APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

MARADEVI AND THIRTEEN OTHERS (PLAINTIFFS NOS. 1 TO 10 AND NOS. 12 TO 15), APPELLANTS,

v.

PAMMAKKA (DEFENDANT), RESPONDENT.*

1911. November 29, 30. December 14.

Aliyasantana law—Separate maintenance, grounds for—What are proper grounds?

A member of the Aliyasantana or Marumakkathayam tarwad will be entitled to separate maintenance from the tarwad if there are good grounds for such allotment. What are proper grounds will depend upon the circumstances of each case. The cases show that where there is substantial inconvenience in living in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there and where there are several houses belonging to the tarwad and a member lives in one of them and where the karnavan's conduct has afforded a valid excuse for a member living away from the tarwad house separate maintenance may be awarded.

There may be other grounds which on social or economical reasons may be considered proper.

Though a member of an Aliyasantana or Marumakkathayam tarwad may not be entitled to a partition or a specific portion of the income which may be an indirect method of enforcing a partition, he is still a co-owner with the karnavan of the tarwad property and he may in a proper case be entitled to separate maintenance. Waiver (arising from conduct, etc.) is a good plea to a claim for past maintenance.

Raja Yerlagadda Mallikarjuna Prasada Nayudu v. *Raja Yerlagadda Durga Prasada Nayudu*, [(1901) I.L.R., 24 Mad., 147 (P.C.)], followed.

Considering the special and common expenses which a yejman or karnavan has to incur out of the income of the family it is wrong to award a numerically proportionate share of the income to any particular member.

The law as to the respective rights of a yejman or karnavan and the junior member of the tarwad, discussed with reference to decided cases.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of South Canara, in Appeal Suit No. 82 of 1909, presented against the decree of A. P. P. SALDANHA, the District Munsif of Puttur, on Original Suit No. 387 of 1908.

The facts of this case are fully set out in the judgment.

B. Sitarama Rao for appellants.

K. Naraina Rau for respondents.

* Second Appeal No. 1159 of 1910.

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JUDGMENT.—The suit in this case is one for arrears of maintenance instituted by 15 members of a family in South Canara governed by the Aliyasantana system of law, against its manager or ejmanthi, the defendant. The plaint alleges that the defendant left the family house of the parties and went away to reside elsewhere about five years before the date of suit, and that she neglected to look after the maintenance of the plaintiffs, junior members of the family. The defendant denied that she quitted the family house and contended that several of the plaintiffs were living away from the house. She alleges she has no objection whatever to maintain the plaintiffs if they all come and live in the family house. She denies the plaintiffs' right to separate maintenance when not living in the house. Her case is that the fourth plaintiff and her minor children, plaintiffs Nos. 10 to 12, were living in the house of the fourth plaintiff's husband, that the fifth plaintiff and her minor children (plaintiffs Nos. 13 to 15) were residing at the fifth plaintiff's husband's house and that the eighth and ninth plaintiffs were living in the house of their father. It is not stated that the plaintiffs Nos. 1 to 3, 6 and 7 were living elsewhere.

The District Munsif found that the defendant was not living in the family house but in another house of her own about three miles away from the former and he held that the defendant had failed to maintain any of the plaintiffs during the period for which maintenance is claimed. He also found that the plaintiffs Nos. 4, 5 and 8 to 15 had not been proved to have been living away from the family house though some of them might be visiting at the houses of their husbands or fathers. He awarded plaintiffs a $\frac{15}{40}$ths share of the income, the plaintiffs being 15 out of a total of 40 members in the family.

