PATTAKKAL KUNHIKOYA (DEAD) BY LRS. A

v.

THOOPIKAL KOYA AND ANR.

DECEMBER 15, 1999

[S.B. MAJMUDAR AND UMESH C. BANERJEE, JJ.] B

Customary law: Laccadive Minicoy and Amindivi Islands—Pandambeli, an ancient tarward became extinct in 1906—Pattakkal and Thoopikal, branches of Pandambeli—Kandangalam, sub-branch of Thoopikal became extinct in 1958—Plaintiff, a member of Pattakkal claimed properties of C *Kandangalam by rights of reversion—Suit filed by appellant before Tehsildar for recovery dismissed—Appeal also dismissed—On appeal, High Court remanded the case to Sub-Court for fresh disposal—Sub-Court disallowed plaintiff's claim on the ground that Kandangalam was a sub-branch of Thoopikal and properties should go to Thoopikal—Appeal to High Court* D *dismissed—On appeal, Held: On extinction of Pandambeli properties were divided amongst the three branches—As Pattakkal neither claimed nor objected at that time, therefore, could not claim later—No evidence as to the communality of interest of the Pattakkal of Andhrot—No evidence as to the continuation of relationship at Amini between Pattakkal and Pandambeli—* E *No proof of Pattakkal being a branch of Pandambeli—Plaintiff not entitled to the suit property.*

Constitution of India, 1950 : Article 136—Concurrent findings of facts by the courts below—Appellant's effort to get the entire evidence re-appreciated under appeal by special leave—Held, normally Supreme Court F *does not re-appreciate evidence for the purpose of examining whether finding of facts arrived at by the Courts below is correct or not—Re-appreciation of facts allowed only in cases of serious miscarriage of justice.*

The plaintiff-appellant herein, a member of the Pattakkal tarwad in Lakshdweep Island, filed a suit before the Tahsildar claiming his entitlement G **to the properties of Kandangalam tarwad on the extinction of the said tarwad in 1958 and prayed for recovery of possession. The plaintiff asserted that Pattakkal tarwad was an undivided branch of Pandambeli tarwad of which Kandangalam was another branch and as such on the extinction of Kandangalam tarwad, Pattakkal tarwad of which the plaintiff is a member is** H

A the sole surviving undivided unit of the original Pandambeli tarwad and is thus entitled to succeed to all the properties and the assets of Kandangalam by rights of reversion. Pandambeli is an ancient tarwad in Amindivi Island and admittedly became extinct in 1906. A female member of Pandambeli had gone to Androth earlier and one of her daughters Beeashabi returned to Amindivi with her children in about 1853 or 1859 under very strained B situation when damage was caused in Androth due to floods and the Karnavan of Pandambeli gave them some of the tarwad properties. It is Beeashabi through whom the plaintiff descended lineage. The plaintiff contended that the tarwad properties were given to Beeashabi towards their share whereas the defendant contended that the properties were given to them as an act of charity only. C The said suit was dismissed and even an appeal against the said decision was also dismissed by the Appellate Authority. Further appeal to the High Court was allowed by setting aside the order of the Tahsildar. However, the matter was remitted to the Sub-Court, Kavaratti for fresh disposal on merits. The Sub-Court held that Pandambeli, the parent tarwad of Kandangalam was not in existence even after 1906 and hence there was no question of the properties D of Kandangalam tarwad being reverted to Pandambeli and such the plaintiff cannot lay any claim to those properties. It was also found that Kandangalam was a sub-branch of Thoopikal branch of Pandambeli tarwad and it alone was entitled to the properties on the principle that the properties of the extinct branch must go the tarwad from which it separated itself. It was also concluded E that the plaintiff had not been able to establish that Pattakkal is collateral undivided branch of Pandambeli having any interest in the properties of Kandangalam tarwad being reverted to Pandambeli. Appeal to the High Court was dismissed. Hence the present appeal.

The issues requiring adjudication in the present appeal were whether F Pattakkal was a branch of Pandambeli tarwad and if so, whether they could claim properties of Kandangalam branch which stands extinct in 1958. Further, when a divided branch becomes extinct who could be heirs to inherit its property obtained from the common and parent tarwad.

G Dismissing the appeals, this Court

HELD. 1.1. It is an admitted fact that Pandambeli tarwad become extinct in 1906 when the last surviving member Abdul Kadir Khazi died. It is in evidence that on such extinction, the properties of tarwad were divided amongst the members of three branches which separated from it and these three H branches had been in undivided possession and enjoyment of property and the

plaintiffs through Beeashabi did not choose either to object to put forward the claim as a co-sharer. While it is true that some assertions were made in the year 1936 but ultimately the same did not succeed. There was, as a matter of fact, no right as the coparcener of the entire tarwad—the right, if any, got extinguished in 1906 and since there was no objection when the properties were divided amongst three of the separate branches from the extinct tarwad and as such question of entitlement would not arise. One branch, again assuming to be part of the tarwad, excludes itself from the common tarwad but subsequently asking for a right of inheritance is wholly unwarranted. [381-C, D, E,] A B

1.2. The afflux of time and the conduct of the Pattakkal people in not enforcing their claim in Pandambeli tarwad properties run in favour of the defendants. When the last member of Pandambeli tarwad sought to convert some of the properties for being included in his acquisition there was no objection from Pattakkal group but from the three branches, namely, Kadukiyam, Thoopiyakal and Kandangalam and in terms of the agreement *inter se* amongst the parties the properties of Pandambeli were divided between the surviving three branches. No objection at any point was raised; neither any claim made for the share therein and by reason of the sheer lapse of time one cannot but come to a conclusion so as to negate the plaintiffs' right to be a part of Pandambeli tarwad or to the properties thereof. Thus it clearly emerges that there was total extinction of Pandambeli tarwad in 1906 and till 1938 there was never any assertion of any right for less exercise of the right of ownership so far as Pattakkal tarwad is concerned vis-a-vis the Pandambeli tarwad's property. [385-D, E; 392-A, B] C D E

