

PRIVY COUNCIL*.

P. C.*

KHATUBAI, PLAINTIFF v. MAHOMED HAJI ABU AND OTHERS, DEFENDANTS.

1922.

November 9.

[On appeal from the High Court of Judicature at Bombay.]

Memons—Succession—Halai Memons of Kathiawar—Custom—Retention of Hindu law—Evidence—Judgment of Local Foreign Court.

Halai Memons of Porebunder in Kathiawar follow in matters of succession and inheritance Hindu and not Mahomedan law, differing in that respect from Halai Memons of Bombay. So held upon the evidence as to the custom amongst the Halai Memons of Porebunder, decisions of the Courts of the Native State of Porebunder being treated as part of that evidence.

Consequently, upon the death intestate in Bombay of a Halai Memon of Porebunder, who carried on business for many years in Bombay but was found to have retained his Porebunder domicile, his sole surviving son takes the whole estate to the exclusion of a daughter.

Abdurahim Haji Ismail Mithu v. Halimabai⁽¹⁾, referred to.

Judgment of the High Court (43 Bom. 647), affirmed.

APPEAL (No. 115 of 1920) from a judgment and decree (September 21, 1918) of the High Court in its appellate jurisdiction reversing a decree of Marten J. (December 18, 1917).

The appeal related to the succession to the estate of Haji Abu Haji Habib who died intestate at Bombay on November 30, 1914, leaving him surviving a widow (respondent No. 2), a son (respondent No. 1) and two daughters, namely the appellant and a daughter who died shortly after her father.

The appellant, the intestate's daughter, brought the present suit in 1915 in the original civil jurisdiction of the High Court to recover the share to which she was

* Present:—Lord Dunedin, Lord Phillimore, Sir John Edge, and Mr. Ameer Ali.

⁽¹⁾ (1915) L. R. 43 I. A. 35.

entitled in the estate on the assumption that Mahomedan law applied, and for administration. The first defendant-respondent by his written statement maintained that the succession was governed by Hindu law. He pleaded that the Hindu law of succession and inheritance either had been retained by Halai Memons of Porebunder, and Kathiawar generally, when they were originally converted to Mahomedanism, or was theirs by immemorial custom; he stated that the intestate was a native of Porebunder, and alleged facts to show that he had retained his domicile there, though without using that term. He further pleaded that the custom whereby Halai Memons in Kathiawar are governed by the Hindu law of succession and inheritance had been frequently determined in the Courts of Kathiawar.

The second defendant filed a written statement to the like effect. The other defendants supported the plaintiff-appellant's case.

Both Courts in India held in effect that the intestate, though he had for many years carried on business in Bombay, had retained his Porebunder domicile, and that the case had to be determined according to the law governing the Halai Memons of that locality.

The trial Judge (Marten J.) held that Halai Memons being Mahomedans, Mahomedan law applied unless displaced by a special custom governing succession, and that the evidence did not establish such a custom.

The appeal was heard by Scott C. J. and Macleod J. and was allowed. The learned judges did not reverse the decision of the trial Judge that the onus of proof lay upon the present respondents Nos. 1 and 2, but they found upon the evidence that the custom alleged by them was established. The appeal is reported at I.L.R. 43 Bom. 647.

1922.

KHATUBAI
v.
MAHOMED
HAJI ABU.

1922.

KHATUBAI
v.
MAHOMED
HAJI ABU.

1922 June 19, 20 ; July 3, 4, 6, 7—*De Gruyther K. C.* and *C. L. Fawell*, for the appellant :—Succession to the intestate was governed by Mahomedan law. Even if the question of domicile had been properly raised by the proceedings, which was not the case, it was wrongly imported into the case. Halai Memons are of one class, not two classes, and being Mahomedans succession amongst them is governed *prima facie* by Mahomedan law : see 37 Geo. 3 c. 142 s. 13, which was in operation until 1916. A special custom as to succession to displace Mahomedan law must be proved by clear and unambiguous evidence ; evidence of local custom, or as to the occasional exclusion of females is insufficient ; *Muhammad Ibrahim Rowther v. Shaikh Ibrahim Rowther*⁽¹⁾, *Abdul Hussein Khan v. Sona Dero*⁽²⁾. In the *Kojahs and Memons' Case*⁽³⁾ it was recognized that Halai Memons, unlike Cutchi Memons, observe the Mahomedan law of inheritance. The Bombay High Court from 1847 has consistently applied Mahomedan law in suits for the administration of the estates of Halai Memons. If, however, contrary to the appellant's contention, Halai Memons of Porebunder can be regarded as a class distinct from other Halai Memons, no special custom affecting them was established. The Halai Memons of Bombay follow the Mahomedan law of succession as the law governing them at the time of their migration ; had they then followed Hindu law they would have taken that law with them whether they went to Bombay or to Porebunder : *Parbati Kumari Debi v. Jagadis Chunder Dhabai*⁽⁴⁾, *Balwant Rao v. Baji Rao*⁽⁵⁾. The short

⁽¹⁾ (1902) 45 Mad. 308 ; L.R. 49 I. A. 119.

