

(1954) 11 KL CK 0003
In the High Court Of Kerala
Case No : A.S. No's. 883 and 884 of 1950

Govindan Nair Neelakantan Nair

APPELLANT

Vs

Narayani Amma

RESPONDENT

Date of Decision : 10-11-1954

Acts Referred:

Travancore Nair Act, 1912 — Section 26

Citation : AIR 1954 Ker 235

Hon'ble Judges : Koshi, C.J;Subramonia Iyer, J;Kumara Pillai, J

Bench : Full Bench

Advocate : T.N. Subramonia Iyer and S. Subramonia Iyer, for the Appellant;
K.N. Narayanan Nair, for the Respondent

Final Decision : Dismissed

Judgement

Kumara Pillai, J.—These appeals have been referred to the Full Bench on account of a dispute regarding the construction of S. 26 of the Nair Act (Travancore) of 1088. They arise out of two connected suits tried and disposed of together by the Temporary Second Judge of the District Court of Mavelikara. A.S. No. 883 of 1950 arises out of O.S. No. 100 of 1119, and A.S. No. 884 of 1950 arises out of O.S. No. 99 of 1119. The latter suit was treated as the main suit in the trial Court, and the evidence for both was taken and the leading judgment written in it. The plaintiff in O.S. No. 99 of 1119, Narayanan Nair Kuttappan Nair, and the plaintiff in O.S. No. 100 of 1119 Narayani Anuria Nangeli Arnma, as well as defendants 13 and 14 in O.S. No. 99 of 1119 and defendant 3 in O.S. No. 100 of 1119 belong to a Nair tarwad known as Velumelethil, and defendants 1 and 2 in both suits are the sons of Narayanan Govindan, who was the karnavan of Velumelethil tarwad. Narayanan Govindan died in 1098. His wife, the mother of defendants 1 and 2, who pre-deceased him, died before the Nair Act (Travancore) of 1088 came into force. Some of the suit properties in both cases are claimed by defendants 1 and 2 as the self-acquired and separate properties of their father, Narayanan Govindan, and to have been inherited by them after

his death. Under the law governing Nairs before the enactment of the Nair Act of 1088, the widow and children of a deceased Nair male had no right of inheritance to his self-acquired and separate properties. By S. 12 of that Act, they were given a right to inherit one-half of his self-acquired and separate property left undisposed of by him. Section 26 of the Act provides that nothing in that Act shall confer any right on the children of a marriage dissolved before it comes into force. The dispute which has necessitated this reference is whether the word "dissolved" used in S. 26 has reference only to a dissolution by act of parties or through a Court of law or whether it would include a natural termination of the marriage by reason of the death of one of the spouses. If the word would include also a natural termination of the marriage by reason of the death of one of the spouses, defendants 1 and 2 would not be entitled to any of the self-acquired or separate properties of Narayanan Govindan left undisposed of by him.

2. According to the plaintiffs in both suits, the plaint properties in the two suits belonged to Velumelethil tarwad and were in the possession of Narayana Govindan, who was the karnavan of the tarwad, till his death in 1097. After his death, his younger brother, Narayanan Neelakantan became the karnavan, and he was in possession of all the tarwad properties including the plaint properties in the two suits, till his death in 1109. Shortly after his death, some members of the tarwad filed a suit for partition in the Thiruvalla Munsiff's Court on 28-3-1109. Taking advantage of the internecine quarrels in the tarwad after Narayanan Govindan's death, which led to the filing of the suit for partition, defendant 1, whose wife also belongs to Velumelethil tarwad, and his brother, defendant 2, executed certain documents on 25-3-1109, with a view to take forcible possession of the plaint properties. Exts. D and II are copies of two of the documents executed by them on 25-3-1109. Ex. D is a mortgage executed in favour of the 4th defendant in O.S. No. 100 of 1119 for a portion of plaint schedule item 3 in that suit and certain other properties, and Ex. H is a mortgage executed in favour of defendants 3, 4 and 5 in O.S. No. 99 of 1119 for a portion of plaint schedule item 1 in that suit. Since defendants 1 and 2 and their alienees attempted to take forcible possession of the properties after the execution of these documents, the then manager of Velumelethil tarwad, Narayan Nair Madhavan Nair, instituted proceedings under S. 128, Travancore Criminal P.C. (corresponding to S. 145, Indian Criminal P.C.) in the Chengannur First Class Magistrate's Court. That case was tried as MC 8 of 1109 and while it was pending, the members of Velumelethil tarwad executed a partition deed, copy of which is Ex. N, on 5-11-1110, whereby the plaint properties in O.S. No. 99 of 1119 were allotted to the branch of the plaintiff in that suit (Narayanan Nair Kuttappan Nair), and the plaint properties in O.S. No. 100 of 1119 were allotted to the branch of the plaintiff therein (Narayani Amma Nangeli Amma). On the execution of Ex. N, the First Class Magistrate dropped the proceedings in M.C. No. 8 of 1109 holding that there was no further likelihood of a Breach of the peace. But defendants 1 and 2 and their alienees were not parties to Ex. N, and the dispute between them on the one hand and the plaintiff's tarwad on the