1.3. Reversionary interest could be considered if that reversioner is in the line of succession and not an ousted reversioner or otherwise briefly put an outed co-sharer cannot act and be termed to be a reversioner in interest. Entitlement to property ought to have its origin through some common ancestors—the claim from Beeashabi by the plaintiffs, however, has not been traced to common ancestor and there is no evidence on record on that score—neither there is any evidence on record that even Pattakkal of Andhrot had any communality of interest in properties with Pandambeli or *vice-versa*. Beeashabi arrived at the Amindivi Island under a strained and an emergent situation and unless some relationship with the ancestors having common property interest is a available on record, the question of ascribing Beeashabi with any entitlement would not arise. [381-E, F, G] F G

1.4. Assuming, however, that pattakkal tarwad family is a branch of H

A **Pandambeli tarwad, even then admittedly Pattakkal tarwad is of Andhrot and not Amini. If at any point of time Pattakkal was a part of Pandambeli then in that event the subsequent shifting from Amindivi to Andhrot without any specific evidence that they continue to maintain the same relationship, question of continuation of relationship at Amindivi between Pattakkal and Pandambeli does not and cannot arise. [381-H; 382-A-B]**

B

2.1. As this appeal arises under Article 136 of the Constitution of India, Judgment of the subordinate Court as also of the High Court wherein concurrent findings of fact had been reached by both the Courts on appreciation of evidence cannot be assailed by making an effort to get the entire evidence re-appreciated as if this is a third appeal on facts. It is not C **the practice of this Court to re-appreciate the evidence for the purpose of examining whether the finding of fact arrived at by the High Court and the Subordinate Court is correct or not. Exception can be taken in the event of serious miscarriage of justice or manifest illegality but not otherwise. This Court is not a regular Court of appeal to which every judgment of the High** D **Court may be brought for a further scrutiny in regard to its correctness. There must be some patent error of law which have resulted in the miscarriage of justice, otherwise and in the normal circumstances this Court would not be justified in interfering with the orders of the High Court.**

[392-F, G, H; 393-A]

E *Bhawani Pillai* **v.** *Ammukutti Pillai,* **(1958) KLT 869;** *Velayudhan Nair* **v.** *Janaki,* **(1957) KLT 222;** *Bhagwati* **v.** *Naraina Pillai,* **(1966) KLT 1160;** *Secretary of State* **v.** *Dugappa Bhandary,* **AIR (1926) Mad 921 and** *Eramagappapalli Karappen Nair* **v.** *Chenen Nayar,* **Madras High Court Reports, (VI)-441, referred to.**

F *"A Short Account of Laccadive Islands and Minicoy"* **By** *R.H. Ellis,* **referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3005 of 1983 Etc.

WITH

G

C.A. No. 8838 of 1983.

From the Judgment and Order dated 1.6.1979 of the High Court of Kerala in A.S. No. 213 of 1974.

T.R.G. Wariyar, A.S. Nambiar, T.L.V. Iyer, S. Balakrishnan, P.K. Manohar, H Samad C.S., and S. Prasad for the appearing parties.

The Judgment of the Court was delivered by A

BANERJEE, J. These appeals by the grant of special leave arising out of the judgments of Kerala High Court focus enforcement of certain ancient customs prevalent in the Lakshadweep Territory. The dispute relates to certain properties which belonged to a tarwad called Kandangalam which became extinct on the death of its last member in the year 1958. B

Before proceeding with the matter any further on the factual score, be it noted that the submissions of the parties were confined to three specific issues raised in the matters: (i) whether Pattakkal is a branch of Pandambeli tarwad; (ii) if so, can they claim properties of Kandangalam branch which stands extinct in 1958; and (iii) when a divided branch becomes extinct who C could be the heirs to inherit its property obtained from the common and parent tarwad.

The plaintiff-appellant herein, a member of the Patakkal tarwad, instituted an action before the Tahsildar, being the authority to decide civil disputes in the Lakshadeep Islands claiming his entitlement to the properties of D Kandangalam tarwad on the extinction of the said tarwad and prayed for recovery of possession. The plaintiff's definite assertion in the plaint is that the Pattakkal tarwad is an undivided branch of Pandambeli tarwad of which Kandamgalam was another branch and as such on the extinction of the latter tarwad Pattakkal tarwad of which the plaintiff is a member is the sole surviving E undivided unit of the original Pandambeli tarwad and its thus entitled to succeed to all the properties and the assets of Kandangalam by rights of reversion.

Incidentally, this particular litigation has a chequered career. The Tehsildar dismissed the suit in the year 1963 and an appeal before the Appellate F Authority, namely, Development Officer of the L.M. & A. Islands in terms of the provisions of Laccadive, Minicoy and Amindivi Islands (Civil Courts) Regulation, 1965 came over to the file of the High Court at Kerala and the appeal registered AS No. 409 of 1968 was allowed by the High Court by its judgment dated 20th July, 1973. In its judgment the High Court set aside the order of the Tehsildar and the matter was however remitted to the Sub-Court G Kavaratti for fresh disposal on merits. The learned Subordinate Judge in terms of the order of the High Court, however, came to the conclusion that the plaintiff has not been able to establish that Pattakkal is a collateral undivided branch of Pandambeli tarwad having any interest in the properties of Pandambeli tarwad. It was held that Pandambeli, the parent tarwad of H

A Kandangalam was not in existence even after 1906 and hence there is no question of the properties of Kandamgalam tarwad being reverted to Pandambeli and as such the plaintiff cannot lay any claim to those properties. The learned Subordinate Judge also found that Kandangalam was a sub-branch of Thoopikkal branch of Pandambeli tarwad and alone was entitled do the properties on the principle that the properties of the extinct branch must B go the tarwad from which it separated itself. Being aggrieved, however, the matter came up before the High Court in appeal and the High Court also did lend its concurrence with the findings of the learned Subordinate Judge and dismissed the appeal without any interference and hence these appeals before this Court.

