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has lost his right, inasmuch as he did not notify the fact of the money being found to the Zilla Judge within one month as required by the Regulation. He then states that, supposing that he is not entitled to claim as finder, he is entitled to get the money under the general custom of the country, which gives property of this description to the owner of the estate in which it is found. Now, in the first place, whatever custom there might have been at one time with regard to such matters, was done away with by the enactment of Regulation V of 1817, the preamble of which states expressly the reason why that law was enacted,—namely, because of the doubts which had arisen as to the disposal of such property on account of the conflicting provisions of the Hindu and Mahomedan law; and even were we to suppose for the sake of argument that there was such a custom still existing, it is quite clear that the appellant could not be called, in the sense which he seeks, the owner of the soil, inasmuch as the ownership of the soil for such purposes would be the ruling power of the country,—that is, the Government.

The appeal is dismissed with costs.

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*Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.**

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*Feby* 6.

RAM DAS SAHA (PLAINTIFF) *v.* MAN MAHINI DASI (DEFENDANT.)*

*Special Appeal—Improper Mode of Dealing with Evidence—Ground of Special Appeal.*

Baboos *Krishna Sakha Mookerjee* and *Hem Chandra Banerjee* for the appellant.

Baboos *Durga Mohan Das* and *Nalit Chandra Sen* for the respondent.

THE judgment of the Court was delivered by

JACKSON, J.—We think that the decision of the lower Appellate Court must be set aside. The question at issue in the case was as to the right of the plaintiff to recover possession of half of a certain godown. The defendants pleaded limitation, and pleaded also that the half of the godown belonged to them. There appear to have been two suits connected with this half share of the godown: one in the Small Cause Court in which the defendants sued for rent and in which the present plaintiff intervened, but his claim was disallowed, and the defendants obtained a decree for the whole rent; the other suit was instituted by the present plaintiff, and was numbered 173 of 1868, but it was subsequently withdrawn. The first Court, in taking up the present case, appears to have sent for the record of the case No. 173 of 1868, as well of the Small Cause Court case. It would appear that a number of the defendant

* Special Appeal, No. 1880 of 1870, from a decree of the Additional Subordinate Judge of Dacca, dated the 25th June 1870, reversing a decree of the Moonsiff of that district, dated the 29th November 1869.

documents were filed in the former case, and we suppose that the case was sent for, in order that the documents might be used as evidence in this case.

The first Court decreed the plaintiff's case. But we are not at present concerned with the decision of that Court. The Appellate Court, the Court of the Subordinate Judge of Dacca, has set aside the decision of the Moonsiff, and has dismissed the plaintiff's claim. It is difficult, from the manner in which the Subordinate Judge of Dacca has worded his judgment, to ascertain exactly what he means in several portions of it. He commences his judgment on the point of limitation by stating that "the kabuliat dated 18th Kartik 1274 B. S. that he (plaintiff) has filed, has not been proved." Now it is admitted that this document is attested, and the first Court relied upon this document as some evidence. It is difficult then to understand what the Subordinate Judge means by saying that it is not proved. He does not give any reason for rejecting it unless the next sentence contains that reason, which runs as follows:—"The party who is said to have given it has not been adduced to swear to it." If this is the reason upon which he has rejected the kabuliat, it is not a sufficient reason. It is not necessary to call the person who gave it in order to prove the document. There may be some reason why that person was not called, more especially as it is admitt ad that, on the record of the Small Cause Court, the was the evidence of this very person to attest this very document. On what ground the Subordinate Judge comes to the conclusion that this is a false document his judgment in no way shows. This is the more important, because when the same Subordinate Judge in the same judgment goes to the defendant's case to allude to the defendant's documents, he admits them all, holding that they make out the defendant's case, even though it is admitted on all hands that a great number of those documents, if not the whole, are not attested any where Even if they were attested in the former case, and the Subordinate Judge has made use of that evidence, it is quite incomprehensible why the Subordinate Judge should apply one law to the defendant, and a quite different law to the plaintiff.

The Subordinate Judge says in alluding to the evidence produced by the plaintiff:—"The daughters and the grandsons of the late Golak Chandra "Dey, who are said to have gifted the property, are, by the evidence of one of "them, Ramkumari Dasi, shown to have been minors at the time, therefore they "were incompetent to make such a gift even had the property been theirs; and "their statements regarding Kishormani's and Ahlaemani's possession are "false." We have heard the evidence of Ramkumari Dasi, and it is admitted by both sides in this Court that that evidence does not contain the statement which the Subordinate Judge puts into her mouth: not only does it not do so but it distinctly proves that the parties were not minors at the time when the gift is said to have been made.

