

(1920) 01 MAD CK 0028
In the Madras High Court

Siddick Hajee Aboo Bucker Sait

APPELLANT

Vs

Ebrahim Hajee Aboo Bucker Sait and Others

RESPONDENT

Date of Decision : 21-01-1920

Acts Referred:

Citation : AIR 1921 Mad 571 : 70 Ind. Cas. 715

Hon'ble Judges : Kumaraswamy Sastri, J

Bench : Single Bench

Judgement

Kumaraswamy Sastri, J.—The plaintiff sues for a declaration that he and the defendants are members of a joint Cutchi Memon family governed by the Ordinary Hindu Law of joint family and succession; that plaintiff as a member of such family is entitled to a partition of the family properties and asks for an account being taken of the family properties, and liabilities, and that plaintiff's fifth share be delivered to him. The plaintiff prays in the alternative for a declaration that the firm of Hajee Aboobucker and Sons became dissolved on the death of his father and for delivery to him of his sixth share as a partner.

2. The plaint sets out that the plaintiff and defendants are Cutchi Memons and the sons of Hajee Aboobucker Rahimatulla Sait who died on the 10th of September 1918, that they and their deceased father were members of a joint Cutchi Memon family governed by the ordinary Hindu Law of joint family and succession, that they were carrying on a joint family business in Madras with others under the name of Hajee Mahomed Hajee Aboobucker & Co.; that on the 10th July 1914 the joint family of the plaintiff on the one hand, and other partners, on the other, dissolved the partnership, the plaintiff's family receiving Rs. 39,500 for their share and executing a deed of release dated 10th July 1914; that with the assets so received the plaintiff's family carried on a joint business at No. 73, Go-down Street and Evening Bazaar, Madras as piece-goods merchants under the name and style of Hajee Aboobucker and Sons; that in 1916 disputes and differences arose between the members of the family, in consequence of which it was agreed that plaintiff should become separated and

be given his share, and that notwithstanding the agreement and demands made by the plaintiff, the defendants refused to give him his share and are carrying on the business after excluding him, alleging that he was only a working partner entitled only to remuneration for his services. The plaintiff states that the defendants are setting up a Will, dated nth September 1918, alleged to have been executed by his father, and states that the Will is inoperative as against him. He values the relief claimed at Rs. 1,25,000.

3. The defendants filed written statements admitting that the parties are Cutchi Memons. They deny that the Hindu Law as to joint family applies to them and state that Cutchi Memons have the power of disposing of the whole of their properties" by Will and that consequently the Will executed by their father is binding on the plaintiff. It is unnecessary for the purposes of the preliminary issue raised in the case to refer to the other contentions raised which relate to the merits of the plaintiff's claim.

4. At the request of all the parties and in order to save trouble and expense, the following preliminary issue was raised:

Is the Hindu Law as to joint family and co-parcenary applicable to the community to which the parties belong?

5. The parties are admittedly Cutchi Memons who settled in Madras from the Bombay Presidency. The contention for the plaintiff is that the Hindu Law as to joint family and co-parcenary is applicable to Cutchi Memons while the defendants contend that they are governed by Hindu Law only on matters concerning succession and inheritance.

6. Cutchi Memons were originally Hindus residing in Cutch and were converted into Muhammadanism several years ago. Sir Eiskine Perry in *Hirbae v. Sonabae Rahimatbae v. Haji Jussap & case of the Khojas & Memons* 4 Ind. Dec. 100; observed: "The Memons were originally, and still are, seated in Cutch, from which they have spread themselves into many of the adjoining countries in Western India, and by their own account, even into Malabar and Bengal. By their traditions they were originally Loannas, a Hindu commercial caste in Cutch; but they are not able, and no records are forthcoming, to indicate the period of their conversion, although there is every reason to believe it must have been some hundreds of years ago. "The history of the Khojahs, another sect of Hindu converts to Muhammadanism, is also, given in the same report and so far as the authorities go it is clear that the same rules have been applied both to Khojahs and Cutchi Memons in dealing with the question as to how far they are governed by Hindu Law.

7. All the cases dealing with the question are from Bombay and it will be convenient to trace the development of the law in chronological order.

8. The earliest reported case is that of *Hirbae v. Sonabae Rahimatbae v. Haji Jussap and case of the Khojas and Memons* 4 Ind. Dec. 100 which was decided in

1847. It is known as the case of Khojas and Memons and the question was whether a rule of succession amongst them at variance with the rules of Muhammadan Law was valid. Sir Erskine Perry, C.J., held that amongst Cutchi Memons, the custom of excluding females from inheritance prevailed, exactly as it does amongst the Hindus and after dealing with the requisites of a valid custom and the arguments advanced to the effect that a custom in derogation of the law as laid down in the Koran was invalid, observes *Hirbae v. Sonabae Rahimatbae v. Haji Jussap* and case of the Khojas and Memons 4 Ind. Dec. 100 . "The conclusion I draw is, that if a custom otherwise valid is found to prevail amongst a race of Eastern origin and Non-Christian; faith, a British. Court of Justice will give effect to it, if it does not conflict with any, express Act of the Legislature. And, as I have before shown, that the succession -to an inheritance is one of those subject matters in which the English Legislature, has not thought it fit to speak by any general enactment, it follows that the particular custom of these Khojas and Memon Cutchees ought to be supported. On all the above grounds I think that the attempt of these young women to disturb the course of succession which has prevailed among their ancestors for many hundred years has failed." In *Gangbai v. Tavar Mulla* 1 B.H.C.R. 71 decided, in 1863, the question arose as to whether, a bequest for charitable purposes (Dharm) in a Will executed by a Khojah lady was void. Sausse, C.J., observed that the Khojah caste "although Muhammadan in religion has been held to have adopted, and to be governed by, Hindu customs and laws of inheritance."

