Kerala High Court
Mary Cheriyan And Anr. vs Bhargavi Pillai Bhasura Devi And ... on 17 March, 1967
Equivalent citations: AIR 1968 Ker 82
Author: R Nayar
Bench: P R Nayar, T Raghavan, P G Nair, V G Nambiyar, T K Iyer
JUDGMENT Raman Nayar, J.

1. The question before us is whether, under the Marumak-kathayam law, a subsequently conceived child gets a right by birth in the property obtained by its mother for her separate share in the partition of her tarwad, thus reducing her theretofore absolute powers of disposition to those of a joint family manager. In other words, whether, after such individual partition as it has been called, the property in the mother's hands continues to retain its character as tarwad property or becomes her individual property (I here use the expression, "tarwad property" not as meaning property still belonging to the tarwad but as meaning property with the incidents of tarwad property -- of. Section 38(2) of the Madras Marumakkathayam Act, 1932 before amendment by (Kerala) Act 26 of 1958 --and the expression, "individual property" to mean property bereft of these incidents and having instead the incidents of self-acquired property.) The expression, "separate property" within the meaning of Chapter IV of the Madras Marumakkathayam Act and of Chapters IV and V of the Travancore Nayar Act, 1100 seems to me wide enough to include "tarwad property" owned by one person in which no one else has got a share, and that is why I am using the expression, "individual property". This question was answered in the affirmative by a full bench of the Travancore-Cochin High Court in Parameswaran Pillai v. Ramakrishna Pillai, 1954 Ker LT 862= (AIR 1955 Trav-co 55) (FB), and in the negative by a full bench of this Court in Kalliyani Amma Bhavani Am-ma v. Narayani Amma Madhavi Amma 1963 Ker LT 859-(AIR 1963 Ker 358) (FB), in both cases by a majority of two to one. The correctness of the latter decision has been questioned and that is why the question is before us once again.

2. I think that the answer given by the earlier full bench is the right answer, and, but for the gentle rebuke administered by Velu Pillai J, in the later full bench case --see paragraph 10 of the report -- I might have been tempted to express myself as emphatically as S. Govinda Menon J. did in Naniamma Janakiamma v. Chandy Varghese 1949 Ker LT 21.

A Marumakkathayam tarwad like a, Mitakshara coparcenary is a fluctuating body of persons (whether corporate or not we need not stop to consider) forming a joint family with community of property. (See the definition of "tarwad" in Section 3(1) of the Madras Marumakkathayam Act in Section 2(6) of the Travancore Nayar Act, 1100 and in section 3 of the Cochin Nayar Act, 1113 as also in the several other Marumak-kattayam law statutes. Community of inter-rest, unity of possession, right by birth and survivorship are incidents of joint family property whether of a Marumakkat-tayam tarwad or a Mitakshara coparcenary but the existence of such property is no more necessary to constitute a tarwad than it is to constitute a coparcenary, although, where persons live together it is difficult to conceive of their possessing no joint property whatsoever. Indeed, until a division takes place, a female and all her descendants in the female line constitute a Marumakkathayam tarwad whether they own property in common or not) Admission to this body is, by birth (or adoption) into the family, in the female line in the case of a tarwad, and in the male

line in the case of a coparcenary, and membership thereof determines with death. Every member is a co-proprietor, with the result, of the joint family property and gets this right on birth. And, on the cessation of his membership on death, his interest lapses, or, as it is commonly put, passes by survivorship, to the remaining members. Thus, the property of the tarwad or coparcenary belongs to its members for the time being and it is property which, so long as it is not transferred and remains with the joint family, is to enure for the benefit not merely of the members in existence at a given time but also of the members to be admitted in the future.

3. On partition, a tarwad breaks up into separate units, each unit a tarwad by itself, or, where it consists only of one person the nucleus of a tarwad, the tarwad coming into being the moment there is an addition cither by birth or adoption. (As I have already indicated, the moment a Marumak-kattayee female who has separated from the remaining members of her tarwad given birth to a child, a tarwad comes into being whether she likes it or not, and whether she owns property or not, and it continues until there is a partition between them). These separate units are commonly called tavaz-hies (or sometimes, in legal parlance, sub-tarwads) in contradistinction with the original tarwad. (The word, "tavazhi" has, however, another and special meaning as implied by the definitions in Section 3(j) of the Madras Marumakkattayam Act and Section 2(3) and (4) of the Travancore Nayar Act, 1100 as denoting the group of persons consisting of a female and her children and all her descendants in the female line or such of that group as are alive, a natural group as some decisions put it. In this special sense, the word is generally applied to such groups constituting branches of an undivided tarwad.

The separate units may consist of one or more members, and between the several units there is no longer any community of property. Any two or more members may form a unit or tavazhi and take their share of the property jointly -- I am of course not thinking of persons who take the property for their shares as tenants-in-common without division by metes and bounds, for, such persons take their shares severally and not jointly and do not constitute the sort of unit I have in mind, namely, a tavazhi --and when they do so, there is community of property between the several members. They constitute a tarwad by themselves, the membership of which decreases by death and increases by birth or adoption, and the property is tarwad property in their hands with all the incidents of such property such as survivorship and a right by birth or on adoption. Such units or tavazhies are usually composed of persons forming a natural group. But that is not necessarily so. Any two or more members of a tarwad, whether or not they form a natural group, can choose to remain joint and form a unit, since the severance of the joint status which they enjoy cannot be imposed on them against their will. See in this connection Explanation I to section 38 of the Madras Marumakkattayam Act as amended by Kerala Act 28 of 1958 which is only declaratory of the law as also Sreedevi Nethir v. Peruvunni AIR 1935 Mad 71 at p. 78, Kuttimalu Amma v. Lakshmi 1960 Ker LJ 1476= (AIR 1961 Ker 166) (FB),) If that be the position with regard to multi-member units, is there any reason why a single-member unit should take its share as individual and not as tarwad property? I can think of none, while I can think of many for the contrary. It is by the same process of partition (involving no transfer destructive of the incidents subject to which the property partitioned is held but only, as it has been put, a crystallisation of the interests of the several units) that single-member and multi-member units are constituted. There is no difference whatsoever regarding the nature of the partition, and I do not see why if the partition effects no change in the

incidents of the property it allots to a multi-member unit, it should effect such a change in the property it allots to a single-member unit.

A Marumakkattayee female and her children constitute a joint family whether or not she has any property obtained from her tarwad by partition. A single-member unit formed in a tarwad partition can add to its members by birth or adoption and thus become a joint family, and, if members added to a multi-member unit got a right to the property obtained in the tarwad partition the moment they become members of the joint family, why should not members added to a single-member unit get a like right? The property of the original tarwad, as we have seen, was property intended for the benefit of persons to be born into it in the future, and, when a tarwad breaks up into units, the property allotted to a multi-member unit undisputedly shares the same character, so that members born into it thereafter get a right by birth. Why should property allotted to a single member unit not share the same character? Had there been no partition, the children of a lone female sharer would have got a right by birth in the entire properties of the tarwad. Why then should they not get such a right in the property allotted to the lone sharer in partition, and why should they be in a worse position than the members born into a multi-member unit?

It is possible for a person to give property to a Marumakkattayee female with no children so as to enure for the benefit of the Marumakkattayam joint family to come into being in the future on the birth of children? Section 48 of the Madras Marumakkattayam Act and Sections 22 and 41 of the Travancore Nayar Act 1100 and Section 64 of the Cochin Nayar Act contemplate this. It is all a matter of intention and the donor need not necessarily be the husband of the woman -- the statutory provisions referred to only enact a presumption regarding the intention when the husband is the donor. And, if that be so, should not a woman who gets a share in her tarwad partition, of property, in which all person born into the tarwad including her own children were to Ret a right by birth, hold the property subject to the same incident of her children Retting a right by birth?

I suppose that the reason why an unsecured creditor of a tarwad is, after partition, allowed to recover from the divided units to the extent of the tarwad property in their hands is that the original promise to pay must be deemed to be by all the members of the tarwad out of the tarwad property (though not as a charge on it) and that the tarwad property retains that character in the hands of the divided units after partition, even in the hands of persons not born at the time of the partition. A single-member unit can no more escape the liability than a multi-member unit; and it seems to me clear that a single-member unit can no more deny a right by birth to those born into that unit than a multi-member unit.

4. The circumstance that the sole member of a single-member unit has absolute powers of disposition over the property should not confuse the issue. That is only because the one member constitutes the whole unit to which the property belongs. The moment there is an addition to the unit that absolute power of the original member vanishes, and he or she can only have the power that can be exercised by a manager in a representative capacity. See in this connection Umayal Achi v. Lakshmi Achi AIR 1945 FC 25 at p. 32.

A multi-member unit has likewise absolute power of disposition over its property and, if all the members thereof are sui juris, they can jointly do what they like with the property. It is only when power is exercised in a representative capacity that the question of vires, in other words, of consideration and legal necessity comes in. The absolute powers of disposition enjoyed by the sole member of the single-member unit is therefore no indication whatsoever that the property is that member's individual property and can be no reason why, if members can be added to the unit by birth or adoption, the new members should not get a right in the property the moment they become members

5. The position of a member of a tarwad who gets an individual share on partition seems to me exactly the same as that of a sole surviving member of a tarwad. In the one case he or she gets sole and exclusive right to the property allotted in partition by the exclusion therefrom of the remaining members as a result of the partition; in the other, in the entire property of the tarwad, by the elimination of the other members by death. In both cases the character of the property remains the same. If the single member founds a joint family whether, in the case of a female, by giving birth to children, or by adoption -- and I see no reason why a single male member, whether the last surviving member or a single sharer in a partition should not adopt -- see for instance Sections 72 of the Cochin Nayar Act 1113 which, if it applies as it undoubtedly does to a sole surviving male member, must apply equally to a single male sharer in a partition -- the new members would forthwith become co-proprietors with that member of the tarwad property.

6. The preponderance of judicial opinion is in favour of the view I am taking. All the decisions brought to our notice with the exception of the decision in 1963 Ker LT 859 = (AIR 1963 Ker 358), namely, Kochu-krishna Menon v. Lakshmi Amma 23 Cochin 495, 1949 Ker LT 21, Kamakshi Amma v. Gan-gadharan Pillai, AIR 1954 Trav-Co 60 (FB), and 1954 Ker LT 862-(AIR 1955 Trav-Co. 55) (FB) take this view. 1963 Ker LT 859-(AIR 1963 Ker 358) alone takes the contrary view. 23 Cochin 495 is nonetheless of persuasive authority for giving full credit to the very able judgment of the District Judge and quoting in extenso therefrom, and the criticism levelled against the remaining decisions that they have slavishly followed the Mitakshra law on the point seems to me entirely unjustified.

