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the inhabitants of Bengal, it was clear that, so far as the question of divorce was concerned, it failed to agree with local usage in Assam, which was to become operative in the event of the defendant being guilty of violation of certain conditions, and that the conditions were proved to have been violated. The Judge reversed the order of the lower Court, and allowed the plaintiffs appeal with costs. The defendant appealed to the High Court.

Baboo *Abhoy Churn Bose* for the appellant.—Divorce is not allowed by Hindu law—*Reg.* v. *Karsan Goja* (1). Even if there were a custom allowing divorce, it could not prevail against the express provisions of the law. There is no evidence of such a custom.

Baboo *Rogonauth Bose* for the respondent.—[COUCH, C.J.—You have to show that a custom in Assam which varies Hindu law can be admitted.] The Assamese are not strictly Hindus, therefore it cannot be said that they are bound by the strict letter of Hindu law. It cannot be said that such a contract is immoral, as there is a law allowing divorce. The Court had power to take cognizance of the local custom, and when that is proved, it overrides the strict letter of the law.

Baboo *Abhoy Churn Bose* in reply.—The custom if proved will not override the law. The Hindu law of Bengal Proper is applicable to Assam—*Deepo Dabea* v. *Gobindo Deb* (2).

(1) 2 Bom. H. C. Rep., 124.

(2) *Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*

The 9th June 1871.

DEEPO DABEA (PLAINTIFF) *v.* GOBINDO DEB (DEFENDANT).*

Hindu Law—Widow—Limitation—Assam.

Baboo *Bhuggobutty Churn Ghose* for the appellant.

No one appeared for the respondent.

THE Court delivered the following judgments:—

E. JACKSON, J.—This case was before this Court on a former occasion, when it was remanded to the lower Appellate Court, certain errors in law having been pointed out in its decision, and it was directed to make further enquiry into

* Special Appeal, No. 1649 of 1870, from a decree of the Subordinate Judge of Kamroop dated the 13th May 1870, reversing a decree of the Munsif of that district, dated the 18th February 1869.

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The following judgments were delivered :—

COUCH, C. J.—I take the description of the suit from the judgment of the Assistant Commissioner which is appealed from. the case, and to pass a fresh decision upon it. The suit was by the plaintiff as the widow of one Ramdeb, for a declaration of her right and title to a certain piece of *dharmatar* land, which she alleged formerly belonged to her husband, and of which she asserted she had been always in possession; but which the defendant had got registered in his own name, as well as in her (plaintiff's) name.

The defendant alleged that, on the death of Ramdeb, his father succeeded to Ramdeb's property as his next of kin, and that he and his father had been in possession since Ramdeb's death, and that the plaintiff was not entitled to any portion of the *dharmatar* land.

The first Court came to the conclusion that the plaintiff and the defendant were each entitled to eight annas of the land; that the property was family property; and the grandfathers of the parties had been brothers equally entitled to the land which devolved in equal shares on their descendants, the plaintiff's husband and the defendants.

On reviewing his decision, the Assistant Commissioner and Subordinate Judge of Burpettah has come to the conclusion that the plaintiff's claim is wholly barred by limitation. He finds that the plaintiff is actually residing upon a portion of the land, and holds a portion of it in her *khas* possession but he finds that the defendant has been managing the property for the last 30 years since the death of the plaintiff's husband, and he therefore considers that the plaintiff's title, if any, has lapsed under the law of limitation.

Upon this point this special appeal is preferred to this Court; and it has been pointed out that the decision of the lower Appellate Court is evidently wrong, inasmuch as the very fact of this lady residing actually on this land, and holding in her own sole possession a portion of it, is sufficient to prevent the bar of the law of limitation, at least as regards that portion of it which is in her *khas* possession. Then there is the other fact that the names of both the plaintiff and the defendant have been registered as proprietors of the land since the year 1264 (1857). Even though proves to those years, the defendant's father's name alone had been registered, still such a change having been made with the assent of the defendant's father, previous undoubtedly that the defendant's father admitted that his possession of the land up to that time had not been independent of and adverse to the plaintiff's right. The entry of the plaintiff's name conjointly with the defendant's is a distinct declaration at least that the plaintiff was jointly entitled to this land with the defendant. It is impossible under these circumstances to understand how the Assistant Commissioner has come to the conclusion that the plaintiff's claim is barred under the law of limitation. We set aside his decision on this point.

There only remains then to consider the finding of the Assistant Commissioner on the merits. It was pointed out to him on the former occasion that he was wrong in stating that the defendant, as a cousion of the plaintiff's husband, was his next of kin, and that he was entitled to succeed to the plaintiff's husband's property, the widow only obtaining maintenance from him. It was pointed out to him that this was contrary to ordinary Hindu law. The Assistont Commissioner states in his judgment that, although it may be the law in Bengal that a widow succeeds to her husband's estate, still that such is not always the Hindu law, inasmuch, as under the Benares school, in certain

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He says :—"The plaintiff sues to have her marriage with the defendant cancelled on the strength of a bond executed by him before his marriage with her by which he engaged to consider his marriage void if he ever left the village in which the plaintiff and her friends reside, or in case of cruelty, or in the event of his ever marrying another wife." He founds his decision upon a breach of that agreement, saying the "violation of its conditions" (the conditions of the bond) "are shown to have occurred.

circumstances, the widow has no right of succession to the husband's property. And I understand him to presume that it is possible it may not be the law in Assam.

