

Madras High Court

Puthiya Purayil Abdurahiman, ... vs Thayath Kancheentavida Avoomma ... on 7 September, 1955

Equivalent citations: (1956) 1 MLJ 119

Author: P Rajamannar

Bench: A R 1937, T A Intention, T O Was, S F Concerned, T T Reservation.

JUDGMENT P.V. Rajamannar, C.J.

1. The learned District Munsif of Cannanore has referred the following question for decision by this Court:

Whether the Madras Shariat (Amendment) Act (Act XVIII of 1949) is ultra vires of Article 19. Clause (1)(F) of the Constitution Act.

The question was raised in a suit pending before the learned District Munsif brought by the widow of one deceased Abdulla Kalpha for partition and separate possession of certain properties, described in schedule A to the plaint. Abdulla Kalpha was a member of a Marumakkathayam tarwad. On 30th October, 1918, the members of the tarwad executed a karar in and by which the main tarwad was divided into three tavazhis. Abdulla Kalpha was a member of the third tavazhi and was one of the executants of the document. The said karar provided inter alia that in case one tavazhi became extinct, the properties allotted to the said tavazhi would lapse to the other tavazhis. Abdulla Kalpha was the sole surviving member of the third tavazhi. He died on 10TH January, 1952. The main question in the case is whether on his death, the properties of the third tavazhi, which Abdulla Kalpha died possessed of, lapsed to the second tavazhi, the first tavazhi having become extinct, as per the terms of the karar, or whether the widow and other heirs of Abdulla Kalpha, according to the Muslim Shariat, i.e., personal law, became entitled to the said properties. The plaintiff claimed that she and the other personal heirs, defendants 1 to 8, became entitled to the properties, because of the provisions of the Madras Shariat (Amendment) Act of 1949.

2. Defendants 9 and 10, who are the karnavan and the senior most anandiravan of the second tavazhi, contended that the said Act was void because it was repugnant to the provisions of Article 19, Clause (1)(F) of the Constitution.

3. Madras Act XVIII of 1949, the impugned Act, amended the Muslim Personal Law (Shariat) Application Act (XXVI of 1937) passed by the Central Legislature. The only material section of the Act for the purpose of this reference is Section 2. That section originally stood as follows:

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession special property of females, including personal property properly inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talak, ila, zihar, lian, khula and mubarat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments), the rule of decision in cases where the parties are Muslims shall be the Muslim personal Law (Shariat).

This section was amended by the Madras Act XVIII of 1949 and the amended section runs thus:

Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talak, ila, zihar, lian, khula and mubarat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

The obvious object of the Madras Amendment was to extend the scope of the Central Act to agricultural lands as well within the State of Madras.

4. Mr. K.V. Venkatasubrahmania Iyer, who appeared on behalf of defendants 9 and 10, frankly conceded that he could not usefully urge the plea that Madras Act XVIII of 1949 was unconstitutional on the ground that it contravened Article 19(1)(F) of the Constitution, if the relevant provision, viz., Section 2 is construed in the only way it should be, viz., that it is only in respect of the enumerated matters that custom or usage has been abrogated, and the result of the Act is not to totally repeal by implication all the prior enactments, customs and usages relating to Moplah Muslims, who were governed by the Marumakkathayam Law. Undoubtedly, the impugned Act does not purport to repeal any statutes not mentioned therein, nor does it in general terms enact that custom and usage have been completely abolished.

5. Learned Counsel, however, drew our attention to a decision of Basheer Ahmed Sayeed, J., in *Ayisumma v. Mayomooty Umma*, in which observations occur which appear to suggest that the Central Act XXVI of 1937, read with the Madras Amendment Act XVIII of 1949, has the effect of completely abrogating the customary Marumakkathayam Law in all matters without reservation. It has, therefore, become necessary to consider that decision and the observations occurring therein.

6. Before doing so, it is useful to briefly refer to the several enactments relating to Malabar Moplahs. The first of these is the Mappilla Succession Act (I of 1918). It was an Act intended to amend and define the law of intestate succession among Mappillas governed by the Marumakkathayam or the Aliyasanthana Law of Inheritance. Sections 2 and 3 are the only substantive sections and they run thus:

2. A person is considered to die intestate in respect of all property of which he has not made a testamentary disposition capable of taking effect.

Explanation: 'Property' in this section does not include tarwad property unless the person dying intestate was exclusively entitled to it.

3. Such property shall, notwithstanding any custom to the contrary, devolve upon his heirs in the order and according to the rules of Muhammadan Law.