7. There are no doubt many vital differences between the Mitakashara and Maru-makkattayam law of joint family property. But the Mitakshara law on this particular point is not derived from any religious text or doctrine such as, for example, pious obligation, peculiar to that law, but from principles of logic and reason which are common to all systems of law. It is only recently after the statutes conferring the right of individual partition were enacted, that Individual partitions have come into vogue under the Marumakkattayam law; before that, when partition could only be by consensus, individual partition was virtually unknown; and that is why decisions on the point we are considering are comparatively recent. But, under the Mitakshara law such partitions have been common enough for a much longer period of tune, and, if the rules evolved by that system of law are logical, reasonable and just, I do not see why we should be shy of adopting them when faced with the same problems under Marumakkat-tayam law, as embodying the principles of equity, justice and good conscience.

For myself, I have arrived at the result which I have reached without reference to the Mitakshara law, and, If the Mitakshara law points to the same result, that, I think, should lend me assurance rather than otherwise. And, I might add that, whatever be the religious trappings of the Mitakshara doctrine of right by birth, the Mitak-shara rule that whoever would have got a right by birth in the property of a joint family had it remained joint -- and, although that is hardly material, I do not think that this right by birth in any way depends on the origin of the property; so long as it is joint family property every coparcener gets a right by birth whether the property is ancestral joint family property, or the self-acquisition of a member thrown into the joint family hotchpots, or the joint acquisition of the members which, whether by the aid of presumptions or otherwise, is to be regarded as joint family property not merely as the "joint property of the acquirers -- will get a like right in the property allotted on partition to the divided unit into which he is born, is a rule founded purely on notions of secular commonsense and secular justice. The three degree rule of Mita-kshara law founded on religious obligation does not obtain in Marumakkattayam law. Under the Marumakkattayam law every member of a tarwad how low-so-ever in decree Rets a right by birth. And, as I have already indicated, it seems to me that it is the right by birth in the undivided family property, not the religious obligation on which it is founded, that is the basis of the Mitakshara rule of a right by birth in property taken on partition.

8. Section 38 of the Madras Marumakkattayam Act before its amendment by Act 26 of 1958 ran thus:

"38. (1) Any tayazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad:

Provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to such tavazhi and to any other tavazhi or tavazhis of the tarwad except with the consent of such ancestress, if she is a member of the tarwad.

(2) The share obtained by the tavazhi shall be taken by it with the incidents of tarwad property.

Explanation -- For the purpose of this Chapter, a male member of a tarwad or a female member thereof without any living child or descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad."

It is clear from the explanation that a sole sharer in a partition whether a male or a female, takes the share with the incidents of tarwad property. This, it seems to me, is only declaratory of the Marumakkattayam law -- it is hardly to be expected that a statute reforming and modernisms that law by (among other things) providing for the first time for a right to compel partition (albeit only a tavazhi partition) would have enacted what reformers might call a reactionary rule regarding the character of the property in the hands of a lone sharer. had that not been the customary law.

That the corresponding provisions in Section 37(ii) of the Travancore Nayar Act and Section 59 of the Cochin Nayar Act which contemplate individual partition do not contain an explanation making it clear that property taken on partition, whether by an individual, or by a group or tavazhi,

continues to have the incidents of tarwad property can lead to no inference that that was not the customary law in the areas to which they apply. For, it is conceded, that a multi-member unit takes it share subject to the incidents of tarwad property. That, it is not disputed, is the customary law, and neither principle or precedent has been brought to my notice why there should be a different rule in respect of a single-member unit. The statutes concerned make no distinction in this regard between single-member and multi-member units; and whether the property in the hands of the divided units should retain the incidents of tarwad property depends solely on what I might call the intention of the law and not on the intention presumed or otherwise, of the parties.

9. The criticism that the view I am taking involves an unreasonable discrimination between the sexes in that a sole male sharer takes the property as his individual property in which his children get no right by birth, while a sole female sharer has to take it as tarwad property in which she must concede a share to her children, if she gives birth to any, forgets the fundamental fact that, under the Marumakkattayam system, a female is a stock of descent while the male is not. The property is the property of the tarwad, and, while the issue of a female belong to the tarwad of the female, the issue of a male do not belong to his tarwad. But should a male adopt to his tarwad-- and, as we have seen, there is no reason why he should not -- the adopted person or persons would forthwith become members of his tarwad, and get a right to the property obtained by him in his tarwad partition.

The notion that the property of a tarwad is meant for the benefit of those who are born into it and not for the benefit of outsiders like the children of a male member is carried to its logical conclusion in the Aliyasanthana law under which a nissan-thathi kavaru in other words, a sterile unit of the joint family not capable of adding to the family, gets only a life interest in the properties allotted to it. If there are santha-thi kavarus among the remaining units formed on the family partition, on the extinction of the nissanthathi kavaru, the property allotted to it reverts to the santhathi kavaru a -- see Section 36 of the Madras Aliyasan-thana Act. In Marumakkattayam law, however, every unit formed on partition, whether a sterile unit or not, is given an absolute estate in the property allotted to it. The so-called discrimination is based on the fundamental differentiation between the male and the female lines of descent in the constitution of a joint family. Where the male is the stock of descent, as under the Mitakshara law the children of a female who is allotted some property in the partition of the family of her birth, or who is given some property by her father, get no right by birth in that property although they are members of the same joint family.

10. The boot of unreasonable discrimination is really on the other foot. It is undisputed that a mother and her minor children who take (and have to take) their shares together under Section 36 of the Travan-core Nayar Act hold the property as tavazhi property, in other words, with the incidents of tarwad property so that afterborn children get a right by birth therein. If the adult sharers taking separate shares (even female sharers who in the ordinary course, would, by giving birth to children, found a tavazhl even as her mother adds to her separated tavazhi), take their shares as individual property, what reason is there to justify the discrimination not merely against the mother but against her minor children who have perforce to take their shares jointly --see in this connection the discussion in Parukutty Amma v. Chella'mma 1957 Ker LT 176 at pp. 183 & 184-(AIR 1957 Ker 69 at pp. 73 & 74).

11. To sum up, 1 would emphasize that the property of a tarwad belongs to its members for the time being, and, in the hands of its karnavan, is burdened though (unless so decreed by court) not charged in the legal sense of that term with the obligation of maintaining them. The property enures for the benefit of members who may be added in the future, in the normal course by birth into the family in the female line, and, on admission, the new members forthwith get a right in the property When, on partition, the tarwad breaks up into units, forming a number of new tarwads as it were, each unit takes the property allotted to it for itself free of any claims by the remaining units.

When the unit is a multi-member unit, it is undisputed that it takes the property with all the incidents of tarwad property and with all its obligations, New members admitted tnto the unit, who, but for the partition would have been members of the original tarwad and would have got a right by birth in the property of the tarwad, get a right by birth in the property allotted to their unit is there any reason then why the tarwad property should change its character and be free of its incidents and obligations when it is allotted to a single-member unit which, on the admission of new members by birth or adoption, becomes a joint family? But for the- partition, these members would have been members of the original tarwad getting a right by birth in the property of the tarwad. Merely because of the accident that the unit into which they were born happens to be a single member unit should they be deprived of this right?

The intention of what I might, for want of a better word, call the customary Maru-makkattayam law cannot be that the property should be shorn of its incidents and obligations when allotted to a single member-unit any more than that it should be so shorn when allotted to a multi-member unit. An outsider can give property to a Maru-makkattayee female impressing it with the character of tarwad property so that it belongs not to her solely but to the joint family to come into being when she gives birth to children. The property in her hands has the incidents of right by birth and survivorship.

It is all a question of intention, and, when the gift is by the husband of the woman the statutes enact a presumption of such an intention -- see for example, section 48 of the Madras Marumakkattayam Act section 41 of the Travancore Nayar Act of 1100 and Sections 64 of the Cochin Nayar Act. These provisions are declaratory of the preexisting customary Marumakkattayam law on the point which imputed such an intention when the donor was the husband. Such property was not to be the individual property of the done but was to be tarwad property in her hands. The courts thought that, when a man steeped in Marumakkattayam traditions gave property to his wife, his intention, in the absence of evidence to the contrary, must be presumed to be to benefit not merely his wife but her entire tavazhi, whether already in existence or still to come Into being by the birth of children.

Are we then to imagine that the customary Marumakkattayam law would (even as informed by progressive statutes and progressive notions) be less steeped in Maru-makkattalam traditions than the Travancore Nayar Act of 1912, or the Malabar Nayar Act of 1932, or the Cochin Nayar Act of 1938, in the case of the latter two even of today since the presumptions enacted by the Madras and Cochin statutes are still in force? Could the intention of the customary Marumakkattayam law be--as I have said the intention of the parties is irrelevant for that cannot alter the incidents of partitioned property as determined by law--that persons who but for the partition, would have got a right by birth in the property of the tarwad should get no such right In the property allotted to their mother

on partition because of the' accident--and so far as the law is concerned it is nothing more--that she was given a separate share for herself and did not take it jointly with some other member? Surely the presumption that the property got by her in Her tarwad partition should enure to the benefit of her children is much stronger than in the case of property given to her by her husband.

12. Before the statutes giving the right to individual partition came into force, individual partitions were rare, and the question of the character of property obtained by a single sharer in partition, or, for that matter even of property in the hands of a sole surviving member, does not appear to have come up for consideration by the courts. But that does not mean that we cannot today determine what the customary Marumakkattayam law on the point is, having regard to the general principles of that law and the principles of justice, equity and good conscience. I have little doubt that the customary Marumakkattayam Jaw is that property allotted to a single sharer retains the character of tarwad property and is subject to all the incidents of such property lust like tarwad property held by sole surviving member of a tarwad.

13. That being the customary Marumakkattayam law on the point, the next question is whether the various statutes have effected any change in that law--in these particular cases we are concerned only with the Travancore Nayar Act 1100. In this connection, it is relevant to bear in mind the provisions of Section 50 of the Madras Marumakkattayam Act. Section 44 of the Travancore Nayar Act and Section 74 of the Cochin Nayar Act all of which say that nothing in the respective statutes shall affect any rule of Marrumakkattayam Law, custom or usage except to the extent expressly laid down therein.

14. Broad statements such as that the object of the Travancore Nayar Act, 1100 was to replace the Marumakkattayam with the Makkattayam system and joint with individual ownership of property by doing away with the joint family, are, even if true--they are hardly true for the statute does not prevent the formation of new Marumakkattayam joint families on partition of such a family the moment a female who is divided from all the other members of her tarwad gives birth to a child--of little avail. There must be some express provision in the Act to effect the change. That there is not.

Section 39 of the Act which has been relied upon in support of the proposition that an individual sharer in the tarwad partition gets the share as his or her individual property free of all incidents of tarwad property says no such thing, not even by implication, far less expressly. It runs thus.

