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7th May, 2020

MUSLIM LAW OF INHERITANCE

1. Mohd. Amirullah Khan v. Mohd. Hakumullah Khan, 23.03.1999, [(1999) 3 SCC 733], Relevant para 6 and 7

- The Permissive occupation even for a decade by the children of a predeceased son of the deceased would not convert into a legal right to remain in their grandfather's property.
- As only the surviving children and wife, if any, were the heirs of the deceased
- Grandchildren had no right since the title did not flow to them from their father, who was predeceased

A copy of the judgment attached hereto at **page no. 2 to 6.**

2. Syed Shah Ghulam Ghouse Mohiuddin & Ors. v. Syed Shah Ahmed Mohiuddin Kamisul Quadri (died) by l.rs. & Ors., 17.02.1971, [(1971) 1 SCC 597], Relevant para 20

- Share of Muslim heirs are known before Partition
- Thus, only partition by metes and bounds for their specific shares
- Heirs holding as tenant-in-common/ joint tenant
- Perpetual recurring cause of action for filing of Partition suit

A copy of the judgment attached hereto at **page no. 7 to 16.**

3. Kasambhai Sheikh v. Abdulla Kasambhai Sheikh, 28.09.2004, [(2004) 13 SCC 385], Relevant para 4

- Held heirs are tenant-in-common

A copy of the judgment attached hereto at **page no. 17 to 19.**

4. Ram Awalamb v. Jata Shankar, 18.09.1968, [AIR 1969 All. 526], Relevant para 6, 42

- Held that tenancy in common or joint tenancy connotes four ideas.
- Unity of title, unity of possession, unity of interest and unity of commencement of title.

A copy of the judgment attached hereto at **page no. 20 to 39.**

5. Abdul Majeeth Khan Sahib v. C. Krishnamachariar, 21.11.1916, [AIR 1918 Mad 1049], Relevant para Page No. 771 and 773

- One of the heir of a deceased person is not competent to bind the other heirs by his acts.
- One Heir no authority to deal with shares of his co-heirs

A copy of the judgment attached hereto at **page no. 40 to 49.**

6. Hakim Rahman Bux v. Muhammad Mahmood Hassan, 27.11.1956, [AIR 1957 Pat 559], Relevant para 5

- It was held that upon the death of a Mohammedan, the whole estate devolves upon his heirs at the moment of his death
- Heirs succeed to the estate as tenants-in-common in specific shares.

A copy of the judgment attached hereto at **page no. 50 to 52.**

7. Abdul Raheem v. Land Acquisition Officer-cum-Revenue Divisional Officer, Mahaboobnagar, 20.02.1989, [AIR 1989 AP 318], Relevant para 2

- it was held that the joint system family or joint property is unknown to Muslim law
- Therefore the right, title and interest in the land held by the person stands extinguished and stands vested in other persons.

A copy of the judgment attached hereto at **page no. 53 to 54.**

8. Soudagar Mohd Abdul Rahim Beg Saheb vs. Soudagar Mohd. Abdul Hakim Beg Saheb, 31.01.2018, [AIR 1931 Mad 553], Relevant para Page 229 and 230

- If, Muslim adult male holds assets and carry on business on behalf of other members of the family.
- The adult will stand in fiduciary relationship to other members
- Section 23 and 28 of Trust Act, 1882 to apply

A copy of the judgment attached hereto at **page no. 55 to 65.**

promotion of sale outside India and, in the High Court's view, that would "certainly be the amount of expenditure incurred wholly and exclusively for the promotion of sales outside India, on maintenance of agency outside India."

11. What is required is an analysis of the provisions of Section 35-B(1)(*b*)(*iv*). The expenditure that is referred to therein has to be incurred on the maintenance outside India of a branch, office or agency for the promotion of sales outside India of the assessee's goods, services or facilities. Therefore, what is requisite is that the assessee should have maintained the branch, office or agency outside India. It is also requisite that such branch, office or agency should be for the promotion of sales outside India of the assessee's goods, services or facilities. When payment is made, as here, by an assessee of commission to agents outside India who had procured orders, the requirements of clause (*iv*) are far from satisfied. There is, in the first place, no maintenance by the assessee of the agency. Secondly, the expenditure has to be incurred on the promotion of sales of the assessee's goods outside India. When expenditure is incurred by way of payment of commission on particular sales, that is not expenditure on the promotion of the assessee's sales in general.

12. While we think that there is some merit in the observation of the Karnataka High Court that the words "branch, office or agency" in the clause draw colour from each other and that the word "agency" should, therefore, be interpreted in the light of the words "branch" and "office", it is, in any event, very clear that even if the agency is an agency established not by the assessee but by a third party, the agency must be maintained by the assessee.

13. In the result, we uphold the view taken by the Karnataka High Court in the judgment and order under appeal and dismiss the appeal with costs.

(1999) 3 Supreme Court Cases 733

(BEFORE B.N. KIRPAL AND U.C. BANERJEE, JJ.)

MOHD. AMIRULLAH KHAN AND OTHERS .. Appellants;

Versus

MOHD. HAKUMULLAH KHAN AND OTHERS .. Respondents.

Civil Appeal No. 3028 of 1986†, decided on March 23, 1999

A. **Muslim Law — Inheritance — Children of predeceased son — Permissive occupation even for decades by children of predeceased son of deceased, held, would not convert into a legal right to remain in their grandfather's property — However, relief may be moulded in such a way as to prevent undue hardship to such occupants — Thus, though plaintiff-appellants being children of the deceased were heirs to the exclusion of defendant-respondents and thus owners of the disputed property, but Defendant 2,**

† From the Judgment and Order dated 18-10-1985 of the Bombay High Court in S.A. No. 520 of 1979

granddaughter of deceased, should not be ousted from the property during her lifetime — High Court erred by not going into the question as to in whom the title to the disputed property vested after the death of the plaintiffs' father and merely holding that plaintiffs were *benamidars* and thus had no title to the property — Specific Relief Act, 1963, Ss. 5 and 34 (Para 7)

The appellants were plaintiffs in a suit for declaration and possession of two adjacent houses and also for perpetual injunction against Respondents 1 & 2 (Defendants 1 & 2) restraining them from interfering with the possession of the appellants.

The disputed property had been purchased by *A*, the deceased, in the names of two of his sons, Plaintiff 1 and *N*. *N* predeceased *A*. Plaintiff 1 claimed to be the sole owner of the two houses after *A*'s death. Further it was the case of the plaintiffs that two other sons of *A* (half-brothers of Plaintiff 1) had also predeceased *A*. Defendant 1 was the son of one and Defendant 2 the daughter of the other. The mother of Plaintiff 1 had brought over Defendants 1 & 2, taken care of them, and permitted them to stay in the now disputed property. After the death of the mother of Plaintiff 1, the defendants claimed ownership of part of the property. Plaintiff 1 applied to the municipal authorities seeking to be shown as owner and defendants as occupiers. The authorities allowed the application. In 1968 the plaintiffs filed their suit. The defendants contended that: (1) Plaintiff was only a benamidar for *A* and was not the owner of the property, and (2) that they had a right to possession of the property because they had been living in it since 1927.

The trial court decreed the suit. Although it held that Plaintiff 1 was a *benamidar*, it also held that under the law of inheritance applicable to the parties the children of predeceased sons did not acquire any right in their grandfather's property. Only the surviving children and widow, if any, were heirs. The appeal was dismissed.

The High Court, however, in second appeal held that plaintiffs had set up their case on the basis of the sale deed executed by *A*, that Plaintiff 1 was a benamidar and that the suit should have been dismissed. The High Court did not go into the question as to who was entitled to inherit *A*'s property.

Allowing the appeal, Supreme Court held as above.

B. **Civil Procedure Code, 1908 — S. 100 — In second appeal High Court ought not to have reappreciated the evidence and reversed findings of fact arrived at by the first appellate court (Para 7)**

A-M/TZ/20988/C

Advocates who appeared in this case :
Ranjit Kumar, Advocate, for the Appellants;
Bhaskar Y. Kulkarni, Advocate, for the Respondents.

The Judgment of the Court was delivered by

KIRPAL, J.— The appellants filed a suit for declaration and possession in respect of Municipal House No. 1995 situated at Mohalla Hatai of Paithan District, Aurangabad. There was also a prayer for perpetual injunction restraining Respondents 1 and 2 from interfering in the possession of the appellant-plaintiffs.

2. Briefly stated the averment in the plaint was that the father of the plaintiffs, Abdullah Khan, had three wives. The plaintiffs are the sons and daughters from the third wife. Abdullah Khan had bought the two adjacent houses in the name of Plaintiff 1 and his brother one Nazifulla Khan.

Nazifulla Khan died when Abdullah Khan was still alive. It was alleged in the plaint that thereafter Amirullah Khan, Plaintiff 1, became the sole owner. It was further the case of the plaintiffs that Defendant 1 was a son from the second wife of Abdullah Khan and Defendant 2 was the daughter of the plaintiff's deceased brother. The said brother who was father of Defendant 2 had died at the time when Abdullah Khan was still alive and the son from the second wife Lutfulla Khan, father of Defendant 1, had also died earlier than Abdullah Khan. According to the plaintiffs, their mother brought to the house Defendants 1 and 2 and looked after them and permitted them to reside in the house in question.

3. The mother of the plaintiffs died in 1955. Plaintiff 1 was not at Paithan at that time. In 1961, he got to know that the defendants were trying to assert themselves as owners of a part of the said house which had been renumbered as 1995, the original number being 166. The plaintiffs thereupon filed a revision petition before the State Government contending that the property should be renumbered to 166 instead of 1995. It was also prayed that the plaintiffs should be shown as owners and the defendants as occupiers. The State Government agreed to this contention and the name of Plaintiff 1 was shown as the owner of the premises in question. It is thereafter that in 1968 the suit was filed. In the written statement, the main contention which had been taken by the defendants was that Plaintiff 1 was only a benamidar of Abdullah Khan and he was not owner of the same by virtue of the sale deed in his favour. The defendants further claimed that they had been residing in that house since 1927 and they had a right to remain in possession thereof. On the pleadings before the Court, the following issues were framed:

"*1.* Do the plaintiffs prove that they have become the owners of the suit premises in 1920 AD as alleged?

2. Do the plaintiffs prove the pedigree as stated in para 6 of the plaint?

3. Do the plaintiffs prove that the possession of the defendants on suit premises is permissive in nature?

4. Do the plaintiffs prove that entries of defendants in municipal record are false and concocted?

5. Is the construction made on suit property unauthorised and liable to be demolished?

6. Do Defendants 1 and 2 prove that sale deed in favour of the father of plaintiffs is benami transaction?

7. Do Defendants 1 and 2 prove that they are the owners of the suit premises?

8. Is the court fee paid sufficient and the suit property valued?

9. Are the plaintiffs entitled to the possession of the suit premises and the suit is within limitation?

10. To what relief the plaintiffs are entitled?

11. Are the plaintiffs entitled to mandatory injunction of demolition of the wall?

12. What order and what decree?" a

4. The trial court decreed the suit. It had held that Plaintiff 1 was merely a benamidar of his father Abdullah Khan. The Court further came to the conclusion that under the law of inheritance, the children of the deceased sons of Abdullah Khan did not acquire any right in the property. It is the widow and the surviving children of Abdullah Khan who inherited the property and all of them had been impleaded as parties in the said suit. A b decree for declaration was passed in favour of all the plaintiffs and the suit was decreed.

5. The lower appellate court dismissed the appeal of the defendants, but the High Court in second appeal reversed the same. The High Court inter alia came to the conclusion that because the case which was set up by the plaintiffs with regard to claming the title to be derived from the sale deed c was not correct as they were merely benamidar, therefore, the suit should have been dismissed. The High Court did not go into the question as to who would inherit the property after the death of Abdullah Khan.

6. In our opinion, the High Court fell in error in not going into the question as to in whom the title vested on the death of Abdullah Khan. It is d not in dispute that all the legal heirs of Abdullah Khan were impleaded as parties to the suit. The surviving sons and daughters were impleaded as plaintiffs. Once it is found that Plaintiff 1 was merely a benamidar of his father Abdullah Khan, then the question would arise that on the death of Abdullah Khan who would become the owner of the property. It is not disputed, and in our opinion rightly so, that the plaintiffs, namely, the e surviving sons and daughters of Abdullah Khan would become the owners of the property in question. This being so, the High Court fell in error in reversing the concurrent judgment of the courts below which had held the plaintiffs to be the owners of the property.

7. The High Court had also held that the defendants were in possession for a long time and that they had acquiesced to the said possession. This f itself is stated to have created a right to possess the property in favour of the defendants and to that extent the defendants could resist the suit for ejectment. We are unable to agree with this conclusion. The courts below had found that it is the plaintiffs' mother who had permitted the defendants to reside with her as members of the family. This permissive occupation by the defendants could not in law convert into giving them any legal right to g remain in the said property. The High Court had not found that by adverse possession, they had become the owners of the property. Even though the defendants do not acquire any right in the property, but considering the fact that the said defendants had been residing in the premises in question since 1927, it will be appropriate for this Court to mould the relief in such a way that undue hardship is not caused to them. We would like to make it clear h that the High Court while hearing the second appeal ought not to have

reappreciated the evidence and reversed the findings of fact arrived at by the lower appellate court.

