1875.

E. SARSTEDT AND ANOTHER v. THE AGRA BANK, LD.

very moderately in claiming only two-thirds of the deposit, we think they are entitled to recover two-thirds of the sum paid over to the widow, with simple interest at 5 per cent from the date of such payment till payment by the Bank to the plaintiffs. We think, too, having regard to all the circumstances of the case, and especially to the fact that the bank displayed such very great readiness to arrest the second plaintiff, by issuing execution against him on the decree of the Division Court, and bringing him down all the way from Jamalpore to Bombay while an appeal was actually pending, the plaintiffs must have all their costs in both Courts. The decree will be for the plaintiffs for Rs. 3,444-15-8, with interest at 5 per cent per annum on Rs. 3,242-4-10 from the 11th February 1869 until judgment, with costs of the suit and appeal, and interest on the judgment at 6 per cent per annum until payment.

BAYLEY, J.:—I entirely concur in the judgment and in all the remarks of my lord.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 316 *of* 1872.

1874. April 29.

SHIVJI HA'SAM and others ...(*Defendants*) *Appellants.*
DATU MA'VJI KHOJA'.....(*Plaintiff*) *Respondent.*

Bombay Minors' Act XX. of 1864, *Section* 1—*Bengal Minors' Act XL. of* 1858, *Section* 2—*Age of majority—Charge of minors' property—Custom among Khojás—Joint Hindu family.*

Under Act XX. of 1864, Section 1, it is the charge of a minor's property and not the property itself which shall vest in the Civil Court—a distinction which has been overlooked in *Bái Kesar* v. *Bái Gangá* (8 Bom H.C. Rep. A. C. J. 33).

The meaning of the 1st Section of Act XX. of 1864, when regarded in connection with the sequel thereof (which provides, for the information of the Civil Court, no such means, regarding the deaths of persons leaving infant children, as would enable the Court to act *ex mero motu* in every such case), is that the care of the persons of all minors (not being European British subjects) and the charge of their property shall be, as expressly

1874.

SHIVJI HA'SAM AND OTHERS v. DATU MA'VJI KHOJA'.

provided in the Bengal Minors' Act XL. of 1858, "subject to the jurisdiction of the Court," and there is nothing in the subsequent sections of the Bombay Minors' Act which would lead to the conclusion that, until the Court is moved to exercise its jurisdiction, the care of the minors themselves or the charge of their property is vested in the Court, or that more was intended than that, like the Court of Chancery in England, the Principal Civil Courts of districts should have the right, if moved so to do, and if they so think proper, to take care of the persons of minors and charge of their property, and that, until the Court does so, the minors cannot be regarded as wards of the Court or their property as in its charge.

It is only for the purposes of Act XX. of 1864 that eighteen is laid down as the age of majority (Section 30). The Legislature has not, by that Act, intended to prescribe eighteen as the age of majority for all persons of all castes and creeds and for all purposes. That limit is not applicable to any person, until the Act be brought into play by the exercise of the Civil Court's jurisdiction.

It must be considered as the 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 among Khojá Muhammadans, and this rule was held to apply in a case of Khojás at Thánà, no evidence having been given in that case to show its inapplicability to the Khojás of that place.

One member (although an infant) of an undivided family, governed by the Mitákshará law, has not such an interest in the joint property as is capable of being taken charge of and managed by the Civil Court or a guardian appointed under Act XX. of 1864.

Quære—Whether, under Act XX. of 1864, the principal Civil Court of Original Jurisdiction in the district can take charge of the property of a person who has completed his sixteenth year, but is under eighteen.

THIS was a special appeal from the decision of G. Ayerst, Assistant Judge at Thána, affirming the decree of the Subordinate Judge of the same place.

One Hásam, a Khojá inhabitant of Thánà, died, leaving him surviving his widow, named Manbái, and three sons, named, respectively, Shivji, Kásam, and A'li. The eldest of these sons, Shivji, after the death of his father, mortgaged to the plaintiff a house at Thánà, formerly the property of his father, for the sum of Rs. 1,999. The mortgage deed, which was dated 5th January 1867, was executed by Shivji for himself, and as guardian of Kásam, in the presence of Manbái. At the date of the mortgage Shivji was seven-

