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APRIL 12.

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13 B. 520
(P.C.) =
16 I.A. 156 =
5 Sar. P.C.J.
400 = 13
Ind. Jur.
231.

to the Official Assignee to move for execution until the order of 5th April, 1886, was made.

The order of the High Court, which is appealed from, is dated the 10th December, 1886. After the appeal was presented, and on the 2nd March, 1888, the High Court amended the order, by remanding the case to the Court below, with a declaration that [534] the application for execution was not barred, instead of directing execution at once. Strictly speaking such an alteration of the order appealed from was beyond the competence of the Court, but their Lordships accept the alteration as indicating the opinion of the High Court as to the best form of order. The present order, therefore, should be that of 1886, as varied by the High Court itself in 1888. Subject to this variation the appeal must be dismissed, and with costs, and their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellants.—Messrs. *Macfarlane and Lefroy*.
Solicitors for the respondents.—Messrs. *Payne and Lattey*.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

AHMEDBHOY HUBIBBHOY (*Defendant and Appellant*) v.
CASSUMBHOY AHMEDBHOY (*Plaintiff and Respondent*) AND
BAHIMBHOY ALLADINBHOY (*Defendant and Respondent*).*

[21st June, 1889.]

Khoja Mahomedans—Law applicable to—Partition—Right of a son to claim partition of ancestral property in his father's lifetime—Custom, proof of—Ancestral property—Wealth amassed in trade—Evidence—Burden of proof.

The rule that Hindu law as administered in this presidency, in the absence of proof of custom to the contrary, is the law applicable to Khoja Mahomedans is not to be understood in its widest sense, but as confined to simple questions of inheritance and succession.

The right of a son to partition in the lifetime of his father, more especially where moveable property is concerned, is one upon which the greatest doubt and difference of opinion has always prevailed, and consequently there is no presumption in favour of its inclusion in the Hindu law, which, in the absence of proof of custom to the contrary, is applicable to Khoja Mahomedans. The *onus* is on the party alleging such a right, in the case of Khoja Mahomedans, to prove it.

Held, on the evidence, that it was not established that amongst Khojas in Bombay there was any recognized right of a son to demand partition in the lifetime of his father, although it was proved to be customary in Kathiawar and Cutch for a father to give a son who wished for it his share of the family property, both ancestral and self-acquired.

[535] *Held*, also on the evidence that there was no sufficient proof of the property, of which the plaintiff sought partition being ancestral property in the hands of his father.

Where wealth amassed in trade by an individual is said to be ancestral in the hands of that individual, it is not enough to show that he inherited some property; it must be shown that the property inherited contributed in a material degree to the wealth so amassed.

* Suit No. 382 of 1884; Appeal No. 602.

[R., 29 A. 244 (247) (P.C.)=4 A.L.J. 227=9 Bom. L.R. 597=5 C.L.J. 340=11 C.W.N. 417=17 M.L.J. 228=2 M.L.T. 147; 37 B. 71=14 Bom. L.R. 336=15 Ind. Cas. 520; 22 A.W.N. 20; 11 Bom. L.R. 366 (369); 8 Ind. Cas. 214=4 S.L.R. 77 (78); 6 M.L.T. 200 (212); D., 15 Bom. L.R. 1061=12 Ind Cas. 813.]

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THE parties to this suit were Khoja Mahomedans resident in Bombay, the plaintiff and the second defendant being the sons of the first defendant, the plaintiff being the elder son.

The plaintiff brought this suit for partition of moveable and immoveable property in the hands of the first defendant, of the value of twenty lakhs or thereabouts, which the plaintiff alleged to be ancestral family property in which he, the plaintiff, became at birth a co-parcener with interest therein equal to that of his father, the first defendant. The first defendant denied that the property in question was ancestral family property, or that the distinction recognized in Hindu law between ancestral and self-acquired property applied to Khoja Mahomedans in Bombay, and he denied the plaintiff's claim to be a co-parcener in such property, or to be entitled to call for partition. The second defendant took no contentious part in the dispute.

The suit was originally tried before Mr. Justice Jardine, who found for the plaintiff on both points, holding that the property in question was ancestral, and that the plaintiff could call for partition. The facts of the case will be found more fully set out in the report of the case before that learned Judge(1).

The first defendant appealed from that decision.

