

(1954) 08 MAD CK 0025
In the Madras High Court

Kaveri and Others

APPELLANT

Vs

Ganga Ratna and Others

RESPONDENT

Date of Decision : 12-08-1954

Acts Referred:

Madras Aliyasantana Act, 1949 — Section 36(6)

Citation : (1955) 68 LW 295 : (1956) 1 MLJ 98

Hon'ble Judges : Govinda Menon, J

Bench : Division Bench

Judgement

Govinda Menon, J.—Defendants 1; 5, 6 and 7 are the appellants in this appeal which is directed against the preliminary decree of the Court of the Subordinate Judge of South Kanara in O.S. No. 152 of 1950, by which partition of the plaint schedule properties into 75, 74, 112 shares and the allotment of the number of shares mentioned in paragraph 12 of the judgment to the various groups therein, were directed. Defendants 1 and 5 to 7 are entitled thereunder to get 471, 172 shares out of the total number of shares aforesaid whereas the plaintiffs get 7,24,880 shares out of the aforesaid shares.

2. At the very outset one has to marvel at the phenomenally large number of shares into which the properties are to be divided and the allotment of the various shares to the respective sharers. It is stated that this state of things is the necessary result of the working of the Madras Aliyasantana Act, 1949 (Madras Act IX of 1949) by which the division of the properties is to be in a very complicated manner. It would require the skill of statisticians and mathematicians to work out the figures properly and in our opinion it is high time that the legislature intervenes to prevent this intriguing situation.

3. There is a geneological tree attached to the plaint about the correctness of which there is no dispute whatever. The plaintiffs form a kavaru as contemplated under the Aliyasantana Act and are entitled to partition and recovery of possession of their share in the properties of the kutumba if the provisions of the Act are applicable. The main contest in the case is at the instance of defendants

1 to 7 and 11 to 16 as well as the 17th defendant who pleaded that under Exhibit B-1, dated 15th April, 1944, there has been division of the family properties and allotment of the respective shares to the various branches with the result that no fresh partition is available. It is argued that even if under Exhibit B-1 there was no division effected still u/s 36, Sub-clause 6 of the Madras Aliyasantana Act, Exhibit B-1 has statutorily become a partition deed and the plaintiff's suit is liable to be dismissed.

4. In the learned Subordinate Judge's opinion, the contention that Exhibit B-I is an instrument of partition deserves to be unceremoniously brushed aside as under that document it is declared in more than one place that the distribution of properties was brought about not to effect division in status in the family but only for the convenience of enjoyment of the various properties. In another place in the document it is stated that it was not to be construed as an instrument of partition. For these and other reasons the lower Court negatived the defendants' plea that under Exhibit B-1 there had been a partition not only in status but by actual metes and bounds.

5. For a variety of reasons which were set out in extenso in Exhibit B-1, learned Counsel for the appellants wants the Court to hold that on a reading of the document itself it would amount to an out and out partition even though the document is styled only as Taha Karar or family agreement and we are asked to say that the present suit is not maintainable. We have, therefore, to find out what the background is for a document of this kind to have come into existence.

6. It is stated in the preamble that there were family disputes as a result of which misunderstandings arose between the members of the family. O.S. No. 81 of 1936 on the file of the Subordinate Judge's Court, South Kanara, had been filed against the yajamanthi and certain properties were put into the possession of a receiver for the purpose of discharging that decree debt. O.S. No. 5 of 1938 had been filed by some other members and it also resulted in the appointment of a receiver to take possession of the properties in dispute. Other suits, namely, O.S. Nos. 113 of 1943 and 93 of 1943 came to be filed between the various members of the family. On account of these disputes and litigations between the various members of the family, respectable persons who were the well-wishers of the family advised the members that it would be to the best advantage of everybody if the family properties were got partitioned among them for the purpose of separate enjoyment only and they were to take possession thereof and enjoy the same and were to conduct the maintenance, etc., from the income thereof. With this background and with a view to restore peace and goodwill among the various members of the family the document has come into existence.

7. If the karar is viewed in the light of this background, it will be clear that though outwardly it was a maintenance arrangement it really amounted to a partition deed is the appellant's contention. The indications to show that it is a partition deed are stated as follows: It is riot as if the yajaman alone by a unilateral deed allots the properties of the kutumba for the maintenance and

enjoyment of the various kavarus but as in the case of a full-fledged partition it is executed by every one of the members of the family. Then there is the unmistakable division of the properties among the various members among Kavarus and Nissanthathi Kavaru. The fact that provision is made for meeting the temple expenses separately goes a long way to show that it is to be a permanent partition arrangement. It is further urged, that if it were a transient maintenance deed there would have been no necessity to have the entirety of the family properties divided without leaving any portion joint and intact.

8. The senior-most male member of the family, the 21st executant in the karar who is the 17th defendant, in the suit had been separately allotted properties as Nissanthathi Kavaru to be enjoyed by him during his lifetime and it is provided that it is to be divided among the first and second branches into two shares in order that there may not be any disputes at the time of his death with regard to the shares. If it were to be a maintenance arrangement, it was urged, that there was no necessity to divide those properties into two shares out of which one share should go to one branch and another to a different branch. There is the further fact that the D-schedule properties which are intended for the performance of festivals in the temple and other religious rites are to be in the enjoyment of the senior male member which would show that for all time to come there would be no question of any female member having rights over the same by becoming the yajamanthi. Such a state of affairs would put an end to the further continuation of the kutumba and there will be disruption in the family after which the viniyogas have to be conducted by the senior members in succession. It is further urged that since there is no reservation of rights of one group or branch in the properties allotted to the other the only inference that can be drawn is that a partition has come into existence. The further fact is that all the residential houses have been divided and allotted to the various groups and that it was decided the pattas for the properties allotted should stand in the names of the respective groups or individuals. From the point of view of the consideration of this deed as an instrument of partition, a very important feature is, the statement contained in paragraph 11 of the document wherein it is provided that the members of the respective branches and sub-branches should hereditarily in their respective branches keep in their own possession properties relating, to the respective schedules and items described therein. So, by this a permanent feature of division is attributed to this document. Further, all the debts, outstandings, maintenance claims, suits and execution petitions and all other matters have been divided. That is to say, provision is made for paying off debts separately, for collection of the outstandings without reference to others. Maintenance claims which have to be met have also been divided. It is further provided that suits and execution proceedings in the different Courts are to be conducted by the members of the different branches separately and even collection of rents were to be made separately. There is a further clear recital that the members of one branch shall not have rights to the properties of the other branch and that any increase or decrease in the number of members of a

branch or group would not affect the holding of properties under this deed. In other words it means that even if there is an increase in the number of members in the family of one group and decrease in the other, the branch which has a larger number of members would not hereafter get any additional properties or the branch in which there is a decrease in the number of members will not lose any of its existing properties. In paragraph 21 of the document, it is provided that only in case the remaining members of the first branch other than individuals Nos. 1,5,6 and 7 or the enjoyers of the B-schedule properties do not have any descendants at all completely, the property relating to that branch should pass on to the branch which has got descendants. This statement shows that until there is an extinction of that branch there can be no right to revert at all. This is made clear by the further statement that on no other account the members of one branch should have any right to claim any income whatsoever from the properties allotted to the other branch. This is equivalent to what under the Marumakkattayam law is known as attala adakam, that is, succession only on the extinction of a branch of a tarwad by the other tarwads not having any community property with the extinguished tarwad. There are other features also such as the decree debts due to one branch cannot be realised by the other branches and that each branch is entitled to effect improvements in the properties allotted to that branch and these would show that there was a permanent partition arrangement. Lastly, it is mentioned that this document has been executed for the purpose of permanent settlement and that all the terms of the karar shall be binding even on the future descendants which could point out to only one conclusion, namely, that it was a partition. For these and other reasons learned Counsel for the appellants contends that the integrity of the kutumba has been put an end to and there can be no yajaman or manager thereafter. It is urged that though the preamble to the document contemplates that it should be a family arrangement the well known principle that the preamble cannot control the operative portion of a document has to be borne in mind and moreover if it were merely a maintenance arrangement which is liable to be modified according to the change of circumstances the recitals would be different. That a maintenance arrangement is liable to change owing to fluctuation or change of circumstances cannot be doubted. Vide Subbiah Mudaliar v. Gopala Mudaliar and Ors. AIR 1936 Mad. 818. It is further argued that if it is a maintenance arrangement then an outside decree holder can attach any item of the family properties in the hands of any one 2 of the groups for the decree debt due from the kutumba. See Kuttisan v. Kunhambu (1944) 1. M.L.J. 218. According to the terms of the document in question such a thing is not contemplated;

9. As against these factors militating against the maintenance character of the deed various points have been urged by the learned Counsel for the plaintiff-respondents to show that not only was there no partition effected by the document but that there could be nothing whatever to effectuate the partition. If on the basis of the document and its true construction there can be no division

and if the parties never intended to get themselves divided from one another then it would not be legal to hold in this case that there was a separation. Learned Counsel, Mr. Krishna Rao, for the respondents, points out that prior to the Aliyasantana Act of 1949 there could have been no idea of partition in the minds of the members of the family because till then the partition of the kutumba could not be effected except with the consent of all the members and the transaction should be beneficial to the minor members as well. In these circumstances we are asked to approach the document not in the spirit and with the ideas obtaining after the passing of the Act but what the people would have intended at a time when impartibility was the rule and partibility could only have been with the consent of all the members. An analysis of the provisions of Exhibit B-1 with this idea in the forefront would clearly show that there was never any partition effected. The question the learned Counsel asks is whether from the four corners of the document any such intention of partition can be gathered and his answer is an emphatic negative. He also puts forward the following points to justify the argument that the karar in question was only a maintenance deed not one of partition. Looking at the creation of the allotment of properties for the performance of viniyogas it is suggested that even if there is an intention to create a trust for that purpose and divide the rest of the properties among the members of the family still under the law all the members of the family cannot create trust of the family properties and tie up for all time the properties for certain ceremonies. If such allotment for the trust purposes is illegal then it, cannot be said that from that, an inference can be drawn that there was an intention, of division.

