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The rule as to certifying Counsel has been interpreted as meaning that Counsel should be certified unless it is not a fit case for Counsel. I should myself have felt inclined to put a stricter interpretation on the rule, but the practice has been the other way; and I do not think I should be justified in disregarding the practice followed by my predecessors.

It seems to me that if either party gives notice of his intention to employ Counsel, that party at any rate acknowledges, that, in his opinion, the matter is fit for employment of Counsel. Again, if the question involves the discussion of complicated facts, or of any substantial question of law, I think Counsel should be certified.

In this case

(*a*) Notice has been given by the plaintiff that he will employ Counsel.

(*b*) A question has been raised as to whether the defendant should be compelled to pay under the circumstances stated in the affidavit.

I cannot say that the employment was improper: or that there was no substantial question of law and fact to discuss.

Therefore I will certify Counsel.

Counsel certified.

Attorneys for the plaintiff:—*Messrs. Mulla and Mulla.*

Attorney for the defendants:—*Mr. M. B. Chothia.*

R. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

MOOSA HAJI JOONAS NOORANI AND OTHERS (DEFENDANTS), APPELLANTS, v. HAJI ABDUL RAHIM HAJI HAMED (PLAINTIFF), RESPONDENT.*

1905. *April* 10.

Cutchi Memons—Succession—Marriage in approved form—Hindu Law.

In the absence of proof of any special custom of succession, the Hindu Law of inheritance applies to Cutchi Memons.

The legal consequences of the classes of marriage, the approved and disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality

* Appeal No. 1315, Suit 412 of 1902.

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and not the form of marriage that decides the course of devolution: where the marriage is approved the husband and his side come in, where disapproved, they do not.

Ashabai v. *Haji Tyeb Haji Rahimtulla*(1) followed. *In the goods of Mulbai; Karim Khatav* v. *Pardhan Manji*(2), and *the case of the Kojahs and of the Memon Cutchees*(3) referred to.

APPEAL from Crowe, J.

The facts of this case as found in the Court below are as follows:—

Haji Salley Mahomed, a Cutchi Memon, died on the 24th December, 1898, leaving a will, dated 5th July, 1894, in which he appointed as his executrices his widow Mariambai and her mother Fatmabai, widow of one Haji Adam Haji Esmail. The will was proved on the 30th August, 1899. Various legacies were given under the will, including one of Rs. 10,000 to the widow Mariambai; Rs. 275 per annum were also set aside for certain anniversary ceremonies and a portion of the residue for feeding fakirs. On the 28th May, 1902, Mariambai died without having received the whole of her legacy of Rs. 10,000. On the 24th July, 1902, the plaintiff filed this suit, alleging that he was the nephew, brother's son, of the testator Haji Salley Mahomed and claimed as heir of Mariambai for the administration of the estate of the said Haji Salley Mahomed and for a declaration of his rights in that estate not only in his own right but also as heir of the said Mariambai. The executrix Fatmabai put in a written statement claiming to be the heiress of Mariambai and claiming all the property of her daughter, the said Mariambai, by virtue of a death-bed gift. On the 5th August, 1902, a receiver was appointed of the moveable estate and on the 12th December, 1902, under a Judge's order the following among other preliminary issues were set down for trial:—

1. Whether according to the law applicable to Cutchi Memons the plaintiff is the heir of Mariambai in the plaint mentioned.

2. Whether according to the custom applicable to Cutchi Memons the plaintiff is the heir of the said Mariambai.

3. Whether the plaintiff has any and what interest in the estate of the testator Haji Salley Mahomed.

(1) (1882) 9 Bom. 115. (2) (1866) 2 Bom. H. C. R. 276.
(3) (1847) 2 Morley's Dig. 431.

4. Whether the suit is not bad for misjoinder of causes of action.

As to the first three issues the learned Judge of the lower Court held that the Cutchi Memons were as regards the order of succession and inheritance governed by Hindu Law, and that as there was no impropriety in the marriage of Mariambai the plaintiff was her heir. As regards the fourth issue, the learned Judge held there was no misjoinder of causes of action, as it was clear that all that was prayed for in the plaint was the administration of the estate of the deceased Haji Salley Mahomed. From this decision the defendants appealed and further evidence was recorded before the Court of Appeal as to the existence or otherwise of any custom of succession or inheritance among the Cutchi Memon community. On the 13th September, 1904, the Court of Appeal referred the case back to the lower Court to take further evidence as to custom. A number of witnesses, for the most part leading members of the Cutchi Memon community, were examined before the lower Court, and on the 24th March, 1905, the case again came before the Court of Appeal.

