APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

MAHA'RA'NA SHRI FATESANGJI JASVATSANGJI (ORIGINAL DEFENDANT), APPELLANT, *v.* KUVAR HARISANGJI FATESANGJI (ORIGINAL PLAINTIFF), RESPONDENT.*

1894. *December* 20.

Molesalám Girásias—Custom—Hindu converts to Mahomedanism—Retention of Hindu law and usages—Maintenance—Rights of junior members of a Thákor's family to maintenance out of an estate of the nature of an impartible ráj—Limitation.

The Hindu law of inheritance and succession applies to *Molesalám Girásias* who were originally Rajput Hindus, but were subsequently converted to Mahomedanism.

The plaintiff was the second son of the defendant, who was the Thákor of A'mod, a tálukdári estate of the nature of an impartible *ráj* or principality. The plaintiff's family belonged to the community of Molesalám Girásias. Plaintiff alleged that according to a family usage he as a junior member of the family was entitled to receive maintenance from his father, who was the holder of the *gádi*. The estate was under the management of the Tálukdári Settlement Officer from 1878 to 1888, during which period that officer granted the plaintiff an allowance in lieu of maintenance without any objection on the defendant's part. On the 1st August, 1888, the estate was restored to the defendant, who stopped the allowance. The plaintiff thereupon sued in 1891 to recover from the defendant arrears of maintenance for two years and eleven months at Rs. 200 a month.

Held, that the plaintiff was entitled to recover, and that the claim was not time-barred.

APPEAL from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Surat, in Suit No. 154 of 1891.

Suit for arrears of maintenance.

The plaintiff was the second son of the Thákor of A'mod, which was a large tálukdári estate of the nature of an impartible *ráj* or principality.

The plaintiff's family belonged to the community of the Molesalám Girásias, who were Rajput Hindus converted to Mahomedanism several centuries ago.

The plaintiff alleged that the Molesalám Girásias were governed by the Hindu law in matters of inheritance and succession, that the A'mod estate was of the nature of an impartible *ráj*

* Appeal No. 139 of 1892.

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or principality, and that according to a long-established family usage he as a junior member of the family was entitled to receive from his father (the defendant), who was the holder of the *gádi*, an allowance in lieu of maintenance suitable to his rank and station in life; that he had been in receipt of such allowance from 1878 to 1888 during the period the Tálukdári Settlement Officer was in management of the estate; that on the 1st August, 1888, the estate was restored to his father the defendant, who refused to allow him any maintenance.

The plaintiff thereupon filed the present suit in 1891 to recover from his father Rs. 7,000 on account of arrears of maintenance for two years and eleven months at the rate of Rs. 200 a month. He also claimed a sum of Rs. 575 on account of the birth ceremonies of his sons, and the funeral rites of his deceased wife.

The defendant pleaded (*inter alia*) that the estate was his self-acquired property; that there was no custom in his family securing maintenance to the younger sons of the Thákor of A'mod; that the plaintiff was not entitled to claim maintenance from him simply because the Tálukdári Settlement Officer had allowed him maintenance; and, lastly, that the claim was time-barred.

The Subordinate Judge held that the estate was ancestral; that the parties were governed by the Hindu law of inheritance, modified by the ancient customs of the Molesalám Girásias; that the younger sons of the Thákor of A'mod were by family usage entitled to maintenance; that the plaintiff's claim was not barred by limitation; that the estate was worth Rs. 50,000 a year, and that the plaintiff was entitled to recover maintenance at the rate of Rs. 200 a month.

The Subordinate Judge accordingly passed a decree awarding the plaintiff Rs. 7,000 on account of arrears of maintenance, but rejected the rest of his claim.

Against this decision the defendant appealed to the High Court.

Ráo Sáheb *Vásudev Jagannáth Kirtikar* for appellant.

Lang, Advocate General, (with him *Gokaldás Kahándás*) for respondent.

The following authorities were referred to in argument:—*Jowala Buksh* v. *Dharum Singh*[1]; *Abraham* v. *Abraham*[2]; *Ráj Bahádur* v. *Bishen Dayál*[3]; *Himmatsing* v. *Ganpatsing*[4]; *Shib Singh* v. *Sitá Ram*[5]; *Shivrám Dinkar* v. *The Secretary of State for India*[6]; *The East India Company* v. *Oditchurn Paul*[7]; 2 Campbell's Gazetteer, 378; 1 Forbes Rás Mála, 343.