9. In *In the goods of Mulbai* 2 B.H.C.R. 276, decided in 1866, an application was made for Letters of Administration of the estate of a Khojah lady who died issueless and intestate, by her brother. His application was opposed. The case for the caveator was the heirs of Khojah widow who died issueless leaving property which she got from her husband were her husband's nearest heirs" and not her relatives". Couch, C.J., after referring with, approval to the case of the Khojahs and the Memons, *Hirbae v. Sonabae Rahimatbae v. Haji Jussap* and case of the Khojas and Memons 4 Ind. Dec. 100 as deciding 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, although it differs from the rule of succession laid down in the Koran, and discussing the evidence held that the custom excluding the wife's relations from property got from the husband was proved and observed "what may be the origin of this custom among the Khojahs, I shall not now enquire. It is very possible that it arises from some analogy to be found in the Hindu Law. I agree with the observations of the Counsel, for the caveator that the law by which the Khojahs are governed is not, properly speaking, Hindu Law, but probably that law modified by their own peculiar customs." One of the contentions for the caveator was that the customs of the Khojahs were more analogous to Hindu than to Muhammadan Law and that they were a caste "who on their conversion from Hinduism preserved to a great extent their old law as to property while they conformed in religious matter to the Koran." In *Shivji Hasam v. Datu Mavji Khoja* 12 B.H.C.R. 281 decided in 1874, it

was held that, in the absence of sufficient evidence of usage to the contrary, the Hindu Law is applicable in matters relating to property, inheritance and succession amongst Khojah Muhammadans. The suit which led to the appeal was on a mortgage executed by the eldest of three Khojah brothers for himself and as guardian of his brothers. It was subsequently renewed by all the three brothers. Afterwards, the District Court granted their mother a certificate of guardianship under Act XX of 1864, as regards one of the brothers who was under sixteen. The mortgagee filed the suit against all the three brothers and their mother. The Subordinate Judge found that the money was borrowed for necessary purposes and for benefit of all the members. He also held that a Khojah attained majority when he completed his sixteenth year. He, in fact applied the same principles as would have been applied if the mortgagors had been members of a joint and undivided Hindu family. On appeal, Westropp, C.J., who delivered the judgment of the Court, in dealing with the question of minority and the power of the District Court to appoint a guardian to one of the brothers approved of and applied the rule laid down in *Sheo Nundun Singh v. Musammatt Ghunsam Kooeree* 21 W.R. 143 to the effect that one member, although an infant of an undivided family governed by the Mitakshara Law, had not such an interest in the joint property as is capable of being taken charge of and managed by the Court or a guardian appointed by it under Act XL of 1858 to the Khojahs and held that the order of the District Court appointing the mother as guardian of one of her sons, was invalid as Shivji, the eldest brother, was then the adult manager on behalf of the undivided family. Dealing with the contention that the Khojahs were not regulated by the law applied to Hindus who are undivided in family and estate, the learned Chief Justice observed that in matters relating to the property, succession and inheritance, Khojahs appear to have retained to a considerable extent the Hindu Law. Referring with approval to *Hirbae v. Sonabae Rahimatbae v. Haji Jussap* and case of the Khojas & Memons (1847) Perry's O.C. 110 ; 4 Ind. Dec. 100 and *Gangabai v. Tavar Mulla* 1 B.H.C.R. 71 he observed: "The traditionary doctrine of the Supreme Court and of the High Court has for upwards of at least twenty-five years been that, in the absence of proof of special usage to the contrary, the law applicable to Khojahs is, in matters relating to property, succession and inheritance, the Hindu Law as administered in this Presidency * * * We think that we must consider it as a settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu Law is applicable in matters relating to property, inheritance and succession amongst Khojah Muhammadans."

10. This decision is important as showing that the ordinary principles governing a Mitakshara joint Hindu family were applied in considering the validity of a mortgage executed by one of the adult members of a Khojah family, that the age of majority was the age according to Hindu Law and that in all cases relating to property, succession and inheritance, Hindu Law was the, law which prima facie was the law governing Khojah Muhammadans. Having regard to the fact that the judgment was of Sir Michael Westropp and West, JJ., two eminent Judges of the

Bombay High Court, it cannot be said that the law was laid down erroneously when they spoke of Hindu Law governing property, succession and inheritance. The Hindu Law of property as administered in the Bombay Presidency was the law of joint property and co-parcenary as based on the Mitakshara and the Mayukha and I think that the judgment shows clearly that the learned Judges did not limit the applicability of Hindu Law only to questions of inheritance and succession.

11. In the goods of Rahimbhai Allubhai Hirbhai v. Gorbai 12 B.H.C.R. 294 was decided in 1875 by Sargent, J. The question was as to who was entitled to Letters of Administration of the estate of a deceased merchant who died issueless leaving a widow, mother and a married sister. It was held that, according to the custom of the Khojahs, the mother was entitled to Letters of Administration in preference to the wife or sister. Referring to Gangbai v. Tavar Mulla 1 B.H.C.R. 71 the learned Judge was of opinion that it showed that the Khojah caste was treated by all parties as one which must prima facie be taken to be governed by Hindu customs and notions. After referring to In the goods of Mulbai 2 B.H.C.R. 276 and Gangbai v. Tavar Mulla 1 B.H.C.R. 71 the learned Judge observed: "The summary of the decisions of the Court as well of the cases disposed of by the Registrar in the non-contentious business explained by the remarks of Sir M. Sausse in Gangbai v. Tavar Mulla 1 B.H.C.R. 71 satisfactorily shows, I think, that the Khojahs have for the last twenty-five years at least been regarded by the Court in all questions of inheritance as converted Hindus who originally retained the Hindu Law of inheritance, which has since been modified by special customs, and that an uniform practice has prevailed during that period of applying Hindu Law in all questions of inheritance, save and except where such a special custom has been proved. * * * * Under these circumstances this Court cannot but throw upon those who dispute the right of the widow to administer (a right which would be clearly hers under Hindu Law) the burden of proving the existence of a custom inconsistent with that right." Shivji Hasam v. Datu Mavji Khoja 12 B.H.C.R. 281 is referred to with approval and there is no suggestion that the case went too far when the Hindu Law of property was held to be applicable. The Judge held on the evidence that the custom set up was proved. On appeal, Westropp, C.J., and Green, J., held that burden was rightly thrown by the Trial Judge and the evidence supported his view.