On appeal, the District Judge dismissed the suit by a judgment which we cannot but regard as unsatisfactory. He has not found whether the defendant went away from the family house to reside elsewhere or not. He objects to the Munsif's decree awarding to the plaintiffs a numerically proportionate share of the family income. He is no doubt right in doing so. He says that the District Munsif's decree "further takes no account of the considerable time spent by the various plaintiffs in their fathers' or husbands' houses during which they were entitled to no maintenance at all in their family house. I

cannot ascertain from this record how much, if any maintenance is really due to them." But he does not find what time, if any, each of the plaintiffs was away from the family house. He has assumed that a member going on a visit to the house of a relation, such as husband or father, would be disentitled to maintenance or that the ejman would be entitled to make a proportionate reduction from the maintenance due to that member. He then says: "It appears clear, however, that the ejmanthi has always been willing to maintain all those who lived and worked at home, and it is clear from the evidence of prosecution witness No. 4, who tried to hold a panchayat about the matter, that plaintiffs' real purpose is to live away from home in their husbands' and fathers' and wives' houses and do no work at home and yet draw their full share of maintenance from there. This they cannot do." Here again he has assumed, without discussing the question, that a person not doing work in the family house is not entitled to maintenance even when he is willing to live there, for he has not decreed any maintenance to the plaintiffs Nos. 1 to 3 and 6 and 7 who the first defendant does not allege were living anywhere away from the family house. It is clear that we must set aside this judgment and remand the appeal for rehearing and fresh disposal. But as the Judge has enunciated several questionable propositions of Aliyasantana law, we consider it our duty in order to avoid a further remand, to express our view of the law which should govern the disposal of the suit.

According to the Aliyasantana system which is very similar in its incidents to the Marumakkathayam law [see *Subbu Hegadi* v. *Tongu*(1)] as no member of the family is entitled to enforce partition of the family property which belongs to all the members. Every junior member is entitled to be maintained by the karnavan and has the right to object to any improper administration of the property of the tarwad and to see that it is duly conserved for the use of the tarwad. The income belongs to all and all are entitled to participate in the benefit of it. But the manager is entitled to administer the property and to use the income for the common benefit of all the members. As observed in *Narayani* v. *Govinda*(2) "the tarwad is a family of which the karnavan is the manager, and although as a senior

(1) (1869) 4 M.H.C.R., 196. (2) (1884) I.L.R., 7 Mad., 352.

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member he enjoys special consideration, he has no higher claim in the enjoyment of the income than any other member of the family. He has a right to expend, as he pleases, for the common benefit of all. The right to maintenance is an individual right. In *Kunhammatha* v. *Kunhi Kutti Ali*(1) TURNER, C.J., says: "Each member of the tarwad has a right to be maintained and suffers a personal wrong if that right is not accorded to him." *Raman Menon* v. *Ittimayamma*(2). The right is not confined to cases where a member has no means of his own because by virtue of his ownership in the tarwad property he is entitled to participate in its income. See *Thayu* v. *Shungunni*(3). It has been held that a suit for maintenance by a junior member of a Marumakkathayam or Aliyasantana family is one that falls under article 127 of the Limitation Act—a suit to enforce the right to share in joint family property *Achutan Nair* v. *Kunjunni Nair*(4) and not one under article 129, which applies to suits which are strictly for a right to maintenance which a person has over property belonging to another. The tarwad property cannot be sold except in cases of necessity without the consent of the junior members. See *Kalliyani* v. *Narayana*(5) and *Raman Menon* v. *Raman Menon*(6). Junior members are entitled to recover on behalf of the family family property improperly alienated by the manager; see *Anantan* v. *Sankaran*(7). In other words, the right to maintenance in a Malabar tarwad is the mode in which the right of ownership is enforced. As no one can enforce partition between the members and as it is the practice for all the members to live together in the same house, all are generally maintained in the tarwad house by the karnavan in whom the right of management is vested and one of whose primary duties is to maintain all the junior members according to the means of the family. The manager who is also the protector of the other members and the guardian in law of those who are minors has not only considerable discretion in his management of the property and the use of it for the benefit of the members but also considerable disciplinary power in the government of the household. To him must fall the allotment of

