Mahomed Haji Abu Vs Khatubai and Others

None

Court: Bombay High Court

Date of Decision: Sept. 21, 1918

Acts Referred:
Evidence Act, 1872 â€" Section 13

Citation: 51 Ind. Cas. 513

Hon'ble Judges: Basil Scott, C.J; Macleod, J

Bench: Division Bench

Judgement

Basil Scott, C.J.
This suit relates to the succession to the estate of Haji Abu Haji Habib, who died at Bombay on the 30th November

1914 intestate. He left him surviving a widow, the 2nd defendant, two married daughters, one of whom has since died, the survivor being the

plaintiff, and one son, the 1st defendant.

2. The plaintiff claims to be entitled as a daughter to 7/32, her share on the footing that Muhammadan Law is applicable: she is supported by the

representatives of the deceased daughter who would under Muhammadan Law be entitled also to 7/32,

3. The 1st defendant contends that Hindu Law applies and under that law he is entitled to the whole estate subject to the maintenance of the

deceased"s widow. In the lower Court the widow, his step-mother, supported his contention though under Muhammadan Law she would be

entitled to 4/32 of the estate. She has not appeared in this appeal.

4. The estate is valued at 2 1/2 lacs and consists of five Immovable properties in Bombay valued at Rs. 1,40,000, a ten annas share in a cutlery

business in Bombay valued at Rs. 60,000, and a house and land at Porebunder valued at Rs. 25,000.

5. The deceased was a native of Kathiawad belonging to the group of converts to Islam from Hinduism known as Memons (Muamins, believers).

Memons are in Bombay popularly classed in two categories, Cutchi Memons from Cutch, and Halai Memons from the Halar District of

Kathiawad. Porebunder, Bantwa and Kutania are Native States in Kathiawad near the borders of the Halar Prant and there is evidence that

Memons in these places are regarded in Kathiawad as Halai Memons.

6. The customs governing succession among the Cutchi Memons have often been the subject of investigation in this High Court and in every case

the Hindu Law of inheritance applicable to the point in controversy has been applied.

7. The first recorded case is that tried by Sir Erskine Perry in the Supreme Court in 1847 and preserved in Perry''s Oriental Cases, page 110. It

was there laid down 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, even though it does not accord with the rule of the Koran. The actual decision was limited to this that the custom pleaded, that

females are not entitled to any share of their father''s property but only to maintenance and the expenses of marriage, if any, was satisfactorily

proved.

8. It was remarked in that case that the Halai Memons follow the Koran in matters of succession, but the remark was obiter and so far as appears

from the evidence of immigrants from Cutch recorded by Sir Erskine Perry (see Exhibit P), those spoken of as Halai Memons were Memons who

had been in Bombay for many years (one witness said 150 years) and were also known as Bombay Memons. There has never been any contest in

the Bombay Courts as to the law applicable in matters of succession and inheritance to those calling themselves Halai Memons in Bombay. It has

always been accepted that the Muhammadan Law applies.

9. In Exhibit A41, the summary of between thirty and forty Probate and Administration grants in Bombay in the matters of the estates of Halai

Memons from 1857 to the date of this suit, all except three relate to Bombay residents and Bombay estates. In the case of the exceptions in two

cases the deceased left bouses at Veraval in Junagadh State, Sorath Prant as well as in Bombay and in one case in Kutiana as well as in Bombay.

10. In Exhibits A45 and A 46, summaries of pleadings in 32 suits for administration in Bombay of Halai Memons'' estates, none states that the

deceased left property in Kathiawad though according to some the deceased left properties in either Surat, Ghogha, Bangkot or Madras as well as

Bombay,

11. In the present case an entirely novel question is raised, namely, what is the customary law governing succession to a non-Cutchi Memon of

Porebunder who, though residing for a considerable time in Bombay and acquiring property there, has clearly indicated his intention to keep up

and not to sever his connection with Porebunder?

12. Speaking generally, the evidence which will later be referred to with more particularity, establishes that the Memons of Kathiawad, of whatever

group or sect, follow the Hindu rule of succession, and this conclusion is supported as to Porebunder Memons particularly by a large number of

instances in which widows and daughters have been excluded from succession, sons have divided the property with their father in his lifetime or

equally with each other after his death and the right of predeceased brothers" sons to share with their uncles has been repeatedly recognised. All

these results are incidental to the Hindu and not to the Muhammadan system.

13. The husband of the plaintiff, who is a Porebunder man and bad the fullest opportunity of countering the evidence adduced in Court by the first

defendant, has not been able to produce any Porebunder evidence to support the contention that the Muhammadan Law applies.

14. The plaintiff relies upon the evidence of Bombay Memons, which does not necessarily help us to decide what is the Customary Law of

Porebunder in only very few of these cases does it appear that there was any continuous connection with Kathiawad and in none does there clearly

appear to have been, as in the case of Haji Abu, an intention of retiring permanently to Kathiawad.

15. A priori there is nothing astonishing in the result of the Porebunder evidence.

16. That the Memons of Kathiawad are converts to Islam from Hinduism is undoubted. It would be surprising if in Kathiawad they had divested

themselves of the social system of their forefathers. Such a result has not followed in the case of other Hindu converts to Islam in Western India,

for example, the Khojas, the Cutchi Memons, the Sunni Borahs of North Gujarat see Bai Baiji v. Bai Santok 20 B. 53 ; 10 Ind. Dec. 594 the

Molesalam Girasias of Amod see Maharana Shri Fatesangji Jasvatsangji v. Kuvar Harisangji Fatesangji 20 B. 181 ; 10 Ind. Dec. 679 and the

Nassaporia Memons of Sind see Abdurahim Haji Ismail Mithu v. Halimabai 32 Ind. Cas. 413 ; 43 I.A. 35 ; 18 Bom. L.R. 635 ; 30 M.L.J. 227 ;

20 C.W.N. 362 ; (1916) 1 M.W.N. 176. It may indeed be said that the habit of the Bombay Memons (other than the Cutchis) to follow the

Muhammadan Law of succession is rather the anomaly. It may perhaps be explained by the fact that, as testified in 1847 before Sir Erskine Perry,

they had been settled for a long time in the city. There they would be open to the influence of professional lawyers at a time when the exclusion of

the law of the religion by the Customary Law anterior to the conversion was not established as a legal possibility, or it may be that the influence of

some religious teacher in the city operated to enforce the adherence of the Bombay Memons to the rule of the Koran. Whatever the cause the

result has been that the Bombay lawyers sweep into the category of pure Muhammadans not merely the Memons settled in Bombay with no

Kathiawad connections but also occasionally Memons who have not given up their Kathiawad connections.

17. The general Bombay assumption, that every Memon who is not a Cutchi is governed by the Muhammadan Law of succession, is well

illustrated by the notice of the Bombay Government (Exhibit L) of the year 1897 described as a ""Public notice to the Memon community by the

Government of Bombay at the desire of the Government of India, "" in which it is stated:

18. The Memon community in India is divided into two sects, the Halai Memons and the Cutchi Memons. The former without exception follow the

Muhammadan Law in all respects."" This notice appeared in the Porebunder Gazette (Exhibit M) with a view to elicit the wishes of the Memon

Community there. The result must have been a surprise to the Bombay Government, for the leaders of the Porebunder Memons (not Cutchis) went

to the Administrator and informed him that the Jamat had approved of the Hindu Law of inheritance by which they were governed.

