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that behalf appoint, all monies or other property, which shall come to his hands either in the capacity of such cash-keeper as aforesaid or by any other means on account of the said Neel Comul Mookerjee" is, I think, not sufficient to carry the plaintiffs home, because the monies, which are alleged to have come to the hands of the defendant No. 1, were not received on account of the individual Neel Comul Mookerjee, but of the firm of N. Mookerjee and Son. The result is that, as far as any cause of action is founded on this bond, the plaintiffs must fail on the facts that they have alleged in their plaint, and the objection of the defendants must be sustained.

It has been stated that criminal proceedings are pending against the first defendant in respect of these defalcations. That being so, and the questions on the merits not having been tried, no execution for costs must be issued as against the plaintiffs, [607] until the determination of the proceedings which are pending, and then only on notice to the other side; subject to that order, the suit must be dismissed with costs.

Mr. *Mehta*.—I ask leave that the costs of the defendant No. 2, may be executed against the plaintiffs.

The Court.—It is inconvenient. He will have to wait, until the determination of those proceedings.

Mr. *Sinha*.—They appear not separately, but through the same Counsel and attorney, and so there cannot be any separate costs.

The Court.—He will have to postpone execution for a short period.

Mr. *Mehta*.—I would ask for an order of discharge of the injunction against him, and for reserved costs.

The Court.—That follows of course as to the injunction. You are entitled to the same order as to reserved costs. All costs will be dealt with together. That will include all reserved costs.

Mr. *Sinha*.—This decree will not affect my cause of action on the debt against the defendants.

The Court.—No, I have tried my best to guard against that.

Suit dismissed.

Attorneys for the plaintiffs: Messrs. *Kally Nath Mitter* and *Sarvadhikary*.

Attorney for the defendants: Babu *K. N. Gangooly*.

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28 C. 608.

[608] APPELLATE CIVIL.*

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.

THE COLLECTOR OF DACCA (*Defendant*) *v.* JAGAT CHUNDER GOSWAMI (*Plaintiff*). [3rd July, 1901].

Ascetic—Letters of Administration—Application for, by preceptor's preceptor—Custom.

On an application for Letters of Administration to the estate of a deceased *bairagee*, that is an ascetic, by his preceptor's preceptor, the Secretary of State resisted the application, alleging that the deceased died without leaving any heir, and that therefore his estate escheated to Government.

Held, that according to the custom prevalent amongst the sect, the preceptor's preceptor was entitled to the Letters of Administration.

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* Appeal from Original Decree No. 282 of 1899, against the decree of S. J. Douglas, Esq., District Judge of Dacca, dated the 15th May 1899.

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THIS appeal arose out of an application for Letters of Administration to the estate of a deceased *bairagee*, that is an ascetic. One Gopal Das Bairagee, resident of Mirzapore in the District of Dacca, died in the month of *Magh* 1303 B. S., leaving some property. The applicant stated in his petition that he was the preceptor's preceptor of the deceased ascetic, and according to the custom prevalent in the country, he was entitled to the Letters of Administration. The Collector of Dacca, on behalf of the Secretary of State for India in Council, objected to the petition on the ground that the deceased ascetic died without leaving any heir, and, as such, his estate escheated to Government. The Court of First Instance having overruled the said objections granted Letters of Administration to the petitioner. Against this decision the Secretary of State appealed to the High Court.

Babu *Ram Churn Mitter* and Babu *Sirish Chunder Chowdhry* for the appellant.

Babu *Baikunt Nath Das* for the respondent.

MACLEAN, C. J. —This is an application for Letters of Administration to the estate, which is very small, of one Gopal Das Bairagee, who died in the month of *Magh* 1303. He was a **[609]** *bairagee*, that is an ascetic, and the petitioner is his preceptor's preceptor, and, as such, claims to be entitled to such Letters of Administration. His application is resisted by the Secretary of State, who alleges that the deceased died without leaving any heir and that his estate has escheated to Government.

The case of the petitioner is that, according to the custom which prevails in the sect, of which he and the deceased disciple were respectively members, he, as the preceptor of the dead man's preceptor, is entitled to his property : to which the Secretary of State replies that no such custom has been satisfactorily proved in this case.

In the observations I am about to make I am dealing only with the concrete case now before us, namely, that of a dead disciple, who was initiated by a disciple, who was the disciple of, and was initiated by, the preceptor, who is now seeking Letters of Adiministration.

The question we have in effect to decide is, whether the applicant has made out that, under such circumstances, he is entitled to Letters of Administration to the property of his disciple's disciple. The Court below has found in favour of the applicant, finding the existence of the custom set up, and hence the present appeal.

Before I deal with the evidence I may, in passing, refer to Chapter XI, s. 6, paragraph 35 of the Dyabhaga, which lays down the general rule in matters of this class : " The goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil and the holy preceptor take. On failure of these, the associate in holiness or person belonging to the same order shall inherit." Thus Yajayawalcya says : " The heirs of a hermit, of an ascetic, and of a professed student, are in their order the preceptor, the virtuous pupil and associate in holiness." And upon the question of custom I may perhaps refer to Chapter V, s. 1, paragraph 144 of the Vyavastha Darpana, where it is laid down, and the authorities for the proposition are given by the learned author, that, " If a custom or usage has obtained in a country, district, village, nation, tribe, class or family, and has been invariably observed from time immemorial or for many generations, it supersedes the general maxims or rules of the law." The **[610]** question really is, whether the

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applicant has made out the existence of the custom, which the appellant, the Secretary of State, says must be ancient, definite and reasonable.