12. In Rahimatbai v. Hirbai 2 Ind. Dec. 23 decided in 1877, the question was whether the widow or sister were the heirs of a Khojah Muhammadan who died childless and intestate. One of the issues raised was "whether the law of inheritance among Khojahs is the Hindu Law, in the absence of proof of custom to the contrary" and this issue was found in the plaintiffs' favour. The Trial Judge (Sargent, J.) held that the widow would prima facie be entitled to possession, her right under the Hindu Law having been displaced only so far as a custom was proved in In the goods of Rahimbai Allubhai Hirbhai v. Gorbai 12 B.H.C.R. 294 that she was postponed to the mother. On appeal, Westropp, C.J. and Green, J., confirmed the judgment of the lower Court and observed that: "It is a settled

rule that, in the absence of proof of a special custom to the contrary, Hindu Law must regulate the succession to property amongst Khojahs," and that the burden of proving any special custom lay on the party alleging it. Dealing with the maintenance to be awarded to a Khojah widow, the learned Judges observed: "In the absence of any evidence to the contrary, maintenance amongst Khojahs would be regarded as governed by Hindu Law. A Hindu widow must, in the first instance, look for maintenance to her husband's property, or the property of his family if the family be undivided, and she can only fall back upon the property of her own relatives where no property of her husband is available."

13. In 1880, the question arose whether Probate could be granted of the Will of a Cutchi Memon to take effect throughout British India. In the matter of Haji Ismail Haji Abdulla 6 B. 452 it was held that Cutchi Memons were not Hindus within the meaning of Section 2 of the Hindu Wills Act (XXI of 1870) but were Muhammadans to whom Muhammadan Law was to be applied except when any ancient and invariable custom to the contrary was established. Westropp, C.J., who delivered the judgment of the Court, observed: "We do not think that Cutchi Memons can be regarded as Hindus within the meaning of the Hindu Wills Act, by which Section 242 of the Indian Succession Act holds them to be Muhammadans to whom the Act with the clause subsequently added by Act XIII of 1875 is made applicable to Hindus. We know of no difference between Cutchi Memons and any other Muhammadans except that in one point connected with succession it was proved to Sir Erskine Terry's satisfaction that they observed a Hindu usage which is not in accordance with Muhammadan Law that is not enough to bring them within the term "Hindu" as used in the Hindu Wills Act. It is admitted that, among such Memons, marriages are celebrated by the Kazi, they attend the Masjid, they being to the Sunni division of Muhammadans and make pilgrimages to Mecca. Under these circumstances we must hold them to be Muhammadans to whom Muhammadan Law is to be applied, except when an ancient and invariable special custom to the contrary is established."

14. The remarks in the concluding portion of the above passage are obiter and if it was intended to lay down that Cutchi Memons are governed by Muhammadan Law of property, succession and inheritance unless a special custom is proved in each case, it is difficult to reconcile it with the previous decisions on the point. All that was necessary to determine was whether a Muhammadan by religion can be said to be a Hindu within the meaning of the Hindu Wills Act. See *Dagree v. Pacotti Sanjo* 19 N. 783 as pointed out by Scott, J. in *Abdul Cadur Haji Mahomed v. C.A. Turner* 9 Ind. Jur. 392, the dictum of Westropp, C.J., was not necessary for the decision of the point before the Court and has not been followed in subsequent cases referred to by the learned Judge.

15. In *Ashabai v. Haji Tyeb Haji Rahimtulla* 9 B. 115 decided in the year 1882, the plaintiffs who were the widow and daughter of one Haji Adam Haji Ismail, a deceased Cutchi Memon, sought inter alia to recover properties alleging them to be the ancestral property of Haji Adam which his father Haji Ismail could not

dispose of by Will. The defendants were the executors and legatees under Haji Ismail's Will. The decision of Sargent, J., is important as laying down that the Hindu Law of joint property and survivorship was applicable to Cutchi Memons. The learned Judge held that there was no partition between Haji Esmail and Haji Adam and that the ancestral property became vested absolutely in Haji Esmail son his sons' death. The jewels of one of the ladies of the family were treated as her streedhanam jewels governed by the Hindu Law of succession to streedhanam property. Eminent Counsel appeared on both sides and it was not suggested that there was any ground for not applying the ordinary law I of Hindu joint family to Cutchi Memons. It is significant that Sargent, J., was a party to the decision in In the matter of Haji Ismail Haji Abdulla 6 B. 452 .

16. Abdul Cadur Haji Mahomed v.C.A. Turner 9 B. 158 decided in 1884 approved the view that Cutchi Memons were governed by Hindu Law of inheritance.

17. In Mahomed Sidick v. Haji Ahmed 10 B. 1 decided in 1885 it was held that a Will made by a Cutchi Memon disposing of ancestral property was invalid. The contention that the parties being Cutchi Memons, the Mitakshara doctrine of sons acquiring by birth an interest in ancestral property did not apply to them was raised. It was argued that the decisions only went to the extent of holding that the Hindu Law of succession and inheritance was held applicable to Cutchi Memons and that a son's right by birth to his father's estate was not a question of succession and inheritance. Scott, J., after a review of the reported and unreported decisions of the Bombay High Court held that Cutchi Memons were governed by Hindu Law of inheritance in the absence of special proof of custom. Dealing with the question of ancestral property the learned Judge observed *ibid* at pages 13 and 14: "The next question is whether, Cutchi Memons by a special usage recognise no difference in the power of alienation between ancestral and self-acquired property. I think the alleged custom to that effect was not proved. The evidence was contradictory; no satisfactory instances were given. The custom was not shown to be uniform, or continuous, or accepted by the community. Indeed, I doubt whether it was proved to have any existence at all, save in the minds of those who set it up for the purposes of the present suit * * * Vested rights, accruing at birth, have been acquired by sons under the law hitherto governing the community, and it would not be just to interfere with those rights on account of this recent change of opinion. I use the word "recent" advisedly, because the community hitherto by their practice have acquiesced in the application of Hindu Law. "Dealing with the question whether the property disposed of by the Will was ancestral or self-acquired, the learned Judge applied the principles governing the Hindus in such cases and held *ibid* at page 18, that as the property was ancestral, "nothing could be done with it which infringed the equal rights of the sons."

