APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

BHATT DAHYABHAI MOTIRAM AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* PANDYA CHUNILAL KESHORDAS AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1913. *September* 23.

Mahomedan Law—Right of pre-emption—Litigation between Hindus—Adoption of pre-emption as usage—Burden of proof—Ancient and invariable custom—Pre-emption, a personal right not descendible to heirs—A custom cannot be proved by the admission of parties or their counsel.

In litigation between Hindus where one party alleges the adoption of a whole branch of the Mahomedan Law, such as that of pre-emption, and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and could be proved to have been so adopted by proof of ancient and invariable custom. Such a party must stand or fall by the strict Mahomedan Law of pre-emption.

Generally speaking the right of pre-emption is a personal right which, under the Mahomedan Law, would not descend to heirs.

Per MACLEOD, J. :—A custom must be proved by evidence in the first instance and once it is proved the Courts are entitled to recognize its existence. A custom cannot be proved by the admission of the parties or their counsel before the Court.

SECOND appeal against the decision of C. N. Mehta, Joint Judge of Ahmedabad, reversing the decree of M. G. Mehta, Subordinate Judge of Borsad.

The plaintiffs sued to obtain a decree for pre-emption in respect of an *ordi* in the town of Borsad against defendants 1 and 2, the vendors, and defendant 3, the vendee under a registered deed of sale dated the 1st July 1908.

The defendants answered *inter alia* that the suit was not maintainable under the law of pre-emption because the grounds on which the right was claimed to have originated were not true and that the parties were Hindus and there was no custom in that part of Gujarat

* Second Appeal No. 106 of 1913.

1913.

DAHYABHAI MOTIRAM v. CHUNILAL KESHORDAS.

where they lived to apply the law of pre-emption to Hindus.

The Subordinate Judge found that the plaintiffs had the right to bring the suit in spite of the fact that the father of plaintiff 1, grandfather of plaintiff 2 and husband of plaintiff 3 had brought a similar suit in respect of the very right, namely, suit No. 660 of 1908, which abated on his death on the 28th January 1909, his heirs, plaintiffs 1 and 2 being disallowed to continue the suit on the ground that the right of pre-emption was, under the Mahomedan Law, *personal*, that defendant 3 had, however, a preferential right to pre-empt the house to that of the plaintiffs and that in any case, as in the second ceremony (*talab-i-ishhad*=invocation to witnesses) reference was not made to the fact of the first immediate demand (*talab-i-mowasibat*) having been previously made, the defect was fatal to the plaintiffs' claim under the Mahomedan Law. He, therefore, dismissed the suit. The Subordinate Judge in his judgment observed :—

> Lastly comes the point taken in the written statement about there being no custom of pre-emption amongst Hindus in this District. No issue was asked for. But it is said it was the duty of the Court to raise the issue, arise as it did out of the pleadings, of its own motion. I believe that all concerned did not feel its necessity in deference to the judicial recognition of the custom in 6 Bom. H. C. R. noticed since as prevalent throughout Gujarat in all the standard text-books. It is true that the ruling quoted was apparently an instance of over-generalization, that the only cases where the right was allowed came from Surat and Broach, which do not constitute the whole of Gujarat; that here in these parts, it is known to be a recent innovation not only from all reliable sources of information but from the absence of any single reported case; that if the question comes to be considered, as a matter of principle and policy, the opinions of learned authors and Judges as to the inherent evils of the right (*vide* I. L. R. 1 All. 207 at pp. 208—209 and MacNaghten's preface, p. XVII, 5th edition, 1882) and its tendency to depreciate the value of property will have to be respectfully dealt with. I do not think this Court is at liberty to regard the point as still open.

1913.

DAHYABHAI MOTIRAM v. CHUNILAL KESHORDAS.

On appeal by the plaintiffs the Judge reversed the decree and allowed the plaintiffs' claim.

The defendants preferred a second appeal.

G. K. Parekh for the appellants (defendants).

Weldon, with *G. S. Mulgaonkar*, for the respondents (plaintiffs).

BEAMAN, J. :—In this suit the plaintiffs sue to enforce an alleged right of pre-emption in respect of certain property in the town of Borsad, zilla Kaira. All parties to the suit are Hindus. The written statement resting on this fact alleged that there was no local custom authorizing the application of the Mahomedan Law of Shaffa or pre-emption. Doubtless that passage, if correctly quoted from the written statement by the learned trial Judge, was not very happily worded, as he at least appears to have thought that had he raised an issue, the onus of proof would have lain upon the defendants. I am very clearly of opinion that in litigation between Hindus where one party alleges the adoption of a whole branch of the Mahomedan Law, such as that of pre-emption, and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and could be proved to have been so adopted by proof of ancient and invariable custom.

