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ORIGINAL CIVIL.

Before Mr. Justice Scott.

MAHOMED SIDICK, PLAINTIFF, *v.* HÁJI AHMED AND OTHERS,* DEFENDANTS ; AND HÁJI ABDULÁ HÁJI ABDSATAR AND OTHERS, PLAINTIFFS, *v.* HÁJI AHMED AND OTHERS,† DEFENDANTS.

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August.

Cutchi Memons, law of inheritance applicable to—Converts to Mahomedanism, law applicable to—Custom—Ancestral property—Profits in business where capital is ancestral property—Profits earned by loans and by commissions—Will of Cutchi Memon.

(1) Wills made by members of the Cutchi-Memon community, whereby the testators disposed of property which was proved to be ancestral, held to be invalid.

(2) The general presumption, arising from the intimate connection between law and religion in the Mahomedan faith, is that the Mahomedan law governs converts from the Hindu religion to Mahomedanism. But a well-established custom in the case of such converts to follow their old Hindu law of inheritance would override that general presumption, and a usage establishing a special rule of inheritance as regards a special kind of property would be given the force of law, even though it be at variance with both Hindu and Mahomedan laws.

(3) Cutchi Memons are governed by the Hindu law of inheritance in the absence of proof of special custom.

(4) Although the Mahomedan law, pure and simple, is part of the Mahomedan religion, it does not of necessity bind all who embrace the Mahomedan creed.

* Suit No. 304 of 1883.

† Suit No. 349 of 1884.

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(5) A custom, alleged to exist among Cutchi Memons, of recognizing no difference between ancestral and self-acquired property, *held* not proved.

(6) Four brothers of the Cutchi-Memon community carried on trade with capital inherited from their father. Large profits were made in the course of business. It was alleged that some of the profits were made by means of borrowed capital, and some arose out of a commission business in which the capital of the firm was not used at all; and it was contended that such profits could not be considered as ancestral funds. It appeared, however, that the entire business was carried on by the same firm. There were common books, common expenses, and a common staff. The borrowed money was put into the general cash with the original capital,—

Held, that the whole property was ancestral. Augmentations, which blend, as they accrue, with the original estate, partake of the character of that estate. Moreover, the loans in question and the extension of business, to which they led, might have produced heavy losses instead of great profits, and the family property would have been liable to debts so incurred. The family property, being thus subject to liabilities arising from the loans, was entitled to participate in any benefits resulting from them.

PRIOR to the *Samvat* year 1901 (A.D. 1844-45) one Háji Abdulá Háji Nur Mahomed carried on business in Cutch, Bombay, and elsewhere in partnership with his five brothers under the name of Háji Jackería Nur Mahomed. In that year the firm was dissolved, and the share of Háji Abdulá Nur Mahomed was ascertained to amount to Rs. 1,84,781-3-29. On the 26th July, 1845, Háji Abdulá Háji Nur Mahomed died intestate, leaving him surviving his widow and four sons, *viz.*, Háji Ismáil, Háji Abdsatar, Háji Ahmed and Háji Hassan. These four sons commenced to trade in partnership in the name of their father, Háji Abdulá Nur Mahomed, and the said sum of Rs. 1,84,781-3-29 was brought into the new firm as its capital, each of the four partners being credited in the partnership books with one-fourth part, *viz.*, Rs. 46,180-1-82, as his share of the capital.

On the 10th June, 1878, one of the brothers, Háji Abdsatar died, having made his will dated the 27th July, 1876, and probate thereof was obtained by two of the surviving brothers, *viz.*, Háji Ahmed and Háji Hassan.

The following are the material clauses of the said will:—

1st (clause) is as follows:—"My respected father, Set Háji Abdulá Nur Mahomed, died on the Mahomedan date the 20th of *Rájáb* in the year 1261, (26th July, 1845), and my eldest brother, Háji Ismáil, the son of Abdulá, took

