

**(1934) 08 MAD CK 0055**  
**In the Madras High Court**

|                                               |            |
|-----------------------------------------------|------------|
| (Ottapilokool Kurunkot Mammili) Ramunni Kitav | APPELLANT  |
| Vs                                            |            |
| Chalikkara Kunhayan and Others                | RESPONDENT |

**Date of Decision :** 02-08-1934

**Acts Referred:**

**Citation :** AIR 1935 Mad 125(1) : 155 Ind. Cas. 651

**Hon'ble Judges :** Walsh, J

**Bench :** Division Bench

### Judgement

Walsh, J.—The plaintiff's suit was decreed in the trial Court and dismissed in the lower appellate Court and he prefers this second appeal. The genealogy of the family has been set out in para. 9 of the trial Court's judgment and it will be convenient to repeat it here:

|                         |                                |                          |
|-------------------------|--------------------------------|--------------------------|
| Ittichira               | Amma                           |                          |
| ----- ----- ----- ----- |                                |                          |
| Kitav                   | Cheeru Cheronni Ummamma Ammini | Chirutha         Kommuni |
| Kitav                   | Krishnan Kitav                 | Ramunni                  |
| ----- ----- ----- ----- |                                |                          |
|                         | Plaintiff in this suit         | Rammunni Kitav           |

Krishnan Kitav Chathukutti Kitav 2. One further fact may be noted that of the three sons of Cherooni, Ramunni Kitav was the son by the first husband and Krishnan Kitav and Chathukutti Kitav are the sons by the second husband. The facts which led up to the suit are as follows : Krishnan Kitav and Chathukutti Kitav who are the sons of Cherooni applied to the Collector to have the registry transferred to their names. This was ordered. Komuni Kitav shown at the extreme left of the table in whose name the properties stood as the son of Ittichira Amma, filed O.S. No. 344 of 1902, for a declaration that the properties belong to him and that Krishnan Kitav and Chathukutti Kitav had no right at all. That suit ended in a razinamah decree Ex. A dated, 27th November 1902. Under this razinamah the plaintiff in that suit, Komunni Kitav got the plaint items. During his lifetime Ramunni Kitav, i.e., the present plaintiff, was to have possession and pay him rent until he attained karnavanship.

3. On this happening he was to give up possession to Krishnan Kitav and Chathukutti Kitav and as these in their turn attained karnavanship the property was to be enjoyed by the tavazhi consisting of the descendants of Cheeru, Ammini and Ummamma excluding Cheerooni and her descendants. Subsequently Krishnan Kitav and Chathu Kutti Kitav have demised the property in favour of the present defendant 1 vide Ex. B dated 7th April 1909. Krishnan Kitav died and Chathu Kutti Kitav granted a melkanom on 15th November 1921, Ex. 1, in favour of the present defendant 2 who brought O.S. No. 344 of 1922 and obtained possession : vide Exs. P and 12. The appellate Court held that the present plaintiff could not in that suit contest the validity of the melkanam and that his remedy was by way of a separate suit. He has therefore filed the present suit. The plaintiff's case in the suit is that the properties belong to the tavazhi consisting of the descendants of Cheeru and Ummamma and that he as karnavan is entitled to be in possession and that the melkanam granted to defendant 2 is in contravention of the terms of the razinamah. Defendant 2 pleaded that the properties belong to a smaller tavazhi consisting of Krishnan Kitav and Chathukutti Kitav and their mother who got the property from the second husband of Cheerooni. The trial Court gave a decree for the plaintiff agreeing with the contentions raised by him.

4. This was reversed by the lower appellate Court on four grounds: (1) that the tavazhi created by the razinamah Ex. A is one unknown to the law; (2) that Ammini's son shown in the right-hand corner of the pedigree is senior to the plaintiff and the suit should have been therefore brought by him; (3) that defendant 2 had no notice of the razinamah; and (4) that the melkanam is binding on the larger tavazhi because the amount was advanced to clear the debt of the tavazhi. I agree with the learned Advocate for the appellant that none of these grounds can be maintained. The plea that such a tavazhi was unknown to the law was not raised in the trial Court nor in the appeal to the lower appellate Court. Assuming that it was competent to the lower appellate Court to raise it and that its view is justified by the ruling in *Moithiyan Kutty v. Puthiapurayil Mammali* 1928 Mad 870, which it quotes, it will not make any difference in this case for two reasons (1): even if the tavazhi was not legally constituted, the right of management under the razinamah Ex. A vests in the senior male member and if the parties did not take the property under Ex. A as a tavazhi, they would be tenants in common and (2) any tenant in common can sue to recover the properties as against the trespasser. Vide *Freeman on Co-tenancy*, Edn. 2, Article 343, and *Debendra Narayan Singh v. Narendra Narayan Singh* 1920 Cal. 610 and the decision in Second Appeal No. 157 of 1930.