8. While allowing the appeal and holding the appellant-plaintiffs to be the owners of the property in question and being entitled to the possession of the suit premises, we direct that the wife of Defendant 1, who is Defendant 2, should not be ousted from the property in question during her lifetime. Her children should be allowed to continue to remain there as long as she is alive and they should vacate the premises six months after her demise.

9. Parties to bear their own costs.

(1999) 3 Supreme Court Cases 737

(BEFORE DR A.S. ANAND, C.J. AND M. SRINIVASAN AND R.P. SETHI, JJ.)

V.S. ACHUTHANANDAN .. Appellant;

Versus

P.J. FRANCIS AND ANOTHER .. Respondents.

Civil Appeal No. 1808 of 1997†, decided on March 22, 1999

A. **Election — Election petition — Material facts and material particulars — Distinction — Material facts are primary facts disclosing some cause of action — These facts have to be specifically pleaded and failure to do so will result in rejection of the election petition — But defect in material particulars can be cured at a later stage by amendment and the petition cannot be dismissed in limine on ground of such defect — On facts held, trial court was not justified in rejecting the petition pertaining to allegations of corrupt practices on ground of vagueness in material particulars — Representation of the People Act, 1951 — Ss. 83, 81, 84, 86, 100, 101, 123 — Civil Procedure Code, 1908, Or. 6, Rr. 2 & 4 and 17 and Or. 7, Rr. 1(e) and 11, Ss. 83 and 94**

B. **Election — Election petition — Pleadings — Vagueness — In limine dismissal if justified — Election petition alleging illegalities in counting of ballot-papers — Held on facts, trial court was not justified in rejecting the petition in limine on ground of vagueness without affording opportunity to the petitioner to substantiate the allegations — Representation of the People Act, 1951, Ss. 83 and 94**

C. **Election — Recounting of ballots — When should be directed by court**

D. **Election — Generally — Word 'election' refers to the entire process starting from issuance of notification till declaration of result — Representation of the People Act, 1951, Ss. 123(2) & 123(7) — Words and phrases — "Election"**

The appellant, a candidate in the Legislative Assembly election, filed an election petition against the first respondent, the elected candidate, on grounds of corrupt practices and illegalities in counting of ballot-papers. While specifying the alleged corrupt practices in the petition, the appellant alleged that one *A*, the Election Tehsildar of the constituency, was a close associate and friend of the first respondent and played a pivotal role in the manoeuvring relating to ballot-papers which were not distributed to the polling stations and ultimately used for the benefit of the successful candidate. He was alleged to have been helping the first respondent in

† From the Judgment and Order dated 8-1-1997 of the Kerala High Court in E.P. No 11 of 1996

sentation of the People Act. The judgment of the High Court is set aside. The charge of corrupt practice under Section 123(6) is set aside. The order setting aside the election of the appellant and the declaration avoiding the election under Section 100(1)(*b*) of the Act are both set aside. The election petition of the respondent is dismissed. The appellant will be entitled to costs.

1971(1) Supreme Court Cases 597

(From Andhra Pradesh High Court)

[BEFORE G. K. MITTER AND A. N. RAY, JJ.]

SYED SHAH GHULAM GHOUSE MOHIUDDIN AND OTHERS .. Appellants;

Versus

SYED SHAH AHMED MOHIUDDIN KAMISUL QUADRI (DIED) BY l. rs. AND OTHERS† .. Respondents.

Civil Appeal No. 219 of 1967, decided on February 17, 1971

Succession—Muslim law—Heirs holding as tenants iu common—Fraud by heir in possession—Claim for partition by co-owner—Whether jnstified.

Limitation Act, 1908 (9 of 1908)—Section 18—Article 144, Schedule I—Right to sue—Impaired by fraud—Effect on period of limitation.

Guardianship and minority—Legal guardian—Whether brother a legal guardian under Mohammadan law.

Adverse possession—Whether possession by co-owner amounts to a contract—Agreements by minor—Whether void.

All the four sons and the two daughters of the deceased entered into an agreement to partition the property by arbitration. The appellant, being a minor, was represented by one of his brothers in the said arbitration agreement, as guardian. On becoming major and knowing about the fraudulent conduct of the brothers in possession, the appellant filed a suit for setting aside the arbitration award and the Court decree confirming the award. The Additional Chief Judge of the Civil Court decreed the suit in favour of the appellant. The High Court reversed the decree. The appellant came to Supreme Court in an appeal.

Held:

(*i*) The brother is not a lawful guardian under Mohammadan law. The legal guardians are the father, executors appointed by the father's will, the father's father and the executor appointed by the will of the father's father. No other relation is entitled to guardianship of the property of the minor as of right. Therefore, the arbitration agreement and the award of the decree are all void by reason of lack of legal guardian of the appellant. **(Para 8)**

Mohammad Amin and Others v. *Vakil Ahmed and Others*, 1952 SCR 1133: AIR 1952 SC 358: 1952 SCJ 545; *Imambsndi* v. *Mutsaddi*, AIR 1918 PC 11: 45 IA 73 *followed*.

(*ii*) The relinquishment of property on behalf of minor is not binding on the minor. There was no legal sanction behind such a compromise in the

†Appeal from the Judgment and Decree, dated December 16, 1965, of the Andhra Pradesh High Court in C. C. C. Appeal No. 24 of 1959.

arbitration and in proceedings resulting in a decree upon the award. The arbitration agreement, is, therefore, void. (Para 10)

(*iii*) Where the heirs continue to hold the estate as tenants in common without dividing it and one of them subsequently brings a suit for recovery of the shares. The period of limitation of the suit does not run against him from the date of the death of the deceased but from the date of express ouster or denial of title and Article 144 of Schedule I to the Limitation Act would be the relevant article. (Para 11)

(*iv*) One who desires to invoke the aid of Section 18 of the Limitation Act must establish that there has been a fraud and that by means of such fraud he has been kept from the knowledge of right to sue or the title or of the title whereon it is founded. In the present case the existence of the right of appellant was kept concealed by the respondent. The appellant neither knew the right nor could he have with reasonable diligence discovered it. (Para 19)

Rahimboy v. *Turner*, 17 Bom 341 : 20 IA 1, *approved.*

(*v*) The cause of action for partition of properties is said to be a perpetually recurring one. In Mohammadan law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. The shares of heirs under Muslim law are definite and known before actual partition. Therefore, on partition of properties there is division by metes and bounds in accordance with the specific share of each heir being already determined by the law. (Para 20)

Monsharam Chakravarty and Others v. *Gonesh Chandra Chakravarty and Others*, 17 CWN 521 : 16 IC 383, *referred to*.

(*vi*) Possession of one co-owner is not by itself adverse to other co-owners. On the contrary possession of one co-owner is supposed to be on behalf of other co-owner unless it is established that the possession of the co-owner is in the denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present case there is no evidence to support this conclusion. (Para 18)

Birch v. *Birch*, 1902 Probate Division 131; *Rolfe* v. *Gregory*, (1864) 4 DeG J and S 576; *Biman Chandra Datta* v. *Promotha Nath Ghose*, AIR 1922 Cal 157 : ILR 49 Cal 886, *referred to.*

Appeal *allowed.*

Advocates who appeared in this case :

M. C. Chagla, Senior Advocate (*R. V. Pillai* and *N. Nettar*, Advocates, with him) — for Appellants;

C. K. Daphtary Senior Advocate (*Rameshwar Nath*, Advocate of M/s. Rajinder Narain and Co. and *Miss Swaranjit Sodhi*, Advocate, with him) — for Respondent No. 1(A);

Dr. V. A. Seyid Muhammad, Senior Advocate (*S. P. Nayar*, Advocate, with him) — for Respondent No. 2.

The Judgment of the Court was delivered by

Ray, J.—This is an appeal by certificate against the judgment, dated December 15, 1965, of the Andhra Pradesh High Court dismissing the appellents' suit and setting aside the decree in favour of the appellant passed by the Additional Chief Judge, City Civil Court, Hyderabad on October 18, 1958.

Shah Abdul Rahim a resident of the city of Hyderabad died on September 26, 1905 leaving behind him four sons Abdul Hai, Ghulam

Nooruddin, Abdul Razak and Ghulam Ghouse Mohiuddin and two daughters Qamarunnissa Begum and Badiunnissa Begum. Shah Abdul Rahim had large movable and immovable properties. The sons and the daughters entered into two agreements in the month of July, 1908 and appointed arbitrators to partition the Matrooka properties of Syed Shah Abdul Rahim. On August 1, 1908 the arbitrators made an award partitioning the properties. On August 13, 1908, there was a decree in the Darul Khaza Court, Hyderabad confirming the award of August 1, 1908. The appellant filed the suit out of which the appeal arises on July 24, 1941 for setting aside the decree, dated August 13, 1908, confirming the award and for partitioning certain Matrooka properties. In 1942, the suit was dismissed. An appeal was preferred to the High Court of Hyderabad. During the pendency of the appeal Abdul Hai died in 1950 and his legal representatives were brought on the record of the suit in the month of February, 1952. The appeal filed in the year 1943 was disposed of by the High Court of Andhra Pradesh in April, 1957 remanding the case to the City Civil Court, Hyderabad. On October 18, 1958 the Additional Chief Judge, City Civil Court, Hyderabad decreed the suit in favour of the appellant and cancelled the decree of the Darul Khaza Court, dated August 13, 1908. On appeal the Andhra Pradesh High Court on December 15, 1965 set aside the decree passed by the Additional Chief Judge.

2. The undisputed facts are these: When Abdul Rahim died in 1905 Abdul Hai the eldest son was major. The appellant was a minor. There were two references to arbitration. Before the arbitrators the appellant a minor was represented by his brother Ghulam Nooruddin as the guardian. The parties to the arbitration agreements were Abdul Hai, Ghulam Nooruddin, Abdul Razak the appellant represented by his guardian Nooruddin, Qamarunnissa Begum and Badiunnisa Begum. It will appear from the award that before the arbitrators there was no dispute between the parties and the arbitrators did not think it necessary to frame any issues. Before the arbitrators the plaintiffs marked with the letter 'F' a plan showing properties attached to the Khankah and Dargah and those properties were marked as Exhibits B-1 to B-10 and the plaintiffs relinquished their title to properties marked Exhibits B-1 to B-10 and further stated "neither at present nor in future will they have any share and right in the said property". As to properties marked B-1 to B-10 the parties stated before the arbitrators that Abdul Hai was the Sajjada Nashin of the Dargah and was in possession of the Dargah and Khankah properties.

3. The award was made a rule of court within a short time upon a plaint filed by Nooruddin, Abdul Razak, the appellant represented by Nooruddin as the guardian and the two sisters Qamarunnisa Begum and Badiunnisa Begum. The defendant was Abdul Hai. The facts recited in the decree are that Syed Shah Nooruddin a pious person of Hyderabad had his Khankah situated at Nampalli. The Dargah of the said pious man was also situated in the same locality. After Syed Shah Nooruddin's death his son-in-law, Abdur Rahim became the Sajjada of the Khankah and the Dargah Shariff. The Sajjada had control over all the expenses of the Dargah and Khankah and the entire property attached to the Dargah and Khankah remained in possession of the Sajjadanasheen and all the expenses of the Dargah and Khankah were met from the income. After the death of Abdur Rahim, Abdul Hai became the Sajjadanasheen and was having control over the Dargah and Khankah. Abdur Rahim left three adult sons and one minor son and also two adult daughters. Apart from the property

attached to the Dargah and Khankah Abdur Rahim left personal Matrooka properties. There might have been a dispute between the parties regarding the partition of these properties. But the parties settled the dispute by mutual consent and by agreements referred the matter to arbitration for the settlement of the dispute. The arbitrators made an award. The decree recited that the properties marked with the letter 'F' in the plan annexed to the award were Khankah and Dargah Shariff properties in the possession of the defendant Abdul Hai for meeting the expenses of the Khankah and no one has any right or claim over the property 'at present' or 'in future'. The decree concluded by stating that the Dargah and Khankah properties were not liable to partition and none of the plaintiffs "shall have any right or claim regarding the same".

4. The appellant impeached the award and the decree upon the award inter alia on the grounds that the award was void by reason of lack of lawful guardian on behalf of the appellant to protect and represent the rights and interests of the minor in the arbitration proceedings and in the proceedings resulting in the decree upon the award. The appellant also claimed that the award and the decree should be avoided because the properties marked Exhibits B-1 to B-10 were not Dargah and Khankah properties in fact and were treated in the award and the decree to be Dargah and Khankah on the wrongful representation of Abdul Hai. The appellant in the year 1938 discovered for the first time the true and correct facts that the same were not Khankah and Dargah properties and therefore claimed the same as divisible upon partition amongst the heirs of Abdul Rahim.

5. The Trial Court held that the award and the decree thereon were obtained by fraud and the decree was to be set aside. The reasoning given by the Trial Court was that it was established on the evidence that Abdul Hai was in full possession and enjoyment of the whole of the property of Abdul Rahim including the property marked as Exhibits B-1 to B-10. In the letter, dated August 13, 1938, Exhibit P-8 Abdul Hai denied that the property was Waqf property belonging to the Dargah and asserted that it was owned and possessed by him and relinquished by his relatives. The letter was held by the Trial Court to indicate that Abdul Hai knew that the property was the property of his father which he inherited along with his brothers and sisters and in spite of such knowledge and belief he caused it to be represented before the arbitrators that the property belonged to the Dargah and that the same was in his possession as Sajjadanasheen. The Trial Court further held that the appellant came to know the real state of affairs from the letter of Abdul Hai, dated August 13, 1938 and therefore the suit was not barred by limitation. The Trial Court therefore passed a decree for cancellation of the decree passed upon the award and passed a preliminary decree for partition of the Matrooka properties including the properties marked as Exhibits B-1 to B-10 in the award.

