
(1928) 01 MAD CK 0001
In the Madras High Court

(Vysyan) Kandiyl Kundan

APPELLANT

Vs

Neelambalatha Andi and Others

RESPONDENT

Date of Decision : 30-01-1928

Acts Referred:

Citation : AIR 1929 Mad 508

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

Bench : Full Bench

Judgement

Wallace, J.—This second appeal is against the decision of the lower appellate Court in a suit for title to certain property. The decision of 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 compulsarily 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* [1892] 15 Mad. 281 it was recognized 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. Chatunni [1894] 17 Mad. 184 it was held that no custom to the

contrary having been made out, the Makkathayam Tiyyas of Calicut follow Marumakkathayam law of non-partibility. *Imbichi Kandan v. Imbichi Pennu* [1896] 19 Mad. 1 is to the same effect. In *Velu v. Chamu* [1899] 22 Mad. 297 it was held that *Raman Menon v. Chatunni* [1894] 17 Mad. 184 is confined to Tiyyas of Calicut. In *Pokkanchart v. Achuttan* AIR 1921 Mad. 74 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 S.A. 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 the (*Parambarathil*) *Pattukkayal Chakutti and Others Vs. Kothembra Chandukutti*, and in particular the expression of opinion therein that *Pokkanchari v. Achuttan* AIR 1921 Mad. 74 goes too far. The general principle of law then is that it lies upon the plaintiffs to establish first what is the customary law of inheritance governing; then 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. Chatunni* 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 Pottukkayil Chakkutti v. Chandukutti. I take the decision in that case to be, that, if it be claimed that the members of a particular family, albeit,

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 Banian Menon v. Chathunni in the same manner in which it has been treated in the

case of Pattukkayil Chakkutti v. 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 recognized as good law and apparently followed without any question

during over thirty years. We also find that the judgment of Sir Arthur Collins in the case Rarichan v Perachi is very much to the same effect and is

with special reference to the community referred to as Thiyyas 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 Thiyyas 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

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 recognized. This is what he says:

All of them are Thiyyas of Calicut and they are clear that among their community no compulsory partition is recognized.

5. No doubt he follows up this statement by the following sentence:

They are supported by the decision in the Indian Law Reports Raman Menon v. Chathunni which has not been overruled or even doubted in the

High Court till now.

6. I am unable to regard this reference to the decision in the case of Raman

Menon v. Chathunni as vitiating the finding of fact otherwise clearly and cogently arrived at by the learned District Judge.

7. 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 summarized 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 Pattukkayil

Chakkutti v. Chandukutti it is the customary law so established that it should be given effect to.

8. 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 of "" Pattukkayil Chakkutti v. Chandukutti.

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