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opponent, he has received less than what he has had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity, and good conscience—there being no specific rule to the contrary—that he should recover the difference on the final adjustment of accounts. The claim is in the nature of salvage; and it is to be observed that the law relating to sales for arrears of Government revenue recognizes an equity to repayment in the case of a person who not being proprietor pays the Government revenue in good faith to protect a claim which afterwards turns out to be unfounded.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed and the decree of the High Court reversed and the decree of the Subordinate Judge restored. The respondents will pay the costs of the appeal and the costs in the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent, Saroda Mohan Roy: Messrs. *Barrow & Rogers.*

C. B.

GHASITI (UNDER GUARDIANSHIP) AND ANOTHER (DEFENDANTS) *v.* UMRAO JAN AND ANOTHER (PLAINTIFFS).

GHASITI (UNDER GUARDIANSHIP) AND ANOTHER (DEFENDANTS) *v.* JAGGU AND ANOTHER (PLAINTIFFS).

*P.C.** 1893 *June 27, July 22.*

[On appeal from the Chief Court of the Punjab.]

Mahomedan Law—Custom—Succession to property among Kanchans—Practices not recognizable by law as customs—Immoral customs.

Among Mahomedan Kanchans, practices relating to their holding and inheritance of property, having an immoral tendency, were not recognizable as customs, or enforceable as law. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law.

Where property left by a female Kanchani, deceased, was claimed by her legitimate kindred, it was *held* that an "adoption," so called, in conformity with those practices, had not operated to separate her from the family in which she was born. The mode in which her property had been acquired

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

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was not the subject of the present question, which was only concerned with the right of personal succession to it; and that property was held to be distributable according to the rules of the Mahomedan law governing inheritance.

APPEALS from two decrees (27th June 1888) of the Chief Court, the first affirming a decree (15th May 1885), and the other reversing a decree of the same date, of the District Judge of Delhi.

These were two suits for possession of fractional shares of property valued at Rs. 20,000, left by Bando Jan, a resident of Delhi, one of the people called Kanchans who died on the 22nd August 1879. One of the suits was brought by two of her surviving sisters, and the second by her two brothers, of legitimate birth. In the suit which the sisters instituted in 1882 the two brothers joined at first; but the latter afterwards obtaining leave to sue, abandoned it; and commenced the other suit in July 1884. Nanhu Jan, one of the sisters of the deceased, who had obtained possession of her property, was a defendant in both suits, and Ghasiti also was a co-defendant, the latter being alleged to have been adopted by the late Bando Jan, who herself was said to have been adopted by Dildara, deceased, also of the Kanchan class, and a dancing girl of Delhi, whose property had come to Bando Jan.

The difference between the claim of the males and that of the females was that the former claimed under the Mahomedan law, while the latter claimed according to an alleged custom of the Kanchans. The relationship of the parties appears in their Lordships' judgment, where all the facts are stated.

Another sister named Banno Jan, who had sued for her share in 1880, had obtained a decree for it. The objection was taken below that the withdrawal of the brothers from the suit of 1882, having been made without the consent of the sisters, their co-plaintiffs in that suit, a second suit by them could not be allowed consistently with the last clause in section 373, Civil Procedure Code. The male plaintiffs claimed each one-fourth, and the females each one-sixth of the estate, and as to the claim of the latter, in the event of no valid custom being established, the rule of Mahomedan law would become applicable in virtue of section 5, clause 2, of the Punjab Laws' Act (IV of 1872).

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The defence in both suits was that neither the brothers nor the sisters were heirs of Bando Jan, for the reason that she had been "adopted" by Dildara, years before her death, and had thus been transferred into another family. It was also alleged for the defence that brothers, by the rules of the Kanchan people, could not inherit where there were sisters; and, again, it was contended that if the plaintiffs could have been considered heirs, they would have been excluded by Ghasiti, who had been "adopted" by Bando Jan. Lastly, even failing the adoption, Ghasiti claimed under a will alleged to have been executed by Bando Jan. That Bando Jan was taken as a daughter to Dildara in her lifetime, and had received her estate in her death, was not disputed in the case.