(1) (1884) I.L.R., 7 Mad., 233.
(2) (1899) 9 M.L.J., 153.
(3) (1882) I.L.R., 5 Mad., 71.
(4) (1903) 13 M.L.J., 499.
(5) (1886) I.L.R., 9 Mad., 266.
(6) (1901) I.L.R., 24 Mad., 73 (P.C.)
(7) (1891) I.L.R., 14 Mad., 101.

quarters to each of the members and if the family house is insufficient for the residence of all, the allotment of a separate house to some of them. As the governor of a family, sometimes consisting of numerous members he would naturally distribute also the work of the family and would have powers of correction over the members. But this right of his as the head of the family coexists with the rights of all the members as legal owners of the family property and the latter cannot be allowed to be seriously prejudiced by the former. See *P. Teyan Nair* v. *P. Rāgavan Nair* (1). The law regulating the right of junior members to maintenance has been gradually developed in the decisions of this Court and it is necessary to state the position in which it now stands. In the earlier cases it was sometimes stated that the right of a member is only to be maintained in the family house, and that he has no right to maintenance if he resided elsewhere. But it will be observed that in some of these cases at least this statement was made in denial of the right of any member to enforce the payment to him separately of a proportionate share of the income. Such a claim was regarded as an indirect attempt to enforce a right to partition which no member of a Marumakkathayam tarwad possesses. In Appeal No. 275 of 1858 (Tellicherry) and in Appeals Nos. 238 and 278 of 1860 (Tellicherry) such a claim to an aliquot part of the family income was negatived by HOLLOWAY, J. See Moore's "Malabar Law and Custom", pages 124 and 125. The statement that a definite share of the income cannot be claimed by a junior member is no doubt coupled, in one of these cases Appeal No. 275 of 1858, with the statement that "the junior members are not entitled to be supported out of the family house from the family property." But it is doubtful whether that learned Judge intended to lay down any such rigorous rule, for in another case, where also a proportionate share of the income was claimed by some junior members of a family, after negativing such a right, he abstained from decisively laying down that no member had a right to be maintained out of the family house. See Moore, page 125. The last case came up to the High Court in appeal and in dismissing the appeal FREER, J. gave expression to the *dictum* that "the members individually are only entitled to maintenance in the family house; and the doctrine of English equity as to the

(1) (1882) I.L.R., 4 Mad., 171.

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right of *cestui quitrust* to call for an account has no application to a case like the present." *Kunigaratu* v. *Arrangaden*(1). It will be observed that the denial of the right to an account does not necessarily lead to a denial of the right to some portion of the income for maintenance outside the family house. FREERE, J., proceeded to explain his concurrence in the judgment of HOLLOWAY, J., who, as already pointed out, did not decide that there would be no right to separate maintenance. The next reported case, *Subbu Hegadi* v. *Tongu*(2), was one fromt he South Canara District and the parties were governed by the Aliyasantana law. There the plaintiff, a female member of the family, sued on behalf of herself and her children and grandchildren for maintenance, both past and future. She was living with her husband in his house. Her claim was resisted on the ground that she was entitled to no maintenance during the life of her husband who was bound to provide for her according to the usage obtaining in Canara. The Subordinate Judge negatived this contention and gave the plaintiff a decree. The Civil Judge on appeal held that an Aliyasantana husband was bound to support his wife and children, but confirmed the decree awarding the plaintiff maintenance from the family property. The special appeal was heard by SCOTLAND, C.J., and ELLIS, J. They dismissed the plaintiff's suit. They held that "the suit was obviously not brought to recover the necessary means of support but to obtain under the name of maintenance the separate enjoyment of a portion of the income of the property equivalent to the share of it which the plaintiff had failed to recover by her suit for a division. The claim in the plaint is very similar to that in the case of *Kunigaratu* v. *Arrangaden*(1), in which the suit was held not to be maintainable on the ground that it was an attempt to obtain indirectly relief which the plaintiff could not obtain directly." They then proceeded to consider whether the plaintiff could claim maintenance. They observe that "No decision could be based on any custom applicable to the parties." And that the case should be decided "on the reasonable effect to be given to the Aliyasantana law in regard to the rights of the family collectively and individually in the family property, and to the nature of the marriage relation." Reference is made to Bhutala Pandya's