out his 'power' (probate) on the 28th day of April in the English year 1849, and he collected all our paternal property. The same amounted to Rs. 1,84,721-3-7, namely, rupees one lách eighty-four thousand seven hundred and twenty-one, three quarters and seven cents. I and my three brothers, namely, Bhái Háji Ismáil, the son of Háji Abdulá, Háji Ahmed, the son of Háji Abdulá, and Háji Hassan the son of Háji Abdulá, having divided the same into four shares, credited again the amount of each share (which came to) Rs. 46,180-1-20½, namely, forty-six thousand one hundred and eighty, one quarter and twenty and a half cents, to each person. And in the trade and business which was carried on from that day up to the *Samvat* year 1918 (A.D. 1861-62) in all five shares were with the free will of us all brothers fixed. And my one share was kept therein. After that (that is) from *Samvat* 1919 (A.D. 1862-63) to this day shares five and a quarter in all were fixed with the free will of us all brothers: my share kept therein is one and a quarter. According to which proportion the net amount found due in respect of my share up to 30th of *Aso Vad* of *Samvat* 1929 (21st October, 1873,) after deducting all the expenses is Rs. 3,80,414-3-10, namely, rupees three láchs eighty thousand four hundred and fourteen, three quarters and ten cents. And the same are credited in the books of our firm. And my said share continues again up to this day. And with regard to the five (few) rupees which I have earned, I have earned the same in all the trade and business. And besides I have with the free will and pleasure of all the brothers purchased here and at outstations moveable and immoveable properties. Of the same some houses, *fatimaries* (country crafts), *padows* and vessels are in my name. The same are not my property. All these are the joint property of the firm. And all those are credited in the books of the firm. And all the shares relating to the interest and concern therein are in proportion to the shares in the business. And those are duly entered in the books of our firm."

2nd (clause) is as follows:—"I have three sons; the eldest of them is Bhái Háji Abdulá *alias* Abá Meyah, and the second is Bhái Ján Mahomed, and the third is Bhái Mahomed Kássam; and (there are) three daughters (namely) Ben Halimábái, Ben Yemnábái and Ben Mariambái. In this manner there are by the blessing of God six children now alive. Besides (these) there is truly my wife Khátábái who is alive now."

4th....."By virtue of this testamentary writing I have constituted and appointed (my) said three brothers my trustees and executors after my decease. They after my decease shall duly respect this my testamentary writing, and act according thereto."

5th (clause).—"The executors appointed in this will shall after my decease duly admit my son Bhái Abdulá as a partner in their own firm."

6th (clause).—"The above-mentioned trustees shall keep all my property in their possession to the account of the firm. And in the same manner in which the business has been carried on, they shall continue it in partnership, and they shall make outlays therefrom on my account according to what is mentioned below."

7th (clause) is as follows:—"My wife Khátábái during her life-time shall be kept (maintained) with her children in our family with respectability and honour in

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the same way as I have been living now. And with regard to my children, who are now infants, the above-mentioned trustees and my heir, Bhái Abdulá, shall take good care of them, and they shall take good care of those people, and they shall give good education to my sons, and shall educate them in our religion, and shall teach them to read and write Gujaráti and English, and shall duly give them education of a high order."

11th (clause) is as follows :—"After my decease the owners of all my wealth, (*i.e.*, moveable and immoveable property, after deducting the above-mentioned legacies) are my above-mentioned three sons (namely), Bhái Abdulá and Bhái Ján Mahomed and Bhái Mahomed Kássam. And as regards whatever there is belonging to me to the same, these three brothers have a right. And after deducting the above-mentioned legacies from all my wealth and property, with regard to the wealth and property that may remain out of the same, my eldest son, Bhái Abdulá, shall take one and a quarter share, and each of my other sons, (namely) Bhái Ján Mahomed and Bhái Mahomed Kássam, shall take one share."

All the children (*viz.*, three sons and three daughters) mentioned in clause 2 of the will and his wife Khátábái survived the testator, Háji Abdsatar. His three sons and his widow were the plaintiffs in the second suit No. 349 of 1884.

On the 17th June, 1878, Háji Ismáil died, and his will, dated 19th February, 1873, was also proved by Háji Ahmed and Háji Hassan. The material clauses of this will were similar to those of Háji Abdsatar's will above set forth, except as to dates and amounts. All the children of Háji Ismáil were alive at the date of his death, except one son, *viz.*, Háji Abdul Rahim, who had died on the 20th July, 1877. The said Abdul Rahim left a widow and three sons, *viz.*, Mahomed Sidick, Ayub, an infant at date of suit, and Mahomed Hossein, who died on 9th June, 1880, leaving a widow, but no issue. The said Mahomed Sidick was the plaintiff in the first of the present suits (304 of 1883).

The two surviving brothers, Háji Ahmed and Háji Hassan, continued to carry on the business of the firm of Háji Abdulá Nur Mahomed as partners; and they retained in the firm and employed in trade the shares of their two deceased brothers, Háji Abdsatar and Háji Ismáil, and realized large profits.

