KERALA HIGH COURT

Hon’ble Justice V. R. Krishna Iyer.

KANDATHY AND OTHERS v. KUTTYMAMMI

Citation : 1970 KHC 146 : 1970 KLT 799 : ILR 1970 (2) Ker. 163

JUDGMENT

1. Law regulates life and the problems of the law are really problems of life. I am therefore baffled when called upon to declare the law of inheritance to property of Pulaya Harijans prevailing half a century ago when they were themselves often de facto owned as the property of others and annexed, as it were, to their lands rather than owning lands as their property to be inherited by others. Today their economic lot has improved, at snail's pace though, and the law of succession is now in no doubt, thanks to the Hindu Succession Act, 1956. The case, however, relates to one who died at the turn of the century, having acquired and left behind a plot of land. His tiny estate has bred litigation among his descendants.

2. The few facts necessary to appreciate the controversy involved in this appeal, may now be briefly stated. One Theyyon - quite an adventurous man, judging by the fact that he had acquired a property as early as 1892 when the community to which he belonged was 'untouchable' and 'unapproachable' to landed property, and was being bought and sold as chattel had died leaving neither wife nor children but a sister called Korumbi. She was the only object of his affection and sole heir to his estate, according to both parties. On Korumbi's death, her children, Aryan, Kandathi and Veluthiru, took as heirs together with Kandathi's children, defendants 2, 3 and 4 - according to the present case of the plaintiff. Succession, Marumakkathayam fashion, is put forward as the correct rule, by the contesting defendants. If Korumbi was governed by the Makathayam system, the plaintiff's case will be vindicated, while if she was governed by the Marumakathayam system, the contention of the defendants appellants will stand substantiated. Thus, the bone of contention between the parties is as to which system regulates Korumbi's inheritance.

3. The plaintiff a non harijan, bad shrewdly taken of course, for cash consideration, as counsel for the respondent reminded me assignments under Ext. A2 and A3 from both groups. There was an earlier suit, O. S. No. 716 of 1960 whereunder one Onakkan and two others claimed partition of the suit property on the basis that the estate of Korumbi devolved on her Marumakkathayam heirs. That suit was contested by the present defendants on the footing that the propositus was governed by the Makkathayam system of inheritance. Meanwhile, came the plaintiff on the scene and took an assignment the rights of the plaintiffs in O. S. No. 716 of 1960 and some others who would have had a share if the Marumakkathayam system applied to the case. With commercial prudence he also took an assignment from two out of the three possible Makkathayam heirs under Exs. A2 and A3, as earlier mentioned. Probably, as counsel for the respondent explained, these assignments were taken by him as a result of a broad understanding among the parties to the first suit, because it is seen that, as a sequel, O. S. No. 716 of 1960 was not pressed and was dismissed. However, in life there is many a slip between the lip and the cup and the assignee has had to face a litigation before getting the benefit of his purchases because his suit for a partition of the 2/3rd share (there were 3 children for Korumbi and Exs. A2 and A3 vested 2/3 share in the plaintiff) is being resisted by the third child and daughter, 1st defendant, and her children, defendants, 2, 3 and 4 who would be entitled to 1/3 out of the estate if the Makkathayam system applied to Korumbi and to more otherwise. Although the plaint when originally filed did not clarify whether the plaintiff sought relief on the basis of Makkathayam or Marumakkathayam, now he has staked his case on the Makkathayam basis and the suit and appeal have proceeded on the footing that the plaintiff's case has to be judged by the applicability or otherwise of the Makkathayam system to Korumbi. I mention this pointedly because counsel for the respondent has requested that if this appeal were to result in a remand and a fresh trial of the suit, he should be given an opportunity to rely, alternatively, on his right under Ext. A4 which is a surrender of the rights of Onakkan and 7 others who will be heirs of Korumbi in the Marumakkathayam line. He would, of course, be entitled to augment his rights under Exs. A2 and A3 even on the basis of Marumakkathayam because Aryan and Veluthura, the children of Korumbi, would be heirs under either system.

4. The Trial Court considered the maintainability of the suit and held that theplaintiff could not be heard to put forward the plea that Theyyon and Korumbi were not governed by the Marumakkathayam law. If the inheritance were to proceed on the Marumakkathayam basis, the suit was bad, since all the necessary parties were not on record. Against the dismissal of the suit an appeal was carried and the Subordinate Judge decreed the suit on the opposite basis that the law of inheritance that applied to Pulayas Theyyon and Korumbi were Pulayas was Makkathayam law and in this view the plaintiff

