

(1921) 04 MAD CK 0017
In the Madras High Court

Pothi Kandiyil Vattoli Kalandar and Another	APPELLANT
Vs	
Keloth Vattoli Puthooram Kalandar and Others	RESPONDENT

Date of Decision : 01-04-1921

Acts Referred:

Citation : (1921) 14 LW 702 : (1921) 41 MLJ 437

Judgement

1. The question on which the decision of these appeals turns is whether the parties in respect of the suit pro-perties are governed by their own

Muhammadan law or have adopted the Marumakathayam lw. The question arises in this way. The family consisted of two brothers and two

sisters. One of the sisters had a daughter Bjiyathumma who married the son of one of the brothers, Vattoli Tharuvaryi. The properties in dispute are

the properties of Biyathumma, which descended to her two sons, Tharuvaryi Kutti and the present plaintiff. The 4th and 5th defendants (the

present appellants) are the sons of Tharuvaryi Kutti. If the devolution of the suit properties is subject to the Muhammadan law, they are entitled to

succeed. The lower Courts have ffeund that, because they came to them from their mother, they are subject to Marum-makathayam law.

2. The first question is whether the matter is res judicata in consequence of a decision of this Court in S.A. No. 1498 of 1911. The present plaintiff

in that litigation was the 12th defendant and the present 4th and 5th defendants were the sons of the then 1st defendant. Both the lower Courts

ihave held that this was not res judicata. One reason for that conclusion is that the persons concerned were then co-defendants and were not in a

position of active contest. But it is not necessary to rely on that to justify the decision. For another ground for the Lower Court's conclusion is that

the matter in suit was not the devolution of the present suit properties, but of some other properties and that the rule applicable to the latter is not necessarily the rule applicable now. In that suit the question was directly of the devolution of some properties, which had been divided by a karar of 1052 between the two brothers and the two sisters who originally composed the family. Those properties are not identical with the properties with which we are concerned, and in paragraph 11 of the pLalnt in that case the plaintiffs said: "" As there are persons who are entitled to the joint properties to which plaintiff is entitled through mother other than this plaintiff and defendants and as those properties are not properties obtained under this right, those properties have not been included herein. When the plaintiff requires to get those divided, fresh suit will be brought,"" meaning that the properties now in dispute had been expressly excluded from the claim he was then making. That being so. it is impossible to hold that the Court in disposing of his claim was concerning itself with the devolution of these properties at all.

3. It is said, however, that tiie devolution of the properties now in suit was considered indirectly, because in that case the karar of 1052 on which the parties' rights now depend was referred to. It is true that in the judgment of the Munsif and the Subordinate Judge some reference is made to this karar; very naturally, because, the question being of the law applicable to the parties argument might fairly be founded on it, so far as it was consistent or inconsistent with the custom in dispute. But in fact, the two lower Courts in that litigation came to no very distinct conclusion; and the High Court dealt with the case wihout any detailed reference to the karar (Ex. XIII) at all. In the leading judgment the conclusion is expressed in these words. ""It is true that neither of the Courts below has considered the question in the manner, in which in ray opinion it should in strictness be considered and it is also true that some remarks seem to me with great difference to both the lower Courts meaningless. and I am unable to hold that the finding arrived at by both Courts is a finding based on such an erroneous mode of approaching it and in such disregard of the evidence as would entitle us to interfere with it in Second Appeal. It is clear that this is the effect of Ex. XIII: and the question which arose incidentally in connection with it was very much at large. In order that an incidental finding in one proceeding shall be res judicata in another, it is essential that the

issue in the second proceeding should have been raised and decided clearly in the first. That condition is not fulfilled with regard to the judgment,

on which the present appellants rely. We cannot hold that it is *res judicata*.

4. We turn then to the case on the merits. The law which these men clearly may be supposed to follow is the Muham-medan law or, as it is put in

this case, the Marumakathayam law. The question is whether the deviation from it, which the respondents allege, has been established by them as a

matter of family custom. The appellants contend, first, that it is not open to the respondents to establish such a custom on the ground, so far as we

can understand to, that it would be immoral or contrary to public policy. Mr. Ramakrishna Iyer for the appellants has not been able to specify any

head of morality or public policy, which would be infringed by such a custom. He relies on a reference in Moore's *Malabar Law and Custom* 3rd

edition, page 326 to the fact that in 1855 the High Court questioned the propriety of two distinct laws of inheritance prevailing in the same family

and to the decision of Mr. Holloway, as Subordinate Judge, against the validity of what he terms "a piebald system of descent" and to a Privy

Council decision in 1871. We have not been able to obtain the full decisions in the two first mentioned cases and we do not think it safe to proceed

on the account of them given by Mr. Moore. The Privy Council decision in *Serumat Umat v. Palathan Vittil Naryacoothy Umat* 15 W.R. (P.C.) 47

is reported in. Their Lordships simply said that the special family custom relied on was not alleged or proved with sufficient distinctness or

certainty. There is a judgment of Subramania Iyer, J, in *Assam v. Pathumma* ILR 22 Mad. 494 in which the right of any party who alleged such a

custom as this to prove it by evidence was clearly recognised. We may also observe that the experienced Subordinate Judge, who tried the case

and is a native of Malabar, refers to the custom as not uncommon within his knowledge. In these circumstances, we can see no reason why such a

custom should not be recognised, if it is sufficiently established.

5. The remaining question is whether the lower Courts were justified in holding it to be established on the facts which they found. We cannot in

Second Appeal interfere with their findings of fact. We can only consider whether the facts found were sufficient to support the custom. There is

first Ex. XIII, the, karar already referred to which draws a clear distinction

between property in the hands of the male members of the family and that in the hands of the two females Pallichy and Pathumma, marking no provision for the devolution of the latter. The other language used in the two karars is clearly appropriate to the Marumakathayam devolution. There are further four instances of assertion by Tharuvaryi Kutti that he followed Marumakathayam law. On the other side nothing irreconcilable with the Marumakathayam devolution has been shown us. We accordingly think the conclusion of the lower Courts was fully justified.

6. In the result the Second Appeals Nos. 1298 and 1299 are dismissed with costs and Second Appeal No. 1300, in which the respondent is not represented, is dismissed without an, order as to costs.