

PIRVY COUNCIL

Mahomed Ibrahim Rowther

Vs.

Shaik Ibrahim Rowther and others

P.C.A. No. 14 of 1918

(Lords Buckmaster, Atkinson, Mr. Ameer Ali and Sir Lawrence Jenkins.)

17.1.1922

JUDGMENT

Sir Lawrence Jenkins JJ.

1. 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.
2. The litigants are LubbaiMahomedans of the Sunni sect, and the contest is as to the devolution of the estate of MahomedHussainRowther. He died in 1904, leaving a widow and three sons and also two daughters named Ponnuthayee and Sulaiha Bi.
3. Ponnuthayee died in September, 1905 leaving husband and a daughter. They are the plaintiffs in this suit. The defendants are the three sons of MahomedHussainRowther, his widow and the two children of Sulaiha Bi who was dead at the institution of this suit.
4. The plaintiffs claim shares in MahomedHussain's estate as heirs of Ponnuthayee and they are supported by the children of Sulaiha Bi, who make similar claim as heirs of their mother. The contesting defendants are the three sons and their mother.
5. The decision of the rival claims depends upon whether the devolution of MahomedHussain's estate is governed by Mahomedan Law, as the plaintiffs contend or by a rule of descent excluding females as the contesting defendants maintain.
6. Though it is common ground that MahomedHussain 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.

7. 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 defendant's father gave jewels, cash and other moveables worth about Rs. 4,000 to the mother of the second plaintiff. 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 PonnuthayeeAmmal while PonnuthayeeAmmal herself had no share.

"17. It has been the custom also in the family of the plaintiffs".

8. 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, MohamadHussainRowther?"

(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?

9. At the hearing an additional issue was framed at the request of the contesting defendants which raised the question 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.

10. And thus the only question that remains for decision is as to this alleged custom or usage.

11. The plea which professes to formulate it has been forcibly criticized by the learned Subordinate Judge in the course of his careful 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.

12. In the result he held that the devolution was governed by Mahomedan Law and

declared the plaintiffs entitled to the share claimed.

13. 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 Labbai community residing in the villages, mentioned in the written statement."

14. On appeal the High Court reversed the decision of the Subordinate Judge and dismissed the suit.

15. The learned Chief Justice, instead of treating this custom or usage as a matter for proof by the contesting defendants, held in effect that the LubbaiMahomedans 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.

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

17. Mr. Justice SreenivasaAiyangar was more guarded in his opinion. Citing a passage from the judgment in *Fanindra Deb Raikat v. Rajeswara Das* ¹as 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."

18. He accordingly considered 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.

19. But it is a misapprehension of the passage cited to treat it as 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 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.

20. No doubt, in *Abraham v. Abraham*² it is said that a convert upon his conversion may renounce 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 customs and an election to abide by the law of the old status differ fundamentally as sources of law, still, making every assumption in its favor, 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 acting's 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.

21. 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.

22. It is enacted by the Madras Civil Courts Act, III of 1873, section 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.

23. The litigants are Mahomedans to whom this act applies so that prima 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 Hussain Khan v. Bibi Sona Dero*,³ where the essentials of a legal custom or usage and the requisites of proof are fully discussed. The following passage from the judgment of *Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar*⁴ was cited as authoritative pronouncement of the law on these points.

" It is the essence of the 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,"

24. Though the custom or usage 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.

25. 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 Menons 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.

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

27. The documents on which the defendants rely for proving the usage, begin in order of time with a decree of the Madras High Court in O.S. 5 of 1887, Exhibit XII, in which Mr. Justice James decided in its favor.

28. 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.

29. Moreover, in 1885, an Appellate Bench of the Court in *Mirabivi v. Vellayanna* 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 Hussain v. SenaDero (Supra.)*

30. The next document in order of time is the judgment in O.S No. 22 of 1904, dated the 26th February, 1906, Ex. III, which in fact was based on that in O.S. No. 5 of 1877, and has little or no independent value.

31. Then reliance is placed on the judgment in O.S. 755 of 1906, dated the 26th 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.

32. This documentary evidence on which the plaintiffs rely starts with the judgment in *Mirabivi v. Vellayanna*⁵ There the High Court held, even in 2nd appeal that there was no evidence to justify the findings of the lower Courts in favour of the custom, and this decision, as already stated, has received the approval of this Board in *Abdul Hussain Khan v. Bibi Sona Dero* (*supra*).

33. Then there follows a series of documents, some negating the custom, others applying Mahomedan Law where the custom was not pleaded, and others proceeding on the assumption that it was Mohamedan Law that applied. In all these instances the parties before the Court were Labbai 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.

34. 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.

35. 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.

36. On the 2nd August 1897, the High Court passed a decree Exhibit G, confirming the decree of the Lower Appellate Court with result that the sister's right to shares according to Mahomedan Law, was established though custom had been pleaded. On the 30th September 1901 it was decided by the judgment in O.S. 753 of 1900, Exhibit P, affirmed on appeal by the judgment of the District Judge Exhibit B, that a female in a Labbai 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 negated, though the District Judge seems to have thought that the appellants would have been entitled to move favorable consideration had they pleaded that they had 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.

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

38. 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 of 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 contesting 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.

39. 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.

40. Looking then at the whole 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.

41. 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 retained the Hindu Law of the inheritance and succession instead of setting up a special custom at variance with the Mahomedan Law.

42. 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.

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

44. The judgment dated 13th January 1904. in O.S 36 of 1901, Exhibit H, and that dated the 4th Dec. 1905, in O.S. 34 of 1899, Ex. N, proceed on the same assumption.

45. 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.

46. It will thus be seen that over this series of years the rights of female members of

the LubbaiMahomedan community under Mahomedan Law have been repeatedly asserted and recognised and that on three occasions the rule of exclusion, when pleaded, has been expressly negated.

47. 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 as 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 moveable's, worth about Rs. 4,000 to the mother of the second plaintiff immediately after marriage.

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

49. 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 12th February 1914, and that the contesting defendants do pay to the plaintiffs their costs in the High Court.

50. Six years have lapsed 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.

Appeal allowed.

Cases Referred.

1. (1885) 11 Cal, 463 : 11 IA, 72 : 4 Sar, 610 (PC)
2. (1864) 9 MIA, 195 : 1 Suther 509 : 19 ER 716 : 2 Sar, 10 (PC),
3. AIR 1917 PC 181 : 45 Cal, 450 : 45 IA, 10 (PC)
4. (1872) 14 MIA 570 : 12 BLR, 396 : 3 Sar, 108 (PC).
5. (1885) 8 Mad 464 (supra).