Upon this question there is a good deal of oral evidence and a fair amount of documentary evidence. The oral evidence, which has been laid before us, is the evidence of the applicant himself and of the three witnesses he has called, and they give important and direct evidence upon the point, and there is no evidence the other way. To cite the language of the witness Radha Ballabh Goswami, he says: "Amongst us, who are *gurus*, we obtain the properties left by our disciples or disciple's disciple on their death," and he gave various instances in support of this assertion, and some of the other witnesses give similar instances. Upon that evidence it is difficult to say that the custom is unreasonable, nor, notwithstanding what the applicant said—"On my death my sons and grandsons will get and on failure of them the Thakoor"—upon which the appellant placed much reliance, can it reasonably be said, looking at his evidence as a whole, that it was indefinite.

But the documentary evidence is important. As to the antiquity of the custom, the applicant says it has been in vogue for a long time, and relies upon an attested copy of a *parawana*, dated the 16th September 1792, purporting to have been issued by a certain Mr. Douglas, though, who this Mr Douglas, was, does not appear. This purports to be a very old document; if genuine, it certainly supports the applicant's case, for it refers distinctly to the property of a disciple of a disciple *(anusishya)*, and would be relevant under s. 42 of the Indian Evidence Act. Looking at the source from which the applicant obtained this document, *viz.*, from his father some 20 years ago, and to the fact that there is no evidence to suggest that it has been fabricated, I think we may fairly agree with the Court below and hold that it is genuine. In this view the custom would appear to be ancient.

There are, however, other documents which support the applicant's case. I refer first to the attested copy of a *rubokari* of the District Judge of Dacca, dated the 29th February 1848. There appears to have been a contest, as to who was entitled to the property of a disciple of this sect on his death, and **[611]** in the result it was determined that the preceptor's preceptor of the disciple was entitled to the property. The Government, however, was not a party to that proceeding.

Then it appears from an attested copy of a judgment of this Court, dated the 15th May 1865, that this Court held that the head of the sect is entitled to the property of the disciple of his immediate disciple. There is a distinction between that case and the present, for there it was held that the head of the sect was entitled to the property; here it is contended that the preceptor of the disciple's disciple is entitled.

However, it appears, from an attested copy of the decree of the Court of the Munsif of Naraingunge, dated the 1st August 1870, to which Government was a party, that a claim, similar to the present, was held good, as against the Government. That decree was appealed against, but the appeal was dismissed with costs, and Government did not think it worth while apparently to bring the case up to this Court. Again, it appears from an attested copy of a judgment of the 31st July 1883, to be found at page 22 of the paper book, that the same conclusion was arrived at. I am not referring to these judgments as constituting *res judicata*, but as evidence in the matter under s. 42 of the Evidence Act.

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Upon these materials we may fairly say that the applicant has proved his case. The appeal then must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The applicant claims the property of the deceased as his preceptor's preceptor. A claim like that can only rest upon custom. The rule of Hindu Law with reference to the property of an ascetic, such as the deceased was, contemplates the succession only of the preceptor himself (*see* Dyabhaga, Ch. XI, s. 6, para. 35). The custom, which is set up, is a custom applicable to the sect, to which the parties belong. And the only question is whether that custom has been proved. It is unnecessary for me to go into the matter at any length, as I agree entirely in all that has been said in the judgment of the learned Chief Justice. I only wish to add a few words with reference to two of the objections that have been urged against the validity of the custom by the learned Junior **[612]** Government Pleader, namely, that the custom is indefinite and that it is unreasonable.

As regards the first objection, there is nothing indefinite in the custom as set up in the petition of the applicant. There, what he says is, that the petitioner is the preceptor's preceptor of the deceased, and, as such, is entitled to receive Letters of Administration to the estate left by him. That is a very definite statement of the right by custom set up. The indefiniteness, which is imputed to the custom, is one that may attach to it, if we take a certain statement of the applicant in his deposition literally, that statement being, that on the death of the applicant, his sons and grandsons will be entitled to the property of his disciple's disciples. But I do not think that that statement should be taken literally. It is susceptible of this interpretation, namely, that after the applicant, his sons and grandsons in there turn will be entitled to the property of their disciple's disciples in their own right as preceptor's preceptor and not merely by reason of their being sons and grandsons of the applicant; and, if the statement is taken in that sense, there is nothing indefinite in the custom set up.

As to the second objection I have noticed above, that the custom is unreasonable, I need only say this that, though by this custom the right of the preceptor to inherit the property of his disciples is ignored, and the preceptor's preceptor acquires a right to inherit such property, that of itself does not make the custom so unreasonable, that we should refuse to recognize it. It may well be (and some of the facts appearing from certain of the documents go to show that is so) that, by reason of superior sanctity attaching to the family, to which the applicant belongs, the right to succeed has been conceded to the members of that family, in preference to the rights of the immediate preceptors of deceased disciples.

Appeal dismissed.

28 C. 613.

[613] APPELLATE CRIMINAL.

Before Mr. Justice Ghose and Mr. Justice Taylor.

GHATU PRAMANIK *v.* KING EMPEROR.* [1st June, 1901.]

Insane delusion—Unsoundness of mind—Criminal liability, test of—Penal Code (Act XLV of 1860), s. 84.

* Criminal Appeal No. 321 of 1901, made against the order passed by F. MacBlaine, Esq., Sessions Judge of Pabna and Bogra, dated the 20th of April 1901.