

(1954) 01 MAD CK 0031

In the Madras High Court

Case No : App. No. 729 of 1948

Bhaskaran Thirumulpad and Others

APPELLANT

Vs

Kavunni Thirumulpad and Others

RESPONDENT

Date of Decision : 28-01-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Madras Marumakkathayam Act, 1932 — Section 48

Citation : AIR 1954 Mad 987 : (1954) 67 LW 455 : (1954) 2 MLJ 294

Hon'ble Judges : Subba Rao, J;Panchapakesa Ayyar, J

Bench : Division Bench

Advocate : M.K. Nambiar, for the Appellant; D.H. Nambudiripad, N. Sundara Iyer and V.R. Venkatkrishnan, for the Respondent

Final Decision : Allowed

Judgement

Subba Rao, J.—This appeal is directed against the decree and judgment of the Court of the Subordinate Judge of Ottapalsm in O. S. No. 85 of 1944, a suit filed by the appellants for partition and for delivery of possession to the plaintiffs and their mother, defendant 14, of their 7/20 share in the tarwad properties described in the plaint B schedule. Before us, learned counsel appearing for the parties did not cover the entire field of disputes occupied in the court below. It would, therefore, be sufficient if the necessary facts relevant to the questions raised were stated.

2. Defendants 1, 2, 6, 9 and 12 to 14 are the children of Kunhikutti Kolpad and her husband Kunhan Nedungadi. Plaintiffs are the children of defendant 14. The other defendants are the children of defendants 2, 6 and 9. Originally, Kunhitcutti Kolpad and her children were members of a tarwad called Mandilakkottil. In 1914 there was a partition among the members of the "tarwad", and Kunhikutti Kolpad and her children separated themselves and constituted a different "tarwad". Kunnan, the husband of Kunhikutti Kolpad, was also in affluent circumstances. The B schedule properties were his self-acquisitions. Though this

fact was disputed in the court below, it is conceded before us. He purchased the "kanom" right in items 1 to 47 of the plaint B schedule, excluding items 16 to 21, in the name of his wife Kunhikutti Kolpad, items 16 to 21 in the name of his two children, defendants 1 and 14, and the leasehold interest in the items 51 to 53 in the names of his wife Kunhikutti Kolpad and four of her children. He acquired the "jenm" right in items 48 to 50 in his own name under Ex. B. 8. Kunhikutti Kolpad died in 1919, and Kunhan died in 1932. Long before his death, on 15-11-1923, Kunhan executed a will Ex. B. 23 bequeathing to his seven children all the properties belonging to him exclusively. On the same day, he and his seven children executed a settlement deed, Ex. B. 24, in regard to items 1 to 47.

After the death of Kunhan, in the year 1934, his children defendants 1, 2, 6, 9 and 12 to 14 partitioned the properties they got from their father, under Ex. B. 31 on stirpital basis. As regards the properties belonging to their "tanvad", the 14th defendant and her children instituted O. S. No. 72 of 1938 on the file of the Walluvanad District Munsif's court. Pending the suit, the parties settled their dispute by executing the partition deed Ex. B. 72. The suit was dismissed. At the time Ex. B. 31 was executed the plaintiffs 1 to 4 were minors and the plaintiffs 5 and 6 were not born. After two of the plaintiffs became majors, they filed O. S. No. 85 of 1944 for partition of the B schedule properties on "per capita" basis. Their case is that the B schedule properties belong to their "tavazhi" and the partition under Ex. B. 1 effected during their minority as per stirpital basis is illegal and would not bind them. The learned Subordinate Judge held that under Exs. B. 23 and B. 24, defendants 1, 2, 6, 9 and 12 to 14 took the properties as tenants-in-common and, therefore, the plaintiffs have no right to reopen the partition on that basis. On that finding, he dismissed the suit. The plaintiffs preferred the above appeal.

