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We also extend the time for payment for three months from this date. The defendants-respondents must pay the costs of this appeal and also the costs in the lower appellate Court.

Appeal decreed.

1906 *February* 24.

Before Mr. Justice Sir William Burkitt and Mr. Justice Aikman.

PADAM KUMARI (PLAINTIFF) *v.* SURAJ KUMARI AND ANOTHER (DEFENDANTS).*

Hindu law—Marriage—Succession—Marriage between a Brahman and a Chhattri illegal.

Held that whatever may have been the case in ancient times, and whatever may be the law in other parts of India, at the present day a marriage between a Brahman and a Chhattri is not a lawful marriage in these Provinces and the issue of such a marriage is not legitimate.

The defendant pleaded that the parties were governed by a Nepalese custom by which a Brahman could lawfully marry the daughter of a Chhattri. *Semble*, that the custom set up, not being an ancient family custom, but merely a territorial custom, would, if it in fact existed, be applicable only to indigenous Nepalese subjects and perhaps to others permanently domiciled in Nepal. *Soorendro Nath Roy* v. *Mussamut Heeramonee Burmoneah* (1) referred to.

THE facts of this case are fully set forth in both the judgments.

Hon'ble Pandit *Sundar Lal*, for the appellant.

Munshi *Kalindi Prasad*, for the respondents.

BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Gorakhpur of July 7th, 1902, dismissing the plaintiff's suit with costs.

This appeal was at hearing before us on a former occasion, when, for the reasons stated in our order of December 13th, 1904, finding that most of the evidence on the record was inadmissible, we were obliged to send down the record to the Subordinate Judge, with directions to submit to us findings on certain issues after giving the parties an opportunity of producing evidence. That has been done, and the appeal is now before us for disposal.

The plaintiff sues for possession of the property of one Bhikhraj Upadhya, who died in the month of April, 1900, possessed of considerable properties in the Gorakhpur and Basti districts.

* First Appeal No. 253 of 1902, from a decree of Maulvi Muhammad Shafi Subordinate Judge, Gorakhpur, dated the 7th July, 1902.

(1) (1868) 12 Moo., I. A., 81.

Admittedly she was lawfully married to, and is the childless widow of, Bhikhraj. Her status as such is fully admitted. She claims a widow's interest in her late husband's property. As to the defendant, Musammat Suraj Kumari, the plaintiff denies that she was lawfully married to Bhikhraj. She is (plaintiff says) a Chhattri woman who was kept by Bhikhraj, by whom she had a son, the minor defendant, Madhoraj. As to the latter the plaintiff pleads that he was not a legitimate child, nor had he any right or title to the "estate of the plaintiff's husband."

Bhikhraj was a Brahman belonging to the Upadhya subdivision of that caste. Musammat Suraj Kumari was by caste a Chhattri or Rajput. A question was raised in the lower Court as to whether the minor defendant, Madhoraj, was the son of the female defendant by Bhikhraj. That question was decided in his favour and was not re-opened at the hearing of this appeal. Now, whatever may have been the case in ancient times, as shown in old text-books, I have no hesitation in saying that at the present day marriage between a Brahman and a Chhattri is not a lawful marriage in these Provinces and that the issue of such a marriage is not legitimate. To meet this Musammat Suraj Kumari in the 12th paragraph of her written statement pleads that "the parties are *paharis* and residents of the Nepal State. They are governed by the Hindu law and the custom in vogue there. According to the Hindu law and custom in vogue in the Nepal State a Brahman can marry the daughter of a Chhattri and the issue of this marriage inherits the estate of the father. Accordingly under this very law and the custom Bhikhraj married this defendant and Madhoraj is the son of the same Bhikhraj. He is the lawful heir of his father under the Hindu law."

As then Mussammat Suraj Kumari sets up a custom of succession to property situate in British India at variance with the *lex loci* which prevails in the Gorakhpur district, and as by virtue of that custom she claims for her son the succession to and ownership of property which under the ordinary law would devolve on the plaintiff-appellant, the onus of proving her plea rests on her. It is for her to establish that the issue of a

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marriage which in the Gorakhpur district is not a lawful marriage is entitled to succeed to the property in dispute in this case.

