

Judgment Reserved on: 03.04.2017

Judgment Pronounced on: 21.04.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

Appeal Suit No. 270 of 2008
and
C.M.P.No.1 of 2008

Gowri
(Rep by her Power Agent
Venkatesan) Appellant/Plaintiff

Versus

1.Subbu Mudaliar
2.Sivasubramanian
3.Sundaramoorthy
(Rep by his Power Agent
Subbu Mudaliar, the
1st Defendant) ... Respondents 1 to 3/
Defendants 1 to 3

Appeal Suit filed under Section 96 of Civil Procedure Code
against the Judgment and decree passed by the Additional Sub
Judge at Puducherry, in O.S.No.150 of 2002 dated 23.03.2007.

For Appellant : Mr.K.Chandrasekaran

For Respondents 1-3 : Mr.G.Masilamani,
Senior Counsel for
M/s G.M.Mani Associates

JUDGMENT

Aggrieved over the decree and judgment of the learned trial
Court, dismissing the suit filed for partition, with the
observation that the plaintiff is only entitled to enjoy certain
items in A schedule and half share in the 'C' schedule property
till her life time, the present appeal came to be filed by the
plaintiff.

2.Brief facts of the plaintiff's case is as follows:- The
plaintiff is the wife of one Arumugam. The said Arumugam is the

younger brother of the first defendant. The second and third defendants are the sons of the first defendant. The plaintiff's husband and the first defendant's father namely Mannarsamy Mudaliar was died in the year 1991 and his wife Chinna Kulandai, pre-deceased him in the year 1955. The plaintiff's husband and the first defendant are the only legal heirs and legal representatives to inherit the estate left by Mannarsamy Mudaliar. The suit properties comprise in Schedule-I was obtained by the deceased Mannarsamy Mudaliar by way of partition through Court in the year 1975. Schedule-II was obtained by the first defendant and the plaintiff's husband through the exchange deed in the year 1992. Schedule-II was purchased by the first defendant and the plaintiff's husband and Mannarsamy Mudaliar from the nucleus of the joint family properties. After the demise of the Mannarsamy Mudaliar his two sons are enjoying the properties jointly. Thereafter, the plaintiff's husband died in the year 1994. Thereafter, the plaintiff and first defendant are enjoying the properties jointly. The plaintiff has also adopted a son by valid adoption deed. Now, due to misunderstanding between the plaintiff and the defendant in enjoying the properties jointly, the plaintiff issued a legal notice dated 22.5.2000 for division of the properties. Hence the suit for partition.

3. The defendants in the written statement admitting the relationship submitted that originally one Ganabady Mudaliar died leaving behind him some properties which were succeeded by his legal heirs (1) Sellappa Mudaliar (2) Sundira Mudaliar (3) Vengachi Mudaliar alias Vengalatta Mudaliar and (4) Paramasiva Mudaliar. Among them Sundira Mudaliar died issueless. Sellappa Mudaliar was the family head of other brothers living jointly (communeaute) and earning jointly and purchased some more properties as joint family properties among brothers. Sellappa Mudaliar died leaving behind him his only son Sivasamy Mudaliar. Sivasamy Mudaliar died issueless leaving behind him Vengachi and Paramasiva to have jointly for which former was the chief owning the joint family properties. Among the said brothers Paramasiva Mudaliar pre-deceased Vengachi Mudaliar leaving behind him Mannarsamy Mudaliar as his legal heir. Thereafter, Vengachi Mudaliar and Mannarsamy Mudaliar jointly in communeaute and then amicably partitioned among them with equal shares putting bounds according to their customary practice in the village and enjoying separately each one share on 05.01.1948. Vengachi Mudaliar also died leaving behind him his only son Pachayappan as his legal heir. When the matter stood thus, Pachayappan played fraud and created encumbrance over some of the properties of Mannarsamy by mortgaging later's share of the property also and obtained loan from Agricultural Department, Government of Pondicherry. Hence, Mannarsamy filed a suit in O.S.No.114 of 1969 on the file of I Additional District Court, Pondicherry for

declaration of his title and for nullity of mortgage deed created. The above said suit was decreed in favour of Mannarsamy. Mannarsamy had two sons namely Subbu Mudaliar alias Subburathinam and Arumugam alias Pachayappan. During the life time of Mannarsamy Mudaliar plaintiff's husband and plaintiff wanted to live in separate house and have separate mess. Mannarsamy Mudaliar out of his affection to plaintiff's husband, set up a separate family in a separate building. Pachayappan the husband of the plaintiff also started leading extravagant life addicted to alcohol and contracted debts.

4. It is the further case of the defendants that Mannarsamy was the absolute owner of the A schedule properties, first item of B schedule property and C Schedule properties as per the Coromandel Coast Customary Hindu law prevailing at Pondicherry. The sons had no right over the ancestral properties and self acquired properties of their father during his life time. He had absolute right under the said law. Hence, before his death he has executed a registered will dated 25.05.1988 voluntarily in a sound disposing state of mind bequeathing 4 Kanies 98 Kuzhiees of land in favour of the first defendant and his wife for life without the right of alienation and 5 Kanies 12 Kuzhiees of lands in favour of plaintiff's husband and plaintiff for life interest only without the right of alienation. Thus, the properties of Mannarsamy Mudaliar devolved as stated above Testamentary succession and hence the suit filed on the ground of intestate succession is not maintainable on facts as well as law. The plaintiff has no locus standi to ask for partition in the above suit on intestate succession under law. Besides the will Mannarsamy Mudaliar has also left a Codicil dated 04.08.1988 by which he has deleted Will B schedule mentioned item No.3 bearing R.S.No.190/6 measuring 72 Kuzhiees and 14 Veesams and substituted in the place property at Embalam bearing R.S.No.49/5 measuring 71 Kuzhiees 3 Veesam, R.S.No.137/8 measuring 26 Kuzhiees 3 Veesams and in the same village Southern half R.S.No.50/20 measuring 55 Kuzhiees and 2 Veesams to plaintiff's husband and the Southern half by first defendant as per the terms of the original Will dated 25.05.1988. The said Mannarsamy Mudaliar died on 4.11.1991 and the said Will was also acted upon the plaintiff and her husband executing exchange deeds on 29.7.1992 along with defendants and paying separate tax for plaintiff's husband share being separate enjoyment of the share. Therefore, the plaintiff is estopped from questioning the said Will and Codicil and consequently the above suit on the intestate succession of life to be dismissed. The debts contracted by the plaintiffs also cleared by the first defendant.

5. It is further case of the defendants that item No.1 of the B schedule properties is the self acquired properties of Mannarsamy Mudaliar purchased even before the suit in O.S.No.114

of 1969 filed by him. He has executed a registered settlement deed on 9.3.1988 reserving life interest to him and the absolute right over defendants 2 and 3. The other properties of item 2 to 6 of the suit B schedule were also purchased out of the separate income of the defendants. Therefore, prayed for dismissal of the suit.

6. On the basis of the above pleadings the following issues are framed:-

1. Whether the plaintiff is entitled to half share in the suit property?
2. Whether the plaintiff is entitled to a preliminary decree as prayed for by him?
3. Whether item Nos.10 and 11 of A schedule and item Nos. 2, 4 and 5 of B schedule are the properties purchased by the first defendant from out of his separate earnings?
4. Whether 'C' schedule properties were purchased by the plaintiff's husband, first defendant and Mannarsamy by joint family?
5. Whether the suit is barred by limitation?
6. Whether the Will dated 25.5.1988 and Codicil dated 4.8.1988 acted upon by the plaintiff?
7. To what relief or reliefs the plaintiff is entitled to?

7. On the side of the plaintiff P.W.1 to P.W.5 were examined and Ex. A1 to Ex.A14 were marked. On the side of the defendants D.W.1 to D.W.9 were examined and Ex.B1 to Ex.B43 were marked.

