PRIVY COUNCIL.

(79)

P. C.* 1879 *March* 17.

SAYAD MIR UJMUDDIN KHAN, LEGAL REPRESENTATIVE OF FATMA-UL-NISSA BEGAM, DECEASED, (PLAINTIFF), *v.* ZIA-UL-NISSA BEGAM AND RAHIM-UL-NISSA BEGAM (DEFENDANTS).

Two consolidated appeals from the High Court of Judicature at Bombay.

Muhammadan law—Willa—Succession—Emancipated slave—Act V of 1843.

Assuming that by the *Willa* rule of the Muhammadan law, the heirs of the master who emancipates a slave are entitled to the property of which the emancipated slave dies possessed to the exclusion of his natural heirs, the effect of section 3, Act V of 1843, which enacts "that no person who may have acquired property by inheritance shall be dispossessed or prevented from taking possession thereof on the ground that the person from whom the property may have been derived was a slave," is to abrogate the rule of the Muhammadan law, and to secure the succession of the heirs of the emancipated slave, as if he had never been a slave.

The provisions of the Act apply not only where the person whose property is claimed has been emancipated after the passing of the Act, but also where he has been emancipated before its passing.

The exclusion of the nature heirs of an emancipated slave in favour of the heirs of his emancipator, is a disability arising out of the *status* of slavery similar in its nature to the exclusion, under the Muhammadan law, of the natural heirs of an unemancipated slave by a master or his heirs and since the general scope and object of Act V of 1843 is to remove all such disabilities, the Civil Courts are bound, in construing it, to give it the widest remedial application which its language permits, and cannot, consequently, limit it to those cases only in which the person from whom property is inherited was a slave at the time of his death, when the words of the statute allow of its being applied to the property of any one who had at any time been a slave.

THE suits, in which these appeals are preferred, were brought by one Fatma-ul-Nissa Begam suing as sole heiress of her brother Moinuddin Bakshi. The first suit was to recover certain immoveable and moveable estate of one Amir-ul-Nissa Begam, who died on the 10th November 1857 possessed thereof. The second suit was to recover a sum of money in cash and Company's paper which had remained in the hands of the Government agent at Surat after the death of the said Amir-ul-Nissa pending the settlement of a claim made by her, which was not finally disposed of until some years after her death.

* Present:—Sir J. W. Colvile, Sir B. J. Phillimore, and Sir M. E. Smith.

Amir-ul-Nissa was the widow of Afzaluddin Khan, titular Nawab of Surat, who died in 1842, and derived her right to the properties in suit as one of his widows. Moinuddin Bakshi was, at the time of Amir-ul Nissa's death, the nearest male heir of Nawab Afzaluddin. The defendants in these suits, who are the respondents in the present appeals, were the granddaughters of Amir-ul-Nissa, being the daughters of her deceased daughter Bakhtiar-ul-Nissa Begam, and the plaintiff's contention was that as Amir-ul-Nissa prior to her marriage with the Nawab, which took her place in the year 1825, had been his slave girl, and had been emancipated by him, not the respondents, who were the granddaughters of an emancipated slave, but herself, as, representing the next male heir of the emancipator, was entitled, according to the Muhammadan law, to succeed on the death of Amir-ul-Nissa to the properties in suit.

A number of questions arose in the trial of the suits in the Courts below, but of these it is enough to notice the two following as having been made the subject of argument in the present appeal:—

1. As to whether Amir-ul-Nissa was or was not an emancipated slave, and, assuming her to be so, what is the Muhammadan law governing the descent of her estate.

2. As to the effect of Act V of 1843, entitled "An Act for declaring and amending the law regarding the condition of slavery within the territories of the East India Company," on the *status* of Amir-ul-Nissa and the descent of her estate, assuming her to have been an emancipated slave.

On these points the decision of the Judge of Surat was that Amir-ul-Nissa was not proved to have been a slave, and, assuming that she was, that the effect of Act V of 1843 was to render the plaintiff's claim inadmissible. This last view was substantially confirmed by the High Court of Bombay, which, however, declined to give any opinion on the question as to whether Amir-ul-Nissa had been a slave. The material passages in the judgments of the Indian Courts and a statement of the facts of the case will be found in the judgment of their Lordships of the Privy Counsel.

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The plantiff's suit having been dismissed and she having died the present appeal was brought by Sayad Mir Ujmuddin Khan her legal personal representative.

Mr. *Scoble*, Q. C., and Mr. *Doyne* for the appellant.—The High Court, having come to no finding on the question as to whether Amir-ul-Nissa was a slave or not, assume for the purposes of the argument that she was, and have held that the effect of Act V 1843 is to alter the Muhammadan law, which formerly governed the descent of the estate of an emancipated slave, and gave it to the emancipator, or the heirs of the emancipator, instead of to the heirs of the body of the slave, and to substitute for that law the ordinary Muhammadan law of descent applicable for the estate of one who had never been a slave. We contend that, under the Muhammadan law, the plaintiff was entitled to succeed to the property she claimed, and that in a matter of this nature the Act of 1843 in no way interferes with the operation of the Muhammadan law.

