In view of what we have stated above, we come to the conclusion that Act II of 1929 does not apply to cases of Hindu males who died intestate before its coming into force. In determining the order of succession to the estate of such persons, the Hindu Law as it stood before this Act should be applied. By so doing, the appellant Krishnan Chettiar would be a preferential heir (as the paternal uncle of the last male owner) to the respondents who are his sisters.

We accordingly allow this appeal and dismiss Original Petition No. 31 of 1930 with costs in both Courts.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Reilly.

1933, October 5.

THATHAMANGALATH ALIAS MALLISSERI ILLATH DECEASED KRISHNA NAMBUDRI'S DAUGHTER DEVASENA PATHANTHADI ANTHARJANAM'S CHILDREN NARAYANAN NAMBUDRI, DECEASED AND THREE OTHERS (PLAINTIFFS AND NIL), APPELLANTS,

v.

KATTAMATATH MANAKKAL KUMARASWAMI NAMBUDRIPPAD'S SON KRISHNA NAMBUDRIPPAD AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Malabar Law—Nambudri illom—Sole surviving widow of—Powers of, to appoint an heir to the illom—Conditions.

The sole surviving widow of a Nambudri illom can make an adoption, i.e., appoint an heir to the illom to prevent its extinction, when the only attaladakkam heir of the illom had, before the adoption, ceased to be such an heir by becoming an

* Appeal No. 241 of 1928.

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outcaste by excommunication and had also authorized the adoption while severing all his ties with the illom.

Vasudevan v. *The Secretary of State for India*, (1887) I.L.R. 11 Mad. 157, discussed.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Original Suit No. 48 of 1926.

P. Govinda Menon for appellants.

C. S. Swaminadhan for *T. S. Anantaraman* and *P. Narayanan Nair* for first respondent.

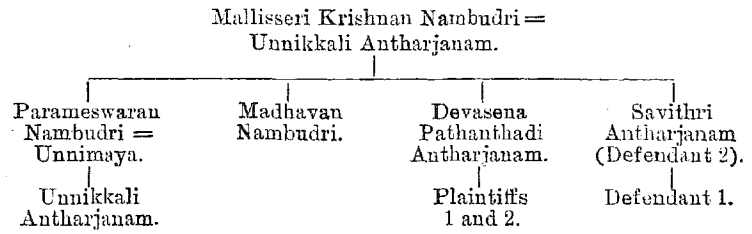
K. Kuttikrishna Menon for second respondent.

Cur. adv. vult.

MADHAVAN NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—This appeal arises out of a suit instituted by the plaintiffs to recover properties which are in the possession of the defendants. These properties belong to the well-known Mallisseri illom—an ancient and historic Nambudri family in South Malabar. This illom possesses considerable properties both in the British territory of South Malabar and in the Cochin State. The suit properties form only a very small portion of those situated in South Malabar. The first defendant claims right to the properties under Exhibit A, a settlement deed executed by one Unnikkali Antharjanam, wife of Mallisseri Krishnan Nambudri, by which he was adopted to the illom. The second defendant is the mother of the first defendant. The plaintiffs dispute the validity of the adoption and claim the properties as the reversionary heirs to the Mallisseri illom. The learned Subordinate Judge of South Malabar at Calicut upheld the adoption and dismissed the plaintiffs' suit.

The following genealogical tree will explain the relationship of the parties :—



One Krishnan Nambudri was the karnavan of the Mallisseri illom about forty years ago. He died leaving behind him his widow Unnikali Antharjanam and children, Parameswaran Nambudri, Madhavan Nambudri, Devasena Pathanthadi Antharjanam and Savithri Antharjanam. Parameswaran Nambudri married Unnimaya Antharjanam and Unnikkali is their daughter. Madhavan Nambudri died unmarried in the year 1921–22. Plaintiffs and the first defendant are the children of Devasena and Savithri, sisters of Parameswaran and Madhavan. At the time of the death of Krishnan Nambudri, the Mallisseri illom consisted of his widow Unnikkali Antharjanam, his sons Parameswaran Nambudri and Madhavan Nambudri, Unnimaya, the wife of Parameswaran Nambudri, and their minor daughter Unnikkali.