Setalvad with *Inverarity*, for the appellants.

We are only concerned with first two issues. On the death of Mariambai the property should go to her mother Fatmabai according to Mahomedan Law. The plaintiff sets up a custom against Mahomedan Law which is neither Hindu Law nor Mahomedan Law. Mariambai gets the property by the will of her husband, this would then be *stridhan*: *Sitabai* v. *Wasantrao*[1].

The devolution of *stridhan* depends upon whether marriage was in an approved form or not. That there is no hardship in applying Hindu Law in a case such as this. We cite the case of the Khojas who were originally Hindus, and were converted to Muhammadanism, retaining their Hindu laws and customs, and to whom, in the absence of special custom, Hindu law of inheritance should be applied. *Hirbai* v. *Gorbai*,[2] *Shivji Hasam* v. *Datu Mavji*,[3] *In re Haji Ismail Haji Abdula*,[4] *Rahimatbae* v. *Hadji Jussap*,[5] *In the matter of Haroon Mahomed*,[6] *Ashabai* v. *Haji*

(1) (1901) 3 Bom. L. R. 201.
(2) (1875) 12 Bom. H. C. R. 294 at p. 305.
(3) (1874) 12 Bom. H. C. R. 281.
(4) (1880) 6 Bom. 452, p. 460.
(5) (1847) Perry's O. C., p. 110.
(6) (1890) 14 Bom. 189 at p. 193.

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Tyeb Haji Rahimtulla,[1] *Abdul Cadur Haji Mahomed* v. *C. A. Turner*[2].

These cases show that Memons are governed by Hindu Law. The case of *Ashabai* v. *Haji Tyeb Haji Rahimtulla*[1] applies technical law of *stridhan* to these classes. The *onus* of proving a custom of inheritance not in conformity with Hindu Law lies upon those who set it up.[3] As to *stridhan* the devolution of Anvadhya Stridhan is according to the Mayukha, and therefore the whole law as to devolution applies. In this case there was no issue of the marriage and so further devolution must be governed by form of marriage. If the marriage is in an unapproved form it goes to heirs of the woman, and if in an approved form then to heirs of the husband: *Hunsraj* v. *Kesserbai*[4]. The marriage in this case cannot be said to be in an approved form as it was admittedly performed according to Mahomedan rites. But a Hindu marriage though in an unapproved form is valid.

This marriage we say is analogous to one of the lower forms of Hindu marriage where divorce is allowed.

Cutchi Memons were mostly Sudras and to assume this marriage to be in an approved form would be to apply neither Hindu nor Mahomedan Law.

As to the custom alleged in this case the plaintiff must prove it strictly as it is contrary to both Hindu and Mahomedan Law.

[JENKINS, C. J.:—Do you admit that on the death of a Cutchi Memon the widow would succeed ?]

We admit that.

Sudras are presumed to marry in unapproved forms. Mayne Hindu Law (6th Edn.), p. 97. Ghose Hindu Law, p. 603. We say there are eight forms of marriage and it is difficult to say which of them resembles this particular marriage.

Robertson and *Lowndes*, for respondent 1.

Bhandarkar and *Bahadurji*, for respondents 2, 3 and 4.

(1) (1882) 9 Bom. 115, pp. 120, 126.
(2) (1884) 9 Bom. 158 at p. 162.
(3) Ibid, p. 120.
(4) (1903) 6 Bom. L. R. 17

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JENKINS, C. J.—Apart from the objection of misjoinder, the only point argued before us has been as to the rights of succession by inheritance to the property of a Cutchi Memon widow, for so the lady must be regarded, notwithstanding the doubt suggested here for the first time at a late stage of the argument that such was not her true description.

The lady's name was Mariambai, and she was the widow of Haji Sale Mahomed Haji Tar Mahomed, who left her by will the property in suit.

Mariambai died without issue, and the plaintiff is her husband's nephew and nearest heir, while the appellants are her nearest heirs in her parents' family: it is between the plaintiffs and the appellants that the contest lies.