"39. Nature of right to tarwad property before partition--Until partition, no member of the tarwad shall be deemed to have a definite share in tarwad property liable to be seized in execution nor shall such member be deemed to have any alienable or heritable interest therein."

The implication, if the converse is implied, is not that every member on partition gets a definite alienable and heritable share in tarwad property, liable to be seized in execution. That is obviously not true. For, a member of a multi-member unit gets no such definite share in the property allotted to the unit. The implication might be that, on partition, every unit into which the tarwad divides whether a multi-member or a single-member unit gets a definite alienable and heritable share in tarwad property liable to be seized in execution. But that does not preclude a subsequently born

member acquiring a right by birth in the case of a single member unit any more than in the case of a multi-member unit. So long as the property belongs to a single-member unit that member has an alienable and heritable interest therein, liable to be seized in execution because he or she constitutes the unit. The moment another member is admitted into the unit, the original member ceases to be the sole owner and therefore ceases to have an alienable or heritable interest in the property, but the unit now a joint family, continues to have such an interest.

15. Reference has also been made to Section 17 of the Act which, it is said, contemplated a Nayar female with children having separate property other than self-acquired property--it is said that the words, "self-acquired and separate" occurring in the section must be read as "self-acquired or separate" as in Section 14 of the Nayar Act of 1088, in Section 35 of the Cochin statute, and in Section 25 of the Madras statute in which her children have no right and which, on her death, devolves by succession and not by surviorship. It is argued that this separate property can only be property obtained by her as an individual sharer in her tarwad partition. But, it can as well be property inherited by her, or property taken by her as an individual sharer in a partition between herself and her children, and, in any case, as I have said, inferences from, or implications of, the statute will not suffice. There must be express provision in the statute effecting a change.

16. Some mention has been made of the principle of stare decisis in order to persuade us to uphold the view taken in 1963 Ker LT 859 :(AIR 1963 Ker 358). That, I should have thought, should have the opposite effect; for, it was 1963 Ker LT 859 :(AIR 1963 Ker 358) that, in departure from, a long line of cases laying down the law correctly, for the first time laid down what I, with great respect, regard as the wrong rule. That to reaffirm the old well-established right rule might have the result of upsetting titles acquired on the faith of the new wrong rule, whereas to follow the new wrong rule might not have the result of upsetting titles, is not. I think, a valid consideration. To follow the new wrong rule would be to deprive children born after partition of their due.

17. Coming now to the cases on hand, the 3rd defendant, 2nd respondent in S. A. No. 51 of 1961, who was childless at the time, got the property in suit for her separate share in the partition of her tarwad in 1105. In 1109, she gave birth to a daughter the plaintiff. In 1110, by Ext P-l, she sold the property to her uncle, the 1st defendant, acting for herself and as guardian of the minor plaintiff to whom she obviously conceded a right by birth. In 1116, the 1st defendant sold the property by means of Ext. D-l to the 2nd defendant, and in 1130 within three years of her attaining majority, the plaintiff brought the present suit for recovery of the property on the ground that it had devolved on the sub-tarwad composed of herself and her mother and that the sale under Ext. P-l being unsupported by consideration or legal necessity was not binding on the sub-tarwad.

The first court dismissed the suit finding that the sale was supported by consideration and was for legal necessity; the lower appellate court found the contrary, and, reversing the decision of the first court, allowed the plaintiff to recover on payment to the 2nd defendant of a sum of Rs. 23 and odd which she had paid for the redemption of a melvaipa to which the property was subject; both courts followed the decision in 1954 Ker LT 862= (AIR 1955 Trav-Co. 55) (FB) V. Ramkrishna Pillai to hold that the property was sub-tarwad property -- indeed that much was conceded, for, the decision in 1963 Ker LT 859-(AIR 1963 Ker 358) (FB) was rendered only after judgment had been pronounced

by the lower appellate court; and the main contention advanced on behalf of the 2nd defendant, the appellant before us, has been based on the decision in 1963 Ker LT 859 = (AIR 1963 Ker 358) (FB). It is that the property was the individual property of the 3rd defendant in which the plaintiff had no right whatsoever and which the 3rd defendant was free to dispose of as she pleased.

18. From what I have said it must be clear that, in my view, the plaintiff got a right by birth in the property, that when the 3rd defendant sold the property in 1109 it belonged to the sub tarwad composed of herself and her daughter, the plaintiff, and that the sale can be upheld only if it was supported by consideration and tarwad necessity.

On this point, namely, the binding nature of the sale, there can be little doubt that the finding of the lower appellate court is the correct finding. The sale under Ext. P-l was for a price of Rs. 284. The whole of this was reserved with the buyer, the 1st defendant. Rs. 23 and odd for redeeming the melvaipa of 1107, and the balance of Rs. 260 and odd for payment to the 3rd defendant later on for acquiring other property for herself and the plaintiff This amount was to be paid within a year, and if not so paid, was to carry interest. The 3rd defendant had no particular property in mind for purchase, and the money which was left with the 1st defendant could well have proved irrecoverable, or after recovery, could have been spent by the 3rd defendant as she pleased. Actually some other property was bought under Ext. D-2 some six years later but, for this, It would appear, that the 2nd defendant who had meanwhile bought the property from the first defendant subject to the payment of the amount due to the 3rd defendant, paid only Rs. 264 whereas, with interest, a sum of about Rs. 426 was due. Even that property was subject to an undisclosed encumbrance with the result that the 3rd defendant had to sell the property to discharge this encumbrance, the encumbrancer having sued for his money. In the circumstances, there can be little doubt that the sale under Ext. D-l was not for family necessity or benefit.

19. The lower appellate court has allowed recovery only on deposit of the sum of Rs. 23 and odd paid by the 2nd defendant for the redemption of the melvaipa and has allowed mesne profits at the rate of Rs. 15 per annum as found by the first court from the date of deposit. The 2nd defendant has no complaint that the rate is excessive, and it follows that the appeal has to be dismissed. I would therefore dismiss it with costs.

20. I might perhaps mention that at the fag end of the hearing, in the course of his reply, counsel for the 2nd defendant put forward the case that the melvaipa which the 2nd defendant had redeemed was a tenancy and that the 2nd defendant is entitled to fixity under the provisions of Act 1 of 1964. This case was not put forward at any previous stage and I do not think we should countenance it.

21. In Second Appeal No. 273 of 1964, both sides are agreed that if the decision in 1954 Ker LT 862-(AIR 1955 Trav-Co. 55) (FB) is good law the appeal has to be dismissed; if on the other hand the decision in 1963 Ker LT 859= (AIR 1963 Ker 358) (FB) is good law it has to be allowed. In my view 1954 Ker LT 862-(AIR 1955 Trav-Co., 55) (FB) was correctly decided and I would dismiss this appeal also with costs.

Raghavan, J.

22. I agree Nambiyar, J.

23. I also agree.

Govindan Nair, J.

24. The question is whether in the property obtained by a woman towards her share on partition in a marumakkathayam tarwad, her subsequent born child would get an interest by birth. This has to be answered in these cases with reference to the principles of Marumakkathayam Law and the provisions of the Tra-vancore Nayar Act, II of 1100.

25. I have had the advantage of reading, in draft form, the judgments of my learned brothers Justice P.T. Raman Nayar and Justice T.S. Krishnamoorthy lyer. Justice Raman Nayar has answered the question in the affirmative and Justice Krishnamoorthy lyer in the negative. I am in agreement with the view expressed by Justice Krishnamoorthy lyer.

26. The earliest case brought to our notice in which the question arose for decision is 23 Cochin 495. The view taken therein was followed by Division Bench of the Travancore-Cochin High Court in 1949- Ker LT 21 and in AIR 1954 Trav-Co. 60. There is an observation in the order of reference to the Full Bench which is in accordance with the view taken in the earliest cases. The point was considered In greater detail in 1954 Ker LT 862-(AIR 1955 Trav-Co. 55) (FB) by a Full Bench of the Travancore-Cochin High Court and the view has been affirmed. The main. If not the only, basis on which these decisions have taken the view that a subsequent born child will get an interest by birth in property obtained by its mother for her share on partition is, that that is the rule in the Hindu Mithakshara Law and there is no reason why the same should not be the principle applicable to those governed by the Marumakkathayam Law.

27. A later Full Bench of the Kerala High Court in 1963 Ker LT 859= (AIR 1963 Ker 358) (FB) however came to an opposite conclusion. The correctness of this decision is challenged and so this larger Bench has been constituted.

28. The question has to be examined from two aspects (a) whether there is any rule in the Hindu Mithakshara Law that a son born subsequent to partition to a sharer who had obtained property on partition of joint family property, would take an interest in that share by birth, and (b) whether it is axiomatic, as it seems to me to have been assumed by my learned brother Justice Raman Nayar, that the property obtained by a woman for her individual share on partition of Marumakkathayam tarwad continues to have the characteristics or incidents of tar-wad property.

29. I think there is no rule in Hindu Law that the share obtained on partition by a member in Joint Hindu family property retained its character of joint property and that an after-born son took an interest in it by birth. The rule in Hindu Law is, that the share obtained by a father in ancestral joint family property is ancestral property in his hands and that in that property his subsequent born son will get an interest by birth. This rule of Hindu Law is a direct corollary to the proposition that the self-acquired property of a grand-father which has descended to his son by inheritance is ancestral

property in the son's hands in which the grandson would get an interest by birth. Self-acquired property of a grandfather which had descended to his son who had at the time no child has never been joint property before a son was born to him. But Hindu Law calls that property "ancestral property" and in regard to such property there is a special rule that the inheritor's son will get an interest by birth.

This, as I have emphasised, does not arise from the fact that" the property was impressed at any time with the characteristics of joint property. This is a peculiar rule of Hindu Law and arises exclusively from the religious obligation which the son, the grandson and the great grandson owe to their ancestor. This relationship in Hindu Law is known as 'sapindaship' and sons, Sandsons and great grandsons have the get to offer the funeral cake on the death of the great grandfather. In a sens this is an obligation. This religious rule, as is often the case in Hindu Law, is interwoven with right to property. Perhaps as a compensation for the religious obligations cast on the son, the grandson and the great grandson, they acquire an interest by birth in the great grandfather's property.

However that might be, this rule cannot have any application to a system of law which has been secular in all its aspects. It is only this rule of Hindu Law which has given rise to the proposition that if ancestral property which had become ancestral joint family property is divided and a share taken by a father, a son born to that father after partition will get an interest in that property by birth. This is because property taken by a father on partition of ancestral joint family property continues to be "ancestral property", the only question to be determined in deciding whether property is ancestral or not being, whether the property had descended from the original owner in the direct male line of descent and is held by a male who is not more than three degrees remote from the last holder.

