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We have been referred to a judgment of this Court of the 12th February 1874 in the case of *Girdharee Singh* v. *Hurdoy Narain Sahoo* (1), in which it was held that "orders made by the [682] High Court under section 15 of the High Court's Act are subject to an appeal to His Majesty in Council." But, as Sir Richard Couch pointed out, that point was not necessary for the decision of the particular case then under discussion. The Full Bench cases, however, to which I have referred, and which, in principle, appear to cover the present case, are binding upon us.

But, apart from authority, I should feel a difficulty in saying that the order against which it is now sought to appeal to the Privy Council was an order "passed on appeal by the High Court in its final appellate jurisdiction," and this view gains support from the terms of section 596, which do not appear to me to apply to such a case as the present.

Apart from these considerations, there is a further point, whether the order here was a "final" order within the meaning of sub-section (*a*) of section 575, but it is unnecessary to go into this.

Upon these grounds I am of opinion that we have no power to grant a certificate.

The application is refused with costs.

GEIDT, J. I concur.

Certificate refused.

30 C. 683.

[683] APPELLATE CIVIL.

BAFATUN *v.* BILAITI KHANUM.* [8th January, 1903].

Mahomedan Law—Inheritance—Default of sharers—Illegitimacy—"Return"—Sunni Sect—Bequest to an heir without consent of other heirs.

According to Mahomedan Law, in default of other sharers by blood and distant kindred, property left by a man or woman returns to the widow or to the husband.

Mahomed Arshad Chowdhry v. *Sajida Banoo* (2) followed.

Among the Sunni sect illegitimacy is no bar to a person inheriting from his mother and is maternal relations.

Sahebzadee Begum v. *Mirza Himmut Bahadoor* (3) considered; *Koonari Bibi* v. *Dalip Bibi* (4) followed.

Under the Mahomedan Law, a bequest to an heir is invalid without the consent of the other heirs.

[**Foll.** 18 C. L. J. 214=20 I. C. 576; 3 Pat. L. W. 232. **Ref.** 1910 M. W. N. 669=9 M. L. T. 149=8 I. C. 481; 21 I. C. 510=18 C. L. J. 223.]

SECOND APPEAL by the defendants, Bibi Bafatun and another.

This appeal arose out of a suit for partition of certain immoveable properties left by one Pir Buksh. The allegation of the plaintiff was that Bibi Bechun died on the 4th October 1897, leaving her husband, Pir Buksh *alias* Piru, as her only heir; that subsequently Pir Buksh died without issue on the 16th October 1897, leaving the plaintiff, his widow, as his only heiress; that she as heiress of the said Pir Buksh, on the 22nd July 1898, obtained Letters of Administration of the estate left by him; that the defendant, on the basis of a will alleged to have been executed by the said Bechun Bibi, on the 29th September 1897,

* Appeal from Appellate Decree No. 954 of 1903, against the decree of F. F Handley, District Judge of 24-Perganas, dated March 2, 1900, affirming the decree of Ram Gopal Chaki, Subordinate Judge of that district, dated Dec. 12, 1899.

(1) (1874) 21 W. R. 263.
(2) (1878) I. L. R. 3 Cal. 702.
(3) (1869) 12 W. R. 512.
(4) (1884) I. L. R. 11 Cal. 14.

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obtained Letters of Administration in respect of the deceased's estate comprised in the will; that if the will alleged to have been executed by Bechun Bibi be genuine, it could only be valid to the extent of one-third share of the estate left by her; that she (the plaintiff) was all along in possession of the said properties and that notwithstanding her repeatedly asking for a partition by metes and bounds, the defendant refused to do so.

[684] The defence was that the plaintiff was not the legally married wife of Pir Buksh; that the defendant took out probate of the will of Bechun Bibi, and as such he was in possession of the entire estate left by her; and that the suit was not maintainable in the form it was brought. It was found that the plaintiff was the legally married wife of Pir Buksh and the defendant was an illegitimate son of the sister of Bechun Bibi. The Court of first instance having held that inasmuch as the will set up by the defendant could not be valid beyond a third share of the Premises devised declared that the plaintiff was entitled to the remaining two-third share by inheritance, being the only heiress of Pir Buksh, and directed a commission to issue to partition the properties. On appeal the District Judge of the 24-Perganas confirmed the decision of the First Court.

