

On receipt of the above finding the Court delivered the following

PAKIAM
PILLAI
v.
INNAST
FERNAND.

JUDGMENT :—Accepting the finding, I dismiss the appeal with costs.

APPELLATE CRIMINAL.

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

KARIYADAN POKKAR,

1895.
December 13.

v.

KAYAT BEERAN KUTTI.*

*Criminal Procedure Code, s. 488—Maintenance of children—Moplahs—
Personal law.*

The right of children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties. If the children are illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing maintenance. If the children are legitimate, the question of the mother's right to their custody would depend on the question whether the parties are governed by Muhammadan or Marumakkatayam law; because (1) if they are governed by Muhammadan law, the mother may have the right to custody until the children attain the age of seven years; (2) if by the Marumakkatayam law, it is doubtful if the father could be held to have neglected his duty to maintain his children if they were actually maintained by the karnavan of their mother's tarwad who is bound by law to maintain them.

CRIMINAL REVISION PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of A. F. Pinhey, Acting Joint Magistrate of Malabar, in maintenance case No. 1 of 1895.

The facts of this case appear from the Joint Magistrate's order, which was as follows :—

“The complainant, Kariyadan Pokkar, claims maintenance for the three children of his sister aged, respectively, 5, 3½ and 1½ years. Defendant is willing to maintain the mother and children if they live with him. It appears he has married again and is living in the new wife's house, and complainant urges

* Criminal Revision Case No. 453 of 1895.

KARIYADAN
POKKAR
v.
KAYAT
BEERAN
KUTTI.

“that the wife under Muhammadan and Marumakkatayam laws
“has a right to the custody of the children till seven years of
“age. The evidence need not be discussed, as there is a ruling
“of the High Court on a similar case from this Court. It has
“been held that an order for separate maintenance cannot be
“made under the Criminal Procedure Code if defendant is willing
“to take the children. An action for maintenance under the
“Muhammadan law or Marumakkatayam law will lie in the Civil
“Court, but not under the Code. No order for maintenance can
“therefore be made.”

The petitioner filed a revision petition against the above order.
Mr. *Krishnan* for petitioner.

Narayanan Nambiar for counter-petitioner.

ORDER.—It is not denied that the defendant is the father of the three children for whom maintenance is sought. The complainant is the karnavan of the mother's tarwad and presumably comes forward as the *de facto* guardian of the children. The Joint Magistrate has dismissed the petition on the ground that there is a ruling of the High Court that an order for separate maintenance cannot be made against a father if he is willing to take the children. The ruling is not quoted, but apparently it is an order of *BEST, J.*, passed in *In re Kunhamavu* * that is referred to. That is an order of a single Judge issued without any hearing in Court and without notice to the parties, and, with great respect, we venture to question the soundness of the decision.

In that case, like the present, the parties were Moplabs, and it was alleged that the defendant had divorced his wife. In the present case a divorce is also alleged, but it is not found whether the parties are governed by the Muhammadan or the Marumakkatayam law. The allegation of a divorce would seem to imply the former, whilst the fact that the petition is put in by the karnavan of the mother's tarwad would indicate the latter.

In *Ayyapattar v. Kalianiammal*(1) it was held by the Chief Justice and Mr. Justice Shephard that there was no foundation for the suggestion that section 488 of the Criminal Procedure Code did not apply to Malabar. That was a case from South Malabar, in which the Head Assistant Magistrate had, on the

* Criminal Revision Case No. 89 of 1893 unreported.

(1) Criminal Revision Case No. 388 of 1893 unreported.

application of a Nair woman, granted an order against a Patter Brahman (with whom she had formerly 'sambandam') for the maintenance of her children, and the High Court upheld the order.

KARIYADAN
POKKAN
v.
KAYAT
BEERAN
KUTTI.

No doubt the expression 'legitimate' or 'illegitimate' in section 488, Criminal Procedure Code, seems at first sight to refer to issue born of parents subject to a law recognizing marriage of some sort; but the code is of general application, and the expression used may also indicate that the only condition laid down is that the person proceeded against is in fact the father. If the parties are governed by Marumakkutayam law as their personal law, it may be that the father is not in any degree of civil relationship and that the person primarily responsible for the maintenance of the children is the karnavan of their mother's tarwad—in this case, the petitioner; and under section 1, Criminal Procedure Code, nothing contained in the Act would affect such special law. Such right to be maintained by the karnavan depending upon the personal law of the parties is a right capable of being enforced and would properly form the subject of a suit in a Civil Court. But the right of a wife and of children to be maintained by the husband and by the actual father is a statutory right, and the duty is created by express enactment independent of the personal law. In *Luddun Sahiba in re*(1), a Muhammadan wife not entitled under the Shia law to maintenance was held entitled to it under the Criminal Procedure Code. And in *Rosario v. Ingles*(2), a married woman was held entitled under section 488 to claim maintenance for her illegitimate children from the putative father.

The questions that arise therefore are: (i) are the children the legitimate or illegitimate children of the defendant? and (ii) has he neglected or refused to maintain them? If the children be illegitimate, that is, the offspring of a connection which is not a legal marriage, the refusal of the mother to surrender them to the father is no ground for refusing an allowance for maintenance—see *Lal Das v. Nekunjo Bhaishiani*(3). But, if on the other hand, the children be legitimate, though the mother be divorced, it might be unfair to hold that the father had refused to maintain them if he was ready and willing to do so should they live with him. Should, however, Muhammadan law award the guardian-

(1) I.L.R., 8 Calc., 736.

(2) I.L.R., 18 Bom., 468.

(3) I.L.R., 4 Calc., 374.

KARIYADAN
POKKAR
v.
KAYAT
BBERAN
KUTII.

ship of the children to the divorced mother till they attain the age of seven years, the defendant might be bound in any case to pay maintenance for them until they attain that age.

It is necessary, therefore, that the Joint Magistrate should determine whether the parties follow Muhammadan or Marumak-katayam law. If the former, the question will arise as to the mother's right to retain the children till they are seven years of age. If the latter, the question will arise whether the father could be held to have neglected his duty to provide for his children if they were actually being maintained by the karnavan of their mother's tarwad who is bound by law to maintain them. Of course, a karnavan is not at liberty to neglect his own duty in order to make the father pay. This application is not made by the mother of the children but by the karnavan, and it may be questioned whether he would have any *locus standi* to make such an application when the law imposed the same duty on himself and when he himself had sufficient means to perform that duty.

We set aside the order and direct the Joint Magistrate to re-hear the case.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS,

v.

SAMINADHA PILLAI AND ANOTHER.*

Indian Penal Code, ss. 188, 290—Public nuisance—Cremation—Disobedience to an order duly promulgated by a public servant—Criminal Procedure Code, s. 143—Illegal order.

On the 11th August 1894, the District Magistrate promulgated an order prohibiting the people of the village of Thirukodikaval from using their burning grounds situated on the southern bank of the Cauvery and directing them to use other burning grounds which had been provided. On the 11th May 1895 certain persons, in defiance of this order, cremated a corpse at the spot interdicted, and were convicted under ss. 188, 290, Indian Penal Code, but the conviction under s. 188 was reversed on appeal :

* Criminal Appeals Nos. 554 and 555 of 1895 and Criminal Revision Petitions Nos. 220 and 227 of 1895.