

# VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

MONDAY, THE 29<sup>TH</sup> DAY OF MAY 2023 / 8TH JYAISHTA, 1945

RSA NO. 770 OF 2011

AGAINST THE JUDGMENT & DECREE DATED 15.11.2008 IN AS.NO.  
138/2000 OF SUB COURT, NEYYATTINKARA  
O.S.NO.784/1998 OF PRINCIPAL MUNSIF'S COURT , NEYYATTINKARA

APPELLANTS/RESPONDENTS 1 TO 5 & ADDL.RESPONDENTS 9, 11 TO  
13/ORIGINAL DEFENDANTS 1 TO 5:

- 1 ARUMUGHOM ACHARI RANGANATHAN ACHARI (DIED)  
VADAKKE KARUMANIKOM VILAKATHU PUTHENVEEDU,  
VIZHINJAM THERUVU, VENGANNOOR DESOM,  
VIZHINJAM VILLAGE.
  - 2 ARUMUGHOM ACHARI RAMALINGOM ACHARI (DIED)  
RESIDING AT -DO-
  - 3 ARUMUGHOM ACHARI VEERAMANIKANTAN ACHARI  
RESIDING AT -DO-
  - 4 ARUMUGHOM ACHARI RAJAN ACHARI  
RESIDING AT -DO-
  - 5 RAJAM, W/O. LATE VEERABHADRAN ACHARI  
RESIDING AT -DO-
  - 6 KALA, D/O. LATE VEERABHADRAN ACHARI  
RESIDING AT -DO-
  - 7 USHA, D/O. LATE VEERABHADRAN ACHARI  
RESIDING AT -DO-
  - 8 SINDHU, D/O. LATE VEERABHADRAN ACHARI  
RESIDING AT -DO-
- ADDL.A9 IMPA KUMARI @ INDU KUMARI,  
W/O.LATE A.RENGANATHAN ACHARI, RESIDING AT  
VADAKKEKARUMANIKKOM VILAKATHU PUTHEN VEEDU,  
VIZHINJAM THERUVU, VENGANNOOR DESOM,  
VIZHINJAM VILLAGE, PIN-695 521.
- ADDL.A10. R.VENU, S/O.LATE ARUMUGHOM ACHARI, RESIDING AT  
VADAKKEKARUMANIKKOM VILAKATHU PUTHEN VEEDU,  
VIZHINJAM THERUVU, VENGANNOOR DESOM,  
VIZHINJAM VILLAGE, PIN-695 521.

## VERDICTUM.IN

R.S.A.No.770 of 2011

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ADDL.A11 R.VINOD,AGED 36 YEARS,  
S/O.LATE ARUMUGHOM ACHARI,  
RESIDING AT VADAKKEKARUMANIKKOM VILAKATHU  
PUTHEN VEEDU, VIZHINJAM THERUVU,  
VENGANOOR DESOM, VIZHINJAM VILLAGE,  
PIN-695 521.

ADDL.A.12 R.I.INDU,AGED 32 YEARS,D/O.LATE ARUMUGHAM  
ACHARI, RESIDING AT VADAKKEKARUMANIKKOM  
VILAKATHU PUTHEN VEEDU,VIZHINJAM THERUVU,  
VENGANOOR DESOM, VIZHINJAM VILLAGE,PIN-695 521.

(ADDL.A9 TO A12 ARE IMPEADED AS THE LEGAL  
REPRESENTATIVES OF THE DECEASED 1ST APPELLANT  
AS PER THE ORDER DATED 23.11.2021 IN  
IA.1250/2016 (AMENDED IA) IN RSA.770/2011).

ADDL.A.13 S.SUDHA @ SINDHU, W/O.LATE RAMALINGAM ACHARI,  
AGED 63 YEARS,RESIDING AT VADAKKEKARUMANIKKOM  
VILAKATHU PUTHEN VEEDU,VIZHINJAM THERUVU,  
VENGANOOR DESOM, VIZHINJAM VILLAGE,PIN-695 521.

ADDL.A.14 S.REMA,D/O.LATE RAMALINGAM ACHARI,  
AGED 36 YEARS,RESIDING AT VADAKKEKARUMANIKKOM  
VILAKATHU PUTHEN VEEDU, VIZHINJAM THERUVU,  
VENGANOOR DESOM, VIZHINJAM VILLAGE,PIN-695 521.

