APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Ayyangar.

1915. July 21 and 22 and August 12.

29 M.L.J 763

SHAIK IBRAHIM ROWTHER *alias* CHINNAPPA ROWTHER AND THREE OTHERS (DEFENDANTS Nos. 1 to 4), APPELLANTS,

v.

MUHAMMAD IBRAHIM ROWTHER AND THREE OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 5 AND 6), RESPONDENTS.*

Muhammadan Law—Lubbais of Coimbatore district—Right of succession—Exclusion of females—Custom—Retention of rule of Hindu Law—Proof of Custom, standard of—Family Custom, proof of—Abandonment of Custom.

Among the Lubbais of the Coimbatore district, who are Hindu converts to Muhammadanism, a custom prevails under which they retain the rule of Hindu Law which excludes females from the right of succession.

Mirabivi v. *Vellayanna* (1885) I.L.R., 8 Mad., 464 and *Kunhambi* v. *Kalanthar* (1914) 27 M.L.J., 156, referred to.

It is open to them to abandon the custom and follow the ordinary rule of Muhammadan Law.

Rajkeshan Singh v. *Ramjoy Surma Moozoomdar* (1876) I.L.R., 1 Calc., 186, referred to.

Per SRINIVASA AYYANGAR, J.—Custom in its legal sense means a rule exceptional to the general rule of law. In India, in many cases, it is impossible to say that any particular usage which is pleaded is in derogation of a general law; consequently the inquiry in many cases is as to what is the law and not what is the usage at variance with law.

Nature of custom and standard of proof thereof required in England and in India compared.

Hirbai v. *Gorbai* (1875) 12 Bom., H.C.R., 294, *Rarichan* v. *Perachi* (1892) I.L.R., 15 Mad., 281, *Kunhi Raman* v. *Kunhi Parvathi* (1910) M.W.N., 642 and *Fanindra Deb* v. *Rajeswar Dass* (1885) 12 I.A., 72, referred to.

APPEAL against the decree of K. SRINIVASA RAO, the Subordinate Judge of Coimbatore, in Original Suit No. 28 of 1909 (on the file of R. D. BROADFOOT, the District Judge of Coimbatore).

The parties in this case are Lubbai Muhammadans of the Coimbatore district, who were Tamil-speaking Hindus who became converts to Muhammadanism. The question relates to the right of succession of the daughters along with the sons of a deceased Muhammadan to the estate left by their father. One Muhammad Hussain Rowther died in 1904, leaving him

* Second Appeal No. 106 of 1914.

surviving three sons (who were defendants Nos. 1 to 3 in the suit), a widow (the fourth defendant), and two daughters Ponnuthayee Sulaihabi. The two daughters died. The first plaintiff is the husband of Ponnuthayee and the second plaintiff is her daughter. Defendants Nos. 5 and 6 are the children of the other daughter Sulaihabi. The plaintiffs sued to recover their share under the Muhammadan Law in the share of Ponnuthayee in the estate of her deceased father Muhammad Hussain Rowther. Defendants Nos. 1 to 4 pleaded that according to a custom prevailing among the Lubbai Muhammadans of the Coimbatore district and alternatively according to a custom prevailing among the parties and their relations, the property of a deceased Lubbai devolved on the sons to the exclusion of the daughters, as under the Hindu Law. The Subordinate Judge of Coimbatore, who tried the original suit, held that the alleged custom was not established and that the plaintiffs were entitled to their share as the heirs of the deceased Ponnuthayee in respect of her interest in her father's property along with the defendants Nos. 1 to 4 under the ordinary Muhammadan Law. The defendants Nos. 1 to 4 preferred an appeal to the High Court.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the first appellant.

T. M. Krishnaswami Ayyar for the appellants Nos. 2 to 4.

E. S. W. Senathi Raja, T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondents.

WALLIS, C.J.

