Privy Council Appeal No. 84 of 1944

K. Kochunni *alias* **Muppil Nayar** - - - - - - *Appellant*

v.

K. Kuttanunni *alias* **Elaya Nayar and others** - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1947

Present at the Hearing:

LORD SIMONDS
MR. M. R. JAYAKAR
SIR JOHN BEAUMONT

[*Delivered by* MR. M. R. JAYAKAR]

This is an appeal from a judgment and decree of the High Court at Madras dated 9th April, 1943, which reversed a judgment and decree of the Court of the Subordinate Judge of Ottapalam dated 26th February, 1938.

The appeal arises out of a suit brought by the respondents, who are Malabar Hindus, for a declaration that the properties in the possession of the appellant (original defendant I) were Tarwad or joint family properties belonging to the joint family consisting of the appellant and the respondents (original plaintiffs). The appellant is the head of a family, and original defendants II and III are members thereof, but as their interest coincided with that of the plaintiffs they were transposed as plaintiffs X and XI. The appellant is in possession and control of certain properties, to which the plaintiffs' claim is related. The appellant denied the claim and asserted that the properties appertained to his Sthanam (sometimes spelt as Stanom) and belonged to him exclusively as the Sthani owner thereof. The Trial Court upheld the contention of the appellant and dismissed the suit, while the High Court took a contrary view, decreed the suit and granted the declaration. The appellant, being aggrieved, appeals against that decision, and the question is whether the properties are Tarwad properties belonging to the joint family of the parties or the separate Sthanam properties of the appellant.

The immediate cause of the dispute was that in 1932 the Madras Marumakkattayam Act, which applied to Tarwads having Tarwad properties, was passed. It gave the members of the Tarwad the right to enforce partition of the Tarwad properties or, if they so wished, to have them registered as impartible. The Act did not aply to Sthanams. Taking advantage of the Act, however, the respondents applied in March, 1934, under Section 43 of the Act, for registration of the lands in the possession and control of the appellant as an impartible Tarwad. The appellant denied the right of the respondents to any interest in the said properties and opposed the registration. An order for registration was, however, made by the Sub-Collector. The appellant applied to the High Court for a writ to quash this order. The High Court refused to issue the writ on the ground that the order did not specify any particular property as impartible and the appellant therefore had no grievance. The respondents thereupon brought the present suit on 10th October, 1934.

The dispute relates to what is called the Kavalappara Estate, which is situated in the Walluvanad Taluq of the district of Malabar. It appears that in pre-British times the Kavalappara territory was under the rule of an Indian Prince or Chief, who was the Muppil Nayar (sometimes spelt as Nair) or the senior male member of the Kavalappara Swarupam or dynastic family. The ruler appears to have been a Sthanam holder at this time.

The meaning of the word " Sthanam " and its three classes are explained by Mr. Sundara Aiyar in his book about Malabar and Aliyasanthana Law. The word " Sthanam ", he says, is " of Sanskrit origin and means ' position ' or ' place ', or secondarily, in the Malayalam language, ' a position of dignity '. In the case of certain positions of dignity there is property attached for the maintenance of the dignity and for the fulfilment of the duties attached to the position. As a technical word, ' Sthanam ' means a position of dignity of this kind, that is, one to which certain specific property is attached and which passes with it and is held by the person who fills this Sthanam for the time being and who is known as the Sthani . . . The origin of Sthanam is by no means clear and is more or less a matter for speculation. In the first instance, it seems to have owed its origin to political exigencies and was a creature of public law. (P. 249.) (This would be class 1.) . . . It appears probable that, in the case of some chieftains and public officers, Sthanams were created by the original king, who would, when he appointed the head of a particular family to an office with hereditary succession, attach also certain lands for the maintenance of the office-holder. (This would be class 2.) . . . In addition to the families of princes and chieftains, there are other families also in which we find Sthanams in the technical sense though without any particular dignity attached to them. The creation of Sthanams in such cases was merely the result of imitation. When a family became very opulent and influential, it was sometimes deemed necessary, in order to keep up its social position and influence, that the head should be able to maintain a certain amount of state and for that purpose the members of the family agreed to set apart certain property for him, and such property would descend to the head of the family for the time being. (P. 251.) (This would be class 3.) . . . . Whatever may be the origin of the Sthanam in any particular case, whether it was the result of public law or owed its origin to a grant by the ruling chief to the holder of an office, or was merely the result of an arrangement amongst the members of a Tarwad for the maintenance of its social prestige and influence, the property vests not in the family of the holder but in himself individually and descends to the person who succeeds to his dignity. Another feature is that the Sthani's ownership and interest in the property of his Tarwad ceases on his succession to the Sthanam. His relationship and consanguinity with the family does not and cannot cease. For purposes of religious, funeral and other ceremonies, the Sthani continues to belong to the family." (P. 252.)

