1895.

CHENAVA v. BASANGAVDA.

To assure the effect of the adoption in this case the deceased executed a *wáraspatra* in the plaintiff's favour. We do not regard that as indicating on his part a belief in the inadequacy of the former rite.

We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895. *October 8.*

DESA'I RANCHHODDA'S VITHALDA'S AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. RA'WAL NATHUBHA'I KESA'BHA'I AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Widow—Daughter—Custom, proof of—Exclusion of women from succession—Gohel Girássias—High Court—Second appeal—Interference in second appeal with findings of fact based on wrong views of law—Limitation.

Hathibhái, a Gohel Girássia, died in or about 1866, leaving a widow Motiba and a daughter Báiba, and possessed of certain lands. Motiba died in 1887. In 1890, the plaintiffs, who were divided collaterals of Hathibhái, sued to recover the lands, alleging that they succeeded thereto on the death of Hathibhái, widows and daughters being excluded from inheritance according to the custom among the Gohel Girássias. The lower Courts found that the lands were never in plaintiffs' possession; that Motiba held them till December, 1882, since which time defendants Nos. 1—3 had them in their enjoyment as purchasers from her; that the custom proved excluded daughters, but not widows, from inheritance; and that the claim was within time, having been made within twelve years of the death of Motiba. On second appeal to the High Court,

Held (1) that the alleged custom excluding daughters was not proved;

(2) that the plaintiffs should not have been allowed to shift the basis of their claim from an alleged custom which excluded both widows and daughters to one which only excluded daughters;

(3) that since limitation must be applied to the plaintiffs' claim as they made it, and tried to prove it, Motiba's possession was adverse to them and, being for more than twelve years, barred the suit.

If the decree appealed against is based on wrong views of the law of evidence, or on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court will interfere in second appeal.

* Second Appeal, No. 426 of 1894.

Basára v. *Lingangauda*(1), *Bhagrándás* v. *Rájmal*(2), *Shidhojiráv* v. *Náikojiráv*(3) and *Neelkisto* v. *Beerchunder*(4) referred to.

1895.

DESÁI RANCHHODDÁS v. RÁWAL NATHUBHÁI.

SECOND appeal from the decision of Dayárám Gidumal, Acting Joint Judge of Ahmedabad.

One Hathibhai, a Gohel Girássia, died intestate in or about 1866 at Chitrá, leaving a widow named Motiba and a daughter Báiba him surviving. At the time of his death he was possessed of a certain garden and a field which were the subject-matter of this suit.

In 1882 the widow Motiba sold this garden and field to the defendants Nos. 1—5. In 1887 she died.

The plaintiffs were descendants in the third and fourth degree from the brother of Hathibhái's paternal grandfather and were divided in interest from Hathibhái. In 1890 they brought this suit to set aside the sale to the defendants, alleging that by custom they were entitled to Hathibhái's property at his death to the exclusion of his widow and daughter; that they had obtained possession of the property after Hathibhái's death, and that the sale by Motiba was void.

The defendants denied the alleged custom and alleged that after Hathibhái's death Motiba had rightful possession of the property and that she had sold it in order to pay her husband's debts.

The Subordinate Judge held that on the death of Motiba the plaintiffs by the custom of the Gohel Girássias were entitled to succeed as heirs of Hathibhái to the exclusion of his daughter Báiba. He, therefore, allowed the plaintiffs' claim.

On appeal the Acting Joint Judge of Ahmedabad confirmed the decree of the Subordinate Judge. He observed :—

"The plaint set up a custom among the Gohel Girássias excluding females from succession, and the plaintiffs' witnesses gave instances in which widows and daughters had not succeeded. It was admitted here before me by Mr. Varajrái, who appeared for the plaintiffs, that the evidence regarding the exclusion of widows was conflicting. Even those witnesses who asserted their exclusion had to admit that they were entitled to maintenance and to the marriage expenses of their daughters; whilst others admitted that the widows of certain separated Girássias had enjoyed their property. All the witnesses, however, agreed that there was no case in which a daughter had

(1) I. L. R., 19 Bom., 428.
(2) 10 Bom. H. C. Rep., 241.
(3) 10 Bom. H. C. Rep., 234.
(4) 12 Moo. I. Ap., 523.

1895.

DESÁI RANCHHODDÁS v. RÁWAL NATHUBHÁI.

inherited her father's property. The evidence on this point is consistent, and has not been rebutted, and I agree with the Subordinate Judge that this custom is proved. * * * Coming to the third point (of limitation), it was argued here that as the plaintiff set up a right to succeed to Hathibhái, the possession of Hathibhái's widow was adverse for more than twelve years, and the suit was, therefore, barred. In the lower Court, however, there was an express issue framed as to whether the plaintiffs were Hathibhái's heirs after the death of Motiba, and this issue was decided in their favour. It is admitted that the suit is within time if the period of limitation is calculated from the date of Motiba's death. It is true that the plaintiffs set up a custom excluding even Motiba from the succession. But looking to the fact that an express issue was framed, by which practically this contention was waived, and the fact that the custom actually found proved gave a right to theplaintiffs to succeed only on Motiba's death, I cannot hold that the suit is time-barred."

