SUPREME COURT OF INDIA

Controller of Estate Duty Mysore, Bangalore

Vs.

Haji Abdul Sattar

C.A.No.1354 of 1968

(S. M. Sikri, C.J.I., J. M. Shelat, A. N. Ray, I. D. Dua and H. R. Khanna, JJ.)

19.04.1972

JUDGEMENT

SHELAT, J.:-

1. This appeal by certificate, is directed against the judgment of the High Court of Mysore dated February 3, 1967 whereby it answered in the negative the question referred to it under S.64 (1) of the Estate duty Act, XXXIV of 1953.

The question was:

"Whether on the facts and in the circumstances of the case, the entire property held by the deceased valued at Rs.12,23,794/- was chargeable to estate duty?"

The said property comprised shares and securities of the value of Rupees 25,778/-, and immovable properties at Bangalore and Madras respectively valued at Rs.5,42,500/- and Rupees 6,10,100/-.

2. The assessment in question pertained to the estate of Hajee Mahomed Hussain Sait, the father of the two respondents, who died at Bangalore on March 22, 1955 leaving the said properties. The said Hajee Mahomed Hussain and the respondents belonged to Cutchi Memon sect amongst the Muslims. The respondents claimed that Cutchi Memons at one time were Hindus residing in Sind, that some four or five hundred years ago they were converted to Islam like the members of another such sect, the Khojas, that they migrated thence to Cutch and from there spread themselves to Bombay, Madras and other places. Their case was that despite their conversion, the Cutchi Memons retained a large part of Hindu law as their customary law including its concepts of joint family property, the right of a son by birth in such property and its devolution by survivorship. Further, neither the Cutchi Memons Act, XLVI of 1920, nor the Muslim Personal Law (Shariat) Application Act, XXVI of 1937, nor the Cutchi Memons Act, X of 1938 applied to them. That being the position, there was no question of the passing of the said properties to them on the death of their father as envisaged by S.3 of the Act or its being applicable to them or the said properties, the said properties having come to them under the Hindu law rule of devolution of joint family property by survivorship. Their case was that only one third of the said properties, that is, the undivided share of their deceased father, could be properly said to have passed to them on his death and to be assessable under the Act.

3. The Deputy Controller rejected these contentions as also the evidence led by the respondents in support thereof and assessed duty at Rs.2,05,996.41 P. on the basis that the entire estate valued by him at Rs.12,23,794/- was assessable. The respondents filed two separate appeals, both of which were rejected by the Central Board of Revenue by its order dated December 30, 1961, and as aforesaid, at the instance of the respondents referred to the High Court the aforesaid question.

4. In support of their contentions, the respondents had produced before the Deputy Controller the following documents as evidence of the Hindu law being their customary law:

(i) O.P. No. 47 of 1909 -- A petition before the High Court of Madras and the High Court's order thereon.

(ii) O.P. 188 of 1927 -- --do--

(iii) O.P. 79 of 1928 -- --do--

(iv) O.P. 1 of 1930 -- --do--

(v) The judgment of the High Court of Madras in Civil Revision Petition No.1727 of 1930.

(vi) The Judgments of the same High Court in Siddick Hajee Aboo Bucker Sait v. Ebrahim hajee, Aboo Bucker Sait, AIR 1921 Mad 571 and Abdul Sattar Ismail v. Abdul Hamid Said. AIR 1944 Mad 504.

These were produced to show that the rules of Hindu law were consistently acquiesced in and applied to their family and the other Cutchi Memons settled in Madras. They also relied on the fact that the High Court had issued letters of administration to them although they had paid succession duty only on one third of the said estate. The Deputy Controller held that neither the said evidence, nor the fact of their having paid succession duty on one third of the said estate only concluded the issue before him, viz., that the rules of Hindu law, including the rules as to joint family property and its devolution by survivorship constituted the customary law of Cutchi Memons in Madras and Bangalore. He rejected their contention that as they had settled down first in Madras and then in Bangalore sometime between 1928 and 1930, and as a large part of the estate was situate in Madras, he should prefer the Madras as against the Bombay view, namely, that the rules of Hindu law applicable to Cutchi Memons governed matters of succession and inheritance only. His view was that as there was only one solitary decision of the High Court of Madras in favour of the respondents' contentions as against a large number of decisions of the Bombay High Court which limited the application of Hindu law to matters of succession and inheritance, the Bombay view was the correct one. As regards the orders and decisions produced by the respondents, he held that they would not assist the respondents as in none of them the question raised by them was specifically dealt with by the High Court.

