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Shivji as head of the family, and for its benefit, we must hold it to bind the family and to be valid against all of the sons of Hásam and the widow. The decree of the Assistant Judge is, therefore, affirmed with costs.

[ECCLESIASTICAL SIDE.]

Appeal No. 255.

1875. July 2.

In the Goods of Rahimbhái Allubhái, deceased.

HIRBA'I, widow .....*Applicant.*
GORBA'I, widow, and another.....*Caveatrixes.*

Khojás—Succession—Letters of Administration—Custom.

In the absence of satisfactory proof of a custom, differing from the Hindu law, the Courts of this Presidency apply to Khojás the Hindu law of inheritance and succession.

If a custom opposed to Hindu law be alleged to exist amongst Khojás, the burden of proof rests upon the person setting up that custom.

The Khojás, having been originally Hindus and converted from the Hindu religion by a Dai, or Missionary of the Imám of the Ismáilis, to the Muhammadan religion of the Shiá division and Imámi Ismáili subdivision, and being partly regulated by Muhammadan law, partly by Hindu law, and partly by custom, occupy a position so peculiar that the Courts do not apply to them, when seeking to prove a custom of inheritance or succession, differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khojá community.

A Khojá having died intestate, and without leaving issue, was survived by his mother (a widow), his wife, and a married sister.

Held that, according to the custom of the Khojás, his mother was entitled to the management of his estate, and, therefore, to letters of administration, in preference to his wife or his sister.

THE hearing of this cause before Sir Charles Sargent, J., commenced on the 15th December 1873, and occupied six sitting days in that month, fifteen sitting days in January, and three sitting days in February 1874; that is to say, twenty-four days in the aggregate.

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Ferguson and *Macpherson* for the applicant Hirbái; the Advocate General *(Scoble)* and *Pigot* for the caveatrix Gorbái; *Latham* and *Inverarity* for the caveatrix Rahimbhái; *Mayhew* and *B. Tyabji* for Fazulbhái Kásambhái and Gulám Husen Jáffarbhái, caveators.

The facts and arguments appear with sufficient fulness in the judgment, which was given on the 22nd of June 1874 by

SARGENT, J. :—The question to be determined in this case is, who is entitled to administer the estate of one Rahimbhái Allubhái, a Khojá, Mahomedan merchant, who died on 20th December 1870 childless, leaving a widow, mother, and a married sister.

The first application for letters of administration was made on the 30th of June 1871 by Hirbái, claiming as widow of the deceased; on the 17th of July 1871, Gorbái, the mother of the deceased, applied for letters of administration; and on the 1st of August 1871, Gorbái and Rahimatbái, mother and sister of the deceased, respectively filed caveats against the application made by Hirbái.

On the 7th of August 1871 Gorbái filed an affidavit, setting forth more particularly the grounds of her claim, as mother of the deceased, to the administration of the estate.

In the 11th paragraph of that affidavit she says:—"I am informed and verily believe that by the customs and usages prevailing and recognized by the orthodox or Shiá Imámi Ismáili Khojás, to which sect or community the said Rahimbhái Allubhái belonged in his life-time, and to which I and my family have belonged and are now belonging, I, as the mother of the said Rahimbhái Allubhái, and in the absence of a male member in our said undivided family, am entitled to be recognized as the head member of the family, and, as such, am entitled to the whole estate, whether moveable or immoveable, of such undivided family, and that the said Hirbái and Rahimatbái, if residing under my care and pro-

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tection, are entitled to receive their maintenance at my hands. That, according to the said customs and usages, a widow, on her remarriage, is bound to relinquish to the head member of her husband's family, whether male or female, all she has received either from her late husband or from the undivided family to which she belonged. That a widow, unwilling to live with the surviving members of such undivided family, and who takes up her residence in a separate dwelling-house, is entitled to a certain sum fixed by the Khojá Shiá Jamát for her maintenance, if the parties themselves do not come to some arrangement on amicable terms in that behalf:" and that any member of the said community, whether male or female, who does not follow the customs of the caste, and disobeys the orders of the *Jamát* in that behalf, is punishable with excommunication or exclusion from the community. On the 8th of August 1871 Rahimatbái filed an affidavit, alleging that Hirbái was only entitled to a befitting maintenance, and asking that administration might be granted to Gorbái as the head surviving member of the family.

On the 1st of June 1872 Rahimatbái filed a second affidavit stating the custom to be as follows:—"That if a male member of the said sect (known as the Shiá sect of the Khojás) dies intestate and without issue and leaving a widow, a mother, and a sister, the widow is entitled to maintenance out of the estate of such deceased person, and the mother succeeds to the entire estate, subject to such maintenance of the widow, and that the widow on her remarriage is not entitled to any maintenance, but, on the contrary, is liable to restore to the estate all the ornaments and jewels belonging to her husband in her possession. That, in the event of the mother dying intestate, the daughter succeeds absolutely to the entire estate, subject also to the maintenance of the widow if not married."

On the 6th April 1872 Hirbái filed an affidavit in answer, by the 7th paragraph of which she says:—"The Shiá sect of the Khojá community, being the sect to which the said Gorbái, Rahimatbái, and myself do belong, is, to the best of

my knowledge, information, and belief, governed almost exclusively by Hindu law in the matters of inheritance, and I believe that the statement made in the said affidavit of the said Gorbái, and in the said affidavit of Visrámbhái Gángji and others, about the law and custom applicable to the case of inheritance to the estate of a member of our community dying intestate without issue and leaving a widow, a mother, and a sister, is incorrect and untrue. The fact is, that the mother in such case, except that she is, on account of her relationship to the deceased and of her age, respected by the members of the family, and is sometimes allowed a share in the management of the estate, owing to the youth or ignorance of the other members of the family, is not considered the head of the family, and is not entitled as of right to the management of the estate of her deceased son; neither is she, as alleged head of the family, entitled to any property or right beyond what she is entitled to as mother, and as mother she is only entitled to suitable maintenance. The widow in such a case is entitled absolutely to all the personal and all the self-acquired immoveable estate of the deceased, and to a life estate in his ancestral immoveable property, and is not bound to live with the mother or sister of the deceased, and loses none of her aforesaid right by not living with them or either of them. The sister of the deceased would in such a case be entitled to no more than a suitable maintenance until her marriage, and to have her marriage expenses, according to the position of the family, paid out of the estate."