In the first of these present suits, *viz.*, Suit No. 304 of 1883, Mahomed Sidick, the son of the said Abdul Rahim and grandson of the said Háji Ismáil, was the plaintiff. In the second suit (*viz.*, Suit No. 349 of 1884), the three sons and the widow of Háji Abdsatar were the plaintiffs. The principal defendants in

both suits were the two surviving brothers, Háji Ahmed and Háji Hassan, as executors and trustees of the will of Háji Abdsatar and of the will of Háji Ismail.

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The plaintiffs in both the suits alleged that the whole of the properties which the wills of the two testators, Háji Abdsatar and Háji Ismail, purported to dispose of, were ancestral property, or the increment of ancestral property, and contended that the said wills ought, therefore, to be set aside as inoperative and void. They also submitted, in effect, in their respective plaints that, according to the rules which govern succession among the Cutchi Memons, the male children and grandchildren of the two testators became entitled to the whole of their shares and interests in the firm of Háji Abdulá Nur Mahomed at the time of their respective deaths, subject to the maintenance of their widows, and had the same interest in the said firm and its assets and property that the testators had in their life-time.

The defendants, Háji Ahmed and Háji Hassan, in their written statements in both the suits submitted to the judgment of the Court (*inter alia*) (1) whether the wills of the two testators were inoperative, either wholly or in part; (2) whether, according to the laws and customs of the Cutchi Memons, there was any distinction as regards modes of descent and powers of alienation between property which had been received by a Cutchi Memon from his father or other ancestors, and property acquired by himself; and (3) whether the property affected to be disposed of by the said wills was ancestral property. They also submitted to the Court whether it was correct, as alleged by the plaintiff, Mahomed Sidick, to say that the two testators and their respective families lived together as members of joint and undivided Hindu families.

At the hearing, issues were raised as to whether the wills were valid; whether the property, disposed of by the wills, was ancestral, and whether, according to the usages and customs of Cutchi Memons, there was any distinction, as regards modes of descent and powers of alienation, between property received by a Cutchi Memon from his father and other ancestors and property acquired by himself, and whether by such usages and customs both classes

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of property could not be devised and bequeathed by a Cutchi Memon.

Starling (*Jardine* and *Vicáji* with him) for the plaintiffs.—

We say the wills are invalid. Their invalidity depends on two questions: 1, whether the property comprised in them was ancestral; and, 2, whether the Hindu law of ancestral property governs Cutchi Memons. The admissions of the testators in their wills, the account-books of the two firms, and the proceedings in obtaining letters of administration to Háji Abdulá's estate, show that the *corpus* of the property in the hands of the testators at their death originally belonged to Háji Abdulá. The new firm was a sort of family-partnership between his four sons, who traded with funds inherited from their father, in which all his male children were equally interested, subject to the right of maintenance of females. The law applicable to Cutchi Memons is Hindu law, unless special custom is proved. In this respect Cutchi Memons have since 1845 always stood on the same footing as Khojás in this Presidency. See *The Khojás and Memons' case*⁽¹⁾; *Ashábái v. Háji Tyeb Háji Rahintulla*⁽²⁾; *Shivji Hásam v. Datu Mávji Khojá*⁽³⁾; *Hirbái v. Gorbái*⁽⁴⁾; and *Rahimatbái v. Hirbái*⁽⁵⁾. In the second case, the peculiar doctrine of *stridhan* was applied to property held by Cutchi Memons. All the general incidents to property under Hindu law attach to the property of a Cutchi Memon; and, consequently, in the absence of any special custom to the contrary, it should be held that the testators in this case were incompetent to devise their ancestral property.

Telang (with *Latham*, Advocate General, and *Macpherson*) on the same side.—The correct way of stating the law is that Cutchi Memons being Hindus in origin, Hindu law applies, unless a change of law is proved. This is a case of succession, because what once was a single right has subsequently become a joint right. The question as to the applicability of Hindu law is not now open. *Abdul Cádár v. Turner*⁽⁶⁾ follows *Ashábái's case*.⁽²⁾

Inverarity (with *Lang*) for some of the defendants.—The great feature of Hindu law is its doctrine of ancestral property—pro-

(1) Perry's Or. Cases, 110.

(2) I. L. R., 9 Bom., 115.

(3) 12 Bom. H. C. Rep., 281, A. C. J.

(4) 12 Bom. H. C. Rep., 295.

(5) I. L. R., 3 Bom., 34.

(6) I. L. R., 9 Bom., 158.