As regards the property of a Tarwad, the same author explains its nature in the following words (P. 7):—

> " The property belonging to the Tarwad is the property of all the males and females that compose it. Its affairs are administered by one of those persons, usually the eldest male, called the Karnavan. The individual members are not entitled to enforce partition but a partition may be effected by common consent. The rights of the junior members are stated to be (1) if males, to succeed to management in their turn; (2) to be maintained at the family house; (3) to object to an improper alienation or administration of the family property; (4) to see that the property is duly conserved; (5) to bar an adoption; and (6) to get a share at any partition that may take place. These are what may be called effective rights. Otherwise, everyone is a proprietor and has equal rights." (See also " Customs and Customary Law in British India ", Tagore Law Lectures, 1908, by Sripati Roy, 1911 edition, p. 434.)

With a Tarwad and its property is connected its manager "Karnavan" whose position is explained as follows:—

> "The senior male member of a Tarwad is called the Karnavan. He is not a mere trustee but bears the closest resemblance to the father of a Hindu family. . . . Under Malabar Law, the eldest member of the Tarwad is the Karnavan. In him is vested actually (though in theory in the females) all the property, movable and immovable, belonging to the Tarwad. It is his right and duty to manage alone the property of the Tarwad, to take care of it, to invest it in his own name . . . and to receive the rents of the land. . . . He is not accountable to any member of the Tarwad in respect of the income. . . . He is interested in the property of the Tarwad as a member of it to the same extent as each of the other members. All members, including the Karnavan, are entitled to maintenance out of the Tarwad property . . . unless he acts *malafide*, he cannot be removed from such management."

As regards the Sthanam which is concerned in this case, it appears from the evidence that, in addition to the Kavalappara Sthanam, the holder thereof had other properties held by him as Sthanam properties under the Rajas of Palghat and Cochin, and with regard to these properties he appears to have been subordinate to these Rajas though independent in relation to the Kavalappara Sthanam lands. As regards the Palghat and Cochin Sthanams, the Subordinate Judge observed in his judgment:—

> "The Palghat and Cochin Sthanams differ in their origin from the rajastanam Kavalappara, which arose from the rulership. The properties of the Palghat and Cochin Sthanams come under a separate category. They are grants to the Muppil Nair for military services and were held by him separately as distinct and separate Sthanams. They might possibly come under class 2 of the origin of Sthanams given in Sundra Aiyar's Malabar Law, namely, Sthanams created by the ruling king who, when he appointed the head of a particular family to an office with hereditary succession, attached also certain lands for the maintenance of the office-holder."

The main dispute between the parties is whether the Kavalappara Swarupam which owns the Sthanams and properties aforesaid is a Malabar Tarwad or a Sthanam in the legal sense of that term. The plaintiff urges that it was an ordinary Malabar Tarwad, that the Nair had no ruling powers in the pre-British period, and that, even if he had ruling powers as an independent chieftain at that time, the advent of the British administration removed all the characteristics of the ruling families and converted them into ordinary Tarwads in the matter of enjoyment of property.

The defendant, on the other hand, urges that Kavalappara Nayar had ruling powers as an independent chieftain in the pre-British days, that one characteristic of a ruling chieftain in Malabar and elsewhere is that the ruler and not the family owns all the property though the family members get maintenance allowed by the ruler either in the shape of lands or in cash, and that this characteristic of the holding was not put an end to when the British assumed sovereignty in Malabar but has continued to prevail till the present day.

These rival contentions crystallized in the following issues raised in the Court of the Subordinate Judge:—

> *Issue* 1.—"Is the Kavalappara Swarupam a Malabar Tarwad, the Muppil Nair being the Karnavan of it and is it possessed of only joint properties in which all the parties to the suit are interested?"
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> *Issue* 2.—"Are and were the properties in the custody and under the management of the first defendant and of his predecessors, properties that appertain to a Sthanam in the legal sense of that term?"
>
> *Issue* 2A.—"If so, have they lost their character as such (i) by allowing user of such properties as Tarwad properties (ii) by the successive occupants of the alleged Sthanams acquiescing in their user as Tarwad properties (iii) by the successive occupants of the

alleged Sthanam waiving their rights over such property as Sthanam properties; or (iv) by adverse possession by the Tarwad as against the Sthanam? "

Issue 11.—" Whether the defendant really acted as Karnavan? "

Issue 12.—" If so, whether such acts will create any estoppel against the defendant or deprive him of his rights as Sthani? "

The findings of the Subordinate Judge on all these issues were in favour of the appellant. The detailed conclusions at which he arrived on these issues can be briefly stated as follows:—

" The Kavalappara Nair has been recognised as an independent chieftain at the time that Tippu ceded Malabar to the British Government. The East India Company entered into treaties with him. The presumption in the case of rulers or independent chieftains is in favour of the impartible nature of their possessions. All the other Rajas or independent chieftains in Malabar are now found to be Sthanis in the legal sense. The way in which the Kavalappara Nair has been described in documents is identical with how those Sthanis have been described in their own documents in the respective periods. He is continuing to perform ceremonials which those quondam rulers are having. The fact that he has been giving maintenance to and meeting the extraordinary expenses of the other members of the family is not inconsistent with his position as a Sthani successor of the old ruling chieftain. . . . Having given my best consideration to the evidence on record and the probabilities, the preponderance of the evidence is, in my view, in favour of the Sthanam nature of the properties."