C Before adverting to respective submission as advanced it would be rather profitable to note certain historical data of the people of Androth and Ameni islands. A lucid details whereof would appear from R.H. Ellies's account of the Laccadive Island and Minicoy. Ellis noted:

D "The religion is Muhammadan. Like the Mopalahs on the mainland, the islanders belong to the Shafi School of the Sunni sect and acknowledge, besides the Koran, the authority of the Sunni or customary law as interpreted by Shafi. They are very strict in all their religious observances and have earned a great reputation for orthodoxy and piety among Muhammadans on the mainland. The men of Androth, E particularly, pride themselves upon their religious knowledge and many of the Koyas of this island travel through Malabar giving religious instruction to the Moplahs and setting religious disputes."

On the people of Ameni Island Ellis has the following to state:-

F "On Ameni the people are divided into four classes :- (1) Tarawad, (2) Tranakampranavar, (3) Kudiyatis and (4) Melacheries. About 5 per cent of the population belong to the first, 35 per cent to 40 per cent to the second, 5 per cent to the third, and the remainder to the last class. The distinction between them appears to have been based originally upon property. The Tarawad class consisted of the four G original tarawad families, Pondambelli, Porakat, Beyamada and Thupekal (now represented by the Poradan family), which alone in the early days of the settlement had tenants. The Tanakampranavar, as their name indicates, were those possessing independent property of their own but with no tenants under them. The Kudiyatis were originally the tenant class. The Melacheries were the landless tree climbers. H Now, however, the Kudiyatis and even some Melacheries have acquired

property of their own and all except the Melacheries have tenants. The first two classes can intermarry and intermarriage between them and the Kudiyaties is allowed, but has very seldom taken place. The women, however, of the Porakat family and its branches in remembrance of an old insult offered to a Porakat lady by a Tanakampranavan do not marry. Tanakampranavars, although a Porakat man will marry a Tanakampranavan girl. Intermarriage for both classes with the Melacheries is strictly prohibited. In one case, a Tanakampranavan who married a Melacheri girl was outcasted. Intermarriage between the third and the fourth class is allowed.

Members of the Tarawad families emigrated to the Malabar Islands and founded families there. Thus the extinct idiyyakal family at Kavarathi was a branch of the Pondambelli family, while the Arenakada and Pudiyedan families are branches of the existence Ameni family of pudian. So also the Pattakal family at Androth is a branch of the Pondambelli, and the Manmel Tarawad of Kalpani is a branch of the Trupekal family. The Ameni Tarawad families will intermarry with these related families and also with the Karanavar class on the Malabar islands but not with other classes.

On chetalat Kiltan and Kadamath, with the exception of one family at Kiltan the people are all Melacheries who have migrated either form Ameni or from the coast. On these northern islands those Melacheries who can read the Koran are styled Mukris and do not climb trees. One family at Kiltan which emigrated from Agathi many generations ago is not regarded as Melacheri and always holds the Khaziship of the island. On both Chetlat and Kiltan a few of the leading families style themselves Koyas and dress in rather better fashion but intermarry with the other Melacheri families. Their superior standing is not recognised by the Ameni islanders and when they visit that island, they have to conform to the custom regarding Melacheri dress."

A brief reference to the factual matrix, would also be convenient and useful at this juncture. Pandambeli is an ancient tarwad in Amini Island and admittedly became extinct in 1906. A female member of Pandamebli had gone to Androth earlier and one of her daughters Beeashabi returned to Amini with her children in about 1853 or 1859 under very strained situation when much damage was caused in Androth due to floods and the then Karnavan of Pandambeli gave them some of the tarwad properties. It is at this however that the disputes arose between the parties; whereas the plaintiff contended that the tarwad properties were given towards their share, the defendants contended that the same to be given to them to be enjoyed as Veliasha (tarwad) properties,

A so that they might survive in Amini. Properties were given to them not because they had any right to Pandambeli properties, but only as an act of charity. When, however. Pandamebli became extinct in 1906, the records depict that the properties were shared by the two branches of the defendants and Kandangalam who were the reversionary heirs. Pattakkal never objected to that till 1936 when alone they filed CS 24/38 which was however dismissed B being barred by limitation and also that the Pattakkal tarwad was not entitled to the properties of Pandambeli tarwad. The Revenue Divisional Officer reversed the findings of the Moneger and by his appellate judgment decreed the suit. The defendants then took the matter in appeal before the Collector and the suit was dismissed by him upholding the plea of limitation but without C deciding the question of relationship and property rights claimed by the Pattakkal tarwad. Later in 1958 the Kandangalam branch became extinct.

Incidentally, the High Court in the earlier remand order as noted above held that the decisions in CS 24/38 do not operate as *res judicata* in considering the question of the status claimed by the plaintiff and has further D held as below :

> "On the merits it goes without saying that the plaintiff would succeed only if he establishes his title, namely, the fact that Pattakkal tarwad is entitled to succeed to the assets of Kandangalam branch. It is not sufficient if he simply establishes that Pattakkal tarwad was a collateral E branch of Pandambeli tarwad. Something more has to be proved. Even if plaintiff seems to be a member of a collateral tarwad that would not be sufficient *ipso facto* to enable the plaintiff to get a decision. He must show equal affinity with the other branches, if not closer (5th page begins). These are matters which the court will certainly look F into when matter goes back to it."

Two specific issues were raised for decision before the learned Subordinate Judge which in fact would also answer the three questions raised herein before in this judgment. The issues being.

G (a) Whether Pattakkal is an undivided collateral branch of Pandambeli;

(b) Whether Pattakkal is entitled to succeed to the assets of Kandangalam in preference to Kadukkiyam and Thoopikal who are the reversionary heirs of Kandangalam?