Against this decision defendants preferred a second appeal to the High Court.

Branson (with him *Govardhanrám M. Tripáthi*) for appellants (defendants) :—Plaintiffs set up a custom excluding women generally as heirs. They were not able to prove this bread allegation. They ought not to have been allowed by the lower Courts to shift the basis of their claim from the alleged custom, which excluded both widows and daughters, to one which only excludes daughters—*Leathes* v. *Newitt* (1). A part only of a custom cannot be proved. The allegation as to a custom must succeed as a whole or fail entirely. A family custom to be held binding must be distinctly proved—*Patel Vandrávan Jekisan* v. *Patel Manilál Chunilál* (2); *Rávji Vináyakráv Jagannáth Shankarsett* v. *Lakshmibái* (3). The plaintiffs here have not proved any single instance in which the daughter of a deceased Gohel Girássia claimed against his separated kinsmen, and her claim was disallowed. In the absence of such evidence the lower Courts were bound to presume that the rules of Hindu law applied, and that Báiba, the daughter of Hathibhái, was his heiress at Motiba's death.

Plaintiffs cannot, then, succeed in this suit as reversioners, because at the death of the daughter they may not be alive. The defendants were entitled to plead a *jus tertii*—*Chandrabhat* v. *Sangápa* (4). The lower Courts have accepted as proof of custom what is no proof according to law. The High Court is

(1) 4 Price, 355 at p. 370.
(2) I. L. R., 16 Bom., 470.
(3) I. L. R., 11 Bom., 381.
(4) P. J., 1875, p. 312.

1895.

DESÁI RANCHHODDÁS *v.* RÁWAL NATHUBHÁI.

not bound by findings based on such insufficient evidence. It can interfere in second appeal: see *Luchmeshwar* v. *Manowar* [1] and *Rámgopál* v. *Shamskhaton* [2]. As regards limitation, the case put forward by the plaintiffs is that they were in possession, and not the widow. As a matter of fact it has been found by both the lower Courts that it was the widow who was in possession and not the plaintiffs; that is, her possession, according to the plaintiffs' own case, was adverse to them.

P. M. Mehta (with him *Sitánáth Gopináth Ajinkya*) for respondents (plaintiffs):—A distinct issue as to the custom was raised and decided at the trial, and it was not alleged by the defendants in the lower Court of appeal that they were prejudiced by the form of the issue. The fact that the daughter has not come forward to claim the property after Motiba's death, shows beyond the possibility of doubt that she knew the custom was against her. Otherwise she would have claimed.

As to limitation, the District Judge holds, and with good reasons, that the claim is not time-barred.

JARDINE, J.:—The lands in suit belonged to a Gohel Girássia named Hathibhái who died on some date unascertained by either of the Courts below, but which was before the execution of the deed of sale on the 20th December, 1882, by Motiba, his widow, to the defendants Nos. 1 to 5. The plaint says he died in Samvat 1919: the Subordinate Judge writing on April 30th, 1891, says he died twenty-five years before.

The plaintiffs are descendants in the third and fourth degree from the brothers of Hathibhái's paternal grandfather. They were divided in interest from Hathibhái. It is admitted that Hathibhái left a widow, Motiba, him surviving. The plaintiffs denied or ignored the fact that he also left a daughter named Báiba: but on issue raised, the fact was proved and she appeared as a witness. By the Hindu law, the plaintiffs are not entitled to succeed as heirs to the exclusion of the widow and the daughter. They say that the widow died on the 26th November, 1887. Their plaint alleges what was found to be unproved, that they took possession in Samvat 1919 on Hathibhái's death, and that

(1) L. R., 19 I. A., 48. (2) L. R., 19 I. A., 228.

1895.

DESÁI RANCHHODDÁS *v.* RÁWAL NATHUBHAI.

they supplied Motiba with food and raiment. This was part of their case, as they pleaded a custom which excluded the widow of a divided brother as well as daughter. As to this part of the plea, the judgment of the Subordinate Judge, Ráo Sáheb Wadilál T. Párikh, is halting. He observes that proof of possession by the plaintiffs upon Hathibhái's death to the exclusion of Motiba would go a long way to prove this part of the custom. Then he finds against them, as to the alleged possession, a matter of fact not so perplexing as one of special custom. Then he observes: "It may be said that even if Motiba was excluded by the custom, her possession was not disturbed till her death, and the custom was not exercised against her. Her enjoyment of the property was, of course, like that of an ordinary Hindu widow and she could not be empowered to a greater extent." It is not easy to form an opinion whether the Subordinate Judge believed there was a custom to exclude widows or not. All that he has to say about limitation and adverse possession is contained in the following sentence:—"Motiba died in Samvat 1944, and, therefore, the claim is certainly not time-barred."