8. On the basis of the oral and documentary evidence and the materials, the learned trial Court has dismissed the suit taking into consideration of the Will executed by Mannarsamy Mudaliar in favour of the parties and observing that the plaintiff is entitled to enjoy the item Nos. 10, 12, 13, 14, 15 and 16 of A schedule properties and half share in the C schedule properties till her life time as per Ex.A6 Exchange deed, Ex.B17 Will and Ex.B18 Codicil. Aggrieved over the same, the plaintiff has filed the present appeal challenging the decree and judgment of the trial Court on the ground that the properties are absolutely ancestral properties of Mannarsamy Mudaliar and he had no capacity to execute Will at the most his right to execute the Will is confined only to his 1/3 undivided share and with regard to 2/3 undivided share the Will executed by Mannarsamy Mudaliar is not valid. It is also on the ground that B schedule properties also purchased out of joint family nucleus. On the above grounds the appeal came to be filed assailing the judgment and decree of the learned trial Court.

9. During the arguments the learned counsel for the appellant at the first instance admitted that the plaintiff is not claiming any right in respect of item 2 to 6 in the B schedule properties and item 10 and 11 in the A schedule property as the said properties are self acquired properties of the defendants and there is also evidence to that effect.

10. The main ground of attack of the decree and judgment of the learned trial Court is with regard to the other items of the A schedule and C schedule properties which are subject matter of the Will executed by Mannarsamy Mudaliar. Though the learned counsel for the appellant at the first instance contended that the Will is not valid as per the Hindu Customary Law applicable to the Hindus at Pondicherry since the father had no right to transfer more than 1/8th share of the properties in a gratuitous transfer. Therefore, it is the contention of the learned counsel that the Will is not valid in law. When this Court has sought certain clarifications with regard to the applicability of the Hindu Succession Act, 1956 to Pondicherry then the learned counsel for the appellant has submitted that in view of the application of the Hindu Succession Act, 1956 to the Pondicherry Union Territory from the year 1963 all the custom usage and practice ceased to exist in view of the overriding effect of the Hindu Succession Act, 1956.

11. It is the contention of the learned counsel that Section 4 of the Hindu Succession Act, 1956 abrogate customary personal law or Hindu Law principles, and practice which were vogue prior to the application of the Hindu Succession Act 1956. Hence, it is the contention of the learned counsel for the appellant the properties are joint family properties and plaintiff and since the defendants are not renouncants of the Union Territory of Pondicherry the Hindu Succession Act alone apply. The custom which was vogue ceased to exist in Pondicherry Union Territory. Therefore, Mannarsamy Mudaliar had no right to execute the Will in respect of the entire suit properties. At the most the Will would be valid only in respect of his 1/3rd share. Therefore, it is the contention of the learned counsel for the appellant that the plaintiff's husband being the coparcenar by birth, he is entitled to 1/3 share in the ancestral properties. Hence, prayed for preliminary decree for division and allotting 1/3 share to the plaintiff in the ancestral properties.

12. Whereas, it is the vehement contention of the learned Senior Counsel appearing for the respondents that for application of Hindu Succession Act, Mitakshara coparcenary is the essential condition. Whereas Section 6 of the Hindu Succession Act regulates only devolution of co-parcenary interest in a Mitakshara coparcenary by testamentary or

intestate succession and not by survivorship. Whereas the Customary Hindu Law applicable to Hindus in Pondicherry there was no coparcenary system of Hindu Joint Family among the Hindus of Pondicherry. As per the Customary Law, the father is the absolute owner of the ancestral properties and the sons do not get any right by birth in the ancestral properties. So, Section 6 does not affect the application of Customary Hindu Law as there is no Mitakshara coparcenary in Pudhucherry and the father is the absolute owner of the ancestral property. It is the contention of the learned Senior Counsel that in the Territory of Pondicherry the legal position is different for long time textual Hindu law had yielded to a local variation, wrought, it would seem, by custom and usage. According to learned Senior Counsel in all purposes whether the property is ancestral or self acquired property of the father, would be in the nature of absolute property in his hands, the son cannot seek for partition during the life time of his father. The only rider provided in the practice is that the father cannot gratuitously transfer the property in favour of others more than $1/8^{\text{th}}$ of the totality of his estate. However, this $1/8^{\text{th}}$ share also to be worked out only on his death. Therefore, the legal heirs who are known as a forced heir cannot have any right by birth to claim share in the ancestral properties.

13. Hence, it is the contention of the learned Senior Counsel that Mannarsamy Mudaliar was absolute owner of the properties, he has executed a Will during his life time dividing the suit properties equally giving life interest to all of his sons and vested remainder to defendants 2 and 3. The above Will also has been proved in the manner known to law and it was also acted upon and based on the Will the plaintiff and first defendant also exchanged certain properties to third parties. Therefore, the plaintiff now cannot attack the Will and claim that the Will is not valid under the Customary Hindu Law on the ground that the Mannarsamy Mudaliar had no right to transfer more than $1/8^{\text{th}}$ share of the properties in a gratuitous transfer more than disposable quota recognized in law.

14. It is the contention of the learned Senior Counsel that the plaintiff has suppressed the Will willfully in fact as per the Will the property was taken and enjoyed separately and the plaintiff was also in possession of the same only on the basis of the Will. The issue of disposable quota now raised in the appeal has not been pleaded before the trial Court. Therefore, the same cannot be urged first time in the appeal. The Will is not denied and in the exchange of notice existence of the Will has been clearly pleaded. Having been took possession of the properties on the basis of the Will, now the plaintiff cannot claim any share in the suit properties. Any dispute with regard to disposable quota can be raised immediately during the life

time of the Mannarsamy and such a dispute never been raised by the plaintiff's husband. Therefore, as per the Customary Hindu Law applicable to the Coromandel Coast the father alone considered as absolute owner of the suit property. The learned Senior Counsel further submitted that the plaintiff did not get into the box to support even her plaint averments and the power of attorney has no locus standi to speak to the facts of the plaint pleadings. Hence, the plaint averments were not duly proved. That itself clearly show that the Will is a genuine one and the plaintiff cannot claim share in the property. Hence submitted that the appeal is liable to be dismissed. In support of his arguments, the learned Senior Counsel has relied upon the following judgments reported in:-

1. Ramalingam v. Manick [1980(1) MLJ 350]
2. Pandurangan v. Sarangapani [1982(1) MLJ 143]
3. Krishnamurthy v. Sitaram Gounder [2002-3-L.W. 669]
4. Viswanathan v. Savarimuthurajan [2004 (3) CTC 81]
5. Man Kaur v. Harttar Singh Sangita [(2010) 10 SCC 512]
6. S.P.Chengalvaraya Naidu v. Jagannath [(1994) 1 SCC 1]

15. In the light of the above submissions now the important questions of law that arise for consideration in this appeal are:-

1. Whether the Customary Hindu Law which were vogue in Pondicherry could still be given statutory recognition de hors the enactment of Hindu Succession Act, 1956?
2. Whether the plaintiff is entitled to claim equal share in the suit property?
3. To what relief ?

16. Point No.1:- After the merger of the then French Settlements, with the Indian Union, several laws prevailing in Indian Union were extended to the merged Territory of Pondicherry to have both administration and legal control. One such enactments that was extending to Pondicherry is the Hindu Succession Act, 1956. By Regulation 7 of 1963 Section 2(2A) with effect from 1.10.1963. Section 2(2A) of the Hindu Succession Act, extended to Pondicherry reads as follows:-

"Section 2(2A): Notwithstanding anything contained in Sub-Section (1), nothing contained in this Act shall apply to the renouncants of the Union Territory of Pondicherry."

The Legislators in their wisdom thought it fit to protect the rights of the certain people called as renouncants. The Personal Laws of renouncants have to be governed by custom and practice which were vogue before extending Hindu Succession Act. The very exemption given by the Legislators to the renouncants makes it clear that except the persons who were renouncants

other Hindus who were natives of Pondicherry are governed by the Hindu Succession Act in entirety.

