

KERALA HIGH COURT

Abdulla Koya Haji

Vs.

Imbichipathumma Bi

A.S. No. 591 of 1954

(Kumara Pillai and Vaidialingam, JJ.)

03.03.1958

JUDGMENT

Kumara Pillai, J.

1. This appeal arises out of a suit for partition. Parties are Mahomedans of Kozhikode, and the main question which arises for decision in the appeal is whether their rights in regard to the properties which are sought to be partitioned are governed by the Mahomedan Personal Law (Shariat) or by the Marumakkathayam Law. Defendants 4 and 8 in the lower court are the appellants before us.

2. One Ahammed Koya Haji who died in 1934 and who was a member of a Mopla tarwad at Cannanore in North Malabar, following the Marumakkathayarn Law of inheritance, had by his wife, Kalmabi, three sons, namely defendants 1 to 3, and four daughters whose names were Pathummabi, Kadeesabi, Ayissabi, and Mariyam Bi. Kalmabi died in 1905, even before her husband. All the four daughters are also now (lead. Mariyam Bi died in 1914. She had two sons, one of whom is dead and the other is defendant 4. Ayissabi died in 1921 leaving two sons and one daughter, the sons being defendants 5 and 7 and the daughter defendant 6. Kadeesabi died in 1948 leaving no issue. The other daughter, Pathummabi, had pre-deceased her, in 1945, leaving a daughter whose name also was Kadeesabi. The properties sought to be partitioned, namely, plaint items 1 to 4, are acquisitions standing in the names of Kalmabi and her four daughters under a gift deed Ext. A1 dated 27-6-1903, executed by Ahammad Koya Haji in favor of Kalmabi for plaint item 1, an assignment (Ex. A3 dated 10-2-1912) executed by him in favor of his eldest daughter, Pathummabi, for plaint items 2 and 3, and another assignment deed (Ex. A2 dated 8-2-1912) executed by Kalmabi's brother, Ussan Koya, in favor of Pathummabi for plaint item 4; and the main dispute in the appeal is whether devolution of these properties after the deaths of Kalmabi and her daughters would be governed by the rules of Marumakkathavam Law of inheritance or by the rules of succession under the Muslim Personal Law (Shariat). Kalmabi's

mother Katheesabi, survived her and died only in 1926. Besides the daughter, Kalmabi, Katheesabi had two sons also. One of them was Ussan Koya, the person who executed Ex. A2 in favor of Pathummabi. He died in 1945. The other son, Abubucker Koya Haji, died in 1929, and plaintiffs I and 2 are his widow and son respectively. Plaintiffs I and 2 are therefore the widow and son of Kalmabi's brother. As stated already, defendants 1 to 3 are Kalmabi's sons and the brothers of her four daughters, defendant 4 is her grand-son, being the son of her daughter (Mariyam Bi); and defendants 5 to 7 are her grand-children being the issues of her daughter, Ayisabi. Defendants 3 to 10 are persons who would be entitled to some rights in the properties belonging to Ayissabi and Mariyam Bi if they were governed by the Muslim Personal Law and not by the Marumakkathayam Law of inheritance. Mariyam Bi's husband, Ali Koya Haji, survived her and died only in 1918. After Mariyam Bi's death, he married a second wife whose name was K. Katheesabi and who survived him and died only in 1923. After Ali Koya Haji's death his second wife, K. Katheesabi, married again, her second husband being Abubucker Koya who was the husband of Ayissabi, Mariyam Bi's sister. After K. Katheesabi's death in 1923 this Abubucker Koya married a third wife, Imbichipathummabi, who survived him and died only in 1931, and defendant 8 is his daughter by her. After Abubucker Koya's death Imbichipathummabi was married a second time, and defendant 10 (Chekkunhi) is her second husband. At the time of the death of Mariyam Bi's second husband, Ali Koya Haji, his father (Mammadkoya Haji) was alive and defendant 9 is Mammadkoya Haji's daughter. Thus, through successive steps of inheritance defendants 8 and 10 would be entitled to a small portion of the estates left by Mariyam Bi and Ayissabi, and defendant 9 would be entitled to a small portion of Mariyam Bi's estate.

3. According to the plaintiffs, Kalmabi and her daughters were governed by the Muslim Personal Law (Shariat) and plaintiff I belonged solely to Kalmabi under Ex. A I and plaintiff items 2 to 4 belonged in common to her four daughters, Pathummabi, Kadeesabi, Ayissabi and Mariyam Bi, their rights being those of tenants-in-common. Plaintiffs brought the suit in 1953 alleging that by the deaths of Kalmabi and her four daughters as well as by the death of Kalmabi's mother and her son, Abubucker Koya Haji, they had become entitled to 3251 out of 17280 shares in plaintiff item 1 and 453 out of 576 shares in items 2 to 4 and praying for partition of the plaintiff properties by metes and bounds and recovery of possession of their share in the same.