teen years and eight months old, Kásam fourteen, and A'li, who was not named as a party to the mortgage deed, was younger than Kásam. On 1st December 1869, Shivji, being then over eighteen years of age; Kásam, being then over sixteen but under eighteen; and A'li, being then under sixteen, respectively executed a document, to which Manbái was not a party, in ratification of the original mortgage. On 30th November 1870 the District Court granted to Manbái a certificate as guardian of A'li under Act XX. of 1864. In 1870 the plaintiff brought the present suit to recover the principal sum of Rs. 1,999, together with the interest due on his mortgage, and joined as defendants the three brothers and their mother, both as the guardian of A'li and in her individual capacity. The defendants all denied the validity of the mortgage sued upon; but the Subordinate Judge, holding it to be valid, made a decree in favour of the plaintiff, and on appeal the Assistant Judge affirmed that decree. He found that the mortgage had been executed for valuable consideration and for the benefit of the family, the money having been borrowed by Shivji partly for the purposes of the trade originally carried on by his father Hásam and continued by Shivji as head of the family for its benefit, and partly to pay off a debt due to one Hargovind for money expended in building the house enjoyed by the family at large. He also found that, after satisfaction of the mortgage, there would still remain sufficient family property for the maintenance of Manbái. He further found that the defendants had completely failed to prove the usage, as alleged by them, of the Khojás, that a male member of that community did not attain his majority until the completion of his twenty-first year, and held that a Khojá who had completed his sixteenth year was adult.

The special appeal, preferred by the defendants against this decree, was heard by WESTROPP, C.J., and WEST, J.

Nánábhái Haridás for the appellants.—The suit is based on the mortgage deed (Exhibit No. 3) executed by Shivji

1874.

SHIVJI HA'SAM AND OTHERS v. DATU MA'VJI KHOJA'.

for himself and as guardian of his minor brother Kásam. But, as both these brothers are found to have been under eighteen years of age at the time of the execution of that deed, they were minors, and the deed is invalid. Every person who has not attained the age of eighteen years is a minor: *Madhusudan Manji* v. *Debigobinda Newgi* (*a*). Although that ruling was under the Bengal Minors' Act XL. of 1858, the provisions of that Act are similar to those of the Bombay Minors' Act XX. of 1864, especially regarding the age of majority. Besides, on the death of Hásam, leaving three minor sons, Shivji, Kásam, and A'li, the property in dispute, by Section 1 of Act XX. of 1864, became vested in the Civil Court, and Section 18 prevented even their guardian, supposing they had one, from alienating the property. While by the Bengal Minors' Act, Section 2, the property of a minor is *subject* to the jurisdiction of the Civil Court—by the Bombay Minors' Act, Section 1, such property *vests* in the Civil Court. The distinction is pointed out in *Bái Kesar* v. *Bái Ganga* (*b*). [WESTROPP, C.J. :—There is a manifest error in that distinction. Section 1 of the Bombay Minors' Act clearly says "that the charge of their (minors) property shall vest in the Civil Court," not the property, and, therefore, the analogy drawn in that case between the terms in the Bombay Minors' Act and those in the Insolvent Debtors' Act as to the vesting of property, is wrong.] Before the passing of Act XX. of 1864 there was no law under which the Civil Court could take care of the property of minors in the Mofussil. It was then left to the respective laws of the parties to determine who was to be the guardian of a minor and to take care of his property. But that law was changed by Act XX. of 1864. The Civil Court is now made a sort of a guardian genéral of all minors. Even a father is not permitted to sue on behalf of his minor son: *Sitárámbhat* v. *Sitárám Ganesh* (*c*). Similarly, a suit against a minor was not permitted to be proceeded with, unless the minor was represented by one holding a certificate

(*a*) 1 Beng. L. R. F. B. 49; S. C. 10 Calc. W. R. 36 F. B.
(*b*) 8 Bom. H. C. Rep. A. C. J. 33. (*c*) 6 Bom. H. C. Rep. A. C. J. 250.

of administration: *Dhondibá* v. *Kusá* (*d*). Section 2 qualifies Section 1. Where a person before death makes an arrangement for the management of his property during the minority of his children, by a will or otherwise, the Civil Court is to give effect to that arrangement. As regards the Assistant Judge's finding, that the parties to this suit, being Khojás, are subject to the Hindu law of inheritance applicable to a joint and undivided family, I contend that that law does not govern them. Even, supposing that that law regulates the succession and inheritance of the Khojás in Bombay, I contend that it does not govern the Khojás at Thána, of which place the present parties are residents.