other hand had not been settled by the execution of that document. So the members of the plaintiff's tarwad objected to the Magistrate's order in M.C. 8 of 1109 being given effect to, and thereupon he passed fresh proceedings under S. 128, Travancore Criminal P.C. and took up another case, M.C. 38 of 1111, in respect of the plaint properties in O.S. Nos. 99 and 100 of 1119. On 30-9-1117, the Magistrate disposed of M.C. 38 of 1111 holding the defendants 1 and 2 and their alienees were in possession of the properties and direct that their possession should be maintained until they were evicted in due course of law. After the revision petition which the members of the plaintiffs' tarwad filed in the High Court against the Magistrate's order was dismissed, the plaintiffs brought O.S. Nos. 99 and 100 of 1119 for declaration of the title of their branches to the properties and recovery of possession of the same with mesne profits after cancellation of Exts. D and H and certain other documents executed by defendants 1 and 2.

3. O.S. No. 99 of 1119, brought by Narayanan Nair Kuttappan Nair, relates to eight items of property got under the partition deed Ex. N. Plaint item 5 in O.S. No. 99 is 63 1/2 cents of land comprised in survey No. 1631A of Aiyroor Pakuthy. Items 1, 2, 3, 4, 6, 7 and 8 are different plots in survey No. 169/1 of the same Pakuthy, and they measure 6 acres, 3 acres 50 cents, 3 acres 25 cents, 6 acres, 4 acres, 1 acre 50 cents, and 1 acre respectively. The documents sought to be cancelled in this suit are (1) Ex. H, mortgage executed by defendants 1 and 2 in favour of defendants 3, 4 and 5 for a portion of item 1 on 25-3-1109, (2) a sale deed executed by defendant 1 in favour of defendant 6 for a portion of items 1 and 2 on 4-8-1111, (3) Ex. J, sale deed executed by defendant 1 in favour of defendant 7 for a portion of item 4 on 6-7-1116, (4) Ex. M, a mortgage executed by defendant 1 in favour of defendant 8 for a portion of item 4 on 7-11-1118, and (5) Ex. K, sale deed executed by defendant 1 in favour of defendant 15 for a portion of item 8 on 6-7-1116.

4. O.S. No. 100 of 1119, brought by Narayani Amma Nangeli Amma, relates to four items of property which her branch obtained under Ex. N. Items 1 and 2 are two plots in survey No. 169/1 measuring 1 acre, and 2 acres 50 cents respectively. Item 3 is a plot of 2 acres 50 cents comprised in survey No. 164 1 and item 4 is a plot of 4 acres 75 cents comprised in survey Nos. 163 1 and 165/1. The documents sought to be set aside in O.S. No. 100 are (i) Ex. G, sale deed executed by defendants 1 and 2 in favour of defendant 3 in that suit for a portion of item 3 therein and other properties on 25-3-1109, (ii) Ex. D, mortgage executed by defendants 1 and 2 in favour of defendant 4 in that suit for a portion of item 3 therein and Other properties. On 25-3-1109, (iii) Ex. AR, sale deed executed by defendant 1 in favour of defendant 5 in that suit for a portion of item 2 therein and other properties on 4-8-1111, and (iv) Ext. M, sale deed executed by defendant 1 in favour of defendant 6 in that suit for a portion of item 2 therein and other properties on 7-11-1118. Defendant 6 in O.S. No. 100 of 1119 is defendant 8 in O.S. No. 99 of 1119, and Ext. M is sought to be set aside in both suits as both plaint item 4 in O.S. No. 99 of 1119 and plaint item 2

in O.S. No. 100 of 1119 are comprised in that document.

5. The cases of the plaintiffs in the two suits are the same. According to them, the plaint properties in the two suits belonged originally to their tarwad and under the partition deed, Ex. N, executed by the members thereof the branch of the plaintiff in O.S. No. 99 of 1119 have obtained the plaint properties in that suit and the branch of the plaintiff in O.S. No. 100 of 1119 have obtained the plaint properties in that suit. The properties, therefore, now belong to the two branches as mentioned above and defendants 1 and 2 and their alienees have no right at all to them. The documents executed by defendants 1 and 2 are invalid and not binding on the plaintiffs and the members of their branches and the plaint properties since defendants 1 and 2 were incompetent to execute the same. The plaintiff in each case sought for a declaration of the title of his or her branch to the plaint properties in that case, cancellation of the documents executed by defendants 1 and 2 in respect of those properties, and recovery of possession of the respective properties with mesne profits. Mesne profits were claimed at the rate of Rs. 205/- per annum in O.S. No. 99 of 1119 and at the rate of Rs. 201/- per annum in O.S. No. 100 of 1119.

