1920

SUGHRA BEGAM v. MUHAMMAD MIR KHAN.

case of claims to the dower debt of a deceased Muhammadan lady. After all, although as a matter of fact a Muhammadan husband's share in the estate of his deceased wife is a definite fraction, independent of the devolution of the rest of the estate, the fact remains that it is impossible to write off any fraction of the debt as satisfied without departing from the broad principle followed by the Full Bench of this Court when they held that a proceeding under the Succession Certificate Act was not the proper forum for the ascertainment of the shares of different claimants in a particular debt due to the estate of a deceased person. For these reasons we have decided that the proper course for us to follow is to abide by the decision of the Full Bench of this Court as it stands and to apply it to the facts of this case. This appeal must, therefore, in substance succeed, that is to say, we must set aside the order of the District Judge. At the same time we think that the respondent ought to be given a further opportunity of taking out a succession certificate in respect of the entire dower debt due to the deceased lady, on such terms as to security as the court below may think proper. We, therefore, send the case back to the court below, to be readmitted on to the file of pending applications, in order that the respondent may be allowed an opportunity of amending his application and of paying further succession duty in respect of that portion of the debt which has been exempted from the operation of the order under appeal. The appellants are entitled to their costs of this appeal.

Appeal allowed and cause remanded.

1920

December, 18.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

LAL BAHADUR AND ANOTHER (DEFENDANTS) *v.* RAMESHWAR DAYAL AND OTHERS (PLAINTIFFS).*

Easement—Prescription—Right of way—Easement not admissible if its use as claimed prevents the servient property from being put to ordinary uses.

The plaintiffs claimed a right by prescription to drive their cattle to pasture through the waste lands of an adjoining village, not by any prescribed and definite route, but generally and promiscuously all over the waste lands.

* Second Appeal No. 389 of 1918 from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 12th of February, 1918, reversing a decree of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 7th of August, 1917.

1920

LAL BAHADUR v. RAMESHWAR DAYAL.

Held that such a right could not be admitted, inasmuch as its recognition would be destructive of all the ordinary uses of the servient property. *Joy Doorga Dossia* v. *Juggernath Roy* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, and Dr. *Kailas Nath Katju*, for the appellants.

Dr. *Surendra Nath Sen* and Munshi *Purushottam Das Tandan*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—This is a second appeal by the defendants in a suit which was dismissed by the learned Subordinate Judge of Cawnpore but has been decreed by the District Judge on appeal. The plaintiffs claim a declaration that they along with other "inhabitants of village Keotra," have a right to take their cattle to a certain grazing ground through the "jungle of village Chapar Ghata." The defendants are the zamindars of Chapar Ghata. The first court, besides recording the evidence, appointed a Commissioner to examine the locality and relied upon the report of the said Commissioner, to the effect that he could find no defined track used by cattle across the defendants' jungle in the direction indicated by the plaintiffs. The lower appellate court, as we understand it, has found that the plaintiffs have acquired a right of easement to drive their cattle in any fashion they please, i.e., straggling generally across the waste lands, through the jungle of Chapar Ghata from south to north in order to reach their own grazing land on the other side of a certain stream. In second appeal two main points are taken, and both of them are in our opinion valid. It has been pointed out in the first instance that the plaintiffs have been given a declaration for the benefit of themselves and the other inhabitants of village Keotra, but that the leave of the court had not been obtained and no proclamation had been issued as required by order I, rule 8, of the Code of Civil Procedure. There is no valid answer to this objection and the decree, as it stands, could in no case be maintained. The question has been argued before us whether a decree in favour of the individual plaintiffs should nevertheless be allowed to stand. The question

(1) (1871) 15 W. R., C. R., 295.

is whether the right which the learned District Judge has found to exist in favour of the plaintiffs is a right of easement, capable of being acquired, or whether the evidence on the record is evidence sufficient to establish the existence of a right of way in a form other than that in which it has been decreed by the lower appellate court. On the first point there seems no room for doubt. The learned District Judge himself felt that there was a difficulty about this aspect of the case. He concludes his judgment by saying that it is open to the defendants to prevent the plaintiffs' cattle from wandering wild in their jungle and grazing it, by making a definite route or cutting through the jungle for the plaintiffs' cattle. It seems to us extraordinary and altogether inadmissible to throw a burden of this sort upon the defendants (the owners of the alleged servient heritage). Our attention has been drawn to an old case of the Calcutta High Court which seems exactly in point, the case of *Joy Doorga Dossia* v. *Juggernath Roy* (1). The learned Judges in that case had to consider almost precisely the same point which is now before us. In their judgment they say :—"The Judge, however, says that the plaintiff's cows have been for very many years driven by him over these lands, and that this must be considered to have given him a right of way which cannot now be interfered with. If the having driven the cattle over the lands *generally*, that is to say, not by any particular path but straggling promiscuously over the lands, which is the right claimed by the plaintiff, be held to give the plaintiff a right in all time to come so to drive his cattle, it would be interfering with the lands to such an extent as to make it impossible that they should ever be used for any useful purpose. But a right of way or other easement must not be so large as to extinguish or destroy all the ordinary uses of the servient property (see *Zumeer Ali*, 1 Weekly Reporter, p. 280); and in my opinion no length of time would have given the plaintiff such a right as he claims, namely, a straggling right to the promiscuous use of the whole property for the purpose of driving his cattle over it."

(1) (1871) 15 W. R., C. R., 295.

1920

LAL BAHADUR v. RAMESHWAR DAYAL

That is in our opinion a correct statement of the law and we cannot improve upon the manner in which it has been there expressed. Yet this is obviously the right which the lower appellate court has found to exist in favour of the present plaintiffs. The learned District Judge says in so many words that it cannot be supposed that the cattle of the plaintiffs would travel by any circumscribed and definite route through the jungle. So far from rejecting the report of the Commissioner on the questions of fact observed by him, he seems to accept and endorse it. For this reason also the decree as passed in favour of the plaintiffs cannot be maintained. What we have been asked to do on behalf of the plaintiffs has been to send down an issue as to whether or not, as a matter of fact, the plaintiffs had acquired by prescription a right of easement in the form of a right of way over a circumscribed and definite path through the defendants' jungle. We have considered this argument carefully, but in our opinion no such assertion is specifically made in the plaint and the finding of the lower appellate court is actually against it. We must, therefore, decline to accede to this request. The result is that the appeal prevails. We set aside the decree of the lower appellate court and restore that of the court of first instance with costs throughout.

Appeal decreed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

NAINSUKH DAS, NAGAR MAL (APPLICANT) *v.* GAJANAND, SHYAM LAL (OBJECTOR)*

1920. *December*, 20.

Act No. IX of 1899 *(Indian Arbitration Act), sections* 4, 20—*Civil Procedure Code* (1908), *section* 104 (1) *(f)—Award under Arbitration Act—Order refusing to file—Appeal.*

The parties to a contract for the sale and purchase of cloth agreed to refer a dispute arising thereout to arbitration under the provisions of the Indian Arbitration Act, 1899. A reference was made and an award was pronounced. One of the parties then applied to the District Judge for an order to file the award, but on objection taken by the other party the District Judge refused to file it.

*First Appeal No. 53 of 1920 from an order of L. S. White, District Judge of Cawnpore, dated the 21st of February, 1920.