Latham (Advocate General) and *Starling*, for the appellant:—We maintain, first, that there is no ancestral property; and, secondly, that, even if there be, yet the plaintiff is not entitled to partition, the Hindu law of partition not applying to Khoja Mahomedans in Bombay. First, as to the property being, or not being, ancestral. The *onus* is on the plaintiff to prove that the property is ancestral, and the learned Judge below erred in throwing the *onus* on the defendant, the appellant—*Mayne's Hindu Law*, pl. 267 (4th ed.); *Nanabhai Ganpatrav v. [536] Achrabai*(2). The property is not ancestral in Ahmedbhoy's hands unless it was so in the hands of his father, Hubibbhoy, since it came to Ahmedbhoy under his father's will—*Jagmohandas Mangaldas v. Sir Mangaldas Nathubhoy*(3). There is nothing shown to have descended to Hubibbhoy from his father Ebrahim, save a house, and that provided no funds that could have been the germ of the successful business afterwards carried on by Hubibbhoy. In all the equity suits filed against Hubibbhoy by the members of his family there is no allegation that the property was ancestral, and it was always claimed by Hubibbhoy as his own separate property. On such a point great weight is to be attached to the conduct of the family—*Lakshman v. Jamnabai* (4). On the other hand, evidence of alleged admissions to the contrary in casual conversations is entitled to no weight. Secondly, supposing the property to be ancestral, yet the plaintiff is not entitled to partition. The learned Judge below argued that Hindu law generally is applicable to Khojas, and that the right to claim partition is part of the general Hindu law, and that, therefore, the plaintiff started with a presumption in his favour. No cases go so far as to establish either of these propositions. It is true that in several cases, e. g., *Shivji Hasam v. Datu Mavji*(5); *Hirbai v. Gorbai* (6) *Rahimatbai*

(1) 12 B. 280.

(4) 6 B. 225.

(2) 12 B. 122.

(5) 12 B. H. C. R. 281.

(3) 10 B. 528.

(6) 12 B. H. C. R. 294.

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v. Hirbai(1)—it has been laid down, in general terms, that the Hindu law of property, in the absence of proof of custom to the contrary, applies to Khojas; but those were all cases on the ecclesiastical side of this Court, and the only point really decided was that the Hindu law of succession presumptively applied to Khojas. No case decides that all the Hindu law of property applies to Khojas. And if it is said it does, then what Hindu law is it that applies? Sind, whence the Khojas originally came, was a Mahomedan kingdom from about A. D. 715, and Cutch and Kathiawar came under the power of the Mahomedans shortly afterwards (Postan's *Scinde and Cutch*, chap. IX); it is not probable, therefore, that the Khojas ever adopted the *Mitakshara*, the greatest age assigned to which is one thousand, and the least, five hundred years; much less the *Mayukha*. Far more [537] likely that they recognized the ancient Hindu law, under which no partition could be had till the death of the father—*Manu*, chap. VIII sl. 416; chap. IX, sl. 104; *Colebrooke's Digest*, pp. 196, 199, 203, 205; *Mayne's Hindu law*, ss. 218, 219, 220 (4th ed.). Even now, the different schools of Hindu law are not in agreement as to the right of a son to partition. No such right, for instance, is recognized in Bengal—*Mayne's Hindu Law*, s. 224 (4th ed.). Consequently there is no presumption whatever in favour of such a right in the case of Khojas, and the plaintiff, if he alleges such a right, must prove it, which he has failed to do. The plaintiff's witnesses on this point are from Kathiawar, and it may well be that such a custom exists in Kathiawar and not in Bombay—*Abraham v. Abraham*(2). Moreover, the custom these witnesses go to prove is not that set up in the plaint, as they assert both ancestral and self-acquired property alike to be partible. On the other hand, the Bombay witnesses proved the non-recognition of such a custom in Bombay, and that is the real point to be decided. On both grounds, therefore, the learned Judge's decision was wrong, and should be reversed.