The High Court, on the other hand, in an appeal from the judgment and decree of the Subordinate Judge, came to the contrary conclusion. The learned Judges (Lionel Leach, C.J., and Lakshmana Rao, J.) agreed with the Subordinate Judge that the heads of the Kavalappara families were formerly in pre-British times ruling chiefs and that the said rulers had Sthanams and that the Sthanams had lands attached to them which were held by the head of the family in his own right. They, however, did not attach much importance to this fact and assumed that the family of the parties was a Tarwad and the appellant its Karnavan, and that there was a presumption that all the property in the possession of the appellant was Tarwad or joint family property; that he had failed to discharge the burden of proving that the said properties were of a Sthanam character. They further held that even if the properties were Sthanam properties previously, their subjection to the assessment of Government revenue at a later date had the effect of abolishing all the incidents previously attached to them and rendering what were by their nature separate and indivisible properties into the joint family properties. The learned Judges relied largely upon the fact that the Court of Wards during its management of the said properties, as will be stated later, regarded them as Tarwad properties. In the result they allowed the appeal, decreed the suit and granted a declaration that all the properties under the management of the appellant were Tarwad properties belonging equally to and jointly with the appellant and the respondents, the appellant being in management thereof as Karnavan only.

In view of this difference of opinion between the courts, it is necessary to examine briefly the evidence in the case. It appears that before 1792 when Malabar came to be ceded to the East India Company by Tippu Sultan, the ruler of Mysore, the then ruler of Kavalappara was an independent chieftain in his own right, exercising ruling powers, and had lands attached to his Sthanam, including lands relating to the Sthanams granted as aforesaid by the Rajas of Palghat and Cochin. On this question, the Subordinate Judge and the High Court both agree, as stated above, and this view may therefore be regarded as a concurrent finding of fact which their Lordships would in accordance with the usual practice of this Board be loth to disturb. An attempt was made by the respondent to avoid the effects of this finding on the ground that it was a mixed question of law and fact, but their Lordships do not agree with this view. The result would

be that if the Kavalappara holding in or before 1792 was the independent holding of a sovereign or semi-sovereign chief, it would partake of the nature of an impartible estate. As the learned Subordinate Judge pithily remarked, " Can it be said that the family holds the rulership and the ruler is only an agent of the family? The ruler can only be an individual and not the family."

The rule relating to sovereign or semi or subordinate sovereign rulers and the impartible nature of their estates was stated by this Board, as early as 1855, in the case of *Baboo Gunesh Dutt* v. *Maharajah Moheshwar Singh* (6 M.I.A. 164, 187) in the following words:—

> " Generally under Hindu Law, estates are divisible amongst the sons, when there are more than one son; they do not descend to the eldest son, but are divisible amongst all. With respect to a Raj . . . the general rule is otherwise and must be so. It is a sovereignty . . . a subordinate sovereignty no doubt but still a limited sovereignty, which, in its very nature, excludes the idea of division in the sense in which that term is used in the present case."

This rule was restated within more recent times in the case of *Sahdeo Narain Deo* v. *Kusum Kumari* (1922) L.R. 50 I.A. 58, where their Lordships observed: " It is true that an estate only becomes impartible by custom, and that the custom has in each case to be proved. But it is a custom which is usually found to exist where the estate belongs to a king or independent chief, or even a semi-independent chief of sufficient importance." Similar observations were made in another recent case, *Martand Rao* v. *Malhar Rao* (1927) L.R. 55 I.A. 45, 56, where it was stated that the possessions of sovereign or semi-sovereign chiefs would necessarily be impartible. Such was the position of the Muppil Nair and his holdings in pre-British times. There could therefore be no question of his proving, as the High Court has required him to do, that the properties in his possession were impartible and of his exclusive ownership.

The next question is did these properties subequently lose their character owing to any action on the part of the British Government? The material facts relating to this question are as below:—

In 1792 when Malabar came to be ceded to the East India Company, as stated above, that Company entered into an agreement with the Nair on 12th July, 1792, which, on its true interpretation, appears to have confirmed this position. It was an agreement entered into between two British officials, as agents of the East India Company on the one hand and the Kavalappara Nair on the other. The contents of this document appear to their Lordships very important as throwing light on the status and position of the Kavalappara Nair in relation to his territory, and also as regards the position he came to occupy in relation to the British Government in and after 1792. The material portion of the document is set out below:—

The agreement refers in clause 1 to the cession of the territory by Tippu Sultan and the Company becoming the sovereign and rightful owners thereof. It mentions in clause 2 " that the said country having formerly belonged to the ancestors of the said Kavalappara Nair, he comes to Calicut and represented that he had been placed in charge of the said country of Koulparah by Keshoo Pillay the Diwan of Travencore and was assured by him in the name of the Company of being continued in his said territory at the place on condition of his assisting in the war against Tippu, which he did on various occasions by furnishing his Nairs and supplying the garrison . . . with grain; on account of these services and having regard to the faith of the English Nation, it is agreed to place him in the administration of the country of Koulparah on behalf of the company." Then, after stating what the Nair had to pay to the Company on account of the produce of the country and that he had agreed to submit to the directions of the Company from time to time, clause 5 mentions the disputes which were at that time being raised by the Raja of Cochin with regard to the

territory of Koulparah and that with reference to this dispute the Nair agreed to prove his claim and to abide by whatever decision the Company might give.

