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that, in sub-section 1 (*b*) when we get to talking about "Appellate Court," that means not the Court in which the appeal should have been started in the first instance but the Court to which it did, in fact, go and ought to have gone if the lack of jurisdiction were to be condoned. In this case in fact it was condoned. In my opinion, the only possible answer to this reference is the one proposed by my Lord.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Spencer, Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

1923, February 21.

MUHAMMAD KUNHI (PLAINTIFF), APPELLANT IN SECOND APPEAL No. 1493 OF 1919,

v.

PACKRICHI UMMA AND ELEVEN OTHERS (DEFENDANTS), RESPONDENTS IN SECOND APPEAL No. 1493 OF 1919.*

Malabar Law—Marumakkattayam Mappillas of North Malabar—"Strisothu"—Custom of settling property on females and their female descendants to the exclusion of males, validity of.

There is no custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar by which property may be settled as *strisothu* on the female members of a tarwad or tavazhi to the exclusion of the males or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males.

Their Lordships refrained from expressing any opinion as to the existence of tarwards in which the manager or Karnavathi is a female.

SECOND APPEALS against the decree of H. D. C. REILLY, District Judge of North Malabar, in Appeal Suit No. 656 of 1917, preferred against the decree of P. G. RAMA

* Second Appeal No. 1493 of 1919 and Second Appeal No. 506 of 1919.

AYYAR, District Munsif of Cannanore, in Original Suit No. 312 of 1916, and against the decree of K. V. KARUNAKARA MENON, Additional Temporary Subordinate Judge of North Malabar, in Appeal Suit No. 157 of 1918, preferred against the decree of P. G. RAMA AYYAR, District Munsif of Cannanore, in Original Suit No. 362 of 1915.

The following are the facts in Second Appeal No. 1493 of 1919.

The plaintiff and defendants 5 to 12 are descendants of the fourth defendant, a Marumakkattayam Mappilla woman. Her husband Mamookoya Haji and his mother and aunt made a gift of the plaint and other properties to her and her daughters in 1018 (1873) under Exhibit B. The material portions of Exhibit B are as follow :—

"Deed of gift granted by Ponmanichintagath Mamookoya, his mother Ayissa and her sister Kunhamina to Mamookoya's wife Kunhikalandathi and his daughters Ayissa Umma and Mariyumma. We have no legal heirs. Out of our own free will we make a gift of all our properties, movable and immovable to you as soujanyam. We have put you in possession of the properties and the title-deeds. We have no further right to the properties. Hereafter you and the female santanams derived from you should hold and enjoy the properties as *strisothu*. The male santanams derived from you will have no power to sell or give away the properties."

The plaintiff is a male member and is the karnavan of the tarwad. He brought this suit to recover possession of the above properties from defendants 1 to 3 to whom they were sold in 1905 by defendants 4 to 12 on the ground that the sale was invalid and not binding on him. Defendants contended *inter alia* that under the gift deed the properties belonged only to the vendors, viz., the female members of the tarwad, that the plaintiff, a male, had no right to the same and that the plaintiff was estopped. In answer to this the plaintiff contended that a gift prescribing the line of succession to females alone

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was invalid. The District Munsif who upheld all the other contentions of the plaintiff held against him on the question of estoppel and therefore dismissed the suit. On appeal by the plaintiff the District Judge held without deciding the question of estoppel that such a gift was valid among the Mappillas of North Malabar and dismissed the appeal. The plaintiff preferred this Second Appeal.

This Second Appeal coming on for hearing on the 7th day of December 1920, their Lordships (AYLING and SPENCER, JJ.) made the following :

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—In these connected Second Appeals a question of law has been taken whether a course of devolution of property among females to the exclusion of males is unknown in North Malabar and is repugnant to Marumakkattayam law as followed by Mappillas in that district. The Subordinate Judge and the District Judge who heard the first appeals have come to different conclusions on the point, and the authorities to which the District Judge refers in his judgment are neither clear nor uniform.

In *Bivi Umah* v. *Keloth Cheriyath Kutti*(1), an instrument of gift which limited the descent of property to the female line was held by COLLINS, C.J., and PARKER, J., to be valid. The learned Judges observe that the gift was of the class known as *strisothu* or *henumula* and created an estate known to Marumakkattayam usage. They quote *Kunhacha Umma* v. *Kutti Mammi Hajee*(2), a Full Bench case, which is not however an authority upon the significance and legality of *strisothu* gifts. On the other hand in *Kunhamina* v. *Kunhambi*(3), MILLER and MUNRO, JJ., refer to a similar gift to females excluding males as being an attempt

(1) (1910) M.W.N., 693. (2) (1893) I.L.R., 16 Mad., 201 (F.B.).
(3) (1909) I.L.R., 32 Mad., 315.

"to create a perpetual succession confined to females, a course of devolution equally unknown to the Marumakkattayam and to the Muhammadan Law."

