

Thomayar Vs. Mary

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Court : Kerala

Decided On : Mar-18-2003

Reported in : 2004(1)KLT863

Judge : K.S. Radhakrishnan and; K. Padmanabhan Nair, JJ.

Acts : Hindu Mitakshara Law; Indian Succession Act

Appeal No. : A.S. Nos. 330, 337 and 477 of 1989

Appellant : Thomayar

Respondent : Mary

Advocate for Def. : P.N.K. Achan, Sr. Adv. and; T. Sethumadhavan, Adv.

Advocate for Pet/Ap. : O. Ramachandran Nambiar,; N. Sudha and; K.S. Babu, A

Disposition : Appeal allowed

Judgement :

K.S. Radhakrishnan, J.

1. All these appeals arise out of a common Judgment in O.S.No. 88 of 1985 of the Sub Court, Palghat. A.S. No. 380 of 1989 is preferred by defendants 1 to 8. A.S.No. 477 of 1989 is by 9th defendant and A.S.No. 387 of 1989 is by 10th defendant.

2. Suit was instituted for partition of plaint B schedule properties and allotment of one-fourth share with appropriate mesne profits. The case of the plaintiff is as follows: Defendants 1 and 10 are the children of Anthoni Ammal. Ninth defendant is the sister of Anthoni Amma and they are the daughters of Ponnan alias Muthappan who is the son of Anthony Muthu. Anthony Muthu had two more children by name Nayakam and Alphonse. First defendant is the son of Nayakam. Nayakam had a daughter by name Anthoni Ammal. Defendants 2 to 8 are the children of the first defendant Eleventh defendant is the son of 7th defendant. Plaint B schedule property originally belonged to Ponnan alias Muthappan. Plaintiff's mother died in 1947. Ninth defendant is the maternal uncle of the plaintiff and the 10th defendant. Ponnan alias Muthappan predeceased his wife Nakshtrammal in the year 1955. First defendant was residing with Nakshtrammal and was helping her in conducting the agricultural operations of the property. Plaint B Schedule devolved upon the defendants 9 and 10 and on the plaintiff. First defendant purchased the share of the 9th defendant in the plaint B schedule properties near about the year 1959. Nakshtrammal cultivated the property with the help of defendants 1 and 10 and she used to pay the share of profits of the plaintiff during her lifetime. Nakshtrammal died in the year 1984. Subsequent to that, first defendant assumed control of the agricultural operations in the property and stopped payment of share of mesne profits to the plaintiff. Plaintiff issued notice dated 24th January 1985 to the first defendant demanding her share from the plaint schedule properties. According to the plaintiff, law applicable for the purpose of inheritance and succession is Indian Succession Act, According to the plaintiff, plaintiff and defendants are entitled to get one-fourth share each from the properties of deceased grandfather. Other half share devolved upon the 9th defendant. Defendants 1 to 8 are entitled to get only the right of the 9th defendant to the plaint schedule properties. Thus the plaintiff and the 10th defendant are entitled to get one-fourth share each and defendants 1 to 9 are entitled to one half share from the plaint schedule properties. Plaintiff claimed partition of the plaint schedule properties and for allotting her separate one fourth share with past and future mesne profits.

3. Written statement was filed by defendants 1 to 8. It was contended that plaintiff and defendants are Vaniya Christians of Chittur Taluk and are following the Hindu

Mithakshara Law for the purpose of inheritance and succession. The joint family of Muthappan and Nayakam owned plaint B schedule item No. 1 property in Swastham right. Plaint schedule items 2 and 3 properties were taken on lease by the first defendant from one late Anantharama Gounder about 40 years with a stipulation to pay annual rent of 825 paras of paddy and Rs. 165 per year. Muthappan had no right over the plaint B schedule item Nos. 2 and 3 properties. Half share of Nayakam in the plaint B schedule item No. 1 property devolved on the first defendant subsequent to the death of Nayakam. Muthappan died in 1955. So the half share of Muthappan in the plaint B schedule item No. 1 property devolved upon the first defendant by survivorship. First defendant was in cultivation of items 2 and 3 properties even during the lifetime of Muthappan. It is contended that Vaniya Christians are not governed by the Indian Succession Act.

4. Ninth defendant also filed separate written statement. It is contended that parties are governed by the Indian Succession Act.

