

(1982) 07 KL CK 0023
In the High Court Of Kerala
Case No : S.A. No. 473/77-D

Habubu Abdulla and Another

APPELLANT

Vs

Sankaran Viswanathan and Others

RESPONDENT

Date of Decision : 30-07-1982

Acts Referred:

Kshatriya Regulation Act, 1908 — Section 1(3), 14, 3
Travancore Nair Act, 1912 — Section 21, 3

Citation : (1982) 07 KL CK 0023

Hon'ble Judges : Sukumaran, J

Bench : Single Bench

Advocate : S. Vyasani Poti and N. Sugathan, for the Appellant; P. Sukumaran Nair, A.K. Chinnann and S. Soman, for the Respondent

Final Decision : Dismissed

Judgement

Sukumaran, J.—May be, marriages are made in Heaven. The problems they generate however, are mostly mundane. That was so, when nearly a century back the House of Lords deliberated over the issues arising out of the marriage of a septuagenarian priest; and when a Full Bench of the

Travancore High Court discussed the obligations of a Nambudiri youth who formed a union with a Nair girl in her sweet seventeen. Narayana Narayanarao v. Kunjikutty Kutty 20 T.L.R. 65. The stories of the adventurous Scottish Barrister as unfolded in Shaw v. Gould (1868) L.R. 55 : 37 L.J.Ch. 433 and of an equally adventurous Banker in Alleppey as revealed from Sreekumari v. Radhamany Amma ILR 1976 Ker 605 have the same theme. It has been given to lawyers and law courts to settle the disputes or resolve the controversies. This second appeal is one such case and concerns the status of and the right to property of one of the members of an ancient and historic family in the State, the Kilimanor Palace a Kshatriya family of " Koil Thampurans". The valour of one of its members brought it in 1728 vast areas of land from the Travancore throne (to be lost later by the legislative enactment, the Travancore-Cochin Act 27 of 1955). It gave

shelter and asylum to Velu Thampi Delwa, who fiercely fought against the English, and received from him his heroic sword (to be handed over in 1957 to the President of India).

2. The subject-matter of this appeal is now restricted to plaint B and C schedule properties; and the events leading to the second appeal are fairly recent. They start from the time of Anizham Thirunal Thampuratti. (The persons, men and women of the family, are generally known by the stars under which they are born; for, the stellar system appears to have had dominant influence in their lives and beliefs). Anizham Thirunal Thampuratti had, as her sons, Raja Raja Varma Chothi Thirunal Kochu Koyitham-puran and Chathayam Thirunal Ravi Varma Koyitham-puran. The latter was the younger of the sons. Chothi Thirunal married from the Travancore Royal family. In 1054 M.E. (1878-79) while a junior member, he got rights over the properties, to be augmented later (in 1073 M.E. 1898 A.D.) by the document Ext. P-7, the rights obtained thereunder resulting in virtual ownership over the property by force of the legislative provisions of the Travancore Jenmi Kudiyan (Amendment Regulation), 1108. Anizham Thirunal Thampuratti and Chothi Thirunal predeceased the Chathayam Thirunal, who became the only surviving member of the family. Chathayam Thirunal married a Nair lady. The 1st Defendant was born to them. The marriage did not last long. The 1st Defendant's mother passed away, according to available evidence, between the years 1070 and 1077 M.E.

3. In the year 1105, the 1st Defendant's father executed the mortgage Ext. P-1 dated 20th Kumbham 1105 in favour of the 1st Defendant for a sum of Rs. 3,500. Properties were put in possession of the 1st Defendant-mortgagee. The 1st Defendant's father passed away in the year 1111 M.E. (3rd March 1930 A.D.)

4. The suit was instituted for redemption of the mortgage. The Plaintiffs alleged that in the light of the partition which took place in the Palace in 1124 M.E. (evidenced by Ext. P-5) the equity of redemption over the plaint schedule properties was partitioned among the members of the family, from whom the present Plaintiffs obtained those rights. Basing their claim on the rights so derived, the Plaintiffs filed the suit for redemption of the properties.

5. The suit was resisted. The 1st Defendant claimed that on the death of Anizham Thirunal Thampuratti and Chothi Thirunal Koyithampuran, their rights in the property devolved on Chathayam Thirunal, the father of the 1st Defendant, and that on his death, the 1st Defendant, being his only child, was exclusively entitled to the property. He was already the mortgagee of the properties. The equity of redemption which his father had, devolved on him on the death of the father and consequently he became the absolute owner thereof is the contention of the 1st Defendant.

