

To say, therefore, that in 1898 the plaintiff had a good title to possession is perfectly consistent with saying that in fact possession was with the defendants, who were ousting the plaintiff to his knowledge and in spite of his title.

As to the case of *Amrita Ravji v. Shridhar Narayan*<sup>(1)</sup> it is, I think, distinguishable on its facts, for there there was an actual decree awarding possession in 1886 to that party who was objecting that the joint judgment-debtor's adverse possession prior to 1886 could not be tacked on to his subsequent possession so as to fill out the complete period of limitation. Moreover, I do not find that in that case the Bench enunciated any proposition of law which is in conflict with the views I have expressed in this appeal.

*Decree confirmed.*

R. R.

(1) (1908) 33 Bom. 317.

## ORIGINAL CIVIL.

*Before Mr. Justice Hayward.*

MAHOMED JUSAB HAJI ADAM NURANI (PLAINTIFF) v. HAJI ADAM HAJI, USMAN NURANI (DEFENDANT).\*

1911.

October 7, 9,  
19.

*Mahomedan law—Maintenance—Cutchi Memons—Minor son—Right of to sue father for maintenance—Extent of maintenance properly grantable where the custody of the minor child is withheld from the father—Maintenance not to be charged on property devolving on the father from his father—Cutchi Memon's son can claim no distinct interest in his father's property.*

The plaintiff, a minor under the age of seven years, sued his father for maintenance and prayed that such maintenance should be a charge on the defendant's share in certain property left by the defendant's father. The plaintiff was the defendant's son by a wife divorced at the date of the suit. The parties were Cutchi Memons.

*Held*, that the rights of the plaintiff must be determined by Mahomedan law and that under Mahomedan law a minor son was entitled to sue his father for maintenance even though the father was not entitled to claim the custody of the child and such custody was withheld from him.

*Held however*, that such maintenance should amount only to bare subsistence for the son and not to maintenance according to the condition in life of the father.

\* Original Civil Suit No. 400 of 1911.

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Such maintenance could not be made a charge on the property left by the defendant's father as the parties, being Cutchi Memons, were governed by Mahomedan law except with regard to inheritance and succession.

THE plaintiff in this suit was a minor under the age of seven years and was the son of the defendant by his wife Mariambai who had been divorced by the defendant previously to the filing of the suit. The parties were Cutchi Memons.

The plaintiff sued the defendant for maintenance and that such maintenance should be charged upon the defendant's share in any of certain properties left by the defendant's father. The defendant submitted *inter alia* that he was entitled to the custody of the plaintiff, that he was ready and willing to maintain him and that the plaintiff should be handed over to him.

*Dastur* and *Havelivalla*, for the plaintiff.

*Jinnah* and *Desai*, for the defendant.

HAYWARD, J.:—The plaintiff a minor son sues by his next friend, his mother, to recover maintenance from the defendant, his father. The plaintiff is a boy under seven years of age and in the lawful custody of his mother who has, however, been divorced by his father. It is sought to charge the maintenance on the father's property. The parties are Cutchi Memons subject in matters of inheritance and succession to Hindu law.

The defendant pleads that a minor son cannot sustain a suit for maintenance against his father and that the amount claimed is excessive and is not chargeable on the father's property.

The first question to decide is the law applicable to the case. It has been contended that the English law under which the father's duty to provide maintenance is a moral and not a legal obligation, as pointed out at page 114, para. 266 of Vol. 17 of Halsbury's Laws of England, is applicable under the terms of the Letters Patent of 1823 continued in force by clause 19 of the present Letters Patent of this Court. Those terms are as follows: "Yet, nevertheless, in the cases of Mahomedans....., their inheritance and succession to lands,

rents and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahomedans..... or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a Native Court." Those terms would appear not to include family relations such as marriage, guardianship and maintenance, but at the same time they do not expressly exclude recourse in such cases to the laws and usages of Mahomedans. No authority has been quoted for the application of the English law of family relations and there are manifest difficulties and objections in the way of such application. Where the family relations of Mahomedans come into litigation, there remains, therefore, nothing for guidance except the laws and usages of Mahomedans, and such laws and usages have, as a matter of practice it is believed, been followed in such cases in this Court.

It has, however, been contended that in any case the Mahomedan law as to maintenance is a law of imperfect obligation imposing a moral and not a legal obligation. The distinction between laws of perfect and imperfect obligation has been discussed in detail by Abdur Rahim at page 62 of his Principles of Muhammadan Jurisprudence, where he has described the laws as to domestic relations to be laws of perfect and not imperfect obligation. Later on at page 343, Abdur Rahim has referred to the maintenance of children being a right against their father. So also Wilson in Chapter VI of his Anglo Mahomedan law has treated the rights of maintenance as rights enforceable under Anglo Mahomedan law, and in para. 142 has asserted the right of minor sons to maintenance from their father on the authority of page 456 of Baillie's Digest. The remarks of Trevelyan in Chapter XXII of his law relating to minors would not appear to be based on any authority relating to Anglo Mahomedan law. So that there would appear to be no reason to doubt that rights of maintenance are enforceable under Anglo Mahomedan law. That being so the right to enforce them in Civil Courts,

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under section 9 of the Civil Procedure Code, is unaffected by the fact that there is a concurrent provision for their enforcement in Criminal Courts under section 488 of the Criminal Procedure Code as pointed out in the case of *Ghana Kanta Mohanta v. Gereji*<sup>(1)</sup>.

