Kaliamma vs Janardhanan Pillai & Ors on 8 February, 1973

Equivalent citations: 1973 AIR 1134, 1973 SCR (3) 503, AIR 1973 SUPREME COURT 1134, 1973 (1) SCC 644, 1974 (1) SCJ 613, 1973 3 SCR 503, 1973 (1) SCWR 395, 1973 SCD 306

Author: A. Alagiriswami

Bench: A. Alagiriswami

PETITIONER:
KALIAMMA

Vs.

RESPONDENT:
JANARDHANAN PILLAI & ORS.

DATE OF JUDGMENT08/02/1973

BENCH:
ALAGIRISWAMI, A.
BENCH:
ALAGIRISWAMI, A.
DUA, I.D.
VAIDYIALINGAM, C.A.

CITATION:
1973 AIR 1134 1973 SCR (3) 503
1973 SCC (1) 644

ACT:
Hindu Law-Special custom-Proof of-Reliance on prior decisions when permissible.

HEADNOTE:
The appellant was the daughter of a member of the Krishnanwaka Community by one of his two wives, and the first respondent was his son by the other wife. The appellant filed the suit claiming half share of her father's property on the basis of a custom of special kind of Patnibhagam. The special kind of Patnibhagam pleaded by the appellant was that even a daughter was entitled to a share. On her behalf, reliance was placed on certain earlier decisions regarding the prevalence of the customs in the community. The trial court dismissed the suit, but the first appellate court held in favour of the appellant. In

second appeal, the High Court took the view that the decisions relied on by the first appellate court could not be said to have established the existence of the special custom.

Dismissing the appeal to this Court,

HELD: (1) A custom which has been recognised and affirmed in a, series of decisions each of which was based on evidence adduced in the particular case may become incorporated in the general law, and proof of it then becomes unnecessary under s. 57(1) of the Evidence Act. [505G-H]

Rama Rao v. Rajah of Pittapur, [1918] I.L.R. 41 (Madras), 778 at 785, Pramraj v. Chand Kunwar, [1947] 11 M.L.J. 516 and Ujagar Singh v. Mat. Jeo, [1959] 2 S.C.R. (Suppl.), 781 followed.

(2) Among the decisions cited only one decision recognised the special kind of patnibhagam pleaded by the appellant. But even that decision did not proceed on the basis of the evidence in the case but relied upon the observations of the learned judges who decided Ramaswami Sadasivan v. Thanu Gouri. But those observations were pot based on a discussion of the evidence and were not necessary for the decision of that case. [50 D]

Avikutti Bhagavathi & Ant-. v. Chithambaratham Mathevan, reported in 8 T.L.R. 51, Ramaswami Sulusivan v. Thanu Gouri reported in Kolappa Pillai's unreported important cases, p. 179 and Hagaru Pillai Saraswathi Amma v. Thanu Pillai Thanu Pillai, reported in 1944 T.L.R. 710 referred to.

(3) While it is true that the community is a very small community found in a small local area and cases reaching courts may not be many, the court cannot, on that ground, ignore the well established principle before a custom can be held as having been proved on the basis of earlier decisions. Those decisions should have been based on evidence adduced in those cases. But in the present case, neither of the two decisions which refer to the special kind of patnibhagam pleaded by the appellant was based on the evidence in the case. [508 F-H; 509 A-B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1251 of 1967.

Appeal by special leave from the judgment and order dated September 29, 1966 of the Madras High Court in S.A. No. 167 of 1963.

K. T. Harindranath, S. N. Sudhakaran, P. Kesava Pillai and M. R. Krishna Pillai, for the appellant. Lily Thomas and A. Sreedharan Nambiar, for respondent No. 1. The Judgment of the Court was delivered by ALAGIRISWAMI, J. This is an appeal by special leave against the judgment of the High

Court of Madras in Second Appeal. The appellant is the daughter of one Ayyappan Mathevan Pillai, who died on 17th January, 1949, by one of his wives, the second respondent. The first respondent is his son by another wife. The parties belong to the Krishnanvaka Community found mainly in the Kanyakumari district of Tamil Nadu. During the appellant's minority her mother and the first respondent entered into a deed of partition under which the appellant was given 9 out of 79 items belonging to her father. She filed the suit out of which this appeal arises for partition and possession of a half share in all her father's properties. Her claim was based on the allegation that in the community to which the parties belong there was a custom of a special kind of pathnibhagam. While under the ordinary pathnibhagam a man's sons by different wives get their shares on the basis that whatever their number the property is divided according to the number of wives he had, rather than, on a per capita basis, the special kind of pathnibhagam pleaded by the plaintiff was that even a daughter was entitled to share on the same basis. She pleaded that as Mathevan Pillai had two wives and she was the daughter by one wife and the 1st defendant the son by the other wife each of them was entitled to a half share.