Moulvi *Mahomed Yusuff* for the appellant.

Babu *Boidya Nath Dutt* for the respondent.

BANERJEE AND GEIDT, JJ. This is a second appeal from a preliminary decree determining the shares of the parties in a partition suit; and the question raised on behalf of the defendants, appellants, is whether the Court of Appeal below has determined the share of the plaintiff correctly under the Mahomedan Law.

At the hearing of the appeal a preliminary objection is raised on behalf of the plaintiff, respondent, that the appeal ought to fail, as the final decree in the partition suit has since been made and has not been appealed against, although the time for appealing has long expired.

We are of opinion that this objection should not prevail. The law allows an appeal from a preliminary decree in a partition suit: see the decision of the Full Bench in the case of *Dulhin Golap Koer* v. *Radha Dulari Koer* (1).

The appellants are therefore entitled to prefer this second appeal and to ask us to determine the question raised in it, leaving it to the parties to see what the effect of the appellants not having appealed against the final decree in the suit may be. Possibly they may yet appeal against that decree, though out of time, because the law allows a party to prefer an appeal after the time [685] ordinarily allowed for doing so has expired, if he can satisfy the Appellate Court that there was good and sufficient cause for not preferring it within the time allowed by law.

Coming now to the merits of the appeal, we find that the Lower Appellate Court, has held that the plaintiff, as the surviving widow of Pir Buksh, is entitled to the whole of the estate left by Pir Buksh, and that the estate left by Pir Buksh was $\frac{2}{3}$ of that left by his wife, Bechun Bibi, the remaining $\frac{1}{3}$ having been devised by Bechun Bibi by will in favour of her sister's illegitimate son, Tunu; we should rather have said the remaining $\frac{1}{3}$ being all that could have been validly bequeathed by Bechun in favour of Tunu.

(1) (1892) I. L. R. 19 Cal. 463.

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This decision, the learned vakil for the defendant-appellant contends, is erroneous in law, because he argues that under the Mahomedan Law a spouse is not entitled to any return, and that all that Pir Buksh was entitled to was $\frac{1}{2}$ of $\frac{3}{4}$ of Bechun Bibi's estate after deducting $\frac{1}{3}$ as validly bequeathed by her to Tunu; and that the plaintiff as widow of Pir Buksh was entitled only to $\frac{1}{4}$ of what Pir Buksh inherited, or, in other words, that the plaintiff was entitled only to $\frac{1}{4}$ of $\frac{1}{3}$ or $\frac{1}{12}$ of Bechun Bibi's share, instead of $\frac{3}{4}$, which the Court of Appeal below has awarded to her. And in support of this contention he relied upon that portion of the Sirajiyyah which deals with the return, where it is said that, in the absence of residuaries, the surplus amount, after assignment of share to the sharers, is returned to the sharers according to their respective rights, except the husband or wife, and where there is no other heir the surplus goes to the Public Treasury. But although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred (see Shama Charan Sarkar's Al Sirajiyyah, p. 17). And this view has been accepted and followed as correct in the case of *Mahomed Arshad Chowdhry* v. *Sajida Banoo* (1), That being so, as there is no dispute with regard to the plaintiff being the only heir of Pir Buksh, the whole of Pir Buksh's estate must be held to have passed by inheritance to the plaintiff.