Macpherson (with him *M. C. Apté*) for the respondent.—The decisions in *Hari Mahádáji* v. *Vásudev Moreshvar* (*e*) and *Gangádhar* v. *Chimnáji* (*f*) are in direct conflict with the Full Bench ruling in 1 Beng. L. Rep. F. B. 49, and lay down that the Hindu law of minority is not altered by the laws of limitation, and that the term "minor" must be construed according to the general law. The reason assigned by Sir Barnes Peacock, C.J., in the Full Bench case for holding eighteen as the age of majority is not satisfactory. Under Act X. of 1865 (Indian Succession Act), twenty-one is the age of majority for the purposes of that Act. The same is fixed to be the age of majority by Act IX. of 1871 (Limitation Act) and Act V. of 1865 (Indian Marriage Act) repealed (except as to the Straits Settlements) by Act XV. of 1872. While this is so, Bengal Regulation XXVI. of 1793 fixes the age of majority at eighteen. So there is a great anomaly, greater than what Sir Barnes supposed in the Calcutta Full Bench case there would be. The language of Act XX. of 1864, Section 30, shows clearly that eighteen is the age of majority only for the purposes of that Act. The words are restrictive, and must be very strictly construed.

Under Act IX. of 1872, Section 11, every person is competent to contract on attaining the age of majority according to his own law. On the question whether the Hindu

(*d*) 6 Bom. H. C. Rep. A. C. J. 219 (*e*) 2 Bom. H. C. Rep. 325
(*f*) 5 Bom. H. C. Rep. A. C. J. 95.

1874.

SHIVJI HA'SAM AND OTHERS v. DATU MA'VJI KHOJA'.

law of inheritance and succession is applicable to Khojá Muhammadans, I submit, on the authority of *Gángbái* v. *Thavar Mullá* (*g*), *Karim Khatáv* v. *Pardhán Mánji* (*h*), and *Hirbái* v. *Sonábái* (*i*), that it does apply to them.

Nánábhái Haridás in reply.—In the two Bombay cases the question of majority under Act XX. of 1864 was not before the Court. The question was considered under Regulation V. of 1827. There is, therefore, no decision on the point whether Act XX. of 1864 does or does not affect the age of majority or minority. As regards the anomaly, the Indian Succession Act (X. of 1865) and the Marriage Act as well as the Contract Act are intended for the whole of India; while Act XX. of 1864, as the title clearly shows, is confined to the Bombay Presidency only. If the term "minor" in the Succession and other Acts had not been defined, it would have meant one thing in Bombay, another at Calcutta, and a third in Madras, and so on.

The following cases also were referred to in the course of argument:—*Jadunath Mitter* v. *Bolyechand Dutt* (*j*), *Archer* v. *Watkins* (*k*), *Cally Churn Mullick* v. *Bhuggobutty Churn Mullick* (*l*), *Hearsey* v. *Girdharee Lal* (*m*), *Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (*n*).

The judgment of the Court was delivered by—

WESTROPP, C.J. :—This was a suit to recover Rs. 1,999 as principal, together with such interest as was due upon a mortgage (dated 5th January 1867) of a house at Thána, the property formerly of Hásam, a Khojá.

The mortgage (Exhibit No. 3) was executed by Shivji, the eldest son of Hásam, after the death of the latter, for himself (Shivji), and as guardian for his brother Kásam, described in the mortgage as then aged fourteen years. Shivji was seventeen years and eight months old at the date of the mortgage, A'li is younger than Kásam, and was not named as a party to Exhibit No. 3. Those three sons Hásam left surviving

(*g*) 1 Bom. H. C. Rep. 71. (*h*) 2 Bom. H. C. Rep. 276.
(*i*) Perry's Or. Ca. 110. (*j*) 7 Beng. L. R. 607.
(*k*) 8 *Idem* 372. (*l*) 10 *Idem* 231.
(*m*) 3 N. W. P. High Court Rep. 338. (*n*) 14 Moo. Ind. App. 393.

him, and a widow named Manbái, in whose presence the mortgage (No. 3) was executed by Shivji in the manner already mentioned. On the 1st of December 1869 Shivji, being then over eighteen years of age; Kásam over sixteen, but under eighteen; and A'li being under sixteen, respectively executed a document (No. 27) in ratification of the original mortgage (No. 3). Mánbai did not execute it. Upon the 30th of November 1870 the District Court granted to Manbái a certificate as guardian of A'li under Act XX. of 1864.

The mortgagee, Datu Mávji Khojá, in 1870 brought the present suit to enforce the original mortgage. Shivji, Kásam, A'li, and their mother Manbái, as guardian of A'li and in her individual capacity, were defendants to that suit, and respectively denied the validity of the mortgage sued upon.

