APPELLATE CRIMINAL.

FULL BENCH.

Before Sir John Beaumont, Chief Justice, Mr. Justice Murphy and Mr. Justice Rangnekar.

EMPEROR *v.* SAYAD ESMAIL WALAD SAYADSAHEB MUJAWAR (ACCUSED No. 1).*

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March 24

Indian Penal Code (Act XLV of 1860), sections 361, 363, 366, 376—Kidnapping from lawful guardianship—To make the offence in section 363 punishable, the victim must be below the specified ages in section 361—Sections 361, 363, construction of—Headings and marginal notes, value of.

At a trial of the accused for offences of kidnapping and rape under sections 366 and 376 of the Indian Penal Code, the Judge directed the Jury that it was open to the Jury to bring in a verdict of simple kidnapping under section 363 if the Jury were satisfied that the girl was below sixteen at the time of the offence. The Jury, however, brought in a verdict of not guilty of any offence. The Judge on the evidence came to the conclusion that the girl was below the age of sixteen and that the accused should be convicted under section 363. He, therefore, referred the case to the High Court. A question arose as to whether section 363, Indian Penal Code, was controlled by section 361 of the Code.

Held, by the Full Bench (Beaumont C. J. dissenting), that sections 361 and 363 must be read together. The offence of kidnapping from lawful guardianship penalised by section 363 was the offence defined in section 361, and in establishing a charge under section 363 it would be necessary to prove that the minor, if a male, was under fourteen years of age, or if a female, under sixteen years.

Per Beaumont C. J. It is clear that the two sections do not in terms correspond. It is no doubt a reasonable assumption that the Legislature intended the definition in section 361 to correspond with the offence, constituted by section 363, but this in terms has not been done. There is, therefore, no justification for assuming that in order to constitute an offence of kidnapping from lawful guardianship under section 363 it must be proved that the minor is under the ages, specified in section 361. The words of section 363 are perfectly plain and in my judgment the Court is not justified in reading into the section words which are not there in an attempt to reconcile two sections which in fact do not correspond.

Per Rangneker J. It is clear on the authorities that the headings in a statute can be referred to for the purpose of finding out the meaning of a doubtful expression in a section.

Hammersmith, &c. Railway Co. v. *Brand*,[1] followed.

* Criminal Reference No. 125 of 1932.

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There can be no objection to refer to marginal notes for the purpose of construing or interpreting the sections of an Act, if they are inserted by or under the authority of, or assented to by the Legislature.

Ram Saran Das v. *Bhagwat Prasad*,[1] followed.

Bushell v. *Hammond*,[2] referred to.

CRIMINAL REFERENCE No. 125 of 1932 by J. N. Mehta, Additional Sessions Judge, Belgaum, in Sessions Case No. 54 of 1932.

One Gurava *kom* Annappa resided with her husband at a village Aigali. On March 27, 1932, she was persuaded by Sayed Ismail (accused No. 1) to leave her husband's house to go to her mother at Badgi on account of ill-treatment by her husband. The girl at first refused but subsequently agreed to go with the accused. She was then taken to a newly built room, belonging to Hongauda Ramgauda (accused No. 2) and accused No. 1 left her there. Accused No. 2 gave her bread and water and a short time after accused No. 1 returned. The two accused and the girl then left the place and on the way they were met by Ningappa who asked them who they were. Accused No. 2 said that they were Ismail (accused No. 1) and his daughter. Accused No. 2 then returned home. Accused No. 1 took the girl to a sugar cane mill and on the way from the mill to Badgi the accused was alleged to have raped her.

The relations of Gurava's husband found that the girl was missing. Finding that the search made by them was fruitless, they set out to go to Badgi in the expectation that she might have gone to her mother. On coming to that place they sat under a tamarind tree. In the early hours of the next morning they saw the accused and the girl coming. The accused and the girl were then brought back to Aigali and were handed over to the Sanadi in the Chavdi after which the investigation followed.

