1896.

VEDU v. NILKANTH.

Though it is not competent to a tenant to deny his landlord's title at the date of his lease, it is open to him to show that it has since determined. We set aside the decree and remand the case for a retrial having reference to the above remarks. Costs, costs in the cause.

Decree set aside and case remanded.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

1896.
September 2.

BAI SHIRINBAI (ORIGINAL PLAINTIFF), APPELLANT, v. KHARSHEDJI NASARVANJI MASALAVALA (ORIGINAL DEFENDANT), RESPONDENT.*

Pársis—Marriage—Infant marriage among Pársis—Custom—Suit for declaration of nullity of infant marriage—Age of majority applicable in case of such suit—Indian Majority Act (IX of 1875), Secs. 2 and 3—Parsi Marriage and Divorce Act (XV of 1865), Sec. 3—Limitation Act (XV of 1877), Art. 120—Practice—Second appeal—Finding of lower Courts as to custom.

A Pársi female, within three years after she had attained the age of twenty-one, brought a suit in the Court of the Subordinate Judge at Broach for a declaration that a marriage ceremony performed in 1869, when she was not three years old, did not create the *status* of husband and wife between her and the defendant. She had never lived with the defendant as his wife. The Subordinate Judge held that the marriage was valid and binding, being of opinion that the custom of infant marriage among the Pársis was well established and recognized. On appeal the Judge confirmed the decree, holding that at all events in 1869, when the marriage took place, the custom was common and recognized as binding. On second appeal the High Court concurred with the opinion expressed in *Peshotam* v. *Meherbái*(1) that the Zoroastrian system did not contemplate marriage in infancy, but the lower Courts having found a custom had grown up among Pársis in India validating such marriages, and that the custom was in force in 1869, did not consider it open on second appeal to arrive at an independent finding as to whether the evidence established the existence of such a custom.

Held, that a Pársi suing to have a marriage declared void is "acting in the matter of marriage" and, therefore, the Indian Majority Act (IX of 1875), which makes the age of eighteen the age of majority, does not apply to a question of limitation with regard to such suit. The age of majority in such a case is that prescribed by the Parsi Marriage and Divorce Act (XV of 1865), *viz.*, twenty-one years.

* Second Appeal, No. 117 of 1896.

(1) I. L. R., 13 Bom., 302.

1896.

BAI SHIRINBAI v. KHARSHEDJI.

Held, also, that article 120 of the Limitation Act (XV of 1877) was applicable to the above suit and that the plaintiff having for the purpose of bringing the suit attained her majority at twenty-one, the suit was not barred.

Act XV of 1865 contains no provision as to the age at which a Pársi marriage can be validly contracted, the matter being left to the general law which governs Pársis in that particular, just as the English Marriage Act (4 Geo. IV, c. 76) leaves it to be dealt with by the common law of England.

SECOND appeal from the decision of C. Fawcett, Assistant Judge of Broach, confirming the decree of Ráo Sáheb Chunilal D. Kavishvar, Subordinate Judge of Broach.

Suit by a wife for a declaration of nullity of marriage. The parties were Pársis. The suit was filed on 11th September, 1890.

The plaintiff alleged that she was born on the 20th September, 1866; that on the 25th January, 1869, she being then between two and three years old, she went through the ceremony of marriage with the defendant; that she had never lived with him as his wife and had never ratified or acquiesced in the alleged marriage, but on the contrary had always repudiated it and had refused to live with the defendant. She contended that the pretended marriage was null and void, as she, being at the time an infant three years old, was incapable of consenting to the contract. She, therefore, prayed for a declaration that the marriage ceremony had not created the *status* of husband and wife, and that the alleged marriage was null and void.

The defendant contended (*inter alia*) that the suit was time-barred by limitation; that the marriage was legal and binding; and that plaintiff could not repudiate it.

The Subordinate Judge held that the marriage was valid and binding on the plaintiff. In his judgment he said:—

"The suit was not time-barred, because the cause of action accrued to plaintiff when she was informed of the marriage on reaching years of discretion, that is, at the age of fourteen. The ordinary period of limitation was six years under article 120 of Schedule II of the Limitation Act (XV of 1877), but under section 7 of the same Act the period was extended to three years from the date of plaintiff's attaining majority. She was proved to have been born on the 20th September, 1866, and in the matter of the marriage the plaintiff attained her majority under section 3 of the Parsi Marriage and Divorce Act (XV of 1865) at the age of twenty-one and not at the age of eighteen under the Indian Majority Act (IX of 1875). The plaintiff was

1896.

