts of the junior members was to prevent this mismanagement by bringing about what are called family karars, or arrangements for the better management of the family properties, the chief object of which was to secure proper management of the properties and fair maintenance to all the members of the tarwad and such karars are very common on the West coast.

4. A few principles have been laid down by all the decisions and they may be referred to. The first is that the whole document must be read and construed. The Courts must have regard to the declared object of the document which is often contained in the preamble whether the arrangement was brought about to ensure the maintenance of the members or to bring about a division. Ordinarily, maintenance arrangements are revokable and are not, except in some extraordinary cases, permanent. "Arrangements for maintenance will not ordinarily be viewed as permanent arrangements, though it is not impossible there should be such arrangement. Divisions for enjoyment short of partition that are sometimes entered into are of this character": Sundara Ayyar's Malabar Law, page 150. Where a document is styled a partition deed or a deed of maintenance, and the other terms of the document are not inconsistent with treating the document as such, the Court will not hesitate to construe it in that way. In other cases all the clauses will have to be read together and the real intention of the parties has to be gathered.

5. In this case, the document is styled a "Kudumba Nischaya Pathram" or "a deed of family management." When parties intend a partition deed, they almost invariably use the well-known expression "bhaga pathram." In a number of decisions comment is made on the fact that the deed is styled only a "nichaya pathram" and not "bhaga pathram" on the ground that the expression "bhaga pathram" is a well-known expression which is almost invariably used when a division is intended. As Venkataramana Rao J. states in S. A. Nos. Sivan Kutti Keyi v. Mariyumma 891 to 893 of 1937,

It is no doubt true, as pointed out by Mr. Govinda Menon, that the name given to a document, is not conclusive of the nature of the arrangement which the document embodies. The fact that they are styled deeds of settlement does not prevent the Court from coming to the conclusion that they are deeds of partition if in fact the arrangement amounts to a partition. On a fair interpretation of the terms of Ex. A, the arrangement cannot amount to a partition. It is clearly indicated in the deed itself that the arrangement was brought about for the purposes stated therein, namely, that as the income was not being properly realised it was not possible to properly manage the family expenses and that there was consequently dissension and loss of money and therefore the members had come to a settlement to the effect that they should carry on the management in accordance with the karar and in conformity with the status of the families. Prima facie the arrangement was entered into to provide for management and for proper appropriation of the income by the several members of the tarwad.

In the present case the document starts by referring to the fact that the management of the tarwad affairs was conducted by the karnavan for the time being till 1885-86, that the management was not found to be satisfactory, that a karar was executed in September-October 1885 with a view to promote the welfare of the members by all the adult male and female members and that by that karar the management of the affairs had been vested jointly in three members other than the karnavan. Then it states that the conduct subsequent to the karar was quite contrary to the stipulations therein, that many litigations arose between the members, that the management changed hands and became diverse and that thereby it resulted in much harm to the tarwad. Then para. 4 states this:

Having made deliberations in the presence of mediators to obviate the harmful aspects indicated in para. 3, we have been satisfied by experience that for the preservation of the properties as well as for the maintenance etc., of the members, the assets and liabilities of the tarwad are to be ascertained and distributed rateably among the three tavazhis as constituted below and possession thereof also made over to each tavazhi with the necessary restrictions and responsibilities, so as to provide for the maintenance etc., of the members that now exist in each tavazhi and that may come into existence hereafter, and that, unless it is done so, mutual litigations and waste of properties will not cease. Therefore in order that the tarwad affairs shall be managed as mentioned above in future properly and thrivingly, all of us agree and fully consent to make the following stipulations. (I have underlined (here italicized) the passages.)

Then para. 41 states, It is further settled, that beyond the fact that the properties are allotted for the expenses and maintenance, nobody has any right or claim to raise any fresh loan, or to dispose of the properties individually.

In conformity with the declared object of the parties, para. 8 states, It has been settled that the control and possession of the properties allotted to each tavazhi, together with the upper and lower produce, along with the debts shown as apportioned in Schedule G have become vested in each tavazhi from this date, that the present income and the increase if any, in future, are to be collected from Kanni 1072 (September-October 1896) by the manager of each tavazhi appointed hereinafter, that each tavazhi members shall properly conduct the expenses and maintenance expenses, mentioned in Schedules A, B and C, as also the extra expenses, such as, marriages etc., that will come into existence hereafter.

