ORIGINAL CIVIL.

(12)

1877
September 1.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Green.

RAHIMATBAI (ORIGINAL DEFENDANT), APPELLANT, v. HIRBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Khojas —Inheritance—Custom—Evidence—Burden of Proof.

The widow of a Khoja Mahomedan who has died childless and intestate succeeds to her husband's estate in preference to his sister.

Where a defendant alleged a special custom of the Khoja community at variance with the Hindu law of inheritance,——*Held* that the burden of proving the alleged custom rested upon her.

In order to prove a custom of inheritance among Khoja Mahomedans at variance with the rules of Hindu law, evidence merely of the opinion of the leading members of the caste, is not enough. Instances must be proved in which the alleged custom has been observed and followed.

Hirbai v. *Gorbai* (1) commented upon.

THE facts of this case are sufficiently stated in the Judgment of Sir C. Sargent, J., which was delivered on 5th March 1877.

The *Advocate General* (Honourable *J. Marriott*), *Purcell* and *Lang* for the plaintiff.

Pigot and *Inverarity* for defendant.

SARGENT, J.—The plaintiff is the widow of one Rahimbhai Allubhai, a Khoja by caste, who died on 20th December 1870 intestate and without issue, but leaving his widow, the plaintiff, his mother Gorbai, and his sister Rahimatbai, the defendant, his next of kin.

On the death of Rahimbhai Allubhai letters of administration to his estate were applied for by Gorbai and Hirbai respectively, and, after a full investigation of their rival claim, it was ordered that they should be granted to the former.

Gorbai died on the 4th October 1875, without, however, having taken out letters of adminstration, but having made her will, bearing date 3rd April 1875, by which she devised and bequeathed all the moveable and immoveable property whatsoever and wheresoever, of or to which she should be seized, possessed, or entitled at the time of her death, to her daughter the defendant Rahimat-

*Suit No. 691 of 1875. Appeal No. 332.

(1) 12 Bom. H. C. Rep. 294.

bái, her heirs, executors and administrators, absolutely to and for her and their own absolute use and benefit, and thereby directed her daughter to carry out certain provisions, therein particularly mentioned, for the maintenance and benefit of the plaintiff.

The plaintiff, by her present plaint, alleges that the defendant is now in possession of the estate, moveable and immoveable, of her husband, Rahimbhai Allubhai, and claims to be absolutely entitled to the moveable property and self-acquired immoveable property and to a life-interest in the ancestral immoveable property. She charges that the defendant claims to be absolutely entitled to the estate of Rahimbhai, whether by descent or by the will of Gorbái, subject to providing for the maintenance of plaintiff, and she prays that the rights of the plaintiff and defendant in and to the moveable and immoveable estate, left by the said Rahimbhai, may be ascertained and declared; that in the meantime the defendant should be restrained by injunction of this Court from alienating the property or collecting the rents and profits thereof, and that a receiver be appointed, and lastly, that an account be taken of the estate come into defendant's hands since the death of Gorbái.

The defendant, by her written statement, denies that the plaintiff is entitled to anything more than maintenance out of the estate of her late husband, and asserts her claim to be absolutely entitled to the property, whether as the heiress of Rahimbhai, or under the will of her mother Gorbái subject to the maintenance therein provided for the plaintiff.

The following issues were raised upon my expressing an opinion, that the Court would not make any declaration, as to the interest in the property of either party, except as to right to possession, that being the only right upon which any relief could now be granted, and that it would be premature and contrary to the ruling of the Privy Council in the case of *Strimathoo mootho alias Kathama Natchiar* v. *Dorasinga Tever*,(1) to make any declaration as to the exact nature and extent of the interest or power of disposition of either party, the necessity for which might never arise, and upon which no relief could be granted at the present moment:—

(1) L. R. 2 Ind. App. 169, at pp. 180, 181.

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1. Whether the plaintiff is entitled to any greater or other interest in the property in plaint mentioned, than a right to a suitable maintenance whilst she continues a widow.

2. Whether the deceased Gorbái was entitled to dispose, by will, of the moveable property which originally formed part of the estate of Rahimbhai Allubhai.

3. Whether the deceased Gorbái was entitled to dispose, by will, of the immoveable property which originally formed part of the estate of Rahimbhai Allubhai.

4. Whether the defendant is now entitled, as heiress-at-law of Rahimbhai Allubhai, to the property in qestion, or to any and what part thereof.

5. Whether the defendant is entitled, as heiress-at-law of Gorbái, to the property in question, or to any and what part thereof.

6. Whether the plaintiff is entitled to the relief prayed, or any part thereof.

7. Whether the law of inheritance amongst Khojas is the Hindu law, in the absence of proof of custom to the contrary.

I further decided that the widow would, *primâ facie*, be entitled to possession, her right under the Hindu law having been displaced only so far as a custom was held to be proved by the decree of this Court (on the occasion of the inquiry into the rival claims of the mother and widow to the administration of the estate) conferring on the mother the superior right to the possession and management of the property of her deceased son in preference to the widow, and I, accordingly, found the seventh issue for the plaintiff.