(1) (1864) 2 M.H.C.R., 12. (2) (1869) 4 M.H.C.R., 196.

work according to which no member has a right to partition " and the possession and control of the property belongs exclusively to the manager." They then observe, "so far the law appears to be settled, and imports clearly we think the preservation of the unity of family, as the only effectual mode of securing to the members severally a full share of the beneficial enjoyment of the joint estate. The obvious effect of allowing one or more members to quit the family and live apart on a portion of the income of the estate sufficient to support a position like that enjoyed by the other members would be to reduce the benefits of the family in a greater or less degree according to the number of the members who might choose to live separately on such allowances: and nearly as much so as by apportioning the shares of the corpus of the property on a division. It seems to us therefore that the pecuniary beneficial interest of the members individually in the family property is in its nature incompatible with the separation from the family." No objection can be taken to the statement that no member can claim either a proportional share of the income or a sufficient portion to enable him to maintain the same position outside the family as those who live in the family house do, for obviously it would cost more to support a person singly on the same scale of comfort than it would do if he lived in the family residence. But this does not logically lead to the conclusion that a member living away from the family is not entitled to anything out of the property for his maintenance. The judgment then refers to a passage relied on by the plaintiff in the suit from Bhutala Pandya's work which provides that if misunderstandings arise between the elder and younger sisters the elder shall provide the younger with a house and household articles and the opinion is expressed that the passage is not in favour of awarding separate maintenance. *Kunigaratu* v. *Arrangaden*(1) is also referred to as well as a statement by Mr. STRANGE in his "Manual of Malabar law" where the author says: "Females whether in alliance with males or not reside in their own families." It need hardly be observed that Mr. STRANGE'S statement does no more than state the social practice of females residing in the tarwad house and in no way supports the inference that if they live with their husbands

(1) (1864) 2 M.H.C.R., 12.

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they are not entitled to maintenance. The learned Judges finally say that a wife's residence with the husband must be treated as a separation from the family, as the union between the sexes according to the Aliyasantana law is not marriage but concubinage, and refer to the practice in Malabar of women continuing to live in their tarwads without residing with their husbands. They state that it will probably be found that the general law would impose an obligation on an Aliyasantana husband to support his wife and children, but do not rest their judgment on that ground. As the learned Judges expressly base their judgment on inferences to be drawn from the principles of Aliyasantana law, it may be permissible to point out, with all respect, that neither the social custom of married women living in their family house nor the absence of a right to an action for a definite share of the family income would seem to support the conclusion that a woman has no right to maintenance at all when she lives with her husband in his own house. The decision does not expressly deal with the right of male members to live outside the family house for purposes of work, education or other good causes. In *Peru Nāyar* v. *Ayyappan Nāyar*(1), KERNAN and MUTHUSAMI AYYAR, JJ., held that where a karnavan has been the cause of quarrels which necessitate a member leaving the family house, he would be entitled to separate maintenance. The same rule would apparently apply even though the quarrel may not be due to the karnavan but a member is obliged to leave the house in consequence of quarrels which the karnavan is not able to put an end to. If the karnavan does not allow a member to live in the family house or in consequence of ill-treatment makes it impossible or difficult for him to live there, there can hardly be any doubt that separate maintenance will be awarded. A decree for maintenance was also given where there were several houses belonging to the tarwad and the claimant lived in one of those houses. *C. K. Nallakandiyil Parvadi* v. *C. K. Chathu Nambiār*(2). It was apparently not thought that the karnavan had the power in such a case to require any particular member to live in the tarwad house, and it was considered that it was not wrong on the part of a member in such a case to live away from the tarwad

(1) (1880) I.L.R., 2 Mad., 282. (2) (1882) I.L.R., 4 Mad., 169.