The accused was afterwards put up for trial before the Additional Sessions Judge with a Jury for having committed

[1] (1928) 51 All. 411 F. B. [2] (1904) 73 L. J. K. B. 1005.

offences under sections 366 and 376 of the Indian Penal Code and accused No. 2 was charged with having committed an offence under section 366 read with section 109 of the Indian Penal Code. At the trial in the course of his charge to the Jury, the Judge observed as follows :—

"If you hold that the girl was below 16 and that accused No. 1 kidnapped her, you should consider whether the accused would be guilty of having committed an offence under section 363 (section 363 read and explained). This section lays down the punishment for the simple offence of kidnapping. The offence under section 366 is a more aggravated offence. If you hold that the facts proved are not sufficient to hold the accused guilty of having committed an offence under section 366, you should consider whether the accused would be guilty under section 363. If you hold that an offence under section 366 is not proved but that a minor offence under section 363 is proved, you can return a verdict against the accused accordingly."

The Jury brought in a verdict of not guilty in favour of both the accused. While accepting the verdict with regard to accused No. 2, who was accordingly acquitted, the Judge differed from the Jury as to the guilt of accused No. 1 and, therefore, submitted the case against the accused to the High Court under section 307 of the Criminal Procedure Code. In the letter of reference, the Judge expressed his view in the following terms :—

"In my summing up I told the Jury that if the girl was below sixteen and if the other ingredients necessary under section 366 were absent, the accused would not be liable under section 366 but would be liable under section 363, Indian Penal Code, if it was held that the girl was taken out of her husband's keeping without the consent of the husband. It is not the defence of the accused that he took the girl with the consent of her husband and he admits that he did take the girl. His case is that he did it because Sakrewa and the girl asked him to do it. If the girl is below sixteen, the consent of Sakrewa or the girl would be of no use. The Jury have found that accused No. 1 is not guilty of having committed any offence. It means that they have held that the girl was not below sixteen at the time of committing the offence. In arriving at that conclusion the Jury have not properly considered the evidence produced by the prosecution to prove the age of the girl. The Sub-Inspector has stated in his statement that he had made attempts to get the birth extracts of the girl. The girl was born in the territory of His Exalted Highness the Nizam and the Sub-Inspector could not produce the birth extract. I do not think that it would be proper to ignore the other evidence produced by the prosecution regarding the age of the girl, merely because the birth extract could not be obtained. If all the evidence on the record regarding the age of the girl is considered it would show that the girl was below sixteen when the offence was committed."

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"In view of these circumstances I think that the Jury was not right in holding that accused No. 1 did not commit any offence. I regret that I cannot accept this verdict of the Jury. I think that the Jury should have found the accused guilty of having committed an offence under section 363, Indian Penal Code."

The reference was placed on January 31, 1933, before Beaumont C. J. and Murphy J. who directed it to be argued before a Full Bench on the question whether section 363 of the Indian Penal Code was controlled by section 361 of the Indian Penal Code.

The case was then argued before a Full Bench consisting of Beaumont C. J. and Murphy and Rangnekar JJ.

B. G. Rao, Assistant Government Pleader, for the Crown. The question arising for your Lordships' consideration is whether the provisions of section 363 are subject to the provisions of section 361. It is to be noted that the wording of section 363 is perfectly general. Having regard to its definition in section 11, the term 'person' is a general expression. It contemplates not only a person falling under section 361, but also a person, whether male or female irrespective of age. That expression includes a minor, an insane person, a child. The word 'person' occurs in sections 363, 364, 367 and 368. Whenever a person of a stated age is in contemplation, the Legislature has actually said so; *cf.* sections 366A, 369, 372 and 373. In construing a penal statute, its meaning cannot be restrained so as to defeat the object of the enactment. The Indian Penal Code is not exhaustive: see *Barendra Kumar Ghosh* v. *The King-Emperor*.[1]

S. K. Nabiullah, for the Accused. The key to the interpretation of the Penal Code is chapter II. Sections 6 and 7 may be referred to in that connection. Sections 361 and 363 must be read together. Any person in section 363 refers to the classes of persons, mentioned in sections 360 and 361. Section 363 is not to be read independently of section 361. If section 363 is read independently then the first two

[1] (1924) L. R. 52 I. A. 40 at p. 44.

sections, viz., 360 and 361, would be redundant and they will be left without a penal section as these two sections, viz., 360 and 361, do not provide for any specific punishment. The section must be strictly construed. Whenever the Legislature wanted to punish offences relating to persons under 18 years of age, it has specifically so stated: vide sections 366A, 372 and 373.

