1930.

KING EMPEROR. v. RAM CHANDER MUTSADDI.

to sit in front of a railway train and to prevent its further progress, even as a protest against the railway company.

We accordingly allow this appeal, restore the conviction passed by the learned Magistrate and impose a sentence of so much simple imprisonment as he has already undergone.

Appeal allowed.

APPELLATE CIVIL.

1930. December, 17.

Before Mr. Justice Muhammad Raza and Mr. Justice A. G. P. Pullan.

BHAGWAN BAKHSH SINGH (PLAINTIFF-APPELLANT) *v.* DRIGBIJAI SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Muhammadan law—Hindu converted to Muhammadan faith —No proof of renouncing Muhammadan religion but observance of certain Hindu ceremonies proved—Inheritance in the family, whether to be according to Muhammadan law—Caste Disabilities Removal Act (XXI of 1850), scope and application of—Change of religion—Law governing succession—Hindu, if entitled to succeed to a converted Muhammadan's estate—Right of inheritance with power of transfer—No provision made for ultimate devolution of property—Presumption of absolute estate in the property inherited.

A person, who was born in the Muhammadan faith and has never been proved to have adopted any other religion, must be held to be a Muhammadan. Where, therefore, a person and his ancestors for four generations were Muhammadans and he never abjured that faith, the court would not be justified in finding that the Muhammadan law of inheritance did not apply to his family because like many Muhammadans whose families were originally Hindus he observed certain Hindu ceremonies.

*First Civil Appeal No. 109 of 1929, against the decree of Babu Jagdamba Saran Additional Subordinate Judge of Hardoi, dated the 7th of October, 1929.

1930.

BHAGWAN BAKHSH SINGH. v. DRIGBIJAI SINGH.

The Caste Disabilities Removal Act applies only to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. When once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. Therefore after the conversion of a Hindu to Muhammadanism, his Hindu relations cannot succeed to the estate after his children. *Mitar Sen Singh* v. *Maqbul Hasan Khan* (1), relied on.

Where any person is given a right of inheritance with the power of transfer and no provision is made for the ultimate devolution of the property on his or her decease, the presumption is that such a person has an absolute estate in the property so inherited. It is possible to find that a family had retained the Hindu rules of succession or customary rules of succession based upon the Hindu law after their conversion to Islam, but such a custom must be proved. *Bai Baiji* v. *Bai Santok* (2), *Abraham* v. *Abraham* (3), *Mohammad Ibrahim Rowther* v. *Shaikh Ibrahim Rowther* (4), *Binaik Dat* v. *Mohammad Ghafur* (5), *Khalil Ahmad Khan* v. *Mohammad Mustafa Khan* (6), and *Roshan Ali Khan* v. *Chaudhri Asghar Ali* (7), relied on. *Jowala Buksh* v. *Dharum Singh* (8), referred to.

Messrs. *Haider Husain* and *Sundar Lal Gupta*, for the appellant.

Messrs. *M. Wasim*, *Ali Zaheer*, *R. N. Shukla*, *Manni Lal*, *K. N. Tandan and Triloki Nath*, for the respondents.

RAZA and PULLAN, JJ. :—These appeals have been preferred against the decision of the Additional Subordinate Judge of Hardoi which covered three suits brought by different claimants to a half share of village Nindarwa which was in the possession of one Musammat Mumtazan who died on the 3rd of August, 1926. The first of these suits was brought by Drigbijai Singh and others who claimed to be the nearest reversioners to this estate alleging that Musammat Mumtazan had only

(1) (1930) 7 O.W.N., 925.
(2) (1894) I.L.R., 20 Bom., 53.
(3) (1863) 9 M.I.A., 195.
(4) (1922) L.R., 49 I.A., 119.
(5) (1927) 4 O.W.N., 770.
(6) (1928) 5 O.W.N., 275.
(7) (1929) L.R., 57 I.A., 29.
(8) (1866) 10 M.I.A., 511.

1930.

BHAGWAN BAKHSH SINGH v. DRIGBIJAI SINGH.