18 .It is significant that while in 1882 the point that the Hindu Law of joint property did not apply to Cutchi Memons was raised in the argument but not pressed at the trial by eminent Counsel, an attempt made in 1885 to prove by

evidence that Cutchi Memons did not recognise any difference between ancestral and self-acquired property utterly failed. In fact, so interwoven is the law of joint family and survivorship with the law of succession in families governed by the Mitakshara system of Hindu Law that it would have been strange if persons who were, before their conversion to Muhammadanism, governed by such law elected to cling to the law governing succession proper and gave up the joint family system.

19. In *Cassumbhoy Ahmedbhoy v. Ahmedbhoy Habibbhoy* 12 B. 280 decided in 1887, it was held by Jardine, J., that amongst Khojah, Muhammadans, a son was entitled to partition of ancestral property during his father's lifetime and that it was not competent to a Khojah to dispose of ancestral property by Will. It was also held that presumptions of Hindu Law applied to Khojah Muhammadans. Jardine, J., after a review of all the authorities observed *ibid* at page 294: "The decisions which apply Hindu Law to matters of property and inheritance in the absence of special custom appear to assume that the Hindu Law applicable is the ordinary Hindu Law, although this is not expressly stated, no contention having apparently been raised heretofore that any other form of Hindu Law should be applied. "A large body of evidence was adduced on both sides as to the custom amongst the Khojahs in dealing with their property and the learned Judge observed (1887) *ibid* at page 307:" Having set forth the evidence produced by plaintiff, I must state my conclusion, which is, that the opinions given and the instances proved combine to show that the customs of the Khojahs as to partition of ancestral property are substantially identical with the ordinary Hindu Law, as might have been expected seeing that in other matters, this identity has already been affirmed by decisions of learned Judges passed after inquiry into facts." On the facts, he held that the property in dispute was ancestral property and passed a decree for the plaintiff who claimed a share in what he alleged to be the family estate from his father and brother.

20. The case went up on appeal and was decided by Sargent, C.J. and Bayley, J.; *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* 13 B. 534 . They held that the rule of Hindu Law applicable to Khojah Muhammadans was confined to questions of inheritance and succession and that there was no presumption in favour of the rule of Hindu Law giving a son the right to partition as against his father being applicable to Khojahs. On the evidence the learned Judges differed from the Trial Judge and held that it was not established that amongst Khojahs in Bombay, there was any recognised right of a son to demand partition in the lifetime of his father though such a custom existed in Kathiawar and Cutch and that the evidence was not sufficient to show that the property in dispute was ancestral. Sargent, C.J., after a review of the authorities, observed; "So far, therefore, as the rule is confined to the simple question of inheritance and succession, as to which the law-books present no difficulty, it would appear to be based on a long-established practice of the Court of applying Hindu Law in the absence of proof of custom to the contrary, which might well justify the onus being thrown on the party alleging such custom of proving it. In the goods of

Rahimbhai Allubhai Hirbhai v. Gorbai 12 B.H.C.R. 294 ; Shivji Hasam v. Datu Mavji Khoja 12 B.H.C.R. 281 and Rahimatbai v. Hirbai 12 B.H.C.R. 294 are all illustrations of the application of the rule in dealing with the evidence on questions of that nature. But whereas in the present case the issue is as to a right upon which, more specially as regards moveable property with which we are now concerned, the greatest doubt and difference of opinion has prevailed, not only in the Courts of this country as--appears from the judgment in Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy 10 B. 528 but amongst all writers and jurists who have given their attention to the subject, as pointed out in the judgment of the Division Court in this case it would be impossible, in our opinion, to hold that there is such a presumption in favour of the Hindu Law in force on the subject amongst Khojahs at the time of their conversion in A.D. 1400 having been identical with the law as it has only recently been authoritatively declared by this Court in Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy 10 B. 528 and of its having been retained up to the present time as to shift the onus of proof from the plaintiff, who alleges that such was the law and is now the custom of Khojahs. * * * The question between the parties must, therefore, in our opinion, be determined solely on the evidence in the case, apart from all presumption one way or the other." As regards the question whether the sons could object to any alienations by their father of the ancestral property the learned Judges observed that the right of the sons to object to alienation by their father is quite consistent with their having no right to demand partition of ancestral property during his lifetime and which was the only point for consideration.

21. It appears from the judgment that the custom in Kathiawar and Catch from which place the Khojahs and Cutchi Memons emigrated to Bombay, was that the ordinary law of the Hindu joint family with the rights of the son to demand partition was in existence. So far as Immovable property is concerned, there is little doubt that the Mitakshara gave the sons an equal right with their father and the. doubtsas regards the moveable property raised by judges and lawyers in British Courts is hardly a ground to hold that there could have been no custom amongst Khojahs and Cutchi Memons, a few centuries after, Vignaneswara to follow their Hindu customs after conversion especially when they held onto the Hindu Law of inheritance and succession. If the custom was proved to have existed in the place from which the Khojahs and Cutchi Memons emigrated, the presumption arises that they carried their personal law with them and the onus will be on tae other side to assert, that after, they settled in Bombay and began to trade and acquire money they found it so inconvenient that a new custom sprang up of refusing a share to a son during the father"s lifetime.