BAI SHIRINBAI v. KHARSHEDJI.

therefore, entitled to institute the suit at any time before she completed her twenty-fourth year, and the suit having been brought on the 11th September, 1890, was not time-barred.

"The marriage was valid, as the custom of infant marriages among Pársis was well established and recognized as valid and was not prohibited by the Parsi Marriage and Divorce Act. The requisites to the validity of a Pársi marriage had also been observed in the present case. The marriage was therefore, binding upon the plaintiff.

"The plaintiff could not repudiate the marriage. There was no authority for holding that she could, and the contrary opinion was expressed by Scott, J., in *Peshotam* v. *Meherbai*(1)."

On appeal by the plaintiff the Judge confirmed the decree. He was of opinion that the suit was barred by limitation. The following is an extract from his judgment :—

"As to the custom, it is clearly established by the evidence in the case. Even the plaintiff's witnesses admit that the custom was formerly very prevalent and was recognized as valid among the Pársis. * * The custom is fast dying out, and it may be that it has now ceased to be a well-established custom having the force of law. That, however, is not the question for me to decide. It is beyond any doubt whatever that in 1869, when this marriage took place, the custom was common and recognized as binding.

"The Subordinate Judge bases his decision upon section 2 (*a*) of the Indian Majority Act, 1875, read with section 3 of Act XV of 1865. He argues that as a Pársi boy or girl is not *sui juris* for the purpose of entering into a marriage contract until he or she reaches the age of twenty-one, *a fortiori*, he or she cannot file such a suit as this without being represented by a guardian or next friend within that period. I do not, however, think this argument sound. As laid down in the case reported at I. L. R., 3 Mad., 248, section 2 of Act IX of 1875 refers only to the capacity to contract, and not to the capacity to sue. It does not, therefore, follow that because the plaintiff was not *sui juris* so as to contract a valid marriage between eighteen and twenty-one, that she was not in a position to bring a suit in a case like this. The word 'minor' in section 7 of Act XV of 1877 must, in my opinion, be construed with reference to the general law as laid down in the Indian Majority Act, 1875, under which the plaintiff attained her majority at the age of eighteen. She should accordingly have brought her suit within three years from 20th September, 1884, and as she failed to do so, her suit is time-barred."

The plaintiff preferred a second appeal.

Macpherson with *Ardesir, Hormusji and Dinsha* appeared for the appellant (plaintiff) :—The suit is not barred by limitation. The

(1) I. L. R., 13 Bom., 302.

age of majority for marriage among Pársis is twenty-one years under section 3 of the Parsi Marriage and Divorce Act (XV of 1865); the Indian Majority Act (IX 1875) is not applicable. Under the provisions of section 2, clause (*a*), that Act is not applicable to marriage, dower, divorce and adoption. The words in the clause are "the capacity of any person to act." We contend that instituting a suit is a capacity to act; otherwise a person who is disabled from contracting marriage before he is twenty-one years old, would be entitled to bring a suit to set aside a marriage made with the consent of guardians. Under article 120, Schedule II of the Limitation Act (XV of 1877) the period of limitation for a suit of this nature being six years our claim is within time.

There is no custom of infant marriage among Pársis. The sacred books do not sanction it. If there had been such a custom the Legislature would have given binding effect to it by the Parsi Marriage and Divorce Act. The Legislature would not have ignored a recognized custom.

Marriage among Pársis is a contract between the husband and wife. The contracting parties must understand and be capable of consenting to the contract. Here the parties were infants when the marriage was performed and quite incapable of understanding or consenting to it.

According to the sacred books of the Pársis the earliest age at which the marriage ceremony can be performed is between seven and twelve years, but the plaintiff's marriage took place when she was only three years old.

Scott with *Manekshah J. Taleyarkhan* appeared for the respondent (defendant):—As to the question of limitation, it is true that the provisions of the Indian Majority Act do not apply to marriage, dower, divorce and adoption. But these exceptions cannot prevent a person *sui juris* from bringing a suit within the statutory period after attaining the age of eighteen years. The present suit is not brought under the Parsi Marriage and Divorce Act.

[FARRAN, C. J.:—The question is whether repudiating a marriage is acting in the matter of marriage.]

We submit it would be so.

1896.

BAI SHIRINBAI v. KHARSHEDJI.