6. In the High Court four questions were considered. First, whether apart from the appellant any other party was a minor at the time of the arbitration agreement and whether there was a dispute which could be referred to arbitration. Second, whether there was proof that at the time of the arbitration agreement and the award Abdul Hai made a fraudulent and false representation to his brothers and sisters and made them believe that the properties belonging to the Sajjadanasheen were the properties of Dargah and Khankah which were not partible and by representation and fraud prevented the partition of those properties. Third, whether the appellant

had knowledge that Abdul Hai had claimed the properties as the ancestral properties of the Sajjadanasheen earlier than the time when the appellant said he had knowledge and whether the suit was barred by limitation. Fourth, what would be the effect of the filing of the written statement by the defendant No. 6 in the year 1958 and the omission of defendant No. 7 to file any written statement to obtain partition of the properties in the event of the decree and the award being set aside.

7. The High Court held that the appellant was a minor but the other parties were not minors. The High Court held that the reference to the arbitration and the award thereon were void. The High Court held that the decree of the Darul Khaza Court upon the award was not a nullity and the present suit should have been filed within three years of the appellant obtaining majority. The High Court also held that the decree of the Darul Khaza Court was not obtained by fraud. The High Court held that Abdul Hai asserted in the year 1927 that the Dargah and the Khankah properties were his personal properties and from that date Abdul Hai asserted his title adverse to the appellant and the other plaintiffs and the appellant and the other plaintiffs knew in 1927 of the adverse claim of Abdul Hai. Therefore, the suit was barred by limitation.

8. The minority of the appellant is a fact found both by the Trial Court and the High Court. It is an admitted fact that the appellant's guardian was his brother Nooruddin at the time of the arbitration proceedings and at the time of the decree on the award. The brother is not a lawful guardian under the Mohammedan Law. The legal guardians are the father, the executor appointed by the father's will, the father's father and the executor appointed by the will of the father's father. No other relation is entitled to the guardianship of the property of a minor as of right. Neither the mother nor the brother is a lawful guardian though the father or the paternal grand-father of the minor may appoint the mother, brother or any other person as executor or executrix. In default of legal guardians a duty of appointing guardian for the protection and preservation of the minor's property is of the court on proper application. It was held by this Court in *Mohammad Amin and Others* v. *Vakil Ahmed and Others*,[1] relying on the dictum in *Imambandi* v. *Mutsaddi*[2] that where disputes arose relating to succession to the estate of a deceased Mohammedan between his three sons, one of whom was a minor, and other relations, and a deed of settlement embodying an agreement in regard to the distribution of the properties belonging to the estate was executed by and between the parties, the eldest son acting as guardian for and on behalf of the minor son the deed was not binding on the minor son as his brother was not his legal guardian; and the deed was void not only qua the minor, but with regard to all the parties including those who were sui juris. It is clear on the authority of this decision that the arbitration agreement and the award and the decree are all void in the present case by reason of lack of legal guardian of the appellant. There is intrinsic evidence in the award that the parties effected a settlement.

9. Counsel on behalf of the respondent relied on a copy of an application in the Court of the Darul Khaza in the proceeding for passing the decree upon the award in support of the contention that the court appointed Nooruddin as the guardian of the appellant. It is stated in the application

1. 1952 SCR 1133 : AIR 1952 SC 358 : 1952 SCJ 545.
2. 45 IA 73 : AIR 1918 PC 11.

that the defendant No. 3 (sic) meaning thereby plaintiff No. 3 the present appellant is a minor and Nooruddin is the real brother and the appellant is under the guardianship of Nooruddin. The application was for permission to file the suit. There is no order for appointment of a guardian. Further, the Court in appointing the guardian of property of a minor is guided by circumstances for the welfare of the minor. There is no justification to hold that Nooruddin was either the legal guardian or a guardian appointed by the Court.

10. The decree which was passed on the award appears on an examination of the pleadings and the decree itself that the parties proceeded to have the decree on the basis of the award without any contest as and by way of mutual settlement. It will appear from the decree that it was admitted by the parties that Abdul Hai was in possession of the Dargah and Khankah and that Abdul Hai alone was the Sajjadanasheen of the Khankah. The relinquishment of property by Nooruddin on behalf of the minor is not binding on the minor. There was no legal sanction behind such compromise in the arbitration and in the proceedings resulting in a decree upon the award. There was no legal guardian. The rights and interests of the minor were also not protected particularly when there was conflict of interest between the minor and Abdul Hai. The arbitration agreement, the award and the decree of the Darul Khaza Court on the award are therefore void.

11. The High Court held that the appellant's suit was barred by limitation by reason of knowledge of the appellant that Abdul Hai was in adverse possession since the year 1927 or 1928. In regard to the properties which the appellant claimed in the suit as liable to partition, it is established that all parties proceeded on the basis that Exhibits B-1 to B-10 in the award were not Matrooka properties but Dargah and Khankah properties. If, in fact, they are not Dargah and Khankah properties but Matrooka properties, these should be available to co-owners for partition unless there are legal impediments. The estate of a deceased Mohammedan devolves on his heirs at the moment of his death. The heirs succeed to the estate as tenants in common in specific shares. Where the heirs continue to hold the estate as tenants in common without dividing it and one of them subsequently brings a suit for recovery of the share the period of limitation for the suit does not run against him from the date of the death of the deceased but from the date of express ouster or denial of title and Article 144 of Schedule I to the Limitation Act, 1908 would be the relevant article.

12. Counsel on behalf of the respondent submitted that there were two impediments to the appellant's claim for partition of the properties. One was that the decree passed by the Court of Darul Khaza upon the award was not obtained by fraud and could not be set aside by reason of limitation. The other was that the appellant came to know in the year 1927 that Abdul Hai adversely claimed properties as his own and therefore the appellant's claim was barred by limitation. The High Court held that the appellant was aware of the attachment of the personal and the Dargah and Khankah properties by the Government of the Nizam in the year 1927 as also release in the same year of the properties atttached. The High Court held that when parties had knowledge of the attachment of the properties it could not be postulated that they would have no knowledge of the contentions of Abdul Hai as to release of the Dargah and Khankah properties on the ground that those were not Dargah and Khankah but personal properties

of Abdul Hai. Knowledge of release of properties would not amount to ouster of the appellant from the property or of abandonment of rights.

13. The evidence of the appellants was that in 1350 Fasli corresponding to the year 1941 the appellant came to know that a letter had been written by Abdul Hai to the Ecclesiastical Department of the Government of the Nizam in the year 1938 to the effect that the properties shown as Dargah and Khankah in the award and the decree were not Dargah and Khankah properties. The appellant also came to know from the same letter that all the properties including those stated to be Dargah and Khankah properties in the award were attached by the Government of the Nizam in the year 1927 and after enquiry by the Government of the Nizam all the properties were released in the year 1927. The appellant further came to know from that letter that Abdul Hai claimed the properties as his own. Thereupon the appellant demanded from Abdul Hai partition of the property as Matrooka. Abdul Hai asked the appellant to consult lawyer.

14. On the evidence it would be utterly wrong to speculate that the appellant knew of the contentions advanced in 1927 by Abdul Hai for the release of the properties by stating that they were not Dargah and Khankah properties. There was no suggestion at the time of the examination of the appellant that he was aware in 1927 of the contentions of Abdul Hai. The High Court relied on Exhibit A-38, a letter, dated October 19, 1927, written by the appellant to Abdul Hai to impute knowledge of the attachment and release of the properties. The appellant was never confronted with that letter. It was never suggested to the appellant that the letter could be construed as attributing to the appellant the knowledge of any adverse claim made by Abdul Hai with regard to the properties. In that letter the appellant stated that he was indebted to the elder brother Abdul Hai for his kindness. The appellant also stated that the expenditure incurred in connection with the litigation would be divided into four parts and the amount incurred on behalf of the appellant could be recovered from his account. This letter, dated October 19, 1927, does not at all have the effect of establishing that the appellant had knowledge of any adverse claim of the appellant. The appellant was never shown the letter to explain what litigation he referred to. No inference can be drawn against the appellant without giving him an opportunity to have his way in that matter. It is unfortunate that Abdul Hai died during the pendency of the suit and before the trial. Not only his oral evidence but also the correspondence that Abdul Hai had with the Government of the Nizam in the year 1927 did not find way into the record of the suit. It would be totally misreading the appellant's letter of the year 1927 as impressing the appellant with the knowledge of ouster by Abdul Hai of the appellant from the properties forming the subject-matter of the suit.

15. There are two letters of great importance. One is, dated August 13, 1938 and marked Exhibit P-8 written by Abdul Hai to the Director of Endowment, Government of Hyderabad and the other is, dated September 7, 1938, written by the Ecclesiastical Department of the Government of Hyderabad to the Secretary of the Endowments, Ecclesiastical Department of the Government of Hyderabad. The letter of Abdul Hai was written in answer to an application made about that time to the Government of the Nizam by one Sheikh Abdur Rahim a tenant against whom Abdul Hai had filed a suit for recovery of rent. Abdur Rahim made an allegation that the properties in respect of which Abdul Hai filed a suit were Dargah and Khankah properties. The complaint of Abdur Rahim was however dismissed and the matter was

not allowed to be reopened on the strength of the orders of the Government recited by Abdul Hai in his letter. In answer Abdul Hai recorded these facts. The Nizam in the month of April, 1927 appointed the Secretary of the Ecclesiastical Department and the Commissioner of Police to enquire and report as to which of the properties were attached to the Dargah and which were personal private properties. Another Commission was appointed by the Nizam to enquire into the proper use of the endowed properties. The Ecclesiastical Department by letter, dated December 28, 1927 held that only the villages Debser and Sangvi were found to be under the Dargah. All properties of the parties which had been attached by the Nizam were released by letter, dated January 3, 1928, excepting the two villages. Abdul Hai by letter, dated January 16, 1928, to the Government of the Nizam stated that the properties marked Exhibits B-1 to B-10 in the award and the decree of the Court of Darul Khaza did not belong to the Dargah and Khankah. Abdul Hai further pointed out that the Nizam by a Firman, dated November 11, 1927, had issued orders saying that according to the opinion of the Council the Government's supervision should be lifted from the 'maash' referring thereby to the properties which had been attached by the Nizam and the same should be given over into the possession of Abdul Hai.

16. The other letter, dated January 5, 1939, from the Government of the Nizam stated that only two villages were held to be Dargah and the Government of the Nizam had made thorough enquiries and held that there was no other Dargah and Khankah properties and the question could not be re-opened.

17. It is established in evidence that the properties which were described as Dargah and Khankah properties before the arbitrators and the decree of the Darul Khaza Court are not Dargah and Khankah properties. Abdul Hai obtained an adjudication and an order of the Government of the Nizam in the year 1927 that only two villages of Debser and Sangvi belonged to the Dargah and the rest were not Dargah and Khankah properties. The appellant knew that there was litigation about the year 1927 about the properties. It is not in evidence as to what that litigation was or which properties were concerned therewith because the letter was not shown to the appellant. Even if it be assumed that all parties treated the properties marked Exhibits B-1 to B-10 as Dargah properties up to the year 1927 and thereafter there was an adjudication on the respresentation of Abdul Hai that the properties were not Dargah and Khankah the parties would be entitled to the same. The only way in which the parties could lose their rights to the property would be on the finding that there was adverse possession or ouster.