The Subordinate Judge found distinctly on the evidence that there is a custom which excludes a daughter from inheriting her father's property. This is on an issue of a vague and dangerous kind which widens the area and favours shifting of ground, *viz.*:

"Is it proved that according to Hindu law and custom, the plaintiffs were the heirs of the deceased Hathibhái at the time of the death of his widow Motiba?"

The plaintiffs were nevertheless allowed to support the case stated in their plaint that the custom excluded all women and widows as well as daughters.

In appeal the Joint Judge, Mr. Dayárám Gidumal, raised the issue of custom and found as follows:—

"The plaint set up a custom among the Gohel Girássias excluding females from succession, and the plaintiffs' witnesses gave instances in which widows and daughters had not succeeded. It was admitted here before me by Mr. Varajrái, who appeared for the plaintiffs, that the evidence regarding the exclusion of widows was conflicting. Even those witnesses who asserted their exclusion had to admit that they were entitled to maintenance and to the marriage expenses of their daughters; while others admitted that the widows of certain separated Girássias had enjoyed their property. All the

1895.

DESÁI RANCHHODDÁS v. RÁWAL NATHUBHÁI.

witnesses, however, agreed that there was no case in which a daughter had inherited her father's property. The evidence on this point is consistent and has not been rebutted, and I agree with the Subordinate Judge that this custom is proved."

He deals as follows upon the issue of limitation:—

"It was argued here that as the plaintiffs set up a right to succeed to Hathibhái, the possession of Hathibhái's widow was adverse for more than twelve years, and the suit was, therefore, barred. In the lower Court, however, there was an express issue framed as to whether the plaintiffs were Hathibhái's heirs after the death of Motiba, and this issue was decided in their favour. It is admitted that the suit is within time if the period of limitation is calculated from the date of Motiba's death. It is true that the plaintiffs set up a custom excluding even Motiba from the succession. But looking to the fact that an express issue was framed by which practically this contention was waived, and the fact that the custom actually found proved gave a right to the plaintiffs to succeed only on Motiba's death, I cannot hold that the suit is time-barred."

The Joint Judge errs, in our opinion, in presuming that the plaintiffs waived their claim, *viz.*, that, 1st, they were entitled to succeed as owners, and, 2nd, actually did so succeed, to the exclusion of Motiba, on the death of Hathibhái. Most of the Subordinate Judge's judgment consists of a discussion of the evidence they insisted on bringing to prove these two points.

Mr. Branson for the appellants-defendants argues that the Courts below have erred in letting the plaintiffs shift the basis of their claim from an alleged custom which excludes both widows and daughters to one which does not exclude any woman relative, but daughters—*Leathes* v. *Newitt*[1]. As the plaintiffs can succeed only on the strength of their own title, he urges that the Courts below should have recognized the title to be in Báiba at Hindu law, *Chandrábhat* v. *Sangápa*[2], a *jus tertii*; and that this error has resulted from their accepting as proof of custom what is not proof thereof in the eye of the law, which mistakes are such as this Court in second appeal can correct—*Lachmeshwar* v. *Manowar*[3] and *Rámgopál* v. *Shamskhaton*[4]. We are of opinion that, if the decree appealed against is based on wrong views of the law of evidence or on misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, this Court ought to interfere in second appeal.

(1) 4 Price at p. 370.
(2) P. J. for 1875, p. 312.
(3) L. R., 19 I. A., 48.
(4) L. R., 19 I. A., 228.

1895.

DESÁI RANCHHODDÁS v. RÁWAL NATHUBHÁI.