It is clear from the words of this document, especially clause 2, that the East India Company accepted his representation with regard to the ownership of the territory in pre-British times and in consideration of his services rendered to the East India Company in the war against Tippu and in confirmation of the assurance given on behalf of the Company by the Diwan of Travencore based on his faith in the British people, the Company authorised the Nair to continue in the administration of the territory on their behalf and on the terms mentioned in the document. It would appear from subsequent events that at this time the administration included the whole of the administration as previously carried on, including justice. Their Lordships agree with the interpretation of the Subordinate Judge of the terms and effect of this document. The regrant of the administration by the East India Company to a previous ruler of the territory would fall within the principle enunciated by this Board in *Martand Rao* v. *Malhar Rao* (1927) L.R. 55 I.A. 45, 49, that " if an impartible estate existed as such from before the advent of British rule, any settlement or regrant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession."

On the termination of this agreement, another agreement was entered into in September, 1794, between the Company and the Nair. It related to the collection of revenue only. Internal customs were abolished and external customs and administration of justice were taken over by the Company. The material words are: " The Company do hereby further stipulate and agree . . . with the Kawlparrah Nair to deliver over to the management of him or his agents the several districts of . . . forming the Taluq of Cawlparrah in as far as regards the detail collection of the revenues of the said districts with the reservation of the authority . . . of the Company." This agreement was not to be subject to alteration but was to be submitted to the revision and approbation of the Governor General in Council after which . . . it was to be deemed complete and not to be deviated from during its term.

In the meanwhile, joint commissioners had been appointed to inspect the state and condition of Malabar on or about 11th October, 1793. The Commissioners reported, *inter alia*, on the claim of the Cochin Raja, disallowed it, and referred to the contents of the previous agreement and the settlement made thereunder. They came to the conclusion, on the evidence adduced before them, that the Kavalappara Nair was independent of any superiority on the part of the Raja of Cochin and concluded with the view that the evidence produced showed that the Nair was " reinstated during the war under the immediate and all-powerful protection of the Raja of Cochin's enemy the Diwan of Travencore " mentioned above. This report was at a later date, under the instructions of the Governor General, placed before him for his sanction and the recommendations were accepted by Sir John Shore, the then Governor General in or about May, 1804, who added a recommendation (apparently in consideration of the Raja's previous services) that " the most positive instructions be given to the Revenue servants for treating those chieftains with attention, civility and kindness ". (See Exhibit 7 at pp. 131, 132 of the Documents and the Manual of the Malabar District by William Logan, 1906, pp. 483, 484, 487 and 488.) A significant statement appears at page 483 of Logan's treatise, that the Travencore Raja and his Diwan Keshoo Pillay mentioned in the document of 1792 had been allowed by the British authority a controlling power over the Malabar Rajas.

After the expiry of the five years covered by the agreement of 1794, the East Indian Company decided to take charge of the territory and to compensate the rulers by payment of a percentage of the amount of revenue collections, and it appears from the documents relating to this time that, though deprived of the ruling powers, the Rajas were left in

possession of their territory subject to the payment and the limitations mentioned in the previous agreement. The compensation offered to the Rajas (including the Kavalappara Nair) took the form of a Malikhana allowance which, as the learned Subordinate Judge observes, was the equivalent of the benefit secured to them when they were deprived of their administration. Reference had been made to the rulers having domain lands for which they were paying no revenue in the past. There was no tax because the accounts on which the settlements were based belonged to the time when they were rulers and the lands were subject to no taxes. The Muppil Nair lived on the proceeds of the lands. It was suggested that these domain lands needed taxation and they were accordingly taxed.

As regards the Malikhana allowance, the appellant claimed in his written statement that, as there was no permanent settlement in Malabar at that time as in other parts of British India, it was a grant made by the East India Company to the Muppil Nair in recognition of the sovereign power once exercised by him and the meritorious services rendered to the East India Company. He claimed that this was one of the unmistakable proofs that the Kavalappara Swarupam was not an ordinary Tarwad but was a Sthanam. The Subordinate Judge has accepted the view that it is an indication of the Kavalappara Nair's ruling chieftainship. The High Court also, notwithstanding an apparently contrary expression in certain parts of the judgment, says: (see p. 176, line 47, of the Record), " there can be no doubt that the head of the Kavalappara family was a ruling chieftain in 1792 because in 1806 the East India Company granted to the family a Malikhana."

In the light of this evidence, their Lordships accept the conclusion of the Subordinate Judge that the deprivation of the Kavalappara Nair of his ruling powers did not affect the incidents which attached to his properties, and they continued to be impartible and were owned by him exclusively. Their Lordships do not agree with the view of the High Court that on the levying of the land revenue on the estates of these Rajas and chieftains under the circumstances mentioned in the several documents referred to above their holdings were converted into *ryotwari* tenure. It may be added that even if any conversion did take place it was so, as the High Court observes in one part of the judgment (at p. 176, line 38, of the Record) only in relation to the Government and not in relation to the other members of the family, with reference to whom the lands continued to enjoy the benefit of the incidents which were previously attached to them.