18. The decree of the Darul Khaza Court will not be an obstacle to the claim of the appellant for partition of the properties, because the properties are admittedly not Dargah and Khankah properties but Matrooka properties. The arbitration proceedings were void by reason of lack of legal guardian of the appellant to enter into a compromise. The decree of the Darul Khaza Court is also invalid and not binding on the appellant for the same reason. If all parties proceeded upon a basis that these were Dargah and Khankah properties and that basis is wiped out by the adjudication by the Government of the Nizam the parties are restored to their position as heirs to the Matrooka property. The award and the decree by reason of evidence of facts discovered since the judgment and the decree of the Darul Khaza Court cannot be allowed to stand because the effect of the discovery of the facts is

to make it "reasonably probable that the action will succeed". In *Birch* v. *Birch*[3] the Court of Appeal held that a judgment will be set aside on the ground of fraud if evidence of facts discovered since the judgment raise a reasonable probability of the success of the action. The principle can be stated in the words of Westbury, L. C. in *Rolfe* v. *Gregory*[4] "when the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or generally speaking by anything done or omitted to be done so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed". This decision was referred to by the Calcutta High Court in *Biman Chandra Datta* v. *Promotha Nath Ghose*[5] where the dictum of Westbury, L. C. was restated by holding that where a plaintiff had been kept from knowledge, by the defendant, of the circumstances constituting the fraud, the plaintiff could rely upon Section 18 of the Limitation Act to escape from the bar of limitation. In the present case, it is apparent that until the year 1927 the appellant and the other parties were clearly kept out of the knowledge of the true character of the properties. Even after 1927 it cannot be said on the evidence on record that the appellant had any knowledge of the true character of the properties or of ouster of adverse possession of Abdul Hai. The reasons are that Abdul Hai never alleged against the appellant and the other parties openly that he was enjoying the properties to the total exclusion of the appellant and the other brothers. Possession by one co-owner is not by itsef adverse to other co-owners. On the contrary, possession by one co-owner is presumed to be the possession of all the co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present case there is no evidence to support this conclusion. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

19. Section 18 of the Limitation Act, 1908 provides that when a person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, the time limited for instituting a suit against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person affected thereby. In *Rahimboy* v. *Turner*[6] Lord Hobhouse said "When a man has committed a fraud and has got property thereby it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit". Therefore if the plaintiff desires to invoke the aid of Section 18 of the Limitation Act he must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. In the present case, the right to sue arose when the appellant came to know that the properties were Matrooka and not Dargah and Khankah. When Abdul Hai got the properties released by reason of the decision of the Government of the Nizam in the year 1927 the properties became divisible among the appellant and his brothers and sisters. The existence of the right of the appellant was kept concealed by Abdul Hai. The appellant was not aware of the right nor could he have with reasonabe diligence discovered it. There was active concealment by Abdul Hai of the fact that the properties were not Dargah and Khankah

3. 1902 Probate Division 131.
4. (1864) 4 DeG J and S 576.
5. ILR 49 Cal 886 : AIR 1922 Cal 157.
6. 20 IA 1 : 17 Bom 341.

having full knowledge of the fact. It was only in 1941 (1350 Fasli) that the appellant came to know of the Matrooka character of the properties. It was then that the appellant also came to know that Abdul Hai had kept the character of properties concealed from the parties and entirely misstated and misrepresented the character of the properties by misleading the parties and obtaining by consent an award and a decree thereon without any contest.

20. The cause of action for partition of properties is said to be a "perpetually recurring one" (See *Monsharam Chakravarty and Others* v. *Gonesh Chandra Chakravarty and Others*.[7] In Mohammedan law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. The shares of heirs under Mohammedan law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and bounds in accordance with the specific share of each heir being already determined by the law.

In the present case the suit is for partition of properties which were by consent of parties treated as Dargah and Khankah but which were later discovered to be Matrooka properties in fact and therefore the declaration in the award and the decree on the award that those were Dargah and Khankah properties cannot stand and the entire partition is to be re-opened by reason of fraud in the earlier proceedings.

21. In the present case, the overwhelming evidence is that because of the representation of Abdul Hai that he was the Sajjadanasheen and the properties marked Exhibits B-1 to B-10 were Dargah and Khankah properties, that all the parties treated the properties as Dargah and Khankah before the arbitrators and in the decree upon the award. The very fact that there was never any contest indicates that the compromise and settlement between the parties was on the basis that the properties were Dargah and Khankah. It was absolutely within the knowledge of Abdul Hai as to what the true character of the properties was. The other parties did not have any opportunity of knowing the same. Abdul Hai knew the real character, concealed the true character and suggested a different character and thereby misled all the parties. Again, when Abdul Hai approached the Government of the Nizam and got the properties released by asserting that they were not Dargah and Khankah properties in the year 1927. Abdul Hai did not inform the same to any of the parties. The unmistakable intention of Abdul Hai all along was to enjoy the properties by stating those to be Dargah and Khankah. When the parties came to know the real character of the properties even then Abdul Hai was not willing to have partition. On these facts it is established that the fraud committed by Abdul Hai relates "to matters which prima facie would be a reason for setting the judgment aside". That is the statement of law in Halsbury's Laws of England, Third Edition, Volume 22, Paragraph 1669 at page 790.

22. For these reasons we accept the appeal and set aside the judgment of the High Court and restore the judgment and decree of the Trial Court. The appellant will be entitled to costs of this Court. The parties will pay and bear their own costs in the High Court.

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7. 17 CWN 521 : 16 IC 383.

and some more examiners would be necessary to examine the subject of third language. However, the review petition was dismissed.

6. The High Court though observed that the writ petitioner who has taken the examination is hardly a competent person to assess his own merit and on that basis claim for re-evaluation of papers, but issued the aforesaid direction in order to eliminate the possibility of injustice on account of marginal variation in marks. It is an admitted position that the regulations of the Board of Secondary Education, Orissa do not make any provision for re-evaluation of answer-books of the students. The question whether in absence of any provision to that effect an examinee is entitled to ask for re-evaluation of his answer-books has been examined by us in *Pramod Kumar Srivastava* v. *Chairman, Bihar Public Service Commission*[2] decided on 6-8-2004. It has been held therein that in absence of rules providing for re-evaluation of answer-books, no such direction can be issued. It has been further held that in absence of clear rules on the subject, a direction for re-evaluation of the answer-books may throw many problems and in the larger public interest such a direction must be avoided. We are, therefore, of the opinion that the impugned order of the High Court directing for re-evaluation of the answer-books of all the examinees securing 90% or above marks is clearly unsustainable in law and must be set aside.

7. The appeals are accordingly allowed and the impugned judgment and order dated 28-8-2003 of the High Court is set aside.

(2004) 13 Supreme Court Cases 385

(BEFORE RUMA PAL AND ARUN KUMAR, JJ.)

MOHAMMADBHAI KASAMBHAI SHEIKH AND OTHERS .. Appellants;

Versus

ABDULLA KASAMBHAI SHEIKH .. Respondent.

Civil Appeal No. 6484 of 2004†, decided on September 28, 2004

A. **Limitation Act, 1963 — Art. 65 — Applicability — Heirs of Mohammedans claiming share in the family property — Limitation period for, held, is governed by Art. 65 — Muslim Law — Succession — Limitation Act, 1908 — Art. 144**

Mahomedally Tyebally v. *Safiabai*, AIR 1940 PC 215 : 67 IA 406, *followed*

B. **Limitation Act, 1963 — Art. 65 — Applicability — Heirs of Mohammedans claiming share in the family property — Event from which time begins to run — Necessity of raising defence of adverse possession against such claim — Held, cause of action for claiming share in family property would arise from date of ouster of the claimant and limitation period would run from that date — However, unless defendant raises defence of adverse possession against the said claim, he cannot raise an issue**

2 (2004) 6 SCC 714 : 2004 SCC (L&S) 883

† Arising out of SLP (C) No. 7393 of 2004

relating to limitation of the claimant's claim — Muslim Law — Succession — Specific Relief Act, 1963 — S. 34 — Civil Procedure Code, 1908 — Or. 20 R. 12 — Hindu Law — Succession — Family Law — Succession

Mahomedally Tyebally v. *Safiabai*, AIR 1940 PC 215 : 67 IA 406; *Mohd. Mohammad Ali* v. *Jagadish Kalita*, (2004) 1 SCC 271, *followed*

Muslim Law — Succession — Nature of interest devolving on heirs of Mohammedans — Held, such heirs succeed to the estate in specific shares as tenants-in-common — Family Law — Succession — Succession Act, 1925, S. 36

Appeal dismissed D-M/32459/S

Chronological list of cases cited ***on page(s)***

1. (2004) 1 SCC 271, *Mohd. Mohammad Ali* v. *Jagadish Kalita* 387*a*
2. AIR 1940 PC 215 : 67 IA 406, *Mahomedally Tyebally* v. *Safiabai* 386*f*

ORDER

1. Leave granted.

2. The only issue in this appeal relates to the period of limitation with regard to the claim of the respondent to his share in the family property. The respondent's suit was filed against the appellants in 1988. The trial court dismissed the respondent's suit on the ground of limitation holding that the right of the respondent to a share in the property arose on the death of his surviving parent, namely, his mother which took place in 1968. Therefore, the claim of the respondent-plaintiff was barred.

3. The District Judge reversed the finding of the trial court holding that the cause of action in fact would not arise from the date of the death of his mother but from the date of his ouster. The High Court did not interfere with the decision of the first appellate court.

4. In our view, the conclusion of the High Court and the first appellate court is correct. However, the reasoning given in support of such conclusion is fallacious. The respondent had come with the clear case that he had been ousted in 1968. If the reasoning of the first appellate court and the High Court were to be accepted then as the suit had been filed only in 1988, it was barred by limitation. But as has been held in *Mahomedally Tyebally* v. *Safiabai*[1] the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Therefore, unless the defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiff's claim. [See, in

1 AIR 1940 PC 215 : 67 IA 406

this regard, the decision of this Court in *Mohd. Mohammad Ali* v. *Jagadish Kalita*[2] (SCC para 20).]

5. It is not in dispute that the appellants had not raised any issue of adverse possession in their written statement. In that view of the matter, the plea of limitation was not available to the appellants. The appeal is, accordingly, dismissed but without any order as to costs.

(2004) 13 Supreme Court Cases 387

(BEFORE RUMA PAL AND ARUN KUMAR, JJ.)

COCHIN PORT EMPLOYEES SANGH .. Appellant;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Civil Appeal No. 6089 of 2004†, decided on September 13, 2004

Labour Law — Trade unions — Employees' representative as a Member of Board of Directors of Port Trust — Method of choosing — Whether by "check-off" system or by secret ballot system — Dispute between two unions — Matter pending in writ appeal before Division Bench of High Court — Interim order passed by the High Court to the effect that the election of the two representatives could take place in any manner otherwise than by secret ballot, stayed by the Supreme Court — Said interim order modified to the extent that no employees' representative shall, at present, be selected for representing the employees on the Board of the Port Trust, which may continue to operate according to the provisions of the Act subject to existence of prescribed quorum (Paras 2 and 3)

R-P-M/31730/SL

ORDER

1. Leave granted.

2. The appeal by special leave has been filed by one of the unions whose members are employees of the respondent Port Trust. The appellant had filed a writ petition before the High Court, inter alia, challenging the method of choosing a representative to be a member of the Board of Directors of the Port Trust. According to the present rules, the employees are entitled to have two representatives on the Board. The contention of the appellant in its writ petition was that the method of selection of the representatives should be by secret ballot and not by the "check-off" system which had been followed from 1998. Respondent 4 is a rival trade union and opposed the prayer of the writ petitioner. The learned Single Judge, however, allowed the writ petition and directed that the employees' representatives to the Board of the Port Trust were to be chosen by secret ballot. Respondent 4 filed an appeal. An interim order was passed by the Division Bench of the High Court to the effect that the election of the two representatives could take place in any

2 (2004) 1 SCC 271

† Arising out of SLP (C) No. 5188 of 2004

1968 SCC OnLine All 178 : 1968 All LJ 1108 (FB) : AIR 1969 All 526 (FB) : 1968 RD 470 (FB)

Allahabad High Court
(Full Bench)
BEFORE S.D. KHARE, RAJESHWARI PRASAD AND A.K. KIRTY, JJ.

Ram Awalamb and others ... Defendants-Appellants;

Versus

Jata Shankar and others ... Plaintiff-Respondents.

S.A. No. 282 of 1967
Decided on September 18, 1968

The Judgment of the Court was delivered by

S.D. KHARE, J.:— These two appeals and the civil revision have been referred to this Bench because a common question of law is involved in them. The extent of the exclusive jurisdiction of revenue courts in certain matters, which are otherwise civil in nature, has been determined in several cases decided by this Court and it was noticed in Second Appeal No. 710 of 1967 that there is an apparent conflict in two Division Bench decisions of this Court, both pronounced in the year 1965.

2. No question was formulated for the opinion of the Full Bench in any of the two second appeals or the connected Civil revision, and all of them have got to be finally disposed of by this Bench. Each of these appeals and the civil revision shall, therefore, be considered separately after the common question of jurisdiction has been discussed.

3. The suit which gave rise to second Appeal No. 282 of 1967 was for the cancellation of three sale deeds executed by defendant no. 7, one member of the family only (who, if separated, could have a half share in the joint family property) for self and as a guardian of the plaintiff. The property sold was bhumidhari land. The alternative prayer was that if the transferor was held to be competent to transfer his interest in the property the sale deed be cancelled to the extent of the other half share in the property belonging to the plaintiff. The relief of joint possession was also sought.

4. So far as Second Appeal No. 710 of 1967 is concerned, the suit as originally filed was for permanent injunction against other co-sharers of the bhumidhari plot restraining them from making constructions over the land of the holding. Later a prayer for demolition of the constructions made by the defendants and for joint possession was added by way of amendment on the allegations that the constructions has been made during the pendency of the suit.

5. Civil Revision No. 1711 of 1965 arises out of a suit against trespassers for demolition and possession and the closing of a door. The common point for consideration is whether one or more or all of these suits were exclusively cognizable by revenue courts.

6. Another question which is common to the two appeals only and relevant for purposes of determining the question of jurisdiction is what is the status of a co-bhumidhar and whether or not a bhumidhari property is subject to any personal law (e.g., Hindu law governing joint family property) so that the entire joint family could be deemed to be one single bhumidhar, and no transfer could be made unless it was for legal necessity or for the benefit of the estate.

7. It would be convenient to consider the second question first.

8. Hindu joint families have existed from times immemorial and they exist even now. However, it is by no means necessary that every Hindu Joint family should be possessed of joint family property also. Where any property is ancestral or it is acquired by all the members of a joint Hindu family or after having been acquired by one member of the joint family only it is thrown in the common stock it is regarded to be joint family property or coparcenary property. Until partition takes place, or only one member of the family is left, without having

any male issue, the coparcenary property remains with the family and upon the death of any one member only his interest devolves on the surviving coparceners. The Karta or manager of the family alone has the right to transfer the property either for legal necessity or for the benefit of the estate.