The circumstances which led to the adoption of the first defendant by Unnikkali Antharjanam may now be briefly narrated. In 1904 the Raja of Cochin held a Kalavicharam, a Court of Inquiry, in which a considerable number of persons were accused of having had illicit intercourse with a Nambudri lady named Savithri Antharjanam. As a result of this enquiry both Parameswaran Nambudri and Madhavan Nambudri

of the Mallisseri illom were outcasted. As Unnikkali, the daughter of Parameswaran Nambudri, was born after the date of Parameswaran Nambudri's illicit intimacy with Savithri Antharjanam, according to usage she was also expelled from caste along with her father. Thus after the enquiry, the only members of the illom who retained caste were Unnikkali Antharjanam and her daughter-in-law Unnimaya. In 1908—see Exhibit I, dated the 6th August—the five members constituting the illom executed a family karar by which certain properties were set apart for the maintenance of the expelled members, Parameswaran Nambudri, Madhavan Nambudri and Unnikkali. The remaining properties were handed over to the management of Unnikkali Antharjanam and Unnimaya. Besides this arrangement relating to the properties, the karar contained also another arrangement and this related to the adoption of a boy. This arrangement is referred to in paragraph 12 which is as follows :—

"Nos. 1 and 2 (i.e., Parameswaran Nambudri and Madhavan Nambudri) have authorised Nos. 3 and 4 (Unnikkali Antharjanam and Unnimaya) to adopt a boy by the process of adoption or otherwise so that the illom may have a male issue and may prosper. If No. 4 did not consent to take an adoption as aforesaid, No. 3 shall have the exclusive right to it."

It was also arranged in the karar that after the death of Nos. 1 and 2 the properties held by them should lapse to the illom. Parameswaran Nambudri died some time in 1908-09. After his death, in 1911 a "partition karar" was entered into by Madhavan Nambudri, his brother, Unnikkali Antharjanam, the widow of Krishnan Nambudri, Unnimaya Antharjanam, the widow of

the deceased Parameswaran Nambudri, and her daughter Unnikkali. As stated in the karar, it was executed as it was found that it was not possible or convenient for Madhavan Nambudri and the rest of the executants to continue as members of a joint family. By the advice of well-wishers and relatives of the family No. 1 (Madhavan Nambudri) was freed from all kinds of ties with the illom "in order that the intention of paragraph 12 of the karar (see paragraph 1) may be fulfilled". The karar referred to here is Exhibit I executed in 1908. It was also stated that No. 1 relinquished all the rights which he possessed over the illom, its properties, dignities, etc., in order that he should remove the obstacle that stands in the way of "acting in accordance with the stipulations contained in paragraph 12 of the karar"; see paragraph 3. Under the karar Madhavan Nambudri and Unnikkali were given some properties with entire rights of alienation in respect thereto. As Unnikkali was a minor, Madhavan Nambudri was to manage the properties on her behalf and hand them over to her on her attaining majority. In paragraph 6 of the karar it was stated specially that Madhavan Nambudri "surrendered all the rights which he possessed over all the properties situated in the British territory and the Cochin State . . ." and in paragraph 7 it was stated

> "that all these stipulations shall be binding on us as well as on the heirs who may come in succession to the illom in accordance with paragraph 12 of the karar . . ."

Parameswaran Nambudri having died and the rights of Madhavan Nambudri and Unnikkali to the illom properties having been relinquished

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under the partition karar, the only persons who retained rights to the properties after Exhibit II were Unnimaya, the widow of the deceased Parameswaran Nambudri, and her mother-in-law, Unnikkali Antharjanam, the widow of Krishnan Nambudri. Though she was allowed to undergo purification ceremony Unnimaya did not like to remain apart from her daughter Unnikkali who had been expelled from caste. She therefore by a "deed of surrender" (Exhibit III) (Avakasam Ozhimuri) surrendered her rights to the family properties and dignities for a money consideration and this was executed in favour of the only remaining member of the illom, Unnikkali Antharjanam. Madhavan Nambudri died in 1921–22. In 1915 Unnikkali Antharjanam executed a deed of settlement, Exhibit A, and by it adopted the first defendant. After stating in paragraph 1 that she has become the exclusive heir and manager to the Mallisseri illom and its properties, she stated in paragraph 2 of Exhibit A that, in order to avert the line becoming extinct and in order to carry out the stipulations of paragraph 12 of the karar of 1908, that is Exhibit I, she has appointed—"adopted" in the document is wrong translation—and accepted the minor named Krishnan . . . as heir to the Mallisseri illom and its properties and to the titles and dignities such as exclusive urayma, joint urayma and so forth. This adopted boy is the first defendant. In paragraph 3 of the karar it was stated that

> "the adopted Krishnan when he attains marriageable age should enter into marriage so as to beget heir to the said Mallisseri illom."