The fact that in the course of descent, ancestral property had become ancestral Joint family property will not change the ancestral character of that property, nor will its character be changed by there being a division among those who jointly held that ancestral property. The son takes an interest by birth in that ancestral property obtained by the father on partition only because it is ancestral and not by reason of the fact that the property was joint family property or because it has retained its character as joint property.

Even this rule cannot apply to property held by a Joint Hindu family which is not ancestral property. That a family can have joint family property which is not ancestral is clear and cannot be disputed. If that joint family property (which is not ancestral) is divided and the father takes a share, a son born to him subsequently will not get an interest in that property by birth. No case has been brought to our notice where the view had been taken that in such property also a son would get an interest by birth. Nor was any text or commentary relied on in support of the proposition

30. On the other hand, there are indications that a son born after partition of such property cannot take an interest in it by birth. Where a father separating from his sons has reserved a share to himself a son begotten after partition is not entitled to have the partition reopened But when tin father had not reserved a share to himself in a partition with his sons, a son who U born as well as begotten after the partition is entitled to have the partition re-opened and have a share allotted to him. Raghava-chariar in his Commentaries on the Hindu Law poses the question as to whether

these principles would apply in the case of a partition between collaterals, and answers it thus:--

"If a partition is made in a joint family consisting of three brothers and one of them does not take any share at all, then his son germio matrix at the time of the partition, on the reasoning that a son begotten is as good as born, can claim to re-open the partition so as to get himself allotted his legitimate share. But the same reason cannot hold good if the son of the brother who had not taken any share was begotten only subsequent to the partition and hence such a son cannot claim to re-open the partition on the ground that his father has not taken any share in the partition between him and his brothers."

Mayne on Hindu Law referring to the samp principle states:--

"But the application of this principle is expressly limited to the case of partition between father and sons, and there is no warrant for its extension to a son born to a separated coparcener, other than the father of the family, after partition."

31. In Chatturbhooj Meghji v. Dharmsl Naranji, (1885) ILR 9 Bom 438 it is clearly assumed that property obtained by a son M on partition from his father and brother, of properties acquired by the three by their joint exertions is the self-acquired property of M which can be disposed of by M by will. The plaintiff, the son of M succeeded in the suit only on the conclusion reached by the court that the property obtained by M was ancestral property. This is what the court said in relation to the character of the property obtained by M.

"Assuming the truth of the defendants' story as to the mode in which the whole property was acquired, It could not be held that it was acquired by the equal exertions of the father and his two sons. The father contributed the nucleus of Rs. 5,000, and on that nucleus the property was formed by the joint exertions of himself and his sons. The portion, therefore, that came to Meghji did not represent the equivalent of his own exertions only. It represented also a portion of the father's original capital. The property thus being ancestral in the hands of Meghji he could not, in the Town of Bombay, dispose of it by will, even though it consisted of moveables, as to the prejudice of the plaintiff's rights."

The defence in this case, which was assumed by the court to be good, that the property obtained for his share by a son on division from his father and brother of joint property acquired by joint exertions of the father and sons was separate property of the son capable of being disposed of by will, clearly illustrates the proposition that an interest by birth is taken by a subsequent born son in the share obtained by the father applies only when such share represents ancestral property.

32. The rule that an after-born son will get an interest in property obtained by his father on partition must be confined to ancestral property obtained by the father. This rule is a peculiarity of Hindu Law and arises from the religious obligations cast on the son which in their turn have given rise to rights in property, and cannot be taken to be a general rule as affording any guide in relation to property not fettered or perhaps blessed with such incidents. With great respect, I think the decisions which I have enumerated earlier and which have sought to support the proposition

enunciated therein on the basis of a rule of Hindu Law have failed to take note of the fact that the rule even in Hindu Law is applicable only in relation to "ancestral property".

33. Then the question is whether it is axiomatic, that property obtained by a Marumakkathayee woman on partition of her tarwad property or property obtained by a member on partition of joint family property (other than ancestral property) continues to be invested with the character of tarwad or joint family property. I have tried to show that there is no such rule in Hindu Law. And as far as I know there is no such rule in Marumakkathayam Law either. When a member demands and obtains his share in tarwad property, as he can now, under the Nayar Act II of 1100 subject to certain restrictions -- it is unnecessary to trace the development of the right to claim partition introduced by legislation -- what he obtains and holds is his property and not tarwad property. After an individual partition (a partition among all the members of a Marumakkathayam tarwad, each member, male and female, minor and adult, taking a separate share) among all the members of a tarwad, in existence at the time of partition, there is no tarwad at all and I cannot conceive of there being tarwad property, either in embryo or otherwise.

It is true that a tarwad need not always break up into its ultimate components; there may be branch divisions or some members may continue joint and continue to hold property and there may be several such groups and there can be a mixture of individuals holding property obtained on partition along with groups who hold jointly property allotted to each of those groups. The distinction to notice is that those groups hold property allotted to each group jointly. No member of that group has any separate interest which he can claim as his own. His interests in the property allotted to the group is of an identical nature as the interests he had in the entire tarwad property before partition. In other words, the group holds the property with all the incidents of tarwad property as joint property. It is because property is so held as joint tarwad property that future tarwad members born in that group take an interest in the property allotted to that group.

The same rule cannot apply to the case of an individual member who obtain his share for himself. The property in such cases ceases to be joint property after partition. What really happens on partition is that the joint nature of the property is destroyed. I conceive that right by birth can be taken in property by a Marumakkathayee only if that property at the time of his birth was joint property. The property allotted to a group will be ."joint property and so children born in that group who normally take an Interest in tarwad property acquire an interest in the property allotted to the group. But the same cannot be said when an individual member holds property, for such property has ceased to be joint property. On partition (forgetting for the moment those groups who take jointly) what happens is me destruction of the joint nature of the property. This happens even when there is only a division in status.

Lord Westbury dealing with the change that takes place when a division has been agreed upon in a joint Hindu family observed thus in Apoovier v. Rama Subha Aiyan, (1866-67) 11 Moo Ind App. 75 (PC):--

"But when the members of an individual family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the

character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with."

The vital incident of tarwad property is the existence of undivided property and joint enjoyment and ownership. If this is destroyed the property ceases to be tarwad property. Only in two types of property is a right acquired by birth; (a) ancestral property in Hindu Law and (b) joint family or tarwad property which continues to be joint property.

34. Property held by the last surviving member of a joint Hindu family or of a Marumakkathayam tarwad cannot be compared with property obtained by a member on partition. Property held by the last surviving member is held as joint family or as tarwad property; the family or farwad in such cases had not been disrupted. The property is not held by the member a? his own in answer to a claim that he must have his share carved out and even to him He happens to be the sole member because all the others had died.

In Attorney-General of Ceylon v. A. R. Arunachalam Chettiar (No. 2) 195? AC 540 the specific question whether the property "owned" by a sole coparcener was the joint property of the Hindu undivided family of which he was the last surviving member came up for decision and the following passage from the judgment is illuminating.

"The nature of the interest of a single surviving coparcener was the subject of exhaustive evidence by expert witnesses and their Lordships were referred to and studied numerous authorities in which in reference to his interest language was used not incompatible with his being regarded as the 'owner' of the family property. But though it may be correct to speak of him as the 'owner' yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son It assumes a different quality; it is such, too, that female members of the family (whose numbers may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property. Once again their Lordships quote from the judgment of Gratisen J. 'To my mind it would make a mockery of the undivided family system if this temporary reduction of the coparcenary unit to a single individual were to convert what was previously joint property belonging to an undivided family into the separate property of the surviving coparcener'. To this it may be added that it would not appear reasonable to impart to the legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners. It was urged that already the difference in there since a single coparcener can alienate the property in a manner not open to one of several coparceners. The extent to which he can alienate so as to bind a subsequently adopted son was a matter of much debate. But it appears to their Lordships to be an irrelevant consideration. Let it be assumed that his power of alienation is unassailable; that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it, and, if he does not alienate It, that is what it remains. The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener 'owner', he then attributed to his ownership such a congeries of rights that the property could no longer be called 'joint family property., The family, a body

fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners of whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word 'owner' in this connexion. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family. Judging by that test their Lordships have no doubt that the Supreme Court came to the right conclusion."

35. Our Supreme Court in Gowli Bud-danna v. Commissioner of Income-Tax, Mysore (1966) 60 ITR 293-(AIR 1966 SC 1523) has also ruled that property of a joint family does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. The share obtaining by an individual member cannot certainly be said to be the joint family property belonging to the family and in cases where the joint family has disintegrated into several units the joint family and joint ownership have ceased to exist. The Individual share obtained by a member on partition is not joint family property belonging to the family in his hands. It is his individual property.

36. The right of female members to be maintained out of the property held by the last surviving coparcener and the right acquired by a son, born or adopted subsequently exists or arises from the fact that the property held by the last surviving member is "joint family property" belonging to the undivided, family. If the property held is not joint family property belonging to the undivided family it is not possible to predicate that any such rights exist or will arise.

37. The development of the law has been from joint ownership to individual ownership. Though Hindu Law recognised partition as of right and enabled members of a joint family to claim it from very early times, such a right has been conferred on Marumakkathayees only by statutes. Here again it was a process of slow development; first permitting only thavazht division, which later matured into a right to claim an individual share subject to certain restrictions. Such changes took place apparently as a result of the desire of the community to change joint ownership into individual ownership.

The Travancore and Cochin Acts now provide for devolution of the separate property of an individual including that of a female. This would devolve in the manner provided by statutes. It is not disputed that the separate property mentioned in the statutes will include property obtained on partition. Nevertheless it is suggested that the question must be answered as to whether it is separate or not with reference to the time at which succession opened and if a child had been born to a woman to whom a share had been allotted the separate property ceased to be separate and had become tarwad property and so her heirs as provided in the statute will not take the property on her death. It appears to me that there is no warrant for this view. The idea in allowing individual partition is not to create myriads of tarwads depending upon the number of members of that tarwad. but to put an end to the system of holding property jointly. It is now open to a member of a tarwad to claim his share of tarwad property, obtain it, and walk out of the tarwad. This he does because he does not desire to continue joint or to hold property jointly.

There may be others, perhaps imbued with greater faith in the Marumakkathayam system of holding property and its virtues, who opt to continue joint. They must stand on a different footing from the individual who does not want to hold property jointly with any-one. He has been given a right to change joint ownership into separate ownership. Joint property is of the essence of tarwad property. When the joint character of property is thus destroyed it ceased to be tarwad property.

38. If the question of intention is at all relevant -- I do not at all think it is so --the intention is writ large when a mother divides from her existing children (for it need not necessarily be that she is a lone woman who had taken her share in partition; there are innumerable instances where a mother with several children severs from such children and takes a separate share for herself) at the time of the partition that she does not wish to hold property jointly with her issue and would like to have her separate share. How can it be that a Court can then presume an intention that she intended to hold property jointly with her subsequent born children?