Lang and Jardine, contra.:—If the *onus* is on the defendant to prove the non-existence of the right of partition, they must fail. And the *onus* is on him, if Hindu law is applicable, which a long series of cases from *The Khojas and Memons' Case* (3) downwards has established to be the case. If the Hindu law of property applies, that *prima facie* includes the right of partition, for that is an integral portion of that branch of the law. Khojas are, as regards the law of property, in the same position as Memons, *i. e.*, governed by the Hindu law in the absence of any special custom to the contrary—*Mahomed Sidick v. Haji Ahmed*(4); *Abdul Cadur Haji Mahomed v. C. A. Turner* (5). Hubibbhoy seems on all occasions to have been anxious to make out his property as self-acquired. Why should he do so, if, as defendant alleges, there is no distinction among Khojas between ancestral and self-acquired property? The evidence from Kathiawar proves the custom we contend for; the Bombay evidence in no way disproves it. The defendant admitted the relevancy of evidence from Kathiawar by [538] himself asking for a commission to Kathiawar and Cutch. As to the property being ancestral in the hands of Hubibbhoy, it is in the highest degree improbable that Hubibbhoy took nothing from his father Ebrahim. Ebrahim was a man of position in the caste, as the evidence shows, and was possessed of property. The presumption is all in our favour, and the evidence sufficiently supports and corroborates that presumption. The decision of the learned Judge was right, and should be confirmed.

(1) 3 B. 34.

(2) 9 M. I. A. 195.

(3) Perry's Or. Ca., 110.

(4) 10 B. 1.

(5) 9 B. 158.

Latham, in reply :—It is the living law actually recognized and put in practice, not some dead formula that the Courts seek to discover and enforce—*Abraham v. Abraham* (1). If no single instance of the exercise of a right in recent times is forthcoming, that outweighs any presumption in favour of the right derived from more general considerations. From all the evidence it is plain that, at the present day, Hindu law generally sits lightly on the Khojas, and that this particular part of it—as to a son's right to partition in the lifetime of his father—finds no recognition among them. The plaintiffs produce no proof of the property being ancestral; they rely merely on presumption. That is not sufficient, especially in the face of much that raises contrary presumptions.

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JUDGMENT.

The judgment of the appeal Court was delivered by

SARGENT, C. J.—This appeal arises out of a suit instituted by Cassumbhoy Ahmedbhoy, of Bombay, against his father Ahmedbhoy Hubirbhoy, to establish his claim to a one-third share in the ancestral family property, which he alleges came to the latter on the death of his father, Hubirbhoy Ebrahim, under his last will and testament. The defendant by his written statement denied the allegation that the property come to his hands, as stated in the plaint, was ancestral property according to the laws and usages governing the Khoja community in Bombay, and, further, that the distinction, according to Hindu law, between ancestral and self-acquired property had any application to, or has ever been recognized, or acted on, by any Khojas in Bombay, and that plaintiff did not on birth, or at any time, become a co-parcener or sharer to any extent [539] in the said property with the defendant. At the hearing, after the issues had been framed, a question was raised whether the plaintiff could contend that the property was ancestral in Hubirbhoy's hands without amending the plaint. The Court ruled that an amendment was not necessary, but two additional issues were raised. The Judge of the Division Court held that the wealth which Hubirbhoy Ebrahim left by will to defendant had been acquired by Hubirbhoy by means of a nucleus of property inherited by him from his father Ebrahim, and that in the absence of a custom to the contrary, which he held not to be proved by the defendant, the law of the Mitakshara was applicable to the case, and referred it to the Commissioner to take an account of the ancestral property come into the possession of the first defendant, and to ascertain and report the amount of the same. As to the law applicable to Khojas, the learned Judge of the Division Court relied on judgments of the Court of Appeal in the cases of *Shivji Hasam v. Datu Mavji Khoja* (2) and *Hirbai v. Gorbai* (3). In the former case Sir M. R. Westropp, C. J., who delivered the judgment of himself and West, J., says (p. 292): "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 Khojas is, in matters relating to property, succession, and inheritance, Hindu law as administered in this Presidency;" and the Court accordingly held that there being no evidence of a special custom to the contrary among the Khojas at Thana, that the members of a Khoja family would be bound by the necessary acts of the manager. And again in *Hirbai v.*

(1) 9 M. I. A. 195 (239). (2) 12 B. H. C. R. 281. (3) 12 B. H. C. R. 294.