9. The first question for consideration, therefore, is whether bhumidhari property governed by the provisions of the U.P. Zamindari Abolition and Land Reforms Act can ever become joint family property or coparcenary property.

10. A bhumidhari property is also property, and, therefore, it might be said that like any other property it should also be capable of becoming joint family property or coparcenary property. On the other hand it can be contended that bhumidhari rights are new rights conferred upon individual members of the family and where more than one member of the joint family become co-bhumidhars of a joint holding the joint family as such does not become a bhumidhar as one single unit but each member of the family on whom bhumidhari rights are conferred becomes a separate unit so that only those members of the family upon whom Bhumidhari rights are conferred become and remain tenants in common and not joint tenants.

11. Thus where one or more members of a joint Hindu family become bhumidhar or bhumidhars under Sec. 18 of the Act the questions which might arise for consideration are—

(a) Whether only those members of the family whose names were recorded as intermediaries or tenants in the revenue papers become bhumidhars;

(b) Whether, in cases where other members of a joint Hindu family were also intermediaries or tenants of that land, other members of the family also became co-bhumidhars along with the recorded intermediaries or tenants;

(c) What was, after the commencement of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act), the status of each member of a joint Hindu family the members of which had acquired interest in bhumidhari land by joint effort or from a common source;

(d) whether the notions of Hindu law regarding joint family could be involved to determine that status;

(e) whether in the case of certain tenancies (such as fixed rate tenancies) governed by personal law of tenants both with regard to the method of devolution and right of transfer, the joint family as such could become a bhumidhar as one single unit;

(f) whether the right of transfer conferred on bhumidhars under the Act is also controlled by the personal law of the holder of that right.

12. The consideration of question (a) and (b) is not necessary for the purposes of these appeals and revision. But all the remaining questions from (c) to (f) shall have to be considered and answered.

13. The scheme of the Act shall have to be examined in order to determine whether

the intention of the Act was to confer bhumidhari rights only on individual members of the family as separate units or whether the framers of the Act intended that in certain cases where the tenancy was of the joint Hindu Family the bhumidhari rights be deemed to be conferred on the entire joint Hindu family, as such, as one single unit.

14. The Preamble to the Act says that it was intended "to provide for the abolition of the zamindari system, which involves intermediaries between the tiller of the soil and the State in the Uttar Pradesh, and for the acquisition of their rights, title and interest and to reform the law relating to land tenure consequent upon such abolition and acquisition and to make provision for other matters connected therewith".

15. After having been passed by the State Legislature the Act was sent for the assent of the President of India under Art. 201 of the Constitution and the same was obtained on January 24, 1951. As from the date of the Notification which was published in the U.P. Gazette Extraordinary, dated July 1, 1952, all estates situated in Uttar Pradesh vested in the State (vide

Sec. 4 of the Act). The term "estate" was defined in Sec. 3(8) of the Act as follows:—

> "'Estate' means and shall be deemed to have always meant the area included under one entry in any of the registers described in clauses (a), (b), (c) or (d) and, in so far as it relates to a permanent tenure-holder, in any register described in clause (e) of Sec. 32 of the U.P. Land Revenue Act, 1901, as it stood immediately prior to the coming into force of this Act, or, subject to the restrictions mentioned with respect to the register described in clause (e), in any of the registers maintained under Sec. 33 of the said Act, or in a similar register described in or prepared or maintained under any other Act. Rule, Regulation or Order relating to the preparation or maintenance of record-of-rights in force at any time and include share in, or of an 'estate'."

16. The consequences of the vesting of an estate in the State are mentioned in Sec. 6 of the Act. All rights, title and interest of all the intermediaries in every estate and in all sub-soil in such estates were to vest in the State, all grants and conferment of title of or to land in any estate so acquired or of or to any right or privilege in respect of such land or its land revenue, whether liable to resumption or not were determined and all rents etc. which were till then payable to an intermediary vested in the State and were made payable to the State Government. The policy of the Act was that the tillers of the soil were not to be disturbed: rather enlarged rights were to be conferred on them. Sec. 18 of the Act provides for the settlement of certain land with intermediaries or cultivators as bhumidhars. All lands:

(i) in possession of or held or deemed to be held by an intermediary as sir or khudkasht or intermediary's grove,

(ii) held by a fixed-rate tenant or a rent free grantee as such,

(iii) held as such by an occupancy tenant, a hereditary tenant, or a tenant on patta *dawami* or *istimrari*, and

(iv) held by a grove-holder on the date immediately preceding the date of vesting was deemed to be settled by the State Government with such intermediary, lessee, tenant, grantee, or grove-holder, as the case may be, who shall, subject to the provisions of the Act, be entitled to take or retain possession as bhumidhar thereof.

17. A controversy arose as to who (the intermediary or the Adhivasi) became the bhumidhar of the land which was in actual possession of an adhivasi. Amending Act 20

of 1954 was passed and it conferred *sirdari* rights on all the Adhivasis.

18. From what has been mentioned above it is abundantly clear that as from the date of vesting new rights were created in the tillers of the soil in actual possession of the soil regardless of the consideration whether the land was a sir land of the proprietors or was entered in the names of the tenants or the sub-tenants. The actual tillers of the soil became sirdars or bhumidhars according to the provisions of the Act. The interest in land conferred upon the bhumidhars was a new right and, therefore, the question whether or not prior to the conferment of such rights the intermediary or tenant had heritable or transferable rights in the land is hardly material. That position was made clear by the decision in the case of *Rana Sheo Amber Singh* v. *Allahabad Bank*[1]. Their Lordships held that bhumidhari right was a new right conferred upon an intermediary and, therefore, it could not be sold in execution of a mortgage decree passed against the intermediary in respect of zamindari property in which bhumidhari land was held as sir land. Nothing could be shown to us from which it could be inferred that the bhumidhari rights conferred on a tenant could not be regarded to be new rights. The observations made by the Supreme Court in that case applied to the erstwhile intermediaries and tenants alike so that both classes acquired new rights only after Act 1 of 1951 came into force.

19. Secs. 134 to 141 of the Act provide how a sirdar could acquire bhumidhari rights in the land held by him. He could do so by depositing ten times the land revenue

in the manner indicated under the provisions of the Act. Such person became entitled to the grant of a certificate under Sec. 137 of the Act and Sec. 138 provided that where any person has become a bhumidhar, whether under Sec. 18 or under Sec. 134, in respect of a share of holding held by him jointly with others who are *sirdars*, the bhumidhar may sue for partition of his share in the holding, and upon partition he shall be deemed to be a bhumidhar of the land allotted to his share.

20. Sec. 152 of the Act provided that the interest of a bhumidhar shall be transferable subject to certain restrictions as contained in Secs. 154 to 156 of the Act. Thus to the extent permissible under Secs. 154 to 156 of the Act itself Sec. 152 of the Act gives full right to each bhumidhar to make a transfer of his interest in the bhumidhari land. That right is not subject to any other restriction. In the Full Bench case of *Ramjit Dixit* v. *Bhrigunath*[2] a Hindu widow who was in possession of a family property and had become bhumidhar of the land held by her was held to be entitled to pass absolute interest to her transferee. It was held in that case by Desai, C.J.:—

> "An agricultural tenant has no religion and no personal law except as expressly provided in the Zamindari Abolition and Land Reforms Act. It applies to Hindus, Muslim, Christians etc. regardless of their religion and, therefore, regardless of their personal law except as regards succession in certain cases. It contains its own provisions regarding inheritance and transfers; and when it has left certain matters to be governed by the personal law it has done so by an express provision. Personal law has never been applied proprio vigore to questions of inheritance and transfer of tenancy rights as it has been applied to inheritance and transfer of proprietary rights".

He respectfully agrees:—

21. The next important section in the Act relating to bhumidhars is Sec. 171. It provides for a general order of succession on the death of a male bhumidhar, sirdar or

asami. The personal law of the tenant is not recognised for the purpose of the devolution of the interest of a deceased bhumidhar and the general order of succession as laid down in Sec. 171 is applicable to Hindus, Muslims and Christians alike. Sec. 172 of the Act provides for succession in the case of a female bhumidhar holding an interest inherited as a widow, mother or daughter after the date of vesting and Sec. 174 of the Act provides for succession to a woman holding an interest otherwise in bhumidhari, sirdari or asami land.

22. Thereafter comes Sec. 175—a very important provision and it reads as follows:—

> "In the case of a co-widow or co-tenure-holder, who dies leaving no heir entitled to succeed under the provisions of this Act, the interest in such holding shall pass by survivorship."

23. It is thus evident that other persons holding bhumidhari interest in land were to hold it as tenants in common and not as joint tenants.

24. There is nothing in the provisions of the Act to indicate that the framers of the Act ever intended that a joint Hindu family should be considered to be one single unit as bhumidhar. Had they envisaged any such contingency they were bound to indicate how succession was to be governed in the case of a joint Hindu family. On the other hand the only inference which can be drawn from Sec. 175 of the Act is that a group of persons holding bhumidhari interest were to hold the same as tenants in common.

25. It is significant to note that the Act does not make any provision based on any particular personal law either in respect of:

(a) the status of each bhumidhar, or

(b) his right of transfer, or

(c) the devolution of his interest after his death.

26. It can also be safely inferred from the provisions of the Act that the intention of the framers of the Act was to recognise only the tillers of the soil (be they males or females) actually in occupation of the holding for conferring bhumidhari rights on them.

27. The joint family as such is never recorded as tenant in the Record of Rights prepared under Sec. 33 of the Land Revenue Act, and it is evident that under Sec. 18 of the Act the bhumidhari rights which were to be conferred on tenants could not have been conferred on any joint family as such. It could only be conferred on individuals who were or could be deemed to be the actual tillers of the soil and held it as tenants, and who, after conferment of a new right, became tenants in common (vide Sec. 175 of the Act).

28. It has, however, been contended by the learned counsel for the appellant that in case the joint Hindu family could be a tenant of a holding prior to the date of vesting there is nothing in Sec. 18 of the Act itself to suggest that the bhumidhari rights were not to be conferred on such a tenant, to wit, the joint Hindu family. It is contended that after such rights are conferred on a joint Hindu family, it should continue to hold that property subject to the provisions of the Hindu law till the time the joint Hindu family continued to exist.

29. In our opinion the contention of the learned counsel cannot be accepted for the following reasons:—

(a) The scheme of the Act seems to be to make one law for persons of all castes and creeds and for that reason there is no mention of Hindu joint family anywhere in the Act except in Chapter III (Assessment and Compensation) where for purposes of calculation of compensation only father and his male lineal descendants are to be treated as one unit while the other members of the family are to be treated as separate units.

(b) The notions of Hindu law, or for that matter any personal law, could not be applied to bhumidhari rights, because—

(i) these are new rights conferred under the Act,

and

(ii) the special provisions of the Act relating to status of a bhumidhar, transfer by him of his interests in bhumidhari land, and devolution of his interests after his death are governed by the provisions of this special Act.

(c) It can be safely inferred from Sec. 175 of the Act that where there are more than one bhumidhar in any holding all the co-bhumidhars shall be tenants in common and not joint tenants. That provision of law is applicable to members of a joint Hindu family having interest in bhumidhari rights. The interest of each person in bhumidhari land passes according to the order of succession given in Secs. 171 to 174 of the Act and not by survivorship. The principle of survivorship amongst co-widows and co-bhumidhars can apply only when there is failure of heirs as mentioned in Secs. 171 to 174: (See *Dulli* v. *Imarti Devi*[3].

(d) The notions of Hindu law will not apply to bhumidhari land because both the main incidents of a joint family property, to wit (i) devolution by survivorship, and (ii) male issue of a coparcener acquiring an interest by birth (vide Mulla's Hindu Law, 13th Ed. Para. 221) are negatived by the provisions of the Act.

30. The question of the application of personal law to bhumidhari interest acquired either under Sec. 18 or under Sec. 134 of the Act was considered by a Full Bench of this Court in the case of *Ramji Dixit* v. *Bhrigunath*[2] and the two questions formulated by it were answered as follows:—

Q: 1(a) Whether a female who has inherited a holding before the enforcement of the Act from the last male holder and has become a bhumidhar under Sec. 18 or has acquired bhumidhari rights under Secs. 134 and 137 can transfer such holding?

A: Yes.

Q: (b) If so, whether such transfer is valid and effective for her life or until remarriage or even beyond her life time?

A: Valid and effective beyond her lifetime.

Q: 2(a) Whether a female who inherits a bhumidhari holding from a male bhumidhar can transfer such holding?

A: Yes.

Q: (b) If so, whether such transfer is valid and effective during her life or until remarriage or even beyond her lifetime?

A: Valid and effective even beyond her lifetime.

31. Under the Hindu law a widow of a joint Hindu family in possession of her husband's property had only a limited right of transfer over it and the transfer was

valid only during her lifetime. It was held by the Full Bench that the notions from personal law could not be imported to restrict the rights of a bhumidhar to alienate her interest in the bhumidhari land and that her right to alienate was subject only to the provisions of the Act itself. We respectfully agree with that view.