The learned Subordinate Judge who tried the suit, on a con- sideration of the evidence in the case, as also various earlier ,,decisions regarding this custom held against the plaintiff. Oil appeal the District Judge of Kanyakumari without going into the evidence but on the basis of some earlier decisions allowed the appeal. In the Second Appeal before the High Court the learned 'Single Judge took the view that the decisions relied on by the District Judge cannot be said to have established the existence of the special custom pleaded by the plaintiff. The 1st defendant also sought to sustain the partition deed on the basis that it was the result of a family arrangement. But the learned Judge did not think it necessary to go into that question in the view he took regarding the custom pleaded by the plaintiff.

The question that arises for decision in this case is whether the custom pleaded by the appellant has been established. On behalf of the appellant reliance was not placed on the evidence in the case to establish the custom. The argument was simply based on certain earlier decisions regarding the prevalence of the custom of pathnibhagam among the community to which the parties belong. The legal position regarding the place of customary law among the Hindus is now well established. In The Collector of Madura v. Moottoo Ramalinga Sethupathy(1) it was observed by the Privy Council :

> "Under the Hindu system of law clear proof of usage will outweigh the written text of the law."

In Rama Rao v. Rajah of Pittapur (2) the Privy Council observed :

> "When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading."

In Premraj v. Chand Kanwar (3) the Privy Council observed "It is not doubtful that the ordinary rule is that a party relying on a custom..... which is at variance with the ordinary Hindu law must

allege and prove it. But it is equally beyond doubt that a custom which has been recognised and affirmed in a series of decisions, each of them based on evidence adduced in the particular case. may become incorporated in the general law, with the result that the onus of proof no longer lies on those who assert it but upon those who assert an exception to it."

The latest decision is that of this Court in Ujagar Singh v. Mst. Jeo (4) wherein after referring to the statement of law in Rama Rao v. Rajah of Pittapur, earlier referred to, this Court pointed out that 'when a custom has been so recognised by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under s. 57(1) of the Evidence Act.' In the particular circumstances of that case this Court pointed out that there was a formidable array of authorities in support of either view, and, therefore, went into the evidence and held that the respon- (1) (1868) 12.M.I.A., 397,436.

(3) (1947) H M.L.J. 516 (P.C.) (2) (1918) I.L.R. 41 (Madras), 778 at 785. (4) (1959) 2 S.C.R. (Suppl.), 781.

dent therein had proved a custom whereby a sister was entitled to succeed in preference to the collateral relations of her brother.

Now let us see whether in the community to which the parties belong the rule of pathnibhagam with the special modification of that rule pleaded by the plaintiff is prevalent. That the rule of pathnibhagam is prevalent in various parts of the country there is no doubt. In Palaniappa Chettiar v. Alagan Chetti(1) the Privy Council referred to the statement of law by Mayne in his Hindu Law (Edn. 7), para. 473 to the following effect :

> "In some families, however, a custom called patnibhaga prevails of dividing according to mothers, so that if A had two sons by his wife B and three sons by C. the property would be divided into moieties, one going to the sons by B, and the other to the sons by C, Somrun Singh v. Kkedun Singh. This practice prevails locallY in Oudh, as evidenced by numerous Wajib ularz, which I have seen in cases under Appeal to the Privy Council."

They also referred to the prevalence of the custom in many parts of Southern India. as referred to by Mr. Ellis, on page 357 of Vol. II of Strange, and at page 167 of that work to the following effect :

> "The division of estates, in case of one person having several families by different women, among the families in equal shares without reference to the number of persons in each."

Their Lordships, therefore, approached the evidence in that case with a knowledge that such a custom does exist, and was not an improbable one in the particular case, and after examining the evidence came to the conclusion that the custom of Patnibhaga was proved.

We may now refer to the decisions that were cited before the Courts below and were relied upon before this Court. The earliest one is a decision of the year 1890, in Avikutti Bhagavathi & ANR. v. Chithambarathanu Mathevan, reported in 8 T.L.R. 51 where the effect of the evidence was stated as follows :

> "From the evidence on both sides, it is clear to us that Krishnavakakkar to which the parties belong, follow the Hindu law with one or two points of divergence from it, viz. the widow cohabiting with the brother of her deceased husband and the existence of Pathni Bhagam."