would be entitled to 2/3 share and should be awarded that share by a decree for partition. In second appeal, the major contention put forward relates to the system of inheritance that would apply to Pulayas who are a sub-division of Harijans in the broad Hindu community. A feeble attempt was, however, made to suggest that the plaintiff was estopped from contending that the parties were governed by Makkathayam; but the basic requirement that on the faith of a representation made by one party another has altered his position to his detriment is wanting and so there is no force in this plea. In short, the only point that falls for decision, at present, is as to whether Korumbi, a Pulaya of North Malabar, was governed by the Makkathayam or the Marumakkathayam law. To serve as background for this enquiry, counsel for the respondent drew my attention to the lurid facts of a decision reported in Korath Mammad v. Emperor (AIR 1918 Mad. 647) which related to Pulayas, more or less inhabiting the same region as Korumbi and Theyyon. That case reveals the tragic and unsavoury truth that as late as 1913 (the date of Ex. B in that case) slave trade was occasionally occurring in Malabar and the "rice slaves" or Pulayas (See Gundert's Malayalam Dictionary) were the subject matter of sale by one jenmi to another Jenmi. Napier J. refers to the number of salves in the various Taluks of Malabar and also to a letter from the Judge of Calicut in 1841 to the Sadar Adalath pointing out facts which had come judicially to his notice of sales of slaves. Mr. Logan also mentions that in 1852 and 1855 the traffic in slaves still continued. He summed up the position in the year 1887:
There is reason to think that they (Cheratnans) are still even now with their full consent bought and sold ....."

In short, a flash back will make us blush to see that Pulayas "were treated more or less like slaves" in and around Kummbanad Taluk where Theyyon and Korumbi were born. I mention this because a community which has itself been treated as property to be bought and sold would be alien to property consciousness and could not have evolved any laws of inheritance and succession which postulate possession and ownership of properties on a large scale by the members of the community. If the Pulaya fold renamed "untouched" by the concept of landed property the task of crystallising the customary law relating to inheritance in that community turns into an obscure search. Nevertheless, the question arises and must be answered as to what law the Court should apply today to settle Korumbi's succession. The problem has to be viewed, notwithstanding the difficulties pointed out by me, as part of the wider issue of what is the law to be applied to 'autonomous' communities which are Hindu by religion but not subject to the Hindu Law as such. The Hindu law steeped in the Shastras by passed many humbler communities which chose to be governed by their own self evolved norms of conduct or social regulation separating religious and secular affairs.

5. As early as 1927 in Parambarathil Patukkayil Chakkutti v. KothambraChandukutti (AIR 1927 Mad. 877) this question was raised with regard to the Thiyyas of Calicut and a Division Bench of the Madras High Court held that the Makkathayam Thiyyas are governed by their own customary law and when a question arises as to what is the rule of law governing them on any particular matter, the Court has to see what is the rule of customary law obtaining amongst them in the matter. But, in the absence of any satisfactory evidence to show what exactly is the rule of the customary law on any particular point, the rule of Hindu law on that point must be presumed to be the rule of customary law obtaining amongst the community on that point. The presumption, therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law. The statutory foundation for this approach is traced to S.16 of Act 3 of 1873 (The Madras Civil Court's Act) by virtue of which, in the absence of proof of special custom, Hindu law has to be administered to Hindus. The question in each case is what is the rule of the customary law on the particular point for decision and if satisfactory evidence thereon is not forthcoming, a presumption that the Hindu law on the point is the customary law applicable to that Hindu community will be raised. A later decision in Kandiyil Kundan v. Neelambalathu Andi AIR 1929 Mad. 508) affirmed the same proposition and, indeed, made the legal position perfectly clear that it lies upon the plaintiff to establish first what is the customary law governing the parties and the Court has to decide first whether they have proved such a customary law. 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 apply to them the ordinary Mithakshara law. The Kerala High Court in a ruling reported in Dharmodayam Company v. Balakrishnan (1962 KLT 712) has also adopted the same proposition of law, following the Madras decisions adverted to by me. Thus, we reach the indubitable legal position that the law that should be applied to those communities which have religious nexus with Hinduism and inhabit the Malabar region is not the Hindu law as such but the customary law of the community.

6. This is as it should be, because the Hindu law, I mean the sastraic law, interpreted and applied by the Courts, had not taken note of the Panchamas and there is no reason why except in the last resort such a law should be applied to them. The appropriate thing, therefore, would be to ascertain the customary law of the community, for, custom is the great guide of human life. In primitive communities customary law has been regarded as supreme and has compelled universal observance. Indeed, custom "reflects the common consciousness of the community as to what is right and therefore carries its own justification in itself; I mean a settled custom, not a passing vogue. A mere social custom, if violated, invites reprobation of the community while a legal custom has sanctions

operating in many ways to make it effective. Alien lays bare this distinction. "A man may, if he chooses argue that it is a waste of time and money to cut his hair; in consequence be may, if he is sensitive, be made uncomfortable, but he will not lose a single right of citizenship or property. He may argue with as much, or as little, reason that the custom of signing, sealing, and delivering a deed is an absurd anachronism; but if he ignores this quaint survival in a transfer of stock, then nihil agit".

