the special circumstances of each case. See *Weldon* v. *Neal*.(1) In the present case we are of opinion that there are peculiar circumstances which take it out of the ordinary rule. The object of the application was perfectly clear, although there was an error in the reference to the decree, an error not unnatural, considering the complicated nature of the previous proceedings. We also observe that even execution for fasli 1295 to which respondent was clearly entitled on his application as it stood was not granted by the Subordinate Judge. Four objection petitions were presented by appellants, and it was not until the last of them was presented, nearly a year after the application for execution was first made, that the present objection was taken. We are of opinion that the general principle laid down by the Privy Council in *Bissessur Lall Sahoo* v. *Maharaja Luchmessur Singh*(2) should be followed unless its application is precluded by express provisions of the legislature. Looking, therefore, at the substance of the application and the prior proceedings which are of a complicated character, we think that the decision of the District Judge was right, and we dismiss this appeal, but under the circumstances each party will bear his own costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

1893. August 3. September 1[illegible]

ILLIKKA PAKRAMAR AND OTHERS (PLAINTIFFS Nos. 1 AND 3 TO 13), APPELLANTS,

v.

KUTTI KUNHAMED AND OTHERS (DEFENDANTS Nos. 1 AND 3 TO 9), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 566—*Remand for trial of a new issue—Malabar law—Mapillas.*

The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The

(1) L.R., 19 Q.B.D., 395. (2) L.R., 6 I.A., 233.

* Second Appeal No. 1586 of 1892.

parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly; (ii) that their mother was not governed by Marumakkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad:

Held, that the order of remand was not one which should have been made under Civil Procedure Code, s. 566, and the proceedings taken under it were irregular.

Observations as to the law applicable to Mapillas.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 359 of 1891, confirming the decree of A. Venkataramana Pai, District Munsif of Tellicherry, in original suit No. 329 of 1890.

The plaintiff sued as karnavan of a Mapilla tarwad in North Malabar to recover property acquired by his late sister and now in the possession of her children.

The further facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Ryru Nambiar for appellants.

Sankaran Nayar for respondents Nos. 2 to 5.

JUDGMENT.—The suit is brought by the karnavan of a tarwad, alleged by him to follow Marumakkatayam law, to recover property acquired by the plaintiffs' late sister, Mamotti. The defendants, who include the children of Mamotti, raise, among other defences, two pleas, either of which is a complete answer to the plaintiffs' claim. They say that Mamotti did not follow Marumakkatayam law, and that it was not to her only, but to her and her children that the property sought to be recovered was given. On the latter plea the defendants succeeded on the trial of the suit by the District Munsif, though he also found that the family was governed by Marumakkatayam law. There was, as he observed, no evidence to the contrary. Against the District Munsif's decree dismissing the suit, the plaintiff appealed, and he was successful in obtaining a reversal of the finding as to the title of Mamotti. The District Judge found on the first issue in the plaintiff's favour, and that finding we are bound to accept. Instead, however, of proceeding to consider the other issue and expressing

his agreement or disagreement with the District Munsif thereon, the District Judge—whether on his own motion or at the instance of the defendants does not appear—framed a new issue and directed the District Munsif to take fresh evidence and return a finding thereon. The issue so framed was as follows:—Whether in Marumakkatayam Mapilla families in North Malabar the devolution of self-acquired property is governed by ordinary Muhammadan law, or whether on the death of the acquirer it lapses to the tarwad?

If this issue had been one of mere fact, the procedure of the District Judge might not have been open to exception; it would have been a question whether the issue was raised by the pleadings, and whether the District Judge had exercised a wise discretion in giving an opening for a fresh inquiry; certainly his reasons for allowing a new case to be set up are not satisfactory. But the issue raised by the District Judge was not a mere issue of fact. It was not even a question as to the custom prevailing in a particular family, but, as he himself says, a question as to what is the ordinary customary law in Mapilla families. The cases *Vishnu* v. *Krishnan*(1) and *Vayidinada* v. *Appu*(2) are authorities for the proposition that such an inquiry is allowable under certain circumstances. In those cases too, among others, the tests and the standard to which the evidence adduced to support an alleged usage should conform are given. In the present case, however, it does not appear that the Judge had before him a particle of evidence (excepting the opinions of two text writers) to justify an inquiry into the law regulating Mapilla families. In our opinion, therefore, the order of remand is one which ought not to have been passed under section 566 of the Code, and the proceedings taken under it are wholly irregular. Mr. Sankara Nayar has referred us to decisions of this Court in support of his contention that the conclusion at which the Judge has arrived is the right one. In *Panangatt Unda Pakramar* v. *Vadakkel Suppi*(3) this same question, viz., as to the descent of self-acquired property in a Mapilla family was raised. There was an inquiry, and it was found that Mapillas are governed in that respect by the ordinary Marumakkatayam law as declared in *Kallati Kunju Menon* v. *Palat Erracha Menon*(4). That finding was accepted by the

(1) I.L.R., 7 Mad., 3.
(2) I.L.R., 9 Mad., 44.
(3) Second Appeal No. 576 of 1883, unreported.
(4) 2 M.H.C.R., 162.

ILLIKKA PAKRAMAR v. KUTTI KUNHAMED.

High Court. In 1886 *Kunhi Pathumma* v. *Mama*(1), the question was raised again, an inquiry was again directed, and the finding was this time in favour of the deviation from Marumakkatayam law. The High Court accepted that finding so far as it concerned the particular family, holding that there was, as regards it, sufficient evidence of a special custom. As far as we are aware, the question has not been raised since in this Court, although there have been cases in which the contention now made would be relevant. In *Kunhacha Umma* v. *Kutti Mammi Hajee*(2), the question referred to a Full Bench was as to the nature of the interest taken by a Mapilla woman and her children in a gift made to them. If, by the ordinary law of inheritance, the children, and not the tarwad generally, would succeed to the mother, the probability is that the gift would be made simply to her; but however that may be, the fact that such was the rule would have been strong to indicate that the tarwad took no interest under the gift. The evidence taken in the present case, so far as it is discussed in the judgments, certainly does not convince us of the existence of the alleged custom. The District Munsif gives good reason for holding it to be vague and uncertain, and the District Judge overruling that finding does not explain how evidence almost exclusively composed of recent documents can suffice to prove an ancient custom; nor indeed does he profess to hold that it is of a character to prove a custom in the manner required by a series of decided cases. Being of opinion that the order of remand was improperly made, and seeing that both the defences set up by the defendants have failed, we must hold that the plaintiff is entitled to judgment. We must accordingly reverse the decrees of the Courts below and remand the case to the Court of first instance for trial on the seventh issue.

Respondents to pay costs of this appeal: other costs to be provided for in the revised decree.

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(1) Appeal No. 125 of 1885, unreported (2) I.L.R., 16 Mad., 201.