As to the emancipator's right, under the Muhammadan law, to the succession of his emancipated slaves, see Hedaya (Hamilton's translation, Vol. III., pp. 436, 437, 438, 444), Book XXXIII 'Of *Willa*'; Baillie's Digest of Muhammadan Law (Hanifua), chap. vi 'Of *Wula*' Shamachurn Sirkar in 'Tagore Law Lectures, 1873,' Vol. I, pp. 89-90.

As regards Act V of 1843, the intention and effect of that Act are not retrospective, but merely to remove personal disabilities arising from the condition of slavery from the date of the passing of that Act. The Act does not alter the Muhammadan law of succession applicable to the circumstances of this case. Where an emancipation has taken place prior to the passing of the Act, an interest is acquired by the emancipator and his heirs in the inheritance of the slave who is emancipated, which the Act cannot touch. Under the Muhammadan law the rights of the heir can be defeated only in one way: *Khajooroonnissa* v. *Roushan Johan*.(1)

[Sir ROBERT PHILLIMORE.—That case seems conclusive against there being a vested interest. The interest of the heir is one

(1) L. R. 2 Calc. 184 at p. 196. S. C. L. R. 3 Ind. 2, App. 391 at p. 307.

that may be defeated ; not one that cannot be interfered with.] The rights must be taken as they existed at the Nawab's death, and since Amir-ul-Nissa was not a slave at the time when the Act passed, she is not within its purview. The Act does not extend to cases where the slave had been emancipated. Emancipation, in the view of the Muhammadan law, is considered meritorious, and the master who gives up the advantage he derives from the earnings of his slave by emancipating him is entitled to compensation under the rule of inheritance which preserves the right of succession to the master. The Act was not meant to affect the general Muhammadan law of inheritance, but to deal with those persons only who lived and died slaves. [Sir MONTAGUE SMITH : —The Act applies to those who acquire property by inheritance. Do not the defendants acquire this property by inheritance ?] Not under the Muhammadan law. Under that there is a preferable class of heirs. The emancipator and his male heir exclude them. The present case does not seem to have been provided for in the Act, and the rights of emancipated slaves probably were not in the minds of those who framed it. Macnaghten's Principles of Muhammadan Law, chap. 9, " Of Slavery," was also referred to.

Mr. *Leith*, Q.C., and Mr. *J. D. Mayne*, who appeared for the respondents, were not called.

Their Lordships' judgment was delivered by

SIR JAMES COLVILE.—The question in this appeal regards the succession to one Amir-ul-Nissa Begam who died in 1857. The short history of the case in this : Afzaluddin, who was the last recognized Nawab of Surat, died on the 8th August 1842. He left two wives, Amir-ul-Nissa Begam and Padsha Begam. He also left a daughter, Bakhtiar-ul-Nissa Begam, whom we may take, for the purpose of this decision, to have been born on the 13th March 1821, some four years before the marriage of Afzaluddin with Amir-ul-Nissa Begam. Bakhtiar-ul-Nissa Begam had been married in her father's life-time to Mir Jafir Aly, and the issue of that marriage was two daughters, the respondents. Immediately after the death of the Nawab, in 1842 there arose considerable discussion regarding the right of succession to him, and there was a contest before one of the Government officers, Mr. Elliott,

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on that subject. No final decision, however, appears to have been come to until after the passing of Act XVIII of 1848, which placed the administration of the estate of the late Nawab at the disposal of the Governor of Bombay in Council, leaving to them to determine who were entitled to succeed. Their course of action under that Act was to refer the matters in dispute, in the first instance, to Mr. Frere, the then agent in Surat. A question as to the *status* of Amir-ul-Nissa Begam was raised before him, it being alleged that she had been a purchased slave of Afzaluddin, that while she was in that state her daughter Bakhtiar-ul-Nissa Begam was born, and that four years after the birth of Bakhtiar-ul-Nissa the Nawab, having shortly before the ceremony emancipated her, had married her. This case was then put forward in order to meet the question raised whether, according to Muhammadan law, Bakhtiar-ul-Nissa Begam could take any share in her father's estate. As a daughter of a concubine who was a slave girl, she would have been entitled to do so, whereas as the illegitimate daughter of the Nawab by a free woman she might not be. She, therefore, and her husband, who acted for her, were then interested in making out that Amir-ul-Nissa Begam had been a slave; whilst the residuaries, who are now represented by the plaintiff and appellant, were interested in maintaining the contrary. Mr. Frere, without deciding anything as to the *status* of Amir-ul-Nissa Begam, but proceeding very much upon the special power that belonged to the Nawab, and the acts of recognition, on his part, of Bakhtiar-ul-Nissa Begam as his daughter and Amir-ul-Nissa as his wife, reported that the succession was to be divided as follows, viz., that one-sixteenth was to go to Amir-ul-Nissa Begam; another sixteenth, making up the eighth to which the widows are entitled under Muhammadan law, was to go to Padsha Begam, the other widow; that Bakhtiar-ul-Nissa Begam was to take the share to which she would be entitled as legitimate daughter, namely, eight-sixteenths or one-half; and that the remaining six-sixteenths were to be divided between Mir Moinuddin Khan and his brother Mir Kamruddin, two distant relatives of the Nawab, who filled the character of residuaries according to Muhammadan law. It is, of course, impossible to go behind the finding of Mr. Frere, which

