

(1978) 01 KL CK 0016
In the High Court Of Kerala
Case No : A.S. No. 344 of 1973

Arakkal Rohini and Another

APPELLANT

Vs

Arakkal Koottappanakkal A.K. Sethumadhavan, Kozhikode
and Others

RESPONDENT

Date of Decision : 31-01-1978

Acts Referred:

Citation : AIR 1978 Ker 119 : (1978) 1 ILR (Ker) 631

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; P. Subramonian Poti, J.; P. Janaki Amma, J

Bench : Full Bench

Advocate : T.S. Venkiteswara Iyer, C.M. Devan and P.E. Narayana Swamy, for the Appellant; T.L. Viswanatha Iyer and E.R. Venkiteswaran, for the Respondent

Final Decision : Allowed

Judgement

Gopalan Nambiyar, C.J.—This reference to a Full Bench was occasioned to consider the applicability of the Hindu Law Doctrine of pious obligation to the Thiyyas of Calicut. The court below ruled that the doctrine has no application to them, relying on a Division Bench ruling of this Court in *Dharmodayam Company v. Balakrishnan* 1962 K LT 712. The Division Bench which made the reference found force in the contention that the decision in *Dharmodayam Company's Case* required reconsideration in view of the observations in the Supreme Court decision in *Anthony Swamy v. M.R. Chinnaswamy* AIR 1970 9C 223.

2. The appeal arises out of a suit for partition. Defendants 2 and 3 who have filed this appeal may be described, as the alienees of certain items, the 2nd defendant being the mortgagee of items 1 to 5 and the 3rd defendant, the vendee (claimed also to be the lessee) of item 6. The plaintiffs 1 to 5 were the children of the 1st defendant who died pending suit, and the 6th plaintiff is their mother and the wife of the 1st defendant. Items 1 to 5 were hypothecated by Ext. B-5 dated 26-12-1958 for a sum of Rs. 6,850/- to the 2nd defendant. A portion of item 6 was sold by Ext. B-13 dated 13-6-1958 to one M. G. Thomas for Rs. 5,000/-, and

the lights became vested in the 1st defendant under Ext. B-14 dated 26-3-1960 for Rs. 4,000/-. The other portion, of item 6 was sold under Ext B-17 dated 26-3-1960 for Rs. 4,750/-. These two alienations were attacked as not supported by family necessity or benefit and therefore not valid and binding. For defendants 2 and 3 they were sought to be justified on the ground of necessity or benefit, and also on the doctrine of the pious obligation of the sons to defray their father's debts. By amendment of plaint it was pleaded that the parties, being Thiyyas of Calicut, are governed by the customary law and that the said custom does not attract the doctrine of pious obligation as known to the Hindu Law. This was in answer to the plea raised by defendants 2 and 3 in their written statement that the Hindu Law doctrine of pious obligation applied to the Thiyyas of Calicut. From the amendment of the plaint and the additional written statement filed by defendants 2 and 3 we are satisfied that the contention raised in the appeal had been squarely reflected in the pleadings and no objection on the ground of want of pleading can be raised against it.

3. The court below held that Exts. B-5 and B-13 cannot be supported on the ground of necessity or benefit; and that as far as the doctrine of pious obligation is concerned, it had no application to the plaintiffs and the 1st defendant, as it had not been proved to be part of the customary law of Thiyyas of Calicut. In the result, it passed a preliminary decree for partition directing the plaint properties to be partitioned into 4 equal shares and allotment of 3 such shares to plaintiffs 1 to 3, one such share in items 1 to 5 to 2nd defendant, and one such share in item No. 6 to the 3rd defendant. It was stated that the share to which the 1st defendant was entitled at the time of the suit was thus given to his alienees, namely, defendants 2 and 3 by way of equity.

4. We have been taken fully through the evidence in the case to show whether the impugned transactions can be justified by necessity or benefit. We are satisfied that the finding of the court below that they cannot be said to be supported by necessity or benefit is correct and has to be affirmed. Briefly stated the position disclosed is as follows: Ext. B-5 is the hypothecation deed for Rs. 6,850/- in respect of items 1 to 5, Out of the said consideration, Rs. 4,500/- was to discharge a prior hypothecation, Ext. B-4 dated 12-9-1950, and Rs. 2,350/- was stated to be borrowed for house construction. There is no proof of any house having been constructed. The prior hypothecation. Ext. B-4 for Rs. 4,500/- recites that the consideration for it was Rs. 2,000/- to discharge a prior loan, and Rs. 2,500/- borrowed for the contract work of the 1st defendant. Ext. B-3 dated 5-2-1950 is an unregistered agreement between the 1st defendant and one Raman for Rs. 2,000/-. It is difficult to find necessity or benefit for this prior loan. In respect of the contract work, there is no proof that the business was a family business of the parties, and not a new or independent business of the 1st defendant. (Vide AIR 1932 182 (Privy Council) . In the circumstances it cannot be said that this part of the consideration again, has been established to be for binding necessities or for the benefit of the family.