Now a considerable number of the leading members of the caste were called by the defendant, whose evidence as to the rights and powers of a mother to and over the property of her deceased son, dying without issue and leaving a widow and sister, may, I think, be fairly summarized as follows:—(1) That the mother succeeds to the property of her son (at least, if he is separated from his brother or brothers in the sense of their having divided the property inherited from their father) as "*muktiár*," with power to dispose of it as against the widow and other female members of the family by act *inter vivos*, or by will, provided she

reserves sufficient or makes adequate provision for their maintenance. (2) As regards collaterals, and especially those nearly related (such brothers, nephews and cousins), there was considerble difference of opinion as to what her testamentary powers were, some thinking that she could not defeat the rights of brothers and cousins, and, indeed, could not will the property out of the family; whilst others, admitting it would be improper for her to do so, said that, if she did so dispose of it, her disposition would hold good. (3) All, however, were of opinion that, if the mother died intestate, the persons to succeed would not be her heirs, but those of her son, from whom she had derived the property. (4) All these witnesses admit that they never heard of a mother giving, selling, or otherwise disposing of the property inherited from her son, either by act *inter vivos*, or by will, except the witnesses Kalemali Sûrji and Hassanbhai Gûlam Hûsein, who gave some very unsatisfactory evidence respecting a will said to have been made by the mother of one Jûma Rahimtûla, of Zanzibar, whose property the mother had taken possession of.

Now this evidence, assuming it to be given in good faith, cannot, I think, be regarded as anything more than statements as to what they consider to be the tradition in the caste as to the custom under such and such circumstances. Jairaz Pirbhai, after stating that the mother is *muktiar*, and can leave it by will, says: "I have always understood this to be the practice; I was about 25 when my grandfather died, and 35 when my father died." But he adds: "I don't remember whether I ever heard anything from them as to the powers of the mother." Others say generally that "the custom has come down to them from their ancestors," or "that the practice has been coming down for a long time;" but it would be contrary to all judicial principles, as to the evidence by which a custom or usage can be established, to hold that such general statements, not only unsupported by a single authentic instance illustrtating the powers claimed for the mother, but accompanied by the admission that they never heard of such an exercise of power by mother, can afford any satisfactory proof of the custom alleged. And, indeed, it is obvious that, if such proof could be deemed sufficient, nothing would be easier than for an influential party in the estate to impose any law of inheritance on the minority it might think

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proper. The evidence, so far as the opinions of the witnesses as to the custom are concerned, would be sure to be all that could be desired under such circumstances, and facts would, *ex hypothesi*, be dispensed with.

Again, the evidence of the witnesses is so very contradictory on all matter, relating to the mother's powers, as regards other persons than the widow, as to throw great suspicion on there being any well-established custom as to her powers in relation to the widow.

Lastly, the powers claimed for her as against the widow are even greater than those claimed for a brother.

Upon the whole, I cannot but think that to hold this evidence to be sufficient, would virtually be to legislate; and, however advisable it may be that the law in matters of inheritance should be determined once for all, and that, too, perhaps according to the opinions and wishes of its leading members, it must be left to the *Jamàt* to take the proper proceedings for carrying that object into effect, as suggested by the Chief Justice in the ecclesiastical suit.

I must, therefore, find the second and third issues for the plaintiff.

As to the questions raised by the fourth and fifth issues, viz., the right of the defendant to succeed to the property as heiress-at-law of her brother Rahimbhai or Gorbái, it is sufficient to say that scarcely two witnesses were agreed on this subject or consistent with thereselves. Some, such as Kalemali Sûrji, Hassanbhai Gûlam Hûsein, claim joint rights for the widow and unmarried sister on the death of the mother, although the latter says that if the original deceased leave a widow and sister, the widow takes the property, and consults the sister. None, I think, assert an absolute right in the sister subject to maintaining the widow; whilst the most trustworthy witnesses, Jairaz Pirbhai, says that the "widow takes the property consulting the sister." And, again, in the case of a brother, widow and sister surviving the mother, he says: "The widow takes the rents, and consults them both."

It would be impossible, therefore, to hold that a custom has been satisfactorily proved for a sister to take in preference to or even jointly with the widow.

I must, therefore, find the further and fifth issues for the plaintiff, and declare that the plaintiff is entitled to the possession of the estate of the late Rahimbhai Allabhai.

The defendant obtained an order staying execution of the decree, and appealed. The appeal was heard by Westropp, C.J., and Green, J.

Pigot and *Inverarity* for the appellant.

The *Advocate General* (Honourable *J. Marriott*) and *Lang*, for the respondent, were not called upon to address the Court.

WESTROPP, C.J.—We affirm the decree, with costs of the appeal and of the application to stay execution.