H The judgment as available on record contains a detailed analysis of the

practice and procedure also as regards the entitlement of the parties. We do record our appreciation therefore. It would thus be useful to record the observations of the learned Subordinate Judge who had the opportunity of going through the original records of the matter. The learned Subordinate Judge observed :

> "The main controversy is over the terms 'our Santhankarathi and given under Velliaezha right' According to the plaintiff the term Santhankarathi means a female member of the tarwad and so what Sainuddin had stated in Ext.P-3 is that "Beeashabi is that "Beeashabi is a member of our tarwad", and "properties were given because of her right in the tarwad". According to the defence, the term, "Santhanakarathi" means wife and what Sainuddin had stated is that the properties were given to his wife Beeashabi to be enjoyed as tarwad properties. The word "Santhanakarathi" is not found any where else and the parties have not produced any other document in which the word has been used, to understand its meaning, though DW-1 has stated that he has seen many other documents in which the word, "Santhanakarathi had been used to mean the wife. It is patent that this word has its origin from the word a common Malayalam word and that "Santhanakarathi" means one who give "Issue". Whether Beeashabi was described as the giver of 'Issue' for the Pandambeli tarwad or for Sainuddin is the controversy".
>
> .....
>
> That Beeashabi was referred to as one who would give offsprings for the Pandambeli tarwad need not necessarily mean that she was treated as a member of the tarwad which was inexistence in Amini when she came from Androth, and was deemed to be a sharer of the properties of the tarwad. If she was considered as a member of the tarwad there was no difficulty to describe her as a member of the tarward or of a collateral branch of the tarwad or whatever status she had in relationship to Pandambeli tarwad. This vague term of santhanakarathi must have been used only to mean that she was not an absolute stranger to the tarwad but was one having Pandambeli blood in her, but a remote connection. There is no evidence as to which predecessor of Beeashabi went to Androth from Amini and how many generations ago. PW-1 has sworn that his information is that it was the mother of Beeashabi who went to Androth but it must be patently false. It must have been some generations ago that Pandambeli people went to Androth

A because Ellis has said that Pandambeli people founded a family called Pattakkal at Androth and that Pandambeli people will inter marry with the related family. It is only reasonable to infer under the circumstances that Beeashabi could have had only very remote connections with Pandambeli and that she was not considered to be a member having community of interest in property. She had her family house and
B tarwad properties in Androth at the time."

The right, if any, thus upon tracing the property in the hands of Beeashabi will have to be ascertained vis-a-vis the circumstances under which the properties were given to Beeashabi. Androth Island had been the
C place of residence of Beeashabi and her coming to Amini under very special circumstances, namely, flood occurring at Androth ought to be taken note of- it is not that Beeashabi came to Amini for the purpose of assertion of her right but to save her life and thus properties were made over for her bare subsistence. The properties were to be enjoyed as Veliyasha properties so as to be enjoyed by her group and not in lieu of her rights in Pandambeli tarwad properties.
D Pattakal people were never treated as having had anything to do with Pandambeli and the properties of that tarwad. It was in 1883 that Sainuddin went to the Moneger to safeguard the interest of Beeashabi and her children and in the decision of the Moneger, (Ext. D2) reference was made to several branches of pandamebli but without any reference to the Pataakkal which the
E plaintiff claimed to be an undivided branch. It is also seen from Ext. D4, that Abdul Kader Musaliar of Pandambeli moved another petition in 1905 for permission to convert some tarwad properties of Pandambeli into his Veliyasha properties and Kandanglam Kunbi Pakki and Kadukkiyam Ammutty objected to that but nobody sought the concurrence of the Pattakkal people. If Pattakkal was a collateral branch of Pandambeli they should have been the first to be
F consulted before converting tarwad properties into separate properties. As a matter of fact Pandambeli people had not recognised Pattakkal as a branch of that tarwad and that Pattakkal people never claimed to be so and much less as having an interest in the properties given to Pattakkal Beeashabi by the Pandambeli Karanvan when she came from Androth after the damages caused
G at Androth due to floods. The conferment of proprietary rights thus are not in recognition of any rights of Beeashabi in the Pandambeli tarwad properties.

Incidentally at the time of the disposal of the appeal before the Kerala High Court (A.S. No. 407/68) in terms of which the matter was remanded to the Court of Subordinate Judge, the Appellate Bench of the High Court in
H paragraph 8 of the judgment recorded that the success of the plaintiff would

only be there if plaintiff establishes his title namely, the fact that Pattakkal tarwad is entitled to succeed to the assets of Kandangalam branch. The High Court observed that it is not sufficient if the plaintiff simply establishes that Pattakkal tarwad was a collateral branch of Pandambeli tarwad but something more had to be proved and even if the plaintiff be a member of a collateral tarwad, that would not be sufficient *ispo facto* to enable the plaintiff to get the decision. The plaintiff must show equal affinity with the other branches, if not closer. We also do feel it expedient to record our concurrence with the observations of the High Court since mere factum of Pandambeli tarwad being a collateral branch of Pattakkal tarwad would not be enough to sign a judgment in favour of the plaintiff.

It is an admitted tact that Pandambeli tarwad became extinct in 1906 when the last surviving member Abdul Kadir Khazi died. It is in evidence that on such extinction, the properties to the tarwad were divided amongst the members of three branches which separated from it and these three branches particulars of which would be dealt with immediately hereinafter, had been in undivided possession and enjoyment of the property and the plaintiff through Beeashabi did not choose either to object or to put forward the claim as a co-sharer. While it is true that some assertions were made in the year 1936 but ultimately the same did not succeed. There was, as a matter of fact, no right as the co-parcener of the entire tarwad-the right if any, got extinguished in 1906 and since there was no objection when the properties were divided amongst three of the separate branches from the extinct tarwad and as such question of entitlement would not arise. One branch and again assuming to be a part of the tarwad excludes itself from the common tarwad but subsequently asking for a right of inheritance is wholly unwarranted. Reversionary interest could be considered if that reversioner is in the line of succession and not an ousted reversioner or otherwise briefly put an ousted co-sharer cannot act and be termed to be a reversioner in interest. Entitlement to property ought to have its origin through some common ancestors-the claim from Beeashabi by the plaintiffs, however, has not been traced to common ancestor and there is no evidence on record on that score-neither there is any evidence on record that even Pattakkal of Andhrot had any communality of interest in properties with Pandambeli or *vice versa*. As noticed above Beeashabi arrived at the Amini Islands under a strained and an emergent situation and unless some relationship with the ancestors having common property interest is available on record, the question of ascribing Beeashabi with any entitlement would not arise.

