

(1912) 10 MAD CK 0047
In the Madras High Court

T. Krishnan Nair and Eleven Ors.

APPELLANT

Vs

T. Damodaran Nair and Thirteen Ors.

RESPONDENT

Date of Decision : 14-10-1912

Acts Referred:

Citation : (1915) ILR (Mad) 48 : (1915) ILR (Mad) 47

Hon'ble Judges : Ralph Sillery Benson, C.J.;Sundara Ayyar, J;Sankaran Nair, J

Bench : Full Bench

Judgement

Ralph Sillery Benson, C.J.—The question referred for our decision is ""whether the self-acquisitions of a female member of a

Marumakkattayam tarwad would, on her death, lapse to the tarwad of which she dies a member, or whether they would descend to her nearest

heirs or her tavazhi.

2. I have no doubt but that, according to the customary or common law of Malabar, such self-acquisitions descend to her Savazhi. That was the

customary law, as I understood it, when [was District Judge of that district for several years before I became a Judge of this Court. That there is

abundant evidence to support that view is clear from the order of reference to the Full Bench in Govindan Nair v. Sankaran Nair I.L.R.(1909)

Mad. 851, It is, however, contended before us that the majority of the Full Bench in that case held that the case law of this Court since Kallati

Kunju v. Palat Erracha Menon (1864) 2 M.H.C.R. 162, shows that the self-acquisitions of a male lapse to his tarwad, and do not pass by

inheritance to his nearest heirs, and that the decision, though it does not in terms apply to the self-acquisitions of females, yet is based on reasoning

applicable to both alike, and that we should hold that the self-acquisitions of a

female lapse to her tarwad in preference to descending to her tavazhi or heirs.

3. I cannot accede to this contention. In the suit out of which the reference arose, there was a question as to the descent of the self-acquisitions of a female, as well as of a male, but the order of reference was limited to the self-acquisitions of a male, and the referring Judges notwithstanding the decision of the Full Bench, decided that the self-acquisitions of the female in that suit descended to her own children and did not lapse to the tarwad. It is, therefore, clear that the learned Judges in that case did not regard the decision of the Full Bench as involving a decision that the self-acquisitions of a female on her death lapse to her tarwad. No case has been quoted to us, nor am I aware of a single case, in which it has been directly ruled that the self-acquisitions of a female pass to her tarwad in preference to her tavazhi. The dictum in *Ummanga v. Appadorai Patter* ILR (1911) Mad. 387, was, I have no doubt, intended to apply only to the self-acquisitions of males, as is shown by the fact that it purports to state the result of the "decisions," and the decided cases refer only to the self-acquisitions of males.

4. Even in the case of the self-acquisitions of a male it may well be doubted whether the customary or common law of Malabar requires them to pass to his tarwad in preference to his tavazhi. But, assuming, as held by the Full Bench in *Govindan Nair v. Sankaran Nair* (1909) 32 Mad. 351, that it is now too late to give effect to the true customary law in the case of males in face of the decisions since 186d, there is certainly no reason to apply a similar rule to the self-acquisitions of females, which are not dealt with by the decisions, in opposition to what I think is the well established customary law. It may be added that since the decision of the *Katama Natchiar v. The Raja of Sivaganga* case (1863) 9 M.I.A. 539 and the application of the principle of that decision to the Malabar cases-*Ryrappan Nambiar v. Kelu Kurup* (1882) 4 Mad. 150 *Alami v. Komu* (1889) 12 Mad. 126, and *Achutan Nayar v. Cheriotti Nayar* I.L.R.(1899) Mad. 9, it has become logically impossible to hold that the members of a tarwad succeed to the self-acquisitions of one of its members on his or her death by virtue of survivorship. If they succeed, it can only be as heirs of the deceased, and it would be strange if the more distant relatives included in

the tarwad should succeed equally as heirs with the issue and other near heirs of the deceased.

5. My answer to the reference is that the self-acquisitions of a female member of a Marutnakkattayam tarwad on her death do not lapse to the tarwad of which she dies a member, but descend to her tavazhi, i.e., to her issue, if she has any, and, if not, then to the tavazhi to which she would, in that case, belong according, to the customary law of Malabar.

