APPELLATE CIVIL.

Before Henderson and Latifur Rahman JJ.

1939

Feb. 21 ;
Mar. 3.

JOHN JIBAN CHANDRA DATTA

v.

ABINASH CHANDRA SEN.*

Mahomedan Law—*Marriage—Christian convert to Islam domiciled in India, if can legally contract a second marriage while the marriage with his former Christian wife is subsisting—Right of inheritance of children of subsequent marriage—Caste Disabilities Removal Act (XXI of 1850) —Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), s. 37.*

A married Christian domiciled in India, after his conversion to Islam, is governed by Mahomedan law, and is entitled, during the subsistence of his marriage with his former Christian wife, to contract a valid marriage with another woman according to Mahomedan rites.

Skinner v. *Orde* (1) and *King (The)* v. *Superintendent Registrar of Marriages, Hammersmith.* Ex parte *Mir-Anwaruddin* (2) distinguished.

Skinner (alias *Sarda Mirza*) v. *Skinner* (alias *Badshah Begum*) (3); *Muncherji Cursetji Khambatta* v. *Jessie Grant Khambatta* (4); In the matter of *Ram Kumari* (5) and *Advocate-General of Bombay* v. *Jimbabai* (6) referred to.

The succession to the property of such a convert would be governed by the Mahomedan law and not by the Indian Succession Act.

Section 37 of the Bengal, North-Western Provinces and Assam Civil Courts Act has no application to a case like this.

The Caste Disabilities Removal Act does not apply to the case of succession to a man who has himself become a convert.

Mitar Sen Singh v. *Maqbul Hasan Khan* (7) relied on.

*Appeal from Appellate Decree, No. 1728 of 1936, against the decree of H. G. Waight, District Judge of Chittagong, dated Mar. 25, 1936, affirming the decree of Gobinda Chandra Chakrabarti, First Additional Subordinate Judge of Chittagong, dated Feb. 28, 1935.

(1) (1871) 10 B. L. R. 125 ; 14 M. I. A. 309.
(2) [1917] 1 K. B. 634.
(3) (1897) I. L. R. 25 Cal. 537 ; L. R. 25 I. A. 34.
(4) (1934) I. L. R. 59 Bom. 278.
(5) (1891) I. L. R. 18 Cal. 264.
(6) (1915) I. L. R. 41 Bom. 181.
(7) (1930) L. R. 57 I. A. 313.

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APPEAL FROM APPELLATE DECREE preferred by the defendant.

The facts of the case are sufficiently stated in the judgment.

Chandra Sekhar Sen for the appellant. Dukhiram was not entitled to contract a second marriage under Mahomedan law after his conversion to Islam at a time when his first wife, who was a Christian and was married to him when he also was a Christian, was alive. The first marriage was subsisting even according to Mahomedan law. The second marriage was, therefore, invalid and bigamous under the law governing the marriage of Indian Christians, by which both the spouses were governed. He could not avoid the original law by a unilateral action like his conversion to Islam.

Skinner v. *Orde* (1) and *King (The)* v. *Superintendent Registrar of Marriages, Hammersmith.* Ex. parte *Mir-Anwaruddin* (2).

Even if Dukhiram's second marriage was valid, the succession to the properties left by him will be governed by the Indian Succession Act and s. 37, Bengal, N. W. P. and Assam Civil Courts Act; and in any event, the rights of his Christian heirs are protected under the Caste Disabilities Removal Act.

Gopendra Nath Das and *Rohini Binod Rakshit* for the respondent. Once a man embraces Islam he ceases to be governed by his former personal law and is governed for all purposes including marriage, succession and inheritance by the Mahomedan law. *Advocate-General of Bombay* v. *Jimbabai* (3); *Muncherji Cursetji Khambatta* v. *Jessie Grant Khambatta* (4); *Mitar Sen Singh* v. *Maqbul Hasan Khan* (5).

Cur. adv. vult.

(1) (1871) 10 B. L. R. 125; 14 M.I.A. 309.
(2) [1917] 1 K. B. 634.
(3) (1915) I. L. R. 41 Bom. 181.
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HENDERSON J. This appeal raises an important and difficult question of law. The facts are as follows: A man named Dukhiram, an Indian Christian, married an Indian Christian woman named Sudakshina. He was subsequently converted to Mahomedanism and contracted a marriage with a Mahomedan woman named Alfatanessa. They had a daughter who is defendant No. 3. After the death of her parents, she inherited a 15 annas share in the property under the Mahomedan law of inheritance. She sold her interest to the plaintiff. The appellant and the other contesting defendant are heirs of Sudakshina. The question for decision is whether an Indian Christian who becomes converted to Mahomedanism can take a second wife. The contention raised on behalf of the appellant is that he cannot and that the union of Dukhiram with Alfatanessa was a mere adulterous connection.