On the 7th August 1871 Fazulbhái Kásambhái filed a caveat, claiming, by his affidavit in support, to be a distant male relation of the deceased, and to be entitled with other distant male relations to the property of the deceased, and asking that the estate might be administered by the Administrator General.

On the 14th August 1872 Jáffarbhái Gulám Husen filed a caveat, also claiming, in his affidavit, to be a distant male relation, and together with other distant male relations, therein particularly referred to, to be entitled by the cus-

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toms of the community to the estate of the deceased, and asking that the estate may be administered by the Administrator General.

It is at once apparent, from the statement of the grounds on which the several claimants seek to obtain letters of administration, that they one and all rely on some rule of succession differing from what is laid down in the Koran, which, *primâ facie*, constitutes the substantive law for all Muhammadans now. As far back as 1847 it was decided by Sir E. Perry in the case of the *Khojás and Memons*, reported in the Oriental Cases, (*a*) 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 though not agreeing with the express text of the Koran. That ruling has always been regarded as having settled the question as to the admissibility of proof of a special custom of descent, and was acted upon by Sir Richard Couch in *the Goods of Mulbái*, (*b*) and I have no hesitation in following it on the present occasion.

The question, therefore, to be determined, as it presents itself at the outset, is, whether either of the claimants has satisfactorily shown that there is such a custom of inheritance among Khojás as that which is relied on for establishing his or her claim to the administration of the estate of the deceased.

Before, however, proceeding to discuss the evidence in the case, it will be necessary to consider an argument which was addressed to the Court on behalf of the petitioner Hirbái. It was urged that it must be taken as settled by authority that the Hindu law of inheritance is the customary law of Khojás in the absence of proof of any other custom to the contrary, and that, consequently, all that is necessary for Hirbái to prove is, that she is the widow of the deceased, and that the *onus* lies upon the opposing claimants to prove the existence of the respective customs on which each of them relies.

(*a*) Perry O. C. 110 ; see p. 125. (*b*) 2 Bom. H. C. Rep. 276.

It was apparently thought that the judgment of Sir E. Perry in the *Khojá and Memon* case, to which I have referred, was tantamount to a decision to that effect. On an examination, however, of that case it is clear, I think, that all that was there decided, was what I have already stated, with the addition that the particular custom pleaded, viz., that females are not entitled to any share of their father's property but only to maintenance, and the expenses of their marriage, if unmarried, was satisfactorily proved. At the same time Sir E. Perry expressed an opinion, as the probable conclusion from the evidence before him, that the Khojás were originally Hindus. He says: (*c*) "The Khojás are a small caste in Western India, who appear to have originally come from Sindh or Cutch, and who, by their own traditions, which are probably correct, were converted from Hinduism about four hundred years ago by a Pír named Sadr Dín. Their language is Cutchi; their religion Mahomedan; their dress, appearance, and manners, for the most part, Hindu. These latter facts, however, do not warrant the conclusion being drawn, if such conclusion is necessary for decision of the case (and I think it is not) that the Khojás were originally Hindu, for such is the influence of Hindu manners and opinions on all castes and colours who come into connection with them that gradually all assume an unmistakeable Hindu tint. Parsis, Moguls, Afghans, Israelites, and Christians, who have been long settled in India, are seen to have exchanged much of their ancient patrimony of ideas for Hindu tones of thought; and, in observing this phenomenon; I have been often led to compare it with one somewhat similar in the black soil in the Deccan, which geologists tell us possesses the property of converting all foreign substances brought into contact with it into its own material."

It may be clearly gathered, I think, from the tone of the judgment, and the discussion which the question received, that it was regarded as *res integra*.

(*c*) At p. 112.

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But it was said that in any case, since the judgment of Sir E. Perry, an uniform practice has prevailed in this Court in the exercise of its ecclesiastical jurisdiction, both in its contentious and non-contentious business, of administering the Hindu law of inheritance in the absence of proof of any special custom to the contrary.

Now an examination of the records of the Ecclesiastical Side of the Supreme Court (during the interval of 16 years which elapsed between the date of Sir E. Perry's decision and 1863) shows that there were as many as ten applications for letters of administration to Khojá estates, seven of which were disposed of by the Registrar as non-contentious business and three by the Court itself.

The first of these latter cases is that of Vallu Musáni in 1855, (*d*) who died leaving a widow, a son and daughter who were minors, and a brother. The widow applied for administration. A caveat was entered by the brother, alleging that his brother had been his partner and joint in food and estate, and that the widow was illiterate and unfit to manage the estate, and that the widow of a Khojá leaving male issue was only entitled to maintenance. The Court granted letters of administration to the brother. This decision is in accordance with Hindu law on whichever ground the Court proceeded.

In the next case, that of Pirbhái Manji (*e*), the deceased left a widow and an infant son. Application was made by the widow, and at first opposed by persons who relied on a will; but, the will having been declared invalid, they alleged that the deceased had other relations, viz., a maternal grandmother and a maternal uncle, and his four sons. Administration was granted by the Court to the widow. This decision is in accordance with Hindu law, and exclusively so, as by Muhammadan law the widow would not be the natural guardian of her infant son for the purpose of managing his property, although she might be entitled to the

(*d*) Decided by Yardley, C.J., 26th November 1855.
(*e*) Decided by Yardley, C.J., 11th February 1856.

custody of the child if under seven. And, as no custom was alleged; it is apparently a decision that the Court will apply Hindu law.

In the last case of Dossá Nánji in 1862 (*f*) the deceased left a widow and niece. The widow applied for administration, and the niece objected on the ground that the widow intended to sell the property; and the Court, consisting of Sir M. Sausse and Sir J. Arnould, granted administration to the widow, she undertaking not to sell or mortgage. This is also in accordance with Hindu law.

