

(1962) 06 KL CK 0027

In the High Court Of Kerala

Case No : A.S. No's. 551 and 558 of 1958

Dharmodayam Company

APPELLANT

Vs

Balakrishnan and Another

RESPONDENT

Date of Decision : 18-06-1962

Acts Referred:

Citation : (1962) KLJ 1004

Hon'ble Judges : M.S. Menon, C.J;T.K. Joseph, J

Bench : Division Bench

Advocate : N. Sundara Iyer, C.J. Antony and T.C. George in A.S. 551/58 and K.N. Karunakaran and K.P. Kesava Menon in A.S. 558/58, for the Appellant; N. Sundara Iyer, C.J. Antony and T.C. George in A.S. 558/58, K.G. Devarajan for Respondent 1 in A.S. No. 551/58 and K.N. Karunakaran for Respondent 2 in A.S. No. 551/58, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Menon, C.J.—These appeals arise from the decision of the Subordinate Judge of Kozhikode in O. 17 of 1956. The plaintiffs are the appellants in A.S. No. 551 of 1958. The 2nd defendant is the appellant in A.S. No. 558 of 1958. The suit was in pursuance of two chitty hypothecation bonds executed by the 1st defendant in favour of the Dharmodayam Company, Trichur, of which the plaintiffs were the trustees. The 2nd defendant, the son of the 1st defendant, contended that the family properties cannot be made liable for the debt under the law obtaining in the Thiyya community of Calicut to which the 1st and 2nd defendants belonged.

2. The contentions of the 2nd defendant were that according to the customary law applicable to the community the family properties were not partible and there was no rule of pious obligation to discharge the debts of the father. The learned Subordinate Judge rejected the first contention, accepted the second, and directed as follows:

In the result the plaintiffs are given the usual mortgage decree for sale, for the plaint amount with interest and costs of the suit against the 1st defendant's half share in the plaint schedule properties. The personal remedy against the 1st defendant is barred and is therefore disallowed. The 2nd defendant's share is exonerated from liability. The 2nd defendant will get his costs from the plaintiffs. Time 4 months.

3. In AIR 1927 Mad 877--a case relating to the Thiyyas of Calicut--the Madras High Court dealt with the proper approach to be made in a case like this as follows:

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 the case. 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.

and held that the rule of impartibility should not be invoked in the case of the Thiyyas of Calicut unless it was established by the evidence in a given case. This decision was followed in AIR 1929 Mad 508.

4. In AIR 1940 Mad 67 it was contended that the incident of impartibility among the Thiyyas of Calicut has been well settled by the decisions of that court and actual proof in a case is no longer necessary. Sommayya J. surveyed the decisions and said:

This being the state of authorities it cannot be said that the incident of impartibility has been recognized in judicial decisions so as to dispense with proof. It must be proved by the party setting up the incident of impartibility that it exists in the community or in the families in question.

5. The evidence before us is certainly insufficient to prove that the incident of impartibility obtains in the community. As a matter of fact the case itself as set up and attempted to be proved is diffused and divergent.

6. The oral evidence on the subject consists of the testimony of D.Ws. 1 to 5, and the documentary evidence of four judgments, Exts. B2, B24, B25 and B27. Ext. B3 is the decree drawn up in pursuance of Ext. B2, Exts. B28 to B30 are the depositions of P.Ws. 1 to 3 in that case and Ext. B31 is a copy of the B Form Diary.

The oral evidence has been discussed fully by the learned Subordinate Judge in paragraph 18 of his judgment and the documentary evidence in paragraph 19 thereof. After doing so his conclusion in paragraph 20 is:

Thus, on a consideration of the entire evidence, oral and documentary, I am firmly of opinion that the evidence is far from sufficient to prove the alleged custom of impartibility. It must follow therefore that the 1st defendant's share is liable to be proceeded against by the plaintiffs.

7. We have been taken through the entire evidence in the case and must say that we see no reason to differ either from the way in which the matter has been discussed in paragraphs 18 and 19 of the judgment under appeal or the conclusion embodied in paragraph 20. The evidence is definitely insufficient to prove the existence of any custom of impartibility among the Thiyyas of Calicut or in the family of the 1st and 2nd defendants.

8. The applicability of the doctrine of pious obligation is discussed by the learned Subordinate Judge in paragraphs 21 and 22 of his judgment. His conclusion in paragraph 22 is:

I accordingly hold that the principle of pious obligation cannot be invoked by plaintiffs in order to make 2nd defendant's share liable. It follows that plaintiffs are not entitled to any relief against 2nd defendant.

We are in entire agreement with this conclusion also.

9. As stated by the learned Subordinate Judge :

No such custom is sought to be proved in this case. On the other hand what little evidence there is, is the other way about viz. that the sons are not under any pious obligation to pay the debts of their father.

The statement of D.W. 2 is:

There is no practice of making the son's share liable for the father's debts among our community.;

and of D.W. 3 :

There is no practice of selling son's shares for father's debts among Thiyyas.

10. 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. In the light of what is stated above both the appeals should fail and have to be dismissed with costs. Judgment accordingly.