19. I will now consider the evidence in detail.

20. First as to the general evidence regarding Kathiawad Memons.

21. Many of the witnesses examined on commission at Porebunder on behalf of the 1st defendant depose that in matters of succession and

inheritance Memons follow the Hindu customs, that all Kathiawad Memons are Halais and all Cutch Memons are Cutchies, that Memons residing

in other Kathiawad towns such as Dhoraji, Upleta, Kutiana, Bantwa, Gondal, Rajkot, Vantli and Vasavad (some of them being under

Muhammadan jurisdiction) follow similar customs: that all Memons were originally Lohanas in Sind before their conversion. These witnesses are

Haji Cassum (Com. 1); Haji Dada (Com. 2); Sakur Haji Ahmed (Com. 3); Mahomed Haji Dada (Com. 4); Haji Umar (Com. 5); Haji Jusab Haji

Dada (Com. 5); Haji Jusab Haji Issack (Com. 7); Haji Sakur Haji Habib (Com. 8); Abdul Karim (Com. 9); Haji Ismail (Com. 10); Haji Ibrahim

(Com. 11); Haji Essa (Ccm. 13); Haji Sulleman (Com. 14); Alli Muhammad Khamisa (Com. 17); Noor Mahomed Abdul Karim (Com. 18);

Umar Haji Dada (Com. 20); Karim Beg Mahomed (Com. 21); Umar Noor Mahomed (Com. 23).

22. Eleven Judgments of Judicial Assistants to the Agent to the Governor in Kathiawad sitting in appeal from the Courts of the Nyayadhish of

Bantwa or the Sorath Prant establish that the Hindu Law of succession, maintenance and partition is applied to Memons of Bantwa. In a Vasavad

case between Memons it was decided by the Court of the Judicial Assistant that a widow"s rights are superior to those of her husband"s mother,

the latter only being entitled to maintenance.

23. In none of these cases was there any contest as to the applicability of the Hindu Law of succession and inheritance, though the right to partition

as among Hindus was disputed more than once.

24. In a case between Memons of Veraval which went through three Courts in the Muhammadan State of Junagadh, it was held that among

Memons the Hindu Law applied and ancestral property was divided equally between three brothers to the exclusion of their sister.

25. I come now to the Porebunder evidence.

26. In dealing with that evidence I do not treat the decisions of the Porebunder Courts as proof of foreign law, for our inquiry is not concerned

with the law of the Porebunder State as created by any local legislative authority or with a Porebunder custom affecting subjects of the State as

such. We are inquiring as to the custom in fact followed by a certain community in Porebunder, a custom peculiar to the community and not

resulting from residence in the State. I shall refer to some of the Porebunder judgments incidentally only, and would not put them higher than

instances in which the custom alleged has bean recognised and which are thus admissible u/s 13 of the Indian Evidence Act.

27. In the family of the plaintiff"s husband (see Pedigree, Exhibit 13A) four instances are ad luced which, it is contended, indicate that Hindu Law

governed the parties. Haji Kassum Khanu left a Will (Exhibit 23), dated the 20th August 1882.

28. He begins by directing that if he does not make another Will his hairs and representees shall give effect to this Wil according to its terms.

29. His property is described as consisting of (a) a house worth Rs. 6,000, next to his brother Adam"s house also worth Rs. 6,000, the title deed

of which stands in the name of his father Khanu, also two houses at Mozambique.

(b) Rs. 60,000, being the balance to credit in his shop account at Mozambique and invested in business.

(c) Rs. 8,000, the value of his boat, Ganje Bere Zum Zum. As to the house next to his brother"s, his widow is to reside in it but she cannot sell it.

30. The boat is left to his sons Sulleman and Tyeb as his heirs, subject to a charge of Rs. 100 out of its profits for his widow"s maintenance. The

rent of the two houses at Mozambique is also allotted towards his widow"s maintenance.

31. Subject to religious trusts to the extent of Rs. 4,000, Rs. 60,000 invested in the Mozambique business is to be taken according to

Muhammadan Law. This direction, however, is subsequently explained thus: His three sons are to decide whether the business should be stopped

or continued. If his widow bears a son, that son is to inherit everything since the testator has on different occasions paid his sons their respective

shares and ""kept them separate from him."" If another son is not born, ""the heirs shall divide and take according to Muhammadan Law, that is to

say that my cash (Punji, assets) shall be divided into four equal parts, three parts going to my present sons and one part to their stepmother,"" and

she may deposit her share at any place she likes. Lastly, his sisters, if entitled to a share according to Muhammadan Law, are to be given it or if not

entitled, they are to be given presents at the time of the obsequial ceremonies.

32. In spite of the reference to the Muhammadan Law, the Will is the Will of a man following Hindu customs. The whole property is dealt with: an

earlier separation with his sons is referred to and in default of a posthumous son the commercial assets are to be partitioned equally between the

sons and the widow, and maintenance and residence is provided for her.

33. Zuleikha, the widow, was not paid the maintenance provided by the Will nor her share on partition of the trade assets. She received only Rs.

30 as maintenance for nine or ten years. She, therefore, sued the representatives of her three stepsons and got a decree (see Exhibit 10A) for Rs.

17,205, being maintenance for ten years, and Rs. 14,000 (one fourth of Rs. 60,000, minus 4,000). To enforce the decree after her death her son,

by her marriage prior to her marriage with Kassum Khanu, proceeded separately against the sons of Tyeb Kassum and Abu, the son of Sulleman

(who is also the present plaintiff''s husband). The proceeding against Tyeb''s sons failed finally on the 27th March 1912, see the judgment (Exhibit

10H) of the highest (Huzur) Court in Porebunder, which decided that Zuleikha''s rights under the decree passed not to her son by her first husband

but to her heirs according to Hindu Law, the grandsons of her second husband, following the decision in Moosa Haji v. Haji Abdul 7 Bom. L.R.

447 ; 30 B. 197.

34. The same result was eventually arrived at on the 24th September 1916 by the Huzur Court in the proceeding against Abu Sulleman, after some

difference of judicial opinion. (See Exhibits 10B, 10C and 10D).

35. The disputes relating to Zuleikha thus form the subject of five of the Porebunder judgments in evidence in this case.

36. The case of Kassum Khanu above analysed is instance 13 among the instances adduced for the 1st defendant. It shows that the grandsons as

heirs according to Hindu Law succeeded to the property of their stepmother and the Will of Kassum indicates how deeply he was impregnated

with Hindu ideas of succession.

37. The brother of Kassum Khanu, Adam Khanu, the uncle of the father of the present plaintiff''s husband, is instance 14 among the defendant''s

instances.

38. Adam had two cons, Joosub and Habib, and one daughter. Habib predeceased his father leaving a son, Ahmed. Of the three witnesses

examined in regard to this instance one is the brother-in-law of Habib. He says Ahmed and his uncle Joosub divided Adam''s property, which

included a house in Porebunder and a house in Mozambique. Adam''s daughter is living but got no share.

39. The plaintiff, whose husband''s grandfather was brother to Adam, calls no witness to contradict this story, nor does the cross examination of

the witnesses indicate that the story is untrue. If it is true, the division by Joosub with his brother''s son was consistent only with the application of

the Hindu Law of the joint family as is also the daughter''s exclusion.

40. The third son of Khanu was Latiff. He is instance 15 for the defendant. His son-in-law, Haji Sulleman Abba, says his wife, Latiff''s daughter,

got no share but he does not say that there was any property. The evidence that there was a house in Porebunder is that of Haji Kassum Haji

Ahmed not an accurate witness but the statement is not disputed by the plaintiff whose husband should have had means of knowledge.

41. Instance No. 1 is the last one from this family. It is the case of the father of the plaintiff''s husband. All witnesses agree that he was worth

several lacs when he died and his daughters got nothing. The witness Karim Haji Beg Mahomed says one of the daughters married his nephew,

Ahmed, another his sister''s son, and a third the son of his brother-in-law. If they had got any inheritance he would have known of it. Abdul Latiff

Haji Habib says two other daughters married two sons of his sister and he would have known if they had got a share.

