Re NARAYANA NADAN.

SADASIVA AYYAR, J.

that we ought not to interfere with the discretion of the subordinate Courts in the matter of the grant of sanction unless there is some *primâ facie* strong ground for holding that there is no reasonable probability of having a conviction on the sanction or that it is otherwise inexpedient to award the sanction on the facts of the particular case or that the party against whom sanction was granted was probably innocent. In the result I would dismiss this petition.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Tyabji and Mr. Justice Spencer.

1914. March 23 and 24.

KUNHAMBI AND SIX OTHERS (DEFENDANTS NOS. 15 TO 21), APPELLANTS,

v.

KALANTHAR AND THIRTY-SIX OTHERS (PLAINTIFF'S LEGAL REPRESENTATIVES AND DEFENDANTS NOS. 1 TO 14, 22, EIGHTH DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Mappillas of North Malabar—Law applicable—Question of fact—Custom, requisites of a valid—Judicial notice—Reasonableness or legality—Question of law—Custom derogating from the Muhammadan Law—Madras Civil Courts Act (III of 1873), sec. 16.

The law applicable to the parties to a suit is the law which the parties as a matter of fact by their customs and usages have adopted, not the law which the Courts by a consideration of the historical circumstances relating to the parties or of their religious books or otherwise consider to be the law that they ought to have adopted. If that law being sufficiently certain and not opposed to public policy is of such a nature that the Courts can give effect to it, then the principles underlying section 16 of the Madras Civil Courts Act require that they should give effect to it.

Jammya v. *Diwan* (1901) I.L.R., 23 All., 10, *Muhammad Ismail Khan* v. *Lala Sheomukh Rai* (1902) 17 C.W.N., 97 and *Hirbae* v. *Sonabae* (1847) Perr. O.C., 1105, referred to.

The question whether the particular parties are governed by the Marumakkattayam or the Muhammadan Law, is one of fact.

George v. *Davies* (1911) 2 K.B., 445, *Assan* v. *Pathumma* (1899) I.L.R., 22 Mad., 494 and *Kunhimbi Umma* v. *Kandy Moithin* (1904) I.L.R., 27 Mad., 77, referred to.

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* Second Appeal No. 1498 of 1911.

A custom to hold good in law must be not unreasonable and must apply to matters which the written law has left undetermined, and the majority at least of any given class of persons must look upon it as binding and it must be established by a series of well-known, concordant, and, on the whole, continuous instances.

The question whether an alleged rule of conduct can be enforced at all or whether it is uncertain or opposed to public policy or unreasonable is one of law and may be considered irrespective of the question whether the custom actually exists.

Moult v. *Halliday* (1898) 1 Q.B., 125, followed.

Section 16 of the Madras Civil Courts Act, discussed.

SECOND APPEAL against the decree of T. A. RAMAKRISHNA AYYAR, the Subordinate Judge of North Malabar, in Appeal No. 189 of 1910, preferred against the decree of M. R. SANKARA AYYAR, the District Munsif of Kuttuparamba, in Original Suit No. 565 of 1908.

The facts appear from the judgment of TYABJI, J.

T. R. Ramachandra Ayyar for the appellants.

T. K. Govinda Ayyar for respondents Nos. 1 to 8.

The others were not represented.

TYABJI, J. TYABJI, J.—The question on which the parties to this appeal are at issue is whether they are governed by the Muhammadan law or the Marumakkattayam law. They are Mappillas of North Malabar. Both the lower Courts have decided that the Muhammadan law is applicable. The learned District Munsif proceeded on the basis that "a custom varying Muhammadan law to be recognised as valid must satisfy the essentials of peaceableness and consistency." "These elements," he added, "appear to be wanting in the case." In appeal the Subordinate Judge came to the same conclusion, on the ground apparently that the general presumption is that the parties follow the law of their religion. He stated, however, that no authority was quoted for the proposition that Mappillas in North Malabar follow the Marumakkattayam law. In conclusion he said; "I do not think, for the reasons pointed out by the District Munsif, that the form of evidence which the law demands to prove a custom is present in this case."

It is argued before us that the findings of the lower Courts proceed on such an erroneous view as to the nature of the question to be decided and in such disregard of the presumptions applicable that we ought to interfere in Second Appeal.