The main attack of the plaintiffs against the Sthanam character of the properties is the circumstance that maintenance was decreed against the then Muppil Nair to junior members of the family in the year 1817. It was argued that the grant of maintenance was inconsistent with the properties being Sthanam in their character, because the other members of the family, it was urged, have, *ex hypothesi*, no rights of maintenance against the Sthani out of the Sthanam property in his hands. The High Court has accepted this view, contrary to that of the Subordinate Judge. The documents material in this connection are Exhibits " O " and " P," being the decree and judgment respectively in two suits for maintenance brought in the year 1817 against the then Muppil Nair, the first by the then third Nair, a minor, and the second by his mother. It is material to note what the issue was and what was decreed in these suits. In the pleadings of both the parties the claim for maintenance was stated to be based on customary rights. The plaintiff alleged it is " the usual custom " that the Nair should pay the maintenance. The defendant admitted " the custom " but denied his liability to pay the maintenance on the ground that his ancestors in ancient times had already settled in accordance with the " usual practice " certain lands on a lady called Amma Nethiar for the maintenance of herself and the junior members, and that the maintenance claimed in the suit, even if it was due, which he denied, should primarily come out of the lands so set aside in previous times. He also denied his liability on the ground that the minor and his mother, contrary to his

advice and that of the well-wishers of the family had gone away to live elsewhere. The defendant denied his liability also on other grounds which it is unnecessary to consider in this case. He, however, expressed his willingness to supplement the maintenance, if the Court thought proper, on particular occasions. The Judge, while admitting that it was the responsibility of Amma Nethiar to maintain the plaintiffs, held that as the plaintiffs stood in the very near relationship of sister and nephew to the defendant and were his next heirs it was " only proper " that the defendant should grant them a periodical allowance for past and future maintenance. In the light of the pleadings set out above, the admissions made therein by both sides about the customary nature of the maintenance and the words it was "only proper " in the judgment, their Lordships cannot accept this as a decision contradicting the incidents of the property in the hands of the Muppil Nair. The maintenance claimed was a customary one originating in ancient times when admittedly the Muppil Nair was a Sthani in possession of Sthanam rights. There is no evidence as to how the maintenance allowance arose, whether it was given in recognition of a legal claim or was only a generous provision made for the benefit of the women and younger members, which the Raja was perfectly competent to do out of property which he regarded exclusively as his own. The claims of generosity often prevail over a sense of ownership, especially when the recipient of the bounty is a near relative in a dependent position. Their Lordships think that in the proceedings of these two cases there is hardly anything to support the view of the High Court that the decrees in these two suits are inconsistent with the Sthanam character of the properties in the possession of the then Muppil Nair or that he did anything which could be regarded as an admission that the properties in his hands were not Sthanam properties. On the question whether and how far the existence of a maintenance allowance is inconsistent with the Sthanam character of the property, on which it is grounded, the following passage in Sundara Aiyar's book (page 255, bottom) may be noted: " The point of view suggested in some cases in which the question has arisen is that the members of the family have rights of maintenance in the property of the Sthanam itself; that is practically assimilating these properties to impartible zemindaries before the recent cases." Besides, the Sthanam in dispute in this case belonged, as stated above, to the second category, and in such a case the existence of a maintenance allowance would be perhaps not so inconsistent as in the case of a Sthanam of the third class, carved out of the family property for the support and dignity of its senior member.

In the year 1859 came what may be regarded as the first challenge to the Muppil Nair's rights in the course of the long and chequered history of this property. It was Suit No. 2 of 1859 in the Zilla Civil Court of Calicut, launched by the remaining members of the family and their alienees against the then Muppil Nair to remove him from management on the ground that he had joined in the execution of a Karar (agreement) under which he (when he was junior Nair) renounced his rights in the management in favour of his next junior. The answer of the Muppil Nair was that the Karar was not genuine, the properties were Sthanam and the plaintiffs had no right to claim them. The Judge found in favour of the Nair that the Karar was not genuine and dismissed the suit, holding that it was unnecessary to go into the question whether the properties belonged to the Tarwad or to the Sthanam. This litigation, therefore, did not decide the question at issue in this appeal. It may be noted that there was no appeal by the plaintiffs from this decision, which was given in the year 1863.