The adoption of the first defendant effected in the above circumstances was upheld by the

learned Subordinate Judge on various grounds. He held that what Unnikkali Antharjanam did was not to adopt the first defendant to any particular individual as under the Hindu Law, but what she did was to appoint him an heir to the Mallisseri illom and that she was entitled to do this both under the various documents above referred to and also, apart from them, under the special law applicable to the Nambudris, she happening to be the last female member of the illom. He also held that Unnikkali Antharjanam became the full owner of the Mallisseri illom properties under Exhibits II and III and as such she had absolute rights to convey them to the first defendant and that

> "even if Exhibit A is not to be treated as a deed of adoption it can be treated as a deed of conveyance under which the last owner of the suit properties assigned all her interest in the same in favour of the first defendant."

He ended the judgment by pointing out various other difficulties which the plaintiffs had to meet before they could succeed in the suit.

In appeal, Mr. Govinda Menon on behalf of the appellants contended that so long as Madhavan Nambudri was in existence Unnikkali Antharjanam could not adopt, that she had not become the last female member of the Mallisseri illom to entitle her to appoint an heir to the illom even under the Nambudri Law, and that, as power to adopt was given both to her and Unnimaya jointly, adoption by Unnikkali alone is invalid. He also contended that Unnikkali Antharjanam had only a widow's estate in the illom properties and that Exhibit A as a deed of conveyance is invalid. His other contentions related to the difficulties which according to the learned Subordinate Judge

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stood in the way of the plaintiffs' success even in the event of the adoption being held invalid.

At the very outset it may be mentioned that if the first defendant's adoption were governed by the principles of the Mitakshara Law then the adoption would be invalid, for under that law the adoption by a widow is made to an individual and no adoption can be made so long as Madhavan Nambudri was alive; and further, it will be a question whether the widow, i.e., the mother, could be validly authorized to adopt by her children as in the present case. It is unnecessary to discuss these questions as it is conceded that if the adoption is to be tested by the principles of the ordinary Hindu Law then it may be held to be invalid on one or all of the grounds urged by the appellants' Counsel; but what is argued by the respondents' Counsel is that what has taken place in the present case is not adoption as understood in Hindu Law but appointment of an heir to an illom by its last female member to prevent its extinction, and that this is justified under the law applicable to the Nambudris. Having regard to the above arguments the questions arising for determination are:

(1) What is the true nature of the adoption of the first defendant by Unnikkali? that is, is it an adoption as understood in the Law of the Mitakshara or is it something different, to which considerations arising under the Mitakshara Law will not apply? (2) Whether the adoption is valid in whichever sense it is understood?

To grasp the true nature of what was done by Unnikkali Antharjanam under Exhibit A, we have first to see what she and Unnimaya, the wife of Parameswaran Nambudri, were authorized to do by the male members under Exhibit I.

Paragraph 12 of that document is very explicit. It says that

"Nos. 1 and 2 have authorized Nos. 3 and 4 to adopt a boy by the process of adoption or otherwise, so that *the Illom may have a male issue*". (The italics are ours.)

It follows from this direction that the object of the adoption was to get an heir to the illom and not to any particular *individual* as under the Hindu Law, so that if a boy is adopted he will be the illom's heir and not the heir of the last male owner. This stipulation contained in the karar is referred to again in Exhibits II and III. It was under Exhibit A, styled a "deed of settlement", that Unnikkali acted on the authority conferred upon her by Exhibit I and adopted the first defendant. What she purported to do and actually did appears to be perfectly clear from its terms which have been already quoted. After stating that by virtue of Exhibits II and III she has become the "exclusive heir and manager to the illom (Mallisseri) and its properties" she says in paragraph 2 that

"in order to avert the Illom becoming extinct as there is no chance of any heirs being born to it she consulted her relatives who advised her to act in accordance with the stipulations contained in paragraph 12 of the karar (Exhibit I)".

The paragraph concludes with this important statement:

"Hence I have appointed and accepted the minor named Krishnan (first defendant) the son of the said Nambudri *as heir to the Mallisseri Illom and its properties.*" (The italics are ours.)

The portion italicised shows that what Unnikkali Antharjanam did was this, viz., that she appointed the first defendant as heir to the illom as she was authorized to do so under paragraph 12 of Exhibit I. In paragraph 3 of Exhibit A there

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is a direction that when the first defendant attains marriageable age he should marry so as to beget heir to the said Mallisseri illom. The first defendant was appointed an heir to the illom under Exhibit A and he in his turn was asked to get heirs to the illom by marriage. Thus from the documents it becomes clear that what really took place under the designation of adoption was the appointment of an heir to the illom by Unnikkali Antharjanam.

