Privy Council Appeal No. 14 *of* 1918.

Mahomed Ibrahim Rowther - - - - - *Appellant*

v.

Shaikh Ibrahim Rowther and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 17TH JANUARY, 1922.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

This is an appeal from a decree dated the 12th August, 1915, of the High Court at Madras reversing a decree of the Subordinate Judge of Coimbatore, dated the 7th January, 1914.

The litigants are Lubbai Mahomedans of the Sunni sect, and the contest is as to the devolution of the estate of Mahomed Hussain Rowther. He died in 1904 leaving a widow and three sons and also two daughters named Ponnuthayee and Sulaiha Bi.

Ponnuthayee died in September, 1905, leaving a husband and a daughter. They are the plaintiffs in this suit. The defendants are the three sons of Mahomed Hussain Rowther, his widow and the two children of Sulaiha Bi who was dead at the institution of this suit.

The plaintiffs claim shares in Mahomed Hussain's estate as heirs of Ponnuthayee, and they are supported by the children of Sulaiha Bi, who make a similar claim as heirs of their mother. The contesting defendants are the three sons and their mother.

The decision of the rival claims depends upon whether the devolution of Mahomed Hussain's estate is governed by

Mahomedan Law as the plaintiffs contend or by a rule of descent excluding females as the contesting defendants maintain.

Though it is common ground that Mahomed Hussain and the litigants are Mahomedans, the contesting defendants seek to escape from the course of devolution this would ordinarily involve by setting up what they describe as an immemorial custom and ancient usage.

In paragraphs 15, 16, and 17 of their written statement, they plead as follows :—

> " 15. It has been the immemorial custom and ancient usage in the Mahomedan families in the district of Coimbatore in general and in the families of these defendants and the relations in particular that they have followed the Hindu Law as regards the law of property and succession and partition. Only the male members are entitled to succeed to the properties of their ancestors and females are excluded from inheritance when there are males. Besides it is also the custom in the Mahomedan families to give some amount including jewels at the time of or immediately after marriage to the female members in lieu of their shares ; and consistently with that usage defendants' father gave jewels, cash and other moveables worth about Rs. 4,000 to the mother of the second plaintiff immediately after the marriage and the plaintiff's conduct in not adverting to this in the plaint is fraudulent.
>
> " 16. According to that immemorial custom and usage the plaintiffs have no right to claim a share in the share of Ponnuthayee Ammal while Ponnuthayee Ammal herself had no share.
>
> " 17. It has been the custom also in the family of the plaintiffs "

On the settlement of issues the following (amongst others) were ordered to be tried :—

> " (1) Are parties to suit governed by Hindu Law and whether Ponnuthayee, mother of the second plaintiff, was not entitled to her share in the estate of her deceased father Mahomed Hussain Rowther ?
>
> " (8) Whether the custom set out in para. 15 of the written statement is true and valid ? and if so, was the claim of Ponnuthayee satisfied in accordance therewith ? "

At the hearing an additional issue was framed at the request of the contesting defendants which raised the question as to whether the suit was barred by an earlier decision. It calls for no discussion now as their Lordships see no reason to dissent from the concurrent determination of the lower Courts that this issue must be answered in the negative.

And thus the only question that remains for decision is as to this alleged custom or usage. The plea which professes to formulate it has been forcibly criticised by the learned Subordinate Judge in the course of his careful and discriminating judgment. He points out that in its wider assertion it is untenable, and even in its narrower form it is not established. He might even have gone further and pronounced the pleading bad.

In the result he held that the devolution was governed by Mahomedan Law and declared the plaintiffs entitled to the shares claimed.

The defendants appealed, and to meet the criticism of the Subordinate Judge they narrowed the definition of the custom. The 9th ground is that " the Court below ought to have found the

custom alleged at any rate as regards the Lubbai community residing in the villages mentioned in the written statement."

On appeal the High Court reversed the decision of the Subordinate Judge and dismissed the suit. The learned Chief Justice, instead of treating the custom or usage as a matter for proof by the contesting defendants, held in effect that the Lubbai Mahomedans in that part of India at the date of their conversion from Hinduism to the Mahomedan faith elected to retain the Hindu rule excluding women, and that the real question in this suit was whether the plaintiffs had proved an abandonment of the Hindu rule of exclusion.

Viewing the evidence in this light the Chief Justice held the evidence oral and documentary sufficient to show that the defendants' family had adhered, with perhaps most of the Lubbais of the neighbourhood, to the Hindu rule excluding the succession of females.

Mr. Justice Srinivasa Ayyangar was more guarded in his opinion. Citing a passage from the judgment in *Fanindra Deb Raikat* v. *Rajeswar Das* L.R. 12 I.A., at p. 81 as a guide to the standard of proof required, he regarded it as probable that "many of the Lubbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion."

He accordingly considered that the evidence to which he made special reference taken along with the evidence of the general prevalence of the practice was sufficient to prove the family custom set up.