We might feel bound to follow this ruling, were there not certain observations in the judgment which indicate that the decision turned rather on a question whether the last survivor of a tenancy in common created by the gift deed had the power of disposing of the property to the exclusion of the descendants, if any, of the donees, than on the validity of the condition in the gift deed as to the exclusion of males, which the learned Judges describe as a condition of no real importance.

To a certain extent the statement that the condition in the gift deed excluding males was invalid was thus an *obiter dictum*.

The District Judge (Mr. REILLY) states in his judgment that he has come across instances in North Malabar of devolution of property being limited to females, and a case of a *strisothu* tarwad came before BAKEWELL, J., and myself in *Soopi* v. *Mariyoma*(1). Such a usage was judicially recognized by Mr. THOMPSON, the District Judge of North Malabar, in Appeal Suit Nos. 641 and 647 of 1891 on the file of that Court which came on appeal to the High Court in Second Appeals Nos. 1127 and 1128 of 1892.

In view of the divergence of opinion both in the Courts below and in this Court as to the validity of such a provision occurring in a gift, I think that the question of law as stated above should be referred to a Full Bench of this Court.

AYLING, J.—I agree to the reference proposed by my learned brother, though I should personally be content to simply follow *Kunhamina* v. *Kunhambi*(2).

(1) (1920) I.L.R., 43 Mad., 393. (2) (1909) I.L.R., 32 Mad., 315.

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On the hearing of this Reference before Sir JOHN WALLIS, C.J., SPENCER, J., and KUMARASWAMI SASTRI, J., on 15th, 16th and 24th March 1921,

K. P. M. Menon for appellant in Second Appeal No. 1493 of 1919 contended as follows:—The point referred does not arise. The gift deed in this case does not disable the males from inheriting the property; it only prevents them from selling or giving; the males have got equal rights of enjoyment. The only peculiarity of *strisothu* property is that in most cases females alone have the right of management. A gift prescribing a new mode of devolution is illegal; see *Kunhamina* v. *Kunhambi*(1). In none of the cases quoted in the Order of Reference this point arose for decision and the facts and decisions in them were different.

C. Madhavan Nayar (with *B. Pocker*).—There are two modes of succession known in Malabar, one through males and another through females; it is open to any one to choose either one or the other. This species of property is recognized as valid in *Bivi Umah* v. *Keloth Cheriyath Kutti*(2), and Second Appeal No. 1502 of 1894 (unreported) with reference to the document in question and in Second Appeals Nos. 1127 and 1128 of 1892 and *Soopi* v. *Mariyoma*(3). In *Kunhamina* v. *Kunhambi*(1), this question did not arise and the decision on this point is *obiter*. It was a case of competition only between two daughters and not one of competition between males and females. This is a special social custom which must be recognized whether it can be based on any recognized rule of law or not.

The Court (WALLIS, C.J., SPENCER, J., and KUMARASWAMI SASTRI, J.) delivered the following

(1) (1909) I.L.R., 32 Mad., 315. (2) (1910) M.W.N., 698.
(3) (1920) I.L.R., 43 Mad., 393.

JUDGMENT.

Opinions appear to be conflicting as to the validity among the Mappillas of North Malabar of a gift of property as *strisothu* or women's property which, it is said, means a gift to a female and her female descendants only, to the exclusion of her male descendants. In Second Appeal No. 1127 of 1892 Mr. ARTHUR THOMPSON, the District Judge of Tellicherry, expressed an opinion favourable to the legality of such a *strisothu* disposition but the High Court, MUTHUSWAMI AYYAR and BEST, JJ., disposed of the case on the ground that the suit of the male karanavan questioning it was barred by limitation.

COLLINS, C.J., and PARKER, J., also regarded such dispositions as valid in *Bivi Umah* v. *Keloth Cheriyath Kutti*(1), and in Second Appeal No. 1502 of 1894 with reference to the documents now in suit. A deed of this kind came before MILLER and MUNRO, JJ., in *Kunhamina* v. *Kunhambi*(2), where the question was whether a gift could be regarded as a gift to the females mentioned therein as tenants-in-common or a gift to the donee and her female descendants as a sort of tavazhi. The Court took the latter view which was sufficient for the disposal of the case. The learned Judges, however, observed incidentally that it had not been contended that the condition of enjoyment could stand so for as it excluded males altogether. For the purposes of the case, it made no difference whether males were excluded or included as the intention to create a tavazhi was clear and that was enough to invalidate a disposition by one of the female donees only. In *Soopi* v. *Mariyoma*(3), it was not disputed that a woman, described as the Karnavathi, was the manager of the Marumakkattayam tarwad in

(1) (1910) M.W.N., 698. (2) (1909) I.L.R., 32 Mad., 315.
(3) (1920) I.L.R., 43 Mad., 393.