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Gorbai(1), where the question was between the rival claims of the widow and mother of the deceased, Sir M. R. Westropp, sitting with Melvill, J., says: "It has been generally assumed that, in the absence of proof of custom to the contrary, the law of succession and inheritance amongst the Khojas is the law of their origin, viz., Hindu." Mr. Justice Jardine considered that the questions raised by the present suit fell within the general terms of the rule as enunciated in the above cases with [540] respect to Khojas, and finding that the son's right, as alleged by the plaintiff, to insist on the partition of ancestral property, whether moveable or immoveable, during his father's lifetime, had been decided to be in accordance with Hindu law in *Jugmohandas v. Sir Mangaldas Nathubhoy*(2), threw the *onus* on defendant of proving the existence of a custom amongst Khojas which was opposed to such right. Now it is to be remarked that the rule of this Court, to which Sir M. R. Westropp refers in the last case, is based on a *dictum* of Sir M. Sausse in *Gangbai v. Thavar Mulla* (3), and the practice which had prevailed during the previous twenty-five years in granting letters of administration to the estates of deceased Khojas which is particularly referred to in the judgment of the Division Court in *Hirbai v. Gorbai*(1). The *dictum* of Sir M. Sausse, that "the Khoja caste had been held to be governed by Hindu customs and laws of inheritance," must have been based on the practice of granting letters of administration to Khojas prior to 1863, when *Gangbai v. Thavar Mulla* (3) was decided; for besides the case before Sir E. Perry in 1847, which certainly did not lay down any such rule, the question would appear to have never arisen except on the ecclesiastical side of the Court. 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. *Hirbai v. Gorbai*(1), *Shivji Hasam v. Datu Mavji Khoja*(4) and *Rahimatbai v. Hirbai*(5) 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 [541] the judgment in *Jugmohandas v. Sir Mangaldas Nathubhoy*(2)—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 Khojas 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 v. Sir Mangaldas Nathubhai* (2) 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 Khojas. If this view of the restricted applicability of the rule be correct, it follows that the present question between the parties should be tried exclusively on the evidence in the case, as the custom of Khojas

(1) 12 B. H. C. R. 294 (321).

(2) 10 B. 525.

(3) 1 B. H. C. R. 71 (73).

(4) 12 B. H. C. R. 281.

(5) 3 B. 34.

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with respect to the succession to a woman's property acquired from her husband was dealt with by Sir R. Couch in *In the Goods of Mulbai* (1), and that the plaintiff, as such, should be required to prove, (as he did in that case to the satisfaction of the Court), that the present custom of Khojas with respect to the question in dispute is as he alleges. It was indeed contended by Mr. Starling, for the defendant, that as the Khojas lived on the confines of Hindu civilization, it ought to be assumed that the law which then prevailed amongst the Khojas in their original home in Sind was of a more primitive type—which, there is every reason to suppose, was in force at one time—by which all the property of the family fell into a common stock, the administration of which was absolutely in the hands of the father. But centuries had elapsed since that primitive or Vedic period of Hindu history before the conversion of the Khojas, during which not only the system of the joint family, (as pointed out by the learned authors of West and Buhler's Hindu Law(2)), had been undergoing dissolution, but the parental authority had suffered serious diminution and there is no sufficient reason for assuming that the Khojas, although living on the confines of Hindu civilization, had remained [542] entirely uninfluenced by the gradual change of ideas and habits, which had taken place in the Hindu community generally.

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. Mr. Justice Jardine having treated the rule enunciated in the above cases as applicable, and having thrown on the defendant the *onus* of proving a custom different from that alleged by the plaintiff, necessarily approached the evidence from that point of view, and it is not necessary for us to express an opinion on the conclusion come to by him that defendant had failed in rebutting the presumption in favour of the Hindu law with which he started on its consideration. It is not in dispute that the Khojas migrated from their home in Sind into Cutch and Kathiawar and thence at the close of the last century to Bombay. The plaintiff's evidence is principally confined to the custom as it prevails in Cutch and Kathiawar, where the Khojas have always been exclusively engaged in agricultural pursuits, and are by no means a wealthy community, and it is important, as Mr. Justice Jardine remarks, as showing how Khoja families dealt with the family property in quiet rural districts, where it is probable that as little change would take place in their habits and customs as in the material conditions by which they were surrounded. The result of that evidence is doubtless to show that it is usual in Kathiawar and Cutch for a father to give a son who wishes for it his share, during his father's life, of the family property—that, too, without any distinction being drawn between ancestral or self-acquired. That is the statement of one and all of the witnesses, whilst, at the same time, they would appear to distinguish between ancestral and self-acquired property with respect to the father's power of alienation without the consent of the son. The Judge of the Division Court thinks it probable that by self-acquired property was meant accretions of the family patrimony, but we find nothing to justify that conclusion in the evidence. But, if so, it must be so understood in the evidence of the Bombay witnesses. The usage appears to us, on the statement of the witnesses, to have been of the most primitive character, *viz.*, for a father to give a son his portion and to let him go, as was [543] done with the

(1) 2 B. H. C. R. 276 (284).