RA'NADE, J.:—This is a maintenance suit brought by the respondent (original plaintiff) against his father, the appellant, who is the Maháráná Thákor of A'mod, a large tálukdári estate in the Broach District. The admitted facts of the case are that plaintiff is the second son of the defendant, and the family belongs to the community of Molesalám Girásias, who were originally Rajput Hindus, but became Mahomedans some centuries ago. The plaintiff's case is that the Molesalám Girásias follow the Hindu law and custom in matters of inheritance and partition, and that as the estate is impartible, he, as a second son of the defendant, is entitled by ancient family custom to receive (*khoraki poshaki*) maintenance suitable to defendant's rank and means, and also to receive special contributions on occasions of death and birth ceremonies in his family.

The plaint stated that during the time that the estate was under the management of the Tálukdári Settlement Officer, plaintiff used to receive an allowance, at first of Rs. 50, and afterwards of Rs. 100, a month from that officer. That allowance was discontinued by defendant when the estate was restored into his possession on the 1st August, 1888. The income of the estate was stated to be about Rs. 80,000 a year. Plaintiff accordingly claimed arrears of maintenance for thirty-five months from 1st August, 1888, besides Rs. 575 on account of the *Bismillah, i. e.*, birth ceremonies of his two sons, and the funeral rites of his deceased wife.

Among other defences, which it is not necessary to notice here, as they were not pressed in argument in the appeal before us, defendant urged (1) that the estate, though ancestral, had been lost to the family, and had been acquired by the defendant after

(1) 10 Moo. I. A., 511.
(2) 9 Moo. I. A., 195.
(3) I. L. R., 4 All., 343
(4) 12 Bom. H. C. Rep., 94.
(5) I. L. R., 13 All., 76.
(6) I. L. R., 11 Bom., 222
(7) 5 Moo. I. A., 43.

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forty years of litigation; (2) that the net yield of the estate was only Rs. 41,000 a year; (3) that there was no family custom securing maintenance and contributions for birth and death ceremonies as of right to the younger sons of the Thákor of A'mod, and that only the eldest son was entitled to have *jivái* of about Rs. 1,000 or 1,500 per year; (4) the fact that the Tálukdári Settlement Officer allowed maintenance to plaintiff did not confer any right on plaintiff to claim maintenance from the defendant; (5) that plaintiff had other sources of income which yielded him Rs. 3,800 a year, besides his income from service as police inspector; (6) that *khoraki poshaki* was only a subsistence allowance, and plaintiff could not claim Rs. 200 a month on that account, simply because he was the second son of defendant, and the estate was considerable; (7) and, lastly, it was urged that plaintiff's claim was time-barred.

The lower Court held that plaintiff's claim was not time-barred; (2) that the estate was ancestral, and not self-acquired; (3) that the net income of the estate was Rs. 50,000; (4) that the Hindu law, modified by the ancient custom of the Molesaláms, governed the parties, and that the special custom set up by the defendant was not proved; (5) that defendant's allegations as regards plaintiff's other income were not proved, and that plaintiff was entitled to claim maintenance, but not the other contingent expenses; (6) and that plaintiff was entitled to the maintenance claimed. Plaintiff's claim for Rs. 7,000 was accordingly awarded, and he was allowed maintenance at the same rate from the date of the suit till the date of the decree.

The defendant appealed from this decree, and the chief points argued before us related to the question of limitation, the applicability or otherwise of a modified Hindu law to the parties, and the adequacy of the maintenance awarded by the lower Court. The points for consideration are thus (1) whether plaintiff's claim was time-barred; (2) whether the parties were governed by a modified Hindu law; (3) whether the maintenance awarded was fair and reasonable. The question of limitation can more conveniently be considered after the question of the law applicable to the parties is disposed of.

If plaintiff has no claim under the law which governs the parties to demand maintenance from the defendant, it is plain that the mere payment of maintenance by the Tálukdári Officer, or its discontinuance by the defendant, would furnish no cause of action to the plaintiff to bring his present suit.