WALLIS, C.J.—This case raises a question of considerable difficulty and importance as to the existence of a special custom among Lubbais or Tamil-speaking converts to Muhammadanism in the District of Coimbatore, or alternatively in the family of the parties to the present suit, who belong to that district, to depart from the Muhammadan rule of succession and as alleged by the defendants to follow the Hindu Law as regards the law of property, succession and partition. This however is too broadly pleaded as the only question arising in the suit is whether they follow the particular rule of Hindu Law which excludes females from the right of succession. The suit is brought by the plaintiffs who are respectively the husband and minor daughter of the deceased Ponnuthayee as her heirs to recover her share under the Muhammadan Law in the estate of her father, the late Muhammad Hussain Rowther who pre-deceased her. In 1877,

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in a suit tried by INNES, J., on the original side of the High Court, the custom relied by the defendants in the present case was proved to exist, but the case was compromised whilst under appeal, and in *Mirabivi* v. *Vellayanna*(1) which came before the High Court in second appeal this Court reversed the decree of the lower Courts finding a similar custom proved in the Palghat country which adjoins the Coimbatore district. The decision of course proceeded on the evidence in the case, but the question was approached from the stand point that it was for the parties setting up the custom to show that though following their religion generally Lubbais had adopted from the Hindu Law the principle of the exclusion of the females. The onus no doubt was rightly placed, but, having regard to the fact that we are dealing with Tamil-speaking people whose adoption of Mahomedanism in many cases due to force cannot be referred to an earlier date than the second half of the eighteenth century, I should prefer to state the question as being, whether after their conversion they had adhered in these respects to the usages to which they had been accustomed as Hindus, and, with great respect, I am unable in the face of the evidence in this case to attach much weight to the suggestion that the state of things which we find existing may be due to unwillingness on the part of Muhammadan females to assert their rights against the male members of the family. Of the later cases this is the first to come before this court on first appeal so as to enable the court to appreciate the evidence for itself, but there have been several cases in the lower courts in which the custom was upheld when set up, and the plaintiff has had to rely largely on the fact that in certain other cases it was not set up. Exhibits L, C, N, R, H, and 9 show that in suits of 1890, 1892, 1894, 1903, 1904 and 1910 arising in the district the women's right to succeed in accordance with Muhammadan Law was not contested. Exhibit G relates to a suit of 1893 in which the custom was pleaded and negatived by the lower courts whose judgments were upheld in second appeal; as, on the other hand, Exhibit B and exhibit B-1 relate to a suit of 1901 in which the District Judge held that the evidence went to show that the parties who were Lubbais had adhered to the Hindu Law in this respect, but had hesitated to plead such

(1) (1885) I.L.R., 8 Mad., 464.

adherence expressly for fear of being considered not to be good Muhammadans, and had set up instead a family custom under which women were excluded from the succession as regards immoveable property and were given cash and jewels in lieu of their share. He accordingly upheld the decree of the District Munsif disallowing the custom on the ground that it was not pleaded that the parties had adhered to the rule of Hindu Law and that the family custom derogatory to Muhammadan Law had not been proved. Exhibit 18 relates to a suit of 1893 in which it was expressly pleaded on behalf of the minor plaintiff by his mother as his next friend that according to well-established custom the widow and daughter of a deceased Lubbai do not take any share in the inheritance, and the razinamah decree, exhibit XVII, proceeded on this view. Exhibit 3 again is a judgment of the District Judge, now Mr. Justice OLDFIELD in a suit of 1904 which upheld the custom in that case, and exhibit XVI is a judgment of a later District Judge in another suit to the same effect. The general result would therefore seem to be that in more recent years, whenever the custom has been set up, it has been established, and the number of instances in which it has not been set up would appear, as was observed by Mr. Brodie in Exhibit B-1, to be due to the growing disinclination of members of the community to adhere to a usage which is not in accordance with a strict observance of the Quran. Looked at as a whole the evidence in my opinion goes far to show that the Lubbais of this part of India at the date of their conversion preferred to retain the Hindu rule excluding women, as it was not unnatural they should, and I should infer that the usage was general until some time before 1877 when we first hear of the question coming before the courts, as any difference on the point must probably exist before they have given rise to litigation. But it also seems to me perfectly natural that as the evidence shows, there should be of late years a growing tendency to depart from the usage and conform in this matter to the precepts of their sacred law. Now assuming that the special usage among Lubbais of this part of the country has been proved, and that it would be open to individual families to abandon it and conform to the ordinary law governing their co-religionists, as to which see the observations of their Lordships in *Rajkishen Singh* v. *Ramjoy Surma Moozoomdar*(1) it would be a question of fact whether they

(1) (1876) I.L.R., 1 Calc., 186.

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had in fact abandoned it, and such abandonment would have to be proved. It is unnecessary to consider this question further because so far as the parties to the suit are concerned, I think that the evidence, oral and documentary, of their transactions is amply sufficient to show that they adhere to the Hindu rule, even if we put aside the various judgments concerning other persons coming from the same part of the country which support this conclusion.

