A T. MADHAVA KURUP

v.

T.C. MADHAVA KURUP (D) BY LRS. AND ORS.

APRIL 5, 2006

B [B.P. SINGH AND ARUN KUMAR, JJ.]

Customary Law:

Succession—In respect of 'Tavazhi' properties in the State of Kerala—
C *After death of last female member of the 'Tavazhi'— Held: The 'Tavazhi' itself would come to an end, since in absence of a female member a 'Tavazhi' cannot be continued by male members alone—Surviving male members of the 'Tavazhi' would inherit the 'Tavazhi' properties as co-owners—Rule of survivorship would cease to operate hence last surviving male member cannot*
D *claim it as his absolute property—Consequently, suit for partition in respect of the 'Tavazhi' properties by heirs of the male member, who pre-deceased the last surviving male member, maintainable—Partition.*

The properties in question in the present appeal were 'Tavazhi' properties. The 'Tavazhi' consisted of one female member and two male
E **members. The female member died. Thereafter the two male members also died one after the other.**

Subsequently, heirs of the male member, who pre-deceased the last surviving male member filed a suit for partition in respect of the 'Tavazhi' properties. Trial Court decreed the suit.

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On appeal, High Court set aside the decree holding that the 'Tavazhi' continued to exist despite death of the last female member, that the last surviving male member of the 'Tavazhi' took it as absolute property and that heirs of the male member, who pre-deceased the last surviving male member, acquired no right in the suit properties and could not, therefore, maintain a
G **suit for partition and separate possession.**

The question which arose for consideration in the present appeal is whether the suit properties being 'Tavazhi' properties devolved on the two surviving male members of the 'Tavazhi' after the death of the last female

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member as co-owners, or whether the suit properties devolved upon the last surviving male member by survivorship, who acquired the same as his absolute property. A

Allowing the appeal, the Court

HELD: 1.1. After the death of last female member of the Tavazhi, the Tavazhi itself came to an end and the surviving male members took the Tavazhi properties as co-owners. [912-G] B

1.2. The High Court observed that the question which arose for consideration in *Balachandran's* case* related to devolution of self acquired property of a Marumakkathayi female, and not in relation to Tavazhi property, and the question whether the tarwad can consist of only two male members did not expressly arise for consideration. It further drew support from the decision of this Court in *Gowli Buddanna's* case** wherein in the context of the Income Tax Act, it was observed that under Hindu Law a joint family may consist of a single male member and widows of deceased male members. Inferentially, the High Court concluded that under the Marumakkathayam Law as well, a single male member could constitute a tarwad. In doing so, the High Court lost sight of the vital distinction between the two that while under the Hindu Law descent is traced through males, in the Marumakkathayam system of inheritance, it is traced through females. In the case of a Hindu Joint Family a single male coparcener may continue the coparcenary with his sons who may be born later, but in the absence of a female member a Tavazhi cannot be continued by male members alone. The comparison is, therefore, not apposite. Different considerations may arise if the sole surviving member of the Tavazhi is a female. [914-D-G] C D E

1.3. If the descent is traceable only through females, in the absence of a female member, the Tavazhi must come to an end with no chance of there being a female member to continue the line. The rule of survivorship in such circumstances ceases to operate and the surviving male members, in the absence of a Tavazhi, must inherit the property as tenants in common, and share it equally. [914-H; 915-A] F G

1.4. Resultantly, the judgment and decree of the High Court is set aside and that of the Trial Court decreeing the partition suit restored. [915-B]

**Balachandran* v. *Sankaran Nair,* (1985) KLT 459, approved.

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A *Thiruthipalli Raman Menon and Ors.* **v.** *Variangattil Palisseri Raman Menon,* **ILR 24 (1901) Madras 73 and** *Alami* **v.** *Kamu and Anr.,* **ILR 12 (1889) Madras 126, distinguished**

Krishnan **v.** *Damodaran,* **ILR 38 Madras 48 and *****Gowli Buddanna* **v.** *Commissioner of Income Tax, Mysore,* **AIR (1966) SC 1523, referred to.**

B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7424 of 2002.

From the Order/Judgment and Decree dated 29.6.2001 of the High Court of Kerala at Ernakulam in A.S. No. 188/1990.

C K. Rajeev for the Appellant.

C.S. Rajan and A. Raghunath for the Respondents.

The Judgment of the Court was delivered by

D **B.P. SINGH, J.** This appeal by special leave is directed against the judgment and order of the High Court of Kerala at Ernakulam in A.S.No.188 of 1990 dated 29th June, 2001 allowing the appeal and dismissing the suit for partition filed by the appellant herein. The question which arises for consideration in the instant appeal is whether the suit properties being Tavazhi properties devolved on the two surviving male members of the Tavazhi after E the death of the last female member as co-owners, or whether the suit properties devolved upon the last surviving male owner by survivorship who acquired the same as his absolute property. The trial court held that the last two surviving male members of the Tavazhi took the suit properties as co-owners, and upon the death of one of them the properties devolved upon his F heirs, who were entitled to maintain a suit for partition. The High Court reversing the finding held that the Tavazhi continued to exist despite the death of the last female member, and that the last surviving member of the Tavazhi, if a male, took it as absolute property. The heirs of the male member, who pre-deceased the last surviving male member, acquired no right in the suit properties and could not, therefore, maintain a suit for partition and G separate possession.

