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Court : Allahabad

Decided On : Feb-06-1936

Reported in : AIR1936All443; 163Ind.Cas.650

Appellant : Mt. Jaffo

Respondent : Chitta and ors.

Judgement :

Sulaiman, C.J.

1. This is a plaintiff's appeal arising out of a suit for recovery of possession of a share in zamindari properties. The plaintiff is one of the daughters of Rohtan who on his death left a widow Mt. Pana and a sister Mt. Umda. The plaintiff's case as put forward in the plaint was that the parties to the suit, namely, Mt. Jaffo and her sister, the daughters of Rohtan, on the one hand, and the defendant Mt. Umda, the sister, on the other, were Thakurs by caste and were originally governed by the Mitak-shara school of the Hindu law; that some time during the Mahomedan rule, the ancestors of the plaintiff and the two defendants in common with many other Thakurs embraced the Mahomedan religion and came to be known as Malkhana Thakurs, but in matters of succession and inheritance as well as in many other matters continued to be governed by the Hindu law and are so governed up to this date. The plaint then went on to allege that for over centuries since their conversion they had been governed by the Hindu law in matters of succession and inheritance as well as many other matters, and that at any rate

there existed a very ancient custom among the Malkhana Thakurs in matters of succession and inheritance as well as many other matters under which a sister cannot inherit her brother's property.

2. The incidents of this custom of succession were enumerated in para. 5 of the plaint. It was then alleged in paras. 6 to 9 that when the plaintiff's ancestor Tunda died leaving a son Dalla and a widow Mt. Ram Kunwar, the son succeeded to the entire estate according to the abovementioned custom to the exclusion of the widow; that when Dalla died leaving a son, a widow, his mother and a daughter, the son succeeded in accordance with the custom to the entire estate to the exclusion of the other three females. It was alleged in para. 12 that when Rohtan died about 12 years ago his wife Mt. Pana alone got the property by inheritance to the exclusion of his daughters as well as other female relations. The plaintiff accordingly came into Court on the allegation that under a family custom, which was common to the Malkhana Thakurs, sisters were excluded from inheritance. The claim was resisted by the transferee from the sister Mt. Umda on the ground that the parties being Mahomedans were governed by the strict Mahomedan law of inheritance and no custom at variance with that law could be set up.

3. The trial Court found that it was proved that Malkhanas were originally Hindus and had embraced Mahomedanism some centuries ago and that since then some of them had adopted all the rites and forms of Islam including the system of succession and inheritance, but that others still retained their mixed Hindu-Muslim characteristics. It was further found that by custom and love of old ideas they have retained their old system of succession excluding the females from succession and inheritance, except in so far as the Hindu Shastras permitted them. But the learned Munsif noted that there were many villages occupied by Malkhana Thakurs and that even in one and the same village there lived Malkhanas some of whom were Muslims while others followed other practices. He came to the conclusion that the custom of exclusion of sisters was not established by the evidence.

4. On appeal the lower appellate Court has come to a contrary conclusion. In the first place it held that as had been done in previous cases it was open to the

plaintiff to prove the alleged custom even though it was contrary to the rule of Mahomedan law, and that in this particular case such a custom of exclusion of sisters had been established.

5. In second appeal a learned Judge of this Court came to the conclusion that the provisions of Section 37, Bengal, Agra and Assam Civil Courts Act 12 of 1887, were specific and civil Courts were bound to follow the Mahomedan law where the parties were Mahomedans. The learned Judge relied on the case of *Jammya v. Diwan* (1900) 23 All 20, and distinguished the case of *Raj Bahadur v. Bishen Dayal* (1882) 4 All 343. It is not quite clear from the judgment whether the attention of the learned Judge was drawn to the case decided by their Lordships of the Privy Council in *Muhammad Ismail Khan v. Sheomukh Rai* (1913) 17 CWN 97, the effect of which has to be considered.

6. If we were to look to the historical origin of the rule it may be noted that even in the Firmans of 1765 taken by the East India Company there was a provision that 'agreeable to the rules of Mahomed and the laws of Empire' the Company should decide causes. Then followed Regn. 2 of 1772, Section 277 of which enacted that:

In all suits regarding inheritance, succession, marriage, and caste and other usages and institutions, the laws of the Quran with respect to Mahomedans and those of the Shastras with respect to Gentoos (Hindus) shall be invariably adhered to.