6. Both suits were contested by defendant 1. Although O.S. No. 99 of 1119 was contested by defendants 3, 4 and 5 also in that suit, it is not necessary to refer in this judgment to their contentions as they have not preferred any appeal.

7. In O.S. No. 99 of 1119 the contentions of defendant 1 were as follows: The plaint schedule properties were not the tarwad properties of Velumelethil, and the members of that tarwad had, therefore, no right to deal with them in Ex. N, partition deed. The plaintiff has, therefore, obtained no right to those properties by their inclusion in Ex. N. Plaint items 1 to 4, 8, 7 and 8 were the self-acquisitions of Narayanan Govindan, the father of defendants 1 and 2, when he was a junior member. Item 5 was the self-acquisition of Narayanan Govindan's younger brother, the deceased Narayanan Velayudha. During his life-time, Narayanan Velayudhan leased item 5 to defendant 1, and the latter is now in possession of that item as lessee, with the consent of Narayanan Velayudhan's heirs. Narayanan Govindan died in 1102. Before his death, he had executed on 9-7-1094 a gift deed in favour of defendants 1 and 2 and their brother and the wife of the first defendant giving to them about 5 acres of land in survey No. 169/1, and on his death in 1102 defendants 1 and 2 obtained all the remaining lands in that survey number as his heirs. In any case before the date of Ex. N, defendants 1 and 2 had perfected title by adverse possession to the plaint properties Narayasan Neelacantan was never in possession of those properties. The documents executed by defendants 1 and 2 are perfectly valid and are not liable to be set aside since the properties belonged to them. The suit is also barred by limitation and adverse possession, and in any event, the defendants are entitled to get the value of the improvements effected by them in the properties.

8. Almost identical contentions were advanced in O.S. No. 100 of 1119 also with

respect to the properties involved in that suit. Plaint item 4 in O.S. No. 100 of 1119 was claimed to be the self-acquisition of Narayanan Velayudhan and it was alleged that after his death item 4 was inherited by his heirs and was in their possession. It was contended that plaint items 1 to 3 in O.S. No. 100 of 1119 were the self-acquisitions of Narayanan Govindan, being puthuval registries obtained by him while he was a junior member of the tarwad, that after his death those items were inherited by defendants 1 and 2 as his heirs, that the plaintiff and her tarwad had no right to those properties, and that the properties were also in the possession of defendants 1 and 2. As in O.S. No. 99 of 1119, adverse possession and limitation were pleaded and value of improvements claimed in O.S. No. 100 of 1119 also.

9. The lower Court found that plaint item 5 in O.S. No. 99 of 1119 and plaint item 4 in O.S. No. 100 of 1119 were the self-acquisitions of Narayanan Velayudhan, and dismissed the two suits so far as those two items were concerned, holding that the plaintiffs tarwad had no right to the said properties. So far as the remaining properties in the two suits were concerned, the lower Court did not decide the question whether they were the self-acquisitions of Narayanan Govindan or not and held that, even on the assumption that they were the self-acquisitions of Narayanan Govindan, they devolved on his death, on the plaintiff's tarwad and not on defendants 1 and 2 and that the said properties, therefore, belonged to the plaintiffs' tarwad and not to defendants 1 and 2. The reason given for this finding was that, since the mother of defendants 1 and 2 had died before the Nair Act of 1908 came into force, defendants 1 and 2 were not entitled on account of S. 28 of that Act to inherit the self-acquired and separate property of Narayanan Govindan, left undisposed of by him at his death. Negating also the plea of adverse possession and limitation, as well as the claim for value of improvements, the lower Court decreed O.S. No. 99 of 1119 so far as plaint items 1 to 4 and 6 to 8 therein were concerned, and O.S. No. 100 of 1119 so far as the plaint items 1 to 3 therein were concerned, declaring the title of the plaintiff in each suit to the respective properties and allowing the plaintiffs to recover possession of the same with mesne profits. The rate of mesne profits was left to be decided in execution. Since most of the plaint items in the two suits are different plots in survey No. 166/1 and there are also other plots in that survey number not involved in these suits, a direction was also made in the decree to the effect that the plaint items should be surveyed and demarcated before actual recovery. From the decree in O.S. No. 99 of 1119 defendants 1 and 10 have filed A.S. No. 884 of 1950, and from the decree in O.S. No. 100 of 1119 defendant 1 has filed A.S. No. 883 of 1950. Plaintiffs have not objected to the finding that item 5 in O.S. No. 99 of 1119 and item 4 O.S. No. 100 of 1119 are the self-acquisitions of Narayanan Veladudhan and do not belong to their tarwad.