42. All the witnesses agree that Sulleman''s sons never divided their father''s property. The learned Judge thinks this was because the estate was

lost before it was divided, but the facts appear to be that the sons were living jointly with their father who died in June 1895 or earlier, leaving

businesses in Bombay and Africa and property in Porebunder. In the Bombay business a share of six annas stood in the name of Sulleman and his

brother Tyeb. Tyeb died in 1897-98 and then Ibrahim son of Sulleman sued the other partners On behalf of Sulleman''s and Tyeb''s families (see

Exhabit F, plaint in Suit No. 646 of 1898) in the Bombay High Court. He recovered under a release in that suit Rs. 34,000 from the other partners

on the 31st December 1898 (see Exhibit G), which was paid by Havala or draft on Tyeb Sakoor & Co. of Beira. The plaint recited that Kassum

Khanu till his retirement in 1889 was head of a joint family whereof the other members were Sulleman, Tyeb and Ibrahim Sulleman. In 1889

Kassum separated from the other members of the joint family. Ibrahim then started business in Bombay in the name of Ibrahim Haji Sulleman &

Co. This Bombay business failed in 1905 and Ibrahim Sulleman went through the Bombay Insolvency Court. The African business, Tyeb Sulleman

& Co., failed about 1911. We have the evidence of the plaintiff''s husband, who survived his brothers Ibrahim and Moosa, that till 1911 or 1912

he and his cousins Tyeb''s sons were interested in that business. He had from the time of Sulleman''s death jointly with his cousin Abdulla Tyeb

family ships of which two have been sold. His father also left a house and a vanchi or cart in Porebunder which were attached by Haji Kassum

Ghadialli (Com. Wit. No. 1), for a debt of Rs. 6,000 upon which Hurbai, Sulleman''s widow, in 1911, unsuccessfully tried to establish a claim for

maintenance (see judgment of Porebunder Nyayadish, Exhibit 29). He says he gave no part of the ships to his sisters or his mother and says he

cannot mention any instance of a daughter getting a share in his family. The judgment of the Nyayadhish (Exhibit 29) records that Hurbai deposed

that a partition was effected between her and her surviving sons whereby Abu got the Vadi, Moosa, the house and Hurbai, Rs. 10,000, but Abu

does not confirm this and says she only got Rs. 700. There is thus ample evidence that Sulleman''s sons enjoyed his property for years after his

death to the exclusion of his daughters as a Hindu''s sons would enjoy it.

43. All these instances have been rejected by the learned Judge, as it seems to me, without a sufficient cause. If it stood alone, the instance of Latiff

(No. 15) would not be of much value, bat taken with the other instances Nos. 14 and 1 in the same family it points to a continuous adoption of the

rule of Hindu succession by which daughters are excluded from inheritance when there are sons. The succession of grandsons is also well

established, which would only occur where Hindu Law was followed. The instances of Kassum Khanu and Sulleman Kassum are also of

importance, in that they show that Porebunder Memons trading in Bombay without cutting themselves off from Porebunder follow the customs of

Hindus.

44. Instance No. 2, Ismail Mohamad, died in 1903, as is deposed to by his widow"s cousin Haji Dada and his daughter-in-law"s uncle Haji Umar.

His grandson, Mahomed Sakoor, married the 3rd defendant, who sides with the plaintiff. The evidence of several witnesses is that he left four sons

and two daughters and property of considerable value in Porebunder end Africa. The daughters got no share. The sons did not partition the

property until after the present suit was filed, twelve or thirteen years after their father"s death. The partition is said to have taken place in Africa.

The learned Judge rejects this instance, as the partition was not till after this suit had begun, it was made in Africa, and rests on hearsay evidence. If

the evidence had been false, it would have been easy for the 3rd defendant"s husband to disprove it but he has not done so. If we hold that this

partition is not proved, the position seems to be that the four sons have enjoyed the property and the daughters have got nothing. The instance

cannot, therefore, be rejected.

45. Instance No. 3 is that of Haji Dada Tar Mahomed who went with the other leaders in 1897 to the Administrator and declared for Hindu Law.

Witness No. 21, Karim, is his son-in-law and says the daughters, one of whom was his wife, got no share. The learned Judge rejects his evidence

on the ground that he had repeated an untrue story of the cause of a daughter of another (instance) receiving a share in Bombay. I do not think this

is a sufficient ground for discarding the evidence of the witness about his own wife.

46. Instance No. 4, Ahmed Haji Habib, is a very well-established case of sons taking the whole estate and providing in a separation deed with one

of them that the two widows should be maintained and the marriage expenses of the sisters and of the unmarried brother should be charged on the

family property. The daughters got no share. There were two widows of whom one Hanifa was mother of all the children while Zuleikha was the

stepmother: Hanifa was to get Rs. 100 for maintenance of herself and her daughters and Zuleikha Rs. 50. This is evidenced by the documents

executed on the 27th April 1902 (Exhibits 10A and 10B). Zuleikha objected and sued for her share under Muhammadan Law. The sons also sued

her apparently for a house in her occupation and its contents including Rs. 16,000 in cash, contending they were entitled under Hindu Law. An

arbitrator"s award gave to Zuleikha the house valued at Rs. 11,000 for residence for life (with remainder to the stepsons) together with all the

contents in lieu of maintenance. The arbitrator says he had Hindu Law in mind in making his award. The value of the instance for the present case is

that it shows the sons took the property and the daughters got no share. The learned Judge rejects the instance because Zuleikha''s claim, which

was compromised, was based on Muhammadan Law. This does not affect the instance as regards the other widow Hanifa and her daughters.

47. Instance No. 5, Haji Kassum Tar Mahomed, (one of the leaders who declared for Hindu Law in 1897) which the learned Judge accepted as

established, is one which shows a partition deed (Exhibit 5A) between four brothers and the sons of their deceased brother of a business in

Bombay and of properties at Porebunder and Natal on the footing of Hindu custom. There were two daughters of Kassum who got no share from

their brothers, yet their husbands attested the partition deed. It is a case where Memons trading in Bombay retained property and connections with

Porebunder and acted according to Hindu custom. Instance No. 6, Cassum Haji Abu, is rejected by the lower Court. It should be considered with

those of Moti Haji Abu, instanoe No. 10, and of Haji Abu Jiva, the father of these men.

48. Haji Abu had three sons, Moti, Sulleman and Cassum, and two daughters, Hurbaiand Hawabai, by his first wife who died in Porebunder. He

married again a Memon of Bantwa and having separated from the sons of his first wife went and settled in Bombay where he acquired a house. He

had a family of sons by his second wife also who were born, married and resided in Bombay. He died in Bombay in 1893. His suryiving daughter

by his first wife was paid Rs. 95 in April 1893 by her step-brothers in Bombay in consideration of the transfer to them of her right, title and interest

in her father''s estate, see Exhibit A 1. This was a Bombay transaction arranged for Hawabai by a Bombay Solicitor, Mr. K.D. Shroff, and in the

release the deceased Haji Abu is described as of Bombay. One of Hawabai''s three stepbrothers, Essa Haji Abu, died in Bombay in 1909 and in

an administration suit in the High Court filed by his full brother Tar Mahomed Haji Abu the estate of Essa was divided between Essa''s widow and

his posthumous son according to Muhammadan Law (see Exhibit A36). Thus in the case of settlers in Bombay Muhammadan Law was applied. It

was otherwise, however, with the children of Haji Abu''s first marriage who remained in Porebunder. Kassum Haji Abu died at Porebunder in

1910 leaving seven sons and the grandson of a predeceased son, Ismail. In 1915 (see Exhibit A) Ismail''s son and his mother passed a release to

Kassum''s surviving sons and became separated from what is styled the joint family receiving Rs. 4,000 in respect of whatever right Jusub Ismail

the releasor might have in getting the releasees'' joint property or Kassum Abu''s property, divided and with regard to whatever right the

(releasor''s) mother Hawabai might have against the releasee''s property or against Kassum Abu''s property."" Ismail had been acting as Moonim in

Bombay of Kassum Abu. The release mentions that Kassum Abu''s daughter was to be married as well as three unmarried sons and the calculation

of Joosub"s share was arrived at on that basis after the accounts of Kassum"s estate had been shown to Ismail"s father-in-law.