Nor can the rule applicable to gifts be of any help in understanding the position regarding property obtained on partition. A custom grew up, and was recognised, and became law, that how donees take property must depend upon the intention of the donor when the donor was a Marumakkathayee. A Marumakkathayee, it was ruled must in the absence of any indication to the contrary be presumed to have intended that the gift should benefit the "thavazhi" of the donees.

Statute Law has made inroads into his rule. For instance, Section 22 of the Nayar Act of 1100 has provided that gifts of the kind envisaged by the section will enure to the benefit of the persons mentioned in ths section and that they would take as tenants in common. The section however also provided that a different course of devolution on the thavazhi of the donee can take place if such an intention is expressed in the instrument of gift. This is a clear instance of statute changing the old rule of Marumakkathayam law but permitting also at the same time the old rule to apply where the donor wants it to be followed. From this Section, it is not possible to draw an inference which will be of any use in determining the nature of the property taken by an individual sharer of a Marumakkathayam tarwad on partition of tarwad property.

39. It is idle to speculate what was the custom among Marumakkathayees in ancient times regarding a share obtained on partition individually by a woman; whether she kept it as her own Individual separate property unaffected by the birth of any subsequent child, for very seldom, if ever, there has been an individual partition in Marumakkathayam tarwads in olden days. And there in no evidence, not even a plea that there was any such custom among Maru-makkathayees, much less proof. As far at Travancore is concerned the right to individual partition came only in 1100, less than 43 years ago and in Cochin it came even later. There is not a single decision of the Travancore High Court where the view has been taken that the share obtained by a woman on partition is tarwad property in her hands in embryo giving a right to the subsequent born son.

In Cochin there is the decision in 23 Cochin 495, but this case merely applied a supposed rule of Hindu Law. I have endeavoured to show that there is no such rule in Hindu Law. There is no decision so far which has held that there is any custom or practice that an individual sharer even after partition holds the property as tarwad property. It appears to me, that such a concept is

opposed to the ideas of the community as recognised and given effect to by the legislature in the various statutes that have been passed in Travancore and Cochin.

The trend of statute law also is to put an end to joint holding of property. Even in regard to those who are not divided, by the provisions of the Hindu Succession Act, it is enacted that the share the deceased would have obtained, had he been divided at the time of his death would devolve on enumerated heirs. Time has made inroads into the old concept of Marumakkathyam Law and it appears to me that the extinction of tarwads is now inevitable. In this state of affairs to postulate that people who are not desirous of holding property jointly and so claim and obtain a share for themselves must be taken to be holding the property so obtained with all the incidents of tarwad property giving rise to new tarwads, on the birth of children, is not to face realities.

40. It is too much to suppose that the provision in the explanation to Section 38(2) of the Madras Marumakkathayam Act before it was amended in 1958, relied on by my learned brother Justice Raman Nayar is declaratory of the law. The Madras Marumakkathayam Act as it stood then only permitted a tavazhi partition and apparently the legislature could not think of a disintegration of a tarwad other than as a disintegration into different tavazhies; a splitting up into smaller tarwads as it were. Whatever be the effect of the explanation in cases to which it would have applied it does not lay down or declare any general principle. The provision is not applicable to the cases we are dealing with. It seems to me significant that the explanation is omitted now and has no application in Kerala. Travancore and Cochin had statutes conferring right of partition, earlier. There is no such provision in those enactments nor is there any such provision in the Cochin Nayar Act which was enacted after the Madras Marumakkathayam Act.

And there is no authority for the proposition that tarwad property can never cease to be tarwad property, "Once a tarwad always a tarwad" seems to me to be a very outmoded concept, and fortunately as I see it, there is no rule of law or custom which compels one to take such a view.

41. That when property was held jointly by a tarwad it was held for future members that may be born in the tarwad cannot give rise to a rule that when tarwad property is divided and an individual member having obtained a share holds it thereafter not as tarwad property, but as separate property, she must still be presumed to hold it for those to be born later. The question is what is the nature of the property held by a single member after partition. Can it be said to be tarwad property? I have tried to show it is not. And so there can be no interest taken by a subsequently born child in that property.

42. I shall not dare to draw any inference based on the decisions which have permitted an unsecured creditor of a joint Hindu family to realise amounts due to him from the properties obtained on partition by the members of the family the partition taking place subsequent to the incurring of the debt. The basis of these decisions is not very clear to me.

The commentaries on Hindu Law refer mainly, if not exclusively, to the decisions of the Madras High Court. And the earliest decision which has held that for a pre-par-tition debt of an undivided family the sharers to the extent to which they have obtained family property can be made liable is

the one in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 Mad 555. There is no discussion of the points in the judgment. In fact there was no claim in the plaint that the second defendant in the suit who obtained the property on partition should be made liable. And counsel on behalf of the respondent conceded that he is not entitled to a personal decree as against the second defendant Even so the Court observed:--

"In our opinion the plaintiff is entitled to judgment as against the second defendant in respect of this liability, but the second defendant's liability is limited to the extent of the family property which came to him under the partition."

It is this judgment which had been apparently approved by Chief Justice Coutts Trotter and Justice Srinivasa Ayyangar their dissenting judgments in Subramania Ayyar v. Sabapathy Aiyar, ILR 51 Mad 361 = (AIR 1928 Mad 657) (FB) which dealt with an entirely different question -- the case turned on the pious obligation of a son to discharge the debts of a father -- that has been relied on by the Madras High Court in a later decision in Suryanarayana v. Viswa-nadan, AIR 1936 Mad 956.

Coutts Trotter, Chief Justice, referring to the decision in (1901) ILR 24 Mad 555 observed thus in ILR 51 Mad 361-(AIR 1928 Mad 657) (FB).

"At first sight it appears to be direct authority in favour of the respondent, but it clearly is not, because the debt there was not a personal debt of the father, but a debt incurred by him as manager of a Hindu joint family and obviously binding on the joint family property as it stood at the date of the debt, whatever subsequent dispositions of it were made."

And Justice Srinivasa Ayyangar referring to the same decision made the following observation: --

"The learned Judges in this case clearly held that the debt, the subject-matter of the suit, was one which arose out of a contract entered into by a father as the managing member of an undivided family. In that view the debt was of course the debt of the family itself including the son, and in respect of such a family debt the partition could not possibly affect the liability of a son to pay the family debts from and out of the property of the family."

After referring to these passages, in AIR 1936 Mad 956 Justice Venkatramana Rao said:--

"Mr. Govindarajachari contends that the joint family property cannot be said to be hypothecated for the debt and therefore the moment partition is effected the property could not be held to be liable. This contention may be correct if the property proceeded against is in the hands of a bona fide alienee. So long as the property remains in the hands of members of the family who are admittedly liable for the debt to the extent of the joint family property in their hands, charge or no charge, the property cannot, escape liability till the obligation is discharged."

As I read these observations, the point emphasised is that a debt binding on the family is binding on all the members of the family. This may be so in the sense that no member of a family can resist an action to sell joint family property including his interest in the property. The view has been taken

that the same will be the result even after partition for apparently partition does not involve a transfer but only a crystallisation of the interests of a member in some specific property allotted to that member. Thai interest is also liable for the debt. This is so not because property obtained by a member is still joint family property but because he was bound by the debt in the sense I have explained above. T would not pursue the matter further for it appears to me inappropriate 10 rely on the principle in these decisions in support of the view that a property obtained by a sharer on partition is always joint family property,

43. Though a long: time has not elapsed after the decision in Bhavani Amma v. Madhavi Amma 1963 Ker LT 859= (AIR 1963 Ker 358) (FB) was rendered, it is conceivable that a number of transactions have taken place on the basis of the view expressed therein. A reversal of that view might upset those transactions. I see no justification for so upsetting them; much less any compelling reason. For this reason also I would upheld the decision in 1963 Ker LT 859= (AIR 1963 Ker 358) (FB).

44. In the light of the above, in my opinion, these two appeals have to be allowed.

Krishnamoorthy Iyer, J.

45. I regret that I cannot agree with the reasoning and the conclusion of my learned brother Raman Nayar, J. I proceed to state my reasons.

46. A Full Bench of this Court in 1963 Ker LT 859 = (AIR 1963 Ker 358) (FB) held that the property obtained by a Nair female towards her share under an outright partition in her tarwad continues to be her separate property notwithstanding the birth of a child to the female after the date of the partition. In coming to this conclusion the learned Judges did not accept the full bench decision of the Travancore-Cochin High Court in 1954 Ker LT 862-(AIR 1955 Trav-Co 55) (FB) as laying down the correct law. The two questions formulated for decision in 1954 Ker LT 862-(AIR 1955 Trav-Co. 55) (FB) are: (1) Does the property obtained by a Nair female towards her share under an outright partition in her tarwad any longer retain the character of tarwad property? (2) Does that property cease to be her separate property and become the property of her tavazhi on the birth of a child to her so as to destroy her absolute powers of disposal in respect of that property? P. K. Sub-ramania lyer, J. with whom M.S. Menon, J., as he then was, agreed, answered the two questions thus:--

"There is no difference between a male and a female member getting divided alone from a tarwad. A child born to the woman would be a member of the thavazhi with her and a child adopted by a male would be a member of a thavazhi or tarwad with him. In both cases the property obtained by the individual member male or female will be tarwad property in which the newly born or adopted member will be interested equally with the one that existed before the birth or adoption. The two questions have, therefore, to be answered in the same way as they would have to be, had the questions related to a coparcener in a Mithakshara family".

47. According to Mithakshara Law, the share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issues and they take an interest in it by birth whether they are in existence at the time of the partition or are born subsequently. The learned

Judges in 1954 Ker LT 862 = (AIR 1955 Trav-Co. 55) (FB) applied the above principle to tarwad property obtained by a Nair female towards her share in the outright partition of her tarwad properties based on principles of equity, justice and good conscience.

48. Velu Pillai and Madhavan Nair. JJ. in 1963 Ker LT 859=(AIR 1963 Ker 358) (FB) took the view that the principle of Mithakshara Law of a son taking an interest by birth in the ancestral property obtained by the father on partition cannot be applied for holding that a child born to a Nair female subsequent to her taking her share on partition in tarwad properties will acquire an interest therein. The correctness of the view expressed in 1963 Ker LT 859 = (AIR 1963 Ker 358) (FB) was doubted by Ragha-van, J. which occasioned the reference of the appeals to the larger bench.

49. A joint Hindu Family governed by Mithakshara Law consists of all members descended lineally from a common male ancestor and includes their wives and unmarried daughters. They are bound together by the fundamental principle of Sapindaship or family relationship which is the essence and distinguishing feature of a Mithakshara joint family.