The Muppil Nair, against whom the suit of 1859 was brought, died in 1872. The only surviving member of the family then was a girl of about six years of age called Parvathi Amma Netiyar. In the meanwhile, a Court of Wards had been established under Madras Regulation V of 1804 for the purpose of taking into its custody and management and thereby preserving the estates of persons incapacitated by minority, sex or natural infirmity. Acting under the powers this Regulation gave them, the Court of Wards entered on the management of the entire estate, including the properties allotted as aforesaid in the name of Amma Nethiar, which it was thought

unnecessary to keep distinct from the other properties. It appears from the evidence that the Court of Wards throughout the entire period of their management from 1872 till 1910 treated the estate as if it was a Tarwad, but this was apparently without any investigation into the true nature of the property. If the grounds on which the Court of Wards could take possession of the lands under the Regulation arose, it made no difference to them whether the property was Tarwad or Sthanam. The only person entitled to the property then was, as stated above, a minor girl, and that fact gave enough ground to the Court of Wards to take possession and manage the property. Besides, there was no adult male at that time to question the treatment by the Court of Wards of the property as Tarwad property. This course appears to have gone on for several years, but in the year 1895 the Collector of Madras, who was agent to the Court of Wards, probably entertaining some doubts as to the nature of the properties, issued a questionnaire (see pp. 1135-6 of the Exhibits) to the manager of the estate. Several questions were put to him and his formal answers obtained. The questionnaire begins with the words: " A detailed report may be sent at an early date regarding the matters mentioned below." In answer to Question No. 2 . . . " whether Tarwad properties are set apart exclusively for the maintenance of the members of the Tarwad who are not Sthanis," the reply was: " There is nothing." Question 4 was: " If the answer to the second question above is ' No ', how do the other members of the Tarwad maintain themselves? Whether they had any claim for maintenance over the Sthanam properties? " The answer was: " It is the custom that the Muppil Nair from and out of the Sthanam properties gives to the other members the expenses for their maintenance and therefore they have a claim to the Sthanam properties for their maintenance." This answer is in accord with the defence adopted by the defendant Muppil Nair in the suit of 1817 mentioned above. It is difficult to understand why the High Court set aside this clear answer of the manager as being ' obviously not correct '. The manager knew best the incidents of the property of which he was the manager and apparently the Collector of Malabar in submitting a detailed questionnaire for his consideration and asking for his report must have thought that his opinion on the matter was valuable. It is to be noted that in none of the documents, relevant during this period, is there anything disclosing the reasons why the Court of Wards treated this property as Tarwad. The respondents' Counsel suggested that it must have been so because, under the rules relating to Sthanams, male succession having come to an end on the death of the Muppil Nair in 1872, the property reverted back to the Tarwad and took the form of Tarwad property. Authorities were cited before their Lordships to support this legal view and they were invited to end this long litigation at the stage of its final appeal on the basis of this legal point, which was not urged in the pleadings and had not found any place in the long and elaborate judgments of the Courts in India. Their Lordships are asked, so to speak, to take this short cut on the ground that the question is purely one of law and therefore can be entertained at this late stage. Their Lordships are most unwilling to adopt this course and to undo all that has been done in this case during several years. They express no opinion on the validity or otherwise of this point except to say that there is nothing to indicate that the Court of Wards treated the property as Tarwad because they were aware of or accepted this legal view.

The difficulty in accepting it arises also from the fact that Parvathi Netiyar attained majority in 1887 and had a minor son, who died before he could succeed to the Sthanam. Whether this son on his birth would not revive the male succession which had ended for a time and thus the Sthanam male line would continue is a question fraught with difficulty. At page 258 of Sundara Aiyar's book it is stated that the question whether a Sthanam becomes extinct on the extinction of the male members or is only in abeyance during the absence of the male member, so as to be capable of being revived, does not admit of an easy solution, and the author concludes with the observation that if a modern incident of this kind arose, it would probably be not an easy one to decide.

Reliance was placed upon certain proceedings which took place in 1887, when Parvathi Amma Netiyar attained majority, but on a careful perusal

of the several applications relevant on this question the matter appears to be equivocal. For instance, in many of the documents, words are used which are appropriate to the nature of the property as Tarwad as also Sthanam. On the other hand, in some of them words are used which indicate a preference for the Sthanam view. The fact that when Parvathi Netiyar had a son, she applied to the Government that possession should be taken in order to preserve the property during the minority of her son, is not decisive, and is equally intelligible on either hypothesis.

Their Lordships have come across no evidence during the long period of the Court of Wards' management which can be accepted as indicative of a considered decision by the Court of Wards to treat the property as a Tarwad. This is apart from the question whether the Court of Wards had the power under the relevant Act to change the nature of the property of which they took possession. It was conceded, and in their Lordships' opinion rightly, in the course of the respondents' argument that if the property bore the character of a Sthanam at the date when the Court of Wards took possession, the subsequent activities of the Court of Wards would not change its character. Their Lordships therefore do not attach that importance to the treatment of this property by the Court of Wards which the High Court has ascribed to it.