The District Judge was of opinion that the alleged customary rule of succession among the Kanchans was bad (sections 5 and 6 of Act IV of 1872), and he held that treating the property as Bando Jan's, the Court must go to the Mahomedan law to find her heirs. These were her two brothers and her four sisters. Each of the sisters was entitled to one-eighth, and each of the brothers to one-fourth by that law. But the suit of the brothers was dismissed by the District Judge on the ground that it had been barred by their withdrawal from the first suit, in which they were plaintiffs with their sisters, without the consent of the latter to their change of claim.

Three appeals were filed in the Chief Court from this decision. In one appeal the male plaintiffs contended that the District Judge had erred in holding their suit barred; in another, the defendants appealed from the decree obtained by the sisters; in a third, Amir Jan, one of the latter, cross-appealed, claiming one-sixth instead of one-eighth.

These appeals were disposed of in a single judgment by the Chief Court which upheld the judgment of the District Judge in the suit brought by the female plaintiffs, dismissing Amir Jan's cross-appeal. But the Chief Court allowed the appeal of the brothers, as there was no real reason why they should not have had the decree to which the District Judge would have held them entitled, had they not separated their suit from that of their sisters. Accordingly, they received one-fourth each. Thus the

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Chief Court disallowed the defences based on the alleged custom of the Kanchans, on the alleged adoptions, and on the alleged will.

Nanhu Jan and Ghasiti joined in appeals from the decrees in both suits.

Mr. *T. H. Cowie*, *Q.C.*, and Mr. *C. W. Arathoon*, for the appellants, argued that the correct decision would have been that the plaintiffs had not proved their title to the property which the sisters and the brothers respectively claimed, and claimed on different, if not contradictory, grounds. There had been an assumption that the Mahomedan law was applicable; and whether it could or could not be maintained that valid customs had been proved, the evidence showed that the parties to these suits had abjured that law if they had ever been bound by it. The giving double shares to the male plaintiffs was only to be supported on the theory that the Mahomedan law was applicable. The order of the District Judge, allowing withdrawal from the sisters' suit by the brothers without the consent of the former previously obtained, and the subsequent increase of the shares claimed by the latter, was irregular and hardly authorized by the section 373, Civil Procedure Code. In the course of the argument *Mathura Naikin* v. *Esu Naikin* (1) was referred to.

The respondents did not appear in either appeal.

Afterwards, on the 22nd July, their Lordships' judgment was delivered by

LORD HOBHOUSE:—These suits relate to the inheritance of a woman named Bando Jan who died in August 1879, leaving a substantial property. Her father Ali Bakhsh and his children professed the Mahomedan religion. She had no issue and she survived her parents. Her heirs according to Mahomedan law were her two brothers, Jaggu and Sannu, who are respondents in the second appeal, and her four sisters, Amir Jan (now represented by Umrao Jan) and Ilahi Jan, who are respondents in the first appeal, Nanhu Jan who is one of the appellants in both appeals, and Banno Jan; and as between them the inheritance would be divided into eight shares, each brother taking two shares and each sister one.

(1) I. L. R., 4 Bom., 545.

Banno brought a suit and obtained a decree in February 1880 for a one-eighth share; and she is no party to the present litigation.

In the year 1882 the two brothers Jaggu and Sannu, the two sisters Amir and Ilahi, and a woman called Imaman, sued the remaining sister Nanhu who had got into possession of the property. They alleged that, Banno being satisfied, the remaining property was divisible into six shares, of which Nanhu was entitled to one, and each of the five plaintiffs to one. They made out their claim as follows. All the parties to the dispute belong to the people (in the translated plaint it is called the tribe) of Kanchans. In that tribe the business of brothel-keeping and prostitution is carried on by families or communities who are recruited by adoption. Bando left her own family to be adopted by one Dildara, who was the head of another establishment of the same kind. She succeeded to Dildara's property; and as Dildara was dead, and her brothel had ceased to have any members except Bando herself, on Bando's death her estate was distributable according to the custom of the Kanchans, which, it was alleged, would carry it to the family heirs of Bando, and to Imaman, the sister of Dildara, in equal shares. It is obvious that such a claim is full of difficulty and apparent inconsistencies in itself, but it was made.