ADDL.A.15 R.NAGARAJAN,S/O.LATE RAMALINGAM ACHARI, AGED 35  
YEARS, RESIDING AT VADAKKEKARUMANIKKOM  
VILAKATHU PUTHEN VEEDU,VIZHINJAM THERUVU,  
VENGANOOR DESOM, VIZHINJAM VILLAGE,PIN-695 521.

(ADDL.A13 to A15 ARE IMPEADED AS THE LEGAL  
REPRESENTATIVES OF THE DECEASED 2ND APPELLANT  
AS PER ORDER DATED 23.11.2021 IN IA.1/2019  
(AMENDED IA.) IN RSA.770/2011.)

BY ADVS.VADAKARA V.V.N.MENON  
N.S.GOPAKUMAR

RESPONDENTS/APPELLANTS AND RESPONDENTS 6 TO 8 AND ADDL.  
RESPONDENT NO.10/2ND PLAINTIFF AND THE CHILDREN OF THE  
DECEASED 1ST PLAINTIFF AND DEFENDANTS 6 TO 8:

- 1 RAJAMMA SAROJAM, T.C.NO.23/499,  
CHENNASALA GRAMAM, CHALA VILLAGE,,  
THIRUVANANTHAPURAM - 695 036.
- 2 S.K. SIVADAS T.C.NO.40/1513  
S/O. LATE RAJAMMA KOLAMMA, ERATTAVILAMOM HOUSE,  
MANACADU, THIRUVANANTHAPURAM - 695 023.
- 3 K. SAROJINI, W/O.SIVARAMAN AND  
D/O. LATE RAJAMMA KOLAMMA, ANITHA BHAVAN,  
KALATHUKAL JUNCTION, KARAKULAM.P.O,,  
THIRUVANANTHAPURAM - 695 564.
- 4 K. VIJAYA, W/O.E.KUMAR AND  
D/O. LATE RAJAMMA KOLAMMA, NO.17, VEERABHADRA  
CHANDA, KALLAR,, NAGARCOIL, PIN - 629 001.
- 5 SANKARA NARAYANAN, S/O. LATE RAJAMMA  
KOLAMMA, IRATTAVILAKOM HOUSE, T.C 40/1513,  
MANACADU, MATTATHARA VILLAGE,  
THIRUVANANTHAPURAM - 695 023, (WORKING AS  
ELECTRICIAN, POST BOX NO.2045, SHARJAH, U.A.E.)
- 6 K.KRISHNAKUMAR, S/O.LATE RAJAMMA  
KOLAMMA, RESIDING AT -DO-, (WORKING AT POST BOX  
NO.66178, MUMBARAZ, AI-HASSAI, SAUDI ARABIA.)
- 7 RAJAMMA PREMKUMARI, VADAKKE KARUMANIKOM  
VILAKATHU PUTHENVEEDU, VENGANNUR DESOM,  
VIZHINJAM THERUVU, VIZHINJAM VILLAGE, PIN - 695  
521 (THE ADDRESS IS PURPOSELY WRONGLY GIVEN IN  
THE PLAINT BY THE PLAINTIFFS. SHE IS RESIDING  
IN TAMIL NADU WHOSE CORRECT ADDRESS IS NOT  
KNOWN)

8 KRISHAN KUMAR, (STRICKEN OFF)  
S/O.LATE VEERABHADRAN ACHARI,VADAKKE  
KARUMANIKOM VILAKATHU PUTHENVEEDU,VIZHINJAM  
THERUVU, VENGANNOOR DESOM, VIZHINJAM VILLAGE,  
PIN-695 521.  
(THE NAME AND ADDRESS OF THE 8TH RESPONDENT IS  
STRICKEN OUT FROM THE PARTY ARRAY AT THE RISK  
OF THE APPELLANTS AS PER THE ORDER DATED  
06.07.2018 IN IA.1885/2018.)

(THE RESPONDENTS 2 TO 6 ARE THE LEGAL HEIRS OF  
DECEASED 1ST PLAINTIFF/1ST APPELLANT IN  
AS.NO.138/2000, SUB COURT, NEYYATTINKARA WHOSE  
HUSBAND THE FATHER OF THEM WAS NOT IMPLEADED.)