5. Turning now to item 6, Ext. B-13 dated 13-6-1958 is the sale of a portion of item 6 to M. G. Thomas for Rs. 5,000/-. One of the items of consideration is to discharge a prior mortgage for Rs. 1,500/- evidenced by Ext. B-11 dated 2-2-1957. The balance Rs. 3,500/- is to discharge the decree debt in O. S. No. 254 of 1952, Sub Court, Coimbatore, stated to be pending in execution. The document recites that steps had been taken for arrest of the 1st defendant in pursuance of the decree. Ext. B-15 is the receipt for discharge of Ext. B-11. Ext. B-11 is stated to be for the marriage of a daughter-Connecting evidence is wanting as to the details, particulars or date of the marriage and the need for the loan. Nor do we have details as to the nature of the decree in O. S. 254 of 1952, and whether it was binding on the family. The remaining portion of item 6 was sold to the 3rd defendant by Ext. B-17 dated 26-3-1960 for Rs. 4,750/-. Out of this, Rs. 3,345/- was to discharge the decree debt in O. S. 254 of 1952. The balance is stated to be for the treatment of a son. There are no details as to the ailment of the son or the treatment accorded. We have already stated that there is nothing to show that the decree in O. S. 254 of 1952 was valid and binding. We have scanned the evidence of D. W. 1 (the 3rd defendant) which is the only evidence in support of the validity of these transactions. It is quite insufficient to establish necessity or benefit. We are not prepared to infer any necessity from the mere recitals in the documents" which have themselves been attacked by the plaintiffs as not valid and binding. (See for instance the decisions in AIR 1957 AP 557 and AIR 1957 AP 744). In these circumstances we endorse the conclusion of the court below that the transactions cannot be justified by necessity or benefit.

6. In paragraphs 20 to 32 of its judgment the court below has discussed the relevant evidence and found against the oral lease set up in regard to item 6. The matter was but feebly canvassed before us; -and we have no hesitation to affirm this part of the finding.

7. The main question is whether the transactions Exts. B-5 and B-13 can be said to be binding on the plaintiffs on the basis of the Hindu Law Doctrine of pious obligation. The law applicable to the Thiyyas of Calicut is essentially customary law. The burden is on the party setting up any particular rule of custom to prove the same. In the absence of proof of custom the Hindu Mithakshara Law will be presumed to apply. This was laid down in several decisions of the Madras High Court, of which it would be enough to notice the decision in (Parambarathil) Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti, . There it is observed (at p. 878):

"We think the Makkathayam Thiyyas are governed by, what is called the customary law and that when a question arises as to what is the rule of law governing them on any particular matter, what we have to see is what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently governed by prior decisions, the question will have to be determined with reference to the evidence in case. Vide *Rarichan v. Parachi* ILR (1892) Mad 281, *Raman Menon v. Chatunni* ILR (1894) Mad 184 *Kunhi Pennu v.*

Chiruda ILR (1896) Mad 440 in each of which a specific issue was raised as to what is the rule of the customary law on the particular question at issue and the Lower Court was asked to submit a finding after taking fresh evidence on it. See also *Imbichi Kandan v. Imbachi Pennu* ILR (1896) Mad 1 where the learned Judges observe that the Sub ordinate Judge was right in laying down that the question for decision was whether according to the law and custom followed by Makkathayam Thiyyas of Calicut, property of a deceased person.

In the absence of any satisfactory evidence to show what exactly is the rule of the customary law on any particular point, the rule of Hindu Law on that point must, we think, be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point. The presumption is not that the Hindu Law as such is the law governing them in all matters; if that be the presumption a person who alleges a rule of customary law at variance with it will have to prove it as a custom in derogation of the law. The presumption is simply that the rule of the Hindu Law is also the rule of the customary law obtaining amongst them, so that if any person alleges that the rule of the customary law on any particular point is something different, the evidence that he adduces in support of his allegation ought not to be subjected to those well known tests which are applied to the case of an alleged custom contrary to or in derogation of the law, but should be viewed simply as evidence adduced to show what is the rule of the customary law itself. The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law".