5. In support of their appeals the respondents, in addition to the aforesaid evidence, also produced a partition deed of 1906 between one Hussain Hajee Ouseph Sait and his two sons, which inter alia recited that the said Hajee Hussain Sait and his six brothers had formed a joint family governed by Hindu law. The different petitions and the orders thereon set out earlier, and ranging from 1909 to 1930 showed, (1) that the respondents' family was in Madras till about 1930 when its members partly shifted their activities to Bangalore, and (2) that in all those petitions the stand taken by the members of the respondents' family was that the family properties were treated as joint family properties. The Board, however, rejected this evidence stating that no weight could be given to it, since a custom followed by one particular family would not "convert that family into a coparcenary governed by the Hindu law of survivorship", and dismissed the appeals. As aforesaid, the High Court upheld the respondents' contentions and answered the question referred to it against the Revenue.

6. On behalf of the Controller of Estate Duty, the following points were raised:

(i) that the concept of joint family did not apply to Cutchi Memons, and that a Cutchi Memon's son did not acquire any interest by birth in the property inherited by his father from his ancestors.

(ii) that in any case there was no scope for raising any such contention after the enactment of the Shariat Act of 1937, and thereafter of the Cutchi Memons Act, 1938,

(iii) that the High Court of Mysore should have preferred the view taken by the Bombay High Court and followed by the old Mysore High Court in Elia Sait v. Dharayya, (1932) 10 Mys LJ 33 and

(iv) that the findings recorded by the Board were binding on the High Court.

After some argument, Mr. Desai conceded that his contention as to the Shariat Act could not be pressed and gave up that part of his second proposition. As regards is 4th proposition, the issues before the High Court were questions of law and therefore there was no question of the High Court being bound by the Board's findings. That leaves proposition 1, part of proposition 2 and proposition 3 of Mr. Desai for our determination.

7. It is a rule of Mahomedan law, the correctness of which is not capable of any doubt, that it applies not only to persons who are Mahomedan by birth but by religion also. Accordingly, a person converting to Mahomedanism changes not only his religion but also his personal law. Mitar Sen Singh v. Maqbul Hasan Khan, (1930) 57 Ind App 313 = (AIR 1930 PC 251). Such a rigid rule, however, applies to cases of individual conversions, for, in cases of wholesale conversion of a caste or a community, it is recognised that the converts might retain a part of their original personal law according to their hitherto held habits, traditions and the surroundings. This principle was laid down in Fidahusein v. Monghibai, (1936) 38 Bom LR 397 = (AIR 1936 Bom 257) where the question arose whether a Khoja of the Shia Ishna Ashari sect could dispose of the whole of his property by testamentary disposition. Tracing the history and the conversion of Khojas from its previous decisions, the High Court held that the conversion of Khojas to the Shia Imami Ismaili sect was not a case of individual conversion but of a mass or community conversion, and that in such a case it could be properly presumed that such converts might retain a portion of their original personal law according to their social habits and surroundings. they, therefore, retain their personal law unless they consciously adopt another. The High Court deduced the following principle (p.402);

"A Hindu convert residing in India is governed by his personal law unless he renounces the old law and accepts the new one, except where a statutory provision is made. His intention to renounce the old law is to be inferred:

(a) if he attaches himself to a class which follows a particular law, or

(b) if he observes some family usage or custom derogatory to the old law".