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perty in which sons take a right by birth. If, therefore, there be no ancestral property in the Hindu sense of the word, the wills will be valid; and, even if there be ancestral property in the same sense, the wills will operate to the extent of the self-acquired property. The practice of taking adult sons to the exclusion of minors as sub-partners of their fathers in the two firms is inconsistent with the property being ancestral according to Hindu law. The inequality of shares, especially in the old firm, of the different partners shows that it was not a family-firm or family-business. Cutchi Memons being Mahomedans, the *onus* lies on the plaintiffs to prove that sons acquire among them a right by birth in their father's property. They must show that they have adopted Hindu law as to ancestral property. The evidence proves that ancestral property in the sense of Hindu law is unknown among Cutchi Memons as distinguished from other kinds of property. *The Khojás and Memons' case*⁽¹⁾ did not go to the Privy Council. *Ashábdí's case*⁽²⁾ simply decides that, in questions of inheritance and succession, Hindu law governs Cutchi Memons. A son's right by birth in his father's estate is not a question of succession or inheritance; and if it be one, the Mahomedan law of inheritance applies, as it is a part of the divine law, and a convert to Mahomedanism accepts it as such. According to *Abraham v. Abraham*⁽³⁾, any Mahomedan convert from Hinduism can choose to be guided by Mahomedan law. Immediately on his conversion the Mahomedan law becomes obligatory upon him. The evidence in this case shows that in all their practices Cutchi Memons are orthodox Mahomedans. If unmodified Mahomedan law is to be applied, a Cutchi Memon cannot make a will except as to one-third of his property. It is clear that the power to make wills is controlled by one limitation only, *viz*, that sons cannot be disinherited. The Cutchi-Memnon practice as to wills far more approaches Mahomedan than Hindu law.

[SCOTT, J., referred to a precedent cited in McNaghten's Principles of Mahomedan Law, p. 114, as to the law applicable to Hindu converts before and after their conversion.]

(1) Perry's Or. Cases, 110.

(2) I. L. R., 9 Bom., 115.

(3) 9 Moore's Ind. Ap., 195.

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It is quite against the idea of ancestral property to appoint executors ; but, since 1841, Cutchi Memons have made wills appointing executors, and such power has never been questioned. The evidence shows that wills are made among Cutchi Memons for the purpose of vesting property in the executors, and executors are appointed to manage the property of infants during their minority.

Starling in reply.—*Abraham v. Abraham*⁽¹⁾ lays down the law as to Hindu parcenership. Apostacy does not necessarily imply change of law. If a Hindu joint family was converted to Christianity, it would still be governed by Hindu law. Hence, when entire sections of Lohánás in Cutch, from whom Cutchi Memons are descended, became Mahomedans there was nothing to prevent them from retaining Lohána—i.e. Hindu—customs. The emperors of Delhi and the amirs of Sind allowed Mahomedan converts among their subjects to retain their old customs. These converts continued to be undivided in family. The present contention of the defendants for the application of Mahomedan law is due to excess of religious zeal now prevailing in the community. The Cutchi Memons on their conversion simply adopted ceremonial Mahomedan law, and took no steps to reverse the decision in *The Khojás and Memons'* case⁽²⁾. Wills have grown up in the community by contact with Europeans. The *Tagore* case⁽³⁾ puts gifts by will on the same footing as gifts *inter vivos*. There has not been a single instance of a will produced in which the testator disinherited his sons and grandsons. Unreported cases by this Court show that Hindu law governs the Cutchi-Memon community—*Háji Adam v. Háji Ismáíl Habib*⁽⁴⁾; *Háji Jakeria v. Háji Kássam*⁽⁵⁾; *Fátmábái v. Háji Taib*⁽⁶⁾; *In the matter of the Estate of Háji Tár Mahamad*⁽⁷⁾; *Háji Abdulá Dosúl v. Ibráhim Kádar*⁽⁸⁾.

SCOTT, J.—I have two suits before me to decide. The first suit (304 of 1883) is brought by the grandson and other representatives of Háji Ismáíl Háji Abdulá, and arises out of his will; and the second suit (349 of 1884) is brought by the eldest son, Abdulá,

(1) 9 Moore's Ind. Ap., 195.

(5) Suit No. 211 of 1876.

(2) Perry's Or. Cases, 110.

(6) Suit No. 369 of 1882.

(3) L. R., p. 47, Sup, Vol. Ind. Ap.

(7) January 1876.

(4) Suit No. 297 of 1876.

(8) 15th April 1875.

and the other representatives of Háji Abdsatar Háji Abdulá, and arises out of his will.