A Assuming however that Patakkal tarwad family is a branch of Pandambeli tarwad, even then admittedly Pattakkal tarwad is of Andhrot and not Amini. If at any point of time Pattakkal was a part of Pandambeli then and in that event the subsequent shifting from Amini to Andhrot to without any specific evidence that they continued to maintain the same relationship, question of continuation of relationship at Amini between Pattakkal and Pandambeli does B not and cannot arise. It is significant to note that the distance between Pattakkal and Pandambeli is also far too long so as to attribute any commonness to them. Ellis at the beginning of his account (supra) stated that Pandambeli people founded a family called Pattakkal at Andhrot and that inter-marriages are permissible between Pattakkal and Pandambeli people. Ellis, however C further stated that inter-marriages between the same tarwads are not permissible and since there is no marriage and Beeashabi's common ancestor has not been traced out the question of having a common ancestor and a corresponding claim by reason therefore would not arise.

It has been contended in support of the appeal that "attaladakkam" D which is the Malayalam equivalent of "succession on extinction" is only a Rule of succession by "Virtue of distant relationship". Community of Interest in the property of the unit that became extinct is not at all necessary or even relevant. If the succeeding heir had a subsisting right in the property of the extinct branch, the latter cannot become extinct at all but would continue to E be the same branch with the survivors as the members since the name "branch" includes all persons having an interest in the property.

Referring to the evidence of DW 1 Thoopikal Koya who happened to be the only witness examined by the defendants wherein the latter says that so far as Pandambeli properties were concerned, the members of Kadukiyam F Thoopiyakal and Kandangalam were the death heirs and relying thereon it has been contended that when all the members living in Pandambeli died, the 3 branches then present shared the properties only in their capacity of "Death heirs" or inherited the property as "successor" on the death of the members as living in Pandambeli. It is not by virtue of any pre-existing right over the G Tarwad property but only by succession. The pre-existing right as members of the Tarwad had come to an end when they initially took their share and separated. The fact that Pattakkal branch did not claim their due share disentitled them from claiming shares from the assets of the extinct unit of Pandambeli by the law of Limitation. But their affinity to the other units is not extinguished by any principle of law. No such principle of customary Law is H pleaded or proved. It has been further contended that membership of a tarwad

is a right by birth or where permissible by adoption. Membership or affinity is not lost by failure to claim right for long periods. The rule of customary law has not been examined or applied at all either by the Subordinate Judge or even by the High Court and as a matter of fact there cannot be any question of applicability of law of Limitation in the islands at all. The learned senior Advocate in support of the appeal further contended that the existence of 'Community of Interest' between the branch which claims to succeed and the extinct branch is not a qualification necessary for succession to the extinct branch. Such a requirement has not been pleaded or proved to be a part of the customary law. The parties are governed by customary law. The oral and documentary evidence on record do not even suggest such requirement being necessary to succeed as an heir. What has to be done is only to apply the customary law which, if disputed will have to be proved in the same manner in which a custom is to be established. A custom disentitling a surviving branch from succeeding to an extinct branch has not been pleaded or established. The precedents or evidence in the case do not justify such a contention being raised for the first time before this Court. In fact, the entitlement of a surviving branch to succeed is admitted even in the evidence of DW1. Such a plea, if allowed to be raised in spite of the admissions in this case, will have to be tried and evidence will have to be taken. There is no application for amending the written statement. Even the remand order in A.S. 407 of 1968 does not cover such a plea. It is submitted that the respondent's counsel did not even argue that Pattakkal is not a branch of Pandambeli tarwad. The claimants are the descendants of Beeayisha who is mentioned in Ex. P3 to P5 and other documents. The plaintiffs-Appellants are thus entitled to succeed.

It was further contended that some ancestral property of Pandambeli tarwad was given for maintenance of Beeayisha and children without objection from anyone is enough to establish that their branch was a branch of the Pandambeli tarwad. Membership of tarwad is a matter of right by birth and such a branch can never cease to be branch of the tarwad by lapse of time as stated by the Subordinate Judge. Their status as a branch continues and that alone is relevant for succession to another extinct branch according to the Rule of Customary Law as stated even by the defendants. The remand order in AS No. 407 of 1968 also precedes on the basis that Pattakal people from a branch of Pandambeli.

The defendants being the respondents herein relying on the issue of re-marriage contended that the trial court had found that inter-marriage between

A Padambeli and the Pattakkal families was possible and that was a ground for holding that Pattakkal did not constitute a branch of the Padambeli family. This finding was not challenged in the appeal. The only ground taken in the memorandum of appeal in the High Court was that the trial court was in error in assuming that in a Marumakkathayam family there cannot be inter-marriage among the members of the family-a ground which was never sought to be
B established and which is opposed to the concept of Marumakkathayam law. When this is position, and since inter-marriage between Pattakkal and Pandambeli families was possible, it is conclusively established that these two families are separate without any common bond between them. Assuming that Pattakkal was a branch of Pandambeli, at some ancient time in the absence
C of any evidence or any case of any community of interest being established at any point of time, it has to be presumed that the bond if any that existed previously had not survived.

The learned senior Advocate for the respondents also contended that as a matter of fact the Pattakkal group had not been claiming any right over
D Pandambeli properties and *vice-versa* and the fact that they have no such rights has been accepted by PW1 in his evidence wherein he has said :

> "In my knowledge Pattakkal people in Androt have not put forward any right regarding properties of Pandambeli or other Sakhas. Androth people have no right in the property which was given to beeayisha
E and her children from Pandambeli and they have put no claim for it.
>
> Androth people also are branch of Pandambeli. I cannot say whether they have any community of interest (The translation of "former relation is wrong". The correct translation is indicated above.")

F It has been contended that the absence of any claim by Pattakkal was evidently because they were not members of the Pandambeli tarwad with a right to claim a share in its properties or of any of its branches. As already stated the permissibility of inter-marriage between these two families is a strong indication that they were not having any common bonds at all.

