KAVALAPPARA KOTTARATHIL KOCHUNNI A
alias **MOOPIL NAIR**

v.

KAVALAPPARA KOTTARATHIL PARVATHI NETHIAR *alias* **VIJAYAM NETHIAR'S CHILDREN GOURI NETHIAR AND OTHERS** B

August 21, 1969

[J. C. SHAH, ACTING C.J., V. RAMASWAMI AND A. N. GROVER, JJ.]

Custom—Impartible Estate—Marumakkathayam Law—Sthanee of Kavalappara estate paying maintenance to junior members of family—Payment whether based on custom—Opinio necessitatis *an essential element of custom.* C

Defendant No. 1 was the Sthanee of Kavalappara estate which was an impartible estate governed by Marumakkathayam law. The plaintiffs claimed maintenance based on a family custom entitling the members to maintenance out of the entire income of the Sthanam. Past maintenance was claimed as also future maintenance from the date of the suit. Defendant No. 1 denied that the plaintiffs had any right based on custom as claimed by them; according to him from older times two kalams of the Sthanam D had been set apart for their maintenance. He claimed that the Privy Council in suit no. 46 of 1934 had declared him absolute owner of the Sthanam properties but despite that, out of generosity only he had been paying to the junior members of the Swaroopam Rs. 17,000/- annually. The trial court granted maintenance to the plaintiffs for the period claimed at the rate of Rs. 250/- per mensem for each of the plaintiffs. Defendant No. 1 appealed to the High Court and the plaintiffs filed cross-objections as E the rate of maintenance allowed to them was lower than they had claimed. The High Court partly allowed the appeal negativing the plaintiffs' claim for arrears of maintenance, and dismissed the cross-objections of the plaintiffs. Both the parties appealed to this Court. The questions that fell for consideration were : (i) whether the right to maintenance as claimed by the plaintiffs was based on custom; (ii) whether the High Court was right in disallowing the claim of the plaintiffs to arrears of maintenance; (iii) whether the rate of maintenance as ordered by the trial court and confirmed F by the High Court was justified.

HELD : (i) An alleged custom, in order to be valid, must be proved by testimony to have been obeyed from consciousness of its obligatory character. A mere convention between family members or an arrangement by mutual consent for peace and convenience cannot be recognised as custom. In order that a custom should acquire the character of law the custom must be accompanied by the intellectual element, the *opinio necessitatis*, the recognition that there is authority behind it. [45 B—C; D—E] G

Ramrao v. *Yeshwantrao*, I.L.R. 10 Bom. 327, applied.

In the present case the evidence sufficiently proved a custom in Kavalappara estate by which the Sthanee was legally obliged to give maintenance to junior members of the family. It was possible that the practice of paying maintenance to junior members originated as an act of generosity of the previous Sthanee. But it had continued without interruption for H such a length of time that it had acquired the character of a legal right. [42 E—F]

Kochuni v. *Kuttanunni*, A.I.R. 1948 (P.C.) 47, 52, explained.

A (ii) Although it had been alleged by the plaintiffs that they had not been paid any maintenance, the High Court had found that maintenance had been given to the plaintiffs' mother with whom the plaintiffs had been living. The High Court's refusal to grant to the plaintiffs arrears of maintenance before the date of the suit must, in the circumstances, be upheld. [46 C]

B (iii) The High Court in fixing the amount of maintenance for each of the plaintiffs at Rs. 250/- per month had taken into account all the relevant factors. It had further directed that it was open to the parties after two years to move the trial court for variation in the rate of maintenance fixed on the ground of altered circumstances of the Estate. There was no reason for interfering with the judgment of the High Court in this matter. [46 G]

C CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1235 to 1237 of 1966.

Appeals from the judgment and decree dated September 20, 1963 of the Kerala High Court in Appeal Suit No. 304 of 1962.

Rameshwar Nath, Mahinder Narain and *Swaranjit Sodhi,* for the appellants (in C.A. No. 1235 of 1966) and respondent No.
D 11 (in C.As. Nos. 1236 and 1237 of 1966).