Sankaran Nair, J.

6. One Narayani Amma, a member of a Marumakkattayam tarwad, died without issue leaving certain separate or self-acquired properties. On behalf of the tarwad, certain members thereof sued the defendants Nos. 1 to 8, the brothers, sisters and sisters' children of Narayani for a declaration of their title.

Mother.

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Damodaran Madhavan | Narayani Govindan Yesoda Kunju

first deft, second deft. Karthiayani (died), third deft, fourth deft, fifth deft.

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Teyunni Raghavan Parukutti

sixth deft. seventh deft. eighth deft.

7. The question referred to the Full Bench for decision is whether the self-acquisitions of a female member of a tarwad ""would on her death lapse

to the tarwad of which she dies a member or whether they would descend to her nearest heirs or her tavazhi."" The "tarwad" is composed of those

whose names are given above, and also of the other parties to the suit, who are related to them in the female line through a common female

ancestress. If we hold that the properties would lapse to the tarwad, all the members including defendants Nos. 1 to 8 take jointly.

8. A "Tavazhi" means a woman and her descendants in the female line. There may be many tavazhis therefore in a tarwad. A female without issue

or a male belongs to the tavazhi consisting of his or her mother and the mother's descendants in the female line; and when it is said that the property of that person descends to his or her tavazhi, it is meant that it devolves on this body of persons. When a female has descendants they all together form the tavazhi of which she is the root and her property devolves on them as her tavazhi. Thus if Narayani had any issue she and her descendants would have formed a tavazhi. But Narayani left no issue and the next group or tavazhi to which she belonged as distinct from the other members of her tarwad is that composed of her mother and all her (i.e., the mother's) descendants in the female line. The mother in this case is dead and her descendants, defendants Nos. 1 to 8, accordingly claim Narayani's property as her tavazhi. The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the tavazhi, may raise another question. If the nearer in blood takes the property then the defendants Nos. 6, 7 and 8 whose mother is dead may be excluded, though they would take as members of the tavazhi. The case before the referring Bench does not raise the question as the claim of the tarwad, the plaintiff in the suit, must be dismissed if any of the defendants are entitled to the property either as a member of the tavazhi or as being nearer in blood to the exclusion of the tarwad. In *Govindan Nair v. Sankaran Nair* ILR (1909) Mad. 351, Miller, J., and myself had to consider the question of succession to the property of a deceased male and also of a female. With reference to the former we had before us a number of decisions which assumed or decided that it lapsed to the tarwad; and as we were of opinion that those decisions ought not to be followed we referred the question to a Full Bench for decision. But in the case of a females we felt no such difficulty. We had no doubt what the usage was. The question being one of customary law, not whether a custom has been proved in derogation of the ordinary law, the Courts were bound to give effect to it though no evidence had been given in the case of the usage.

9. Only two cases have been referred to in which the question of succession to the property of a deceased female was discussed. In the first case a Subordinate Judge of great experience, Mr. Gopalan Nair, refused to apply what is believed to be the ordinary rule laid down by Holloway, J., to the case of succession to females and upheld the claim of the children to the mother's property. He said:

10. In well-conducted Nair tarwads in Malabar where the Marumakkattayam law of inheritance obtains in all its purity and integrity, a female's

property which is usually acquired by her more or less with funds derived from her parents or husband goes to her own children and I have never

heard of a single instance in which a good karnavan has ever asserted the tarwad's rights to property of this character. Mr. K.R. Krishna Menon

than whom there is no better authority on Malabar law has always maintained that a female's property would descend to her own children and not

to the tarwad and the oft-quoted authority on the other side is the decision in Kallati Kunju v. Palat Erracha Menon (1864) 2 M.H.C.R. 162

where the question was as to the self-acquisition of a deceased male and not a female. ""Pathummah v. Mama Appeal No. 125 of 1885. The High

Court did not lay down any general rule in that case but held that the Muhammadan law governed the self-acquisition of a member of that family. I

am not aware of any case in which it has been held that the self-acquisitions of a female lapsed to or were inherited by her tarwad. The other case

referred to by the appellants' pleader is not in point. The question there was whether in cases of Mappillas following Marumakkattayam law the

devolution of self-acquired property was according to the Muhammadan law. The question was whether the Marumakkattayam law or the

