# ORIGINAL CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Bayley.*

RUSSOOBA'I (ORIGINAL PLAINTIFF), APPELLANT, *v.* ZOOLEKHABA'I (ORIGINAL DEFENDANT), RESPONDENT.*

1895. March 8.

*Inheritance—Step-mother—Right of step-mother to succeed to her step-son in preference to his paternal first cousin.*

A step-mother succeeds to the property of her step-son in preference to the step-son's paternal uncle's son.

SUIT by a step-mother to recover her step-son's property from his widow on the remarriage of the latter.

The parties were Kutchi Memon Mahomedans, and as such subject to Hindu law(1).

The plaintiff was the widow of one Háji Joonas Háji Abdul Sackoor. The defendant (Zoolekhabái) was the widow of Háji Jackeria Háji Joonas, the son of Háji Joonas Háji Abdul Sackoor. The plaintiff was the step-mother of the said Háji Jackeria.

Háji Jackeria died in 1876, and his widow (the defendant) came into possession of a large amount of moveable property (*viz.* money, ornaments, jewels, &c.,) which had belonged to him. The defendant subsequently remarried, and the plaintiff filed this suit claiming the said property as the nearest heir of Háji Jackeria. She alleged in the plaint as follows:—

"5. The defendant has since remarried; and the plaintiff says that according to the custom and usage of the Kutchi Memon community to which the said Háji Jackeria belonged, the defendant has thereby forfeited all her interest in her said husband's estate, and also in the said ornaments presented to her as aforesaid; and the plaintiff as the nearest heir of the said Háji Jackeria is now entitled thereto."

The defendant filed a written statement in which she stated (*inter alia*) as follows:—

"5. The defendant denies that there is any custom or usage as alleged in paragraph 5 of the plaint. The defendant denies that she has forfeited her rights and interests in the property mentioned in the plaint by her remarriage as alleged. Even if such a forfeiture did take place on remarriage, the defendant submits that the plaintiff is not the person who would be entitled to such property, nor would she be entitled to any of the property claimed in this suit."

* Suit No. 481 of 1891; Appeal No. 833.

(1) See *Mahomed Sidik* v. *Háji Ahmed* (I. L. R., 10 Bom., 1); *Abdul Cadur* v. *C. A. Turner* (I. L. R., 9 Bom., 158).

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It appeared that the deceased Háji Jackeria left a first cousin (a paternal uncle's son) him surviving.

At the hearing before Farran, J., the following issues were raised:—

(1) Whether the plaintiff is nearest heir of Háji Jackeria, and as such entitled to maintain this suit?

(2) Whether the custom alleged in paragraph 5 of the plaint is a valid and subsisting custom of the Kutchi Memon community?

(3) Whether at the date of the defendant's remarriage she had any property liable to be forfeited under the alleged custom?

(4) Whether the plaintiff is entitled to any and what relief in this suit?

Counsel for the parties agreed that the first issue should be tried first; as, if it should be found in the negative, the decision would dispose of the suit.

*Lang* (Advocate General) and *Scott* for plaintiff:—They cited *Ashábái* v. *Háji Tyeb* (1); *Abdul Cadur* v. *C. A. Turner* (2); West and Bühler's Hindu Law (3rd Ed.), p. 471; *Gojábái* v. *Shrimant Sháhájiráo* (3).

*Jardine* and *Russell* for defendant:—They cited Mayne's Hindu Law (5th Ed.), para. 522; *Kesserbái* v. *Valab Ráoji* (4); *Kumáravelu* v. *Virana* (5); *Muttammal* v. *Vengalakshmiammál* (6); *Mari* v. *Chinnammal* (7); Mitákshara, Ch. II, sec. 5, pl. 4.

FARRAN, J.:—I think the case is governed by the Mitákshara, Ch. II, sec. 5, pl. 4. It appears that Háji Jackeria, the defendant's former husband, whose property is in question here, had an uncle (Háji Cássum) who was his father's brother. That uncle has left a son (Ahmed Háji Cássum). He is, therefore, a named heir, and as such excludes a female as wife of a *gotrája sápinda*, even though nearer in relationship. It is quite clear,

(1) I. L. R., 9 Bom., 115.
(2) *Idem* p. 158.
(3) I. L. R., 17 Bom., 114.
(4) I. L. R., 4 Bom., 188.
(5) I. L. R., 5 Mad., 29.
(6) *Idem* p. 32.
(7) I. L. R., 8 Mad., 107.

upon the authorities, that the term "máta" does not include the step-mother. I find the first issue in the negative and dismiss the suit with costs.