6. The trial court found that the equity of redemption over the properties was the separate property of the 1st Defendant's father. It, however decreed the suit on the ground that on an interpretation of the relevant provisions of the enactments

applicable, the 1st Defendant could not claim the property of Chathayam Thirunal, as his son.

7. The 1st Defendant carried the matter in appeal. The court below allowed the appeal. It held that the property was the separate property of the father of the 1st Defendant that the 1st Defendant was the child of Chathayam Thirunal and that as such he could claim inheritance over Chathayam Thirunal's property under the provisions of the statute.

8. In this second appeal, the Plaintiffs complain about this judgment of the lower appellate court. Both the findings of the court below are attacked.

9. The second appeal therefore raises two questions: (i) Whether the property is the separate property of the father of the 1st Defendant? and (ii) Whether the 1st Defendant is the child of Chathayam Thirunal Kochu Koyithampuran, entitled to the property of Chathayam Thirunal on his death?

10. On the first question both the courts below have concurred to find that the property is the separate property of the 1st Defendant's father and not that of the family of the Kilimanoor Palace. As stated earlier, Ext. P-7 is the document of acquisition, the document being described as "Adukkuvathu Otti" in favour of (sic) Thirunal. The courts below have proceeded on the basis that on the date of acquisition, he was the seniormost male member of the palace. Even after taking full note of that fact, the courts below have found that the acquisition was only in his individual capacity. Two reasons have been given in support of such a finding. Ext. P-7 itself makes reference to an earlier transaction. Concededly, at the time of that earlier transaction, Ghothi Thirunal was not the head of the family; he was only a junior member. There cannot, therefore, be any doubt that the rights were initially obtained by him in his individual capacity and constituted his private acquisition. The additional consideration which has passed under Ext. P-7 as disclosed from the certified copy of the mortgage produced in the court is only two fanams (less than a rupee). Though the Plaintiffs contended that it was a mistake and that the correct figure would have been 2002 fanams (about Rs. 300) it was a matter of sordid speculation, according to the court below. That court, however, dealt with the case even on the basis that the amount is 2002 fanams. The established fact is that Chothi Thirunal was in possession of the plaint schedule items on the basis of the assignment of rights as early as in the year 1054 M.E. (1878-79). The fact that he had marriage connection with the Royal Family of Travancofe, that he was having an income, of Rs. 300 per annum otherwise, were all circumstances which weighed with the courts below in holding that the acquisition was a separate property of Chothi Thirunal. The recitals in Ext. P-1 mortgage executed long prior back, in the year 1930, and at a time when no controversy was contemplated in respect of the plaint schedule properties, were to the effect that the property was the self-acquisition of Chothi Thirunal. Even the 2nd Plaintiff as P.W. 2 admitted that the recitals in that document are true. That fortified the defence contention. One item of the plaint schedule property (item 6 of the D schedule) had been gifted by the 1st Defendant's

father to a temple under Ext. P-2 dated 15th Mithunam 1097 (29th June 1922). That document also had remained unchallenged. This was a further circumstance, pointed out by the trial court to indicate that the property acquired was the separate property of Chothi Thirunal and not the family property.

11. Having considered the evidence on this aspect I am in full agreement with the view taken by the courts below. The conclusions reached by the courts below are in conformity with the principles governing the question, as laid down in the decisions of this Court and of the Supreme Court. See Achuthan Nair Vs. Chinnamu Amma and Others, , and the explanation of the implications of that decision in Chenthamarakshan v. Kondath Damodaran Nair and Ors. ILR 1970 Ker 54 .The submission of counsel for the Respondent--1st Defendant regarding the lack of clear pleadings by the Plaintiffs on this aspect is also justified. There is only a bare statement in paragraph 1 of the plaint on this aspect. There is also force in the contention that the Plaintiffs have not established by cogent or acceptable evidence how the property had devolved on them. P.W. 3 was oblivious of the mode of devolution even though he is an executants of Ext. P-5. In the light of the discussion above, I am clearly of the view that the first contention urged by counsel for the Appellants is devoid of merits. It is accordingly rejected.

