

(1893) 09 MAD CK 0020
In the Madras High Court

Mullolindavida Illikka Pakrammar and Others

APPELLANT

Vs

Vendavamprath Kutti Kunhamad and Others

RESPONDENT

Date of Decision : 15-09-1893

Acts Referred:

Citation : (1894) 4 MLJ 14

Judgement

1. The suit is brought by the karnavan of a tarwad alleged by him to follow Marumakkathayam law to recover property acquired by the plaintiff's

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 Marumakkathayam law and that if 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 the Marumakkathayam 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 1st issue in the plaintiff's favor, 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 Maru-makkathayam Mopla families in North Malabar, the

devolution of self-acquired property is governed by ordinary Mahomedan 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 Mopla families. The cases decided in Vishnu v. Krishnan I. L. R. 7 M 3 and Vayidinada v. Appu I. L. R. 9 M 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 Mopla

families. In our opinion, therefore, the order of remand is one which ought to have been passed u/s 566 of the Code and the proceedings taken

under it are wholly irregular. Mr. Sankara Nair 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 Second Appeal No. 576 of 1883 this same question, viz., as to the descent of self-acquired property in a

Mopla family was raised. There was an enquiry and it was found that Moplas are governed in that respect by the ordinary Marumakkathayam 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 (Appeal

No. 125 of 1885) the question was raised again, an enquiry was again directed and the finding was this time in favor of the deviation from

Marumakkathayam 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 in this Court, although there have been

cases in which the contention now made would be relevant. In the case reported at I. L. R 16 M 201 Kunhacha Umma v. Kutti Mammi Hajee, the

question referred to a Full Bench, was as to the nature of the interest taken by a Mopla 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 to 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 7th issue.

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