On behalf of the respondent an objection was taken to the effect that this point cannot be argued as it was not pressed at the trial. It is certainly included by implication in issue No. 5. The written statement went further and alleged that Dukhiram did not even go through a form of marriage with Alfatanessa at all. The learned Subordinate Judge certainly says nothing about it and it looks as though the defendants were so confident of succeeding on the facts alleged that the legal aspect of the matter was not adverted to. The point was, however, taken in the lower appellate Court in support of the decree. The learned Judge refrained from deciding it and contented himself with dismissing the appeal on the ground that after Dukhiram's death the parties directly concerned all acquiesced in the position of defendant No. 3 as one of the heirs.

The contention put forward in support of this objection is that if the point has been directly taken, the plaintiff might have been able to meet it by proving that Sudakshina also was converted to

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Mahomedanism. The plaint contains an allegation that both Dukhiram and Sudakshina were so converted. This was denied in the written statement. Issue No. 4 was framed in connection with the alleged conversion of Dukhiram. No issue was framed in connection with Sudakshina. It is thus plain that the plaintiff's case with regard to the conversion of Sudakshina was abandoned, presumably on the ground that it was realised to be perfectly hopeless. The case must accordingly proceed on the footing that Dukhiram was converted to Mahomedanism, while Sudakshina was not. The question whether on such facts Dukhiram was legally married to Alfatanessa is a pure question of law and the plaintiff was entitled to support the decree on that ground in the lower appellate Court.

It appears that this point has never been actually decided. A similar question arose in the case of *Skinner* v. *Orde* (1). In dealing with the validity of the alleged marriage their Lordships of the Judicial Committee said this:—

> The High Court expressed doubt of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

Now, it appears that in that case there was some doubt whether the parties were really converted to Mahomedanism or merely pretended to be so in order that they might take advantage of the Mahomedan law. Those doubts must be read in connection with the facts of the case.

In the case of *Skinner* (alias *Sarda Mirza*) v. *Skinner* (alias *Badshah Begum*) (2), the question arose whether after the conversion of the husband the wife would be entitled to succeed to the share of a Mahomedan widow in spite of the fact that she was altogether excluded by a will. In the course of

(1) (1871) 10 B. L. R. 125 (130); 14 M. I. A. 309 (324).

(2) (1897) I. L. R. 25 Cal. 537 (546); L. R. 25 I. A. 34 (41).

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the judgment of their Lordships of the Privy Council, Lord Watson observed:—

> Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance, and, it may be, of nicety.

In view of this pronouncement, it might be difficult to say whether Dukhiram could have divorced Sudakshina by *tâlâk*, but there is no suggestion that his marriage to Alfatanessa was not valid. The question was directly raised in the case of *Muncherji Cursetji Khambatta* v. *Jessie Grant Khambatta* (1). It was there held that when both spouses are converted to Mahomedanism the wife can be divorced by *tâlâk*. The present question, however, was not in issue.

Little assistance can be derived from the decisions in connection with the interpretation of s. 494 of the Indian Penal Code. I should, however, like to refer to the case *In the Matter of Ram Kumari* (2). In that case, a Hindu married woman was converted to Mahomedanism. She subsequently went through a form of marriage with a Mahomedan and was convicted under s. 494 of the Indian Penal Code. It was held that she had been rightly convicted, because the Mahomedan law does not allow a plurality of husbands. The *ratio decidendi* suggests that the learned Judges would have refused to convict Dukhiram of bigamy.

Both Dukhiram and Sudakshina were Indians domiciled in India. In connection with marriage the personal law must be applied. In the case of *Advocate-General of Bombay* v. *Jimbabai* (3), Beaman J. said this:—

> On conversion to Mahomedanism, converts, no matter what their previous religion may have been, must be taken at that moment to have renounced all their former religious and personal law in so far as the latter flowed from and was inextricably bound up with their religion and to have substituted for it the religion of Mahomed with so much of the personal law as necessarily flows from that religion.