The position was restated by the Madras High Court in *Krishnan v. Ramanatha Iyer & Co.* AIR 1940 Mad 67. In *Dharmodayum Company v. Balakrishnan* 1962 K LT 712 a Division Bench of this Court approved the principle in *(Parambarathil) Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti*, and held that the evidence did not justify that the custom of impartibility had been proved to exist in the community. Discussing the applicability of the doctrine of pious obligation, the Division Bench recorded its entire agreement with the conclusion of the trial Judge that the applicability of the doctrine to Thiyyas as a matter of custom had not been proved. Having endorsed this finding, the learned Judges observed:

"12 There is no doubt that polyandry was prevalent among the Thiyyas of Calicut. It is very doubtful indeed whether a doctrine like the doctrine of pious obligation will ever gain currency in a community that recognised more husbands than one".

The above observation is purely obiter; and we cannot accept the same as negating the applicability of the doctrine of pious obligation on the ground that polyandry was prevalent among the Thiyyas of Calicut. That was a matter which was not pleaded, nor put in issue in this case. Such treatises as we have been referred to in support of the prevalence of polyandry among the Thiyyas of Calicut, as *Edgar Thurston (Volume 7) "Castes and Tribes"*, Page 48, and *Legan's "Malabar Manual"* Page 144, would not justify our unreserved

endorsement of a general statement that polyandry prevailed among the Thiyyas of Calicut. It is of significance that neither Moore nor Sundara Iyer in their treatises on Malabar Law, refers to this aspect of the matter.

8. Even assuming that polyandry was prevalent among the Thiyyas, we doubt whether, on that ground, we can exclude the applicability of the doctrine of pious obligation altogether, or merely hold that the identity of the father whose liability is sought to be fastened on the son, cannot be established, and that, for that reason, the son cannot be made liable. However, we need not pursue the matter further.

9. We have adverted to the pleadings in the case which had squarely raised the controversy as to the rule of customary law applicable to the parties, which, it was said, included the Hindu Law Doctrine of pious obligation. The decisions are clear that in the absence of any proof on any particular aspect, the Rule of Hindu Mithakshara Law must be presumed to be applicable to the Thiyyas. This should therefore attract the doctrine of pious obligation. On that ground we feel that the appellants are well founded in their contention that the doctrine of pious obligation must be presumed to be applicable as the rule of Hindu Law in the absence of any proof of any custom to the contrary, to the parties in this case.

10. The judicial decisions to which our attention has been drawn support our conclusion as to the applicability of the doctrine of pious obligation to Thiyyas of Calicut. In Balakrishnan and Others Vs. Chittoor Bank and Others, a Division Bench of the Madras High Court, dealing with the question and speaking through Varadachariar, J., observed (at p. 938):

"It has now been argued before us that the Ezhava community of Palghat to which the appellants belong should not be held to be wholly governed by the Hindu Law though they follow the Makatayam and not the Marumakathayam system. Reliance has been placed in this connexion upon the decisions in ILR (1894) Mad 184 as recognising that the mere adoption of the Makatayam system of inheritance by a particular family does not involve the conclusion that the family has adopted all the rules of the Hindu Law. Mr. Krishna Iyer admitted that it has been held by this Court that unlike the Nambudhiries of Malabar the Ezhavas have adopted the rule of partibility: see ILR (1899) Mad 297. But he nevertheless maintains that, as held by this Court in ILR (1915) Mad 527 in respect of Nambudhiris, the principle of the son's obligation to pay the father's debts ought not be applied to the Ezhavas. We are unable to see any Justification for this contention. The decision in ILR (1915) Mad 527 proceeds on the theory that the Nambudhiris have followed the doctrine of corporate ownership of Illom property, that there is no question of anybody's share being alienated or seized in execution for the debts either of himself or of the father and that in these circumstances the Illom property as a whole can be made liable only for the debts binding on the Illom. Once, however, it is granted that individual members of the family have separate rights to which they can claim partition the reasoning of the above decision will not avail. It is only by unconsciously importing the

Hindu Law theory, the son's right by birth to a share in the family property, that Mr. Krishna Iyer can claim that the son's shares ought not to be held liable for the father debts."

A little lower down it was stated:

"We see no warrant for introducing one portion of the Hindu law without taking along with it the other portions which form an integral part of the whole system."