This being the declared object of the executants, it is to be seen whether as declared, the document is not merely a maintenance arrangement but amounts to an out and out partition. Mr. Variar, learned Counsel for the appellant, has referred to a number of other clauses which according to him indicate that the "hold of each branch over the properties given to the other two was maintained in tact to prevent the properties from being lost to the tarwad." These are contained in paragraphs 15, 17, 27, 28, 29, 35, 36 and 41.

6. It will be observed that under Ex. 12 most of the properties were divided by metes and bounds and allotted to the three tavazhis and some properties which are described in Schedule B were kept in common. Paragraph 15 says this:

If the assessment, michavaram and interest payable by each tavazhi under Schedules A, B and C are not paid in due time and left in arrears, and thereby the basic common right belonging to all the executants in the properties allotted to each tavazhi is likely to be affected, the other tavazhis shall at once pay that amount in discharge of the dues and the members who paid thus shall recover from the defaulting tavazhi, the amount paid together with the necessary expenses . . . , . and if the members of the said tavazhi devise no means to avoid the same, the other tavazhi members have the right to take possession of such property from the properties allotted to the defaulting tavazhi, the income whereof would be sufficient to meet such arrears, keep such property in possession and meet such expenses.

The expression which is translated as the "basic common right" is Adi Avakasam which is said to denote a common title or a common right. This clause contains a clear indication that each tavazhi has got a basic common right with regard to the properties allotted to the other tavazhis. Then para. 17 says,

The tanks and wells mentioned in Schedules A, B, C and D are common to all members and the water required for the lands allotted to the three tavazhis shall be taken and baled out, consistent with the requirement and the anubhavams therein (the right of fishery, the right of taking leaves and medicinal herbs and other rights of anubhavam) and the channels from canals and hills existing before and which might come into existence hereafter and the water therein can be used by all tavazhis according to their requirement, who will also look to their upkeep, without any mutual objection to the same.

Then para. 27 provides inter alia for enhancement of revenue in the future. This clause says that if the assessment is increased in future in respect of any one of the properties all the tavazhis should bear the increase proportionately. If really there was a complete separation of the tarwad properties. why, when the Government revenue on a land allotted to one branch is increased, the others

should contribute proportionately, it is difficult to understand except on the basis that all of them continued to have a right in the properties. Then para. 28 provides that,

all litigations that might arise relating to the properties shall be conducted jointly by all the three tavazhis spending proportionately to the number of members now existing or separately and if any of the tavazhis fails to co-operate in it, the rest of the tavazhis shall have power to conduct the same and expenses required for the same shall be recovered proportionately from the rest of the tavazhis.

Herein again take a case where long after this deed, a litigation arises with respect to the properties allotted to one branch. Why the other branches also should join and conduct the litigations jointly and contribute towards the expenses and why in the event of one alone conducting separately (that obviously refers to a case where the others do not care to join) it should be entitled to recover a proportionate share of the expenses from the rest of the tavazhis is not at all clear if there was a division.

7. Then para. 29 is still more significant. It provides for the contingency of some of the lands allotted to each tavazhi being acquired by the Government compulsorily under the Land Acquisition Act. The provision is that when such lands are taken by the Government, the amount of compensation should be shared by all the tavazhis and that the tavazhi which lost the property should be recouped by the other tavazhis. Thus, if ten acres of tavazhi B are taken by the Government and a thousand rupees is given as compensation, the other two tavazhis are entitled to share in the thousand rupees and they are bound to make up their quota of the ten acres to the tavazhi B. This appears to me to be a wholly unnecessary clause, if really what was intended was an out, and out partition. Years and years afterwards some property may be taken by the Government. In that event under this clause all the other tavazhis are entitled to share in the compensation amount, contributing in property what the tavazhi lost. Paragraph 35 states that all the title deeds of the tarwad should be in the custody of individual number 20. Here separate items are allotted to the three tavazhis. Why the title deeds relating to the properties allotted to each tavazhi should not be delivered over to that tavazhi and

why one individual should be selected to keep them in his custody is again difficult to understand. Paragraph 35 states,

As No. 20 has in his custody all the title deeds of the tarwad on the responsibility of the members of his tavazhi, he shall give them to other tavazhis in time of need, and after use shall take them back and keep in custody.