3. The main question raised in the appeal by the learned counsel for the appellants turns upon the construction to be put on Exs. B. 23 and B. 24 dated 15-11-1923. Before we advert to the question raised, it would be convenient to clear the ground by disposing of some of the incidental questions argued in the case. One of the points urged by the respondents is that Section 48, Madras Marumakattayam Act, Act 22 of 1923, would govern the construction of the documents before us. Section 48 reads:

"Where a person bequeaths or makes a gift of any property to, or purchases any property in the name of his wife alone or his wife and one or more of his children by such wife together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line :

Provided that in the event of partition or the property taking place under Chap. VI, the property shall be divided on the stirpital principle, the wife being entitled to a share equal to that of a son or daughter,"

4. In -- Kannothe Punnoron Krishnan (deceased) and Others Vs. Kannothe Punnaran Thala and Others, , a Division Bench of this court held that there is nothing in the language of Section 48, Madras Marumakattayam Act, which, by necessary implication, shows that the section must be applied retrospectively. There, the learned Judges held that the right to partition provided therein cannot be claimed by a person in whose case the other party to the union died before the Act came into force and there was no legalised marriage. In -- "Thath Amma v. Than-kappa", AIR 1947 Mad 137 (B), a Division Bench of this Court, consisting of Somayya and Yahya Ali JJ. held that the Madras Marumakattayam Act. applies only to transactions after 1st August 1933 when the Act came into force. We are bound by these decisions and do not see any reason to differ from them and to refer the case to a Full Bench.

5. Some arguments were advanced on the question of the nature of the presumptions that should be invoked in construing gifts made or properties purchased in the name of a wife or a wife and her children by a person governed by Marumakattayam law. The leading case on the subject is the decision of the Full Bench in -- Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veettil Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others, . There, a gift was made by a father to his two sons and daughter. The question that arose for decision was whether they took the property as joint tenants or only as members of the "tarwad". The Full Bench held that where properties were given by a person to his wife and children or to the children alone following the Marumakattayam law, the presumption was that the donees took the property with the incidents of "tarwad" property. The principle of the decision is that the "tavazhis" or the subordinate groups constituting the "tanvad", are capable of holding properties and that, if a gift is made to the members of a "tavazhi", the presumption is that they had the properties with the incidents of "tarwad" property. This decision has been followed without question in all subsequent decisions.

The law on the subject has been reviewed and re-stated by Govind Menon and Basheer Ahmed Sayeed JJ. in -- Chalakaran Kuttayi Lakshmi and Another Vs. Chalakaran Puthia Purayil Mukundan Karnavan and Others, . In that case the gift was in favour of a woman called Tala. But, in the operative portion, it was stated that the donor gave the properties to Tala and her "santhanams". The document directed Tala and her "santhanams" to enjoy forever in "jenm" the property given to them. The question was whether the gift enured for the "tavazhi" constituted by Tala, her children and their descendants in the female line or whether it was only for Tala and her two daughters mentioned in the deed. On a construction of the document, the learned Judges held that by that document the donor intended to give the properties to the entire group constituting the "tavaahi". After, considering the earlier case-law on the subject, the learned Judges observed at page 547 as follows :

"It is therefore clear that if the donee constitute a natural group according to the

Marumakatta-yam law capable of acquiring & owning property, there is no reason why the presumption in --"AIR 1916 Mad 391 (FB) ((c))", should not be applied to them."

6. It is contended that the learned Judges laid down that, even if a gift is made to some of the members of the "tavazhi", the presumption should be drawn that the donor intended to give the property to the entire "tavazhi". But the judgment does not lay down any such proposition. At the time the gift was made, there were only three members of the "tavazhi" and they constituted a natural group. The document expressly recited that the gift was to Tala and her "Santhanams", and that the "Santhanams" at the time of the gift were those two girls. The learned Judges, therefore, construed the document to mean that the gift was to the "tavazhi". In -- "AIR 1947 Mad 137 (B)" after a consideration of the earlier decisions, Somayya and Yahya Ali JJ. laid down that where property is gifted to the wife alone, or to some of the children alone, there is no presumption that the donees took it with the incidents of "tarwad" property and that such a presumption will arise only if the gift was in favour of the wife and children or in favour of all the children who by themselves form a "tavazhi". The same principle, they said, would apply in the case of acquisition by the father in the name of one or more children. Though some of the observations made by the learned Judges were not accepted by the Division Bench Chalakaran Kuttayi Lakshmi and Another Vs. Chalakaran Puthia Purayil Mukundan Karnavan and Others, ", as we understood the said Bench decision, they did not purport to differ from the conclusion arrived at by Somayya and Yahya Ali JJ. in the earlier decision.

7. It would be seen from the aforesaid decisions that the following principles are well settled: (i) that a person governed by Marumakattayam law can make a gift to an entity called a "tavazhi", in which case the members of the said "tavazhi" take the property with all the incidents of "tarwad" property; (ii) when a gift is made to a wife and her children or to all the children or the entire group constituting the "tavazhi", a presumption is drawn that the gift is for the "tavazhi"; and (iii) if the gift is to a wife or only to some of her children, there is no scope for invoking any presumption; but the question falls to be considered in each case on the facts whether the gift was intended for the "tavazhi" or for the donees absolutely or for the donees as joint tenants. Bearing these principles in mind, we shall now proceed to consider the two documents Exs. B. 23 and B. "24.