Muhammadan law was applicable to a species of property left by a member of a Muhammadan Marumakkattayam tarwad. The question as to the

descent of the property of a female under the Marumakkattayam law was neither raised nor allowed to be argued in the High Court [Hlikka

Pakramar v. Kutti Kunhamed (1894) 17 Mud. 69. The judgment of the District Judge in that case shows however the prevalence of the practice

of the succession of her children to a female's property. I am not aware of any case in which the property of a deceased female was decreed in

favour of the tarwad. Such at any rate was not and is not the legal consciousness of the people as stated by Mr. Gopalan Nair and I think he is

quite right.

11. Is there any reason why we should not decide so? Miller, J., and myself considered that the reasons which required a reference to the Full

Bench in the case of succession to a male's property did not preclude us from acting on our opinion in the case of succession to the property of a

deceased female, and we did so, even after receiving the decision of the Full Bench. The learned Judges refer to a judgment of the Chief Justice and myself decided before the question was considered by the Full Bench. The question of succession to the property of a male or female was not then before us for decision and it was not argued before us. Further the dictum was pronounced as regards the general law though it happened that the property in question was that of a deceased female.

12. Assuming that the customary law is as laid down by the Full Bench so far as the devolution of the property of a male is concerned, there is no reason why we should apply that rule to the property of a female when the usage is otherwise. I am also satisfied that such is the law also.

Strange, J.

13. Says in his Manual that self-acquired moveable property-which alone was considered by him heritable property-descends ""in the case of females to their issue male and female."" Both Strange and Holloway, JJ., spoke from personal knowledge of the customary law of the country.

14. Many reasons may be easily suggested for this difference; according to the theory of the Malabar law the property is vested only in females.

(See Strange's Manual, Article 401). The result was that the divisions of tarwad properties in old days was according to tavazhis (Strange's

Manual, Article 389). In decrees for partition the Courts set apart properties for males when they left or divided from the tarwad only for their use

and on their deaths the decrees directed that the shares should lapse to their family, though there was no such restriction in the case of females who

received their share. See the cases referred to and discussed. Aliyasantana Law, by Krishna Rao, page 104. It is possible to suggest that therefore

a male may not have been recognized as a source of inheritance when he had a tarwad. I assume that the Pull Bench accepted Holloway's, J.,

view that the property lapsed to the tarwad. For to recognize the tarwad as heir would lead to the result that the property of a male who has no

tarwad should escheat to the crown though he may have divided brothers, sisters and mother. Again the devolution of a person's property on his

or her issue is generic to all systems of law though sex and seniority may have been grounds of preference. The succession of a widow in Hindu

law is no exception as the widow is for this purpose treated as part of the person

of the husband. The Malabar law is no exception, as in the case

of males, the law does not recognize their issue. Females usually acquire property by gifts from husbands, fathers or favourite brother or uncle.

Such property is intended for her and her children.

15. I should not be understood as suggesting that for these reasons the laws of inheritance are not the same for males and females. My reasons for

the other conclusion are given in the order of reference to the Full Bench and in the dissenting judgment of Miller, J., with which I agree. But; if the

law is rightly declared by Holloway, J., and by Full Bench, it is possible to suggest the above reasons for this difference in the customary law of

succession.

16. I adhere therefore to our judgment in *Govindan Nair v. Sankaran Nair* (1909) 32 Mad. 351 so far as succession to a female's property is

concerned and hold that the children and other descendants, if any, of a female succeed to her property as members of her tavazhi.

17. This involves the conclusion that in their absence the tavazhi to which she would then belong, i.e., her mother and the descendants of her

mother, succeed to her. The mother of Narayani is dead. Therefore defendants Nos. 1 to 8 succeed to her property.

18. My reply to the reference is that the self-acquisitions of a female do not lapse to her tarwad but they descend to her tavazhi; if she has issue,

the tavazhi is composed of that issue; if she has no issue, her mother and her descendants form her tavazhi.

Sundara Ayyar, J.