It has, however, been further contended that the right to maintenance cannot be enforced under Mahomedan law so long as the custody of the minor is withheld from the father. But this would not appear to be the case, for it has not been denied that the right to the custody of the minor plaintiff, who is a boy under seven years of age, rests with his mother even though she has been divorced, and this right would appear to have been recognized by Mahomedan law for the benefit of children of tender age and to be independent of the obligation resting on the father to maintain his children. These principles have been indicated upon the authority of Hamilton's Hedaya, pages 138 and 146, in Wilson's Notes to paras. 49 and 107 of his Anglo Mahomedan law, and have been followed in the case of *Emperor v. Ayshabai*<sup>(2)</sup>.

There remains only for consideration the amount of maintenance to be allowed. It has been contended that bare subsistence can alone be enforced and not maintenance according to the condition of life of the father. This contention must, in my opinion, be allowed in default of express authority under Mahomedan law, and no such authority has been quoted nor would appear to be forthcoming as stated in Wilson's Notes to para. 140 of his Anglo Mahomedan law. Now the plaintiff has been offered, since his mother's divorce, Rs. 7-8-0 a month which cannot, in my opinion, be held to be less than bare subsistence for a child under seven years of age.

But in any case it would, in my opinion, hardly be possible to award a higher maintenance upon the evidence produced as to the father's position in life. Prior to the divorce the maintenance allowed for both mother and child was only Rs. 25 plus Rs. 9 for house-rent though three years earlier as

<sup>(1)</sup> (1904) 32 Cal. 479.

<sup>(2)</sup> (1904) 6 Bom. L. R. 536.

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much as Rs. 30 plus Rs. 13 for house-rent had been allowed. This appears from the correspondence between the parties, Exhibits A and B. This maintenance was paid out of the earnings from the defendant-father's shop and rents received from two houses, and the defendant alleges the shop has been working for years at a serious loss and that Rs. 60 a month is all he gets for his share in the two houses. On the other hand the mother alleges the shop to be worth Rs. 100 to 150 a month and the rents six or seven hundred rupees, but there is nothing beyond the mother's own statement in support of her estimate of the income, which would appear to have greatly exaggerated the father's real position in life. It has only to be added that no authority has been quoted for charging the maintenance on the father's property and there would appear to be none under Mahomedan law. No distinct interest can be claimed in the father's property, for, though the parties are Cutchi Memons, it is only with regard to inheritance and succession that they can claim to be governed by the principles of Hindu law. Reference was made to the case of *Haji Noor Mahomed v. Macleod*<sup>(1)</sup>, in support of a wider extension to Cutchi Memons of Hindu law. But that was a decision of a single Judge purporting to follow the appellate Bench decision in the case of *In the matter of Haroon Mahomed*<sup>(2)</sup>, and it appears from the remarks at page 194 of that report that the decision rested actually on the application only of the rules of succession of Hindu law. It will not, therefore, conflict with the decisions in the cases of *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*<sup>(3)</sup> and *Bai Baiji v. Bai Santok*<sup>(4)</sup>.

Upon the issue whether the plaintiff discloses any cause of action—my finding must accordingly be in the affirmative, upon the issue whether the defendant is not entitled to have the plaintiff to live with him and to maintain him in his own house—in the negative; upon the issue whether a minor Cutchi Memon can sustain a suit for separate maintenance against his father and have the maintenance charged on the property

(1) (1907) 9 Bom. L. R. 274.

(3) (1889) 13 Bom. 534.

(2) (1890) 14 Bom. 189.

(4) (1894) 20 Bom. 53.

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in his father's hands whether self-acquired or ancestral—that he can sustain the suit but not so as to charge the maintenance on the father's property; and upon the issue whether Rs. 7-8-0 agreed to be paid for maintenance of the plaintiff in the "talaknama" of the 2nd April 1911 is not a proper amount of maintenance having regard to the position and income of the defendant, and if not what other sum would be proper maintenance for the plaintiff—that Rs. 7-8-0 as agreed to be paid is a proper amount. There must, therefore, be a decree in favour of the plaintiff declaring that he is entitled to recover from the defendant maintenance at the rate Rs. 7-8-0 per month and for recovery of arrears at that rate due from the 1st March 1911 to judgment. As the plaintiff was offered maintenance at that rate before the institution of these proceedings each party must bear his own costs.

Attorneys for the plaintiff: *Messrs. Jehangir Mehta & Sonji.*

Attorneys for the defendant: *Messrs. Tyabjee Dayabhai & Co.*

H. S. C.

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## ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

1911.

November 25.

RE THE LAND ACQUISITION ACT, CAUSE IN THE MATTER OF  
(1) GOVERNMENT (2) PESTONJI JEHangIR MODI AND ANOTHER.

*Land Acquisition Act (I of 1894), sections 3 (b), 11, and 31 (1) and (2)—Compensation money deposited in Court under section 31 (2)—Claim of Government to deduct poundage and fees paid by Government on such deposit out of the moneys deposited—Person interested in compensation moneys—Compensation money how to be apportioned among.*

Government sought under the Land Acquisition Act (I of 1894) to acquire a piece of land vested in the City of Bombay Improvement Trust under Schedule C of Bombay Act IV of 1898, and in the occupation of one Pestonji Jehangir under an agreement with the Improvement Trust under which he had the right to obtain a lease of the land for 99 years when certain buildings had been erected in accordance with the terms of the said agreement.

The amount payable as compensation for the land was fixed by the Collector under section 11 of the Act and was apportioned under the same section between