17. Section 4 of the Hindu Succession Act provides overriding application of the provision of this Act. In effect it lays down that in respect of any of the matter dealt in the Act, it seeks to repeal of existing laws whether in the shape of enactment or otherwise which are inconsistent to this Act. The Hindu Succession Act brought about some fundamental and radical changes in the Law of Succession and the result is that immediately on the coming into operation of the Act, the Hindu Succession Act alone applicable to the Hindus whether development of 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 matters expressly dealt by this Act. From the overriding effect of the Act it could be easily understood that any custom or usage as part of the law which was governing the Hindus in Pondicherry except renouncants immediately before the commencement of this Act shall cease to have effect and such practice in vogue is literally overridden by Section 4 of the Hindu Succession Act.

18. In this regard, a judgment reported in Giasi Ram vs Ramjilal [AIR 1969 SC 1144], wherein a Hindu Jat, governed by the customary law of the Punjab alienated some ancestral property without legal procedure. In a suit instituted by one of his sons it was declared that sale was null and void and not binding of his sons. As a result, the alienations could not enure beyond the life time of Jwala. He died in the year 1959. It was held that not only his three sons but also his wife and two daughters were entitled to inherit to his estates including the alienated property. Even though under the customary law the wife and the daughters of a holder of ancestral property could not sue to obtain a declaration that the alienation of ancestral property will not bind the reversioners after the death of the alienor, the Hon'ble Supreme Court taking into consideration of overriding effect of the Hindu Succession Act, has held that only Hindu Succession Act prevailing over the customary law of Panjab.

19. Whereas, the learned Senior Counsel placed strong reliance on the judgment of this Court to show that only customary Hindu Law which was vogue in Pondicherry alone governing the field. In this regard a judgment reported in Ramalingam v. Manick 1980 (1) MLJ 350 and Pandurangan v. Sarangapani 1982 (1) MLJ 143 the learned single Judges of this Court mainly relied upon the Article of French Writer Sanner on Hindu Law and also the practice followed in the Pondicherry Courts has held that only customary law alone applicable to the

Hindus residing in Pondicherry. In the above two judgments the effect of Section 4 of the Hindu Succession Act has not been dealt with.

20. Similar view was adopted by the Division Bench of this Court reported in Krishnamurthy v. Sitaram Gounder 2002 (3) Law Weekly 669. In the said case, before the Division Bench it was conceded by the parties that they are not governed by the Mitakshara School of Hindu Law, but governed by the customary Hindu Law prevailing in Pondicherry. The entire case was discussed and decided by the Division Bench on the basis of the French Writer Sanner on Hindu Law and also the Article by Justice David Annoussamy on French Legal System published by the Institute of Comparative Law and Jurisprudence, National Law School of India University, Bangalore and also the opinion of Sanner in his *Droit Civil Applicable aux Hindous*, 1916. It is relevant to extract paragraphs 17, 18, and 19 of the judgment to understand what was the practicing Laws of Succession governing the Hindus, how the Customary Law of Hindu was followed during the French Regime.

"17. In Sanner on Hindu Law it is stated as follows:

"The theory of common property of father and sons so far as the ancestral patrimony is concerned, is abandoned in our Establishments of the Coromandel Coast. It is to the chief of the family that belongs in reality, in the juridical sense of the word, the properties deriving from ancestors and he is alone qualified to exercise by principle, the right of free disposition which confers on him his title as owner. It is admitted that the sons have rights, if not in presenti, at least in future on those properties, i.e. A reserve which they can claim at the opening of their father's succession, against those who have benefited by the liberalities of the deceased.

So far as the alienation by onerous title agreed on by the father, even for his exclusive benefit they are out of control of the sons. Save, be it understood, that, if it concerns about sham deeds and without prejudice to the right which the French legislation grants to interested parties to provoke the interdiction of their father, or to provide him with a judicial counsel, in the case provided by the Code Civil. The same observation applies to the suit for partition, which the commentators of Mitakshara gave formerly to the son when, due to mental weakness, or by prodigality, the chief of the family frittered away the ancestral patrimony. The

interdiction or the appointment of a judicial counsel being unknown procedures in olden days, it was necessary to avoid the dangers of an administration more disastrous to the sons, by allowing them to ask immediately their share in family patrimony. But now as they have the rights to resort to the means of protection, defined by Chapters I and II of Title XI of Code Civil, they cannot be allowed to proceed by way of partition suit, i.e. to exercise rights which did not belong to them till the father is alive."

Same is the case with regard to self acquisition of the father. As regards the acquisition of his sons, the presumption is that they are also family properties and it is for the sons to establish that the acquisition by onerous title was realised not only with the income personal to his sons, but also that they were never merged with the family patrimony. Justice DAVID ANNOUSSAMY reiterates that the exclusive right of a Hindu father in Pondicherry is recognised, "in respect of all properties whether ancestral or self acquired and the denial to the son of any right by birth or any right to ask for partition during the life time of his father. Till his death the father is the sole owner of all the properties with full right of disposal for valuable consideration."

18. The next point is as to what the son can do after the life time of the father in respect of gratuitous transfers. That is where the principle of legitim steps in. What is legitim?

19. To quote Justice DAVID ANNOUSSAMY "French jurists however have found that the father could give away only a portion of his properties called his disposable quota and the balance, constituted the legitim of the heirs. The principle of legitim for direct heirs as has been a consistent principle in the legal history in France and the same was affirmed with force and precision in the Code Civil. It is how the principle of legitim is a familiar one for Hindus in Pondicherry, whereas it is unknown in the rest of India. Till his death the father is the sole owner of all the properties with full right of disposal for consideration. The legitim is the portion of the estate which a person cannot dispose of by an act of liberality, if he has heirs in direct line, who are called accordingly forced heirs. When a person indirectly deprives his forced heirs of

the amount of property which was in their legitimate expectation, by disposing away without consideration the totality or a substantial part of his estate, those heirs are entitled to show that their legitime had been encroached upon and to have it restored by way of reduction of excessive liberalities."

21. In *Viswanathan v. Savarimuthurajan* [2004 (3) CTC 81], a Division Bench of this Court has dealt with the case relating to the Personal Law of Christians and the Division Bench has also relied upon the Sanner Hindu Law and some of the judgments of the Pondicherry Courts has held that as far as the Christians are concerned as Hindu Succession Act, 1956 extended to Pondicherry is not applicable to the Christians. The Christians are continue to be governed by the Customary Hindu Law. The Division taking into consideration of the Regulation dated 6.1.1819, Section 3 of the said Regulation, whether Hindus, Muslims or Christians would continue to be governed by usage and customs of their respective castes and French law has become the law of the land though in matter of personal law it was applicable only to settlers and their descendants. Subsequent Regulation dated 24.4.1880 made the provisions of Code of Civil Procedure relating to civil status, namely the declaration of births and deaths of marriage applicable to Pondicherry Union Territory, but saving clause did not apply to Christians who were from that time governed by French Law in respect of marriage and divorce but in respect of all other matters pertaining to personal law, Christians continue to be governed by the customary Hindu Law. Taking into consideration of the above resolutions and also subsequent applicability of the Hindu Succession Act, 1956 to Pondicherry, which applies only to the Hindus, the Division Bench has held that since the Christians were governed by the Customary Hindu Law even after the application of the Hindu Succession Act, 1956 to Pondicherry, they still continue to be governed by the Customary Hindu Law. The above judgment makes it clear that the Division Bench has applied Customary Law to the Christians since Hindu Succession Act which was made applicable in the year 1963 only to the Hindus and not to Christians. Therefore, the judgment relied upon by the learned Senior Counsel in 2004 (3) CTC 81 will not be helpful to decide the issue except to know how the Customary Hindu Law developed in the Pondicherry.