BY ADV. SRI.K.B.PRADEEP

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD  
ON 29.05.2023, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**"C.R."**

**JUDGMENT**

This Regular Second Appeal arises from the judgment and decree dated 15.11.2008 passed by the Subordinate Judge's Court, Neyyattinkara, in A.S.No.138 of 2000, which arose from O.S.No.784 of 1998 on the file of the Principal Munsiff's Court, Neyyattinkara. The defendants are the appellants. The plaintiffs are the respondents.

2. The Original Suit was instituted for partition and separate possession. The plaint schedule property originally belonged to Sri.Arumughom Achari, the father of the parties in the Original Suit. Sri.Arumughom Achari died on 19.5.1975. He acquired right and title over the plaint schedule property by virtue of Exts.A1 and A2 title deeds. Ext.A1 is a sale deed dated 23.7.1115 (M.E.), and Ext.A2 is dated 6.8.1121 (M.E.). After the death of Sri.Arumughom Achari, his widow, and children, were enjoying the property. The mother of the parties in the Original Suit died on 20.4.1996. The plaintiffs and the defendants were the surviving legal heirs.

3. The plaintiffs pleaded that as per the Hindu Succession Act, 1956, the plaintiffs and defendants are entitled to equal share over the plaint schedule property, including a building.

4. The defendants challenged the claim of the plaintiffs. According to the defendants, the plaintiffs are not entitled to share over the plaint schedule property. The defendants claimed that as the plaintiffs belong to Hindu Malayala Kammala community and as the plaintiffs were given in marriage in the customary '*kudivaippu*' form after giving *sthreedhanam*, they are not entitled to any share. The defendants raised a further contention that the property belonged to Sri.Arumughom Achari was the coparcenary property of the family, wherein the female heirs had no right.

5. The trial Court framed issues and proceeded with the trial.

6. On the side of the plaintiffs PW1 was examined, and Exts.A1 & A2 were marked. DWs1 & 2 were examined on the side of the defendants.

7. The trial Court held that as the plaintiffs were given *sthreedhanam* and were given in marriage in *kudivaippu* form they are not entitled to claim right over their parental property.

8. The plaintiffs challenged the decree and judgment of the

trial Court before the First Appellate Court in A.S.No.138/2000. The First Appellate Court reversed the findings of the trial Court and decreed the suit, holding that the plaintiffs are also entitled to share in the plaint schedule property. The First Appellate Court passed a preliminary decree directing the partition of the plaint schedule property. The decree and judgment of the First Appellate Court are under challenge at the instance of the defendants in this Regular Second Appeal. During this proceedings, appellant Nos.1 and 2 died, and their legal representatives were impleaded.

9. After hearing both sides, this Court reformulated the substantial questions of law as follows:-

1. Would not any custom governing intestate succession in respect of the self acquired property of a Hindu inconsistent with the provisions of the Hindu Succession Act be treated as abrogated and destroyed immediately on coming into force of the Act by virtue of Section 4(1) .
2. Whether non-bringing of one of the LRs of plaintiff No.1 (appellant No.1 in the First Appellate Court) resulted in the abatement of the appeal as a whole.

10. Heard both sides.

11. It is not in dispute that Sri.Arumughom Achari died intestate. He had three daughters (the original plaintiffs and

defendant No.6) and five sons (original defendants 1 to 5).

12. The plaintiffs claimed that they are entitled to share in the plaint schedule property as succession to the estate of the late Sri.Arumughom Achari is governed by Section 8 of the Hindu Succession Act.

13. The contesting defendants pleaded that being members of the Hindu Malayala Kammala caste, they are governed by *Mithakshara* law and as the daughters of Sri.Arumughom Achari were given in marriage in the customary '*kudivaippu*' form after giving *sthreedhanam*, they are not entitled to any right in the parental property.

14. The property was acquired by Sri.Arumughom Achari as per Exts.A1 and A2. The question whether the property acquired by Sri.Arumughom Achari as per Exts.A1 and A2 was self-acquired property or ancestral property was considered by the First Appellate Court. The Court, relying on the recitals in Exts.A1 and A2 sale deeds and the admission of defendants 1 to 5 in the partition deed No.1862/1997, held that the plaint schedule property was self-acquired property of Sri.Arumughom Achari. This finding is a pure question of fact that has become final. The learned counsel

for the appellants contended that as the parties belong to the Hindu Malayala Kammala caste and the custom existing in their community is that when females were given in marriage in the customary *Kudivaippu* form after giving *sthreedhanam*, they were not entitled to share in the parental property. The learned counsel for the respondents/plaintiffs contended that in view of the overriding effect of Section 4 of the Hindu Succession Act, whatever custom existed in the community stood abrogated with the coming into force of the Hindu Succession Act, 1956.

