COUCH, C. J. :—The subject-matter of this suit is an obligation in equity on the mortgagor to repay what another has been obliged to pay for him, and this suit should, therefore, be tried by the Principal Ṣadr Amín : *Rambux Chittangeo* v. *Modhoosoodun P. Chrowdhry and others* (*a*), which is a Full Bench Ruling of the Calcutta High Court.

NEWTON, J. :—I concur.

PER CURIAM :—The Principal Ṣadr Amín to be ordered to receive and register the plaint.

(*a*) 7 Calc. W. Rep., Civ. R. 377.

Aug. 25.

Special Appeal No. 761 *of* 1867.

BA'I KHEDA' ....*Appellant.*
DA'SU SA'LE *et al.* ....*Respondents.*

Bhágdári *Tenure—Custom—Right of Females to succeed to a* Bhág.

The custom in the Broach District of male first cousins succeeding to property held on the *bhágdári* tenure in preference to daughters or sisters, upheld in a case in which the *bhágdárs* were Muhammadans.

THIS was a Special Appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge at Broach, in Appeal Suit No. 164 of 1867, reversing the decree of the Munsif of Broach.

The plaintiff, the daughter of a Bohrá *bhágdár*, sued the defendants, her cousins, to recover ten-twelfths of certain lands which had been held on the *bhágdári* tenure by her brother Abrám Sále up to the time of his death, and since had been wrongfully taken possession of by the defendants.

The defendants, by their written statements, answered that though the plaintiff, as sister of the deceased, might in other cases be entitled to a share, according to the Muhammadan Law, she was not so entitled in this particular case, in consequence of a usage prevailing in the *bhágdári* villages which debarred females from inheriting, and which usage was, by Sec. 26 of Reg. IV. of 1827, to be preferred to the law of the parties.

1868.
BA'I KHEDA' v. DA'SU SA'LE *et al.*

The Munsif of Broach gave a decree for the plaintiff, in accordance with the principles of the general Muhammadan Law.

In appeal the Acting Senior Assistant Judge held, *inter alia*, "that according to Reg. IV. of 1827, Sec. 26, and Special Appeal No. 228 of 1863, the usage of the district in which a suit may arise takes precedence over the law of the defendant, and that according to *bhág* custom the first cousins or sons of paternal uncles inherit in preference to daughters or sisters. This he said was proved by witnesses Nos. 24 to 31, and that such was the custom was also proved by Monier Williams' book on Baroche, page 33, which was admitted as an authority in the Ṣadr Adálat in Special Appeal No. 3405, and under Act II. of 1855, Sec. 36, the Court was at liberty to refer to books of authority. The custom referred to has only been disturbed twice, and on both of those occasions through the decrees the appellant has cited, Special Appeals 3405 and 3652, but in the former this question did not arise, and in the second case it was not *bhág*, but *inám* and *khatá* land."

The appeal was heard before TUCKER and WARDEN, JJ.

Nánábhái Haridás, for the appellant:—This is apparently a case of custom against Muhammadan Law; but it is really not so. There is here no recognised custom. A custom entitled to receive the sanction of a court of law must be proved to have existed from time whereof the memory of man runneth not to the contrary, and to have been not injurious to the public interests, and not conflicting with any express law of the ruling power (*vide* Perry's Or. Ca. 121). The alleged custom in this case was held to be established in one case and not established in another. The decision of the then Assistant Judge, Mr. Hebbert (*Raghunáth* v. *Náran*, November 1858) ruling that *bhágs* do not descend to females, was between two Hindús, and founded on the authority of a passage at page 33 of Colonel Monier Williams' Memoirs of Baroche, where the author was speaking of a Hindú *bhág*. In the present case the parties are Bohrás, a division of the Muhammadan community. Mr. Hebbert's

decision has been superseded, and virtually set aside, by another more recent one of equal authority (*Vakhat* v. *Jagá*, 23rd March 1867), per Naylor, Assistant Judge, where the alleged custom of females not inheriting in the Shek division of the Muhammadan community was held not proved.

Dhirajlál Mathurádás, for the respondent:—Mr. Hebbert's decision that *bhágs* do not descend to females is prior, and, being based on the usage of the country, should be followed. In the case decided by Mr. Naylor no issue as to custom was specifically raised, and, therefore, any decision on that point was a mere dictum.

PER CURIAM:—We consider that in this case the Senior Assistant Judge has found on the evidence that it is proved that there is a custom with reference to lands held in the Broach District on the *bhágdári* tenure that first cousins, sons of paternal uncles, inherit such lands in preference to daughters and sisters. The existence of such a custom is asserted in Colonel Monier Williams' Report on the Zillá of Baroche, p. 33 (A. D. 1820). There was a decision by Mr. H. Hebbert, when Senior Assistant Judge of Broach, in 1858, upholding the custom. There was an opposite decision by Mr. Naylor, another Assistant Judge, in 1867, who held that in the particular case before him no custom had been established which would justify his not applying the ordinary Muhammadan law of inheritance to *bhágdári* lands. The Senior Assistant Judge was not bound to follow this last decision, there having been a previous decision of the same court to the contrary, and we can find no error in law in the conclusion he has arrived at. If there be any such usage as has been described in the district, it would, under Sec. 26, Reg. IV. of 1827, take precedence of the Muhammadan law. Two decrees of the High Court have been cited as opposed to the Senior Assistant Judge's view, but on referring to them we find that they do not decide any question of usage with reference to *bhágdári* lands. In the present case the witnesses on both sides appear to have deposed to the existence of the usage, which the Senior

1868. BA'I KHEDA' v. DA'SU SA'LE.

Assistant Judge has found to be established, and we see no reason to interfere with his decision, which would seem to be just, as well as legal.

Decree affirmed.

Sept. 1.

Special Appeal No. 267 *of* 1868.

DA'DA'BHA'I NARSI..............................*Appellant.*
SALLEMA'N DASSU ....*Respondent.*

Agreement for Sale of Goods—Place of Delivery.

In the absence of any agreement as to delivery, goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement for sale, or, if not then in existence, at the place at which they are to be produced.

Distinction between an ordinary contract for sale of goods and a contract to pay an existing debt in specific articles pointed out.

THIS was a Special Appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge at Broach, in Appeal Suit No. 101 of 1867, confirming the decree of the Munsif of Jambúsar.

This suit was instituted by the plaintiff, Dádábhài Narsi, on an agreement dated 27th December 1865, whereby the defendant agreed to deliver to the plaintiff 2½ *bhár* of cotton on the 3rd of March 1866, or in default to forfeit Rs. 60 per *bhár*, and repay with interest the sum of Rs. 300 advanced on the agreement. He alleged that, the defendant having failed to fulfil his part of the contract, he was entitled to recover the principal sum of Rs. 300, together with damages and interest.

The defendant admitted the execution of the bond, but stated that on account of the depression in the price of cotton the plaintiff refused to receive it, though repeatedly asked to do so; that he had kept the cotton on the plaintiff's account, and always had been ready and willing to deliver it.

The Munsif, Jamiyatrám Himayatrám, rejected the plaintiff's claim, on the ground that the plaintiff had failed to take delivery of the cotton at the place where it was deliverable.