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KOCHAN KANI KUNJURAMAN KANI

v.

MATHEVAN KANI SANKARAN KANI

May 7, 1971

B [K. S. HEGDE AND A. N. GROVER, JJ.]

Custom—Plea of tribal custom—Whether family custom can be proved. Kanikkars—Whether governed by Marumakkathayam law or Makkathayees.

The appellant who was the son of the last male holder, was recognised by the revenue authorities as entitled to his father's estate. The respondent, who was the brother of the last male holder, filed two suits claiming to be the legal heir of the last male holder on the basis that his brother belonged to the Kanikkar *tribe* governed by the customary Marumakkathayam law. The appellant contended that his father was a Makkathayee. The appellant also filed a suit for eviction of his tenant.

In appeals arising out of the suit, the High Court decided that the *family* of the last holder was governed by Marumakkathayam law, relying on certain admissions made by the last holder during his life time.

In appeal to this Court,

HELD: The High Court was in error

(a) the evidence in the case and various reports and books, which came into existence at undisputed point of time, showed that the Kanikkar tribe was not governed by any particular custom. Different families of the tribe followed different customs, some of the Marumakkathayam, some of the Makathayam and others a mixture of the two. [790F-G]

(b) The admissions by the last male holder were not uniform. He sometimes described himself as Marumakkathayee and sometimes as Makkathayee. [790H]

(c) Further, the question in issue was whether the Kannikar *clan* was governed by Marumakkathayam law. The custom pleaded by the respondent was a *tribal custom* and not a *family custom*. He could not be permitted to prove a custom not pleaded by him and such proof would not help him. [789E]

[Therefore, respondents suits were dismissed and the appellant was given a declaration in his suit or eviction, that he was the owner of the properties. The suit was however remanded for decision as to his right to evict his tenant, in view of the prevailing tenancy laws.]

Abdul Hussain Khan v. *Bidi Sona Dero*, 45 I.A. 10 and *Thakur Gokalchand* v. *Parvin Kumari*, [1952] S.C.R. 825, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 924 to 926 of 1966.

Appeals by special leave from the judgment and order dated August 31, 1965 of the Kerala High Court in A. S. Nos. 686 of 1961, 469 of 1964 and S. A. No. 356 of 1962 A

M. Natesan, N. Sudhakaran and *P. K. Pillai*, for the appellants (in all the appeals).

M. K. Ramamurthi, J. Ramamurthi and *Vineet Kumar*, for respondent No. 1 (in C. A. No. 924 of 1966) and respondents Nos. 1 and 5 (in C. A. No. 925 of 1966). B

The Judgment of the Court was delivered by

Hegde, J.—A common question arises for decision in these appeals by special leave. That question is as to who is the legal heir of the deceased Kochan Kani. Kunjuraman Kani, the son of the deceased Kochan Kani (who will hereinafter be referred to as the appellant) claims that he is the legal heir. On the other hand Mathevan Kani (who will hereinafter be referred to as the respondent) the brother of the deceased Kochan Kani claims that he is the legal heir. According to the respondent the deceased was governed by Marumakkathayam law but according to the appellant he was a Makkathayee. Both Marumakkatham system as well as Makkathayee system are customary laws. C D

After the death of Kochan Kani the revenue authorities came to the conclusion that the appellant was entitled to the estate of his father. Thereafter the respondent filed O. S. No. 74 of 1956 on the file of the Second Additional District Judge, Trivandrum against the appellant and his step-mother seeking a declaration that he was entitled to the transfer of the registry in his name as the legal heir of the deceased Kochan Kani. That suit was dismissed by the trial court but on appeal the High Court of Kerala reversed the decree of the trial court and decreed the suit in favour of the respondent. Civil Appeal No. 924 of 1966 is directed against that judgment. E F