(1) (1921) I.L.R. 44 (Madras), 740.

The next decision is of the year 1904, in Ramaswami Sadasivan v. Thanu Gouri, reported in Kolappa Pillai's unreported important cases p. 179. Here again on a Consideration of the evidence it was held that the preponderance of evidence as a whole was in favour of Pathni Bhagom. But one of the learned Justice observed :

> "The Pathni Bhagon which prevails in this com- munity seems to go even beyond the usual custom known as Pathni Bhagom. that it is not only sons of different mothers that take per stirpes (according to the number of mothers) but when one mother has got only female issue and another a male issue the female issue get a half share in their father's properties and the male issue by the other wife of the father takes the other half."

It is upon this decision that, the plaintiff, based her whole case. It must be pointed out, however, that the learned Judge did not go into the evidence regarding the particular type of pathnibhagam which was stated to be prevalent among this community. Nor was it necessary to decide that question for the purpose of that case. It was a mere passing observation and this is a solitary case in which such a special custom is mentioned. We then come to another decision of the year 1944, in Nagaru Pillai Saraswathi Amma v. Thanu Pillai Thanu Pillai, reported in 1944 T.L.R. 710. In that case also the special custom pleaded by the plaintiff did not arise for decision. What; was urged was the right of absolute ownership for a widow of a member of a Krishnanvaka community. The argument was that the existence of Pathnibhagam in the community implied the principle that on the death of the husband of a Krishnavakakar woman, in the absence of his children, she was entitled to inherit her husband's property absolutely. This contention was rejected but the decision proceeded on the basis that the custom of Pathnibhagam was prevalent in this community.

There is a decision of the District Court of Nagercoil in O.S. No. 109 of 1096 M.B., dated 22nd December. 1923, marked Ex A-6.. wherein it was observed:

> "But it has been held in Kolappa Pillay, page 179 that in the community Krishnavakakars to which the parties belong that when a man dies leaving two wives even though one wife might have only female issues such females issue are entitled to a half share as the Pathnibhagam to their mother. It appears to me therefore that

> under the ruling in Kolappa Pillay's Select Decisions cited before in which 8 T.L.R. 51 and T.L.R. 7-L796Sup.C. I. /73 .lm15 16, Calcutta 759 have been cited and followed, plaintiffs are also entitled to a half share in the assets of Kunchan."

There is another decision of the District Munsiff's Court of Kuzhithurai in O.S. No. 18 of 1959, dated 2nd January, 1960, wherein it was observed "Ex. B. 26 judgment proceeded on the basis that as the parties belonged to Krishnan Vakakkar community per capita division among them-is not allowable. That community does not follow Hindu Mithakshara Law. There is authority for the possession that this community follows the system known as Patnibhagam under which property of the deceased is inherited according to the number of widows he had irrespective of the existence of the children to the deceased."

This decision recognised the existence of Pathnibhagam but not the special custom pleaded by the plaintiff. It is thus seen that most of the decisions either expressly or implicitly recognised the existence of custom of Pathnibhagam In this community, but the decision found in Ext. A-6 is the only one on the special kind of pathnibhagam pleaded by the plaintiff and is directly in point. But even this decision did not proceed on the basis of the evidence in the case. It relied on the observation of the learned Chief Justice in the decision already referred to, in Ramaswami Sadasivan v. Thanu Gouri. This observation was not, however, based on a discussion of the evidence and was not necessary for the decision in that case, as already pointed out.

While it is true that this community is a very small commu- nity found within a small local area and the cases that are likely to arise in that community, which will reach the courts may not be many, we cannot merely on that ground ignore the well established principle that before a custom can be held as having been proved merely on the basis of earlier decisions, those decisions, should have been based on evidence adduced in respect of the cases. That test is not satisfied in this case. Neither of the two decisions which refer to the special kind of pathnibhagam pleaded by the plaintiff was based on the evidence in the case. Thus while the existence of the custom of pathnibhagam in the community may be said to have been established, the special kind of pathnibhagam pleaded by the plaintiff cannot be said to have been established and the appellant cannot succeed unless she establishes the latter. In this view it is unnecessary to go into the question of family arrangement. The appeal is dismissed with costs of the 1st respondent to be paid by the appellant.

V.P.S. Appeal dismissed.