22. In In the matter of Haroon Mahomed 14 B. 198 decided in 1890 by Sir Charles Sargent, C.J. and Scott, J., the question arose about the right of Cutchi Memons who formed a trading family and it wa9 held that the rules of Hindu Law and custom applied, and the position of one of the members with regard to the family property was to be determined by the same condition as would apply in

the case of a member of a joint and undivided Hindu family. Sargent, C.J., who delivered the judgment of the Court treats it as undoubted law that the rules of Hindu Law and custom governing joint and undivided Hindu trading families would apply to Cutchi Memons and observed: "The appellant is a Cutchi Memon, and belongs to the same family as the other persons who have been made insolvents. As Cutchi Memons the rules of Hindu Law and custom apply to them, and the position of the appellant with regard to the family property must be determined by the same considerations as would apply in the case of a member of a joint and undivided Hindu family." After referring to the facts, he observed that the firm was a family firm, and was the property of a family subject to Hindu Law and applied the rule laid down in *Samalbai Nathubhai v. Someshwar* 5 B. 38 that ancestral trade may descend, like other heritable property, upon the members of an undivided family.

23. In the judgment the Chief Justice who delivered the judgment in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* 7 Ind. Dec. 354 speaks of family trade and undivided family and treats the whole of the law applicable to Hindu undivided trading families as applicable to Cutchi Memo as. I find it difficult to reconcile this view with his opinion in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* 7 Ind. Dec. 354 to the effect that it was only on questions of inheritance and succession that there was any presumption that Hindu Law applied.

24. *Bai Baiji v. Bai Santok* 10 Ind. Dec. 594 decided in October 1894 was a case of Suni Borah Muhammadans, who were Rajputs converted to Muhammadanism several centuries ago. The plaintiff who was the daughter of a deceased Borah sued his widow for possession of the property left by her father on the ground that by the custom of her caste, she was entitled to succeed to her father's estate to the exclusion of the widow. She set up a Will bequeathing the property to her and in the alternative claimed a share under Muhammadan Law. The defendant pleaded that the parties were governed by Hindu Law as regards matters of Succession and inheritance. The Subordinate Judge found for the defendant who was the widow. On appeal, Ranade and Fulton, JJ., confirmed the judgment of the lower Court. The only question before the Court was whether the strict Muhammadan Law or the Hindu Law and usage governs the succession to the estate of a Suni Borah Ranade, J., after referring to the previous decisions, observed, that they laid down that a well-established custom of Hindu converts to Muhammadanism following the Hindu Law of inheritance, would override the general presumption that Muhammadan Law generally governs converts to that faith from the Hindu religion but that the custom should be strictly confined to cases of succession and inheritance. The learned Judge did not refer to In the matter of *Haroon Mahomed* 7 Ind. Dec. 584. With all deference, it seems to me that the decisions in *Rahimatbai v. Hirbai* 2 Ind. Dec. 23 where questions of maintenance were held to be governed by Hindu Law; *Ashabai v. Han Tyeb Haji Rahimtulla* 5 Ind Dec. 77; *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy* 5 Ind. Dec. 742 and In the matter of *Haroon Mahomed* (16) where property was

treated as ancestral and the law of survivorship applied, do not limit the application of Hindu Law principles and presumptions only to cases of succession and inheritance. Falcon, J., was more guarded in his judgment and confined himself to the question whether the parties were governed by Hindu or Mahammadan Law of inheritance. The only question raised related to a rule of inheritance and it was unnecessary to consider if any other principles of Hindu Law were applicable. In *Maharana Shri Fatesangji Jasvatsangji v. Kuvar Harisangji Fatesangji* 10 Ind. Dec. (679 decided in December 1894, the claim was by a member of the Molesalam Girassias who were Rajputs converted to Muhammadanism for maintenance. Jardine and Ranade, JJ., held, that he was entitled to maintenance. Ranade, J., observed *ibid*, at page 187: "Under the general Hindu Law the person in possession of an ancestral impartible estate or Raj is bound to provide maintenance for the younger branches of the family who cannot claim partition: *Muttusawmy Jagavera Yettappa Naicker v. Vencataswara Yettaya* 12 M.I.A. 203; *Himmatsing v. Ganpatsing* 12 B.H.C.R. 94. The sons and daughters expressly come under this category. Plaintiff will thus have a right to claim maintenance, unless indeed as the Molesalams are converted Hindus, defendant succeeded in establishing a particular custom to the contrary, in which case the special custom, and not the general law must prevail. *Rahitmibai v. Hirbai* 2 Ind. Dec. 23; *Mahomed Sidick v. Haji Ahmed* 5 Ind. Dec. 383. It is clear that the learned Judge did not confine the rules of Hindu Law strictly to cases of succession and inheritance as he was disposed to do In the decision of *Bai Baiji v. Bai Santok* 10 Ind. Dec. 594 but extended the rule to cases of maintenance and cast on the converted Muhammadans setting up custom at variance with the rule of Hindu Law, the burden of proving it. In *Rashid Karamali v. Sherbanoo* 6 Bom. L.R. 874 decided in 1904, it was held by Russell and Chandavarkar, JJ., that when a Khoja and his brothers lived jointly, his widow would only be entitled to maintenance, the property devolving on the brothers. Russell, J., observed *ibid* at page 89: "Although he and plaintiff were Muhammadans married according to Muhammadan rites, yet at the moment of his death so far as regards the succession to his property he was a Hindu. The living Muhammadan by operation of law became a dead Hindu. His brothers living joint with him, Naser's wife would on his death be entitled to maintenance out of his estate while his property devolved on them. * * * * Although Khojahs are governed by Hindu Law for the purposes of succession and inheritance, the limited application of the said law attracts with it all the consequences which attach to it under that law." One of the consequences apparently was that the brothers of the deceased Khojah took by survivorship all the properties while the widow was given only maintenance. It seems to me that this consequence can only follow if the Khojahs are regarded as governed by the law of joint family as administered to persons governed by the Mitakshara.

25. In *Advocate General v. Karmali Rahimbhai* 6 Bom. L.R. 601 decided in 1903, it was conceded by all parties that the Will of a Khojah must be construed on the basis of the testator having the testamentary power of a Hindu resident in

Bombay and Jenkins, G.J., and Russell, J., construed the Will accordingly and determined the rights of the parties on principles governing Hindu Wills. In *Moosa Haji v. Haji Abdul* 7 Bom. L.R. 447 decided in 1915. Jenkins, C.J., and Batchelor, J., held, that in the absence of any special custom of succession, the Hindu Law of inheritance applied to Cutchi Memons and that when a widow married according to Nikah rites died issueless, her property was governed by the Hindu Law of *streedhanam* where a woman was married in an approved form.