After a while the brothers reconsidered their position. They determined to assert a claim under the common law of Mahomedans, by which they would take larger shares than under the custom of Kanchans. Thus their interests became adverse to those of their sisters, and they could no longer be co-plaintiffs. They procured orders under which they were made defendants instead of plaintiffs. And they instituted a suit of their own, to enforce their claim against their three sisters. This is the second suit in which an appeal is brought. These matters of procedure have no importance except for the reason that the institution of the brothers' suit is objected to as irregular. The Chief Court have held it to be regular, and their Lordships have declined to hear the appeal on this point argued. The decree complained of can be made as properly in the suit where the brothers are defendants as in that where they are plaintiffs, and the objection is based on a technicality without any practical bearing.

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The substantial defences of Nanhu were, first, that Ghasiti was the adopted daughter and also the legatee of Bando; and secondly, that as Bando had been adopted by Dildara, no right of inheritance could devolve on the plaintiffs either by Mahomedan law or by custom. The allegations respecting Ghasiti were negatived by both Courts; so that the only questions which remained for them were whether the plaintiffs could claim any inheritance, and if so, in what shares. Imaman was discharged from the suit, and died before the hearing. The contest, therefore, was between the two sisters claiming customary shares, the two brothers claiming shares by common law, and the third sister contending that none of her father's family had any claim at all.

It is quite clear that there was no adoption under any general Indian law. Adoption is not known to the general law of Mahomedans, and adoption of girls is not known to the general law of Hindus. If there was adoption, it could only have been under some local, tribal, or family custom, which must be proved by those who allege it. Accordingly, a great deal of evidence was given to prove the customs of the Kanchans. The two Courts are in accord as to the result, a portion of which their Lordships will now re-state.

It appears that each family or community live a coenobitical, quasi-corporate, life in what the learned Judges call the family brothels. All the members, including males, are entitled to food and raiment from the business, the males living a life of idleness at the expense of the females. There is no such thing as separate or individual succession upon death. All the members succeed jointly. No division or partition is allowed, for that would break up the establishments, and the witnesses say that the lamp should be kept burning in the house. A member of a family brothel who leaves it does so with only her clothes on her back and nothing more. The body is recruited by adoption. A girl is brought in as the adopted daughter of a female member of the institution, and the girl thus adopted is regarded as having ceased to belong to her own family.

That Bando was adopted by Dildara according to the custom, there seems to be no doubt, if indeed there was any dispute. Whether she thereby acquired a right of inheritance according to the custom is a question which does not arise in this suit. She

joined Dildara's establishment, and on Dildara's death became its head, took the property there, and increased it by her own earnings. But the suit relates entirely to the succession from Bando; it raises no question as to the succession from Dildara to Bando, nor has anybody made any claim adverse to Bando in respect of property belonging to Dildara, or in respect of any property possessed by Bando at her death. The question is how that property is to devolve, and how Bando got it is immaterial.

The two plaintiff sisters contend that Bando held the property as head of the brothel into which she had been adopted. By what process they claim that it passed to them and the other plaintiffs is, as above intimated, not easy to understand. The defendant sister is more logical. Agreeing that Bando was adopted by Dildara, she says that the adoption severed Bando completely from her own natural family. That certainly is the effect of adoption by Hindu law, and the evidence shows that it is the same according to Kanchan custom. A distinct issue on the point was settled and decided by the first Court.

On this issue the District Judge found as follows:—"Upon the custom as above stated no question can arise as to Bando Jan having ceased to be a member of her natural family by being adopted by Dildara. The adoption (if proved) really was for the purpose of succession to Dildara's family brothel, and in this way Bando Jan ceased to be a member of the brothel of her natural family, and ceased to have any claim therein." But he stated his view of the law to be that all these rules and customs of the Kanchans aim at the continuance of prostitution as a family business, that they have a distinctly immoral tendency, and should not be enforced in Courts of Justice. He therefore held that the whole transaction was null and void, that there was no severance of Bando from her family, and that her property must be distributed according to Mahomedan law.