10. As has been stated already, most of the plaint items in the two suits are different plots in S. No. 169/1 which has an extensive area. It is common ground that Narayanan Govindan has executed in 1094 a gift deed in favour of his sons

and the defendant 9 for a portion of S. No. 169/1. Exhibit V is the original gift deed, and Ex. A is a copy of it. In these suits plaintiffs have not questioned Ex. V and do not seek to recover possession of the plot comprised in that gift deed. It would appear from the evidence of the plaintiff in O.S. No. 100 of 1119 (P.W. 2) that, Ex. V being a gift by the karnavan of the tarwad to his sons and the wife of one of his sons, the members of the tarwad did not take any step to have it set aside. The son's wife herself was a member of the plaintiffs' tarwad. The items sought to be recovered in these suits are mostly plots in the remaining portion of survey No. 169/1. Plaintiffs claim these items as their tarwad properties and as allotted to them in the tarwad partition, Ex. N. Ex. N would show that the plaintiff items were included in the tarwad partition and have been allotted to the share of the branches of the two plaintiffs. The appellants' case in the lower Court was that the plaintiff properties were part of the self-acquired and separate properties of Narayanan Govindan, left undisposed of by him at his death, that Narayanan Govindan died in 1102, that on his death the plaintiff properties devolved on defendants 1 and 2 as his heirs, that the plaintiff and her tarwad had, therefore, no right to them, and that those properties were wrongly or fraudulently included in the partition deed.

11. Until the enactment of the Nair Act of 1088 the widow and children of a deceased Nair male had no right of inheritance to him, and all his self-acquired and separate property left undisposed of by him at his death were taken by his Marumakkathayam heirs. By the Nair Act of 1088, the widow and children were given the right to inherit one-half of the self-acquired and separate property left undisposed of by the deceased. The other half was to be taken by his undivided Marumakkathayam heirs, and in the absence of the Marumakkathayam heirs, the widow and children were to take the whole of the self-acquired and separate properties. The Nair Act of 1100, which came into force on the 1st Chingom 1101, provided that the widow, mother and children of a deceased male were to take the whole of the self-acquired and separate property left undisposed of by him and that in the absence of the widow and the mother, the children should take the whole. In the lower Court, the appellant had contended that as Narayanan Govindan had died only in 1102 and his mother and wife had predeceased him, defendants 1 and 2, who were his surviving children, had obtained on his death the whole of his self-acquired and separate properties left undisposed of by him, including the plaintiff properties in O.S. No. 99 of 1119 and O.S. No. 100 of 1119. The plaintiff's answer to this contention was that Narayanan Govindan had died in 1097 and not in 1102, that succession to his self acquired and separate properties was therefore governed by the Nair Act of 1088 and not by the Nair Act of 1100, that, even on the assumption that the plaintiff properties were the separate and self-acquired property of Narayanan Govindan left undisposed of by him at his death, defendants 1 and 2 were not entitled to them because of the provision in S. 26 of the Act of 1088 that nothing in the said Act would confer any right on the parties to or offspring of a marriage dissolved before it came into force, and that on Narayanan Govindan's death the

whole of his separate and self-acquired property left undisposed of by him devolved on their farwad. The lower Court has found that Narayanan Govindan died in 1098 when the Nair Act of 1088 was in force, and upheld the plaintiffs' case that on account of S. 26 of that Act defendants 1 and 2 have not obtained any right to his self-acquired and separate properties left undisposed of by him at his death, and that, on his death, such properties devolved on the plaintiffs' tarwad.

12. In view of the death certificate, Ex. W, the appellants' counsel did not dispute, and at the time of hearing, the correctness of the finding that Narayanan Govindan died on 30-11-1098, and so he did not press the contention that the whole of the self-acquired and separate properties of Narayanan Govindan left undisposed of by him at his death had devolved on defendants 1 and 2 under the Nair Act of 1100. The case put forward in this Court on behalf of the appellants was that the finding of the lower Court that defendants 1 and 2 had no right or title at all to the plaint properties was wrong, that on Narayanan Govindan's death one-half of his self-acquired and separate properties had devolved on defendants 1 and 2 under S. 12 of the Nair Act of 1088, that the provision in S. 26 of the Act would not apply to defendants 1 and 2 since the dissolution of the marriage contemplated in that section was only a dissolution by act of parties or through Court of law and would not include a natural termination of the marriage by reason of the death of one of the spouses, and that on Narayanan Govindan's death defendants 1 and 2 had, therefore, obtained one-half of the plaint properties other than item 5 in O.S. No. 99 of 1110 and item 4 in O.S. No. 100 of 1119 By right of inheritance.

