

## ECCLESIASTICAL SIDE.

1866.  
Feb. 26.

*In the Goods of MULBA'I (deceased).*

KARI'M KHATA'V ..... *Applicant.*  
PARDHA'N MA'ANJI ..... *Caveator.*

*Succession—Custom of Khojás—Administration.*

By the custom of the Khojá Muhammadans, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband.

If no blood relations of the deceased husband are forthcoming, the property left by the widow belongs to the jamát.

As to the degree of relationship which will entitle members of the deceased husband's family to succeed, *Quære.*

KARI'M KHATA'V applied for a grant of letters of administration to the goods of Múlbái, widow, who had died intestate and without issue. Múlbái was the sister of Karím, the applicant, and the widow of Hírji Nánji; Pardhán Mánji was a distant relation of Hírji Nánji; Pardhán and Hírji being each fourth in descent from a common ancestor. The parties were Khojá Muhammadans.

The caveator opposed the grant of letters of administration on the following grounds:—(1) That, by the custom of the Khojá caste, when a widow died intestate and without issue, leaving property acquired from her husband, no blood relation of the widow's had any claim to such property; (2) That the nearest blood relation of her deceased husband was entitled to it; (3) That, if no blood relation of the husband could be found, the property went to the general funds of the caste; (4) That, according to such custom, Pardhán Mánji and twenty-two other persons, whom he named, being blood relations of the deceased Hírji Nánji, were entitled to the property in this case.

The statement of the caveator was that Hírji Nánji was fourth in descent from one Valli; that six of the persons, jointly with whom Pardhán claimed, were third in descent

from the same Vallí ; and that Pardhán and the remaining fifteen were fourth in descent from Vallí.

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*The Honourable J. S. White (Acting Advocate General) and Scoble* for the applicant.

The case was heard before COUCH, Acting C.J., on the 22nd, 23rd, and 24th of February.

In this case a Khojá Muhammadan applies for letters of administration to his deceased sister, the widow of a Khojá named Hírji Nánji. The property left by the deceased consists of jewels presented to her on her marriage, and of some property inherited from her husband. The entire amount does not probably exceed Rs. 7,000. Múlbái, the deceased, died on the 28th of April 1865, intestate and without issue ; her brother, the applicant, being her sole next of kin.

The case set up by the caveator is that the Khojá Muhammadans are governed, not by Muhammadan law, but by Hindú law ; and he claims this property, or a share of it, not as her relation, but as a relation of her deceased husband. He admits that, if this case is to be governed by Hindú law, the husband of the deceased was divided from the rest of his family. The case relied on will be *The Khojahs' and Memons' Case (a)* ; but that does not decide that Khojás are governed by Hindú law. The conflict in that case was between the daughter and the brother of a deceased Khojá. If the property had been separate property, it would, according to the general principles of Hindú law, have gone to the daughters ; but it does not appear from the case whether the family was divided or not. It did not appear to the Court to be necessary to determine that, which is alone sufficient to show that the case was not decided on Hindú law.

The applicant in the present case is clearly entitled to the property by Muhammadan law : Macnaghten, ch. i., 21 ; and Precedents, Case 13, p. 12.

(a) Perry's Or. Ca. 110 ; 2 Mor. Dig. 431.

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He would also be entitled by Hindú law ; the husband of the deceased being a member of a divided family, and the property being moveable property. *Devkúvarbáú's Case* clearly decides this (b). See also Strange, Hindú Law, ch. 10, "Widowhood." (c) If any part of the property were the *stridhan* of the woman, that would descend according to the form of marriage of the deceased. In the present case the marriage was *nikáh*. See also *Mitákshará*, ch. 2, sec. 11, pl. 9, and ch. 4, sec. 2.

*O'Leary* (with him *McCulloch*), for the caveator:—Although the interest claimed by the caveator here is very small, being only a twenty-third share of about Rs. 7,000, the question involved is one of great importance to the Khojá Muhammadans. The contention of the caveator is simply this, that the case is to be governed, not by Muhammadan law, or by Hindú law, strictly speaking, but by the customs and usages of the Khojá caste. The *Case of the Khojás and Memons* is not used by us as showing that the Khojás are governed by Hindú law ; but as showing, first, that there are peculiar customs existing as to the descent of property among the Khojás : and, secondly, that this court will, if such a custom be proved, give effect to the custom, as the law governing the case.

The customs of the Khojás are certainly at variance with Muhammadan law. They are, probably, at variance also, in many respects, with Hindú law. But they are much more analogous to Hindú law than to Muhammadan law. In fact, they would appear to be a caste who, in their conversion from Hindúism, preserved to a great extent their old law as to property, while they conformed in religious matters to the law of the Kurán.

