

1881

MUHAMMAD
FULSHERE
KHAN
v.
MARIAM
BEGAM.

or at the same time, he was attacked by fever and his hands and feet swelled, and during a large portion of the time of his illness he suffered most from the boil, but it lessened for a time about the date of his death, and he was a little better. But it appears that the boil was outwardly and superficially cured, and the sore seemed somewhat healed up, yet inwardly its effect was present, and it was not completely cured, then the swelling and fever increased and he died, till that time he was not relieved of the original malady of the ulcer." This can hardly be regarded as a satisfactory conclusion. For ourselves we think that there is sufficient evidence to warrant the finding that for a long time past, from 1874 up to July, 1878, Ghulam Nabi Khan had been a sufferer from boils or a carbuncle, it is not possible to say which with any distinctness, and ultimately died; but that when he executed the deed of gift there was no immediate apprehension of his death; that twenty days before his death his surgeon thought that he would get well, but he did not get better, but became weaker under treatment, and finally died, but whether from the boil, or from some other supervenient disease, there is no satisfactory evidence to show. Under these circumstances we are not disposed to say that the deed of gift executed by Ghulam Nabi Khan was invalid under the Muhammadan law. We are therefore compelled to annul the decree of the lower Court and to dismiss the claim *in toto*. It is unnecessary here to consider the objections of Nirali Begam whilst those of Mariam Begam have been disposed of by the judgment. Appellant will pay his own costs and those of Mariam Begam, Nirali Begam will pay her own costs in this Court.

Decree modified.

1881
April 5.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BHAONI (PLAINTIFF) v. MAHARAJ SINGH (DEFENDANT).*

Regulation VII of 1822—Award—Act IX of 1871 (Limitation Act), sch. ii, No. 44—Act XV of 1877 (Limitation Act), sch. ii, No. 45—Hindu Law—Succession—Custom—Illegitimate son—"Gandharv" marriage.

D died in 1860 leaving him surviving his first wife *G*, his second wife *B*, his mother *R*, and *M* his son by a woman to whom he had been married by the "*gan-*

* First Appeal, No. 57 of 1880, from a decree of Manvi Zain-ul-abdin, Subordinate Judge of Shahjahanpur, dated the 6th December, 1879.

dharp" form of marriage. On *D*'s death *G*'s name was registered in the record-of-rights in respect of his proprietary rights in a certain village. In 1871 *G* died and on her death *B*, *R*, and *M* preferred separate claims to have their names registered in respect of such rights. The Assistant Settlement Officer before whom these claims came for decision, professing himself unable to decide which of the claimants was in possession, and observing that it was not shown that possession was joint, referred the case to the Settlement Officer. The Settlement Officer, without making any inquiry, disposed of the case on the evidence taken by the Assistant Settlement Officer, and held that the claimants were in joint possession of such rights, and it was proper that the name of each should be registered in respect of a one-third share of such rights. He at the same time intimated to the parties that, unless they settled their claims in the Civil Court or by arbitration, before the *khowal* was framed, it would be framed as he had directed. In 1873 *R* died and on her death *M* procured the registration of his name in respect of her one-third share. In 1879 *B* sued *M* for possession of the one-third share which he had obtained under the proceeding of the Settlement Officer, and of *R*'s one-third share, claiming as heir to her deceased husband *D*, and alleging that *M* was not the legitimate son of *D* and was therefore not entitled to succeed to such rights. *M* set up as a defence that, as the proceeding of the Settlement Officer was an award under Regulation VII of 1822, and the suit was one to contest such award, and it had not been brought within three years from the date of such award, the suit was barred by limitation; that he was the legitimate son of *D* and therefore entitled to succeed; and that, assuming he was not legitimate, he was entitled to succeed by the custom of the village. In support of such custom *M* relied on the following entry in the village *wajib-ul-arz*:—
 "In this village a mistress treated as a wife and the child of such a mistress shall also have a right to transfer property and to obtain and receive property."

Held that the suit was not barred by limitation under No. 44, sch. ii of Act IX of 1871, or No. 45, sch. ii of Act XV of 1877, as the proceeding of the Settlement Officer was not an award under Regulation VII of 1822.

Held also that a marriage by the "*gandharp*" form is nothing more or less than concubinage, and has become obsolete as a form of marriage giving the status of wife and making the offspring legitimate. Also, with reference to the entry in the *wajib-ul-arz*, that it did not necessarily place illegitimate children on an equality with legitimate as heirs; and if that was its intention it was ineffectual, as parties could not by agreement alter the law of succession; and if the entry was regarded as evidence of custom it was not conclusive.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The Junior Government Pleader (Rabu Dwarka Nath Banarji), Lala Lalta Prasad, and Babus Oprokash Chandar Mukarji and Jogindro Nath Chaudhri, for the appellants.

1881

BHAONI
v.
MAHARAJ
SINGH.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the respondent.