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a question which is referred to by the learned Judges as a *strisothu* tarwad, but the question whether the male members of the family were excluded from ownership as well as from management did not arise. Mr. Menon contended before us that this is the real meaning of a *strisothu* gift and that a *strisothu* tarwad in North Malabar is merely a tarwad in which the right of management is in the senior female instead of in the senior male, according to the system which prevails in the adjoining district of South Kanara with reference to Aliyasantana tarwads, and that otherwise the male members of the family have an equal interest with the females in the tarwad property. He also contended that the question had never arisen directly between the female members of a tavazhi claiming under such a gift and the male members. Coming now to the two suits, which have given rise to this reference, the District Munsif dealing with both suits purported to follow *Kunhamina* v. *Kunhambi*(1), and held that Marumakkattayam usage only knew of tarwads and tavazhis and that its conception of a tarwad or a tavazhi is that it consists of a female common ancestor and her descendants, male and female in the female line, and that a tarwad or a tavazhi consisting of females only to the exclusion of male descendants of females was a thing so far unrecognized by Marumakkattayam usage. The appeal in one suit came before the District Judge, Mr. REILLY, and the appeal in the other before the Subordinate Judge, the late Mr. K. V. KARUNAKARA MENON. The latter observed in his judgment that it had rightly been conceded before him that the gift deed did not exclude males from participating in the income of the properties, and that all that was contended for was that the right of management was in

(1) (1909) I.L.R., 32 Mad., 315.

the females. This contention he rejected observing that in *Kunhamina* v. *Kunhambi*(1), a gift like this had been held to create a tavazhi consisting of males and females and that the present gift must be taken to have been made to a tavazhi consisting of males and females. In the other appeal, the District Judge, Mr. REILLY, took a completely different view and held that Exhibit B created what was sometimes known as a *strisothu* tarwad or tavazhi consisting of a woman and her female descendants who alone have the right of management and that it was unnecessary to consider whether the male descendants would have any right of maintenance. He regarded the observations of MILLER and MUNRO, JJ., in *Kunhamina* v. *Kunhambi*(1), as the *obiter dicta* of Judges whose experience had lain in South and not in North Malabar, the usages of which vary in several respects. He further observed that instances in which the devolution of property was confined to the females of a family had come to his own knowledge among the Marumakkattayam Mappillas of North Malabar and that he understood that that course of devolution was recognized in South Kanara. Accordingly he held that the male members of the family were not entitled to question the sale by the female members under Exhibit I.

As we regard the decisions and other materials before us as inconclusive we have decided before disposing of the reference to call for a finding from the District Judge of North Malabar in Second Appeal No. 1493 of 1919, in which the question necessarily arises, as to whether according to the custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar property may be settled as *strisothu* on the female members of a tarwad or tavazhi to the exclusion of the

(1) (1909) I.L.R., 32 Mad., 315.

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males, or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males. Fresh evidence may be taken. Finding will be submitted in two months after the local vacation. Seven days will be allowed for objections.

In compliance with the order contained in the above judgment, the District Judge of North Malabar submitted a finding in the negative stating that neither side was ready with evidence to prove the usage and that he was not inclined to grant an oral application for adjournment for producing evidence.

On the 5th December 1921, the High Court, after the return of the above finding and on application of the parties to grant further time to adduce evidence made the following

ORDER :—

Seeing that both sides were not ready on 25th July and applied for an adjournment and that the time allowed for returning a finding did not expire till 18th August, we think that the District Judge might properly have granted an adjournment.

Considering the importance of the question at issue, we are not inclined to decide it on the materials on record and we direct the District Judge to give the parties another opportunity for adducing evidence.

After the examination of oral and documentary evidence produced before him the District Judge again returned a finding in the negative.

When the case came on for hearing again on 21st February 1923 the Full Bench (SPENCER, KUMARASWAMI SASTRI and RAMESAM, JJ.) gave the following

OPINION :—

In calling upon the District Judge to record evidence of a custom or usage prevailing in Malabar of males

being excluded from tarwads or tavazhies managed exclusively by females of certain Marumakkattayam Mappillas, we discussed in some detail all the decisions in which such a custom might be said to have been judicially recognized or its recognition refused, and we stated that we regarded them as inconclusive. The District Judge was therefore asked to return a finding on such evidence as might be produced before him to prove the existence of the particular custom in question. This he has done, and we agree with him in holding that it is wholly inadequate to prove the prevalence of any custom by which males are treated as having no right to be consulted in the management of the affairs of the tarwad or tavazhi and no right to participate in the income of the tarwad or tavazhi properties. It is not necessary to express any opinion as to the existence of tarwads in which the manager or Karnavathi is a female.

We therefore answer the reference made to us in the affirmative.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

SUBRAYA SAMPIGETHAYA AND TWO OTHERS (DEFENDANTS 1, 3 AND 4), APPELLANTS,

v.

KRISHNA BAIPADITHAYA (PLAINTIFF), RESPONDENT.*

1923, March, 12.

Section 6 (d), Transfer of Property Act (IV of 1882)—Personal right of widow to future maintenance, not transferable.

Where a widow who had succeeded as heir to her husband's properties surrendered her life-interest therein to the nearest

* Second Appeal No. 498 of 1921.