

(1936) 03 MAD CK 0003
In the Madras High Court

Balakrishnan and Others

APPELLANT

Vs

Chittoor Bank and Others

RESPONDENT

Date of Decision : 27-03-1936

Acts Referred:

Citation : AIR 1936 Mad 937 : 167 Ind. Cas. 706 : (1936) 44 LW 480

Hon'ble Judges : Varadachariar, J; Mockett, J

Bench : Division Bench

Judgement

Varadachariar, J.—These appeals arise out of O.S. Nos. 17 and 39 of 1931, on the file of the Sub-Court of Palghat. Some of the

questions raised in these suits have already been dealt with by us in the judgment delivered by us in Appeals Nos. 253 and 350 of 1933. The

present appeals have been preferred by defendants Nos. 7 to 9 in these suits. They are the sons of defendant No. 5 who joined as a surety in the

promissory notes which gave rise to these suits. Defendant No. 5 has been held liable for the debts; the appellants contend that as these debts

were not borrowed for any necessity of their family, the family property should not be held liable for the discharge of the debts. The lower Court

applied the rule of the Hindu Law and held that as the debts are not illegal or immoral, the son's shares in the family property are liable to be

proceeded against for recovery of the father's debt, independently of any question of family necessity. We may mention that in the first instance

these defendants were not impleaded as parties to the suits. They got themselves impleaded on their own application and in the written statement

filed by them they alleged in para. 2 that under the custom of the Samudhayam of these defendants, the suit debt cannot be made binding on the

family of these defendants. On August 31, 1931, an issue (Issue No. 6 in the case) was framed which raised the question whether the debt is

binding on the family of defendant No. 5. The trial, however, did not commence till early in 1933 and about a fortnight before the commencement

of the trial the issues were cast on some objection raised by the plaintiff as to where the onus of proof should be cast. For reasons which do not

appear on the record, the reference to the family of defendant No. 5 was omitted in the amended issue. The result was that no evidence was let in

one way or the other on the question of custom mooted in para. 2 of the written statement of the appellants.

2. It has now been argued before us that the Ezhuva 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 Marumakatayam system. reliance has been placed in this connection

upon the decision in *Raman Menon v. Chathunni* 17 M. 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 Nambudhiris of Malabar, the Ezhuvas have adopted the rule of partibility: see *Velu v. Chamu* 22 M 297.

But he nevertheless maintains that, as held by this Court in *Kunha Kutti Ammah v. Mallaprath* 38 M 527 : 27 Ind. Cas. 807 : AIR 1915 Mad. 698

: 16 M.L.T. 614 : (1915) M.W.N. 23 in respect of Nambudhiris, the principle of the son's obligation to pay the father's debts ought not to be

applied to the Ezhuvas. We are unable to see any justification for this contention. The decision in *Kunha Kutti Ammah v. Mallaprath* 38 M 527 :

27 Ind. Cas. 807 : AIR 1915 Mad. 698 : 16 M.L.T. 614 : (1915) M.W.N. 23 proceeds on the theory that the Nambudhiris have followed the

doctrine of corporate ownership of family 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 family property as a whole can be made liable only for the debts binding

on the family. 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

properly, that Me. Krishna Iyer can claim that the son's shares ought not to be held liable for the father's debts.

3. We are unable to agree that the decision in *Vein v. Chamu* 22 M 297 should be understood merely to rest upon proof of that particular custom

without reference to any underlying principle. If, however, *Vela v. Chamu* 22 M 297 is to be so understood the question will still arise what locus

stand the appellants will have to object to the sale of the family property except on the theory of the son's right by birth. 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. In

(*Parambarathil*) *Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti*, . to which Me. Krishna Iyer invited our attention, the learned

Judges were dealing with a Thiya family and not an Ezhuva family. The case in *Vela v. Chamu* 22 M 297 itself draws a distinction between the two

communities but it is noteworthy that even in dealing with the They community the learned Judges recognized that in the absence of evidence to the

contrary as to the customary law applicable to any particular community the ordinary rule of Hindu Law will apply. If so, it must a fortiori be the

case in the case of Ezhuvas. In view, however, of the reference to custom in para. 2 of the written statement of the appellants, we desired to know

whether any serious attempt was made in the lower Court to adduce evidence on this question. Me. Krishna Ayyar maintained that his clients

adduced no evidence on the point because the issue as finally amended omitted all reference to this question. But the issue in the original form had

been the issue in the case for nearly 15 months, and if the parties had seriously intended to lead evidence on the question of custom, we expect that

steps would have been taken to summon witnesses for the purpose. We accordingly gave Me. Krishna Ayyar's clients an opportunity to file an

affidavit stating what exactly happened in the lower Court in that connection. It is now admitted this no steps Averse taken to summon any

witnesses in this connection. The only explanation suggested is that they probably thought that when the trial has actually commenced, they might

bring the necessary witnesses. We are not prepared to re-open the case merely on the strength of a suggestion of this kind. The appellants are

minors and if they ever feel that their case has been prejudiced by any negligence on the part of their guardian, it will be for them to take

appropriate steps.

4. On the present state of the record we are not prepared to allow the matter be re-opened or to give a fresh opportunity for adducing evidence

on the question of custom. The appeals fail and are dismissed with costs of the plaintiff-respondent.