It was contended on appellant's behalf that as the parties admittedly professed the Mahomedan faith, the Mahomedan law governed them, unless it was satisfactorily established that there was any binding family or local custom which subjected them to any other law, and that the burden of proving such a custom lay heavily on the party who claimed the benefit of the same—*Abraham* v. *Abraham*[1]; *Jowala Buksh* v. *Dharum Singh*[2]; *Raj Bahádur* v. *Bishen Dayal*[3]. The general correctness of these propositions was not disputed by the respondent, but it was urged on his behalf, that as the community to which the parties belong were Rajputs, who were converted by force into Mahomedanism, and who retained many of the Hindu customs and usages, among them the old law of inheritance, the present case fell within the class of the cases relating to similar communities, such as the Khojas and Kutchi Memons, in respect of whom their customs have been allowed to prevail over the Mahomedan law. It was to prove such a custom that the plaintiff filed numerous decisions of the Subordinate Courts confirmed in appeal, which judicially recognized the custom of the applicability of Hindu law to the Molesalám community. The lower Court has placed its chief reliance on these decisions, copies of which were filed as Exhibits 43—52. It is, however, of more consequence to note the express admission of the defendant in this connection. Defendant admitted (Exhibit 68), that the Mahomedan law did not govern his community of Molesaláms, to which he belonged, in matters of inheritance and maintenence. It is true he stated at the same time that the Hindu law also did not govern them. But there is not much force in this last contention, seeing that he admitted that, if a Molesalám father left behind him his widow, sons, and daughters, the sons succeeded to the property, and maintained the widow and the daughters till these last were married. Simi-

(1) 9 Moo. I. A., 195. (2) 10 Moo. I. A., 511.
(3) I. L. R., 4 All., 343 at p. 348.

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larly, a joint brother displaced the sonless widow as heir, while, in the case of separation, the widow succeeded as heir, if there was no male issue. These rules are distinctively rules of Hindu law, and they are not recognized by Mahomedan law. Moreover, defendant admitted (Exhibits 68, 65,) that *khoraki poshaki*, monthly maintenance, was given by the Thákor in possession of the *gádi* to his sons, and that after the father's death, the younger sons obtained lands as *aida* or *jivái* from their eldest brother, who succeeded to the *gádi*. This again is a rule of succession known to Hindu law in respect of impartible *ráj* estates. These admissions must be read with the admitted facts that the names borne by the parties and their ancestors (Exhibits 70, 54) are all Hindu names, and that defendant's accounts show that, in his family, the Hindu rite of *homa* is performed by, and *dakshina* given to Bráhmins, and the goddesses Lakshmi and Sharada worshipped on Diváli and Dasara days (Exhibits 115—121, 122—126).

Next in order we have to consider the decisions and the authority of writers like Mr. Forbes. Mr. Forbes in his Rás Mála has given an account of the conversion of these Rajputs, and he states that while the Molesaláms follow the Mahomedan practices of circumcision, *nika*, and burial, they yet worship certain Hindu gods, and have *bhats* to recite their pedigrees, and they follow the Hindu law and custom in matters of inheritance. The cases referred to in Exhibits 43—52 fully bear out these assertions. Exhibit 43 is a copy of a decision, passed so far back as 1865, in which the District Court remanded the case back specially for an inquiry into this question of the applicability of Hindu law to the Molesalám parties, and both the Court of first instance and the District Court found this issue in the affirmative. Exhibit 45 is a decision of the Subordinate Judge's Court of Anklesvar, which goes fully into this question, and the decision arrived at was to the same effect. These two cases were also noticed and followed in a later decision of 1887 (Exhibit 46), and upheld in appeal here, Exhibit 47. Exhibits 48, 52 relate to a case in which the present defendant was a party, and one of his female relations brought a suit for maintenance against him in 1865. That suit was disposed of on the same ground in the lower Courts, and their decision was upheld in special appeal by this Court. Exhi-

bits 49, 50, 51 also relate to a suit between Molesaláms in which the same point of the applicability of Hindu law was affirmed in all the Courts. In a more recent case decided by a Division Bench of this Court, *Bái Báiji* v. *Bái Santok*(1) (Ránade and Fulton, JJ.) a few months ago, this point was argued at some length, and the course of decisions noted above was followed, and it was held that the general Hindu law governed disputes about inheritance in this community.

