Thattan Kunhi Kutti and Another Vs Thattan Raman and sixteen Ors.

Court: Bombay High Court

Date of Decision: Nov. 30, 1922

Citation: (1923) ILR (Bom) 597

Hon'ble Judges: K.C., C.J; Walter Salis Schwabe, J; Wallace, J

Bench: Full Bench

Judgement

Wallace, J.
The suit is one for partition by the plaintiff who is a member of the Thattan caste in North Malabar, which caste follows

Makkattayam law. Various issues were framed, but the original Court dealt with two only, issue II, whether the properties are impartible, and issue

XIV, whether the plaintiff is not the legitimate son of the deceased Valianambi, the owner of the property sought to be partitioned. The original

Court held that the property is impartible, which finding was enough to dispose of the suit, and that the plaintiff was what is known as a Veettukutti,

or the son of a sambandham wife who is not brought to her husband''s house, and that such Veettukutti is not entitled to share in his father''s

property. The appellate Court agreed with the original Court on the last two points, did not consider the first. It is urged before us by the plaintiff,

who is the appellant before us, that the lower Courts have erred in law in coming to these conclusions.

2. To take the first issue as to partibility, we think the original Court has wrongly thrown the onus of proof on the plaintiff, though the frame of the

issue threw it on the contesting defendant, and that it was wrong in holding that there is any presumption of law in favour of impartibility in the case

of Thattan caste. The Thattans are Hindus and, therefore, u/s 16 of Act III of 1873, the Courts have to apply to them the principles of Hindu law,

unless and until it is proved that they follow any other customary law. The rule of Hindu law is in favour of partibility, and impartibility is the

exception. Makkattayam law, which the Thattan caste admittedly follows, corresponds in the main to the ordinary Hindu law. Marumakkattayam,

in which partibility is unknown, is an exception to the general rule. Hence, prima facie, Makkattayam involves partibility. The original Court has

relied on various rulings of this Court to rebut that legal presumption, but in our opinion these do not justify any such inference. The case in

Rarichan v. Perachi ILR (1892) Mad. 281. merely says that those who follow Makkattayam must not be taken to be necessarily governed by

Hindu law, that is, that it is open to them to prove a custom at variance with Hindu law; but it is no authority for the proposition that even if such a

custom is not proved, Hindu law will not apply. The ruling in Raman Menon v. Chathunni ILR (1894) Mad. 184. proceeded on a definite finding

that among Thiyyans there is no custom of compulsory partition. It may be noted that this ruling relates to Thiyyans and not to Thattans and that its

correctness has been gravely called in question in a later ruling of a Bench of this Court reported in Raman v. Muthu ILR (1920) 40 . In Imbichi

Kandan v. Imbichi Pennu ILR (1896) Mad. 1. the decision follows the general principle of Hindu law either of impartible or of divided property.

The ruling in Kunhi Pennu v. Chiruda ILR (1896) Mad. 440. also substantially follows the ordinary Hindu law as opposed to that of Marumak-

kattayam. In Velu v. Chamu ILR (1899) Mad. 297. which deals with the caste of Illuvans, the Court refused to extend to that caste the rule of

impartibility among Thiyyans as laid down in the Raman Menon v. Chathunni ILR (1894) Mad. 184. and held that Illuvans had proved a custom of

partibility. There is therefore no good ground why this Court in the case of the Thattan caste should not follow the principle laid K down in the

Banian v. Muthu ILR (1920) M.L.J. 301 or depart from the ordinary rule that the ordinary Hindu law has in the? first instance to be applied unless

and until proof of custom to the contrary has been established. This principle has also been adopted in two unreported cases of this Court coming

from Malabar, Second Appeals Nos. 518 of 1901 and 1056 of 1919.