(2) 3rd ed. 713.

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prodigal son, and that without any distinction as to ancestral or self-acquired. However, when we come to the evidence of the Bombay witnesses, we find almost a *consensus* of opinion that the son has no right to demand partition either of ancestral or self-acquired property in the father's lifetime, illustrated by numerous instances, of which those of Goolam Hoosain, Mahomed Cassum, Rahimbhai Virji, Kaki Dossa, Alibhai Hubib, and others, are cases, in which there was undoubtedly ancestral property, of sons being turned out of the family house by the father, without any portion of the property in the hands of the father being given to them. No case was adduced by plaintiff of such partition having taken place except in 1844 in Hubibbhoy's own case, when he was old and going to Mecca. At the same time Mr. Justice Jardine has discussed this evidence at great length, and, considering that this "turning out" spoken of by so many witnesses might be explained by the unwillingness of sons to enforce their rights, considered that it was not of itself sufficient to rebut the presumption, in favour of the plaintiff's right with which he started. But without expressing any opinion as to whether that was a correct conclusion from the evidence, we cannot, apart from any such presumption, regard the evidence as to the "turning out" of sons by their fathers without any portion of the property, whether ancestral or self-acquired, otherwise than as pointing, in the absence of special circumstances, to there being no such recognized right on the part of the sons to demand partition. It is true that the witnesses go even so far as to say that there is no distinction between ancestral and self acquired property as regards alienation by the father, but without being able to cite any instance of a Khoja alienating ancestral property, by will or otherwise, away from his sons; but, however that may be, 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 life, which is the only point now for consideration, and which affords the only reasonable explanation of their submitting to be turned out without any share. Nor, indeed, is it to be wondered at that the custom should be different in Bombay from what it is [544] stated to have always been in Kathiawar and Cutch. Since the Khojas have settled in Bombay, which is said to have been for the last hundred years, they have engaged in commerce, and greatly increased in wealth. From being cultivators of the land with very limited personal property, they have become active and energetic merchants, contractors, and men of business, and it was only to be expected that, under these circumstances, such a custom as is stated to have existed in Kathiawar would in course of time undergo modification. Such would naturally be the wish of the leading men of the community who had accumulated capital, and would gradually under their influence permeate the lower strata of the body corporate until the old usage would gradually fall into desuetude, and the strict right of the son, if it ever existed, be lost, with the approval of the general community. In *Abraham v. Abraham* (1) the Privy Council point out that usages are not independent of volition, and may (unless their continuance is enjoined by law) as they were adopted voluntarily, be also changed or lost by desuetude. The evidence of the Bombay witnesses leads, in our opinion, to the conclusion that such a change has gradually taken place in the Khoja community, with respect to the son's right to partition, since their emigration to Bombay.

(1) 9 M.I.A. 195 (243).

It is also worthy of remark that on the occasion of the Khoja Commission, appointed by the Government in 1878 to prepare a draft project of law on succession for Khojas, the peculiar title of sons by the Mitakshara law to ancestral property by birth is disregarded. The 7th section of the Bill, which was drafted provided that for the purposes of the Act, *i.e.*, for the purposes of intestate succession, there should be no distinction between ancestral and self-acquired property, and this would appear from the proceedings to have given rise to no difference of opinion in the community. Upon the whole of the evidence we have come to the conclusion that plaintiff has not proved that, according to the general custom of Khojas in Bombay, the son is entitled to demand partition of ancestral property. The plaintiff's own conduct in allowing so many years, during which he was on the worst possible terms with his father, to pass without claiming, or even suggesting in [545] his correspondence with his father that he had such a right as he now claims, would seem to show that he was not aware of any such custom as he now relies on.