But it is a misapprehension of the passage cited to treat it as a guide to the standard of proof in this case. There the question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been governed by Hindu Law and there would have been this power. But though they affected to be Hindu, that in fact was not their status: the utmost that could be said was that though the family had introduced many Hindu customs, they in fact were governed by family customs. Of such a family it was manifestly appropriate to remark that "the question is not whether the general law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu Law, or by customs which do not allow an adopted son to inherit." But such a comment can have no application to conditions as they exist in this case.

No doubt in *Abraham* v. *Abraham*, 9 M.I.A. 195, it is said that a convert upon his conversion may renounce the old law by which he was bound as he has renounced his old religion, or if he thinks fit he may abide by the old law notwithstanding he has renounced his old religion. It is not, however, suggested in the present case that the Lubbais as a community have thought fit to abide by the entirety of their old law: the utmost that is said is that they, or some of them in a particular locality, have followed the Hindu Law, not in all respects, but in relation to property succession and

partition. In their essential characteristics, custom and an election to abide by the law of the old status differ fundamentally as sources of law, still, making every assumption in its favour, in the circumstances of this case and on the record as it stands there is no mode of proving this alleged election except by way of inference from actings and conduct that would establish a custom, so that along whatever line this case may be approached the custom must be established and the burden of proof of this is on the defendants.

Their Lordships have dealt with this aspect of the case at some length as it has evidently influenced the judgment of the High Court. But there is another aspect of it by which (in their Lordships' opinion) their decision must be guided.

It is enacted by the Madras Civil Courts Act, III, of 1873, § 16, that all questions regarding inheritance, marriage, or any religious usage or institution shall be decided where the parties are Mahomedans by the Mahomedan Law or by custom having the force of law.

The litigants are Mahomedans to whom this Act applies so that *primâ facie* all questions as to succession among them must be decided according to Mahomedan Law. 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 Mahomedan Law, governing the succession in a particular community of Mahomedans. But the custom must be proved. The essentials of a custom or usage have been repeatedly defined, but it will suffice to refer to the recent decision of *Abdul Hussein Khan* v. *Bibi Sona Dero*, L.R. 45 I.A. 10, where the essentials of a legal custom or usage and the requisites of proof are fully discussed. The following passage from the judgment in *Ramalakshmi Ammal* v. *Sivananantha Perumal Sethurayar*, 14 M. I.A. 570, was cited as a correct and authoritative pronouncement of the law on these points.

> "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Though the custom or usage as pleaded is open to objection, still their Lordships will not reject the defendants' contention on that ground, but will deal with the case as though the custom or usage had been pleaded in a form that was free from fault.

There is no suggestion on the record that the rule of exclusion on which the contesting defendants rely has been established by judicial decision in the sense that this can be predicated of the rules of property and succession applicable to Khojas or Cutchi Memons in the Bombay Presidency. Therefore it is necessary to examine the evidence to see whether it supports the rule of succession asserted by the contesting defendants.

This evidence is documentary and oral, and as the former is more important and more trustworthy, their Lordships will first deal with that.

The documents on which the the defendants rely as proving the usage, begin in order of time with a decree of the Madras High Court in O.S. No. 5 of 1877, Exhibit XII, in which Mr. Justice Innes decided in its favour.

There was, however, an appeal from his decree which ended in a compromise, a circumstance which deprives his decision of much of its evidentiary value.

Moreover, in 1885, an Appellate Bench of the Court in *Mirabivi* v. *Vellayanna* I.L.R., 8 Mad., 464, decided that the custom of exclusion in the case then before them had not been proved, and this decision has been recently approved by the Judicial Committee in *Abdul Hussein* v. *Sono Dero* (*supra*).

The next document in order of time is the judgment in O.S. 22 of 1904, dated the 26th of February, 1906, Exhibit III, where the custom was affirmed ; but the decision in fact was based on that in O.S. 5 of 1877, and has little or no independent value.

Then reliance is placed on the judgment in O.S. 755 of 1906, dated the 26th of September, 1910, Exhibit IX. But it is open to the comment that the decision was influenced by that given in O.S. 22 of 1904, as also was the judgment on appeal Exhibit XVI. Thus on an examination of these documents it may fairly be said that the several judgments are substantially based on that pronounced in O.S. 5 of 1877, which is open to the comment that has been made on its value.

The documentary evidence on which the plaintiffs rely starts with the judgment in *Mirabivi* v. *Vellayanna* (*supra*). There the High Court held even in 2nd appeal that there was no evidence to justify the finding of the lower Courts in favour of the custom, and this decision, as already stated, has received the approval of this Board, in *Abdul Hussein Khan* v. *Bibi Sona Dero* (*supra*).