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Neither of the lower Courts has alluded to the Madras Civil Courts Act, section 16 of which lays down: "Where, in any suit, or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, (*a*) the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, or, (*b*) any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision." The Act expressly mentions customs and usages as capable of being enforced by Civil Courts; and in this respect it differs from such Acts as the Civil Courts Act for Bengal, the United Provinces and Assam, Act XII of 1887, section 37 of which does not refer to customs and usages. The Courts bound by the latter Act had through a series of decisions been holding that inasmuch as the Muhammadan law was by the Legislature required to be enforced by the Courts and inasmuch as that Act did not refer to custom, it was not permissible for the parties to adduce any evidence of custom varying the strict Muhammadan law. The rule as I have just stated was followed by the Allahabad High Court in *Jammya* v. *Diwan*(1) and in a later case which was taken in appeal to the Privy Council. In the latter case the position taken up by the Allahabad High Court is very distinctly laid down. It appears from the decision of the Privy Council *Muhammad Ismail Khan* v. *Lala Sheomukh Rai*(2), that the following two issues among others were raised: (1) "can the answering defendants plead that the family in the matter of inheritance is subject to any custom in supersession of the Muhammadan law?" and (2) "if so, does any custom prevail in the family depriving female issue of right of inheritance in presence of their male issue?" All the three Courts in India in that case decided that no evidence of the alleged custom was admissible. Their Lordships of the Privy Council, however, reversed these decisions. Their judgment consisted of the following sentence: "Their Lordships have considered this case, and they think that the suit should be remanded to the High Court to enable the parties to file evidence with respect to issue No. 3 as to the family custom."

(1) (1901) I.L.R., 23 All., 20. (2) (1902) 17 C.W.N., 97.

As the Privy Council have not given reasons for differing from the series of decisions pronounced by the Allahabad and the Calcutta High Courts, it is only possible to fall back on previous decisions in order to discover the principle underlying the rule of law enacted specifically in the Madras Civil Courts Act, and held by the Privy Council to be applicable notwithstanding that it finds no explicit mention in the Act with which they were dealing. That principle was considered with very great learning in a celebrated judgment by Sir ERSKINE PERRY, C.J., of the Supreme Court of Bombay in *Hirbae* v. *Sonabae* (*Kojahs and Memons' case*)(1). The CHIEF JUSTICE considers this point at page 116 *et seq.* He lays down in effect that such legislative enactments as we have to deal with and as govern the rights of the parties in the present case proceed on the basis that the Courts have to give their decisions in accordance with the law as delivered to them for administration by their Sovereign and that the law so delivered to them consists of that law which the parties as a matter of fact by their customs and usages have adopted, not the law which the Court either by a consideration of the historical circumstances relating to the parties, or of their religious books or otherwise should consider to be the law that they ought to have adopted. If that law, being sufficiently certain and not opposed to public policy, is of such a nature that the Courts can give effect to it, then the enactments require that they should give effect to it. In dealing with the rules that are included in the body of law to which any class of persons is subject, he points out various considerations rendering customs peculiarly important. "In every well-ordered community" he says, "it is essential to its peace that clear and certain rules should exist as to the various relations of domestic life, and in every early history it will be found, that as to most of these, such as marriage, succession, adoptions, as well as to the various occupations, agricultural, pastoral or mercantile, which may happen to prevail in such society, the exigencies of man have framed rules long before written laws existed. A considerable body of law thus arises in every state, and the legislator, when he is required to enter upon his task, rarely seeks to interfere

(1) (1847) Perr. O.C. 110; s.c., 2 Morley's Digest, 431 at p. 435 *et seq.*

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with regulations which the habits and manners of the people have spontaneously adopted." (1847) Perry O.C., 116. The reason of this non-interference is that "it is a matter of comparatively little interest to the Commonwealth how the affairs of the private individuals are conducted among themselves." "In some cases the wisdom, but in most the indifference, or want of skill, of the legislator, has left mankind to frame their own rules for the conduct of daily life, and when such rules grow up into a custom, we may see by the present cases that it is often more difficult to change it than even the peculiar religion out of which it perhaps arose." Sir ERSKINE PERRY cites the words of Austin "The prevalence of a custom amongst the governed may determine the Sovereign, or some political superior in subjection to the Sovereign, to transmute the custom into positive law;" and concludes that the policy leading to such enactments as the Charters of the High Court, or the Civil Courts Acts "proceeded upon the broad, easily recognizable basis of allowing the newly conquered people to retain their domestic usages." "The main object was to retain to the whole people lately conquered their ancient usages and laws, on the principle of *uti possidetis*." These seem to me to be the principles which must be taken to have been re-affirmed by the last decision of the Privy Council to which I have referred.

Therefore the question must in each case be, what as a matter of fact is the rule of law followed amongst the particular parties before the Court?