8. Exhibit B, 23 is a will executed by Kunnan in favour of his seven children in respect of move-able and Immoveable properties belonging to him. At the time Ex. B. 23 was executed, it is conceded that the first plaintiff was born and he was two years old. It is therefore, a case where the father bequeathed his properties only to some of the members of the "tavazhi". But it is argued that the boy perhaps was excluded because he was too young and that the intention of the testator would have been only to benefit the group constituting the "tavazhi". Though we see some force in the argument, we cannot accept it in view of the

case law on the subject and the recitals in the document. At the time the will was executed, Kunhan for one reason or other not only excluded the first plaintiff, but he made a specific statement in the will that

"except for them, no other persons can lay any manner of claim to this property."

If he intended that the property should be taken by the "tavazhi", he would not have made such a specific statement in the will. It is, therefore, not permissible to raise the presumption that the bequest was to the "tavazhi" with the incidents of "tarwad property. It, was specifically made to the persons named therein to the exclusion of other persons and, therefore, in law the persons named therein took the property as tenants-in-common.

9. Now coming to items 1 to 47, it may be recalled that items 16 to 21 were purchased by Kunhan with his funds in the names of defendants 1 and 14 and the other items in the name of his wife Kunhikutti Kolpad. The question is,, whether the purchases were "benami" for Kunhibutti Kolpad, or for the benefit of the persons in whose name they were purchased, or for the benefit of the "tavazhi". The theory of advancement is not accepted in India, and, therefore, it cannot be presumed that the properties were purchased for the benefit of the wife and her children. Assuming that Kunhan advanced monies for the benefit of his wife in one case, and his two children in the other case, no presumption can be raised that the said sale deeds were taken for the benefit of the "tavazhi" for, as has been pointed out, such presumptions are permissible only in a case where the purchase is in the name of the wife and children or in the name of all the children or the entire group constituting the tavazhi". The question, therefore, is what was the intention of Kunhan when he purchased the properties in the names of his wife and children.

10. The learned counsel for the appellants contended that the intention of Kunhan is made clear in Ex. B. 24. Ex. 13. 24 does not by itself create any interest in the parties to the document. It is styled as a "nischayapatram" executed amongst the sons of Kunhikutti Kolpad. The parties to the document are Kunhan and his seven children. The first child, Kununni Thirumalpad (defendant 1) is described as "karnavan" of the private "tavazhi", and Kunhikutti Kolpad (defendant 14), the next eldest child, is described as "Kaniavatm"". Under that document, items 1 to 47 of the plaint B schedule are dealt with. The gist of the document is that the said items are treated as the properties of the "tavazhi" and the management thereof is entrusted to Kunhan, Items 1 to 47, excluding items 16 to 21, were purchased in the name of his wife Kunhikutti Kolpad, and the other items in the names of defendants 1 and 14. As the contentions of the parties turn upon the interpretation of para 1 of the document, the said paragraph may be read in full:

"As it is found expedient and desirable that a settlement should be effected for the protection and management of the landed properties described in the subjoined schedule, which, we, Nos. 1 to 7, got from No. 8 our father in

"Putrava-kasam right, which stand in the name of our private tavazhi" and which are being held in possession and caused to be cultivated under executant No. 8, the same is set out as below."

11. The paragraph requires to be scrutinised¹ with some care. It will be seen therefrom that the father recognises that the said items were granted by him in "Putravakasam" right and they stand in the name of the private "tavazhi". It is not suggested that the father made a gift of the items subsequent to the purchases made by him. It is, therefore, manifest that, when the father made the purchases, he did not purchase the said items "benami" for himself in the name of his wife and children. But the difficult question is whether he purchased them for his seven children or for the "tavazhi". In the aforesaid, paragraph, it is clearly mentioned that the father gave it to them in "putravabasam" right and that it stands in the name of the private "tavazhi". The first plaintiff joined as a party to the document also in his capacity as "karnavan" of the private "tavazhi". If the natural meaning of the recitals is accepted, it "prima facie" shows that the gift was a "putravabasam" gift made to the "tavazhi". But it is contended that "putravakasam" right only means a title conferred by a person on his wife and children and does not take in a right conferred on the entire "tavazhi", that there is no institution like a private "tavazhi", in Marumakat-tayam law, and that those words are used only in a loose sense to convey the group of seven persons included in Ex. B. 24.