In this case the learned trial Judge merely mentioned the point at the conclusion of his judgment but it is clear that the defendants' pleader must have made use of it in his final address, and I am of opinion that the pleader was right when he said that in the state of the pleadings, it was the learned trial Judge's duty to have raised the issue of custom upon which alone the plaintiffs could have succeeded in this suit and have thrown the burden of proving it upon them. This was not done because it appears to be generally accepted that the Mahomedan

1913.

DAHYABHAI MOTIRAM v. CHUNILAL KESHORDAS.

Law of pre-emption has been adopted as part of the customary law and usage of the Hindus of Gujarat generally. This notion which certainly is widely spread throughout the whole legal profession, appears to me to rest upon no solid foundation whatever. It is traceable in this Court to the case of *Gordhandas Girdharbhai* v. *Prankor*[1], decided by Gibbs and Melvill, JJ. The facts in that case appear to have been that the trial Court took evidence of the alleged custom and found as a fact that it was not established. But their Lordships in appeal overruled that finding relying apparently upon numerous decisions to the contrary in the Suddar Adawlats of Broach and Surat. That is to say that the decision rests not upon any proof of custom in the particular case but on the supposed proof of that custom in other cases decided in other Courts. The learned Judges gave as a case in point (taken I suppose from the numerous cases which they believe to have been decided in the Saddar Adawlats of Broach and Surat) the case of *Narun Nursuee* v. *Premchund Wullubh*[2], decided by Forbes and Newton, JJ. That case came from Surat and the trial Judge without apparently having taken any evidence whatever of the alleged custom, expressed his opinion that the custom was formally established at any rate in the town of Surat. The appeal Court did not find any such custom proved and taking a short cut to their decision said in effect that if the parties really had been governed by such a custom drawn from the Mahomedan Law, the necessary requirements of that law had not been complied with, while if they were not governed by any such special custom, then they had no right of pre-emption under the Hindu Law and so dismissed the claim. Now that is the sole foundation in the case law for this extraordinarily large doctrine, which, as I say, disseminated chiefly by tradition, I think, passing

(1) (1869) 6 Bom. H. C. R. (A. C. J.) 263. (2) (1862) 9 Harrington 591.

from lip to lip in the profession and confirmed by commentaries and text books is that the complete and highly technical Mahomedan Law of pre-emption has been adopted not only in the towns of Surat and Broach but by every Hindu inhabitant of Gujarat. It will be observed that even admitting the correctness of the views expressed by the learned Judges in *Gordhandas Girdharbhái* v. *Prankor*[1], their decision goes no further than the territorial jurisdiction of the Sudder Adawlats of Surat and Broach. We are not in a position to consider any other cases decided in those Adawlats which are merely collectively referred to by the learned Judges but if the single case they do cite is typical of the rest, it supports my view that the foundation of this doctrine is, to say the least, extremely narrow and extremely insecure. Gujarat contains other districts than Surat and Broach and the population of those districts, particularly Kaira and Panch Mahals, is of an essentially different character from the population of the towns at any rate of Surat and Broach. Between the decision of 1869 which I have just referred to and the decision in *Rewa* v. *Dulabhdas*[2] in the year 1902 (Batty and Aston, JJ.), I have been unable to discover a single authority in this Court which supports the view expressed by the learned trial Judge and evidently approved by the learned Judge in appeal. In this case I think it is very necessary to express my most emphatic disapproval of such methods of extending Customary law. The particular law which is thus sought to be made applicable to the entire population of a Province is a law which the Courts, I think, would only so extend with the very greatest reluctance and on compulsion after being satisfied in proper cases and upon proper evidence that that law had been adopted from time immemorial and had been invariably and consistently acted upon from time

[1] (1869) 6 Bom. H. C. R. (A. C. J.) 263. [2] (1902) 4 Bom. L. R. 811.

1913.

DAHYABHAI MOTIRAM v. CHUNILAL KESHORDAS.

immemorial to the present day to those Hindus of Gujarat who are now upon mere assumption said to have incorporated it in their own Hindu Law with which it has absolutely no affinity in any point. In all future cases I hope that where a custom of this kind is alleged as the foundation of a claim and is denied by the defendant, the trial Judge will insist upon strict proof of it and will not be misled by the very general dicta to be found in the two cases of *Gordhandas Girdharbhai* v. *Prankor*[1] and *Rewa* v. *Dulabhdas*[2] to which I have just referred.

