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person against whom an order has been made." See *Hood Barrs v. Cathcart*⁽¹⁾.

Whichever view we adopt, whether an appeal or second appeal is regarded as a fresh proceeding, not a continuation of the suit, or whether we treat it as a step in or stage of the suit itself, the result is the same for the purposes of section 10A of the Dekkhan Agriculturists' Relief Act. It is either a stage of a suit or it is a fresh proceeding; and if the section is in force when the appeal or second appeal is pending, the Court has power to act upon its terms in deciding the appeal. The law embodied in the section is one of procedure, and, being retrospective in effect, applies to pending proceedings.

On these grounds, accepting the finding of fact of the Court below that the transaction in dispute, ostensibly a sale, represented a mortgage according to the true intention of the parties, we must confirm the decree with costs.

Decree confirmed.

R. R.

(1) [1894] 3 Ch. 376 at p. 380.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911.
October 3.

ISMAILMIYA BIN BANNEMIYA (ORIGINAL PLAINTIFF), APPELLANT, v. WAHADANI BEGAM, A MINOR, BY HER GUARDIAN FATHER KUDBUDIN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Religious institution—Khanga attached to Darga—Right of management—Exclusion of females—Prevailing usage—Usage as indication of the direction of the founder.

The right of management of religious institutions such as Khangas attached to Dargas is to be decided according to the prevailing usage, that usage being taken as indication of the direction of the founder. Even in cases where appointments have been regularly made by the last holders an inquiry into the usage governing such appointments has been considered relevant.

* Second Appeal No. 247 of 1905.

Shah Gulam Rahumtulla Sahib v. Mahommed Akbar Sahib(¹), *Sayad Abdula Edrus v. Sayad Zain Sayad Hasan Edrus*(²), *Sayad Muhammad v. Fatteh Muhammad*(³), referred to.

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SECOND appeal against the decision of E. M. Pratt, District Judge of Khandesh, reversing the decree of G. R. Datar, Subordinate Judge of Nandurbar.

Suit relating to a share by rotation in the management of certain *wakf* property.

At Nandurbar in the Khandesh District there is a Darga (Pirsthan) of a Mahomedan Pir (saint) known as Pir Mahamad alias Garibbun Nawaz. For the maintenance and dignity of the Darga and the family of the Pir the ruling power granted as *wakf* three villages, namely, Hatnur, Sundarde and Sonare, and some fruit trees, the income of which was enjoyed by the members of the family from time immemorial. In or about the year 1854 two brothers Budhanmiya and Bannemiya were in management of the property, and the management continued undisturbed between them for some years, but eventually disputes having arisen it was decided by the High Court in 1870 that each manager should hold his office for periods of three years in turn. Bannemiya died in 1874 leaving him surviving four sons, Ismailmiya, Abdulkadarmiya, Hafizmiya and Yasinmiya. Ismailmiya succeeded to Bannemiya's share in management jointly with Budhanmiya. Budhanmiya died in the year 1884 and the Collector of Khandesh passed orders substituting his eldest daughter Jinatbegam in the revenue books as the holder of the villages, but she being a female was not allowed to step in the shoes of her father when Ismailmiya's turn of management came to an end in June 1885. The Collector, however, in October 1885 passed orders in favour of Jinatbegam, and Ismailmiya had to retire from the management to make room for her. After Jinatbegam's death the names of her daughters Rahimanibi and Wahadani were in succession substituted for hers in the revenue records. Owing to the recognition of Wahadani's right as manager in rotation

(1) (1875) 8 Mad. H. C. R. 63.

(2) (1888) 13 Bom. 555.

(3) (1894) L. R. 22 I. A. 4.

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in place of Budhanmiya, the two elder sons of Bannemiya, namely, Ismailmiya and Abdulkadarmiya, brought two suits, Nos. 407 and 408 of 1897 respectively, against Wahadani and others. In Suit No. 407 the plaintiff Ismailmiya sought to establish his right alternately with his three brothers to a fourth share of the turn of management on the ground that Wahadani, being a female, had no right to claim any share in the management of the property which was *wakf* and from which females were excluded according to the custom of the family.

The defendants contended *inter alia* that the suit was not maintainable owing to non-joinder of parties and denied the plaintiff's right to manage the property.

The Subordinate Judge found that having regard to Mahomedan Law, the custom of the family and the nature of the office and service, the plaintiff was entitled to the management of the property together with his brothers to the exclusion of the female descendants of Budhanmiya and that the suit was not defective for want of parties. He, therefore, allowed the claim.