These last noticed observations were quoted by a Division Bench of this Court in a decision to be noted presently. The Division Bench ruling of the Madras High Court was thus a direct decision on the applicability of the doctrine of pious obligation to the Thiyyas of Calicut. The decision was noticed with approval by a Division Bench of this Court in Chinnaswamy Koundan Vs. Anthonyswamy and Others, . The question there considered was whether the Tamil Vaniya Christians of the Chittur Taluk were governed by the Hindu law in matters of inheritance and succession. It was ruled that there was nothing in the Christian faith which precludes parcenership from being a part of the law governing the rights of a Christian family converted from the Hindu religion; and that the rule of Hindu law by which a son gets by birth a right in ancestral property cannot be said to be opposed to the Christian faith. It was observed (at p. 164):

"15. In the light of what is stated above, the appellant's contention that the rule of Hindu law by which a son gets by birth a right in ancestral property is opposed to the Christian faith cannot be sustained. The only question for decision on this aspect of the case will be whether the evidence on record is sufficient to come to the conclusion that that rule has been adopted by the Vaniya Christians of the Chittur Taluk as part of their law on their conversion from Hinduism.

16. In 12 Cochin 213 Narayana Menon J-, said that "the rule as to the pious liability is closely connected with and is almost correlative to the rule relating to the right by birth" and that it will be "unreasonable to disassociate the two" in the matter of their applicability. To the same effect is Lalta Prasad and Others Vs. Gajadhar Shukul and Others wherein Iqbal Ahmad, J., said:

"So far as I can see, this rule was introduced as a sort of corrective to the rule that every male member of a joint Hindu family acquires an interest in the joint family property from the moment of his birth, and therefore no member of such a family can predicate the extent of his share or can alienate the same. If by the mere fact of his birth the newly born son acquires an interest in the joint family property, and thus automatically reduces the extent of his father's interest in the same, it is but fair and just that he should shoulder along with the father the liabilities of the father. To make provision for the payment of debts due to a creditor far from being "unsuited to any but a primitive and patriarchal society" is in consonance with common honesty and is, I should think, the recognised practice of the civilized world. The liability imposed on a son, to pay the just debts of his father is not a gratuitous obligation thrust on him by Hindu law but is a necessary corollary if not a salutary counter-balancing proviso, to the principle

that the son from the moment of his birth acquires" along with the father, an interest in joint family property".

In Balakrishnan and Others Vs. Chittoor Bank and Others, the Court said: "

"We see no warrant for introducing one portion of the Hindu law without taking along with it the other portions which form an integral part of the whole system"; and applied it to the Ezhava Community of Palghat which follows the Makkathayam system of law. 12 Cochin 213 and Balakrishnan and Others Vs. Chittoor Bank and Others, were cited and followed in 31 Cochin 247, a case relating to the Makkathayi Kaniyans of the Cochin State".

11. Before concluding the discussion on this aspect of the matter we may notice some of the decisions rendered by the Cochin High (Chief) Court. In Sankaran v. Kailasa Iyen (10 Cochin LR 135) the question was whether impartibility can be said to be the rule among the Makkathayam Ezbavas. It was ruled that in the absence of a well established custom to the contrary, the property belonging to a family of Makkathayam Ezhavas should be deemed to be partible. The contention advanced is thus noted by Varugis J., who delivered the leading judgment of the Chief Court of Cochin:

"The defendant"s contention on the other hand is that the Ezhavas are governed by ordinary Hindu law so far as it may be made applicable to a primitive community which allows divorce and remarriage and does not rise to the lofty religious plane on which the higher castes of Hindus move."

Discussing this aspect of the question and noticing the Madras decisions the learned Judge observed:

"No customary rule being found one way or other, the only thing left to us to do is to decide according to the principles of equity, justice and good conscience, taking into consideration, all that we do know of the habits, beliefs and modes of thought of the Ezhava community. As far as their beliefs are concerned, it is indisputable that they embrace the same faith as the higher castes and direct their devotions to the same consummation. In their habits and modes of thought they follow the standards set for them by the superior castes. The present Ezhavas being Makkathais, if we are compelled to resort to analogies in order to decide a question as to their personal law, we should go rather to the Makkathayi group than to the Marumakkathayi groups of Malayalees for the required analogy. The rule of impartiality does not obtain among the Makkathayis of Malabar. The exception is the Namboori community, but that community is at the opposite pole, socially, from the Ezhavas and it would be absurd to suppose that the latter ever copied or desired to copy their manners. Thus we do no violence to the known conditions of the Ezhava Society if we extend to it the ordinary incidents of Makkathayam. From the point of view of public policy the rule of partibility is in consonance with enlightened ideas. When the Nairs whose personal law is definitely fixed struggle to break the shackles of impartibility, it would be strange if we condemned any other community, on the score of equity

and good conscience, to the very evils from which the Marumakathayam people want to be delivered. It seems to be a just rule to lay down that in the absence of a well-established custom to the contrary property should be deemed partible."