Passing to the cases decided by the Registrar, the first is that of Jairáz Dharramsi in 1855, who died leaving a widow, four brothers, and no issue. A brother applied for administration, and the widow entered a caveat, but withdrew it, and letters were granted to the brother. The second is that of Mahomed Alluwany, where the application was by a brother, alleging that he had been joint in food and estate with his brother, and that a widow was only entitled to maintenance; and the Registrar, on consent of the widow, granted letters to the brother. In the third case, Pardhán Rávji, the mother applied, there being a widow and an infant son, and the Registrar refused, unless the widow consented, which she ultimately did. The fourth is that of Mithu Somji, where the family left consisted of three sisters, and administration was granted to one, the others being in Cutch. The fifth is that of Vallubhái Alvany, where letters were granted to the widow, there being a mother and daughter. In the sixth, that of Dádá Alvánná in 1859, the family consisted of a son, six daughters, and a grandson, and administration was given to the son. In the seventh, that of Pachan Punjáni, administration was granted to the widow.

It is to be remarked that in all these cases, with the exception of two, the widow either applied for administration or entered a caveat, and that in all administration was either given to the widow, or, if not, it was with her consent, or

(*f*) Decided by Sausse, C.J., and Arnould, J., 29th September 1862.

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under special circumstances, analogous to those of an undivided Hindu family, as in the case of Vallu Musáni.

It may be said that it would be unsafe to draw any positive conclusion from these scanty materials as to what the practice of the Court really was, although they undoubtedly point to such a practice as I have stated, and are difficult to explain on any other supposition.

We are, however, not without corroborative evidence on this point, and that, too, having regard to the source from which it comes, of a most valuable description. In 1863 Sir M. Sausse, delivering judgment in *Gángbái* v. *Thávar Mulla* (*g*), speaks of the Khojá caste as "one which, although Muhammadan in religion, had been held to have adopted and to be governed by Hindu customs and laws of inheritance." In that case the question for the Court was the construction to be put on the word "charity" in the will of a Khojá. It was contended that it must be construed with reference to Hindu notions of "charity", which are expressed by the Hindu word "dhurm", and that, consequently, the devise was bad, having regard to the decisions of the Court as to devises to charity under the description of *dhurm* in Hindu wills. The Court refused to adopt this argument, and held that the testatrix, having made her will in English, must be taken to have intended what was clearly expressed in it, and that the Court could not speculate on the particular views she might have had as to charity.

Although, therefore, there was no actual necessity for deciding the question whether Khojás were governed by Hindu customs and laws of inheritance, it was assumed throughout that they were so, or there would have been no foundation for the plaintiff's contention, and no necessity for the Court's reasoning to justify its conclusion in favour of the devise in question. The statement of the learned Judge was, therefore, something more than a mere *obiter dictum* as argued here by counsel for the mother, and the case shows that the Khojá caste was treated by all parties

(*g*) 1 Bom. H. C. Rep. 71; see p. 73.

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as one which must *primâ facie* be taken to be governed by Hindu customs and notions. As it is not likely that so careful a Judge as Sir M. Sausse would have mistaken the real point decided by Sir E. Perry in the *Khojá and Memon case*, his statement as to the law of inheritance by which Khojás were governed must have reference to the established practice of the Court in dealing with questions of succession in any one of its several branches of jurisdiction.

Since 1863 the applications for administration of Khojá estates have been very few. In 1864, in the *Goods of Pachan Punjáni*, administration was granted to the widow. There appears to have been no opposition to it. In 1866 the question of the administration of the estate of Mulbái came before Sir R. Couch (*h*), the question being between the brother of the deceased and the relations of her husband from whom she had inherited the property. The case made for the brother of the deceased was that his claim was in accordance both with Hindu and Muhammadan law; whilst the caveator contended that the Khojá law of succession was neither Hindu nor Muhammadan law, but a special law of their own, which was to a great extent analogous with Hindu law. Sir R. Couch in his judgment says: (*i*) "I agree with the observations of the counsel for the caveator, that the law by which the Khojás are governed is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs," and he held the custom proved in that case. The custom would appear to be in accordance with Hindu law according to the authorities, although it does not appear to have been regarded as such either by the learned Judge or counsel for either party.

Although some remarks of the Chief Justice would almost imply that Hindu law would be applied in the absence of proof of any modification in it having been adopted by the community, they can be scarcely relied on as an express authority to that effect. The case was doubtless rather treated as one between persons claiming under two rival customs.

(*h*) 2 Bom. H. C. Rep. 276. (*i*) *Id. ib.* 284.

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There was one other case in 1870, *in the Goods of Lilbái*, wife of Rahimbhái Dharramsi. She left three sons and a daughter, all minors, and a husband, surviving her, and letters of administration were granted to the husband by the Registrar on 9th March 1870.

The most important occasion, however, on which the manners, customs, and religion of the Khojás were brought prominently under the notice of the Court was in the case known as *the Agá Khán case*, decided by Sir J. Arnould in 1866. (*j*) That learned Judge, at p. 11 of his interesting and exhaustive judgment, in answer to the question "who and what are the Khojás?" says: "From the evidence adduced in the case, the more probable conclusion, I think, is that they were originally Hindus of the trading class inhabiting the villages and towns of Upper Scinde." That the doubt expressed by the words "I think" was not intended to apply to their having been originally Hindus, but only to the locality from which they came, is conclusively shown by his making the circumstance of their having been converted from Hinduism the basis of his very important argument, which he raises at p. 18, on the religious book of the Khojás called *Dasutar*, the first nine chapters of which treat of the nine incarnations of the Hindu god Vishnu. Unless the Khojás were originally Hindus, the inference drawn from that work by the learned Judge in favour of the Pir Sadr Din, by whom they were converted, having been a Shiá and not a Suni, would have had nothing to rest on.

The customs of the Khojás once more engaged the attention of the Court in the case of *Kásam Pirbhái and his wife Hirbái* (*k*), but there was no necessity in that case for considering the present question, and the judgment delivered by the Chief Justice is silent on it.