49. Moti Haji Abu left four sons and three daughters. The father-in-law of one of Moti"s sons says Moti"s property was inherited by his sons to

the exclusion of his daughters.

50. I do not think these instances were rightly rejected by the lower Court. The release, Exhibit A, is said to be too recent since the present suit

bad already been started. I am not able to agree with the apparent suggestion that the release had any connection with the parties to this suit, nor

with the learned Judge"s opinion that the statement of the witness Com. 2 concerning his own son-in-law should be disbelieved because at different

times he had given self contradictory evidence on a wholly different matter and biassed evidence regarding Hawabai"s release (Exhibit A1).

51. Instance No. 7, Beg Mahomed Tar Mahomed, is held established by the lower Court. Bag Mahomed was a resident of Porebunder and

traded first in Africa and afterwards in Bombay in partnership with Abu Jiva with whose estate this suit is concerned. Beg Mahomed left two

daughters and a grandson, son of his predeceased son Moosa. The grandson inherited the property to the exclusion of the daughters and his sister

the daughter of Moosa also got no share.

52. Instance No. 8, Beg Mahomed Hassnu, is also held established by the lower Court. His wife was sister of Jiwa Haji Abu"s father. He left a

son and three daughters and two houses in Porebunder, the son inherited and the daughters got no share.

53. Instance No. 9 is Khanu Hassam, one of the leaders who declared for Hindu Law before the Adminidistrator in 1897. This instance is rejected

by the lower Court as the evidence is unsatisfactory. I agree that it is of no value.

54. Instance No. 11, Haji Beg Mahomed Haji Jiwa, was one of the leaders who appeared before the Administrator in 1897 and declared for

Hindu Law. He left three sons and two daughters and the son of a predeceased son. He had a shop at Bombay and his family lived at Porebunder.

The Bombay shop was subsequently closed. The sons and the grandson inherited the property and the daughters got no share. The lower Court

holds this instance established: in this conclusion I agree.

55. Instances Nos. 16 and 17, Haji Alli Janu and Haji Joosub Janu, were brothers, residents of Porebunder, who both had property in Africa also.

Their sons inherited to the exclusion of their daughters. I agree with the lower Court that these instances are established.

56. Instances Nos. 18 and 19 are Haji Umar Habib and Haji Sakoor Habib, brothers of witness Com. 2, Haji Dada Habib. He says that after

their deaths his brothers" sons were joint and the females (widows in Haji Umar"s case) and (daughters in Haji Sakoor"s) got no share. The

learned Judge here and I think rightly accepts the evidence of Haji Dada as establishing these instances.

57. Instances Nos. 21, 22 and 23 are the father, paternal grandfather and maternal grandfather of Haji Kassum Ahmed, Com. witness No. 1.

Owing to his distrust of this witness the learned Judge rejects the instances. There was, however, no cross examination, Moreover, Haji Cassum

was a man of some property since he attached the property of the plaintiff''s husband for a debt of Rs. 6,000 (see the judgment, Exhibit. 29). I

doubt if there is sufficient reason for rejecting these instances. This is a convenient place to consider whether Haji Cassum should be considered as

a false witness unless corroborated. He is, as a matter of fact, corroborated as regards all the instances he speaks to, except instances Nos. 21, 22

and 23 in his own family. The charge aginst him is that be is a bought witness and told a false story to conceal the fact. He was the person

employed by the 1st defendant to collect evidence as to custom at Pore bunder and not unnaturally received remuneration for his labours. Equally

naturally having regard to the inveterate practice of such witnesses in India he was unwilling to tell the truth as to his remuneration. He appears to

have worked hard for the 1st defendant. I am not prepared to hold that because ho told a false story as to his remuneration he is in other respects

a false witness. I would accept these instances.

58. Instance No. 25, Haji Abba Hassum, is a Very well established case of a partition in 1890 (see Exhibit 3A) of the property in Porebunder and

Africa of Haji Abba according to Hindu Law. The sons divided the property in equal shares providing for their mother but their sisters got no

share. The lower Court with good reason holds this established.

59. Instance No. 26 is Haji Adam Sale Mahomed, who died about 1864 leaving Rs. 5,000 to 7,000. His son says that after he and his brother

had made money in Africa about ten years later they gave Rs. 700 or 800 each to their sisters. As this would be about the amount of the

daughter''s share under Muhammadan Law, I agree with the learned Judge that the instance is too doubtful to be relied on.

60. Instance No. 32 Haji Dada, is one in which five sons got the property, which consisted of a house and a few thousand rupees, in Porebunder

to the exclusion of the daughters. The learned Judge has, I think, rightly held this instance established.

61. Instance No. 36, Haji Ayub Hassum, is accepted by the lower Court on very clear evidence.

62. Instance No. 37, Valli Mahomed Khamissa.

63. The brother of the instance deposes to litigation in the Supreme Court at Pretoria, in which he held a power-of-attorney lor Valli Mahomed''s

adult sons who contested the right of their sister to share. The witness says the Court decided against the sister but the decree is not produced. The

proof is, therefore, defective. On this ground it must be rejected as it was rejected by the lower Court.

64. Instance Nos. 38 and 39 are accepted by the learned Judge while instance No. 40 is rejected. The learned Judge rejects No. 40 as it is

deposed to only by Com. witness No. 19, who would not admit having joined in valuing the estate of Sale Mahomed in Bombay for the purpose

of assessing the widow''s one-eighth share. I doubt if this is a good ground for rejecting the witness'' evidence as regards his own family,

particularly as he was not cross-examined as to this part of his evidence. The evidence as to each is that the daughters got no share, In none of

them is the property which the sons got indicated. It seems to me that either all should be rejected on the ground that there is not sufficient evidence

of the property or all should be accepted. If accepted the number of the defendant''s instance, is increased; if rejected the case for the application

of Muhammadan Law-is in no way strengthened.

65. I think all should be rejected as the existence of property is not dearly established.

66. Instances Nos. 44 and 45 are also instances of exclusion of daughters. The learned Judge, I think, rightly accepts them as established.

67. I now come to the evidence in support of the plaintiff''s case.

68. Plaintiff''s instance No. 1, Ebrahim Noor Mahomed Daina, was a case of an arbitration in Bombay in which the witness says a widow and

daughters claimed according to Muhammadan, while the Sons claimed according to Hindu, Law. He cannot say if the widow got nothing by the

award, the married daughter certainly got nothing. The witness merely speaks from his recollection as a clerk to whom the award was dictated,

This instance must be rejected.

69. Plaintiff''s witnesses Nos. 2, 2A and 5 will be referred to later.

70. Plaintiff''s instance No. 3, Mahomed Jumma Ghaya.

71. Joosub Haji Valli speaking from hearsay says the instance, who was once his servant, died leaving female relations only and his property at

Ranavav was distributed according to Muhammadan Law. The other witness Haji Moosa Haji Oosman tells an entirely different story and says

there were sons of the deceased who traded and died in Bombay and left property in Bombay. He says the sons separated from their father in his

lifetime and does not know if he left any property in Porebunder.