The learned Counsel for the respondents argues that this form of adoption consisting in the appointment of an heir to an illom by the last female member for begetting issues to perpetuate the illom, invalid though it is under the Hindu Law, is sanctioned by the law and usage prevailing amongst the Nambudris and is therefore valid. The appellants' learned Counsel meets the argument by saying that, even under what is claimed to be the Nambudri Law, the appointment of an heir to perpetuate an illom when there is an attaladakkam heir in existence is invalid. On this point he further contends that Unnikkali Antharjanam was not the last surviving female member of the illom when she made the adoption.

The important question for determination is what is the law applicable to the Nambudris generally and whether the adoption in question, the nature of which we have explained above, is sanctioned by the law prevailing amongst them. The whole question of the law relating to the Nambudris was very fully discussed in *Vasudevan* v. *The Secretary of State for India*(1). In

(1) (1887) I.L.R. 11 Mad. 157.

that case the question arose in a suit to declare the Crown to be entitled to the property of one Thammarassori illom on the death of defendant 1 notwithstanding the disposition made by that defendant in favour of defendant 2. The defendants were Nambudri Brahmans. In 1872 defendant 1 and her mother, the sole surviving members of their illom—there being no attaladakkam heirs—appointed defendant 2 to be heir to their illom and to marry and raise up issue for it. Defendant 1 had previously been given in sarvaswadhanam marriage to a member of another illom who however had died without issue. The case of the plaintiff was that the appointment of defendant 2 was invalid, that defendant 1 was without heirs, and that therefore the property of the illom would escheat on her death to the Crown. In deciding the point which they decided against the plaintiff the learned Judges discussed the general question, viz., what was the law applicable to the Nambudri Brahmans of Malabar and whether under that law the appointment of defendant 2 as heir to the illom by defendant 1 was valid? On the first point they came to the conclusion that the Nambudri Brahmans migrated to Malabar before the Mitakshara had been written and that they are governed by Hindu Law,

> "except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the usage being either some doctrine of Hindu Law as it stood at the date of the settlement, though now obsolete, or some Marumakkathayam usage."

This statement of the law has been accepted in the subsequent decisions of this Court; see

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Vishnu Nambudiri v. *Akkamma*(1) and *Narayanan Nambudri* v. *Ravunni Nair*(2). This being their view, before deciding the second point, they issued a commission to the Munsifs in South Canara and in North and South Malabar to take evidence as to

> " what are the rights and powers of a lady in a Brahman illom who has survived all the male members of the illom, and who has no known attaladakkars, as to the disposal of the property of the illom and the adoption of members to continue the family."

A commission was also issued from the High Court to the High Court of Travancore and the Appeal Court of Cochin for the elucidation of this question. After receiving the evidence elaborately discussed in the judgment, they came to the conclusion that there was a custom to the effect that the sole surviving Antharjanam of a Nambudri illom is entitled to appoint an heir in order to perpetuate her illom. This form of affiliation is referred to both by Mr. Ramachandra Ayyar (*see* chapter V, section 85) and Mr. Wigram (*see* chapter I) in their books on Malabar Law. Both these writers refer to the appointment of an heir as akin to the Kritrima form of adoption in force in the Mithila country. The learned Judges refer to these facts in the course of the judgment. If the decision in *Vasudevan* v. *The Secretary of State for India*(3) applies to this case, there can be no doubt that the adoption of the first defendant should be held to be valid.

But it is contended that the decision is inapplicable because in the case before us when

(1) (1910) I.L.R. 34 Mad. 496. (2) (1924) 47 M.L.J. 686.
(3) (1887) I.L.R. 11 Mad. 157.

Unnikkali Antharjanam made the adoption an attaladakkam heir did exist, which was not the case in *Vasudevan* v. *The Secretary of State for India*(1), and further, the widow cannot be said to be the sole surviving member of the illom as there were also other members living at the time. It is true that there were no attaladakkam heirs in *Vasudevan* v. *The Secretary of State for India*(1) and the learned Judges did not decide the question whether a widow can adopt when there are such heirs as it was not necessary for the purposes of the case before them. But it is interesting to note the opinion of the learned Judges as regards the evidence bearing on the point. After saying "it is not suggested that there are attaladakkam heirs in this case", they say that "the bulk of evidence is in favour of her power". The inclination of the learned Judges' view, though the question is left open, seems to be that, even though an attaladakkam heir exists, the sole surviving widow of a Nambudri illom can appoint an heir to the illom; see Mr. Justice Sundara Ayyar's book, page 227. It is not necessary to discuss this point any further as in our view, having regard to the circumstances that took place before the adoption, it must be held that Madhavan Nambudri has ceased to be an attaladakkam heir who can object to the adoption because of the important fact that he had become an outcaste as a result of excommunication and also of the further fact that he had authorized the adoption severing all his ties with the illom under the documents already referred to. Here it may be stated it is nobody's case that either Madhavan Nambudri or for that

(1) (1887) I.L.R. 11 Mad. 157.