If the suit is in time then the question is whether the marriage is binding on the parties. Both the lower Courts have concurred in finding on the evidence that it is binding. That finding is a finding of fact and cannot be upset in second appeal. There is overwhelming evidence in the case with respect to the custom of such marriages among Pársis. The Parsi Marriage and Divorce Act does not lay down that infant marriages are illegal. Marriage may be a contract under that Act, but it is not necessarily a contract under the Contract Act.

FARRAN, C. J. :—The first question which has to be considered in this appeal is whether the suit is within time. The plaintiff Shirinbai, as found by the lower Courts, was born on the 20th September, 1866. Her marriage with the defendant, which she impeaches, took place in or about the year 1869. On the 20th September, 1884, she, therefore, attained the age of eighteen, and on the 20th September, 1887, the age of twenty-one years. On the 11th September, 1890, within three years of the latter date she filed the present suit in which she prays for a decree declaring that the marriage ceremony performed in her infancy did not create the *status* of *wife* and *husband* between her and the defendant.

It is admitted that article 120 of the schedule to the Limitation Act governs the present case, as no other article in the schedule applies specifically to it. That article allows a period of six years within which to sue from the time when the right to sue accrues. We agree with the lower appellate Court that the right to sue—the cause of action—accrued during the plaintiff's infancy at the time when being of years of discretion she knew of the marriage and understood its consequences, which is found to be at latest when she was fourteen years of age. That being so, the effect of section 7 of the Act is to allow the plaintiff three years' time within which to sue after attaining her majority. We must, therefore, inquire whether for the purpose of bringing this suit the plaintiff attained her majority on reaching the age of eighteen or of twenty-one years. The question is by no means free from difficulty.

When the Parsi Marriage and Divorce Act (XV of 1865) was passed, twenty-one was the age of majority for Pársis in

the Presidency Town, as the English law in that respect applied to them—*Peshotam* v. *Meherbai* (1); *Nanoji* v. *Rogers* (2). There is no evidence before us to show that a different law as to the age of majority amongst Pársis prevailed in the mofussil. The Legislature in Act XV of 1865 adopted twenty-one years as the age of majority for Pársis, enacting by section 3 that no marriage contracted after the commencement of the Act should be valid, unless in the case of any Pársi who should not have completed the age of twenty-one years the consent of his or her father or guardian should have been previously given to such marriage. The schedule to the Act shows that the age of twenty-one was inserted in section 3 as denoting the limit of the age of infancy. For the purpose of the Act it must, therefore, we think, be taken that minority did not cease amongst Pársis until the age of twenty-one, and it was so held by Candy, J., in *Sorabji* v. *Buchoobai* (3). The present suit is not, however, brought under the provisions of that Act, as (probably by an oversight) no provision is contained in it dealing with a case like the present where it is alleged that a marriage though in form a marriage is invalid in law, the element of consent being absent—*Peshotam* v. *Meherbai* (*supra*). It is, we think, to be regretted that a case like this cannot be tried before the special Pársi tribunal constituted by the Legislature for the trial of cognate cases.

The "Indian Majority Act" (IX of 1875) enacts generally (subject to a certain specific exception which does not apply here) that "every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before" (section 3), but by section 2 nothing in the Act "shall affect the capacity of any person to act in the following matters (namely), marriage * * * divorce, &c." The question is whether filing a suit like the present is "acting in the matter of marriage." If it is, a Pársi's minority is not in that respect altered—his capacity is not affected—by Act IX of 1875. On the best consideration which we can give to the subject we think that the question must be affirmatively answered. A Pársi suing for a divorce must, we

(1) I. L. R., 13 Bom., 309. (2) 1 Bom. H. C. Rep., 1.
(3) I. L. R., 18 Bom., 366.

1896.

BAI SHIRINBAI v. KHARSHEDJI.

think, be an "acting by him in the matter of divorce." It is the only way in which a Pársi can act in that matter. A Pársi suing to have a marriage declared void appears to us similarly an acting by him in the matter of marriage. It would be, as pointed out in argument, a strange anomaly if a Pársi between eighteen and twenty-one years of age could not contract a marriage without the consent of his guardian, but could sue to set it aside of his free will as though he were a major. This view is not perhaps wholly reconcileable with the judgment of the Madras High Court in *Puyikuth* v. *Kairhirapokil* (1), but that case was not argued, and the decision can be supported on other grounds. The Majority Act does not use the expression "capacity to contract," but "capacity to act," which is of much wider import. We have, therefore, come to the conclusion that the suit is not time-barred.