The Subordinate Judge held it to be valid, and made a decree in favour of the plaintiff. On appeal the Assistant Judge, Mr. Ayerst, affirmed that decree. He found (*inter alia*) that the mortgage (No. 3) was executed for valuable consideration and for the benefit of the family, the money having been borrowed by Shivji, partly for the trade originally carried on by his father Hásam, and continued by Shivji as head of the family for its benefit, and partly to pay off a debt due to one Hargovind for money expended in building the house (value Rs. 4,000) enjoyed by the family at large. He also found that, after satisfaction of the mortgage, there would still remain sufficient family property for the maintenance of Manbái. The Assistant Judge further found that the defendants had completely failed to prove that by the usage of the Khojás (as alleged by the defendants) a male of their community did not attain his majority until completion of his twenty-first year. The Assistant Judge held that a Khojá who had completed his sixteenth year was adult.

Before my brother West and myself it was on special appeal argued that on the death of Hásam, under Act XX. of 1864,

1874.

SHIVJI HA'SAM AND OTHERS v. DATU MA'VJI KHOJA'.

the charge of the property in dispute vested in the District Court (Section 1), and that his three sons being, at the date of the original mortgage, under eighteen years of age (Section 30), even their guardian, if they then had one under the Act, could not alienate, sell, mortgage, or otherwise incumber the house, or grant a lease thereof for any period exceeding five years, without the sanction of the District Court previously obtained (Section 18).

The 1st section of the Act provides that "the care of the persons of all minors (not being European British subjects) and the charge of their property shall vest in the Civil Court", subsequently (Section 34) explained to mean the principal Civil Court of Original Jurisdiction in the district, *i.e.*, in the present case the District Court. It should be here observed that it is "the charge of the property," not "the property" itself, which is to "vest" in the Civil Court, a distinction which seems to have been overlooked in the judgment in *Bái Kesar* v. *Bái Gangá* (*o*). A like provision to that in the Act for Bombay exists in the similar Act for Bengal (Act XL. of 1858, Section 2), but with a slight variation. It enacts that "the care of the persons of all minors (not being European British subjects) and the charge of their property, shall be subject to the jurisdiction of the Civil Court." In *Sheo Nundun Singh* v. *Massamut Ghunsam Kooeree* (*p*), Phear and Morris, JJ., have held, so recently as the 9th of January last, that one member (although an infant) of an undivided family, governed by the Mitákshará law, has 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. In that decision we concur. But it may be said that all of the sons of Hásam were under eighteen at the time of his death and of the execution of the original mortgage, and that, even assuming them to be members of an undivided family, subject to Hindu law, the charge of the property of all of them for that reason and by virtue of the peculiar language of the

(*o*) 8 Bom. H. C. Rep. 31 A. C. J; see p. 33.
(*p*) 21 Calc. W. R. 143 Civ. R.

Act for Bombay (Act XX. of 1864) vested immediately upon Hásam's death in the District Court, and came under the protection of that Act. We do not, however, agree in that argument. We think that the meaning of the first section, when regarded in connection with the sequel of the Act, (which provides no such means for informing the Civil Court as to the deaths of persons leaving infant children as would enable the Court to act *ex mero motu* in every such case,) is that the care of the persons of all minors and the charge of their property shall be, as expressly provided in the Act for Bengal, "subject to the jurisdiction of the Court," and that, by the apparently accidental variation in language in the 1st section of the Act for Bombay, no such consequences were intended as insisted upon in the argument for the defendants. The subsequent sections show how it was intended that the Bombay Courts should be moved to exercise their jurisdiction, and we see nothing in those subsequent sections which would lead us to the conclusion that, until the Court is moved to exercise its jurisdiction, the care of the minors themselves or the charge of their property is vested in the Court, or that more was intended than that, like the Court of Chancery in England, the principal Civil Courts of districts should have the right, if moved so to do, and if they so think proper, to take care of the persons of minors and charge of their property; and that until the Court does so, the minors cannot be regarded as wards of the Court, or their property as in its charge. It is only "for the purposes of the Act" that eighteen is laid down as the age of majority (*q*). We should have expected a very differently worded enactment if, as contended for the defendants, the Legislature intended to prescribe eighteen as the age of majority for all persons of all castes and creeds and for all purposes. We do not consider that limit as applicable to any person until the Act be brought into play by the exercise of the jurisdiction of the Court. In the present case the Court did not exercise its jurisdiction (viz., by granting a certificate of guardianship of A'li to Manbái) until one, at least, of the

(*q*) Sec. 30.

