

(1939) 04 MAD CK 0005
In the Madras High Court

Marakkakandi Krishnan and Others	APPELLANT
Vs	
P.R.N. Ramanatha Aiyar and Company	RESPONDENT

Date of Decision : 20-04-1939

Acts Referred:

Citation : (1939) 50 LW 511 : (1939) 2 MLJ 718

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—The question involved in this appeal is whether the property of the debtors is impartible and if so whether the debt due to the

decree-holder is recoverable from that property.

2. The respondent in this appeal obtained a money decree against one Baputty who died in April, 1926, leaving two brothers Velukutty and Choyi.

The first of them died in 1926 and the second is still alive. In the execution petition filed by the respondent herein to execute his decree, the sons of

the judgment-debtor Baputty were impleaded as his legal representatives. They are the appellants in this appeal. Objection was taken that the

property of the family consisting of the deceased Baputty, his brothers and sons is impartible and that according to the customary law applicable to

the Thiyyas of Calicut Taluk, such an impartible estate cannot be proceeded against in execution of a decree obtained against the deceased

Baputty. By "impartible" it is said that the property is not partible unless all the parties consent. It is urged that as it is not partible at the instance of

one member against the wishes of the others, the property is such that it cannot be proceeded against in execution of a money decree obtained

against that member.

3. The Subordinate Judge held that the effect of the decisions of the Madras High Court is that laid down in the decision in Parambarathil

Patukkayil Chakkutti and Others Vs. Kothambra Chandukutti, , that the Thiyyas of Calicut are governed by the Makkatayam law of inheritance

and that they are governed by customary law. If no evidence is forthcoming as to what is the rule of customary law on a particular point the rule of

Hindu Law on that point must be adopted as the customary law obtaining in the community on that point. If a person alleges that the rule of

customary law on any particular point is something different from the Hindu Law, the evidence which 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 and

should be viewed simply as evidence adduced to show what is the rule of customary law itself. Applying this principle, the Subordinate Judge

discussed the evidence adduced by either party and came to the conclusion that it was proved by the objectors that the property was impartible

and that it cannot be proceeded against in execution of a money decree obtained against Baputty. On appeal the learned District Judge of South

Malabar came to the opposite conclusion. The learned District Judge applied the same test as the Subordinate Judge and weighed the evidence

according to that standard. He came to the conclusion that the evidence on record was not such as to justify a finding in favour of the objectors.

He reversed the order of the Subordinate Judge and directed execution to proceed. Against this decision, the present appeal is filed by the sons of

Baputty. They urge that the decision of the District Judge is wrong.

4. It is argued by the appellants' learned Advocate that according to the decision of this Court, the incident of impartibility in the sense in which

that expression is used as stated above is applicable to all cases of Thiyyas of Calicut Taluk. It is said that the law was laid down correctly in

Raman Menon v. Chathunni ILR (1893) 17 Mad. 184, and that this incident has been judicially recognised so well as to dispense with actual proof

of it in this case. This and the latter decisions were all referred to at length and discussed by Mr. Justice Waller and Mr. Justice Madhavan Nair in

the decision reported Parambarathil Patukkayil Chakkutti and Others Vs. Kothambra Chandukutti, . As is pointed there when the matter came up

before the High Court on the first occasion in *Raman Menon v. Chathunni* I.L.R. (1893) 17 Mad. 184, the pleadings and the evidence were all

vague and unsatisfactory, the issue that was raised was vague, the evidence that was adduced inconclusive, the witnesses were not even asked

about the real questions at issue, and the Subordinate Judge arrived at the conclusion that the ordinary rule of *Marumakkatayam* against

compulsory partition was applicable to the *Thiyyas* of Calicut on the authority of two unreported decisions. When the matter came before the High

Court in Second Appeal the High Court observed that it should not have been decided in, that way and they framed an issue whether according to

the customary law followed by the parties to the suit, compulsory partition can be effected according to the wish of one member of the *tarwad*.

When the matter went back, the Subordinate Judge based his finding upon the ground that there was no presumption of partibility of family

property in the case of *Thiyyas* and that the evidence adduced before him was not sufficient to support the custom of partibility. Starting from that

standpoint he examined the evidence adduced before him and held that the incident of partibility was not proved. When the matter came after the

return of the finding, the High Court did no more than accept the finding. The Subordinate Judge really went too far in laying down that there was

no presumption of partibility. In the first place, the presumption must be that all joint property is partible, that being the rule of equity recognised in

the absence of any usage to the contrary, and secondly, the Hindu rule of partibility is also the same and hence the rule of partibility must prevail

unless displaced by evidence that some other rule is recognised by the community as binding upon it. When the question came up with respect to

another community who were also *Thiyyas* but belonged to Palghat, this Court refused to extend the rule laid down in the decision in *Raman*

Menon v. Chathunni I.L.R.(1893) 17 Mad. 184 and confined the case to the *Thiyyas* of Calicut, *Velu v. Chamu* I.L.R.(1898) 22 Mad. 297. In

Second Appeal No. 580 of 1917 Mr. Justice Phillips and Mr. Justice Krishnan observed that it was questionable whether a single decision in

Raman Menon v. Chathunni I.L.R.(1893) 17 Mad. 184, can be said to be a final decision binding on all *Thiyyas* of Calicut. The question came

before Mr. Justice Waller and Mr. Justice Madhavan Nair in (*Vysyan*) *Kandiyil Kundan Vs. Neelambalatha Andi and Others*, . There the learned

Judges went into the matter at great length and came to the conclusion that the decision in Raman Menon v. Chathunni I.L.R.(1893) 17 Mad. 184

must be confined to the facts and circumstances of that case and held that among the Thiyyas of Calicut there was no rule that the rule of

impartibility was applicable unless it was proved to be so by evidence adduced in any given case. The question again came before this Court in

(Vysyan) Kandiyil Kundan Vs. Neelambalatha Andi and Others, before Mr. Justice Wallace and Mr. Justice Srinivasa Aiyangar. Wallace, J.,

followed without any reserve the decision of Waller and Madhavan Nair, JJ., and laid down the rule in the same terms. Mr. Justice Srinivasa

Aiyangar though he was inclined to doubt whether the observation of Mr. Justice Waller and Mr. Justice Madhavan Nair were correct, applied the

law as laid down by them and held that the evidence adduced in the case before him proved a custom of impartibility. This being the state of

authorities it cannot be said that the incident of impartibility has been recognised 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. As is pointed out at page 239

of Sundara Aiyar's Malabar Law impartibility is a rule that is incidental to common ownership, it is a rule of equity applicable to joint status and it is

upon the person setting up that the property is impartible to allege and prove it.

* * * * *

5. His Lordship after discussing the evidence in the case proceeded.

6. I therefore hold that the question of impartibility has not been established by the evidence on record. On the other hand the evidence referred to

proves the contrary. The appeal therefore fails and is dismissed with costs.

7. Leave refused.