

(1920) 10 MAD CK 0012
In the Madras High Court

Karuppaliyal P.K. Raman and Others

APPELLANT

Vs

Ramulathaparukkal V. Muthu and Others

RESPONDENT

Date of Decision : 13-10-1920

Acts Referred:

Citation : AIR 1921 Mad 661 : (1921) 13 LW 218 : (1921) 40 MLJ 301

Hon'ble Judges : Oldfield, J; Hughes, J

Bench : Full Bench

Judgement

Oldfield, J.—The appellants 1st, 2nd, 4th to 6th plaintiffs, claimed the suit property as heirs, defendants as transferees from 1st defence

witness, alleged by them to be entitled to the succession. Defendants had also other defences connected with a will, a surrender and an adoption,

but they have relied here only on their denial of plaintiff's right to inherit; and therefore it alone need be considered.

2. The property belonged originally to one Karuppan, who died leaving his widow Kalu and mother Neela. 1st, 2nd and 3rd plaintiffs are

grandsons of Vella, a sister of Neela's husband; and 4th plaintiff is the grandson and 5th and 6th plaintiffs the great grandsons of another sister

Kuppachi. 1st defence witness, under whom defendants claim, is an agnate of Karuppan, connected with him through his great grandfather

Koratpura Konni. It is clear and it is conceded that plaintiffs, tracing through women, Vella and Kuppachi, are not heirs under the Mitakshara

Law. The question is whether they have, as they contend, established a custom, as binding in the Ezhuva or Thiya caste to which they belong, in

accordance with which they can inherit.

3. Such a custom is not alleged in general terms in the plaint and it will be seen

that there is some difficulty in expressing it in such terms consistently with the evidence. We start then with the statements in plaint, para. 2 that Kelu and (though this is not clear) Neela enjoyed women's estates in Karuppan's property and those in para. 4. that (1) the heirs to it after them are his father's children, their children and in their absence his grandfather's children, the brothers of his mother succeeding only in default of nearer heirs and (2), the important point, that his heirs after his mother's death are the plaintiffs who are descendants of his father's sisters. Generally the custom was formulated in argument as being that (1) women married into the family take life-estates in accordance with the ordinary law (2) after them the heir or heirs are first the male members of each degree or their descendants and secondly the females of each degree when no such males exist, the females being admitted to the succession, only when representatives of nearer degree in the order, sons and daughters, parents, paternal uncles and aunts, grand parents and paternal great-uncles and aunts and so on with their descendants are wanting. It is not disputed that the burden of proof of this customary scheme of inheritance is on plaintiffs; and it is necessary to specify defendants' contention, only because some reference has been made to their admission in para. 9 of their written statement that neither they nor plaintiffs are governed by Hindu Law. In fact however here and apparently at the trial they admitted deviations by Ezhuvas or Thiyas from the ordinary law in respect only of remarriage and divorce, not in any direction at present material, and asserting a general adherence to the Mitakshara system, denied the general right of women and their descendants to succeed which plaintiffs alleged. In fact the District Munsiff's judgment indicates that the conduct of the case on both sides before him was inexact and confused; and it does not appear that this part of defendants' pleading had any material influence on the trial. Reference has been made to it now, only because it is relied on as supporting the argument next to be referred to.

4. There is no dispute as to the reasonable character of the alleged custom; and the Lower Appellate Court has dealt fully with the evidence on the questions whether it is ancient and certain. But it is contended that it has misappreciated the evidence in doing so, because it assumed that Hindu Law would ordinarily be applicable and enquired how far a deviation from it was

established. Such an assumption was no doubt treated as unwarranted in *Rarichan v. Perachi* ILR (1892)M. 281; and although that case related to Thiyas, not Ezhuvas or Iluvas, the two last mentioned being admittedly identical castes, it is not necessary to draw a distinction between that case and the present. Moore's Malabar Law, 3rd Edition

414. For it is not clear what the effect of the dictum relied on or of plaintiffs' objection based on it is in the latter. It can be said only that *Rarichan v. Perachi* ILR (1892) M. 281 ; was referred to in *Raman Menon v. Chathunni* ILR (1893) M. 184; *Imbichi Kandan v. Imbichi Pennu* I.L.R (1395) M. 1 ; and *Kunhi Pennu v. Chiruda* (1896) ILR M. 440 without any elaboration of this part of the decision, that none of those cases mentions Section 16, Act 3, of 1873, under which in the absence of proof of special custom Hindu Law is to be administered to Hindus : and that Exhibit XII confirming Exhibit XI., S.A. Nos. 518 of 1901 and 1056 of 1919 have been decided in this Court in accordance with that view. In these circumstances, it is not necessary or possible to regard *Rarichan v. Perachi* ILR (1892) M. 281 as enunciating more than a rule as to burden of proof or its weight and as the decision in *Kumarappa Reddi v. Manavala Goundan* ILR (1912) M. 48 authorises us in Second Appeal to consider the validity of the Lower Appellate Court's inferences from the facts found proved and to appreciate their weight for ourselves, this objection is not of moment.