In this connection it seems to me to be necessary to point out that both the lower Courts have been misled by the use of the word "Custom." No customary rule of conduct will be enforced unless it satisfies those general requirements of the law which are well known, and which alone can give to it a claim to judicial recognition. Hence previous adjudication on the question whether a particular rule of conduct satisfies those requirements, would afford guidance in subsequent cases: and such previous decisions may be binding on the Court considering the same question subsequently; that question being, whether the alleged rule of conduct can be enforced at all. Or whether, *e.g.*, it is uncertain or opposed to public policy, or unreasonable. This question is one of law and may be considered irrespective of the question whether the custom actually exists, as in *Moult* v.

Halliday(1). But a further question has always to be considered (unless the parties admit that it must be answered in the affirmative) whether the rule of conduct (assuming that it has all the elements entitling it to be so recognized) applies to any particular person. The latter question is a question of fact; and for the reasons I have already stated the latter question is resolvable into: have the particular parties as a matter of fact adopted this rule of conduct?

Our attention was drawn to a number of rulings of this Court in which the question was considered by which system of law the parties then before the Court (being Mappillas of North Malabar) were governed, and it was argued that the presumption arising from the decisions is that the parties now before us are governed not by the Muhammadan law but by the Marumakkattayam law. The cases reported and unreported are collected in Mr. Moore's Malabar Law and Custom (3rd edition), pages 323, 324 and 325, where nine cases in all are cited and as a result the learned author says: "The result of these decisions appears to be that this question is left as it was decided in 1860 by the Sudder Court following Mr. HOLLOWAY'S *dictum*" (in the Second Appeal No. 651 of 1860). That *dictum* was as follows: "The presumption, of course, is that the descent is that of nephews, as is the rule of North Malabar universally." It seems to me, however, that this exposition proceeds on the erroneous basis, that presumptions of this nature can be raised by counting the decisions in which facts have been found to be similar to those alleged in the case under enquiry or by showing that in the last decision the facts were held to have been to a particular effect. I am unable to see how in a case of this kind it is possible for the Court to lay down by a decision that there shall be a presumption one way or the other. I am further of opinion that the Courts have not purported to do so. It is true that if there has been a series of decisions holding concurrently that a particular community of persons has adopted a special customary law, then the Courts will take judicial notice of the repeatedly proved fact. But that is not what we are asked to do.

Two reported decisions have been cited to us. One is *Assan* v. *Pathumma*(2). The passage dealing with this question is

(1) (1898) 1 Q.B., 125. (2) (1899) I.L.R., 22 Mad., 494.

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at pages 504, 505 and 506. The question there also was whether the rights of the particular parties in regard to the property which formed the subject of litigation had to be governed by the Marumakkattayam law or by the Muhammadan law. The decision according to SUBRAHMANIA AYYAR, J., depended on three facts: (1) that the father and the paternal ancestors of one Pokker had all along been following the Muhammadan law; this fact was, it is stated, established beyond doubt by the evidence, (2) that Pokker's mother was governed by the Marumakkattayam law, (3) that the Mappillas of North Malabar were originally and generally bound by the Muhammadan law but that later they had adopted certain rules of conduct taken from the Marumakkattayam law. This third fact was also like the two other facts established by evidence. The evidence was furnished by Logan's Manual of Malabar, volume 1, page 273, to which the Judge was entitled to refer in accordance with sections 49, 87 and 32 (4) of the Evidence Act. Taking these three facts, SUBRAHMANIA AYYAR, J., by a process of reasoning in which he also included considerations of principle and of equity and justice came to the conclusion that in regard to the particular parties the conclusion of the lower Courts was correct, namely, that the Muhammadan law should be taken to have been the law of the parties. In a later case *Kunhimbi Umma* v. *Kandy Moithin*(1), SUBRAHMANIA AYYAR, J., had again to consider a similar question, and he there held that the parties before him were governed not by the Muhammadan law but by the Marumakkattayam law, and he stated: "The question will, to a great extent, depend upon the circumstances of each case and the presumption would often be in favour of the Marumakkattayam rule of devolution, since we know that, in fact, that rule is followed in very many instances by such families." Here, therefore, he based his decision on a fourth fact quite distinct from the three facts which were before him in the earlier case and on which in his opinion the decision of the earlier case depended. This fourth fact was the knowledge of the fact that a great number of "such families" follow the Marumakkattayam law.

(1) (1904) I.L.R., 27 Mad., 77.