K. Jayaram and *R. Thiagarajan,* for the appellants (in C.As. Nos. 1236 and 1237 of 1966) and respondents Nos. 1 to 7 (in C.A. No. 1235 of 1966).

M. R. K. Pillai, for respondent No. 3 (in C.As. Nos. 1236
E and 1237 of 1966) and respondent No. 9 (in C.A. No. 1235 of 1966).

The Judgment of the Court was delivered by

Ramaswami, J. Kavalappara estate is an impartible estate. Succession thereto is governed by the Marumakkathayam law,
F that is to say, the eldest member of the family by female descent will succeed to the Gaddi and hold the estate. The parties to the suit are members of the Kavalappara Swaroopam, the 1st defendant being the Sthance. The 7th defendant is the mother and the 9th defendant the elder brother of the plaintiffs. The plaintiffs claimed maintenance based on family custom entitling the
G members to maintenance out of the entire income of the Sthanam. Past maintenance was claimed for each of the plaintiffs 1 to 4 for 12 years at Rs. 500/- per mensem; for plaintiff no. 5 at the above rate and for plaintiffs 6 to 8 at Rs. 400/- per mensem from their respective dates of birth. Future maintenance from date of suit was also claimed at the aforesaid rates. The suit was contested by the 1st defendant on the ground that the plaintiffs had
H no enforceable legal right to maintenance from the Sthanam estate; that from olden times two kalams, Palachithara and Velliyad of the Sthanam estate had been set apart for the maintenance of the

junior members of the Swaroopam; that the plaintiffs have to look to those two kalams only for their maintenance "as deposed by him in the former suit" in O.S. No. 46 of 1934; that even after the Privy Council had decided O.S. No. 46 of 1934 declaring him to be absolute owner of the Sthanam properties, he had been paying maintenance out of affection; that though there was no recognised custom binding on him, he had been adopting the generosity of the predecessor Sthanees and paying to the junior members of the Swaroopam Rs. 17,000/- annually and that the plaintiffs had no right to claim income from the Sthanam estate. The trial court granted maintenance for the period claimed until the date of decree at the rate of Rs. 250/- per mensem for each of the plaintiffs charged on the corpus and income of the Sthanam estate. The first defendant appealed to the Kerala High Court in A.S. No. 304 of 1962. The plaintiffs preferred cross-objections. The High Court partly allowed the appeal negativing the plaintiffs' claim for arrears of maintenance and modified the trial court's decree. The High Court dismissed the cross-objections of the plaintiffs. C.A. No. 1235 of 1966 is brought to this Court by certificate on behalf of defendant no. 1 and C.As. 1236 and 1237 of 1966 are brought to this Court by certificate on behalf of plaintiffs.

A B C D

The first question to be considered is whether the plaintiffs are entitled to maintenance out of the Sthanam properties as a matter of family custom. It is argued on behalf of the 1st defendant that the maintenance allowance was previously given by the Sthanee only as an act of generosity and not in recognition of any legal claim of junior members of the Swaroopam. In any case it was contended that the practice prevailing in the past was that the income from two kalams "Pilachithara" and "Velliyad" was given to the Amma Nethiar for the benefit of the members of the Swaroopam and that the members of the Swaroopam could not insist on anything more than the same as a matter of right. In our opinion there is no justification for this argument. There is sufficient evidence on the record of the case to support the finding of the Subordinate Judge and the High Court that the plaintiffs have established a customary right of maintenance from the Sthanam properties. In the first place there are two decisions O.S. 991 and 992 of the year 1817 granting a decree for maintenance to two members of the Kavalppara Sthanam (Exhibits A-57 and A-58). It was contended for the Sthanee in those suits that separate properties had been allotted to Amma Nethiar to maintain all the females and minors in the Swaroopam, that only major males in the Swaroopam can claim separate maintenance from him and that those members who chose to live away from the palace had no right to claim maintenance. These contentions were not accepted by the Court which gave each of the plaintiffs a money

E F G H

A decree for maintenance both past and future. The material portions of the two decisions are quoted below:

"On a careful consideration of all the particulars referred to and in view of the circumstances that the Plaintiff went separate from the tarwad members in disB regard of the orders of Defendant who is the present Moopil Nair of Kavalppara and in opposition to the status, ranks and dignities (Sthanamanams) and propriety of Sthanam and merely for their own pleasure and that, even after the Moopu had caused negotiations to be made through Brahmins and other respectable persons under his (Moopu's) written authority with a view to C avoid the Moopu (Sthanam) falling into disgrace (as a result of family) dissension and in view of the fact that, in spite of the efforts of the said persons, the plaintiff did not return and live together (have common residence and mess), it is *only proper,* as the Defendant contends in his written statement, that it is the Amma D Nethiar who should provide for the maintenance of the plaintiff along with that of the lady members. The plaintiff's witnesses Cherumpatte Manakkal Vasudevan Bhattathiripad and Pannasseri Adisseripad state on solemn affirmation that, since it is the Moopu that manages the properties forming the assets of the Swaroopam (esE state) and received 16,000 and old fanams being 2 per 10 from the Government if the next nephew as well as the heir and next of kin of the Moopil Nair were to live separate from the Moopil Nair and demand maintenance for whatever reasons it might be, such person ought to be paid maintenance expenses and supported as befitting the Sthanamanam (rank and dignity) of such perF son and not necessary (*sic*). The plaintiff and his mother Valiakava Nethiar left Kavalappara on the 16th Medom 992 (26th April 1817) and went to and stayed at Mangalathu, Panambala Kode and Melarkode for reasons not apparent. Under the orders of the Defendant maintenance had been paid to plaintiff, the said G Nethiar and 20 persons from that date, 16th of Medom (26th of April) to the month of Edavam (May-June). Thereafter the defendant ordered payment of maintenance to 16 persons from 1st Mithunam (13th June) and to 12 persons thereafter. Subsequently the Moopu ordered that maintenance need be paid for 8 persons H only including (the plaintiff). The written statement (deposition) does not make any mention as to—nor have the plaintiff's witnesses proved as to what expenses the sum of—claimed in the plaint relate to. It is therefore

decreed that the Defendant do pay plaintiff 450 fanams being the maintenance expenses for 3 months as evidenced by the plaintiff's witnesses after deducting 25(?) fanams from the amount claimed in the plaint, that the Defendant do also pay the plaintiff's future maintenance at the rate of 150 fanams a month as mentioned above and that the plaintiff and Defendant do pay and receive proportionate costs." A B

Ext. A-58 :

"On looking into the matters mentioned above, there is nothing to show on what ground the plaintiff had gone and lived separate from the tarwad members of her own accord in disregard of the order of the present Kavalappara Moopil Nair and without considering the status, dignity annd propriety (of the Sthanam). Even though the Defendant's contention in his written statement that it is the Amma Nethiar who should look after the maintenance of the plaintiff in as much as the plaintiff did not return to and stay in the Kavalppara in spite of the attempts made through the Brahmins and other respectable persons to avoid the Moopu getting a bad name owing to a rumour getting afloat that there is dissension among the members as a result of the plaintiff's action, is a proper only, the court is of the opinion that, if the members who are related to the Moopil Nair as his direct sister and direct nephew like the 3rd Nair and who are closely related together as heirs to the properties live separate for any reason whatsoever and ask for their maintenance, the Moopil Nair ought to have ordered payment of their maintenance, amounts and maintained them in accordance with their status in the Sthanam. Instead of doing this, the Moopil Nair cannot stop the maintenance paid to the Anandaravas who may be of bad temperament. The plaintiff's and defendant's witnesses prove that the plaintiff had been paid for the maintenance from the Medom 992 (April-May, 1817) when she went separate until the 30th of Karkitakam (about the 16th of August) and that the Moopil Nair had stopped paying for the maintenance thereafter. From the evidence of the plaintiff's witnesses it has been proved that the plaintiff and the persons staying with her would all together require 3 fanams for maintenance expenses and 1 fanam for extra expenses for a day. It, therefore, does not appear from the oral and documentary evidence that they would require anything more than—fanams for the maintenance for the 3 months from C D E F G H