A Joint Hindu family is purely a creature of law and cannot be created by act of parties except by' adoption or marriage. All members of the joint family do not possess equal rights in the property of the joint family even though the property is called joint family property. The female members of the family like the daughters have no share in the property. The position is well established that the joint family status being the result of birth, marriage or adoption the possession of joint family property is only an adjunct of the joint family and is not necessary for its constitution.

50.According to Mithakshara school, a Hindu coparcenary is a narrower body than the joint family and consists of only those persons who take by birth an interest in the property of the holder for the time being and who can enforce a partition whenever they want. A coparcenary starts with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. A son, a grandson or a great-grandson is a coparcener with the holder of the property. The great-great-grandson cannot be a coparcener with him because he is removed by more than three degrees from the holder The reason why coparcenership is so limited is in view of the peculiar tenet of the Hindu religion that only descendants up to three degrees can offer pinda to an ancestor Females are excluded from the coparcenary, because the test of coparcenership is the right to enforce a partition and no female has that right.

As pointed by Mayne in his treatise on Hindu Law and Usage, 11th edition, page 338, a joint family and its coparcenary with all its incidents are purely a creature of Hindu Law and cannot be created by act of parties, as the fundamental principle of the joint family is the tie of Sapindaship arising by birth, marriage or adoption. The nature of a coparcenary under the Mithakshara school of Hindu Law and the rights of coparceners in coparcenary property in general are too well known to be repeated here. The Mithakshara school recognises two modes of devolution of property namely survivorship and succession. Survivorship applies to coparcenary property The rule of survivorship is only a corollary to the right to demand partition.

51.But it is necessary to have a correct idea of what is coparcenary property under the Mithakshara school of Hindu Law. Coparcenary property consists of ancestral property and joint family property which is not ancestral. The term "ancestral properly" as understood in the Mithakshara school of Hindu Law is a technical term having a special meaning and does not mean property inherited from any ancestor male or female paternal or maternal, near or re-mot; , but includes only such property as is inherited by a male from father, father's father and father's father's father. Such inheritor's son. son's son and son's son's son get an interest in it by birth and can interdict improper alienations by inheritor whose position in respect of that property though it will otherwise be absolute is reduced in the presence of such descendants to that of an owner with restricted rights. Their Lordships of the Privy Council in Atar Singh v. Thakar Singh (1908) ILR 35 Cal 1039 (PC) at p. 5045 observed that unless the lands came "by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu Law." And again observed in Md. Hussain v. Kishva Nandan AIR 1937 PC 233:

"The word 'ancestor' in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the 'ancestral' estate in which under the Hindu Law a son acquires jointly with his father an interest by birth must be confined, as shown by the original text of the Mitaka-shara to the property descending to the father from his male ancestor in the male line."

52.Their Lordships of the Supreme Court in Arunachala v. Muruganatha AIR 1953 SC 495 considered the question whether a property gifted by the father to his son is ancestral property in the hands of the donee or legatee simply by reason of the fact that the donee or legatee got it from his father or ancestor. It was held that such property could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got It from his father or ancestor. B.K. Mukher-jea J speakine for the court brought out the characteristic features of ancestral property in Hindu Mithakshara Law in the following terms:

"To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner." And again it was observed at pages 498 and 499:

"It is undoubtedly true that according to Mithakshara, the son has a right by birth both in his father's and grandfather's estate, but as has been pointed out before, a distinction is made in this respect by Mitaksh-ara itself. In the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father: while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or predominant interest in the same: vide Mayne's Hindu Law, llth Edition, p. 336. It is obvious however, that the son can assert this equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his lifetime. On both these occasions the grandfather's property comes to the father by virtue of the

latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands."

53. I have already said that though the term "joint family property" is synonymous with coparcenary property it is different from ancestral property. It is to be remembered that possession of property is not under Mithakshara law a necessary requisite for the constitution of a Hindu joint Mithakshara family. It is equally true that for the formation of a coparcenary under Hindu Law a nucleus of property which has come down to the father from his father, grandfather or great-grandfather is not necessary provided the persons constituting it stand in the relation of father and son or any other relationship requisite for a coparcenary. It is possible for the members of a Mithakshara joint family to acquire property by their joint labour or by a gift or grant made to them as a joint family. Such property will be the property belonging to the coparcenary of the acquirers.

It is well settled that when the members of a joint family by their joint labour and exertion acquire properties with the intention of owning them as joint family property their male issue will acquire a right by birth in such property if the joint family continues to be in existence at the time of the birth of the son. Let me take the following illustration. Suppose a coparcenary consists of A and his three sons B, C and D. A dies. At the time of the death of A, the coparcenary is not assessed of any property. B, C and continue to be members of the coparcenary, If B, C and D by their joint labour or in their joint business acquire property with the intention of constituting the acquisition as joint family acquisition the properties acquired by them will be coparcenary property. Such coparcenary property is not ancestral property but only joint family property. If B, C and D effect a division of the joint family property before sons are born to them, the coparcenary will be disrupted and the properties allotted to the share of B, C and D will be taken by each of them as his separate (individual) property. It is neither ancestral property in the hands of the sharer nor it is his self-acquired property. If subsequent to such partition a son is begotten by B or C or D can it be said that the son will acquire an interest in the property allotted to the share of the father in the division? I do not think so because what the father got in the division of coparcenary property is only his share in the joint family property and not a share in the ancestral property.

Even in Mithakshara school of Hindu Law there is a distinction in the character of the property which a coparcener obtains in the division of ancestral property and he gets in the division of joint family property not being ancestral property. The former does not lose its character of ancestral property while the latter loses its character as joint family property. No decided case was cited at the bar to establish that when members of a coparcenary divide joint family property not being ancestral property, an afterborn son of the coparcener will acquire an interest by birth in the share of the joint family property taken by the father in the division.

Mr. Justice Beaman in Karsondas Dha-ramsey v. Gangabai (1908) ILR 32 Bom 479 has considered the distinction between joint property, joint family property and joint ancestral property. The learned Judge observed thus:

"In the third case, (i.e. joint ancestral property) property is qualified in a two-fold manner: it must have been joint-family property, and it must be 'ancestral'. It is here for the first time that we come

in touch with the nucleus doctrine, the extension of which beyond its proper sphere, is a fertile source of bad argument. It is obvious that there must have been a nucleus of joint family property before ancestral joint-family property can come into existence. Because the word ancestral connotes descent and therefore of course pre-existence. But because it is true that there can be no joint ancestral family property without a previous nucleus of joint-family property, it is not true that there cannot be joint-family property without a pre-existing nucleus. For that would be identifying joint-family property, with ancestral joint family property."

The learned Judge has also considered the case envisaged in the illustration already given by me. The learned Judge said thus:

"There is nothing either in practice or theory which excludes the possibility of members of the same family, starting a family fortune, holding it as members of a joint-family, and thereby clothing it with all the legal qualities, and incidents of joint family property, chief among which is that every member born into the family after the property has acquired that character, and before it has been divested of it by partition obtains by birth an interest in it."

This passage, I am sure, is with reference to the joint-family property and not to the .ioint-family ancestral property. It shows that the quality of the ioint-family property other than joint-family ancestral property and the right by birth in such property can be determined by partition of the joint family property and disruption of the joint family

54. Before I leave this aspect of the case. I should not overlook the following passage given in Mayne's Treatise on Hindu Law and Usage, 11th edition, pages 346 and 347-

"It a single individual acquired a fortune by his own exertions, without any assistance from ancestral property, his male issue would certainly take no interest in it. If several brothers did the same, the property would, in the absence of any indication of an intention to the contrary, be owned by them as joint family property, and in that case their male issue would necessarily acquire a right in it by birth, for under the Mitakshara system there can be no joint family property in respect of which the male issue of the ioint owners do not take a share by birth."

I understand the above passage as dealing only with the right of the male issue of the joint owner to take a share by birth in the family property so long as the family re-remains joint the decisions in Venkayyam-ma Garu v. Venkataramanayyamma Baha-dui (1902) ILR 25 Mad 678 and 64 Ind App. 250 :(AIR 1937 PC 233) do not lay down any proposition to the contrary as was held in Maktul v. Mt. Manbhari AIR 1958 SC 918.

55. A contention was raised at the bar that a partition of coparcenary property does not affect the nature and quality of the property allotted to each sharer. If this is right, there cannot be any distinction in the share obtained by a coparcener in the ioint family ancestral property and in the joint family property in partition. This contention therefore leads me on to the consideration of the legal effect of partition in a Hindu Mithakshara coparcenary.

"Partition in Hindu Law" said Lord Westbury in Appoyier's case (1866-671 11 Moo Ind App. 75 (PC) does not mean sim-ply division of property into specific shares; it covers division of title and division of property " It was further observed in the said case:

"But when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severally, although the property itself has not been actually served and divided." Lord Justice Turner in Kattama Nachiar v. Raja of Shivagunga (1861-63) 9 Moo Ind App. 539 at p. 609 (PC) said that "when property belonging in common to a united Hindo family has been divided, the divided shares go in the general course of descent of separate property."

In considering the position of a member of a Hindu family who has become a convert to Christianity with reference to his rights as a coparcener the Judicial Committee observed in C. Abraham v. F. Abraham (1861-63) 9 Moo Ind App 195 at. p. 237 (PC) "Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations growing out of the status of an undivided family, is the creature of. and must be governed by the Hindoo law. Considering the case, then, with reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. 'Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindoo law recognises and creates'. "

(The underline (here in is mine.) If there is no united family, there can be no joint family property. If so there can be no right by birth in joint family property giving right to a demand for partition under the Hindu Mithakshara Law with a consequent right of survivorship. This is the view taken by their Lordships of the Madras High Court in Kunhichekkan v. Arucanden 1912 Mad WN 386. It was observed at page 390:

"The incident of survivorship was one which attached to the property on account of its being owned by the members of a joint Hindu family. When the Hindu family ceased to exist, the incident of survivorship ceased to exit."

In a Mithakshara undivided family, it is the right to partition that determines the right to take by survivorship. Nothing said in V.N. Sarin v. Ajit Kumar AIR 1966 SC 432 militates against this view.

56. If the effect of a division under the Hindu Mithakshara family is to terminate the joint family nature of the property and the consequent incident of survivorship, then what is the principle

behind the theory that an afterborn son acquires an interest by birth in the share of ancestral property obtained by father on partition. This is based on the doctrine of equal ownership of the father, son and grandson in ancestral property, founded upon the well-known text of Yagnavalkya to the following effect:

"The ownership of father and son is coequal in the acquisition of the grandfather whether land, corody or chattel."