13. Part IV of the Nair Act of 1038 bears the heading "Intestate Succession" and Part VII of that Act bears the heading "Supplemental Provisions." Section 12 occurs in Part IV and Section 26 in Part VII. Section 12 reads as follows:

On the death of a Nair male, leaving him surviving a widow or children, or both, she or they shall, if he has undivided Marumakkathayam heirs, be entitled to a half-share in self-acquired or separate property left undisposed of at his death, and, if there are no such heirs, such widow or children or both shall be entitled to the whole of such property.

Section 26 reads as follows:

Nothing in this Regulation shall (1) confer any right on the parties to, or offspring of, a marriage dissolved before it comes into force; or (2) affect the existing rules of Marumakkathayam Law, custom or usage, except to the extent hereinbefore provided for.

It was contended by the appellants' counsel that S. 12 confers the right upon all the children of a Nair male to inherit one-half of his self-acquired and separate properties left undisposed of by him at his death, irrespective of any consideration as to whether the marriage of their mother with him had been dissolved before the Act came into force or not, that S. 26 is a clear curtailment

of the right conferred by S. 12, that by the subsequent section in the part relating to Supplemental Provisions, the Legislature could not have intended to curtail the right which it had conferred in regard to Intestate. Succession to a father on all his children irrespective of the question whether his marriage with their mother had been dissolved before the Act came into force or not, and that unless the word "dissolved" occurring in S. 26 was taken as meaning a divorce or dissolution by act of parties or through Court of law, and not including a natural termination of the marriage by reason of the wife's death, there would be a repugnancy between the two sections. The learned counsel also contended that it was inequitable to draw a distinction in the matter of Intestate Succession between children whose mother had died before the Act came into force and children whose mother was alive at the time it came into force and that the framers of a progressive piece of legislation like the Nair Act of 1088 could not have intended to make such a distinction.

14. Part II of the Act of 1088 bears the heading "Marriage and its Dissolution." Section 4 occurring in that Part bears the marginal note "Dissolution of marriage" and reads as follows:

Such marriage may be dissolved only in one of the following ways:

- (1) By death of either party, or
- (2) By mutual consent evidenced by a registered document; or
- (3) By a formal order of dissolution as hereinafter provided.

Section 5 provides for dissolution through court of law. Section 4 would, therefore, indicate that the expression "dissolved" was meant to include not only dissolution by act of parties or through court of law but also natural termination of a marriage by reason of the death of one of the spouses. Unless there is something in the context to indicate the contrary, the ordinary presumption in construing statutes is that the same expression used in different sections of an Act has the same meaning. "Maxwell on the Interpretation of Statutes" (Edn. 10 p. 322) contains the following passage:

It is at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. Accordingly, in ascertaining the meaning to be attached to a particular word in a section of an Act, though the proper course would seem to be to ascertain that meaning if possible from the consideration of the section itself, yet, if the meaning cannot be so ascertained, other sections can be looked at to fix the sense in which the word is there used.

If the meaning of a word used in a particular section cannot be found out from that section itself, Jessel, M.R. has held in "Spencer v. Metropolitan Board of Works" (1883) 22 Ch D 142 (A) that:

as a general rule a word is to be considered as used throughout an Act of

Parliament in the same sense, and that, therefore, we may look through the other sections to see in what sense the word is there used.

Having regard to the clear meaning of the word as gatherable from S. 4 and to the fact that there is nothing in S. 26 itself to show that it has been used in that section in a limited sense or in a sense other than the one in which it has been used in S. 4, it is not possible to hold that the word "dissolved" in S. 26 means only dissolution by act of parties or through court of law and does not include a natural termination of the marriage by the death of the wife.

15. The contention that S. 26 is repugnant to S. 12 and that it is a curtailment of the right conferred by S. 12 is also unsustainable. Up to the enactment of the Nair Act of 1088, Nairs in Travancore were governed by the Marumakkathayam Law, pure and simple. Important changes in the branches of that law affecting marriage and its dissolution, guardianship and inheritance were sought to be introduced by the enactment of that Act so far as Nairs were concerned. In making those changes, it was perfectly within the competence of the Legislature to provide that the changes shall not affect the parties to, or offspring of, a marriage which had already been dissolved and was not in existence on the date of the enactment. Section 26 provides only thus much and nothing more. It is only a saving clause and provides but for an exception to the general rule. It has not the effect of taking away any vested right. In cases in which the succession opened before the passing of the Act of 1088 that Act will have no application at all, and the widow and the children of the deceased will have, in such cases, no right to inherit his self-acquired and separate properties, since under the law as it then stood they had no such right. In cases in which the succession opened after the passing of the Act of 1088, the succession will be governed by S. 12, subject to the proviso contained in S. 26. Section 26 has not, therefore, curtailed any right which was vested in any one. An exception or a saving clause may be enacted in any Part of a Statute, either in the section to which the exception is sought to be made or in a separate section, Part, or Chapter. In the Act of 1088, Part 7 bears the heading "Supplemental Provisions" and contains only one section, viz. S. 26; and both clauses of that section are of the nature of saving clauses or exceptions. Regarding construction to avoid collision with other provisions, it is said in "Maxwell on the Interpretation of Statutes" (Edn. 10, page 162):

There is no rule that the first or enactment part is to be construed without reference to the proviso. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest. The true principle, undoubtedly, is that the sound interpretation and meaning of the statute, on a view of the enactment clause, saving clause, and proviso, taken and construed together is to prevail.

