ORIGINAL CIVIL.

Before Mr. Justice Scott.

1884
August 26.

ABDUL CADUR HA'JI MAHOMED (PLAINTIFF) *v.* C. A. TURNER, OFFICIAL ASSIGNEE, AND OTHERS (DEFENDANTS).*

Mahomedan law—Will—Bequest to persons not in existence at testator's death —Cutchi Memons, law of inheritance applicable to.

A Mahomedan testator who died in 1861 by his will left his property in equal fourth shares to his second and third sons (Abdul Vyed and Ebráhim), to the lawful son (if any) of his eldest son (Mahomed), and to his (the testator's) brother Allána. His eldest son (Mahomed) he disinherited. He directed that the property was not to be divided until Abdul Vyed and Ebráhim had attained the age of twenty, and as to the share of the lawful son of Mahomed, it was to be held in trust until such son should reach the age of twenty. At the time of the testator's death no son of Mahomed was living. Shortly after his death a son was born to Mahomed, but he lived only for a few months. The testator's brother Allána was appointed executor of the will. In 1878 Abdul Vyed and Ebráhim sued the executor Allána and his son Esmáil for an account and division of the property, and by a consent decree passed in 1881 three-fifths of the property were given to Abdul Vyed and Ebráhim, and the remaining two-fifths to Allána and Esmáil. The estate was duly divided in accordance with the decree, and the parties got possession of their respective shares. In February, 1884, another son was born to Mahomed, and in May, 1884, the infant brought this suit by his father and next friend claiming to be entitled, on his attaining the age of twenty, to one-third of the property received by Abdul Vyed and Ebráhim under the consent decree.

Held, that the plaintiff could not recover, not having been in existence at the date of the testator's death.

According to Mahomedan law as well as Hindu law, persons not in existence at the death of a testator are incapable of taking any bequest under his will.

Held, (following *Ashábái* v. *Háji Tyeb*(1)) that Cutchi Memons are governed by the Hindu law of inheritance.

RULE obtained by the plaintiff calling on the first defendant (the Official Assignee) to show cause why he should not be restrained from selling, disposing of, or alienating any portion of the estate of the testator Usman Vydina in his hands as Official Assignee until the final disposal of this suit, &c.

The suit was brought by the plaintiff, an infant of three months old, by his father and next friend, to recover a share of the estate of his grandfather, the testator Usman Vydina.

*Suit No. 164 of 1884.

(1) *Supra*, p. 115.

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Usman Vydina, a Cutchi Memon, died in 1861 possessed of considerable property. At his death he left, him surviving, three sons, *viz.*, Mahomed, Abdul Vyed, and Ebráhim; two daughters; two brothers, *viz.*, Allána (who had a son Esmáil) and Jáffir; and two widows.

By his will Usman Vydina appointed his brother Allána to be his executor, and he left all his property in equal fourth shares to (1) his brother Allána, (2) to his son Abdul Vyed, (3) to his son Ebráhim, (4) to the lawful son, if any, of his eldest son Mahomed. Mahomed himself was disinherited. The division of the property was not to take place until Abdul Vyed and Ebráhim attained the age of twenty years. As to the share of the lawful son of Mahomed, the testator directed that it should be held in trust until such son should attain the age of twenty, and, in case Mahomed died without male issue, the share was to be divided equally between Abdul Vyed and Ebráhim. At the date of the testator's death no son of Mahomed was living. A son was born shortly afterwards, but he only survived a few months.

In December, 1878, Abdul Vyed and Ebráhim filed a suit (No. 627 of 1878) against the executor Allána and his son Esmáil for an account and division of the property. The suit was referred to arbitration, and finally, in 1881, a consent decree was passed by which Abdul Vyed and Ebráhim were to be given three-fifths of the property, the remaining two-fifths being given to Allána and Esmáil. The estate was duly divided in accordance with this decree, and the parties obtained possession of their respective shares. In February, 1884, another son (the present plaintiff) was born to Mahomed. In March, 1884, Abdul Vyed and Ebráhim filed their petition in insolvency, and their estate vested in the first defendant as Official Assignee, who proceeded to realize the said estate.

In May, 1884, the plaintiff by his father and next friend (Mahomed) brought this suit against the Official Assignee as assignee of Abdul Vyed and Ebráhim and against the executor (Allána), and the widow of the testator, claiming under the will of the testator, as the lawful son of Mahomed, to be entitled on

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his attaining the age of twenty years, to one-third of the property received by Abdul Vyed and Ebráhim under the consent decree in Suit No. 627 of 1878.

On the 8th May a rule was obtained on behalf of the plaintiff, as above stated, to prevent the Official Assignee from disposing of any part of the property until the determination of this suit. The rule now came on for argument.