The next is the Mappilla Wills Act (VII of 1928) which provided that testamentary dispositions by Mappillas, governed by the Marumakkathayam or Aliyasanthana Law of Inheritance in respect of property, which but for such testamentary disposition would devolve in accordance with the provisions of the Mappilla Succession Act of 1918, shall be governed by the Muhammadan Law relating to wills and not by the Malabar Wills Act of 1898. The next Act, which was of a far more comprehensive nature than the two earlier Acts, is the Mappilla Marumakkathayam Act (Madras Act XVII of 1939). In several respects this corresponds to the Marumakkathayam Act (Madras Act XXII of 1933). It deals with the tarwad and its management, the duties of the karnavan and the rights of the junior members of the tarwad, investment of the surplus income, debts and alienations, removal of the karnavan partition and registration of tarwads. Section 13 of this Act conferred for the first time on an individual member of a tarwad the right to take his or her share of the properties of the tarwad over which the tarwad had power of disposal and to separate from the tarwad. Section 17 provided that in case of a division under Section 13 the individual member shall be entitled to such share of the tarwad properties as would fall to such individual member if a division per capita were made among all the members of the tarwad then existing. Succession to the property obtained by an individual member on partition was to be governed by the Islamic Law of Inheritance (section 18).

7. The only Central Act to which reference need be made is the Muslim Personal Law (Shariat) Application Act (XXVI of 1937). Section 2 has already been given above. Section 3 of that Act ran thus:

3. (1) Any person who satisfies the prescribed authority

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of Section 11 of the Indian Contract Act, 1872, and

(c) that he is a resident of British India, may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the provisions of Section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under Sub-section (1), the persons desiring to make the same may appeal to such officer as the Provincial Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

In 1943, for the words "the provisions of Section 2" the following words were substituted, viz., "the provisions of this section." Section 6 repealed several provincial enactments in so far as they were inconsistent with the provisions of the Act, One of them was Section 16 of the Madras Civil Courts Act, 1873. To understand the implication of that repeal, it is necessary to extract Section 16 of the Madras Civil Courts Act. It runs thus:

16. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution,

(a) the Muhammadan Law in cases where the parties are Muhammadans and the Hindu Law in cases where the parties are Hindus, or,

(b) any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished;

(c) in cases where no specific rule exists, the Court shall act according to justice, equity and good conscience.

If there is one thing clear on the language of Section 2 of the Central Shariat Act and Section 2 of the Madras Amending Act of 1949, it is that neither enactment purported to make the Muslim Personal Law applicable to all matters relating to Muslims. Nor did it in terms totally abrogate custom and usage in respect of matters other than those enumerated in Sections 2 and 3 of the Central Act and Section 2 of the Local Act. No doubt, Section 16 of the Madras Civil Courts Act was repealed but only so far as it was inconsistent with the provisions of the Central Act. It follows therefore that as regards matters not covered by the Central Act, Section 16 continues to be applicable.

8. Section 2 of the Central Act and as amended by the Madras Act expressly mentions "intestate succession." But neither the Central Act nor the Madras amendment even attempts to specify the properties to which the rules of intestate succession would apply. Whenever a question arises as to what property would fall within the scope of a rule regarding intestate succession, that question will have to be decided on the law in force, whether it is embodied in statutes or in custom and usage. Neither the Central Act nor the Madras amendment seeks to enlarge the powers and property rights of Muslims dying intestate. To give an extreme example, if a Muslim had only a life-interest in a property, the Shariat Act certainly would not have the effect of converting it into an absolute estate in respect of which there could be intestate succession. Before Section 2 of the Act could apply as regards intestate succession to a Muslim, there should be property of that Muslim which would devolve on his heirs in the absence of a testamentary disposition. Who the heirs would be is, of course, a different question. Assuming there was property which would devolve on i.e., which would be inherited by, his heirs, before the Act, the heirs had in certain cases to be ascertained by reference to custom and usage. Undoubtedly that would not be so after the coming into force of the Central and the Local Acts. The heirs would not be the customary heirs but only heirs according to the Shariat. That is the effect of the Shariat Acts. If, therefore, a Muslim did not have at the time of his death any proprietary interest in property which would descend to his heirs as on intestate succession, but would survive to other members of the family unit to which he belonged, as for example a tarwad, then in our opinion, there is no scope for the application of Section 2 of the Shariat Act.

9. In our opinion, the Shariat Act (including the Madras amendment) did not purport to nor did it abolish the rights and incidents of a Mappilla Marumakkathayam tarwad.