was adopted and confirmed by the Governor in Council, and must be assumed to have determined, once and for all, the succession of Afzaluddin. Bakhtiar-ul Nissa Begam died in 1845 in her mother's life-time. Amir-ul-Nissa did not died until 1857, and it is conceded that, but for the question that has been raised in this suit, the respondents, her to granddaughters, would be her only ascertainable heirs. Kamruddin also died in the life-time of Amir-ul-Nissa Begum.

In this state of things, and a good many years after the death of Amir-ul-Nissa Begam, the present suits were instituted by one Fatma-ul-Nissa Begam, who claimed to be the sister and heirsess of Moinuddin, who, though he had survived Amir-ul-Nissa Begam, was then dead; and the little put forward was that according to the law of Willa, which has been very ably and clearly expounded at the bar, the person entitled to succeed and taken the property of which Amir-ul-Nissa Begam died possessed, or to which she was entitled, was Moinuddin, as the male heir of Afzaluddin, who was the emancipator of Amir-ul-Nissa Begam, to the disherison of her own natural heirs.

A number of issue were settled in the suit, with many of which it is unnecessary to deal. The principal one, and that upon which both the Courts below have decided against the plaintiff in the suit, and in favour of the respondents, was that by Act V of 1843 this right, which was the foundation of the claim of Moinuddin, or of his representative Fatma, was taken away, and it is to that question that their Lordships propose on the present occasion to address themselves. In order to try that question they must, of course, assume that the *status* of Amir-ul-Nissa Begam was that which the plaintiff represented it to have been, namely, that having been originally a Rajput girl who had been converted to Muhammadanism, she was brought into the zanana of the Nawab as his purchased slave; that she was the mother, whilst still a slave, of Bakhtiar-ul-Nissa by him; and that on the day previous to the celebration of the *nikah* marriage, by which she became his wife, he had emancipated her. It must also be assumed that the Willa rule of the Muhammadan law is such as Mr. Scoble has shown it to be upon the authorities which he cited. The question now to be decided is, whether the

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Act in question prevents, the application of that rule of law, and entitles those parties, who but for it would have succeeded to their grandmother as her natural heirs, to take the inheritance. Each of the Courts below has adopted a view of the operation of the Act favourable to the respondents, though not precisely upon the some grounds. The Subordinate Judge says: "This Act was passed to declare and amend the law regarding the condition of slavery within the territories of the East India Company; and section 3 runs as follows:—No person who may have acquired property by his own industry or by inheritance shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person or that the person from whom the property may have been derived was a slave.' Now, in the present case the plaintiff alleges that, had Amir-nl-Nissa been a free woman, the defendants would have been her heirs, but because she was a slave her property goes to her master's relatives. The section appears to me clearly to apply to such a condition." He then discusses Mr. Baillie's view of the effect of the statute as expressed in Book IV of his Digest of Muhammadan Law, and refers to the absence of any discussion on the subject before Mr. Frere, when, indeed, the question had not arisen, and ends by saying: " I think, then, that the plea that Amir-ul-Nissa's property must go to her husband's relations instead of to her own grandchildren, because, though subsequently emancipated and married, she was originally a slave, is one which the Court cannot entertation, and that the claim is on this ground inadmissible."

The High Court say on this subject: "We think that Act V of 1843 deprived the plaintiff of any right to bring this suit. Amir-ul-Nissa died in 1857 when that Act was in full force. We think that the effect of that Act was to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the *status* of slavery. The right claimed by the plaintiff rests solely upon the alleged fact that Amir-ul-Nissa had been at one time the slave of the late Nawab. He is said by the plaintiff to have enfranchised Amir-ul-Nissa; and on the authority of 1 Baillie's Digest, 386, 387, and 3 Hedaya, 444, 445, it is contended that he, as her emanci-

pator, or, he being dead, his nearest male relative, or, in default of him, that male relatives heir would be her heir, and that neither her daughter nor the defendants, who are that daughter's daughters, are so. That right, if it ever existed, is, in our opinion, one arising out of an alleged property of the late Nawab in Amir-ul-Nissa's person and services before he enfranchised her, and as such is one of the rights which every Civil Court in British India is prohibited by section 2 of Act V of 1843 from enforcing. We are not prepared to say whether this case would not also come within the prohibition in section 3 of the same enactment."

