
(1893) 09 MAD CK 0036
In the Madras High Court

Illikka Pakramar and Others

APPELLANT

Vs

Kutti Kunhamed and Others

RESPONDENT

Date of Decision : 15-09-1893

Acts Referred:

Citation : (1894) ILR (Mad) 69

Hon'ble Judges : Arthur J.H. Collins, C.J.;Shephard, J

Bench : Division Bench

Judgement

1. The suit is brought by the karnavan of a tarwad, alleged by him to follow Marumakkatayam law, to recover property acquired by the plaintiffs' late sister, Mamotti. The defendants, who include the children of Mamotti, raise, among other defences, two pleas, either of which is a complete answer to the plaintiff's claim. They say that Mamotti did not follow Marumakkatayam law, and that it was not to her only, but to her and her children that the property sought to be recovered was given. On the latter plea the defendants succeeded on the trial of the suit by the District Munsif, though he also found that the family was governed by Marumakkatayam law. There was, as he observed, no evidence to the contrary. Against the District Munsif's decree dismissing the suit, the plaintiff appealed, and he was successful in obtaining a reversal of the finding as to the title of Mamotti. The District Judge found on the first issue in the plaintiff's favour, and that finding we are bound to accept. Instead, however, of proceeding to consider the other issue and expressing his agreement or disagreement with the District Munsif thereon, the District Judge--whether on his own motion or at the instance of the defendants does not appear--framed a new issue and directed the District Munsif to take fresh evidence and return a finding thereon. The issue so framed was as follows: Whether in Marumakkatayam Mapilla families in North Malabar the devolution of self-acquired property is governed by ordinary Muhammadan law, or whether on the death of the acquirer it lapses to the tarwad?

2. If this issue had been one of mere fact, the procedure of the District Judge

might not have been open to exception; it would have been a question whether the issue was raised by the pleadings, and whether the District Judge had exercised a wise discretion in giving an opening for a fresh inquiry; certainly his reasons for allowing a new case to be set up are not satisfactory. But the issue raised by the District Judge was not a mere issue of fact. It was not even a question as to the custom prevailing in a particular family, but, as he himself says, a question as to what is the ordinary customary law in Mapilla families. The cases *Vishnu v. Krishnan* ILR 7 Mad. 3 and *Vaidinada v. Appu* ILR 9 Mad. 44 are authorities for the proposition that such an inquiry is allowable under certain circumstances. In these cases too, among others, the tests and the standard to which the evidence adduced to support an alleged usage should conform are given. In the present case, however, it does not appear that the Judge had before him a particle of evidence (excepting the opinions of two text writers) to justify an inquiry into the law regulating Mapilla families. In our opinion, therefore, the order of remand is one which ought not to have been passed u/s 566 of the Code, and the proceedings taken under it are wholly irregular. Mr. Sankara Nayar has referred us to decisions of this Court in support of his contention that the conclusion at which the Judge has arrived is the right one. In *Panangatt Unda Pakramar v. Vadakkal Suppi* Second Appeal No. 576 of 1883 unreported this same question, viz., as to the descent of self-acquired property in a Mapilla family was raised. There was an inquiry, and it was found that Mapillas are governed in that respect by the ordinary Marumakkatayam law as declared in *Kallati Kunju Menon v. Palat Erracha Menon* 2 M.H.C.R. 162 That finding was accepted by the High Court. In 1886 *Kunhi Pathumma v. Mama* Appeal No. 125 of 1885 unreported, the question was raised again, an inquiry was again directed, and the finding was this time in favour of the deviation from Marumakkatayam law. The High Court accepted that finding so far as it concerned the particular family, holding that there was, as regards it, sufficient evidence of a special custom. As far as we are aware, the question has not been raised since hi this Court, although there have been cases in which the contention now made would be relevant. In *Kunhacha Umma v. Kutti Mammi Hajee* ILR 16 Mad. 201 the question referred to a Full Bench was as to the nature of the interest taken by a Mapilla woman and her children in a gift made to them. If, by the ordinary law of inheritance, the children, and not the tarwad generally, would succeed to the mother, the probability is that the gift would be made simply to her; but however that may be, the fact that such was the rule would have been strong be indicate that the tarwad took no interest under the gift. The evidence taken in the present case, so far as it is discussed in the judgments, certainly does not convince us of the existence of the alleged custom. The District Munsif gives good reason for holding it to be vague and uncertain, and the District Judge overruling that finding does not explain how evidence almost exclusively composed of recent documents can suffice to prove an ancient custom; nor indeed does he profess to hold that it is of a character to prove a custom in the manner required by a series of decided cases. Being of opinion that the order of remand was improperly made, and seeing that both the

defences set up by the defendants have failed, we must hold that the plaintiff is entitled to judgment. We must accordingly reverse the decrees of the Courts below and remand the case to the Court of First Instance for trial on the seventh issue.

3. Respondents to pay costs of this appeal: other costs to be provided for in the revised decree.