[His Lordship dealt with the evidence in detail and proceeded as follows] :—

I think the evidence, oral and documentary, is sufficient to show that the defendants' family have adhered with perhaps most of the other Lubbais of the neighbourhood to the Hindu rule excluding the succession of females. As observed in *Kunhambi* v. *Kalanthar*(1), it is under the provisions of the Civil Courts Act a question of fact in each case as to the usage followed by the family, and in the present case, I think, the usage is sufficiently proved.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—The principal question for decision in this case is as to the devolution of the property of a Muhammadan named Hussain Rowther who died, it is said, about the end of the year 1904. He left him surviving three sons defendants 1 to 3, a widow, the fourth defendant, and two daughters Ponnuthayee and Sulaihabi. There was another son who is now dead, but whether he left any heirs other than the parties to the suit does not appear. The two daughters are dead. The first plaintiff is the husband of Ponnuthayee and the second plaintiff is her daughter. Defendants Nos. 5 and 6 are the children of the other daughter Sulaihabi.

Plaintiffs sue to recover their share, under the Muhammadan Law, of the share of Ponnuthayee in the estate of her father Muhammad Hussain Rowther. Muhammad Hussain Rowther and the parties to the suit are Lubbais. The claim is opposed by defendants 1 to 4, who plead that, according to the custom prevailing among Lubbai Muhammadans of the Coimbatore district and alternately according to the custom prevailing among the parties and their relations, the property of a deceased Lubbai devolves on the sons to the exclusion of the daughters, as under

(1) (1914) 27 M.L.J., 156.

the Hindu law, they also state that unmarried daughters are maintained out of the paternal estate and stridhanam given to them at the time of marriage, as in Hindu families. Custom in its legal sense means a rule exceptional to the general rule of law. In countries like England where there is a uniform territorial law binding on all persons, a custom in derogation of that law, when allowed, requires very strict proof. But in India where there are innumerable sects each following its own usage which constitutes its law, in many cases it is impossible to say that any particular usage which is pleaded is in derogation of a general law. For instance, the Numbudris and Nairs of the West Coast are Hindus, but they are mostly governed by their usages. In the case of many of the aboriginal tribes who come in under the general designation of Hindus, the presumption that they are governed by the Hindu law of Smriti writers and their commentators, is so slight that very little evidence suffices to displace this presumption. Among the Nattukottai Chetties of Southern India who are orthodox Hindus, there are usages relating to adoption which are entirely at variance with the rules of Hindu Law. The Moplahs of North Malabar, who are Muhammadan converts from Hinduism, generally follow the marumakkatayam system, modified in some matters by rules of Muhammadan Law, as in the case of succession to self-acquired property. The Khojas and Memon cutchies of Bombay who are Muhammadans by religion follow the Hindu law of succession. Again a family domiciled in Southern India is presumed to be governed by the Mitakshara School of Hindu Law, but if it is proved that they emigrated from the northern or Mahratta country, this presumption is rebutted, and the family is presumed to retain the law of the place from which it emigrated. In many cases the enquiry is as to what is the law and not as to what is the usage at variance with law. *Hirbai* v. *Gorbai*(1), *Rarichan* v. *Perachi*(2) and *Kunhi Raman* v. *Kunhi Parvathi*(3). The Judicial Committee in dealing with a family custom forbidding adoption said "looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu Law is modified by a family custom forbidding adoption,

(1) (1875) 12 Bom. H.C.R., 294 at pp. 316 and 317.
(2) (1892) I.L.R., 15 Mad., 281. (3) (1910) M.W.N., 642.

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but whether with respect to inheritance the family is governed by Hindu Law, or by customs which do not allow an adopted son to inherit." *Fanindra Deb Raiket* v. *Rajeswar Das*(1). The standard of proof which is required in any particular case may therefore vary.

The parties to the suit being Muhammadans by religion they are presumably governed by their religious law, i.e., the Muhammadan Law in matters of succession. There is however the fact that the Lubbais are a mixed class of Muhammadans consisting partly of compulsory converts to Islam made by the early Muhammadan invaders and Tippu Sultan. (See *Madras Census Report of* 1891.) They generally speak Tamil in their houses. Their marriage ceremony is said to closely resemble that of the low Hindu castes. (See Thurston on *Castes and Tribes*, volume IV, page 200.) It is therefore probable that many of the Lubbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion, though in course of time they would try to give up such usages and adopt rules of devolution of property prescribed by their religious law. An examination of the evidence in this case presents these features.