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Háji Ismáil and Háji Abdsatar were sons of one Háji Abdulá Nur Mahomed, and the two first defendants in both cases, Háji Hassan and Háji Ahmed, are sons of the same person. They are the executors of the wills of their brothers, Ismáil and Abdsatar, who died, within a few days of each other, in June 1876. All the members of the families of the two testators are made parties; but Háji Hassan and Háji Ahmed, the surviving brothers and executors, are the real defendants. The property disposed of by the wills consists entirely of profits made in a business started by the four brothers, Ismáil, Abdsatar, Hassan and Ahmed, in 1845, under the partnership name of Háji Abdulá Nur Mahomed, their father. It is now contended that the wills deal with joint family property, and are consequently invalid, and ought to be set aside; that an account of the partnership should be taken; that the estates of the two deceased brothers, respectively, should be divided amongst the two families in accordance with the rules of Hindu law; and that a receiver of the partnership property should be appointed pending the account before the Commissioner. Although the two cases were not heard actually as one, it was agreed that most of the evidence in the first, which dealt with the will of Háji Ismáil, should be admitted as evidence in the second, and it was understood that I should give only one judgment. The questions raised are numerous, and I will deal with them *seriatim*.

First comes the general question—the parties are Cutchi Memons—what is the law applicable to that community with respect to inheritance? Is it Hindu law? Is it Mahomedan law? Or have the Cutchi Memons created for themselves by their conduct, since their conversion, a special customary law which differs from Hindu law, inasmuch as it recognizes no distinction between ancestral and self-acquired property; and from the Mahomedan law, inasmuch as it gives a man unlimited power of disposing of all his property by will? Their ancestors were Hindus, but several hundred years ago they adopted Mahomedanism. The intimate connection between law and religion

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in the Mahomedan faith justifies the presumption that converts to that faith, apart from any evidence of customs which the community may since their conversion have voluntarily imposed upon themselves, would be governed by Mahomedan law. This presumption has received the sanction of the Privy Council,⁽¹⁾ where their Lordships say: "But the written law of India had prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to Mahomedans;" and in the judgment delivered by Lord Kingsdown in *Abraham v. Abraham*,⁽²⁾ it is said that "this rule must be understood to refer to Hindus and Mahomedans, not by birth merely, but by religion also." But at the same time it is quite clear that, where the natives of India are concerned, usage must override the presumptions of general law in matters of inheritance amongst converts to a new religion, just as much as in other matters. As their Lordships say in the leading case of *Abraham v. Abraham*,⁽²⁾ "it must be gathered from the course of conduct of the convert by what law he intends to be governed." There are abundant instances in this country of customs modifying the ordinary law of succession—*Soorendronath Roy v. Musst. Heeramonnee Burmoneah*⁽³⁾ and *Neelkisto Deb Burmondo v. Beerchunder Thakor*.⁽⁴⁾ The principles applicable to this case, therefore, may be stated as follows:—The general presumption is that the Mahomedan law would govern converts from the Hindu religion to Mahomedanism. But a well-established custom in the case of such converts to follow their old Hindu law of inheritance would override that general presumption. And a usage establishing a special rule of inheritance as regards a special kind of property would be given the force of law even though it be at variance with both Hindu and Mahomedan law. Now let us apply these propositions to the present case.

First, have the Cutchi Memons by their conduct shown that they retained the Hindu law of inheritance as the customary law of their community? That question has been decided in the affirma-

(1) 10 Moore's Ind. Ap., 537.

(2) 9 Moore's Ind. Ap. at p. 243.

(3) 12 Moore's Ind. Ap. 81.

(4) 12 Moore's Ind. Ap. 523.

tive by a series of decisions in this Court. Cutchi Memons appeared as litigants in 1847—*The Khojás and Memons' case*.⁽¹⁾ It was there held by Sir Erskine Perry that, as regards Cutchi-Memon females, the Hindu order of succession applies, although it is opposed by that prescribed by the Korán. The learned Judge there (see page 125) refers to an earlier case in the following terms:—"And in a case in this Presidency in 2 Borr., 33, the text of the Korán, in a case of inheritance, was also set aside in favour of a different prevailing custom, on the ground that during the previous Bráhmín Government the Mahomedan law had fallen into disuse, and had given way to the custom of the country." Sir E. Perry's decision was not appealed against, and it stood alone in the reports for many years. Of course it directly decides only the one point as to the inheritance of females, but it also affirms the important principle that "customs conflicting with the express text of the Korán can be valid amongst a Mahomedan sect." This principle—that although the Mahomedan law, pure and simple, as found in the Korán is part of the Mahomedan religion, it does not of necessity bind all who embrace that creed—is of great importance. The opposite doctrine makes Mahomedan dissent or Protestantism impossible. It also closes the door on that social progress which in other communities has gradually introduced a system of civil law for secular matters, and made social justice and its sanctions independent of religion. For over thirty years the community wisely abstained from litigation. But although the reports contain no decisions between 1847 and 1881 concerning Cutchi Memons, there have been many concerning a similar Mahomedan sect, the Khojás, concerning whom in *Shivji Hásum v. Datu Mávjí Khojá*⁽²⁾ the late Chief Justice and Mr. Justice West held it to be settled law that, "in the absence of settled evidence to the contrary, the Hindu law is applicable to matters relating to property, inheritance and succession among Khojá Mahomedans." As regards the Cutchi Memons themselves, there is considerable evidence of another character, which shows it to have been their practice also to follow Hindu law as their own law of inheritance. In almost every application for letters of