22. In a Division Bench Judgment in 2002 (3) Law Weekly 669, the relevant portions are extracted above when carefully read, it makes one thing clear that the French Writer Sanner on his Hindu Law has opined that a theory of common property of father and sons so far as the ancestral patrimony is concerned is abandoned in their establishment of the Coromandel Coast. The

above opinion makes one thing clear that the old Mitakshara principles of law was gradually abandoned in the French Regime after their establishment in the Coromandel Coast. The Article of the Justice David Annoussamy quoted in the Division Bench Judgment clearly show that principle of legitim for direct heirs as has been a consistent principle in the legal history in France and the same was affirmed with force and precision in the Code of Civil. It is how the principle of legitim is a familiar one for Hindus in Pondicherry, whereas it is unknown in the rest of India. His Article also throw some light how the principle followed in the French Legal system has been gradually started to be followed in the French Regime by the native Indians. The Article of Justice David Annousamy itself clearly show that the French Jurists did not make any distinction between the ancestral properties and self acquired properties and para 23 of the same Judgment also clearly show that the Jurists and Judges in the French Regime have endeavored of applying French Principles.

23. In para 20 of the above Judgment also clearly shows that principle of legitim as understood in French Law came to be accepted in view of the French Courts decisions in respect of the properties. All these facts clearly show that the Courts in Pondicherry during their regime and its judgments made serious inroads into the Mitakshara coparcenary system, by passage of time the people gradually accepted to the principles repeatedly held by the French Courts. Only in such background Coromandel Coast Hindu Customary Law said to be existing in Pondicherry. It is to be noted that prior to the Hindu Succession Act there were two systems one of is Mitakshara system. Dayabhaga system was followed in Bengal while Mitakshara system was followed in all other parts of India except Bengal. The Mitakshara mode of devolution of property was followed without any deviation in Southern parts of India. Whenever Mitakshara School of law being administered in this country according to Hindu Law Texts succession of ancestral or coparcenary property was only by way of survivorship and not by inheritance. This Rule was general in its application wherever the Mitakshara principles followed. It is also undisputed fact that Southern parts of India was always governed by Mitakshara School of law. That being the position the native of the Hindus happen to reside in the Territory which were held by the French for some period following the different custom other than Mitakshara principles is highly improbable.

24. This fact has been further fortified by the fact that Karaikal one of the parts of Pondicherry Union Territory originally was with Maharaja of Tanjore till 1739. (as per book titled Glimpses of Pondicherry by P. Rajan and Ritanath Keshari). It was acquired by the French Rulers only in the year 1739. Prior to that the inhabitants of then Karaikal were either

Hindus or Muslims, the entire area was under the Kingdom of Tanjore. Therefore, the people residing in the Karaikal following different custom other than the principles of Hindu law would not have been possible at all. Hindus who resided in Karaikal before French Regime are highly connected to Hindus in other parts. Therefore, Hindus in Karaikal adopting different culture and custom other than the Hindus residing in other parts of the Tanjore is also highly improbable. Similarly, the other parts of the Pondichery, Mahe again came to French Regime only in 1725. Thereafter, due to conflicts between the British and French, Mahe came to the French Government only in the year 1763. Similarly, Yanam came into control of the French Government only in early 17th Century. Only after the French Government set up their Regime in these periods Hindu Law principles originally applicable to Hindus were gradually abrogated by French principles followed in French Court. Including the French principles followed in French Court repeatedly by passage of time Hindus resides in the French Territory adopted that practice which has been subsequently developed as customary law of Coromandal Coast. These inference is fortified by the opinion of French Writer Sanner on his Hindu Law and also the Article written by Justice David Annoussamy.

25. From the French Writers Sanner on Hindu Law and also the Article by Justice David Annoussamy on French Legal System published by the Institute of Comparative Law and Jurisprudence, National Law School of India University, Bangalore and also the opinion of Sanner in his *Droit Civil Applicable aux Hindus*, 1916 and other judgments of the local Courts, this Court easily can visualise that prior to French Regime there was no custom governing the Hindus. They are all governed only Mitakshara principles only after application of the French law the Mitakshara principles solely abrogated and that has been consistently practiced and accepted by the people in the Union Territory. Therefore, it cannot be said that there were customs which were unique other than Mitakshara school were in existence among the Hindus in the Pondicherry even prior to the French Regime.

26. As per the Articles of the then District Judge Ramabadran, he writes as follows:-

"Even after the treaty of Cession and merger of the French settlements of Pondicherry, Karaikal, Mahe and Yanam with the Indian Union, while introducing the various Indian laws to these territories, a saving clause has been added not to affect the rights of Renoncants. That is to say, the Hindu Succession Act 1956, the Hindu Minority and Guardianship Act, 1956, the Hindu Adoption and

Maintenance Act, 1956, the Hindu Marriages Act, 1955, the Hindu Disposition of Property Act, 1916, the Hindu Inheritance (Removal of Disabilities) Act, 1928, etc., in their application to the people of Pondicherry, do not apply to the Renoncants. Similar was the case in respect of Muslim Renoncants and they were exempted from the application of the Muslim Personal Law (Shariat) Application Act, 1937 and the Dissolution of Muslim Marriages Act, 1939, both of which were extended to the Pondicherry under the Pondicherry (Extension of Laws) Act, 1968. Similarly, the provisions of the Parsi Marriage and Divorce Act, 1936, the Converts, Marriage Dissolution Act, 1866, the Indian Christian Marriages Act, 1872, the Indian Majority Act, 1875, the Child Marriage Restraint Act, 1929 and the Guardian and Wards Act, 1890 as extended to the territory of Pondicherry through the Pondicherry (Extension of Laws) Act, 1968 contained a special provision that those Acts do not apply to the Renoncants. Such saving provision was included based on the Agreed Process-Verbal.

The Agreed Process-Verbal to the treaty concluded on 28-05-1956 and signed on 16-03-1963 provided for judicial protections of the French nationals in Pondicherry territory and that of the Renoncants. In the Agreed Process-Verbal, under Part I, Clause 2, the following declaration as to the situation of Renoncants was made:

"It was agreed that the "Renoncanats" will continue to be governed in respect of personal laws like those relating marriage, divorce, adoption, succession etc., by the relevant articles of the French Civil Code dealing with these matters"

After the de jure transfer of the then French establishment of Pondicherry, Karaikal, Mahe and Yanam with the Indian Union with effect from 16-08-1962, the Pondicherry (Administration) Act, 1962 was enacted by the Indian Parliament "to provide for the administration of Pondicherry and for matters connected therewith". Section 4 of the Pondicherry (Administration) Act, 1962 provided for the continuance of the existing laws in force their adaptation immediately before 16-08-1962 until amended or repealed by a competent legislature or other competent authority. Section 18 of the said Act also made it clear that the provisions of that Act, i.e. the Pondicherry

(Administration) Act, 1962 shall have effect notwithstanding anything inconsistent therewith contained in any other law in force in Pondicherry.

Section 6 of the Pondicherry (Laws) Regulation, 1963 and Section 6 of the Pondicherry (Extension of Laws) Act, 1968 are in pari materia and deal with the rules of construction in and by which it was also made clear that any reference to any provision of law not in force, or any functionary not in existence in Pondicherry shall be construed as a reference to the corresponding law in force or to the corresponding functionary in existence in that Union Territory and for the purpose of facilitating the application of any Act, inclusive of any rule, notification, order, regulation or bye-law made or issued thereunder, in relation to Pondicherry any court or other authority may construe it in such manner, not affecting the substance, as may be necessary or proper to adapt it to the matter before the court or other authority.

By the Pondicherry (Laws) Regulation, 1963, which came into force with effect from 01-10-1963, amongst other laws, the Hindu Succession Act, 1956 was extended to the Union Territory of Pondicherry, with a newly added section in Section 2A. By the operation of Section 4 of the said Regulation, all laws including custom that had the effect of law, corresponding to the extended laws were repealed saving only the accrued rights and the pending lis, investigation etc. Section 4 of the said Regulation reads as under:

Section 4. Repeal and Saving: (1) Any law in force Pondicherry or any area thereof corresponding to any Law referred to in Section 3 shall stand repealed as from coming into force of such Act in Pondicherry and all the laws specified in the Second Schedule are hereby repealed..

(2) Nothing in Sub Section (1) shall affect-

(a) The previous operation of any law so repealed or anything duly done or suffered thereunder; or
(b) Any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(c) Any penalty, forfeiture of punishment incurred in respect of any offence committed against any law so repealed; or

(d) Any investigation or legal proceeding or remedy in respect of any such right, privilege,

obligation, liability, penalty, forfeiture or punishment as aforesaid;

And any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed. ...