4. After Kalmabi's death her husband, Ahammad Koya Haji, and her seven children together executed Ex. B7 agreement on 11-2-1912 stating that they were thereby relinquishing all the rights they had obtained under the Shariat Law in the properties left by Kalmabi and also providing that Kalmabi's properties as well as the properties standing in the names of the four daughters (Pathummabi, Kadeesabi, Ayissabi and Mariyam Bi) would thereafter vest and be held for the next sixty years by a streevazhi, tarwad constituted of the four daughters and their female issue, that the manager and karnavan of this tarwad should be the eldest female member thereof, that the tarwad properties were not to be partitioned, and that except a mere right to reside in the tarwad house neither Kalmabi's sons nor the sons of her daughters and other female

members of the tarwad would have any right in the tarwad properties. In 1950 defendant 3 had filed a suit in the court of the Subordinate Judge of South Malabar, Kozhikode, as O. S. No. 72 of 1950 for partition of his share in the present plaint properties. To that suit the plaintiffs were not parties, and it was brought on the footing that plaintiffs were not entitled to any share in the properties. After the institution of that suit plaintiffs made an application, 1. A. No. 1270 of 1950 copy of which is Ex. A4, to implead them also as additional defendants, but their application was opposed by the plaintiff & defendants in O. S. No.72 of 1950 and so it was ultimately dismissed with the direction that the decree there- in would not be binding on them. Ex. BY is the judgment and Ex. B37 the decree in O. S. No. 72 of 1950 In the plaint in the present suit the plaintiffs stated that neither Ex. B7 nor Ex. B37 was binding on them and would stand in the way of their claiming their share. According to them, Ex. B7 was not binding on them because Kalmabi's mother, Katheesabi, and her son, Abubucker Koya Haji, were not parties to it and also because the instrument was void as it purported to create an estate unknown to law and change the rules of succession and inheritance to property which it was not open to private individuals to effect. It was also averred in the plaint that from the time each of them became entitled to a share in the plaint properties till the death of each, Kalmabi's mother, Katheesabi, as well as Abubucker Koya Haji had been in joint possession and enjoyment of the plaint properties and that the plaintiffs also had been in possession and enjoyment and receiving their portion of the income till 1948.

5. Defendants 1 to 9 entered appearance in the lower court and filed written statements, some of them supporting the plaintiffs and some denying their right. As this appeal is only by defendants 4 and 8 and the other defendants have not appealed against the preliminary decree for partition which the lower court has given to the plaintiffs it is not necessary to refer here to the contentions of all the defendants. Defendant 4 contended that the Shariat Law was not applicable to the plaint properties, that plaintiffs and defendants have got self-acquired properties which are being held under the Shariat Law and also other properties which are being held as tarwad properties under the Marumakkathayam Law, that the properties acquired by Kalmabi belonged to her thavazhi consisting of herself and her children and were being held as thavazhi-tarwad properties under the Marumakkathayam Law, that plaint item I was gifted by Ahammad Koya Haji in the name of Kalmabi for being held by her and her children as a stri-thavazhi, that Kalmabi was karnavastri of the said thavazhi till her death and after her death her eldest daughter, Pathummabi, became the karnavastri thereof, that plaint items 2 to 4 were also acquired for and on behalf of the said thavazhi, that Ex. B7 was executed in 1912 stating all these facts, that the said agreement is not void or invalid, that all the members of the thavazhi have accepted and acted in accordance with Ex. B7 and that instrument has taken effect, that plaintiffs have therefore no right in the plaint properties, that plain- tiffs were also never in possession and enjoyment of the plaint properties, and that, even if they had any rights in the properties, such rights have therefore become barred by limitation. Defendant 8 merely stated that "she totally denies all the allegations made in the plaint save those that are expressly admitted in her written statement" and that "it is necessary that she should get her lawful share out of the plaint properties duly partitioned and allotted to her separately and also duly freed of the joint possession thereof". At the time of the trial in the lower

court the defendants also urged that, like her husband, Kalmabi also originally belonged to a Marumakkathayam tarwad, which was known as Kunheeryambalath tarwad, that therefore even apart from the creation of a thavazhi-tarwad by Ex. B7 there was a thavazhi-tarwad consisting of Kalmabi and her children, that the said thavazhi-tarwad was known as Kunheeryambalath Pudiya Purayil thavazhi, and that the plaint items belonged to that thavazhi-tarwad and were governed by the Marumakkathayam Law.

6. The lower court repelled these contentions and, holding that Kalmabi and her children were followers of the Shariat Law and not followers of the Marumakkathayam Law of inheritance and that Ex. B7 was void and had no effect, passed a preliminary decree for partition allotting shares as follows to the various parties:

"Over item 1

| | | | | |
|------------|-----------|----------|------------|-------|
| Plaintiffs | ... 34304 | Each | of | 45226 |
| | out | of | defendants | |
| | 134320 | 1,2 & 3. | | |

| | | | |
|---------------|----------|---------------|----------|
| 4th defendant | ... 6682 | 5th defendant | ... 3455 |
|---------------|----------|---------------|----------|

| | | | |
|---------------|---------|---------------|----------|
| 6th defendant | ... 737 | 7th defendant | ... 1143 |
|---------------|---------|---------------|----------|

| | | | |
|---------------|--------|---------------|---------|
| 8th defendant | ... 86 | 9th defendant | ... 149 |
|---------------|--------|---------------|---------|

| | |
|----------------|--------|
| 10th defendant | ... 86 |
|----------------|--------|