It is said that there is a slight error in the translation and that it ought to be

No. 20 has in his custody all the title deeds of the tarwad on the responsibility of the members of all tavazhis, he shall give them to the other tavazhis in times of need and after use shall take them back and keep in custody.

Whichever is correct, whether he has them in his custody on the responsibility of the members of his tavazhi or on the responsibility of the members of all the tavazhis, the point that is made by Mr. Variar is that there was absolutely no reason for the title deeds of all the properties allotted to the various tavazhis being kept in the possession of individual No. 20. The further provision is that in times of need he should give them to the other tavazhis and after use take them back and keep them in his custody.

8. Paragraph 36 states,

It has been agreed that in the event of any necessity to raise any new debts for tarwad necessity, all the male and female adult members of the three tavazhis should join together and borrow under a registered document and meet such necessity and that no debts can be raised in any other manner and if raised, shall not be binding on the tarwad properties.

Mr. Variar asks where is the tarwad and where are the tarwad properties on which alienations are declared to be not binding unless the debts were raised under registered instruments executed by all the adult male and female members of all the three tavazhis.

9. Lastly paragraph 41 states,

It is further settled, that beyond the fact that the properties are allotted for the expenses and maintenance, nobody has any right or claim to raise any fresh loan or to dispose of the properties individually.

Mr. Variar also relies on para. 8 which has been already set out. He urges that it is only the control and possession of the properties that are given to each tavazhi and that the tavazhis were not given full and absolute right or title which is a necessary feature of a partition. He says that as declared in this document, the object of the parties was only to provide for the maintenance and expenses of the members. They had made several experiments before. In 1885 the then karnavan was removed and the management vested in three members other than the karnavan. Still matters did not improve and therefore the document in question was executed with the same object namely, that of making a better provision for the maintenance of the members. Mr. Variar urges and I think with some force, that as all the adult members were joining in this document, there was no need to camouflage the real character of the document. If really the parties intended a partition and they could well have said so and well have called it a "bhaga pathram" or "partition deed" which is the well-known expression and an expression almost invariably used for a partition deed. As pointed out in one of the cases referred to if some of the adult members did not join and under the law then existing without the concurrence of all the adult members you cannot have a complete division, then there might be some occasion for the executants not to call it a " bhaga pathram" or a deed of partition but introduce a number of provisions which will have the effect of a partition. In such cases, the document is not styled a partition deed because they do not wish to give the unwilling parties an opportunity of attacking the document and of setting it aside. If it was styled a partition deed and if the other members attacked it, it must necessarily be set aside. There is no option. But if on the other hand, it is not styled a partition deed but a family karar or "nischaya pathram" (family arrangement) or some other name and clauses are put in which have the effect of a permanent partition, there will be some difficulty in the way of dissenting members attacking it. There would be a chance of success by putting forward the document as a maintenance arrangement. ' But where all the adult members male and female agreed and their intention was to bring about a partition there is not the slightest reason why they should not have said so and

there is no reason for them to give any other name to the document. Nor was there any need to put in various clauses which seem to preserve the right of one tavazhi over the properties allotted to the other tavazhi.

10. Now I shall consider the various points' which are relied upon by the lower Courts and which were very much emphasised in the arguments before me by Mr. Kuttikrishna Menon, the learned advocate for the respondents. These provisions are contained in paras. 5, 6 and 54. Paragraph 54 declares that the arrangement come to was permanent. It runs thus, we have affixed our signatures hereto in the presence of the undersigned witnesses consenting that all the provisions herein shall be in force permanently to be valid and binding to all persons included in this.