72. It is clearly a Bombay case but not so clearly a case in which Muhammadan Law was applied and is of no value as evidence of the custom

followed in Porebunder. it is rejected by the lower Court.

73. Plaintiff''s instance No. 4, Mahomed Joosub Patel, is spoken to by a witness who has no personal knowledge of it. According to his account

there was no son to compete with the daughters. It is rightly rejected by the lower Court.

74. Plaintiff''s instance No. 6, Sulleman Haji Adam.

75. This is a Bombay case and, therefore, rightly rejected.

76. The same must be said of plaintiff''s instance No. 7, Ayoob Noor Mahomed, and No. 8, Haji Ahmed Pir Mahomed.

77. Plaintiff''s instance No. 10, Hasham Haji Hassum, is the case of one who was described in his widow''s application in 1904, for Letters of

Administration of, as of Bombay. Two years after the grant of letters the Bombay estate was divided according to Muhammadan Law between the

widow and the heirs of the son and daughter who survived their father. The document evidencing this division mentions two houses in Porebunder

which were not included in the settlement, but the witness Haji Cassum Ahmed said he was about to distribute the sale proceeds of these houses

according to Muhammadan Law. The deceased is said to have visited Porebunder from time to time till his death. There is, therefore, a similarity

between the circumstances of the deceased and Haji Abu, though there is no clear evidence that Hassam intended to retire to Porebunder. No

objection was raised to the estate being treated as that of a Bombay Memon governed by Muhammadan Law. It was indeed to the interest of the

deceased"s male collaterals that it should be so treated.

78. Plaintiff"s instance No. 11, Mahomed Adam, is one of Memons who came originally from Bhavnagar settling permanently in Bombay and

having no property in Bhavnagar. It is, therefore, of no assistance.

79. Plaintiff"s instances Nos. 12, 14, 15, 17, 18, 19 and 21 are all cases of Bombay Memons who had no property elsewhere.

80. Plaintiff"s instance No. 20 is one of a Memon settled in Madura. The only witness is not very clear in his account of what happened to the

estate of the deceased which was entirely in the Madras Presidency. It is of no value for either side.

81. Plaintiff"s instance No. 13 was a case of two Memon brothers from Kutiana who settled in Bombay and acquired a small property there. On

their deaths the widow of one bought out the widow of the other (see Exhibit A16), and the sister got nothing. The same result would have

followed under Hindu Law.

82. There are three instances deposed to for the plaintiff which the learned Judge has considered were established as being cases of Muhammadan

succession amongst Halai Memons domiciled in Porebunder.

(1) Saleh Mahomed Haji Vali.

83. He came to Bombay from Ranavav in Porebunder State with his father and brothers thirty five years ago. He seems to have carried on

business in Bombay and South Africa and died at Ranavav in November 1910 leaving properties in Porebunder, Ranavav, Bombay and South

Africa. He left him surviving a widow, Zuleikabai, a daughter, three brothers, Abdulla, Karim and Yusuf, and three sisters. His estate remained in

the possession of Karim. Until 1915, the widow was maintained by Yusuf. In that year one Jusub Tyab, witness Com. A for the plaintiff, wrote a

letter to Yusuf Haji Vali. According to the writer, as no maintenance had been received for three or four months he asked Yusuf not to stop the

maintenance. Yusuf asked him to come to Bombay. He went and asked Yusuf to pay up the maintenance account, Yusuf said he was unwilling to

pay it any longer and wanted to settle. On the other hand Yusuf says that Joosub Tyab asked by letter for Zuleikabai"s share according to

Muhammadan Law. However that maybe, Saleh Mahomed"s estate was valued by five persons and Yusuf purchased the widow"s share for Rs.

5,567-4-11, which she received partly by retaining ornaments belonging to the estate and partly in cash. See Exhibit O which was signed by Yusuf

Tyab as her constituted attorney on the 5th July 1915. Prior to that, on the 12th June 1912, the three brothers and three sisters of Saleh Mahomed

had executed at Ranavav a curious document (Exhibit Q), whereby they declared that they relinquished their shares in the estate of the deceased

according to Muhammadan Law on condition that their shares should be used for any charitable or religious purpose or purposes which Abdulla

might select, provided the money was spent in India. The estate seems to be still in the hands of Karim and nothing was done to give effect to

Exhibit Q except that, if Yusuf is to be believed, a payment of Rs. 200 has been made in charity. It seems to me that whether Saleh Mahomed may

be said to have retained his Porebunder domicile or not, his estate came into the hands of his brothers who had become Bombay Memons and

were, therefore, permeated with the ideas of Bombay Memons.

(2) Sulleman Hassan Kali.

84. He died about 1900 leaving a widow, a father, a sister and a maternal uncle. Yusuf Haji Vali, a nephew of the widow, said that Sulleman had a

business in Bombay but kept up his connection with Ranavav. The widow got a share according to. Muhammadan Law. Her constituted attorney,

Tar Mahomed Abba Sheriff, signed Exhibit A17, together with the father of Sulleman and the maternal grandfather who was stated to be the

executor of Sulleman''s Will. That document was a release in favour of the partners of the deceased of his share in the business for Rs. 3,205-2-6.

Out of this sum the father got Rs. 1,600 and the widow Rs. 800. Though Yusuf says the deceased left property at Ranavav this is contradicted by

Tar Mahomed. It may be taken, therefore, that Sulleman carried on business in Bombay in partnership. His share in that business was the only

property left by him. He seems to have left a Will which has not been produced, but his executor was a party to Exhibit) A17 and must have taken

a part in the distribution of the money received from the partners of the deceased. How that money was distributed is by no means clear. If the

father got Rs. 1,600 and the widow Rs. 800, that would not be a distribution according to Muhammadan Law, In any event the distribution took

place in Bombay and it is. not certain that Sulleman remained a Porebunder man.

(3) Oosman Hamid.

85. This instance is deposed to by Haji Cassum Haji Ahmed who said: ""Oosman Hamid was a Porebunder man and come to Bombay for a short

time. He left Immovable property at Porebunder. He died in 1887 leaving a widow Yemnabai, two sons, Cassum and Hasham, and a daughter

Safoorabai. Oosman''s estate was administered privately by his heirs. A release was passed in favour of my son-in-law Hasham by his other heirs.

It is dated 24th Decamber 1889. Oosman dealt in Porebunder stone and so far as I know exclusively. He sent stone from Porebunder for sale in

Bombay. His place of business was in Porebunder.

86. The release (Exhibit U). on which so much reliance has been placed by the plaintiff, puts a very different aspect on this story. In the first place it

recites that Oosman Hamid died in 1877. The witness, who gave his age as forty-nine, could only then have been a boy of ten. It further recites

that Oosman left moveable and Immovable property in Bombay and at Porebunder; that on his death Cassum took charge of it as eldest male

member of the family and continued to carry on the business of tailoring for and on behalf of the parties interested therein until he died in 1888; and

that Letters of Administration to the estate of Cassum were granted to his brother Hasham. Therefore, it is clear that some time before 1877

Oosman came to Bombay and started a tailoring business. He may before that have had a stone business in Porebunder, but if he had, the witness

could scarcely have had any personal knowledge of it. He could have known nothing more about Oosman Hamid beyond what be heard owing to

his daughter having married Hasham, The release then recites that Yemnabai and Safoorabai and another Yemnabai, the widow of Cassum, had

agreed to receive certain sums fixed and ascertained as their shares in full satisfaction of their claim and demand in the property mentioned in the

schedule as the heirs of Oosman Hamid and Cassum Oosman, and in consideration of the said sums the said parties released Hasham from all

claims against the tailoring business and the property mentioned in the schedule, which included two houses at Porebunder valued at Rs. 3,000.