G Exts. P3 to P5 and the use of the word Santhankarathi are stressed in support of the plaintiffs case. Santhankarathi means the progenitor of off-spring i.e. wife. There is no further to go into the genesis or the meaning of this term, as it is evidence from Ext. P3 to P5 that the properties were given to be Beayisha as a matter of charity and not because of any right when she
H came from Androth in distress. The document giving the property is not

produced. There is only the hear-say statement of Sainudin in Ext.P3. Ext.P3 is only an objection by Sainudin before the Moneger. The issue for decision in Ext.P3, Petition was not whether Beayishabi was a member of tarwad or not. The question was whether Hussain kutty who retained an item of property could do so or not. It was in that context that Sainuddin was called upon to make oath on certain matters. There was no adjudication in those proceedings about the nature of the properties given to Beayishabi etc. Nothing, therefore, terms on Ext.P3 to P5.

Thirty two years after the Pandambeli tarwad became extinct, a claim was made for the first time by a member of Pattakkal group to its property. The claim was dismissed by the proceedings Ext.B12 of the Moneger. It was allowed by RDO by Ext.P1. The Collector, however, set aside Ext.P1 and dismissed the Pattakkal claim as barred by limitation. He did not express his opinion on the merits of the claim. Therefore, Ext.P1 on which reliance is placed by the appellant does not survive and the findings therein cannot constitute *res judicata* or even be of any evidential value.

The afflux of time and the conduct of the Pattakkal people in not enforcing their claim in Pandambeli tarwad properties run in favour of the defendants. When the last member of Pandambeli tarwad sought to convert some of the properties for being included in his acquisition there was no objection from Pattakkal group but from the three branches, namely, Kudukiyam, Thoopiyakal and Kandangalam and in terms of the agreement *inter se* amongst the parties the properties of Pandambeli were divided between the surviving three branches as noticed above. No objection at any point was raised neither any claim made for the share therein and by reason of the share, lapse of time one cannot but come to a conclusion so as to negate the plaintiffs right to be a part of Pandambeli tarwad or to the properties thereof.

While the plaintiff has not been able to place any near relationship to Pandambeli, Ext. D-II, the decision of the Moneger traced the genealogy of Pandambeli family and its branches to 120 years prior to 1886 (i.e. from 1766). A reference in this context be made to the decision of Moneger as noticed and which reads as below:-

> "On consideration of the statement of the parties and after examining the Muktassers, it is seen that the Petitioner's tarwad is the Pandambeli house where the Defendant is residing. (Mariya)? Mardiya, a lady of Pandambeli had three daughters approximately 120 years ago. From among them, "Adabi" was made to reside in Thooppiyakkal house.

A Mardiya stayed on in Pandambeli. The assets obtained from the former Thoopiyakkal, when she was made to reside in Thoopiyakkal, was given to her for maintenance. Like this, the residents in that house (Thoopiyakkal) were looking after the properties available there and were maintaining themselves with these assets. Subsequently, when all the family members in Pandambeli died, there were no women B to look after their grandchildren. Therefore, Adabi, who had earlier tone to Thoopiyakkal from Pandambeli, was brought and made to stay in Pandambeli. When the children were grown up. Ummathumma, the lady who was brought from Thoopiyakkal, were given properties from Pandambeli tarwad by the then Karnavan and she was given a house C called Kandangalam. This was about 70 to 80 years back. That lady continued to reside in that house. Aforesaid Ummathumma is the direct elder sister of the Petitioner. Assets have thus been given to Kandangalam about 70 years ago. The present Mukhtiyar, the Defendant gave some more property from Pandambeli to the Petitioner."

D The tracing back for 120 years signifies that Kandangalam was a sub-branch of Thoopiyakkal being founded by one of its members, Ummathumma. Pattakkal was never treated as a branch of the Pandambeli family with any right or communality of interest in his property or in any one of its branches. It is on this score that the Learned Advocate for the Defendant very strongly E contended that by reason of complete absence of evidence of any such relationship-distant or otherwise and by reason of the factum of there being no trace of common ancestors between Pandambeli and Pattakkal, the question of entitlement to any relief in the suit does not and cannot arise and as such, it has been contended, that both the Subordinate Judge and the High Court were right in rejecting the contentions of the plaintiff and consequently F dismissing the suit. The Bench of the High Court, upon reliance on Exhibit P-III being the certified copy of a petition dated 30th July, 1883, filed by Pandambeli Sainudin before the Moneger, observed as below:-

"It is stated by Sainudin in that petition that when Beeashabi (who G is described therein as Friday property came over to Amini Island from Androth consequent on the floods at the latter place some properties had been given to them by him on....." In our opinion, the Court below is perfectly right in holding that the expression "one through whom children are born sandanam karti" cannot be understood as denoting a member of Sainudin's tarwad having community of interest H in the tarwad properties. In our opinion, it will be reasonable to

understand that expression as connecting a spouse as contended by the defendants-respondents. However that may be, the case of the plaintiff that the Pattakkal branch of Androth had been founded by the Migration from Amini of Beeashabi's mother cannot be accepted as correct." A

The High Court after relying upon the Ellis's Book 'A Short Account of the Laccadive Islands and Minicoy" came to a conclusion: B

".....that the Pattakkal family at Androth had been in existence for a long time prior to 1924 and that though the original of Pattakkal tarwad could be traced to Pandambeli there were intermarriages between the members of the two tarwads, namely, Pattakkal of Androth and Pandambeli of Amini. If Pattakkal was an undivided branch of Pandambeli, it is inconceivable, according to the custom in the Islands, that much intermarriages would have been permitted. P.W.1 has admitted that his family people are known as Pattakkal, that as members of Pattakkal tarwad they have properties and house at Androth, two tavazhies of the said tarwad being still based in Androth Island. In his cross-examination before the Tahsildar, P.W.1 had further stated that the children of two sisters of Beeashabi are settlers in Androth Island. As rightly pointed out by the learned Subordinate Judge if Beeashabi was a member of the Pandambeli tarwad of Amini and was entitled to a share as of right her two sisters would have been also members of the Pandambeli possessing similar right in the Pandambeli tarwad properties. P.W.1 has, however, deposed that he could not say whether the Androth Pattakkal people have any rights in the suit properties and at a later stage in his testimony, he has positively asserted that the Androth Pattakkal people had no right in the properties of Beeashabi and her children from Pandambeli tarwad. This lends support to the inference that the settlement of properties on Beeashabi and her children and sainuddin was not in recognition of any pre-existing right which they had by virtue of their being members of an undivided branch of Pandambeli tarwad but only by way of ex-gratia charity or generosity." C D E F G