The respondent and some of the alienees from him instituted O. S. No. 78 of 1959 against the appellant in the court of Additional Sub-Judge, Trivandrum for a declaration of the title of the respondent in the properties mentioned in that suit and for the possession of the same on the ground that those properties belonged to the deceased Kochan Kani and after his death they had devolved on the respondent. That suit was decreed by the trial court. As against that decision, the appellant appealed to the High Court of Kerala in A. S. No. 469 of 1964 on its file. That appeal was dismissed. Thereafter the appellant has appealed to this Court in Civil Appeal No. 925 of 1966. G H

A Civil Appeal No. 926 of 1966 arises from O. S. No. 436 of 1124 filed by the appellant and his step-mother in the court of Additional Munsiff, Neyyattinkara for the eviction of Isreal Nadar. That suit was dismissed by the trial court and the appellant was unsuccessful in the first appeal as well as in the second appeal.

B The deceased Kochan Kani belonged to a tribe known as Kanikkars. Originally they were Nomads. They hardly had any immovable property. But in recent times they have settled down and a few of them have acquired immovable properties. Kochan Kani was one such. In O. S. No. 74 of 1956, the respondent pleaded that the Kanikkars tribe follows Marumakkathayam sys-
C tem. In paragraph 2 of the plaint he stated :

> "....The Kanis from time immemorial follow Marumakkathayam law and Kochan Kani has in several cases declared himself to be a Marumakkathayee".

He also averred in that plaint that in several decisions, the
D courts have declared that Kanikkars follow Marumakkathayam system. The custom pleaded by the respondent was a tribal custom and not a family custom pertaining to the family of Kochan Kani. In O. S. 78 of 1959, the averments relating to the custom in question are vague. At any rate even in that suit, the respondent did not put forward any family custom. Therefore the
E only question that the courts had to decide was whether the respondent had proved the custom pleaded by him. It is well established that in the matter of custom a party has to plead in specific terms as to what is the custom that he is relying on and he must prove the custom pleaded by him. He cannot be permitted to prove a custom not pleaded by him. In *Abdul Hussain Khan* v. *Bibi Sona Dero*[1], the Judicial Committee observed "It is there-
F fore incumbent upon the plaintiff to allege and prove the custom on which he relies." That was also the view taken by this Court in *Thakur Gokalchand* v. *Parvin Kumari*[2] The reason for this rule is obvious. Anybody who puts forward a custom must prove by satisfactory evidence the existence of the custom pleaded, its continuity and the consistency with which it was observed. A party
G against whom a custom is pleaded must have notice as to what case he has to meet. The opposite party apart from rebutting the evidence adduced by the plaintiff may be able to prove that the custom in question was not invariably followed. He cannot get ready with that evidence without knowing the nature of the custom relied upon by the plaintiff. Therefore all that we have to
H see in the present case is whether the respondent has established

(1) 45, I.A. p. 10.

(2) [1952] S. C. R. 825.

the custom pleaded by him *viz.* the custom of the clan to which the deceased belonged. The learned trial Judge in O. S. 74 of 1956, after carefully examining the evidence in the case came to the conclusion that the respondent has not proved the custom pleaded by him. He referred not merely to the evidence in the case but also to various reports and books which came into existence at undisputed point of time. On the other hand the learned trial judge in O. S. 78 of 1959 mainly relying on certain alleged admissions of the deceased Kochan Kani came to the conclusion that he was governed by Marumakkathayam law. Similar was the view taken by the court in the proceedings arising out of O. S. 436 of 1124.

The High Court came to the conclusion that so far as Kanikkars tribe is concerned, it was not governed by any single customary law. Some of the families were Marumakkathees, some are Makkathayees and some are Misravalis. But at the same time it came to the conclusion that the family of Kochan Kani was governed by Marumakkathayam law. For coming to that conclusion it solely relied on certain admissions made by Kochan Kani during his life time.

In our opinion the High Court misdirected itself in determining the question before it. It overlooked the fact that the only plea of the respondent was that Kanikkars tribe was governed by Marumakkathayam law. He did not plead any family custom. Before he could succeed in his suits, he had to establish the custom pleaded by him. Proof of any other custom could not help him.