10. As regards the allotment of items 1, 2 and 3 given to the first defendant the provision in the deed to the effect that it is only for her life and after her death the same should go to her younger brother, the fourth defendant and the devolution of the fourth item after her death to her sons, defendants 6 and 7 and thereafter to the other members is an indication that there was no outright partition of the properties among the members of the family. If there was any intention to divide and thereby create a severance in status such a thing would not have happened and so the family as an entity has continued throughout the entire document without any separation. This is clear from the words used. Mr. Krishna Rao contends that the Kannada word vengadithu meaning separate is used and not vibaga for partition. Stress is laid upon the expression, "for the purpose of maintenance", etc., of the various branches occurring in paragraphs 5 and 6 of Exhibit B-1 for showing that there could be no division. In paragraph 7, C-schedule property is allotted for the maintenance of the 21st individual, that is, the 17th defendant and after his death they are to be divided among the two branches into two shares. There is no absolute gift in favour of the 17th defendant by this deed. With regard to D-schedule property the allotment for expenses in connection with the conducting of the Daiva Devara Viniyogas of the family can refer only to an arrangement and not to the partition. It is contended that the correct meaning of the Kannada word is "put in possession" and not

"allotted". It is not as if according to the learned Counsel, that separate properties were set apart for charity purposes and for expenses in connection with the performance of religious ceremonies but what was contemplated was that the entire family should have the ownership of the properties which should be managed by the 21st individual and after his death the senior-most male member in the entire family shall take possession and enjoy the same in accordance with the terms mentioned in the deed assuming the title of Daivada Gadi in the same manner as the 21st individual. The intention, therefore, is to tie up the properties forever in the family itself without their being frittered away or divided among the various groups of the family and whoever was the senior-most male member should assume the honorific title of Daivada Gadi and taking possession of the property enjoy the same. This would show that there was a desire to keep up the jointness in the family and that there could be no intention to create a severance in status at least. From a reading of paragraph 99 of the document it is clear that though portions of sub-division 5 of survey number 15 had been allotted to individuals, 1, 5, 6, and 7, pattas for this item along with item A-IV property should be transferred in the name of the second individual. That is an indication, that even if certain items of property are put in possession of one individual the ownership is not transferred to that persona and that it remains as before jointly. Learned Counsel then stressed upon the fact that in paragraph 11 though the mulgeni is allotted to the group of the first defendant still the rent is payable by the third defendant, Seethamma. This kind of intermingling of rights with liabilities could not be contemplated if there had been a partition. Again in paragraph 13 with regard to the power of borrowing it is stated that if anyone borrows moneys, creates encumbrance, alienates the property, etc., in derogation of the terms of the document, not only will such transactions be invalid and disapproved but that such alienations and encumbrances, etc., would not affect the properties covered by the document, namely, the karar or any portion thereof. It cannot be said that if there is an outright partition such restraint on alienations can be held to be valid. Attention is then invited to paragraph 15, where it is provided that on the death of the first defendant, Kaveri, Narasimha Setti, her younger brother, the fourth defendant is to have possession of two items of property and to pay the revenue thereof, and appropriate the income as he pleases till his death. Here again, there is an indication that though defendants 1 5, 6 and 7 formed one Nissanthathi Kavaru still on the death of the first defendant certain properties allotted to her should go to another Nissanthathi Kavaru, namely, the fourth defendant and if it were a partition, such a scheme of things cannot exist. Similarly we have dispositions of property in paragraph 19 with regard to allotment of item A-III in favour of the first defendant, Kaveri. It is stated that after her and all her children's death those items of properties should go to the remaining members of the first branch. Clearly such a division cannot be consistent with the idea of partition.

11. With regard to the unalterable nature of the allotment in case the members of a particular branch increase or decrease it is the respondents' argument that

even in the case of allotment of maintenance to a tavazhi or kavaru such an increase in the membership would not give the kavaru a right to unsettle the provisions of allotment or a decrease thereof would not disentitle it to hold the entire property allotted to it under the family arrangement and for this purpose reliance is placed upon the decision in *Thekke Veetil Makkam Amma and Others Vs. Thekke Veetil Kunhi Kalappa Kurup and Others*, , where Venkataramana Rao, J., held that it is open to a karnavan of the tarwad to provide for the maintenance of the tavazhi including persons to be born hereafter treating it as an entity. Any such provision will not be in excess of the powers of the karnavan as such. Such maintenance arrangements are capable of revision by the karnavan and it is also open to the tavazhi to seek an enhancement according to changed circumstances. How this decision would help the respondent, it is difficult to say, though there are observations made by the learned Judge that until other arrangements are made the mere fact that the members of the tavazhi have increased would not entitle them to ask for higher maintenance if the allotment had been to the tavazhi as such. The learned Judge also relied upon the decision of Philips, J., in *Kidangu Kettiya Ramdupurayil Kunhahomed Vs. Payoth Ramdupurayil Sara Umma and Others*, though that decision was reversed in the Letters Patent Appeal on the construction of the document but the appellate Bench did not dissent from the view expressed by Phillips, J., that the allotment can be made in favour of the tavazhi as such, that is for the existing members and also for members to be born.

12. What paragraph 20 of the document lays down is that increase in the membership of the family in the different branches would not either entitle them to claim a higher maintenance out of the property allotted to the other branch or a decrease thereof would make them liable to pay for the maintenance of the other branch or branches in which there has been an increase in the membership. No doubt this was intended to be a permanent feature but if all the members of the different branches existing at a time joined together and entered into another document by which the terms of Exhibit B-1 were modified it cannot be said that such a transaction would be illegal or irregular.

13. With regard to the provision contained in paragraph 21 of Exhibit B-1, that, on the extinction of the members of a particular branch alone, should the properties allotted to it be divided among the other branches, it is urged that such a provision is not akin to attala adakam right under the Marumakkathayam law because in the same paragraph there is an express recital that on account of the provisions, in the earlier part of the paragraph the document should not be construed as a partition deed.

14. To sum up, learned Counsel urges that a reading of the document as a whole the expression in paragraph 11 "shall hereditarily in their respective branches keep in their own respective possession the properties relating to the respective schedules and items and enjoy them" should be understood in the sense that so long as the arrangement lasts there cannot be any change in the provisions of

the deed and that the document does not create any severance of status between the different branches; the existence of the family as such is envisaged and continued and the appointment of several persons for conducting viniyogas and the joining of all persons for raising; debts should all indicate that the karar was intended to be a deed of maintenance under which the properties were to be enjoyed rather than to be an instrument of partition. As impartibility has been the rule and maintenance arrangements were common at the time the deed came into existence, we are asked to effectuate the intention by giving effect to it.

15. Learned Counsel also referred to the effect of impartibility to the decision in *Aryalparath Kunhi Pocker and Ors. v. Kanthiah Ahmed Kutti Haji* ILR (1906) Mad. 62, where it has been held that a partition in a Marumakkattayam family where there are minor members can be valid only if it is shown that the same is beneficial to the interests of the minors and that the rule is the same both in Marumakkattayam and Aliyasantana law.

16. I have set forth in some detail the arguments put forward by the learned Counsel on either side to justify the point of view which each of them has advanced. It seems to me on a careful reading of the entire document, trying to harmonies all the paragraphs together without in any way trying to interpret portions piecemeal that the document must be construed only as a family settlement which could later on be modified, altered or amended if all the members join together and that it is not a partition by which the community of property between the various branches is extinguished forever. No authority is necessary for the self-evident proposition that when a partition takes place, the rights inter se cease to exist, for the meaning of partition is that co-ownership is put an end, and individual or separate group ownership is created thereby. Though there are some provisions in the document as pointed out by Mr. M.K. Nambiar which might be read as indicating that the effect of the document is division in status, still the parties to the document have made clear in explicit terms that it should never be understood as a deed of partition. How in the face of such unequivocal declaration of intention we can read into the document the effects of division, it is difficult to say.