Bhikhraj, Upadhya, whose awful son the minor defendant, Madhoraj, claims to be, was the youngest of the four sons of one Indobar Upadhya. The latter after serving for some years in the Nepal State settled finally at Thuthibari in Gorakhpur, a village closely adjacent to the Nepal frontier, where he acquired large jungle grants and eventually accumulated considerable property in the Gorakhpur and Basti districts, with houses, &c. He had two wives, both of them Brahman ladies. Of his four sons, two, Jhabindraj and Manindraj were by one wife and the other two, Bholanath and Bhikhraj, by the other. All four sons were married to Brahman ladies. The family chiefly resided at the large family house at Thuthibari, and it was there that Indobar and his mother and wives died.

Indobar died some time before 1881, having executed a will which bears date of February 13th, 1878, previous to the birth of his fourth son, Bhikhraj, whom Musammat Suraj Kumari claims to have been her husband. Bhikhraj died in 1900. For the defendant it is alleged that a year before his death he married a second wife, Musammat Suraj Kumari, who gave birth to a posthumous child, the defendant-respondent, Madhoraj, a few days after Bhikhraj's death. The first wife, plaintiff-appellant, denies that such a marriage took place, alleging that Bhikhraj eloped with the girl, but was not married to her and that at any rate the issue of such a marriage could not inherit immovable property in these Provinces. The onus of proof lying on the defendant, we first take up for consideration the evidence called by the latter.

[After a discussion of the evidence for the defendant, which is omitted, the judgment, proceeded as follows:—]

On the evidence I am of opinion that it is not proved that Indobar was an indigenous Nepalese subject. I find that he was a British subject, most probably from Kumaun, who resided for many years in Nepal in the service of the Darbar, but without any intention of taking up his abode permanently in Nepal, and who on resigning the service returned to British India and settled at Thuthibari, where he married and where his children

were born and where he died. If I am right in this finding as to Indobar, the case as to Bhikhraj is even clearer. He was born many years after his father had settled in Thuthibari, his mother being a Brahman lady. He lived permanently on his father's land in Gorakhpur and Basti, though he may have occasionally visited Nepal; he married a lady whose family were residents of British India and he died at Gorakhpur.

I have considered it unnecessary to discuss (i) whether the custom alleged for the defendant-respondent does or does not prevail in Nepal, and (ii) whether in accordance with that custom a valid marriage took place between Bhikhraj and the defendant-respondent, Suraj Kumari.

The custom, as explained to me by the learned vakil for the respondent, is not an ancient family custom which, on returning from Nepal, Indobar brought with him thence, such a custom as is discussed by their Lordships of the Privy Council in the case of *Soorendro Nath Roy* v. *Mussamut Heeramonee Rurmoneah* (1) and similar cases. It is purely a territorial custom prevalent in Nepal, a custom which permits intermarriages which under the ordinary Hindu law would not be lawful and which legitimises the issue of such marriages. It is a custom which, as far as I know, prevails nowhere outside Nepal. It is a custom which, I think, would be applicable only to indigenous Nepalese subjects and perhaps to others permanently domiciled in Nepal. It does no more than validate a marriage between a Brahman and a Chhattri woman in Nepal. The case we have here is that of a British subject, Bhikhraj, who I find never had any domicile in Nepal and but seldom visited that country. To such a person, I think, the alleged custom is not applicable. If it be true that he, a British subject, purported to marry the female respondent under the pretence of taking advantage of the Nepalese local custom, I am of opinion that the marriage was not a lawful marriage and that the minor defendant, Madhoraj, is not entitled to succeed to Bhikhraj's property in British India.

Therefore, disagreeing with the judgment under appeal and partially agreeing with the opinions expressed in the findings submitted in obedience to our order of December 13th, 1904,

(1) (1868) 12 Moo., I. A., 81

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I am of opinion that this appeal must be allowed. We set side the decree under appeal and give a decree to the plaintiff-appellant, for possession as claimed by her of her late husband's property with costs.

AIKMAN, J.—I am also of opinion that this appeal must succeed. It arises out of a suit brought by Musammat Padam Kumari, who was plaintiff in the Court below, and is appellant here, for a declaration of her right to certain immovable property in the district of Gorakhpur, as heir of her deceased husband, one Bhikhraj, an Upadhya Brahman, who died on the 28th April, 1900. In the alternative the plaintiff asked for a decree for possession of the property. In the plaint as originally framed, there was only one defendant, Musammat Suraj Kumari, daughter of a man of the Chhattri caste, a native of the Nepal State. The plaint asserts that the defendant was the mistress of Bhikhraj, that a son to whom the defendant gave birth a few days after Bhikhraj died was not a legitimate child; that, moreover, the said son was dead, and that the defendant was in search of some other child to be put forward as her son. Madhoraj, minor, under the guardianship of Musammat Suraj Kumari, was subsequently added as a defendant to the suit.