C. A. V.

BEAUMONT C. J. This is a reference by the Additional Sessions Judge of Belgaum under section 307 of the Criminal Procedure Code. The accused was charged with offences under sections 366 and 376 of the Indian Penal Code and the Jury brought in a verdict of not guilty of any offence. The learned Judge had told the Jury that it would be open to them to bring in a verdict of simple kidnapping under section 363, but that in order to justify such a verdict they must be satisfied that the age of the girl kidnapped was under sixteen at the time of the offence. The learned Judge is of opinion that the verdict of the Jury was wrong, and that the accused should have been convicted under section 363 of the Indian Penal Code, and he has therefore referred the matter to us.

If the learned Judge was right in charging the Jury that they must be satisfied that the age of the girl at the time of the offence was under 16, it is, in my opinion, impossible to say that the verdict of the Jury was perverse. The evidence, particularly that of the mother and the Doctors, appears to show that the girl was probably just under 16 at the time of the offence. But the evidence is by no means clear, and I think that the Jury was justified in saying that they were not satisfied upon the point.

There is, however, no doubt upon the evidence that the girl was under 18 at the time of the offence, and the question therefore arises whether in establishing a charge under section 363 of the Indian Penal Code of kidnapping a minor from lawful guardianship it is necessary for the prosecution

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to prove that the minor, if a male, is under 14 years of age, or, if a female, under 16. That question is one which I have had to consider more than once, and the answer depends upon whether the definition contained in section 361 of the Code is to be read into section 363.

The offence of kidnapping is dealt with in section 359 and the following sections. Section 359 provides that kidnapping is of two kinds, kidnapping from British India and kidnapping from lawful guardianship. Section 360 defines kidnapping from British India and the definition does not involve any limit upon the age of the person kidnapped. Section 361 is in the following terms :—

"Whoever takes or entices any minor under fourteen years of age, if a male, or under sixteen years of age, if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person."

It is to be noticed that that definition is not a definition of the offence of kidnapping any person from lawful guardianship but is a definition of the offence of kidnapping a minor under the ages specified or a person of unsound mind from lawful guardianship. Section 362 deals with abduction and is not relevant. Section 363 is in the following terms :—

"Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

That section is general in terms and the offence constituted consists in kidnapping any person from British India or from lawful guardianship without any reference to the age of the person kidnapped. It follows *ex necessitate rei* that the offence of kidnapping from lawful guardianship can only be committed in respect of a person who can be the subject of lawful guardianship, that is to say, a minor or a person of unsound mind. But there is nothing in the wording of section 363 to suggest that the minor must be below the

ages specified in section 361. It is argued that having regard to the scheme of the Code, which is first to define an offence and then by a later section to impose a penalty for the commission of that offence, and to the relative positions of the sections to which I have referred, the Court should hold that the offence of kidnapping from lawful guardianship constituted by section 363 relates only to the offence defined in section 361. It is clear that the two sections do not in terms correspond. To make the offence constituted by section 363 correspond to the definition in section 361 it would be necessary either to read section 361 as saying that whoever takes or entices any minor under the ages specified or any person of unsound mind as mentioned is said to kidnap a person from lawful guardianship, reading the words " a person " in place of the words " such minor or person ", or to read section 363 as providing that whoever kidnaps any person from British India or any such minor or person of unsound mind as is referred to in section 361 from lawful guardianship shall be punished etc. It is no doubt a reasonable assumption that the Legislature intended the definition in section 361 to correspond with the offence constituted by section 363, but this in terms has not been done. Having regard to the great care and skill with which the Code is drawn, it is not improbable that the discrepancy between the two sections arose from some change in the intentions of those responsible after the Code was originally drafted, and it is at least as likely that the failure to bring the two sections into line arose from an omission to widen the definition in section 361 by extending it to all minors, as from a failure to limit the penal section to a particular class of minors. There appears to me in the nature of things to be no convincing reason why a person who entices any minor away from that minor's lawful guardian should not be held to commit an offence.

It is further argued that unless the definition in section 361 is read into section 363 the definition section is surplusage.