Mr. Kuttikrishna Menon says that if an arrangement is permanent it necessarily means that it is a partition deed. If this is so, there is nothing more to be said. He relies on certain decisions containing expressions which if read alone and divorced from the context may appear to support his argument. But those very decisions which I shall consider presently do not lay down that other clauses in the document are not to be looked into. In fact after stating emphatically one feature which would sound in favour of the document being a partition deed, they go on referring to various other clauses to see if the other clauses militate against the view that it is a partition. If really permanency is the conclusive factor, there is no need to go into the other matters and all the other clauses even if they point the other way, must have been ignored. On the other hand, in every one of these decisions relied upon, it is not taken to be conclusive. It is said to be a very clear indication and in some cases it is said to be almost conclusive. That even a permanent arrangement may be by way of maintenance is recognised in Mr. Sundara Ayyar's Malabar Law at p. 150. As the learned author points out, arrangements for maintenance will not ordinarily be viewed as permanent arrangements though it is not impossible that there should be such arrangements. Divisions for enjoyment short of partition that are sometimes entered into are of this character.

That is the character of permanent arrangements. No doubt it is rather very rare. But it cannot be said that permanency is entirely inconsistent with the arrangement

being one of mere-maintenance.

11. Paragraphs 5 and 6 are next relied upon by Mr. Kuttikrishna Menon. He says that these two clauses expressly state that the united or joint status and the karnavanship were put an end to and therefore there is a clear indication that there was an out and out partition. As pointed out in the various decisions, difficulty is that in all these documents there are clauses sounding this way and that and the Court has to see, taken as a whole, what the real intention of the parties was. Paragraphs 5 and 6 run thus:

(5) In order to make the matter mentioned in para. 4 permanent and valid, the present karnavan No. 1, has relinquished his right of management vested in him as karnavan and No. 2 onwards have also renounced with pleasure their right to succeed to that stanom and we all agree. . . .

(6) The authority of the karnavan, and the state of united existence of the members having ceased in the manner mentioned in para. 5 above, and the members, grouping themselves, following the ties of their blood relationship, Nos. 1 to 5 as members of one tavazhi, Nos. 6 to 18 as members of one tavazhi and Nos. 19 to 41 as members of one tavazhi, it has been settled that they shall hereafter live as (members of) 3 separate tavazhis constituted as above.

The matter mentioned in para. 4, which according to para. 5 is to be made permanent and valid, is as stated in that paragraph," to provide for the maintenance of the members to avoid litigation and waste of properties and to ensure that "the tarwad affairs shall be managed as mentioned above in future properly and thrivingly." Therefore it is the tarwad affairs that are to be managed and the object which is to be made permanent is the provision for the maintenance of the members, the avoidance of mutual litigation and the consequent waste of the tarwad properties. In order to achieve this object no one was to be the karnavan in future and that is what is stated in para. 5.

12. Paragraph 6 which causes some difficulty states that the authority of the karnavan and the state of united existence of the members has ceased in the manner mentioned in para. 5. Here again, the expression "state of united

existence," it is urged, denotes joint status according to the respondents but according to the appellants it only means that joint living was put an end to. They were till before then living jointly and it is that state of joint living or united existence that is put an end to according to the appellants. He also lays stress upon the fact that after stating that 1 to 5 were to form themselves as one group, 6 to 18 as another and 19 to 41 as a third group, the name that is given is that they are to be members of a tavazhi and that the three groups were thereafter to live as three separate tavazhis. The argument, as I understand, is if this document is an Out and out partition, each of these groups should be a separate tarwad and the document ought to have stated that these groups were thereafter to live as separate tarwads and not as separate tavazhis. If this paragraph had stood alone, much might be said for the argument advanced by Mr. Kuttikrishna Menon. But I have to take these provisions along with the other paragraphs, and if the other paragraphs clearly denote a continuance of the right of the members of one group over the properties allotted to the other groups, then these clauses by themselves cannot override the other provisions, and have to, be construed in a manner which would not introduce any inconsistency between the various parts of the document. The sentences in paras. 5 and 6 are capable of the explanation given by Mr. Variar for the appellants. I have been taken through the original expressions translated as "state of united existence". and the other expressions used in this paragraph. The expression corresponding to "state of united existence" given in the translation is Ekayoganila. Eka means single, "yoga" means association or group and nila means states. That eka means single and nila means state is common ground. The only point is about the meaning of the expression yoga. So far as I am aware, it can well be translated as association or group. The expression united existence does not bring out the meaning of the word correctly. Eka is single. It is the word yoga that brings in the idea of association or group or union and if we translate literally, it will be "single group state" or "single association state." I think the expression as a whole does not mean that it is the joint status that is put an end to. It is only the state of living in common that is put an end to, and that is why immediately thereafter all the members are grouped according to blood relationship into three tavazhis-tavazhis always indicating the existence of a tarwad of which they are component parts. A tarwad is the main

group and tavazhis are the component parts of it.