17. Quite a large body of case -law has been brought to our notice where the question whether a document was a partition deed or a family arrangement had to be considered. In addition to reported cases on the issue raised certain unreported cases were also cited before us. As stated in some of those decisions each document has to be construed on its own merits and not with reference to how similar documents were interpreted or construed under different conditions. Now I shall refer to some of the decided cases on the question at issue. It is unnecessary to cite any authority for the proposition that no partition can be enforced in an Aliyasantana family though the learned Counsel has cited the decision in *Munda Chetti v. Thimmaju Hensu* (1863) 1 M.H.C.R. 380 and referred to *Sundara Aiyar's Malabar Law*, page 8, for that proposition. In *Sulaiman v.*

Biyuthumma (1916) 32 M.L.J. 137 (P.C.), their Lordships of the Privy Council in considering whether a document of a similar nature amounted to an instrument of partition or an arrangement laid down certain tests in the following terms:

The arrangement manifestly proceeds on the basis of a complete division in interest. But the matter does not rest there. The history of the family and the conduct of the parties, with an exception to which reference will be made later was in accordance with such a division. There was separate residence, separate assessment and separate management. The revenue proceedings, the statements in the vakalats, the alienations of property are all suggestive of separation and this is the view that has been taken in earlier litigation in which this issue has been involved.

One thing that has to be considered in this connection is that the document which their Lordships had to consider was of the year 1887 and nearly 30 years had elapsed between the coming into existence of the document and its interpretation by the Judicial Committee. But long before the compromise which came up for consideration it was in evidence that the parties were having separate residence, separate assessment and separate management for a considerable period of time. Even if an intention to separate had not been in existence originally still the course of conduct for such a long time would result in only one conclusion and that is one of the factors why their Lordships came to that conclusion. It is the time factor that has been very much emphasised in *Nannu v. Purayil Theyyan* 1911 M.W.N. 281, where Benson and Sundara Iyer, JJ., came to the conclusion that, what was originally, one tarwad had become two independent entities by reason of the fact that they lived for a long time separately, dealt with the properties in their possession as if they belonged to each of them separately but there were now and then acts and conduct of the karnavan of both the families which led one to suppose that they formed members of the family. Still it was held that the fact that both the families lived separately for a long time raised the presumption that they became separate and in such a state of things the onus was on the plaintiffs to establish that they continued to be members of one Marumakkattayam family and in order to constitute separation of interest it is not necessary that there should be an execution of a legal document evidencing division but it may be a question of inference from the acts and conduct of the parties. Benson and Sundara Iyer, JJ., did not have to consider the effect of any deed or instrument in writing but what was assumed was that long separation should be considered as evidence of partition. Though Mr. Nambiar sought to seek assistance from what Sir Arnold White, G.J., and Sadasiva Iyer, J., have laid down in *Kandiyil Kattooli v. Koran* 1912 M.W.N. 532, we do not think that any real help can be derived from that decision for the document which was considered by the learned Judges in that case specifically stated that after certain undefined properties had been given before to one of the parties in discharge of some tarwad debts all the remaining properties were divided among the four tavazhis in a particular mode so as to destroy all community of interest between the four tavazhis. The real point,

therefore, was whether by that document community of interest has been extinguished. That being the case we do not think that despite the circumstance that the document was of the year 1902 and the suit was in 1908 nearly six years after the document came into existence we can really get any assistance from the case relied on. The only case which is somewhat akin to the subject of consideration now is the one in Appa and Others Vs. Kachai Bayyan Kutti and Others, , decided by Jackson and Ananthakrishna Iyer, JJ. There the karar was on 22nd November, 1877 and the litigation was of the year 1926 and so nearly 50 years had elapsed at the time the document came up for consideration. In an exhaustive judgment setting forth all the points of view, the learned judges came to the conclusion that the document in question effected a partition and they further held the view that where a deed is somewhat ambiguous and difficult to construe the subsequent conduct of the parties can legitimately be taken into account. Though there is some similarity between the provision in Exhibit B-I and the recitals in the karar in the case cited the main factor which weighed with the learned Judges was the long lapse of time during which period the two branches lived as two (independent families and but for the conduct which evidenced separation it would have been somewhat doubtful what the result would have been. The other cases cited on behalf of the appellants, namely Mudara and Others Vs. Muthu Hengsu and Others, , Sreedevi Nachiar v. Peruvuni Nayar (1934) 67 M.L.J. 771, Narayani Kuttiammal v. Achuthan Kutti Nair (1918) 36 M.L.J. 529 : ILR 42 Mad. 292, do not carry the matter any further. The question in each case was whether there has been absolute allotment or gift to one branch or individual so as to cut asunder all ties in regard to others. If such a thing had been done then as was held in Mudara and Others Vs. Muthu Hengsu and Others, , even if there is any prohibition against alienations such a restraint would be invalid and would be repugnant to Section 10 of the Transfer of Property Act.

18. On the side of the respondents chief reliance has been on the judgment of Somayya, J., in Muttathil Kuppu Amma's daughter Ammalu Amma and Others Vs. Muttathil Mamma Amma's son Vasu Menon and Others, where the learned Judge was of the opinion that reading the document as a whole if there are clauses which are entirely inconsistent with an out and out partition then the Courts are bound to construe the document as a maintenance arrangement even though it is stated to be a permanent arrangement. It is unnecessary to discuss this judgment in any detail for the reason that the main foundations of the learned Judge's conclusion were the provisions of the deed in question. The unreported cases which go to show that such documents should be construed as partition deeds are S.A. Nos. 1922 and 1923 of 1926, S.A. Nos. 763 of 1929, 1001 of 1929 and Appeal No. 57 of 1938. In all these cases the documents in question were construed as partition deeds and on a close scrutiny of the dates of those documents it will be seen that there was a long lapse of time between the coming into existence of the deed and its interpretation. Unreported cases in which the documents have been construed as maintenance grants are S.A. No.

891 of 1937, C.M.A. No. 301 of 1939, S.A. No. 441 of 1933, App. No. 296 of 1941 and App. No. 8 of 1941. In all these cases there were indications of the united existence of the family as such without any division in status. It is only where there has been separation for a long period of time that division can be presumed. In Lewis Moore's Malabar Law and Custom, at page 19, it is stated that separation for two generations, that is, for sixty years was good presumptive evidence of a division and that complete separation for one generation, that is for thirty years, would be sufficient to throw the burden of proof on those who alleged community of interest. As I have already stated, the principle underlying the construction of what on the face of it does not appear to be a partition deed, is the course of conduct for a long period of time as is seen from the reported as well as unreported cases and if that principle is to be applied there is no justification for construing Exhibit B-I as anything other than a family arrangement, not as an outright partition, for only six years had elapsed since the execution of the deed and the filing of the suit. I would, therefore, hold that Exhibit B-1, cannot be construed as having effected a partition between the members of the family either at its inception or by subsequent course of conduct.

19. The next point to be considered is whether the plaintiffs are entitled to a division on a per capita basis according to the provisions of the Madras Aliyasanthana Act (Madras Act IX of 1949). The appellants admit that but for the provisions of Sub-section 6 of Section 36 of the Aliyasanthana Act such a partition can be allowed. This section lays down the principles for the ascertainment of shares at a partition and they are extremely complex and complicated. But it is not necessary to deal with each provision in extenso as in my view Sub-section (6) of Section 36 statutorily has converted Exhibit B-I into an outright partition. Sub-section (6) of Section 36 of the Act runs as follows:

A registered family settlement (by whatever name called) or an award to which all the major members of a kutumba are parties and under which the whole of the kutumba properties have been or were intended to be distributed or purport to have been distributed, among all the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity, shall be deemed to be a partition of the kutmba properties notwithstanding any terms to the contrary in such settlement or award.

The learned Subordinate Judge was of the opinion that because some properties mentioned in the list D were entrusted to the 17th defendant to enable him to perform family viniyogas there has not been a distribution of the family properties among all the kavarus of the kutumba. The necessary pre-requisites for the application of Section 36(6) are the following:

- (1) There must be a registered family settlement or award.
- (2) All the major members of the kutumba must be parties to that.
- (3) The whole of the kutumba properties must have been or were intended or purported to have been distributed, and

(4) The distribution must be among all the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity.

20. If these conditions are satisfied, notwithstanding any other terms to the contrary in such a settlement or award the same should be deemed to have effected a partition on the date of its execution.

