APPELLATE CIVIL.

1882
March 22.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

RAJ BAHADUR AND OTHERS (DEFENDANTS) *v.* BISHEN DAYAL (PLAINTIFF)*

Hindu law—Muhammadan law—Convert—Act VI of 1871 (*Bengal Civil Courts Act*), *s.* 24—"*Justice, equity, and good conscience.*"

To entitle a person to have the Hindu or Muhammadan law applied to him under the first paragraph of s. 24 of Act VI of 1871, he must be an orthodox believer in the Hindu or Muhammadan religion. The mere circumstance that he calls himself, or is called by others, a Hindu or Muhammadan, as the case may be, is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates his law for him. If he fails to establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with under the latter paragraph of s. 24 of Act VI of 1871 according to justice, equity, and good conscience.

B, alleging that his family was a joint undivided Hindu family, sued *R* his father for a declaration that certain property was joint ancestral property, and for partition of his share according to the Hindu law of inheritance of such property, *viz.*, one moiety. *R* set up as a defence to the suit that the members of the family were Muhammadans and were therefore not governed by the Hindu law. The evidence in the suit established that the members of the family were neither orthodox Hindus nor Muhammadans. It also established that the Hindu law of inheritance had always been followed in the family.

Held, following the principle enunciated above, that the family not being Hindus or Muhammadans, the rule of decision applicable to the suit was neither Hindu nor Muhammadan law, but justice, equity, and good conscience; that, the Hindu law of inheritance having always been followed in the family, it was justice, equity, and good conscience to apply that law to the suit; and that therefore *B* was entitled to demand partition of half of the family estate.

Abraham v. *Abraham* (1) referred to

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Conlan*, the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), and Maulvi *Mehdi Hasan*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—This is an appeal from a decision of the Subordinate Judge of Cawnpore, dated the 4th May, 1880. The plain-

* First Appeal, No. 92 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 4th May, 1880.

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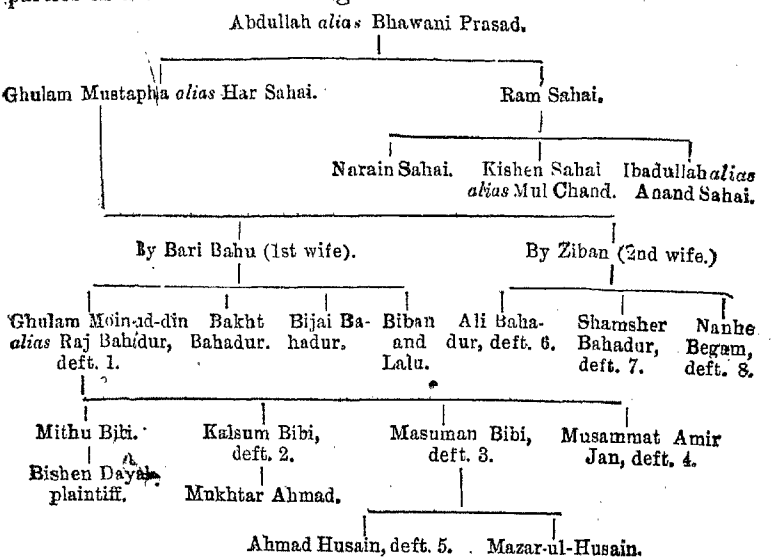
tiff-respondent comes into Court alleging himself to be a member of a joint Hindu family under the Mitakshara with his father Raj Bahadur, defendant No. 1, and as such entitled to one half of the ancestral property. He therefore prays for a declaration that the property, a detail whereof accompanies the plaint, now in possession of his father, or in the hands of third parties as donees, or ostensible but fictitious owners, be declared joint ancestral estate, and that partition being decreed, he receive one moiety thereof with mesne profits to the date of possession. The cause of action is alleged to have arisen on the 17th July, 1876, the day on which demand for partition was made and refused. The defendants, of whom there are several, may be said to range themselves into four groups:—(i) Raj Bahadur, principal defendant; (ii) Kulsum Bibi, Masuman Bibi, and Amir Jan, alleged donees, or ostensible but fictitious owners; (iii) children of Har Sahai, grandfather of plaintiff; (iv) purchasers at various times of portions of the alleged ancestral property.

The following table may perhaps make the position of the various parties in the suit more intelligible:—



Other defendants.