Over items 2 to 4:

| | | | | |
|------------|-------------|------------|----|-----|
| Plaintiffs | ... 192 out | Each | of | 448 |
| | of 2304 | defendants | | |
| | | 1,2 & 3 | | |

| | | | |
|---------------|---------|---------------|---------|
| 4th defendant | ... 358 | 5th defendant | ... 294 |
|---------------|---------|---------------|---------|

| | | | |
|---------------|--------|---------------|--------|
| 6th defendant | ... 39 | 7th defendant | ... 61 |
|---------------|--------|---------------|--------|

| | | | |
|-----|-------|---------------|-------|
| 8th | ... 4 | 9th defendant | ... 8 |
|-----|-------|---------------|-------|

defendant

10th ... 4"
defendant

The appeal is against this preliminary decree.

7. In this court also it was vehemently urged that, like her husband, Kalmabi also originally belonged to a marumakkathayam tarwad, and that therefore, even apart from the creation of a thavazhi-tarwad under Ex. B7, there was a thavazhi-tarwad consisting of Kalmabi and her children and the acquisitions under Exts. A1, A2 and A3, being properties obtained from Kalmabi's husband and brother, would under the ordinary Marumakkathayam Law belong to that thavazhi-tarwad as a whole and not individually to the persons in whose names the documents were taken. But this contention is belied even by defendant 4's written statement paragraph 2 of which reads as follows:

"The plaint schedule properties are not being held and cultivated under makkathayam system of law, in accordance with Mussalman Shra, as mentioned in paragraph 1 of the plaint. The plaintiffs and defendants have got self-acquired properties, which are being held under Mussalman shra, and they have also got properties which are being held as tarwad properties, under Marumakkathayam system of law. Kalmabi referred to in the plaint is a member of the Cheetheavil Kuruthu alias Kunheeryambalath tarwad, and the properties belonging to that tarwad are being held and cultivated under shra. The properties acquired by Kalmabi for her own thavazhi, by residing at Puthiyapnra, and also the properties attached thereto are being held and cultivated, as thavazhi tarwad properties, under marumakkathayam system of law".

The two last sentences in paragraph 2 of the written statement of defendant 4, i. e., the sentence underlined by us in the above extract and the sentence following it, would show that his case was that although Kalmabi's family of birth, i. e., Kunheeryambalath tarwad, and the properties belonging to it were governed by the Shariat Law and not by the Marumakkathayam Law, her branch or thavazhi consisting of herself and her children and the properties belonging to that branch were governed by the Marumakkathayam Law-that is to say, his case was that, although Kalmabi came from a family governed by the Shariat Law and not by the Marumakkathayam Law, she and her children constituted a marumakkathayam tarwad governed by the Marumakkathayam Law in respect of the properties which they obtained from her husband as he was governed by the Marumakkathayam Law. The case that Kalmabi herself originally belonged to a Marumakkathayam tarwad was only a subsequent development and in the light of the statement in paragraph 2 of defendant 4's written statement, there seems to be no truth in that case. Ex. B7 also tends to show that Kalmabi's original tarwad was not a marumakkathayam tarwad. It was executed after Kalmabi's death by her children and husband jointly, and in clause 4 thereof it was expressly stated that after Kalmabi's death all the executant's (**VERNACULAR**

MATTER OMITTED i.e., all of us) had become her heirs under the Shariat Law and obtained shares in the properties left by her. If Kalmabi originally belonged to a marumakkathayam tarwad and was governed by the Marumakkathayam Law her husband could not have become her heir, and what is more, there is the definite statement in clause 4 that it was under the Shariat Law that he and her children became her heirs. It is the common case of the parties that plaintiff I which was dealt with in Ex. B7 as property left by Kalmabi and devolved on her husband and her children after her death, was obtained by her from her husband. Her husband was admittedly governed by the Marumakkathayam Law; and if Kalmabi also was governed by the Marumakkathayam Law property which she had obtained from her husband would have belonged to her and her children as constituting a thavazhi-tarwad under the Marumakkathayam Law (see *Chakkra Kannan v. Kunhi Pokker*¹, & *Lakshmi v. Makundan*²); & in respect of such properties the Shariat Law would not have been applicable at all. The oral evidence relating to Kalmabi's family of birth consists of the evidence of plaintiff 2 as Pw. I and defendants 3 and 5 as Dws. 1 and 2 respectively. According to Pw. 1, in Kozhikode some Mopla families follow the Marumakkathayam Law and some follow the Marumakkathayam (Shariat) Law. Regarding Kalmabi and her family, he has said:

"Kalmabi, wife of Ahammad Koya, was a member of Kunheeryamhalam tarwad. That tarwad does not follow Marumakkathayam. They have not divided. My father belongs to that thavazhi. The patta of the family house stands in the name of females. I have a share in that house derived through father."