[686] The question then remains, what was the extent of Pir Buksh's share in Bechun Bibi's estate? It is contended for the appellant that Pir Buksh was not the sole heir of Bechun Bibi, but that her sister's illegitimate son, Tunu, was in the line of heirs, as illegitimacy is, under the Mahomedan Law, no bar to a person inheriting from his mother and his maternal relations. This is so, and it is supported by the authorities cited (see Baillie's Digest of Mahomedan Law, pages 391 and 414). Upon this point the learned Vakil for the respondent contends, upon the authority of the case of *Sahebzadee Begum* v. *Mirza Himmut Bahaaoor* (2), that according to the Shiah Law of Inheritance an illegitimate child does not inherit from his mother or his maternal relations. Now, in the first place, it is not clear how far that case is an authority for the proposition in support of which it is cited. What was held there was that the plaintiff had no right to inherit the estate of his illegitimate brother. But, be that as it may, it is not shown that the parties to this case are Shiahs. It is not even alleged before us in the argument that they are so, and, in the absence of any such allegation, there is a presumption that the parties are Sunnis, to which sect the great majority of the Mahomedans of this country belong, as has been pointed out by Baillie in the Introduction to his Digest of the Imameea Law. That being so, we must hold that Tunu was an heir of Bechun Bibi, and that Pir Buksh was not entitled to more than $\frac{1}{2}$ by inheritance. This view is in accordance with that taken in the case of *Koonari Bibi* v. *Dalim Bibi* (3). But, if that is so, it would follow that Tunu could not claim by bequest from Bechun: for, according to Mahomedan Law, a bequest in favour of an heir is invalid without the consent of the other heirs. That being so, the estate left by Bechun vested by inheritance in two persons—her husband Pir Buksh,

(1) (1878) I. L. R. 3 Cal. 702.
(2) (1869) 12 W. R. 512.
(3) (1884) I. L. R. 11 Cal. 14.

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and her sister's illegitimate son Tunu—the husband being entitled to ½. The share of the plaintiff, therefore, will be ½ of Bechun's estate inherited by her through Pir Buksh.

The decree of the Lower Appellate Court must therefore be modified by reducing the share of the plaintiff from ⅔ to ½. The parties will be entitled to costs in proportion.

Decree modified.

30 C. 687.

[687] APPELLATE CIVIL.

AMBICA DAT VYAS *v.* NITYANUND SINGH.*

[6th March, 1903.]

Limitation—Limitation Act (XV of 1877) s. 19, exp. 1, Sch. II, Art. 56—Acknowledgment of debt, unstamped—Stamp Act (I of 1879), Sch. I, Art. 1—Tankha—Stamp-duty—Evidence of debt.

The mere fact of a document being an acknowledgment of a debt within the meaning of s. 19 of the Limitation Act, would not make it liable to a stamp-duty under Sch. I, Art 1 of Act I of 1879. There are other conditions required to be fulfilled, one of which being that it should be intended to supply evidence of a debt.

Binja Ram v. *Rojmohun Roy* (1), *Bishambar Nath* v. *Nand Kishore* (2), and *Mulji Lala* v. *Lingu Makaji* (3) referred to.

[Ref. 18 L. W. 246.]

SECOND APPEAL by the plaintiff, Ambica Dat Vyas.

The suit was for the recovery of the sum of Rs. 1,090-11 from the defendant on account of the costs of printing receipts, etc. It was found by the Court of first instance that the printing work was completed in August 1893, but that the defendant admitted by a writing, dated the 11th June 1896, that a certain sum was due by him on account of the said work and gave a *tankha* or written order to his *tehsildar* to pay the amount to the plaintiff. The said document was addressed to the *tehsildar*. The plaintiff instituted the suit on the 15th October 1898, dating his cause of action from the said 11th June 1896, the date of the *tankha*. The defence was mainly one of limitation.

The Subordinate Judge held that the suit was governed by article 56 of the second schedule to the Limitation Act, and that it was therefore barred by limitation ; and that the *tankha* being on an unstamped paper was inadmissible in evidence as an acknowledgment of the debt by the defendant. The suit was accordingly dismissed. On appeal, that decision was affirmed by the District Judge.

[688] Babu *Baldeo Narain Singh* for the appellant.

Babu *Prasanna Chandra Roy*, for the respondent.

BANERJEE AND HENDERSON, JJ. In this appeal which arises out of a suit brought by the plaintiff-appellant for the price of work done by him for the defendant, the only question raised for determination is whether the Lower Appellate Court was right in holding that a certain letter of acknowledgment called *tankha* was inadmissible in evidence,

* Appeal from Appellate Decree No. 568 of 1900, against the decree of W. H. Vincent, Officiating District Judge of Bhagalpur, dated Jan. 16, 1900, affirming the decree of Kally Coomar Bose, Subordinate Judge of that district, dated July 22, 1899.

(1) (1881) I L. R. 8 Cal. 282.
(2) (1892) I. L. R. 15 All. 56.
(3) (1896) I. L. R. 21 Bom. 201.