8. The question as to which personal law, sects among the Muslims, such as the Khojas and the Memons, would be subject to in maters of property, succession and inheritance arose in Bombay as early as 1847. In Hirbai v. Sonabae, (1853) Perry's Oriental Cases 110, commonly called the Khoja and Memon cases, the Supreme Court of Bombay was called upon to determine the claim of two sisters in the estate left by their father, who had died intestate without leaving any male issue. The claim was resisted on the ground that in the Khoja community the custom was that females were excluded from any share in their father's estate, and were entitled only to maintenance and marriage expenses. A suit raising precisely the same question was also before the Court between members of Cutchi Memons sect. Both the suits were tried together and disposed of by Sir Erskine Perry, C.J., by a common judgment in which he held the custom put forward before him as proved. On that finding he held:

"I am, therefore, clearly of the opinion that the effect of the clause in the Charter is not adopt the text of the Koran as law any further than it has been adopted in the laws and usages of the Muhammadans who came under our sway, and if any class of Muhammadans, Muhammadan dissenters as they may be called, are found to be in possession of any usage, which is otherwise valid as a legal custom and which does not conflict with any express law of the English government, they are just as much entitled to the protection of this clause as the most orthodox society can come before the Court."

The learned Chief Justice held that the Khojas who had settled down in Cutch, Kathiawar and Bombay were converted as a caste to Islam some three or four hundred years ago, but had retained on their conversion the Hindu law as to inheritance and succession. As to Cutchi Memons also, he held that they had originally settled down in Cutch from where they spread in western India; that originally Lohanas, they too were converted to Islam some three or four hundred years ago. Though a little more orthodox Muslims than the Khojas and more prosperous, they had yet retained the Hindu law of succession, excluding females from inheritance, who were entitled only to maintenance and marriage expenses. (pp. 114-115).

9. A few years hence, Sausse, C.J., following the decision held in Gangbai v. Thavar Mulla, (1863) 1 Bom HCR 71 that the Khoja caste, "although Muhammadan in religion, has been held to have adopted, and to be governed by Hindu customs and laws of inheritance". Three years later, in In the Goods of Mulbai, (1866) 2 Bom HCR 276 Couch, C.J., observed that the law by which the Khojas were governed was not, properly speaking. "Hindu law, but probably that law modified by their own

customs". In yet another similar case during that year. In the Advocate General of Bombay ex relations Dava Muhammad, (1866) 2 Bom HCR 323, commonly known as the Agha Khan's case, the question was not as regards the rules of succession and inheritance, but whether the Khojas were to be considered as orthodox Sunnis or Ismailia Shias. Arnould, J., once again considered the history of their conversion, their religious book called 'Dashavatar' (the ten incarnations) and came to the conclusion that Khojas represented "the dissidence of dissent" in its most extreme form the Ismailias being dissenters from the main body of Shias, as these in turn were dissenters from the main body of orthodox Islam". (Wilson's Anglo Muhammadan Law, 33-34 (6th ed.). From these premises, Westropp. C.J. took a step forward in Shivji Hasam v. Datu Mavji Khoja, (1875) 12 Bom HCR 281 and held that Hindu law applied to the Khojas in all matters relating to properly, succession and inheritance, the Khojas having retained that part of their personal law to which till their conversion they were accustomed. Similarly, In the Goods of Rahimbhai Allubhai, (1875) 12 Bom HCR 294 after referring to the previous decisions, Sargeant, J., declared that the Khojas for the last twenty five years at least had been regarded by the court in all questions of inheritance as converted Hindus, who originally retained the Hindu law of inheritance, which had since been modified by special customs, and that a uniform practice had prevailed during that period of applying Hindu law to them in all questions of inheritance, save and except when such a special custom had been proved. The consequence of such a proposition was that the burden of proof lay on the person who set up such a special custom derogatory to the Hindu Law. In Rahimatbai v. Hirbai, (1878) ILR 3 Bom 34 Westropp, C.J. once again declared:

"It is a settled rule that in the absence of proof of a special custom to the contrary Hindu law must regulate the succession to property among Khojas".

and dealing with a question such as that of maintenance to be awarded to a Khola widow, he held that in the absence of a special custom to the contrary, that question also must be governed by Hindu law. In Rashid Karamali v. Sherbanoo, (1905) ILR 29 Bom 85 rules of Hindu law were applied as between the widow of a deceased Khoja and his brothers, the Court holding the widow to be entitled to maintenance only and the property of the deceased going to the brothers who had lived jointly with their deceased brother. Thus, from 1847 to 1905 the Bombay High Court consistently treated the Khojas as being governed by the rules of Hindu law in matters of property, succession and inheritance.