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(1) Perry's Or. Cas., p. 110.

(2) 12 Bom. H. C. Rep., p. 281, A. C. J.

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administration, and in the carrying out of almost every will made by the community during that time, the Hindu law has been followed. As early as 1845 this very family, whose members are now litigating, divided the family property, amounting to nearly three lakhs of rupees, according to Hindu rules. In a series of exhibits put in by Mr. Starling, Hindu law is evidently considered the governing law of the sect. Thus out of sixty Cutchi-Memon wills on the list furnished by the Ecclesiastical Registrar, in only one, (No. 38), the principles of Mahomedan law seems to have guided the Registrar. That case did not go to the Court; but will No. 8 was submitted to the Court, and Perry, C. J., decided (14th January, 1852,) "that the widow of a separated Memon is entitled to the property." Again in 1877 a case came before Mr. Justice Green, where the question was raised in an affidavit, whether Memons were governed by Mahomedan law. The result of the case shows that they were treated as subject to the rules of Hindu law, and the question of the applicability of Mahomedan law does not seem to have been argued. The next case (in 1881) concerning Cutchi Memons was before the late and the present Chief Justices—*In re Háji Ismáil Háji Abdulá*⁽¹⁾—when it was decided that Cutchi Memons were not, at any rate, Hindus in the sense required by the Hindu Wills Act. That case was followed by a decision in the same year, but only recently reported—*Ashábái v. Háji Tyeb Háji Rahimtullá*⁽²⁾—where the question of the law of inheritance was expressly raised before the present Chief Justice, and Cutchi Memons were held to be bound by Hindu law. The Chief Justice says: "No sufficient reason exists for placing Memons on any different footing from Khojás as regards the application of the Hindu law of inheritance in the absence of the proof of any special custom." He adds: "that the argument used against Khojás, that in all non-contentious matters the Hindu law has been applied to their estates, applies with greater force to Memons, as the ecclesiastical records of the Court are even richer in instances of the application of that law to Memon estates." The Chief Justice has been subsequently followed by Mr. Justice Bayley and Mr. Justice Birdwood. I was pressed

(1) I. L. R., 6 Bom., 452.

(2) I. L. R., 9 Bom., 115.

to disregard these decisions as not being binding upon me. But the principle of uniformity of decisions in co-ordinate Courts on the same point is very important. An uncertain jurisprudence only encourages litigation. I ought, therefore, to follow this current of authority, unless I entertain a very strong opinion the other way. But I fully concur with these judgments. I have only re-argued the question, because the community showed in the course of this case that they are now somewhat desirous of changing the law of inheritance which has hitherto governed them. The general principle is, therefore, that Cutchi Memons are governed by the Hindu law of inheritance in the absence of proof of special custom.

The next question is, whether Cutchi Memons by a special usage recognize no difference in the power of alienation between ancestral and self-acquired property. I think the alleged custom to that effect was not proved. The evidence was contradictory: no satisfactory instances were given. The custom was not shown to be uniform, or continuous, or accepted by the community. Indeed, I doubt whether it was proved to have any existence at all, save in the minds of those who set it up for the purposes of the present suit. But, although the custom is not proved, I think the evidence is useful as confirmatory of the decisions of this Court as to the law which has governed the community up to this date. The first defendant himself said that so long as there are sons, nobody else will get the property; and he admitted in cross-examination that Hindu law had hitherto been applied in matters of inheritance. He also said that at a recent meeting of the community a petition had been drawn up and forwarded to the Governor-General, praying that the Mahomedan law might in future be employed. Many witnesses confirmed this evidence. The position of the community was thus described by Rahimtula Joonas, also one of the defendant's witnesses, who gave his evidence very fairly:—"Our law of inheritance has been Hindu. We want to change it. We have had Hindu law since Sir E. Perry's decision." Hájí Kassam Abdul Sukur, a *settia* of the community, and other witnesses of the plaintiff confirm this application of the Hindu law. In cross-examination the *settia* was most emphatic.