The facts of the case are not in dispute and may be briefly noticed.

The Vattiyot Tavazhi belonged to Ummamma Amma, who had a son Krishnan Nair and a daughter Mathu Amma. After the death of Ummamma H Amma , the Tavazhi consisted of Krishnan Nair and his sister Mathu Amma

along with her three sons and a daughter. Krishnan Nair died in the year 1934. A son and a daughter of Mathu Amma pre-deceased her without any issue. The Tavazhi then consisted of Mathu Amma with her two sons Balakrishnan Nair and Appa Nair. Mathu Amma died in the year 1944 leaving behind her two sons and their heirs. The Tavazhi, therefore, consisted of no female member but only two male members. Balakrishnan Nair died in the year 1950 and Appa Nair, the last surviving member died in the year 1967.

The plaintiffs belonging to the branch of Balakrishnan Nair filed a suit for partition against defendants 1 to 4 belonging to the branch of Appa Nair. It appears that during his life time Appa Nair had bequeathed some of the properties under a Will in favour of defendants 4 to 8 as also to the second defendant. He had also gifted some of the suit properties to the 4th defendant. The question which arose for consideration was whether after the death of Mathu Amma, the last female member of the Tavazhi, her two sons took the suit properties as co-owners, or whether the suit properties continued as Tavazhi in their hands and ultimately vested in Appa Nair, the last surviving member of the Tavazhi.

The plaintiffs claiming 2/6th share in the suit properties filed the suit which was decreed by the trial court, but dismissed by the High Court. Counsel for the appellant submitted that upon the death of the last female member of the Tavazhi, the Tavazhi properties devolved on the surviving male members as co-owners. According to him, since the Tavazhi did not consist of any female member, it ceased to exist as a Tavazhi and, therefore, the Tavazhi properties devolved upon the surviving male members by inheritance and not by survivorship. Reliance was placed upon authorities in support of this proposition.

On the other hand, counsel for the respondents submitted that in the absence of a female member the Tavazhi properties became absolute property in the hands of the last surviving male member of the Tavazhi who could dispose it of as he liked. The Tavazhi continued so long as any member of the Tavazhi was alive. In the hands of the last surviving male member of the Tavazhi, the Tavazhi property became his absolute property. If there was no disposition by the last surviving male member, the doctrine of escheat applied.

It was urged on behalf of the appellant that the High Court erred in holding that after the death of the last female member of the Tavazhi, the Tavazhi continued consisting of only two male members, and that only upon the death of one of them, the sole surviving member of the Tavazhi became

A the absolute owner of the Tavazhi properties. According to the appellant the settled position in law under the Marumakkathayam system of inheritance is that the descent of property is through female and in the absence of a female member of the Tavazhi, the Tavazhi itself comes to an end and the male members inherit the property as co-owners. The rule of survivorship does not operate after the death of the last female member of the Tavazhi.

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We may refer to the decisions relied upon by the parties.

Counsel for the appellant heavily relied upon a Division Bench judgment of the Kerala High Court in *Balachandran* v. *Sankaran Nair* : 1985 KLT 459. That was a case in which the Marumakkathayi female died leaving behind two C sons and no female heir. It is no doubt true that in that case Kalliani Amma, the Marumakkathayi, was possessed of self-acquired properties, which exclusively belonged to her and not to the Tavazhi consisting of Kalliani Amma and her two sons. The High Court held that inheritance to the plaint scheduled property, which was her separate property and not Tavazhi property, would descend to her close heirs or to her Tavazhi. Reliance was placed on D a Full Bench decision of the Madras High Court in *Krishnan* v. *Damodaran*: ILR 38 Madras 48. The learned Judges, however, held that since Kalliani Amma left behind only two sons as her heirs, there was no question of her sons inheriting the property as Tavazhi since there was no female for the purpose of constituting or continuing the Tavazhi. Therefore, by no stretch E of imagination it could be said that they inherited the property as Tavazhi with the incidents of survivorship. The learned Judges went on to observe :-

> "But it is only common knowledge that two surviving males by themselves cannot constitute or continue a tavazhi. If there is no question of inheriting the property as tavazhi, the position is that the F two sons take individually. They inherited the property as the nearest heirs of the deceased Marumakkathayi female. It is beyond doubt that they take the property as tenants in common. There is no question of survivorship."