Turning to the merits of the appeal it is first to be observed that Act XV of 1865 contains no provision as to the age at which a Pársi can contract marriage. Though the Legislature in section 37 impliedly recognizes the validity of the marriage of a Pársi woman under the age of fourteen and of a Pársi male under the age of sixteen years, it does not deal with the age at which a Pársi marriage can be validly contracted. That matter is left to the general law which governs Pársis in that particular just as the English Marriage Act (4 Geo. IV, c. 76) leaves the same matter to be dealt with by the Common Law of England. Now in *Ardeseer* v. *Perozeboye* (2) it is assumed by the Privy Council that the validity of a Pársi marriage must be determined by Pársi law and not by English law. That opinion was expressed in a case which was brought in the late Supreme Court on its Ecclesiastical Side, but the *dictum* is of general application and applies with even more force outside the limits of the Presidency Town where under Regulation IV of 1827 the law to be observed is, in the absence of Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone.

(1) I. L. R., 3 Mad., 248. (2) 6 M. I. A., 348.

The difficulty in this case is to ascertain what the Pársi law on the subject of infant marriage is. Mr. Justice Scott seems to have been of opinion that the Zoroastrian system did not contemplate marriage in infancy—*Peshotam* v. *Meherbai* (*supra*) at page 311. In that opinion we concur. The authorities referred to by him and those cited before us appear to be inconsistent with any other view.

In the present case, however, we are met by the finding of the lower Courts that there has grown up in India a custom amongst Pársis which validates and renders binding marriages between Pársis though contracted between children of tender age, and that that custom was in full force as a custom in 1865. Sitting as we are in second appeal we feel that it is not open to us to arrive at an independent finding as to whether the evidence establishes the existence of such a custom, as there is indisputably a large body of evidence upon the record in support of it.

It may well be, as contended by Mr. Macpherson, that the Assistant Judge might have treated that evidence as establishing, not a custom binding as law but a mere practice, the validity of which as embodying a customary law the backwardness and ignorance of Pársis generally in former times and of Pársi children especially as to their rights on attaining years of discretion or of majority and the habit of adhering to the wishes of their parents prevented from being questioned. "*Communis error*" (he argues) "*non facit jus.*" Such a finding, it is contended, would not have invalidated infant marriages where the parties on attaining years of discretion had not repudiated them, but would only have severed the marriage tie in rare instances like the present in which the married pair or one of them at the proper time repudiated the marriage performed during their infancy. It would have illegitimized no children, but would have afforded relief in cases of hardship. That is an argument which is, we think, entitled to much consideration, but it is not open to us on second appeal to give effect to it. It no doubt was pressed upon the Assistant Judge, and he declined to accede to it; and we may add, that Mr. Justice Scott in the case which we have above referred to appears not to have been inclined to accept it, though he decided the case upon a different ground. It is also contended

1896.

BAI SHIRINBAI v. KHARSHEDJI.

for the appellant that the Assistant Judge has not understood the distinction between practice and custom, and that his finding amounts to nothing more than (what is conceded) a finding as to the common practice of infant marriages amongst Pársis. The Assistant Judge, however, finds that *the custom was both common and recognized as binding*, which shows that he fully appreciated the distinction as we should expect that a judge of the judicial acumen and knowledge of the Assistant Judge in this case would certainly do.

It is lastly urged that by the upheaval of opinion amongst enlightened Pársis upon this subject which resulted in the passing of Act XV of 1865 the custom, if it prevailed as a custom, was as it were broken up, and that after that time no such custom could as a binding custom exist, but we cannot accede to that argument. No doubt the more enlightened amongst Pársis revolted against the practice and desired that it should cease to be treated as a custom, but it is impossible to read the passages to which our attention was directed without seeing that the writers of them believed that the custom against which they inveighed in their view existed as such. If they thought that infant marriages allowed children the option of repudiating them on attaining years of discretion, there would have been no need for their asking for special legislation in the matter. The Pársi law would in this view have been in accord with the English law upon the same subject. The practice only would have needed reformation. We must confirm the decree with costs.

Decree confirmed.

CRIMINAL REFERENCE.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IMPERATRIX *v.* NARAYAN VAMANAJI PATIL.*

1896.
September 3.

Criminal Procedure Code (Act X of 1882), Sec. 545—Compensation—Injury caused by the offence committed—Indirect consequences resulting from the offence.

Compensation for loss caused by inability of the complainant to attend to his work on account of his time being taken up with the prosecution of the accused.

* Criminal Reference, No. 80 of 1896.