19. The question referred to the Full Bench is whether the self-acquisitions of a female member of a Marumakkattayam tarwad would on her

death lapse to the tarwad of which she dies a member or whether they would descend to her nearest heirs or her tavazhi. In *Govindan Nair v.*

Sankaran Nair (1909) 32 Mad.351 two out of the three Judges constituting the Full Bench expressed the opinion that the self-acquisitions of a

male member must lapse on his death to the tarwad. The Judges who made the reference, Miller and Sankaran Nair, JJ., were of contrary opinion

and held that they should descend to the immediate heirs of the acquirer. Miller, J., adhered to his opinion as a member of the Full Bench. Mr.

C.V. Anantakrishna Ayyar contends that no difference can be made between the

acquisitions of a male member and of a female member, that the ratio decidendi in the Pull Bench case is equally applicable to the acquisitions of a female and that we are therefore now bound to hold that the self-acquisitions of a female must also lapse to the tarwad. In the case which was referred to the Pull Bench the learned Judges-Miller and Sankaran Nair, JJ.-had to decide also the question of the descent of the self-acquisitions of a female. They did not refer that question to the Pull Bench but decided that a woman's self-acquisitions would go to her own children. The learned Chief Justice in his judgment expressly states that the question referred was limited to the self-acquisitions of males but he refers to the pronouncement of himself and Sankaran Nair, J., in an earlier case subsequently reported, *Ummanga v. Appadorai Patter* (1911) 34 Mad., 387, that the self-acquisitions of a female would lapse to the tarwad. The judgment of Abdur Rahim, J., is not based on any considerations peculiar to a male and his reasoning would apparently be equally applicable to the self-acquisitions of a female. The question is, are we bound to extend the rule laid down in *Govindan Nair v. Sankaran Nair* (1909) 82 Mad. 351 to the self-acquisitions of a female? If the decision is to be regarded as based on the usage governing the followers of the Marumakkattayaon law, then there is no reason for extending the decision beyond the circumstances in which the rule was laid down. There may be a custom that the self-acquisitions of males would lapse to the whole tarwad while the custom with regard to the self-acquisitions of females may be that they would descend to their own children. The children of males have no rights in the property of the tarwad and if the custom had its origin in a desire to benefit children, the motive would not operate in the case of a male's self-acquisitions. But whatever the motive may be the operation of a custom cannot be extended by analogy. The particular custom applicable to any set of circumstances must be proved. If on the other hand the basis of the full Bench decision is not custom but a rule of law, then the appellants would be entitled to contend that the principle laid down must be applied though the facts may be different. The argument cannot be accepted to the extent that a principle enunciated with respect to certain circumstances must always be carried out to its logical conclusion and applied to all analogous circumstances, for, in the language of Lord Halsbury, law is not

always logical. It stops short of logical conclusions where it is necessary to do justice in a different state of things. Though the principle applicable may appear to be the same the rule of law to be laid down must depend on the interests of the community at large and the demands of justice in varying circumstances; and logical deduction must yield to what justice, equity, and good conscience require. Between the male and female members in a Marumakkattayam tarwad, there is this important distinction; that the female is the stock of descent while the male is not. Whether this could be a ground on which the nearer heirs of a male could be denied preferential rights of inheritance while they are accorded to the nearer heirs of a female is questionable. Besides, females generally acquire property by gifts from their husbands or their nearest relations in the tarwad and the object of such gifts would ordinarily be not to benefit the donee alone but her children also. But again, it is questionable whether this should be a ground for giving rights of inheritance to a female's children which the nearest heirs of a male do not possess in acquisitions belonging to him. I confess that if the Pull Bench judgment is to be regarded as based on a rule of law, I can find no sufficient reason for making a distinction between the acquisitions of a male and those of a female. If nearness of kinship is a ground of preference in the one case, it would seem that it ought to be equally so in the other. If the judgment, however, of the Full Bench supposing it to proceed on a rule of law and not on custom, proceeded on an incorrect view of the Marumakkattayam law as contended for by the respondents, then we are not bound to extend it beyond the actual circumstances of that case, and to apply it to the self-acquisitions of a female. The judgment of the learned Chief Justice is based solely on the rule of stare decisis; it is not clear whether he regarded the rule to be laid down as depending on usage or on law apart from usage. Probably he adopted the latter view. Abdur Rahim, J., apparently regarded the question as one of customary law for he observes, "'Marumakkattayam law to which the question pertains is entirely customary law,'" and refers to the observations of this Court in Wannathan Kandile Chiruthai v. Keyakadath Pydel Kurup (1871) 6 M.H.C.R. 191 that if Malabar law is a branch of Hindu law, it is one put out or separated from the parent stem before the present form of Hindu law existed,'" and to the observations of the Privy Council in Raman Menon v. Raman Menon (1901) 24 Mad. 73 that