7. All systems of law, the Hindu law and English Common law included recognise the binding force of customary law. But what are the attributes of a custom before it can be exalted into a rule of law? Antiquity is essential for a custom to be obligatory. "But antiquity", as Alien, in an illuminating passage, observes, "is a relative term, and if it were applied as a test without qualification, every custom would necessitate indefinite archaeological research." The arbitrary rule about the age of a custom having to be immemorial, "*time whereof the memory of man runneth not to the contrary*" does not apply to India. The custom to be valid must be uniform and continuous, so that the conviction of the members of the community that they are acting in accordance with law, when they obey the custom, should, be clearly shown. No hard and fast rule as to the period during which the custom has prevailed can be insisted upon. If it has existed for a long time long enough in the circumstances of the case there is a presumption of antiquity. Although the onus of proof of antiquity is upon the person who sets up the custom, the degree of proof depends on many factors. Take this case as an illustration. Evidence of acts proving the custom, decisions of Panchayats and of Courts, upholding such acts, statements of competent persons of their belief that such acts are legal and valid are the usual materials on which a Court acts, but, if we are dealing with a rule of custom, relating to inheritance and succession to members of a community who, until recently, did not have properties to inherit or to succeed to, proof of custom may be hard to compile. In those cases "The rules of evidence are liberal in matters of such antiquity, but they remain rules of evidence and, with every willingness to admit all such inferences as can properly be drawn, we must distinguish clearly between reasonable inference and plausible conjecture. The party setting up the custom must have the benefit of all legal presumptions, but he can take nothing by any resort to mere surmise, however ingenious, and his proof, though scanty, must still be 'rational and solid'. Again, when the existence of a custom for some years has been proved by direct evidence, it can be shown to be immemorial by hearsay evidence and such evidence is allowable as an exception to the general rule (See AIR 1925 PC 213). It must also be remembered that the task of proving a custom as such is easier than proving one in derogation of the law.

8. Thus, Courts have to adopt the tests outlined above to crystallise thecustomary law applicable to the community on a particular point. Authoritative records and books may also be usefully consulted in this connection. What the appellate Judge did in this very case and I think he was right in referring to such materials was to state that the Malabar gazetteer has mentioned Pulayas as followers of Makkathayam law. Sundara Iyer in his book on Malabar and Aliyasanthanam law has mentioned at pages 5 and 327 that Pulayas (item 21 in Appendix A) are governed by the Makkathayam system. The learned author of course relies upon the Malabar gazetteer for this statement. Logan in his Manual, Vo. 1 page 155, following Dr. Gundert, includes Cherumans (which term loosely comprehends Pulayas also) in the list of castes following the Makkthayam system of inheritance. Thus we have some high authority of antiquity for the view that Pulayas are Makkathayees. Even so, counsel for the appellant argues that there has been an error of approach in the lover Court's enquiry. The learned District Judge has not really searched for the custom of the Pulaya community with reference to local variation which the Court has to duly recognise on the question of succession and inheritance. He has merely adopted the Hindu law without first satisfying himself about the preliminary condition that there is no proof about the rule of customary law on the point. I agree that the real enquiry should be what the custom is and, if evidence of custom is not forthcoming, then the rule of Hindu law will be presumed to be custom. I am afraid, the learned District Judge has gone wrong in not pursuing the enquiry along proper lines. J, therefore, set aside the judgment and decree of the appellate Court and send the case back to the Trial Court to decide the issue as to what is the system of inheritance according to the customary law of the Pulayas of Kurumbranad at the time Korumbi died. I need hardly say that the Court will be particularly careful to exclude possible perjury issuing from hoary visages in the witness box and will also be not swayed by vague and general statements, since custom has to be established largely by tangible instances and competent evidence. S.13, 48 and 49 of the Evidence Act relate to the proof of custom and the Court will be guided by these provisions coupled with the warning that there will always be a temptation when there is general obscurity about a matter such as this, to turn on the tap of turbid falsehood. The Court will be acting properly, as I have indicated earlier, in giving due weight to eminent authorities like Logan, Dr. Gundert and Sundara Iyer. Due note will be taken also of what I have stated earlier regarding the nature of attributes required to establish such usage as ripens into custom. Where there is no satisfactory evidence of the rule of customary law, the relevant rule of Hindu law, will, of course, be adopted by the Court as the customary law on the assumption that the community has by initiation or absorption treated it as part of its customary law.

9. Now that I am sending the case back to the Trial Court to consider what the rule of customary law is I should give an opportunity to the plaintiff to put forward and prove his alternative case that even if the Marumakkathayam system of law applies to this case he is entitled to a decree for partition.

10. I set aside the decree and judgment of the Courts below and remand the case to the Court of first instance for fresh disposal according to law and subject to the directions given above. There will be a refund of court fee now that I am remanding the case. The costs in the second appeal will be costs in the cause.