The plaintiff appealed.

*Badrudin Tyabji* and *Inverarity* for the appellant.

*Lang* (Advocate General) and *Macpherson* for the respondents.

In addition to those cited in the lower Court the following authorities were cited:—*Rácháva* v. *Kalingápa* (1); *Rakhmábái* v. *Tukárám* (2); *Vithaldás* v. *Jeshubái* (3).

SARGENT, C. J.:—The question raised by this appeal is whether the step-mother or a paternal uncle's son has the preferable right of succession. In *Kesserbái* v. *Valab Ráoji* (4), Westropp, C. J., says that although the step-mother cannot take as heir under the term "mother", it is a necessary inference from the cases of *Lakshmibái* v. *Jayrám Hari* (5) and *Lallubhai* v. *Mánkuverbái* (6) that she is entitled to inherit as a *gotrája sápinda*. The latter case as explained by the judgment in *Rácháva* v. *Kalingápa* (1) must be taken as deciding that the widows of *gotrája sápindas* in the case of collaterals are to be preferred to the male *gotrájas* in a more remote line, and *a fortiori* the widow of a male *gotrája* in the ascending line, which is the case here, will have that preference over such collateral. Unless, therefore, there is an exception to that rule, the step-mother would appear to have a prior right to the paternal uncle's son, who represents a remoter line of succession. Mr. Justice Farran, however, considers that the express mention of the paternal uncle's son in Mitákshára, Ch. II, sec. 5, pl. 4 has that effect.

In *Kesserbái* v. *Valab Ráoji* (4), where the question was between the step-mother and the half-sister, Westropp, C.J., says (p. 209): "There was not any intention on the part of the Court which decided *Lallubhai* v. *Mánkuvarbái* to displace a person so specially introduced" as included in the term "brothers" who are one of the "compact series of heirs".

(1) I. L. R., 16 Bom., 718.
(2) I. L. R., 11 Bom., 47—52.
(3) I. L. R., 4 Bom., 219.
(4) I. L. R., 4 Bom., 188 at p. 208.
(5) 6 Bom. H. C. Rep., 152.
(6) I. L. R., 2 Bom., 388.

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The uncle's sons are indeed mentioned in pl. 4 of Ch. II, sec. 5, of the Mitákshara, which introduces them as belonging to the class described in section 3 as "sprung from the same family with the deceased and connected by *funeral* oblations, *i.e.* the paternal grandfather and the rest," but they cannot be regarded as specially mentioned in the succession so as to exclude the operation of the above rule. Moreover, there is force in what is said in West and Bühler (3rd Ed.), p. 472, that the step-mother "ought to be placed, on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts."

We must, therefore, reverse the decree of the Court below and declare that the plaintiff is the nearest heir of Háji Jackeria, and send back the case for disposal after finding on the remaining issues. Costs to abide the result.

*Case remanded.*

Attorneys for appellant:—Messrs. *Tyabji, Dayabhai and Co.*

Attorneys for defendant:—Messrs. *Bháishankar and Kánga.*

## ORIGINAL CIVIL.

*Before Mr. Justice Starling.*

1895. *June* 15.

JEYNA'RA'YAN MEGHRA'J AND ANOTHER, PLAINTIFFS, *v.* ISMA'IL KURIMALI AND OTHERS, DEFENDANTS.*

KHETSIDA'S HURMOOKHROY—CLAIMANT.

*Execution—Decree—Attachment under decree of High Court of property already attached under decree of Small Causes Court—Claim to attached property, by what Court decided—Civil Procedure Code (Act XIV of 1882), Sec. 272—Jurisdiction—Practice—Procedure.*

In execution of a decree obtained in the High Court the plaintiffs, on the 22nd of March, 1895, attached certain property of the defendant, which, however, had been already attached on the 22nd of February, 1895, by one Rájbái, who had obtained a decree against defendant in the Court of Small Causes. The plaintiffs' attachment was, therefore, effected under section 272 of the Civil Procedure Code (Act XIV of 1882) by a notice addressed by the Prothonotary of the High Court to the Registrar of the Small Causes Court. The claimant was mortgagee in possession and the defendants were his tenants. On the 25th February he had lodged a claim in the Small Causes Court

* Suit No. 143 of 1894.