9. Sheo Dayal
10. Sheo Shankar
} Purchasers from Raj Bahadur, Bakht Bahadur, and Bijai Bahadur.

11. Sarbuland
12. Dhuman Khan
13. Mir Khan
14. Shankar
} Purchasers from three persons named above to satisfy debt of Cawnpore Bank.

The principal defence is necessarily that put forward by defendant No. 1. In substance it comes to this, that he, his father, Har Sahai, and his grandfather, Bhawani Prasad, were not Hindus, nor members of a joint and undivided Hindu family, but on the contrary were Muhammadans by religion, and as such subject to the Muhammadan law regulating the devolution of property. Defendants Nos. 2, 3 and 4 assert that they are the properly married wives of defendant No. 1 according to Muhammadan law and ordinances; and defendant No. 5 that he is the legitimate son of the said defendants Nos. 1 and 3. Defendants Nos. 6, 7 and 8 virtually reiterate the statement of defendant No. 1, as to the family professing the Muhammadan religion, and they allege that, upon a division of the property according to Muhammadan law, they are entitled to 48 out of 104 sahams. The pleas of the defendants Nos 9, 10, 11, 12 and 13 assert them to be "*bonâ fide*" purchasers for good consideration from defendant No. 1 and his brothers Bakht Bahadur and Bijai Bahadur, who they say sold with the knowledge and consent of the plaintiff. The Subordinate Judge found (i) that it was not established that Har Sahai, father of defendant No. 1, abjured the Hindu religion and professed Muhammadanism, though he no doubt did practise the ceremonies and rites of both religions. "But", as to this he remarks, "neither true Musalmans nor Hindus, according to equity and good conscience they must be held subject to the law of inheritance to which they repeatedly publicly declared themselves amenable, and to which they invariably conformed, and the plaintiff is therefore entitled to one half share." (ii) That defendants Nos. 2, 3, and 4 were not the wives but the concubines of defendant No. 1, and that defendant No. 5 was therefore illegitimate. (iii) That defendants Nos 6, 7 and 8 were not the legitimate children of Har Sahai by Ziban, who was his concubine and not his wife. (iv) That the sales to defendants Nos. 9, 10, 11, 12 and 13, with one exception, namely, that in respect of the debt to the Bank at Cawnpore, being made without the knowledge and concurrence of the plaintiff, were not binding on him, and could not stand. The Subordinate Judge accordingly decreed the plaintiff's claim to a half share of the property with mesne profits, excepting two houses in Fatehpur from the operation of the decree, and holding him liable to contribute one half of the debt due to the Bank at Cawnpore under the decree of the 8th February, 1879.

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From this decision defendants Nos. 1, 2, 3, 4 and 5 appeal. It is unnecessary to set forth at length the various pleas raised in the memorandum of appeal. As compressed and embodied in the able argument of the learned counsel for the appellants, they substantially are represented by the following contentions :—

(i.) The evidence establishes that Bhawani Prasad, the grandfather, Har Sahai, the father, and Raj Bahadur, defendant No. 1, have successively professed and followed the Muhammadan religion ; that during this period of upwards of 50 years the family have been believing in its tenets, and have observed its rites and ceremonies. Under these circumstances the Muhammadan law and no other must govern them in matters of inheritance and such like : (ii) If it is not established that these persons and their families were and are Muhammadans in the strict meaning of the term, still they cannot be regarded as Hindus in the sense implied by s. 24 of Act VI of 1871, and the Hindu law of inheritance is inapplicable to them. Some special principle to regulate the distribution of estate must therefore be found for them, either based upon family custom and usage or conceived in equity, justice and good conscience.

It has been a task of no slight labour and difficulty to wade through the very voluminous depositions of the many witnesses examined on either side, much of the matter contained in which, we may add, is not only irrelevant as evidence but inadmissible. It would have been far more convenient and infinitely less confusing had the Subordinate Judge restrained the proof tendered by the parties within reasonable limits, instead of allowing them to put forward a mass of statements and allegations, the sources of information as to which were not tested, and the greater bulk whereof amounts to nothing better than hearsay. The effect of the Subordinate Judge's procedure has been to incumber the record with a quantity of material that is practically useless. However, despite the unnecessary complication that has thus been introduced into an otherwise comparatively simple case, the main issues between the parties are involved in the decision of the following points :—

(i.) Is the family, of which Bhawani Prasad was the ancestor, and to which plaintiff and his father, defendant No. 1, belong, Hindu or Muhammadan in the sense of s. 24 of Act VI of 1871.?