In 1910, the Muppil Nair immediately previous to the present one assumed management and after 1925 the present Muppil Nair came into possession. During the period of their management there is no doubt that they made no conscious distinction between their position as Karnavan and Sthani. Whereas, on the one hand, much of their action is intelligible on the footing that they thought that their position was that of a Karnavan, there are, on the other hand, many contrary indications. For instance, as stated in the Subordinate Judge's judgment, they exercised the functions and privileges and enjoyed the ceremonial and other dignities relating to their status as the owners of a Sthanam. Further, they continued to use in various documents relating to purchases and other matters the title of "Karakkat Kumaran Raman", which had been appropriated to their position as Sthani. These documents, as the learned Subordinate Judge points out, extend from the year 1745 up to 1926 (see Ex. CCCIII, part 2, p. 1361). It therefore appears that the distinction which exists between the two positions as a matter of law was not fully appreciated by the defendant or his predecessor. This is further indicated by the different answers which the defendant gave in the Subordinate Judge's Court when subjected to cross-examination at the hands of the plaintiffs' Advocate. In the learned Subordinate Judge's judgment are detailed these answers, and their Lordships agree with his conclusion, based on the explanation given of his conduct by the defendant in his deposition, that he continued the management on the same lines as the Court of Wards and had no idea of the real legal position of the estate when he entered on the management. But, apart from it, the conduct of the defendant is legally material only if it could lead to an estoppel, acquiescence or waiver. But, as the learned Subordinate Judge points out, no such questions could arise on the evidence in the case. Clear issues were raised on these points; they were all decided against the plaintiffs; the High Court, in the view it took, did not go into these matters; and there has been no argument addressed to their Lordships on these questions. As the learned Subordinate Judge points out, admissions which have been made under a mistake as to the true legal character of the estate will not operate to create an estoppel or acquiescence. No-one was mislead into doing anything to his detriment as a result of this mistaken view. There was "no representation, no acting on it, no misleading, and no change of position on such representation. When all are under a mistake," there is neither estoppel nor waiver nor acquiescence.

Before concluding this judgment, it would be necessary to consider one or two matters to which their Lordships' attention was invited by the respondents' Counsel. The first relates to the difficulty of identifying the properties in this suit. With regard to this, the position is as follows:—Both the parties wanted a decision with regard to *all* the

properties in the possession of the defendant. In his plaint the plaintiff asked for a declaration that all the properties under the management of the first defendant were Tarwad properties belonging equally and jointly to the plaintiffs and the defendants. In the defendant's written statement this allegation was met by a counter-allegation that all the properties in his possession were Sthanam properties. The defendant, in paragraph 16 of his written statement, sought to obtain a specification of the properties claimed by the plaintiffs as joint properties, and added that in the absence of such specification he was unable to urge his specific rights with regard to those properties, that the prayer for a declaration was indefinite and vague as no schedule of properties was given with a proper specification to enable the defendant and the Court to identify the properties. He added that the plaintiffs refused to comply with the imperative provisions of the Civil Procedure Code relating to specification of properties even after the defendant brought the defect to the notice of the Court and the plaintiffs by means of a separate petition. He raised a specific issue (No. 9) on this point, on which the learned Subordinate Judge's finding was in the plaintiffs' favour on the ground that " the same point was considered by my predecessor in an application of the defendant in 1934. He gave a ruling to the effect that such a schedule was unnecessary as the suit is really one for establishing the plaintiffs' status in the family. That order has been confirmed by the High Court." The plaintiffs accepted this position and took the risk of having a decision regarding all the properties in the possession of the defendant.

In reply to questions from the Board during the argument, attempts were made to identify the properties, but, in their Lordships' opinion, they have failed. The question, therefore, is whether, at this late stage, their Lordships should direct an enquiry regarding the identification of the properties or treat the suit as both parties and the Courts in India have done. Their Lordships, after careful consideration, feel that to direct such an enquiry at this stage would have the effect of prolonging this litigation, which began thirteen years ago, and of raising questions of a complicated character leading perhaps to a revival of controversies which have long been agitated and which their Lordships desire to terminate by their judgment in this appeal. They are therefore unwilling to adopt this course.

A further question of a similar character was raised whether the properties which had been acquired by the defendant have been merged with the Sthanam. Though detailed issues were raised in the case, this question was not suggested and no attempt was made before the Subordinate Judge to distinguish between properties previously owned and subsequently acquired. Their Lordships do not find any discussion of this question in the judgment of the Subordinate Judge, who was asked and gave his decision with reference to all the properties in the suit. Before the High Court the question appears to have been raised and the Court decided it in favour of the plaintiffs, putting the onus of proof on the defendant. Their Lordships have already stated their view about the onus of proof in this case. Besides, as already stated, most of these properties, from 1745 up to comparatively recent times in 1926, were acquired in the Muppil Nair's official name of Karakkat Kumaran Raman (see pp. 136-143 of the Subordinate Judge's judgment), which led the learned Subordinate Judge to observe that " this uniform dealing shows that the Sthanam and Sthanam properties were recognized as related right through the period commencing from 1745 ". In view of these facts, it seemed necessary for the plaintiffs, as an alternative case, to select and specify the particular properties in the defendant's possession, which they sought to claim on this ground, notwithstanding the general and comprehensive declaration they claimed regarding all the properties in the defendant's possession. It therefore appears to their Lordships undesirable, on the same grounds as relate to the identification of the properties, to permit this question to be raised at this stage. As both parties took the risk of having a decision regarding all the properties in

this suit, making no distinction between one class of such properties and another, they must rest content with such a decision.