This is sufficient for the decision of the case, but we think it advisable to express an opinion on the question—doubtless a difficult one—whether Hubibbhoys' property was ancestral, as having arisen from a nucleus of property inherited from his father Ebrahim—for it was assumed that since the decision in *Jugmohandas v. Sir Manguldas Nathubhoys* (1) it had been settled that if Hubibbhoys' property was self-acquired, it would not become ancestral by being devised to Ahmedbhoys. To establish this it lies on the plaintiff (for we entirely agree with Farran, J., in *Nanabhai Ganapatrav Dhairyvan v. Achratbai* (2) that the *onus* is on the party alleging it, to give satisfactory proof that Hubibbhoys succeeded to property on his father's death; and further, as the Privy Council say in *Rampershad Tewarry v. Sheochurn Doss* (3), "that it contributed in a material degree to the acquisition of the funds employed in his trade." Now Ebrahim died in A. D. 1816, having held, as this evidence, we think, satisfactorily shows, the honourable position of *waras* in the community to which a man is appointed for his moral worth and respectability rather than his wealth, and it was not disputed that he was living in a house at Chinch Bandar when he died, which, however, stood in his son's name, but there is no evidence to show what other property he left, except the statements of Dhurumsey Poonjabhoys and Mowji to which we shall afterwards refer. As to the business which ultimately resulted in so much wealth, the evidence of plaintiff's witness Mowji, or the defendant's witness Alibhai Hubib, can leave little doubt that Hubibbhoys was already engaged in trade before his father's death. He was Ebrahim's only son, and as Ebrahim was between 50 and 60 when he died, he may well have set him up in trade, possibly reserving to himself only maintenance, as Hubibbhoys himself contemplated doing in A. D. 1844, and which the witnesses say is not uncommon among the Khojas. Again there is no evidence as to the extent of Hubibbhoys' [546] trade until the beginning of *Samvat* 1877 (A. D. 1820-21), four years after Ebrahim's death, when the *mel*, or cash book, produced by the defendant, although beginning with only a cash balance of Rs. 200, would appear to show that he was then in partnership with one *Datu*, with goods, &c., in China and *in transitu* to the amount of Rs. 14,000 to which they were equally entitled; but it affords no evidence as to the capital employed. The book also shows that Hubibbhoys was drawing very small sums for family expenses. However, the business was

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(1) 10 B. 528.

(2) 12 B. 122 (131).

(3) 10 M. I. A. 490 (505).

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so successful that in *Samvat* 1886 (A. D. 1829-30), the books showed a balance to his favour of Rs. 46,000; but the books also show that he had had several partners in the business, and had been largely assisted with capital by his wealthy relative Nathu Tajani, besides availing himself largely of the *avanga* system of insurance, which enables a merchant to a certain extent to dispense with capital of his own. Now this evidence by itself cannot, we think, having regard to the circumstance that Hubibbhoy had commenced before his father's death, and to the usages of the Khojas in their relations with their sons, be regarded as amounting to proof that Hubibbhoy inherited property from Ebrahim which constituted a material part of the funds employed in the trade; and we do not think that Mr. Justice Jardine regarded it differently. He, however, relied on the very important statement of Dhurrumsey Poonjabhoy that Hubibbhoy told him in A.D. 1852 that he had got Rs. 30,000 or Rs. 40,000 from his father. Dhurrumsey says he took part in the partition between Hubibbhoy and his sons in 1852, and that it was on that occasion he told him this. Now Dhurrumsey Poonjabhoy is an old man broken in fortune, who had only recently passed through the Insolvent Court, taking an active part in this suit, on the side of the plaintiff, as shown by his going to Kathiawar to obtain evidence of custom. There was no particular reason why Hubibbhoy should have told him this on the occasion of the partition. The books showed the amount of actual property to be partitioned, and no question had been raised as to the existence of ancestral property. Under all these circumstances, it would, in our opinion, be most unsafe to rely upon a statement as to a conversation said to have taken place thirty-five years ago, by a keen partizan witness, in a family [547] dispute of this description, in which the spirit of partisanship is always unusually strong. This statement also, it is to be remarked, disagrees with that of the witness Mowji—doubtless not a reliable witness, but still the plaintiffs own witness—for he says that at the time of Ebrahim's death it was reported that he had left Hubibbhoy Rs. 10,000. As to the evidence of Gulam (Ex. 70), who is an old man of eighty years of age, and deposes to having been present at a conversation between Hubibbhoy and Natha in *Samvat* 1879 (A.D. 1822-23) with a view to their combining to bring in capital into the business, it is to be remarked that this was six years after Ebrahim's death, and Hubibbhoy may well have acquired capital in the interval. As to the alleged conversation with respect to what Ebrahim had left Hubibbhoy, it is impossible, in our opinion, to place any reliance on such evidence. Passing next to the evidence as to what occurred in Hubibbhoy's family, which commences with the settlement which Hubibbhoy proposed making in his family in 1844 in view of his advanced years, we find Hubibbhoy throughout treating his property as his own self-acquired property, of which he was the sole owner; and assuming to himself the right to dispose of the same, as appears from the deed of 1844 and also from his wills of 1858, 1859 and 1864, in which he devises the residue which remained with him after the settlement with Aladin and Fazul in 1850. The suit which was instituted by Aladin in 1860, with a view to preventing Hubibbhoy from disposing of such residue by will, was not based upon the ancestral character of the property, but either upon a special agreement, or on its having been acquired by the joint efforts of Hubibbhoy and his family constituting an undivided family, and, as such, by Khoja custom not within Hubibbhoy's power to devise by his will as he might think proper. On the other hand, in Hubibbhoy's written statement his absolute property is asserted, and the suit was dismissed after one day's hearing.