The mere fact that a saving clause or exception enacted in a subsequent section controls and limits the operation of a former section cannot, therefore, render

the subsequent section repugnant to the former section.

16. As regards the argument about the intention of the Legislature and the inequity in not allowing children whose mother is dead to succeed to their father's self-acquired and separate properties when children whose mother is alive are allowed to succeed to such properties, it has to be said, first of all that "the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the court as to what is just or expedient." (Maxwell Edn. 10, p. 5). The plain meaning of the words "dissolved" and "dissolution" would include a termination of the marriage by the death of either of the spouses: Section 4 of the Act of 1088 also makes it clear that the word "dissolved" has been used in that Act as meaning not only dissolution by act of parties and through court of law, but also a termination of the marriage by the death of either party. Therefore, there is little room for doubt about the intention of the Legislature. Nor can the Legislature be said to have acted unreasonably or inequitably. The right of inheritance to the self-acquired and separate properties of a father was an entirely new right, novel to Marumakkathayam law, and it was being conferred for the first time by S. 12. It is, therefore, not unlikely that the framers of the legislation considered that the change should be made gradually and in a manner generally acceptable to the community concerned. They might have thought that the new right of Intestate Succession to the father need not be conferred on children born of marriages which were not subsisting at the time the Act came into force. It was contended by the appellant's counsel that, if the word "dissolved" in S. 26 would include termination of the marriage by the death of either of the spouses it would be fraught with grave and disastrous consequences and that the Legislature could not have intended to bring about such a state. Section 10 of the Act of 1083 provides that the wife and minor children shall be entitled to be maintained by the husband or father, as the case may be, and S. 11 enacts that the husband shall be the legal guardian of his minor wife and the father the legal guardian of his minor children. According to the learned counsel, if the effect of S. 28 is not to confer any right on children whose mother had died before the Act of 1088 came into force, they would be deprived of the right of maintenance and would also have no guardian to look after them, and the Legislature could not have intended to place them in that situation. This argument overlooks very many important facts. Before the enactment of the Nair Act of 1088, the karnavan of the children's tarwad was their guardian and the children were also entitled to get maintenance from their tarwad. In the case of children whose mother had died before the Act of 1088 came into force, this right would, of course, continue even after that Act, for not only does S. 26(2) provide that nothing in the said Act shall "affect the existing rules of Marumakkathayam law, custom or usage, except to the extent herein before provided for", but Ss. 10 and 11 also contain important provisos. The second proviso to S. 10 reads: "Nothing herein contained shall affect the rights of the wife or widow and children to be maintained by their own tarwad". Even

the guardianship of the husband or the father under S. 11 was limited to cases in which the wife and the children were maintained by him and lived with him or under his protection and did not extend to cases in which they were maintained by and living in their tarwad.

17. In this connection, a reference to S. 44 of the Nair Act of 1100 will be profitable. That Act is divided into Chapters, and Chapter IV thereof relates to Intestate Succession. Chapter IX bears the heading "Supplemental Provisions". Section 44 occurs in that Chapter, and Cls. (a) and (b) of the said section provide that nothing in the Act of 1100 shall:

(a) affect the existing rules of Marumakkathayam Law, custom or usage, except to the extent hereinbefore expressly provided for; or

(b) confer any right on the parties to a marriage dissolved before Regulation 1 of 1088 came into force.

The difference in language between S. 26(1) of the Act of 1088 and S. 44(b) of the Act of 1100 is very significant. Section 26(1) of the Act of 1088 had provided that nothing in that Act shall "confer any rights on the parties to, or offspring of, a marriage dissolved before it comes into force". In S. 44(b) of the Act of 1100, the words "or offspring of," have been omitted, and thereby, in cases of succession which opened after the Act of 1100 came into force children born of marriages which had been dissolved before the Act of 1088 came into force have also been enabled to inherit the self-acquired and separate properties of their fathers. In *"Thankamma v. Lekshmi Anna, 1947 Trav LR 841 (B)*, in which the question arose for decision whether, in the case of a Nair male dying intestate after the Nair Act of 1100 came into force, his offspring of a marriage which was dissolved before the Act of 1088, would be entitled to succeed to his estate, it was held by the former High Court of Travancore that such offspring were entitled to succeed to his estate. In that case, after quoting S. 26(1) of the Act of 1088, the learned judges who decided it have observed:

But while enacting S. 44(b) of Act II of 1100, the words or offspring of had been omitted, retaining however the position of the parties to the marriage as it was in Act I of 1088. Section 44(b) of Act II of 1100 stood thus. "Nothing in this Regulation shall confer any rights on the parties to a marriage dissolved before Regulation I of 1088 came into force". The object of the Legislature was, therefore, clear and it was to take away the disqualification of the children to inherit the father's properties, if the father died only after 1101, "though their mother was dead," or the marriage of their mother with their father had been terminated before 10-3-1088. The Act of 1088 came into force on 10-3-1088.