7. The Regulating Act of 1773 under which the Supreme Court was established at Calcutta also in Section 17 directed that between the native inhabitants of Calcutta 'their inheritance to lands, rents and goods and all matters of contract and dealings between party and party shall be determined in the case of Mahomedans by the laws and customs of the Mahomedans and in the case of Gentoos by the laws and usages of Gentoos to which they belong, and where only one of the parties shall be a Mahomedan or Gentoos, by the laws and usages of the defendant.' In this usages also came in. In the Bengal Civil Courts Act (6 of 1871) Section 24 also provided:

Where in any suit or proceedings it is necessary for any Court under this Act to decide any question regarding, succession, inheritance marriage or caste or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

8. This section has been reproduced in the Bengal, Agra and Assam Civil Courts Act (12 of 1887), Section 37. It is certainly significant that there is no specific reference to any customary law in addition to the Mahomedan and the Hindu laws mentioned therein. Of course the Hindu law in itself embodies rules of custom, but the Mahomedan law does not. Similar enactments were passed as regards other provinces and it is certainly a fact that with the exception of the provinces of Bengal, Agra and Assam, everywhere else, e.g., the Bombay Presidency, the Madras Presidency, the Punjab and the North-Western Frontier Province, Ajmer-Merwara, the Central Provinces and Burma, the corresponding sections of the Act make provisions for the enforcement of any custom having the force of law, while in the section in the Act applicable to these provinces there is no such specific reference. The question came up for consideration before a Full Bench of this High Court in *Surmust Khan v. Kadir Dad Khan* (1867) 1 Agra HCR 38. The Full Bench overruled a previous ruling of this Court reported in *Noor Jehan Begum v. Nawab Mahomed Ali Hoossein* 1864 SDA 416a, where following an observation of their Lordships of the Privy Council in *Abraham v. Abraham* (1861-63) 9 MIA 195, the Court considered that a change of religion, although it releases the convert from obligation of the law, under which his former religion placed him, does not necessarily place him under a new law of property, nor does it necessarily involve any change of the rights or relations of the party abjuring his old faith in matters relating to the property, etc. It was pointed out by the Full Bench that the case before their Lordships of the Privy Council was a case of a convert to Christianity and that their Lordships had then remarked that:

The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relation of the converts in matters with which Christianity has no concern, such as his rights and interests in and power over property.

9. The Full Bench came to the conclusion that it will be contrary to all principle to rule that the successors of the original converts themselves born Mahomedans should be held bound for all time by the act of those original and so, as in the instance of the female of the family in that case, be deprived of those rights, to which they are entitled by the very religion of which they were born members. Their Lordships of the Privy Council then in a later case *Jowala Buksh v. Dharam Singh* (1863-65) 10 MIA 511 distinguished the ruling in *Abraham v. Abraham* (1861-63) 9 MIA 195, and at pp. 537-38 referred to two precedents in Macnaghten's Principles of Hindu Law where converts from the Hindu to the Mahomedan faith were held to be governed by the Mahomedan Law so far as their subsequently acquired property was concerned. Their Lordships left the question open whether it is competent for a family convert from the Hindu to the Mahomedan faith to retain for several generations Hindu usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance which, according to their Lordships, had never been definitely decided.

10. The Full Bench ruling of this Court was however distinguished in *Raj Bahadur v. Bishen Dayal* (1882) 4 All 343, where it was held that the status of a Hindu or a Mahomedan to have the Hindu or the Mahomedan law made the 'rules of decision' depends upon his being an orthodox believer in the Hindu or Mahomedan religion and the mere circumstance that he may call himself or be termed by others a Hindu or a Mahomedan would not be enough. It is for him to establish his religion, and if he fails to establish his privilege to the application of that law he must be relegated to that class of person whose cases have to be decided under Section 24, Act 6 of 1871. In that case the finding of the Court below was that 'the parties have failed to prove that they are either true Muslims or Hindus.' The Bench accordingly applied the rule of justice, equity and good conscience. The question came again for consideration before another Bench in *Jammya v. Diwan* (1900) 23 All 20, and the Bench followed the Full Bench ruling and laid down that the law