32. It was held in the case of *Mahendra Singh* v. *Attar Singh*[4] by a Division Bench of this Court to which one of us was a party that the bhumidhari rights are special rights created by Act 1 of 1951 and these new rights are solely to be governed by the provisions of the Act. Notions of Hindu law, or Mohamedan law, or any other personal law which would be applicable to other properties not governed by any special law cannot be imported into the rights created by this Act.

33. Prior to the coming into force of Act 2 of 1901 a tenancy could be coparcenary property of a Joint Hindu family in this limited sense only that:—

(a) the tenancy rights enjoyed by a Hindu joint family could also be considered property, and

(b) the devolution of interest of a tenant upon his death was to take place according to personal law.

34. Where the tenancy belonged to all the members of the joint Hindu family it could be possessed and enjoyed by all such members and such tenancies could, to that extent only, be described as joint family tenancies or coparcenary property. The position, however, changed to a very great extent after Act II of 1901 came into force. Sec. 22 of Act II of 1901 provided for succession to tenants. However, no provision was made in that Act regarding the status of old tenants where all the persons in whose favour the tenancy had been created or in whom the tenancy was to vest were members of a joint Hindu family. In the absence of any specific provision in Act II of 1901 the devolution in the case of such old tenancies could be by right of survivorship as in the case of joint tenants although new tenants were to be governed by the provisions of Sec. 22 of Act II of 1901.

35. The tenancy law underwent further change when U.P. Act III of 1926 came into operation. It was specifically provided (vide Sec. 26 of Act III of 1926) that tenants falling under most of the categories and forming a joint Hindu family were to be regarded as tenants in common and not joint tenants. When Act XVII of 1939 came into operation Sec. 38 of that Act again provided what had been laid down by Sec. 26 of Act III of 1926.

36. In course of time cases under the various Tenancy Acts were decided and in some of them the personal law of Hindus regarding the devolution of joint Hindu family property was applied to tenancy property also. In some of the reported cases which were decided prior to the coming into force of Act III of 1926 it was held that a joint Hindu family could be a tenant. That, in our opinion, amounted to saying that tenancy could be regarded as joint property or coparcenary property. It is, however, significant to note that in none of those cases the extent to which a joint family as such could be considered as a tenant was ever required to be considered.

37. The earliest case which has been cited before us is that of *Bhup Singh* v. *Jai Ram*[5], governed by Act II of 1901. In that case the admitted case of the parties was that there was but one occupancy holding, that is to say, that all the land in the two villages constituted one holding as between the landlord and the several persons who were entitled to the occupancy holding and that the rent was a joint one. After the death of the widow of the last male tenant of the holding the suit of his reversioners for possession over that holding was decreed. It was held that the ordinary

rules of Hindu law would prevail and the plaintiffs would be entitled to succeed.

38. The next case is that of *Mendya* v. *Jhurya*[6], governed by the same Act. In that case the tenancy belonged to all the male members of a joint Hindu family. Upon the death of one of the members of the joint Hindu family the question arose whether his interest was to devolve on his brother, who was joint with him, or on his widow, who could inherit if, Sec. 22 of Act II of 1901 was applicable. Under provisions of Act II of 1901 there was no bar to the interest in old occupancy tenancy (where it was of the nature of a joint tenancy) devolving by right of survivorship. The deceased tenant having remained joint with other members of the joint Hindu family, his interest in the joint property could devolve by right of survivorship on the co-owner of the joint property. Hence it could not be inherited by his widow under Sec. 22 of N.W.P. Tenancy Act II of 1901. It must be in this context that the following observations were made by Tudball, J., that where:

> ".....two persons.....held an occupancy tenancy as a joint Hindu family we can see nothing in the Act to prevent a joint Hindu family as such acquiring an occupancy tenure.....so long as the joint family exists the tenant in that case does not the and, therefore Sec. 22 does not operate. As the joint family in the present case owned the tenure the family still remains the tenant in spite of the death of Ram Ghulam".

39. The next case which has to be considered is *Acharji Ahir* v. *Harai Ahir*[7], governed by Act III of the 1926. It was held in that case by a Division Bench of this Court that:—

> "the ordinary rule of Hindu law, that properties acquired while the family was joint and with the help of the ancestral or joint family property should be regarded as joint family property, and that the burden of proof that it was self-acquired property of a single member should be on that member, should be applied to a case where the property in question is a tenancy."

40. It was further held that the new Tenancy Act also recognises the possibility of a joint family holding lands as an occupancy tenant *though it had modified the rule of succession for the future*.

41. It is, therefore, clear from the observations made in this case that after the passing of Act III of 1926 the rule of survivorship could not be applied to tenancy land and the succession was to be governed by Secs. 24 and 25 which was applicable to Hindus, Muslims and Christians alike.

42. The last reported case on this point is that of *Mahabir* v. *Suba Lal*[8]. The learned Judge who decided this case held on the basis of the case of *Rana Sheo Amber Singh* v. *Allahabad Bank*[1] that after the passing of the Act the entire property vested in the States and what was conferred by Sec. 18 of the Act was a new right which the persons on whom it had been conferred never had and that they held it subject to the provisions of the Act. To that extent we respectfully agree. The learned Judge, however, further held that where several members of a joint Hindu family became co-bhumidhars because they had been co-tenants under the earlier Tenancy Act they did not have any coparcenary interest in the new rights acquired as bhumidhars but they continued to be the joint tenants of the land. We respectfully disagree with this view. It has been held in several decided cases that the concept of joint tenancy of British law is unknown to Hindu law except in the case of coparcenary property—vide *Jogeshwar Narain Deo* v. *Ram Chund Dutt*[9], *Mt. Bahu Rani* v. *Rajendra Baksh*[10], *Krishnaswamy* v. *Avayambal*[11], *Seshureddi* v. *Mallareddi*[12], *Kapula Surareddy* v. *Koppula Venkatta Surhareddi*[13] and *Shridhar Ghose* v. *Hari Mohan Sahu*[14]. According

to *Halsbury's Laws of England*, Vol. 32, page 332 joint tenants are those who form one body of ownership. Each tenant has an identical interest in the whole land and every part of it. The title of each arises by the same Act. The interest of each is the same in extent, nature and duration. Thus joint tenancy connotes four ideas-unity of title, unity of possession, unity of interest and unity of commencement of title. In a tenancy-in-common also there may be unity of possession and where title is derived from a common sale deed or by inheritance from one person it might very well commence at one and the same time. However, other ingredients which would be the main ingredients of the joint tenancy would be missing. In our view having regard to the provisions of the Act it cannot be successfully argued that the co-bhumidhars hold the bhumidhari land as joint tenants.

43. Relying on a division Bench case of this Court a learned single Judge of this Court did not accept the case of *Mahabir* v. *Suba Lal*[8] as laying down good law (vide *Mahendra Kumar* v. *Deputy Director of Consolidation*[15].

44. Our attention has, however, been invited to an unreported case *State of U.P.* v. *Pradeep Sunder Narain Singh*[16] decided by a Division Bench of this Court dismissing a writ petition in limine. It was held that there was nothing objectionable in the decision of the consolidation authorities that a bhumidhari interest could be held by a joint Hindu family as such, which, being a tenant, could acquire bhumidhari rights under Sec. 18 of the Act. For reasons mentioned in the preceding paragraphs of this judgment we respectfully disagree with the following observations made by a Division Bench of this Court that:—

(a) a joint Hindu family as such, as one unit, can hold bhumidhari land,

and

(b) it shall, after the death of any member of the joint Hindu family, devolve on the others by right of survivorship.

45. Our conclusions can, therefore, be briefly summarised as follows:—

(1) Where members of a joint Hindu family hold bhumidhari rights in any holding, they hold the same as tenants in common and not as joint tenants. The notions of Hindu law cannot be invoked to determine that status.

(2) Where in certain class of tenancies, such as permanent tenure holders, the interest of a tenant was both heritable and transferable in a limited sense and such a tenancy could, prior to the enforcement of the Act, be described as joint family property or coparcenary property, the position changed after Act 1 of 1951 came into force. Thereafter the interest of each bhumidhar, being heritable only according to the order of succession provided in the Act and transferable without any restriction other than mentioned in the Act itself, must be deemed to be a separate unit.

(3) Each member of a joint Hindu family must be considered to be a separate unit for the exercise of the right of transfer and also for the purposes of devolution of bhumidhari interest of the deceased member.

(4) The right of transfer of each member of the joint Hindu family of his interest in bhumidhari land is controlled only by Sec. 152 of the Act and by no other restriction. The provisions of Hindu law relating to restriction on transfer of coparcenary land, e.g., existence of legal necessity, do not apply.

46. Now we proceed to consider the vexed question of the exclusive jurisdiction of revenue courts in civil matters coming before the courts.

47. The preamble to the Code of Civil Procedure shows that the Act was enacted to consolidate and amend the law relating to procedure of the courts of civil judicature.

48. Sec. 5 of the Code of Civil Procedure, 1908, defines "revenue court" as a court, having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes but does not

include a civil court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of the civil nature. Sec. 9 of the Code of Civil Procedure, 1908, provides:

> "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either, expressly or impliedly barred".

49. It, is, therefore, evident that a civil Court has jurisdiction to try all suits of a civil nature except those of which its cognizance is barred under any local law.

50. In the case of *Abdul Waheed Khan* v. *Bhawani*[17] their Lordships of the Supreme Court, while considering the bar of certain provisions of Bhopal State Land Revenue Act to the jurisdiction of the Civil Court, observed as follows:—

> "Under Sec. 9 of the Code of Civil Procedure, a civil Court can entertain a suit of a civil nature except a suit of which its cognizance is either expressly or impliedly barred. It is settled principle that it is for the party who seeks to oust the jurisdiction of a civil court to establish his contention. It is also equally well settled that a statute ousting the jurisdiction of the civil Court must be strictly construed."

51. The bar of the jurisdiction of civil Court with regard to certain classes of cases relating to agricultural land is provided under Sec. 331 of the Act. The relevant portion of that section reads as follows:—

> "Except as provided by or under this Act no court other than a court mentioned in column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908, take cognizance of any suit, application, or proceeding mentioned in column 3 thereof;
>
> (Or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application);
>
> Provided that where a declaration has been made under Sec. 143 in respect of any holding or part thereof, the provisions of Schedule II in so far as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof.
>
> Explanation: If the cause of action is one in respect of which relief may be granted by the revenue Court, it is immaterial that the relief asked for from the Civil Court may not be identical to that which the revenue could have granted...."

52. Thus the jurisdiction of a Civil Court shall be barred in respect of suits based on a cause of action for any of the reliefs:

(a) mentioned in column 4 of Schedule II as being cognizable by revenue court,

Or

(b) if on the same cause of action any relief could be obtained by means of any suit or application mentioned in column 4 of Schedule II of the Act, the relief asked for from the civil Court may or may not be identical to that which the revenue court would have granted.

53. In other words, (a) above relates to the class of cases where the jurisdiction of Civil Court is specifically barred. Under clause (b) falls that class of cases where the jurisdiction of the Civil Court is impliedly barred.

54. Almost a similar provision existed for barring the jurisdiction of Civil Courts also under the provisions of Act XVII of 1939. An almost identical provision existed in Act III of 1926 also with, however, this difference only that the revenue court should in such cases have been capable of giving "adequate" alternative relief. However, under the later act relating to revenue law the words "any relief" occurred in place of "adequate" relief.

55. As was held in the Full Bench case of *D.N. Rage* v. *Kazi Muhammad Haider*[18] the term "any relief" will certainly bring within the jurisdiction of revenue courts more cases than could be tried by it exclusively under Act III of 1926 where the word used was "adequate" (and not "any") relief. However, the jurisdiction

of Civil courts with regard to agricultural land was not altogether barred, and it was held that the revenue court had no jurisdiction where no plea of tenancy had been set up by the defendant within plaintiffs knowledge before the institution of the suit.

56. While interpreting the scope and applicability of Sec. 242 of Act XVII of 1939 which was almost identical to Sec. 331 of Act 1 of 1951 to the class of cases where the jurisdiction of the Civil Court was only impliedly barred, it was held in the Full Bench case of *D.N. Rage* v. *Kazi Muhammad Haider*[18] that the jurisdiction of a court primarily depends upon the allegations made in the plaint but at the same time it was clear that the plaintiff could not either by hiding or misstating certain facts give jurisdiction either to the civil Court or to the revenue court. It was observed as follows:—

> "We think that it is very difficult in view of the provisions of Sec. 242 of the United Provinces Tenancy Act, 1939, to hold that the Civil Court and revenue court can in any case have concurrent jurisdiction and we would hold, therefore, that the jurisdiction is not concurrent but depends on the allegations made in the plaint provided those allegations are established to be true".

57. It is the cause of action which determines the jurisdiction of a court. The term "cause of action" though no where defined is now very well understood. It means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment—vide *Mohammad Khalil Khan* v. *Mahbub Ali Mian*[19].

58. If the basic evidence to support the two claims is different then the causes of action are also different—vide *Mohammad Khalil Khan* v. *Mahbub Ali Mian*[19]. For example, there can be no doubt that the cause of action for a suit based on title will be different from the cause of action for a suit under Sec. 9, Specific Relief Act. In the case of *Yar Muhammad* v. *Lakshmi Das*[20] the question arose whether the jurisdiction of the Civil court was barred by virtue of Sec. 242 of the U.P. Tenancy Act in respect of a suit filed under Sec. 9, Specific Relief Act for *obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the suit*. It was held that the cause of action for a suit for possession based on title being different from the cause of action based on possession only under Sec. 9 of the Specific Relief Act the jurisdiction of the civil Court was not barred to entertain a case of the latter class.