13. The real contention of the respondents is that these three groups ought to be separate tarwads thereafter. The word tavazhi would not fit in if really there was not a common tarwad of which they were parts. It may be' that the word tavazhi is rather loosely used here. But if read in the manner in which the appellants contend it ought to be, the clause fits in with the rest of the clauses and would not lead to any inconsistency which would otherwise be caused between these clauses and the other clauses which I have referred to. We must so read the document as to avoid any inconsistency if possible. It is only in the last resort and if no other mode of reading the document exists, we have to recognize an inconsistency and then see which portion has to give way. But here if read as indicated above, there will be no inconsistency and that I think is the proper method of reading it.

14. As regards the abolition of the karnavan-ship that by itself is nothing. On the other hand we find that a common manager for some purpose is provided in this very document. Further in the opening paragraphs of this document, it is stated that the management was removed from the karnavan even in 1885 and entrusted to three members other than the karnavan. We often find that in family karars, the karnavan is asked to abdicate for ever. He is not to function and the family karar or the maintenance arrangement is to regulate the management of the properties. Then Mr. Kuttikrishna Menon points out that all the minor members also were included in this document as executants and that an equal share was given to the minors. He urges that if it is a maintenance arrangement only a half share would be given to the minors and that the fact that an equal share was given to them is an indication that it is a partition deed. This does not appear to me to be correct. As pointed out in Sundara Ayyar's Malabar Law at p. 144, this practice is only a recent one:

A practice seems to have grown up of treating the minor as equal to half an adult in calculating the rate of maintenance. There is no justification for such an artificial rule.

Reference may now be made to a decision of Devadoss J., who had to deal with this very document. Two cases Damodara Menon v. Ramakrishna. Iyer (25) 12

A.I.R. 1925 Mad 624, and Ramakrishna Ayyar v. Kuttathil Madhava Menon S.A. No. 373 of 1922 came together and were disposed of by the learned Judge, the leading judgment being pronounced in Damodara Menon v. Ramakrishna. Iyer (25) 12 A.I.R. 1925 Mad 624. This decision is reported in Damodara Menon v. Ramakrishna. Iyer (25) 12 A.I.R. 1925 Mad 624. A third party obtained a money decree against the karnavan of one of the tavazhis, attached some of the items allotted to that tavazhi, brought them to sale and purchased them himself. The defendants raised the contention that no saleable interest at all was conferred on any of the tavazhis and that the plaintiff was not entitled to recover. Exhibit 12 in this case was marked as Ex. 1 in that case. The learned Judge held that even though the allotment was for the maintenance of the members, there was some interest created in each tavazhi and that that interest whatever it might be, could be attached and sold and that the plaintiff was therefore entitled to recover. In one case at least, the plaintiff purchaser did not claim the full right or the jenman right in the property. This is how the learned Judge deals with the document:

Whatever the name of the document is, settlement, agreement or karar, we have to see what the arrangement really is. The properties of the tarwad were divided among three tavazhis composing it. It was no doubt for convenient management and enjoyment; but the arrangement was to be of some duration. . . . The recitals show clearly that the arrangement was to last for a considerable period. It is urged by Mr. Sivarama Menon that no power was given to the tavazhis to raise any new debts, charging the properties set apart for them. He also relies upon paras. 36 to 41 in support of his contention that the power of alienation was taken away and that there is a restraint on alienation. What the karar provides is against the tavazhis charging the properties with any debt so as to bind the tarwad. The tarwad is the owner of the property and the tavazhis have been given the possession and enjoyment of the property and they are restrained from encumbering the property so as to bind the tarwad. There is no restraint against the tavazhis alienating their right in the properties derived under Ex. I, in favour of a third person; and even if such a restraint is contained in Ex. 1 that would not stand in the way of the tavazhi alienating its interest for its debts; for under Section 10, T. P. Act, such a restraint on alienation is void. The plaintiff does not claim any jenman right in the property or the right of the tarwad in the property. ,The plaintiff