Then there follows a series of documents, some negativing the custom, others applying Mahomedan Law where the custom was not pleaded, and others proceeding on the assumption that it was Mahomedan Law that applied. In all these instances the parties before the Court were Lubbai Mahomedans. The first is a judgment of the 15th July, 1890, in O.S. 85 of 1890, Exhibit L, followed by a judgment on appeal in that suit, Exhibit M, in both of which the right of a female to succeed under Mahomedan Law is recognised.

On the 3rd October, 1892, judgment was pronounced in O.S. 373 of 1891, Exhibit C, where the rights of females were treated as governed by Mahomedan Law.

On the 23rd January, 1893, a Petition for a succession certificate, Exhibit F, was presented, and female members of the family were made counter petitioners as though the rights of the parties were governed by Mahomedan Law.

On the 2nd August, 1897, the High Court passed a decree, Exhibit G, confirming the decree of the lower appellate Court, with the result that the sisters' right to shares, according to Mahomedan Law, was established, though the custom had been pleaded

On the 30th September, 1901, it was decided by the judgment in O.S. 753 of 1900, Exhibit B, affirmed on appeal by the judgment of the District Judge, Exhibit B1, that a female in a Lubbai Mahomedan family was entitled to a share. In this case a custom was alleged that a woman is given by her family, at or about the time of her marriage, her share, or the equivalent of her share, in the estate of her own family. The custom was negatived, though the District Judge seems to have thought that the appellants would have been entitled to more favourable consideration had they pleaded that they had retained the Hindu Law of inheritance and succession, instead of setting up a special custom at variance with the Mahomedan Law.

On the 5th of June, 1903, a plaint in O.S. 337 of 1903, Exhibit O, was presented in which it was taken for granted that the rights of a female were governed by Mahomedan Law.

On the 30th March, 1903, there was a judgment in O.S. 238 of 1902, Exhibit R, which assumed a right to a share in a female, though it held that in the circumstances of the case the female's right was barred under Mahomedan Law.

The judgment dated the 13th January, 1904, in O.S. 36 of 1901, Exhibit H, and that dated the 4th December, 1905, in O.S. 34 of 1894, Exhibit N, proceed on the same assumption.

On the 18th October, 1906, and the 2nd January, 1907, petitions for succession certificates, Exhibits K and P were presented by daughters, and on the 2nd September, 1910, by a judgment in O.S. 33 of 1908, Exhibit Q, the right of a widow and daughters to shares according to Mahomedan Law was affirmed.

It will thus be seen that over this series of years the rights of female members of the Lubbai Mahomedan community, under Mahomedan Law have been repeatedly asserted and recognised, and that on three occasions the rule of exclusion, when pleaded, has been expressly negatived.

When this documentary evidence is contrasted with that adduced in support of the alleged rule of exclusion, it cannot be said that the custom or usage is supported by clear and unambiguous evidence. On the contrary so far as the weight of documentary evidence goes the preponderance is on the side of the plaintiffs.

Turning then to the oral evidence their Lordships cannot find in it sufficient proof to support the defendants' plea.

The witnesses were all examined before the Subordinate Judge who made in his judgment a careful and critical examination of their evidence with the result that he was unable to find the custom or usage proved, and their Lordships can see no sufficient reason for questioning his appreciation of the evidence. He evidently did not consider that the witnesses called by the con-

testing defendants held a position in the community entitling them to greater credit than those called by the plaintiffs, and this appears to their Lordships to be a just estimate of their worth.

There is a witness who holds an office that should have enabled him to speak with some measure of authority and that is P.W. 5 a Khazi of Pallapati, and the same may be said of P.W. 7 a Moulvi, but the Subordinate Judge evidently was not impressed by either of them. For what it may be worth, however, both assert that a Lubbai's estate is divided according to Mahomedan Law.

Looking then at the whole of the evidence, documentary and oral, their Lordships consider it falls far short of the standard of proof requisite to establish a custom or usage excluding females from succession.

It merits notice too that the custom as pleaded is not limited to the exclusion of females, but asserts as a part or at any rate an accompaniment of it that it is the custom to make a gift to female members at the time of or immediately after marriage in lieu of their shares ; and it is alleged that consistently with that usage the defendants' father gave jewels, cash and other moveables, worth about Rs. 4,000 to the mother of the second plaintiff immediately after marriage.

This is negatived by the Subordinate Judge and from this conclusion the High Court expresses no dissent.

The result then is that their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the decree of the Subordinate Judge restored, with the variation that a day be fixed by the Court of 1st instance for the appointment of a Commissioner in lieu of the 7th February, 1914, and that the contesting defendants do pay to the plaintiffs their costs in the High Court.

Six years have elapsed since the date of the decree under appeal, and as no satisfactory explanation is given of this long delay there will be no order as to the costs of this appeal.

In the Privy Council.

MAHOMED IBRAHIM ROWTHER

v.

SHAIKH IBRAHIM ROWTHER AND OTHERS.

DELIVERED BY SIR LAWRENCE JENKINS.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1922.