A the 1st of Chingam (14th August) to the 1st of Vrichigam (14th November) the date of the suit, calculating at 120 fanams a month. It is not clear from the plaint as to what expenses the sum of Rs. 150 claimed in the plaint relates. I therefore direct the defendant to pay to plaintiff a sum of Rs. 360 fanams after deducting 165 B fanams from the amount claimed by the plaintiff and I also direct that the Defendant do pay to the plaintiff the future maintenance at the rate of 120 fanams a month and that the plaintiff and Defendant do pay and receive proportionate costs."

Exhibit B-1 is a deposition given in O.S. 2 of 1859 by the C then Sthanee of the Kavalappara Swaroopam. The deposition is marked as Ex. 67(b) in O.S. 46 of 1934 and reads as follows :

"The properties belong to the Sthanam only. Two Kalams (lands attached to two granaries) have been set apart for the maintenance of the members of the tarwad. And it has been the practice that the rest of the D members maintain themselves therefrom. It has been so separately allotted from ancient times. When precisely, is not known. It could be seen from the accounts that It has been so set apart. It is only if I think it necessary to take back what has been so set apart, that I should give them their maintenance expenses .... I E have not enquired whether there were any other places where the entire properties and the Malikhan belonged to the Sthanam only and the tarwad has no separate property of its own."

[The High Court has observed that this translation is not correct and that 'kalam' denotes a division of the estate for purposes of F collecting rents from the tenants. Again a true translation of the first sentence in the above quotation would be 'only the Sthanam has properties and not the properties belong to the Sthanam only".]

This deposition shows clearly that the Sthanee in office admitted over a century ago his obligation to maintain junior members G of the Swaroopam.

The next piece of evidence is the deposition of the Sthanee in O.S. No. 46 of 1934. In the present case the 1st defendant did not give evidence. He admitted that his deposition in the previous suit O.S. No. 46 of 1934 contained a true statement of facts. The previous deposition of the 1st defendant in Ex. B-13 and H reads as follows :

"4. The eldest lady in the Swaroopam is called Amma Nethiyar. Some properties had been allotted for the

maintenance of the members in the name of Amma Nethiar ..... Those properties had been allotted in ancient times in her name from the properties of the Moopil Nair.

5. The Moopil Nair was originally a ruling chief. The grant of properties in the name of Amma Nethiyar should have been made when the Moopil Nair was a ruling chief. The present Amma Nethiyar has even now the right to manage the properties which had been so allotted. It was in ignorance of such allotment that my elder brother and after him, myself managed those properties along with the stanam properties. I am willing to hand back the management of those properties to Amma Nethiyar. If those properties are handed back, I shall no more be liable to pay the maintenance of the members."

In his written statement defendant no. 1 made the following admission in para 6 :

"..... The defendant does not deny that the members of the Swaroopam are entitled to be maintained by the Moopil Nayar by virtue of custom. But that does not make him any the less a Stani nor detract from the Stanom character of the properties."

In our opinion the evidence adduced in the case sufficiently proves a custom in Kavalappara Estate by which the Sthanee was legally obliged to give maintenance to junior members of the family. It is possible that the practice of paying maintenance to junior members originated as an act of generosity of the previous Sthanee. But it has continued without interruption for such a length of time that it has acquired the character of a legal right.

On behalf of defendant no. 1 it was contended that the Judicial Committee had said that the payment for maintenance was an act of generosity on the part of the Sthanee and was not a legal right of the junior members. Reference was made to the following passage in the judgment in *Kochunni* v. *Kuttanunni*(1):

"The maintenance claimed was a customary one originating in ancient times when admittedly the Muppil Nair was a Sthani in possession of Sthanam rights. There is no evidence as to how the maintenance allowance arose, whether it was given in recognition of a legal claim or was only a generous provision made for the benefit of the women and younger members, which the Raja was perfectly competent to do out of property

(1) A.I.R. 1948 (P.C.). 47 at p. 52.