The Chief Court expressly abstain from pronouncing any opinion on the question whether the adoption of a girl by a prostitute at the head of a brothel gives that girl any legal rights in the property of the institution. They sum up the case thus:—"As to the custom of inheritance, there is none applicable. It is clear that Bando Jan left the family brothel of Ali Bakhsh, and no question arises as to succession to Bando Jan as a member of that institution.

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She was the last survivor of the brothel of which she became a member under Dildara, and no question arises of succession to her as a member of that brothel."

Their Lordships are disposed to think that is a sound conclusion; and if so, it would suffice to settle the controversy between the plaintiff sisters and their brothers. But it does not cover the whole ground. If the custom is valid, what answer is there to the defendant sister's contention that Bando's natural family could not inherit from her after her adoption by Dildara?

Their Lordships have no hesitation in affirming the law as laid down by the District Judge. In the case of Hindus there are stronger grounds for maintaining that practices of prostitution are related to worship in the temples, and meet with countenance from the law. But even in the case of Hindus great difficulties have been felt by Courts of Justice in admitting the validity of transactions intended for the furtherance of prostitution. See the case of *Mathura Naikin* v. *Esu Naikin* (1) and the authorities there referred to. And as regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws.

Mr. Baillie's valuable Digest of Mahomedan Law opens thus:—"The intercourse of a man with a woman who is neither his wife nor his slave is unlawful, and prohibited absolutely, When there is neither the reality nor the semblance of either of these relations between the parties, their intercourse is termed *zina*, and subjects them both to *hudd*, or a specific punishment for violating the laws of Almighty God." The statement is quite justified by the authority of the Hedaya, Book VII., caps. 1, 2, and 3, according to which the practice of *zina* is held up to reprobation, and is punishable in ways which would now be considered as savage and cruel. Indeed the most venerable of all authorities, the Koran itself, though not going so much into detail as the Hedaya, forbids harlotry under severe penalties, see caps. 4 and 24 of Sale's Translation. It seems to their Lordships impossible to say that such customs as are proved in this case to exist among the Kanchans are not contrary to the policy of the great religious community to which the Courts have found that all the parties belong.

(1) I. L. R., 4 Bom., 545.

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A minor point in the case relates to certain moveable property which appears to have been stolen after the commencement of litigation by Banno. The Courts below have concurred in thinking that Nanhu had the property in her possession, and therefore is responsible for the loss, and their Lordships consider that it would not be proper to disturb concurrent decisions on such a point. The result is that both appeals should be dismissed, and their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

MAHOMED RIASAT ALI (DEFENDANT) *v.* HASIN BANU (PLAINTIFF).

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

*P.C.** 1893 *June* 28 *and July* 22.

Mahomedan law—Succession of a Mahomedan widow by local custom to a life-interest in the estate of her husband—Cause of action in her suit for dower distinguished from that in her suit for such estate—Civil Procedure Code (Act XIV of 1882,) *s.* 43—*Limitation Act (XV of* 1877), *schedule II, articles* 49, 120, 123.

A decree in a suit brought by a Mahomedan widow against the brother of her deceased husband, declaring her right to possess for life the estate of the latter in accordance with a proved local custom, with an order for possession, was affirmed. A decree in a suit previously brought by the widow against the same defendant for her dower, gave no occasion for the application of section 43 of the Civil Procedure Code, having been made upon a cause of action distinct from that on which the present suit was founded. *Raja of Pittapur* v. *Venkata Mahipati Surya* (1) referred to, and followed.

Article 120, schedule II, Limitation Act, XV of 1877, was held applicable to this suit, which was not a suit for a distributive share of property within the meaning of article 123 of the same; and was not a suit for specific moveables wrongly taken within the meaning of article 49, nor was any other article of schedule II applicable.

APPEAL from a decree (26th March 1889) of the Judicial Commissioner, affirming, with a variation, a decree (27th February 1887) of the District Judge of Lucknow.

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

(1) I. L. R., 8 Mad., 520; L. R., 12 I. A., 119.