....

Thus, when the Hindu Succession Act, 1956 was extended to the territory of Pondicherry, all the then existed laws and customs relating to the Hindus of this territory, except Renoncants, were repealed. The application of the then existed French law and the then existed customs recognized to be law by virtue of Arrêté dated 6.1.1819, were saved only to the Renoncants as per Section 2A, inserted to Hindu Succession Act, 1956 in its application to the Territories of Pondicherry, which reads as under:

"Section 2A: Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the Renoncants of the Union Territory of Pondicherry."

Thus, it is clear that except the special category of people residing in the UT of Pondicherry, called Renoncants, all other Hindus of Pondicherry territory are governed only by the provisions of the Hindu Succession Act, 1956, Hindu Marriages Act, 1955, the Hindu Adoption and Maintenance Act, 1956 etc. Thus, even as on date, only to the French Nationals residing in the UT of Pondicherry and to the Renoncants, who can be found in all religions and castes are governed by the French Code Civil and established customs followed in their community, as the case may be, in matters relating to marriage, divorce, adoption, guardianship etc. Citizenship of people in the Territory of Pondicherry after merger. After the coming into force of the Treaty of Cession with effect from 16-08-1962, France has ceded to India in full sovereignty the Territory of the Establishments of Pondicherry, Karaikal, Mahe and Yanam. Therefore, it became necessary for the Indian Union to specify the persons who shall be citizens of India by reason of their connection with the merged territories of Pondicherry, Karaikal, Mahe and Yanam. Accordingly, in exercise of the powers conferred by Section 7 of the Citizenship Act, 1955 (LVII of 1955), the Central Government of the Indian Union made the Citizenship (Pondicherry) Order, 1962. As per

Paragraph 3(1) of the Citizenship (Pondicherry) Order, 1962, subject to the provisions of sub paragraph (2) of that section, every French national born in Pondicherry and domiciled therein or elsewhere in India on the appointed day (16-08-1962) shall, as from that day, be citizen of India. Sub paragraph (2) referred therein provides that any such person may, by written declaration made within six months of the appointed day (16-08-1962) by himself, or if he be a minor, by his parent or guardian on his behalf choose to retain his French nationality; and if the choice is so made, that person shall be deemed never to have acquired Indian Citizenship under sub paragraph (1) of Paragraph 3. The proviso therein also enabled the minor on his attaining the age of eighteen years, option to retain French nationality or to change to Indian nationality. Similarly, Paragraphs 4, 5A and 6 of the Citizenship (Pondicherry) Order, 1962 provide the modalities of acquiring citizenship. As per Paragraph 5 of the Citizenship (Pondicherry) Order, 1962, every French national not covered under Paragraphs 3 and 4 of that Order, by virtue of the cession of Pondicherry with the Indian Union, lost French nationality on and from the appointed day (16-08-1962) and shall become citizens of India. Needless to say that all the Indian citizens are governed by the laws of the land, which are in force for the time being.

Repeal of the opinions of the Consultative Committee on Indian jurisprudence:

After the duple transfer and merger of the then French establishments of Pondicherry, Karaikal, Mahe and Yanam with the Indian Union and amendment of the Indian Constitution to include such merged territories as Union Territory of Pondicherry (now called as UT of Puducherry), the "Comite Consultatif de la Jurisprudence Indienne" (Consultative Committee on Indian Jurisprudence), should be deemed to have been abolished by operation of law. It may be noted here that such opinions of the "Comite Consultatif de la Jurisprudence Indienne" (Consultative Committee on Indian Jurisprudence) are also available only for the period from 1828 to 1895 and even in that period, the opinions expressed during 1862 to 1871 are declared as not traceable. Beyond this period, no authentic record is available to prove the continuation of such committee. [Justice Dr.David

Annoussamy, The French Legal System, 1995, p.150]. Therefore, the opinions expressed by the said committee, which were complied to have a guideline to dispose the litigations before the then French Courts by treating such opinions as the Customary Hindu Law, is no longer in vogue, due to change in the legal fabric in the territory after merger. Thus in effect, as on date, except Renoncants of UT of Pondicherry, all Hindus are only governed by the provisions of the Hindu Succession Act, 1956 with all its amendments. The system known to be "customary Hindu Law or Coramandal Hindu law" as was prevailing during the French regime got repealed by the introduction of various Indian laws to this territory except to the specific extent saved, as discussed supra. The saving effect is applicable only to the Renoncants of this territory and not to all the inhabitants in the application of the respective personal laws to them. However, it would be an interesting research to explore in spite of such totality of change in the legal fabric in Pondicherry, still there remains any area in the field of customs accrued to the Hindus within the ambit of the saving clauses in the various enactments extended to this territory, which can be legally enforced."

27. It is further to be noted that the Legislators while extending the Act of Hindu Succession Act in the year 1963 in their wisdom had exempted the renouncants. In the given case none of the parties are renouncants. In a latest judgment of our High Court a learned single Judge of this Court (Justice V.Ramasubramanian, as he then was), traced the history of the entire Regulations and how the people were called as renouncants in a judgment reported in M. Kadirvelu vs. G. Santhanalakshmi 2016 4 MLJ 562, wherein para 24 to 40 dealt with the Regulations of the French Government from 06.04.1819 and subsequent Ordinances. Paras 28 to 34 of above judgment is as follows:-

"28. With a view to enable the local population to renounce their personal laws and to adopt the French Code Civil, a Regulation was passed on 21.9.1881. By this Regulation, an option was given to the native Indians to renounce their personal status. Such a renunciation was to be effected by way of a declaration in the office of the Mayor of the locality. Incentives were also offered to people, who renounce their personal status. These incentives were in the form of political rights and the opportunities thrown up for an employment in the Government. According to Author Claude

Markovits (A History of Modern India 1480-1950), people professing Christianity and people belonging to lower castes, were eager to make use of this opportunity. These persons were actually given a term namely "renouncants". These renouncants are governed by the French Code Civil in matters relating to marriage, divorce and family affairs. The 3 major enactments, namely, The Hindu Succession Act, Hindu Marriages Act and the Hindu Adoption and Maintenance Act are not applicable to renouncants in Pondicherry.

29. The decree of 21 September 1881 enables the Indians, who so desired to renounce their personal status and to come under the purview of the French laws, with the objective of facilitating the progressive assimilation of natives and of contributing to the uplift of the pariah by fraternity. These measures, which aimed at ethnic (or cultural), not only political, assimilation marked the beginning of the process of absorption.

30. One of the important steps taken in this direction was to give French Indians the right of Universal Manhood Franchise and towards that end, the French counters in India were endowed with a Deputy, a Senator, a General council, Local councils and Municipalities. In addition, native M.Kadirvelu vs G.Santhanalakshmi Indian Kanoon-<http://indian-kanoon.Org/doc/52794329/8> Indians were given the right to representation, association and organisation. Culturally, those Indians, who so desired, were invited to renounce their personal status (hence become renouncants) and place themselves under the authority of the French Civil Code.

31. After India attained Independence, an agreement was signed in October 1954 between India and France for the defacto transfer of the French Territories, including Pondicherry in India. A Treaty of Cession was signed on 28.5.1956. The Treaty was ratified by the French Parliament in 1962. On 16.8.1962, both countries exchanged Instrument of Ratification. Consequently, de jure transfer got effected and Pondicherry, together with the enclaves of Karaikal, Mahe and Yanam became the Union Territory of Pondicherry from 01.7.1963. In the meantime, Pondicherry (Administration) Act, 1962, was passed by the Parliament, to provide for the administration of Pondicherry and matters connected therewith. Under

Section 4(1) of the Pondicherry (Administration) Act, 1962, all laws in force immediately before the appointed date in the former French Establishments were directed to continue to be in force, until amended or repealed by a competent legislature. 16th day of August, 1962 was made as the appointed date.