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But that is not so. Section 363 embraces the offence defined in section 361, though it may embrace other offences too. Where the Court is dealing with kidnapping from lawful guardianship a male under fourteen or a female under sixteen, the definitions in section 361 directly apply. When the Court is dealing with the offence of kidnapping minors over those ages (assuming such offence to fall within section 363) the Court would no doubt act on the definition by way of analogy, since it is plain that the expression "kidnapping from lawful guardianship" must have the same meaning whether applied to a minor above or below the ages specified in section 361.

It is curious that there appears to be no reported case in which this question has been considered, and it would appear that the Courts in this Presidency at any rate have always assumed that to constitute the offence of kidnapping from lawful guardianship it must be proved that the minor is under the ages specified in section 361. But, in my opinion, there is no justification for such assumption. The words of section 363 are perfectly plain, and in my judgment the Court is not justified in reading into the section words which are not there, in an attempt to reconcile two sections which in fact do not correspond. In my opinion, therefore, we ought to accept the reference and convict the accused under section 363, but as my learned brethren take a different view of the law, the reference must be rejected.

MURPHY J. The point for the decision of the Full Bench arises on sections 361 and 363 of the Indian Penal Code. The former section defines the offence of kidnapping from lawful guardianship and limits the cases to those committed against persons who are, if males, under the age of fourteen, and if females, under the age of sixteen. Section 363 provides the punishment for kidnapping from lawful guardianship but does not repeat the phrases enacting the two age limits, and as it stands, makes punishable all kidnapping from lawful guardianship, which, in the ordinary sense, would

mean of persons who have a lawful guardian, that is, all persons of unsound mind, and others under eighteen or twenty-one, as the case may be, these being the two possible limits of minority.

In the case before us the girl in question must have been found by the Jury to have been over sixteen, or at least the Jury must have thought that it had not been proved that she was under that age. I think, on the language of the section, that the wider construction of section 363 is justified by its expression, but if it is the true one, there could be no conceivable object in enacting section 361, with its different age limits, and providing no separate section to enable the offence defined in section 361 to be punished. There is a difficulty in interpreting the two sections and the explanation seems to me to be that the Legislature thought that the connection between them was sufficiently clear from the explanation in section 361, the lack of another section punishing the offence defined in section 361, and its obvious superfluity if viewed as a special case of the offence aimed at in section 363 ; and that a repetition of the phrases limiting the age of male and female victims of the offence defined in section 361 in section 363 was unnecessary. In my thirty years' experience of the criminal Courts, sections 361 and 363 have always been read together, and we have not been able to find a case of a different reading of them in any of the reports.

I am, therefore, of opinion that the offence punishable under section 363 in the cases of minors is that contemplated in section 361 and not one comprising all minors in lawful guardianship.

RANGNEKAR J. In this case the Jury were not satisfied that the girl was under sixteen years of age, but there is no doubt upon the evidence that she was under eighteen years of age at the time when the offence was committed, and the question is whether the accused can be convicted under

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section 363. The question really is, what are the offences made penal by section 363 ? If the definition in section 361 is read into section 363, the accused must be acquitted ; if not, he must be convicted.

Mr. Rao says that section 363 is general in terms and constitutes two offences, (1) kidnapping a person from British India, and (2) kidnapping from lawful guardianship, which would include kidnapping a minor irrespective of the age limit prescribed by section 361 and kidnapping a person of unsound mind. He further says that the words ought to be construed in their ordinary and natural sense and are capable of being construed in that way. That being so, no separate definition was considered necessary and the offence of kidnapping from lawful guardianship was created by section 363 itself. The learned advocate also relies upon the connected sections in the same Chapter which follow section 363.

The point thus raised has not come up for decision specifically in any reported case. There are, however, numerous decisions of the Indian High Courts which show that as soon as it was found in any case that the victim of the outrage was a boy over fourteen or a girl over sixteen, even though he or she may be a minor under eighteen years of age, the Courts have refused to convict the accused under section 363, and have thus in effect held that the second offence mentioned in section 363 is the same offence as defined in section 361. The question then is whether the construction which seems to have been uniformly put on section 363 so far is correct.