26. In *Haji Noor Mahomed v. Macleod* 9 Bom. L.R. 274 decided in 1907 by Russell J. it was held that the doctrine of devolution by survivorship applied to Cutchi Memons, that the position of a family firm carried on by a Cutchi Memon is between that of a joint Hindu family and that of a partnership under the Indian Contract Act, and that Cutchi Memons acquire their father's estate as Hindu "Universitas" which survives to them, as Hindu after-born members acquire an interest in it by birth. Russell, J. observed as follows: "There is a direct authority, see In the matter of *Haroon Mahomed* 7 Ind. Dec. 584, to the effect that the rules of Hindu Law and custom applied to the applicant in that case (who was a Cutchi Memon) and that his position with regard to the family property was to be determined on the same conditions as would apply in the Case of a member of a joint undivided Hindu family. It was held, further, that the firm in question was a family firm and was the property of a family. Subject to Hindu Law, whatever might have been the appellant's position previously, it was clear that on his father's death the father's share in the firm descended to him and his brothers if he had any. After referring to *Bai Baiji v. Bai Santok* 10 Ind. Dec. 594 and pointing out that *Ranade, J.* did not notice In the matter of *Haroon Mahomed* 7 Ind. Dec. 584 decided earlier and to the distinction between co-parcenership and inheritance, the learned Judge observed: "It appears to me, therefore, that the doctrine of survivorship must apply to a family firm of Cutchi Memon, e.g., in the present case on the removal of J.A. the enjoyment of the then existing rights in the family firm was increased and his grandson, the son of J.A., acquires rights therein merely by being a member of the family. But it also seems to me that this does not carry with it other questions of Hindu Law which are applicable to the manager of a joint Hindu family or estate, for this reason that, if Hindu Law is to be exclusively applicable to cases of inheritance or succession; to which I think I may add the devolution by survivorship of a family firm, Hindu Law is not applicable to the relationship between the manager and the members of a Cutchi Memon family firm."

27. *Ahmedbhoy Habibbhoy v. Sir Dinshaw M. Petit* 1 Bom. L.R. 545 decided in 1909, raised the question as to whether a Khojah who had sons living with him can confer a good title on the purchaser when the sons raised the contention that the property was ancestral property and there was no necessity for the sale so as to bind them. *Beaman, J.*, dismissed the suit for specific performance on the ground that the vendor was not in a position to give a title free from doubt. *Beaman, J.*, observed: "Further, in dealing with the Khojah community it must be remembered that what is to be ascertained is not how much Hindu Law, the

Khojahs have adopted but how much Hindu Law they have-discarded and it may well be doubted whether until our Courts re-imposed it on them, they had not desired and intended to disembarass themselves of most of the more rigid rules of Hindu Law governing the accumulation of family wealth. If the Khojahs really have a custom that sons cannot enforce partition during the lives of their fathers that probably means he more than that the community to that extent had abandoned the Hindu Law of the family and proceeding along the same line it would have been, but a short and natural step to have abandoned¹ the whole Hindu Law of joint family estate. I have little doubt that this is what the Khojahs or as many of them as reside in great cities and carry on large businesses would wish to do. Nothing could be well more unsuited to a growing commercial community than the doctrine of joint ancestral or joint family property. Unless, however, special legislation frees from the yoke, it must be for the present taken to be settled that in these important aspects of life, the Khojahs are under the Hindu Law. Therefore, it would be at present out of the question to presume that an alienation of ancestral family property made without necessity and without the assent of co-parceners would bind the latter."

28. In *Mahomed Jusab v. Haji Adam* 15 Ind. Cas. 520 decided in 1911, Hayward, J., held, that a claim by a Cutchi Memon son against his father for maintenance should be decided according to Muhammdan Law. The learned Judge was of opinion that the son could not claim any distinct interest in his father's property as the principles of Hindu Law only governed questions of inheritance and succession. I find it difficult to follow the reasoning of the learned Judge where he states that *Haji Noor Mahomed v. Macleod* 9 Bom. L.R. 274 and *In the matter of Haroon Mahomed* 14 B. 198 support the view that it is only in matters of inheritance and succession that Hindu Law governs the parties. It would appear from *Rahimatbai v. Hirbai* 3 B. 34 : 2 Ind. Dec. (N.S.) 23 and cases I have already referred to, that the questions of maintenance were regarded as governed by Hindu and not by Muhammadan Law.

29. In *Hassanali Moledina v. Popatlal Parbhudas* 17 Ind. Cas. 17 : 37 B. 211 : 14 Bom. L.R. 782 decided in 1912 Beaman, J. treated the question as to whether Khojahs were governed by Hindu or Muhammadan Law as to testamentary matters as open and not authoritatively and finally decided. He was not inclined to treat the decision of Jenkins, C.J. in *Advocate-General v. Karmali Rahimbhai* 29 B. 133 : 6 Bom. L.R. 601 as authoritative and final "as it rested chiefly upon the assent of Counsel made probably for their own convenience in the argument of the case. The judgment of Jenkins, C.J., at page 148, refers to the recent decision of the Court where on the evidence it was held proved that the law applicable to Hindus governed the testamentary powers of Khojahs and the admission of the eminent Counsel was that the decision was in accordance with the custom that prevailed in Bombay. The Chief Justice speaks of it being" Common knowledge in legal circles that Khojahs continually made their Wills as though they had the testamentary capacity of a Hindu." I do not think the decision can be disposed of in the manner suggested by Beaman, J. In Jan