Now the witness was a Bombay Memon and even if Oosman died a Porebunder Memon, which is not certain, his sons became Bombay

Memons. Exhibit U was drawn up and executed in Bombay as a release to the administrator under letters granted in Bombay to the estate of

Cassum. It is true that there were two houses at Porebunder belonging to that estate but there is nothing unusual in Bombay Memons owing

property in Kathiawad. It is difficult, therefore, to see how this can be considered as an instance of the estate of a Porebunber Memon being

divided according to Muhammadan Law. Oosman''s estate was never really administered; it was only after the death of Cassum that the family

property with its accretions since the death of Oosman was divided by Hasham, a Bombay Memon.

87. On a consideration of all the cases above mentioned, the evidence seems to me to be all one way. Twenty-five cases are proved which

indicate that Hindu Law was applied and not Muhammadan Law, and there is no clear case of the application of Muhammadan Law among

Memons settled at Porebunder. It is natural that there should be frequent proof of such cases occurring in recent years and but few witnesses as to

cases more than twenty years old, but there is evidence of a case dating from 1884.

88. The suggestion of the learned Judge that the bulk of the cases took place after 1897, perhaps in consequence of the action of the leaders in

that year, does not explain that action and does not explain away the fact that in a suit of 1892 in which final judgment was given in 1896, the

leaders of both branches of the Memon community in Porebunder gave evidence that sons excluded daughters (see Exhibit 8). The learned Judge

trying that case remarked that from fifteen instances given by. the witnesses it seemed clear that the Memons of Porebunder did not follow the

Muhammadan Law of succession.

89. In this state of the evidence we are, I think, justified in holding that the conditions of a valid custom have been established. The custom is

certain in its operation excluding daughters in favour of sons. It is invariable, inasmuch as no case of variation in Porebunder has been proved. It is

ancient, because it is the custom which must certainly have prevailed in the community before the conversion to Islam, for Muhammadans do not

discard when once adopted, though they do not always on conversion adopt, the rule of the Koran relating to succession.

90. The suit as filed relates to property in Bombay alone and the deceased Haji Abu died in Bombay intestate. But he was a Porebunder man.

Neither circumstance implies severance from Porebunder. The evidence is strong that the deceased had retired to Porebunder, where he had a

house, with the intention of ending his days there and he only came to Bombay to consult a doctor during his last illness. Since then there was no

severance from Porebunder, the customary law of Porebunder Memons must govern the distribution of the estate.

91. We do not think it is open to us in our view of the evidence to follow the course taken by the lower Court and bold that the defendant has not

made out the custom alleged, Nor can we hold that custom has established a lex loci peculiar to Bombay property, namely, the Muhammadan

Law, and another lex loci peculiar to Porebunder property, namely, the Hindu Law. There is no principle recognised by the law administered in this

country upon which a Hindu''s or Muhammadan''s possessions may be distributed partly by one law and partly by another according to the locality

of the possession. They must all fall under either the law of the religion or the customary law of the community. There is no lex loci for the purpose

of distribution. If it were possible on the evidence to infer an election by the deceased a severance of his connection with the Hindu Kathiawad

environment and a permanent settling in Bombay where non-Cutchi Memons have long adopted the Muhammadan Law for distribution, the

analogy of the law of domicile could be applied as in the Mombassa case of Abdurahim Haji Ismail Mithu v. Halimabai 32 Ind. Cas. 413 ; 43 I.A.

35 ; 18 Bom. L.R. 635 ; 30 M.L.J. 227 ; 20 C.W.N. 362 ; (1916) 1 M.W.N. 176. It would not be the law of domicile, for permanent residence

in Bombay does not necessarily import the Muhammadan Law of succession for one whose ancestors were converted from Hinduism. Severance

from the domicile of origin and permanent residence in Bombay would, in the case of persons falling within the purview of the Indian Succession

Act, effect change of domicile and with it a change of law, e.g., from French to Anglo-Indian or Portuguese to Anglo-Indian, but it would not

change the law of succession for Hindus or Muhammadans. 91. Therefore, since we are of opinion that the deceased died as he was born a

Porebunder Memon, we must hold that according to the custom established by the evidence his son succeeds to all his property, his daughters are

not entitled to share in his estate and his widow is entitled only to maintenance. We set aside the decree of the lower Court and dismiss the suit.

The plaintiff must pay the costs of the 1st defendant throughout.

92. The order as to costs is that the plaintiff must pay the costs of the 1st defendant throughout including costs reserved, except that the defendant

No. 1 must pay his own and the plaintiff''s costs mentioned in the supplementary judgment as to costs of the 18th December in the Court below.

93. Respondent No. 4 to have her costs out of the estate.

94. The decree as to 1st defendant paying the costs of the 2nd defendant stand Section

95. Costs of respondents No Section 2 and 3 to be borne by their guardian ad litem, the plaintiff''s husband.

96. The Receiver to hand over possession to the 1st defendant of all the property in his charge.

97. The costs of the 1st defendant will include the costs occasioned by the appointment of the Receiver.

MACLEOD, J.

98. One Haji, Abu Haji Habib, a Halai Memon, died intestate at Bombay on or about the 1st December 1914 leaving a son, Mahomed, a widow,

Bibibai, and two daughters, Khatubai and Ayshabai, as his heirs according to Muhammadan Law. Ayshabai died after her father leaving as her

heirs her husband, Mahomed Haji Sakoor, and a daughter, Hawabai. Khatubai married one Abu Haji Sulleiman. On the 3rd September 1915 she

wrote through her, solicitors to her brother Mahomed stating that their father left considerable property in Bombay, moveable and immovable, and

calling upon him to render an account and hand over to her her share in the estate left by the deceased.

99. On the 7th September Mahomed''s solicitors replied that as the parties came from Porebunder, according to the law applicable to them a

married daughter was not entitled to any share in the estate of her deceased father.

100. On the 17th September they wrote further that the parties were governed by the rule of Hindu Law. Thereupon Khatubai filed this suit against

her brother, Mahomed, her mother, Bibibai, and the heirs of Ayshabai, praying inter alia that the plaintiff was one of the heirs of her father Haji

Abu and as such entitled to a 7/32nd share in the estate left by him.

101. The 1st defendant in his written statement contended that the parties were governed by the Hindu Law of inheritance and succession, on the

ground that such Hindu Law was retained by Halai Memons of Porebunder and Kathiawar generally when they were originally converted to

Muhammadanism or that such law was theirs by custom which had been followed by them from time immemorial, that though the deceased had

come to Bombay and carried on business there for many years, he cantinued to be a Porebunder man and his family had always been governed by

the custom of inheritance and succession which prevailed at Porebunder amongst Halai Memons, lastly that the custom of Halai Memons in

Kathiawar that they were governed by the Hindu Law of inheritance and succession had been frequently judicially determined in the Courts of

Kathiawar. The widow Bibibai supported the 1st defendant while the 3rd and 4th defendants were content to abide by the decision of the Court,

102. The suit came on for hearing before Marten, J., and after a very lengthy trial the learned Judge decided that the deceased Haji Abu belonged

at all material times to a family of Halai Memons who were settled in Porebunder, that Halai Memons so settled in Porebunder did not as regards

inheritance and succession retain Hindu Law at the time of their conversion to Islam nor had they by immemorial custom adopted Hindu Law, and

that the deceased at the date of his death was governed by Muhammadan Law as regards the inheritance and succession to his properties,

moveable and immovable, in Bombay and outside Bombay. That, therefore, the plaintiff was entitled to a 7/32nd share in his estate.