Under the general Hindu law the person in possession of an ancestral impartible estate or *ráj* is bound to provide maintenance for the younger branches of the family who cannot claim partition—*Mutusáwmy* v. *Venkataswara*(2); *Himmatsing* v. *Ganpátsing*(3). The sons and daughters expressly come under this category. Plaintiff will thus have a right to claim maintenance, unless indeed, as the Molesaláms 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—*Rahimatbái* v. *Hirbái*(4); *Mahamad Sdick* v. *Háji Ahmed*(5). So far from this being the case, it is admitted by the defendant, that the younger brothers have a claim to demand *aida* from their eldest brother when he succeeds to the *gádi*, Exhibit 95, though he denies the son's right to claim *jivái* from the father. Defendant himself has cited instances in his own family when such *aida* settlement was made in favour not only of younger brothers, but of younger sons also. Exhibits 80, 90, 91 show that a son's claim for maintenance was recognized by the civil Courts in the case of the Thákor of Saroda. Exhibits 98, 113 are documents passed in 1861 by Abheysing to his brother, the present defendant and his father, by which an allowance of Rs. 1,500 was fixed for Abheysing, Rs. 400 out of which were to be paid during defendant's father's lifetime, and the whole after defendant succeeded to the *gádi*. Defendant has been himself paying not only to his eldest son, the Patwi Kuwar Ishvarsing, but also to his other sons, both before and after the attachment was removed, certain sums annually for their private expenses,

(1) P. J. for 1894, p. 350.
(2) 12 Moo. I. A., 203.
(2) 12 Bom. H. C. Rep., 94.
(4) I. L. R., 3 Bom., 34.
(5) I. L. R., 10 Bom., 1.

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Exhibits 222, 211, 240. Taking all these circumstances into account, it cannot be maintained that any special custom derogatory of the general law has been established by which a Thákor in possession of an impartible *ráj* is absolved from the obligation of providing maintenance (*khoraki poshaki*, i. e. food and dress) to his second son. The lower Court, therefore, very properly found this issue in plaintiff's favour, and against the defendant.

The plaintiff's right to claim maintenance being thus established, the next question is, whether plaintiff's present claim is time-barred. Defendant's contention is that he refused plaintiff's demand in 1873 or 1876. The appellant's counsel before us stated that the refusal was made in February, 1877, and that, counting from that time, the present suit brought in 1891 was time-barred. He also contended that the intervening attachment did not extend the period, and that the Tálukdári Officer's acts did not bind appellant. Plaintiff alleges that his claim was never refused, and that there were distinct admissions of the defendant of a much later date, and that he received maintenance from the Tálukdári Settlement Officer from 1878 to 1887, and it was only in 1888 that this allowance was discontinued, from which period the suit was admitted within the time allowed by law. It is, therefore, necessary to examine the evidence to see how far defendant's contention is made out. (His Lordship referred to the evidence at length and continued :—)

It is unnecessary to refer to the other exhibits. The correspondence shows clearly that defendant never objected to plaintiff's claim for maintenance. His objections were confined solely to the amount, offering first to settle Rs. 150, and then Rs. 400 a year. As late as 1887, defendant asked an increase of his own allowance and those of all sons by Rs. 25 for each of the sons, Exhibit 72. Defendant certainly objected to settle lands on plaintiff during his lifetime, but he so far recognized plaintiff's claim as to express his readiness to settle at first lands yielding an income of Rs. 1,500, and next an income of Rs. 2,400, to come into effect after his own death. This latter question of *aida* is not now before us, and it is only necessary to refer to it here for satisfying ourselves that, according to defendant, plaintiff has a right after his death to have an income from land of

Rs. 2,400 a year. It furnishes a measure of the fairness or otherwise of the maintenance settled by the lower Court during defendant's lifetime. That Court has properly given weight to the rank of the defendant, and plaintiff's near relationship on the one hand, and the circumstances of the family on the other.

The question of limitation does not, therefore, arise in this case for the simple reason that there has been no formal and final refusal on defendant's part of plaintiff's claim till 1888. The claim being recognized as an obligation by the defendant, the Tálukdári Officer simply stood in defendant's place in settling Rs. 50 in 1878, and raising that allowance to Rs. 100 in 1886. Defendant had never refused plaintiff's claim either before the estate was taken over for management by the Tálukdári Officer, or while it was under such management.

The last issue in appeal relates to the adequacy of the amount. The estate admittedly yields a net income of Rs. 41,000. Its gross income appears, from Exhibits 223, 226, 229, 233, 272, 241, 244, to be Rs. 67,000 a year. There are no debts now, and the income is rising. Defendant himself fixed plaintiff's *aida* after his death at Rs. 200 per month or Rs. 2,400 per year, Exhibit 211. That amount, therefore, cannot be said to be unreasonably high during defendant's lifetime. The fact that plaintiff is employed in the Police Department cannot detract from the merits of plaintiff's claim as the Thákor's son.

On the whole, therefore, the lower Court's decision appears to be correct, and we dismiss the appeal, and confirm the decree with costs on appellant.

Decree confirmed.