It does not appear that any of the parties in this case asserted that the ordinary Hindu law did not apply; it does not appear that the Assistant Commissioner had any ground for saying that the ordinary Hindu law does not apply in the province of Assam. If the law differs in Assam, there must be some proof of that fact, it might have been distinctly pleaded, but it was not, and it might of course have been easily proved, but there was no attempt to prove it. It is quite true that the widow only obtains a life-interest in the property, and that she is unable to transfer it except for her life. But there seems to be no ground whatever for the presumption made by the Assistant Commissioner to the effect that the law in Assam differs from the ordinary law in Bengal. The widow is under the Hindu law entitled to succeed to her husband's property, and is entitled to have her name registered as the proprietor of this land. The first Court seems to have gone very carefully into the rights of the parties, and that Court came to the conclusion that the plaintiff and the defendant are each equally entitled to 8 annas of the disputed land. There is nothing in the decision of the lower Appellate Court upon which we can find that the first Court was in any way in error in arriving at that conclusion. We are therefore obliged again to set aside the decision of the Assistant Commissioner, and to restore the decision of the first Court.

Each party will pay his own costs of this litigation.

MOOKERJEE, J.—I am also of opinion that the Assistant Commissioner is wholly wrong in dismissing the suit of the plaintiff. I cannot make out how the Commissioner thinks that the law of inheritance in Assam is different from the law prevalent in Bengal *i.e.*, the law of the Dayabhaga. The defendant never raised that contention, and never pleaded that, under either the Mitakshara or any other system of law, he is a preferential heir to the deceased Ramdeb, or that the widow is no heir at all. The plea put forward appears to be that inasmuch as Ramdeb had, at the time of his death bequeathed his share to the defendant's father, the widow is not entitled to succeed. This is not a plea that the widow is not an heir according to the law prevalent in Assam, but it is quite consistent with the law of Bengal proper, *i.e.*, the law of the Dayabhaga. The first Court found that the defendant has not been able to substantiate his allegation of a bequest, and therefore gave a decree of a moiety of the property to the plaintiff in right of her husband. Where the assistant Commissioner got a different Hindu law for Assam is not at all clear to me.

I also would restore the decision of the first Court, and reverse that of the Commissioner. Under the circumstances of the case, each party should pay his own costs throughout.

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I therefore reverse the order of the lower Court, and decree the plaintiff's claim by which her marriage with the defendant is to be deemed void, with effect from date on which it is shown he violated the condition of the marriage agreement." The Assistant Commissioner says that he can take notice of certain decisions of the Courts of Assam, which show what he considers to be a usage which would support this decree, but the usage which he describes is not one of persons making an agreement of this kind that a marriage about to be contracted is to become void on the happening of certain events, but a usage which recognizes that, amongst Hindus in Assam, there may be a divorce, and that persons may, by consent, effect one. That is very different from a usage which would sanction a contract of this description. I am supposing that the Assistant Commissioner had authority to decide this case according to what was the usage in Assam, and that the rules of Hindu law might be modified by the usage. I am not prepared to say that this is the case, and it is not necessary for us to give an opinion upon that point. In order to support this decision, we must come to the conclusion that an agreement of this kind by which persons, when they are going to contract a marriage, agree that it shall become void on the happening of a certain event, for instance, as in this case, if the husband does not continue to reside in the wife's village, is valid, and can alter the law of marriage prevailing amongst Hindus.

We think it is contrary to the policy of the law to allow persons by a contract between themselves to avoid a marrisge on the happening of any event they may think fit to fix upon. According to this judgment, they might have agreed that the marriage should become void on the happening of any other event, such as, if the husband went to any particular place, or did some other act. An agreement of this kind is contrary to the policy of the law, and persons subject to it cannot be allowed to alter the law in that way. Therefore the decision of the Assistant Commissioner must be reversed. It is immaterial whether the contract was entered into or not, as it would not render the marriage void. A suit cannot be maintained upon such a bond as this.

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The appeal must be allowed, and the suit of the plaintiff dismissed with costs.

KEMP, J.—I wish to add that I entirely concur in this judgment. One of the conditions of this bond was that, if the husband, who is a Hindu, married again, his first marriage would be considered null and void. Now, supposing this lady who now sues to have her marriage cancelled happened to be barren, the husband, if this contract was one which could be enforced, would not, by reason of that contract, be able to marry again without running the risk of having his marriage with the first wife cancelled. I think such a contract quite contrary to the policy and spirit of the Hindu law, and that the suit ought to be dismissed.

Appeal allowed.

Before Mr. Justice Kemp and Mr. Justice Pontifex.

BICHOOK NATH PANDAY (PLAINTIFF) *v.* RAM LOCHUN SINGH (DEFENDANT).*

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Interest, Rate of—Bond payable by Instalments—Penalty—Liquidated Damages.

The defendant executed a bond in favor of the plaintiff by which he agreed to pay "interest at 8 annas *per cent.* month after month, and to repay the principal money with in the period of three years." It was further stipulated in the bond that, "should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 *per cent. per mensem* from the date of this bond to that of liquidation.' The defendant made default in payment. *Held* in a suit brought on the bond' that the stipulation in the bond for the payment of interest at 4 *per cent. per mensem* was in the nature of a penalty, and the plaintiff was only entitled to recover interest a reasonable rate. In this case 1 *per cent. per mensem.* was given.

See also 12 B L R 468

THIS was a suit to recover Rs. 1,507-3 as principal and interest due on a bond dated 1st Assin 1275, Fuslee (14th September 1867), executed by the defendant in favor of the plaintiff. The material portion of the bond was as follows :—

"I, Ram Lochun Singh, execute this to the effect following :—

* Special appeal, N. 709 of 1872, from a decree of the Judge of Bhaugulpore, dated the 9th January 1872, modifying a decree of the Subordinate Judge of that district, dated the 2nd December 1870.