there is no sacred book or other writing [among the Nairs] having legal authority"" and their law is wholly based on the Rages of the people. The

learned Judge apparently regards the pronouncement of Scotland, C.J., and Holloway, J., in *Kallati Kunju v. Palat Erracha Menon* (1864) 2

M.H.C.R. 162 that all acquisitions of any member of a family lapse on the death of the acquirer to the family, as a decision on the usage prevailing

amongst the followers of the Marumakkattayam law. He regards it as a rule of inheritance based on usage. If, as held by the learned Judge, the

usage has, in numerous decisions extending over a long period, been held to be that the self Acquisitions of a member must lapse to the tarwad,

then I agree that the case is one to which the principle of stare decisis should be applied and that any change in the law must be left to the

legislature. If, on the other hand, the decision in *Kallati Kunju v. Palat Erracha Menon* was not a pronouncement on the existing usage but on the

view of the judges who decided the case as to the rule of law applicable and their view as to the proper rule was erroneous, then the question

whether the rule of stare decisis should be applied would depend on whether the habits of the people have been subsequently moulded on the rule

laid down in that judgment and whether justice requires that those habits and the vested rights acquired in the faith of the rule laid down by the

Court should not be disturbed after the lapse of a long time. The first matter for decision therefore is whether *Kallati Kunju v. Palat Erracha Menon*

(1864) 2 M.H.C.R. 162 held that the usage of Marumakkatayis was that the self-acquisition of a member of a tarwad lapsed to the whole tarwad.

The dispute in the particular case was between the Karnavan of the tarwad of the deceased acquirer and the children of the acquirer who alleged

that during his life-time he had alienated it to them. The alienation was held to be valid. The learned Judges observed that it was unquestionable law

that the acquirer was fully entitled to hold, encumber and dispose in his life-time of his self-acquisitions and his right to alienate was held to be

unquestionably in accordance with usage, for in all the reckless litigation of Malabar, one member of the Court (i.e., Holloway, J.) with judicial

experience of several years does not remember an instance of a Karnavan attempting to get into his own hands the self-acquired property of a

junior member."" That was the only question that arose in the case. But the decision of it is preceded in the judgment of the learned Judges by a

dictum with regard to the devolution of the property, after the death of the acquirer. They say: ""It is unquestionably the law in Malabar that all the acquisitions of any member of a family undisposed of at his death form part of the family property, that they do not go to the nephews of the acquirer but fall, as all other property does, to the management of the eldest surviving male."" That is not stated to be the usage of the people or to be in accordance with the usage. ON the other hand it is perfectly clear to my mind that Holloway, J., did not consider it to be in accordance with the usage. In *Kamaram v. Ryru Moore's Malabar Law and Custom*, III Edn., p. 181 he observed as Judge of Tellicherry that it was a prevalent fallacy in Malabar that the immediate heirs of the acquirer were held entitled to inherit the acquisition and the learned Judge deplored the actual law as fruitful in mischief. The learned Judge held about the same time in *Varadiperumal Udaiyan v. Ardanari Udaiyan* (1863) 1 M.H.C.R., 412 that the self-acquired property of a Hindu co-parcener governed by the Mitakshara law would also lapse by survivorship to all his co-parceners and would not be inherited by his own heirs. There was no doubt a stage in the development of the law of joint families when all property acquired by any member of the family was taken to be for the benefit of the whole family. At first the acquirer was not held entitled to have any higher rights over it than any other member of his family. According to the Mitakshara law he was at one time entitled to a double share in that property; subsequently he was permitted to dispose of it at his pleasure during his life-time but probably the right of testamentary disposition ignoring the rights of the co-parceners was not at first recognised. But a stage was reached later on when the right of inheritance was taken to vest in the heir of the acquirer, and his co-parceners were held not entitled to take it by survivorship, The Privy Council held in the *Sivaganga case: Katama Natchiar v. The Raja of Sivaganga* (1863) 9 M.I.A. 539-that in a Mitakshara family the right of succession depended on the nature of the property and not on the status of the acquirer as to whether he was a member of an undivided family or a separate member. Is there any reason to suppose that the same stage of law had not been reached in 1864 when *Kallati Kunju v. Palat Erracha Menon* (1864) 2 M.H.C.R. 162 was decided, amongst the followers of the Marumakkattayam law in Malabar? There is absolutely no reason for holding that it had not been reached. The rule of descent to