The Mithakshara divided property into two classes apratibanda daya or unobstructed heritage and sapratibanda daya or obstructed heritage. It is called unobstructed heritage because the accrual of the right to it is not obstructed by the existence of the owner. Property in respect of which right accrues on the death of the last owner without having male issue is called obstructed heritage as the accrual of the right to it is obstructed by the owner. The distinction between obstructed and unobstructed heritage is that while in the former, the nearer excludes the more remote while in the latter the doctrine of representation excludes the rule of preference. The creation of ancestral property is purely the result of Hindu Law texts based on religion Justice Muthuswamy lyer stated the reason for the distinction between obstructed heritage and unobstructed heritage in Muttuvaduganatha Tevar v. Periasami (1893) ILR 16 Mad 11 in these words."

"The general rule of Hindu law is that when a male heir succeeds a male owner, the former is as much full owner as the latter, the principle being, as stated by Manu in chapter IX, verse 187, that to the nearest sapinda the inheritance belongs. The only recognised exception to it is that when a female, such as a widow or daughter, succeeds a male owner, her succession is a case of interposition between him and his next sapinda, on the authority of Catyayana, who directs that, upon the death of such female, the last male owner's (and not her own) heirs shall take the heritage. This text is referred to, and the history of the introduction in the Mitakshara of widow and daughter among heirs is explained in the decision of this Court in Muttu Vaduganadha Tevar v. Dora Singha (1881) ILR 3 Mad 290, 330, 331. As for obstructed and unobstructed heritage (sapratibanda and apratibanda), the distinction is material only to the extent that, in the one case, the nearer male heir excludes the more remote, whilst in the other, the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derived from three lineal male descendants, such as son, grandson and great-gandson, is the same, though among collateral male heirs, the quantum of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner. Hence it is that the text of Yajnavalkya, cited in Mitakshara, chapter II, section 1, verses 2 and 3, premises the death of a male owner without male issue, and enumerates his heirs in the order in which they are entitled to succeed, adding that on failure of the first in the order in which they are enumerated, the next in order is the proper heir. Thus the rule that to the nearest sapinda the inheritance belongs applies alike whether the heritage is obstructed or unobstructed, with this difference, viz., that when the last full owner leaves sons, grandsons and great-grandsons, their sapinda relationship confers equal spiritual benefit on him, though their blood relationship is not the same, and that they are all co-heirs within the meaning of the rule." The existence of a coparcenary is not necessary to invest a property with the character of ancestral property. The father in whose hands the property becomes ancestral holds it subject to the rule of Mithakshara which gives to the son and the grandson an unobstructed right by birth to that

property. The ancestral nature of the property being impressed on it by the peculiar tenet of the Hindu Law cannot be taken away by act of parties. So long as the right of equal sapindaship is there the owner of that right gets an interest by birth in the ancestral property. The grandson separated from his own father as well as from his grandfather ought, even in the lifetime of his father take a share of his grandfather's estate.

It was pointed out in Marudayi v. Doraisami (1907) ILR 30 Mad 348 that even in a separated family the rule of succession was per stirpes and partition did not extinguish the grandson's right to succession of the estate. The following observations made in that connection are pertinent:

"To allow a rule of succession per stirpes in a separated family is to admit an exception to the rule of Hindu Law by which the inheritance devolves on the nearest sapinda; but the exception is one which in our opinion necessarily follows from the exposition given by Vijnaneswara (Mlt. 1-1-3) of the rights of sons and grandsons in the estate of the grandfather."

The right of the son to a share in the ancestral property is wholly independent of his father. When a son Inherits the estate of the father, he takes it only subject to the right of his son and grandson to get a right in that property by birth. That is because of the nature of the property inherited and the nature of the filial relation between father son and grandson. Partition does not annul the filial relationship and the right of succession arising out of such relationship is not also destroyed by partition.

57. But partition as I had already stated does bring about a change in the quality and the nature of the ioint family property other than ancestral property. The result of partition is to convert what was originally joint family non-ancestral property into separate property. Such property cannot by the mere birth of a son after the joint family is disrupted give rise to the incidents of joint family non-ancestral property when a son is begotten after the partition. The afterborn son with the father no doubt forms a coparcenary but the property obtained by the father on partition will continue to be the separate property of the father, unless the father by his voluntary act converts it into coparcenary property. I am therefore of the view, that in Hindu Mithakshara Law the share which the father may obtain on partition in the joint family non-ancestral property is his separate property and does not in any way retain the character of joint family ancestral property to enable the afterborn son to acquire an interest therein by birth.

58. I have stated above that when a son inherits the property of his father, it is ancestral in his hands and it cannot therefore be termed his separate property Even if on the date of succession there are no other sons, grandsons and great-grandsons still it is only "ancestral property" in the hands of the inheritor. P.K. Subramania lyer, J. observed thus in 1954 Ker LT 862 at p, 865 '(AIR 1955 Trav. Co. 55 at p. 57):

"That is to say, ancestral property would be his separate property and can be dealt with by him in the same way as he could deal with his self-acquired property. This power is, however, subject to the condition that at the time of alienation or of his death no male issue is born to him who would be a coparcener with him with a right by birth in ancestral property in the hands of his father."

With great respect to the learned Judge, I am not in a position to accept the reasoning for two reasons. One is that the ancestral property is never the separate property of the Inheritor, even if he was the sole heir on the date of the succession. Secondly the powers of a father over the ancestral property even in the absence of other members of the coparcenary are not similar to those in the self-acquired property. The nature of the property in the hands of the sole surviving coparcener in Hindu Mithakshara Law was considered by the Judicial Committee in 1957 AC 540 a case which went from Ceylon.

Their Lordships observed thus:

"The nature of the interest of a single surviving coparcener was the subject of exhaustive evidence by expert witnesses and their Lordships were referred to and studied numerous authorities in which in reference to his interest language was used not incompatible with his being regarded as the 'owner' of the family property. But though it may be correct to speak of him as the 'owner', yet it is still correct to describe that which he owns is the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality; it is such, too, that female members of the family (whose numbers may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these fire incidents which arise, notwithstanding his so-called ownership just because '"the property has been and hat, not ceased to be joint family property. Once again their Lordships quote from the judgment of Gratiaen J., (1953)55 C. N. L. R. 496, 501: To my mind it would make a mockery of the undivided family system if this temporary reduction of the coparcenary unit to a single individual were to convert what was previously joint property belonging to an undivided family into the separate property of the surviving coparcener' To this it may be added that it would not appear reasonable to impart to legislature the intention to discriminate, so lone as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners. It was urged that already the difference is there since a single coparcener can alienate the property in a manner not open to one of several coparceners. The extent to which he can alienate so as to bind a subsequently adopted son was a matter of much debate. But it appears to their Lordships to be an irrelevant consideration. Let it be assumed that his power of alienation is unassailable; that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it, and, if he does not alienate it that is what it remains. The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener 'owner', he then attributed to his ownership such a congeries of rights that the property could no longer be called 'joint family property'. The family a body fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word 'owner' in this connection. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those vet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family. Judging by that test their Lordships have no doubt that the Supreme Court came to the right conclusion."

59. Their Lordships of the Supreme Court in 1966-60 ITR 293 :(AIR 1966 SC 1523) following the above decision said thus:

" "Property of a joint family, therefore, does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In the case in hand the property which yielded the income originally belonged to a Hindu undivided family. On the death of Buddappa, the family which included a widow and females born in the family was represented by Buddanna alone, but the property still continued to belong to that undivided family and income received therefrom was taxable as income of the Hindu undivided family."

60. 1 shall now summaries my conclusions reached as a result of the above discussion. There is a difference in Hindu Law between ancestral property and joint family property. There cannot be any joint family property without a joint family owning the same. When there is a disruption of the joint family and division of joint family property the ioint family nature of the property is destroyed and the property obtained by the member towards his separate share in the partition is his separate (individual) property the rights over which are not in any way restricted on account of the birth of a son born after partition. The right of birth available to a son or grand-son in the ancestral property in the hands of the father is not destroyed by partition because of the nature of the property and the nature of the filial relation between father, son and grandson under the Mithak-shara school of Hindu Law. For the creation of ancestral property there need not be any coparcenary or joint family.

61. In the above discussion, I have not considered the inroads made into the Hindu Mithakshara Law by the Hindu Women's Property Act or the Hindu Succession Act as it is not necessary for the purpose of this case.

62. I shall now consider the nature of the property obtained by a member of the tarwad towards his or her separate share in individual partition of tarwad property.

63. In Moidin Kutti v. Krishnan (1887) ILR 10 Mad 322 Muttusami Ayyar. J. stated about the conception of a Marumakkathay-am tarwad at page 330 thus:

"Having regard to the family system that obtains in Malabar, I do not consider that a tarwad is a corporate body in the sense that no single member of it has an individual right to enforce. Each member of a tarwad has a right to be maintained in the Larwad house, and this is a personal right. He has also a right, if a male and not incompetent, to succeed to management in the order of seniority, and this is also a personal right. The tarwad property is not partible at the pleasure of any one member, and he cannot maintain a suit to enforce partition because no separate right to demand partition exists. The tarwad property is, however, a common fund for subsistence, and each member is entitled to see that the karnavan to whose managment it is entrusted does not exceed his lawful authority and waste it, and this is an individual right vesting in every anandravan by reason of his position as such. If the anandravan is a female, there is the further right to see that the tarwad property is not wasted by the karnavan, and thereby divested from descent to her children. The conception of a tarwad is that of a joint family under the management ordinarily of the senior male,

in which the anandravans have each a group of individual rights which they are entitled to enforce individually or collectively either as against the karnavan or his alienee or both."

64. There was not much of a dispute at the bar as to the conception of a family governed by Marumakkathayam law or a Marumakkathayam tarwad. But there was an earnest attempt to show that Malabar law is only a school of Hindu law. This stand was obviously taken to invoke certain principles of Mithakshara in the case of Marumakkathayam tarwads as well. In K. K. Kochuni v. States of Madras and Kerala AIR 1960 SC 1080 at p. 1099 Subba Rao, J. observed thus :

"Marumakkathayam law governs a large section of people inhabiting the West Coast of South India Marumakkathayam literally means descent through sisters' children. It is a body of custom and usage which have received judicial recognition. Though Sundara Aiyar, J., in Krishnan Nair v. Damodaran Nair. ILR 38 Mad. 48: (AIR 1916 Mad. 751) (FB) suggested that 'Malabar Law is really only a school of Hindu Law'. It has not been accepted by others."