(ii.) If it is not either one or the other, then by what principle or rule is the devolution or division of property belonging to it among its several members to be guided. ?

Before adverting to the evidence bearing upon the first of these two considerations, it will be convenient to examine the terms of s. 24 of Act VI of 1871. Now it seems to us that the language therein used expressly limits the operation and application of the first paragraph of the section to those cases in which the parties are at the time of the litigation orthodox Hindus or Muhammadans in religion. That is to say their "*status*" before the law absolutely depends upon their religious belief, and this in the strict sense of the term. For the very essence of the principles of Hindu and Muhammadan law is drawn from, and may be traced to, religious sources, and it is only where the union of the two exists in its well understood and natural sense that the "rule of decision" provided by the Act is to be followed. A Hindu or Muhammadan, who becomes a convert to some other faith, is not deprived "*ipso facto*" of his rights to property by inheritance or otherwise. "*Primâ facie*" he loses the benefits of the law of the religion he has abandoned, and acquires a new legal "*status*" according to the creed he has embraced, if such creed involves with it legal responsibilities and obligations. Thus a Hindu adopting the Muhammadan faith, from the moment of his conversion, by that act affects all the property he may acquire subsequently to it, so as to render it subject to the Muhammadan law of inheritance. His apostacy has an immediate and prospective, not a retrospective effect; and his subjection to the new law dates from the moment of his profession of the new religion. It therefore seems to us that in determining whether parties are Hindus or Muhammadans within the meaning of s. 24 of Act VI of 1871, we must apply its terms strictly, and confine their operation to those who may properly be regarded as orthodox believers in the one religion or the other. It is said that while Hindus will not eat or hold intercourse with those of their community who indulge in the practices of other religions, and virtually regard them as excommunicated, yet that they nevertheless account such persons to be properly describable as Hindus. How this may be we are not prepared to vouch, though admitting such to be the case

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it does not carry the matter further. If we are correct in our view that the *status* of a Hindu or Muhammadan under the first paragraph of s. 24, Act of VI of 1871, to have the Hindu or Muhammadan law made the "rule of decision", depends upon his being an orthodox believer in the Hindu or Muhammadan religion, the mere circumstance that he may call himself or be termed by others a Hindu or Muhammadan as the case may be is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates his law for him. If he fails to establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with under the latter paragraph of s. 24 of Act VI of 1871.

Turning then to the evidence tendered on the one side and the other, has the plaintiff, Bishen Dayal, established that he and his father have been and are Hindus in the sense we have indicated, and were they at the time of institution of the suit members of a joint and undivided family; or has the defendant Raj Bahadur succeeded in making out that he is a Muhammadan in the like sense? It seems to us impossible upon a perusal of the depositions of the various witnesses to come to any other conclusion than the one arrived at by the Subordinate Judge, namely, that the parties have failed to prove that they are either "true Musalmans or Hindus." If we were to look no further than to the evidence of Raj Bahadur, the defendant himself, and the replies to the interrogatories of Bakht Bahadur and Bijai Bahadur, there would be sufficient to bear out the view, let alone the statements of Ali Bahadur, Anand Sahai, and Kishen Sahai. To our minds it is established to demonstration that no person indulging in the strange and incongruous practices spoken to by these several witnesses could rightly be described either as an orthodox Hindu or Muhammadan, any more than the Plymouth Brethren could be called members of the Church of England. It may be, and no doubt is, true that Bhawani Prasad, then Har Sahai, and then his brother, Ram Sahai, and after them their descendants, Raj Bahadur, Bishen Dayal, Bakht Bahadur, Bijai Bahadur, Narain Sahai, Kishen Sahai, and Anand Sahai read *nimaz* and the *kalma*, offered sacrifices, observed fasts,