Incidentally, there was a suit between Sainudin and one Kunhipakki of Kadukiyapura branch which dispute, as a matter of fact, culminated in the decision as rendered by the Moneger as noticed above. It is rather significant to note that in the decision of the Moneger, reference has been made to several branches of the Pandambeli Tarwad but for whatever may be the H

A reason, there is no mention at all therein of Pattakkal Tarwad which the plaintiff claims to be a part of Pandambeli. In 1905, Abdul Qadir Musaliar, who was the last surviving member of Pandambeli, filed an application before the Moneger praying for permission to convert two items of the properties into his personal properties. The application was objected to by the members of Kandagalam Thoopiyakkal and Kadukkiyan. The Pattakkal branch was nowhere B there. Be it noted, however, that Abdul Qadir was permitted to convert the properties into his personal properties. The records depict that after the death of Abdul Qadir, his branch became extinct and subsequently, the properties were divided as between Thoopiyakkal Kandagalam and Kudukkiyam branches. Needless to record that there exists no dispute as regards the factum of Abdul C Qadir, being the last of the surviving members of Pandambeli Tarwad. In 1936 also, as the records depict, the last surviving member of Kandagalam applied to the Authority for permission to convert some properties as his personal properties. The application, however, was opposed by the members of Thoopiyakkal and Kadkkiyam and it is for the first time that Pattakkal Tarwad in the year 1930 objected to the conversion which however was rejected by D the Moneger after express recording of the fact that the Pattakkal Tarwad had no right to object. Even though the order of the Moneger was set aside by the Revenue Divisional Officer, Mangalore by his proceedings dated 20th November, 1939 and having an appeal filed by Pattakkal Tarwad, the order of the Appellate Authority was reversed by the District Collector in second E appeal whereby it was held that the Pattakkal Tarwad's claim was barred by limitation as detailed herein before in this judgment more fully.

Be it noted that while in a Mitakshra Joint family, the members claim their descent from a common ancestor, the members of the family constituting a marmakatyam Tarwad had descended from a common ancestress. Incidentally, F Marumakkattayam Law, as administered by the Courts, is a body of customs and usages which have received recognition and may be taken to be well settled on most matters. While it is essentially a customary law, as regards the issue of succession, Mayne's Hindu Law and Usage' (Edition) has this to state:

G

> "Next as to the system of inheritance among those governed, by the Marumakkattayam law, questions of inheritance can only arise as to individual property or in respect of property left by an extinct tarwad. As early as 1864, the question of the devolution of the self-acquired property of a male member of a tarwad came before the Madras High H Court and it was held that, by the law of Malabar, all acquisitions of

any male member of a tarwad, which he had not disposed of in his lifetime, lapsed to the tarwad, on his death and formed part of its property. The right of the acquirer to mortgage or sell his self—acquisition was also recognised. *(Kallati Kunju Menon* v. *Palat Erracha Menon,* (1864) 2 MHCR 162)." A

Incidentally, the decision of the Madras High Court in *Kallati Kunju's* case (supra) stood affirmed by a Full Bench judgment in the case of *Govindam Nair* v. *Sankaran Nair, (*1908-(32) Madras 351). Subsequently, however, the same High Court in another Full Bench Judgment sounded a different note as regards the self-acquired property of a female to the effect that it descends to her own issue. B C

Mayne's Hindu Laws further states:

"Under the Aliyasantana law, there is no such distinction as regards the devolution of self-acquired property belonging to a member of the tarwad; such property whether of a male or female goes to the nearest branch, and, where there are more branches than one standing in the same degree of relationship, they inherit jointly *Managappa Ajei* v. *Marudai,* (1916) 39 Mad 12; *Antamma* v. *Kaveri,* (1884) 7 Mad 575 and *Timma* v. *Daramma,* (1887) 10 Mad 362. The Madras Marumakkattayam Act has altered the law as laid down by the Full Bench decisions in *Govindan Nair* v. *Sankaran Nair* and in *Krishnan* v. *Dmodaran,* (1908) 32 Mad 351 FB; *Krishnan* v. *Damodaran,* (1915) 38 Born 48 FB. So far as Marumakkathayi Hindus are concerned. Similarly, the Madras Aliyasanthana Act, 1949 (Chapter IV) has altered the law of intestate succession among Hindus, other than Jains, governed by the Aliyasanthana law of inheritance." D E F

These statutory changes, however, do not have much bearing on the matter in issue and as such we refrain ourselves from dilating further on the issue more as by reason of this fact that the learned Advocates appearing for the parties did not also proceed on that score. G

Mr. Wariyar, the learned senior advocate, appearing in support of the appeal placed very strong reliance on a decision of the Kerala High Court in the case of *Bhawani Pillai* v. *Ammkutti Pillai,* (1958) KLT 869. The High Court, in paragraph 6 of the report, observed as below:-

"When the properties which originally belonged to Krishnan H

A Parameswaran's branch devolved after the extinction of that branch on the surviving branches, the surviving branches could have taken those properties only as tenants-in-common, with each branch having separate rights, and not as an undivided tarwad comprised of all the surviving branches. Likewise after the subsequent partition between the members of the plaintiff's branch, any common property left out B of the partition would belong thereafter not to the branch as a whole and as constituting and undivided tarwad with respect to such property, but to the individual members or units of the branch as tenants-in-common and with each divided member or unit having separate rights to the property. As has been pointed out in *Velayudhan* C *Nair* v. *Janaki,* (1957) KLT 222, when once a Marumakkathayam tarwad becomes divided there will be no tarwad on behalf of which a divided member can sue."