I have referred to the mode in which each of the first three facts were brought to the cognisance of the Court. With reference to the fourth fact the point is so often misunderstood that I must explain myself more fully. When the fact of the existence of a custom amongst a particular class of people has been repeatedly proved in the Courts, the Courts have the power to take judicial notice of it. *George* v. *Davies*(1) strikingly illustrates the rule. The question then arose in the following circumstances: There was a reported decision, *Moult* v. *Halliday*(2), in which HAWKINS and CHANNELL, JJ., had felt unable to take judicial notice of the existence of a particular usage. Thirteen years later, in 1911; the County Court Judge took judicial notice of the existence of that same custom, and BRAY and Lord COLERIDGE, JJ., held that this could be done notwithstanding that thirteen years earlier the Court had held that then the custom could not be judicially noticed—*George* v. *Davies*(1).

The two English cases to which I have referred bring out with great lucidity the two component elements of the question: one an element of fact, and the other of law; and the decisions also show when and to what extent Courts have power to take judicial notice of previous decisions.

Thus in the former case, *Moult* v. *Halliday*(2), HAWKINS, J., said: "I am very sorry to say that our decision in this case cannot settle the law on the question which the parties wished to have decided. The question which came before the County Court Judge for decision was whether or not the alleged custom had been proved, and that is a question of fact, and not a question of law. There is nothing here to show that this alleged custom has been recognised, so as to dispense with the necessity for proving its existence. In this particular case I wish we had power to consider the evidence, and determine whether the alleged custom had really been established, but the law is that the County Court Judge is the sole Judge on questions of fact, and therefore on this ground only we must dismiss the appeal. There was evidence before the County Court Judge which justified him in arriving at the conclusion that the alleged custom had not been proved."

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(1) (1911) 2 K.B., 445. (2) (1898) 1 Q.B., 125 at pp. 127 and 128.

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With reference to the legal aspect of the point he said: "Having heard the question as to the reasonableness of the alleged custom fully discussed in the course of the argument, I think we ought to give our opinion upon it, and I have no hesitation in saying that, in my opinion, not only would the alleged custom not be so unreasonable that it could not prevail, even if proved, but it would be so reasonable that, if it were established by evidence, it ought to be acted upon."

And CHANNELL, J., said: "I am entirely of the same opinion. I agree with everything that has been said in the judgment which has just been delivered, and I should not have considered it necessary to add anything, were it not that the case raises a question of some interest as matter of law. It depends on what is the nature of that thing which is called a custom. A custom is what is so well known and understood that in transacting business it is unnecessary to mention it, because it is so well known that it must be taken to be incorporated in every contract, unless something to the contrary is said. For instance, there is the custom of a month's notice or a month's wages, which is so well known that every person who is hired as a domestic servant is taken to be engaged on those terms, unless there is an express stipulation to the contrary. The question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the Courts take judicial notice of it. . . . In the present case the custom certainly has not got to the stage of being judicially noticed, but the Court must in each case have evidence of the custom, and must form an opinion on that evidence. Here the County Court Judge has formed an opinion, and we cannot review his finding. I think the alleged custom, if it were proved, would be reasonable, and certainly it would not be acted upon. There can be very few cases, where a custom has been sufficiently proved, in which a Court could hold that it was unreasonable for that it must be convenient is shown by the fact that it has been established and followed."

In the later case BRAY, J., said: "At the trial the plaintiff relied upon a custom that either party in the case of a contract for the engagement of a domestic servant may terminate the contract of service at the end of the first month by giving notice to that effect at or before the expiration of the first

fortnight of the service. The County Court Judge was asked to take judicial notice of that custom and to act upon it. The Judge, who has been a County Court Judge for many years and who must have had great experience of these cases, which almost necessarily, owing to the smallness of the sums claimed, are brought in the County Court, said that he had in previous cases taken judicial notice of the custom, and would take judicial notice of it in this case. I cannot say that the Judge was wrong in so doing. A time must come when a County Court Judge having had the question of the existence of this custom before him in other cases, is entitled to say that he will take judicial notice of it, and will not require it to be proved by evidence in each case. In *Moult* v. *Halliday*(1), evidence was called in support of the custom, but the County Court Judge came to the conclusion, upon the evidence that the custom was not proved, and he gave judgment for the defendant. Upon appeal it was contended that the Judge was bound to take judicial notice of the custom. This Court held that the question whether the custom was proved was a question of fact, upon which the County Court Judge's decision was final, and upon that ground alone they dismissed the appeal. That case was decided over thirteen years ago, and, as I have said, when this custom is continually being put forward and proved by evidence, a time must come when a Judge may say that he no longer requires it to be proved, but that he will take judicialnotice of it. I cannot say that the Judge was wrong in taking judicial notice of the custom, and therefore that point fails."