claims only the right of the tavazhi under the karar .... But in the case of an ordinary i maintenance arrangement under which property is 'placed in the possession of the maintenance holder, a person obtaining a decree against him can proceed against the interest of the maintenance holder in the property. The arrangement under the karar Ex. 1 can be varied by a subsequent arrangement between the members of all the tavazhis. But so long as the arrangement under the karar is in force, the right of the tavazhi under the karar is alienable. It is quite open to all the members of all the tavazhis to put an end to the karar in which case an alienee of the right of the tavazhi who have delivered possession of the property alienated as the alienor's interest in it has ceased.

I have underlined (here italicized) the passages. It is true as Mr. Kuttikrishna Menon urges that the alienee did not urge that the document was a partition deed and he contended himself by saying that though it was a maintenance deed, he could get the right of that tavazhi to enjoy whatever interest that tavazhi had. But I might observe that the whole document was before the learned Judge and the plaintiff was represented by Messrs. C. V. Ananthakrishna Ayyar (as he then was) and C.V. Mahadeva Iyer. It is hardly likely that such an easy argument as that of the document being a partition deed would have escaped the attention of the learned advocates of the plaintiff or of the Judge. All of them seem to have taken it that the document was not a partition deed and then proceeded to consider whether even treating it as a maintenance arrangement, the plaintiff could succeed. Being the view of a learned Judge of this Court on the construction of this very document this judgment is entitled to very great respect and independently of it after considering the various clauses, my own view is in favour of that taken by the learned Judge.

15. Two decisions-one of Lakshmana Rao J. in S. A. No. 441 of 19333 and the other of Venkateramana Rao J. in Sivan Kutti Keyi v. Mariyumma A. Nos. 891 to 893 of 1937-are relied upon by the appellants' advocate. In the former case, the document was styled a nischaya leka. Leka and patrom are the same. In either case, it means a deed of settlement. There was a clause in that case restraining alienation on the part of the tavazhis. The provision was that if any debt was to be contracted in respect of the tarwad necessity, all male and female members of

both the tavazhis should join and execute the document. There were only two tavazhis in that case. This stipulation is almost in the same terms as para. 36 in Ex. 12 in this case. It may be observed, that in that case there was no provision for continuance of the karnavan after the date of the document which was of the year 1888. The properties set apart for the tavazhis were to be managed by the senior most member for the time being. Another clause which the learned Judge referred to is that the properties set apart for each tavazhi were to be held by the senior most member of the tavazhi for the maintenance of its members. That is what is found in para. 41 of Ex. 12. In fact, it was provided that the festivals, etc., which were to be conducted in the temples by the tarwad were to be conducted by the first tavazhi. There was no provision for the continuance of a karnavan as such. No doubt the document does not say that the karnavanship is put an end to as in this case. But that is the clear effect of it. It was held that the document evidenced a maintenance arrangement and not a deed of partition.

16. Mr. Kuttikrishna Menon says that the governing provision in the document was that the tavazhis were to live as before; and says that means that there was to be no partition. The clause relied on stated that the two tavazhis were already living separately and they were to live separately as before. In this case, whether they were living separately before the document or whether the separate living was to begin thereafter, it does not in the least matter. I do not see how the clause referred to by Mr. Kuttikrishna Menon can have any bearing on the question. That is not in my opinion, the governing factor of the judgment.

