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IN THE GOODS OF COWAR SUTTYA KRISHNA GHOSAUL.

No doubt Mr. Justice Pontifex in the case of *Ram Chund Seal* (1) has decided that only general letters of administration can be granted to Hindus, but the question has been commented in on the case of *Grish Chunder Mitter* (2). It has already been adjudicated that the five children are entitled to the property and it has been paid over to the mother as guardian *ad litem*, but I submit the property has been severed so as no longer to belong to Suttya Krishna Ghosaul's estate.

CUNNINGHAM, J.—It appears to me that the circumstances set out in the petition of the applicants are sufficiently special to take the case out of the operation of the rule laid down by Mr. Justice Pontifex in the case of *Ram Chund Seal* (1) and therefore I make the order as prayed.

Application granted.

Attorney for applicants: *Gillanders.*

PRIVY COUNCIL.

P. C.* 1883 *November* 23.

BURJORE AND BHAWANI PERSHAD (DEFENDANTS) *v.* BHAGANA (PLAINTIFF.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Act X of 1877, *s.* 602—*Extension of time for giving security in appeal—Custom—Wajib-ul-arz.*

The words in s. 602 of Act X of 1877, relating to the time within which security is to be given, are directory only; and although they are not to be departed from without cogent reason, the Court from which the appeal is preferred has the right of extending the time. In this case, a satisfactory explanation having been given of delay in giving security until after the time limited by the above section had expired, *held* that the Court had rightly exercised discretion in extending the time. *In the matter of the petition of Soorjmukhi Koer* (3) approved.

The paternal grandmother of a deceased village shareholder claiming to inherit in preference to his male collateral relations, the issue was fixed with the assent of the pleaders on both sides, whether the plaintiff, as a female,

* *Present:* Lord FITZGERALD, Sir B. PEACOCK, Sir R. P. COLLIER, and Sir A. HOBHOUSE.

(1) I. L. R., 5 Calc., 2. (2) I. L. R., 6 Calc., 483.
(3) I. L. R., 2 Calc., 272.

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was excluded from inheriting by the custom of the family, or tribe. *Held*, that this was substantially a question of fact, and that on the evidence, which included the village *wajib-ul-arz*, the customary exclusion of females was not proved.

APPEAL from a decree (29th October 1880) of the Judicial Commissioner of Oudh, affirming a decree (8th July 1880) of the District Judge of Lucknow.

The suit out of which this appeal arose was brought by Bhagana, the respondent, the widow of Sadanand, formerly kabuliát-dar, or shareholder, responsible for the revenue of a five annas four pie share in mouzah Rahemnagar, pargana Bijnour in the Lucknow district. She claimed to have a declaration of her right on that share against the nephews of Sadanand. The latter had two brothers, from whom he was disassociated, and died in 1849 leaving a son, Suraj Buksh, born of the respondent Bhagana. Suraj Buksh inherited his father's property, and with him till his death in 1879 his mother Bhagana lived. He left a son, Pirthi Pat, who died in the same year, leaving a daughter. After the death of Pirthi Pat, whose name during his life was not entered in the collectorate books as in possession, his grandmother continued to hold the land. But on the 30th January 1880 the sons of the brothers of Sadanand (deceased) obtained *dakhil kharij* or alteration of entry of names, from the tahsildar of Lucknow. Bhagana then brought the present suit; to which the defence was made that she, being a female, was excluded from the inheritance by the custom of the family and tribe, Pande Brahmins in Oudh.

In the Court of first instance it was held that no custom to that effect had been proved, the *wajib-ul-arz* (or village administration paper signed at settlement,) contradicting it, save as to certain specified female relations, *viz.*, daughters and unmarried women. The Judicial Commissioner, in affirming this judgment, observed that the evidence had not proved that, by custom, a grandmother could not succeed.

On this appeal—

Mr. *J. H. W. Arathoon* appeared for the appellant.

Mr. *J. G. W. Sykes* for the respondent.

A preliminary objection was taken for the respondent, objecting that the Judicial Commissioner had without legal authority

extended the time for giving security; and that even if he had such authority, where a proper case was made out for the exercise of a judicial discretion, such a case had not been made out here. Mr. *J. G. W. Sykes* contended that under s. 602 of Act X of 1877 the limit of time was enacted by law, and therefore could not be extended. In this case the appellants had already exceeded it when they made their application to have it extended. Whatever could be done for them could only have been on application to this Committee. He referred to Act VI of 1874, s. 8, and s. 11, cl. 6; and cited *In re Lalla Gopeechand* (1); *In re Funendro Deb Roy* (2); *In re Soorjmukhi Koer* (3).

The latter case was distinguishable from the present. It decided that the requirements of s. 11 of Act VI of 1874 were not imperative, the Court having a discretion to allow security and costs to be deposited after the period mentioned in the Act when the Court had been closed at the expiration of that period, allowing the deposit to be made on the day of re-opening. Now, provision for the case of the Court being closed had been made, and the appellants in the present case had not the same kind of excuse; their explanation being that, wrongly advised, they attempted to make the deposit in the Court of first instance, which caused the delay.

Mr. *J. H. W. Arathoon* for the appellant relied on the Full Bench decision in *Soorjmukhi Koer's* case.

Their Lordships having intimated that the appeal should proceed—

Mr. *J. H. W. Arathoon* was heard for the appellants.

Counsel for the respondent was not called upon.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—This was a suit brought by Mussumat Bhagana against the defendants for the purpose of recovering a certain mouzah. The only question in the case was this, whether the Mussumat, who was the grandmother of one Pirthi Pat, succeeded to the real property of Pirthi Pat, or whether the male descendants

(1) I. L. R., 2 Calc., 126.
(2) 23 W. R., 220.
(3) I. L. R., 2 Calc., 272.