12. In P. R. Sundara Aiyar's Malabar and Aliyasanthana Law, "Putravakasam" is defined as a gift by the father to his wife and children. In Lewis Moore's Malabar Law and Custom, it is stated to be a term applied in North Malabar to that portion of a man's self-acquisitions which his tarwad, on his death, sometimes allows to his children- in -- Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others, ", Srinivasa Aiyangar J. describes it at p. 400 as follows :

"The husbands of the female members and the children of the male members of a "tarwad" are not members of the "tarwad". It is not uncommon for them to make gifts of properties to their wives, daughters or sisters and their children, and such properties are called "putravakasam" properties."

In -- "Subraniania Aiyar v. Meenakshi Animal", 4 Coc L. J. 88 (E), gifts made in favour of children were described as "Putravakasam" pro-perty, though in that case the learned Judge held further that in the case of donees of "Putravakasam" property, they must be presumed to have taken as co-owners or tenants-in-common. "Putravakasam" property etymologically means property given to a son, but it is not disputed that it includes also property given to children, whether male or female. Sundara Aiyar in his Malabar and Aliyasanthana law states, at page 160 that a "tavazhi" may acquire property by gifts and other kinds of acquisitions, and that such property, when the donor is the father, is known as "putravakasam" property. Even if the donee is not the entire "tavazhi" but only some members of the group constituting the "tavazhi", it is also

described as "putravakasam" property. It cannot therefore be laid down that whenever a gift is made in "putravakasam" right, the gift is to the "tavazhi", though gifts to the "tavazhi" are also described by that name. It follows that the word -putravakasam" right is consistent with the gift made by the father to his children or to all the members of the "tavazhi".

13. The executants of Ex. B. 24 do not leave the question in any doubt, for, they make it clear that the gift of the properties was by the father in "putravakasam" right, which stand in the name of the private "tavazhi". Here we find no room for ambiguity. "Tavazhi" literally means "tayar", mother, and vazhi line, i.e., mother's line. Sundara Aiyar points out in his text book, at page 161, that one of the modes of acquisition by the "tavazhi" is by getting gifts of "Putravakasam" property.

14. In -- Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veettil Chakkara Kannan Vs. Varayalankandi Kunhi Pokker and Others, " Srinivasa Aiyangar J. describes "tavazhis" as follows:

"The tavazhis, or the subordinate groups constituting the "tavazhi", are I think, capable of holding properties as corporate units with the incidents of "tarwad", property at the same time retaining their joint interest in the properties of the main "tarwad", just as branches and sub-branches in a Mitakshara joint Hindu family are capable of holding properties with the incidents of joint Hindu family property. I am also of opinion that some only of the members of a "tavazhi" cannot form a corporate unit capable of holding property as such. The husbands of the female members and the children of the male members of a "tarwad" are not members of the "tarwad".

It will be seen, therefore, that the word "tavazhi" has got a definite connotation in Marumakattayam law. It is a branch of the "tarwad", and it is a distinct entity. It comprises one of the females of the "tarwad" and her descendants in the female line. It is capable of owning property and taking gifts of property. When the executants, who must be presumed to know the concept of a "tavazhi" and its incidents, say in a solemn document executed between them that the property stands in the name of the private "tavazhi", we find it very difficult to say that they do not mean what they say. But it is said that there is no distinction in the instant case between "tavazhi" and "tarwad", for, it is pointed out that the same individuals are members of the "tarwad" as well as the "tavazhi". This argument in our view does not really help the respondents for the use of the word "tavazhi", notwithstanding the fact that all the members of the "tavazhi" are members of the "tarwad" indicates clearly that the executants consciously and deliberately used that word so as to distinguish their "tarwad" properties from "tavazhi" properties.

Nor can we appreciate the emphasis on the word "private" made by the learned counsel for the respondents Private "tavaahi" cannot mean only some members of the "tavazhi". It qualifies the entire word "tavazhi". The parties could have

only meant to emphasise by the use of the adjective "private" the distinction between their "tava-zhi" (Kunhikutti and her descendants in her fe-male line) and the "tarwad". The parties only intended to bring out the idea that the properties belonged to their "tavazhi" as distinct from the "tarwad". If there is any ambiguity, it is also dispelled by the subsequent statement made in the document. In para 4 it is stated that after the death of No. 8, the aforesaid acts of management shall be done and caused to be done in the manner above mentioned by executant No. 1, the "kar-navan" and by executant No. 2, the "karnavathi". This passage makes it clear that the gift was for the "tavuzhi". Otherwise, if the properties were the separate properties of the 7 individuals, no question of the "karnavan" of the "tavazhi" or the "karnavathi" of the "tavazhi" managing the properties arise.