32. Under Section 4(2) of the Pondicherry (Administration) Act, the Central Government was empowered by order to make such adoptions and modifications, for the purpose of facilitating the application of any law in relation to the administration of Pondicherry and for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution. But, the Central Government was to pass such an order within three years from the appointed date. Section 8 of the Act empowers the Central Government to issue notifications extending any enactment which is in force in a State, to Pondicherry with such restrictions and modifications as it deems fit.

33. Thereafter, the Pondicherry (Laws) Regulation, 1963, was issued by the President in exercise of the powers conferred by Article 240 of the Constitution, with a view to extend certain laws to the Union Territory of Pondicherry. Section 3 of the said Regulation declared that the Acts as they are generally in force in the territories to which they extend, shall also extend to and come into force in Pondicherry on the 1st day of October 1963, subject to the modifications specified in the First Schedule. The First Schedule to the Regulation contained a lot of enactments. The Hindu Succession Act, 1956 is one of the Parliamentary enactments included in the First Schedule to the Regulation of the year 1963. But, as seen from the First Schedule, the Hindu Succession Act, 1956 was extended to Pondicherry and it came into force in Pondicherry on the 1st day of October 1963, subject to one modification. The modification was that a separate Sub-Section, namely Sub-Section (2A) was inserted under Section 2 of the Hindu Succession Act, 1956. This new Sub-Section reads as follows: "Section 2(2A): Notwithstanding anything contained in Sub-Section (1), nothing contained in this Act shall apply to the renouncants of the Union Territory of Pondicherry."

34. Therefore, it is clear that as per Section

3 read with the First Schedule to the Pondicherry (Laws) Regulation, 1963, the provisions of the Hindu Succession Act, 1956, were extended to the inhabitants of the Union Territory of Pondicherry, subject to one restriction namely that in so far as renouncants are concerned, the Hindu Succession Act would not have any application."

28. Similarly, in para 40 and 41 it has been held as follows:-

"40. As we have seen earlier, the French Code Civil was made applicable to the inhabitants of the French Settlements of Pondicherry, Karaikal, Mahe and Yanam by the resolution dated 6.1.1819. But, this resolution contained a saving clause. By a subsequent resolution dated 24.4.1880, provisions relating to registration of births and deaths and performance of marriages were regulated. Even this resolution contained a saving clause, making it optional to the Indians to follow their own customs. It appears that a further option to the Indians to switch over to the French way of life was given under another resolution dated 21.9.1881. By this option, the inhabitants were allowed to renounce their Personal Law and espouse the French law. People, who availed this opportunity and exercised the option to renounce their Personal Laws, emerging out of customary rights and practices, were called renouncants.

41. It is a linguistic paradox that the descendants of the renouncants inherited the consequence of renunciation by their forefathers. Mr. Ramabathiran cites in his article, 3 decisions, which recognised the consequence of such renunciation. One was a judgment dated 12.11.1870 by the then Cour d' Appel at Pondicherry, which held valid the recourse by Muslims to the freedom of guardianship as organised by the French Code Civil. The second was the case of a Hindu widow, who adopted a son to herself. The adoption was held valid by the Privy Council in C.S. Nataraja Pillai v. C.S. Subbaraya Chettiar [AIR 1949 PC 24].

"

29. The learned single Judge ultimately held that only the persons who were exercised the option to renounce their customary laws and adopted the French Code Civil, are not governed by the provisions of Hindu Succession Act, 1956 and

held that the saving clause applies only to persons, who are inhabitants at the time when the French Code Civil was extended. Persons, who are descendants of those inhabitants, are also entitled to the benefit. But, persons, who became inhabitants of Pondicherry after the application of the French Code Civil, are not entitled to claim since they are not renouncants.

30. The Legislators also in their wisdom clearly held that except renouncants Hindu Succession Act has been extended to entire inhabitants of Pondicherry. The Parliament by their wisdom only taking into consideration of the Resolution of the French Government and adoptions of the French Code Civil by the persons who had renounced their personal status and who had adopted French Laws the Legislators thought it fit to give exemption to them. Therefore, now it cannot be contended by the parties that in Pondicherry only Customary Hindu Law is prevail over. The Division Bench in 2002 (3) Law Weekly 669. In the above case it was pleaded before the Court that both the parties are governed by the Customary Hindu Law none of them have agitated the issue with regard to the applicability of the Hindu Succession Act. In the judgment reported in 2004 (3) CTC 81 the Division Bench dealt with the applicability of Customary Law to Christians. Though both the Division Benches and single Judges have decided the issue on the basis of the Sanner on Hindu Law and also the Article by Justice David Annoussamy on French Legal System published by the Institute of Comparative Law and Jurisprudence, National Law School of India University, Bangalore, as already pointed out by me they clearly show that French principles were applied often by the French Courts that made serious inroads into the basic Hindu principles.

31. Be that as it may, Division Benches, 2002 (3) L.W. 669, 2004 (3) CTC 81 and 1982 (1) MLJ 143 have discussed only the applicability of the Customary Law governing the parties. Unfortunately, before the Division Benches the judgment of the earlier Division Bench with regard to the applicability of the Hindu Succession Act has not been brought to the notice.

32. In *Pauline Luca vs Jerome Pascal* [AIR 1977 Madras 270] the Division Bench of this Court in par 3 has held as follows:-

"3. It is no doubt true that the Parliament when it passed the Hindu Succession Act of 1956 provided for an overriding clause which out of necessity gave the go by to the Customary Law in force immediately before the commencement of this Act and as was adopted by the community of Hindus. s. 4 of the Hindu Succession Act states as follows--

"4.(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.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings".

This overriding effect prima facie would help the appellant. But there is an overriding clause to this overriding provision in so far as the Christian's are concerned. S. 2(1)(c) of the same Act provides--

Then the Act shall apply--

"2.(1)(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed."

The Hindu succession Act of 1956 would not apply to a Christian amongst others mentioned expressly in the above said sub-clause. By a logical reasoning, therefore, it follows that the customary law which was in force and which has become ineffective by reason of the statute law as is provided for in S. 4(1) of the Act would not be in operation in so far as Hindus are concerned. But as under S. 2(1)(c), the Act is not made applicable to Christians, it is for consideration whether the state of law as it prevailed prior to the application of the Hindu Succession Act in the State of Pondicherry could be availed of by the Christians residing therein. It is common ground that prior to the introduction of the Hindu Succession Act into this State, the Christians were governed by the customary law which was by then applicable to the Hindus. When this proposition is therefore unassailable it follows that the laws of succession applicable to

Christians in the State of Pondicherry is not the Succession Act as envisaged in the Hindu Succession Act of 1956, but it is the customary law amongst Hindus, which was prevalent in that State prior to the change of the law of succession. As it is not in dispute that in so far as the Christians in the State of Pondicherry are concerned, they are governed by the Hindu Customary Law and as the Hindu Succession Act does not apply to the Christians in that State, the learned Judge was right when he concluded that the succession law applicable to the parties in this litigation before us is the Hindu customary law prevalent in Pondicherry prior to the induction of the Hindu Succession Act into that State. The appeal therefore fails and it is dismissed. But in the circumstances, there will be no order as to costs."

In the short judgment the Division Bench has held that by logical reasoning it follows that Customary Law which was in force and which has become ineffective by the reason of statute law as provided under Section 4(1) of the Act would not in operation in so far as Hindus are concerned in Pondicherry.