The custom contended for in the present case is, that on the death of a Khojá widow, intestate and without issue, her property reverts to the relations of her husband, if any such are to be found. If there are none, the property will not

(b) 1 Bom. H. C. Rep. 130.

(c) 4th Edn., by Mayne, p. 248.

go to the wife's relations, no matter how near relatives there may be, but will, as it were, escheat to the jamát, and be by it applied to the general purposes of the caste; or, possibly, in the case of the relations either of the widow or the husband being in a destitute state, the jamát may transfer some of the property to them as a gift, but not as a matter of right.

Counsel was proceeding to argue that, in analogy to Hindú law, the caveator in the present case was not too remote a relation of the deceased Hírji to succeed to the property.

The Court intimated that the only questions were: had the caveator sufficient interest to be allowed to intervene, and was the applicant entitled to the grant; and His Lordship subsequently held that the fact of some relationship being shown to have existed between the caveator and Hírji gave a right to intervene, as, on the evidence, the jamát, if the property reverted to them, might possibly give it to the caveator.

*Cur. adv. vult.*

COUCH, C. J.:—Sir Erskine Perry having held, in the *Case of the Khojahs and the Memons*, that, if a custom as to succession is found to prevail amongst a sect of Muhammadans, and is valid in other respects, the Court will give effect to it, although it differs from the rule of succession laid down in the Kurán; I think I should follow the rule so laid down.

The question, therefore, is, whether such a custom has been shown to exist among Khojás, as will entitle the applicant to a grant of letters of administration to the effects of the deceased Múlbái. The evidence on the part of the applicant (the marriage having been proved) was as follows:—

Allárakiá Sumár, the Mukhyá of the caste, deposed:—That the "cousin brother of a deceased husband is a relation of the widow—a distant relation; that the person to whom a Khojá widow may have bequeathed by will any property she has acquired from her husband, will succeed to it; that if she has made no will, and there is a near relation of her hus-

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band living at the time of her death, that relation is entitled to the property; that if there be no such relation, the widow's brother, if alive at the time of her death, is entitled." By the words "near relation" he said he meant a brother's, or nephew's, or paternal uncle's son. On cross-examination, he said that, as a rule, the husband's family come in first; and he had never known an instance where the relations of the wife succeeded on her death to property acquired from her husband, where any of the husband's relatives appeared and claimed it. The last answer very much qualifies the former portion of this witness's evidence, with regard to the distinction between near and distant relatives of the husband. His direct examination would appear to show that, whilst near relatives of the husband succeeded to the property, in preference to any of the widow's relatives, distant relatives of the husband would be excluded by near relatives of the widow.

I think the observation of the counsel for the caveator, that the mere fact, that the witnesses have not been able to give any actual instances of a very distant relative of the husband having succeeded to property under these circumstances, does not satisfactorily prove that they are not entitled to succeed, is a just one. It certainly is not very likely that many cases of such very distant relationship, as exists in the present case, would occur. I am of opinion that, in deciding this case, I must, to a great extent, be guided by analogy, and must decide on the evidence of custom, although no case precisely similar to the present has been deposed to by any of the witnesses. Even on the applicant's own showing, the evidence is not strong enough to show that, where there are only very distant relatives of the husband to be found, a near relative of the widow will succeed.

The next witness on this point was the Kamariá of the caste. In his examination-in-chief he says:—"I know the custom of the Khojá caste. If a widow die, leaving no issue, but leaving a brother, then if the husband leave any relative at all,—if he leave a brother, or father, or grandfather, he (the husband's relative) succeeds to the widow's

property ; but if she die, leaving no relatives, the whole jamát meet together and defray the expenses of her funeral ceremonies, out of the caste property ; and the property left by her is credited in the books of the caste." Then he says that by the phrase "dying and leaving no relatives," he means that, "if the father or grandfather of the widow be alive, he performs the funeral ceremonies, but does not take her property. It is a stigma to take a daughter's property. A brother cannot succeed to the property, but performs the funeral ceremonies out of the funds left by his sister, and applies the remainder in charity." No doubt, the way in which this witness put the matter would seem to show, not that the widow's brother is not legally entitled to take her property, if he thinks fit, but that, having taken it, he is bound to apply it to charitable purposes. I think it not improbable that the witness gave this construction to the custom, rather with a view to meet the evidence which he expected would be given on the other side.

In cross-examination he says that, as a rule, the property goes to the husband's relatives ; and in answer to me he says : "I do not know of any instance of the widow's property having gone to her husband's grandfather ; if she die without disposing of it, it goes to the Aga Sáheb." He also says the jamát would take it ; indicating some knowledge on his part that the jamát would take it where there are only distant relatives of the husband surviving ; so that this witness himself proves that the relations of the widow would not be entitled to succeed. In the present case he says : "the A'gá Sáheb would be entitled to the property, and this would be so even if she left a brother or grandfather."