(1) (1934) I. L. R. 59 Bom. 278. (2) (1891) I. L. R. 18 Cal. 264.
(3) (1915) I. L. R. 41 Bom. 181, 196.

After his conversion Dukhiram was governed by the Mahomedan law. There can be no question that under that law he was entitled to contract a valid marriage with Alfatanessa. It would, therefore, be a serious thing to say that such a union was a mere adulterous connection.

In our view, as he was entitled to contract this marriage under the Mahomedan law, it must be held to be a valid marriage unless there is some statute which invalidates it. Mr. Sen was not able to put forward any such provision: nor can we find anything either in Act XV of 1872 or in the Indian Divorce Act which would expressly invalidate this marriage. The result is that, in our opinion, Dukhiram did contract a valid marriage with Alfatanessa.

The second contention made in support of the appeal was that the succession to the property of Dukhiram would be governed by the Indian Succession Act so far as Sudakshina was concerned and that under the provisions of that Act she inherited a third share.

Attempts have been made to take advantage of the Caste Disabilities Removal Act in cases of this kind. It has now, however, been definitely laid down that that Act does not apply: *vide Mitar Sen Singh* v. *Maqbul Hasan Khan* (1).

In the present case an attempt has been made to bring the case within s. 37 of the Civil Courts Act. That section is in these terms:—

(*1*) Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished.

(*2*) In cases not provided for by sub-s. (*1*) or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

(1) (1930) L. R. 57 I. A. 313, 317.

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In our opinion, that section cannot possibly have any application. Dukhiram died as a Mahomedan. His property, accordingly, devolved in accordance with the Mahomedan law. In giving the judgment of their Lordships of the Judicial Committee in *Mitar Sen Singh* v. *Maqbul Hasan Khan* (*supra*), Lord Atkin said this :—

> In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. It may, of course, work hardly to some extent upon expectant heirs, especially if the expectant heirs are the children and perhaps the unconverted children of the ancestor who does in fact change his religion, but, after all, it inflicts no more hardship in their case than in any other case where the ancestor has changed the law of succession, as, for instance, by acquiring a different domicile, and their Lordships do not find it necessary to consider any question of hardship that may arise.

In the second place, supposing that that section did apply, I should find it difficult to say that justice, equity and good conscience require that the interest of the daughter should be sacrificed to that of the widow. It would also be extremely difficult to make provision for the other widow Alfatanessa.

In our opinion, the decrees made by the Courts below are correct and the appeal is accordingy dismissed with costs.

Latifur Rahman J. This appeal arises out of a suit for declaration of title to and recovery of possession and partition of the land mentioned in the plaint. It is admitted by both the parties that the land was originally owned by one Dukhiram, who professed the Christian faith. It is, however, alleged by the plaintiff that Dukhiram subsequently became a convert to Islam, married a Mahomedan woman of the name of Alfatanessa and had a daughter by her who is defendant No. 3 and that this daughter conveyed to the plaintiff the land which she obtained by right of inheritance under the Mahomedan law.

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The learned Subordinate Judge has found that the fact that Dukhiram embraced Islam was proved. He has also found that Dukhiram became a Mahomedan on conversion from Christianity and married Alfatanessa, a Mahomedan, and had a daughter, defendant No. 3, born of Alfatanessa.

On appeal the learned District Judge has upheld these findings.

The main ground urged is as to whether the second marriage with Alfatanessa is a valid one during the subsistence of the first one. This particular point does not appear to have been directly the subject of any judicial decision.

Under the Mahomedan law, however, where a Christian embraces Islam he acquires all the rights which a Mahomedan possesses and can contract a valid marriage even though the first one with the Christian wife subsists. If the first marriage were contracted in England under English forms, during its subsistence the second marriage would be regarded as a nullity. See *King (The)* v. *Superintendent Registrar of Marriages, Hammersmith.* Ex parte *Mir-Anwaruddin* (1). In the present case, both the parties were domiciled in India and both the marriages of Dukhiram were solemnised here.

I am, therefore, of opinion that Dukhiram having embraced Islam, his second marriage with Alfatanessa was a valid one and that defendant No. 3 having inherited her share under the Mahomedan law and having conveyed the same to the plaintiff, he is entitled to succeed.

I agree that this appeal should be dismissed with costs.

Appeal dismissed.

A. A.

(1) [1917] 1 K. B. 634.