To sum up: the nature of the properties in the suit during the pre-British period is clearly established as an impartible Sthanam. There is no evidence that the British Government altered the character of this property so far as the other members of the family are concerned, although they made it liable to tax with reference to the claims of the Government. The maintenance decrees in the suits of 1817 were not inconsistent with the Sthanam nature of the properties, and the Muppil Nair did not admit in those suits that his properties were not Sthanam. He never consciously altered his position or agreed to its alteration. His possession never changed. There was only one challenge to his title in the year 1859, but the Court did not decide the question. The subsequent treatment by the Court of Wards had not the effect of altering the character of the property, nor was there any considered decision on their part or any power to do so. The subsequent conduct of the Muppil Nair has no legal effect in altering its character for it did not create any estoppel, waiver or acquiescence. Their Lordships are therefore of opinion that the original character of the property in its relation to the other members of the family is still retained and the plaintiffs are not entitled to the declaration they sought in the case.

For the reasons stated above, their Lordship agree with the conclusion at which the Subordinate Judge arrived, and are of opinion that the judgment of the High Court and decree be reversed, and that of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly. The respondents will pay the costs of the appellant before this Board and in the High Court.

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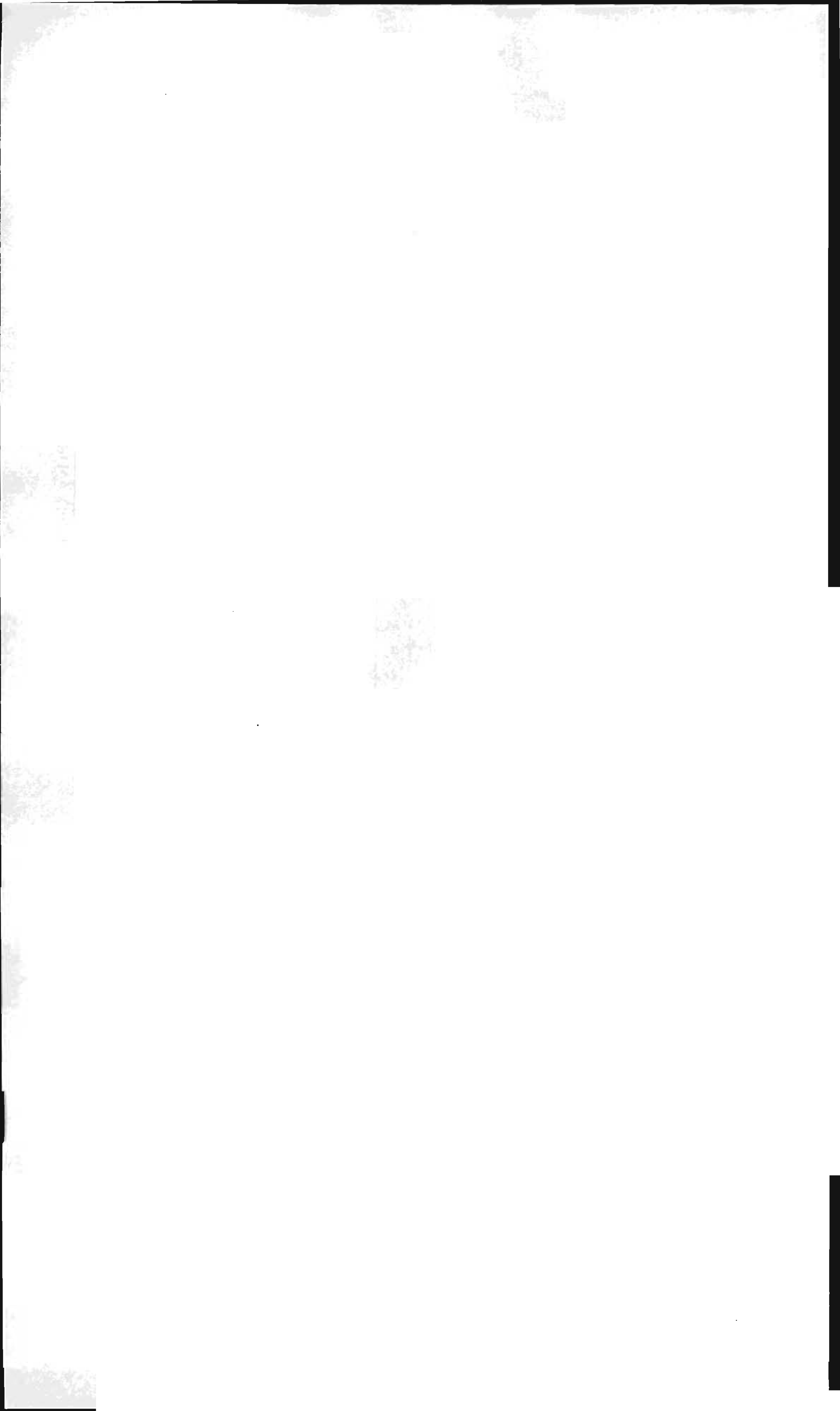

In the Privy Council

K. KOCHUNNI *alias* MUPPIL NAYAR

v.

K. KUTTANUNNI *alias* ELAYA NAYAR AND OTHERS

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