1880

NARRONJI BHIMJI v. MUGNIRUM CHANDAJI.

however, allow the plaintiffs to elect between a dismissal of this suit or a withdrawal of it under section 373 of the Code of Civil Procedure, to enable them, if so advised, to proceed against the defendant in the Nizam's territories, where the law of limitation may not be the same as that of British India.

[The latter course being chosen, the suit was allowed to be withdrawn, with liberty to the plaintiffs to bring a fresh suit, if so advised, in respect of the same subject-matter.]

Attorneys for plaintiffs.—Messrs. *Jefferson, Bhaishanker, and Dinsha.*

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

1881
July 20.

GOPAL NARHAR SAFRAY, A MINOR (ORIGINAL PLAINTIFF), APPELLANT, *v.* HANMANT GANESH SAFRAY AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Review—Delay—Adoption of daughter's son—Custom—Breaches of Custom—Practice—New case set up in special appeal.

An application for review was presented to the High Court more than eighteen months after time, the applicant alleging that, soon after the decision sought to be reviewed, he was engaged in collecting instances of the special custom relied upon by him in support of his claim. The special custom was not set up in the Courts below, but an objection was taken for the first time in special appeal that an issue regarding it should have been raised in the lower Courts. No instance of such special custom had been given in evidence. It was urged that the applicant was a minor until shortly before the making of the High Court decree, and was only represented by his adoptive mother as his guardian.

The High Court considered that there was no sufficient excuse for the delay, and rejected the application, observing that, unless upon very strong grounds and under very special circumstances, the Court would hesitate to permit a party at such a stage of his suit to set up a case which was not set up for him in the Courts below, where his professional representatives must have been well aware whether such a case could be legitimately set up, and abstained from any attempt to do so.

THIS was an application by the appellant, Gopal, praying for a review of the decree passed by the High Court (Westropp, C. J., and Kemball, J.,) on the 14th April, 1879 [1]. The following (*inter alia*) were the grounds on which the review was asked:—

* Review in Special Appeal No. 259 of 1874.

(1) See I. L. R. 3 Bom. 273.

1881

GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY.

That the applicant was a minor during the pendency of the suit and appeals (regular and special), and was represented by his adoptive mother as his guardian; that, soon after the decision of the High Court in special appeal, he was engaged in collecting instances of the special custom set up by him in support of his claim; that the High Court should have given him an opportunity to prove that, by the custom of the country and the caste, his adoption was valid; that the High Court did not give proper effect to the admitted fact that the Swamariacharya, as head of the Brahman community, had held the adoption of the applicant to be valid after due inquiry, and had set aside the excommunication of the applicant's father by the Brahmans of his caste; that, in obedience to the decision of the Swamariacharya, the Brahmans had admitted the applicant's father into the caste; that the applicant was justified in asking an issue on the question of the special custom set up by him, as it was supported by the instances specified in the affidavit annexed to the application.

K. T. Telang and *Ghanasham Nilkanth* appeared for the appellant, and asked for a rule *nisi* on the 20th July, 1881.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—It does not appear to us that any sufficient reason for excusing the delay in the presentation of this petition has been assigned on behalf of the petitioner. The decree was made on the 14th April, 1879. The three months allowed to the party to apply for a review consequently expired on the 14th July, 1879. The petition of review was not presented until the 28th January, 1881,—*i. e.* more than eighteen months after time. The alleged special custom was not set up in the Subordinate Judge's or District Court. Objections were made for the first time in special appeal to the High Court that an issue to try whether there was a special custom in the caste and country for Brahmans to adopt a daughter's son, should have been raised, but it was admitted by the appellant's pleader that not a single instance of such an adoption had, up to that time, been offered or given in evidence. It is urged that the plaintiff was a minor until shortly before the making of the High Court decree in July, 1879, and was only represented by his adoptive mother

as his guardian. But, both in the Subordinate Judge's Court and in the District Court, he (the appellant and plaintiff) was represented by pleaders of his own caste, viz., Rigvedi Brahmans, and the Subordinate Judge was a Rigvedi Brahman, and, if there had been any such well-established special custom in that caste, they must have been cognizant of it. The circumstances that the pleaders did not ask for, and the Subordinate Judge did not suggest, any issue as to the existence of such a custom, and that the Subordinate Judge rested his decree in favour of the plaintiff solely on the maxim *quod fieri non debuit factum valet*, afford strong reason for supposing that there is not any such duly established special custom sanctioned by the caste. The plaintiff has, in the affidavit filed in support of his petition of review, specified fifteen alleged instances of adoption by Brahmans of daughters' sons collected from various places far from and near to his place of residence, but it is admitted by his learned and able counsel that only eleven of these alleged instances occurred in the plaintiff's caste of Rigvedi Brahmans, and that of these eleven only the three first instances of adoption mentioned in his affidavit occurred in the locality (Satara) to which the plaintiff belongs. Of these one is stated to have occurred about fifteen years ago; the second about seventeen or eighteen years ago; and the third about twenty years ago. Of the residue of the eleven, which residue is said to have occurred in other districts, the oldest is not alleged to have occurred more than thirty years ago. Occasional breaches of general rules of caste or law do occur, but a few modern breaches of such a rule do not constitute an ancient and invariable custom—more especially when we remember that the caste itself expelled Narhar, the plaintiff's adoptive father, for his adoption of the plaintiff. We could not have stronger evidence than that as to the caste's view with respect to the existence of any such special custom as would justify the plaintiff's adoption. It is stated in the petition of review that it is an "admitted fact" that Narhar, after the interference of the Swamariacharya, was restored to the caste. The learned counsel and pleader for the plaintiff have, however, been unable to point to any such admission on the record of this case, and there was not any statement made at the hearing of the special appeal before this Court that

1881

GOPAL NARHAR SAPRAY v. HANMANT GANESH SAPRAY

Narhar had been restored to the caste. The plaintiff himself, in the 3rd paragraph of his affidavit already mentioned, swears that Narhar died a few days after the adoption of the plaintiff. Even if he had been so restored, under pressure of the Swamariacharya, it would not detract from the weight of the act of the caste in expelling him. There is not, in our opinion, any reason to suppose that the best case that could be made for the plaintiff has not been made in the Courts below by his Brahman pleaders, and we are personally cognizant that his case on the special appeal was argued with great ability, energy and discretion by Mr. Shantaram Narayan, who stands second to no pleader at the Bar of this Court, and omited no legitimate effort to obtain success. Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representatives must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation. Whether we look to the lateness of the application or to the merits of it, we think it our duty to refuse a rule *nisi* for review.

Rule refused.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

November 15.

NILVARU (ORIGINAL PLAINTIFF), APPELLANT, *v.* NILVARU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Res judicata—Appeal—Effect of appealing against a judgment—Civil Procedure Codes, Act VIII of 1859, *Sec.* 2; *Act X of* 1877, *Sec.* 13, *Expln.* 4—*Title—Trespass—Damages.*

When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata*, and becomes *res sub judice*; and if the Appellate Court declines to decide that issue, and disposes of the case

* Second Appeal, No. 111 of 1881.