The learned Subordinate Judge found that Musammat Suraj Kumari was the lawful wife of Bhikhraj and that the minor defendant, Madho, is the son of Bhikhraj by Suraj Kumari. Upon those findings he dismissed the suit. The plaintiff appeals to this Court. In the memorandum of appeal the plea is again put forward that the defendant, Madhoraj, has not been proved to be a son of Bhikhraj. But this plea was not supported before us, and the learned counsel for the appellant stated that he was not prepared to dispute the finding that the minor defendant is the son of Bhikhraj by Musammat Suraj Kumari. The main argument on behalf of the appellant was that Musammat Suraj Kumari was not the lawful wife of Bhikhraj, and that if any ceremony of marriage took place between them, it was invalid under Hindu law owing to the parties not being of the same caste. This is the real issue in the case, for if Madhoraj is the legitimate son of Bhikhraj, the plaintiff's suit necessarily fails.

Whatever may have been the case in ancient times, and whatever may be the law in other parts of India, I think there can be no doubt that in these Provinces there cannot in the present day be a lawful marriage between a Brahman and a member of a different caste.

The main defence of the respondent, Suraj Kumari, is to be found in paragraph 12 of her written statement, wherein she says:—"The parties are *paharis* and residents of the Nepal State. They are governed by the Hindu law and custom in vogue there. According to the Hindu law and the custom in vogue in the Nepal State a Brahman can marry the daughter of a Chhattri, and the issue of this marriage inherits the estate of his father."

We sent down an issue to the Court below in order to ascertain what was the domicile of Bhikhraj at the date of his alleged marriage with Suraj Kumari. The learned Subordinate Judge has found that at that date Bhikhraj had his domicile at Thuthibari, a village in the Gorakhpur district in these Provinces. Objections are taken to this finding on the part of the respondents. But in our opinion it is amply supported by the evidence on the record, which proves to our satisfaction that not only Bhikhraj, but his father before him, one Suba Indobar, were domiciled at Thuthibari. The learned Subordinate Judge finds that Indobar was a resident of the Nepal State. That he was at one time in the employment of that State appears to be proved. But there is in my opinion no satisfactory evidence adduced on behalf of the respondent to show that he was a native of that State. The only definite evidence as to his domicile of origin is that adduced by the appellant, to the effect that the family came originally from Kumaun, a British district in the Hills.

But wherever the family may have had its origin, the evidence shows that Indobar had settled permanently at Thuthibari, where he owned a substantial house.

In his defence to a suit instituted against him in 1876 for possession of property in British India, Indobar, who describes himself as a resident of Thuthibari, asserts that he had been in possession of the property for a period exceeding the period of limitation. In a will executed by him in 1878 he divides his

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property amongst his sons. In an application for partition presented by Bhikhraj in 1895 (No. 283 of the Record) it is stated that Indobar divided the whole of his property under a will. In the will there is no allusion to any property in Nepal.

The evidence adduced by the respondents shows that Bhikhraj, a Brahman by caste and a domiciled British subject, went through a form of marriage in Nepal with the defendant, Suraj Kumari. The evidence also shows that such mixed marriages are not uncommon in Nepal and that the issue of such marriages succeed to the father's estate. But whatever may be the case in Nepal, I do not think this evidence helps the respondents. Such a marriage is not recognised as a legal union in this part of British India. In my opinion there is nothing to take this case out of the general rule that all rights to immovable property are governed by the law of the country where the property is situated.

For the above reasons I am of opinion that this appeal must succeed.

Appeal decreed.

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REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

EMPEROR *v.* ABDUS SATTAR.*

Act No. XLV of 1860 *(Indian Penal Code), sections* 286 *and* 337—*Definition—Causing hurt by means of a gun—Evidence of negligence.*

Held that the causing of hurt by negligence in the use of a gun would fall within the purview of section 337 rather than of section 286 of the Indian Penal Code. But where all the evidence against the accused was that he went out shooting in the month of July when people were likely to be about in the fields and that a single pellet from his gun struck a man who was sitting in a field, it was *held* that this was not sufficient evidence of rashness or negligence to support a conviction under section 337 of the Code.

THE facts of the case, so far as they are necessary for the purpose of this report, appear from the judgment of the Court.

Sir *W. M. Colvin*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

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* Criminal Revision No. 53 of 1906.