21. The question, therefore, is whether all or any of the conditions of Sub-section (6) of Section 36 of the Act have not been fulfilled. There can be no doubt that there is a registered family settlement. Nor can there be any dispute that all the members of the kutumba are parties to the document. It is also seen that it dealt with the entire family properties but the dispute is whether those properties have been distributed or were intended to be distributed among all the kavarus for their separate and absolute enjoyment in perpetuity. The learned subordinate Judge took the view that the settlement in Exhibit B-I does not deal with the entire kutumba properties because a considerable extent of such properties are still kept joint. How he comes to this conclusion is in the following way. The allotment of properties for the viniyogas does not amount to a complete dedication in that the family does not divest itself of its rights in the property, and in the absence of actual perpetual dedication to any deity it cannot be said that the whole of the kutumba properties have been distributed among the various kavarus. In my view the learned subordinate Judge is not correct in the conclusion he reached. It is stated that the properties intended for the viniyoga performance consisted of lands yielding only 100 muras whereas the entire family estate yielded about 1250 mudras of paddy. From this it is clear that only a fraction of the properties alone has been set apart for the viniyogas. But whatever that might be the question to be considered is whether there has been an actual dedication of the properties for the performance of the viniyogas and for the deity and whether all the properties have been distributed among the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity. The dictionary meanings of the word "distribute" are: deal out, give share of to each of a number, spread abroad, divide into parts, arrange, classify, etc."

22. It is, therefore, clear that when the 21st executant, that is the 17th defendant is put in possession of the properties for the performance of viniyogas they were distributed to him and that the rest of the properties alone were distributed among the various kavarus. So the condition with regard to distribution of properties is fulfilled. What has next to be considered is whether such distribution was for separate and absolute enjoyment in perpetuity? It cannot be said that when the properties have been allotted to the 17th defendant for expenses in connection with the conducting of the Deiva-Devara viniyogas of the family they are for his separate and absolute enjoyment in perpetuity. There is evidence to show that the previous yajaman had also set apart a few items of the properties for the performance of religious ceremonies and rites and what Exhibit B-I does is to add some more items to that category. Mr. Krishna Rao relies upon certain statements of law contained at page 924, paragraph 793 of

Mayne's Hindu law to the effect that:

very strong and clear evidence of an endowment is required and onus lies upon a party who sets up a dedication to prove that the property has been inalienably conferred upon an idol to sustain its worship or upon a religious or charitable institution.

23. Paragraph 8 of Exhibit B-I makes it clear that the items mentioned therein are specifically set apart for expenses in connection with the conducting of the Deiva-Devara viniyogas of the family in accordance with the mamool existing in the family. There has been such a setting apart of items of properties by all the members of the family and the ownership in those items must be deemed to have passed on to the trust in favour of the charitable institution. A line of devolution for the trusteeship has also been created. It is just as if a private trust has been created for the purpose of worship of the family deity and performance of religious ceremonies attendant thereto. What has happened as a result of Exhibit B-I is that before the division of the properties among the kavarus of the kutumba certain items have been dedicated for the purpose of worship of the family deity and by such a dedication the family ceased to have uncontrolled powers of disposition over those items. There is no prohibition if all the members of the kutumba or family were to dedicate a small fraction of the family properties for the religious worship of the family deity and if that is done such an arrangement cannot be disputed by anybody else. The result of such an arrangement would be that though the trust is a private one the properties so dedicated are taken out of the category of family properties and when once such a state of things come into existence the rest of the properties alone will remain as family properties. Viewed in the light that the trust properties have been separated from the family properties and the rest have been distributed among the various kavarus of the kutumba for their separate and absolute enjoyment there can be no difficulty in concluding that all the elements necessary for the application of Sub-section (6) of Section 36 of the Madras Aliyasanthana Act of 1949 are present in the instant case. I am, therefore, of the opinion that all the conditions laid down in Sub-section (6) of Section 36 have been complied with and that therefore Exhibit B-I statutorily amounts to an instrument of partition and that being the case the suit by the plaintiffs for the partition of the family properties cannot be maintained. In the result the appeal is allowed and the suit is dismissed as regards the general partition asked for but the plaintiffs will be entitled to a decree for the partition and separate possession of their share of the properties allotted to the branch of the plaintiff and Ors. except defendants 1,5,6 and 7 and for this purpose the suit will be remanded to the lower Court. The parties will bear their costs in both Courts.

24. Ramaswarmi, J.-The short point for determination in this appeal is whether Exhibit B-1 embodies a revocable family arrangement or has to be construed as a partition deed completely dissolving the family corporation. If the former is found to be the case, the suit has got to be decreed as has been done and if the

latter is found to be the case, the suit has got to be dismissed.

25. In order to appreciate the point in controversy I must briefly notice the essentials of (a) partition; and (b) family arrangement.

26. What is partition? According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he-that particular member-has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property, in other words it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary; *Appovier v. Rama Subba Aiyar* (1866) 11 M.I.A. 75, *Ram Pershad v. Lakhpati* (1902) 30 Cal. 231, *Sheodan v. Balkaran* ILR (1920) All. 193. Once the shares are defined, whether by an agreement between the parties or otherwise the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. But whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property.

27. In order to effect this partition there must be an unequivocal and unmistakable manifestation by a member of a joint family by his words or conduct of a fixed and determined intention to become separate and this is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place or though there is no separation in food and dwelling: *Amritrao v. Mukundrao* (1920) 13 L.W. 112 (P.C.), *Yadao v. Namdeo* (1921) 42 M.L.J. 1 : L.R. 49 1.A. 513 : ILR 49 Cal. 1 (P.C.) *Syed Kasam v. Jorawar Singh* (1922) 43 M.L.J. 676 : L.R. 49 IndAp 358 : ILR 50 Cal. 84 (P.C.), *Ramalinga Annavi v. Narayana Annavi* (1921) 43 M.L.J. 428 : L.R. 49 IndAp 168 : ILR 45 Mad. 489 (P.C.), *Girija Bai v. Sadasiv* (1916) 31 M.L.J. 455 : L.R. 43 IndAp 151 : ILR 43 Cal. 1031 (P.C.), *Suran Narain v. Iqbal Narain* (1912) 24 M.L.J. 345 : L.R. 40 IndAp 40 : ILR 35 All. 80 (P.C.), *Kawal Nain v. Budh Singh* (1917) 33 M.L.J. 42 : L.R. 44 IndAp 159 : ILR 39 All. 496 (P.C.). Once there is a definite and unmistakable indication of a member to separate, his right to obtain and possess his share is unimpeachable, and neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; *Girija Bai v. Sadashiv* (1916) 31 M.L.J. 455 : L.R. 43 IndAp 151 : ILR 43 Cal. 1031 (P.C.). Thus for severance in status (i) there must be an unmistakable manifestation of intention to be divided; (ii) no division by metes and bounds is necessary; (iii) existence of property is not essential; (iv) the reasons for the severance are immaterial; and (v) the existence of minors is no bar.

28. In the matter of partition Aliyasanthana Law underwent as pointed out by Mr. G. Krishna Rao, in his *Aliyasanthana Law* (1898) a retrograde step and practice was made to conform to theory. Divisions were formerly made freely but in 1843

in A.S. No. 82 of 1843, Mr. Findlay Anderson passed his famous decree in which he condemned divisions on principle but as a rule of expediency thought partition advisable where the members cannot amicably and peacefully live together. Suits for partition continued even after this decision, by both the female and male members and a share was decreed in such suits. Thus in *Make v. Sankoo Maria and Ors.* Decree No. 196 of 1851, 19th June, 1858, plaintiff, a female brought a suit for a partition of the family property and it was held that the first defendant the *Ejaman* in possession, had no exclusive right in the property, and as he was a coparcener with the plaintiff, the parties had all equal rights, and that therefore the plaintiff was entitled to demand a partition from the first defendant during his lifetime. In *Lakshmi and Anr. v. Duggu and Ors.* A.S. No. 224 of 1852, which also was a suit for division, plaintiffs were held entitled to a share. In *Venkatarama Ballala v. Mahalinga Shetti* A.S. No. 178 of 1852, 25th September, 1854, though the division was deprecated on the general principle that such a division was opposed to the letter of the *Aliyasanthana* law, yet a share was awarded on the principle stated in A.S. No. 82 of 1843. In A.S. Nos. 264 and 265 of 1852 decided on 25th June, 1856, plaintiff was awarded one-third share in the family property in a suit for partition. In A.S. No. 37 of 1855, plaintiff a convert to Christianity, sued for his half share. It was urged in defence that the plaintiff being a single member had no such right. Plaintiff was awarded a life interest in the property. See also *Duggoo v. Kajambai* A.S. No. 124 of 1852, 31st May, 1855 *Monoppa Shetti v. Bhamo* A.S. No. 132 of 1852, 1st February, 1854, *Kantoo v. Coojoombai* A.S. No. 265 of 1853, 31st May, 1855. But it will be noted that in all these partitions, males were awarded only a life interest in the share allotted to them, conformably to the theory that their interest in the property was restricted to one of maintenance and that after their deaths, their share had to lapse to the family. But where females were given their share, the property in their hands was not fettered with restrictions as in the case of males, since they were regarded as the proprietors, they being the channel through which the property devolves on the descendants.