103. From that decision the 1st defendant has appealed. The origin of the Halai Memons is by no means clear. The word "Memon" is derived

from the word Muamin, i.e., believer, and has been applied to a particular class of converts from Hinduism to Islam, The Bombay Gazetteer states

that the Memons in Kathiawar were of two divisions: Cutchi Memons, who were supposed to be the descendants of converted Lohanas and to

have come originally from Sind, and Halai Memons, the descendants of converted Kachhias Kachhias are husbandmen and it is not clear whether

it was intended to be implied that the Halai Memons were converted inhabitants of Kathiawar or were immigrants from some other country after

conversion. It certainly appears from the evidence of several of the Porebunder witnesses in this case that the tradition is that the Halai Memons

came over to Kathiawar from Cutch and were called Halai Memons, as distinguished from Cutchi Memons, from Halar, the name of the Prant in

which they settled. They do not intermarry with the Cutchi Memons and this points to their having belonged originally to a different Hindu caste,

though in Porebunder the tradition appears to be that they were also Lohana Section. If then they were husbandmen in bind, they would naturally

have preferred to pass through Cutch and settle in Halar which was more adapted to agriculture. It is also more probable that they were converted

at or about the same time as the Lohanas in Sind rather than that there was a conversion of the indigenous population in Halar. From Halar the

Halais spread over Kathiawar and whatever their original occupation may have been, it seems that they are now mostly occupied in trade. Thus

they come to Bombay. In the Khojahs and Memons" case Hirbae v. Sonabae Perry"s O.C. 110 ; 4 Ind Dec. 100 the defend, ant, a Cutchi

Memon, said that the Halais came to Bombay one hundred and fifty years ago, but however that may be, it is now undi Section puted that Halai

Memons who have settled in Bombay and are called Bombay Memons consider themselves governed by the Muhammadan Law of inheritance

and succession and no attempt has ever been made, as far as I know, to establish that they are governed by the Hindu Law. Bat as regards the

Cutchi Memons, ever since Sir Erskine Perry''s decision, which has been followed in numerous cases in this Court, it has been taken as settled that

they retained after their conversion the Hindu Law of inheritance and succession. Their Lordships of the Privy Council have put the question

beyond dispute by their remarks in Abdurahim Haji Ismail Mithu v. Halimabai 32 Ind. Cas. 413 ; 43 I.A. 35 ; 18 Bom. L.R. 635 ; 30 M.L.J. 227

; 20 C.W.N. 362 ; (1916) 1 M.W.N. 176.

104. If then the Halai Memons originally immigrated into Cutch and decided instead of settling down there with the Lohana Memons to pass on to

a country more suited to agriculturists, and if it be taken for granted that the Lohana Memons retained their Hindu Law of inheritance and

succession, there is nothing improbable in the Kachhia Memons having done likewise.

105. The first question to be decided is whether Haji Abu at the time of his death was a Porebunder or a Bombay Memon for, if he was a

Bombay Halai Memon, the question what law governs Halais in Porebunder becomes immaterial. Haji Abu was born in Porebunder of a

Porebunder family. His father had a cutlery shop there. Haji Abu himself went to Durban for five years and a few month Section. After his return to

Porebunder his father died. Thereafter he continued his father''s business for a short time, when he sold it and came to Bombay at the age of

twenty-five or twenty-six. For two or three years he was in service and then opened a shop in partnership with two other Section. That must have

been about 1882 A.D. Until 1899, when Haji Abu spent over Rs. 20,000 on a house at Porebunder, it does not appear that he had any family

residence there of his own. No doubt he often used to visit Porebunder, marriages and other ceremonies would be performed there, and the

women of the family would go there for their confinements, but that might very well be the custom with many Memons who considered themselves

as settled in Bombay, and if Haji Abu had died before 1899 there would have been considerable difficulty in establishing that he was anything else

but a Bombay Memon, nor is it likely that any such attempt would have been made. But whether before 1899 he considered himself a Porebunder

or a Bombay Memon, there is a considerable body of evidence as regards what happened after 1899 to show that he retained, or reverted to if he

had ever lost, his Porebunder environment. He spent what must be treated as a fairly large sum in building a house there, he lived there a

considerable part of the year and was a leader of the Jamat. In 1910 the rents of the 4th and 5th floors of his Bombay house, where he used to

reside, were debited in the books to his son, and this undisputed fact certainly supports the first defendant''s story that his father said to him then:

Do whatever business you want to, I want to go to my native country,"" and again, ""I am now going to Porebunder. If I die there bury me near the

graves of my mother and my father''s mother."" And that thereafter his father only came to Bombay at his son''s request when business was

pressing. There is also the evidence that the deceased was anxious that his daughters should marry Porebunder men and refused two offers from

Bombay Memons for Ayshabai''s second marriage, accepting finally a Porebunder man. The witness, Exhibit Com. 21, deposed that he had had a

talk with the deceased about these offers when deceased told him that he belonged to Porebunder and liked Porebunder customs of inheritance

and, therefore, disapproved forming connections with Bombay men, as there was a difference of customs in Bombay. The witness does not seem

to have been cross-examined about this statement and the probability of its truth is supported by undisputed fact Section. Then the deceased was

taken ill at Porebunder and only came to Bombay because his son wrote to him that he would get better medical advice in Bombay,

106. Such being the evidence it would, in my opinion, be impossible to say that Haji Abu had so completely detached himself from his Porebunder

environment as to become a Bombay Memon. It is not, strictly speaking, a question of domicile, since a Hindu or Muhammadan who rencunces

his domicile of origin does not thereby subject himself to the law of his domicile of choice. And in this connection it may be noted that it may be

inferred from the Privy Council judgment in the Mombassa case 32 Ind. Cas. 413 ; 43 I.A. 35 ; 18 Bom. L.R. 635 ; 30 M.L.J. 227 ; 20 C.W.N.

362 ; (1916) 1 M.W.N. 176 above referred to that their Lordships would consider the case of a Memon migrating from Cutch to some other part

of India as different from that of a Memon settling in another country outside India, much stronger evidence being required in the former case to

establish a change of personal law.

107. As Haji Abu died a Porebunder man, his estate in Bombay must be distributed according to the personal law which governs Porebunder

Halai Memon Section. If he had been a Cutchi Memon, it would have been at once presumed that this was Hindu Law and theonus of proving the

contrary would lie on the plaintiff. I do not see myself why a presumption which has been so easily arrived at with regard to Cutohi Memons in

Cutch should not also be applied to Halai Memons in Porebunder. It is true that Porebunder is a few miles outside the limits of the Halar Prant but

that does not, in my opinion, affect the issue. However, the burden of proof has been thrown on the 1st defendant and he has sought to prove his

case 20 B. 53 ; 10 Ind. Dec. 594 by showing that the decisions of the Porebunder Courts establish that Halai Memons in Porebunder are

governed by the Hindu Law in matters of inheritance and succession, (2) by proving that there is a custom among Halai Memons of Porebunder

that in matters of inheritance and succession Hindu Law is applicable.

108. As regards the first point we have to find whether there is any law in Porebunder (which for the purpose of this case may be considered as a

foreign country) governing the succession to estates of Halai Memons, and, if there is, what that law i Section.

109. This is a question of fact and must be proved by evidence. There is no Statute Law but it is argued by the 1st defendant that the evidence of

experts based on their opinion, and the decisions of the Porebunder Courts, prove what the law i Section. If the Porebunder Courts have decided

that a particular custom exists, then there is a rule of decision and with all due respect to the learned Judge it is not open to us to question whether

the Porebunder Courts were right or wrong, for then our conclusion would be, not what the law of Porebunder is, but what we think it ought to be.