house. A further step was taken in *Chekkutti* v. *Pakki*(1), where separate maintenance was allowed to a junior member not living in the family house but in another house belonging to the tarwad. The Court observed that the karnavan did not contend that the plaintiff lived apart from him without his permission and contrary to his wish. But *C. K. Nallakandiyil Parvadi* v. *C. K. Chathu Nambiār*(2) does not recognize any right on the part of the karnavan to compel the residence of a member in a particular house, where there are more houses than one, belonging to the tarwad. Second Appeal No. 23 of 1882 also recognizes a right to separate maintenance where there is no room in the family house, a question on which apparently the Court is at liberty to arrive at its own finding. In *Raman Menon* v. *Ittimayamma*(3) SUBRAMANIA AYYAR and MOORE, JJ., held that a woman living with her children in a house belonging to her own tarwad would not be disentitled to maintenance by occasionally leaving that house in order to visit her husband in his own house. Mr. MOORE referring to this decision in his book on Malabar law observes: "It must be admitted that this decision read with that arrived at in *Parvathi* v. *Kamaran*(4) leaves the law as to this question in a very doubtful condition." That is, they are not in accordance with any strict doctrine of the right to maintenance being limited to cases where a member lives in the tarwad house. *P. Teyan Nāir* v. *P. Ragavan Nāir*(5), is an important decision for it recognizes the principle that the right to maintenance is not conditional on a member being of good behaviour. The learned Judges INNES and TARANT, JJ., observe: "A tarwad does not differ in this respect from an ordinary Hindu family, the manager of which is not entitled to exclude the members from a right to participation of some portion of the income of the family property." The karnavan's right to require a member to obey him cannot override the latter right to maintenance. In *Krishnan* v. *Govindan Menon*(6), SUBRAMANIA AYYAR and MOORE, JJ., held that a junior member was not entitled to be paid by the karnavan the expenses incurred by him for being educated in an English school in a place distant from the tarwad house. The karnavan contended that he was not bound to

(1) (1889) I.L.R., 12 Mad., 305.
(2) (1882) I.L.R., 4 Mad., 169.
(3) (1899) 9 M.L.J., 158.
(4) (1883) I.L.R., 6 Mad., 341.
(5) (1882) I.L.R., 4 Mad., 171.
(6) (1898) 8 M.L.J., 294.

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defray the expenses of the plaintiff's education in the English language and that he was willing to give the plaintiff such education in his own place as was practicable there. The suit was not framed as one for maintenance generally and the question was not therefore considered whether a person leaving the family house for the purpose of attending a school, even though it is not agreed to by the karnavan is not entitled to separate maintenance. In *Kesava* v. *Unikkanda*(1), BRANDT and PARKER, JJ., held that, where the karnavan himself had left the family house separate maintenance might be awarded to a junior member who does not live there.

The cases cited above show that where there is substantial inconvenience in living in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there and where there are several houses belonging to the tarwad and a member lives in one of them and where the karnavan's conduct has afforded a valid excuse for a member living away from the tarwad house, separate maintenance may be awarded.

The general result of the decided cases is in our opinion that in order that a member of a Marumakkathayam or Aliyasantanam tarwad may be entitled to separate maintenance he or she should be able to allege some good ground for doing so. It would be unwise to hold that the decisions up to date have exhausted the list of good grounds which may be urged. It is the recognized practice in South Canara for a woman and her minor children to live with her husband. See *Subbu Hegadi* v. *Tongu*(2). It is a common practice in North Malabar and it is a growing practice in South Malabar. See *Parvathi* v. *Kamaran*(3). The interests of social improvement would be against discouraging such a practice. There is no principle in the Marumakkathayam or Aliyasantana law requiring that it should be discouraged. The only principle which has ever been relied on against the award of separate maintenance is that the family property should not be diminished by such award. But this does not require anything more than that in determining the rate of maintenance more should not be allowed than would be received by the claimant if he resided in the family