10. The Shariat Act of 1937 by itself did not confer the right of partition on the individual members of the tarwad when the tarwad consisted of Muslims. The following observations of Basheer Ahmed Sayeed, J., are, with great respect to the learned Judge, not warranted upon the language of the Act of 1937:

... Even if the Mappilla Marumakkathayam Act (Madras Act XXVII of (1939) was not enacted, the position would not have been different, for under the Muslim Personal Law (Shariat) Application Act, it would have been still open to a junior member of the tarwad or his heirs to apply for a partition of the property of the tarwad under the Muslim Personal Law (Shariat) Application Act.

We are unable to see any basis for this conclusion of the learned Judge. None of the subjects mentioned in Section 2 relates to partition by a living member of the tarwad. So far as we are able to gather, the only basis for the learned Judge's conclusion appears from the following sentence:

For it cannot be denied that the object of the Muslim Personal Law (Shariat) Application Act was to put an end to all the anti-Islamic customs and rules that had obtained the force of law and in their stead to apply the original principles of Islamic law itself.

This assumption is certainly not justified by the limited scope of Section 2 of the Act.

11. That the scope of the Shariat Act of 1937 is limited and does not cover the entire field of property rights is the view taken by other High Courts. In *Mohiuddin Ahmed v. Sofia Khatoon* I.L.R. (1940) 2 Cal. 464 at 473, it was held by a Division Bench of the Calcutta High Court that Section 2 had no application to the provisions of the Mussalman Wakf Validating Act, 1913. They refused to accept the contention that that section had restored in its complete form the Mussalman Law of Wakf. The learned Judges said:

Before the passing of the Shariat Act, Section 37 of the Bengal, Agra and Assam Civil Courts Act (XII of 1887) provided for the application of Mussalman Law to questions of succession, inheritance, marriage and religious usage and institutions only and left all other matters to be decided according to equity and good conscience. No doubt, other branches of Mussalman Law were applied to other subjects, but only under the head of equity and good conscience. The Acts and Regulations in force in the Presidency towns and in other provinces were similarly worded. The effect of Section 2 of the Shariat Act is to make the Mussalman Law expressly applicable to subjects, which, under the terms of previous Acts and Regulations had to be decided on principles of equity and good conscience. That this was the object of Section 2 is made clear by the repeal of parts of the earlier Acts and Regulations mentioned in Section 6.

12. In *Ashraffalli Cassim v. Mahomedalli Rajaballi* I.L.R. (1947) Bom. 1 at 7, Chagla, J., (as he then was), dealing with the question how far the Shariat Act affected the legal position so far as it refers to *khojas* observed thus:

Section 2 of that Act abrogates all customs and usage which is contrary to Muhammadan Law in those matters which are enumerated in that section and applies to Muslims their strict Muslim

Personal Law. The only subjects that I need refer to are intestate succession, gifts, trusts and trust properties, and wakfs. It is to be noted that testate succession is not referred to in that section. Therefore it is clear that any established custom with regard to testate succession which departs from Muhammadan Law can still be enforced by Courts of Law, and as I have already held that khojas were governed by Hindu Law both in matters of testate and intestate succession, although in the case of the latter, they would now be governed by Muhammadan Law, as far as the former is concerned, their customary law would still prevail.

(Vide also *Ata Mohammad v. Mohd. Shafi* A.I.R. 1944 Lah. 121 at 125, per Mahajan, J.).

13. Taking the Act of 1937 by itself, the limited scope of the Act becomes amply evident. There is first the enumeration of certain subjects in Section 2 under which the Muslim Personal Law is made applicable to questions regarding these subjects irrespective of volition of parties. Section 3 mentions three more subjects, viz., adoption, wills and legacies. In respect of these matters, the Muslim Personal Law will only apply if a person who is a Muslim competent to contract and resident of India makes a declaration that he desires to obtain the benefit of that section. It is only then that the law relating to those matters would be Muslim Personal Law. Even then, it will only apply to the declarant and all his minor children and their descendants. Section 6, as already mentioned, does not repeal the enactments mentioned therein except in so far as they are inconsistent with the provisions of the Act.

14. Basheer Ahmed Sayeed, J., in *Ayisumma v. Mayomoot Umma* (1952) a M.L.J. 933, was of the view that Sub-clause (b) of Section 16 of the Madras Civil Courts Act cannot be said to be consistent with Section 2 of the Shariat Act of 1937 and that, therefore, that sub-clause should be considered to be repealed by Section 6 of the Shariat Act. With deference to the learned Judge, we must say that the statement is a little too wide. A more accurate statement would be that sub-clause should be considered to be repealed in all matters set out in Section 2 of the Shariat Act. The same must be said of the statement of the learned Judge that in consequence of the Central Shariat Act as amended by the Madras Act.

so far as the Province of Madras is concerned The Muslim Personal Law was made applicable to all properties owned by Muslims, including the agricultural lands.