12. Very elaborate arguments were advanced by counsel on either side, sketching the background of the legislation of the marumakkathayees in the State, with a view to establish the respective contentions on the second question. It is not, however, necessary to go into all those details of legislative exercises, for, it emerges from the facts discussed above that the question about the entitlement of the 1st Defendant to the property of Chathayam Thimnal, depends on a construction to be placed on Section 14 of the Kshatriya Regulation Act, 1108. As noted earlier, Chathayam Thirunal, father of the 1st Defendant passed away in 1111 M.E., subsequent to the coming into force of that Act. Sections 1(3), 3 and 14 are relevant in this context. They may be extracted:

1(3) It shall apply to all Malayala Kshatriyas (Excluding the members of the Royal Family of Travancore) domiciled, in Travancore, and to such Kshatriyas, not so domiciled, and non-Kshatriyas, whether so domiciled or not, as have, or shall have, marital relations with Kshatriyas domiciled in Travancore, and also to all Malayala Kshatriyas, wherever domiciled, in respect of their properties in Travancore.

3. The conjugal union of-

(a) A Kshatriya male or female with a Kshatriya female or male, as the case may be, subject to such restrictions of consanguinity and affinity, as are approved by the community or communities to which they belong, or

(b) A Kshatriya male or female with a non-Kshatriya female or male, as the case may be, where such union is permissible according to recognised usage, shall be deemed to be a valid marriage for the purpose of this Regulation, if registered in

the manner hereinafter provided for:

Provided that, notwithstanding the provisions of Section 3 of the Nair Regulation II of 1100 marriage of Kshatriya males with Nair females shall be valid, whether registered in the manner herein provided for or openly solemnised by the presentation of cloth as provided for in the Nair Regulation II of 1100:

Provided also, that marriages, where both parties are Kshatriyas, shall not be deemed to be invalid by reason of consanguinity or affinity alone, if they are removed from the common ancestress by more than four degree, except in cases where both the parties are members of the same undivided family:

Provided further, that all marriages in force on the date of the commencement of this Regulation shall be valid irrespective of registration.

14. On the death of a Kshatriya male leaving him surviving a widow or widows, or mother or both, and children, or lenial descendants of deceased children, or all, they shall, notwithstanding the provisions of Section 21 of the Nair Regulation, or any other law for the time being in force governing the parties, take, after deducting all reasonable expanses for his funeral, the whole of his self-acquired and separate property left undisposed of by him at his death, and, in the absence of the mother and the widow, the children, and the lineal descendants of deceased children shall take the whole. In the absence of the mother, the widow, children and the lineal descendants shall take the whole.

13. It was contended at the outset that only the children in the "caste-wife" thereby meaning a Kshatriya female would be entitled to inherit the property as contemplated u/s 14. This over ambitious contention is only to be stated to be rejected. The words of the section do not say that the children should be those born in a caste-wife. A marriage alliance with non-caste-wife is expressly recognised, by the Act. In such circumstances, to treat the term "children" as those born to a Kshatriya male in his caste-wife would be redrafting the section with a vengeance. I reject this contention.

14. Putting aside the irrelevant details, it would be clear that the 1st Defendant will be entitled to the whole of the property of his father, if he is a child of the deceased Chathayam Thitunal; for, the other heirs viz., widow or widows and mother or other children were not in existence at the time of his demise.

15. The trial court, felt that the non obstante clause contained in Section 14 of the Kshatriya Act, denied the 1st Defendant any right to the property of his deceased father. This was obviously wrong. The non obstante clause contained in Section 14, did not render Section 14 non est a section which was to have effect, and effect notwithstanding the provisions contained in Section 21 of the Nair Act. A survey, starting from 1088 M.E. of the progress made in making ameliorative provisions for the hair females who used to be married by others out side the community will show that there had been considerable progress in their position from time to time. The limited rights they obtained under the Nair Act 1100, had

been considerably improved by the provisions of the Kshatriya Act, passed 8 years later. It was to impress upon the efficacy of the new measure that the non obstante clause was provided in Section 14 of the Act.

16. Connections with Naif females had been recognised from early times as regards Nambudiris or Kshatriyas, as observed in 20 T.L.R. 65 referred to above:

Such unions are undegrading in the eyes of the Namboories on the one hand and are ennobling in the eyes of high class Nairs so much so that whole families among the Nair aristocracy such as that of the Defendants' 2nd witness have unions with Namboories alone.

The recognition by law, of such an inter-caste marriage was a burning issue of the times.