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collateral to her husband, succeeded to that property? The parties were both represented by Counsel, and they agreed to this issue: "Is plaintiff, as a female, excluded from inheritance by the custom of the family and tribe? On defendants." It appears to their Lordships that, this issue having been settled by the learned Judge by the consent of Counsel, and the cause having been tried upon it, it is the only issue now before us; and the question to be determined is whether, the two Courts, that of the Subordinate and of the Judicial Commissioner, having found as a fact that the defendant had not sustained the burden of proof laid upon him, *viz.*, that the plaintiff, as a female, was excluded from the inheritance, that finding shall or shall not be affirmed.

The question of the custom, or no custom in the family is substantially one of fact. If their Lordships could see that any proposition of law was mixed up with it they might be disposed to review it, but no such proposition arises upon the evidence, and further they are disposed to say that the conclusion of the Courts upon the evidence seems to them to have been right. The evidence was in substance that of a great number of members of the family, and strangers, of whom more might have been called, to the effect generally that there was such a custom in the family, which is a mere assertion by the witnesses of the question to be tried in the cause. But it would appear that all the witnesses founded their opinion upon one particular case, *viz.*, that upon the death of Baijnath, the father of the husband of the plaintiff, instead of his widow or mother taking, his uncles and nephews took. The Courts say that that, being the only instance in the family, does not sufficiently prove custom. Further it is to be observed that that evidence was in a great degree contradicted by a paper called a *wajib-ul-arz*, which was put in, whereby the general contention of the defendants, which was that no female whatever could succeed, was, to a certain extent at all events, modified. The *wajib-ul-arz* is in these terms: "If the deceased have two or more wives, lawfully married, then the property left by the deceased would be divided among the number of wives in this way: that if there be one son from one wife, and two or more from the other, then the one son from the former would take one half, and the two or more from the latter would take the other

half, sub-dividing it equally among themselves; but a wife having no male issue shall receive no share; she shall, however, receive maintenance from the sons of the other wives who have inherited a share. In our family the custom is to give no share to daughters. If none of the wives lawfully married to a deceased co-sharer have any issue, in such a case of course the childless widow shall have possession of the share of the deceased. If a widow being childless desire to adopt a son, she can adopt one of the nearest male members of her deceased husband's family. She shall not be competent to adopt her brother or brother's son. Women not lawfully married, and their issue, provided they bear good moral character, will be entitled to receive only food and clothing, but shall not receive a share." This *wajib-ul-arz* seems very much indeed to qualify the general statement of the witnesses that no female could succeed in the family; for it distinctly states that under some circumstances wives and widows succeed, although it does not distinctly state that grandmothers do.

On the whole, therefore, it appears to their Lordships that the finding upon this one issue, which was settled by both the parties and by both Courts, is right.

It should be stated that it appears in this case that Pirthi Pat had a daughter about seven years old, but by consent of both parties that daughter is excluded from consideration in the case; and the case has been treated as if that daughter had not existed. Their Lordships think it right to say that that daughter, being no party to this suit, is in no way bound by this decision, and they give no opinion with respect to what her rights may be.

Under these circumstances their Lordships are of opinion that the judgment appealed from was right; and they will humbly advise Her Majesty to affirm that judgment with costs.

It only remains to state that a preliminary point was raised as to whether the Judicial Commissioner had a right to extend the time for giving security in this appeal. Their Lordships upon that point have to say that they concur in the view which was taken by the Full Bench of the Court in Calcutta, that the words in the Act which have been quoted relating to the giving of security are directory only; and, although not to be departed from without

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cogent reason, in this particular case it seems to them that the Commissioner has exercised a right discretion. Under these circumstances their Lordships do not give weight to the objection against the admission of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson and Beard.*

Solicitors for the respondent: Messrs. *Van Sandan, Gumming* and *Armitage.*

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

1884

March 18.

ABDOOL ADOOD AND OTHERS (DEFENDANTS) *v.* MAHOMED MAKMIL AND ANOTHER (PLAINTIFFS.)*

Onus of proof—Hindu customs amongst Mahomedans—No presumption when no allegation of custom made.

A and B were two brothers, Mahomedans, who lived together in commensality: *A*, whilst so living with his brother, purchased certain lands under a conveyance executed by the vendor and *A*. In a suit by the heirs of *B* against the heirs of *A* to obtain possession of such lands, in which they alleged they had been dispossessed by the heirs of *A*, the Court found the land to be joint family property and to have been purchased with joint funds. On appeal, the onus of proving that the land was purchased by *A* alone was put upon *A*, *held* that there being no allegation that the parties had adopted the Hindu law of property, the Judge, by applying to Mahomedans the presumption of Hindu law, had cast the onus on the wrong party.

THE plaintiffs in this case sued to recover possession of certain lands from which they had been dispossessed by the defendants.

The plaintiffs alleged that the land in question had been bought by two uterine brothers (the father of the plaintiffs and the father of the defendants) who were Mahomedans, living in commensality with each other. That on the death of the plaintiffs father, their mother and uncle lived together and held joint

* Appeal from Appellate Decree No. 1319 of 1882, against the decree of Baboo Ram Coomar Pal, Roy Bahadur, Subordinate Judge of Sylhet, dated 16th of May 1882, affirming the decree of Baboo Romesh Chunder Bose, Roy Bahadur, Munsiff of that district, dated 21st November 1881.