Upon the merits the Subordinate Judge commences his judgment by saying that "the respondent (plaintiff) has nothing to prove the gift of which he speaks." He goes on to say:—"The parties who are said to have made the

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"gift were minors at the time as seen from the deposition of one of them. Had "this property been theirs, they are not likely to have given it away to their "sister-in-law, Kishormati, to the detriment of their own children. I do not "believe the evidence of the witnesses who speak to it, for they have been "tutored." It is to be supposed that the Subordinate Judge means to say that the plaintiff has no documents by which to prove the case. Both parties, I understand, produced no documentary evidence. But, although the Subordinate Judge gives this as a reason for rejecting the plaintiff's claim, he seems altogether to have failed to see that the defendants made exactly the same allegation, namely, that they only received this property by an oral gift. Why then this should be a reason for rejecting the claim of one side, and a reason for admitting the claim of the other side, it is difficult under the circumstances to see. The very same remark applies to the fact that it is improbable that the parties should have given the property, because both parties say that it was given to the detriment of the children. The children themselves come into the Court and give evidence against their own interest and in favour of the plaintiff. Of course, their evidence may be disbelieved, but the reasons given by the Judge are untenable, as they apply equally to both sides. As I have said before, he seems to apply one rule to the evidence of one side, and another rule to the evidence of the other side.

Then on the merits, in alluding to the *ikrarnama* filed by the plaintiff, the Judge says that he disbelieves the witnesses for the plaintiff, because they have been tutored. How the Subordinate Judge has satisfied himself on this point that the witnesses had been tutored, of course, we cannot see. Had all the other reasons given by the Subordinate Judge been satisfactory in the case, we might perhaps have accepted his impression that there was something in the evidence of these witnesses which led him to distrust them. But when all the reasons he gives in his judgment appear to be almost from first to last untenable, we think that the mere statement that the witnesses were all tutored, without giving any reason for coming to that conclusion, is not a satisfactory adjudication of the case.

The decision of the Subordinate Judge must be set aside, and the case will be remanded to the Judge, with a request that he will take up the case on his own file and decide it, and pass a fresh decision upon it.

Costs of this appeal will follow the ultimate result of the suit.

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*May* 5.

*Before Mr. Justice Kemp and Mr. Justice Glover.*

IN THE MATTER OF THE PETITION OF MAHENDRANATH MOOKERJEE.*

*Guardian, Removal of—Act XL of* 1858, *ss.* 21 *and* 23—*Appeal*

The order of a Judge, rejecting an application for the removal of a guardian under Act XL of 1858, is appealable.

* Miscellaneous Regular Appeal, No. 84 of 1871, from an order of the Judge of Hooghly, dated the 20th January 1871.

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IN THE MATTER OF THE PETITION OF MAHENDRANATH MOOKERJEE.

MAHENDRANATH MOOKERJEE applied to the Judge of Hooghly for the removal of Bamasundari Debi, widow of Jaggeswar Banerjee, from the guardianship of her minor step-sons, on the grounds of waste and misconduct, and want of care with respect to the minors.

The Judge dismissed the application, on the ground that the applicant had failed to prove any of his allegations.

Mahendranath Mookerjee appealed to the High Court.

Baboo *Anandachandra Ghosal*, for the opposite party, took a preliminary objection that no appeal lay, as the certificate had not been withdrawn. The order of the Judge was final.

Baboo *Ambikacharan Banerjee* for the appellant contended that, as the application had been made under section 21, Act XL of 1858, to remove the guardian on the ground or waste, and of not taking sufficient care of the person of the minor, and as the order passed on the application was an order passed by the Civil Court under Act XL of 1858, it was appealable under section 28 of that Act.

Baboo *Anandachandra Ghosal* in reply.

The judgment of the Court was delivered by,

GLOVER, J.—This was an application to have a certificate of administration granted under Act XL of 1858 to one Bamasundari, widow, of Jaggeswar Banerjee, and step-mother and guardian of his minor children, withdrawn on the ground of mismanagement of the family estate, waste, neglect to provide the minors with proper means of education, or with proper food and dress.

A preliminary objection was taken to the hearing of the appeal by the pleader for the respondent, on the ground that, as the Judge's order did not direct the withdrawal of the certificate, it was not appealable. We think that this objection is altogether untenable. The Judge has tried this case under section 21 of Act XL of 1858, which section gave him the power, if satisfied that the manager had been improperly fulfilling her trust, to withdraw the certificate; but whether he withdrew it or not, the action which he took was clearly under that section, and, therefore, by section 28, which lays down that all orders passed by the Civil Court, or by any Subordinate Court under this Act, shall be open to appeal, this order of the Judge is appealable.

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Upon the merits, the appeal was dismissed.