It is beyond dispute that in the absence of proof of any special custom of succession, the Hindu Law of inheritance applies to Cutchi Memons: *Ashabai* v. *Haji Tyeb Haji Rahimtulla*.(1)

The property in suit, therefore, devolved as *stridhan* and so the succession must be determined by reference to the rule which draws a distinction in the devolution of that class of property according as the lady's marriage was approved or disapproved.

Crowe, J., decided in the plaintiff's favour, holding that Mariambai's marriage must, for the purpose of this rule of descent, be regarded as approved, and the case is before us on appeal from his decree. The record, since the case was before Crowe, J., has been amplified by the addition of evidence of custom.

The Hindu rule of descent is thus propounded in the Mayukha (Ch. IV, s. X; pages 97-98 of Mandlik's Hindu Law), which is the governing authority in this case:

"[As regards succession to] the technical *stridhana* in default of both kinds of issue, Yajnavalkya states a distinction [Ch. II, V. 144]:—

'Her kinsmen (*bandhavas*) take it, if she die without issue.' (2)

The same [author] expounds the succession of kinsmen according to the different kinds of marriage. (3) 'The property of a childless woman married in the *Brahma* or any other [of the four approved forms of] marriage goes to her husband; in the remaining [four forms of marriage] it goes to her parents.(4) But if she leave female issue, [it will go to her daughter's daughters]'(5) Failing

(1) (1882) 9 Bom. 115.

(2) Vir. I. 218, p. 2; Kam. and Vya. M.

(3) Yaj. Ch. II, V. 145.

(4) Vir. I. 218, p. 2; Kam. and Vya. M.

(5) Vijnanesvara (Mit. Ch. II, I. 63, p. 1) distinctly mentions daughter's daughters, and gives his reason for so doing.

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the husband, the nearest to her in his family takes it; [similarly] failing the father, the nearest to her in her father's family succeeds; as Manu in the text [Ch. IX, V. 187]:—'Of the nearest *sapinda*, the wealth [of the deceased] shall be' declares propinquity to the deceased as the criterion of the right to [take] wealth. As regards [the statement] in the Mitakshara (1) that on failure of the husband, it goes to *tatpratyasanna* (the nearest to that) *sapindas*, and on failure of the father, to *tatpratyasanna* (the nearest to that) *sapindas*, even there the [word] *tatpratyasannah* is [to be dissolved as] *tena asyah pratya sannah* [the nearest to her] through him, so as to mean ('the nearest in his family through him'). In the four [forms of marriage] beginning with *Brahma* relates to the Brahmana on account of these (forms) alone being lawful in respect to him. In the case of Kshatriyas and the rest, to whom the *Gandharva* [form of marriage] is lawful, the wealth of even her who has been married according to that [form] belongs to the husband alone. To the same effect [says] Manu [Ch. IX, VV. 196, 197]:—'It is ordained that the property [of a woman] married in the *Brahma*, *Daiva*, *Arsha*, *Gandharva*, or *Prajapatya* form of marriage, and dying without issue, shall go to her husband alone; but it is ordained that if she obtained wealth when married in the *Asura* and the like form, on her death without issue, it goes to her mother and father.'" (2)

Now the Hindu system recognized eight kinds of marriage and no more, the Brahma, the Daiva, the Arsha, the Prajapatya, the Gandharva, the Asura, the Rakshasa, and the Paishacha. Of these the first four are commonly described as marriages in the approved form, and the last four as marriages in the disapproved form: and it will be convenient for the present purpose to accept that division, though according to some the Gandharva is under certain conditions to be regarded as in the approved form.

The argument for the appellants has been that, as the marriage between Mariambai and her husband was not in an approved form, the husband's family cannot take.

But there is an obvious fallacy in this: strictly speaking the marriage was in none of the eight forms, and is at least as far removed from those that are disapproved as from those that are approved.

In my opinion it partook more of the character of the approved. It was the higest form of union known to Cutchi Memons, and was free from all that was reprehensible, or that could call for censure, and in this it corresponded with the four approved kinds of marriage under the Hindu system, and is distinguishable from the four disapproved.

(1) Ch. II, I. 63, p. 1. (2) Vir. I. 219, p. 1; Kam. and Vya. M.

The legal consequences of the classes of marriage, the approved and the disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality and not the form of the marriage that decides the course of devolution: where the marriage is approved the husband and his side come in, when disapproved they do not.