⁽²⁾ (1917) 45 Cal. 450 ; L.R. 45 I. A. 10.

⁽³⁾ (1847) Perry's Oriental Cases, 110 at p. 115.

⁽⁴⁾ (1902) 29 Cal. 433 ; L. R. 29 I. A. 82.

⁽⁵⁾ (1920) 48 Cal. 30 ; L. R. 47 I. A. 213.

period which elapsed between the migration of Halai Memons to Bombay and the time when the Mahomedan law of succession governed them is insufficient to account for a change; there were not in Bombay the special influences alluded to in *Abdurahim Haji Ismail Mithu v. Halimabai*⁽¹⁾ as existing at Mombasa. The judgment of the appellate Court of the Porebunder State in 1916, which was relied on below, proceeded upon the mistaken view that the last mentioned decision of the Board referred to Halai Memons as well as Cutchi Memons; no reference was made to Hulai Memons throughout that appeal. The earlier decisions of the Porebunder Courts were conflicting and unsatisfactory. The oral evidence was worthless; the witnesses did not speak as to their own knowledge. [Reference was also made to *Jan Mahomed v. Datu Jaffer*⁽²⁾ and *Advocate-General of Bombay v. Jimbabai*⁽³⁾.]

Upjohn K. C., E. B. Raikes, and Patat, for the first respondent:—This respondent's case throughout has been that the intestate was a Porebunder man, and not a Bombay man. Both Courts below were satisfied that that was established. The law of British India applies only so far as under it the succession to property locally situate in Bombay is according to the law of Porebunder. That law is to be ascertained, like other foreign law, by evidence and from the decisions of the Courts having jurisdiction there. The law of British India does not operate directly in Kathiawar: *Devchand v. Chhotamlal*⁽⁴⁾. It is therefore the personal law of the intestate as a Porebunder man which has to be ascertained; it is not suggested that he renounced

1922.

 KHATURAI
 v.
 MAHOMED
 HAJI ABU.
⁽¹⁾ (1915) L. R. 43 I. A. 35.⁽²⁾ (1915) 41 Bom. 181.⁽³⁾ (1913) 38 Bom. 449.⁽⁴⁾ (1905) 33 Cal. 219; L.R. 33 I. A. 1.

1922.

КНАТУБАЛ
v.
МАХОМЕД
НАИ АБУ.

that personal law, as he might have done: *Balwant Rao v. Baji Rao*⁽¹⁾. The judicial decisions in Porebunder amply establish that according to the customary law there the succession was governed by Hindu law; of the ten decisions in evidence one only is to the contrary, and the last decision of the appellate tribunal is decisive. The oral evidence strongly supports the same conclusion.

De Gruyther K. C. replied.

November 9—The judgment of their Lordships was delivered by

LORD DUNEDIN :—The present appeal relates to the succession of one, Haji Abu Haji Habib, who died intestate at Bombay on 30th November, 1914. The contest is between a daughter, the plaintiff and appellant, on the one hand, and a son and other members of the family, the defendants and respondents, on the other, and depends entirely upon what is the law of succession to be applied to the property of the deceased.

Now, the deceased was a Mahomedan. Accordingly the Indian Succession Act does not apply, and if nothing more were known it would be obvious that the ordinary Mahomedan law of succession would fall to be applied, which would mean that the appellant would succeed. But the deceased was not what may be termed an ordinary Mahomedan. There are among the Mahomedans certain groups whose ancestors were Hindus and professed the Hindu religion, and were then converted to Islam. Among these groups may be reckoned, as is shown by decided cases, Khojas, Suni Borahs, Molesalam Girasias, Cutchi Memons, Nassapooria Memons, and, lastly, Halai Memons, to which

⁽¹⁾ (1920) 48 Cal. 30; L. R. 47 I. A. 213.

1922.

 KHATUBAI
 v.
 MAHOMED
 HALAI ABU.

group the deceased belonged. Now, with regard to the groups other than Halai Memons, it has been held by a succession of cases beginning with a case decided by Sir Erskine Perry in 1847, that the converts had retained their Hindu law relating to the exclusion of females from succession, and that that law had been engrafted as a custom on the Mahomedan law, although not in accordance with the rules of the Koran. In the present case, as is said by the learned Chief Justice, an entirely novel question is raised, viz., What is the customary law governing succession to a non-Cutchi Memon of Porebunder? Both the learned Judge of first instance and the learned Judges of the appellate Court held that the deceased was, so to speak, a Porebunder and not a Bombay Memon. These being concurrent findings of fact, their Lordships, while entirely agreeing with them, need not examine the evidence on which they are founded. It follows that the personal law of the deceased, so far as the question for decision in the present appeal is concerned, was the law of a Halai Memon of Porebunder.