10. With regard to the Cutchi Memons, whom Sir Erskine Perry had clubbed together with the Khojas, Westropp, C.J., in In the Matter of Haji Ismail Haji Abdulla, (1881) ILR 6 Bom 452 held them not to be regarded as Hindus for the purposes of the Hindu Wills Act XXI of 1870, and added:

"We know of no difference between Cutchi Memons and any other Muhammadans except that in one point connected with succession it was proved to Sir Erskine Perry's satisfaction that they observed a Hindu usage which is not in accordance with Muhammadan Law".

But in Ashabai v. Haji Tyeb Haji Rahimtulla, (1885) ILR 9 Bom 115 where the plaintiffs, the widow and the daughter of the deceased Haji Adam, a Cutchi Memon, sought to recover properties alleging them to be the ancestral properties of Haji Adam, which his father could not dispose of by will, Sargeant, C.J., ruled that there was no partition between Haji Ismail and his son Haji Adam, and that the ancestral property absolutely vested in Haji Ismail on his son's death. He further held that the jewels of one of the females of the family were treated as stridhan property to which the Hindu law of succession to such stridhan property would apply. The same judicial trend also appears in Abdul Cadur Haji Mahomed v. Turner, (1885) ILR 9 Bom 158, where Cutchi Memons were held to be subject to Hindu law in matters of inheritance. In Mahomed Sidick v. Haji Ahmad, (1886) ILR 10 Bom 1 the contention expressly raised was that the Mitakshara doctrine of sons acquiring interest by birth in ancestral properties did not apply to Cutchi Memons, and that the earlier decisions limited the Hindu law to govern matters of inheritance and succession only. Scott, C.J., dealing with this contention held:

"Vested rights, accruing at birth have been acquired by sons under the law hither to governing the community, and it would ot be just to interfere with those rights on account of this recent change of opinion. I use the word 'recent' advisedly, because the community hitherto by their practice have acquiesced in the application of Hindu Law".

In the next case which came before the High Court, the High Court changed its view and reversing the judgment of Jardine, J., held that the rule of Hindu law applicable to the Khojas applied only to matters of inheritance and succession, and that the further rule of the sons having a right by birth in the ancestral property and consequently having a right to demand partition of it did not apply. The High Court, however, noted that such a right did prevail in Cutch and Kathiawar from where the Khojas had spread themselves to Bombay. (See Ahmedbhoy v. Cassumbhoy, (1889) ILR 13 Bom 534). But, contrary to what he had held in that case, the same learned Chief Justice (Sargeant, C.J.) in In the matter of Haroon Mahomed, (1890) ILR 14 Bom 189 a case of Cutchi Memons, held that in the case of a family trading concern the members of the family would be governed by the Hindu Law and stated the position of Cutchi Memons thus:

"The appellant is a Cutchi Memon, and belongs to the same family as the other persons who have been made insolvents. As Cutchi Memons the rules of Hindu Law and custom apply to them, and the position of the appellant with regard to the family property must be determined by the same considerations as would apply in the case of a member of a joint and undivided Hindu family".

Mossa Haji v. Haji Abdul, (1906) ILR 30 Bom 197 is yet another instance where the High Court held that in the absence of a special custom as to succession the Hindu Law of inheritance would apply to Cutchi Memons, and therefore, when a Cutchi Memon widow dies issuless, her property would be governed by the Hindu Law as to stridhan. A year later, in Haji Noor Mahomed v. MaCleod, (1885) ILR 9 bom 274 the rule of devolution of property by survivorship was applied to parties who were Cutchi Memons in the matter of a family firm, save that somewhat contrary to it,

the principle of relationship between the manager and the members of the family was held not to apply.

11. The above analysis shows that barring one or two stray decisions, the general trend of judicial opinion in Bombay was that both the Khojas and the Cutchi Memons retained, despite their conversion, considerable portion of their personal law and that the rules of Hindu law were accepted by them as customary law in matters of property, inheritance and succession, including rules as to joint family property, the right of a son therein by birth and the devolution thereof by survivorship.

12. In Jan Mahomed v. Datu Jaffar, ILR 38 Bom 449 = (AIR 1914 Bom 59) Beaman, J., after an elaborate analysis of the previous decisions dealing with both Khojas and Cutchi Memons, struck for the first time a note of dissent and laid down two propositions:

(1) that the invariable and genral presumption was that Mahomedans were governed by the Mahomedan law and usage and that it lay upon a party setting up a custom in derogation of that law to prove it strictly, and

(2) that in matters of simple succession and inheritance, it was to be taken as established that these two matters among Khojas and Cutchi Memons were governed by Hindu Law "as applied to separate and self-acquired property".