Mahomed v. Datu Jaffar 22 Ind. Cas. 195 : 38 B. 449 : 15 Bom. L.R. 1044 decided in 1913, the plaintiffs, who were the sons of a Khojah, prayed for a declaration that the properties and the business carried on specified in the plaint were the properties and business of a joint and undivided family, for a declaration that the deed of release referred to in the plaint was invalid and for a partition. The defence was that the release was valid, that plaintiffs separated from the family in 1878, and that the only property owned by the family was a small shop and that properties subsequently acquired were the self-acquisitions of the second defendant. The defence was the usual kind of defence set up where a member of a joint and undivided Hindu family sues for setting aside a partition and claims a share in properties acquired by another member. As remarked by Beaman, J.: "A perusal of the pleadings is instructive as showing how deeply the community has, under pressure of judicial decisions, become tinged with the peculiar notions of the Hindu Law of the joint family." On the pleadings in the case as set out in the judgment there does not seem to have been any necessity to enter into any discussion as to whether the Hindu Law of joint families was applicable to Khojahs. The learned Judges referred to the authorities and subjected them to an elaborate criticism. He was of opinion that (1) "where Muhammadans are concerned the invariable and general presumption is that they are governed by the Muhammadan Law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly" and (2) "in matters of simple succession and inheritance, it is to be taken as established that succession and inheritance among Khojahs and Memons are governed by the Hindu Law as applied to separate and self-acquired property."

30. With all respect, I am of opinion that the second of the two propositions laid down cannot be supported unless the series of decisions of eminent Judges I have referred to, are overruled or are brushed aside as containing mere obiter dicta. The learned Judge prefaces his examination of the authorities with the remark that "a course of decisions beginning with the case of Hirbae v. Sona bae Rahimatbae v. Haji Jussap and case of the Khojas and Memons (1847) Perry's O.C. 110 at pp. 115; 128 : 4 Ind. Dec. (O.S.) 100 at p. 105 which I shall now examine, soon rivetted the fetters of the law of the Hindu joint family upon ,these and, later, other Muhammadan groups in this Presidency; so that it now remains to be seen whether it is possible to undo what has been done, so as to relieve these progressive and wealthy communities from what I believe is generally coming to be felt as an intolerable burden." He also points out that it has been definitely decided that in every respect the law of Hindu joint family governs Khojahs and Memons where members of a family are found to be living and trading together. As pointed out in more than one case I have referred to the duty of relieving the Khojahs and Memons from the law applicable to them is not within the province of the Court but on the Legislature. The grievance of being governed by an archaic system of law is not peculiar to Khojahs and Memons. The law of joint family and succession is equally galling to certain progressive sections of the Hindu community. I might point out that the view taken by

Beaman, J., is in direct conflict with his own decision in *Ahmedbhoy Habibbhoy v. Sir Dinshaw M. Petit* 3 Ind. Cas. 124 : 11 Bom. L.R. 547 : 6 M.L.T. 200 which I have already referred to where he observed that it must be taken as settled that the law as to Hindu joint families applied to Khojahs and that it was for the legislature to free them from the yoke.

31. In *Mangaldas v. Abdul Razak* 23 Ind. Cas. 565 : 16 Bom. L.R. 224; Macleod J. followed the decision of Beaman, J., in *Jan Mahomed v. Datu Jaffar* 22 Ind. Cas. 195 : 38 B. 449 : 15 Bom. L.R. 1044 and Beaman, J. in *Advocate-General v. Jimbabai* 31 Ind. Cas. 106 : 41 B. 181 : 17 Bom. L.R. 799 dissented from *Mahomed Sidick v. Haji Ahmed* 10 B. 1 : 5 Ind. Dec. (N.S.) 383 and followed his own decision in *Jan Mahomed v. Datu Jaffar* 22 Ind. Cas. 195 : 38 B. 449 : 15 Bom. L.R. 1044 and held, that the law of joint families did not apply to Cutchi Memons. He also held that the Muhammadan Law as to Wills did not equally apply to them but in *Jan Mahomed v. Datu Jaffar* 22 Ind. Cas. 195 : 38 B. 449 : 15 Bom. L.R. 1044; Maeleod, J. held, that they were governed by Muhammadan Law in this respect.

32. A consideration of the authorities renders it perfectly clear that, till the decision of Beaman, J. in *Jan Mahomed v. Datu Jaffar* 22 Ind. Cas. 195 : 38 B. 449 : 15 Bom. L.R. 1044 in 1913 the current of authority was decidedly in favour of the view that the law of Hindu joint family applied to Khojahs and the Cutchi Memons. The dissenting note struck by Sargent, J., in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* 12 B. 280 : 12 Ind. Jur. 463 : 6 Ind. Dec. (N.S.) 673 was not adhered to by him in *In the matter of Haroon Mahomed* 14 B. 198 : 7 Ind. Dec. (N.S.) 584 where he held, that the position of a Cutchi Memon with regard to joint family property must be determined by the same considerations as would apply in the case of a member of a joint and undivided Hindu family. I think Beaman, J., correctly summed up the authorities in *Ahmedbhoy Habibbhoy v. Sir Dinshaw M. Petit* 3 Ind. Cas. 124 : 1 Bom. L.R. 545 : 6 M.L.T. 200 where he observed that it was too late to question the fact that Khojahs and Cutchi Memons were governed by Hindu joint family Law, It was found in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* 12 B. 280 : 12 Ind. Jur. 463 : 6 Ind. Dec. (N.S.) 673 that the members of the Khojah and Cutchi Memon community in Cutch and Kathiawar, the places from which they emigrated, followed the ordinary Hindu Law of joint, family and. I do not think there is anything so strange in the members of the community having followed the same rules in Bombay for some centuries. So closely is the law of joint family and survivorship connected with the law of succession and inheritance that, as pointed out by Beaman, J., it is often very difficult to say precisely where the Hindu Law of succession and inheritance can be separated from the rest of the Hindu Law of the joint family. As pointed out in *Katama Nakhier v. Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver ; Raja of Shivagunga* 9 M.I.A. 539 : 2 W.R.P.C. 31 : 1 Suth P.C.J. 520 : 2 Sar. P.C.J. 25 : 19 E.R. 843 the right of survivorship is "one of the two principles on which the rule of succession according to the Hindu Law appears to depend." At the time of their conversion

