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of deceased had to be satisfied. Their discharge is a matter of necessity, and as observed in the Full Bench decision quoted above (1), the right of the heirs is connected with the estate on the sole condition of its being free from incumbrance. Musammat Husaini was in possession of the property, whatever it was, on her own account, and on behalf of the minors, and, in that character, it would seem that she could act for them. In about five years after his death she was compelled to sell the property covered by the deeds of sale, the landed portion of which was already mortgaged for more than Rs. 3,000, to satisfy the debts and for other necessary family purposes and wants. She thus was enabled to bring up the children and maintain and marry them. Whatever she did was done openly, and the Judge has found that the consideration was duly paid, that the sales were effected to pay the ancestral debts and that they were paid, and to meet pressing necessity for the benefit of the minors. Under these circumstances we agree with the lower appellate Court that the Muhammadan law and principles of equity and justice are binding on the plaintiffs, who have not in their petition of plaint assigned any reason or grounds for repudiating the act of Musammat Husaini.

With these observations, which go to all the pleas in appeal, we dismiss the appeal and affirm the judgment of the lower appellate Court with costs.

Appeal dismissed.

APPELLATE CIVIL.

1877
December 19

Before Mr. Justice Pearson and Mr. Justice Spankie.

WALI-UL-LA (PLAINTIFF) *v.* GHULAM ALI (DEFENDANT).*

Reference to Arbitration—Form of Oath—Power of Arbitrator to administer Oath other than in prescribed form—Validity of Award based upon evidence taken on Oath illegally administered—Act X of 1873 *(Indian Oaths Act) ss.* 8, 10, 13—*Act XLV of* 1860 *(Indian Penal Code), s.* 20—*Act I of* 1872 *(Indian Evidence Act), s.* 3—*Special appeal—Objection.*

The matters in dispute in a suit were, by the desire of the parties to the suit, referred to arbitration. During the investigation of these matters by the arbitra-

*Special Appeal, No. 878 of 1877, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Shâhjahânpur, dated the 16th May, 1877, affirming a decree of Babu Brijpal Das, Munsif of Shâhjahânpur, dated the 26th March, 1877.

(1) *Hamir Singh* v. *Zakia*, I. L. R. 1 All., 57.

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tors the plaintiff offered to be bound by the oath of the defendant administered on the Koran. The defendant agreed to take such oath, and such oath was accordingly administered to him by the arbitrators, and his evidence taken, and an award made based on the evidence so taken. On special appeal to the High Court by the plaintiff, he objected for the first time, the objection not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such oath, and the evidence so taken could not form a valid basis of an award, and the award was therefore void.

Held per PEARSON, J., SPANKIE, J., dissenting, with reference to the legal competency of the arbitrators to administer the oath, that the objection was good, and that the arbitrators had no power to administer the oath.

Per PEARSON, J., SPANKIE J., doubting, that as the objection was one which vitally affected the procedure of the arbitrators it could not be ignored, although it was not preferred in the lower Courts, and was not to be found in the memorandum of special appeal.

Per PEARSON, J., that the statement of the defendant made on an oath illegally administered could not form a valid basis of an award, and the award was void, and should be set aside.

Per SPANKIE, J., that the plaintiff having offered to be bound by the oath, and the defendant having agreed to take it, the plaintiff was bound by the evidence given on such oath, and that as the arbitrators had, by law and consent of parties, authority to receive the evidence of the defendant, the substitution by them of an oath on the Koran for an affirmation did not, under the provisions of s. 13 of Act X of 1873, invalidate such evidence, and consequently render the award based on such evidence void.

THIS was a suit for the recovery of money in which, by the desire of the parties to the suit, the matters in difference between them were referred to arbitration by the Munsif. During the investigation of these matters by the arbitrators the plaintiff offered to be bound by the defendant's oath administered on the Koran. The defendant agreed to take such oath, and the arbitrators administered it to him, and made an award in accordance with his evidence taken by them on such oath. The plaintiff applied to the Munsif to set aside the award for reasons which it is unnecessary for the purposes of this report to state. The Munsif refused this application, and gave judgment according to the award. On appeal by the plaintiff to the Subordinate Judge, when he again contended that the award should be set aside for the reasons stated by him in the Court of first instance, the Munsif's decree was affirmed. The plaintiff then appealed to the High Court, where he contended, among other things, for the first time, the contention not being raised in his memo-

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randum of special appeal, that the arbitrators were not legally competent to administer the oath to the defendant, and that the defendant's evidence taken on such oath could not form a valid basis of an award, and the award was consequently void and should be set aside.

Mr. *Colvin* and Pandit *Nand Lal*, for the appellant.

Munshi *Kashi Prasad* and Shah *Asad Ali*, for the respondent.