15. The question whether a custom, as pleaded by the contesting defendants, existed in their community or not was also considered by the First Appellate Court, which held that the defendants failed to plead and prove the existence of the custom. The finding on this question of fact has also become final.

16. The Hindu Succession Act came into force on 17.6.1956. The Original Suit was instituted on 28.9.1998. Admittedly, the marriages of the plaintiffs were conducted after the coming into force of the Hindu Succession Act. Sri.Arumughom Achari died in 1975.

17. Section 4 of the Hindu Succession Act reads thus:-

"4.Over-riding effect of Act.-(1) Save as otherwise expressly provided in this Act,-

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

18. Even if it is assumed that a custom governing intestate succession, as pleaded by the defendants, existed in their community, the same would be treated as abrogated and destroyed in view of Section 4, in respect of a self-acquired property. Custom is not in the modern world a very important 'source' of law. It is usually a subordinate one, in the sense that the legislature may by statute deprive a customary rule of legal status. [vide: The Concept of Law, Third Edition by H.L.A.Hart, Oxford (Pages 44-45)]. I have not come across any precedents which militate against this proposition. The position would have been different if the property in question was ancestral property in which case provisions of Section 6 of the Hindu Succession Act would come into play.

19. In the present case, as it has come out that the property involved was a self-acquired property of Sri.Arumughom Achari there is no doubt that whatever custom, if any, existed in the community governing intestate succession would be treated as abrogated and destroyed.

20. The first substantial question of law is answered accordingly against the appellants/defendants.

21. The next question is whether the non-bringing of one of the legal representatives of plaintiff No.1 (appellant No.1 in the First Appellate Court) resulted in the abatement of the appeal as a whole. During the pendency of the First Appeal Smt.Rajamma Kolamma, plaintiff No.1, died. The plaintiffs impleaded the children of Smt.Rajamma Kolamma alone as the legal representatives of plaintiff No.1. The plaintiffs omitted to implead the husband of Smt.Rajamma. The learned counsel for the appellants contended that the appeal as a whole stood abated due to the non-impleadment of one of the LRs of plaintiff No.1. The relevant provision dealing with abatement where one of two or more plaintiffs/appellants dies is Order 22 Rule 3 which reads thus:-

**"3. Procedure in case of death of one of**

**several plaintiffs or of sole plaintiff.**- (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole-surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

22. When Order 22 Rule 3 of CPC refers to 'legal representatives', is it the intention of the legislature that unless each and every one of the LRs of the deceased plaintiff/appellant, where there are several, is impleaded there is no proper appeal with the result that the suit or appeal would abate. In **Daya Ram and Others v. Shyam Sundari and Others (AIR 1965 SC 1049)**, the Apex Court considered this question. The Apex Court held that there is no abatement of the suit or appeal, where the impleaded legal representatives sufficiently represent the estate of the deceased, and that a decision obtained with them on record will bind not merely those impleaded but the entire estate, including

those not brought on record. While considering the principle of substantial representation, in **Hameed v. Sumithra & Others (1987 (1) KLT 308)**, this Court held that where the impleaded representatives sufficiently represent the estate of the deceased and the decision with them on record will bind the entire estate including those legal representatives not brought on record in the absence of fraud or collusion or circumstances indicating that there has not been a fair or real trial or that against the absent heir, there was a special case which was not and could not be tried in the proceeding. In the instant case, all other co-owners of plaintiff No.1 represented the share of plaintiff No.1 in the estate in the suit. It is also important to note that being co-owners, one co-owner is treated as having right in every part and parcel of the joint property. (vide: Delhi Development Authority v. Diwan Chand Anand and Other [(2022) 10 SCC 428]. The aforesaid principle of law would be applicable in the appeal also.

23. Yet another aspect that requires consideration is that the husband of plaintiff No.1, who was omitted to be impleaded as her legal representative in the First Appellate stage, had died, and the

additional appellants 3 to 5 before the First Appellate Court are the sole legal representatives. Therefore, the non-impleadment of the husband of plaintiff No.1 in the First Appellate Court has no consequence. The substantial question of law No.2 is also, therefore, answered against the appellants.

The Regular Second Appeal stands dismissed. All the pending interlocutory applications stand dismissed.

Sd/-  
**K.BABU**  
**Judge**

TKS