From the passage quoted above, it may thus be seen that the former High Court of Travancore also had considered that the word "dissolved" in S. 26(1) would include a natural termination of the marriage by reason of the wife's death.

18. For the reasons stated above, we hold that the children of a marriage which

was dissolved before the Nair Act of 1088 came into force on account of the death of the wife, were not entitled to claim the right of inheritance to their father under S. 12 of that Act, that is to say, in the case of a Nair male, who had died after the enactment of the Act of 1088, but before the passing of the Nair Act of 1100, his children were not entitled to claim any right of inheritance to his self-acquired and separate properties, if his marriage with their mother had been dissolved by the mother's death before the Act of 1088 came into force. It is admitted by both sides that the plaintiffs' tarwad was undivided at the time of Narayanan Govindan's death and that Narayanan Govindan was a member of that tarwad. It, therefore, follows that the lower Court was right in holding that, even on the assumption that plaint schedule items 1 to 4 and 6 to 8 in O.S. No. 99 of 1119 and plaint schedule items 1 to 3 in O.S. No. 100 of 1119 were the self-acquired and separate properties of Narayanan Govindan, left undisposed of by him at his death, defendants 1 and 2 have not obtained any right to them, and that on Narayanan Govindan's death the said items devolved on the members of the plaintiffs' tarwad and not on defendants 1 and 2. These items, therefore, belonged in any case to the plaintiffs' tarwad, and the members of that tarwad have under the partition deed Ex. N, allotted them to the branches of the plaintiffs in the two suits. The case of adverse possession and limitation which defendant 1 had put forward in the lower Court was not pressed at the time of hearing in this Court.

19. The only other question that remains for consideration is the appellant's claim for value of improvements. Defendant 1 had claimed Rs. 25,000 in each suit as the value of the improvements effected from the year 1097. The lower Court refused the claim on the ground that defendants 1 and 2 and their alienees have not effected any improvements. In the appeals, the appellants have made substantial reductions in their claims. In A.S. No. 883 of 1950, arising out of O.S. No. 100 of 1119, defendant 1 claims only Rs. 1,500 on account of value of improvements, and in A.S. No. 834 of 1950 arising out of O.S. No. 99 of 1119 appellants claim Rs. 3,000 under this head. In any case the appellants will not be entitled to get the value of the improvements in the properties sold by defendants 1 and 2. The buyers have not come up in appeal claiming any value of improvements. Defendants 1 and 2 claim to have obtained the properties (other than item 5 in O.S. No. 99 of 1119 and item 4 in O.S. No. 100 of 1119) only as the heirs of their father and after his death. In his deposition defendant 1 said that he had effected improvements after his father's death, and according to him, his father died only in 1103. Exhibit W proves conclusively that Narayanan Govindan died on 30-11-1098, and that is the finding of the lower Court also. In the circumstances the claim for the value of the improvements from 1097 is, in any event, unsustainable. According to the plaintiffs, defendants 1 and 2 got possession only on 3-11-1112, after the order in M.C. No. 8 of 1109. The Receiver appointed in that case was directed by the Magistrate to give them possession of the properties during the pendency of M.C. No. 38 of 1111. If the plaintiffs' case is true, the appellants would not be entitled to any value of

improvements, for they could not have effected any improvements before 3-11-1112 and defendant 1 himself admitted in his evidence that he has not effected any improvements in the properties after 3-11-1112. So, the main question for decision is whether defendants 1 and 2 got actual possession of the properties on their lather's death and were in possession of them till the Receiver was appointed in M.C. No. 8 of 1109. If they were in possession during, that period, it is not unlikely that they might have effected some improvements in the properties. If they were not in actual possession, it is not at all likely that they would have effected any improvements at all in the properties.