17. A decision of Venkataramana Rao J. relied upon by the appellants' advocate has already been referred to. It lays down that the stated object of the document if there is one must be given due weight. The learned Judge also points out that the provision against alienation is an indication that it is a maintenance arrangement. There was a provision in that case for separate registry in the name of each tavazhi and for separate enjoyment, and yet the learned Judge held that the deed was not a partition deed. In this case, it will be noticed that there is no provision for separate registry at all. Dealing with the argument that the provision for separate registry and separate enjoyment was consistent only with the case of a partition, Venkataramana Rao J., says this:

But it seems to me that the separate registry which was provided for was consistent with separate enjoyment which the parties intended that each tavazhi should have and this does not lead to the inference that the intention was to confer an absolute right in the tavazhis. Further, the fact that separate management was intended and that the parties were living separately is consistent with the arrangement being for convenience of management. It must not be forgotten that unlike Hindu law provision for enjoyment without actual disruption of the family is very common in Malabar. This fact will have to be taken into consideration in construing arrangements such as are embodied in Exs. A and B.

Referring to the decision of Jackson and Anantakrishna Ayyar JJ., in Appa v. Kachai Bayyan Kutti('32) 19 A.I.R. 1932 Mad. 689 , Venkataramana Rao J., points out that the decision turned on the particular terms of that document.

18. Mr. Kuttikrishna Menon relies very strongly upon two decisions of Krishnan Pandalai J.; one of which is reported in Mudara v. Muthu Hengsu ('35) 22 A.I.R. 1935 Mad. 33 and the other in Kanthaswami Pillai v. Bhargavi S. A. No. 1001 of 1929. In the former case the learned Judge found that the property originally belonged to one Thangaju and that she gave it to the descendants of her two predeceased sisters under a gift deed, Ex. I, in the case which set out, "You four and your descendants in hereditary succession shall enjoy in two equal shares." The learned Judge held:

It is clear that the descendants of Parameswari and those of Vengamma were given the properties in equal halves to be enjoyed by them and their descendants in absolute right. The later partition, Ex. II, dated 14th January 1889, recites that the two branches had been enjoying this property without division till that time, that such joint enjoyment had become inconvenient and that therefore with the help of wise men the properties themselves were being divided by metes and bounds.

Under these circumstances the learned Judge held that there could be no question that Ex. 1 under which the property was gifted by Thangaju had vested in two equal shares on the descendants of her two sisters. It was, therefore, held that the later document was only to divide the properties given in the first document and that therefore it was a clear case of a partition. To start with the properties never

belonged to the two branches jointly. It always vested in the two branches separately. A provision against alienation in the later document was held naturally to offend against Section 10, T. P. Act. There is therefore nothing in this judgment to help the respondents. *Kanthaswami Pillai v. Bhargavi S. A.* No. 1001 of 1929, the other judgment of Pandalai J., contains several expressions which are undoubtedly of some help to the appellants. There the document was styled a family settlement and purported to be executed by 26 persons seven of whom were minors and there was a clause that all the stipulations made in the settlement shall always remain in force and be binding effectively on the members therein. The learned Judge stated that it was unusual to see a maintenance arrangement in which the minors take part and that in law it is impossible to have a maintenance deed which is to be permanently binding on the members. He also said that it was a contradiction in terms that an arrangement as to enjoyment, etc., of a property in a tarwad short of a partition shall be permanent and not open to alteration, for it is the essence of maintenance arrangements that they should be open to revision. No doubt the learned Judge has in this part of the judgment declared himself very emphatically but if that is conclusive then there was no occasion for the learned Judge to go into all the other clauses and see whether those clauses indicate a contrary intention. Clause after clause on which reliance was placed for the other side to show that the right of the other branches over the properties given to any one branch was kept intact was discussed and it was held that those clauses did not bear the construction contended for. If the other clauses were all consistent with the document being a partition deed, then there is nothing more to be said. In the case before the learned Judge all the other clauses could easily be explained on the footing of the document being a partition deed. The clause imposing a restraint on alienation could be ignored as being repugnant to the entire document under Section 10, T. P. Act. Other clauses presented no difficulty.

