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KELUKUTTY & ORS.

v.

MAMMAD & ORS.

August 1, 1972.

B

[K. S. HEGDE, A. N. GROVER AND D. G. PALEKAR, JJ.]

Customary law—Makkathavam—Thiyya—Succession to self acquired property.

C

The Thiyyas of the former Calicut, Taluk are governed by the customary law known as *Makkathavam* and as per the *Makkathayam* rule of inheritance an undivided brother of a deceased person succeeds to the self-acquired property of the deceased in preference to the wife and daughter of the deceased. Therefore, the daughter's son who comes after them under the general Hindu Law cannot have a superior claim unless a custom to that effect is pleaded and proved. [760C]

D

Parambarathial Pattukava Chakkutti and Ors. v. Kothembra Chandukutti, A.I.R. 1927 Mad. 877 *Paricham v. Perachi & Ors.* I.L.R. 15 Mad. 281 *Rama Menon v. Chachunni* I.L.R. 17 Mad. 184 *Imbichi Kandan & Ors. v. Imbichi Pennu & Ors.* I.L.R. 19 Mad. 1 referred to.

CIVIL APPELLATE JURISDICTION : C.A. No. 749 and 750 of 1967.

Appeals by certificate from the judgment and decree dated 19th October 1965 of the Kerala High Court at Ernakulam in Second Appeal No. 400 of 1961.

E

S. T. Desai and *A. Sridharan Nambiar* for the appellants.

P. Ram Reddy and *A. V. V. Nair* for respondent No. 1.

The Judgment of the Court was delivered by

F

Hegde, J. In these appeals by certificate only one question arises for decision and that is whether Chandu, the undivided younger brother of Kelu or the grand-children of Kelu through his daughter were the legal heirs of Kelu.

G

Before going into that question we may dispose of the contention advanced on behalf of the appellants that there is no satisfactory evidence to show that Chandu was the undivided brother of Kelu. The pleadings in this case proceed on the footing that Chandu and Kelu were the members of an undivided family. The evidence also discloses that fact. The judgments of the courts below proceed on that basis. Hence the appellants cannot now be permitted to raise the contention in this Court that Chandu is not proved to be the undivided brother of Kelu.

H

In considering the question formulated above, we shall proceed on the basis that Kelu and Chandu were the members of an undivided family.

Kelu was a Thiyya resident of Calicut Taluk (at present known as Kozhikode Taluk). He was governed by the customary law known as Makkathayam. He died on November 15, 1935 leaving behind him besides his two brothers Chandu and Chekku, his widow Manikka, daughter Ichira and Ichira's son and daughter who were the appellants before the High Court. He left behind him three items of immovable property which are the subject matter of the present appeals. Kelu's widow Manikka and his daughter Ichira as well as his brother Chekku died prior to 1944 long before the institution of the suits from which these appeals arise.

It is not necessary to go into the history of the long litigation. As mentioned earlier, the only question for decision is as to who were the legal heirs of Kelu. It is now established that the suit properties are the self-acquired properties of Kelu. There is no dispute about it now. The High Court came to the conclusion that under the Makkathayam rule Chandu succeeded to the estate of Kelu in preference to his wife, daughter and daughter's children. The said conclusion is challenged in these appeals.

The contesting parties are Hindus. As mentioned earlier, they are governed by Makkathayam rule. If the Hindu law as in force in South India had governed the succession with which we are concerned, the wife of Kelu should have succeeded to the estate of her husband in preference to the other heirs. The claims of the son and daughter of Ichira could come in only later. Therefore the principal question that we have to decide is whether the wife of Kelu succeeded to the estate of Kelu on his death.

Mr. S. T. Desai, appearing for the appellants contended that Makkathayam rule being a rule of customary law can only derogate the ordinary Hindu law to the extent it is satisfactorily established; in other respects the ordinary Hindu law should prevail; the contesting respondents having not established by positive evidence the claim put forward by them i. e. that Chandu was a preferential heir to Kelu, they must fail. On the other hand it was contended by Mr. Rama Reddy on behalf of the respondents that Kelu was governed by a customary law i. e. Makkathayam law and not by ordinary Hindu law. Hence all that we have to see is whether the customary law pleaded is well established on the basis of the decisions of courts. According to him the custom pleaded is of a community and not of any family. He urged that the custom in question to the extent relevant for our present purpose is well settled.

The law relating to Thiyyas of the former Calicut taluk had come up for decision before the Madras High Court in several cases. The approach to be adopted in spelling out the same is

A laid down in the decision of the Madras High Court in (*Parambarathil*) *Pattukkayal Chakkutti an' ors. v. Kothembra Chandukutti*⁽¹⁾. Therein the Court observed :

B “We think the Makkathayam Thiyyas are governed by what is called the customary law and that when a question arises as to what is the rule of law governing them on any particular matter what we have to see is what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently governed by prior decisions, the question will have to be determined with reference to the evidence in the case.”

C In *Parichan v. Perachi and ors* ⁽²⁾ the High Court of Madras came to the conclusion that a community following Makkathayam rule must not be taken to be necessarily governed by the Hindu law of inheritance with all its incidents. On the basis of the evidence in that case, the court held that when a member of the

D Thiyya community in Calicut following that rule alleged and proved a custom that undivided brother succeeded to the self-acquired property in preference to widow, the court must give effect to it. Therein the competition was between the widow and the brother of the deceased who was a member of an undivided Tarwad and the property in dispute was the self-acquisition of the deceased.

E In *Rama Menon v. Chathunni*⁽³⁾, the High Court of Madras held that the ordinary rule of Marumakatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam, no custom to the contrary having been made out.

F In *Imbichi Kandan and ors. v. Imbichi Pennu and ors.*⁽⁴⁾ the High Court held that on the death of a Thiyya of South Malabar following Makkathayam rule of inheritance, his mother, widow and daughter are entitled to succeed to his self-acquired properties in preference to his father's divided brothers. In the course of the judgment, this is what the learned judges observed:

G “The decision of the subordinate judge is entirely in accordance with the principles laid down in *Parichan v. Perachi* and *Rama Menon v. Chathunni* (supra). It has been decided that the rule of impartibility applies to Makkatayam Tiyans of Calicut, and in *Parichan v. Perachi* following the principle that self-acquired property lapses to the tarwad, it was held that the undivided brother succeeded in preference to the widow.

(1) A.I.R. 1927 Mad. 877.

(2) I.L.R. 15 Mad. 281.

(3) I.L.R. 17 Mad. 184.

(4) I.L.R. 19 Mad. 1.

But the case is quite different when the brothers are divided and have no community of interest as in this case. Here it is found that the only property in which plaintiffs and Kelukutti ever had a common interest is in the family burying place, which will certainly not constitute then an undivided tarwad. That being so, the mother, wife and daughter of Changaran who certainly belong to his tarwad are preferential heirs to his uncle who did not belong to his tarwad at all and had no community of interest with him."

From these decisions it is clear that Thiyyas of former Calicut Taluk were governed by the customary law known as Makkathayam. Further as per the Makkathayam rule of inheritance an undivided brother of a deceased person succeeded to the self-acquired property of the deceased in preference to the wife and daughter of the deceased. If that is so the daughter's son who comes after them under the general Hindu law cannot have a superior claim unless a custom to that effect is pleaded and proved. Such a custom is neither pleaded nor proved.

No other contention was raised before us.

In the result these appeals fail and they are dismissed. But in the circumstances of the case we direct the parties to bear their own costs in this Court.

S.C.

Appeals dismissed.