Raza and Pullan, JJ.

the estate of a Hindu widow after the death of her husband Bhajan Singh. The second suit was filed by Sarfaraz Khan and others who pleaded that the husband of Musammat Mumtazan was a Muhammadan named Bhajju Khan whose estate was governed by Hindu law, but the inheritance of that estate should devolve on them as the nearest Muhammadan reversioners and not on the Hindu reversioners represented by Drigbijai and others. The third suit was filed by one Bhagwan Bakhsh at a much later date and was consolidated with the two former suits after the evidence had been recorded. This Bhagwan Bakhsh was another Hindu who alleged that he was also a reversioner. He compromised his case with Drigbijai Singh and others and for the purposes of these appeals their case may be considered as the same.

The suit brought by Sarfaraz Khan and others was dismissed mainly on the ground that the plaintiffs were of an illegitimate stock. They filed an appeal but that appeal was dismissed for want of prosecution. The suits of Drigbijai Singh and others and of Bhagwan Bakhsh were decided against them on identical grounds and they raise the same questions in their appeals which have been argued together by one counsel.

The appellants, who have been described as Arwa Thakurs, are the descendants of one Chhatra Pati, a Gour Thakur by his son Bir Sah. Another son of Chhatra Pati named Lohang Rai was converted to Islam some 200 or 250 years ago. A direct descendant of Lohang Rai was Bhajju Khan or Bhajan Singh who died in the year 1882. At the time of his death his widow Musammat Mumtazan and three daughters were living. The whole of this village was inherited by Mumtazan and one half was still in her possession at the time of her death on the 3rd of August, 1926. We are not concerned with the other half of the village which she is alleged to have transferred in her lifetime to another person. Her daughters died before their mother and no descendants of theirs have made any claim before us to

1930.

BHAGWAN BAKHSH SINGH v. DRIGBIJAI SINGH.

this estate. On the death of Mumtazan the plaintiffs in these three suits all made claims in the mutation proceedings but possession was declared to rest with the contesting respondent Inayat Khan who was the brother of Mumtazan.

Raza and Pullan, JJ

In a careful and elaborate judgment the learned Additional Subordinate Judge dismissed the suits of the Arwa Thakurs on three main grounds. The first is that Bhajju and Mumtazan were Muhammadans. The second is that the inheritance to the estate of Bhajju was governed by Muhammadan law and Mumtazan had therefore an absolute estate, and the third is that the Arwa Thakurs being Hindus had no claim to inherit the estate of a Muhammadan.

The first question which we have to decide is whether Bhajju and Mumtazan were or were not Muhammadans. In the plaint it was stated that Lohang Rai was converted to Muhammadanism forcibly, but in fact he never accepted the Muhammadan religion, and always followed the Hindu religion, and continued to act upon it and always followed the Hindu practices and customs and the Hindu mode of life, that in his family the inheritance was always governed by the Mitakshara Law and that his descendants always followed the Hindu customs and laws. Further it was stated that Bhajan Singh, as he is called in the plaint, and his wife Musammat Mumtazan who is given the Hindu name Munni had undergone *shuddhi* or reconversion and both died as Hindus. It was nowhere stated that Lohang Rai seased to be a Muhammadan after his conversion or that any of his descendants ceased to be Muhammadans until Bhajan Singh or Bhajju Khan was received back into Hinduism. Drigbijai Singh himself was examined as a witness and he stated definitely "Lohang Rai and his descendants up to Bhajju Singh till the time of his *shuddhi* were Muhammadans." Thus the plaintiffs' case that Bhajan Singh at the time of his death was a Hindu depends on proof of the *shuddhi* set up in the plaint.

1930

BHAGWAN BAKHSH SINGH, v. DRIGBIJAI SINGH.

Raza and Pullan, JJ.