(1) (1888) I.L.R., 11 Mad., 307. (2) (1869) 4 M.H.C.R., 196.
(3) (1883) I.L.R., 6 Mad., 341.

house along with its other members. We are not bound to shut our eyes to the fact that families governed by this system of law are often numerous and consist of persons related in very different degrees of kindred and no social or economical service is done by compelling them all to reside in one house where they have good grounds for not doing so. Several cases have come up to this Court which show that in the houses of Rajas and other well-to-do tarwads it is the rule to allow separate maintenance. If a member lives away from the tarwad house for an improper purpose, that would be a good ground for refusing separate maintenance. What purposes are proper and what improper may be safely left to the decision of courts. It may happen that the husband of a woman is not able to support her fully. To force her to live in the tarwad house in such a case under the penalty of being refused all maintenance can only be a disadvantage both to her and to the tarwad. Similarly a male member may be willing to earn a part of his maintenance by doing elsewhere work which may not be available near his own house. It would equally be a disadvantage in such a case both to him and to his family if maintenance from the family income were altogether withheld from him. It is not alleged in this case that any one of the plaintiffs Nos. 4 to 15 was living away from the family residence for a purpose which can be regarded as otherwise than proper. The suit is one for past maintenance and in such a case it would no doubt be open to the Court to infer from the conduct of any of the plaintiffs that he or she waived the right to maintenance during any portion of the period in question. It may be sufficient to show that the conduct of the party was such as to lead to a reasonable inference of waiver of any claim for maintenance against the ejmanthi. On this point see *Raja Yarlagudda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Durga Prasada Nayudu*(1). But in the absence of such waiver the right to maintenance cannot be refused. The District Munsif was certainly wrong in dividing the total income of the property into as many shares as there are members and in awarding a 15/40ths share to the plaintiffs on the principle of an equal share to each member. The karnavan has to defray the expenses of all ceremonies in the family. He has to keep up the

(1) (1901) I.L.R., 24 Mad., 147 (P.C.).

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house and other family properties. The principles on which maintenance should be calculated are laid down in the judgments of this Court in *Nārāyani* v. *Govinda*(1) and *Kunhammatha* v. *Kunhi Kutti Ali*(2).

On the conclusion we have come to it will be unnecessary for the lower Appellate Court to decide whether the defendant left the family house, as alleged by the plaintiffs. But the question how long any of the plaintiffs resided away from the family house and the circumstances under which he or she did so will have to be decided in order that a conclusion may be come to on the question whether the claim to maintenance for the period in question or any portion thereof can be held to have been waived by any or all of the plaintiffs.

With these observations we reverse the decree of the lower Appellate Court and remand the appeal for fresh disposal in the light of our remarks. The costs in this Court will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1912, January 24.

S. KRISHNAMA CHARLU AND ANOTHER (RESPONDENTS AND COUNTER-PETITIONERS), APPELLANTS,

v.

S. VENKAMMAH (MINOR BY GUARDIAN AND FATHER) AND R. LAKSHMANA CHARLU—(PETITIONER), RESPONDENTS.*

Succession Certificate Act (VII of 1887)—Certificate to a minor can be granted—Sec. 9, no bar.

A succession certificate can be granted to a minor.

Per curiam: Section 9 of the Succession Certificate Act (VII of 1889) presents no difficulty to the grant in such a case.

Kali Coomar Chatterjea v. *Tara Prosunno Mookerjea* [(1879) 5 C.L.R., 517-9] and *Ram Kuar* v. *Sardar Singh*, (1898) I.L.R. 20 All., 352 followed.

Ex-parte *Mahadeo Gangadhar*, [(1904) I.L.R. 28 Bom.], 344 and *Gulabchand* v. *Moti*, [(1901) I.L.R., 25 Bom., 523], considered.

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(1) (1884) I.L.R., 7 Mad., 352. (2) (1884) I.L.R., 7 Mad., 233.

* Appeal Against Order No. 19 of 1911.