Similar is the view expressed by Learned Single Judge of the Kerala High Court.in the case of *Bhagwati and others* v. *Naraina Pillai,* (1966 KLT D 1160) and relying thereon, the learned senior advocate contended that a divisible one-third or at least one-fourth share should be made available to the plaintiff and the total rejection of the claim thus was not justified. On this score, the issue arises as to whether Pattakkal can be termed to be a survived tarwad. As noticed above, documents dating back to about 120 years do not E suggest the same. In the event of an extinction, it should be read as eligible surviving branch and not otherwise. This is, of course, on an assumption that Pattakkal, at some point of time, belonged to some particular part of Pandambeli Tarwad. In the contextual facts in our view, thus the two decisions noted above do not lend any support to the appellant's contentions. It should be competent and eligible in order to come within the *ratio decendi* of the two F judgments noticed above. Unless some relationship with ancestors having common property interest is shown, the question of ascribing Beeashabi with the ownership or entitlements on a part of Pandambeli Tarwad does not and cannot arise. A reference can made to a decision of the Madras High Court wherein in the case of *Secretary of State* v. *Dugappa Bhandary,* AIR (1926) G Madras 921, the Madras High Court stated as below:-

"Under Hindu Law heirs must come within 14 degrees of the deceased and similarly there must be some limit to the remoteness of relationship in Aliyasantana families, and it is unlikely that heirship would extend to a remote relation who did not observe pollution. In the present case H it is in evidence that Anthaya Shetti of Choradi family was divided off

from the Kavanjur family, and it is alleged that they both originally formed one family jointly with the Haladi family. Inasmuch as the claim of the Kavanjur family has been negatived by the decision of the District Court, *prima facie* the Choradi family which was a branch of the Kavanjur family would be disentitled to succeed. In these circumstances, Government must be held to have adduced sufficient evidence to make out a *prima facie* case that Durgi Shettithi died without heirs. If the defendants which to in negative this contention, it lies upon them to prove that this Anthaya Shetti, or any other person whom they may choose to set up was actually an heir to Durgi Shettithi. For proving this, they merely rely on the fact that the Government dropped the escheat proceedings in 1905 and on the evidence of P.Ws. Nos. 3 and 12, that the Haladi family and Anthaya Shetti's family divided long ago, but both these witnesses couple this admission with a statement that Durgi Shettithi had not any heirs, thus showing that in their opinion, the relationship was too remote to constitute heirship. It is, therefore, unnecessary in this case to decide a point which has been urged at some length, viz., the exact nature of kinship which would constitute a person an heir under the Aliyasantana Law. On this point, therefore, I find that Durgi Shettithi died without heirs and that the property escheated to Government."

The observations of the Madras High Court in one of its very early Judgments seem to be rather aposite and more or less on a similar situation. The Madras High Court observed in the case of *Eramgappalli Korappen Nayar* v. *Chenen Nayar,* (Madras High Court Reports (VI)-411) as below:

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

The discussion above in our view does not lend any concurrence to the submissions of the Appellant as regards the entitlement to inherit the property. Ancestral history there has none and assuming that there was some total exclusion from 1906 onwards cannot but lead to a situation in acceptance with

A the respondent's point of view. A right shall have to be established and that it is incumbent upon the plaintiff to prove the contention of the existence of some right through the years. On an analysis of the factual situation, it clearly emerges that there was total extinction of Pandambeli tarwad in 1906 and till 1938 there was never any assertion of any right for less exercise of the right of ownership so far as Pattakkal tarwad is concerned *vis-a-vis* the Pandambeli B tawad's property. We are, therefore, unable to record our concurrence with the submissions of Mr. Wariyar.

A faint attempt was made in support of the appellant's contention by reason of the appointment of Koya of Pattakkal to the post of Qazi by virtue of his belonging to Pandambeli tarwad and as such, there had been a recognition C of Pattakkal tarwad being a part of Pandambeli tarwad. The High Court has dealt with the issue in the following manner:

> "It may be that for the purpose of Kazihood the elders of the Islands considered the Koya of Pattakkal as an eligible candidate by virtue of the ancient connection which Pattakkal is said to have originally had D with Pandambeli before the former's migration to Androth several generations ago but the said fact does not, in our opinion, constitute acceptable evidence that Patakkal tarwad of Androth continued to be an undivided branch of Pandambeli at the relevant point of time".

E We do record our concurrence to the observations of the High Court and as such, we need not detain ourselves on that score except recording that right to succeed to the post of a Qazi does not by itself confer a property-interest over the lands of Pandambeli tarwads.

In any event, while dealing with the appellants' grievances it is necessary F to keep in view the limited scope of the present proceedings. As this appeal arises under Article 136 of the Constitution of India, judgment of the learned Subordinate Judge as also of the High Court wherein concurrent findings of fact had been reached by both the courts on appreciation of evidence cannot be assailed by making an effort to get the entire evidence re-appreciated as if this is a third appeal on facts. It is not the practice of this Court to re-G appreciate the evidence for the purpose of examining whether the finding of fact arrived at by the High Court and the Subordinate Court is correct or not. Exception can be taken only in the event of serious miscarriage of justice or manifest illegality but not otherwise. We had occasion to decide clearly the law on this score and as such no further dilation is called for but we only H emphasise it once that the Supreme Court is not a regular court of appeal to

which every judgment of the High Court may be brought for a further scrutiny in regard to its correctness. There must be some patent error of law which have resulted in the miscarriage of justice as noticed above, otherwise and in the normal circumstances this Court would not be justified in interfering with the orders of the High Court. The two Courts at an earlier stage of the proceeding did rely upon unimpeachable documentary evidence and we do not see any reason to come to a different conclusion than what is on record.

In that view of the matter, we do not find any merit in this appeal. The appeal, therefore, fails and is dismissed. Each party has to pay and bear its own costs.

CA No. 8838 of 1983

The cross objection filed in the matter being Civil Appeal No.8838 of 1983 was not seriously pressed. In view of the finding in CA No. 3005 of 1983 no further order need be passed in CA No.8838 of 1983 and the same stands disposed of on the basis of the judgment as above.

R.C.K. Appeals dismissed.