19. A case of that kind differs very materially from the case which I have to deal because as I have said there are a number of clauses in Ex. 12 which cannot possibly be understood on the footing that the document is a partition deed. There is an express clause stating that the common title or the common right (*adi-avakasa*) of one branch over the property of the other is to be enforced in the

manner provided in paragraph 15 in the contingency of failure to pay assessment. The next decision relied upon by Mr. Kuttikrishna Menon, is that of Pandurang Row and King JJ. in Ramunni Nair v. Putukare Korappan Appeal No. 57 of 1938. There again after stating that the provision that the arrangement was to be permanent was a very clear indication that it was a partition, the learned Judges dealt with the various clauses. Reference was made to Clause 4 of that document which provided for the title deeds to be handed over to the respective tavazhis. The clause in our case is just the contrary. Then they dealt with another provision which provided for joint renewals of demises from the jenmies. They say, this no doubt appears at first sight to indicate an intention to keep alive the joint ownership of the tarwad. But the object of this provision clearly was to provide against any refusal of the jenmies to split up the demises. It is therefore impossible to regard this provision as a clear indication of the intention of the parties to retain the ownership of the tarwad in the properties allotted to the tavazhis.

Then they refer to the next clause which provided for the separate registry of the properties allotted to each tavazhi in the names of their respective karnavans. Next they refer to the fact that the karnavan of each tavazhi should have the power to recover possession of the properties from the tenants and to grant renewals and point out that their right to sue in Court for possession could not be recognised unless they had not merely actual possession but also title derived from the tarwad. Lastly they referred to the clause against alienation and held that it was bad under the Transfer of Property Act. They construed it as an expression of a pious hope that the properties would be kept intact. In the present case it will be observed that far from each tavazhi being given the right to sue through its own karnavan for the properties allotted to it, there is a provision that all the tavazhis should join in the prosecution of any litigation each proportionately contributing towards the expenses. Then again there is no provision for separate registry in our case. What is more, it will be seen that the learned Judges discussed the question whether the other clauses contained an indication of the intention of the parties to retain the ownership of the tarwad in the properties allotted to the tavazhis. If there was such an indication evidently the learned Judges were prepared to say in spite of the fact that the arrangement was stated to be permanent, it was to be only a deed of maintenance. It is clear therefore that the provision that the arrangement

was to be permanent was not treated as a conclusive factor. If there were other indications in the document showing an intention to retain the common ownership over the tarwad properties, it would have prevailed. I cannot therefore agree with the observations of Krishnan Pandalai J. in Second Appeal Kanthaswami Pillai v. Bhargavi S.A. No. 1001 of 1929 that the fact that it is stated to be permanent is conclusive in the matter. As I have already pointed out, in Sundara Ayyar's Malabar Law it is stated that,

arrangements for maintenance will not ordinarily be viewed as permanent arrangements though it is not impossible that there should be such arrangements. Divisions for enjoyment short of partition that are sometimes entered into are of this character.

No doubt it may not be common but if on a reading of the entire document, there are clauses which are entirely inconsistent with an out and out partition, the Courts are bound to construe the document as a maintenance arrangement even though it is stated to be a permanent arrangement. I do not propose to refer to in detail with the decisions of the other Courts cited before me. But one decision of the Full Bench of the Travancore High Court which is set out in full at p. 100 of 53 T.L.R. may be usefully referred to. I have not had access to 23 T. L. J. which contains the report of the decision of that Full Bench; but as stated in 53 T.L.R. it is this,

Then follows the Full Bench decision in Achutan v. Madhavan. The characteristic features of the document which had to be interpreted in the above case were : (1) Properties were allotted to the branches separately. (2) The allotments were more or less of an enduring character. (3) Limited power of alienation had been conferred on some of the members, but care was taken to see that properties were not frittered away by independent dealings. (4) The hold of each branch over the properties given to the other two was maintained intact to prevent the properties from being lost to the tarwad. (5) The document was styled a Nischayapatrom. The Full Bench held that the document was not a deed of partition.

On the whole I am of opinion that the document in question is only a deed of maintenance and not a partition deed. In this view the decisions of the lower

Courts are reversed and a preliminary decree for partition as prayed for in the plaint is granted with costs of the appellants throughout. No leave.

(The case having been posted to be mentioned this day, the Court made the following)

## **ORDER**

20. In calculating the amount of mesne profits payable to the appellants, the profits of the properties in their possession will be taken into account. The contesting respondents in this Court and in the lower Courts will pay the costs of the appellants throughout.

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