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IN THE MATTER OF MAHIN BIBI.

am clearly of opinion that so far as concerns the marriage of his daughter, a Mahomedan, to Mirza Mahomed Saleh, who is also a Mahomedan, Cohen was not the guardian of the daughter, he being an apostate from the Mahomedan faith. His consent consequently was not necessary. And he being an apostate, the mother's consent, she being a Mahomedan woman (which was in fact given), is sufficient.

Another point has been raised in argument before me, namely, that the mother and not the husband is the proper guardian of the infant, who is about ten years of age and has not reached puberty; and the decision of Norman, J., in the case of *Khatija Bibi* (1) is relied upon by Mr. Branson. I think, however, that case turned on the special circumstances under which the infant wife came into the custody of her mother, and that although the mother's custody of an infant wife who has not attained puberty may be legal, custody by the husband is not necessarily illegal.

On the whole, as the matter stands before me, I cannot find that in the custody of Mirza Mahomed Saleh, her husband, the girl is not in legal custody: therefore the writ will be quashed.

Writ quashed.

Attorney for Cohen: Mr. *Leslie.*

Attorney for Mirza Mahomed Saleh: Mr. *Fink.*

PRIVY COUNCIL.

THAKUR DURRYAO SINGH (PLAINTIFF) *v.* THAKUR DARI SINGH (DEFENDANT).

* P.C. 1873 *Nov.* 4.

[On appeal from the Court of the Financial Commissioner of Oudh.]

Hindu Law—Joint Estate—Impartibility—Partition.

A custom of impartibility must be strictly proved in order to control the operation of the ordinary Hindu law of succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition.

APPEAL from a decision of the Financial Commissioner of Oudh, dated 27th August 1868, reversing on review his own judgment and the judgments of the two lower Courts.

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR L. PEEL.

(1) 5 B. L. R., 557.

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THAKUR DURRYAO SINGH v. THAKUR DARI SINGH.

The appellant sued his elder brother, the respondent, in the Revenue Courts of Khyeabad for a partition of their ancestral estate of Bonneamow. In three judgments, *viz.*, of the Assistant Settlement Officer, of the Commissioner of Khyeabad, and, in special appeal, of the Financial Commissioner of Oudh (dated respectively the 3rd July 1865, 8th of June 1866, and 26th November 1866), the appellant was held entitled to a partition as a member of a joint Hindu family. On the 27th August 1868, the Financial Commissioner, in review of his own judgment reversed those three judgments and held that the appellant was only entitled to receive suitable maintenance from the respondent.

By the facts as admitted, or as found in the first two Courts, it appeared that the talook in question had belonged for several generations to the family of the appellant and respondent. It had not been divided for six or seven generations, and the respondent pleaded a family custom against partition, which, however, he failed to establish by evidence.

In the judgment passed in review, the Financial Commissioner relied upon a case in which his predecessor Mr. Davis had decided that an unbroken prescription of six or seven generations is sufficient warrant for maintaining the family usage under which a talook had always descended to a nigh heir.

The appellant then appealed to Her Majesty in Council.

Mr. *Kay*, Q.C., and Mr. *Doyne*, for the appellant, contended that the Financial Commissioner had no jurisdiction in special appeal to reverse the findings of fact of two Courts below; that the case before Mr. Davies did not apply, since in that case a custom had been proved; that evidence of a talook having continued to be joint property for several generations is no evidence of a custom against partition; and that the onus lay on the respondent to show separate enjoyment, which onu he had failed to discharge.

Mr. *Leith*, Q.C., and Mr. *J. H. Arathoon*, for the respondent, contended that the lower Courts had found as facts that there was a custom in the family for one person to hold the kabuliat, and that for at least six generations the talook had never been

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divided, and that in consequence the decree appealed from was right.

The judgment of their LORDSHIPS was delivered by

Sir J. W. COLVILE.—Their Lordships are of opinion that this appeal must be allowed. It is an appeal against a decision of the Financial Commissioner, who, upon special appeal, overruled the finding of the two lower Courts, to the effect that the succession and enjoyment of the estate in question, and the rights of the appellant and respondent as members of a joint and undivided Hindu family, were to be regulated by the ordinary rules of the Hindu law. That the family was *joint* and undivided was indisputable; and it, therefore, lay on the respondent if he could displace the operation of the ordinary Hindu law, to do so by clear proof of the same family or other custom which varied the law. Both the lower Courts have found that no such custom was established; but that, on the contrary, there was evidence, satisfactory to them, that the estate, though engaged for in the name of one brother, was, in point of fact, held and enjoyed by the two brothers as co-sharers. There was also evidence that although there had been no partition of this estate for six or seven generations, the property of the family had in former times been the subject of partitions. The case went before the Financial Commissioner upon special appeal, and he appears to have considered that it was governed by a former decision of his prodecessor Mr. Davies by reason of which he was bound to reverse the judgment of the Courts below. The only appeal is against that reversal on special appeal.

It appears to their Lordships that the decision of Mr. Davies has not the effect which the Financial Commissioner, Colonel Barrow, attributes to it; and that it is not an authority which governs the present case. In the case before Mr. Davies, the lower Courts had found that during six or seven generations the estate then in question not only had remained undivided in fact, but had descended as an impartible estate to a single heir. That being so, Mr. Davies appears to have ruled that this proof was sufficient to raise a presumption of an unbroken family custom, which could not be rebutted by some evidence that had

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been tendered to show earlier partitions in the family, whereby a larger estate had been broken up into several smaller portions, one of which was the estate in dispute. In the present case there was no evidence of enjoyment by a single member of the family during six or seven generations; all that was found was that during that period the estate had never been divided. The fact alone cannot control the operation of the ordinary rules of Hindu law, or deprive the parties, if members of a joint and undivided family of the right to demand a partition when they are so minded.

If then the decision of Mr. Davies fails to support that which is under appeal, is there any other ground upon which the Financial Commissioner was justified in overruling on special appeal the judgment of the Lower Courts? Their Lordships can find none. It certainly cannot be said that there was no evidence to support the material findings of these Courts; for they had before them the admission of the respondent by his agent on the occasion of applying for the settlement of 1859, and his former admission on the occasion of applying for the settlement in 1856.

Their Lordships in the course of the argument intimated that it was not open to them upon such an appeal as this, as it was not open to the Financial Commissioner on special appeal, to disturb the findings of fact by the lower Courts. They may, however, state that if they could have violated the rule which they have laid down as to not giving special leave to reopen the whole case when the application is made to them for the first time at the bar, they do not think that upon the evidence on this record Mr. Leith could have succeeded in inducing them to come to a different conclusion from that arrived at by the Courts below.

Their Lordships will, therefore humbly advise Her Majesty to allow this appeal, to reverse the decision of the Financial Commissioner, and to affirm the decree of the lower Courts.

The appellant must have the costs of this appeal.

Appeal allowed.

Agent for the appellant: Mr. *W. D. H. Oehme.*

Agents for the respondent: Messrs. *Young, Jackson & Co.*