1874.

SHIVJI HA'SAM AND OTHERS v. DATU MA'VJI KHOJA'.

coparceners, Shivji, was upwards of eighteen, and, therefore, the Act could not, according to the Calcutta case, have been applied to the property to the extent, at all events, of taking charge of it. The charge would remain in Shivji as an adult manager on behalf of the undivided family. Whether or not the Court could, under the Act, take charge of the property of a person who has completed his sixteenth year, but is under eighteen, it is not necessary for us to express any opinion at present.

But it is contended that Khojás are not regulated by the law applied to Hindus who are undivided in family and estate.

In the *cause célébre* of *The Advocate General* at the relation of *Daya Mahomed and others* v. *H. H. Agá Khán and others*(*r*) Sir Joseph Arnould, in his able and eloquent judgment, pronounced on the 12th November 1866, after a long and laborious trial extending over some weeks, arrived at the conclusion that the Khojás are a sect of people whose ancestors were originally Hindus, and were converted to the Shiá branch of the Muhammadan faith and to the Imâmi Ismaili sub-division of that branch, and have, until the recent dissensions of the present century, throughout abided in that faith, and have always been and still are bound by ties of spiritual allegiance to the hereditary Imâms of the Ismailis. In matters matrimonial they appear to have followed the Muhammadan law. In the case just mentioned as well as *In the Goods of Mulbái* (*s*), although the circumstance is not mentioned in the report of the latter case, it appeared in evidence in the notes of Chief Justice Couch that, until recently when the division took place in the Khojá community, their marriages were celebrated by the Kazi of the Suni Muhammadans, but that, since the division, the marriages of the majority of the caste have been solemnized in the presence of His Highness Agá Khán, the minority still resorting to the Kázi. In the case of *Kasam Pirbhai* (*t*) the Muhammadan law of divorce was recognized. In that case the husband

(*r*) Reported *infra*. (*s*) 2 Bom. H. C. Rep. 276.
(*t*) 8 Bom. H. C. Rep. 95, Cr. Ca.

belonged to the minority, who had seceded to the Suni branch of Muhammadanism, and the wife was alleged to belong to the majority who still adhere to the Shiá tenets of the Imâm Ismaili School. Amongst the Khojás, widows re-marry as amongst other Muhammadans. But in matters relating to property, succession, and inheritance, the Khojas appear to have retained to a considerable extent the Hindu law. In *Hírbái* v. *Sonábái* (*u*) they succeeded in showing that the Koran did not govern the order of succession amongst them. The facts there, as stated by Perry, C.J., were as follow:— The plaintiff Hirbái and her infant sister were the only children of Hajibhái Mir A'li, a merchant in Bombay, who died intestate, leaving behind him a widow Sonábái, and property, moveable and immoveable, in value about three lakhs of rupees. He had carried on trade in Bombay with his brother Sájan Mir A'li, and the latter, on his brother's death, took possession of the whole of the property and retained the same until his death in 1843, when he left a will appointing his sister-in-law Sonábái and his wife Rahimatbái, his executrixes. Hirbái filed her bill against these ladies, claiming, under the Koran, a share of her father's property according to Muhammadan law. The defendants pleaded that the family belonged to the community of Khojás, who were distinct from other Muhammadans, and under the government of laws and customs differing in many respects from those of Muhammadans, and which excluded daughters from any share of their father's property at his decease, except, if unmarried, from maintenance and the expenses of their marriage. On evidence being taken as to the custom amongst Khojás, it was held that the custom to exclude daughters from inheriting, under such circumstances as presented themselves in that case, was established, and Hirbái's bill was dismissed, Perry, C.J., saying: "I think that the attempt of these young women to disturb the course of succession, which has revailed among their ancestors for many hundred years, has failed." We may add that neither Sájan Mir A'li nor Hajibhái Mir A'li left any male issue surviving them. This

(*u*) Perry's Or. Ca., 110.

1874.