20. Even the children born of a marriage which was subsisting on the date the Nair Act of 1088 came into force were entitled to inherit only one-half of the self-acquired and separate properties of their father and his undivided Marumakkathayam heirs were entitled to the other half. Under S. 13 of the Act of 1088 until division between the children and the undivided Marumakkathayam heirs, possession of the sell-acquired and separate properties of the deceased was to be with the senior male member among the undivided Marumakkathayam heirs, or in the absence of a male member, with the senior female member among such heirs. It was, therefore extremely unlikely that the members of the plaintiffs' tarwad would have allowed defendants 1 and 2 to take possession of the properties. First of all, they were contending that defendants 1 and 2 have no right at all to the properties left by Narayanan Govindan since the latter's marriage with the defendants mother had been dissolved before the Act of 1088 came into force. Then there was the undeniable fact that even children of a subsisting marriage were entitled only to one-half of the properties left by the deceased, and lastly there was the right of the senior member of the plaintiffs' tarwad to be in possession of all the properties until a division was effected between the children and the Marumakkathayam heirs. The probabilities are, therefore, strongly in favour of the plaintiffs' case that defendants 1 and 2 did not get possession after Narayanan Govindan's death and that they got possession only from the Receiver on 3-11-1112. Exhibits Y, Z, AA, AB, AC, AD, AH and AJ show that after Narayanan Govindan's death the next senior member of the plaintiffs' tarwad obtained transfer of patta for the plaint properties and that the tax was also being paid a least till the institution of M.C. No. 8 of 1109 by members of the plaintiffs' tarwad. Exhibits O and U, both of which are registered documents, show that the plaintiffs' tarwad was dealing with some of these properties in 1100 and 1102. Defendants 1 and 2 have not executed any document or paid tax for these properties till 1109. According to the plaintiffs, on account of internecine quarrels in their tarwad, the suit for partition was instituted by some of the members of their tarwad in 1109 in the Thiruvalla Munsiff's Court, and taking advantage of that circumstance, defendant 1, who was the husband of one of the female members of the tarwad, and his brother, defendant 2, brought into existence certain documents with a view to advance claims to the plaint properties and attempted to take wrongful possession of them. This led to the institution of M.C. No. 8 of 1109, in which case the First

Class Magistrate of Chengannur attached the plaint properties and placed them in the possession of a Receiver. Exhibit XVIII is the copy of the plaint in the partition suit. It shows that the suit was instituted on 26-3-1109. It is significant that just a day previous to the institution of that suit defendants 1 and 2 executed five documents in respect of the plaint properties, Exs. G, D and H sought to be set aside in the present suit and Exs. E and F. The last mentioned document is a partition deed between defendants 1 and 2. All these documents were executed on 25-3-1109. Why defendants 1 and 2 who had not executed any document at all in respect of the plaint properties after their father's death in 1098 found it necessary to execute so many documents, all of a sudden, on the day previous to the institution of the partition suit, has not been explained at all. Ex. XIV is the final order in M.C. No. 8 of 1109. That order shows that the preliminary order in M.C. No. 8 of 1109 was passed by the Magistrate on 17-4-1109. There is, therefore, every reason to consider that the plaintiffs' case that defendants 1 and 2 took advantage of the quarrels in the plaintiffs' tarwad at the time of the institution of the partition suit to advance claims to the plaint properties and tried to take wrongful possession of them after executing Exts. D to H on 25-3-1109 is true. After the final order in M.C. No. 8 of 1109 the plaint properties continued to be in the possession of the Receiver till 3-11-1112, when they were delivered over by the Receiver to defendants 1 and 2. As pointed out by the lower Court, Pw. 1 is an independent witness and a close neighbour, and his evidence is that, after Narayanan Govindan's death, the next karnavan of the plaintiffs' tarwad, Narayanan Neelacantan was in possession of the plaint properties. The plaintiff in O.S. No. 100 of 1119 also swears to the plaintiffs' case as Pw. 2. As against these circumstances, defendant 1 relies upon the evidence of Dws. 1 to 4 and the evidence which he himself has given as Dw. 5. The evidence of Dws. 1 to 5 has been considered at length by the lower Court in para. 13 of its judgment in O.S. No. 99 of 1119, and after going through their evidence, we also consider that it is unreliable and worthless. On the whole it appears to us that defendants 1 and 2 have been in possession of the properties only from 3-11-1112 and that the improvements existing in plaint items 1 to 4 and 6 to 8 in O.S. No. 99 of 1119 and items 1 to 3 in O.S. No. 100 of 1119 on the date of suit were those effected by Narayanan Govindan before his death on 30-11-1098, and by the members of the plaintiffs' tarwad from the time of Narayanan Govindan's death till the properties were attached in M.C. No. 8 of 1109 and taken possession of by the Receiver in that case. The improvements, if any, effected after the institution of the present suits cannot be considered to have been made bona fide and the defendants cannot, therefore, claim any value for them. In the circumstances the lower Court was right in holding that defendants 1 and 2 and their alienees are not entitled to get any value of improvements.

21. The appeals, therefore, fail. The decrees of the Courts below in the two suits are confirmed and both appeals are dismissed with costs.