
(1928) 01 MAD CK 0007
In the Madras High Court

Vysyam Kandiyl alias Punathil Kandan APPELLANT
Vs
Neelambalathi Andi and Others RESPONDENT

Date of Decision : 30-01-1928

Acts Referred:

Citation : 114 Ind. Cas. 338

Hon'ble Judges : Wallace, J;Srinivasa Ayyangar, J

Bench : Division Bench

Judgement

Wallace, J.—This second appeal is against the decision of the lower Appellate Court in a suit for title. The question at issue depends on

whether the families of plaintiffs and defendants who are Tiyyas of Calicut governed by the Makkathayam Law, follow or do not follow a custom

by which joint family estate is not compulsorily partible. The lower Appellate Court has held that among the Tiyyas of Calicut the joint family estate

is not compulsorily partible.

2. The discussion before us has centred mainly on the application of certain decided and reported cases in this Court. That the Tiyyas of Calicut

follow the Makkathayam Law is not disputed and that is also noted in the Local Gazetteer. But Makkathayam Law means merely a system of

inheritance by sons as distinct from Marumakkathayam law, a system of inheritance by daughters, and in itself it imports no custom one way or the

other on the question of partibility. In *Rarichan v. Perachi* 15 M. 281 it was recognised that in several respects the Customary Law governing

Tiyyas of Calicut differs from the Mitakshara, and it was decided, therefore, that the Customary Law is a matter of evidence and proof. In *Raman*

Menon v. Chathunni 17 M. 184 it was held that no custom to the contrary having

been made out, the Makkathayam Tiyyas of Calicut follow the Marumakkathayam Law of non-partibility. *Imbichi Kandan v. Imbichi Penno* 19 M. 1 is to the same effect. In *Velu v. Chamu* 22 M. 297 it was held that *Raman Menon v. Chathunni* 17 M. 184 is confined to Tiyyas of Calicut. In *Thaikkandhi Pokkancheri v. Illivathukkal Aehuttan* 60 Ind. Cas. 209 : 39 M.L.J. 427 : 13 L.W. 101 it was held that, in the absence of proof to the contrary the Mitakshara must be the law which prevails and the same proposition is laid down in Second Appeal No. 518 of 1901. The whole question has been discussed at length in (Parambarathil) *Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti*, which was also a case from Calicut, where the general conclusion is stated that in the absence of evidence to show what is the rule of Customary Law on any point the Hindu Law must be applied. I agree with the principles laid down in (Parambarathil) *Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti*, and in particular the expression of opinion there in that *Thaikkandhi Pokkaneheri v. Illivathukkal Achuttan* 60 Ind. Cas. 209 : 39 M.L.J. 427 : 13 L.W. 101 goes so far. The general principle of law then is that it lies upon the plaintiff to establish first what is the Customary Law of inheritance governing them and the Court has to decide first whether they have proved such a Customary Law; then if the Court decides that they have proved it, that is their law and that is the law which the Court has to apply to them; if they have not proved it, then the Court will, in the absence of proof of what their law is, apply to them the ordinary Mitakshara Law. The lower Appellate Court has viewed the case from this aspect, and come to a definite finding of fact on the evidence to clinch which it calls-in-aid *Raman Menon v. Chathunni* 17 M. 184 as laying down the law applicable to Makkathayam Tiyyas so that in its view on the evidence the law applicable to the parties in this case is not the Mitakshara Law of partibility but the law of impartibility. I think it, therefore, not necessary that the case should be remanded for a re-hearing. The second appeal is, therefore, dismissed with costs.

Srinivasa Ayyangar, J.

3. The question in this second appeal is whether the decision of the learned District Judge in the lower Appellate Court is wrong that according to the Customary Law applicable to the family of the parties to the litigation there is

no right in the members to demand or enforce a compulsory partition. For the purposes of the present case it is unnecessary to canvass the correctness of all the observations of the learned Judges in the case of (Parambarathil) Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti, . I take the decision in that case to be, that, if it be claimed that the members of a particular family, allecit of Thiyyas in Calicut, who claim to be governed by a special custom which is not in accordance with the Customary Law in South India known as the Law of Mitakshara, then the burden of establishing such Customary Law and its incidents is on those who aver it. I for my part am not disposed to brush aside the decision of the eminent Judges in the case of Raman Menon v. Chathunni 17 M. 184 in the same manner in which it has been treated in the case of (Parambarathil) Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti, . That decision was in the year 1893 and merely confirmed the view of Mr. E.R. Krishnan, the Subordinate Judge, himself a gentleman of the West Coast. It has been recognised as good law and apparently followed without any question during over 30 years. We also find that the judgment of Sir Arthur Collins in the case of Rarichan v. Petachi 15 M. 281 is very much to the same effect and is with special reference to the community referred to as Tiyyas of Calicut.

4. The finding by the learned District Judge in the Court below is, as will be seen even from the opening words of his judgment, that the members of the family are Tiyyas of Calicut, whatever that may mean or signify. Apparently that description by the District Judge was not called into question in the Court below by either of the parties. But it seems to me, however, unnecessary in the present case to proceed on any general presumption as applicable to the case. As I read the judgment of the learned District Judge in the Court below he has clearly arrived at the finding of the fact on a careful consideration of the evidence before him that according to the custom of the particular community to which the family belongs no compulsory partition is recognised. This is what he says: ""All of them are Tiyyas of Calicut and they are clear that among their community no compulsory partition is recognised."" No doubt, he follows up to this statement by the following sentence: ""They are supported by the decision in the Indian Law Reports, Raman Menon v, Chathunni 17 M. 184, which

has not been overruled or even doubted in the High Court till

now." I am unable to regard this reference to the decision in the case of Raman Menon v. Chathunni 17 M. 184 as vitiating the finding of fact

otherwise clearly and cogently arrived at by the learned District Judge.

5. After the whole of the evidence had been adduced and considered there is really no room for any question of burden of proof, and if on the

evidence so well-summarised by the learned District Judge, I should be asked to come to a conclusion myself, I should have very little hesitation in

coming to the same conclusion. I cannot see how it can be said, having regard to the very clear terms of the judgment that there is no finding by him

as regards the Customary Law applicable to the parties. If that is the finding, it follows that even on the authority of the said case of (Parambarathil)

Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti, it is the Customary Law so established that should be given effect to.

6. It seems to me, therefore, that on the finding of the lower Appellate Court no question of law really, arises and it is really unnecessary to discuss

the correctness of the obiter dicta in the said case and (Parambarathil) Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti, .

7. I, therefore, agree that the second appeal should be dismissed with costs.