This evidence is positive that Kalmabi and her family of birth was not governed by the Marumakkathayam Law. Plaintiff could not have obtained any right to the properties of Kunheeryambalath tarwad through his father if that tarwad was governed by the Marumakkathayam Law and not by the Shariat Law Of course, Pw. 1's evidence is open to the objection that it is interested But his evidence is supported by that of defendant : (Dw. 1), whose evidence cannot be said to be interested so far as this matter is concerned. Whether Kalmabi and her family of birth were governed by the Shariat Law or by the Marumakkathayam Law he would in either case be entitled to a share in the properties standing in her name. If she was governed by the Marumakkathayam Law he, as her son, would be a member of her tarwad and thavazhi and would be entitled to a share in her properties as member of the tarwad and thavazhi; and if she and her family of birth were governed by the Shariat Law he would be one of her residuary heirs and could in that case also be entitled to a share in her properties. He says as Dw. 1:

"Kunheeryambalam is not a tarwad. It is not divided. "The patta of its lands stands in the name of ladies. The plaintiff is entitled to a share in it".

These statements admitting the plaintiff's rights to Kunheeryambalath tarwad properties are admissions made by defendant 3 against his own interests and are entitled to very great weight.

When defendant 3 says that Kunheeryambalam is not a tarwad what he means is that it is not a tarwad as that term is understood in Marumakkathayam Law as distinguished from how it is understood in common parlance. He has also stated categorically in his cross-examination:

"We do not follow Marumakkathayam",

and this statement is fully borne out by the statement in Ex. B7, already referred to, made by himself and all the children of Kalmabi jointly at a time when there was no dispute as regards their rights. Defendant 5 has naturally given evidence in support of defendant 4's case that Kalmabi and her family of birth were governed by Marumakkathayam Law, but like the evidence of Pw.1 his evidence also is open to

¹ ILR 39 Mad 317

²1953-11-MLJ 545

the objection that it is interested. No document whatever has been produced to show that Kalmabi and Kunheeryambalath tarwad were governed by Marumakkathayam Law. On the other hand, Ex. B7 which is relied upon by the defendants themselves would contradict that case. Some reference was made by the appellants' counsel to the fact that Kalmabi's family of birth is referred to by the witnesses as Kunheeryambalath tarwad and that the account books of the family, namely, Exs.B 40 and B41, also purport to be account books of the said tarwad and there are entries in them regarding Kalmabi's mother. The use of the word tarwad, according to him, denotes that the family was a marumakkathayam tarwad. We are unable to accept this contention. As pointed out in the judgment of the lower court, although the word 'tarwad' means in law a marumakkathayam family holding properties as a joint family with all the incidents of a joint family under the Marumakkathayam Law, the word is also used loosely all over Malabar, Cochin and Travancore to denote a family, whether Makkathayam or Marumakkathayam. It is not unusual in Kerala to find Brahmans governed by the Hindu Mitakshara Law and Christians and Mahomedans, to whom the concept of joint family is utterly foreign, using the word 'tarwad' to denote the original family of their birth. Kalmabi's mother, Katheesabi, would naturally belong to the family to which her sons or husband belonged, and therefore there is nothing strange in the accounts of Kunheeryambalath tarwad containing entries about her dealings. Having regard to the statements in defendant 4's written statement and also the other circumstances mentioned above, we believe the evidence of Dw1 and Pw. 1 on this point and agree with the lower court in holding that Kunheeryambalath tarwad was not a marumakkathayam tarwad and that Kalmabi was not governed by the Marumakkathayam Law.

8. It was contended by the appellants' counsel that even though Kalmabi was not a member of a marumakkathayam tarwad and she was not governed by the Marumakkathayam Law at the time of her birth she and her children would be governed by the Marumakkathayam Law and would constitute a thavazhi-tarwad under the Marumakkathayam Law in respect of properties which she and they had obtained from her husband who admittedly was a follower of the Marumakkathayam Law, and in support of this contention he relied upon the observations in the judgment of Govinda Menon, J., in *Lakshmi v. Mukundam*³, The observations relied upon by him

occurs at page 546 of the report and reads as follows:

"..... Still, ever since the decision of the Full Bench in *Chakkra Kannan v. Kunhi Pokker*⁴, it has been the recognised rule of law that where a person governed by the Marumakkathayam Law makes a gift or purchases property in the name of his wife and children, or children alone, then the presumption is that the donees take the property with all the incidents of Marumakkathayam property".