the man's own heir was applied by the Privy Council in the Mitakshara law not only to cases where he was a separated individual, but also where

he was living in commensality with his co-parceners. All the evidence of usage that we possess in Malabar is in favour of the view that the prevalent

rule of descent in Marumakkattayam law was the same as what was laid down in the Mitakshara law by the Privy Council in the Sivaganga case-

Kitaina Natchiar v. The Raja of Sivaganga (1863) 9 M.I.A 539 Mr. Cook, Mr. Strange and Mr. Holloway himself have recorded the fact. Mr.

Logan, the author of the Manual of Malabar Law, is another witness to the usage of the people. Mr. Wigram no doubt was of opinion that the rule

laid down in *Kallati Kunju v. Palat Erracha Menon* (1864) 2 M.H.C.R. 162 was "undoubtedly in accordance with ancient usage which regarded

the family as an indissoluble unit and took no thought of the individuals composing that unit" and he regarded the practice of inheritance to the

nearer heirs of the acquirer as of recent growth. See Moore's Malabar Law and Custom, page 176. But that learned Judge refers to no authority

in support of his conception as to the actual usage in Malabar. His opinion was probably based on what he regarded "must have been the usage

as the family was regarded as "an indissoluble unit and took no thought of the individuals composing it." That is a theory applicable alike to Hindus

governed by the Mitakshara and by the Marumakkattayam law, In *Alami v. Komu* (1859) 12 Mad. 126 it was found that the practice of making

wills relating to self-acquired property had come into vogue as early as the beginning of the past century. It is very unlikely at that very early time

that the right of testamentary disposition would have been recognized if the property of the testator would not otherwise descend to his own heirs.

The only evidence of usage as far as I am aware is that self-acquisitions should descend to the immediate heirs of the acquirer and the decision in

Kallati Kunju v. Palat Erracha Menon (1864) 2 M.H.C.R. 162 far from being based on usage was based on the theory of the Marumakkattayam

law which one at least of the learned Judges who decided it knew to be contrary to the prevailing usage; and usage was referred to only in support

of the view that the acquirer could during his life dispose of his acquisitions at his pleasure. Regarding that judgment, then, as based on the theory

of the Marumakkattayam law of property was it a correct exposition of the law? If as observed by Abdur Rahim, J., Marumakkattayam system is