5. The last cited decision of course in no degree affects our duty to reject the Lower Appellate Court's finding of facts, when reason for doing so of the character ordinarily admissible is available, as for instance failure to consider material evidence in reaching them, and therefore it must at once be observed that the Lower Appellate Court has erred in rejecting four of the instances relied on by plaintiffs as supporting the custom alleged on the ground that the agnate concerned in each case has not been called. It is admitted here that he has been in cases 1, 5, 6 and 11, which are in question. But it is unnecessary to remand the appeal for a fresh finding regarding them, because even if they are accepted as established the result will be the same. Mention may also be made at this point of the particular criticism on another portion of the Lower Appellate Court's judgment, its reference to the necessity for strict proof and its

statements that the operation of custom cannot be extended by analogy. The former appears to assert, not the necessity for any particular kind of evidence in support of this custom, but only that in view of its character and the circumstances strong and direct evidence of it must be required, and from that there is no reason for dissent. The principle enunciated in the latter was relied on by the Lower Appellate Court as justifying its refusal to draw any inference from the instances adduced in proof of the custom, which were all of its application to inheritance by relatives in a nearer degree than the plaintiffs' paternal aunt's grandsons, to the case of persons of plaintiff's degree; and there is no doubt that Sundara Aiyar, J. expressed himself in the words used by the Lower Appellate Court in *Krishnan v.*

Damodaran ILR (1912) M. 48 at 58 , But there the analogy proposed was between established right of a male member of a tarwad to inherit the self acquisitions of a deceased member and the right of females to do so; and the danger of the argument was pointed out by the learned Judge and was clear. Generally however, the principle involved is rather one of logic than of law; and it may with all respect be doubted whether the intention was to state it as of universal application or to exclude the argument from analogy, when it can be legitimately employed; that is when the similarity between the classes of cases is sufficient to justify its employment.

6. It is now possible to approach the instances, which are relied on as supporting the alleged custom, and in which the facts may be taken as established. One of them however No. 7, is of the exclusion of two brothers and a father by a daughter, and, as this is in accordance with Hindu Law, it is conclusive. Moreover the exclusion appears to have been partial, the case being really one, like those next to be referred to, of partition.

In cases Nos. 5 and 11 a brother's daughter took a share not by inheritance, but, at a partition after her father's death; and, even if the evidence of her doing so in the latter by a family arrangement is rejected, these cases also are inconclusive if only because contrary to the custom as formulated by plaintiffs they involve the female's right to take concurrently with males, not only in the absence of males of her degree and their descendants.

Exhibits M. and N. are relied on as containing admission of the custom by Neela and Kalu already referred to in another suit. But they cannot bind or esstopel defendants who do not claim through either of those persons, and, as

we must accept the Lower Appellate Court's finding of fact as to the circumstances connected with and the motive which inspired them, they are useless to plaintiffs. There remain only the small number of eight cases for consideration. Of the monly one appears on any definite documentary evidence to date more than twenty five years back and the majority are far more recent. The evidence therefore does not show that the custom is ancient. It is further defective so far as it is intended to establish the custom as certain, in that some of the witnesses, for instance, 8, 9, and 10th plaintiff's witnesses deposed so consistently with its existence as it is alleged that it is doubtful whether they had any coherent idea of it or followed it consciously at all; and the truth may well be that, as 9th plaintiff's witness indicated by his reference to the tendency during the last thirty years, this poor and ill-educated community with on the one hand its adhesion to the joint family system, on the other its environment of castes, which allow a special status to woman has no clear or settled conviction as to the extent of its departure from or allegiance to the Mitakshara Law. Certainly in respect of departure from it by the custom under discussion the instances relied on are too few, too recent and supported by evidence too uncertain to justify any conclusion; much less to support an extension of such custom to a degree of relationship, which those instances do not actually cover.

7. The case standing thus, the Lower Appellate Court's conclusion that the custom relied on has not been established can be sustained without reference to defendant's evidence. The result is that the second appeal is dismissed with costs.

Hughes, J.

8. I agree.