He added that he limited his second proposition to separate and self-acquired property to take the sting out of the earlier judgments and "effectively prevent its further extension in all directions upon the basis of the Hindu Law of the joint family having been establihed to be the law of the Khojas and Memons". (p. 511). In an equally outspoken dissent in relation to Cutchi Memons, he deprecated in the Advocate-General v. Jimbabai, ILR 41 Bom 181 = (AIR 1915 Bom 151) after yet another analysis of the earlier judicial trend, the habit of treating the Khojas and Cutchi Memons alike, as if they were on precisely the same footing and urged the necessity of deciding the cases of Cutchi Memons on the customs proved in respect of them rather than the customs prevailing among the Khojas, and observed (p.190):

"While there are many peculiar features in the sectarianism of the Khajas, strongly marking them off from orthodox Mahomedanism, the Cutchi Memons, except for the historical fact that they were originally Hindoos, and were converted four hundred or five hundred years ago to Mahomedanism, are, at the present day, strict and good Moslems".

He dissented from (1886) ILR 10 Bom 1 and held that the proposition there laid down that not only Hindu law applied to Cutchi Memons in matters of inheritance and succession but that the concept

of joint family property also governed them, was open to objection, since such a rule could rest only upon proved customs, that no custom of that kind had ever been proved and that Scott, C.J., had based his conclusion only on the case law. His conclusion was that the only thing which could be said with certainty was that the Cutchi Memons had acquired by custom the power of disposing of the whole of their property by will, but that it was not proved before him and never had been proved affirmatively that they had ever adopted as part of their customary law the Hindu law of the joint family as a whole or the distinction in that law between ancestral property as against self-acquired property, and that the Cutchi Memons were subject by customs to Hindu law of succession and inheritance as it would apply to the case of an intestate separate Hindu possessed of self-acquired property and no more. The dissent of Beaman, J., received approval from another learned single Judge in Mangaldas v. Abdul Razak, 16 Bom LR 224 = (AIR 1914 Bom 17) and finally from the Appellate Bench of the High Court in Haji Oosman v. Haroon Saleh Mahomed, ILR 47 Bom 369 = (AIR 1923 Bom 148) and therefore, the law as laid down by Beaman, J., may be taken as finally settled so far as the Bombay High Court is concerned. The Appellate Bench of the High Court summed up the position thus:

"There was a time when it was assumed that the Hindu law of joint property applied to Cutchi Memons; (1885) ILR 9 Bom 115 and (1886) ILR 10 Bom 1. But these decisions are now obsolete and that application of Hindu law is now restricted to cases of succession and inheritance as it would apply in the case of an intestate separate Hindu possessed of self-acquired property".

The Revenue would be correct in the position taken by them, were the view finally settled in Bombay to apply to Cutchi Memons settled in Madras and elsewhere also.

13. But the High Court of Madras has adopted a view different from the later trend of opinion in the Bombay High Court. In AIR 1921 Mad 571, Kumaraswamy Sastri, J., after an analysis of the case law in Bombay, came to the conclusion that since the Khojas and the Cutchi Memons spread themselves from Cutch and Kathiawar, where they had originally settled down and where they had lived in Hindu Kingdoms with Hindu surroundings and traditions, there was nothing surprising that they retained the rules of Hindu law in general not only in matters of succession and inheritance but also concepts, such as, the joint family property and its devolution by survivorship. According to him, at the time of their conversion, the Cutchi Memons were Hindus governed by the Mithakshra system of joint and undivided family together with its rule of survivorship. "I find it difficult", he said, "to assume that the Cutchi Memons on their conversion were so enamoured of the Hindu Law of inheritance that they adopted it, but were so dissatisfied with the laws of the joint family that they discarded the rules as to coparcenary and the son's interest in the property of his grand-father". Since there were no reported decisions on the position of the Cutchi Memons who had settled down in Madras, the learned Judge had the High Court's record searched. As a result of that search, he found several suits filed by and against the Cutchi Memons wherein they were consistently treated as members of an undivided family governed by the rules applicable to the members of the Hindu joint families and decrees had been passed in those suits on that footing. Even as regards the parties before him, he found that till the filing of the suit, which he was trying, they had regulated thier affairs upon the basis that the Hindu law of the joint family applied. On the premise that the Cutchi

Memons in Madras had regulated succession and inheritance according to Hindu Law, including its principle of devolution of property by survivorship, he held that the Hindu law of comparcenary and joint family applied to the Cutchi Memons settled in Madras.