5. With regard to the second point that the suit should have been brought by Krishnan Kitav, son of Ammini, it is not in my opinion open to the lower appellate Court to raise this question. The defence in the suit was not that this Krishnan Kitav and not the plaintiff was the proper person to bring the suit, but that the plaintiff was not a member of the tavazhi at all, nor entitled to the tavazhi property. It should be mentioned here that the witnesses in their evidence speak

to three legal entities. First there is the larger tavazhi consisting of those persons shown in the tree, (descendants of Ittichira) and some other members. Secondly, there is the tavazhi, to which the plaintiff is speaking, which is a special one constituted by the razi, excluding Cheerunni and her descendants. This is the tavazhi which the lower appellate Court has found to be illegal. Thirdly, there is a small tavazhi which the defendants speak to consisting of Krishnan Kitav, Chathukutti Kitav, Ramunni Kitav and Cheerunni. Defendant 2's case has throughout been that the property in question came to Krishnan Kitav and Chathukutti Kitav through their father. It was never their case that it belonged to a larger tavazhi, and that as such not the plaintiff but Krishnan Kitav, the son of Ammini, should be the karnavan who should sue. The matter was not put in evidence nor in the first Appeal Memo. It is sought here to argue that it is referred to in para. 2 of the appeal preferred to the Subordinate Judge which says:

Because the Court below erred in not recording any clear finding on issue 1.

6. But the next words are:

The Court below should have held that the plaintiff is not a member of Kurunghot tavazhi and he has no right to maintain the suit.

7. Issue 1 raised was "is the plaintiff entitled to sue?" Nowhere was the contention raised that he was a member but was not the karnavan. In his evidence the plaintiff as P. W. 1 alluded to this Krishnan Kitav and said:

Ammini has a son called Krishnan Kitav, the karnavan of Marunalli tarwad. He has no right over the plaint property.

8. This witness was in no way cross-examined on this statement, nor was any suggestion made that this Krishnan Kitav had the right and was the proper person to bring the suit as karnavan. Therefore in my opinion the lower appellate Court was not justified in raising a mixed question of law and fact which was not the case of the parties. The third ground was that defendants had no notice of the razi. That matter seems to have been alleged in the written statement : vide para. 8 of the trial Court's judgment. But it does not seem to have been argued before the trial Court nor was any ground raised in the first appeal on this point nor objection taken that the trial Court did not consider it. The lower appellate Court has itself found-and it is quite obvious- that under the razinamah Chathukutti Kitav was not a member of the tavazhi constituted by the razinamah and was deprived under that razinamah of that property and the rent. Sundara Ayyar, J. in his book, Malabar Law, at p. 129, states as follows, referring to the judgment of Holloway, J. in Kanna Pisharody v. Kombichen (1885) 8 Mad. 381.

If the reasoning of Holloway, J., is accepted, where there is a total prohibition against the karnavan dealing with the property, his disposition will not be binding on the family, whether the lender had notice or riot \* \* \* Suppose the effect of the karar is to terminate the karnavan's authority altogether. How would it then

stand? Would the analogy of Section 208, Contract Act, apply and would third parties not be affected till they have notice of such termination? This would be pushing too far the analogy of agency. The Karnavan is not an agent. He has authority to act by reason of his status. If he ceases to have the status, he has no longer authority to act on behalf of the family. If the analogy is pressed too far, even a decree in a suit deposing the karnavan might not be efficacious enough to terminate the agency so far as ignorant strangers are concerned.

9. It appears to me on perusing *Kanna Pisharody v. Kombichen* (1885) 8 Mad. 381 that it really is no help in the matter. It concerns a case where the party had no notice of the limited powers of the karnavan and I can find no remarks of Holloway, J., as to what the position would be if the karnavan had no powers at all. Nevertheless, in the absence of any cases quoted to the contrary, the opinion of Sundara Ayyar, J., deserves very high respect. In the present case however, having regard to the defence set up and the evidence of defendant 2 himself, it is really unnecessary to give any final opinion on this point of want of notice because defendant 2 entirely supported the defence case that the tavazhi to which he was lending money was the minor tavazhi of Krishnan Kitav and Chathukutti Kitav and that he lent the money on the property which they got from their father. His evidence is quite clear. He says:

Krishnan Kitav was the karnavan of Kurungothil house. Properties belonging to Kurungothil house were given on Puthravakasam right to Krishnan Kitav and Chathukutti Kitav by their father. I paid Rs. 450 to discharge the debt due by that tarwad.

10. To the same effect is the evidence of D. W. 2 who got the decree on Ex. 2 which defendant 2 paid off. Therefore defendant 2 helped this smaller tavazhi to discharge a debt created by it and the property which he took was the property which had come from the father of Krishnan Kitav and Chathukutti Kitav. There is no question therefore of want of notice. The last ground on which the lower appellate Court based its judgment is that the melkanam is binding on the larger tavazhi because the amount advanced is clearly tavazhi family debt. That is really an astonishing conclusion in the face of the evidence of D.W. 1 himself and the whole defence in the suit and the evidence adduced. Ex. I, melkanam, does not profess to be executed on behalf of the tavazhi. On the other hand Chathukutti Kitav says the property is his exclusive property. Defendants 1 and 2 have attempted to support this view and sworn to the effect that this smaller tavazhi to which they lent the money held the property as the property given on Puthravakasam right, to Krishna Kitav and Chathukutti Kitav by their father. In the face of that it is absolutely impossible to say that there is any evidence at all for holding that the melkanam was binding on the larger tavazhi. In fact it is opposed to the defendant's case. The only respondent who has contested this appeal is defendant 2 and in the face of his plea in the written statement that the property did not belong to the tavazhi of Cheeru and her descendants but was the property obtained by Krishnan Kitav and Chathukutti Kitav from their father

he cannot be allowed to argue in appeal that this was not so and that the evidence which he gave before the Court, especially when that evidence was the defence case, was not true. This appeal must therefore be allowed and the decree of the District Munsif restored with costs here and in the lower appellate Court.