At the outset I should like to refer to certain general principles which, I think, are applicable in this case. The scheme of the Act, generally speaking, is that there is first a definition of an offence, and then a penal provision relating to it. Unless the case falls within the ambit of the definition, there is no offence. Accordingly, the sections

with which we are concerned here appear in Chapter XVI, under the heading, "Of Kidnapping, Abduction, etc.". It is clear on the authorities that the headings in a statute can be referred to for the purpose of finding out the meaning of a doubtful expression in a section. In *Hammersmith, &c. Railway Co.* v. *Brand*[1] it was observed that the headings of different portions of a statute can be referred to to determine the sense of any doubtful expression in a section arranged under any particular heading. It is equally clear that in cases of doubt the Court can have regard to the position of a particular section in an Act. After the heading we have section 359 in these terms :

"Kidnapping is of two kinds: kidnapping from British India, and kidnapping from lawful guardianship."

Then comes section 360, which defines the offence of kidnapping from British India, and this is followed by section 361, which defines the offence of kidnapping from lawful guardianship. Section 362 defines the cognate offence of abduction, and then comes section 363, which runs as follows :—

"Whoever kidnaps any person from British India or from lawful guardianship, shall be punished . . ."

So that the statute first under the heading "Kidnapping" says that kidnapping is of two kinds, then defines both in sections 360 and 361 respectively, and makes them punishable under section 363. The arrangement of the sections seems to be complete and in conformity with the general scheme of the Code. Apart from section 361 there is no definition of the offence of "kidnapping from lawful guardianship." Now it is said that no definition is necessary, that the offence is both created and punished by section 363. The answer to the argument is that if the Legislature intended to make kidnapping a minor from lawful guardianship, irrespective of his age, an offence, then section 361 is clearly redundant. Secondly, that part of

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section 361 which refers to the case of a person of unsound mind is equally redundant. Why, again, was it necessary for the Legislature to define the offence of kidnapping from British India in section 360? Assuming that the word "kidnapping" required no explanation, can it be said that the expression "lawful guardianship" would require no definition or explanation? In the legal acceptation of the expression it would apply to the case of either a natural or testamentary or a guardian appointed under the Guardians and Wards Act. But would it include the case of a person to whom the custody of a minor is entrusted? By the explanation to section 361 the term "guardian" has been extended to any person lawfully entrusted with the care and custody of the minor. If it be said that for that purpose the Court may adopt the definition of that expression in section 361, the answer would be that that definition is limited only to that section and only for the purpose of that section. Without this explanation the guardianship would be limited to lawful guardianship in its legal sense. The explanation says that the term "lawful guardian" is to be understood in that extended sense only "in this section", i.e., section 361.

Mr. Rao refers to the sections which follow section 363. These lay down punishments for aggravated forms of offence of kidnapping as defined in sections 359, 360 and 361, and the offence of abduction as defined in section 362, with certain objects and with certain motives, and that accounts for the expression "any person" occurring in those sections. It seems to be clear that wherever the word "kidnaps" occurs in those sections it can only be understood in the sense in which it is defined in sections 360 and 361 read with section 359.

The definitions of offences in the Indian Penal Code are exhaustive. Whenever it is provided in the definitions that whoever does such and such a thing, etc., is said to do something, etc., which is made punishable as an offence, the

thing or things thus described are the essential ingredients of the offence, and unless a person comes within the ambit of the definition, he cannot be held to have committed the offence, e.g., sections 339, 340, 351, 378, 415, 441, etc. Reading section 363 with sections 359 and 361 it follows that no one can be convicted of kidnapping from lawful guardianship unless the case comes within the ambit of section 361.