The principle as enunciated in this decision certainly supports the case G of the appellant that after the death of last female member of the Tavazhi, the Tavazhi itself came to an end and the surviving male members took the Tavazhi properties as co-owners.

Learned counsel for the respondents submitted that the principle laid H down in the aforesaid judgment cannot be applied to the facts of the instant

case because the aforesaid decision related to property which was the separate property of Marumakkathayi female and not Tavazhi property; whereas in the instant case, we are admittedly concerned with the Tavazhi property. Assuming it to be so, the learned Judges held, following the Full Bench decision of the High Court of Madras that self acquisition of female member would descend to her close heir or her Tavazhi. Since no Tavazhi existed after the death of the last female member of the Tavazhi, there was no question of the properties descending on the Tavazhi. There were only two male members, who could neither constitute nor continue the Tavazhi. In these circumstances it was held that the property devolved upon them by inheritance as the close heirs of the deceased Marumakkathayi female.

Learned counsel for the respondents relied upon decisions which took the view that the last surviving member of a Tavazhi has the absolute right to dispose of the property in the manner he likes since the Tavazhi properties descend upon him by survivorship and in the absence of any female member of the Tavazhi, he has the absolute right to dispose of the same in the manner he likes. On his failure to do so, the law of escheat may apply. The legal proposition so enunciated by the respondents is not even disputed by the appellant since that is the settled position in law. The question, however, is where only two male members survive, whether the law of survivorship will still apply so as to make the last surviving member the absolute owner of the property. The Division Bench decision to which we have referred earlier answer the question in the negative and, in our view, rightly so.

The respondents placed reliance on a decision of the Privy Council in *Thiruthipalli Raman Menon and Ors.* v. *Variangattil Palisseri Raman Menon,* ILR 24 (1901) Madras 73. That was a case where the tarwad was reduced in number to the karnavan himself and one anandravan. The karnavan adopted at his own discretion, and without consent of the latter, 4 persons with a view to be the members of the tarwad. The adoptions were challenged on the ground that he could not make the adoptions without the consent of the other surviving male member, in the absence of any proved custom authorizing adoption by the karnavan alone. The Privy Council held that though the last karnavan may have such a power to him alone with a view, as being essential, to preserve the tarwad, but in that case the last karnanan had not been reached, and the adoption by the actual one acting alone without the consent of the surviving anandravan was, therefore, invalid. Relying upon this decision the respondents contended that it must logically follow that even in the absence of a female member, the tarwad continued and the karnavan had not

A acquired absolute authority to act in the manner he liked in relation to the tarwad or the tarwad properties. Therefore, the law of survivorship operated and the tarwad property vested absolutely in the last surviving male member of the tarwad. It is not possible to read into the judgment any such principle. Apparently the parties proceeded on the basis that the tarwad continued to exists even in the absence of a female member. The question that has arisen B in the instant appeal did not fall for consideration in the aforesaid decision of the Privy Council. The question was never urged before it. The only other decision on which the respondents have relied is *Alami* v. *Komu and Anr* : ILR 12 (1889) Madras 126. This decision does not help the respondents because the question which has arisen for consideration in this appeal did C not arise for consideration, and all that the High Court held was that the last surviving member of a Malabar tarwad can make a valid testamentary disposition of the tarwad properties.

In the instant case the High Court distinguished the decision in *Balachandran* (supra) observing that the question which arose for D consideration in that case related to devolution of self acquired property of a Marumakkathayi female, and not in relation to Tavazhi property, and the question whether the tarwad can consist of only two male members did not expressly arise for consideration. It further drew support from the decision of this Court in *Gowli Buddanna* v. *Commissioner of Income Tax, Mysore* : AIR (1966) SC 1523 wherein in the context of the Income Tax Act, it was observed E that under Hindu Law a joint family may consist of a single male member and widows of deceased male members. Inferentially, the High Court concluded that under the Marumakkathayam Law as well, a single male member could constitute a tarwad. In doing so, the High Court lost sight of the vital distinction between the two that while under the Hindu Law descent is traced F through males, in the Marumakkathayam system of inheritance, it is traced through females. In the case of a Hindu Joint Family a single male coparcener may continue the coparcenary with his sons who may be born later, but in the absence of a female member a Tavazhi cannot be continued by male members alone. The comparison is, therefore, not apposite. Different considerations may arise if the sole surviving member of the Tavazhi is a G female.

We find that the observations in *Balachandran* (supra) are supported by good reason. If the descent is traceable only through females, in the absence of a female member, the Tavazhi must come to an end with no chance H of there being a female member to continue the line. The rule of survivorship

in such circumstances ceases to operate and the surviving male members, in the absence of a Tavazhi, must inherit the property as tenants in common, and share it equally. No authority was cited before us which takes a different view. A

In the result this appeal is allowed. The judgment and decree of the High Court is set aside and that of the trial court decreeing the suit restored. There will be no order as to costs. B

B.B.B. Appeal allowed.