17. The developments in the field had been neatly and elaborately dealt with in *Sreekumari v. Radhamani Amma* ILR 1976 (1) Kerala, by a Bench consisting of Nafayana Pillai and Balagangadharan Nair, JJ. of this Court. This decision covers 32 pages and has extracted opinions, of eminent men like O. Chandu Menon, K.P.-Padmanabha Menon and Dr. N. Funhan Pillai, it has referred to the Travancore Mafumakkathayam Committee Report, Malabar Marriage Commission Report, the Census Report of Travancore, and has commented on passages from books on the subject like M.P. Joseph's "Marumakkathayam Law", Justice J. Moore's "Malabar Law and Custom". The decisions which have a bearing on the issue have been discussed at length. The question whether "sambandham" itself was a valid marriage was dealt with at some length. The historic background was sketched in paragraphs 28 and 29. The following extract is useful in understanding that historic background:

28. There was some controversy as to whether sambandham itself was a valid marriage. Unlike Hindus who belonged to the Aryan stock Nairs belongs to the Dravidian stock. Their customs and manners were entirely different. The law that was suitable for the Aryans was not suitable for the Dravidians. Although the Nairs were brought within the Hindu fold they did not follow the Hindu law. In their civil life they followed their own usages and customs, some of which like those relating to marriages were contrary to principles of Hindu law.

29. East coast Brahmins who followed Hindu law and who practised polygamy, and Nambudiries who followed Hindu law modified by certain customs freely entered into sambandham union with Nair ladies. As regards East coast Brahmins they could freely enter into such alliance with Nair ladies without fear of any obligation being attached to that alliance because there could be no marriage in the Hindu law sense between a Brahmin and a Nair. After entering into marital alliance with Nair ladies when confronted with marital obligations, without any compunction and unabashed, they used to plead that the marriage was invalid citing versus of Manu who said:

for him who drinks the foam of the lips of a sudra female or whose body feels her

breath or who has a child by her, there is no expiation declared by law.

and some other similar sages in support of their plea and that used to find favour with some courts also. Among Nambudiries, whether as a measure of economy or not, the eldest brother alone usually married and the others consorted with Nair ladies. For the origin of this rule the Nambudiris invoked the authority of Sankaracharya.

18. The learned Judges there, were considering the marriage u/s 3 of the Travancore Nair Act. Ultimately, a question was posed and answered in paragraph 44 of the judgment in the following words:

But what is the proper ceremony and what is the due form for a marriage u/s 3 of the Travancore Nair Act? They are only presentation of cloth and that being done openly. Neither thalikettu nor any other formality other than open presentation of cloth by the bridegroom to the bride is a necessary requirement of a valid marriage u/s 3 of the Travancore Nair Act.

19. To add to the discussion of the above decision, would be to paint a lily. It need only be remembered that nearly a decade later, a well studied and well documented book by an Australian Professor Dr. Robin Jeffre, "The Decline of Nair Dominance, Society and Politics in Travancore 1847 to 1908" commented and gave an objective over view of many of the developments in the community during the period.

20. Taking cue from this historic background, if the provisions referred to above are read, the answer appears to be clear and evident. That Chathayam Thirunal had an alliance with the 1st Defendant's mother is admitted. The 1st Defendant was born out of such an alliance. The alliance was not one which was tabooed socially or legally. As a matter of fact, such a conjugal union was one permissible according to recognised usage. That is not, and cannot be disputed. If that be the case, the proviso to Section 3(b) of the Kshatriya Act will be attracted to the facts of the case. The conjugal union in the present case is of a Kshatriya male with a non-Kshatriya female, where such union is permissible according to recognised usage. The main provision of Section 3(b) states that such a conjugal union shall be deemed to be valid for the purpose of the Act, if registered as provided under the Act. However, registration is dispensed with under the proviso. The only question is whether there had an open solemnisation of that conjugal union by the presentation of cloth in the manner provided in the Nair Regulation II of 1100. The provision in the Nair Act relating to the solemnisation of marriage is Section 3. The solemnisation can also be by the presentation of cloth to the female by the male. There is no contention about there not having been a solemnisation of the marriage in the manner provided above. It has therefore to be found that the 1st Defendant's mother was the legally wedded wife of Chathayam Thirunal and that the 1st Defendant was born out of such a valid marriage. It may be also noted that even the trial court had not rejected the 1st Defendant's contention that the 1st Defendant was the son and

Chathayam Thirunal was the father. It has referred to such relationship of father and son as existing between them in about six places during the discussion on that aspect.