The judgment of the High Court (SPANKIE, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J., (SPANKIE, J., concurring).—The plaintiff (Bhaoni) is the second wife of Darioo Singh, who died in 1860, leaving surviving him his first wife Ganesh Kuar, his second wife Bhaoni, his mother Raj Kuar, sister Mahtab Kuar, and three daughters; also Ajit Kuar alleged to be his concubine and her son Maharaj Singh defendant and respondent in this case. On the death of Darioo Singh in 1860 Ganesh Kuar was entered in the settlement record, and when she died in 1871 the plaintiff and Raj Kuar and Maharaj Singh were recorded as heirs and entitled to equal shares. Raj Kuar died on the 5th January, 1873, and Maharaj Singh obtained entry of his name in respect of her one-third share on the 22nd March, 1873. It appears also that in 1872 Maharaj Singh sued the plaintiff (Bhaoni) and Raj Kuar to set aside the order of the settlement officer passed in 1871 declaring those ladies entitled to a third share each in the estate, and to establish his own title to the whole of the property left by Darioo Singh. The matter in dispute was referred to arbitration, and the arbitrators decided that Raj Kuar, and not Bhaoni or Maharaj Singh, was entitled to the property, on the ground that Bhaoni had forfeited her right by unchaste conduct, and that Maharaj Singh was illegitimate. The suit brought by Maharaj Singh was in consequence dismissed on the 16th August, 1872, and the decision was affirmed by the High Court on the 21st July, 1873. Subsequently in 1874 the sister and daughters of Darioo Singh sued Bhaoni, plaintiff in this case, and Maharaj Singh, defendant in this case, to recover the property left by Darioo Singh, and to set aside the order of the settlement officer; they sued as heirs of Raj Kuar. This suit was ultimately dismissed by the High Court on the 3rd March, 1879, which held that the right of inheritance to her husband Darioo Singh's estate had vested in Bhaoni by law long before she was guilty of misconduct, and in her presence as heir to Darioo Singh none of the plaintiffs had any right to succeed to the estate. Raj Kuar having died in 1873 and Maharaj Singh having obtained

entry of his name in respect to the one-third share which she had obtained under orders of the Settlement Officer in 1871, the plaintiff (Bhaoni) has brought this suit, which was instituted on the 1st September, 1879, for two-thirds of the estate of Dariao Singh, namely, the shares which had been given to Raj Kuar and Maharaj Singh by the order of the Settlement Officer in 1871. The defence of Maharaj Singh is that he has held adversely to the plaintiff beyond the term of limitation; that the orders passed in 1871 declaring his right to one-third and in 1873 in respect of his right to Raj Kuar's share have become final and conclusive as awards, no suit having been brought within three years to set them aside; that plaintiff is estopped by her conduct from disputing his title; that he is the legitimate son of Dariao Singh, and assuming him to be the son of a concubine (*dharoka*), he is entitled to succeed according to the custom of the village. The Subordinate Judge has held that the defendant has not been in adverse possession for twelve years, but that the suit, so far as it refers to the one-third share which the defendant obtained under the order of the 15th November, 1871, is barred by limitation of three years, that order being an award which has not been set aside. He held that the plaintiff is estopped by her conduct from bringing this claim. He refers to her statement of the 23rd June, 1860, to the effect that Maharaj Singh is her heir; to her recognizing his right by applying for partition of the one-third share she obtained under the order of the Settlement Officer dated the 15th November, 1871; and her consent to his being appointed lambardar dated the 13th February, 1876, and her recognition of his right to the two-thirds in suit by applying to have it sold in execution of a decree against the defendant. He further held that Maharaj Singh is the son of Dariao Singh by Ajit Kuar his concubine, and the marriage in the *gandharp* form is valid; and that he is also entitled to succeed by the custom in Pirthipur according to which the offspring of a *dharoka* (concubine) inherits. The plaintiff appeals on the ground that the suit is not barred by the three years' limitation; that the previous litigation is conclusive of the plaintiff's right and of the absence of any title in defendant; that there is no estoppel; and that Maharaj Singh is illegitimate and has no right of inheritance.

1881

 BHAONI
 v.
 MAHARAJ
 SINGH.

1881

BHAONI
v.
MAHARAJ
SINGH.