PEARSON, J.—(After disposing of the pleas set forth in the memorandum of appeal continued:)—A far more serious objection to the procedure of the arbitrators has been here orally urged by the learned counsel for the appellants, *viz.*, that the arbitrators were not legally competent to administer the oath to the respondent under s. 10 of Act X of 1873, which only empowers a Court to administer such an oath as is mentioned in s. 8 thereof. The arbitrators were persons authorised by law to take evidence, and for that purpose to put witnesses upon oath or affirmation according to the provisions of the law for the examination of witnesses, but they do not constitute a Court, and are not empowered to administer an oath of the nature mentioned in s. 8 of the Oaths Act. Their proceeding in administering such an oath to the respondent in this case was therefore invalid, as being without warrant of law, and consequently his statement, made on an oath so illegally administered, cannot form a valid basis of an award. I am constrained to admit the strength of this objection, which being one vitally affecting the arbitrators' procedure cannot, I think, be ignored by us, although it was not preferred in the lower Courts, and is not to be found in the memorandum of special appeal. I would decree the appeal, set aside the decree of the lower Courts and the award in conformity with which it has been passed, and remand the case to the Court of first instance for fresh disposal under s. 351 of Act VIII of 1859, with an instruction that the costs of the litigation up to this time should follow the event.

SPANKIE, J.—The objection which my honourable colleague would admit was never urged in the first Court, nor in appeal. It is not even one of the pleas in the memorandum of special appeal in this Court. It was raised for the first time at the hearing of the appeal. I am doubtful whether we should entertain the objection. The lower appellate Court disposed of all the pleas taken by the appellant, and its

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judgment and that of the first Court was in accordance with the award. Assuming that the learned counsel was at liberty to take the plea, I would reject it because there is no question that the appellant offered to abide by the defendant's oath on the Koran, that his offer was contained in a written petition to the arbitrators and accepted by the defendant. He was bound by his agreement, made with the free consent of both parties, competent to make it, and for a lawful object, *viz.*, the ascertainment of the truth by means which the petitioner, plaintiff, considered most likely to be successful, and which the defendant accepted. The plaintiff, in my opinion, should be held bound by the evidence of the defendant, given under an obligation imposed upon him, and fulfilled in the manner required by the plaintiff himself. But going beyond this, I would say that I do not find that there is any section in Act X of 1873 which would make it unlawful for the arbitrators to administer an oath on the Koran to a party willing to be sworn upon it. It is conceded that arbitrators are authorised to administer an oath; they are also persons, if the Oaths Act applies to them, who by that Act are "persons having by consent of parties authority to receive evidence." They, however, are not a Court within the meaning of s. 8 of the Act. A Court of Justice includes a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when the Judge or body of Judges is acting judicially—s. 20 of the Indian Penal Code. Moreover, the Indian Evidence Act thus defines the meaning of the Court which receives the evidence in the judicial proceeding referred to in s. 8 of the Oaths Act. "Court" includes all Judges, Magistrates and all persons, *except arbitrators*, legally authorised to take evidence—s. 3. I am therefore disposed to conclude that s. 8 refers to parties and witnesses in every judicial proceeding actually before the Court for the purpose of giving evidence, or who may offer through their representatives actually before the Court to give evidence in any form held binding by them. But I am not prepared to extend the section to arbitrators, who do not appear to be fettered by the Act or bound to communicate the offer of a party or witness to be sworn in any particular form to the referring Court for sanction. It seems to me that if arbitrators are not lawfully empowered by the Oaths Act to do what a Court is empowered to do by s. 8, their act in administering

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an oath or affirmation to any witness in any form "common amongst or held binding by persons of the same race or persuasion to what he belongs and not repugnant to justice or decency, or not purporting to affect a third person" is covered by s. 13, in which there is not only no exclusive mention of the term Court, but in fact the word is not to be found there at all. The section which is in a different chapter from s. 8 runs thus: "No omission to take any oath, or make any affirmation, *no substitution* of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of the witness to state the truth." If the arbitrators in this case were authorised to affirm witnesses in the manner now in force in our Courts, and they substituted an oath on the Koran by request of one of the parties assented to by the other party, the substitution, under s. 13 of the Act, does not invalidate the evidence, and therefore does not render void the award founded on that evidence. I therefore would affirm the judgment of the lower appellate Court, and dismiss the appeal with costs.

APPELLATE CIVIL.

1878
January 2.

Before Mr. Justice Pearson and Mr. Justice Spankie.

MADHO DAS (PLAINTIFF) *v.* KAMTA DAS (DEFENDANT).*

Saniasi—Inheritance—Guru—Chela.

Amongst Saniasis generally no *chela* has a right as such to succeed to the property of his deceased *guru*. His right of succession depends upon his nomination by the deceased in his lifetime as his successor, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among his *chelas*, such successor is elected and installed by the *mahants* and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased. *Nirunjun Barthee v. Padaruth Barthee* (1) followed.

Where therefore a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela*, without alleg-

* Special Appeal, No. 336 of 1877, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 30th June, 1877, affirming a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 31st March, 1877.

(1) S. D. A., N.-W. P., 1864, vol. i, 512.