This summary of the decisions of this Court, as well as of the cases disposed of by the Registrar in the non-contentious business, explained by the remarks of Sir M. Sausse in *Gángbái* v. *Thávar Mulla* (*l*), satisfactorily shows, I think,

(*j*) See *post*. (*k*) 8 Bom. H. C. Rep. 95 Cr. Ca.
(*l*) 1 Bom. H. C. Rep. 71.

that the Khojás have, for the last 25 years at least, been regarded by the Court, in all questions of inheritance, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that an uniform practice has prevailed during that period of applying Hindu law in all questions of inheritance, save and except where such a special custom has been proved.

It may be said that no express decision can be cited in support of either of the two propositions, that the Khojás were originally Hindus who were converted to Muhammadanism, retaining their Hindu laws and customs, or that this Court will always apply the Hindu law of inheritance in their case in the absence of special custom; but the uniform course of practice, extending over the last 25 years, has assumed the truth of the first proposition, and has never, I believe, deviated from the rule enunciated by the latter.

Lastly, I may add that in a special appeal recently decided by Sir M. R. Westropp, C.J., and West, J., a question of inheritance having arisen as to the estate of a Khojá, the Court held that, in the absence of proof of a special custom, Hindu law must be administered (*m*). I need scarcely say that the opinion of the Chief Justice from his long experience in the ecclesiastical business of this as well as of the late Supreme Court, is especially valuable on a question of this nature.

Under these circumstances this Court cannot but throw upon those who dispute the right of the widow to administer (a right which would be clearly hers under Hindu law) the burden of proving the existence of a custom inconsistent with that right.

I shall first deal with the claim set up by Fazulbhái Kásambhái and Gulám Husen Jáffarbhái, distant relations of the deceased.

Their contention is that the female members of the family, including widow, mother, and sister, are only entitled to maintenance out of the estate, and that, in default of male

(*m*) *Supra*, p. 281.

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issue, the nearest male relation, however distant, or, at least, within the degree of relationship in which they stood to the deceased, takes the property, subject to the charge of maintaining the surviving unmarried female members.

In support of this contention they rely generally on the evidence given by the witnesses called by the other claimants as elicited in cross-examination, but more particularly on that given in examination-in-chief by Rahimbhái Hemráj, Ahmedbhái Habibhái, and Hussan Khán Mahomed. Secondly, on the evidence of their own witnesses—Alli Mahomed Bhimji, Mahomed Dharramsi, and Gulám Husen Hirji—the first and third of whom mentioned cases, supporting their view of the custom, which had happened at Jafferábád and Ragoola in the state of Bhaunagar.

Lastly, they urge that the custom as alleged by them is the more reasonable one, having regard to the admitted rule of the caste, that a widow on her remarriage is bound to restore to her deceased husband's family all property which she may have received from him.

Now, of the witnesses called by Mr. Ferguson for the widow, Rahimbhái Hemráj and Ahmedbhái Habibhái, two of the most respectable Suni members of the Khojá community, undoubtedly give direct evidence in support of the custom as stated by Mr. Tyabji's clients, the distant male relatives. The first states, as his view of the Khojá custom of inheritance, that, where there are no children, the male relations take the property and maintain the mother, widow, and sister; that the male relations may be at any degree of distance; and that they always take in preference to women, who are only entitled to maintenance. The latter says: "I consider our settled custom is for male relations to take the property, and for females only to have maintenance out of the estate. That is my opinion." Afterwards to the Court he said: "I say so, because I have always heard it." Evidence to the same effect was also given by the witnesses called by Mr. Tyabji—Mahomed Dharramsi, a Suni merchant of respectable position; Alli Mahomed Bhimji, who was certainly

a witness of great intelligence; and Gulám Husen Hirji, a native of Jafferábád and well advanced in years. None of these witnesses, however, were able to mention any instances in which a relation more distant than a brother or father of the deceased had taken the property, except the two last witnesses, who mentioned three or four cases which had occurred at Jafferábád and Ragoola. In the case of Váljí Manji a first cousin took; in Gigá and Tejá Ragváni, a nephew; and in Deoráj Virji's case apparently more distant relations took.

It was, however, urged that Mr. Tyabji's clients could not reasonably be expected to give many instances in which very distant relations had taken; such cases would necessarily be very few and far between. But that, if the custom were satisfactorily established in the case of brothers, fathers, uncles, nephews, and cousins, that would be sufficient to establish the principle, and it might well be inferred, at least in default of evidence to the contrary, that the custom was, as they broadly state it, in favour of male relations, however distant. This argument is, perhaps, not altogether unreasonable.

Passing, however, to the numerous and important witnesses called by the widow and mother of the deceased, we find a mass of evidence which satisfactorily shows that, whatever difference of opinion there may be as to which of those relations has the preferable right, there is little or none as to the right of one or other of them, where there is no male issue, to take the property and manage it, unless where there is a father living, or the deceased and some near relation, as uncle, brother, or nephew, had been living and carrying on business together, or perhaps simply carrying on business together.

As to what their powers over the property might be, nearly all spoke hesitatingly; whether they or either of them could sell or make a good title, whether they or either of them could spend all the income, or were bound to accumulate the surplus income after providing for their maintenance,

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were matters on which it may be conceded they differed not a little; but, notwithstanding the many discrepancies and apparent contradictions into which they were led in cross-examination by the ingenuity of counsel, or the difficulty of speaking with accuracy on such a subject, it is impossible to entertain any doubt, after reading their evidence, that they considered the widow and mother (subject to the above exceptions) were entitled, at least, to manage the property during their lives or until they married.

It will, I think, be sufficient to refer particularly to the evidence of the *Mukhi* and *Kamaria* of the caste and one or two of the most intelligent and elderly members of the community. The evidence of the other witnesses called by Gorbái was substantially to the same effect.

