

instead of Madras. However that may be, we hold that as a matter of law, the preliminary objection must be sustained and the application in revision be dismissed with costs.

Application rejected.

1920

CHANDU LAL

v.

KOSA MAL.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SUGHRA BEGAM AND OTHERS (OBJECTORS) v. MUHAMMAD MIR
KHAN (APPLICANT). *

1920
December, 15.

Act No. VII of 1889 (Succession Certificate Act), section 4—Certificate not to be granted for collection of part only of a debt—Debt in part irrecoverable or extinguished—Muhammadian law—Dower.

On the death of a Muhammadian lady to whom her dower was due the heirs were her husband, her brother, and three daughters. The brother applied for a succession certificate in respect only of the share of the dower debt to which he was entitled as an heir. On objection being raised by the daughters that a certificate could not be granted for part only of the debt, the District Judge, finding that a portion of the debt was satisfied by reason of the husband inheriting it as an heir and that the recovery of one of the daughters' shares was time-barred, gave the applicant a certificate in respect of the remainder.

Held that, on the reasoning upon which the Full Bench decision in *Ghafur Khan v. Kalandari Begam* (1) was founded it was not competent to the District Judge to grant a certificate except for the whole of the dower debt. *Mohamed Abdul Hossain v. Sarifan* (2) and *Sreemutty Annapurna Dassay v. Nalini Mohan Das* (3) dissented from.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Gulzari Lal*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondent.

PIGGOTT and WALSH, JJ. :—This is an appeal arising out of a proceeding under the Succession Certificate Act. The point in issue is a simple one. A Muhammadian lady died leaving as her heirs a husband, a brother and three daughters. An application for a succession certificate in respect of the dower debt due to the lady was made by the brother, who is the respondent to this appeal. He asked for a succession certificate in respect of that share only

* First Appeal No. 66 of 1920 from an order of E Bennet, District Judge of Farrukhabad, dated the 12th of March, 1920.

(1) (1910) I. L. R., 33 All., 327. (2) (1911) 16 C. W. N., 291.

(3) (1914) 18 C. W. N., 836.

1920

SUGHRA
BEGAM
v.
MUHAMMAD
MIR KHAN.

of the dower debt which he would inherit under the Muhammadan law. The daughters objected that he should not be allowed a succession certificate for anything less than the whole amount of the debt. The learned District Judge has passed an order which partly sustains and partly rejects the objection taken by the daughters. He calculates that one-fourth of the dower debt has been automatically satisfied on the death of the lady, by reason of her husband's having inherited one-fourth share in her estate. He has also calculated, further, that any claim which one of the daughters might have in respect of her share in the dower debt is now barred by limitation; hence he holds that the only valid debt now due or recoverable from the husband is the share of two of the daughters, amounting to $\frac{4}{9}$ ths of the whole, together with the $\frac{1}{12}$ th share of the brother. He has, therefore, called upon the respondent to take out a succession certificate in respect of $\frac{4}{9}$ ths plus $\frac{1}{12}$ th of the entire debt. The daughters have brought the matter up to this Court in appeal. The learned District Judge has referred to an older decision of this Court, *Muhammad Ali Khan v. Puttan Bibi* (1) a decision which does support the view taken by him; but he has overlooked the fact that the entire question was reconsidered by a Full Bench of this Court in *Ghafur Khan v. Kalandari Begam* (2). In that case the learned Judges laid it down, in the most unqualified and uncompromising terms, that the dower debt due to a Muhammadan lady was a single debt, that the Succession Certificate Act does not contemplate the granting of a certificate for the collection of any portion of a debt and that, consequently, no succession certificate should be granted in a case like the present except for the collection of the entire debt. The present case is quite indistinguishable on the facts from that decided by the Full Bench, and it might be sufficient for us to say that we are bound to accept the view of the law laid down by the Full Bench and to determine this case accordingly. Certain arguments have, however, been addressed to us, in respect of which it is perhaps expedient that we should say a few words. The question now before us has been considered by the Calcutta High Court in two cases decided subsequently to the Full Bench case of this Court. These are

(1) (1896) I. L. R., 19 All., 129. (2) (1910) I. L. R., 33 All., 327.