In 1878 this custom was pleaded in a suit in the Original Side of this Court, and Mr. Justice INNES, after a careful consideration of the large mass of evidence, both oral and documentary, placed before him, came to the conclusion that "in the district of Coimbatore there are customs peculiar in regard to marriage and succession, and the most prominent feature in the rule observed as regards succession is that, on the death of a man leaving sons and unmarried daughters and a widow, the sons take to the exclusion of the females who are simply maintained, and that married daughters are regarded as entitled, as among Hindus, to no provisions whatsoever." Exhibit XII. It is noticeable that the evidence in this case consisted mostly of witnesses from the village of Pallipatti in which and in the neighbouring villages the defendants and their relations mostly live. This decision was appealed against but the appeal was however compromised.

This custom was again set up in *Mirabivi* v. *Vellayanna*(2). That was a case of Lubbai Muhammadans residing at

(1) (1885) I.L.R., 11 Calc., 463 at p. 476; s.c., 12 I.A., 72.
(2) (1885) I.L.R., 8 Mad. 464.

Palghat. Both the first Court and the first Appellate Court held the custom proved. But the High Court interfered in second appeal holding that the evidence was not sufficient to prove the custom. The learned judges were able to find satisfactory explanation in the evidence in that case as regards the various instances proved in that case of devolution in accordance with the principles of Hindu law.

The next occasion when the matter was the subject of controversy was in the year 1901. Exhibits B and B (1). Exhibit B is the judgment of Mr. Sadasiva Ayyar (now Mr. Justice SADASIVA AYYAR) as District Munsif of Coimbatore and B (1) is the judgment of Mr. Brodie, the District Judge on appeal. A careful perusal of the two judgments leads to only one conclusion, namely, at that time that is so late as 1901, it was the practice of the Lubbai Muhammadans of Coimbatore district to follow Hindu usages in matters of succession. In a paragraph 6 of the appeal judgment Exhbit B (1), Mr. Brodie observes that "though no doubt the customary law of the Lubbais in this district has up to date been more in accordance with Hindu than Muhammadan law as is only natural, I observe a tendency on the part of the defendants in such cases as the present to resort to any defence to defeat such claims amongst themselves rather than plead that they are governed in anything by Hindu Law as this lays them open to the reproach of not being strict observers of Muhammadan practices. The actual decision was in favour of the claim of a female to a share, but this was based on the absence of the plea that the parties were governed by Hindu Law in matters of succession.

Again in 1906 the District Judge of Coimbatore held the custom proved in Exhibit III.

This matter came up for adjudication again in 1910 and it was held that among the Lubbais of Pallapatti the custom of exclusion of females was prevalent. Exhibits IX and XIV.

There is only one other judgment to which I need make reference, i.e., Exhibit G. What is printed in the records is merely the decree in the second appeal, but our attention was drawn to the judgments in the lower Courts. It appears that in a previous litigation between the parties this custom was set up, but was found against for want of evidence. In the present litigation the question was disposed of on the plea of *res judicata*. This decision is not of use either way. The respondent relied on several

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judgments in partition suits in which the right of females to shares was not disputed. They are Exhibits L and M in 1890, Exhibit C in 1892, Exhibit N in 1894, Exhibit R in 1903, Exhibit H in 1904 and Exhibit Q in 1910. In Exhibit XVIII, a plaint in a suit of 1893, the custom was expressly pleaded by a mother suing as next friend of her minor son, the suit was compromised, but the compromise decree Exhibit XVII proceeded on this view. The documents referred to above prove in my opinion the general prevalence among the Lubbais of the Coimbatore district of this custom of excluding females from participating in the property of their deceased ancestors at the time of partition, and also that in recent times the custom was not set up in some cases owing to the disinclination of members of this community to follow usages at variance with their religious law.

There is evidence in this case which establishes that the family of the parties follow this custom.

His Lordship then dealt with the evidence in detail and proceeded as follows :—

The evidence above set out taken along with the evidence of the general prevalence of the practice is, I think sufficient to prove the family custom set up.

It is remarkable that the fourth defendant the widow, who if the Muhammadan law applied, would be entitled to an eighth share in the properties of her husband which are of considerable value, disputes the claims of the plaintiffs along with her sons defendants Nos. 1 to 3. No explanation is given for her disclaiming any interest in the valuable properties of her husband nor is there any reason shown for her joining her sons as against her own daughters' children. I am therefore unable to agree with the conclusion of the lower Court on this point. On this ground the decree of the lower Court will have to be reversed and the plaintiffs' suit dismissed with costs throughout.

K.R.