Taken out of the context and read by itself, this observation might support the contention that in all cases in which a marumakkathayee husband makes a gift to his wife and children, whether the wife and children are followers of the Marumakkathayam Law or not, they will take the gift with all the incidents of

³1953-II-MLJ 545

⁴ILR 39 Mad 317

marumakkathayam property. But from the context as well as the cases relied upon by Govinda Menon, J., himself in his judgment it is clear that the rule of law referred to by him is a rule applicable to gifts to marumakkathayee wives and children. In *Lakshmi v. Mukundan* the wife as well as the husband were marumakkathayees and there was therefore no occasion to consider whether a gift made by a marumakkathayee husband to a non-marumakkathayee wife was subject to this rule of law or not. After referring to the decision in *Chakkra Kannan v. Kunhi Pokker* and Sundara Aiyer's Malabar Law, Govinda Menon, J. himself sums up his conclusion at pages 546 and 547 of the report as follows:-

"There are also other decisions which hold that when the donor is the uncle or brother, still, if the donee forms a natural group according to Marumakkathayam Law then the presumption is that the gift is to a thavazhi..... It is therefore clear that if the donees constitute a natural group according to the Marumakkathayam Law capable of acquiring and owning property there is no reason why the presumption in *Chakkra Kannan v. Kunhi Pokker* should not be applied to them. Nobody can dispute the fact that the thavazhi as such can purchase the property so that the future members born in that group will have rights in that property by right of birth. If such a group can acquire, hold and dispose of the property, there is no reason why the same group cannot take a gift from a near relative."

The first question referred to the Full Bench in *Chakkra Kannan v. Kunhi Pokker* was itself only,

"when properties are given by a person to his wife and children or children alone following the Marumakkathayam Law, do the donees constitute by themselves a tarwad or thavazhi, and if they do so, is the right of management of the properties forming the subject of the gift vested in the senior male member thereof".

The emphasis in *Chakkra Kannan v. Kunhi Pokker* was therefore on the law which the donees

were following and not on the law which the donor was following. That is also clear from the judgments of all the learned Judges who took part in that case. At pages 333 and 334 of the report in *Chakkra Kannan v. Kunhi Pokker*, Wallis, C. J., says:

"With reference to the observations of Their Lordships of the Judicial Committee in *Joggeswar Narayan Deo v. Ramachandra Dutt*⁵, which are referred to by Sankaran Nayar, J, that the principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a co-parcenary between members of an undivided family, it may be observed that these observations of Their Lordships were made with reference to ordinary Hindu Law and not to the peculiar Marumakkathayam system which was not tinder Their Lordships' consideration. But even taking them to be applicable I cannot see how a gift to a female and all her descendants in the female line can be held to infringe the principle, for that is the kind of joint family known to the Marumakkathayam

⁵ ILR 23 Cal. 670
system".

Sadasiva Aiyer, J., says at page 334 of the report:

"I am prepared to follow the decision in *Kunhacha Umma v. Kuttimani Haji*⁶, (which is in conformity so far as I find) with the views universally held by the communities following the ordinary Marumakkathayam Law and that the intentions of a father (who might even belong to a Makkathayam community) who consorts with a lady belonging to a marumakkathayam community and who makes or arranges a gift to his children born of his said marumakkathayee wife".

Therefore, according to Sadasiva Aiyer, J., for the application of the rule that the gift would be taken by the donees with the incidents of tarwad or marumakkathayam property, the question of the system of law followed by the donor, the husband, was perfectly irrelevant and what was material was the system of law governing the wife or donee. Srinivasa Ayyangar, T., has put the matter beyond all doubt. At page 340 of the report he said:

"My answer to the first question is that it is not the giving of the properties by a person to his wife and children that constitute them a tarwad or thavazhi, but that if the properties are given to a wife and children, following the Marumakkathayam Law, they as a thavazhi hold those properties with the incidents of tarwad property, and the right of management of property is vested in the senior male member of that thavazhi".

In all the reported cases from Malabar and Travancore, so far as we are aware, "it is only in the case of gifts made by a husband to a marumakkathayee wife and his children by her that this rule, that the gift made by the husband is taken by the wife's thavazhi as a whole with the incidents of marumakkathayam property, has been applied. No case has been brought to our notice in which

the rule has been applied to a gift made by a marumakkathayee husband to a non-marumakkathayee wife and his children by her.

9. The rule that the gift is to be taken by the donees with all the incidents of marumakkathayam property is based on the principle that, the intention of the donor in making the gift being to provide for his wife and children, the law governing the donees is, in the absence of other evidence, the best indication of his intention as to how they were to take the gift. In *Kunhacha Umma v. Kuttimammi Haji*⁷, which was a case decided by a Full Bench of the Madras High Court, the reasons for holding that a gift made by a makkathayee husband to his marumakkathayee wife and children is taken by the donees with all the incidents of tarwad property has been given as follows:

"In the case before us the donor expressed no intention as to how the properties should be held by the donees and in the absence of such expression

⁶ ILR 16 Mad 201

⁷ ILR 16 Mad 201

the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with the marumakkathayam usage which govern the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreematty Soorjeemony Dossee v. Denobundoo Mullick*⁷, and *Mahomed Shumsool v. Shewakram*⁸, "

(underlining, ours)

The same principle should hold good in the case of a gift made by it marumakkathayee husband to a non-marumakkathayee wife and her children, that is to say, in such cases the presumption ought to be that the gift would be taken by them according to the rules of law which govern them.