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He said: "Sir Erskine Perry made it Hindu law, Hindu law, Hindu law." Perhaps the most striking example of the law hitherto followed was given by a wealthy young Cutchi Memon, Ibraím Háji Jakariá, in describing his own case. His father died in the grandfather's lifetime, and the witness, the grandson, inherited his grandfather's property, which was considerable. The grandmother and stepmother live with him, and he maintains them, but he has had the possession and control of the property in his own hands since it came to him, and a large sum of money due to the grandfather was paid to him, and he alone signed the receipt. It would take up too much space to analyse here the whole of the evidence on custom, but I have gone through it very carefully and the exhibits connected with it, and I think the only fair inference to be drawn is that the Hindu rules of inheritance have been hitherto applied. But it is also pretty clear that a large and influential section of the community, in fact the great majority, wish to follow in future the law of their religion. A good case is thus made out for the consideration of the Legislature, but no case whatever for the interference of a Court of law. Vested rights, accruing at birth, have been acquired by sons under the law hitherto governing the community, and it would not be just to interfere with those rights on account of this recent change of opinion. I use the word "recent" advisedly, because the community hitherto by their practice have acquiesced in the application of Hindu law. If they had seriously doubted its applicability, it was open to them either to appeal against Sir Erskine Perry's decision, or out of their wealth they could easily have subscribed funds to raise the question again in the High Court, and carry it to the highest tribunal for final decision. Instead of doing so when it appeared in a concrete form before the present Chief Justice in 1882 they quietly accepted his decision.

The next question is the validity of the wills. Both the wills give unequal shares to the sons, and their validity, therefore, very much depends on the further question whether the property was ancestral or self-acquired. I will deal with this first.

Háji Abdulá Nur Mahomed, the father of the two testators, was a partner in the previous family-firm of six brothers, the

firm being known by the name of the eldest brother, Háji Jackeriá Nur Mahomed. That firm was dissolved in 1845. Háji Abdulá Nur Mahomed received as his share (about) 1,84,000 rupees, and died the same year. His four sons—that is, the two testators and the first and second defendants—started a new firm under the father's name. Both testators in their wills describe in identical terms what after the father's death Háji Ismáil says :—

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“My father, Set Háji Abdulá Nur Mahomed, died on the 20th day of *Rájab* in the Mahomedan year 1261, (26th July 1845), and having obtained his power on the 28th of April in the English year 1849, *I collected all my paternal property* and (the amount) thereof, Rs. 1,84,721 $\frac{3}{4}$ -7, namely, rupees one lách eighty-four thousand seven hundred and twenty-one and three quarters and seven cents, having again entered to credit in the proportion of four shares, (the amount) of each share being Rs. 46,180 $\frac{1}{4}$ -20 $\frac{1}{2}$, namely, rupees forty-six thousand one hundred and eighty and a quarter and twenty and a half cents, and having joined with my brothers Háji Abdsatar, the son of Háji Abdulá, Háji Ahmed, the son of Háji Abdulá, and Háji Hassan, the son of Háji Abdulá, these three brothers, I commenced carrying on a partnership business in the name of our father, Set Háji Abdulá Nur Mahomed, and the said rupees were entered to credit in the books of our firm in the proportion of four equal shares of (us) four brothers.”

Thus each brother received the fourth share, Rs. 46,000, of the father's property. This clearly was ancestral property in respect of his sons of each of the brothers. It was one-fourth part of the paternal property ; and although it may have been self-acquired by the grandfather, still in the hands of the sons it is ancestral estate as regards their sons. Thus the whole of the capital with which the four brothers started business was property inherited from their father, and, so far as the two testators are concerned, they have carried on no other business, and all they possessed at their death came from the one business started by the four brothers. How much of the property now in dispute must be considered ancestral? The general rule is,

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that any acquisition, in order to be self-acquired, must have been an original and independent one. The essence of the exclusive title consists in the acquisition having been made by the sole agency of the individual without employing what belongs in common to the family. It is also an admitted principle that the ownership of father and son is coequal in the acquisition of the grandfather; and if the common property has been augmented, still there must be equal division of the accretion as well as of the original property (see L. R., 6 I. A., 233). Now in this case the trade was, no doubt, started on capital furnished by the joint stock, and there is no doubt that that capital was a substantial amount. But Mr. Inverarity, whilst admitting that the common stock, however improved and augmented, is to be equally divided, maintained that a great portion of these gains did not come from this common stock at all; and that it was not the nucleus out of which all the money was made. Some of the profit, he said, was made by means of borrowed capital, some again was made by a commission business where the firm's capital was not used at all, and he maintained that these portions of the profit could not be held to have been produced by ancestral funds. Let us examine this contention.