29. While this was the state of the law, a suit for partition came up in Special Appeal before the High Court in *Munda Chetti v. Timmaju Hengsu* (1863) 1 M.H.C.R. 380, and it was held by Frere and Hallaway, JJ., after a review of all the previous decisions, that such partition was opposed to the letter of the law as contained in the Code of *Bhupal Pandya*, and that the family system which obtains in *Canara* resembles that of *Malabar* in the vesting of the property in the females and that it only differs from the latter, in "more consistently carrying out the doctrine that all rights are derived from females." This decision settled the law with regard to partitions and the rule of impartibility of family property got as firmly established as ever.

30. But it will be remembered that the effect of this decision was not that no partition was at all allowed under any circumstances, but only that no compulsory division could be brought about at the instance of a single member. There was no inherent right in an individual member to claim a partition of the

joint property as in a coparcenary under the Hindu Law. Voluntary partitions, however, were freely allowed, and where the family was too large, such divisions of property among the several branches were very common. *Kinhakke v. Derakke* (Unreported A.S. No. 67 of 1881, 23rd January, 1883, *Kotayya v. Honnu* O.S. No. 26 of 1886, 21st February, 1887. The customary and judge made law as regards partition has been radically changed by the Madras Aliyasanthana Act, 1949.

31. Owing to the absence of a right of compulsory partition as under the Mitakshara law (See Sundara Iyer, page 8, and *Munda Chetti v. Thimmaju Hengsu* (1863) 1 M.H.C.R. 380 and the consequent increase in the number of members and the impossibility of living together under one roof, both under Marumakkathayam and Aliaysantha tarwads and kutumbas, instances often arise where branches of tarwad or kutumbas under karars entered into between the members live separately enjoying properties as per terms of the karar towards their maintenance. In such cases no division is to be presumed and the usual incidents of a joint property attach themselves to such separate enjoyment. (Thus arose the large number of family arrangements in South Kanara and Malabar).

32. The difficulties which arise under the Marumakkathayam and Aliyasanthana Law in regard to partition arrangements and family arrangements are pointed out by Somayya, J., in *Muttathil Kuppu Amma's daughter Ammalu Amma and Others Vs. Muttathil Mamma Amma's son Vasu Menon and Others*, . Inasmuch as if some of the adult members did not join, a complete partition cannot be effected, there might be occasions of the executants not to call even a real partition deed a Bhaga Pathrom but introduce a number of provisions which will have the effect of a partition deed but at the same time disguise it as a family karar or Nischaya Pathrom or some other name. In other words, though there will be clauses showing a complete permanent partition, there will be attempts of disguising the patentness of it by styling it as a Nischayalaka, etc., so that it would not give the unwilling parties an opportunity of attacking the document and getting it set aside which would be the case if it were styled what it is intended to be, viz., a partition deed.

33. The description of the document will not make a maintenance arrangement into a partition arrangement or vice versa. The Courts must construe all the clauses of the document to gather the real intention of the parties and give effect to it. In *Sivan Kutti Keyi v. Mariyumma S.A.* Nos. 891 to 893 of 1937, Venkataramana Rao, J., pointed out:

It is no doubt true, as pointed out by Mr. Govinda Menon that the name given to a document, is not conclusive of the nature of the arrangement which the document embodies. The fact that they are styled deeds of settlement does not prevent the Court from coming to the conclusion that they are deeds of partition if in fact the arrangement amounts to a partition.

34. Devadoss, J., In *Damodara Menon v. Ramakrishna Aiyar* (1924) 21 M.L.W.

362 and in Ramakrishna Aiyar v. Kuttathil Madhava Menon S.A. No. 373 of 1922, remarks:

Whatever the name of the document is, settlement, agreement or karar, we have to see what the arrangement really is.

Jackson and Ananthakrishna Ayyar, JJ., in Appa v. Kachai Bayyan Kutti (1932) 35 L.W. 444 held that the name given by the parties to a document is not conclusive as to its real nature and effect though that undoubtedly is a circumstance to be taken into consideration along with the contents of a document. Therefore, whatever may be the name given to a document, its real import has to be gathered and adjudicated upon by Courts.

35. In regard to these prima facie ambiguous arrangements which lead to the controversy, whether they constitute a partition dissolving the family corporation or revocable family arrangement, disputes constantly arise because under partition several consequences flow and which make a large difference to the erstwhile members of that corporation. These consequences have been pointed out in Mulla's principles of Hindu law (10th edn.) at page 406. In regard to Marumakkathayam and Aliyasanthana families the important consequence which flows from a partition is that subsequent to the partition increases and decreases in the various branches will not in any way be attended by readjustments of the shares to which the branch in an undivided status would be entitled. Therefore, a branch which multiplies after coming to such an arrangement would stand to lose, whereas under a revocable family arrangement the multiplying branch will have a definite advantage. The mode of partition, whether it ought to be per stirpes or per capita was the subject of conflicting judicial opinion: Sulaiman v. Biyathumma (1916) 32 M.L.J. 137 (P.G.), Sreedevi Nachiar v. Peruvunni Nair (1934) 67 M.L.J. 771, Narainkutti Amma v. Achutan Nair (1918) 36 M.L.J. 529 : ILR 42 Mad. 292. The accepted view is that partition should be per capita and this has been affirmed by Section 40 of the Madras Marumakkathayam Act and also by Section 36 of the Madras Aliyasanthana Act. In fact, in the instant case it is this very multiplication of the disputing branch subsequent to this Taha Karar that has been responsible for this litigation.

36. The learned Advocate for the appellants relies upon the following ten circumstances for construing Exhibit B-I dated 15th April, 1944, as a partition deed. Firstly, unlike family arrangements and as in the case of partition deeds, Exhibit B-I has been executed not by the karnavan only but by all the members constituting this kutumba at the time of its execution. Secondly, the entirety in the properties of this kutumba consisting of immovable and movable properties, assets and liabilities, decrees of Courts, family trust for Gods, etc., have been divided and nothing remained undivided. Thirdly, the properties have all been divided by metes and bounds. Fourthly, all the houses have been divided. Fifthly, provision has been made for the transfer of pattas as per allocation. Sixthly, paragraph 11 states that the members of the respective branches and sub-branches shall hereditarily in their respective branches keep in their own

respective possession the properties, etc. Seventhly, paragraph 20 states:

In case, the members increase in any one of the branches out of the said first and second branches the said branch shall not on that account have the right to claim any maintenance whatsoever out of the income of the property allotted to other branch; and the branch which has got less members is not bound to pay the same.

Eighthly, paragraph 21 states that the members of one branch shall have no right to claim any income whatsoever from the property allotted to the other branch: and "none among us has got the right to say that the shares mentioned... are unequal and that they have to be got exchanged." Ninthly, after this arrangement has been come to all the improvements were to be effected by the persons to whom the properties have been allotted. Tenthly, there is no continuation of the Ejaman or Ejamanthi or karnavan or Karnavastri after the coming into existence of this arrangement.

37. On the other hand, the learned Advocate for the respondents urges the following ten circumstances as negating partition and showing only a family arrangement. Firstly, the document is styled as Taha Karar or family arrangement for safeguarding family properties. Attention is drawn in this connection to the well known observation in *Udayamami Achi v. Umayal Achi* (1944) 1 M.L.J. 182 : ILR (1944) Mad. 850, and *Sivan Kutti Keyi v. Mariyumma S.A.* Nos. 891 to 893 of 1937 that maintenance arrangements are common and it is the usual mode of enjoyment of properties by the members of an Aliyasanthana family. Secondly, in paragraph 21 it is stated:

But on no other account the members of one branch shall have the right to claim any income whatsoever from the property allotted to the other branch; and further, none among us has got the right to say that the shares mentioned below and allotted for purpose of maintenance and enjoyment only are unequal and that they have to be got exchanged. But on this account, this should not be considered as a partition deed; and in the same manner, the portions allotted for purpose of enjoyment only should not also be considered as absolute shares.

Thirdly, the concluding paragraph 29 states:

We have entered into this Karar for purpose of permanent settlement with self-satisfaction and with full consent in the presence of respectable persons; and the entire terms of this Karar are "binding on us inclusive of the said minors, etc., and also on future descendants; and we, inclusive of the minors, are bound to conduct ourselves in accordance with the same.