which governs these Provinces gives no openings where parties are Mahomedans to the consideration of custom, and that where the parties are Mahomedans, the Mahomedan law shall form the rule of decision, except where such law has by legislative enactment been altered or abolished. A similar question arose in *Ismail Khan v. Imtiaz-un-Nissa* (1908) 4 ALJ 792, where the parties who were Baluchis by caste and originally residents of the Punjab, had from Sind migrated to the Punjab and from the Punjab they came to these provinces. They were not orthodox Mahomedans and were apparently not found to be strict observers of the Mahomedan religion. They set up a family custom of the exclusion of daughters. The Bench held that the Full Bench ruling in *Surmust Khan v. Kadir Dad Khan* (1867) 1 Agra HCR 38, was conclusive and that the rulings of this Courts which had consistently followed the Full Bench decision for a number of years should not be disturbed. The case was taken up in appeal before their Lordships of the Privy Council, and their Lordships' judgment is reported in *Muhammad Ismail Khan v. Sheomukh Rai* (1913) 17 CWN 97. The respondents were not represented but the judgment of the High Court was of course before their Lordships and Section 37, Bengal Civil Courts Act was specifically referred to by the learned Counsel for the appellants. Their Lordships after a consideration of the case thought that the suit should be remanded to the High Court to enable the parties to file evidence with respect to the issue as to whether any custom prevailed in the family depriving female issue to the right of inheritance in the presence of their male issue. The custom which was the subject-matter of issue 3 was specifically a family custom and not a general custom overriding the Mahomedan law. It would therefore seem to follow that at least in a case where the parties had migrated from Sind or the Punjab to these provinces where a custom contrary to the Mahomedan law had prevailed, and were setting up in these provinces a family custom depriving female issue of their right of inheritance in the presence of their male issue, such a custom should be allowed to be proved by the Courts in these provinces. The order of their Lordships remanding the case necessarily involves this decision and it must be taken as the settled law that a party who is setting up a family custom of such a kind should not be prevented from proving it and his evidence should not be shut out. The much wider question whether a universal custom in supersession of the Mahomedan law can also be allowed to be proved was neither raised nor

decided in that case.

11. In another case of this Court *Raja v. Allahdiya* 1916 33 IC 114 the evidence as regards the alleged custom was examined first by a Bench of this Court and then in Letters Patent Appeal by a Full Bench. Ultimately it was found that the custom was not established. Two of the learned Judges did not consider it necessary to decide the general question whether or not any special custom can be set up in derogation of the Mahomedan law. But Walsh, J., expressed his own view that Section 37 did not apply to a dispute between Mahomedans themselves, but that the section meant that the Mahomedans are governed by the Mahomedan law and the Hindus by the Hindu law, and that neither of them against their will should be subjected to the law of the other or to the English or any other law. He even went so far as to remark that a man is free to adopt for himself any special custom which he pleases.

12. In *Ali Asghar v. Collector of Bulandshahr* 1917 39 All 574 a similar question was raised where a native of Palwal in the Gurgaon District of the Punjab rendered distinguished services to Government and was rewarded with the grant of a village in Bulandshahr. On retirement from service he retired to his native town and died there, leaving two widows, two daughters and a minor son. According to the custom of the Punjab and the local custom of Palwal daughters were not entitled to any share in the paternal inheritance in the presence of a son. The Bench held that evidence was admissible to prove the custom alleged by the plaintiff notwithstanding that such custom was contrary to the Mahomedan law. At p. 585, Bannerji, J., referring to the judgment of their Lordships in *Ismail Khan v. Imtiaz-un-Nissa* (1908) 4 ALJ 792 remarked:

We must, therefore, take it that in the opinion of their Lordships, evidence is admissible to prove the alleged custom although it is at variance with the Mahomedan law.

13. At p. 595, Piggott, J., observed:

The case was taken to the Privy Council in appeal and their Lordships directed evidence to be taken in proof of the alleged tribal or family custom. The Court

below has therefore rightly permitted the plaintiff to adduce evidence in proof of the custom set up by him and that evidence it is our duty to consider.

14. Now the Bengal, North-Western Provinces, and Assam Civil Courts Act of 1871 is called: 'An Act to consolidate and amend the law relating to civil Courts'. And the preamble states:

Whereas it is expedient to consolidate and amend the law relating to civil Courts in Bengal, the North Western Provinces, and Assam; it is hereby enacted as follows.