5. In order to establish the case, plaintiff herself was examined as PW1 as well as PWs.2 and 3 were examined. DW1 was examined on the side of the defendant. Exts. A-1 and A-2 were marked on the side of the plaintiff and B-1 to B-54 were marked on the side of the defendants. Third party documents are marked as Exts.X1 to X3(a). Considering the oral and documentary evidence and the fact that the properties of first defendant was taken on lease by Ponnan and Nayakam the Court below found that plaintiff has succeeded in establishing that the plaint B schedule item No. 2 property is the leasehold property of Ponnan alias Muthappan. The Court also found that plaintiff has succeeded in establishing that item No. 3 property belonged to Ponnan alias Muthappan. It was also found that half of the plaint schedule item No. 1 belongs to Ponnan and it is available for partition. With regard to the question whether plaintiff and defendants are governed by the Hindu Mitakshara Law in matter of succession and inheritance the Court below took the view that the law applicable to the parties is Section 5 of the Indian Succession Act and not the provisions of the Indian Succession Act. That issue was found in favour of the plaintiff. With regard to the question whether plaintiff is entitled to claim any share on plaint B schedule property the court below found that in items 2 and 3 properties plaintiff was not entitled to claim any right.

The court below therefore decreed the suit holding that plaintiff is entitled to get 3/24 separate share from the plaint schedule item No. 1 after partitioning the properties with metes and bounds. It was also declared that defendants 1, 9 and 10 are entitled to get 16/24, 2/24 and 2/24 share respectively from the plaint schedule item No. 1 property. Plaintiff is also entitled to get proportionate share of the mesne profits of the plaint schedule item No. 1 property from the date of suit till plaintiff gets her separate share from defendants 1 to 8. The claim for partitioning the plaint B schedule item No. 2 and 3 properties is found against the plaintiff.

6. When the matter came up for hearing, contention was raised by counsel on either side with regard to the law applicable in the matter of succession and inheritance as far as Tamil Vaniya Christians are concerned. In order to determine the issue the court below placed reliance on the decision of the Apex Court in *Anthony Swamy v. M.R. Chinnaswamy Koundan*, AIR 1970 SC 223 and the decisions of this Court in *Albuthammal v. Taluk Land Board*, 1977 KLT 333, *Lurthu Mary Amma v. Souriyar and Ors.*, 1987 (1) KLT 288. Placing reliance on the decision of this Court in *Mary Alias Kunjamma and Ors. v. Eliyamma and Ors.*, 1973 KLT 728, the Court below took the view that since subject matter of the suit lies outside Chittur Taluk and that execution of Ext. B-53 release deed shows that the parties renounced their personal law and the law applicable to the parties is Section 5 of the Indian Succession Act for the purpose of inheritance and succession and not by the provisions of Hindu Mitakshara Law.

7. Counsel appearing for the appellant in A.S.No. 380 of 1989 took us through the decision of this Court in *Lurthu Mary Amma's case*, 1987 (1) KLT 288, wherein a Division Bench of this Court examined the scope of Section 29(1) of the Indian Succession Act and its applicability to Vaniya Christians Community in Chittur Taluk. That was a case where the trial court found that party would be governed by Hindu Mitakshara Law unlike in the instant case where the trial court held that parties are governed by the Indian Succession Act. The Division Bench after considering the impact of *Mary Roy and Ors. v. State of Kerala*, 1986 KLT 508 (SC), 1986 (2) SCC 209 on Christian inheritance held as follows:

'The Supreme court held that on the coming into force of Part B States (Laws) Act, 1951, the Travancore Christian Succession Act, 1092, corresponding to Chapter II of Part 5 of the Indian Act was repealed and that intestate succession in the case of members of the Indian Christian Community in the territories of the erstwhile State of Travancore was governed by, the Indian Act. The limited question that was decided in Mary Roy's case, was whether the Travancore Act or any part thereof survived after the Part B States (Laws) Act. The contention of the appellant that by reason of the law declared by the Supreme Court in the case of Mary Roy, the Indian Act would govern the parties must therefore fail. An ancillary argument was that statutory law replaced the customary law of succession viz., Hindu Mitakshara Law. There is no warrant to think so. The expression 'any other law for the time being in force' in Section 29(1) of the Indian Succession Act includes the Hindu Mitakshara Law'.

Further the Division Bench also took note of the decision of another Division Bench in CRP 728 of 1961 wherein it was held that the Legislature when it passed a comprehensive legislation for all the Christians of the State, chose to exclude this community and left them free to follow the tenets of Hindu Law. The Supreme Court in Anthonyswamy's case, AIR 1970 SC 223 also held that Hindu Mitakshara Law governed matters of succession in the case of Tamil Vaniya Christians of Chittur Taluk. In view of the authoritative pronouncement of the Apex Court as far as Tamil Vaniya Christians of Chittur Taluk are concerned, they are governed by Hindu Mitakshara Law and not Indian Succession Act. In such circumstances, judgment rendered by the Court below cannot stand. We therefore set aside the judgment and direct the trial court to consider the matter afresh under Hindu Mitakshara Law in the matter of succession and inheritance. All the appeals are allowed as above. Trial court will dispose of the matter as expeditiously as possible.