gave "*zakat*," distributed alms and food during Ramzan and Muharram, attached themselves to *pirs*, recognised ceremonies on the anniversaries of the deaths of departed relatives, and generally performed many acts characteristic of a belief in the Muhammadan religion. On the other hand, they, with scarcely an exception, on every occasion it was necessary to do so, described themselves as Sribastab Kayasths, always selected their wives from that caste, performing the ceremonies *barat* and *gauna* according to the Hindu fashion; recognised and kept all Hindu holidays and festivals, distributing food and alms on those occasions; lived and fed for the most part in the manner of Hindus; did not bury their dead nor require circumcision, and refused to recognise the title of the females of the family to any share in the inheritance to property. In face of circumstances like these, it seems to us impossible to hold that persons pursuing such inconsistent and irreconcilable ways, which no follower of either religion could combine in practice without placing himself outside its pale, can be allowed to come into Court and claim the same privileges that the law affords to orthodox Hindus and Muhammadans. In our opinion therefore the first paragraph of s. 24 of Act VI of 1871 is not applicable to the present case, with which we must deal according to "justice, equity, and good conscience." Now it is present to our minds that if we were to regard the plaint by the strict rules of pleading, the plaintiff-respondent having based his claim upon the Hindu law and the allegation that he and his father are members of a joint family, and failing to establish his position, his suit should be dismissed as brought. We do not, however, feel called upon to adopt this extreme course, especially as from the view in which we treat the case, though technically different from the precise form in which it has been presented by the plaintiff-respondent, in substance it is practically the same. Under such circumstances we are not disposed to subject the parties to the great expense and delay that would be caused by requiring a fresh suit to be brought.

How then shall we be best acting according to justice, equity, and good conscience in dealing with the case before us.? In the well known decision of the Privy Council in *Abraham* v. *Abraham* (1)

(1) 9 Moo. I. A 199.

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the following passage may be found at p. 242: "Their Lordships, therefore, are of opinion that upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion." Now it will be observed that these remarks are applicable to the case of a Hindu converted to *Christianity*, that is to say, to a form of religion which, strictly speaking, can scarcely be said to carry with it or involve any legal rights or obligations. So that a Hindu who becomes a Christian may, if he thinks fit to do so, still elect to be governed by the Hindu law as regards succession and inheritance. But if he embraces the Musalman faith, and becomes an orthodox Muhammadan, it is otherwise; for his new religion is concerned with, and does directly provide for, the devolution and distribution of estate, and he cannot adopt it in one respect and refuse to be bound by it in the other. In the present case, however, we may regard the position of the parties as virtually identical with that of a Hindu converted to Christianity, whose apostacy does not necessarily involve a change of legal *status*. Applying the remarks of their Lordships of the Privy Council above quoted to the case before us, the solution of it is greatly facilitated, for if a Hindu, who becomes a Christian, may yet adhere to the Hindu law, *a fortiori* it should be administered for those who, occupying a *terram mediam* betwixt Hinduism and Muhammadanism, have nevertheless by sustained and consecutive action for many years evinced their recognition of, and submission to, the principles of that law. In *Abraham* v. *Abraham* (1) their Lordships also remark: "The convert though not bound as to such matters, either by the Hindu law, or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by himself having observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his

(1) 6 Moo. I. A. 199.

property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed." Making use of this test in the matter before us we find that, however much the defendant Raj Bahadur and the rest of the family sprung from Bhawani Prasad may have strayed away from the Hindu religion, the Hindu law of inheritance has always been followed among them. When Bhawani Prasad died, his two sons, Har Sahai and Ram Sahai, succeeded him, and subsequently partitioned the property between them. So at the death of Har Sahai, Raj Bahadur, defendant No. 1, Bakht Bahadur, and Bijai Bahadur, his three sons, took the estate jointly at first, to the exclusion of his two daughters, Biban and Lallu, while the three children of his mistress Ziban, as she was described by the defendant Raj Bahadur in the proceedings before the Sadr Amin of Fatehpur in June, 1866, obtained no share or portion. The three sons of Ram Sahai inherited their father's estate in like manner. Then again in October, 1877, the defendant Raj Bahadur and his two brothers Bakht Bahadur and Bijai Bahadur effected a partition entirely in accordance with the principles of the Hindu law. Further than this and prior to such partition we find in the *wajib-ul-arz* two entries which show that the three brothers were joint, and at that time recognised the Hindu law of inheritance as governing them. Then we have two distinct offers by the defendant No. 1 to give the plaintiff one half of the property. Looking at all these circumstances and the other facts in the case, we think it is equity, justice, and good conscience to apply to the parties to this suit that law of inheritance, whereof partition is a necessary incident, to which they have uninterruptedly adhered. In this view we approve the decision of the Subordinate Judge in holding that the plaintiff is entitled to demand partition to the extent of half the property.

Having thus disposed of the main contention in the case, it is only necessary very shortly to consider the other pleas urged, the first being that for the appellants Kulsum Bibi, Masuman Bibi, and Amir Jan, and the son of Masuman Bibi, Ahmad Husain. (The judgment then proceeded to decide these pleas).