

(1877) 08 CAL CK 0003

Calcutta High Court

Case No: None

Joteeram Kolita

APPELLANT

Vs

Kudomee Dossee and
Others

RESPONDENT

Date of Decision: Aug. 27, 1877

Citation: (1878) ILR (Cal) 306

Hon'ble Judges: Lawford, J; Kemp, J

Bench: Division Bench

Judgement

Kemp, J.

(who, after stating the facts, continued as follows): In special appeal it is contended that the Judge committed an error in law in holding that in Assam a Hindu cannot divorce his wife, and that he has also erred in law in holding that a custom, if proved, cannot have the force of law so as to override the Hindu law; further, that if the Judge thought there was no evidence of the custom, he should have remanded the case to the first Court for the purpose of taking evidence on that point. We think that the Judge was right so far in holding that the Hindu law does not contemplate divorce; but we think that he was clearly wrong in holding, as he has done, broadly, that a custom, even if established, cannot override the general provisions of the Hindu law. There can be no doubt that the Hindu law has been affected in particular districts by particular usages, and these usages have hitherto been respected unless clearly repugnant to the principles of Hindu law; see page 387 of Shama Churn's Vyavastha Darpana. The text lays down that "reason and justice are more to be regarded than mere texts, and that wherever a good custom exists it has the force of law."

2. We, therefore, think that the Judge was wrong in holding, as he has done, that even if the custom were established, it would not affect the Hindu law. Now the Munsif has found that there is evidence of this custom, and that it exists in the province and we think that the Judge ought to have found on that part of the case,

namely, whether the defendant No. 1 had established the custom set up by her in her defence. We, therefore, remand the case to the Judge to come to a finding on that point, taking evidence if necessary. Costs to follow the result.