customary law, than the judgment must be held to be wrong as it was not based on the usage but was contrary to it. If on the other hand, it was not based on usage but upon the theory of lapse applicable to all property acquired by a member of an undivided family then it was equally wrong as shown by the judgment of the Privy Council in the Sivaganga case-Katama Natchiar v. The Raja of Sivaganga (1863) 9 M.I.A. 639. I myself have no doubt, as already observed, that the learned Judges based it on the theory of joint family property. Their view was that the tarwad had an inchoate right in the acquisitions of a member which should therefore lapse to them by survivorship on the acquirer's death. After the decision in the Sivaganga case-Katama Natchiar v. The Raja of Sivaganga (1863) 9 M.I.A. 639-the judgment can be no longer held to be right. It has been held in subsequent decisions that Scotland, C.J., and Holloway, J., based their judgment on the right of survivorship. This was the view taken of it in Ryrappan Nambiar v. Kelu Kurup (1882) 4 Mad. 150 Alami v. Komu (1889) 12 Mad.. 126 and Achutan Nayar v. Cheriotti Nayar (1899) 22 Mad., 9 as well as in other cases. In the first of these cases it was held that divided kitismen had no right to object to a will made by the last survivor of a tarwad as they had no right of survivorship. In the second case it was held that the Sivaganga case-Katama Natchiar v. The Raja of Sivaganga (1863) 9 M.I.A. 639-showed that there was no survivorship with regard to the self-acquired property of a member and that therefore when the property lapses to the tarwad they must take it subject to his debts. The question did not arise there as to whether it would descend to the immediate heirs of the acquirer or to the tarwad. In the third case, it was held overruling an earlier decision that an acquirer could dispose by will of his self-acquisitions and the absence of the right of survivorship as shown by the Sivaganga case-Katama Natchiar v. The Raja of Sivaganga (1863) 9 M.I.A. 639-was again referred to. The language of the judgment in Kallati Kunju v. Palat Erracha Menon (1864) 2 M.H.C.R. 162 is itself quite clear on the point. It was observed by Abdur Rahim, J., in the Pull Bench case "no doubt the use of the words "lapse" and "survivorship" points to a stage in the growth of the Marumakkattayarn system when the tarwad had an interest in the self-acquired property of one of its members, but I do not find it difficult to conceive that though this may serve to explain its origin the rule in favour of succession by the

tarwad may have survived the state of things which gave rise to it." I entirely agree that a rule may survive the reason which gave rise to it. But did it survive as a matter of usage in this case? I think not, for there is absolutely no evidence that it did. As a rule of law the proposition is wrong as shown by the judgment of the Privy Council. I would respectfully observe that the Malabar law is really only a school of Hindu law. It is true that there are no sacred writings which are authoritatively binding on the followers of the Marumakkattayam system but the Marumakkattayis are undoubtedly a class of Hindus whose system of holding property is similar to that of other Hindus and who have a system of heirs of their own as other Hindus have. There are, no doubt, two essential differences between the Mitakshara law and the Marumakkattayam law; first with regard to the rule of inheritance and secondly that a co-parcener is not entitled to a compulsory right of partition. But the same principle would be applicable to Marumakkattayam law and to Hindu law in deducing the consequences flowing from the joint-holding of property. Such holding if it would not affect the succession to the self-acquired property of a Mitakshara Hindu, should no more affect the rule applicable to the self-acquisitions of a Marumakkattayi. At any rate such a distinction could be supported only by the actual usage of the people. The effect of the Privy Council decision was perceived by the Court in the cases already referred to, viz., Ryrappan Nambiar v. Kelu Kurup (1882) 4 Mad. 150 Alami v. Komu (1889) 12 Mad., 126 and Achuthan Nayar v. Cheriotti Nayar (1899) 22 Mad. 9. But with regard to the self-acquisitions of a male the consequences of the judgment of the Privy Council were apparently not clearly apprehended. No doubt the rule laid down in Kallati Kunju v. Palat Erracha Menon (1864) 2 M.H.C.R. 162 was limited and its logical consequences denied as pointed out in the judgment of Sankaran Nair, J., in the order of reference in the Full Bench case. No case actually arose between the tarwad and the immediate heirs of an acquirer in which the dictum in Kallati Kunju v. Palat Erracha Menon (1864) 2 M.H.C.R. 162. was affirmed. Several Subordinate Judges, followers of the Marumakkattayam law, denied the correctness of the dictum. The High Court no doubt has affirmed the dictum in subsequent obiter dicta. The question arose directly for decision only in the case of a Muhammadan family in Illikka Pakramar v. Kutti Kunhamed (1894) 17 Mad. 69. but all that was decided there was

that Moplah families in North Malabar governed by the Marumakkattayam law would be governed by the rule of lapse of self-acquired property

to the tarwad, it being assumed that this was the rule applicable to Hindu Marumakkattayis. It was decided more than a quarter of a century ago

that amongst the followers of the Alyasantana law in South Canara, the incidents of which are in all essential respects the same as those of the

Marumakkattayam law, the succession to the self-acquisitions of a member was to his own heirs and not to the tarwad, the decision being based

on the usage prevailing amongst the people. The same decision has been recently arrived at with regard to the self-acquisitions of a member of a

Nambudri family, the law of the Nambudris also disallowing compulsory partition as the Marumakkattayam law does. The Travancore High Court

and the Cochin Chief Court have also held that according to the Marumakkattayam law the rule laid down in *Kallati Kunju v. Palat Erracha*

Menon (1864) 2 M.H.C.R.162 is wrong [see *Sakthi Kerulan v. Sakthi Sakth* 24 Trav. L.R. 102.