I am of opinion that the Subordinate Judge has wrongly held that any portion of this claim is barred by limitation under art. 44, Act IX. of 1871, or art. 45, Act XV. of 1877, as the order of the Settlement Officer dated the 15th November, 1871, is not an award under Regulation VII. of 1822 which it was necessary to set aside within three years under the Limitation Act. On referring to the proceedings in the settlement department, we find that, on the death of Ganesh Kuar, the Settlement Deputy Collector instituted inquiries as to who should be recorded in her place, and Bhaoni (plaintiff), Raj Kuar, and Maharaj Singh (defendant) preferred claims. The Deputy Collector, after making inquiry, recorded a proceeding to the effect that Ganesh Kuar, who was proprietor in possession, had left as her heirs Raj Kuar, her mother-in-law, Bhaoni, and Maharaj Singh described as the son of Dariao Singh by his mistress Ajit Kuar. The Deputy Collector, after referring to the proceedings taken on Dariao Singh's death, when Bhaoni and Raj Kuar had consented to allow the name of Ganesh Kuar to be entered, with the understanding that Bhaoni should be recorded at her death and Maharaj Singh after Bhaoni's death as the last heir, proceeds to record that the dispute before him was between Raj Kuar, Bhaoni, and Maharaj Singh. The first named set up her own right, alleging Maharaj Singh was illegitimate. Bhaoni claimed that she should succeed under the arrangement made in 1860, and Maharaj Singh claimed to be the heir and disputed any title on the part of Bhaoni by reason of her unchastity. The Deputy Collector finally records that he is unable to come to any conclusion on the question of which party is in possession, and referred the case to the Settlement Officer with these words: "The circumstances of joint possession are not clear; the case is an intricate one; and criminal cases, &c., between the parties are apprehended; and it is observed that they keep up with them a large following with the view of disturbance; it is absolutely necessary that final orders be passed by the Settlement Officer." The papers appear to have been sent to the Settlement Officer, who without making any inquiry disposed of the case on the evidence taken by the Deputy Collector of Settlement, and held that all the three claimants had joint possession of Dariao Singh's property, and it was proper that the

1881

 BHAONI
 v.
 MAHARAJ
 SINGH.

names of each in equal shares should be substituted for that of Ganesh Kuar, and the order was passed to that effect, and it was intimated that, unless they settled their claims in the Civil Court or by arbitration, before the *khewat* came to be prepared, it would be prepared according to the above directions. This proceeding, however, of the Settlement Officer does not constitute an award under Regulation VII. of 1822. It does not appear to have been made after opportunity given to the parties to establish their respective claims before the Settlement Officer or upon evidence taken by that officer. The Regulation contemplates that the Settlement Officer shall act as a Court of Civil Judicature (s. 23). He must have the parties before him and give them opportunity for establishing their claims, and must adjudicate on evidence taken before him, and an order passed like the one before us upon a reference made by some other officer on inquiries instituted by him has no element of a judicial character, so as to give the order the authority of an award under the Regulation. The defect is not one of mere irregularity of procedure, but it strikes at the root of the proceedings before the Settlement Officer and takes from them all pretence to be of a judicial character. The Subordinate Judge has rightly held that there is no bar to the claim with reference to the order of the 22nd March, 1873. (After holding that the plaintiff was not estopped by her acts and conduct from bringing any portion of her claim, and that her claim was not barred with reference to the decisions in the former suits, nor by the adverse possession of the defendant for twelve years, the learned Judge continued): The above remarks dispose of all the preliminary objections to the maintenance of the suit; and the plaintiff will have a right to the property as widow of Dariao Singh, unless the defendant can show a better right as the son of Dariao Singh. It is quite clear that his mother Ajit Kuar was not married to Dariao Singh by any form of marriage recognised by Hindu law among Rajputs. The marriage by the *gandharp* form, which it is contended is valid, is nothing more nor less than concubinage, and has become obsolete as a form of marriage giving the *status* of wife and making the offspring legitimate; and the contention that the illegitimate son can inherit under the custom of the village and family is not

1881

BHAONI
v.
MAHARAJ
SINGH.

established. Such a custom is opposed to the general law and must be well-established before we can recognise it. There is an entry in the *wajib-ul-arz* of the village that "in this village a mistress treated as a wife and the child of a mistress shall also have a right to transfer property and to obtain and receive property." In regard to this, all that need be said is that it does not necessarily place illegitimate children on an equality with legitimate as heirs; and if that is the intention, it is ineffectual, as parties cannot by agreement alter the law of succession, and if this record be regarded as evidence of a custom, it is not conclusive. The few instances referred to by the Subordinate Judge in which illegitimate children may have succeeded are of doubtful authority, and would not go far to establish the custom contended for. The evidence that any such custom having the force of law exists is conflicting, and the fact that in the suit of 1872 the arbitrators disallowed Maharaj Singh's claim on the ground of illegitimacy, and Ajit Kuar never claimed the right for him at Dariao Singh's death, but permitted it to be postponed till after the death of his two wives, goes far to show that such a custom is not recognised. The decree of the lower Court should be set aside, and the appeal allowed, and the claim decreed with costs.

Appeal allowed.

CRIMINAL JURISDICTION.

1881

April 7.

Before Mr. Justice Ollfield.

IN THE MATTER OF THE PETITION OF RAM PRASAD v. DIRGPAL AND OTHERS.

Masters and Workmen—Breach of Contract on the part of Workmen—Act XIII of 1859—"Station."

An employer of workmen residing and carrying on business in the city of Mirzapur, alleging that he had advanced money to certain workmen on the understanding that they would work for him and no one else until they had repaid such money, and that they had broken such contract by leaving his employment, made a complaint against such workmen under Act XIII of 1859, which had been extended to the "station" of Mirzapur by the Local Government. It appeared that such money was advanced by way of loan, and without any reference to the wages of such workmen or the payment for the work performed by them, and that no deduction on account of such advance was ever made from their wages or the payments made to them. *Held* that the contract between the parties was