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matter any other members of the family objected to the adoption. The following passage from the Hindu Law of Adoption by Sircar has a bearing on the question under discussion. The learned author says (page 197) :

> "You will bear in mind that the character of sonship consists in the capacity to take the heritage and the capacity to present funeral oblations, the two together constitute the status of a son ; apostates and outcastes who do not possess the latter capacity, cannot, therefore, fill the full character of a son according to Hindu Law. A man having a son of that description cannot but be regarded as 'sonless' in the contemplation of Hindu Law. It would therefore appear that the existence of such a son does not debar the father from adopting a son."

It would therefore follow that the existence of Madhavan Nambudri cannot be considered to be a legal impediment to the adoption of the first defendant.

The next question is whether Unnikkali Antharjanam when she adopted the first defendant was the last surviving female member of the illom. Having regard to the circumstances of the case there cannot be any doubt on this point. From the facts already narrated at the commencement of the judgment it will appear that, at the time of the adoption, Parameswaran Nambudri had died, Madhavan Nambudri was alive but being an outcaste had left the illom renouncing, as we have seen, all his rights and dignities and taking away some properties for his maintenance. So also Unnimaya, the wife of Parameswaran Nambudri, and her daughter had left the illom renouncing their rights. In the very first arrangement effected, that is, Exhibit I, soon after the excommunication, the only unpolluted members of the family, namely, Unnikkali, the widow, and

her daughter-in-law Unnimaya, were authorized to adopt a boy by all the members. In the next arrangement Madhavan Nambudri and Unnikkali, the excommunicated daughter of Parameswaran Nambudri, severed their connection with the illom. Then there remained in the illom only two female members, the wife of the deceased Parameswaran Nambudri, and Unnikkali, the widow. These had not come under the ban of excommunication. But of these two, in 1911 Unnimaya, feeling herself polluted by having taken prohibited food in company of her child, left the family surrendering her rights for a consideration. It is clear that all these arrangements were made to facilitate the adoption of a boy, and when Unnimaya left the illom the adoption of a boy by Unnikkali and his subsequent life in a pure atmosphere were the uppermost thoughts in her mind. All the members of the illom having surrendered their rights and left the illom, the only person who could adopt an heir to the illom to perpetuate it was Unnikkali, the widow of Krishnan Nambudri, and being thus left the sole individual to give effect to paragraph 12 of Exhibit I she adopted the first defendant. We cannot accede to the argument of Mr. Govinda Menon that to become the sole surviving member of the illom all its other members should have ceased to exist by reason of death. In our opinion the present case clearly falls within the principle of the decision in *Vasudevan* v. *The Secretary of State for India*(1), and therefore it should be held that the adoption of the first defendant is valid. In this connection we may observe, as held in a subsequent decision,

(1) (1887) I.L.R. 11 Mad. 157

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viz., *Kesavan Unni* v. *Nicholas*(1), that the usage among Nambudris permitted a male and two females of an illom to validly affiliate another by requiring a member of another illom to marry and beget issue for the first illom.

It being our view that, apart from the documents which authorized her to adopt, Unnikkali Antharjanam had inherent power to adopt under the Nambudri Law, the question raised by Mr. Govinda Menon whether the authority to adopt jointly given to Unnimaya and Unnikkali can be legally exercised by Unnikkali alone, does not arise for consideration. But it may be stated that Unnimaya had surrendered all her rights in the illom properties under Exhibit III.

In the view that we take of the case it is also not necessary to decide the question whether Exhibit A, the deed of adoption, can be regarded as a deed of settlement entered into between Unnikkali and the first defendant, the alternative ground on which the lower Court has based its decision.

For the above reasons the decision of the lower Court is confirmed and this appeal is dismissed with costs. It is interesting to note that the validity of the adoption has been upheld in the Cochin Courts.

G.R.

(1) (1912) 23 M.L.J. 165.