20. It is not denied, and it was not denied in the course of the arguments in the Full Bench case, that a Marumakkattayi has his own heirs other

than the tarwad. Suppose for instance all the members of a Marumakkattayam tarwad become divided from each other at the same time and one

of them subsequently dies, who is the heir to the property of the deceased? There is no tarwad to which it could lapse. It is impossible to contend

that every person who was a co-parcener of the deceased would be equally entitled to the property. That would be completely ignoring the rule

established from time immemorial that a man's own nearest heirs are entitled to succeed to the property. The rule was recognized in the translation

of the Mahabharata by the well-known Tunjat Ezhutta the father of Malayalam literature. It was recognized by Mr. Cook and Mr. Strange.

Nobody in Malabar has ever had any doubt about it. It is indeed not denied in the judgment of Abdur Rahim, J., in *Govindan Nair v. Sankaran*

Nair (1909) 32 Mad. 351 That learned Judge apparently adopts the view that there are two lines of heirs according as the deceased was the

member of an undivided tarwad or not, a proposition which was negatived with respect to the Mitakshara law by the Privy Council and not

supported by usage as observed by Messrs. Cook, Strange and Holloway. I am not impressed with the argument that there would be difficulties in

giving effect to the succession of the nearest heirs or the tavazhi of an acquirer. It is contended that the tavazhi does not include the mother of the acquirer though she must be held to be nearer than the descendants of the sisters and perhaps even than the brothers and sisters themselves. But the definition of a tavazhi does not exclude the mother herself whose descendants including the acquirer form the tavazhi along with herself. In the enumeration of heirs by Mr. Strange in his manual of Hindu law the mother is no doubt mentioned after the brothers and sisters and the issue of sisters. But in the Keralavakasakramam by a native writer in Travancore the mother is included along with the brothers and sisters. I do not think that the Judges who made the reference in the Full Bench case intended to exclude the mother from the tavazhi of the acquirer though the descendants alone are named. It does not appear whether the mother was alive in that case. My examination of the decisions has led me to the conclusion that the rule laid down in the dictum in Kallati Kunju v. Palat Erracha Menon (1884) 2 M.H.C.R. 162. was wrong as a proposition of law deduced from the Marumakkattayam system, that it was recognized at the time of its pronouncement as contrary to the prevailing usage, that the application of the rule has been restricted and departed from in subsequent decisions, that its incorrectness has been shown by the decision of the Privy Council in the Sivaganga case-Katama Natchiar v. The Raja of Sivaganga (1863) 9 M.I.A. 543. and recognized in several decisions of this Court and that it has never been affirmed directly in any subsequent case where a competition arose between the nearest heirs of the acquirer and his tarwad. The referring order in the Full Bench case shows that notwithstanding the dicta of the High Court the usage of the people has not been altered, that as a matter of custom it is the immediate heirs of the acquirer that succeed to his property at his death. In these circumstances I am of opinion that there is no scope for the application of the doctrine of stare decisis. The case is a curious one in which the people have followed their customary law for a period of about half a century notwithstanding the attempt of the High Court to modify it. They have succeeded in inducing the Court to depart from the principle in several respects. I do not think that we should hesitate to pronounce a judgment which would be in accordance with both law and custom. I think for these reasons that the decision in the Full Bench case in Govindan Nair v. Sankaran Nair

(1909) 32 Mad. 351, cannot be applied to the self-acquisitions of a female member of a tarwad, My answer to the question referred to the Full

Bench is that the self-acquisitions of a female would descend to her nearest heirs under the Marumakkattayam law.