In the first place it has been held that "when the self-acquired property is so held that the profits blend with those of the ancestral property, the whole is to be deemed a common stock" — *Govroochurn Doss v. Goluckmoney Dossee*⁽¹⁾; *Lakshman Mâyárám v. Jamnábái*.⁽²⁾ Now in this case the business was all one. There was the same staff, the same expenses, and the same books. All these borrowed moneys were put into the general cash with the original capital. No distinction was made between the two sources in the books, all the operations were recorded indiscriminately, and it would be almost impossible to say with any degree of accuracy what profits were due to the loans and what were due to the original capital. Similarly, though in a less degree, this argument applies to the money made on commission, as undoubtedly the credit of the firm increased commission business, and the whole staff was utilized to carry it out. Apart from the principle that augmentations which blend, as they

(1) *Fulton's Rep.*, 166.

(2) *I. L. R.*, 6 Bom., 225.

accrue, with the original estate partake of the character of that estate, there is a still stronger ground for considering these gains to be ancestral property. These loans, and the extension of business to which they led, might have produced heavy losses instead of great profits, and there is no doubt that the family property would have been liable to debts so incurred. It certainly cannot be admitted that whilst the family property was subject to the liabilities of this borrowing, it had no right to participate in the benefit.

But before I hold that the whole of the property possessed by the two testators at their death is ancestral, I have another point to settle. It was contended that they had shares in the old firm of Hájí Jackeríá Nur Mahomed, and that the profit arising from those shares was self-acquired. There is a considerable body of evidence on this point. I think, on the whole, the balance of probability is in favour of there having been no independent share. The document chiefly relied upon by the defendants, and alleged to be a copy of the old firm's *rojvalí*, was shown, by the evidence of the first defendant himself, not to be a faithful copy of the lost original, nor was it a book kept in the ordinary course of business by a person who is dead, nor again was it a document the contents of which are against the interests of the person who wrote it. I ought not, therefore, to use this document, although I have admitted it; but, whether I use it or not, I think the evidence on the other side is conclusive.

Both the wills show that the property derived from the old firm was divided equally amongst the four brothers, and invested equally in their names in the new adventure. The first partnership agreement says: "We received the money from revered Shriji in equal shares;" and the accounts of the brothers also show that they divided the profits on the basis of equality. It is clear, therefore, that either no individual brother had any claim to any share in excess of the rest, or that he waived his right, and allowed what he had acquired separately to be merged again in the common family fund.

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I am of opinion, therefore, that the property is ancestral. Nothing could be done with it which infringed on the equal rights of the sons. Yet both these wills deal with the property unequally, and make gifts to the daughters, which are illegal. Saving the appointment of the surviving brothers as guardians of the infant children, I do not think any legal effect can be given to either will; and so far as they are a testamentary disposition of property they must be declared invalid. [The remainder of the judgment is not material for the purposes of this report.]

Judgment for the plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Macfarlane and Edgelow.*

Attorneys for the defendants.—Messrs. *Jefferson, Bháishankar and Dinshá*; and Messrs. *Payne, Gilbert and Sayáni.*

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdw ood.

KESHAV BA'PUJI, PLAINTIFF, v. NA'RA'YAN SHA'MRA'V,
DEFENDANT.*

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January 19.

Power—Principal and agent—Power to sue given to an agent, extent of—Vakil, reasonable remuneration to, under such power.

A mere power to sue does not authorize an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration.

THIS was a reference by Ráo Sáheb Bulákhidás Gangádás Desái, Joint Subordinate Judge of Sangamner, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference for the purposes of the report was as follows :—

“ Plaintiff Keshava Bápuji, a pleader in the Sangamner Court, sued to recover from Náráyan Shámráv Pátíl a sum of Rs. 99, alleging that the former mukhtyár of the defendánt agreed to give to the plaintiff Rs. 99 for his professional services engaged in a redemption suit. While the suit was progressing, Náráyan revoked the *mukhtyárnámá*, or the general power of attorney, and applied to the Court, through another mukhtyár, to dismiss the

* Civil Reference, 43 of 1884.