33. It is also pertinent to note in T.S. Sadagopan (Deceased) vs T.N.K. Ramanujam [1993 (2) MLJ 481], the Division Bench consisting of Justice Srinivasan and Justice Thangamani, has held as follows:-

"22. It is now necessary to make a reference to a fallacy contained in the judgment of the Division Bench rendered on the earlier occasion in A.S. No. 150 of 1976. The law which prevailed in Pondicherry was set out clearly in the judgment of the trial court on the first occasion and it was pointed out that a two tier system of civil status was applicable to French nationals even prior to the promulgation of code civil was confirmed by Arrete dated 6.4.1819 namely one, the statute as defined in Code Civil, i.e., the French personal Law which was the ordinary law and two, the local status which could be Hindu and Mahommedan customs as they prevailed in Pondicherry at that time, which was the exceptional law. The trial court also pointed out that the first status was applicable to all French nationals of French origin, their descendants, foreigners who acquired French nationality and French indigenous people who renounced their personal status and prayed for being covered for the future by the French Code Civil and the second status was applicable only to

the remaining indigenous people. It was clearly stated that the exceptional law which was neither the French Law nor the Hindu Law Applied in the other parts of the country, but a local custom should be restricted to those who were recognised as following that custom from generation to generation and not extended to others as a law of general appliance. It was further stated that the assurance given by the French Government the time of the French settlement and reiterated in Article 3 of Arrete dated 6.4.1819 could apply only to the indigenous stock of population, which was brought under French power by force or treaty with local Indian princes and not to British people who acquired French nationality individually and out of their will. The Division Bench accepted the statement of law found in the judgment of the trial court that there was a two tier system of civil status applicable to French nationals even prior to the promulgation of Code Civil. But, after holding on the facts that Nannayya was a French national because of his birth in Pondicherry, the Bench took the view that it was necessary for the parties to prove that Nannayya's parents were of indigenous stock and stated the proposition of law as follows:

Once Nannayya Bagavadar is found to be a French national, then the customary Hindu Law applicable to Hindus in Pondicherry will automatically apply to the estate of Nannayya Bagavadar.

With great respect to the learned Judges, we must point out that the proposition is erroneous. Once the two tier system in civil status is recognised, it cannot be held that all Hindu nationals would be governed by the customary Hindu law of Pondicherry. As rightly held by the trial court, the customary law is applicable only to those Hindus who were adopting the customary law prevailing in Pondicherry and it would not apply to Hindus who did not choose to change their personal law which was applicable to them in the place of their origin. When admittedly the parties were Sourashtra Brahmins belonging to Madurai, the normal presumption in Hindu Law is that they were governed by the personal law which was prevalent in Madurai, unless there is evidence on record to prove that the family had adopted the customary law prevailing in Pondicherry. It is not as if the family had been living in Pondicherry for several generations. The best that could be said on the

evidence is that Nannayya Bagavathar's father had some properties in Pondicherry in addition to his properties in Madurai and Nannayya Bagavathar was born in Pondicherry. The fact that almost all the marriages in the family had taken place in Madurai and all the brothers of Nannayya died at Madurai, would only show that the family had not given up their place of origin, even if it assumed that they had migrated to Pondicherry. Even in the event of a migration by a Hindu from one territory to another, the personal law is carried by him and he will be governed thereby. In Mayne's Hindu Law & Usage, 12th Edition at page 72, the following passage is found:

It becomes the personal law, and a part of the status of every family which is governed by it. Consequently, where any such family migrates to another province, governed by another law, it carries its own law with it, including any custom having the force of law.

23. In *Mallathi Anni v. Subbaraya Mudaliar* I.L.R. 24 Mad. 650, a Division Bench of this Court held that migration by the widow of a Hindu subject of French India to British India, and acquisition of British Indian domicile, does not change the character of the estate held by the widow, and if she does not adopt the system of law prevalent among Hindus in British India, the property inherited by her from her husband will be held by her according to the customary law of French India."

In fact in the above judgment the Division Bench has found fault with the earlier Division Bench and held that once the two tier system in civil status is recognised, it cannot be held that all Hindu nationals would be governed by the customary Hindu law of Pondicherry. It is also held that the Hindus who did not choose to change their personal law they were governed by the principle of Hindu Law and not by the Customary Hindu Law. This judgment has not not been brought to the notice of the subsequent Division Benches which were relied upon by the learned Senior Counsel.

34. This Court having regard to the fact that the judgment of the Division Bench of this Court relied upon in 2002 (3) Law Weekly 669 wherein the parties themselves conceded thereby Customary Hindu Law not governed by the Mitakshara Hindu Law as decided by both Division Benches. Similarly the judgment of the another Division Bench reported in 2004 (3) CTC 81, wherein the Customary Law was applicable only to the Christian Law governed to the Christians are customary as stood prior to the Hindu

Succession Act. Both the judgments would not be useful to decide the question of law as to whether the Pondicherry (Extension) Laws Act 1963 prevail over the Hindu Succession Act. Whereas the Judgment of the Division Bench in AIR 1977 Madras 270 and 1993 (2) MLJ 481 of this Court and the judgment of the learned single Judge in 2016 4 MLJ 562 appears to be correct law with regard to the applicability of the Act. Further, the Legislators also in their wisdom has clearly carved out only exception to renouncants. If the entire Hindus who are the native of Pondicherry are governed by the Customary Law as contended by the learned Senior Counsel, the Legislators would not have been even extended the Hindu Succession Act to the Pondicherry.

35. The contention of the learned Senior Counsel that the Hindus residing in Pondicherry are governed by the Customary Hindu law cannot be accepted for another simple reason, that Act 39/2005 Hindu Succession Act was enacted by giving equal status to the daughters on par with the sons in a coparcenary system. If the contention of the learned Senior Counsel is accepted, the very purpose of bringing the Act 39/2005 giving equal status to the daughters on par with the sons in joint Hindu family itself would be defeated.

36. Therefore, this Court is of the view that in view of Section 4 of the Hindu Succession Act, which is overriding effect of all the customs Hindu Succession Act alone apply to the Hindus residing in the Pondicherry except renouncants who renounced their personal status and adopted French Law. Further, in the Ex.A4 judgment in O.S.No.114 of 1969 under which the suit properties came into Mannarsamy Mudaliar when carefully perused the suit property came to Mannarsamy Mudaliar as per the declaration decree passed in O.S.No.114 of 1969. Some of the suit properties came from one Ganabady Mudaliar and he had four sons namely (1) Sellappa Mudaliar (2) Sundira Mudaliar (3) Vengachi Mudaliar alias Vengalatta Mudaliar and (4) Paramasiva Mudaliar and one of the sons Sundira Mudaliar died issueless. Therefore, his share has been devolved as per survivorship to other brothers. Sellappa Mudaliar was the head of the family and he purchased some more properties from the joint family nucleus and Sellappa Mudaliar died leaving behind him his only son Sivasamy Mudaliar. Sivasamy Mudaliar died issueless leaving behind him his wife and the properties have been only devolved by survivorship not by any customary Hindu Law. The recitals and the issues framed in the suit in Issue No.1 particularly with regard to the joint Hindu Family, ultimately the Court found that the properties purchased by the members of the joint family were treated as joint family property.

37. It is curious to note that the widow of the Sivasamy Mudaliar and one of the brothers also claimed maintenance and

obtained a judgment with regard to the maintenance in the Court of First Instance at Pondicherry as per the Hindu Women Right to Property Act. Thereafter, some compromise was effected and she has been given some properties and ultimately, the Court found that all of them were coparcenars and there was joint family between them. The first defendant's father Mannarsamy also found to be coparcenar along with his uncles. When the property itself was obtained as Hindu Joint Family and only Rule of Survivorship was applied as per the Mitakshara principle of law. One of the legal heirs now cannot contend that the above property is self acquired property as per the Customary Hindu Law. Ex.A-4 dated 23.12.1975 and issue Nos.1 and 2 clearly prove the factum that the parties are in fact Governed by the Mitakshara principle and not under Customary Rule of Hindu Law Practice in Pondicherry. Exhibit A-4 judgment itself clearly show that the ancestors of the family to the parties herein were governed by the principle of Hindu Law. Therefore, now they cannot contend that the Customary Law alone were vogue in their family. In view of these facts and also summarized as discussed earlier and also taking into consideration of Section 4 of the Act, its overriding effect this Court hold that The Hindu Succession Act which was extended to Pondicherry alone will prevail over except renouncants. Accordingly, this point is answered.