10. Relying upon *Chathunni v. Sankaran*⁹, and *Kadir Ibrahim Rowther v. Arunachellam Chettiar*¹⁰, in which it was held that the children of a makkathayee husband by a marumakkathayee woman would be governed by the makkathayam law in respect of properties which they obtained through their father and by the marumakkathayam law in respect of the properties belonging to their mother's tarwad, the appellant's counsel contended that, on the principle of the decisions in these cases, in the converse case of a marumakkathayee Mahnmedan's wife who was governed by the Shariat Law and his children by her the Marumakkathayam Law would be applicable to them in respect of properties obtained from him and the Shariat Law in respect of properties obtained from her tarwad. In *Chathuani v. Sankaran* it was held that in the case of Thiyyas when a woman governed by the Marumakkathayam Law has issue by a man who is governed by the Makkathayam Law such issue are prima facie entitled to their father's property in accordance with the Makkathayam Law and to the property of their

mother's tarwad in accordance with the Marumakkathayam Law. The parties to *Kadir Ibrahim Rowther v. Arunachellam Chettiar*¹¹, were Mahomedans; and the question for decision in that case was, when a marumakkathayee Mahomedan had inherited properties from his father who was governed by the Mahomedan Law, whether such property would, on his death, devolve on his marumakkathayee heirs, i. e., members of his tarwad, or on the heirs under the Mahomedan Law, i. e., his children. The decision was that, in the absence of any usage to the contrary, properties inherited under the Mahomedan Law would pass in further descent under that law. The relevant portion of the judgment in that case is very brief and reads as follows :

"It must now be taken to be common ground that on Suppi's death his children inherited the property under Mahomedan Law. It was argued, however, that on the death of the plaintiff's father, who was one of Suppi's children, the further descent of his share in the properties must be according to the Marumakkathayam Law because he was also a member of Marumakkathayam tarwad. This does not, however, follow, for in the absence of any usage to the contrary, property inherited under Mahomedan Law will pass in further descent under that law. This is in accordance with the decisions in Chathunni

⁷⁶ M.I.A. 526

⁹ I.L.R. 8. Mad 238

¹¹19 M.L.J. 736

⁸ L.R. 2 I.A. 7

¹⁰19 M.L.J. 736

*v. Sankaran, 8 Madras 238, Assan v. Pathumma*¹², and *Kuuthimbi Umma v. Kandi Moithin*¹³, The defendants have not proved any such usage"

Both *Chathunni v. Sankaran* and *Kadir Ibrahim Rowther v. Arunachellam Chettiar* are cases in which children born of a marumakkathayee wife had inherited property from their makkathayee father. In such cases, there can be no difficulty in holding that the father's property would devolve on the children, and the further devolution after their deaths would also be, according to the Makkathayam Law and that the property which they get as members of their mother's tarwad would devolve according to the Marumakkathayam Law. The right of inheritance under the Makkathayam Law is based on the descent from the father, and so, the children, whether they are Makkathayees or Marumakkathavees, can inherit the properties belonging to their makkathayee father, and since the right to inherit under the Marumakkathayam Law is based on the descent from the mother the children. who are governed by the Makkathayam Law in respect of their father's properties, can at the same time be governed by the Marumakkathayam Law in respect of properties they obtain from their marumakkathavee mother or her tarwad. In the converse case of a marumakkathavee father having a non-marumakkathayee wife and children by her there is no scope for applying the two systems of law at the same time, the law of the father to the property inherited from him and the law of the mother to the property inherited through her. Now, under the Marumakkathayam Law the husband and wife belong to two separate families or tarwads which have no community of interest with each other, the children belong not to the husband's family or tarwad but to the wife's family or tarwad, and inheritance is not by descent through males but by descent through females. The children do not inherit their father's properties or properties belonging to their father's family or tarwad and are entitled only to properties belonging to their mother or mother's family or tarwad, and the properties belonging to the

marumakkathayee father devolve on his death not on his children but on his marumakkathayee heirs, i. e., members of his tarwad. As the wife and children of a marumakkathayee male could have obtained property from him, before the enactment of the Marumakkathayam Act, only by gift and not by any right of inheritance, and they being also aliens to his family, it cannot be contended that by reason of his marriage with her or their descent from him a marumakkathayee male can pass on the Marumakkathayam Law to his non-marumakkathayee wife and his children by her. In the case of gifts, as has been pointed out already, the donees would take the properties according to the intention of the donor, if such intention is not contrary to law and, in the absence of other evidence, it would be presumed that his intention was that they should take it according to the law which govern them

11. The appellants' counsel contended that from the joint execution of Ex. B7 by Ahammad Koya Haji and his children and the terms of that document it was clear that Ahammad Koya Haji's intention in giving the properties to his wife and children was that they should take the gifts as constituting a marumakkathayam thavazhi or tarwad and hold the properties with all the incidents of tarwad property. According to him, the provisions made in Ex. B7 as to how the properties comprised in Exs. A.1 to A3 were to be held thereafter have the effect of constituting a marumakkathayam tarwad

¹²22 Mad 494

¹³ 27 Mad 77

comprised of Ahammad Koya Haji's children, both daughters and sons, and settling the plaint properties on the said tarwad as their tarwad property with all the incidents of marumakkathayam property; and so, the conduct of the executants of that document in making those provisions would show that the properties comprised in Exs. A1 to A3 were gifts made by Ahammad Koya Haji to his wife and children with the intention that they should constitute thavazhi and hold the properties as their thavazhi properties. It was also urged by him that even if Kalmabi's children were not marumakkathayees and were governed by the Shariat Law and Ahammad Koya Haji had no intention at the time of making the gifts that his wife and children should take them as constituting a thavazhi or tarwad and with the incidents of marumakkathayam property, it was open to them to elect to be governed by the Marumakkathayam Law in respect of the properties given to them by their father and their other acquisitions, and they have so elected by executing Ex. B7.