On appeal by the defendants the District Judge found that (1) the plaintiff had not proved a family custom excluding females from succession, (2) females were entitled to succeed under Mahomedan Law and (3) the plaintiff was not entitled to a fourth share of the office held by Wahadani. He, therefore, reversed the decree and dismissed the suit.

The plaintiff preferred a second appeal.

Jinnah with *N. M. Patvardhan* for the appellant (plaintiff).

Tyabji with *N. V. Gokhale* for respondents 1 and 2 (defendants 1 and 5).

SCOTT, C. J. :—The claim in this suit and in Suit No. 408 of 1897 is that the defendants Nos. 1 to 5 be ordered to give to the plaintiff a turn of one-fourth share of the management of certain villages which the defendant Wahadani carries on.

The facts found by the lower Courts are that the villages referred to in the prayer are three villages assigned by the

ruling power in the 18th century for the support of a Darga and Khanga. The monastery was already attached to the Darga prior to 1708, the year of the first recorded grant of a village by the ruling power. In that year a Firman of the Emperor Shah Allum was issued, whereby the village of Hatnur was granted to Hafizulla for expenses in connection with Fakirs and the monastery as "money payable for the maintenance of Syed Hafizulla, one of the children of Kutub Rubbini." The village of Sundarde was granted in the year 1745 to Mahamad Yasin who is stated by the lower Court to have been a brother of Hafizulla, and the village of Sonare was also granted to Mahamad Yasin, but the date of that grant is not given. Abdulla, the eldest son of Mahamad Yasin, was in possession as manager of the villages and the institution in the year 1823. In 1827 it appears that the management was being enjoyed by the three sons of Abdulla—Masumiya, Hajimiya and Bismilla. Of these, Hajimiya and Bismilla predeceased Masumiya, and Masumiya's management ceased on his death in 1838.

The villages were then taken into the management of the Collector and in the year 1840 were handed over by that officer to Masumiya's eldest son Janimiya. He died in 1842, and a dispute then arose between Masumiya's second son Ghasitamিয়া and Bismilla's eldest son Budhanmiya. The Collector decided the dispute in favour of Ghasitamিয়া who was installed as manager and remained in possession until 1849, when he died. His death exhausted the male descendants of Masumiya. A dispute then arose between the widows of Janimiya and Ghasitamিয়া on the one hand, and Budhanmiya and Bannemiya, the elder sons of Bismilla, on the other, with regard to the right of management. The Collector again was the person who decided the dispute. His decision was that the management should be with Budhanmiya and Bannemiya, and that the widows of Janimiya and Ghasitamিয়া should be entitled only to maintenance. This was in 1854, and the management continued undisturbed between Budhanmiya and Bannemiya for some years, but eventually disputes occurred which led to litigation. The disputes were finally settled in 1870 by the

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High Court, as a result of which each manager held office for periods of three years in turn. On the death of Bannemiya in 1874 his eldest son, the plaintiff in Suit No. 407 of 1897, succeeded to his father's share in the management jointly with Budhanmiya. On Budhanmiya's death the Collector passed orders substituting his eldest daughter Jinatbegam in the revenue books as the holder of the villages, but as she was a female she was not allowed to step into the shoes of her father when the plaintiff's turn of management ended in June 1885. However in October 1885 the Collector passed orders which necessitated the plaintiff's retiring from the management in favour of Jinatbi. She died and the names of her daughters Rahimanibi and Wahadani were in succession substituted for hers in the revenue records. It is in consequence of the Collector's recognition of Wahadani as a person entitled to manage in rotation in place of Budhanmiya that this suit and Suit No. 408 have been brought by the two elder sons of Bannemiya.

The learned District Judge states that the issues for decision were (1) Has the plaintiff proved a family custom excluding females from the succession? (2) Are females not entitled to succeed under Mahomedan Law? (3) Is plaintiff entitled to a fourth share of the office held by Wahadani Begam? Upon the first issue he held that the family custom excluding females has not been proved, and on the third issue, that the plaintiff was not entitled to a fourth share of the office held by Wahadani Begam. On the second issue he held that females are not entitled to succeed under Mahomedan Law.

There can, we think, be no doubt that in regard to institutions such as Khangas attached to Dargas in India the right of management is to be decided according to the prevailing usage, that usage being taken as indicative of the directions of the founder: see *Shah Gulam Rahumtulla Sahib v. Mahomed Akbar Sahib*⁽¹⁾. Even in cases where appointments have been regularly made by the last holder an inquiry into the

(1) (1875) 8 Mad. H. C. R. 63.

usage governing such appointments has been considered relevant : see *Sayad Abdula Edrus v. Sayad Zain Sayad Hasan Edrus*⁽¹⁾ and *Sayad Muhammad v. Fatteh Muhammad*⁽²⁾.