38. Fourthly, stress is laid upon the absence of the word "Bhaga Pathram" when all the adult members were joining in this document and there was no need to camouflage the real nature of the document and if really the parties intended a partition they could well have stated so and well have called it a Bhaga Pathram or partition deed which is the well known expression, an expression used almost

universally for a partition deed. This is not one of the cases where some of the adult members did not join and under the law then existing without the concurrence of all the adult members there could not be a complete division. There was no occasion for the executants not to call it a Bhaga Pathram or a deed of partition but introduce only a number of provisions which will have the effect of partition but at the same time safeguard that document from being attacked and got set aside by unwilling parties. Fifthly, there are clauses in the documents restraining alienation which will be a circumstance showing the intention of the parties not to disrupt the family corporation, though if this were to be considered as a partition deed such restraints on alienation would be void u/s 10 of the Mudara and Others Vs. Muthu Hengsu and Others, . Sixthly, only a life estate is given to Padmanabha Setti and this is inconsistent with a final disruption of the joint family status. When under an arrangement some properties are allotted to a member to be enjoyed by him for his life such an arrangement does not amount to partition; Kutti v. Raghavan 1924 M.W.N. 526. Seventhly, there is a provision for all the members of the kutumba to join together to contract debts. In this connection attention is invited to the observations in Sundara Iyer's Malabar and Aliyasantana Law, page 18 and Muttathil Kuppu Amma's daughter Ammalu Amma and Others Vs. Muttathil Mamma Amma's son Vasu Menon and Others, , that a clause in a karar to the effect that a loan in order to bind the family must be raised by the joinder of all the members of the family is an indication that it is only a maintenance arrangement. Eighthly, as an instance of this being; an imperfect partition it is pointed out that in regard to a property given to Kaveri it is stipulated that the patta should be in the name of Muthakke. Ninthly, in regard to the D schedule properties it is pointed out that there was no dedication and no allotment in perpetuity and it continued to be joint family property negating partition which requires a complete distribution of the joint family assets. Tenthly the key-note of this deed is stated to be set out in the following preamble:

Respectable persons who are our well wishers advised us that it would be to our best advantage if we were to get our family properties partitioned among us for purpose of separate enjoyment only and were to take possession thereof and enjoy the same and were to conduct the maintenance, etc., from the income thereof so that we might not suffer such trouble and loss in future and that we might not have any manner of misunderstanding amongst ourselves and that it may be convenient for us to live with love and affection towards each other. We were satisfied with the advice and agreed to it with self-satisfaction.

39. The allusion to maintenance is that this family was at that time suffering from a plague of maintenance suits by disgruntled members of the kutumba continuously engaged in litigation and pauperising themselves and that many other such claims were in the offing. Therefore, it is contended that the object of this Exhibit B-1 was merely to safeguard the family properties by entering into a family agreement regarding the separate enjoyment of the properties towards the maintenance of the members of the kutumba.

40. These respective contentions are based upon the evolution of the case-law on the subject. In Justice P.R. Sundara Iyer's *Malabar and Aliyasanthana law* revised and brought upto date by Mr. B. Sitarama Rao in 1922 (M.L.J. publication) the help which we can derive from the case-law to determine the point in controversy has been set out as follows:

The burden of proving that there has been a partition is, of course, on the persons setting it up. In *Korpen Nair v. Chenan Nair* (1871) 6 M.H.C.R. 411, Mr. Justice Halloway said, that where there are several houses bearing the same original tarwad name but with an addition and there is no evidence of the passing of a member of one house to another, there is the strongest possible ground for concluding that a separation has taken place. In one case Mr. Wigram held that separation for two generations that is for sixty years was good presumptive evidence of partition. (A.S. No. 15 of 1879). See Moore's. *Malabar law*, page 19. In A.S. No. 78 of 1878 (North Malabar) the Sub-judge held that forty years' separation was sufficient to raise an inference that there was a partition and his decree was affirmed by the High Court. The exact length of time necessary to raise the presumption is not a question of law. It is essentially a question of fact depending on the circumstances of each case and some assistance may be derived in this matter from analogous cases under the ordinary Hindu law. But in using those cases it must be borne in mind however that division for convenience of enjoyment is not resorted to under the ordinary Hindu law to the same extent as under the *Marumakkatayam* law. In A.S. No. 18 of 1898 the *tavazhi* bore distinctive names and there was evidence of separate performance of ceremonies.. They had also separate enjoyment for forty years. But as none of these circumstances was necessarily inconsistent with a state of non-division (their Lordships suggest that it might have been the result of an arrangement for maintenance) partition was not inferred. In *Nanu v. Puviyil* (1916) 9 I.C. 849 two families were living separately for 100 years. It was admitted that there was community of pollution between, them which undoubtedly indicated common descent. The parties were unable to state who the common ancestor was or how long ago the separation took place. There was no resumption of joint living after the separation and each house managed its concerns without interference by any of the members of the other house. Each branch was in full enjoyment of different sets of properties as if each formed a separate tarwad and dealt with the properties without reference to the other. In these circumstances their Lordships (Benson and Sundara Ayar, JJ.) held that the onus lay heavily on the plaintiffs to adduce satisfactory evidence that community of interest was maintained between the two houses at the date of the suit. "Mere lapse of time" their Lordships observed, "does not destroy community of interest but lapse of time without any apparent exercise of proprietary right is a very cogent circumstance against its continued existence, and the presumption against it must tell with increasing pressure according to the length of time that has elapsed." As against the circumstances referred to above, their Lordships declined to attach any weight to the fact that tali tying ceremonies more than

once took place in the same house or to the fact that members of both the houses joined in the funerals of some of the members of the plaintiffs' family. As stated in *Sulaiman v. Biyathumma* (1916) 32 M.L.J. 137 (P.C), separate residence, separate assessment and separate management are the common indicia of partition. As provision for enjoyment without actual disruption of the family is very common and especially as partition is generally difficult when there are minors, ordinarily there would be a disinclination to hold in favour of an absolute partition. Provision for participation in management or insistence on joinder in contracting debts would be circumstances against partition. The same cannot, however, be said of prohibition of alienation or provision for each other's consent in the event of alienation; for such provisions are usual even in ordinary partitions under the Hindu law. Provision for alienation within the family would indicate disruption as the implication, of such a clause is an independent power of disposition which is inconsistent with joint status. It need hardly be said that after partition the karnavan of the whole family can no longer represent the divided branches and any sale in execution without proper representation of the branches by their own karnavans would not bind them.

It sometimes happens that while some properties are divided the rest are undivided. In most cases, the properties are divided from the bulk of the family properties and the property left undivided is so left merely to maintain a quasi-*stanom* or to meet the expenses of the common family ceremonies and charities. But it sometimes happens that the property left undivided is very considerable and difficult questions arise for determination as to the status of the family and the rights inter se of the branches. These problems are not dissimilar to the problems arising in similar circumstances under the Hindu law.

41. To these earlier decisions may be added the following unreported decisions culled out by G. Krishna Rao in his *Aliyasantana Law*, published in 1898. In *Manjayya Shetti v. Daramma* (Unreported S.A. No. 1329 of 1886, 20th December, 1887.), an arrangement was entered into among the four branches of a family. Two of the branches which were expected to be soon extinct, were to have the management in their hands, while the remaining two were to hold the family properties after the extinction of the first mentioned branches in separate shares. It was held that this was a family arrangement. In *Chikkayya Shetti v. Achappu and Ors.* (Unreported S.A. No. 1175 of 1883, 17th November, 1884), there was a *karar* or agreement which, while providing for the separate enjoyment of different lands by different branches stipulated that the members should "live in union as their ancestors had done," that each of the branches should render an account of its management to the others every year, that a debt due on the mortgage of the family house should be paid by them in equal shares, and that none of them should alienate the lands, except in conjunction with the other branches, and that any member desiring to separate, should receive the value of his share and make it over to the other branches. It was held by the High Court, that this *karar* evidenced a state of things which was inconsistent with the status of division, and this, notwithstanding the fact that

the members had been acting independently of each other for a long time.

42. In *Thimmayya Bhandari v. Darama* (Unreported S.A. No. 276 of 1886), the words in a karar "share and enjoy the produce equally" were held to be not inconsistent with some temporary arrangement, of the family made for convenience of enjoyment only.

43. In *Dere alias Annappu v. Hami* (Unreported S.A. No. 1739 of 1888, 25th October, 1889), where the assets and liabilities of a family were divided among the several branches by a document which provided that each branch should successively enjoy the share allotted to it and should not be entitled to object to the division on the score of its inequality but at the same time contained a clause, that none of the branches should contract debts, and that if any necessity arises, all the branches should join and borrow, it was held by the High Court that notwithstanding the last clause, the deed evidenced an absolute partition and that the stipulation in restraint of alienation was inoperative.

44. In *Kunhakke v. Derrakka* (Unreported A.S. No. 67 of 1881, 23rd. January, 1883), where it appeared from several documents that, besides enjoying lands separately for more than 60 years, the members of the two branches of a family designated one another not as anandravans or ejamans, not as subsidiary karnavans but as "hissadars" or parceners and there was no indication of a joint family interest, it was held the division was complete.

45. The subsequent case-law on the subject can be briefly summarised. In *Sivan Kutti Keyi v. Mariyumma* S.A. No. 891 to 893 of 1937, Venkataramana Rao, J. stated:

On a fair interpretation of the terms of Exhibit-A, the arrangement cannot amount to a partition. It is clearly indicated in the deed itself that the arrangement was brought about for the purposes stated therein, namely, that as the income was not being properly realised it was not possible to properly manage the family expenses and that there was consequently dissension and loss of money and therefore the members had come to a settlement to the effect that they should carry on the management in accordance with the karar and in conformity with the status of the families. Prima facie the arrangement was entered into to provide for management and for proper appropriation of the income by the several members of the tarwad.