This has not been even argued before us, but as it was an essential part of the plaintiffs' case, we think it proper to say that we entirely agree with what the learned Additional Subordinate Judge has said on this question. It must be remembered that Bhajan Singh or Bhajju Khan died in the year 1882 and it is alleged that he was received back into Hinduism at some time between the years 1870 and 1880. The learned Additional Subordinate Judge observes "the present movements of reformation of the Hindu religion are of comparatively recent growth. Only one of them, i.e., the Arya Samaj movement took root in these provinces and in seventies of the last century it was just beginning to make its influence felt. *Shuddhi* movement is one of its latest phases and has begun to take a practical shape only within the last ten or fifteen years. It could not have made its influence felt in rural areas and backward communities of highly conservative instincts . . . The story of Bhajju and his wife's *shuddhi* by an Arya Samajist a few years before Bhajju's death, i.e., in 1878 or 1879 is therefore an unachronism invented by persons, who had no idea of historical sequence."

After discussing the evidence of the *shuddhi* which he considers worthless the learned Judge observes: "It is not conceivable that a conservative clan like the Gour Thakurs of the Hardoi district, would have thought fifty years back of taking into their fold a Thakur family which had been converted into Muhammadanism two and a half centuries ago and which had during the course of that long period imbibed and adopted the Muhammadan religion in its entirety."

Apart from these general considerations which are, in our opinion convincing, there is little or no evidence either that this man was known as Bhajju Singh or that he ever considered himself to be a Hindu. In public documents such as the *wajib-ul-arz* of this village Nindarwa on which for other reasons the plaintiffs rely,

1930.

BHAGWAN BAKHSH SINGH v. DRIGBIJAI SINGH.

Raza and Pullan, JJ.

Bhajju described himself as Bhajan Khan, son of Mehrban Khan, Nau-muslim, and he stated in particular that this very village of Nindarwa was granted to his ancestor Lohang Rai as muafi and Jagir by the Emperor of Delhi when he accepted the Muhammadan religion. There is no reliable evidence that he ever described himself as Bhajan Singh or that he was so described by others. As to his widow she was always known as Mumtazan. Her father was a Muhammadan named Shahamat Khan. She describes herself in many documents as the widow of Bhajju Khan, Nau-Muslim. She built a mosque and she was buried close beside it. These facts are admitted by Drigbijai Singh himself and the fantastic theory that she was buried owing to some impurity of blood has been rightly rejected by the learned Additional Subordinate Judge.

The learned counsel for the appellants has argued before us that although Bhajju Khan may have been a Muhammadan, he was not an orthodox Muhammadan, and as he came of a family which had been converted from Hinduism, it should be held that the inheritance to his estate should be decided by justice, equity and good conscience as laid down by a Bench of the Allahabad High Court in the case of *Raj Bahadur* v. *Bishen Dayal* (1). According to the learned Counsel justice, equity and good conscience in this case would favour a rule of inheritance in accordance with the Hindu law. It was never pleaded in this case that Bhajju Khan was not an orthodox Muhammadan. Rather it was stated that he was a Muhammadan who became a Hindu. But apart from this objection in our opinion orthodoxy can never be used by courts of law as the criterion for determining a question of succession. The followers of all revealed religions seek to determine orthodoxy or right opinion by revelation, and on the authenticity of revelation, there is no unanimity. When the doctors of religion disagree, the doctors of law cannot decide between them. The decision of the Allahabad High Court to which we have

(1) (1882) I.L.R., 4 All., 343.

1930.

BHAGWAN BAKHSH SINGH v. DRIGBIJAI SINGH.

Raza and Pullan, JJ.

referred was doubted by the Chief Court of the Punjab in the case of *Bhagwan Koer* v. *J. C. Bose* (1). Their judgment is reported in (1) and was accepted by their Lordships of the Judicial Committee, who have not, however, thought it necessary to refer to the Allahabad case in their judgment, which is also reported in L. R., 30 I. A., 249. In our opinion a person, who was born in the Muhammadan faith and has never been proved to have adopted any other religion, must be held to be a Muhammadan. We are satisfied that Bhajju Khan and his ancestors for four generations were Muhammadans and that he never abjured that faith. It is possible that like many Thakur Muhammadans whose families were originally Hindu Bhajju Khan observed certain Hindu ceremonies, but we are not prepared to hold that this fact, even if it were proved, would justify the courts in finding that the Muhammadan law of inheritance did not apply to this family.