15. The primary object of the Act, therefore, was to consolidate and amend the law relating to civil Courts and not to modify the personal law of litigants who may seek the help of such Courts. The language of Section 37 also shows that there is a direction given to civil Courts, where it is necessary to decide any question regarding succession, inheritance etc., that the Mahomedan law in cases where the parties are Muhammadans shall form the rule of decision, except in so far as such law has by legislative enactment been altered or abolished. In other cases the Court has to act in accordance with justice, equity, and good conscience. Now in Islam also there are several sects, and the law of inheritance is not identical for all. Section 37 cannot, therefore, be interpreted as laying down that any particular rules of Mahomedan law should be enforced. Obviously the section meant that in matters of succession, inheritance, etc., the parties when they are both Muhammadans should be governed by their personal law. It may be difficult to hold that the enforcement of a general custom contrary to the Mahomedan law and superseding it would not be repugnant to the provisions of Section 37. But in view of the pronouncement of their Lordships of the Privy Council it must be held that a family custom which alters the personal law of the parties, even though not in accordance with the strict. Mohamedan law can be allowed to be proved.

16. If Section 37 were to be interpreted in its strict sense various anomalies would follow. A person from Bombay who is subject to a customary law of inheritance may come to this province temporarily and die here. Can it be said that the Courts are bound under Section 37 to enforce the rule of Mahomedan law as between his heirs, notwithstanding the custom by which he was governed? There may again be emigrants from other places who, though settled down in this province have not

yet abandoned their previous personal law. It would be difficult to hold that the Courts have no option but to ignore such law and enforce the strict Muhammadan law against their heirs. On the other hand, there may be considerable difficulty in holding that a person can by a mere choice lay down a new rule of succession contrary to the law of the faith to which he belongs, so as to bind his descendants generation after generation. But a family custom which has the force of law, and therefore modifies the personal law of the members of such family, can be pleaded. To this extent only the previous decisions of this Court must now be deemed to have been overruled by implication by their Lordships of the Privy Council. As already pointed out the plaintiff in this case had actually set up a family custom under which the rule of succession under the Hindu law had governed the ancestors of the parties. No doubt she also alleged the same practice as prevailing among the Malkhana Thakurs; but that was by way of further strengthening her case. She enumerated instances in the family when the Muhammadan law of succession was not followed and the Hindu law was. The question in this case is whether the family custom set up has been established by evidence or not. When admittedly the parties are Muhammadans, there is a heavy burden on the person who sets up a custom contrary to the Muhammadan law to establish it. The burden is heavier still when the custom set up is contrary to any express text of the Quran. But Muslims in other; provinces are known to be governed by special rules of inheritance, not in accordance with the Muhammadan law. In the present case the plaintiff has produced a number of judgments to show that it has been held by the Courts in these provinces that among certain Malkhana Thakurs succession was governed by the Hindu law. In 1893 the Judge of the Court of Small Causes, Agra, in a case from Mahaban in the district of Muttra, held that the parties in that case who were converts to Islam were not strictly Muhammadans, and applied the rules of justice, equity and good conscience, and enforced the customary law of inheritance, which their ancestors had uniformly followed. The Court, while conceding,

that of course such members of the family community as may choose to follow the Muhammadan law by adhering to the rules of their faith, will have their law applied to them.

held that such was not the case before him. In appeal that judgment was affirmed in view of the authority of this Court in *Raj Bahadur v. Bishen Dayal* (1882) 4 All 343. In another case in 1912 the Subordinate Judge, Agra in appeal held that the Malkhana Thakurs who were old Hindus converted to Muhammadanism had in spite of such conversion retained many of their old usages and customs. Again in 1915 the Subordinate Judge, Muttra, in another case from Mahaban, held that in view of the evidence the Malkhana Thakurs of village Suri did not follow the Muhammadan Law of inheritance but followed the Hindu law. Lastly in 1930 the Munsif of Muttra held that the Malkhana Thakurs of village Tera were governed by the Hindu law of succession and not by the Mahomedan law. There was an earlier case of 1909 decided by the Munsif of Hathras in the district of Aligarh where he had declined to go into the question of custom on the ground that the Full Bench ruling in *Surmust Khan v. Kadir Dad Khan* (1867) 1 Agra HCR 38 precluded such an enquiry. That case was decided before their Lordship's pronouncement.