The Joint Judge does not examine any single instance of the alleged custom. We must, therefore, inquire what the evidence is. The Subordinate Judge finds the custom proved by witnesses 35, 38, 51, 52, 66, 67, 83 and 84, who, he says, are in favour of it. He notes that the defendants tendered no rebutting evidence. That makes no matter, says Mr. Branson; there was nothing for them to rebut. Neither Court has tested what the witnesses say as this Court did in each instance in *Basava* v. *Linganganda* (1), nor applied the canons. See pp. 458 and 473. Witness 35 like most of them excludes widows. He swore Báiba was dead and that Motiba was only found in maintenance. His meagre remarks about daughters are not worth consideration. The same remarks apply to witness 38, who was not asked about daughters. Neither was witness 51. Witness 52 deposed to the death of Báiba and the maintenance of Motiba. He spoke as to what happened if a Girássia died childless. Witness 66 stated in the abstract the proposition of the plaint, and named three instances in his family. But in none of these was there a farikhat. The same remarks apply to witness 67. Witness 83 speaks to the customs in the neighbouring State of Bhávnagar. Witness 84 speaks to two instances affecting daughters: they are not in point unless the brethren were divided: the witness in cross-examination admitted he knew little about that essential fact: the parties who are alive have not been called. The only evidence thus appears to be that of witnesses 66 and 84. There is no documentary evidence whatever nor anything to show that the exclusion of daughters in favour of divided brethren has ever received recognition from the revenue officers or the Courts of justice. No person who has excluded the daughter when she happened to be the heiress at Hindu law has been called. The case, therefore, resembles *Bhagvándás* v. *Rájmal* (2). See for the canons p. 260 and for the authorities p. 261, where it is held that proof of only three instances could not be regarded as proof of an ancient, still less of an immemorial custom. "The course of practice, upon which the custom rests, must not be left in doubt, but must be proved with

(1) I. L. R., 19 Bom., 428. (2) 10 Bom. H. C. Rep., 241.

certainty"—*Shidhojiráv* v. *Náikojiráv* (1). The argument, that no instance of a daughter succeeding has been proved, is under the circumstances of no great weight. The issue ought to have been whether the plaintiffs can prove the existence of a special custom among Gohel Girássias that a collateral male relation of the father deceased succeeds to his property, they being separated in interests at Hindu law, where the heiress at Hindu law entitled to the possession is a daughter. The *onus* is on the plaintiff; for "where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom"—*Neelkisto* v. *Beerchunder* (2). Non-usage though relevant to matters of procedure—1 Coke on Litt. 81 b.—is not valid argument here. The defendants might have difficulty in getting any relevant instances; they are only concerned with the case of a divided brother dying with no nearer heir than a daughter. In like manner no general statements nor cases among undivided brethren avail the plaintiffs: neither do those where the evidence is not clear, 1st, that there had been a separation in interests between the succeeding male collateral and the deceased; 2nd that there was no heir nearer than the daughter; 3rd that the family was one of Gohel Girássias. This very case ought to have made the Courts below extremely careful to test the evidence by the usual canons: as the attempt of the plaintiffs to convince those Courts of the custom by bringing witnesses to prove not only that widows are always excluded but that this widow Motiba had actually been excluded failed so completely. Those Courts should further have noticed the endeavour to avoid all proof of the custom about daughters by raising doubts about Báiba being alive. For these reasons we find that the custom to exclude daughters was not proved.

We must also hold that the adverse possession of the widow Motiba bars this suit. The plaintiffs, as we have seen, struggled by every means in their power to make the Subordinate Judge believe that Motiba was, in pursuance of the alleged custom, excluded from the property and found in maintenance. The possession found to exist in her case as a fact must, therefore, have been adverse to the plaintiffs. The limitation must be

(1) 10 Bom. H. C. Rep., 228. (2) 12 M. I. A., at p. 542.

1895.

DESÁI RANCHHODDÁS v. RÁWAL NATHUBHÁI.

applied to their claim as they made it and tried to prove it: not to a different set of pretensions which they would not have raised if the evidence they brought had not been disbelieved by the Subordinate Judge.

The Court, therefore, reverses the decrees of the Courts below and dismisses the suit; costs throughout on the plaintiffs.

Decree reversed and suit dismissed.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895. *October 8.*

RAHIMKHA'N AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. FATU BIBI BINTE SA'HEB KHA'N (ORIGINAL PLAINTIFF), RESPONDENT.*

Bombay Act V of 1886, *Sec.* 2†—*Retrospective effect—Vatan—Vatan becoming the property of widow and daughter—Heirs.*

Section 2 of Bombay Act V of 1886 is not retrospective.

A vatan having devolved on the widow and daughter of a deceased Mahomedan as his heirs, and each having become owner of her share in it, in so far as a vatan can be held in ownership,

Held, that on the death of the widow in 1890, leaving no qualified male heirs, the daughter was entitled to succeed as her heir.

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge of Thána with Appellate Powers, modifying the decree of Ráo Sáheb Máneklal G. Ganderia, Subordinate Judge of Panvel.

The plaintiff sued as the heiress of her father Sáheb Khán and mother Aishábibi to establish her right to a moiety of a vatan, alleging that the entire vatan had belonged to her father Sáheb Khán and the first defendant in equal shares; that Sáheb Khán received Rs. 233-5-6 a year, on account of his share, from Government till his death in 1851; that in July, 1853, plaintiff and

* Second Appeal No. 408 of 1894.

† Section 2 of Bombay Act V of 1886:—

2. Every female member of a vatan family other than the widow of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any vatan, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force, to every male member of the family qualified to inherit such vatan, or part thereof, or interest therein.