We cannot agree with the following conclusion of the learned Judge:

A reading of the original Act (XXVI of 1937) and the amendment made by Madras Act (XVIII of 1949) would go to show that the intention and the object of this enactment was, so far as at any rate the State of Madras was concerned, that the Muslim Personal Law (Shariat) Application Act should govern the Muslims in all matters without any reservation.

Having held that Sub-clause (b) of Section 16 of the Madras Civil Courts Act had been repealed in toto, the learned Judge proceeds to say that the customary rule of inheritance by survivorship cannot be made applicable by Courts of Law in this country to Muslims, and, therefore, the proprietary interest of a member of a Mappilla tarwad, if such a member died intestate, would

devolve upon his heirs according to Muslim Law. We have already shown how the learned Judge's view that Sub-clause (b) of Section 16 of the Madras Civil Courts Act has been wholly repealed cannot be supported. Again, with respect to the learned Judge, we must hold that no member of a Mappilla tarwad has till partition a share in the property of the tarwad which devolves on any one on his death as on intestate succession. In our opinion, it is not correct to say that when a junior member of a tarwad dies "his share" survives to the other members of the tarwad. The correct legal position is that the property is owned by the tarwad as a composite entity, the members of which fluctuate, i.e., the members increase or decrease. In a Hindu Mitakshara joint family at least a junior coparcener in Madras can alienate his undivided share, though he cannot make it the subject of a testamentary disposition. Such a share can be attached by a creditor and brought to sale to satisfy the individual debt of the coparcener. In a Marumakkathayam tarwad, there is no such thing. We are unable to appreciate how Basheer Ahmed Sayeed, J., could disregard the rulings of this Court beginning from *P.P. Kunhamod Hajee v. P.P. Kuttiath Hajee* (1881) I.L.R. 3 Mad. 169 Taking for instance *P.P. Kunhamod Hajee v. P.P. Kuttiath Hajee* (1881) I.L.R. 3 Mad. 169, which in the clearest terms laid down that a junior member of a tarwad had no separate interest in the tarwad property, and, therefore, nothing could devolve on his heirs on his death, the learned Judge gets over the decision by saying that it was long prior to the various enactments which had the purpose of taking out the Mappillas from the application of customary Marumakkathayam Law in matters of succession wills and partition. We are unable to understand what exactly was in the mind of the learned Judge. If he meant that subsequent legislation had the effect of conferring on the members of a Mappilla tarwad a right to a definite share in the tarwad properties even without partition which was capable of being governed by the rule of intestate succession, we must point out with respect that nothing of the sort was done by any enactment. The learned Judge gets over the decision in *Moidin Kutti v. Krishnan* (1887) I.L.R. 10 Mad. 322, also in the same way by referring to subsequent enactments. The learned Judge places reliance on decisions in which it has been held that the right of a member of a tarwad for allowance is an incidence of proprietorship in the property of the tarwad. But we fail to see how that conception can have any bearing on the question in issue, viz., whether a member of a tarwad has a definite share in the tarwad property which on his death could devolve on his heirs. It has been held in the case of impartible estates that the right of a junior member to claim maintenance from the holder for the time being is founded on co-proprietorship. But surely this has never been understood to mean that each junior member has a definite share in an impartible estate.

15. Dealing with an argument pressed before him that a member of the tarwad should at least have put forward a claim for partition during his lifetime before he could be deemed to have left anything to devolve as on intestate succession, Basheer Ahmed Sayeed, J., said at page 941:

When once the right to succession by the customary law of survivorship has been repealed by the Muslim Personal Law (Shariat) Application Act and the Muslim Personal Law has been made applicable to all Muslims including Mappillas, there can be no force in the argument that the junior member of the tarwad should have claimed partition before his death in order that his heirs might claim a right to his proprietary interest in the tarwad properties. Whether the junior member did or did not claim a right during his lifetime to partition, when his proprietary interest becomes inheritable under the Muslim Personal Law (Shariat) Application Act, then, on his demise, his heirs

would become automatically entitled to claim the right which has been left by him in so far as it has not been disposed of by any testamentary disposition. He would be deemed therefore to have died intestate in respect of his proprietary right or interest in the tarwad property and the surviving heirs of the deceased junior member would be entitled to claim partition of the property and have their share or shares separated from the property.

With respect, we cannot agree to this statement of the Law for reasons already given.

16. In the above view, no question of the constitutional validity of Madras Act XVIII of 1949 can arise. Our answer to the reference is that the said Act is not repugnant to Article 19(1)(F) of the Constitution.