To begin with Allárakhiá Sumár, the *Mukhi* of the Shiá Khojás in Bombay :—This witness was called to support the mother's claim as against the widow, and in his examination-in-chief maintained, in the event of a man dying without male issue, the right of the mother to the property absolutely as against all relations but the father. However, when cross-examined by Mr. Ferguson, he says : "The widow is only entitled to maintenance. She manages the property if it is separate." Further on he says : "The brother's son cannot take when the widow is alive. How can the uncle take when the widow is alive? The son, brother, father, grandfather can take, but no other male relation whilst the widow is alive."

The evidence of Kháki Paddamsi, the *Kamaria*, is to the same effect. Whilst the mother is living the right of the widow is to maintenance, but he distinctly admits her right to the management of the property as against the male relations in default of male issue. He says : "When the mother dies, the brother takes the property, not the widow—I mean if it is joint property; but, if it is separate, the widow takes it." And, again : "The surplus income, when the widow takes the property, after providing herself with maintenance, remains with her during her life-time"; and, again : "The brother has no

interest in the property during the life-time of the widow, if he was separate from his brother."

Lálji Laddhá, after stating that the mother manages the property if the brothers were divided, says: "If the deceased leaves only distant relations they take as far as the third generation. In that case the widow takes, and it goes afterwards to the uncle and the uncle's son. Where the relations are distant the widow can spend more than is necessary for her maintenance."

The other witnesses for Gorbái were not questioned particularly as to the widow's rights as against male relations other than male issue, and they necessarily confine themselves to stating the mother's rights; but their evidence is distinctly opposed to the alleged general principle set up by the distant relations, viz., that all female relations are only entitled to maintenance out of the estate, and not to the ownership or management of it.

If we pass to the witnesses for Hirbái, excepting Rahimbhái Hemráj and Ahmedbhái Habibhái, their evidence is clear that the widows of Khojás dying without male issue are entitled to take and manage the property as against other male relations (except, perhaps, under circumstances where brothers or an uncle and a nephew have been living and trading together), and the only point on which they speak with indistinctness is as to her powers, and that the mother is similarly entitled in default of a widow, or on her death or remarriage.

I shall refer only to the evidence of two of those witnesses' Jairáz Pirbhái and Sujibhái Mánikbhái. The former' whom I consider a most trustworthy witness, says: "The mother has the better right to manage the property, giving the widow and sister maintenance. If a brother were left, he would manage, but not distant relations; but it would go to them after the mother." Afterwards he says: "There is no established custom where the property goes after the mother." In cross-examination by Mr. Tyabji he says: "If sister or widow survive the mother, I do not think distant

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relations can take. I say this as far as I know. Only very near relations take when the parties are separate. I say that only a brother or father would take in that case."

Sujibhái Mánikbhái, who is a cousin of Hirbái, considers that both widow and mother take before all male relations except a brother, who would manage where he and deceased had been living jointly. This witness was cross-examined by Mr. Mayhew respecting the course he took with regard to the administration of the estate of Kásam Kaman, who died at Zanzibar, and was his father's paternal uncle's son. He left no widow or legitimate children, but a mother, and the witness claimed to be his nearest male relative. It was pointed out that the power of attorney which he sent in his own name, and the letters which he wrote to Zanzibar respecting his relative's estate, were inconsistent with his evidence. In the letter (Exhibit No. 1) he doubtless refers to the mother's right as a right merely to maintenance and clothing. At the same time in a subsequent letter he urges, as an argument for the property being sent to Bombay, that the mother is sitting there, and that no one can claim whilst she is alive. All that can be said is, that the letters show that he asserted his right to have the property sent on both grounds. Considering that he was acting with the full knowledge of the mother, and was obviously on good terms with her, this is only what he might be expected to do.

Lastly, if we examine the actual cases referred to by the witnesses, in which a brother or other near male relation has taken, where there has been a mother or widow surviving, it will be found that in all of them, where the circumstances are known, the deceased and such near male relation were living jointly on the income of ancestral property, or were engaged in trade, or, lastly, it was deemed the more convenient course, or it was the result of a compromise. In the cases of Jivá Mánik, Vallu Musáni, Rámji Varji, Vallu Alváni, Piru Sumár, and Kásam Karmalli, the deceased and the male relative who succeeded, had been living together on ancestral property or engaged in trade. Those of

Jairáz Dharamsi, Gulam Husen Dhanji, and Kásam Fakir may be explained on one or other of the latter grounds as matters of arrangement between the parties. In the former case Rahimbhái Dharamsi says that, in the case of his brother Jairáz, the widow said: "I am a woman: where can I go?" and of her own accord gave him and the other surviving brothers power. "We administered it for her until she remarried." In the latter case the witnesses say that a lump sum was given, which certainly points to the compromise of an essential right by the widow to the property, or, at least, to the management of it, rather than to a payment in lieu of a simple claim to maintenance.

Looking at the vastly preponderating evidence in favour of the right of the widow and mother to the management, at least, of the property, as against any but very near relations, and those, too, under exceptional circumstances, and that there are no cases on record of any relation more distant than a father or brother taking, except three, which are stated to have occurred at Bhaunagar and Jafferabad, it would be impossible, I think, to hold that the custom, as contended for by Fazulbhái Kásambhái and Jáffarbhái Gulám Husen, has been proved.

I now pass to the consideration of the question as between the widow and the mother. The two principal witnesses in support of the mother's claim are the *Mukhi* and *Kamaria* of the *Jamát*. The former states that by the custom of the caste the mother succeeds to the property of her son who dies leaving no male issue, and can dispose of it as she thinks fit, providing maintenance for the widow and unmarried female members of the family. As to the rights of the widow, he commences by placing them as low as even Mr. Tyabji's clients could wish. In examination-in-chief he says: "She is only entitled to maintenance out of the estate; she cannot spend the income. She never manages the property where there are male relations within four generations." In cross-examination, however, he says: "If a man dies leaving a widow and nephew who is grown up, the nephew takes it, and the widow is only entitled to maintenance." Asked the

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question again, he says: "I do not know for certain." Asked again, "The custom is come down from ancient times. The widow is only entitled to maintenance. She manages the property if it is separate, and preserves it for the nephew." Afterwards the witness says: "The widow and nephew would manage it together," and then that he could not speak positively. Afterwards he says: "How can the brother's son take when the widow is alive? How can the uncle take when the widow is alive?" In examination-in-chief he had stated that some widows acquiesce, and some object when instigated by others,—"I cannot say which are the most numerous. When they object, they compromise it, and sometimes come to the *Jamát*." In answer to me he said: "When I say that the mother should succeed in preference to the widow, I mean that I consider it the right rule. Not many widows object to their mothers-in-law taking the property; when not on good terms with their mothers-in-law, they do object. They only object when they are instigated by others. I consider that there is no division of opinion in the caste."