The learned counsel for the plaintiffs has suggested that if this Court takes that view of the custom, or rather I should say of the manner in which the alleged custom has virtually been presumed to exist in the present case, it would be desirable to frame two issues, namely, whether the plaintiffs proved the custom upon which they rely and second, whether, if so, the plaintiffs have conformed to all the requirements of the Mahomedan Law of pre-emption in the particular case, and remand those two issues to the Court below. I should have been only too willing to do so particularly in order to ascertain whether, upon a proper trial, any evidence whatever would be forthcoming in support of the alleged custom but I felt that it would be merely wasting the moneys of the plaintiffs in this case for the sake of establishing a general principle, because even assuming that they did succeed in establishing the custom they alleged, it appears to me too clear to admit of argument that they would still be bound to fail in this litigation. The plaintiffs cannot have it both ways. They must either accept the Hindu Law or the Mahomedan Law. Under the Hindu Law, it is admitted that they have no right of pre-emption whatever. Therefore they must stand or fall (I am now assuming that their alleged custom is

(1) (1869) 6 Bom. H. C. R. (A. C. J.) 263. (2) (1902) 4 Bom. L. R. 811.

proved) by the strict Mahomedan Law of pre-emption and in my opinion they must fail. Their father Kishordas originally brought a suit for pre-emption in respect of this property. He was one at least of the persons entitled to pre-empt, whether the other plaintiffs were entitled to pre-empt or not would depend not so much, I think, upon their relation to each other as members of a joint Hindu family as upon their being properly classifiable under the Mahomedan Law as those entitled to pre-empt. But either they were or were not entitled, and if they were, it is clear that under the Mahomedan Law each of them was bound to make his claim the moment he knew of the intended sale to the defendant. It is found by the Courts below—indeed it was admitted before the learned Judge of appeal—that none of the present plaintiffs attempted to enforce his right, whatever that might have been under the Mahomedan Law to pre-empt when first the sale to the defendant became known. The only member of the family who did attempt to enforce that right was Kishordas. During the pendency of Kishordas' suit he died. None of the plaintiffs in this suit were made co-plaintiffs with him in that suit. On his death they applied to be entered as plaintiffs in his stead and so to be allowed to carry on that litigation. Generally speaking the right of pre-emption is a personal right which, under the Mahomedan Law, would not descend to heirs. The Courts, therefore, refused to allow any of the present plaintiffs to continue the suit instituted by Kishordas and that suit abated. Then on the very last day of the period of limitation allowed to them the plaintiffs filed this suit in their own right to enforce their own claim to pre-emption. But it is perfectly plain that under the Mahomedan Law that claim could not, so advanced, be sustained. They had known for more than a year of the sale to the defendants and not one of them had gone through any of the requisite formalities of the Mahomedan Law of pre-

1913.

DAHYABHAI MOTIRAM v. CHUNILAL KESHORDAS.

emption. In such circumstances any suit which they brought strictly under Mahomedan Law would be clearly predestined to failure. They seek to evade this by a blending of the Hindu with the Mahomedan Law and the Courts below have acceded to their contentions in this respect. I am however very clearly of opinion that the learned Judge of Appeal was entirely wrong in thus giving effect in a pre-emption suit to the doctrine of representation by a manager peculiar to the Hindu Law. In my opinion, therefore, no useful purpose can be served by remanding the issues suggested by Mr. Weldon for trial upon evidence by the Courts below. I entertain no doubt whatever in my own mind as to what the decision in this case ought to be, and I would, therefore, now dismiss the plaintiffs' suit with all costs upon them.

MACLEOD, J. :—I entirely concur. A custom must be proved by evidence in the first instance and once it is proved the Courts are entitled to recognise its existence. A custom cannot be proved by the admission of the parties or their counsel before the Court. I concur that the appeal should be allowed with costs throughout.

Suit dismissed. Appeal allowed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913. *September* 26.

HARI BALU GAEKAWAD AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, *v.* GANPATRAO LAKHURJIRAO GAEKAWAD AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

Provincial Small Cause Courts Act (IX of 1887), sections 23 and 27—Small Cause suit—Question of title—Suit transferred to the ordinary jurisdiction of the Court—No substantial irregularity—Decision on title—Decree not final—Appeal.

* Application No. 142 of 1913 under the extraordinary jurisdiction.