Saraswathi Ammal

Vs

Jagadambal and Another

Civil Appeal No. 105 of 1952

(M. C.Mahajan, S. R. Dass JJ)

27.02.1953

JUDGMENT

MAHAJAN J. -

One Thangathammal who was a dasi (dancing girl) lived in the Tanjore district in Madras State and died possessed of some properties. She left her surviving three daughters, Saraswathi, Jagadambal and Meenambal. Jagadambal filed the suit out of which this appeal arises against her sisters for partition of the movable and immovable properties set out in the plaint and for allotment of a third share to her therein. She alleged that her mother was married to one Thyagaraja Pillai, that the properties in suit were the stridhanam properties of her mother who died intestate on 26th July, 1943, and that according to the law or custom of the community to which the parties belonged she and her sisters were entitled to share equally the properties of her mother.

Saraswathi Ammal, the 1st defendant contested the suit. She pleaded that her mother was not a married woman but a dasi who followed her hereditary occupation and was attached to Shri Saranatha Perumal temple at Tiruchuraj in the Tanjore district, that of the three daughters the plaintiff and the 2nd defendant married and lived with their husbands, while she (1st defendant) was duly initiated as a dasi in the said temple and remained unmarried and that according to the law and custom of the community, the mother's property devolved solely on her to the exclusion of the plaintiff and the 2nd defendant. The 2nd defendant supported the 1st defendant's case. The material issue in the suit was issue No. 1 which was in these terms :-

> "Who is the proper heir of Thangathammal. Whether according to custom as set up by the plaintiff, all the daughters are heirs, or according to the custom put forward by the 1st defendant, the unmarried daughters alone are entitled to inherit."

The Subordinate Judge dismissed the suit holding that Thangathammal was a dasi and not a married woman, that according to the custom of the dasi community in South India, a dasi daughter is regarded as a nearer heir to the mother than a married daughter and that the 1st defendant was entitled to remain in possession of the suit properties. Against this decision an appeal was taken to the High Court. The High Court reversed the decree of the Subordinate Judge and held that the custom pleaded by the 1st defendant was not proved and that the rule of propinquity of Hindu law as a rule of justice, equity and good conscience, governed the succession and the married and dasi daughters were equally entitled to the inheritance. It was further held that a dasi daughter was not in the status of a maiden or unmarried daughter for purposes of succession to stridhanam property.

Leave to appeal to the Supreme Court was granted under article 133 of the Constitution.

After hearing the learned counsel for the appellant, we feel no hesitation in concurring with the decision of the High Court. It was contended that the High Court was in error in holding that the custom set up by the defendant was not proved. To prove the custom that a dasi daughter was a preferential heir and excluded her married sisters reliance was placed on the evidence of some members of the community and reference was also made to certain instances. The same kind of evidence was led by the plaintiff in support of her case. The evidence of both the parties on the issue of custom is of an unsatisfactory and inconclusive character and from it no interference can be drawn of the existence of a uniform, certain and ancient custom prevailing in the community on this point.

Out of the defendant's witnesses, the first witness, Rajagopal Pillai, deposed that his wife was the daughter of dasi Kamakshi who had six daughters of whom three were married and three were dasis, that on Kamakshi's death, her dasi daughters alone would take the inheritance and that his wife, would be excluded. This statement does not hurt him in any way as his wife will not be bound by what he might state. His bald assertion about the custom in the community is not of much value. He does not disclose any source of his information. In cross-examination he admitted that he did not know a single specific instance where such a custom was enforced. The second witness on the point is the first defendant. She stated that one Tulasi's sister Mangalam got no share in her mother Ammani's properties. In cross-examination it was admitted that Mangalam died about forty years ago, i.e., some time before the defendant was born. She could therefore have no personal knowledge about Ammani's instance. No written record of that inheritance is forthcoming. Mangalam's son Govindaswami Pillai appeared as D.W. 3. He deposed that Mangalam's mother Ammani had divided her properties between her dasi daughters in her lifetime. The instance therefore in not an instance concerning succession and cannot be treated as relevant in this enquiry. The 1st defendant further deposed to an instance in Srirangam when succession opened out on the death of dasi Chellappa. It was said that her property was taken by her dasi daughter Visalakshi to the exclusion of her married daughters Marakatham and Rukmini and that the assets were worth a lakh of rupees. One would have expected some written documents about that succession if it took place in the manner deposed to. In the absence of any evidence from the descendants of Chellappa and in the absence of any documentary evidence regarding that succession it is difficult to place any reliance on this so-called instance. Defendant No. 1 stated that her knowledge of it was only from hearsay, and the requirements of section 32 of the Evidence Act not being fulfilled, her evidence on this point cannot be treated as admissible. The third witness, about whom reference has already been made, apart from deposing as to Mangalam's instance also deposed about the instance of dasi Meenakshi. Her daughter Jeevaratnam is married to the witness. He said that Meenakshi's dasi daughters inherited her property and that his wife was excluded. The only property alleged to belong to Meenakshi was a house, the value of which is not known. The succession is said to have occurred over twenty years ago. None of the daughters of Meenakshi have been examined as witnesses in the case, to enable the court to find out the details about it and merely on the statement of this witness the instance cannot be held proved. The fourth witness for the defendant is her non-contesting sister. She said nothing on the on the question of custom. She, however, stated that she was not entitled to a share in the assets of her mother. When asked why she was making that statement, she said that she was saying so because her husband and some elders (whose names were not disclosed) had told her so. Evidence of this character on the question of custom cannot be seriously considered. Venugopal Pillai is the fifth witness for the defendant. He is the husband of the second defendant. His evidence regarding the instance of Chellappa is purely hearsay. He deposed that he had learnt that a dasi's married daughter is not entitled to claim a share as she is not her heir in the presence of a dasi