The evidence of Kháki Paddamsi, *Kamaria* of the caste, was to the same effect, but had the advantage of being expressed with far greater clearness and precision. He says: "If a man dies childless, leaving mother, sister, widow, and no near male relations, the mother takes. The father takes if he is alive, but no other male relation before her. He becomes absolute owner, but is bound to pay the widow maintenance. The sister takes if there is no mother and widow. If a man leaves a widow and unmarried sister, the widow manages the property and maintains the sister. On her death the sister becomes the owner. The widow has no ownership in the property; I mean she cannot dispose of it or sell it. Subject to the claims of the widow and sister, the mother is absolutely entitled to the property, and can apply it to any purpose she likes. This is an ancient custom; I have heard it from old people. I never heard any one say the widow was entitled before the mother." Further on he says: "I say it is usual for the widow to acquiesce in the

mother's taking. The widows who object are few. I heard this custom from members of my own and other families in Bombay." In cross-examination by Mr. Tyabji he says: "The mother may sell a house, but must put the proceeds out at interest. How can she do what she likes with it when the widow is entitled to maintenance? She takes the income, but must keep the property. After her death the brother would take. Where there is no widow, but only a brother, she can do what she likes with it. If she remarried, she could not take it to her new husband's house; she must give it to the brother. When the mother dies, the brother takes the property, not the widow—I mean if it be joint property, but if it is separate, the widow takes it. The surplus of the income, when the widow takes the property, remains with her during her life-time. The brother has no interest in the property during the life-time of the widow if he was separate."

The cases relied on by these witnesses in support of the superior claim of the mother were those of Virji Rattansi, Nura Thava, Virji Fakir, Kásam Surji, and Muchi Vallab. These were all settled in favour of the mother's right to the management of the property, either privately or by the *Jamát*, after the question had been referred to it by the mother and widow. Whether the mother resisted on principle, or merely as to *quantum* of maintenance, is not so clear.

The next most important witness was Hussanbhái Gulám Husen, a ship-owner in a large way of business, having branches at Zanzibar and Mozambique. This witness spoke to what have been called "the Zanzibar cases." Those cases, assuming them to be genuine, undoubtedly go to prove that the custom, as understood by the *Jamát* of Zanzibar, supports the right of the mother.

Karmalli Suji, who had lived forty years at Zanzibar, and been twice *Mukhi* of the *Jamát*, gives the same account of the custom at that place.

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The other witnesses who were called for Gorbái were nearly all persons engaged in petty trade, or were more or less closely connected with Gorbái, or on terms of intimacy with her relations. Their evidence is substantially the same as that given by the *Mukhi* and *Kamaria*, but I do not consider that it can be regarded as adding much independent strength to that which has been already referred to.

The most important evidence, however, in support of the mother's superior claim, was given by one of the witnesess called by Hirbái herself—I allude to Jairáz Pirbhái. I have already said that I consider him a most respectable and reliable witness. He is a man of position in his caste, and was, I believe, honestly anxious to assist the Court with such knowledge of the customs of the caste as he possessed. He says: "Inheritance and succession with us are determined partly by Hindu law and partly by custom. I say this partly from what has been decided in the Courts, and partly from what obtains now in Khojá communities. If a man dies leaving no children, a widow, mother, and sister, I think the mother has the better right to manage the property, giving the widow and sister maintenance. I know of no instance. I remember one instance of a widow managing. Vullu Alváni's widow did. I do not know Pirbhái Manji, nor Dossá Manji. I knew Pachan Punjá. In that case the widow managed. I remember the widow of Hirji Manji. She managed the estate. I do not remember any instance of the mother managing the estate. There is a strong feeling in the Khojá caste on this case. I believe a few leading members of the *Jamát* are making exertions for Gorbái. They have considerable influence with our community." Again, "there is no established custom as to where the property would go after the mother. The *Jamát* has made no custom. I do not think the question is in doubt so far as the mother is concerned. I have heard of instances of small properties, but cannot remember them. It is not a fixed custom, but many people are of this opinion. I mean the *Jamát* has never assembled and determined it so. I do not consider it to be a fixed custom until the *Jamát* has done

so." However, afterwards he says: "I do not remember a single instance of inheritance being determined by the *Jamát*." To the Court he said: "What I have stated as to the rights of mothers and widows, are my own views of the custom. In the case of the mother I consider it is well established. I believe the majority of the community are in favour of my view as to the mother. As to the rest of what I have said, there is not, I think, any well-established custom."

Passing to the other witnesses called by Hirbái, the first is Kulpan Rattansi, who although a Shiá, from his own admission was clearly not an adherent of Agá Khán. He considered there was no settled custom. He says: "The influential party takes the property. Such matters are generally settled privately. There is no settled custom."

Hussan Khán Mahomed, a Suni Khojá, who had always lived in Bombay, said: "The widow, mother, and sister are all entitled to maintenance, but I cannot say who will succeed. The Sirkár must decide. The widow's right is preferable to the mother's"—obviously expressing his own opinion.

Mir Ali Dámá says: "I never heard of the mother taking in preference to the widow. They are entitled in equal shares. The mother and widow would take my property jointly if I and my brother were separate; that is my view of it, what I think would be best. I cannot say whether the mother or widow should take the chief part in the management. There is no settled custom."