We have however been asked to consider the question whether in this family Hindu customs of inheritance were not retained. It has now been accepted by their Lordships of the Privy Council that several Muhammadan families in India have retained Hindu customs, in particular custom of succession. This matter was left open by their Lordships in the case of *Jowala Buksh* v. *Dharum Singh* (2) in the year 1866. Their Lordships were of opinion that where property passed to the descendants of one who was a Muhammadan, they themselves being Muhammadans, it seemed "contrary to principle that, as between them, the succession should be governed by any but Muhammadan law" and this judgment was delivered after the judgment in the case of *Abraham* v. *Abraham* (3) on which the subsequent rulings as to the maintenance of Hindu customs by converted Muhammadans have been based. In 1894 the High Court of Bombay in the case of *Bai Baiji* v. *Bai Santok* (4) decided definitely that the Suni Borah Muham-

(1) (1903) I.L.R., 31 Calc., 11.
(2) (1866) 10 M.I.A., 511.
(3) (1868) 9 M.I.A., 195.
(4) (1894) I.L.R., 20 Bom., 58.

1930.

BHAGWAN BAKHSH SINGH v. DRIGBIJAI SINGH.

madan community of the Dhandhuka Taluka in Gujarat are governed by the Hindu law in matters of succession and inheritance and it was stated in the judgment that the following principles may be regarded as settled, namely, (1) that though the Muhammadan law generally governs converts to that faith from the Hindu religion; (2) a well established custom of such converts following the Hindu law of inheritance would override the general presumption, (3) that this custom should however be confined strictly to cases of succession and inheritance and (4) that if any particular usage at variance with the general Hindu law applicable to these communities in matters of succession be alleged to exist, the burden of proof lies on the party alleging such special custom.

Raza and Pullan, JJ.

In 1922 their Lordships of the Privy Council in considering the case of Lubbai Muhammadans of Madras—*Muhammad Ibrahim Rowther* v. *Shaikh Ibrahim Rowther* (1)—observed. "In India, however, custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Muhammadan law, governing the succession in a particular community of Muhammadans. But the custom must be proved." In Oudh it was held by a Bench of this Court in the case of *Binaik Dat* v. *Mohammad Ghafur Khan* (2) that the Muhammadan converts of the Mudarkaya Thakur clan retained certain Hindu customs as to inheritance. Later the same Bench came to a similar decision as to Bhale Sultans of the Sultanpur district who were originally Hindu Rajputs—*Khalil Ahmad Khan* v. *Mohammad Mustafa Khan* (3) and very recently their Lordships of the Judicial Committee have in the case of *Roshan Ali Khan* v. *Chaudhri Asghar Ali* (4) held that "now the prevalence of customary rules of succession in this part of India has been recognized in the statute law of Oudh, as well as of the

(1) (1922) L.R., 49 I.A., 119.
(2) (1927) 4 O.W.N., 770.
(3) (1928) 5 O.W.N., 275.
(4) (1929) L.R., 57 I.A., 29.

1950

BHAGWAN BAKHSH SINGH v. DRIGBIJAI SINGH.

Punjab and the North-Western Province, which provides that in matters of succession the ordinary rules of Muhammadan and Hindu law are only to be applied in the absence of such customs". It would not therefore be surprising if we were to find that the family to which Bhajju Khan belonged had retained the Hindu rules of succession or customary rules of succession based upon the Hindu law after their conversion to Islam. But we do not find that this is the case. The custom of the family is laid down in the *wajib-ul-arz* and was dictated by Bhajju Khan himself. He laid down only the following rules :—

Raza and Pullan, JJ.

(1) After the death of a co-sharer his sons become owners of equal shares,

(2) If the co-sharer has two wedded wives, one of whom has child and the other is childless, the son will inherit (*qabiz warsa hoga*) and the childless widow will have only the right of maintenance,

(3) If both widows have issues the sons will have possession (*qabiz honge*) according to the custom of *jura-bant*,

(4) In my family the daughter gets no share, but she can get a share if her father gives it to her; otherwise the person who inherits (*qabiz warsa*) will provide for her maintenance and marriage, etc.