It has been suggested that this does not mean, that the widow's relations would not be entitled to the property if they chose to take it ; but that it would be considered improper for them to keep it. I do not consider this to be the meaning of the evidence. Certainly, if the widow's relations are not entitled to the beneficial use of her property, it would be much more likely that the jamát would take it directly,

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than that it should go to the jamát through the widow's relations.

The next witness called on behalf of the applicant showed, by an answer which he gave, that his evidence could not be depended upon ; and the witness who followed him, Gulám Husen, is open to the same observation, because he said, what had not been suggested before, that, in this case, Múlbái made a will.

The witness Dhanji Rájú was next called. He knew Múlbái, and gave some evidence as to what took place at her funeral, and also deposed as to the usage of the caste ; but it appeared that his knowledge was derived from some conversation which took place between him and two of the witnesses already examined ; so that, on the whole, I do not think any weight can be attached to his evidence.

Then we have the evidence of Khánji Hirá. He says that when a Khojá widow dies without issue, the relations of her husband take her property. On cross-examination he says he knows of no instance of distant relatives of the husband taking the widow's property ; but they are entitled to it. Therefore, so far as the opinion of a man such as this witness was—a firewood dealer—can be considered of any value, there is evidence that the husband's family will take the property.

That was the entire case for the applicant, and the evidence offered to show that the widow's relations are entitled to the property is certainly very weak.

The first witness called by the caveator was Fájálbhái Gulám Husen, a leading member of the caste. He stated, on cross-examination, that he was a member of the reforming party in the caste. It has been suggested that there is a desire amongst the members of that party to make a convert of the caveator ; but I do not think that any such desire would be sufficient to induce the respectable gentlemen who have been examined here, to give evidence relative to a usage in their caste, which they must have known to be untrue. This witness says he knows the laws relating to

the succession to property in his caste. If a Khojá widow die intestate and without issue, her husband's relations take her property; and with regard to the degree of the relationship, which will entitle the husband's relations to take, he says: "I have not heard of any limit: if there are no near relatives, the distant ones take; if there are no relatives of the husband to be found, the property goes to the jamát. I have not heard of the relations of a widow having a right to property left by her, and I do not think they could claim it as a right."

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Now this is very strong evidence to show that the relations of the widow cannot claim the property as a right; although the jamát might, and, if the widow's relations were poor, probably the jamát would, give it to them.

On cross-examination, this witness says he is a very old friend of the applicant; and further on he says: "I have heard of instances in which more distant relatives of the husband than the husband's father and the husband's father's descendant, took property left by the widow. There are instances of this in my own experience, where the widow left relatives of her own. There is no custom for the widow's relatives to take. If there are no relations of the husband, the jamát takes it. There are no limits to this. Amongst us it is unlawful to take the property of a sister." He goes on to say he knows the case of one Habíbbháí, who took the property of his sister on her decease; and the reason of that was, that she had been living all her life with her brother, and that she made a will leaving him the property.

The next witness on this point was Pírbbháí Khálakdiná. He also is a leading man in the caste. He says that "when a Khojá widow dies intestate and without issue, the rule is that the nearest relation of her deceased husband succeeds; and this applies to every relation of the husband. Failing these, it goes to the jamát; but in no case do the wife's relations come in."

The third witness was Khán Muhammad. He says that, under the circumstances of the present case, the relations of

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the husband would take the property. The relations of the wife would not. He goes on to say that the distant relatives of the husband will take as far as the seventh degree, but no further. With regard to this latter point the evidence of this witness is somewhat confused; and if I were now called upon to decide that Pardhán Mánji was entitled to the property of the deceased Múlbái, on the ground that he and her deceased husband were both fourth in descent from a common ancestor, I should certainly find very great difficulty in coming to a conclusion.

But that is not the question at present. The only question I have to decide is, whether the applicant, as brother of Múlbái, is entitled to succeed to property which Múlbái had acquired from her deceased husband.

With regard to this question, I certainly think that, looking at the position in life of the witnesses last mentioned, the balance of testimony is greatly in favour of the existence of a custom which excludes the relations of the wife from succession to such property.

What may be the origin of this custom among the Khojás I shall not now inquire. It is very possible that it arises from some analogy to be found in the Hindú law. I agree with the observations of the counsel for the caveator, that the law by which the Khojás are governed is not, properly speaking, Hindú law, but probably that law modified by their own peculiar customs; and I think it has been sufficiently established, that there is a Khojá custom which excludes the wife's relations from succeeding to property such as this.

That being so, I cannot grant letters of administration to the applicant. I am of opinion that it was a question of such a nature that the parties might fairly litigate it; and I think each party should bear his own costs.

*Application refused.*