Pirbhái Khimji says: "I believe when a man leaves a widow, mother, and sister, the widow is entitled, but there is no settled custom. If the property is small, the question is usually compromised." In cross-examination he says: "The mother is entitled to be maintained in good order. After the widow dies, the mother takes. The mother is much respected. If she is intelligent, she is regarded as the head of the house. The daughters-in-law should listen to their mothers-in-law if their husbands are alive, and also

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afterwards as long as they retain their wits. Some obey their mothers-in-law and some do not."

Salli Mahomed Gulám Seyá says: "When a man dies, leaving a mother, widow, and sister, I believe the widow takes. The Hindu law of inheritance is principally the guide in matters of succession. I never heard of an instance in which the mother was preferred to the widow. Before the present case I do not remember hearing the point raised."

Dharamsi Kaku, Rahimbhái Dharamsi, and Sujibhái Mánikbhái, all respectable and intelligent witnesses, gave similar evidence in favour of the widow's claim. The latter two, however, are open to the remark that they are connections of the widow Hirbái.

Such being the evidence on the rival claims of the mother and widow, it is at once clear, I think, that it is not of a character to support the pretensions of either party if tested by the strict rule, applied in cases where a custom is set up at variance with the written law—such, for instance, as would properly be required where a particular class in the Hindu community sets up a special law of inheritance differing from the general Hindu law. Under the special circumstances, however, of this Khojá community, the question as to the adequacy of the evidence presents itself under a somewhat different aspect. This Court having established a practice based upon the assumed peculiar circumstances under which this community became converted to Muhammadanism, the question is no longer between the written positive law laid down in the Koran, and the customary law of inheritance, as alleged by a sect of Muhammadans, but rather between such customary law and that law which this Court has adopted as the one which presumably is the custom of the community until the contrary be proved. Such evidence, therefore, under the circumstances of this case, may, I think, be deemed sufficient to rebut that presumption, although it may fall short of "proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the governing rule of the community," to

adopt the language of Scotland, C.J., in the case of *Sivanan-anja* v. *Muttu Ramalinga* (*n*), and that it will be sufficient if, in the language of the Jurist Thibaut, "a majority, at least, of the community look upon the rule as binding, and it be established by a series of well-known, concordant, and, on the whole, continuous instances" (*o*).

Now there is undoubtedly a considerable amount of evidence in this case to show that the great majority of the community consider that, according to the custom of their caste, the mother ought to have the management of the property in preference to a childless widow, and that that custom has (so far as there is any evidence before the Court) been invariably adopted by the *Jamáts* of Bombay and Zanzibar, and also in all cases of private arbitration. The cases to which I have referred in discussing the evidence of the *Mukhi* and *Kamaria* establish this satisfactorily as to Bombay. With respect to Zanzibar, the evidence is, of course, not so satisfactory, because of the difficulty of testing the accuracy of the statements; but the witness who gave the information was a man of respectable position as a merchant, and he was confirmed by the *Mukhi* generally in his statement of the custom, and in particular as to one of the instances cited by him. On the whole, looking at the close connection between the Khojás of Bombay and those at Zanzibar, I do not think I should be justified in disregarding that evidence.

As to the quality of the evidence generally, it is no doubt true that many of the witnesses are such as not to be entitled to much weight in a question like this, which, as admitted by the witness Jairáz Pirbhái, has the ruling principal members of the community enlisted on one side. At the same time, there are many witnesses of a most respectable position, who, it may fairly be presumed, would not lend themselves to stating the custom differently from what they believed it to be, and amongst them I would refer more especially to Jairáz Pirbhái. Again, if we turn to the

(*n*) 3 Mad. H. C. R. 75; see p. 77. (*o*) 1 Thib. Sys. de P. R. 15.

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evidence in support of the widow's claim, it consists exclusively of her own relations, and the support which that evidence receives from the case of Vallu Alváni in 1866, in which letters of administration were granted to the widow by the Registrar after the mother had been cited. No evidence, it is true, was given by the other side to explain why the mother consented to this being done, and the widow is certainly entitled to the benefit of it. It may, however, perhaps be explained on the supposition that the mother and widow were living together in amity, and that it was a matter of indifference to whom the administration was granted. In any case, it ought not to be allowed to outweigh the rest of the evidence, which, I think, satisfactorily establishes that the leading members as well as the great majority of the community look upon the custom as alleged by the mother, to the extent, at least, of giving her the right to the management of the property in preference to the widow, as well established ; and that the *Jamáts*, which are the governing bodies of the community in all matters relating to the caste, regard the custom, as alleged, as the custom of the caste, and act upon it in all cases referred to them by the parties interested.

Lastly, if we bear in mind the circumstance that Khojá widows can remarry, and that, as a matter of fact, it is very common for them to do so, and that on their doing so, as admitted by all the witnesses, they cease to have any right or interest to or in the properties of their deceased husbands, it is far from unlikely that the mother, who, as the evidence shows, is treated with unusual respect in the Khojá community, and would generally be past the age at which women marry in eastern countries, would gradually come to be regarded as the safer person to be entrusted with the management of the property.

Under these circumstances I think I ought to declare the custom set up by Gorbái to be proved, so far and to that extent only as it confers the superior right on the mother (being a widow) to the possession and management of the

property in preference to the widow. The letters of administration must, therefore, issue to the applicant Gorbái. Hirbái and Gorbái must both have their costs out of the estate, considering the importance and unsettled character of the question in dispute between them. Rahimatbhái and the other caveators must pay their own costs.

An order was accordingly made on 23rd June 1874, refusing the application of Hirbái, allowing the caveat of Gorbái, and dismissing the caveats of the other caveators, and allowing the application of Gorbái for letters of administration. Against this order Hirbái appealed, and the appeal was heard on the 18th, 19th, 25th of June, and 2nd of July 1875, by WESTROPP, C.J., and GREEN, J.

Purcell and *Lang* for the appellant.

Scoble (Advocate General), *Latham*, and *Pigot* for the respondent Gorbai.

