

1895.

DINSHAW
NOWROJI
BODE
v.
NOWROJI
NASARWANJI
BODE.

dismiss this suit without prejudice to any question as to the intended application by the trustees of the trust funds already accumulated in their hands.

Suit dismissed.

Attorneys for plaintiff and defendants:—Messrs. *Nanu and Hormasji.*

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

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September 27.

GIRDHARLAL HARGOVANDA'S (ORIGINAL PLAINTIFF), APPLICANT, v.
LALLU JAGJIVAN (ORIGINAL DEFENDANT), OPPONENT.*

Practice—Procedure—Plaint, presentation of—Return of plaint for presentation to proper Court—Jurisdiction—High Court, power of, to interfere under Regulation II of 1827, Sec. 5, Cl. 2.†

A Second Class Subordinate Judge returned a plaint for presentation in the proper Court on the ground that the subject-matter exceeded his pecuniary jurisdiction. The First Class Subordinate Judge to whom the plaint was then presented, also returned it for presentation in the proper Court on the ground that the subject-matter was below his pecuniary jurisdiction. The plaintiff thereupon presented the plaint to the successor of the Second Class Subordinate Judge who had originally returned the plaint. That Judge held that he had no jurisdiction to review the order passed by his predecessor. The plaintiff appealed, and the Judge rejected the appeal, holding that no appeal lay against an order refusing to grant a review.

The plaintiff applied to the High Court under its extraordinary jurisdiction.

Held, that the case was one in which the High Court ought to interfere under clause 2, section 5 of Regulation II of 1827.

The order of the Second Class Subordinate Judge was set aside with a direction that he should admit the plaint as of the date of its original presentation.

APPLICATION under the High Court's extraordinary jurisdiction (section 5, clause 2, of Regulation II of 1827) against the order of Gilmour McCorkell, District Judge of Ahmedabad.

*The applicant presented a plaint to the Second Class Subordinate Judge of Viramgám, who on the 31st August, 1892, returned

* Application No. 51 of 1894 under the extraordinary jurisdiction.

† Section 5, clause 2, of Regulation II of 1827:—

Second.—It shall be competent to the said Court (Sudder Dewanny Adawlut) to call for the proceedings of any Subordinate Civil Court, and to issue such orders thereon as the case may require.

it for presentation in the proper Court, on the ground that the value of the subject-matter in dispute being more than Rs. 5,000, the case was beyond his pecuniary jurisdiction.

The applicant then presented the plaint to the First Class Subordinate Judge of Ahmedabad. That Judge also returned it for presentation in the proper Court, finding that the value of the subject-matter was less than Rs. 5,000, and, therefore, not within his pecuniary jurisdiction.

The applicant again presented the plaint to the Second Class Subordinate Judge of Viramgám, who declined to entertain it on the ground that he had no authority to review the decision passed by his predecessor on the 31st August, 1892.

The applicant then appealed to the District Judge, praying that either the First Class Subordinate Judge or the Second Class Subordinate Judge should be directed to accept the plaint. The Judge rejected the appeal on the ground that the order refusing a review of judgment was not appealable.

The applicant now applied to the High Court under its extraordinary jurisdiction, contending that the Judge should have heard the appeal and that he should have directed the Subordinate Judge to accept the plaint. A *rule nisi* was granted calling on the defendant in the suit to show cause why the order of the Judge should not be set aside.

Nagindás T. Marphatia appeared for the applicant in support of the rule:—Either the Second Class Subordinate Judge or the First Class Subordinate Judge has jurisdiction to accept the plaint. We contend that the Second Class Subordinate Judge was wrong in, holding that he had no jurisdiction. What determines the jurisdiction of the Court is the value of the claim as mentioned in the plaint and not the actual value of the property.

Goverdhanrám M. Tripathi appeared for the opponent to show cause:—The present application under this Court's extraordinary jurisdiction cannot be entertained, because the order of the Second Class Subordinate Judge returning the plaint for presentation in the proper Court was appealable and the applicant ought to have appealed to the District Court and then come up to the High Court in second appeal. So also when the First Class

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Subordinate Judge returned the plaint, the applicant ought to have appealed to this Court. Those orders being appealable, the applicant cannot seek redress under the extraordinary jurisdiction. This application is against the order of the District Judge, which is perfectly correct. The original order of the Second Class Subordinate Judge was apparently wrong, but the plaintiff ought to have sought redress in a proper form.