12. As has been stated already, Ex. A1 alone is a gift by Ahammad Koya Haji, and Exs. A2 and A3 are assignment deeds. Ex. A2 was executed by Ussan Koya, the brother of Kalmabi, in favor of Pathummabi for a consideration of Rs. 500 received by him from her and her sisters; and Ex. A3 was executed by Ahammad Koya Haji in favor of Pathummabi for a consideration of Rs. 300 received by him from them. There is no evidence that the recitals of consideration in Exs. A2 and A3 were bogus and that these documents, although executed in the form of assignment deeds, were really gifts by Ahammad Koya Haji to his children. Neither of these transactions can therefore be a gift by the father in favor of his children. So far as Ex. A1 is concerned it is clear from the recitals in Ex. B7 itself that the property was not given to Kalmabi to be held as

thavazhi property belonging to her and her children. In clause 4 of Ex. B7 it was expressly stated that on Kalmabi's death all the executants of that document, i. e., Kalmabi's husband and children, had become entitled to the property comprised in Ex. A1 as her heirs under the Shariat Law. If the property was given to her as thavazhi property it is difficult to understand how its devolution after her death came to be according to the Shariat Law and how her husband became entitled to it. In the circumstances, it is not possible to accept the case that Ex. A1, A2 and A3 are gifts made by Ahammad Koya Haji to his wife and children with the intention that they should hold the properties as their thavazhi properties.

13. The participation of Ahammad Koya Haji in the execution of Ex. B7 was due to the fact stated in clause 4 thereof namely, that under the Shariat Law he had become one of the co-heirs to Kalmabi's properties after her death. It was expressly stated in clause 4 of Ex B7 that the executants thereof were thereby relinquishing the rights which they had obtained to Kalmabi's properties as heirs under the Shariat Law and making the provisions mentioned in the subsequent clauses as regards the properties which belonged to her and the properties comprised in Exs. A2 and A3. These statements prove positively that even in respect of the property she got from her husband under Ex. A1 Kalmabi was governed during her lifetime by the Shariat Law and not by the Marumakkathayam Law. Kalmabi's mother, Katheesahi, was alive at the time of her death and was one of her heirs under the Shariat Law, her share being 1/6th. This share in Ex. A1 property, i. e., plaint item 1, devolved on Katheesabi after Kalmabi's death, and since Katheesabi had not participated in the execution of Ex. B7 and the plaintiffs' right in plaint item I is derived through Katheesabi nothing contained in Ex. B7 would in any case affect the plaintiffs' rights in that property.

14. Coming to the contention that a marumakkathayam thavazhi or tarwad has been constituted by Ex B7, comprised of the children of Ahamad Koya Haji, and the plaint properties have been settled by the executants of that document on the said tarwad to be held as tarwad property, even apart from the question whether a marumakkathayam thavazhi or tarwad composed of persons who were not till then governed, by the Marumakkathayam Law can be artificially created, it has to be said that the provisions themselves of Ex. B7 do not support the contention that a marumakkathayam thavazhi has been created by that document. The provisions in Ex. B7, which, according to the appellants, have created a marumakkathayam tarwad are given in paragraph 32 of the judgment of the lower court, and may be summarised as follows:

In deference to the wishes of their parents and as fully and freely agreed to by executants Nos. 1 to 7, i. e., the sons and daughters of Ahammad Koya Haji and Kalmabi, it is decided that a strivuzhi tarwad is constituted with plaint item I and the house therein as the main tarwad house and plaint items 2 to 4 as other properties belonging to that tarwad and the said tarwad is to be undivided for the next 60 years and the management of its affairs and the rights of the members will be, according to the provisions in the next five clauses in the document, viz.

(1) The tarwad is to be undivided, and its properties cannot be alienated and Ex. B7 itself

cannot be cancelled.

(2) The tarwad properties are to be leased and the tarwad affairs are to be managed by the karnavastri.

(3) The karnavastri would be Pathummabi during her life-time and after her death the eldest female member of the tarwad.

(4) The three present male members of the tarwad (i. e., defendants 1 to 3 who are the sons of Ahammad Koya Haji and Kalmabi) and sons who might be born in the future to the female members of the tarwad will have no right whatever in the tarwad and tarwad properties except the mere right to reside in the tarwad house.

(5) Documents to be executed by the tarwad and documents to be taken by the tarwad as well as pattas for tarwad properties will be executed by, and taken in the name of, the karnavastri.