SHIVJI HA'SAM AND OTHERS v. DATU MA'VJI KHOJA'.

fact is not stated in the report, but is known to one of the members of this Court. According to Hindu law, where brothers are undivided in estate, the survivor takes the whole. It seems reasonable to suppose that the two brothers, who were trading jointly, were in that position; and that this was so is supported by the recorded fact that, although Hajibhái, who died first, left a widow and daughters, Sájan kept possession of the whole of the estate until his own death, and, according to Hindu law as administered in this Presidency, Sájan, the survivor, not having any male issue, might dispose of his property by will, and did in fact appoint his wife Rahimatbái and his sister-in-law, Sonábái, widow of Hajibhái, to be his executrixes, and their title as such was upheld against the daughters of Hajibhái. If Sájan had died intestate, his widow would, according to Hindu law, have been preferred to his female issue or to the female issue or widow of Hajibhái. 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 Khojás is, in matters relating to property, succession, and inheritance, the Hindu law as administered in this Presidency. Accordingly, in *Gángbái* v. *Thávar Mullá* (*v*), we find Sir Matthew Sausse, C.J., saying that the Khojá caste, although Muhammadan in religion, has been held to have adopted and to be governed by Hindu customs and laws of inheritance. In *the Goods of Mulbái*, already mentioned, it was held that when a Khojá widow dies intestate and without issue, property acquired by her from her deceased husband descends to his relations, and not to those of the widow. This was established in evidence before Couch, J., as the usage amongst Khojás, and is in accordance with Hindu law. The attempt by Mulbái's brother to establish the opposite usage completely failed. Couch, C.J., said:—"What may be the origin of this custom," (that in favour of the husband's relatives,) "I shall not now inquire. It is very possible that it arises

(*v*) 1 Bom. H. C. Rep. 71; see p. 73.

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 Khojás are governed, is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs; and I think it has been sufficiently established that there is a Khojá custom which excludes the wife's relations from succeeding to property such as this."

In a contest for administration in a case of intestacy, which has lately arisen between the mother and widow of a Khojá at the Ecclesiastical Side of the High Court, and, after occupying Sir Charles Sargent many days in hearing, now stands for judgment, the Ecclesiastical Registrar has collected several precedents at that side,—some being cases disposed of by the Court and others by the Ecclesiastical Registrar (*w*). In all, the Hindu law, as indicating the person entitled to succeed to the property, would seem to have been taken as the guide in granting letters of administration, except in one or two instances, in which the person so entitled expressly consented to the grant to another.

In the case of *the Goods of Vallu Musáni* administration was granted by the Court, in 1855, to an undivided brother of the deceased in preference to the widow. The children of the deceased were infants. The Hindu law clearly prevailed in that instance.

We think that we must consider it as the 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 Khojá Muhammadans. There has not been any evidence that, in such a case as the present, there is in Bombay any usage amongst Khojás opposed to the Hindu law. And no evidence has been given to the effect that the ordinary rule in Bombay, viz., that of the Hindu law, is not applicable to Khojás at Tháná. We think, therefore, that we are bound to apply to them the Hindu law, and, it being found that the original mortgage was executed by

(*w*) *Infra* p. 300.

1874.

SHIVJI HA'SAM AND OTHERS v. DATU MA'VJI KHOJA'.

Shivji as head of the family, and for its benefit, we must hold it to bind the family and to be valid against all of the sons of Hásam and the widow. The decree of the Assistant Judge is, therefore, affirmed with costs.

[ECCLESIASTICAL SIDE.]

Appeal No. 255.

1875. July 2.

In the Goods of Rahimbhái Allubhái, deceased.

HIRBA'I, widow .....*Applicant.*
GORBA'I, widow, and another.....*Caveatrixes.*

Khojás—Succession—Letters of Administration—Custom.

In the absence of satisfactory proof of a custom, differing from the Hindu law, the Courts of this Presidency apply to Khojás the Hindu law of inheritance and succession.

If a custom opposed to Hindu law be alleged to exist amongst Khojás, the burden of proof rests upon the person setting up that custom.

The Khojás, having been originally Hindus and converted from the Hindu religion by a Dai, or Missionary of the Imám of the Ismáilis, to the Muhammadan religion of the Shiá division and Imámi Ismáili subdivision, and being partly regulated by Muhammadan law, partly by Hindu law, and partly by custom, occupy a position so peculiar that the Courts do not apply to them, when seeking to prove a custom of inheritance or succession, differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khojá community.

A Khojá having died intestate, and without leaving issue, was survived by his mother (a widow), his wife, and a married sister.

Held that, according to the custom of the Khojás, his mother was entitled to the management of his estate, and, therefore, to letters of administration, in preference to his wife or his sister.

THE hearing of this cause before Sir Charles Sargent, J., commenced on the 15th December 1873, and occupied six sitting days in that month, fifteen sitting days in January, and three sitting days in February 1874; that is to say, twenty-four days in the aggregate.