21. Counsel for the Appellant, however, submits that the 1st Defendant's mother died between 1070 and 1077. Consequently, the marriage cannot be found to be one subsisting on the date when the Kshatriya Act came into force in 1108. For that reason, the 1st Defendant cannot be treated as a child of Chathayam Thirunal under the Act. It is submitted that before the first Marumakkathayam Act of 1088 came into force the 1st Defendant's mother passed away. Death dissolved the marriage. No marriage under the Kshatriya Act can therefore be postulated in the case of the 1st Defendant's mother. On that basis, the 1st Defendant cannot be treated as a child of the Chathayam Thirunal. These were the submission of counsel for the Appellants.

22. An answer to the above contentions can be better obtained by advertence to the relevant principles relating to the legitimacy and status of a person. Judicial decisions in England have considered various facets of this question in diverse contexts. It appears to me that Romer, L.J. correctly explained the position in *Re Bischoffsheim* 1947 (2) All E.R. 830 when he summarised the contention in that case:

That status is conferred or withheld as the case may be, by the law of the domicile of origin, which is the law of the domicile of the parents at the time when the person whose legitimacy is in question was born. The status, once conferred, remains with the person concerned throughout his or her life and will be recognised and given effect to by our courts....

(emphasis supplied)

And later accepted it with the following words:

I am of opinion that on the authorities, and especially having regard to the majority judgments in *Re Goodman's Trusts*, the contentions which were advanced on behalf of Mr. Wellesley, and which I have already summarised, must prevail.

The decision had been referred to with approval by the judicial Commissioners in *Mathew Olajide Bamgbose v. John Bankole Daniel and Ors.* 15 (1) Chan 122 corresponding to 1955 App. Gas 107. The exceptions to this rule appear to be what Professor Blackstone referred to as "the precious absurdities in English law of real property", and what Cotton L.J. referred to as a special rule of the feudal law as adapted in England (See 1881 Chan Div.266.

23. The proposition has been referred to by Tolstoy on Divorce, 7th Edition, at page 117.

24. If the legitimacy is thus a status conferred on the child at birth, there can be no doubt that the 1st Defendant who was a child born out of lawful wedlock is a

legitimate child. That status is not taken away by an unfortunate demise of his mother years later. In that view of the matter, the 1st Defendant is a child referred to in Section 14 and is in the circumstances, the sole heir entitled to succeed to the property of Ghathayam Thirunal To deny the status of a wife to the 1st Defendant's mother would be to import to her marriage alliance, notions in the 17th century France "when the misogyny of classical authors and the Church fathers was reinforced by standard theories of physiology to maintain the idea of woman as the weaker vessel, inherently and necessarily inferior to man, susceptible to every temptation and incapable of any worthwhile achievement except child bearing". I have no hesitation to reject such a theory and such a contention.

25. In the light of the above conclusion, it is not necessary to consider the observations made by Lord Phillimore in *Khoohooi Leang v. Khoo Heart Kwee* 1926 A.C.C 529.

In deciding upon a case where the customs and the laws are so different from British ideas, a court may do well to recollect that it is a possible rural conception that a child may be legitimate, though the parents were not and could not be legitimately married.

(emphasis supplied)

I hold that the lower appellate court was correct when it observed that the 1st Defendant, as a child of Chathayam Thirunal, was entitled to succeed to the property of his father.

26. The march of law in relation to marriage cannot be overlooked while evaluating the contentions centering round the provisions relating to marriage of parties, and the legitimacy of the offspring. As observed by J. W. Tayler:

Patterns of marriage and cohabitation are undergoing rapid changes which tend to transform traditional forms of family cohesion and stability.

The book "Areas of legal, social and ethical change", An International and Interdisciplinary Study, Edited by John M. Eakelaar, Sanford N. Katz gives a glimpse of such developments.

27. The article by Rebeca, J. Barley entitled "Legal Recognition of Defacto Relationships" (1978 Australian Law Journal, page 174) perhaps gives an indication of what, according to some, may be disturbing trends in the concept of family law.

28. Giving my anxious consideration to the interpretation of the statutory provisions, involved in the second appeal, in the background of the people governed by them and the history of the antecedent legislation, I have come to the conclusion that the 1st Defendant is the child of Chathayam Thirunal and entitled to succeed the properties of Chathayam Thirunal as his legal heir.

In the result, both the contentions urged on behalf of the Appellants fail. The

second appeal is therefore dismissed with costs.