It will be seen from the above provisions that, under Ex. B7, the male members of the tarwad have absolutely no right in the tarwad and the tarwad properties except a bare right of residence in the tarwad house. A Full Bench of the Madras High Court has held in *Muhammad Kunhi v. Packrichi Umma*¹⁴, that there is no custom or usage prevailing among the marumakkathayee Moplas of North Malabar by which property may be settled as 'strisothu' on the female members of a tarwad or thavazhi to the exclusion of the males or so as at least to authorise the female members to sell the property without the consent of the males and that a document which makes such a settlement is void. The estate, strivazhi tarwad, created by Ex. B7, with absolutely no

¹⁴ ILR 46 Mad 650

right to the males of the tarwad, is an estate entirely unknown alike to Marumakkathayam Law and Makkathayam Law. The appellants' learned counsel referred to an earlier decision of a Division Bench of the Madras High Court, *Bivi Umma v. Kelothu Cherivathu Kutti*¹⁵, in support of his contention that the creation of a strivazhi tarwad was in accordance with Marumakkathayam usage. But, that and other earlier cases have been referred to and considered in the Full Bench decision in *Muhammed Kunhi v. Packrichi Umma*; and the view of the Division Bench in *Bivi Umma v. Kelothu Cherivathu Kutti* was not accepted by the Full Bench. The total exclusion of male members from rights in the tarwad and the tarwad properties is a thing entirely unknown to Marumakkathayam Law. Even the right to maintenance has been denied to the male members, not only to the male members who have joined in the execution of Ex. B7 but even to the male children who might be born to the female members of the tarwad in the future. Following the decision in *Muhammed Kunhi v. Packrichi Umma*¹⁶, we hold that Ex. B7 creating a strivazhi tarwad like this with the plaintiff properties as tarwad properties and denying any right whatsoever to the male members of the tarwad, is void. It cannot therefore be contended that a marumakkathayam tarwad has been created by Ex. B7.

15. In the view that we have taken regarding Ex. B7 it is not necessary to consider in this case whether it is open to the makkathayee children of a marumakkathayee father to elect to be

governed by the Marumakkathayam Law and whether they could voluntarily create a marumakkathayam tarwad composed of themselves for holding the properties obtained from him.

16. Lastly, it was contended by the appellants' counsel that the plaintiffs' claim is barred by adverse possession and limitation as neither their father nor they were ever in possession and enjoyment of the plaint properties and the properties were being held in accordance with the provisions of Ex. B7 from the date of that document. The evidence relied upon by the appellants' counsel in support of this contention is that of defendant 3. He said as Dw. I in his chief examination:

"My mother's mother is Kunheeryambalath Kadeesabi. She did not live in item IGrandmother had no possession of items I to 4 after death of mother. She was not paid any share of the income of these items after mother's death. She never asked for any share of income either. Grandmother died in 1926.....My father (i. e., Ahammad Koya Haji) was in management. The others had never asserted any right to these items. Abubucker Koya (Plaintiff 2's father died two or three years after the death of Kadeesabi. After that plaintiffs have never asserted any right to the plaint items".

Since Kadeesabi died in 1926 it is urged that Abubucker Koya must have died in 1929, and that plaintiffs 2 and 3 having never asserted any claim after 1929 their rights to the plaint properties have been lost by adverse possession and limitation. There can be no doubt of the fact that this evidence of defendant 3 is not true, for even defendant 5 has sworn as Dw.2 that Kadeesa was first living in Kunheeryambalath house, that after that she was living in Puthiyapura (i. e , plaint

¹⁵1910 Mad W N. 693

¹⁶ILR 46 Mad 650

item 1) with Kalmabi, and that she died from the latter house. In view of this evidence the suggestion that Kadeesabi had been kept out of the enjoyment of her share in Kalmabi's estate is wholly groundless, for if she was living till the time of her death with Kalmabi's children in Kalmabi's house her very residence in that house would b2 enjoyment or assertion of the right she had. Further, in his cross-examination defendant 3 has admitted that the plaintiff's rights were denied for the first time only in O. S. No. 72 of 1950, the suit filed by him for partition. The present suit was filed within three years of the institution of O. S. No. 72 of 1950. According to Dw. 2, Abubucker Koya died in 1929, and till his death he was living in the house in plaint item I with the plaintiffs. He says further that even after Abubucker Koya's death plaintiffs continued to live in the house, in plaint item I till 1943 when they left the house because plaintiff 2's brother Assan became mad and on account of his violent habits he had to be removed to another place. The evidence of plaintiff 2 also is to the effect that till 1943 plaintiffs were living in plaint item I and were enjoying their share of the income from the plaint properties. Having regard to the evidence of Dw. 2 and also the circumstances brought out in the cross-examination of Dw. 1 we agree with the lower court in believing plaintiff 2's evidence. As the suit was filed in 1953, and the plaintiff⁴ were living in plaint item 1 and enjoying their share of the income till 1943, we

hold that the suit is not barred by adverse possession or limitation.

17. In the result, the decree of the lower court is confirmed and the appeal is dismissed with costs.

Dismissed.