3. As to proof in this case of any custom to the contrary, we find none, no proof of the sort which is required to establish a uniform, continuous,

and definite practice submitted to for so long a period that it should be accepted as an established governing rule of the caste. The original Court

rejected Exhibit B, perhaps, with reason, but if the law of Thiyyans is to be used to prove a custom of impartibility amongst Thattans then Exhibit

G, which lays down that the law among Kanichans is partibility, should be used in favour of the Thattans. But it is right that each caste should stand

on the footing of its own rules and customs. Beyond the evidence noted there is only the vague evidence of three Thattans, defence witnesses 2, 3

and 4 that custom sanctions no compulsory partition, as against that of plaintiff"s witness 2, another Thattan, who says it does. The evidence is very

vague and seems to be based merely on the fact that the witnesses, defence witnesses 2, 3 and 4 have never known a case of partition. We cannot

hold that such evidence affords in law sufficient proof of a valid custom, which would suffice to rebut the presumption of law that the property is

partible. We hold therefore that the trying Court has on this issue committed an error of law.

4. As to the next point, both the lower Courts have failed to address themselves to the proper legal points at issue. Assuming for the moment that

there is a concurrent finding of fact that the plaintiff is illegitimate, it does not follow as a matter of course, as the lower Courts suppose, that he is

not entitled to a share in the joint family property. Among Sudras, under the ordinary Hindu law, an illegitimate son is entitled to a share, and it was

therefore open to the plaintiff to contend, as he does here, either that he is a Sudra for the purposes of Hindu law, (which prima facie applies to his

caste) since Hindu law brings together as Sudras all castes below the vaisyas, or to contend that his caste follows Sudra custom in the matter of the

inheritance of an illegitimate child. On the merits of these contentions we say nothing at present, but would point out only that if the Hindu law for

Sudras is to be applied to the plaintiff"s caste, he will prima facie, even if illegitimate, be entitled to a share without further proof or disproof of that

custom; while if his case is to rest on proof of a custom by which Sudra custom is applied to his caste or on proof of independent custom

altogether, then such custom will have to be proved. In the former case the onus of disproving the presumption of law will rest on the defendant; in

the latter the onus of proving the custom will lie on the plaintiff.

5. Now the only issue on this part of the case, and the only point therefore to which the parties had to direct their attention, was whether the

plaintiff is not the legitimate son of the deceased Valianambi. Instead of trying that issue, both Courts have tried an issue not framed, whether the

plaintiff is a Veettukutti, apparently assuming first that a Veettukutti is illegitimate, as the word is used in Hindu law, and secondly that to find that

plaintiff is illegitimate puts him out of Court.

6. It may be here pointed out that among the caste of Mukhavars in Malabar, also an inferior caste it would appear that the children of a

sambandham connection may inherit their father"s property (vide the Gazette of Malabar, page 182). We think there should be definite findings on

these points in the case of the Thattan caste, since the customs of this caste appear not yet to have been the subject of judicial decisions, and a

decision in this case will affect the whole caste.

7. In. order that the matter may be reopened and properly tried, the findings that the plaintiff is a Veettukutti and that a Veettukutti has no share in

his father"s property must be set aside and we do so on the ground that they were never in issue in the case. The finding of the trying Court on

issue 2, as to partibility, is also set aside for reasons already given. The decisions of the lower Courts, based on these findings, are set aside.

8. The whole case is remanded to the original Court with a direction to rehear the case after framing and trying the following issues in the light of

the above remarks:

I. Does the ordinary Hindu law of partibility of joint family property not apply to the Thattan caste in North Malabar, or is there any caste custom

to the contrary?

II. Is the plaintiff a Veettukutti, as that word is used by the Thattan caste?

III. Is a Veettukutti illegitimate in the legal sense of that word?

IV. Does a Veettukutti have no share in the joint family property?

V. Does an illegitimate Thattan have no share in the joint family property?

VI. If the property is partible and the plaintiff is legitimate, to what share is he entitled?

VII. If the property is partible and the plaintiff is a Veettukutti, is he entitled to any share, and if so what?

VIII. If the property is partible and the plaintiff is illegitimate is he entitled to any share and if so what?

9. Fresh evidence may be taken, as offered by either party or by the Court.

10. If the findings are that the property is impartible or that the plaintiff is not entitled to any share, it is not of course necessary to decide the other

issues as the plaintiff''s suit will fail in limine.

11. Costs up to date in both lower Courts will abide the result. Appellant will get his costs in this Court.