In the present case the evidence detailed by the District Judge does not disclose any case of appointment by the last holder, but it affords ample material for determining whether females were excluded. According to the pedigree given by the District Judge, Abdulla was the eldest son of Mahamad Yasin. He had two brothers and one sister, none of whom were associated with him in the management. His son Masumiya carried on the management jointly with his two brothers, Hajimiya and Bismilla, but none of his four sisters were associated in the management. Masumiya was succeeded by the eldest son to the exclusion of his second son Ghasitamiya and his daughter Bibijan; and on Janimiya's death Ghasitamiya alone obtained the management. It was not until his death that Budhanmiya and Bannemiya, the sons of Bismilla, became managers, and they carried on the management to the exclusion of the widows of Janimiya and Ghasitamiya and of their sisters Papabi and Amirbegam.

It appears to us to be clear that by the usage prevailing throughout the 19th century, females were excluded from succession to the office of manager. Such exclusion was indeed inevitable, for, as is observed by the District Judge, the office of manager was an office which involved both temporal and spiritual duties, and the spiritual duties were such as could not be discharged by a woman.

In this state of facts the legal inference is that the preferential right of management is confined to members of the family of Hafizulla and Mahamad Yasin in the male line. The first issue should therefore have been found in the affirmative instead of in the negative.

On the third issue, "whether the plaintiff is entitled to a fourth share of the office held by Wahadani Begam," it is clear from the prevailing usage that the eldest male member of the

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family is entitled to a share in the management, if not always to a share exclusive of his younger brothers. There have been cases, as has been pointed out, of exclusive management by eldest sons and cases of collective or alternate management between brothers. The plaintiff has hitherto been the manager for the triennium in which his father Bannemiya would have been entitled to manage had he been alive, but he does not now, as he says on the ground of expense, claim to manage during the whole triennium for which Budhanmiya would have managed if he had been alive. He only claims to manage alternately with his three brothers during each such period. In paragraph 12 of his plaint he states that being the eldest son in the male line and it being customary in his family that the Wahivat should be carried on only by that member in the male line in whose name the villages may be standing, he is entitled to Wahivat, but owing to short funds only claims one-fourth.

The learned District Judge appears to have overlooked this allegation in the plaint, for he says that the plaintiff has not alleged a custom of succession to the office by inheritance in derogation of the Mahomedan Law.

As we understand the case, the plaintiff's contention was entirely based upon the usage prevailing in the family as to the right of management. Instances of alternating management are not wanting in the family and rotation of this kind is entirely in accordance with the custom of the country in such matters.

The decision of the lower Court leads to a situation of unnecessary difficulty. It holds that Wahadani is not entitled to the management, but confirms her for periodic terms of three years in possession of the property as against the two eldest male members of the family.

We hold that the female defendants are not entitled to manage. The plaintiff is entitled to manage, if not exclusively, at all events, by arrangement with his brothers. The right of females to participate in surplus revenues in the hands of the manager has not been disputed and is not in question in

the suit. We reverse the decree of the District Judge and restore that of the Subordinate Judge with costs throughout on the defendants who contested the plaintiff's claim.

Decree reversed.

G. B. R.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

WASUDEV LAKSHMAN BHAGVAT AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS, v. GOVIND MAHADEV GHATE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1911.

October 4.

Land Revenue Code (Bom. Act V of 1879), sections 3 (11), 109, 197 and 217(1)—‘Holder’—A person in whom a right to hold land is vested—Occupants—Entry in the revenue register—Misunderstanding of an order—‘Oversight’—Rectification of the register—Natural justice.

The term ‘holder’ as defined by section 3 (11) of the Land Revenue Code (Bom. Act V of 1879) signifies the person in whom a right to hold land is vested.

* Second Appeal No. 252 of 1909.

(1) Sections 3 (11), 109, 197 and 217 of the Land Revenue Code (Bom. Act V of 1879) are as follows :—

3. In this Act, unless there be something repugnant in the subject or context—

(11) “Holder” or “land-holder” signifies the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust for another person, or for a class of persons, or for the public; it includes a mortgagee vested with a right to possession.

109. The survey officer, or, if the survey settlement have been introduced under the provisions of section 103 by the Collector, or Assistant or Deputy Collector, the Collector or Assistant or Deputy Collector shall at any time correct or cause to be corrected any clerical errors, and any errors which the parties interested admit to have been made in the settlement register;

he shall also receive and inquire into all applications made to him at any time within two years after the introduction of the survey-settlement for the correction of any wrong entry of a registered occupant's name in the said register, and if satisfied that an error has been made, whether through fraud, collusion, oversight