17. In addition to this general kind of evidence, the plaintiff relied on the entry in the *wajib-u-larz* of the village Undi to which the parties belong, which after mentioning that the division of the property among the Malkhana Thakurs of the village was according to the 'bhai-bant system' stated that where there are two widows left and one of them has children, those children would exclude the childless widow; and a childless widow succeeds to a husband with a limited estate only. It also contained a provision for the adoption of the son of the nearest collateral. It contained no mention 'of the succession of a sister or a daughter in the presence of sons. It is possible to argue that the word 'aulad' was wide enough to cover both sons and daughters. But the provisions regarding the exclusion of the childless widow, the limited estate of a widow and the adoption were certainly contrary to the Mahomedan law. No doubt the entry as a record of custom may not be of great value, but it certainly shows that the practice in the village might have been or at any rate what the co-sharers, among whom presumably the predecessors in title of the parties to the suit also were intended to be followed.

18. The plaintiff also produced oral evidence and her eight witnesses cited numerous instances when in the presence of sons a daughter or sister did not inherit. The defendant produced six witnesses who stated that the parties were

Mahomedans, but they were not able to cite any clear instance where any Malkhana sister had succeeded along with her brothers. The finding of the lower appellate Court as regards this point is, however, vague for it has added 'except where a family has become out and out Muslim.' This exception may imply that there were instances in which Malkhana sisters succeeded along with their brothers. But the defendants' witnesses certainly had to admit that on many an occasion daughters had not inherited in the presence of sons, nor had widows; of course the mere fact that a daughter or widow or mother does not take a share, but allowed the whole estate to go to the son, is not by itself conclusive that there is a custom excluding females. Standing by themselves, such instances may not be weighty; but along with other evidence they certainly carry weight. The plaintiff also produced the Khewats of the village and these did not show that there had been any instance in which the Mahomedan Law had governed the inheritance of a Malkhana Thakur. As regards the instances in the family itself the lower appellate Court has remarked:

In the very family in question there is evidence that when Tunda and Dalla died each had left a widow, but the widow in each case was excluded by the son. So was Mt. Umda herself on the death of her father, Dalla. It is to be noted that Umda did not claim any share until after the death of Rohtan's widow, i.e., Mt. Pana. The family is, therefore, clearly governed by the Hindu law of succession.

19. We take this finding to be that a family custom, under which succession is governed by the Hindu law, has been proved by sufficient evidence in the case. We have already enumerated the evidence. We are unable to say in this second appeal that there was not sufficient legal evidence before the Court below to come to this conclusion. The burden was undoubtedly very heavy on the plaintiff; but it was capable of being discharged. The lower appellate Court has taken into account both oral and documentary evidence and has recorded a clear finding that the family of the parties is governed by the Hindu law of succession. We think that we must accept this finding as one of fact as it is not vitiated by any error of law. Had the evidence been legally insufficient to establish a family custom we would have intervened; but this is not the case here.

20. As the ruling of their Lordships of the Privy Council in *Ismail Khan v. Imtiaz-un-Nissa* (1908) 4 ALJ 792 does not appear to have been cited before the learned Judge of this Court, and he was bound to follow the previous Division Bench ruling of this Court in *Jammya v. Diwan* (1900) 23 All 20, he has held that a custom could not be proved. For the reasons given above we must hold that it was open to the plaintiff to prove the family custom, and accordingly the finding of the lower appellate Court must on this point be accepted.

21. The only other point that remains for consideration is whether the plaintiff is estopped from claiming the share on account of a compromise in the revenue Court which was entered into on her behalf by her guardian. Mt. Umda, the sister, claimed a one-third share in the revenue Court against the minor daughters of Dulla. Their guardian conceded the whole claim and gave up the claim of the minors altogether. Apparently there was no consideration received for the same, and no property was taken by way of compensation. There was no necessity for the guardian to give up the minors' claim at all. He need not have contested the application for mutation of names if he was not prepared to fight out the matter. No registered deed was executed. The main question before the revenue Court was whose name should be entered in the revenue papers for fiscal purposes. No attempt was made by the guardian to obtain the sanction of the revenue Court for entering into a compromise on behalf of the minors nor was he a certificated guardian of the minors. He was merely acting as their next friend. In these circumstances we cannot hold that the minors were bound by the act of the guardian, and that the plaintiff is now estopped from claiming a share because her guardian did not press for her rights in the revenue Court. The appeal is accordingly allowed, the decree of the learned Judge of this Court is set aside, and that of the lower appellate Court restored with costs.