This decision further lays down that the provision against alienation is an indication that it is a maintenance arrangement. There was a provision in that case for separate registry in the name of each tavazhi and for separate enjoyment, and yet the learned Judge held that the deed was not a partition deed. Dealing with the argument that it is consistent only with a case of partition, Venkataramana Rao, J., had to say this.

46. Devadoss, J., in *Damodara Menon v. Ramakrishna Aiyar* (1924) 21 L.W. 362, held as follows. In that case a third party obtained a money decree against the

karnavan of one of the tavazhis, attached some of the items allotted to that tavazhi, brought them to sale and purchased them himself. The defendants raised the contention that no saleable interest at all was conferred on any of the tavazhis and that the plaintiff was entitled to recover. The learned Judge held that even though the allotment was for the maintenance of the members, there was some interest created in each tavazhi and that interest whatever it might be, could be attached and sold and that the plaintiff was therefore entitled to recover. In one case at least, the plaintiff purchaser did not claim the full right or the jenmom right in the property. This is how the learned Judge deals with the document (Exhibit I):

Whatever the name of the document is, settlement, agreement or karar, we have to see what the arrangement really is. The properties of the tarwad were divided among three tavazhis composing it. It was no doubt for convenient management and enjoyment; but the arrangement was to be of some duration... The recitals show clearly that the arrangement was to last for a considerable period. It is urged by Mr. Sivarama Menon that no power was given to the tavazhis to raise any new debts, charging the properties set apart for them. He also relies upon paras. 36 to 41 in support of his contention that the power of alienation was taken away and that there is a restraint on alienation. What the karar provides is against the tavazhis charging the properties with any debt so as to bind the tarwad. The tarwad is the owner of the property and the tavazhis have been given the possession and enjoyment of the property and they are restrained from encumbering the property so as to bind the tarwad. There is no restraint against the tavazhis alienating their right in the properties derived under Exhibit I, in favour of a third person; and even if such a restraint is contained in Exhibit I, that would not stand in the way of the tavazhi alienating its interest for its debts; for u/s 10, Transfer of Property Act, such a restraint on alienation is void. The plaintiff does not claim any jenmom right in the property or the right of the tarwad in the property. The plaintiff claims only the right of the tavazhi under the karar....But in the case of an ordinary maintenance arrangement under which property is placed in the possession of the maintenance holder, a person obtaining a decree against him can proceed against the interest of the maintenance holder in the property. The arrangement under the Karar Exhibit I, can be varied by a subsequent arrangement between the members of all the tavazhis. But so long as the arrangement under the karar is in force, the right of the tavazhi under the karar is alienable. It is quite open to all the members of all the tavazhis to put an end to the karar in which case an alienee of the right of the tavazhi who have delivered possession of the property alienated as the alienor's interest in it had ceased.

47. In C.K. Baduvotti v. Mammad S.A. Nos. 1922 and 1923 of 1926, the question for decision by Madhavan Nair, J., was whether Exhibit I in that case evidenced a binding partition or a revocable family arrangement. That document was executed by the then karnavan of the tarwad and under it the properties were divided into two equal shares. One share was arranged to be enjoyed by the

plaintiffs" branch and the other by the defendant's branch. It was mentioned in the document that this arrangement was to continue and go on forever. The karnavan had separated himself out from the family altogether. In pursuance of this document pattas for the property were obtained in the names of the respective tavazhis. The document was dated 1875. The lower Courts found that the said document was accepted and acted upon by the parties concerned all these years and that all the properties of the tarwad were included in Exhibit I. Madhavan Nair, J., held that having regard to these terms Exhibit I evidenced a partition and not a maintenance arrangement.

48. Lakshmana Rao, J., in S.A. No. 441 of 1933 had to deal with the case of a document styled Nischaya Leka. There was a clause in that document restraining alienation on the part of the tavazhis. The provision was that if any debt was to be contracted in respect of the tarwad necessity, all male and female members of both the tavazhis should join and execute the document. There were only two tavazhis in that case. There was no provision for continuance of the karnavan after the date of the document which was of the year 1888. The properties set apart for the tavazhis were to be managed by the senior-most member for the time being. Another clause was that the properties set apart for each tavazhi were to be held by the senior-most member of the tavazhi for the maintenance of its members. It was also provided that the festivals, etc., which were to be conducted in the temples by the tarwad were to be conducted by the first tavazhi. There was no provision for the continuance of a karnavan as such. But the document did not say that the karnavanship was put an end to, though it was the clear effect of it. It was held that the document evidenced a maintenance arrangement and not a deed of partition.

49. In Appa v. Kachai Bayyan Kutti (1932) 35 L.W. 444, Jackson and Anantakrishna Aiyar, JJ., held that where a document is ambiguous and difficult to construe, the subsequent conduct of the parties to the document can legitimately be taken into account. On a proper construction of the terms of the document in that case, which was styled as karar, the learned Judges construed it as a partition deed. They pointed out that the non-mention of rights of alienation, etc., in the document would not prevent the usual legal incidents from attaching to the ownership of the property in case it is found that ownership of such property passed to particular persons by virtue of the provisions of the document.

50. Pandalai, J., in Kanthasami Pillai v. Bhargavi A.S. No. 1001 of 1929, dealt with the case of a document styled as a family settlement and purported to be executed by 26 persons seven of whom were minors and there was a clause that all the stipulations made in the settlement shall always remain in force can be binding effectively on the members therein. The learned Judge stated that it was unusual to see a maintenance arrangement in which the minors take part and that in law it is impossible to have a maintenance deed which is to be permanently binding on the members. He also said that it was a contradiction in

terms that an arrangement as to enjoyment, etc., of a property in a tarwad short of a partition shall be permanent and not open to alteration, for it is the essence of maintenance arrangements that they should be open to revision. Therefore, he held this fact to be almost conclusive against the document being construed as a maintenance arrangement.

51. Pandrang Rao and King, JJ., in Appeal No. 57 of 1948 held that the provision that the arrangement was to be permanent was a clear indication that it was a case of partition. They referred to the clause against alienation and construed it as an expression of a pious hope that the property should be kept intact and that it was bad under the Transfer of Property Act. (See also *Dere alias Annappu v. Hami* Unreported S.A. No. 1739 of 1888, dated 25th October, 1889).

52. In *Krishnan Nambudiripad v. Damodaran Nambudiripad* App. 296 of 1941, the question in appeal was whether a document, dated 13th January, 1932, effected a partition of the properties of a tavazhi or it should be regarded as a deed of arrangement for the maintenance out of the tavazhi properties of the members after division into two groups. The Subordinate Judge considered that the deed effected a partition. In appeal Sir Lionel Leach, the Chief Justice and Lakshmana Rao, J., held that this evidenced only a family arrangement. They relied upon Clauses 11, 18 and 22, therein for their conclusion. Clause 11 provided that the father during his lifetime should have the power of charging any portion of the family properties for the payment of his debts if they were not discharged by his sons. Clause 18 provided that if the two sons who were to manage the respective portions of the family estate did not fulfil their duties properly, the father had the right of resuming the management of the whole estate. Clause 22 reads as follows:

The arrangement, namely, that of managing our affairs in a state of bifurcation as abovementioned is at present considered to be for our common benefit. And, as in the above arrangement, no exact or correct division of the properties have been made, and if later, we ourselves or our successors and descendants desire that we should come together again and manage our affairs under a unified common control, or desire on the other hand that a rateable and correct division of the properties should be made, it has been settled hereby, that it shall be open to us to do so.

Somayya, J., in *Muttathil Kuppu Amma's daughter Ammalu Amma and Others Vs. Muttathil Mamma Amma's son Vasu Menon and Others*, , has referred to a Full Bench decision of the Travancore High Court, wherein the characteristic features of the document which had to be interpreted in that case were:

53. (1) Properties were allotted to the branches separately. (2) The allotments were more or less of an enduring character. (3) Limited power of alienation had been conferred on some of the members, but care was taken to see that properties were not frittered away by independent dealings. (4) The hold of each branch over the properties given to the other two was maintained intact to

prevent the properties from being lost to the tarwad. (5) The document was styled a Nischayapatrom. The Full Bench of the Travancore High Court held that the document was not a deed of partition.

54. Somayya, J., in Muttathil Kuppu Amma's daughter Ammalu Amma and Others Vs. Muttathil Mamma Amma's son Vasu Menon and Others, , dealt with the implications to be drawn from the abolition of the karnavanship and held that by itself it was nothing and that on the other hand we often find in family karars the karnavan being asked to abdicate forever and he was not to function and the family karar or the maintenance arrangement being made to regulate the management of the properties.

55. These tests are not exhaustive and no circumstance or group of circumstances will enable us to decide whether a given document has to be construed as a partition or family arrangement deed. Each case has to be decided on all the circumstances of that case.