Inverarity for the Official Assignee showed cause.—The plaintiff is a Cutchi Memon. Whether, as such, he is governed by the Hindu law or by Mahomedan law, it is clear he has no right to sue. He was not in existence until long after the testator's death, having been born in February, 1884. As to whether Hindu law is applicable to Cutchi Memons, see *Ashábái* v. *Háji Tyeb Háji Rahimutulla*(1); *Háji Ismáil Háji Abdulá's Case*(2). If Mahomedan law applies, the plaintiff has no claim: see Macnaghten's Mahomedan Law, p. 242; *Ibid.*, 229. If Hindu law applies, the authority of the *Tagore Case*(3) is conclusive against him. The gift to the plaintiff by the will of the testator is void.

Farran (Acting Advocate General) in support of the rule.—*Háji Esmáil's Case*(2) does not apply here. The question there was one of succession. That case only decides that Cutchi Memons are to be regarded as Hindus in applying the Wills Act. Counsel cited *In re Thatcher's Trusts*(4).

SCOTT, J.—The facts, on which this motion depends, are set forth in the plaint, and they are not contested by the defendant. The question for decision is one purely of law. The learned Advocate General pressed me to grant the injunction asked, and leave the question to be settled at the hearing. Of course the Court at this stage avoids, as far as possible, the determination of any right, and abstains, as much as it can, from prejudging any question in the suit. But the action of the Court cannot be invoked, unless some *primâ-facie* case in support of the title asserted is shown. For this purpose I must examine the facts, which may be briefly stated as follows.

(1) *Supra*, p. 115.
(2) I.L. R., 6 Bom. 452.
(3) L. R. Ind. Ap., Sup. Vol., p. 47
(4) 26 Beav., 365.

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One Usman Vydina died in 1861, leaving considerable property and a going and lucrative business. He left three sons, Mahomed, Abdul Vyed, and Ebráhim; two daughters; two brothers, Allána (who had a son Esmáil) and Jáffir, and two widows. The deceased had made a will, and after certain testamentary dispositions, not necessary to mention, he left all his estate in equal fourth shares (1) to his executor, his brother Allána; (2) to his two sons, Abdul Vyed and Ebráhim; and (3) to the lawful son, if any, of his eldest son Mahomed—Mahomed himself being disinherited. He directed his business to be carried on by his brother and executor Allána, and further directed that his brother Allána's son, Esmáil, should, on his marriage, be admitted to one-fifth share of the profits. The division of the property and of the business profits he directed to be postponed until Abdul Vyed and Ebráhim had attained the age of twenty years, and as to the share of the lawful son of Mahomed he also directed it to be held in trust, if he came into being, until he reached the age of twenty, and, in case Mahomed died without male issue, the share was then to be divided equally by Abdul Vyed and Ebráhim.

In December, 1878, Abdul Vyed and Ebráhim filed a suit against Allána and his son Esmáil for an account and a division. The suit was referred to arbitration, and, finally, a consent decree was taken, by which the whole property was divided into fifths, and three-fifths given to Abdul Vyed and Ebráhim and two-fifths to Allána and his son. At that time no son of Mahomed was living. One had been born and had died. But in February, 1884, the present plaintiff was born. He now claims to be entitled to one-fourth of the estate of Usman, and, as his fourth share was taken under the consent decree by Vyed and Ebráhim, he now claims from them one-third of what they received.

On the 18th March, 1884, Vyed and Ebráhim filed their petition in insolvency, and their estate has vested in the Official Assignee, who is a party defendant in this suit. The Official Assignee is about to realize the insolvents' property in the ordinary course, and the plaintiff, therefore, asks for an injunction restraining the Official Assignee from selling, until the question of the plaintiff's title has been settled, as I have already

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stated. In order to entitle him to the interference of the Court he must make out a *primâ-facie* case in favour of the testator's power to accumulate income and tie up his estate in favour of persons unborn at the time of his (the testator's) death.

The parties belong to the caste known as the Cutchi Memons, who, like the Khojás, are Hindus by origin, converted to Mahomedanism some centuries ago. It is a well-known principle of law in India, that, when a Hindu is converted to Christianity or Mahomedanism, the conversion does not, of necessity, involve any change of the rights or relations of the convert in matters with which Christianity or Mahomedanism has no concern such as his rights and interests in, and his powers over, property—*Abraham* v. *Abraham*[1]. As regards the Khojás, it has been decided by this Court that in questions of inheritance they are governed by Hindu law in the absence of any proved special custom to the contrary—*Rahimatbái* v. *Hirbai*[2]. But the point is not so clearly settled as regards Cutchi Memons. Sir E. Perry in *Hirbái* v. *Sonábái*[3] treated the two castes on the same footing, and decided that, by their customary law, females were not entitled to a share of their father's property at his death, as they would have been according to Mahomedan law, but only to maintenance and marriage expenses. This ruling has been followed and strengthened in the case of Khojás until now they are completely governed by Hindu law in matters of inheritance. But in the case of Memons this Court has decided *In re Háji Ismáil Háji Abdula*[4] that Cutchi Memons are not Hindus within the meaning of section 2 of the Hindu Wills Act (XXI of 1870), and the late Chief Justice then added: "We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point, connected with succession, it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law." This *dictum* was not, however, necessary to the decision of the point before the Court; and it has not been followed in subsequent cases. In *Asháhái* v. *Háji Tyeb*[5]