(5) If a deceased leaves a single childless widow she will inherit after the death of her husband with power of alienation (*ba ikhtiar intiqal qabiz warsa hoti hai*).

These customs of inheritance are not customs of the Muhammadan law: nor the customs of the Hindu law. They are family customs which are not based on either of these codes. We have therefore to determine

1930.

BHAGWAN BAKHSH SINGH v. DRIGBIJAI SINGH.

Raza and Pullan, JJ.

the position of the childless widow without reference to the Hindu law, and we cannot follow the learned counsel when he argues that we should presume that a widow inheriting in accordance with this custom must be held to have only a life estate. The words themselves do not convey this meaning. It may be observed that the words *qabiz warsa* which describe the position of the widow are used equally to describe the male inheritor of the estate. And where any person is given a right of inheritance with the power of transfer and no provision is made for the ultimate devolution of the property on his or her decease, the presumption is that such a person has an absolute estate in the property so inherited. It cannot even be said that the custom of the family of Bhajju Khan is the same as that of the Hindu branch of the same family. Their customs are dealt with in the *wajib-ul-arz* of Arwa, the plaintiffs' own village. There it is distinctly laid down that widows will have a life estate and that the property will devolve on the collaterals. The omission of the collaterals in the *wajib-ul-arz* of Nindarwa is not without design. In our opinion there is no ground for reading into this *wajib-ul-arz* a provision based on Hindu law that the estate given to a widow is a life estate only. We find that the estate of Musammat Mumtazan was an absolute estate and these collaterals can have no claim against the brother of Mumtazan who is in possession.

Lastly the learned counsel has failed to show how being Hindus they are entitled to succeed to a Muhammadan estate. Their plea is based upon an interpretation of the Caste Disabilities Removal Act (XXI of 1850) which has now been decided by their Lordships of the Judicial Committee to be incorrect. We refer to the case decided on the 30th of June 1930, which is reported in *Mitar Sen Singh* v. *Maqbul Hasan Khan* (1) and which lays down that the Caste Disabilities Removal Act applies only to protect the actual person who either

(1) (1930) 7 O.W.N., 925.

renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. When once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. Under the Muhammadan law the present appellants have no right of succession to this estate.

We accordingly dismiss these appeals with costs.

Appeal dismissed.

FULL BENCH.

1929
April, 19.

Before Sir Louis Stuart, Knight, Chief Judge, Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

RAGHNUNANDAN PERSHAD AND OTHERS (DEFENDANT-APPELLANTS) v. MOTI RAM (PLAINTIFF) AND ANOTHERS (DEFENDANT) RESPONDENTS.*

Hindu law—Joint Hindu family—Debt incurred by father as manager—Partition between father and sons after the debt—Sons' share after partition, if liable to satisfy the decree against father.

Held, that it is a necessary corollary from the principles laid down by their Lordships of the Judicial Committee that the family property is liable in execution to satisfy a decree on a debt incurred by the father as manager of the joint family property where the other members are the sons that the property will remain liable even if it is subsequently partitioned. The liability is with the property and the acts of the members of the family cannot divest the property of that liability. A simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons even after a *bona fide* partition between the father and the sons. The property will remain liable even if it is partitioned. Sons who are divided are liable for the debts of the father to the extent of the family property which comes to them under the partition. *Brij Narain* v. *Mangla Prasad* (1), *Gaya Prasad* v. *Murlidhar* (2), *Annabhat Shankarbhat Alvandi* v.

* Second Civil Appeal No. 224 of 1928, against the decree of S. Shaukat Husain, Additional Subordinate Judge of Gonda, dated the 13th of March 1928, confirming the decree of Pandit Brij Nath Zutshi, Munsif of Utraula, dated the 22nd of December, 1927.

(1) (1923) L. R., 51 I. A., 129. (2) (1927) I. L. R., 50 All., 137.