38. Point No.2:- The plaintiff is the widow of one Arumugam alias Pachayappan who is the brother of the first defendant and the defendants 2 and 3 are sons of the first defendant. This fact is not in dispute. Though the plaintiff claim equal share in the entire suit property. Learned counsel appearing for the appellant himself clearly admitted that in respect of items 10 and 11 of the A schedule property and item Nos. 2 to 6 in B schedule property she has given up her right in those items since all those properties were purchased independently by the defendants and the evidence adduced on the side of the defendants also show some of the properties were purchased by Mannarsamy Mudaliar even before the joint family property came into his possession and those properties also stood in the name of the defendants. Similarly the defendants also adduced evidence to show that they also independently cultivated the properties and earned independent income and purchased the properties namely B schedule items 2 to 6. The plaintiff also not examined herself to show what was the nature of the joint family nucleus available at the relevant time. Therefore, merely because some properties are ancestral properties it cannot be construed that the subsequent purchase made by defendants 2 and 3 only out of joint family nucleus. It is to be noted that the parties are also taken possession of the properties and enjoying the same separately. Therefore, it cannot be said that those properties are purchased from out of joint family nucleus. As far as B schedule item 1 is concerned it was originally

purchased by Mannarsamy Mudaliar in the year 1949 much before the ancestral property came into his possession. He has gifted the same to the first defendant under Ex.B16. Hence the plaintiff now cannot claim any share in the item 1 of B schedule. The gift settlement is also not disputed.

39. In view of the evidence available on record this Court hold that as rightly stated by the appellant's counsel the plaintiff is not entitled to claim any share in the items 10 and 11 of the A schedule properties and item 1 to 6 in the B schedule properties. Admittedly, the properties more fully set out in the A schedule except items 10 and 11 and C schedule properties are the ancestral properties came to Mannarsamy Mudaliar. He had two sons namely Arumugam alias Pachayappan and first defendant. The two sons by virtue of their becoming coparcenars along with their father, each entitled to 1/3 share in the ancestral properties which came into the possession of the father.

40. Now the father has executed a Will under Ex.B17 dated 25.05.1988 and Codicil dated 04.08.1988 bequeathing the ancestral properties equally giving life interest to the plaintiff and her husband in respect of certain properties. Similarly, giving life interest to the first defendant and his wife in respect of certain properties, vested the remainders to the defendants 2 and 3. The Will also not seriously disputed by the plaintiff. Exchange of notices also not denied. Further on the basis of the Will the plaintiff and defendants have also jointly executed exchange deeds in respect of certain properties with the third parties under Ex.A6. These facts clearly show that the Will has not been disputed by the plaintiff. That apart D.W.8 and D.W.9 also examined to prove the Will in the manner known to law. They spoken about the signing of the Will by Mannarsamy Mudaliar while he was sound disposing state of mind and both of them seen the testator while signing the Will. The testator also seen the attesting witnesses signing the document in his presence. From the evidence of D.W.8 and D.W.9 it is very clear that the Will has been proved in the manner known to law.

41. Now, the question arises for consideration is as to whether Mannarsamy Mudaliar had competent to execute the Will in respect of the entire joint family properties?

42. As stated above, two of his sons became coparcenars along with Mannarsamy Mudaliar in the joint family properties. Therefore, Mannarsamy Mudaliar at the most had only 1/3 share in the ancestral properties. Remaining 2/3 shares go to his two sons. Therefore, any Will executed in respect of entire joint family property is not valid in law. Section 30 of the Hindu Succession Act gives power to the male Hindu to dispose by Will

only his interest in the property. Therefore, this Court is of the view that even though the Will has been proved in the manner known to law, the same will be valid only in respect of 1/3 share in the Mitakshara coparcenary property. Hence, the Will and Codicil executed by Mannarsamy Mudaliar will be valid only in respect of his 1/3 share.

43. Admittedly, the first defendant being the son of the Mannarsamy Mudaliar by birth is entitled to 1/3 share in the ancestral properties and the plaintiff's husband is entitled to 1/3 share in the ancestral properties. Accordingly, this Court hold that the plaintiff being the widow of Pachayappan is entitled to 1/3 share in the suit A schedule properties except items 10 and 11 and C schedule properties. In respect of other items the suit is dismissed.

44. Though it is the contention of the learned senior counsel that the plaintiff has not got into the box to support her case and therefore, adverse inference has to be drawn against her, it is to be noted that on behalf of the plaintiff the adopted son of plaintiff has deposed as power agent. Adoption deed also filed. It is to be noted in the partition suit all the parties are plaintiffs and defendants or defendants and plaintiffs, the issue in the partition suit is with regard to the determination of shares of the parties. Therefore, this Court is of the view that merely because the plaintiff has not got into box the same is not a ground to deny the legitimate right of the parties in getting share in the ancestral properties.

45. Hence, this Court hold that the judgment decree of the trial Court dismissing the suit giving right to the plaintiff to enjoy certain items of properties along during her life time as per the Will and Codicil is set aside. Preliminary decree is passed for dividing the suit A and C schedule properties except items 10 and 11 of A schedule properties in to three parts and to allot 1/3 share to the plaintiff. Though certain properties were exchanged on the basis of the Will, it is for the parties to work out their remedy in the final decree proceeding in respect of their share in the ancestral properties. The Appeal is partly allowed to the extent indicated above. The suit is dismissed in respect of item No.10 and 11 of A schedule and entire B schedule. No costs. Consequently, M.P.No.1 of 2008 is closed. No costs.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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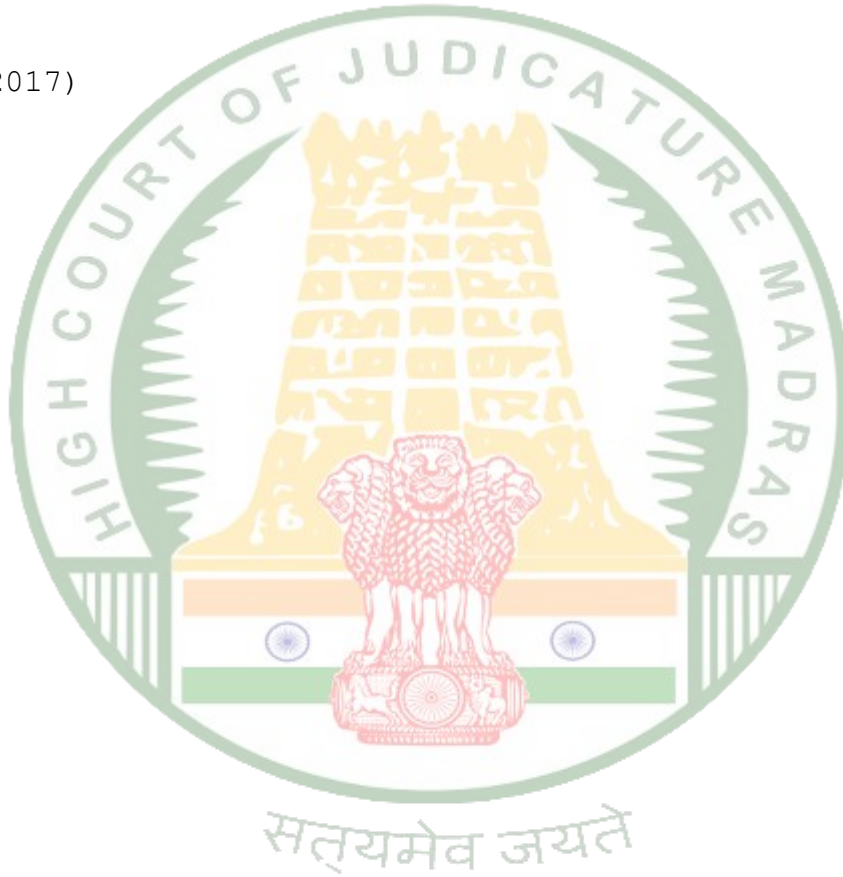
To

The Additional Subordinate Judge,
Puducherry.

+2cc's to M/s.G.M.Mani Associates, Advocate, S.R.No.24214

A.S.No.270 of 2008

VD(CO)
CA(12/07/2017)



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