15. In paragraph 5, a distinction is made between borrowings by members individually and for and on behalf of the "tavazhi". In the case of Individual borrowings, it is expressly agreed that neither the property in the schedule nor any of the other properties belonging to the said private "tavazhi" shall be liable. This paragraph makes-it clear that the gift was to the "tavazhi" and that its properties could not be made available for private debts of the executants.

16. Reliance is placed by the learned counsel for the respondents on paragraph 6 of the document, wherein we find that certain amounts due under the "kuri" chit fund were allotted specifically to some of the executants, and the other amounts due from different persons Were allotted to other executants. In regard to Etamarathoiti "kuri" it was agreed that if it was drawn in favour of the executants, the interest accruing due from the prize money and the interest recovered from the other outstandings should be utilised for the due payment of the future instalments and that if interest from the other outstandings was insufficient, the deficit therein should be made good from the income from the schedule properties. Relying upon this recital, it is contended that as the parties agreed to pay the deficit interest in respect of the "kuri" drawn in favour of the executants from and out of the income of the properties covered by the document, it indicates that the properties are not the properties of the "tavazhi" but that of the executants. In our view, no such irresistible inference would flow from this passage. It only means that the executants as representing the "tavazhi" agreed that in that eventuality, the income from the "tavazhi" properties should be utilised. As the "kuri" drawn was on behalf of the "tavazhi" the deficit interest was agreed to be paid by the "tavazhi".

17. What is more, in paragraph 9, they specially mentioned that none of the "tarwad" properties belonging to executants 1 to 7 had been included in this "karar". It is not suggested that executants 1 to 7 constituted the "tarwad". They were only making a distinction between "tarwad" and "tavazhi" properties. The fact that the husband of defendant 14 and the husband of one of the other executants attested the document is relied on. But that does not make the gift any the less a gift to the "tavazhi", if really it was a gift to the "tavazhi".

18. It is said that in Ex. B. 31, the partition deed in respect of the B schedule properties executed between the seven executants they used! The word "private" "tavazhi" only to include the seven children and not their children. It is true that under that document, they divided the properties into seven shares. It is also true that the husband of the 2nd, 6th and 14th defendants attested the document. If Ex. B. 34 clearly shows that the gift was for the "tavazhi" the mere fact that the executants of Ex. B. 24 divided the properties into seven shares in Ex. B. 31 cannot make the gift to the "tavazhi" a gift to the seven individuals as tenants-in-common. Indeed, the partition effected by Ex. B. 31 is now questioned in this suit. We, therefore, hold that the said items are the properties of the "tavazhi".

19. Items 51 to 53 were purchased by Kunhan in the name of Kunhikutti Kolpad and four of her children. These items are not covered by Ex. B. 24. It follows that Kunhikutti and her four children take the same as tenants-in-common. Kunhikutti's share, it is admitted devolves on the "tarwad". On that basis, the plaintiffs and defendant 14 would be entitled to 5/18th of the 1/5th share of Kunhikutti in the said items.

20. It is then contended that the suit is barred under Order 2 Rule 2, Civil P. C. To appreciate this contention, some relevant facts may be stated. Kunhikutti Kolpad and her children separated from their Mandilakkottil "tarwad" under the partition deed Ex. A. 1 in the year 1914. Thereafter they constituted a separate "tarwad". In regard to those properties, the 14th defendant and her children instituted O. S. No. 72 of 1938 on the file of the District Munsif's court, Walluvanad, for partition against the other members of the "tarwad". The parties settled their disputes and executed a partition deed in respect of the properties, Ex. E. 72. Thereafter, they filed an application under Order 23 Rule 3, Civil P. C. to dismiss the suit on the ground that it had been settled. The suit was dismissed -- Vide Ex. B. 76.