And so far as this affords any clue, then a marriage such as this between Mariambai and her husband should attract the consequences that amongst Hindus follow on a marriage in the approved form.

I would hesitate to hold that a marriage between Cutchi Memons could only create those rights of succession which are regarded by Hindus as the proper sequel of marriages deserving of censure, and whatever may be the infirmity of the evidence in the case as positive proof of custom, it at any rate shows that the views of the leading members of the community, including the Shet, justify this hesitation.

The position accorded to a Cutchi Memon widow in the line of succession tends to confirm the view that she is treated as one married in an approved form.

It is admitted that she comes in where the *Patni* would, and that she has rights of inheritance, not merely of maintenance: but the *Patni* is the lawfully wedded wife married in one of the approved forms of marriage: while she, whose union has been in a disapproved form, ordinarily is not a *Patni* and has no more than rights of maintenance.

Then again it has been decided as far back as 1866 that, by the custom of Khoja Mahomedans when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband: *In the goods of Mulbai*; *Karim Khalav* v. *Pardhan Manji*.[1]

This decision may not be a direct authority on the question now before us, for it dealt with Khojas while we are concerned with Cutchi Memons, but it cannot be put aside as of no weight in view of the similarity of the conditions that govern both

(1) (1866) 2 Bom. H. C. R. 276.

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communities. Sir Erskine Perry's judgment in *The case of the Kojahs and of the Memon Cutchees* (1) opens with the remark that "the question which has arisen in the cases of the Khojahs and of the Memon Cutchees is founded on such similar states of fact, and depends so entirely on the same principles of law that it may be conveniently disposed of in one judgment." And then the Chief Justice proceeds to deal with the Khoja and the Memon Cutchi cases on the same footing.

So then we find that among the Khojas a rule of succession has prevailed for close on 40 years, which is in accordance with the rule of inheritance to a Hindu widow married in an approved form. This shows that the rule for which the plaintiff contends agrees with that which governs in a community to which his bears so close a resemblance, and that to treat a marriage between Cutchi Memons as leading to rights limited by Hindu Law to marriages in an approved form does not involve any absurdity or improbability.

Were it necessary to rest the plaintiff's case on specific instances of the course of descent he asserts, then it is doubtful whether his proofs would suffice for the purpose, but in the considerations with which I have dealt there is ample material to justify his contention, and I therefore hold that Crowe, J., rightly decided in his favour on this point.

I have alluded to the objection of misjoinder: it refers to the claim for administration of Mariambai's husband's estate. The claim is necessitated by the fact that Mariambai's legacy out of that estate has not been satisfied, and therefore is properly included in the suit.

At the same time the plaintiff has no desire to have the estate administered provided assets be admitted, and it be shown to his satisfaction that the executors have made the payments they allege on account of the legacy. We confirm the decree with costs including costs reserved except the costs of and incidental to the motion of 23rd September 1904 which must be borne by respondent 1. The costs of the Advocate General as between attorney and client. The accounts should not be proceeded with

(1) (1847) 2 Morley's Dig. 431.

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without the leave of the Judge in Chambers. Liberty to the Advocate General to apply to the lower Court as to a scheme.

Attorneys for appellants: *Messrs. Tyabji, Dayabhai & Co.*

Attorneys for respondents: *Messrs. Ardeshir, Hormasji, Dinsha & Co.* and *Messrs. Tyabji, Dayabhai & Co.*

W. L. W.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905.

July 21.

BHAGWANDAS NAROTAMDAS (DEFENDANT), APPELLANT, *v.* KANJI DEOJI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Contract—Pakki Adat—Incidents of the custom—Employment for reward.

The plaintiffs in Bombay bought and sold in Bombay cotton and other products on the orders of the defendant who traded at Shahada in Khándesh. In respect of the transactions sued on the plaintiffs before due date had entered into cross contracts of purchase with the merchants to whom they had originally sold goods on the defendant's account. The transactions were entered into on *pakki adat* terms.

The contract of a *pakka adatia* in the circumstances of this case is one whereby he undertakes or guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

The evidence in the case establishes the following propositions in connection with *pakki adat* dealings.

1. That the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant and that no contractual privity is established between the up-country constituent and the Bombay merchant.

2. That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

3. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

Held, that the defendant knew of the custom, which was not unreasonable as it did not involve a conflict between the *pakka adatia's* interest and duty.

* Appeal No. 138 S; Suit 544 of 1904.