

**Maliya Kalakath Bava Vs. W.C. Pathuma and ors.**

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**Court :** Chennai

**Decided On :** Jul-23-1912

**Reported in :** 16Ind.Cas.689

**Judge :** Sundara Aiyar and; Sadasiva Aiyar, JJ.

**Appellant :** Maliya Kalakath Bava

**Respondent :** W.C. Pathuma and ors.

**Judgement :**

1. The suit in this case is by a Muhammadan lady for a share in the properties alleged to have belonged to her mother. The parties are Muhaminadans. The properties might, for the purpose of this second appeal, be taken to have originally belonged to one Aliyathamma. She had two sons, Assanar and Parukuthi and a daughter, Ayissa. Assanar married Ummachumma. Ummachumma had a husband prior to her marriage with Assanar and the 1st plaintiff is her daughter by the first marriage. Defendants Nos. 5 to 9 are the children of Ayissa. The 1st plaintiff claims a share of items Nos. 1 and 2 in the plaint schedule on the ground that they belonged to Assanar and that Ummachumma was entitled to a share of those properties as Assanar's widow and that she herself was entitled to a share of Ummachumma's share. Her claim to the other items was traced from Aliyathamma in whom their ownership was originally vested. The District Munsif at first dismissed the suit on the ground that Ummachamma had alienated her right to the properties to a stranger. On appeal, the Subordinate Judge held that the alienation, which is evidenced by Exhibit I, related only to Items Nos. 2, 3, 5 and 10 and asked the District Munsif to record his findings on the various issues framed in the suit. On remand, the defendant's contention before the District Munsif was that the 1st plaintiff was not entitled to any share in the properties not alienated under Exhibit I, because the family was governed by the Marumakathayam Law and, therefore, Ummachumma could not claim any right to any property of Assanar or of Aliyathamma through Assanar. He also found that Items Nos 1, 4 and 6 had been given away to Ayissa as stridhanam. According to him, the 1st plaintiff was entitled to a share of Items Nos. 7, 8, 9, 11 and 12.

2. On appeal, the Subordinate Judge accepted the District Munsif's finding with respect to Items Nos. 1, 4 and 6 and we see no reason to interfere with the finding that those items belonged to Ayissa as her stridhanam, property. But, with respect to the other items, viz, Nos. 7 to 9, 11 and 12, we are unable to accept the view taken by the Subordinate Judge. He says in paragraph 8 of his judgment: 'It is not the defendant's case that this is a Marumakathayam tarwad like the Moplah tarwads of North Malabar. The law of inheritance applicable to the properties of individual members is the Muhammadan Law. This does not prevent the descendants of a female ancestor from holding impartible properties like a Marumakathayam tarwad.'

It is not quite clear what the Subordinate Judge's conception is of the tenure on which the properties are held. He refers to the deposition of Parookutty in which he said: 'Females live in the tarwad house. Males live in their wife's houses. Males are not given a share in the tarwad house in which the females live and in the tarwad properties.' It is not quite clear whether the Subordinate Judge means that the female children of Aliyathumma and the female issue of those female children would alone be entitled to the properties. If so, such a tenure of property is not known either to the Muhammadan Law or to the Marumakathayam Law, by which some Muhammadans of Malabar are governed. Apparently, the judgment is based on the view that whoever exactly may be the persons entitled to the property, no one can claim to enforce a partition. He observes in Paragraph 5 of his judgment: 'That certain Moplah families in Calicut, Parapanangadi, Tanur and Ponani are called tarwads and that they possess common properties which are managed by the karnavan or senior female member and they cannot be alienated by individual members is a well known fact. The female members live in the tarwad house and their husbands visit them there. They do not go and live with their husbands like other Moplahs.' Beyond observing that the families are called tarwads and that the members live together, he does not say that there is a binding custom of impartiality of tenure. Perhaps, the observation that the members are not entitled to alienate may indicate that such is his view. If so, is the custom a local custom or the custom of particular tarwads? Such a question could have been decided on the evidence in the case. We may also observe that the Subordinate Judge's observation in Paragraph 7 of his judgment shows that male members are not shut out from all participation in the properties. Our attention is not called to any evidence that there is a binding custom of impartibility among the owners. All males and females entitled to shares under the Mahommedan Law must be deemed to have rights of inheritance in the properties. The Subordinate Judge has not recorded a finding on the question whether Aiyssa was entitled to Items Nos. 7 and 3 as stridhanam property. The District Munsif says that the claim of stridhanam regarding those items was not proved. There is no documentary evidence bearing on that point. We confirm the Munsif's finding that the 2nd plaintiff as the 1st plaintiff's assignee is entitled to a share in those items also. The decrees of both the Courts will be reversed and there will be a decree in favour of the 2nd plaintiff for 1/90th share of items Nos. 7 to 9, 11 and 12. There will be a partition by metes and bounds. The lower Appellate Court will hold an inquiry as to the amount the plaintiff is entitled to as mesne profits from the date of plaint up to the date of delivery of possession and pass a final decree for the amount found due.

3. The plaintiff and the contesting defendants will have proportionate costs through out.