In the headnote of the decision we find it also stated:

"The strict rule of Hindu law of pious obligations cannot be applied to Ezhuvas."

The proposition as such is not seen stated in the body of the decision: In *Sankaran v. Kailasa Iyer* 12 Cochin 213 : 12 CLR 382 the law relating to Ezhuvas fell to be considered by a Full Bench of the Cochin Chief Court. It was ruled that the evidence was not sufficient to establish a customary rule that among Makkathayam Ezhuvas the son acquires a right by birth in the ancestral properties Varugis, J. delivering the leading judgment stated :

"Finally we are pressed with the argument that Thiyyas being Hindus, the Mithakshara should be applied to them as a matter of course in the absence of any special custom.

A decision of the Sub-Judge of Ottapalam was produced in this court to support the argument. The reasoning of this judgment is that the Thiyya community are immigrants from the Tamil country and were therefore originally under the influence of the Hindu Law. But the proofs advanced for this theory of the origin of the community do not dispel scepticism. Moreover, even assuming that the theory is proved, what is there to show that the community has continued the traditions of their pilgrim fathers? It may be that an examination of the skulls of a particular race may show their affinity with some other but such a discovery may not be of much value to the lawyer. Before I decide that sons have a right by birth in ancestral property among Thiyyas I desire to be satisfied that such a rule has long been recognised by them as obligatory."

Narayana Menon, J, observed:

"For these reasons I am of opinion, that the correct position to be taken up is that in the absence of any proved custom modifying any of the rules of the Mithakshara system, that system will be applicable whenever possible to the Ezhava community in this State."

Discussing further the question of the applicability of the rule of pious obligation the learned Judge stated:

"But the above view does not, however, take us further in upholding the claim of the plaintiff in this case. While he may have a right by birth in the said ancestral estate, there is another rule of the Mithakshara, namely, the doctrine of pious obligation making his share also liable for the debts of his father which are neither illegal nor immoral-It is, no doubt, contended for the plaintiff that while the former rule of the Mithakshara is applicable to his community, the latter is not. But I fail to see any good ground for distinction between the two in the matter of applicability to the said community. The only manner in which we were

able to uphold the right of the son by birth, with reference to the community in question, was by upholding the prima facie applicability of the entire body of the Mithakshara system. That being so, it is obvious that another rule of the same, namely, that relating to the pious liability, must also be equally applicable, in the absence of a custom abrogating or modifying that rule. The evidence in the case is not at all sufficient to make out any such custom. Moreover, the rule as to the pious liability is closely connected with and is almost correlative to the rule relating to the right by birth. So, it would be unreasonable to dissociate the two in the matter of the applicability."

Narayana Iyer C. J. expressed his concurrence with the colleagues.

12. In *Rama Kurup v. Kochu Govinda Kurup* 31 Coc 247 the question that fell for decision was the law applicable to the Kaniyans. It was held that it was the same as the law governing the Makkathayi Ezhavas and that the sons do not acquire any right by birth in the property so as to disentitle the father alone to alienate it in the absence of family necessity. Discussing the question it was observed:

"The doctrine of pious liability is closely connected with, and is almost correlative to, the rule relating to the right by birth. It would be unreasonable to dissociate the two in the matter of their applicability. As observed by the learned Judges of the Madras High Court in a recent decision in *Balakrishnan and Others Vs. Chittoor Bank and Others*, , there is "no warrant for introducing one portion of the Hindu law without taking along with it the other portions which form an integral part of the whole system."