59. It follows that in each and every case the cause of action of the suit shall have to be strictly scrutinized to determine whether the suit is solely cognizable by a revenue court or is impliedly cognizable only by a revenue court, or is cognizable by a civil Court.

60. Where in a suit, from a perusal only of the reliefs claimed, one or more of them are ostensibly cognizable only by civil Court and at least one relief is cognizable only

by the revenue court, further questions which arise are whether all the reliefs are based on the same cause of action and, if so, (a) whether the main relief asked for on the basis of that cause of action is such as can be granted only by a revenue court, or (b) whether any real or substantial relief (though it may not be identical with that claimed by the plaintiff) could be granted by the revenue court. There can be no doubt that in all cases contemplated under (a) and (b) above the jurisdiction shall vest in the revenue court and not in the Civil Court. In all other cases of a Civil nature the jurisdiction must vest in the Civil Court.

61. It was contended by Sri K.P. Singh (appearing for the appellant in Second Appeal No. 282 of 1967 and for the respondent in the connected Second Appeal) that the Legislature has, by using the term "any relief" in Sec. 331 of the Act completely barred the jurisdiction of the civil Court in suits relating to agricultural land where any relief based on the

same cause of action, whether or not the same is real or substantial, could be given to the plaintiff by a revenue court. There is no force in this contention. In our view it is opposed to the observations made by the Supreme Court in the following two cases:—

(1) *Ram Swamp* v. *Shikar Chand*[21], and (2) *Abdul Waheed Khan* v. *Bhawani*[17]

62. The case law of this Court also on the interpretation of Sec. 242 of Act XVII of 1939 or Sec. 331 of Act I of 1951 does not support this contention.

63. It was observed by the Supreme Court in the case of *Ram Swamp* v. *Shikar Chand*[21] that one of the points which is often treated as relevant in dealing with the question about the exclusion of the civil Court's jurisdiction is whether the special statute (in that case the U.P. Temporary Control of Rent and Eviction Act, III of 1947) has used clear and unambiguous words indicating that intention. Another test which is applied is:

64. Does the said statute provide for any adequate and satisfactory alternative remedy to a party that may be aggrieved?

65. It was laid down in the case of *Abdul Waheed Khan* v. *Bhawani*[17] that a statute ousting the jurisdiction of the Civil Court must be strictly construed.

66. The case law in this Court on this point might be classified under the following two heads:—

(a) Where several reliefs closely connected with each other can be claimed on the basis of the cause of action set forth in the plaint it has to be examined which of them is the main relief and which others are ancillary reliefs. If upon a consideration of facts constituting the cause of action the main relief is such which can be granted by the Civil court the suit will be cognizable in the Civil Court which will proceed to grant the ancillary reliefs also. On the other hand if the main relief is specifically cognizable by a revenue court only but ancillary reliefs may be such as could be granted by the Civil Court the matter was cognizable only by a revenue court.

(b) The pith and substance of the allegation made in the plaint constituting the cause of action must be scrutinized in order to determine whether or not if on the same cause of action any adequate or satisfactory alternative remedy could he available to the plaintiff in the revenue court. If the answer to the scrutiny be in the affirmative, then the suit brought in the civil Court must fail regardless of the consideration that in respect of the reliefs actually claimed the suit was on the face of it cognizable by a Civil Court.

67. The decided cases of this Court, having a bearing on the above two propositions of law, might now be examined.

68. A suit for possession of a plot of land by uprooting the trees standing thereon was held by Kidwai, J. to lie in the Civil Court—*Puttu* v. *Bharat Singh*[22]. In the Full Bench case of *Kanhaya Lal* v. *Huriyan*[23] it was held that such suits were cognizable in revenue court only because a suit under Sec. 93 of Act XII of 1881 could be brought. The two cases are under two different Acts.

69. Where the plaintiff claimed the relief of injunction and also the relief for settlement of account and for his share of profits of agricultural land it was held that the relief of injunction was not the main relief but was only subsidiary to the relief for settlement of account and that suit was held by a Division Bench of this Court to be cognizable by revenue court only: *Syed Zahid Ali Sabzposh* v. *Syed Shahid Ali Sabzposh*[24].

70. It was held by a Division Bench of this Court in the Case of *Angnu* v. *Mahabir*[25] that a suit for demolition and possession against a trespasser may lie in a civil Court.

71. It was held by Asthana, J. in *L. Deep Chandra* v. *L. Durga Pd.*[26] that where the suit was for specific performance of the

contract of sale and also for possession and the main relief was for specific performance of the contract of sale, the suit was cognizable by the Civil Court.

72. Where the suit was for injunction only, as a suit for declaration filed under Sec. 63 of the U.P. Tenancy Act in a revenue court was stayed, it was held by a Division Bench of this Court that the suit was cognizable by a Civil Court—vide *Khaderu Mal Teli* v. *Ram Karan Ahir*[27]. That was, however, on the consideration that the suit for possession was stayed.

73. It was held by a Division Bench of this Court that where the suit was for cancellation of a sale deed on the ground of fraud and for possession the main relief was for cancellation of document and, therefore, the ancillary relief for possession could also be granted by the Civil Court—vide *Mewa* v. *Baldeo*[28].

74. A suit for possession of agricultural land and for demolition of unauthorised constructions standing thereon brought against a trespasser was held by a Division Bench of this Court to be cognizable by the revenue court only, because (as subsequently explained in *Mewa* v. *Baldeo*[28]:—

(a) the definition of the word 'land' under Act I of 1951 is different from that given in the U.P. tenancy Act, 1939. Under Act XVII of 1939 the land, as soon as it was built upon, ceased to be land but that was not so under Act 1 of 1951 and on that account earlier rulings of the Court holding that the Civil Court had jurisdiction to entertain a suit for demolition and possession were not considered to be good law under the provisions of Act I of 1951, and

(b) as against trespasser the relief of possession could always be considered to be the main relief and the relief of injunction an ancillary relief—(vide *Mukteshwari Prasad Tewari* v. *Ram Wali*[29].

75. In the following cases it was held that upon a consideration of the cause of action the real relief which could have been claimed was to determine the forum of the suit.

76. In the case of *Ram Sewak Lal* v. *Bashist*[30] decided by a Division Bench of this Court the suit was for a declaration that a consent decree passed by the revenue court was void and ineffectual against the plaintiff. It was found that the real relief which

the plaintiff sought in the suit in appeal was a declaration of his status as a tenant of the plots in suit. It was, therefore, held that in the circumstances the suit was one which was contemplated by Sec. 59 of Act XVII of 1939 and should have been filed in the revenue Court.

77. The case of *Baiju* v. *Shambhu Saran*[31] decided by a Division Bench of this Court was for injunction based on the allegations that the plaintiff was a khudkasht holder but the defendant had got his name entered in the revenue papers and was interfering with his possession. The defendant claimed to be the tenant in possession. The lower appellate court granted the decree of injunction. The second appeal filed before the High Court was allowed on the ground that the Civil Court had no jurisdiction to decide the case because upon the facts of the case it was clear that the plaintiff must seek a declaration as to his title and, therefore, the suit was one in which relief would be granted by the revenue court.

78. The next case referred to us is that of *Rasool Ahmad* v. *Beni Prasad*[32] decided by Gangeshwar Prasad, J. Interpreting the provisions of Sec. 242 of the Act XVII of 1939 the learned Judge observed that the suit was cognizable by the revenue court where the prayer was for declaration that the plaintiff was an occupancy tenant of the land in suit and in the alternative claimed possession against a person who according to the plaintiff relief upon invalid and ineffective lease deeds, although the cancellation of the lease deeds could not be done by the revenue courts but that was hardly necessary.

79. In the case of *Rohan* v. *Chiraunji*[33] it was held by Takru, J. that although the relief for cancellation of the sale deed was also incidentally claimed the main relief was for declaration under Secs. 59 and 61 of the U.P. Act XVII of 1939.

80. The main point for consideration in all cases where on a definite cause of action two reliefs can be claimed is which of the two reliefs is the main relief and which relief or other reliefs are ancillary reliefs. Where from facts and circumstances of the case the relief for demolition and injunction is the main relief there could be no reason why the jurisdiction of the Civil Court should be barred. On the other hand, if it could be said that the main relief, that is to say, the real and substantial relief, could not that cause of action be of possession only then the suit will definitely lie in the revenue court. In our opinion it is difficult to lay down any hard and fast rule that where the suit is brought against a trespasser the only relief which the plaintiff should claim as an effective relief is that of possession and he need not try to obtain an Injunction order and get the constructions made by the trespasser demolished. The revenue courts have not been empowered to grant the reliefs of injunction and demolition and in case the defendant refuses to take away the materials from the land in dispute after the decree for possession has been passed against him the main object of the plaintiff would be frustrated. A civil Court will, therefore, have the power to entertain the suit where the main relief sought by the plaintiff is that of injunction and demolition, a relief which could be granted by the Civil Court only. The relief of possession will be merely ancillary relief which the Civil Court could giant after having taken cognizance of the suit for injunction and demolition. We respectfully agree with the view expressed by Dayal and Seth, JJ. in the case of *Mewa* v. *Baldeo*[28] that once the suit is maintainable for the main relief in the civil court then there is no bar for the civil court to grant all possible reliefs flowing from the same cause of action. We, however, with

great respect, differ from the view taken by the Division Bench in the case of *Mukteshwari Prasad Tewari* v. *Ram Wali*[29] that whenever a suit is for demolition and possession against a trespasser it must always be held that the main relief was that of possession. We are of the view that the determination of the question as to which out of the several reliefs arising from the same cause of action is the main relief will depend on the facts and circumstances of each case.

81. Further we are of the view that where, on the basis of a cause of action—

(a) the main relief is cognizable by a revenue court the suit would be cognizable by the revenue court only. The fact that the ancillary reliefs claimed are cognizable by civil court would be immaterial for determining the proper forum for the suit;

(b) the main relief is cognizable by the civil court the suit would be cognizable by the Civil Court only and the ancillary reliefs, which could be granted by the revenue court may also be granted by the civil Court.

82. We are also of the view that the above principle will apply also to a suit for injunction and demolition relating to agricultural land and brought against a trespasser. With great respect to the Hon'ble Judges who took a different view it is not possible for us to arrive at the conclusion that as against trespassers the main relief must always be that of possession only. The argument that the definition of the land has slightly changed and, therefore, the old case-law on the point cannot be at all accepted as good law has not appealed to us. It has to be remembered that so far as the plaintiff is concerned he never intended to make any construction on his land and wants to get back its vacant possession. Therefore, the slight change in the definition of land (so as to exclude the land built upon) can hardly affect the question of jurisdiction.

83. We now proceed to dispose of the two Second Appeals and the connected civil Revision referred to this Bench for disposal.

84. *Civil Revision No.* 1711 of 1965: This revision application is directed against an

order of the Munsif dated 7-8-1965 deciding the issue of jurisdiction against the defendant and holding that the suit for demolition and possession was maintainable in the Civil Court.

85. It is contended by the learned counsel for the applicant that the plaintiff need not have sued for demolition of the constructions made because under Sec. 209 of the U.P. Zamindari Abolition and land Reforms Act—Vide Schedule II, Item 24—the revenue court was empowered to grant the plaintiff the relief for possession and for damages. In our opinion this contention has no force because the relief of possession and damages could not be real and substantial alternative relief.

86. It appears from the judgment of the learned Munsif that the real and substantial relief sought in the suit was that of injunction and demolition and the relief of possession was merely an ancillary relief. The learned Munsif rightly held that where the revenue court was not competent to grant all the reliefs arising out of one and the same cause of action and the main relief was that of injunction and demolition the suit would lie in the Civil Court.

87. There is no force in this revision application and it is, therefore, dismissed with cost.

88. *Second Appeal No.* 282 of 1967. There is no force in the contention that the suit giving rise to this appeal was not cognizable by the civil Court. The suit was for cancellation of three sale deeds and in the alternative for the cancellation of those very

sale deeds to the extent of one-half share belonging to the plaintiff, who in the latter event also claimed joint possession along with the defendants, who had made the purchase by means of those sale deeds.

89. The sale deeds were voidable and not void. Even in case of the alternative relief with regard to one-half of the property only the sale deed must be held to be voidable because the sale had been made by the defendant No. 7, an elder brother of the plaintiff on behalf of the plaintiff also. In the present case the suit could not be said to be barred by Sec. 331 read with Sec. 209 of the Act for the simple reason that Sec. 209 of Act 1 of 1951 applied only to Suits against trespassers and where the suit for joint possession is instituted by one co-sharer against the other it can have no application. The opening words of Sec. 209 read as follows:—

"A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force….."

90. A suit for ejectment directed against such persons only (i.e., trespassers) could be filed under Sec. 209 of the Act: Vide *Ram Dass* v. *Board of Revenue, U.P., Allahabad*[34]. The jurisdiction of the Civil Court, therefore, would not be barred under Sec. 331 read with Sec. 209 of the Act, in a Suit for joint possession against co-sharers.