The marginal note to section 361 supports this view. It is said that a marginal note cannot be looked at for the purpose of construing a statute. It has, however, been recently held by a Full Bench of the Allahabad High Court in *Ram Saran Das* v. *Bhagwat Prasad*[1] that there can be no objection to refer to marginal notes for the purpose of construing or interpreting the sections of an Act, if they are inserted by or under the authority of or assented to by the Legislature. This view derives support from the observations in Maxwell on the "Interpretation of Statutes", 7th edition, at page 37, viz., "But, as regards marginal notes, the rule regarding their rejection for the purposes of interpretation is now of imperfect obligation". The learned author then mentions some cases where the marginal notes were referred to. Speaking for myself, I am, as at present advised, inclined to accept this view. But even without going so far, I think, as Collins M. R. said in *Bushell* v. *Hammond*[2] (p. 1007): "The side note, also, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section". Now the marginal note in section 361 is "Kidnapping from lawful guardianship". The second kind of kidnapping in section 359 is also in similar words. The same expression appears in section 363. It seems to me, therefore, that the words "kidnapping from lawful guardianship" must be construed in the same sense throughout the Code, and there is no reason why in

[1] (1928) 51 All. 411 F. B. [2] (1904) 73 L. J. K. B. 1005.

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section 363 they should be construed in a sense different from that in which they are used in section 361.

It is said that on principle it is difficult to see why a boy of 14 or a girl of 16 should be protected and not a boy of 15 or a girl of 17. The policy of Legislature in fixing the age limits in the case of certain offences is a matter of no concern on the question of the construction of the statute. The Indian Penal Code was enacted in 1860. The Indian Majority Act was enacted in 1875. When the Indian Penal Code was enacted the age of majority was 15 in Bengal and 16 in this Presidency in the case of Hindu minors under the Hindu law. In the case of Mahomedans the age was the age when the minor, male or female, attained puberty, which was presumed at the latest to be the completion of 15 years. The fact, therefore, that the ages of 14 and 16 are specified in section 361 seems to indicate that the Legislature did not intend that the offences of kidnapping from lawful guardianship should depend upon the age of majority under the personal law of the Hindus and Mahomedans, and the Legislature seem to have considered that for the purpose of such an offence the age limit should be reduced. Before the Indian Majority Act the Legislature might very well have taken the age of 16 for both boys and girls and this would have included all minors, whether boys or girls, Hindus or Mahomedans. It was not necessary to make any distinction as the Indian Penal Code seems to have made in section 361 between boys and girls and fixed a lower age limit for boys and a little higher for the girls. It seems to me, therefore, even from the point of view of the policy of the Legislature, that the ages of 14 and 16, as the case may be, were fixed upon deliberately in the definition of kidnapping a minor from lawful guardianship in section 361 and other factors were considered besides that of legal minority. Throughout the Code there is an indication that the Legislature has prescribed different age periods in the case of children and minors in connection

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with certain offences. In some cases you have the age of 18, in some 14, and in others 10, and so on, e.g., sections 369, 372, 373, etc. Although, therefore, one may desire to see a change effected and the age limit advanced, it is not open to one to discuss the reasons which have led the Legislature to prescribe certain limits in certain cases.

For these reasons I hold that section 361 must be read with section 363 and that the offence of kidnapping from lawful guardianship penalized by the latter section is the offence which is defined in section 361.

Per Curiam. Reference is rejected, and the accused is acquitted.

Answer accordingly : reference rejected.

Y. V. D.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

AKBARALLY ADAMJI PEERBHOY AND OTHERS *v.* MAHOMEDALLY ADAMJI PEERBHOY AND OTHERS.*

1931

June 16.

Mahomedan Law—Mosque, administration of—Principles governing personal law of parties—Customs and usages may vary principles of Mahomedan Law—Proof of custom—Dedication of mosque to a community—Whether other communities excluded—Mosque, essentials of.

Questions relating to the administration of a mosque are governed by the personal law applicable to the parties concerned, viz., Sunni or Shiah law as the case may be.

As the great majority of the Musalmans in India follow the Hanafi school of Sunni law, the Courts presume that Muslims in India follow that school unless the contrary is alleged and proved. Similarly, the presumption is that if the parties are Shiahs, they are governed by the Shiah law. The great majority of Shiahs being Ithna Asharis, their exposition of the law is enforced, unless the parties show that a different rule applies to them.

Where, however, it is shown that the parties have adopted customs or usages having the force of law, such customs or usages will be given effect to, even if they are at variance with Mahomedan law. Such customs and usages must be proved by adducing evidence of a series of well-known concordant and on the whole continuous instances of the custom alleged, so that the common consent of the community is clearly demonstrated by the number of instances proved.

*O. C. J. Suit No. 1960 of 1927.