The argument is that as no partition was asked of the B schedule properties in the suit, the present suit is barred under Order 2 Rule 2, Civil P. C. If, under Ex. B. 76, the District Munsif made a valid order under Order 23 Rule 3, Civil P. C. no question of any bar under Order 2 Rule 2 would arise. Even if Order 23 Rule 3 did not apply, we cannot hold that Order 2 Rule 2, Civil P. C. bars the pre-sent suit. The necessary condition for the application of Order 2 Rule 2 is that both the suits should arise in respect of the same cause of action. From the aforesaid statement of facts, it is seen that O. S. No. 72 of 1938 was a suit filed by the plaintiffs for partition of their "tarwad" properties, i.e., properties which they got in the partition of Mandilakkottil properties. On the other hand, O. S. No. 85 of 1944 is a suit for partition of the properties of the "tavazhi" of Kunhikutti Kolpad as a different entity. Though it is a coincidence that in the instant case, all the members of the "tarwad" are members of the "tavazhi" it need not necessarily be so. They are two legal entities. The cause of action for partition of the "tarwad" properties and that of the "tavazhi" properties gifted to it by

Kunhan is not the same. We, therefore, hold that Order 2 Rule 2 is not a bar to the maintainability of the suit.

21. The next contention is that the suit, as framed, is not maintainable, as by reason of the filing of O. S. No. 390 of 1943, there was a division in status in the "tavazhi". O. S. No. 390 of 1943 was a suit filed by the first plaintiff for partition and separate possession of the B schedule properties. That suit was filed in the Court of the District. Munsif of Walluvanad on 13th November 1944. The learned District Munsif found that the Mun-sif's court had no jurisdiction to try the case, as the valuation for the purpose of jurisdiction was more than Rs. 3000. The plaint was accordingly returned for presentation to the proper court. Thereafter, the present suit was filed. It was argued that, by reason of the filing of that suit, there was a division in status between the first plaintiff and the other members of the family, and that this suit, filed as if all the plaintiffs are members of the "tavazhi", is not maintainable.

It is true that the filing of the suit by the first plaintiff effected a division in status between the first plaintiff and others, and the return of the suit for presentation in a different court would not efface the division in status created by the filing of the suit. It has been so held in -- "Radhakrishna v. Satyanarayana", AIR 1949 Mad 173 (P). There, a suit was filed for partition of the plaintiff's share and for possession. Notice was served on all the defendants. Thereafter, the plaintiff intended to revoke the intention to divide, expressed in the plaint. The learned Judge held that division in status has been brought about by the plaint in the suit and it was not open to the plaintiff therein to revoke or withdraw the unambiguous intention to separate contained in the plaint, so as to restore the joint status, and, as such, the members should be treated as divided members for the purpose of working out their respective rights, so too, in the present case, as the plaintiff declared his unambiguous intention to divide from the rest of the members of the "tavazhi" by filing the suit, he cannot withdraw that intention. The fact that the plaint was returned for presentation to the proper court could not have the effect of making him a member of the "tarwad" again.

But, in our view, the said legal position has no practical bearing on the question of the maintainability of the suit. The present suit is filed by six plaintiffs. Plaintiffs 3 to 6, being minors, are represented by the first plaintiff as their next friend. Whether the first plaintiff is divided from the other plaintiffs or not, all the plaintiff put together would be entitled to the same share. It is open to them to ask for separate shares, as between themselves, but they have not chosen to do so. But that is not the concern of the defendants. The suit is, therefore, maintainable.

22. The learned counsel for the respondents then argues that the entire partition effected between the parties under Ex. B. 31 need not be reopened, for the parties to the document other than the plaintiffs have neither questioned it nor have they any grievance in respect of it. The advocates appearing for the various respondents expressed their willingness to abide by the said partition. By reason

of our aforesaid findings it is not disputed that the partition should have been effected on "per capita" basis. But it is said that defendant 14 should not be given any relief in this suit as she is not one of the plaintiffs- But in the plaint relief was asked for not only for the plaintiffs out also for the 14th defendant. In the partition effected under Ex. B. 31 she got 1/7 share in the family properties. Now, under the new scheme, she would only get a lesser share. Unless the partition is reopened so far as she also is concerned, there would be conflict between the two partitions. We would, therefore, direct the reopening of the partition of the B schedule properties for the purpose of giving relief to the six plaintiffs and the 14th defendant. Though the plaint-schedule properties will have to be divided on per capita" basis for the purpose of giving relief to the plaintiffs and defendant 14, as regards the other parties the partition effected by Ex. B. 31 would stand. As regards the share to which the plaintiffs and defendant 14 would be entitled, it is not disputed that two of the plaintiffs were not born at the time when Ex. B. 31 was executed, and that therefore they are not entitled to separate shares. On that basis plaintiffs 1 to 4 and defendant 14 would be entitled to 5/18th share in the items covered by Ex. B. 24.

23. In the result, the decree of the lower court is modified. In the circumstances, we direct the parties to bear their own costs.