

APPELLATE CIVIL

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Benson.

KUNHIMBI UMMA AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
APPELLANTS,

1903.
March 4.

v.

KANDY MOITHIN AND OTHERS (PLAINTIFF AND DEFENDANTS
NOS. 3 AND 4), RESPONDENTS.*

Malabar law—Devolution of property—Application of Marumakkatayam or Makkatayam law—Presumption where deceased was Muhammadan.

In North Malabar, where the devolution of property is in question, if the late owner was governed by the Muhammadan law, the presumption would be that the law governing the devolution of his estate would be the Muhammadan law, notwithstanding that the deceased was, through his mother, interested in tarwad property.

In *Assan v. Pathumma*, (I.L.R., 22 Mad., 494), the property, the devolution of which was in question, had belonged to a person who was admittedly governed by Muhammadan law. That case should not be understood as laying down that in every case between Muhammadans in North Malabar, even when they are members of a Marumakkatayam tarwad, the devolution of property is governed by the Muhammadan law until the contrary is shown.

Where the deceased has followed the Marumakkatayam law his self-acquired property passes, on his death, to his tarwad.

SUIT for a declaration that the otti rights of one Kunhayan Kutti, deceased, were liable to be sold in execution of a decree of which plaintiff was the transferee. Defendants Nos. 1 and 2 claimed the properties as the legal representatives of the deceased, who, they said, had followed Makkatayam law. The District Munsif framed an issue as to whether the deceased was governed by Makkatayam law, as alleged by defendants Nos. 1 and 2 or by Marumakkatayam law, as alleged by plaintiff. He decided the issue in favour of plaintiff, and gave the declaration sued for. He said:—"In addition to the slight evidence adduced by plaintiff in favour of Marumakkatayam succession for the late Kunhayan Kutti, the fact that the High Court has held that in North Malabar the presumption is that the Muhammadans are governed by Marumakkatayam, (*Aryappalli Kuttiassan v. Chalil Biyatamma* (1)) is also

* Second Appeal No. 1527 of 1901, presented against the decree of M. J. Murphy, District Judge of North Malabar, in Appeal Suit No. 63 of 1901, presented against the decree of M. Subbayyar, District Munsif of Quilandy, in Original Suit No. 157 of 1900.

(1) S. App. No. 380 of 1895 (unreported).

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in plaintiff's favour, for first and second defendants have not proved the contrary by satisfactory evidence. I find the issue, therefore, for the plaintiff."

Defendants Nos. 1 and 2 appealed to the Acting District Judge, who concurred with the finding of the Munsif that the circumstances led to the conclusion that the deceased was a member of a tarwad following Marumakkatayam law. He continued:—"In connection with the law on the point, I am, however, referred to *Assan v. Pathumma*(1) and in particular to the dictum which appears at page 505. The case under consideration in that suit was different to that here. One of the persons there was admittedly a person governed by Muhammadan law and the remark in question was not, it is urged, an essential point in the determination of that suit. It has always, I think, hitherto been held in North Malabar that when a person is found to belong to a Marumakkatayam family, his self-acquisitions are presumed to be amenable to the same Marumakkatayam system of devolution, unless it is set up and proved that his self-acquisitions are, by custom or otherwise subject to the Muhammadan law of inheritance (*vide Illikka Pakramar v. Kutti Kunhamed*(2) and *Aryappalli Kuttassan v. Chalil Biyatumma*(3)). But in the ruling first quoted, the following remark occurs: "the Muhammadan law must be taken to govern the devolution of the separate and exclusive property of a Moplah, notwithstanding that he is a member of a tarwad owning property subject to Marumakkatayam law except when it is shown that the Muhammadan law has, even in regard to the separate and exclusive property of such a person, been superseded by rules, established by usage or otherwise." If this were to be held to throw the burden of proof henceforth on those who assert Marumakkatayam law for self-acquisitions of a person whose family follows that law, I should have referred the suit back to the District Munsif, for a special finding on an issue whether Marumakkatayam law did not prevail, also in regard to the deceased Kunnayan's private property. But in view of many cases decided specifically by the High Court to the contrary, I am doubtful as to the necessity of doing this. Besides, it was no part of the appellants' case in the lower

(1) I.L.R., 22 Mad., 494.

(2) I.L.R., 17 Mad., 69.

(3) S.A. No. 380 of 1895 (unreported).

Court that the devolution of the deceased's private property might be according to Muhammadan law, he himself as a member of his tarwad being Marumakkatayam. Their contention simply was that the deceased and his family also were followers of Mukkatayam and it was tacitly agreed that whatever law governed him and his family governed also his self-acquisitions. The nature of the exhibits and the arguments in the case show this. It must be conceded, however, that as the rulings on the points now stand, there is a certain amount of doubt regarding the presumption about the devolution of the self-acquired property of a member of a Marumakkatayam Moplah family." He dismissed the appeal.

Defendants Nos. 1 and 2 preferred this second appeal.

V. Ryrū Nambiar for appellants.

K. B. Subrahmanya Sastri for first respondent.

JUDGMENT.—With reference to the case *Assan v. Pathumma*(1), the fact that the property, the devolution of which was in question belonged to a person who was admittedly governed by Muhammadan law should not be overlooked. In such a case the presumption would be that the law applicable was the Muhammadan law, notwithstanding that the deceased owner of the inheritance was through his mother interested in tarwad property.

That case should not be understood as laying down that in every case between Muhammadans, in North Malabar, even when they are members of a Marumakkatayam tarwad, the devolution of property is governed by the Muhammadan law until the contrary is shown. The question will, to a great extent, depend upon the circumstances of each case and the presumption would often be in favour of the Marumakkatayam rule of devolution, since we know that, in fact, that rule is followed in very many instances by such families.

In the present case District Judge has considered the question with reference to the enjoyment of the property and the surrounding circumstances and has arrived at the conclusion that the deceased owner of the property was governed by the Marumakkatayam rule. Consequently the conclusion that the self-acquired property of the deceased passed to the tarwad is right.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 22 Mad., 494.