

Khatubai - - - - - *Appellant*

v.

Mahomed Haji Abu and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1922.

Present at the Hearing :

LORD DUNEDIN.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

The present appeal relates to the succession of one, Haji Abu Haji Habib, who died intestate at Bombay on the 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 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 Appeal 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 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, but 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 Appeal 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 Court of Appeal.

Their Lordships, after careful consideration, are in accordance with the views of the Appeal 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 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*, I.A. 43, 35 (the Mombasa case). Of course, this is not an inference which itself need necessarily be drawn, but it counterbalances 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 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.

In the Privy Council.

KHATUBAI

v.

MAHOMED HAJI ABU AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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