Privy Council Appeal No. 95 of 1914.

Abdurahim Haji Ismail Mithu - - - *Appellant,*

v.

Halimabai - - - - - *Respondent.*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER 1915.

Present at the Hearing:

EARL LOREBURN. VISCOUNT HALDANE.
LORD WRENBURY.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Court of Appeal for Eastern Africa reversing a judgment of the High Court of East Africa at Mombasa. The question to be decided is whether the succession to the estate of one Haji Ismail Mithu, deceased, is governed, as the appellant, who is a son, claims, by Hindu law, or whether such succession is governed by Mohamedan law, as the respondent, who is the widow, asserts. This question arose in an action brought by the respondent against the appellant claiming administration and a declaration that she was entitled, on the footing that Mohamedan law applied, to an eighth of her husband's estate. On the appellant's contention the respondent, as widow of the deceased, became entitled to no more than maintenance.

The deceased was a merchant who had settled at Mombasa, and was a member of the Indian

sect known as Memons. According to the case as stated by the appellant's Counsel, some 400 or 500 years ago the "Luwanas," a sect of Hindus located in Scinde, became converted to the Mohamedan faith and took the name of Memons. A century or so later they migrated to Cutch, where they settled. There were two migrations. Those who first migrated, and their descendants became known as Cutchee Memons, while those who migrated on the second occasion, and their descendants, were called Nassapooria Memons. Both sets of migrants held to religious tenets and customs which are common to the Memon community, and, for the purposes of the present appeal, the distinction between the two sets is immaterial.

Upon their conversion to Mohamedanism the Memons did not adopt the Mohamedan law as to succession, but retained the Hindu law of succession as a customary law which remained binding upon the entire Memon community at Cutch. Over half a century ago Memons began to migrate from Cutch to East Africa, and there are now, so it is stated, at least a hundred Memon families at Mombasa.

The deceased's father was a Nassapooria Memon who about half a century ago, with his wife and children, including the deceased, migrated to Mombasa, where they settled. At Mombasa the succession to Mohamedans is in general governed by Mohamedan law, although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession.

The action was tried before Hamilton, C.J. The appellant and respondent both called evidence. It was shown that in some cases, of which eleven appear to have been fully proved, succession among the members of the Memon community at Mombasa had taken place accord-

ing to Mohamedan law. The only documentary evidence was also in accordance with this view. On the other hand oral evidence was given for the appellant and accepted by the learned Judge who tried the case which showed that in a few cases distribution in accordance with Hindu law had taken place. It was also established that there had been a custom, or at least a practice, that ornaments given to a wife in her husband's lifetime were allowed to remain with the widow only during her life or until remarriage, a custom or practice more nearly resembling the rule which obtains among Hindus than any which regulates such cases among Mohamedans. Upon consideration of the evidence Hamilton, C.J., decided in favour of the appellant. He took the view that the burden of proof lay on the respondent to show that there was a Mohamedan custom which applied to the Memons in Mombasa, that this custom was ancient and invariable, and that it had superseded the custom which governed the Cutch Memons in such cases before migration.

The Court of Appeal were of a different opinion. They held that Hamilton, C.J., had having regard to the facts as established, wrongly stated the character of the burden of proof. They took the view that if the present respondent simply produced sufficient evidence to show that the custom of Hindu succession had ceased to be generally observed by the Memons in Mombasa, that was sufficient to entitle her to succeed, if the other side failed to bring forward sufficient evidence in answer. They commented on the indications, adverse to the present appellant, furnished by the documentary records, and on what they considered to be on the whole the preponderance in trustworthiness of the oral evidence against him. That on certain occasions females should

have been proved to have preferred maintenance to a share of a very small estate they regarded as in the circumstances inconclusive; nor was the special custom or practice as to ornaments enough to displace the presumption that the general rule was that of Mohamedan law.

Their Lordships are in agreement with the conclusions reached by the Court of Appeal for Eastern Africa. It seems to them that the learned Judge who tried the case misconceived what, having regard to the circumstances of the Memon migration to Mombasa, was the real question for the Judge who had to try the case.

Where a Hindu family migrate from one part of India to another, *primâ facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mohamedans, settle among Mohamedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances. In the present case it is to be observed that it does not appear that the Memons in Mombasa have at any time established any distinctive political or social organisation for themselves. Such organisation as has been formed appears to have been formed mainly, if not entirely, for purposes of

worship. There seems to be no sufficient reason in what has been brought before the courts in this case for regarding the Memons who have emigrated from Cutch to Mombasa as other than a number of individual Mohamedans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturally follows from that religion, and so prevails among the Mohamedans at Mombasa. Their Lordships have examined the oral evidence brought forward on behalf of the appellant. It relates to very small estates and is of an inconclusive character. There is lacking in it indication of intention to assert a principle. A good deal of the evidence for the respondent is open to the same observation. But several of the documentary records distinctly support the contention that some at least of the Memon families had treated themselves as governed in point of succession by Mohamedan law, and the balance of the oral testimony, appears to be on this side. Under these circumstances their Lordships think that the presumption which arises from the facts proved, and the weight of evidence are both in favour of the conclusion reached by the Court of Appeal.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed without costs.

In the Privy Council.

ABDURAHIM HAJI ISMAIL MITHU

v.

HALIMABAI.

DELIVERED BY VISCOUNT HALDANE.

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