I should have been content myself to decide the point on the evidence given by Varajlal Ranchhodji, a Pleader who has been practising in the

Porebunder Courts for seventeen year Section. He was a witness for the plaintiff and was called to contradict evidence given by the witness,

Exhibit Com. 2, regarding the distribution of the property of one Ibrahim Nur Mahomed. In cross-examination he said: ""In Porebunder there is a

conflict of decisions but the latest is that Hindu Law governs Halai Memon Section. That is the decision of the final Court of Appeal there--the

Huzur Court."" The only expert called by the first defendant was Narbheshankar Jivanram, who was in the judicial service in the Porebunder State

from 1891 until he retired in 1913. He said that in three suits decided by him in 1896 the custom that the Hindu Law of inheritance and succession

applied to the, Memons of Porebunder was held proved. After those decisions until he retired it was taken for granted by all the Courts of

Porebunder that the Memons of Porebunder were governed by the Hindu Law of inheritance and succession. That statement was not entirely

accurate, as in a case decided in 1900 by the Sar Nyayadhish it was held that Muhammadan Law applied. The decisions of the Porebunder

Courts are not reported but a large number of judgments on this question have been put in as Exhibit Section. In Appeal No. 8 of 1908-1909,

decided by the Huzur Court in August 1909 (Exhibit 10 A), the main question in dispute was the validity of the Will of a Porebunder Memon who

died leaving property in Mozambique and Porebunder. It was conceded in argument and found by the Court that the Porebunder Memons

followed Hindu Law as regards inheritance and succession. This decision was followed by the Huzur Court in Civil Appeal No. 16 of 1911-1912,

which was an appeal in the proceedings for the execution of the decree obtained by one Zulekhabai in Appeal No. 8 of 1808-09. The judgment

(Exhibit 10H) given in March 1912 contains the following passage: ""So in the matter of inheritance Muhammadan Law does not apply but Hindu

Law applies to these Memon Section. This fact can be taken to be undisputed and even proved so far as this case is concerned."" Exhibits 10B,

10C, A15 are all judgments given in 1915 by the lower Courts in which it was taken for granted that the Hindu Law of inheritance and succession

applied to Porebunder Memon Section

110. In Civil Special Appeal No. 37 of 1915-1916 the question was finally decided by the Huzur Court as to who was the proper legal

representative of Zulekhabai and so entitled to execute the decree obtained by her. The Court decided that the parties were governed by the

Hindu Law for the purposes of inheritance and succession. The correctness of this decision has been questioned by Marten, J., on the ground that

the Court took an erroneous view of what was decided by the Privy Council in the Mombassa case. No doubt the Court considered that the Privy

Council had decided that the distinction between Cutchi and Halai Memons had been done away with and that all-Memons were as a general rule

governed by Hindu Law, save where a local custom to the contrary was proved. But the Court then proceeded to consider the previous decisions

of the Porebunder Courts, disapproving the decisions of the Nyayadhish in February 1915 and the Sar Nyayadhish in October 1900, and

approving of the decisions of the Huzur Court in March 1918. It is not for us to say that if the Court had rightly read the decision in the Mombassa

case as applying to Cutchi Memons only, it ought to have decided otherwise than it did. It has been contended that as this decision was given after

the death of Haji Abu it should not be taken into consideration; but the decision did not constitute a change in the law, it laid down what the

customary law had always been. In my opinion, therefore, it has been proved that the law in Porebunder is that Halai Memons in Porebunder are

governed by Hindu Law in matters of inheritance and succession and this would be sufficient to decide the case in favour of the 1st defendant. But

assuming that I am not correct, and that the custom has not been judicially determined, there is abundant evidence in the case that the custom is as

contended for by the 1st defendant. The onus of proof has been thrown upon him chiefly, it seems, on the ground that Halai Memons in Bombay

have always followed Muhammadan Law. This, however, may have been due to special circumstances after their arrival in Bombay and I am not

prepared to accept the argument that because Bombay Halais follow Muhammadan Law, Porebunder or Kathiawar Halais must be taken to

follow it unless the contrary be proved. However that may, it is an argument which should be disregarded in dealing with the evidence. That can be

divided into two Classes: (1) evidence of tradition, (2) evidence regarding the application of Hindu or Muhammadan Law to particular instance

Section. Twenty-six Halai Memons including many Shethias were examined on behalf of the 1st defendant. They all swore that Porebunder

Memons were governed by Hindu Law in matters of inheritance and succession. Although the Commission sat at Porebunder for over two months

only two witnesses were called for the plaintiff. The first, Joosab Tyab, said he had heard that Porebunder Memons were governed by Hindu Law.

The second, Haji Mahomed Hassan, said: ""I cannot say in what manner and according to what law the Porebunder Halai Memons divide their

property. But it ought to be divided according to Muhammadan Law."" The plaintiff"s witnesses who were examined in Bombay, were all Bombay

Memons whose views may be considered as expressed by the typical answer of Haji Musa Haji Oosman at page 355 of paper-book: ""There is a

strong feeling amongst Halai Memons of Bombay that Halai Memons wherever they may be, they ought to be governed by Muhammadan Law.

The evidence of the Porebunder witnesses regarding the tradition is supported by the fact that when the opinion of the community was invited by

the Administrator of Porebunder on the Government Notification, Exhibit M, in 1897, several Shethias attended before the Administrator and told

him that the Porebunder Halais did not wish to follow Muhammadan Law. But apart fromthat there is no ground whatever for supposing that these

Porebunder witnesses were saying something which they did not believe to be true.

111. With regard to the importance to be attached to evidence of tradition given by leading men of the community, I may refer to the remarks of

their Lordships of the Privy Council in Mir Abdul Hussain v. Musammat Bibi Sona Dero 43 Ind. Cas. 306 ; 20 Bom. L.R. 528 ; 16 A.L.J. 17 ; 4

P.L.W. 27 ; 34 M.L.J. 48 ; 22 C.W.N. 353 ; 23 M.L.T. 117 ; 27 C.L.J. 240 ; P.L.R. 1918 ; 45 C. 450 ; 12 S.L.R. 104 ; 45 I.A. 10 . This

evidence of tradition would be negatived, if it could be proved that as a matter of fact the property of Porebunder Halais was distributed according

to Muhammadan Law.

112. The instances which have been brought forward on both sides have been considered in detail by the learned Chief Justice and I entirely agree

with the conclusions at which he has arrived. No instance has been proved in which the estate of a Porebunder Halai Memon has been distributed

in Porebunder according to Muhammadan Law, while considering the numbers of the community a large number of instances hare been proved in

which, the distribution has been according to Hindu Law. The custom may, therefore, be said to have been established by evidence. It may also be

noted that the plaintiff"s husband, who may be safely treated as responsible for this litigation, was a party to the proceedings in the Porebunder

Courts in the matter of the decree obtained by Zulekhabai, and there it suited him to contend that Hindu Law governed Porebunder Memon

Section.

113. Reference has also been made to numerous decisions in the Court of the Agent to the Governor in Kathiawar on appeal from the Courts of

States which do not possess final jurisdiction, and also in the Courts of Junaghad. They are of no value, except to show that it has always been

taken for granted that Halai Memons in Kathiawar are governed by Hindu Law in matters of inheritance and succession, while the chief question in

dispute was whether they were also governed by the Hindu Law of partition and the joint family.

114. I agree that the appeal succeeds and the plaintiff''s suit must be dismissed.