It may be here well to say a word as to what is meant by a Halai Memon. A Memon, as the word denotes, is a convert. The name Memon, however, has not been applied to all branches of Hindu converts, e.g., as in the case of the Khojas. There was a body which came from Sind and settled in Cutch, and these have been denominated as Cutchi Memons. Another body from the same place settled in the Halai Prant of Kathiawar, and these have been designated Halai Memons. Some of the Halai Memons pushed on to Bombay, where they have formed a community known as the Bombay Halai Memons. There was also an immigration to Bombay from Cutch, and the Cutchi Memons formed by themselves a separate community in Bombay from the Halai Memons. Now, it is admitted

1922.

KHATUBAI
et.
MAHOMED
HAJI ABU.

that so far as the Bombay Halai Memons are concerned they have been content for many years to have their property distributed on succession according to the tenets of the Mahomedan law, so that if the deceased had been, in the proper sense of the word, a Bombay Halai Memon, the question of the succession would have been solved. But, as already stated, both Courts have found that he was not a Bombay Halai Memon, a Porebunder Halai Memon. The question, therefore, is, Does a Halai Memon domiciled in Porebunder follow the Hindu or Mahomedan law with regard to the succession of females?

Voluminous evidence was taken which consisted of (1) the reports of a set of judgments of the Porebunder Courts—Porebunder being a Native State, from whose Courts there is no appeal either to any appellate Court in India or to the King in Council; (2) oral testimony from pleaders and from persons belonging to the community in Porebunder as to what the custom of succession was. The learned Judge of first instance, after a careful and elaborate judgment, came to the conclusion that the custom of succession according to Hindu law was not sufficiently proved so as to oust the general application of the Mahomedan law.

On appeal that judgment was reversed, and an equally careful and elaborate judgment pronounced by the learned Judges of the appellate Court.

Their Lordships, after careful consideration, are in accordance with the views of the appellate Court. The learned trial Judge has, in their view, drawn a wrong inference from the fact that the Bombay Halai Memons follow the Mahomedan law, and they cannot help thinking that this inference has coloured his views on the whole case. Finding that these Bombay Halai

1922.

 KHATUBAI
 v.
 MAHOMED
 HAJI ABU.

Memons practise in the matter of succession the Mahomedan law, he has drawn the inference that when they came to Bombay from Kathiawar they brought that law with them, and that consequently the community which they left also followed the Mahomedan law. Their Lordships agree with Macleod J. that this is not a necessary inference. If it is otherwise shown that the Kathiawar Halai Memons practised the Hindu law excluding females from succession, it is equally easy to infer that the Bombay Memons, finding themselves among other Mahomedans who followed the Mahomedan law in its purity, renounced the custom of the Hindu law of succession in favour of the orthodox tenets of their own religion. An example of this may be found in the case of *Abdurahim Haji Ismail Mithu v. Halimabai*⁽¹⁾ (the Mombasa case). Of course, this is not an inference which itself need necessarily be drawn, but it counter-balances the other, and matters are, therefore, left as they were, viz., to depend on an enquiry as to what has been *de facto* the practice of the Halai Memons in Porebunder.

The decisions of the Porebunder Courts are minutely examined by Macleod J. The most that can be said for the appellant was reduced in the cross-examination of her chief witness to this:—"In Porebunder there is a conflict of decision, but the latest is that Hindu law governs Halai Memons. That is the decision of the Final Court of Appeal there—the Huzur Court."

It has been objected to this last and most authoritative decision—for it was the decision of the highest tribunal in Porebunder—that it is based on a misreading of the Mombasa case. It probably does go too far in thinking that their Lordships in that case laid it down as a general proposition that all Memons necessarily

⁽¹⁾ (1915) L. R. 43 I. A. 35.

1922.

KHATUBAI
v.
MAHOMED
HAJI ABU.

follow Hindu law of succession. But that was not the only ground of judgment, and the judgment remains as the last of the Porebunder Courts.

Their Lordships, however, are not inclined to take the view that that settles the matter, for the enquiry is not as to what is the Porebunder law, but as to what is the Porebunder custom. But the judgments of the Courts are good as evidence, and they are borne out by the other evidence in the case. Here their Lordships are content to follow the result arrived at by Scott C. J., who after a most careful examination of the evidence sums it up thus :—"On a consideration of all the cases above mentioned, the evidence seems to me to be all one way. Twenty-five cases are proved which indicate that Hindu law was applied and not Mahomedan law and there is no clear case of the application of Mahomedan law among Memons settled at Porebunder."

The learned counsel for the appellant directed criticism to the character of certain of the witnesses, but such criticism is of small avail in contrast with the overwhelming effect of the negative result alluded to by the Chief Justice, that there is no clear case of succession according to the Mahomedan law.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellant : Messrs. *Waltons & Co.*

Solicitors for first respondent : Messrs. *T. L. Wilson & Co.*

A. M. T.