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RAM CHUNDER SHAHA v. MANICK CHUNDER BANIKYA.

as we can see, it appears to us that the defendants have really thrown every obstacle they could in the way of the plaintiffs having this account taken. In the examination of the principal defendant himself, a question in cross-examination was put by the plaintiffs—a very pertinent question as it seems to us—with respect to property alleged to be now belonging to this partnership, *viz.*, "which of the talooks was purchased with joint funds?" That question was objected to by the defendants, and was disallowed. Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or in default of assets, by the partners in proportion to their respective shares in the partnership business. But when one of the partners either denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, it is usual to make such partner pay the costs up to the hearing. However, under the circumstances of this case, we think that the costs of the proceedings up to this time must be dealt with as costs are ordinarily dealt with in a partnership suit: accordingly we leave them to be dealt with by the District Judge, and we make no other order concerning costs. In taking the accounts before the District Judge, the parties will be at liberty to use any part of the evidence adduced by them before the Subordinate Judge, and also to adduce further evidence. This course is consented to by the parties before us. Neither party will be bound by the conclusions arrived at by the Subordinate Judge, but the whole case will be open for decision by the District Judge.

Case remanded.

ORIGINAL CIVIL.

Before Mr. Justice Cunningham.

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July 26.

IN THE MATTER OF HOSSEINI BEGUM, AN INFANT, AND IN THE MATTER OF ACT X OF 1875.

Mahomedan Law—Shiah School—Minors—Custody—Mother.

According to the Shiah School of the Mahomedan law, a mother is entitled to the custody of her female children, unless she has been guilty of unchastity.

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In this case a rule had been obtained by one Phoodia Bibee, calling upon two persons, named Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim, to show cause why they should not bring up before the Court the persons of Hosseini Begum and Koolsum Begum, the infant children of Phoodia Bibee, to be dealt with according to law. It appeared that Phoodia Bibee was the widow of one Meer Mahomed Kazim Jowhuree, to whom she had been married according to the Shiah rites of the Mahomedan law, and with whom she had resided up to the time of his death, which happened on the 13th April 1881. Meer Mahomed left a will, of which Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim were the executors; and they had applied for, but had not obtained, probate of the will at the time of the present application. By this will Meer Mahomed had appointed one Hadjee Aga Syed Saduq the supervisor of the matters connected with the will. Phoodia Bibee had two children by her husband,—namely, the infants Hosseini Begum and Koolsum Begum, who were of the age of six and four years respectively, and she alleged that these children had, since their respective births, been brought up, suckled, and reared by her personally. She further stated, that since the death of her husband, she continued to live at his dwelling-house until the 22nd of May 1881, when she left the house owing to an attempt by Aga Mahomed Kazim Ispahani, to commit an indecent assault upon her, and went to the house of one Fatima Begum, a niece of her husband, and that she was obliged to leave her children behind. She then applied, through her attorney, to Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim to give up the children to her, which they refused to do, stating that she had left her house without cause, and that, acting under the advice, and in obedience to the wishes of Hadjee Syed Aga Saduq, they would retain the custody and guardianship of the infants. They further stated that they had reason to apprehend that proper and sufficient care would not be taken of the infants, and that the moral atmosphere of their mother's new dwelling-house would be far from wholesome for the children. And they refused to allow Phoodia Bibee to have access to the children.

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The rule was obtained upon an affidavit by Phoodia Bibee setting out the above facts. Counter-affidavits were filed alleging that Phoodia Bibee was the "moota" wife of Meer Mahomed Kazim Jowhuree, and charging her with various acts of unchastity. These charges were denied by Phoodia Bibee.

Mr. *Jackson* and Mr. *Gasper* in support of the rule.

Mr. *Ameer Ali* and Mr. *Abdul Rahman* showed cause.

Mr. *Ameer Ali*.—Under the Shiah law, Phoodia Bibee is not entitled to the guardianship of her children. In *Mohomuddy Begum* v. *M. S. Oomdutoonissa* (1), the Court say,—"The appellant before us now states that she is a Shiah. If she be a Shiah, then, as we see in Baillie's Digest of the Mahomedan Law, Imameea Doctrine, p. 232, a mother can neither be herself the guardian of her children, nor can she make a testamentary appointment of guardian to them." [CUNNINGHAM, J.—Though she may not be entitled to the guardianship of her children, she is entitled to their custody.] The word 'guardian' is used to imply both guardianship of person and of property. Unchastity takes away the right of the mother to the custody of her children. In the Tagore Law Lectures for 1873, Baboo Shamachurn Sircar, quoting the Fatawa Alamgiri, Vol. I, p. 728, says:—"The mother is of all the persons best entitled to the custody of her infant child, unless she be wicked or unworthy to be trusted. Wickedness which disqualifies a mother for the custody of her child, is such wickedness as may be injurious to it, adultery or theft, or the being a professional singer or mourner." In Baillie's Digest, Imameea, p. 95, it is said, that the mother has a preferable right to the custody of a female child until the child has attained the age of seven or ten years. But that must be taken subject to the qualification stated in the Tagore Law Lectures, 1873. In Ali's Personal Law of the Mahomedans, p. 203, it is laid down, that "the qualifications necessary for the exercise of the right of *hazanat* are the following:—(i) that the *hazina* should be of sound mind; (ii) that she should be of an age

(1) 13 W. R., 454.

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which would qualify her to bestow on the child the care which it may need; (iii) that she should be well conducted; and (iv) that she should live in a place where the infant may not undergo any risk, morally or physically." All the cases are decided with reference to the interest of the children; if these are imperilled, the mother loses her right. [CUNNINGHAM, J.—Unless she has committed some act of impropriety, she is entitled to the custody of her infant children.] The executors must be able to exercise supervision. If the mother goes to a place where they cannot do this, she loses her right.

Mr. *Jackson* and Mr. *Gasper* were not called upon.

CUNNINGHAM, J., made the rule absolute, and directed that the children should be given up to the mother in the course of the day.

Attorney for Phoodia Bibee: Baboo *G. C. Chunder.*

Attorney for Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim: Baboo *M. D. Sen.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Maclean.

BEEJOY KEOT (PLAINTIFF) *v.* GORIA KEOT AND OTHERS (DEFENDANTS).*

1881
June 10.

Declaration of Title to Land in Assam, Suit for—Jurisdiction of Civil Court—Registration of Claimant's Name by Collector.

A person claiming a right to rent-bearing land in Assam, held under a patta from Government in the names of the persons against whom he claims, is entitled to sue in the Civil Court for a declaration of his title and right to have his name registered as co-owner in the Collectorate; and the Civil

* Appeal from Appellate Decree, No. 1737 of 1879, against the decree of W. E. Ward, Esq., Judge of the Assam Valley District, dated the 28th April 1879, reversing the decree of G. E. McLeod, Esq., Assistant Commissioner of Gowhatty, dated the 30th December 1878.