Again in Fazul's letter, which is set out in the answer to Fazul's suit of 1862, Fazul admits that the property in Hubibbhoys hands was self-acquired, except so much as had been vested in him as trustee of the settlement of 1850. Lastly, throughout the correspondence between the parties during the many years preceding this litigation [548] and when they were on bad terms, there is not to be found a hint that the property in defendant's hand was ancestral. Upon the whole of the evidence bearing on this part of the case, we think that, although it makes it possible that Hubibbhoys inherited some property from his father, it must be regarded as falling short of such proof as the plaintiff ought to have given, under all the circumstances of the case, that it contributed materially to the funds which Hubibbhoys employed in the business. We must, therefore, reverse the decree, with costs throughout on the plaintiff.

Attorneys for the plaintiff (respondent):—Messrs. *Ardesir, Hormasji and Dinsha*.

Attorneys for the first defendant (appellant):—Messrs. *Jefferson, Bhaishankar, Dinsha and Kanga*.

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APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

LIMBA BIN KRISHNA AND OTHERS (*Original Plaintiffs*), Appellants v. RAMA BIN PIMPLU AND ANOTHER (*Original Defendants*), Respondents.* [3rd September, 1888.]

Suit for a declaration of plaintiffs' right to officiate as priests and receive offerings—Jurisdiction of Civil Courts—Declaratory decree—Specific Relief Act, s. 42—Practice—Amendment.

A suit will lie in a Civil Court for a declaration of the plaintiffs' right to officiate, in alternate years, as priests in a temple and receive the offerings to the idol.

A suit should not be dismissed by an appellate Court on the ground of its being one asking merely for a declaratory decree and no consequential relief, where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint.

[F., 14 M. 46 (48); R., 15 M. 15 (18); 5 Bom. L.R. 329 (330); 12 C.L.J. 74 (78)= 14 C.W.N. 1057=6 Ind. Cas. 864; 11 Ind. Cas. 231=96 P.R. 1911=216 P.L.R. 1911=143 P.W.R. 1911; 14 Ind. Cas. 776=23 P. R. 1912=93 P.W.R. 1912; U.B. R. (1897—1901) 231; D., 19 A. 429; 26 C. 845 (850); 15 M. 255 (257).]

SECOND appeal from the decision of G. Jacob, Assistant Judge of Satara, in appeal No. 326 of 1884 of the District File.

The plaintiffs sued to have their right declared to officiate as priests in a certain temple, and receive the offerings in alternate years, alleging that the defendants had obstructed them in the exercise of their right in *Shake* year 1802 (1880 A. D.), and had [549] also dispossessed them of a certain portion of the temple lands. They also prayed for possession of this land.

The defendant No. 1 denied the plaintiffs' right, and contended that he alone had the right of conducting the worship and taking the offerings in the temple; that the land in dispute had been in his possession for

* Second Appeal, No. 356 of 1886.