14. In Abdul Sattar Ismail v. Abdul Hamid, AIR 1944 Mad 504 Leach, C.J., referred to this decision with approval and the distinction therein made between self-acquired property which a Cutchi Memon could dispose of by a will without the restriction of the one third under the Mahomedan Law, on the one hand, and joint family property which he could not so dispose of. (pp. 507 to 508). In Abdul Hameed v. Provident Investment Co., Ltd., ILR (1954) Mad 939 = (AIR 1954 Mad 961 FB) where a suit was filed by a Cutchi Memon son challenging a Court sale in pursuance of a mortgage decree against his father, the parties presumably on the basis of S. Haji Aboo Bucker Sait, AIR 1921 Mad 571 proceeded on the assumption that the rules of Hindu law governed them, (p.942). That this position continued in Madras even after the Shariat Act, 1937 came into force, except in regard to matters dealt with by Section 2 thereof, is clear from Abdurahiman v. Avoomma, AIR 1956 Mad 244 where a Division Bench of that High Court differed from the sweeping conclusion of Basheer Ahmed Sayeed, J., in Ayisumma v. Mayommothy Umma, AIR 1953 Mad 425 and held that that Act applied, as its Section 2 clearly said, only to property left intestate and which was capable of devolving on the heirs of the deceased and that that Act did not make the Mahomedan Law applieable in all matters relating to Muslims nor did it abrogate the custom and usage in respect of matters other than those specified in Section 2 of the Act. The Act therefore, would not apply to property except that which was capable of devolution on intestacy to the heirs of the deceased holding such property, (see also Mariyumma v. Kunhaisumma, 1958 Ker LT 627 and Lakshmanan v. Kamal, AIR 1959 Ker 67 (FB)). Indeed, no decision of the Madras High Court holding a view contrary to the one held in S. Haji Aboo Bucker Sait's case, AIR 1921 Mad 571 was shown to us. On the contrary, there are, as seen above, decisions referring to that decision with approval. It may, therefore, be taken for the time being that the view prevailing in that Court is the one of Kumaraswamy Sastri, J., in that decision. The record of past cases and the decisions of the High Court therein found by that learned Judge as also the past proceedings filed in the High Court by the members of the respondents' family and orders passed thereon would seem to reinforce the reasoning and the conclusion arrived at by the learned Judge, in that the parties in those proceedings would not have in filing those proceedings assumed that rules of Hindu law applied to them unless there was a prevailing understanding that that was their customary law. That it is the law laid down by the High Court of Madras which must apply and govern the Cutchi Memons settled there is clear from Begum Noorbanu v. Deputy Custodian General of Evacuee Property AIR 1965 SC 1937 where the Khojas settled in the former Hyderabad State were held to be governed by the law as laid down by the Privy Council of the then State of Hyderabad.

15. As to how surroundings in which a convert settles down affect the customary law to which he is accustomed till then can be seen from two highly illustrative decisions. The first is in Abdulrahim Haji Ismail Mithu v. Halimabai, 43 Ind App 35 = (AIR 1915 PC 86) a case of Memons who had settled down in Mombasa, Memons, it is stated there, began to migrate to Mombasa in the latter half of the 19th century. At the date of the suit, from which the appeal went up to the Privy Council, there were about a hundred Memon families settled in Mombasa. The question which arose in the suit was whether the respondent, the widow of one of them, was entitled, as against the appellant, the eldest son of the deceased by his first wife, to one eighth share according to Mahomedan law or

only to maintenance under Hindu law which applied to the Cutchi Memons in India. The respondent had led evidence to show that during the ten years preceding the suit, there were at last eleven cases in which distribution of estates was according to Mahomedan law. The respondent's contention was that the Cutchi Memons who migrated to East Africa had settled down among Mahomedans there and had adopted their customs and traditions, including as a special custom the rule as to succession according to Mahomedan law, thus, diverting from the rules of Hindu law, which in Cutch they had retained as their customary law upon conversion to Islam. The Privy Council held on these facts that:

"Where a Hindu family migrate from one part of India to another, prima 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 Mahomedans, settled among Mahomedans, 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." (p. 41)

The second case is that of Khatubai v. Mahomed Haji Abu, 50 Ind App 108 = (AIR 1922 PC 414) where the dispute was regarding the estate of a Halai Memon who hailed from Porbandar and had settled down in Bombay. If succession to his estate was governed by Mahomedan law, the appellant, his daughter would get a share as against the respondent. Just as the Cutchi Memons came from Sind and settled down in Cutch, retaining, in spite of their conversion, Hindu law as their customary law, Halai Memons also came from Sind and settled down in Halai Prant in the then Kathaiwar. Some of these proceeded to Bombay where they formed a sub-sect known as the Bombay Halai Memons, who it was admitted, governed succession to their properties according to Mahomedan law. Therefore, if the deceased had been in the proper sense of the word a Bombay Halai Memon, the question of succession to property left by him would have been governed by Mahomedan law. But the concurrent findings of the courts here was that he was not a Bombay Halai Memon, but a Porbandar Memon. The question was what customary law did Halai Memons follow in regard to succession to their properties? From the evidence led by the parties, which consisted of judgments of Porbandar courts and the oral evidence of some of the pleaders from Porbandar it appeared, as the Appellate Bench of the High Court held, that the Halai Memons of Porbandar, settled as they were amongst Hindus there, followed as their customary law Hindu law as regards succession and inheritance as against the Bombay Halai Memons who settled down amidst their co-religionists in Bombay. Lord Dunedin took the Mombasa case as an illustration for his dictum that if it was otherwise shown that the Kathiawar Halai Memons practised the Hindulaw, excluding females from succession, it was equally easy to infer that the Bombay Memons, finding themselves among other Mahomedans who followed the Mahomedan law in its purity, renounced the customs of the Hindu law of succession in favour of the orthodox tenets of their own religion.

16. These two decisions show that the question as to which customary law is applicable turns really

on the consideration as to which law a community decides to have for regulating succession to the properties of its members depending upon amongst whom they settled down and the surroundings and traditions they found in that place. Thus, the Cutchi Memons, who settled down amongst Mahomedans when they went to Mombasa, in spite of their having originally retained Hindu law when they migrated to Cutchi from Sind, accepted as their custom rules of Mahomedan Law in Mombasa. Similarly, Halai Memons, although they had followed Hindu law when they migrated to Porbandar accepted Mahomedan law when they proceeded to Bombay and there settled down amongst their co-religionists. In the light of this reasoning it would appear from the view taken in S. Haji Aboo Bucker Sait's case, AIR 1921 Mad 571 against which no other Madras view was shown to us, and especially as that view was supported also by the records of several other cases in that High Court, that Cutchi Memons, who had settled down in Madras, had regulated their affairs, since they had settled down amidst Hindus, according to Hindu Law not only in matters of succession and inheritance, but also in matters of their property including the Hindu concept of coparcenary and survivorship.

17. That being the position, there is no question of our having to decide whether the Bombay view, as reflected in the decisions since Beaman, J., threw doubts on the dicta in the earlier decisions and the Madras view, as reflected in S. Haji Aboo Bucker Sait's case, AIR 1921 Mad 571, or of having to prefer one against the other. We do not do so not only because it is not necessary but also because were we to do so at this date, it might perhaps have the result of upsetting a number of titles settled on the basis of the decisions of each of the two High Courts and perhaps elsewhere too. The conclusion, which we arrive at on consideration of the decisions referred to above is that the Cutchi Memons who proceeded either from Cutch or from Bombay to Madras and who, it appears, settled down amongst Hindus, Hindu surroundings and traditions there, regulated their affairs as regards their property, succession and inheritance according to the Hindu law which they had retained while in Cutch and to which they were already accustomed.