The High Court then proceeded mainly upon the second section and the Subordinate Judge upon the third section of the Act. In their Lordships' opinion both sections point to the conclusion that it was the general intention of the Legislature, in passing this Act, to relieve all persons then subject thereto from all the disabilities arising out of the *status* of slavery; and without saying whether the second section of the Act is sufficient of itself to dispose of the claim in this suit, they have come to the conclusion that the third section, at least, has that effect.

The section runs thus: "And it is hereby declared and enacted, that no person who may have acquired property by 'inheritance' shall be dispossessed of such property or prevented from taking possession thereof, on the ground that such person from whom the property may have been derived was a slave." Various arguments have been addressed to their Lordships as to the non-applicability of this enactment to the present case. It was first said that to apply it to this case would be to give a restrospective effect to the Act, in violation of the well-known rule of construction. Their Lordships cannot accede to that argument. The Act was in force at the time of the death of Amir-ul-Nissa; and the question—who is entitled to succeed to her property—is determinable by the law as it stood when the succession opened. Their Lordships cannot recognize any vested interest said to have been acquired previous to the passing of the Act by the unascertainad persons who might at her death be the then residuary heirs of her husband; or admit that her husband, by the act of emancipation, acquired a vested right which the

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statute could not, except by express and retrospective words, take away. One of his residuary heirs died before the widow, and it is not contended that any interest vested in him. The whole right, if any, which can be asserted under the *Willa* rule of law is treated as having been in Moinuddin when Amir-ul-Nissa died. If he, too, had died in her life-time, the right could not have been asserted by his sister and heiress, the plaintiff in the suits. It would have been in some more distant male relative of the Nawab.

It was further contended that the respondents cannot claim the benefit of the statute, inasmuch as they are not persons "who may have acquired property by inheritance," and that the words are to be construed by the Muhammadan law, which gives the property to a preferable class of heirs, viz., the heirs of the husband, the emancipator. This argument seems to their Lordships to reduce the clause to a nullity. They conceive that the words must be taken to include any persons who would have acquired a title to property by right of inheritance, but for some obstacle arising out of the *status* of slavery.

It was argued by Mr. Doyne that in all probability the Legislature had not its mind directed to this somewhat obscure branch of Muhammadan law, and that the section must be taken to apply only to cases in which the person from whom the property is inherited was at the time of his death a slave; but if the third section were to be taken subject to the old Muhammadan law, the master in such a case would be entitled to take the property of the slave; and the son of the slave or the other natural heirs of the slave could not be said to be persons "who may have acquires property by inheritance." The clause upon this construction of it would have no meaning or operation.

Their Lordships cannot accede to the general proposition of Mr. Doyne, that the operation of the statute or of this particular section in it is to be confined to the property of persons who at the time of their death were slaves. They are of opinion that in construing this remedial statutes they ought to give to it the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be

remedied, and falls within the language of the enactment. They find it impossible to say that this is not the case in the present instance.

They have already intimated their opinion that the general scope and object of the statute was to remove all the disabilities arising out of the *status* of slavery. The rule of *Willa*, whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator, was not less such a disability than the rule of law whereby the natural heirs of an unemancipated slave were excluded by his master or his heirs. As to the language of the Act, the question which arises upon the first words of the section has been already dealt with; but a further argument has been founded upon the words "that the person from whom the property may be derived *was a slave*." The words are not "was a slave at the time of his or her death," and the terms may well be taken to apply to any person who had at any time been a slave. Putting this interpretation upon the statute, their Lordships think that it is sufficient to dispose of this appeal without going into any of the other questions raised either of law or of fact, and they will therefore humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal with costs.

Appellant's agent.—Messrs. *West, King, Adams & Co.*

Respondents' agent.—Messrs. *Gregory, Rowcliffes and Rawle.*

APPELLATE CIVIL.

(80)

Before Mr. JusticeM. Melvil and Mr. Justice Kemball.

GURACHARYA (OPPENENT), APPELLANT, *v.* SVAMIRAYACHARYA (APPLICANT), RESPONDANT,*

July 9.

Administration—Guardianship—Undivided Hindu family—Minors Act XX of 1864.

Where a member of a Hindu family dies, leaving to his children only his undivided share in the joint family property, administration cannot be granted under, Act XX of 1864, nor, under such circumstances, can a guardan of the persons of the minor children be appointed; but if the deceased has left any separate property, administration of such property may be granted, and a guardian may be properly appointed at the same time.

* Appeal No. 1 of 1879 under the Minors Act.