We consider that in *Hirbai* v. *Gorbai*(1) we have gone quite as far as we can properly go in applying a less stringent rule with regard to the evidence required to prove a custom in the case of Khoja Mahomedans than we should do in the case of Hindus or Mahomedans proper.

We are of opinion that Sir. C. Sargent was right in requiring the defendant Rahimatbai, the sister of Rahimbhai Allubhai, to prove the affirmative of both of her propositions, viz.,(1) that, by special custom prevalent amongst the Khoja community, she as his sister, succeeded to his estate, moveable and immoveable, in preference to his widow Hirbai, the plaintiff; and,(2) if this were not so, that, by another special custom prevalent amongst Khojas, his mother Gorbai had power to dispose, by will, of that estate or any part thereof. Both of these propositions are contrary to Hindu law; and as it is now a settled rule that, in the absence of proof of a special custom to the contrary, Hindu law must regulate the succession to property amongst Khojas,(2) it is clear that the burden of proving such special customs lay upon the defendand Rahimatbai who put them forward.

Such a custom as that which is set up in the first of these propositions, viz., that the sister of a deceased childless and intestate Khoja should wholly exclude his widow from inheriting, and that

(1) 12 Bom. H. C. Rep. 294.

(2) 1 Bom. H. C. Rep. 71. 12 Bom. H. C. Rep. 281, 294.

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the latter should, at the utmost, be entitled to maintenance, being contrary a like to Mahomedan and to Hindu law, many instances of its observance would need to be proved before this Court could hold its existence to be satisfactorily established. It was, however, admitted by the defendant's counsel that she had not adduced in evidence a single instance in which this alleged custom had taken effect. There is, then, nothing before the Court but the *opinion* of certain members of the Khoja community upon the two points in question, and we consider that if we were to decide in accordance with that opinion, contrary as it is to Hindu law, we should be assuming legislative powers.

We should not be justified in adopting and enforcing as law the *opinion*, even if it were unanimous, of all the leading members of the Khoja community as to what the law *should be* upon the questions now before us. But it is to be observed that, among the seventeen witnesses who have given evidence in this case, there appears to be considerable diversity of opinion with respect to the relative rights of a widow and a sister. The Court, too, has not failed to observe that Rahimatbai has carefully omitted to call, as a witness on her behalf, Khaki Paddamsi, the *Kamaria* of her (the Shia) party. The reason of that is obvious. He was examined in the previous suit (*Hirbai* v. *Gorbai*(1)) in which she (Rahimatbai) was one of the parties, and in his evidence he said: "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;" that is to say, if there be a widow, she takes as heir in preference to the sister; the latter, if she be unmarried, being entitled to maintenance out of the estate of the deceased. This proposition is in complete accordance with Hindu law.

As to the second proposition, only two of the seventeen witnesses pretended to name an instance in which the mother of a deceased Khoja intestate, has affected to dispose of by will, or otherwise to alienate his estate. One of these witnesses was Hassanbhai Gulam Husein, *Mukhi* of the Shia (H. H. Aga Khan's) division of the Khoja community, and the other was Kalemali Surji, an

(1) 12 Bom. H. C. Rep. 294. See p. 312.

ex-Zanzibar *Mukhi*, who likewise belongs to the Shia division. That instance was said to have occurred at Zanzibar. Sir C. Sargent has, however, said that the evidence with regard to it was "very unsatisfactory," an opinion from which we find it impossible to differ. We think that when the evidence on behalf of Rahimatbai so completely failed to establish either of the special customs at variance with the Hindu law, Sir C. Sargent was perfectly right in declining to her any witnesses on behalf of Hirbai.

As to the argument that the decree of the Court below is defective, inasmuch as it has made no provision for the proper maintenance of Rahimatbai out of the estate of her deceased brother, it is sufficient to say that neither by her written statement, nor at the hearing of the cause, nor in her memorandum of appeal to this Court, has she made any claims to maintenance; nor has she given any evidence that she has not a sufficient maintenance out of her deceased husband's estate, or provided for her by this family. In the absence of any evidence to the contrary, maintenance amongst Khojas would be regarded as governed by Hindu law. A Hindu widow must, in the first instance, look for maintence to her hasband's property, or the property of his family if the family be undivided, and she can only fall back upon the property of her own relatives where no property of her husband is available.

The special customs set up here by the sister against the widow, appear to us to be wholly groundless: we, therefore, affirm the decree of the Court below, with costs. This case is an illustration of what we feared would be a consequence of the laxity of rule as to proof of custom amongst Khojas, which in *Hirbai* v. *Gorbai* (1) we reluctantly found ourselves compelled to tolerate. We feared that it would operate as an encouragement to set up false customs, and it certainly has had that effect here.

Appeal dismissed.

Attorneys for the appellant.—Messrs. *Janardhan and Ghandi bhoy.*

Attorneys for the defendant.—Messrs. *Macfarlane and Skipsey.*

[1] 12 Bom. H. C. Rep. 294. See pp. 321, 322.