56. Therefore, where the weight of evidence and balance of probabilities are fairly balanced, and the circumstances relied upon by one side to establish its hypothesis are equally consistent with the hypothesis on the other side as not unnaturally it will happen often because a family arrangement is in its essence only a revocable partition arrangement and the distinction between them is one of degree rather than of difference the only conclusive test is the subsequent conduct of the parties and in regard to which the position could not be stated better than in the language of Benson and Sundara Aiyar, JJ., already referred to viz., that mere lapse of time does not destroy community of interest but lapse of time without any apparent exercise of proprietary right is a very cogent circumstance against its continued existence, and the presumption against it must tell with increasing pressure according to the length of time that has elapsed. In Mayne's Treatise on Hindu Law and Usage (11th Edn.) page 974, it is pointed out how far the fact that the branches of a tarwad have lived separate for long, enjoying the properties of the tarwad separately, would after the lapse of considerable time give rise to an inference of partition has been discussed in some decisions and the view that has found favour is that separate residence, separate assessment, separate management, etc., for over a long period the length of time being dependent on the circumstances of each case will establish the intention to divide.

57. In this case owing to the fact that this arrangement was come to in 1944 and the suit itself had been filed in 1950, this invaluable and almost conclusive test cannot be availed of. So in this state of evidence where the circumstances relied upon by each side to establish its hypothesis are equally consistent with the hypothesis on the other side and where there has been no intervening length of time between the arrangement and the disputation to enable us to decide one way or the other, I hold that Exhibit B-I has to be construed as being what it purports to be namely a family arrangement and not as a partition deed. Absoluta sententia expositors non indiget (There is no necessity to explain that

which requires no explanation).

58. This family arrangement is not impeached on any invalidating circumstance but only on the ground that it is not an irrevocable family partition.

59. Having come to the conclusion that this is a family arrangement, I have got to examine whether this falls within the meaning of Section 36(6) of the Madras Aliyasantana Act, 1949, which runs as follows:

A registered family settlement (by whatever name called) or an award, to which all the major members of a kutumba are parties and under which the whole of the kutumba properties have been or were intended to be distributed, or purport to have been distributed, among all the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity, shall be deemed to be a partition of the kutumba properties notwithstanding any terms to the contrary in such settlement or award.

60. In the instant case there can be no dispute that Exhibit B-I is a family settlement and called as such to which all the major members of the kutumba are parties and under which the whole of the kutumba properties have been distributed among all the kavarus of the kutumba for their separate and absolute enjoyment. The only dispute is that, in regard to the G and D schedule properties, they have not been allotted in perpetuity and therefore this Exhibit B-I is taken out of the ambit of Section 36(6) of the Aliyasantana Act, 1949.

61. Paragraph 7 of Exhibit B-I runs as follows:

C schedule property is allotted for maintenance, etc., of the 21st individual Padmanabha Chetti alias Thimmappa Punja. In the branch relating to this individual, as there is no other descendant, the entire property should, after his lifetime pass on to the first and second branches in two shares; and in order that there may not be any disputes at that time with regard to shares, it is found better to keep them separately now alone. Hence, C schedule property is divided into two shares as items I and II. After the death of the 21st individual, item C-I property, out of them, should be included with item IV of A schedule and item C-II property should be included with B schedule.

62. The argument built upon it is that only life estate is given to Padmanabha Chetti, that it is not a distribution in perpetuity and therefore the arrangement would not amount to a partition. But there are three circumstances showing that this provision in paragraph 7 of Exhibit B-I would not take it out of Section 36(6) of the Aliyasantana Act. First of all, as pointed out in Sundara Aiyar's *Malabar and Aliyasantana Law*, page 11, before the decision of *Munda Chetti v. Thimmaju Hengsu* (1863) 1 M.H.C.R. 380, which put an end to suits for partition under Aliyasantana system, the practice seems to have been to allot a life interest to males and females with possibility of issue extinct and to divide the property among the females. See also page 104 of *Sri S. Krishna Rao's Aliyasantana Law*:

It will be noted in all these partitions the males were awarded only a life interest

in the share allowed to them conformably to the theory that their interest in property was restricted to one of maintenance and that on their deaths their share had to lapse to the family.

63. This Padmanabha Chetti was a nisanthathi kavaru and therefore the property has been distributed in such perpetuity in accordance with the custom under which the allotment was possible to him, viz., for life. But this interest did not cease with his life and provision is made for devolution in two equal shares to the Nisanthathi kavarus. It was certainly open to the parceners by agreement to regulate the mode of distribution in perpetuity. It will be noticed also that there has been certainly distribution is not a makeshift arrangement but a perpetual arrangement. The section itself speaks of distribution of the kutumba properties in perpetuity among the kavarus and not of each kavaru enjoying in perpetuity the kutumba properties distributed. Therefore, looked at from any point of view the distribution of the C schedule property would not in any way make this family arrangement any the less a partition as contemplated by Section 36(6) of the Aliyasantana Act, 1949.

64. Paragraph 8 of Exhibit B-I runs as follows:

D schedule property and (item) VII of A schedule, i.e., Chavadi building of the Daiva, are allotted for expenses in connection with the conducting of the Daiva Devara Biniyogai of our family; and in accordance with the mamool existing in our family for the senior most male member to conduct the same, the said properties are allotted, for possession to the 21 st individual who is the senior most member at present in the family. From the income of the said property, this individual shall, upto his death, pay the tirva to Government, shall properly conduct all the viniyogas to be conducted according to the mamool described in the abovementioned karar No. 453 of 1933 in association with all the members of the family, shall without default pay in accordance with the ancient practice, the harike (vow), kanike, vanthige, varadu, etc., to be paid by our family, shall receive the honour and dignities to be got by our family, shall carry out the repairs to the roof, etc., of the Daivada Chavadi item VII of schedule A, and, thus shall enjoy the property. After the death of the 21 st individual, the senior most male member in the entire family shall get possession of the said D schedule property and shall enjoy the same in accordance with the abovementioned terms assuming the title of Daivada Gadi in the same manner as the 21st individual. The chief Mekhtesarike and the management of Sri Kaveswara Bhandara possessed by our family are being conducted by mamool at present by the 21st individual only, and hence, after his lifetime, the same should be conducted by the senior most male member in the family in the order of succession.

The argument built upon this provision is that there was no absolute dedication of these properties and that only a charge was created on the properties to receive and apply a portion of the income for religious and charitable purposes enumerated in Exhibit B-I and that in such a case property descends and is alienable and partible in the ordinary way, the only difference being that it passes

with the charge upon it and that therefore the D schedule properties should be construed as properties remaining undistributed and therefore inasmuch as there was no exhaustion of the distribution of all the kutumba properties under this arrangement, this would not become a partition u/s 36(6) of the Aliyasantana Act, 1949. Therefore we have got to see whether there was an absolute dedication or a family trust created under Exhibit B-I. That the entire family by consent dedicated absolutely these D schedule properties for the religious and charitable purposes enumerated and that in any event it would constitute a trust can admit of no doubt whatsoever. First of all it is common ground that in the case of respectable families both in Malabar and South Kanara, it is customary to set apart a small portion of the properties at the time of the partition for religious and charitable purposes. In the instant case the family is a wealthy one and has been getting 1250 muras of rice. There was already, by a previous ejaman, an endowment of properties yielding an income of 21 muras of rice under a settlement deed, dated 4th January, 1930 : See Exhibit B-2. The endowment under the D schedule is of 15 items yielding income of about 100 muras of rice. This dedication of property for religious or charitable purposes was not partial but absolute. There is no evidence whatsoever that any portion of the income after meeting the expenses of the trust created went towards the support of the person put in charge of the properties. Therefore, this is not a case where a charge has been created on the property or there was a trust to receive and apply a portion of the income for religious or charitable purposes and when in such a case the property would descend and be alienable and partible in the ordinary way. In other words, the property by consent of parties was taken out of the properties to be distributed as partible properties. Section 36(6) of the Aliyasantana Act, 1949, only contemplates a distribution of all the distributable kutumba properties for separate and absolute enjoyment. In addition, even carrying technicalities to their uttermost extent, the D schedule properties have been separated and allotted to a kavaru and a provision has been made for its separate and absolute enjoyment in perpetuity. Therefore, looked at from any point of view, it cannot be stated that the D schedule properties remained undistributed within the meaning of Section 36(6) of the Aliyasantana Act, 1949.

65. The net result of this analysis of the evidence is that the registered family settlement, to which all the major members of the kutumba were parties and under which the whole of the kutumba distributable properties taking the D schedule properties from out of the hotchpot have been distributed among all the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity has got to be construed as a partition of the kutumba properties notwithstanding any terms to the contrary in such a settlement.

66. On this conclusion it follows that the plaintiffs would not be entitled to the relief of partition as asked for. The appeal is allowed, the decree and judgment of the lower Court are set aside and the suit will be disposed of in the terms set out by my learned brother in the last paragraph of the judgment just now delivered by him and in the circumstances without costs throughout.