There was not any appearance for the other respondents, Fazalbhái Kásambhái and Jáffarbhai Gulám Husen.

WESTROPP, C.J., *in delivering judgment, said*:—*Though* this case occupied the Court below for twenty-four sitting days and this Court for four days we think we may deliver our decision at once, as the learned Judge in the Court below has afforded to us such valuable assistance by his elaborate discussion of the authorities and evidence on the point before us, viz., whether the widowed mother of an intestate Khojá, dying without male issue, is entitled by the custom of that community to letters of administration to the estate of her deceased son in preference to his widow, on which question Sir Charles Sargent seems to have availed himself of every available source of information. No doubt, among Muhammadans proper or Hindus the evidence adduced in this case would not be sufficient to establish an ancient and invariable custom different from their ordinary law. In considering a question of custom in a case among Muhammadans proper or Hindus we have always followed the doctrine laid down by the Privy Council, that the party

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seeking to establish a custom different from the ordinary law of his community, must prove that the custom is ancient and invariable, and considered to be legally binding.

But in this case we are dealing, not with Muhammadans proper or Hindus, but with a caste converted from the Hindu religion about four hundred years ago by Pír Sadrdin, a Dai or missionary of the Imám of the Ismáilis, and their religion has, since the date of their conversion, been Muhammadan of the Shiá division and Imámi Ismáili form. In comparatively recent times a schism has occurred amongst them in Bombay. A numerical minority, professed to belong to the Suni division of Muhammadans, insisted that the religion of the Khojás at large was Suni, that the public property of that community ought to be applied to Suni purposes, and sought to cast off all allegiance to H. H. Agá Khán as Imám of the Shiá Imámi Ismáilis. However in a suit brought by some of the innovating party with those objects (*Dayá Muhammad and others* v. *H. H. Agá Khán and others*) (*p*), the hearing of which occupied twenty-four days in A.D. 1866, Sir Joseph Arnould held "that the Khojás never were Sunis, but that from the beginning they have been, and (with the exception of the relators and plaintiffs, and their followers in Bombay) still are Shiás of the Imámi Ismáili persuasion."

In matters matrimonial it is not denied that the Khojás are regulated by Muhammadan law. On that footing was the decision in *Pirbhái's* case (*q*), which, so far as we know, has never been questioned. Amongst ordinary Muhammadans marriages are performed by the *Kázi* or his naibs or deputies (1 Bom. H. C. Rep. 236, and Appendix XVIII., XXI., XXVIII.). The marriages of all Khojás in Bombay used to be performed by him until the schism. That fact appeared in *Dayá Muhammad* v. *H. H. Agá Khán* above mentioned, and *In the goods of Mulbaí* (*r*), in the notes of Couch, C. J., which I have examined, but not in the published report. Since the schism, however, those Khojás, who regard Agá

(*p*) See *post* p. 323. (*q*) 8 Bom H. C Rep. 95 Cr. Ca.
(*r*) 2 Bom. H. C. Rep. 276.

Khán as their head, have had their marriages performed by him, while the others continue to employ the *Kázi* as before. It has here been generally assumed that, in the absence of proof of custom to the contrary, the law of succession and inheritance amongst the Khojás is the law of their origin, viz., Hindu. This has generally been assumed to be the rule, and was so expressly laid down, in a *dictum* by Sausse, C.J., in the case of *Gángbái* v. *Thávar Mulla* (*s*). Perry, C. J., in *Hirbái* v. *Sonabhai* (*t*) made a decision in conformity with Hindu law, but did not decide that Hindu law is to be generally followed; and it is to be noticed that the case before him arose in the same family as that the members of which were parties to the suit in which occurred the *dictum* of Sausse, C.J., to which we have just referred. In *Mulbái's* case (*u*) Couch, C.J., did not decide on the principles of Hindu law but on the evidence in the case. The applicant there sought to come in on a footing of custom, and the custom proved was contrary to the one set up. As a matter of fact, the custom proved was in accordance with Hindu law. Recently, *Shivji Hásam* v. *Datu Mavji* (*v*), a special appeal from Thánáh heard by my brother West and myself, was decided by us in accordance with Hindu law; because there was neither allegation nor proof that there was any custom governing the matters there in issue, contrary to Hindu law.

In this state of the authorities we think that our brother Sargent was right in placing the burden of proof on the mother and the distant male relations of the deceased intestate, as they were setting up customs not in conformity with Hindu law, whereas the widow's claim was completely consonant with Hindu law.

It is, however, evident, from what has been said, that the Khojás are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law, or Hindus by the Hindu law, and hence it is that it would not be reasonable to require such

(*s*) 1 Bom. H. C. Rep. 71.
(*t*) Perry O. C. 110.
(*u*) 2 Bom. H. C. Rep. 276.
(*v*) *Supra*, p. 281.

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stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law, as from a Hindu.

Now it is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Pársis, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment, giving effect to those views. Unanimity, of course, could not be expected, but the rules which were found generally to prevail might be made law; and though the religious difference existing among members of the Khojá caste might create some difficulty, it would not, we think, be insuperable.

As to the evidence in this case, we think with the learned Judge in the Court below that it greatly preponderates in favour of the mother's claim, though, no doubt, there is a considerable conflict; and we also think that he rightly placed great reliance on the evidence of Jairáz Pirbhái. Though the evidence at large is not such as in the case of Muhammadans proper or Hindus would suffice to establish an ancient and invariable custom, we think we must hold that it is sufficient to establish a custom in a community, such as this, placed midway between Muhammadans and Hindus. We think that, under such circumstances, the Court ought to act upon satisfactory proof that the custom has existed for a considerable time, and has been generally accepted by the great majority of the Khojá community. All costs must come out of the estate.

GREEN, J.:—I concur, and would only add that the fact that all the cases decided on this point by the *Jamát*, or public authority in the community, were decided in favour of the mother, seems not only to support the view which we have taken of this case, but also, inasmuch as the estates in all those cases were small, to disprove the assertion that the decisions of the *Jamát* were procured by money or influence.

Order affirmed.