Cutchi Memons were Hindus governed by Mitakshara and the normal state of their family was a system of a joint and undivided Hindu family with a law of survivorship as elaborated in the Mitakshara whereby females were excluded in favour of the male co-parceners and were only entitled to residence and maintenance. It has been argued that the law of joint family with its doctrine of survivorship is peculiar to the Hindu Law and cannot be applied to converts to Muhammadanism. If there is nothing illegal in such converts adopting the Hindu law as regards the succession and inheritance, there is nothing to prevent them from adopting the joint family system with its doctrine of survivorship. The question is not so much whether after their conversion, a custom sprang up at variance with the Hindu Law but whether they retained their old law to any and if so to what extent. I do not think there is much force in the argument that when the Cutchi Memons became converts to Muhammadanism they adopted Muhammadan Law in its entirety and then began to graft on it rules of Hindu Law at variance with the law of the religion and that this process stopped with the simple point of succession and inheritance. It is remarkable what a strong hold the joint family system had on the community and how converts to Muhammadanism have clung to and lived and traded together even though they in other respects conformed to the Law of the Koran. The Mapillas of Malabar whose ancestors were Hindu converts to Muhammadanism have adopted the system of owning tarwad property and are governed by the rules of the Marumakathayam Law as regards tarwad property. There is great force in the view taken by Dwarkanath Mitter, J. in *Rup Chand Chowdhry v. Latu Chowdhry* 3 C.L.R. 97 as to the presumption to be applied where Hindu converts live together adopting Hindu customs. I do not think there is much reason to suppose that Cutchi Memons who were Hindus governed by the Mitakshara for some centuries prior to their conversion and who after conversion lived amongst a large Hindu population recognised the juristic conceptions involved in the doctrine of survivorship and inheritance and adopted only one part of the rules of the Mitakshara discarding the former. It seems to me that even Vigneneswara did not clearly mark the distinction between survivorship and inheritance and succession proper, when he elaborated the well-known division of heritable wealth into Apratibhanda and Spratibhanda. He treats of both as two divisions of Daya or heritage and his rule as to sons having an interest in the wealth of their grandfathers is closely bound up with Apratibhanda relationship. As observed in *Baboo NundCoomarLall v. Moulvie Ruziooddeen Hossein* 10 B.L.R. 183 : 18 W.R. 477 ancestral property maybe said to be co-extensive with the object of Apratibhanda Daya or unobstructed inheritance. He observed "here the term heritage signifies that wealth, which becomes the property of another, solely by reason of relationship to the owner. It is of two sorts: unobstructed (Apratibhanda) and liable to obstruction (Sapratibhanda). The wealth of the father or the paternal grandfather, becomes the property of his sons or his grandsons: and that is an inheritance not liable to obstructions. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner, if there be no male issue: and thus the actual existence of a son and the

survival of the owner are impediments to the succession; and on their ceasing, the property devolves (on the successor) in right of his being uncle or brother. This is an inheritance subject to obstruction." Mitakshara Chapter I, Section 1, paragraphs 2 and 3. Viganeneswara's doctrine is that property which descends from one's paternal grandfather is an unobstructed heritage in which one's sons and grandsons acquire on birth an interest. I find it difficult to assume that the Cutchi Memons on their conversion were so enamoured of the Hindu Law of inheritance that they adopted it, but were so dissatisfied with the laws of the joint family that they discarded the rules as to co-parcenary and the sons' interest in the property of his grandfather. It was only within the last 35 or 30 years that Khojahs and Cutchi Memons wanted to free themselves from the yoke of the joint family. As is usual in the Hindu society, those who made money wanted to get rid of this system while those who did not (and they formed the majority) were fully alive to the benefit of the Hindu joint family and oppose any innovation. The cases I have referred to show that attempts made to prove that the law of the joint family was not adopted by the Khojahs and Cutchi Memons failed and, as pointed out by Beaman, J., the community in view of the current of authority and the advice of eminent Counsel like Mr. Inverarity regarded themselves for several years as bound by the Hindu Law of the joint family.

33. Turning to Madras, there are no reported decisions one way or the other. I caused a search to be made amongst the record of the Original Side to see whether there were any suits by or against the members of the Khojah or Cutchi Memon communities. Mr. Hamed Hassan with great trouble and diligence put before me cases by or against the members of the Khojah or Cutchi Memon communities. This took much time and delayed delivery of the judgment considerably as the case had to be reported for argument after the parties had an opportunity to go into the records placed before me by Mr. Hamed Hassan. I find from the records that there were several suits filed against Cutchi Memons on the footing that they were members of an undivided family governed by the rules applicable to the members of the Hindu joint families and that decrees have been passed on that footing.

34. In Civil Suit No. 222 of 1894, Davies, J., referred with approval to the decision in *In the matter of Haroon Mahomed* 14 B. 198 : 7 Ind. Dec. (N.S.) 584. As regards suits for partition, in some of the suits it was not denied that the parties were governed by the Hindu Law of joint family and in some suits where it was denied, there was no adjudication owing to parties having compromised the suits. Probate have been applied for, but in no case does it appear that properties admitted to be joint family properties were disposed of or asserted to be by the sons of the testator where such disposal was to their prejudice.

35. So far as the parties to the present suit are concerned, there can be little doubt that till this suit was filed they regulated their affairs on the footing that the Hindu Law of joint family applied. This is borne out by the recitals in the deed of release dated 10th July 1914 referred to in the plaint. It is alleged by the

defendant that it was executed in ignorance of the law governing the parties. It is, however, clear that they and their legal advisers assumed that they were governed by the ordinary Hindu Law.

36. I am of opinion, that the Hindu Law as to joint family and co-parcenary is applicable to Cutchi Memons and find the preliminary issue in favour of the plaintiff. It will be open to the defendants to prove any special custom varying any particular incidence of the joint family law. The suit will be posted for settlement of such other issues as may be necessary.