In the same way there was nothing to prevent SUBRAHMANIA AYYAR, J., from taking judicial notice of the fact to which he alludes in *Kunhimbi Umma v. Kandy Moithin*(2), that a great number of Mappilla families had adopted the Marumakkattayam law. Nor do I see any more inconsistency between the legal points of view from which *Kunhimbi Umma* v. *Kandy Moithin*(2) and *Assan* v. *Pathumma*(3) were respectively decided than between *Moult* v. *Halliday*(1) and *George* v. *Davies*(4). In each case the question was one of fact. The considerations on which the decision in the first case [*Kunhimbi Umma* v. *Kandy Moithin*(2)]

(1) (1898) 1 Q.B., 125.
(2) (1904) I.L.R., 27 Mad., 77.
(3) (1899) I.L.R., 22 Mad., 494.
(4) (1911) 2 K.B., 445.

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proceeded were different from those on which the second case was decided. Being the decisions of so distinguished a Judge as Sir SUBRAHMANIA AYYAR they must no doubt be taken to be of assistance and guidance as to the way in which the consideration of such a question must be approached. But they cannot be distorted into authorities for holding that because he found on the evidence in the one case that the parties were governed by the Marumakkattayam law therefore in any subsequent case there is a presumption or likelihood that the parties should be governed by the same law. The question would be whether there is the same basis for coming to the same conclusion. SUBRAHMANIA AYYAR, J. himself laid down the true basis of presumption to be twofold: either some policy of law or some general conformity with fact—see *Subramanian Chetty* v. *Arunachelam Chetty*(1).

I, therefore, come to the conclusion that where the question is whether the particular parties are governed by the Marumakkattayam law or the Muhammadan law the real issue to be decided is one of fact, namely, whether the particular parties have adopted the one system of law or the other and whether they have been governing their conduct in accordance with the one system or the other. For that purpose various considerations may have to be weighed on one side or the other—four of which have been alluded to by Sir SUBRAHMANIA AYYAR. One consideration is no doubt that if the parties belong to the Mussalman religion the rules of succession being a portion of that religion, it may be inferred that there would be a tendency to follow the rules of Islam as regards inheritance.—*Mahomed Sidick* v. *Haji Ahmed*(2). Another consideration pointing the other way would be that if the parties are Mappillas, it is known—I adopt SUBRAHMANIA AYYAR, J.'s *dictum*—that a great number of families as a matter of fact observe the Marumakkattayam law. There may be also some considerations as regards the way in which property has been held or the way in which the parties have conducted themselves in the past: if, for instance, the parties themselves or their ancestors have in previous litigation set up that they are governed by one system or the other. The

(1) (1905) I.L.R., 28 Mad., 1 at p. 4.
(2) (1885) I.L.R., 10 Bom., 1 at pp. 9-10.

mode of proving the existence of custom in any particular case is thus alluded to by Thibaut *System des Pandekten Rechts*, volume 1, page 15 in a passage cited by Sir ERSKINE PERRY in *Hirbæ* v. *Sonabæ*(1): "A custom, therefore, to hold good in law, requires, besides the above negative conditions (viz., that the custom is not unreasonable and applies to matters which the written law has left undetermined), the following positive condition, namely, that the majority at least of any given class of persons look upon the rule as binding, and it must be established by a series of well-known, concordant, and, on the whole, continuous instances. How many examples are necessary to prove a custom cannot be laid down beforehand, neither is the number to be left to the arbitrary discretion of the Judge,—but the point in each case is, whether the common consent of the class in question is clearly demonstrated by the number of instances proved." These considerations are not exclusive of each other. Due attention must be given to each of them and to any others that may be relevant under the Indian Evidence Act to the question of fact involved.

It is true that neither of the Courts below has considered the question in the manner in which in my opinion it should in strictness be considered; and it is also true that some remarks seem to me, with great deference to both the lower Courts, meaningless in reference to the real question to be decided. But as I have pointed out there is no basis for taking judicial notice of any circumstance which in itself is decisive of the question of fact or which has so strong a bearing on the question of fact as to raise a presumption that the question of fact must *primâ facie* be decided in any particular way, and I am unable to hold that the finding arrived at by both the Courts is a finding based on such an erroneous mode of approaching it and in such disregard of the evidence as would entitle us to interfere with it in Second Appeal.

It seems to me that the evidence has as a matter of fact been considered and that the decision, notwithstanding some remarks, is based on the evidence. I would therefore dismiss this appeal with costs.

SPENCER, J.—I concur. SPENCER, J.

S.V.

(1) (1847) Perry's O.C., 110 at p. 118.