daughter and therefore he told his wife not to claim a share. He did not disclose the source of his information. Janaki Ammal, the sixth witness, is a dasi. She deposed that she has five daughters of whom two are married, one is a dasi and the other two are young girls and that according to their caste custom her properties on her death would devolve on her dasi daughters and that the married daughters must remain content with the presents given at their marriage. In cross-examination she admitted that she was deposing about the caste custom not from any specific instance in which the custom was observed but at the request of the defendant, and that she had heard of this custom from her elders whose names she did not disclose. She further admitted that she had an uncle living but she did not even ask him about the custom. The witness, it appears, knows nothing about the custom and is giving evidence in order to oblige the defendant. The next witness who gave evidence on the issue is D.W. 8, Kamalathammal, a dasi. Her mother was also a dasi. She deposed that her mother's properties were divided between her and her other dasi sister and Amba, her third sister, who was married, was not given a share. In cross-examination she admitted that Amba never asked for a share. Neither was Amba produced, nor any written municipal records showing that the witness actually inherited the property of her mother to the exclusion of Amba. It is difficult to hold this incident proved merely on the vague testimony of this witness. Pappathis Ammal, the next witness in the case, is also a dasi. She deposed that her father's mother's property devolved on her two dasi daughters on her death and that there was no married daughter in existence. This evidence is of a neutral character and is not of much use on the question of custom pleaded in the case. Apart from asserting that in this community dasi's property devolves on her death only on the dasi daughters to the exclusion of married daughters, she cited the instance of Chellappa, a dasi of Srirangam. It was elicited in cross examination that Chellappa left a house and landed properties. For explanation is forthcoming why documentary evidence of revenue records about this instance has been withheld. Oral evidences add to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given. The last witness in the case is Rajamani Ammal, another dasi who does service in Sri Ranganathaswami temple. She also referred to the instance of Chellappa. She said that her jewels which were worth Rs. 1,000 would pass on her death to her dasi daughter. She went to the length of saying that if a dasi leaves an only child who is a married woman, even then her properties will pass to a next heir such as a cousin and not a married daughter. This is all the evidence led by the defendant to prove custom. On this meagre and unsatisfactory material we cannot hold that the custom pleaded is proved. The opinion evidence is not of a convincing character and evidence as to specific instances in support of the custom is really nil.

Our attention was also drawn to a decision of the Madras High Court in Shanmugathammal v. Gomathi Ammal [67 M.L.J. 861.] In that case the plaintiff, a member of the dasi community, claimed to succeed to her deceased maternal aunt and pleaded that the three surviving sisters of the deceased who were impleded as defendants were not entitled to inherit because one of them had been adopted by another dancing girl and the other two had become married. The issue raised in the case was whether the custom set up by the plaintiff that among dancing women married women are excluded by a woman who continues to be a dasi is true, valid and enforceable. Certain dasis gave evidence in support of the custom. No evidence whatever was given to the contrary and the custom pleaded was held proved in the circumstances of that case. Emphasis was laid on the circumstance that there was no evidence whatsoever against the plaintiff and defendants 2 and 3 who denied the existence of the custom in their written statements did not venture to deny it on oath in the witness box. The dasi community concerned in that case was a small one consisting originally of twenty houses of which only seven or eight were then in existence and in that situation it was said that the custom might well be one that was well recognized and so much a part of the consciousness of the

community, that any dispute like the present dispute amongst so small a body of women would be an extremely rare occurrence and therefore impossible of proof and that the plaintiff could not reasonably be expected to search the presidency for witnesses to speak to some similar dispute in other places. In our opinion, that decision does not furnish a good judicial instance in respect of the custom pleaded in the present case. There is no evidence that the customs of that small community of dasis are applicable to the community of dasis in the present case which form a considerable community in this district. Moreover, the case was decided on the peculiar circumstances of that case on very meagre materials and did not lay down any general custom of dasis on this point.