18. It is true that some of the Cutchi Memons went over to the then State of Mysore either from Cutch or from Western India or Madras. As aforesaid, the family members of the deceased Haji Mahomed Hussain Sait settled down in Bangalore Civil Station tion sometime between 1928 and 1930. On the basis of that fact, reliance was placed on the decision of the then High Court of Mysore in (1932) 10 Mys LJ 33 where the question for consideration was whether the custom of adoption recognised in the Hindu Law prevailed also among the Cutchi Memons there. The High Court, it appears, had before it both the Bombay view and the Madras view as expressed in S. Haji Aboo Bucker's case, AIR 1921 Mad 571, but preferred the Bombay view as stated in Haji Oosman's case, ILR 47 Bom 369 = (AIR 1923 Bom 148). The High Court, however, gave no reasoning for that preference nor did it have before it, as it appears from the decision itself, any evidence as to the customary law which the Cutchi Memons settled in Bangalore followed. That being so, that decision cannot be treated as a well considered judgment reflecting the position of the customary law applicable to Cutchi Memons who had settled down in the then Mysore State nor was it consequently binding on the High Court.

19. The question next is, whether the subsequent legislation on which the Revenue relied changed in

any way the position as laid down by Kumaraswamy Sastry, J.?

20. The Cutchi Memons Act, XLVI of 1920 was an enabling Act as its long title and preamble indicate. Its second section provided that any Cutchi Memon, who had attained the age of majority and was at the time a resident in British India, could declare in the prescribed manner and before the prescribed authority that he desired to obtain the benefit of the Act, and thereafter, such a declarant, his minor children and their descendants would, in matters of succession and inheritance, be governed by the Mahomedan law. It is nobody's case that any such declaration was ever made to get the benefit of the Act. The Act, therefore, would have no operation upon the respondents. Then came the Cutchi Memons Act, X of 1938, which was passed, inter alia, to facilitate administration of justice by the civil courts under a uniform established Code for all Cutchi Memons in various parts of the country instead of "a wide field of custom and usage" which "has to be traversed for a proper determination of the case". The Act came into force as from November 1, 1938. Section 2 provided that all Cutchi Memons, subject, however, to the provisions of S.3, shall in matters of succession and inheritance be governed by the Mahomedan law. Section 3, subject to which the foregoing section applied, is a saving provision and provides that nothing in the Act "shall affect any right or liability acquired or incurred before its commencement or any legal proceeding or remedy in respect of any such right or liability; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed". In between the two Acts was enacted the Muslim Personal Law (Shariat) Application Act, XXVI of 1937. We do not have to consider the effect of this Act in view of Mr. Desai having in express terms stated that he was not relying upon it.

21. The Cutchi Memons Act, X of 1938 was not extended at first to the Civil Station area in Bangalore where the deceased and the members of his family had settled down and carried on business. Until 1947, that area was administered by the Viceroy in his capacity as the Crown representative. A number of Acts passed by the Central Legislature were extended by him to this area with or without modifications but not the Cutchi Memons Act, 1938. In 1948, after the said area was retroceded to Mysore, the Mysore Legislature passed the Retroceded (Application of Laws) Act, 1948 extending to the Civil Station area certain laws and enactments in force in the princely State of Mysore. One of them was the Mysore Cutchi Memons Act, 1 of 1943, which was verbatim the same as the Central Act, X of 1938, and contained only three sections. The first section gave the title of the Act. The second section provided that subject to S.3 all Cutchi Memons shall in matters of succession and inheritance be governed by the Mahomedan law. Thus the option of being governed by the Mahomedan law contained in 1920 Act was replaced by a uniform and mandatory provision. But the third section, which is a saving provision, inter alia, provided that "nothing in this Act shall affect any right or liability acquired or incurred before its commencement or any legal proceeding or remedy in respect of such right or liability and any such proceeding or remedy may be continued or enforced as if this Act had not been passed".

22. If the parties as aforesaid were governed in matters of property, succession and inheritance by the rules of Hindu law including the rules as to joint family property, its distribution according to the rule of survivorship and the right of a son in it by birth, the High Court would be right in its view that the accountable persons, having been born long before 1948, had already acquired a right

by birth in the property held by their father, a right expressly saved by S.3 of the Act. There was, therefore, no question of that interest passing to them on the death of their father as envisaged by S.3 of the Estate Duty Act. In this view the judgment of the High Court under challenge has to be upheld. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.