A which he regarded exclusively as his own. The claims of generosity often prevail over a sense of ownership, especially when the recipient of the bounty is a near relative in a dependent position."

In our opinion this argument proceeds on a misreading of the B judgment of the Judicial Committee. The Judicial Committee has observed that the claim for maintenance was based on customary rights and was not *ex gratia* payment. In the course of the judgment Mr. M. R. Jayakar states :

"The documents material in this connection are Exs. C 'O' and 'P' being the decree and judgment respectively in two suits for maintenance brought in the year 1817 against the then Muppil Nair, the first by the then third Nair, a minor, and the second by his mother. It is material to note what the issue was and what was decreed in these suits. In the pleadings of both the parties D the claim for maintenance was stated to be based on customary rights. The plaintiff alleged it is 'the usual custom' that Nair should pay the maintenance. The defendant admitted 'the custom' but denied his liability to pay the maintenance on the ground that his ancestors in ancient times had already settled in accordance with the 'usual practice' certain lands on a lady called Amma E Nethiar for the maintenance of herself and the junior members, and that the maintenance claimed in the suit, even if it was due, which he denied, should primarily come out of the lands so set aside in previous times. He also denied his liability on the ground that the minor and his mother, contrary to his advice and that of the F wellwishers of the family had gone away to live elsewhere. The defendant denied his liability also on other grounds which it is unnecessary to consider in this case. He, however, expressed his willingness to supplement the maintenance, if the Court thought proper, on particular occasions. The Judge, while admitting that it was G the responsibility of Amma Nethiar to maintain the plaintiffs, held that as the plaintiffs stood in the very near relationship of sister and nephew to the defendant and were his next heirs it was 'only proper' that the defendant should grant them a periodical allowance for past and future maintenance. In the light of the plea- H dings set out above, the admissions made therein by both sides about the customary nature of the maintenance and the words it was 'only proper' in the judgment, their Lordships cannot accept this as a decision contra-

dicting the incidents of the property in the hands of the Muppil Nair." A

In any event the question as to whether the right of maintenance was given by the Sthanee in recognition of the legal claim or whether it was an *ex gratia* payment was not directly in issue in the previous suit. The question for determination was whether B the existence of maintenance allowance was inconsistent with the Sthanam character of the properties in possession of the then Moopil Nair. On this point it was held by the Judicial Committee that the payment of the maintenance allowance for junior members was not inconsistent with the Sthanam character of the property on which it was grounded. At p. 53 of the Report Mr. Jayakar has observed; C

> "Their Lordships think that in the proceedings of these two cases there is hardly anything to support the view of the High Court that the decrees in these two suits are inconsistent with the Sthanam character of the properties in the possession of the then Muppil Nair or D that he did anything which could be regarded as an admission that the properties in his hands were not Sthanam properties. On the question whether and how far the existence of a maintenance allowance is inconsistent with the Sthanam character of the property, on which it is grounded, the following passage in Sundara Aiyar's book (p. 255, bottom) may be noted : E
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> "The point of view suggested in some cases in which the question has arisen is that the members of the family have rights of maintenance in the property of the Sthanam itself : that is practically assimilating these properties to impartible zemindaries before the F recent cases.'
>
> Besides, the Sthanam in dispute in this case belonged, as stated above, to the second category, and in such a case the existence of maintenance allowance would be perhaps not so inconsistent as in the case of a Sthanam of the third class, carved out of the family property for G the support and dignity of its senior member."

The question at issue before the Judicial Committee was whether the Kavalppara Estate was a Tarawad or joint family property belonging to the joint family or whether the properties appertained to the Sthanam and belonged to defendant no. 1 as a Sthanee H exclusively. The question as to the right of maintenance of the plaintiffs was incidentally gone into and it was ultimately held that the existence of such maintenance right of junior members of

A the family was not inconsistent with the Sthanam character of the properties.

In our opinion the High Court was right in its finding that the plaintiffs have established their right to maintenance from the Sthanam properties as a matter of custom. Counsel on behalf of
B defendant no. 1 has been unable to make good his argument on this aspect of the case.