It is unnecessary to examine the plaintiff's evidence in detail. Suffice it to say that it is more than sufficient to rebut the evidence led by the defendant and it neutralizes its effect, if any. In the absence of proof of existence of a custom governing succession the decision of the case has to rest on the rules of justice, equity and good conscience because admittedly no clear text of Hindu law applies to such a case. The High Court thought that the just rule to apply was one of propinquity to the case, according to which the married and dasi daughters would take the mother's property in equal shares. No exception can be taken to this finding given by the High Court. No other rule was suggested to us leading to a contrary result.

It was argued that the dasis have a distinct status in Hindu society and that a rule has been evolved by judicial decisions under which the state of degradation by itself furnishes a rule of preference in a competition between dasi daughters and married daughters. The judicial decisions referred to concern the community of prostitutes and the rule evolved concerning them has been abrogated by later decisions. It was contended that though the said rule had been abrogated and was no longer applicable to that community concerning which it was evolved, it should by analogy be applied to cases of succession to dasis. Narasanna v. Gangu [I.L.R. 13 Mad. 133.] was the first case cited. There, an adopted niece of a prostitute dancing girl was preferred to a brother remaining in caste. It was said that the legal relation between a prostitute dancing girl and her undegraded relations remaining in caste becomes severed and they are therefore not entitled to inherit the estate. In Subbaratna Mudali v. Balakrishnaswami Naidub [33 M.L.J. 207.], the next case cited, the facts were that a deceased woman Palani inherited the property in dispute from her mother Nagu, who inherited it from her mother Mottai who again inherited it from her father Arunachalam. Arunachalam had two brothers Ramaswami and Mathurbutham and the question in that case was whether Mathurbutham's daughter Seethai or Ramaswami's daughter's son Marudamuthu Mudali was the heir of Palani. The learned judges held that Mathurbutham's daughter was preferential heir to Ramaswami's daughter's son. It was pointed out that the rule of preference based on degradation was no longer good law. It was, however, added that in cases of dancing girls the law remained as it was before. Our attention was also drawn to certain observations in Subbaraya Pillai v. Ramaswami Pillai [I.L.R. 23 Mad. 171.] at page 177, and to the decision in Balasundaram v. Kamakshi Ammal [71 M.L.J. 785.]. In the former case the learned Judges rejected the broad proposition that degradation of a woman in consequence of her unchastity entails in the eye of the law cessation of the tie of kindred between her and the members of her natural family and also between her and the members of her husband's family. We think that decision on this point is sound in law. Degradation of a woman does not and cannot sever the ties of blood and succession is more often than not determined by ties of blood than by the moral character of the heir.

In Balasundaram v. Kamakshi Ammal [71 M.L.J. 785.] it was held that the property acquired by the mother had been acquired by her as a married woman and notwithstanding her lapse into unchastity, it devolved on her daughters clothed with the ordinary character of property acquired by a Hindu female, that is to say, the daughters took a life estate in it.

The learned counsel attempted to persuade us to hold the custom pleaded proved by the assistance of decisions given in analogous cases and by applying the principles of the rules said to have been enunciated in some of them. Those cases were decided on their own facts and in some of them a rule was enunciated that degraded people are a class by themselves and their degraded relations are preferential heirs to the undegraded ones. As already said, we cannot subscribe to the view that any such rule can be evolved merely on logical grounds. Its existence can only be justified on the basis of established custom. No trustworthy evidence has been led in this case to establish that the daughters of a dasi by marriage lose their right of inheritance and form a separate community. The correct approach to a case where a party seeks to prove a custom is the one pointed out by their Lordships of the Privy Council in Abdul Hussein Khan v. Soma Dero [I.L.R. 45 Cal 450 (P.C.)]. It was there said that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule or decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be established inductively, not deductively and it cannot be established by a priori methods. Theory and custom are antitheses, custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another. A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same custom.

The last point taken by the learned counsel was that under Hindu law the 1st defendant as a maiden was entitled to preference over her married sisters. Defendant No. 1 was admittedly married to the idol and she has been on her own showing living a life of prostitution. The text of the Mitakshara dealing with the case of a virgin cannot be applied to her case. [Vide Tara v. Krishna [I.L.R. 31 Bom. 495.]]. It is inconceivable that when the sages laid down the principle of preference concerning unmarried daughters they would have intended to include a prostitute within the ambit of that text.

For the reasons given above we see no force in this appeal and it is dismissed with costs.

Appeal dismissed.

Agent for appellant : S. Subramaniam.

Agent for respondent No. 1 : M. S. K. Aiyangar.

</html