65. In view of the statement of law by their Lordships of the Supreme Court it has to be held that Marumakkathavam law is only a body of custom and usage which have received judicial recognition and not a school of Hindu Law

66. The attempt of the decisions in 1954 Ker LT 862 :(AIR 1955 Trav. Co. 55) (FB) and 23 Cochin 495 which are pressed into service in preference to the decision in 1963 Ker LT 859 :(AIR1963Ker 358) (FB) is to assimilate tarwad property to the category of ancestral property in the school of Mithakshara law and in the hands of the father. To appreciate the reasoning in the two decisions referred to above it is necessary to know precisely the rights of the members of a tarwad in tarwad property and the change brought about by disruption of the tarwad.

Under the Marumakkathayam law before the passing of the relevant enactments in the component parts of the State, no member of a Malabar tarwad has Sot any definite shere but the property of the tarwad is vested in all the members thereof The tarwad is impartible except with the consent of all the adult members of the tarwad. No individual member of the tarwad could have alienated his interest in tarwad property and it was not liable to be attached and sold in execution of a decree obtained against him. Neither the principle of representation nor the principle of survivorship as known to Mithakshara Law existed in a Marumakkathayam family but the death or birth in the tarwad might affect the beneficial enioyment of tarwad property by others. The rights and obligations flow out of the status of being a member of the tarwad. The right of survivorship arises out of the right to demand partition.

Under the prestine Marumakkathayam law, a member has no right to demand partition. The interest therefore of a member of the tarwad ceased with his death and there was no right remaining to survive to the other members of the tarwad. It is agreed that when members of a tarwad bring about a consensual partition of the tarwad properties there is a severance of the status of the members and a severance of community of rights among them Thereafter there is no more tarwad property in existence. The property allotted to each member towards his or her separate share becomes his or her individual property. It has no more any incident of tarwad property. The division

changes the quality of the property. It becomes attachable and saleable in execution of the decree obtained against the sharer and it is alienable by him. The member to whom the property is allotted takes the same on his or her own behalf and not on behalf of a future tavazhi which may be brought into existence by the member A consensual partition may divide the tarwad into tavazhies also, in which case tarwad property becomes converted into tava-zhi property. I do not find any analogy between tarwad property and property impressed with the character of ancestral property in Hindu Mithakshara law. On the other hand, I am of the view that tarwad property is more akin to joint family property other than joint family ancestral property There cannot be any tarwad property without a tarwad. The legal effect of consensual Individual partition in a Marumakkathavam tarwad is not to bring into existence several tavazhies represented by each member dividing from the tarwad. As I have already said 1 find it difficult to accept the contention that a partition in a Marumakkathavam tarwad does not bring about 8 change in the character of the property.

The plea raised at the bar is that the share in the hands of the separated member is his tavazhi property Even then there is a change in the character of the property. The property which was originally tarwad property is converted into tavazhi property. There is no presumption in Marumakkathayam law that when individual members are allotted properties towards their separate share in the tarwad properties such properties are tavazhi properties in their hands. It was not contended at the bar that individual consensual partition cannot be had in a tarwad. If individual partition and allotment of property separately to each member in a tarwad is possible such partition should bring about a severance of the community of rights among the members of the tarwad with the result that the property allotted to the separate share of each member is neither tarwad property nor tavazhi property in the hands of the sharer But it is her or his separate property (i.e. individual property) Such separate property cannot again be converted into tavazhi property by the birth of a child to a female member or even by adoption by the male member. It is possible for the member by his own will to convert it into tavazhi property by methods known to law It is also not possible to consider the property obtained by a member of a Marumakkathayam tarwad towards his separate share in the tarwad partition as ancestral property in Hindu Mithakshara Law Under Hindu Law for the existence of ancestral property no joint family or coparcenary is necessary. It is not possible to conceive of tarwad property without a tarwad. Even if there is only a sole member in the tarwad the character of the tarwad property on account of the extinction of all the remaining members is not changed. Under Hindu Law ancestral property is brought into existence by succession of the son to the self-acquired property of the father dying intestate. The property which the son gets from the father y devolution in his right as a son makes the property ancestral in his hands This is because of the equal right to succeed in the son, grandson and great-grandson to the estate of the father, grandfather and greatgrandfather. I am not aware of any principle of Marumakkathavam taw by which the property obtained by an individual on intestate succession is tarwad property in the hands of the person setting it The separate properties of a junior member can lapse to the tarwad or tavazhi under the prestine Marumakkathavam law According to Hindu Law, it is competent to a father to make a partition during his life of the ancestral estate even without the sons joining the partition deed The partition so made will bind the sons not because the sons are deemed to be consenting parties to the arrangement but because it is the result of a power conferred on the father according to the tenets of Mithakshara, though subject to certain restrictions imposed in the interests of the sons When a on is begotten after a partition is effected between the father and

his other sons in which the father has not reserved to himself any share, the son begotten after the date of partition is entitled to reopen the partition. If on the other hand, a share was allotted to the share of the father under the partition, the son begotten thereafter will be entitled to succeed to the property taken by the father in the partition and in his self-acquisitions to the exclusion of the divided sons. This is because of peculiarity of the relationship of father and sons based on Hindu Law texts. These principles do not apply even in partition between collaterals in Hindu Milhakshara Law. If there is a partition in a ioint family consisting of only three brothers, and if one of the brothers does not take any share in the partition, the son begotton by him after the partition can-not claim to reopen the partition. As a necessary corollary to the principle that a son, grandson or great-grandson acquires a right by birth in ancestral property he is under the principle of pious obligation bound to discharge even the personal debts of the father, grandfather and great-grandfather provided they are incurred before partition and are not tainted with illegality and immorality. The father need not even be the manager of the joint family of which the father and sons are members. On the other hand, the joint family properties are not liable for even the personal debts of joint family manager. The doctrine of pious obligation is also based on the peculiar text of Hindu Law governing the relationship of father, son, grandson and great-grandson. I am therefore of the view, that the right by birth available to a son, grandson and preat-grandson in ancestral property stands on a different footing from the right of birth available to a member of the joint Hindu family in the joint Hindu family non-ancestral property. This latter right is available only so long as the ioint family continues which is necessary for the existence of joint family property. The position is the same regarding tarwad property.

P. K. Subramania lyer, J. in 1954 Ker LT 862 = (AIR 1955 Trav-Co. 55} has held that the passage "they who are born, and they who are vet unbegotten, and they who are still in the womb, require the means of support". (Mayne's Hindu Law. page 318, paragraph 259) is the basis for the recognition of the right by birth of a son, grandson or great-grandson in ancestral property and It applies to members of a Marumakkatha-yam family on the principles of equity and conscience. The above is an extract from Section I, Chapter I. Placitum 27 of Mitha-kshara where the religious duty of a man not to have his family without the means of support is insisted on. Placitum 27. Chapter I, Section 1 of Mithakshara lays down.

"It is a settled point that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, 'though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are vet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made.' "

There was an attempt in Hindu Law though unsuccessfully to raise a contention based on the above text that even in the self-acquired property of a father following the Hindu Mithakshara Law his son acquires an interest by birth and Lord Hobhouse in Balwant Singh v. Rani Kishori (1898) 25 Ind

App. 54 (PC) observed in the course of the judgment that in the text books and commentaries on Hindu Law, religious and moral considerations are often mingled with rules of positive law. It was also held therein that the passages in Chapter I, Section 1, verse 27, of Mithakshara contain only moral or religious precepts while those in Section 5, verses 9 and 10, embodies rules of positive law. It was therefore held that the father of a joint Hindu family has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. The above text which is therefore made applicable to Marumakkathayam Law is never followed even in Hindu Law in regard to the determination of rights in joint family property. I am therefore of the view, that there is no justification on the basis of the above rule to change the character of separate (individual) property into tavazhi property in Marumakkathayam Law. The above, according to me, is the position even under the prestine Marumakkathayam Law.

67. Even if it is held that under the prestine Marumakkathayam Law the property taken towards his separate share by a member of the tarwad is not his separate property, I entertain no doubt that subsequent to the Travancore Nayar Act 2 of 1100 which alone is relevant for deciding the appeals, the property obtained on partition by a member of a tarwad towards his or her separate share constitutes his or her separate property in respect of which no rights will be created in favour of anybody else by adoption or birth. The Travancore Nair Act has been passed to define and amend among other things in certain respects the law relating to intestate succession and partition in Nayar tarwads.

Chapter VII of the Act provides for partition of tarwad property. The right of a member to demand partition of Ms or her share in the tarwad properties is conferred by Chapter VII of the Act subject to certain restrictions. The object of the Travan-eore Nair Act is to confer the right of individual partition on the members of a tarwad or tavazhi subject to the limitation contained therein to enable the member to form a Marumakkathayam family. This obviously shows that the intention is to confer an absolute right to the member in the property which he or she gets in the partition of tar-wad property. Section 40 of the Travancore Nair Act says that "if a person was in management of his or her Tarwad, one-fourth of the acquisitions, if any, made by such person during such management with the aid of the income from Tarwad property. shall, on partition, be allotted to him in addition to the share which he would otherwise be entitled to get." Normally any property acquired by a person in management of a tarwad with the aid of the income from tarwad property is tarwad property belonging to all the members of the tarwad. The Nair Act provides that on partition one-fourth of such acquisition shall be allotted to the person acquiring the same. I do not think that it can be doubted that the property thus obtained on partition under the Nair Act can be considered to be properties in which subsequent born members can get an interest by birth. Section 39 of the Tra-vancore Nair Act is in these terms:

"Until partition, no member of the Tarwad shall be deemed to have a definite share in Tarwad property liable to be seized in execution nor shall such member be deem-ed to have any alienable or heritable interest therein."

The scope of the above Section gave rise to a Rood deal of discussion in the bar. While it was contended on one side that Section 39 confers an alienable and heritable interest on the member

over the share of tarwad property obtained on partition, it was argued on the other that Section 39 only declares the nature of the right of a member of the tarwad in the tarwad property 'until partition'. To support the latter contention much help was sought from the negative wording of the section The argument was that there is no positive conferment of any right on a divided member over his share of property or account of Section 39. No doubt Section 39 is negative in form. But I think that a negative form is adopted to enable the Section to receive a mandatory construction to the effect that it is only on partition that a member of the tarwad gets denned share, with a heritable and alienable right A statute has to be judged as a whole regard being had not only to its language' but to the objects and purposes for which it has been enacted. The Travancore Nail Act has been enacted to confer on the members the right to demand partition in the tarwad property and to get their separate share allotted to them. The intention and purpose of the enactment in conferring that right is to make the share separately allotted to the member hereitable and alienable in his hands. There is therefore no scope for the argument that a right by birth to a subsequent born child is available in that property. I am therefore of the view, that the decision in 1963 Ker LT 859 = (AIR 1963 Ker 358) lays down the correct law. If so, the second appeals have to be allowed. In reversal of the decisions of the lower appellate courts. T allow the second appeals with costs.

ORDER In accordance with the opinion of the majority these appeals are dismissed with costs.