(1) 9 *Moo. I. A.*, 195.
(2) I. L. R., 3 Bom., 34.
(3) Perry's Or. Ca., p. 110.
(4) I. L. R., 6 Bom., 452.
(5) *Supra*, p. 115.

the question was raised, and the present Chief Justice distinctly ruled that Memons as much as Khojás, although converts to Mahomedanism, still retain the Hindu law of inheritance. This ruling, I am informed, has been followed subsequently by Mr. Justice Bayley and Mr. Justice Birdwood, and my own opinion coincides with it.

But in presence of the conflict of authority it may be useful to point out in the present case, that, even if it were governed, not by Hindu but by Mahomedan law, the will would be invalid and inoperative as regards the present plaintiff, who was not in existence at the time of the death of the testator. Baillie in his Digest of Mahomedan Law says (p. 626): "The conditions of a valid bequest are that the testator is competent to make a transfer of the property, that the legatee is competent to receive it, and that the subject of the bequest is susceptible of being transferred." The second condition is obviously incapable of fulfilment by any one not in existence at the time of the testator's death; and the only relaxation of the rule mentioned by Baillie (p. 627) is the case of "a child in the womb if born within six months from the date of the bequest." In the code of Mahomedan law, according to the Hanefite Rite, prepared by a council of pundits from the university mosque of El Azhar at Cairo ten years ago, and which is now in use in Egypt, this rule is thus expressed:—"*Pour faire un testament il faut être libre, majeur, sain d'esprit, et jouissant de son libre arbitre. Il faut en outre que le légataire soit réellement vivant ou au moins conçu et la chose léguée susceptible d'etre transférée après la mort du testateur*" (*Droit Mussulman, s. 531*). Clearly, therefore, the case is excluded by Mahomedan law.

It remains to examine whether it is good according to Hindu law. The law is thus stated by Mr. Justice West in his work on Hindu Law: "As the law of wills follows the law of gifts, though with some differences, it will be understood that a grant in favour, partly, of persons not in existence at the time of execution so far fails with the estates dependent upon it"[1]. The point

(1) West. and Bühler, Vol. I, p. 182 (3rd ed.)

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has been directly decided by the highest Court in the *Tagore Case*(1), and the Privy Council lays down the rule that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and must, therefore, be either in fact, or in contemplation of law, in existence at the testator's death. The only persons who, though non-existent at the death, are by a legal fiction supposed to be in existence, are a son adopted after death by the testator's authority and a child in the womb. This rule, therefore, clearly excludes the plaintiff, who was not born till twenty-three years after the death of the testator.

Thus, no case is made out according to either Hindu or Mahomedan law. The learned Advocate General pointed out that his claim would be good according to English law. But the Privy Council has expressly stated that the nature and extent of the testamentary power must not be governed by any analogy to the law of England (*Nána Narian* v. *Huree Punth Bhaoo*(2)), and, I think, it would be a misfortune for the natives of India if testators were given the power to tie up their property for the benefit of persons unborn, to the exclusion of those who have the highest and most natural claim.

Rule discharged with costs; undertaking on part of Official Assignee not to sell during appeal if appeal is made.

(1) L. R. Ind. Ap., Sup. Vol., p. 47. (2) 9 Moo. Ind. Ap., 96.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Nánábhai Haridás.

1884
December 22.

In re THE PETITION OF MUSA' ASMAL AND OTHERS.*

Jurisdiction—Sessions Judge—Joint Sessions Judge—Criminal Procedure Codes Act X of 1872, *Sec.* 17, *and Act X of* 1882, *Secs.* 9 *and* 195, *and Ch. XXXII—Discharge by a Magistrate—Power of Joint Sessions Judge to direct committal.*

A Joint Sessions Judge cannot exercise the powers of the Sessions Judge under Chapter XXXII of the Criminal Procedure Code (X of 1882).

Accordingly, where a Magistrate had discharged certain accused persons, and the Joint Sessions Judge had subsequently, on the application of the complainant

* Criminal Review Petition 251 of 1884.