13. The trend of reasoning in 10 CLR 135 which we have noticed earlier found its echo in the decision of Krishna Iyer, J. of this Court (as he then was) in *Unnooli Alias Kuttimalu v. Thayyu* 1969 KLJ 620. The learned Judge remanded the case to the trial Court for amendment of pleadings and for evidence regarding the applicability of the rule of pious obligation, but made the following observations:

"15. Before parting with this subject, I would, like to observe that the Hindu Code, which encountered opposition and was eventually withdrawn in Parliament, did contain a clause (Clause 88) abrogating the rule of pious obligation for all Hindus. The theological foundation of the moral duty of the son to discharge his father's (and not of any other relation's) debt has now lost much of its appeal. In this context, particularly when the Constitution directs the State to have a uniform Civil Code for all Indians, it is a matter worthy of serious consideration whether the rather obsolescent rule of pious obligation should be extended by the Courts to all the non-brahmin Makkathayyes of Kerala. Although these considerations are largely for Parliament and not for the Courts they may serve to understand whether the Thiyyas of South "Malabar had really assimilated this rule as custom."

14. It remains to notice the decision of the Supreme Court in *Anthony Swamy Vs. M.R. Chinnaswamy Koundan by Lrs. and Others*, at p. 225, This was an appeal against the decision of this Court in *Chinnaswamy Koundan Vs. Anthony Swamy*

and Others, . While confirming the Judgment the Supreme Court observed:

"7. It is evident therefore that the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. The doctrine is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property and both those conceptions are correlated. The liability imposed on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu law but is a salutary counterbalance to the principle that the son from the moment of his birth acquires along with his father an interest in joint family property. It is, therefore not possible to accept the argument addressed on behalf of the appellant that though the community is governed as a matter of custom by the Mitakshara School of Hindu law the doctrine of pious obligation was not applicable. In Balakrishnan and Others Vs. Chittoor Bank and Others, the question arose whether among the Ezhava community of Palghat though they follow Makatayam Law and not Marumakatayam Law, the sons are liable for the debts of their father not incurred for illegal or immoral purposes irrespective of any question of family necessity. It was held by Varadachariar J., that the sons were so liable and it was observed that there was no warrant for introducing one portion of the Hindu Law in governing a certain community without taking along with it the other portions which form an integral part of the whole system"

Further down, the Supreme Court observed:

"For the reasons already given we are of opinion that the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. It is an integral part of the Mitakshara School of Hindu law wherein the sons from the moment of their birth acquire along with their father an interest in the joint family property. The doctrine is in consonance with justice, equity and good conscience, and it is not opposed to any principle of Christianity."

The last sentence in the above quotation should perhaps be an effective refutation of any doubts as to the obsolescence of the doctrine and the suitability of its application. There is no need to canvass the correctness of the decision in 1962 K LT 712, in the light of the above Supreme Court decision, and in view of our explanation of the actual scope of the said decision, and the mere obiter dictum nature of the observation therein regarding pious obligation being excluded by the custom of polyandry.

15. An examination of the authorities, the pleadings and the evidence in the case, leaves us in no doubt that no custom having been proved, the Hindu law doctrine of pious obligation must be presumed to apply to the Thiyyas of Calicut, and that the conclusion to the contrary of the Court below cannot be sustained. Counsel for the appellant was at pains to point out with reference to the decisions where this aspect of the matter has been stressed, that pious obligation is a counterpart or a necessary corollary to the doctrine of the right of the son by birth, and this latter doctrine being applicable to the Thiyyas of

Calicut, the rule of pious obligation must also stand attracted as a necessary corollary. We do not see any reason, at any rate, in this case, to travel by this comparatively circuitous route, when a plainer and simpler one to reach the same conclusion is available. No rule of custom having been proved, the rule of Hindu law must be presumed to be the rule of decision, and that will be sufficient to attract the doctrine of pious obligation,

16. We desire to add one word about the decree passed by the learned Judge. The learned Judge was wrong in directing at this stage, the allotment of only one share in item No. 6 to the 3rd defendant. As for how equities have to be adjusted and whether interests of justice and equity cannot be made by allotting item 6, as prayed for, to the 3rd defendant, are all matters to be considered and decided at the stage of the final decree; and nothing said at this stage shall preclude such consideration at that stage.

17. We allow this appeal and set aside the judgment of the learned Judge and hold that Ext. B-5 mortgage over items 1 to 5, and Ext. B-13 sale in respect of item 6 are valid and binding on the plaintiffs by reason of the doctrine of pious obligation. The result is, that the plaintiffs will not be entitled to a partition of item 6, and will be entitled to partition of only the equity of redemption of items 1 to 5. The preliminary decree passed by the court below will stand modified to this extent and the appeal will stand allowed as above. As stated, the court below will consider the question of adjustment of equities and working out the rights of parties at the stage of the final decree. The appellant is entitled to his costs from the contesting respondents.