Mohamed Abdul Hossain v. Sarifan (1) and *Sreemutty Annapurna Dassay v. Nalini Mohan Das* (2). The case of *Ghafur Khan v. Kalandari Begam* (3) was cited in the Calcutta cases and the learned Judges of that Court expressly dissented from it. On this ground mainly an appeal has been made to us to refer the questions raised by this appeal for reconsideration by a complete Full Bench of this Court. It is to be observed that the difference of opinion between Allahabad and Calcutta goes very much further than the mere question of the dower debt of a Muhammadan lady. The learned Judges in Calcutta have in effect looked at the whole matter from the point of view of the rights of a creditor when he comes to institute a suit for the recovery of his debt in a Civil Court. They point out that no creditor can be compelled to sue for the whole of the debt due to himself. It would be quite open to him to remit a portion of the debt and institute a suit for the balance only. For these and other reasons the learned Judges in Calcutta have come to the conclusion that there is nothing in the Succession Certificate Act, No. VII of 1889, to prevent a certificate being granted in respect of a portion only of a particular debt due to a deceased person. From this view our Court has entirely dissented, and in the main for two distinct reasons. Our Judges have been of opinion that one of the principal objects of the Succession Certificate Act is the protection of debtors from the danger of having to meet successive claims in respect of a single debt and perhaps in the end being forced to pay more than the entire amount of the debt. They have pointed out that a proceeding under the Succession Certificate Act is not a suitable forum for the determination of conflicting claims or for the specification of the shares in a debt due to the estate of a deceased person respectively falling to different heirs, successors or legal representatives of that person. The view taken is that the intention of the Succession Certificate Act is that the Court should choose that one claimant who seems *prima facie* to have the best title and, after taking such security from him as may suffice to safeguard the interests of all other claimants, to grant him a single certificate in respect of the entire debt, thus throwing

1920

SUGHRA
BEGAM
v.
MUHAMMAD
MIR KHAN.

(1) (1911) 16 C. W. N., 231.

(2) (1914) 18 C. W. N., 336.

(3) (1910) I. L. R., 33 All., 327.

1920

SUGHRRA
BEGAM
v.
MUHAMMAD
MIR KHAN.

upon him the responsibility of dealing with any other claims and ensuring for the benefit of the debtor a complete discharge of his entire liability, once he has settled with the holder of the succession certificate. The other argument which has weighed with the Full Bench of this Court is that the Succession Certificate Act may be regarded as, in part at any rate, a fiscal statute, and that the object of the Legislature may well have been that no person should be permitted to realize any portion of a debt due to the estate of a deceased person until the Government's claim to duty under the Succession Certificate Act in respect of the entire debt had been duly met. Taking these arguments into consideration we are clearly of opinion that it is not expedient that the law as settled for this Court, and the courts subordinate to it, by the Full Bench decision in *Ghafur Khan v. Kalandari Begam* (1) should now be unsettled or re-considered because the learned Judges in Calcutta have taken so divergent a view of the effect and purpose of Act No. VII of 1889. It has been pressed upon us in argument that it might be possible to draw a distinction in the present case between the effect of the judge's finding that the claim of one of the daughters has become barred by limitation and his finding that the husband's share in the estate of his deceased wife operated so as to satisfy a definite fraction of the dower debt from the moment of the lady's death. On this latter point the respondent certainly has an arguable case. It might well be suggested that, whatever meaning may be put upon section 4 of Act No. VII of 1889, the fact would still remain that the debt due to the heirs of the lady, from the moment of her death, was no more than the original dower debt less the share taken by inheritance by her husband in the same. The point as now put to us was not specifically considered by the learned Judges who decided the case of *Ghafur Khan v. Kalandari Begam* (1); but we have come to the conclusion that, the point being in itself a narrow one, and as we have suggested a very arguable one, it does not seem worth while to unsettle the broad view of the law laid down in the Full Bench decision of this Court for the sake of any theoretical hardship inflicted on particular individuals in the

(1) (1910) I. L. R., 39 All., 327.

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.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Figgott.

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. 399 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

SUGRA
BEGAM
v.
MUHAMMAD
MIR KHAN.

1920
December, 18.