An alleged custom, in order to be valid, must be proved by testimony to have been obeyed from consciousness of its obligatory character. A mere convention between family members or an arrangement by mutual consent for peace and convenience
C cannot be recognised as custom. In *Ramrca* v. *Yeshwantrao*(1) it was proved that it had been the practice in a Deshpande Vatandar's family for over a hundred and fifty years, without interruption or dispute of any kind whatever, to leave the performance of the services of the vatan and the bulk of the property in the hands of the elder branch and to provide the younger branches with
D maintenance only. It was held that such practice was due in its origin to a local or family usage and not to a mere arrangement and that it was therefore to be recognized and acted upon as a legal and valid custom. In order, therefore, that a custom should acquire the character of law the custom must be accompanied by the intellectual element, the *opinio necessitatis* "the conviction
E on the part of those who use a custom that it is obligatory and not merely optional". In other words the mark which distinguishes custom in the legal sense from mere convention is the *opinio necessitatis*, the recognition that there is authority behind it.

> F "In the modern state the custom, if legally recognized has behind it the court and an apparatus of coercion. In primitive communities we do not find authority necessarily organized in the institutional sense. We must ask, 'what is the ultimate power in the group to settle conflicts or to prescribe rules ?' It may be the old men, the military group, the priests, or merely a general consensus
> G of opinion. But the *opinio necessitatis* can come into existence only when the community in some way throws its force behind the particular rules."

(See G. W. Paton—Jurisprudence—3rd edn. p. 164)

We have shown in the present case that the plaintiffs have estab-
H lished their right to maintenance from the Sthanam properties not merely as an act of generosity on the part of the Sthanee but the

(1) I.L.R. 10 Bombay 327.

payment of maintenance has been made by the Sthanee as a matter of legal obligation. A

The next question is whether the plaintiffs are entitled to arrears of maintenance. It appears that after the decision of the Privy Council declaring the 1st defendant as exclusive owner of properties he has paid Rs. 17,000 annually to the Amma Nethiar for the maintenance of the junior members of the Swaroopam. It is not B disputed by the plaintiffs that such payments were made before the institution of the present suit. Even after the institution of the suit the 1st defendant had been depositing annually Rs. 25,000 in court for the maintenance of the plaintiffs and other members of the Swaroopam as ordered by the trial court. It was alleged by the plaintiffs that they have not been paid any maintenance. But C the High Court found that maintenance had been given to the plaintiffs' mother with whom plaintiffs had been living. For these reasons the High Court held that there was no ground for awarding arrears to maintenance before the date of suit. We see no reason for taking a view different from that of the High Court in the matter. D

As regards the rate of maintenance the trial court granted decree at the rate of Rs. 250/- p.m. for every one of the plaintiffs irrespective of age. It has been found by the trial court that the net income of the Swaroopam was about Rs. 2 lakhs per annum. It is admitted that the income of the Swaroopam consists mostly of rents from cultivating tenants. With the abolition of perqui- E sites and the fixation of fair rents by recent tenancy legislation there appears to have been a reduction of the net income of the Sthanam in recent years. It also appears that the plaintiffs are the only minor members in the family and excepting the 7th defendant who is their mother the defendants are males whose children would not be members of the Swaroopam. In the Madras Estates F (Abolition and Conversion into Ryotwari) Act 26 of 1948 compensation to members of the family entitled to maintenance out of an impartible estate is fixed at 1/5 of what is paid for the estate. In view of these considerations the High Court held that the provision of Rs. 250/- p.m. to each of the plaintiffs was adequate. The High Court, however, directed that it is open to the parties G after two years to move the trial court for variation in the rate of maintenance fixed on the ground of altered circumstances of the Estate. Having heard the parties we see no reason for interfering with the judgment of the High Court in this matter.

In the result we dismiss all the three appeals (Civil Appeals— Nos. 1235, 1236 and 1237 of 1966). There will be no order as H to costs with regard to any of the appeals.

G.C. *Appeals dismissed.*