There is plenty of evidence to show that the Kanikkars tribe as such was not governed by any particular custom. The Census Report of 1931, dealing with the Kanikkars states thus :

> "A man's property devolves equally on his sons and sisters' sons. In the absence of nephews, the sons get the whole property. Descent is reckoned through the female line and children belong to the clan of the mother. In Cherukara of Pathanapuram Taluk, inheritance is through the male line."

In the History of Kerala edited by Shri K. P. Padamanabha Menon, it is observed :

> "In the matter of inheritance there is some difference between the Kanies who live in the interior of the hills and those living in the plains. The former follow Makkathayam, the sons taking the father's property, if any, and yet it is not Makkathayam pure and simple, for, the moiety of the personal property goes to the sister's son, i.e. to the nephews. With those living in or near the

A plains, the self-acquired property is distributed equally between the sons and nephews. If there are no sons, the nephews inherit the whole property. The rights of the widow being considered to maintenance alone."

In Sri L. A. Krishna Iyer's book on the Travancore Tribes, dealing with Kanikkars the learned author observes :

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"Property includes clothing, implement, utensils, weapons, live stocks and crops. Deceased man's property is divided half to his nephews and the other half among his sons. In the absence of a nephew, the property devolves on his sons. In the absence of sons it devolves on the niece. In her absence it goes to his brothers and sisters. In no case does it go to his wife. Even the hut goes to the nephew. The widow with her children goes back to her brother. In regard to the lives stock, the Kanikkars in the vicinity of Kallar, state, that pigs and goats are reared by women and they pass on to their children on their demise. When a girl is married the property goes with her to her husband's home ; the husband's share goes to the nephew."

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The author also says that "Descend is reckoned in the female line. A man's children belong to the clan of the mother".

E In the Travancore State Manual published in 1940 by T. V. Velu Pillai, dealing with Kanikkars, it is stated thus :

"The law of inheritance is not uniform. What generally obtained is Makkathayam. In many cases what belongs to a deceased man is divided between sons and nephews equally. Marumakkathayam is also met with. Sometimes different clans forming the same tribe followed different systems of inheritance."

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From the above it is clear that Kanikkars clan as such does not follow any particular custom. It appears that different families follow different customs. Some were following Marumakkathayam, some Makathayam and others a mixture of the two.

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The High Court has come to the conclusion that the family of Kochan Kani was governed by Marumakkathayam law mainly on the basis of certain admissions said to have been made by him. These admissions may be classified under two different heads. In some of the documents he described himself as "ananthiravan" of Mathevan—a practice followed by Marumakkathayees. But he did not do so invariably. In some documents he had described himself as the son of Malan Kani. Therefore it is unsafe to place any reliance on those documents. The second

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set of documents relied on by the High Court are those where Kochan Kani described himself as a Marumakkathayee but there are other documents where he described himself as Makkathayee—see Exhts. D-32 and D-31. Hence the High Court should not have placed much reliance on these alleged admissions. It may be that Kochan Kani's family was following a custom which is partly Marumakkathayam and partly Makkathayam. A B

It is not necessary for us to decide in these proceedings as to the custom followed by the family of Kochan Kani. As seen earlier, the only question to be decided is whether Kanikkars clan was governed by Marumakkathayam law. For the reasons mentioned above we have to hold that it is not proved that the clan in question is governed by Marumakkathayam law. In the result Civil Appeals Nos. 924 and 925 of 1966 are allowed and the suits from which they have arisen are dismissed. So far as Civil Appeal No. 926 of 1966 is concerned, the appellant being the son of Kochan Kani must be held to be entitled to inherit his father's property, unless it is proved that his father was governed by a custom under which the son does not inherit his property. No such proof is forthcoming. Therefore he is entitled to have a declaration that he is the owner of the suit properties. But the question whether the defendant therein can be evicted in view of the prevailing tenancy laws or not has not been decided by the High Court. Hence that case is remitted to the High Court for deciding that question. Under the circumstances of the case we direct the parties to bear their own costs in all the courts. C D E

V. P. S.