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Judicial Committee, "the effect of the deed is to give the property not in substance to charitable uses, but in substance to the grantor's family," and that upon this point the Court below was right.

As regards the cross-objection, I have felt some doubt as to whether it is open to the plaintiff, as one of the heirs of his father, who did not dispute the *wakfnama* created by his mother, to maintain the present suit, but it is unnecessary to decide this, for, looking at this deed of *wakfnama* (see p. 114 of the Paper Book) as a whole, I am not disposed to say that on the whole the view taken by the Court below as to the nature of the deed is erroneous. The amount involved is very small, and this cross-objection has not been very seriously urged before us.

[679] The result is that the appeal and the cross-objection are both dismissed with proportionate costs.

GEIDT, J. I concur.

Appeal and Cross-objection dismissed.

30 C. 679.

APPELLATE CIVIL.

SUNDER KOER *v.* CHANDISHWAR PROSAD SINGH.* [5th May, 1903.]

Leave to appeal to Privy Council—Letters Patent, 1865, *cl.* 39—"*Order made on appeal*"—*Amendment of decree, application for—Civil Procedure Code* (*Act XIV of* 1882) *ss.* 206, 595 *and* 596.

An order passed by the High Court, rejecting an application under s. 206 of the Civil Procedure Code to amend a certain decree of the Court, is not an order "made on appeal," and is therefore not appealable to His Majesty in Council.

Soudamonee Dossee v. *Maharaj Dheraj Mahatab Chand Bahadoor* (1) and *Rajah Enaet Hossein* v. *Ranee Rowshun Jahan* (2) referred to.

[**Foll.** 32 Bom. 108=9 Bom. L. R. 566; **Dist.** 13 Cal. L. J. 90=15 C. W. N. 848=9 I. C. 183; **Ref. to.** 16 O. C. 264.]

APPLICATION by Rani Sunder Koer for leave to appeal to His Majesty in Council.

The facts of the case are as follows:—

A consent decree was passed by the High Court, on appeal, in favour of the opposite party, Chandishwar Prosad Narayan Singh, on the 12th September 1884 in a suit originally brought by him against his brother, Raja Rameshwar Prosad Narayan Singh, in the Court of the Subordinate Judge of Gaya. Subsequently on the death of Raja Rameshwar Prosad Narayan Singh, his widow Rani Sunder Koer, made an application to the High Court to amend **[680]** the said decree, under s. 206 of the Civil Procedure Code, so as to bring it in conformity with the judgment. Thereupon a Rule was issued upon Chandishwar Prosad Narayan Singh to show cause why the application should not be granted. The Rule was heard in due course and ultimately discharged. Against the order the present application for leave to appeal to His Majesty in Council was made.

Mr. *Hill*, Dr. *Rash Behary Ghose*, Babu *Karuna Sindhu Mookerjee*, and Babu *Satis Chunder Ghose* for the petitioner. The question is whether the order, against which leave to appeal to His Majesty in Council is asked for, is an order made on appeal by a High Court within the meaning of section 595 of the Civil Procedure Code. The words "order made on appeal" ought to receive a liberal construction. They

* Application for leave to appeal to His Majesty in Council, No. 8 of 1903.

(1) (1866) 6 W. R. (Misc. R.) 102. (2) (1868) 10 W. R. (F. B.) 1.

mean orders passed in the exercise of appellate jurisdiction. The case of *Girdharee Singh* v. *Hurdoy Narain Sahoo* (1) lends support to our contention.

Mr. *O'Kinealy*, Babu *Golap Chunder Sarkar*, Babu *Umakali Mookerjee*, Babu *Saligram Singh*, and Babu *Surendra Nath Roy* for the opposite party. It is not an order "made on appeal." The words "order made on appeal" cannot mean *any* order passed in the exercise of appellate jurisdiction: see *Rajah Enaet Hossein* v. *Ranee Rowshun Jahan* (2) and *Soudamonee Dossee* v. *Maharaj Dheraj Mahatab Chand Bahadoor* (3).

Dr. *Rash Behary Ghose* in reply.

MACLEAN, C. J.—As I was a party to the order against which it is desired to appeal to His Majesty in Council, I should have been glad if I could have seen my way to accede to the present application. But, looking to the terms of clause 39 of the Court's Charter, coupled with sections 595 and 596 of the Code of Civil Procedure, I do not think it is open to us to grant a certificate. The order against which it is sought to appeal was an order made upon an application under section 206 of of the Code of Civil Procedure to amend the decree in the suit dated the 12th of September 1884, so as to bring it into conformity with the judgment; and **[681]** this Court held that the decree, which was a consent decree, as drawn up accurately represented the views and intentions of the compromising parties. That being the nature of the application and of the order, we have to consider whether it was a final decree—the term "decree" includes "order"—passed on appeal by a High Court or any other Court of final appellate jurisdiction. Under clause 39 of the Letters Patent of 1865 an appeal to the Privy Council lies in any matter, "not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal *made on appeal*."

The question is whether the order in question is an order made or passed on appeal. The point is not free from judicial authority. It was decided by a Full Bench of this Court, so far back as the 11th of September 1866, in the case of *Soudamonee Dossee* v. *Maharaj Dheraj Mahatab Chand Bahadoor* (3), that an order rejecting an application to review a judgment passed on appeal is not an order made on appeal from which an appeal lies to the Privy Council under section 39 of the Charter of the High Court. There is a substantial analogy in principle between that case and the present. The same view was practically held in another Full Bench case of *Rajah Enaet Hossein* v. *Ranee Rowshun Jahan* (2), in which it was held that an order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard is not an order made on appeal within the terms of clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to His Majesty in Council. In that case Sir Barnes Peacock drew attention to the language used in the Charter—which is practically identical with that in section 595 of the Code—and to the difference between the words "made or passed on appeal" and "made in the exercise of its appellate jurisdiction." In section 595 of the Code the language used is "passed on appeal" and not "passed in the exercise of its appellate jurisdiction."

(1) (1874) 21 W. R. 263, 264.
(2) (1868) 10 W. R. (F. B.) 1.
(3) (1866) 6 W. R. (Misc. R.) 102.

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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.