[FULTON, J., referred to section 5, clause 2, of Regulation II of 1827.]

That section has been repealed by Act XII of 1873, schedule, Part VII.

[FULTON, J., referred to *Ganesh v. Rámchandra*(1).]

There have been several cases in which that Regulation was referred to—*Mahádáji v. Sonu*(2); *Shiva Nátháji v. Joma Kashinath*(3); *Satu v. Shivrambhat*(4). It seems that the repealing Act XII of 1873 was not brought to the notice of the Court in those cases.

FULTON, J.:—In this case the plaint was originally presented to the Second Class Subordinate Judge of Viramgám, who, thinking that the subject-matter exceeded Rs. 5,000, returned it for presentation in the proper Court. The plaintiff then went to the First Class Subordinate Judge, who, finding that the subject-matter was less than Rs. 5,000, again returned it for presentation to the proper Court. Thereupon the plaintiff went back to the Subordinate Court at Viramgám, where there was a new Subordinate Judge, who was of opinion that he could not review his predecessor's decision. Upon this an appeal was made to the District Court against the final order of the Viramgám Court, but was rejected by the Judge, who held that no appeal lay against an order rejecting an application for review, and at the same time advised the plaintiff to apply to the High Court.

We think it would have been simpler if the District Judge had recommended the conversion of the appeal into one against the original order of the Second Class Subordinate Judge of Viram-

(1) P. J., 1881, p. 133.

(2) 9 Bom., H. C. Rep., 249.

(3) I. L. R., 7 Bom., 341.

(4) P. J., 1894, p. 52.

gám and had excused the delay which was manifestly occasioned by a *bonâ fide* mistake as to the proper course to follow; but as all the proceedings are now before us, we are of opinion that this is a case in which we ought to interfere under clause 2, section 5 of Regulation II of 1827, on the principles explained in Mr. Justice Melvill's decision in *Ganesh v. Rámchandra* ⁽¹⁾.

It is not disputed by Mr. Goverdhanrám that the original order of the Second Class Subordinate Judge of Viramgám, which was passed without reference to the provisions of Act VII of 1887, was erroneous. We now set aside that order, and direct that the plaint be sent to the Subordinate Judge of Viramgám and be admitted by him and numbered and registered as duly presented on 27th June, 1892. All costs hitherto incurred in the Second Class Subordinate Judge's Court at Viramgám, in the First Class Subordinate Judge's Court, in the District Court, and in this Court, to be costs in the cause.

Order set aside.

(1) P. J., 1881, 133.

APPELLATE CIVIL.

Before Mr. Justice Ránade and Mr. Justice Fulton.

BA'I BA'IJI (ORIGINAL PLAINTIFF), APPELLANT, v. BAI SANTOK
(ORIGINAL DEFENDANT), RESPONDENT.*

Boráh Mahomedans—Suní Boráhs—Conversion, effect of—Hindu converts to Mahomedanism—Inheritance—Succession among such converts—Native Christians—Law applied to Native Christians prior to Indian Succession Act (X of 1865)—Custom and usage of inheritance among converts—Burden of proof—Evidence—Matter of public interest—Decrees—Evidence of custom—Practice.

The Suní Boráh Mahomedan community of the Dhandhuka Táluka in Gujarát are governed by the Hindu law in matters of succession and inheritance.

Held, therefore, that in this community a widow is entitled to succeed to her husband's estate to the exclusion of a daughter or a step-daughter.

As to the law governing Hindu converts to Mahomedanism, the following principles may now be regarded as settled:—(1) Mahomedan law generally governs converts to that faith from Hinduism; but (2) a well-established custom of such converts following the Hindu law of inheritance would override the general presumption. (3) This custom should be confined strictly to cases of succession and inheritance. (4) If any particular custom of succession be alleged which is at variance with the general law applicable to these communities, the burden of proof lies on the party alleging such special custom.

* Appeal No. 72 of 1892.

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October 2.