91. Both the reliefs claimed in the suit were cognizable by the civil Court only. It has, however, been contended by the learned Counsel for the respondent that upon the same cause of action a suit for declaration or for partition could have been brought and any of such suits, if instituted, could have been cognizable by a revenue court. The argument, therefore, is that the jurisdiction of the Civil Court is barred by implication.

92. The question that arises for consideration, therefore, is whether the cause of action for a suit for partition is the same as the cause of action for cancellation of the sale deed.

93. In our opinion this question must be answered in negative. It is true that both kinds of suits would be based on the plaintiff's title. However, in a suit for cancellation of a sale deed it will have to be established that the title the not pass as a result of the sale deeds ostensibly transferring plaintiff's share as the transferor had no authority to make any transfer on his behalf. On the other hand, in a suit for partition all that has to be established is the extent of the plaintiff's share and the fact that he does not want to keep the property joint any longer. In such circumstances both the suits cannot be said to be based on one and the same cause of action.

94. At one time it was doubted whether relief for joint possession need at all be granted because in some cases it would be an incomplete or ineffectual relief, not even being capable of any effective execution through court, However, now the law is well-settled that a decree for joint possession may be granted (vide Full Bench cases of (1) *Bhairon Rai* v. *Saran Rai*[35] and (2) *Hanuman Prasad Narain Singh* v. *Mathura Prasad Narain Singh*[36]. Order 21, Rule 36, C.P.C. provides for the mode of execution of such decrees.

95. A document under which the plaintiff's share also purports to have been transferred by a person not authorised to do so can be cancelled through court to the extent of the plaintiff's share and after a decree has been passed in his favour information regarding the has to be sent to the registration department for making a

note in their register. To have a document adjudged void or voidable is provided for under Sec. 31 of the Specific Relief Act and cannot be considered to be altogether unnecessary because after a lapse of several years the unchallenged existence of such documents can cause serious difficulty to the plaintiff in establishing his title to the land of his share. The parties may, after the sale deeds have been cancelled, like to hold the land as co-sharers. They need not in all cases be forced to get the holding partitioned. The plaintiff was not bound to ask for a mere declaration of his title in respect of the joint land when he could pray for cancellation of the entire sale deed or at least a part of it. In short, the reliefs for declaration and partition could not be said to be effective alternative relief for the cancellation of the sale deeds in respect of the whole or part of the joint property. There is ample authority for the proposition that a suit for joint possession could be filed and the relief claimed could not be considered to be an unnecessary relief. The jurisdiction of the Civil Court to entertain the suit out of which this appeal arises was not even impliedly barred.

96. The courts below decided the case on appreciation of evidence and decreed the plaintiff's suit. In other matters the appeal is concluded by findings of fact,

97. No other question of law arises.

98. There is no force in this appeal and it is dismissed with costs.

99. *Second Appeal No.* 710 of 1967: This second appeal arises out of the suit for injunction restraining the defendants from making any construction on the land in suit, for removal of the constructions made by the defendants during the pendency of the suit and for joint possession. All the three reliefs claimed were cognizable by the Civil Court only, and therefore, the courts below rightly decided the question of jurisdiction in favour of the plaintiff.

100. The view taken in some of the cases was that as between co-sharers the relief of partition may be an effective relief and, therefore, the relief for injunction, demolition and joint possession may not be granted. It is not at all necessary to consider that point in detail because where a discretionary relief is disallowed on the ground that in the circumstances of the case it was not a proper relief (vide Sec. 39, Specific Relief Act) it could not be said that the civil court had no jurisdiction to entertain the suit as originally brought before it. The Civil Court, and no other court, had the power to grant the relief for injunction, demolition and joint possession provided the same was considered to be an equitable relief. Where it could not be considered to be an equitable relief the suit would fail not because the civil court had no jurisdiction to entertain it but because it did not consider that the relief prayed for was an equitable relief.

101. The findings of fact recorded by the lower appellate court are in favour of the plaintiff-appellant. The plaintiff's case was that he and defendants Nos. 2 to 10 were the co-owners of the plot in village Prem Chak and defendant No. 4 had sold the northern portion of that plot to defendant No. 1 and Smt. Hamidan and the transferees had made the constructions in dispute. The lower appellate court, after recording a finding that the plaintiff is a co-sharer, dismissed the suit on the

ground that the remedy of the plaintiff lay by means of a suit for partition and not by seeking the relief of demolition and possession.

102. In a suit of this nature the court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the

relief than by granting it. On the contrary, if material and substantial injury will be caused to the defendant by the granting of the relief, the court will no doubt be exercising proper discretion in withholding such relief. The court in exercising its discretion will be guided by considerations of justice, equity and good conscience. It is, however, not possible for the court to lay down any inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused. We are supported in this view by the Full Bench case of *Chhedi Lal* v. *Chhotey Lal*[37].

103. The learned District Judge has, after recording all the findings in favour of the plaintiff, refused to grant him the relief for injunction, demolition and joint possession on the main ground that the transferee of defendant No. 4 must be deemed to be co-sharer of the plaintiff in respect of a portion of a big plot and, therefore, the proper relief to be sought in the case was that of partition. The lower appellate court has not thought it proper to give the question the consideration it deserved and to discuss the evidence of the parties with regard to the balance of convenience of the parties in case the relief was granted or refused. In view of the fact that the case has not been decided keeping that point of view into consideration and it has been assumed that in all cases between co-sharers the relief for injunction, demolition and possession must be disallowed and the only proper relief to be granted would be the relief for partition the appeal shall have to be allowed and the case remanded to the lower appellate court for decision in accordance with law in the light of the observations made above.

104. The second appeal is allowed and the decree of the lower appellate court is set aside and the appeal is remanded to the first appellate court with the directions that it be restored to its original number and be heard and decided in accordance with law in the light of the observations made in this judgment. Costs shall abide the result.

105. R. PRASAD, J.— I am in respectful agreement with the view taken by my brother Khare, J. in respect of questions involved in this case.

106. The Full Bench decision of this Court in *Ramji Dixit* v. *Bhrigunath*[2] referred to by my brother Khare, J. in his judgment was the subject matter of Civil Appeal No. 458 of 1965 in the Supreme Court and the Supreme Court dismissed the appeal on the 12th January, 1968. The majority view taken by this Court was confirmed. In view of that decision of the Supreme Court, there is no manner of doubt that the notions of personal law cannot be imported to restrict the right of Bhumidhari to alienate interest in the Bhumidhari land, and that such right to alienate is subject only to the provisions of the Act itself.

107. I also take this opportunity of expressing my view that the introduction of the expression “any relief” in Sec. 331 of the U.P. Zamindari Abolition and Land Reforms Act in place of the expression used earlier, namely, “adequate relief was not really intended to imply that the relief which the revenue court can grant, need not be a relief adequate to the relief claimed in the Civil Court. A relief which fails to relieve cannot be a relief at all. In spite of change introduced in the language of the provision, the relief which the revenue court should be in a position to grant must be a real relief to the plaintiff. In none of the three cases that came up before this Full Bench, can it be said, in view of the facts thereof, that the revenue court could be in a position to giant real relief

to the plaintiff to which he is entitled in law.

108. A.K. KITTY, J.— I agree with the conclusions arrived at by my brother, Khare,

J. and concur with the decision that Civil Revision No. 1711 of 1965 and Second Appeal No. 282 of 1967 should be dismissed and Second Appeal No. 710 of 1967 should be allowed as ordered in the judgment of my brother.

109. Besides the reasons given by my brother I respectfully desire to mention that from the undernoted provisions contained in Secs. 143 and 331 of U.P. Act I of 1951 also it would appear that, except as provided under that Act, the Bhumidhar will not be governed by the personal law to which he is subject but by the provisions of the Act.

110. Sec. 143(1):—

"Where a bhumidhar uses his holding or part thereof for a purpose not connected with agriculture, horticulture, or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector in-charge of the sub-division may, *suo moto* or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.

(2) Upon the grant of the declaration mentioned in sub-Sec. (1) the provisions of this Chapter (other than this section) shall cease to apply to the bhumidhar with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject".

111. Section 331(1):—

"Except as provided by or under this Act no court than a court mentioned in column 4 of Schedule II, shall, notwithstanding anything contained in the Civil Procedure Code, 1908, take cognizance of any suit, application, or, proceeding mentioned in Col. 3 thereof.

Or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application:

Provided that where a declaration has been made under Sec. 143 in respect of any holding or part thereof, the provisions of Schedule II in so far as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof."

112. *By The Court*.—Civil Revision No. 1711 of 1965 and Second Appeal No. 282 of 1967 are dismissed with costs. Second Appeal No. 710 of 1967 is allowed and the judgment and decree of the lower appellate court are set aside. The appeal is remanded to the first appellate court with the directions that it be restored to its original number and be heard and decided in accordance with law in the light of the observations made by this Court. Costs shall abide the result.

C.R. No. 1711 of 1965 and S.A. No. 282 of 1967 dismissed.
S.A. No. 710 of 1967 allowed.

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[1] A.I.R. 1961 S.C. 1790 : 1961 A.L.J. 716.

[2] 1964 A.L.J. 197.

[3] 1966 A.L.J. Rev. Sec. 29.

[4] 1967 A.L.J. 8.

[5] 16 A.L.J. 459.

[6] 18 A.L.J. 769.

[7] 1930 A.L.J. 974.

[8] 1965 A.L.J. 582.

[9] 23 I.A. 37 P.C.

[10] A.I.R. 1933 P.C. 72.

[11] A.I.R. 1933 Mad. 204.

[12] A.I.R. 1935 Mad. 852.

[13] A.I.R. 1960 A.P. 368.

[14] A.I.R. 1964 Orissa 141.

[15] 1968 A.L.J. 460.

[16] Civil Misc. Writ No. 2286 of 1965.

[17] A.I.R. 1966 S.C. 1718.

[18] 1946 A.L.J. 369.

[19] A.I.R. 1949 P.C. 78.

[20] 1958 A.L.J. 628.

[21] A.I.R. 1966 S.C. 893.

[22] 1949 A.W.R. 52.

[23] I.L.R. XXIII, All. 486.

[24] A.I.R. 1952 All. 660.

[25] 1954 A.L.J. 669.

[26] 1956 A.L.J. 955.

[27] 1961 A.L.J. 854.

[28] 1966 A.L.J. 1084.

[29] 1965 A.L.J. 1137.

[30] 1947 A.L.J. 683.

[31] 1963 A.L.J. 1064.

[32] 1965 R.D. 79.

[33] 1964 R.D. 199.

[34] 1966 A.W.R. 802.

[35] I.L.R. XXVI All. 588.

[36] A.I.R. 1928 All. 472.

[37] A.I.R. 1951 All. 199 : 1951 A.L.J. 196.

lately followed these two decisions in Criminal Revision Case Nos. 485 and 486 of 1916. Where the language used by the legislature is intentionally wide, as it is in this case, I think that on the whole it is best not to attempt to limit it, but to leave to the legislature the task of imposing limitations if it is found that any power exercised under this rule operates in a manner which the legislature thinks unjust. I am, therefore, of opinion that the power to award costs is vested in the Court under this section. It is next urged that we should interfere with this order as it was made against a person whose position in the trial was that of a witness only. I quite agree that we have power to revise any order under this section and to use that power freely for the very reason that the words are so wide. But in this case, I see no reason why we should interfere. The petitioner was, in addition to being a witness, the informant to the police. An informant is a person recognised in Criminal Procedure as initiating criminal proceedings. A person considering himself aggrieved can either lay a complaint before a Magistrate under Sect. 190 or give information to the police under Sect. 154 and in either case he occupies virtually the same position in that he is seeking protection from the Courts exercising criminal jurisdiction. As stated above, the informant in this case employed a Vakil and was virtually the prosecutor. I see no reason, therefore, why he should not be responsible to the accused for the costs of the adjournment which he asked for.

I would dismiss the petition.

M. R. *Petition dismissed.*

FULL BENCH.

Original Side Appeal No. 52 of 1915.

Abdur Rahim. Spencer and Srinivasa Aiyangar, JJ.

21st November 1916.

ABDUL MAJEETH KHAN SAHIB ... *Appellant* (*1st Defendant*).

v.

C. KRISHNAMACHARIAR ... *Respondent* (*Plaintiff*).

Muhammadan Law—Alienation by one co-heir—Effect on the shares of the other heirs.

Under the Muhammadan Law one of the heirs of a deceased person is not competent to bind the other heirs by his acts.

ABDUL MAJEETH KHAN SAHIB *v.* KRISHNAMACHARIAR.

Pathummabi v. *Vittil Ummachabi* (1) : Overruled.

Dictum in *Hasan Ali* v. *Mehdi Husain* (2) : Dissented from.

Per Abdur Rahim, J.—The heirs of a deceased Muhammadan take their shares in severalty as tenants in common.

The provision of the Muhammadan Law, that a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest is part of the processual law of that system and is not based on the ground that a single heir if he happens to be in possession of the estate of the deceased, represents the rest of the heirs for the purpose of administration generally.

On Appeal from the judgment of the Honourable Mr. Justice Bakewell, dated the 23rd day of March 1915, in the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 381 of 1913.

[This Original Side Appeal first came on for hearing on the 24th and 27th days of March 1916, before their Lordships the Chief Justice and Mr. Justice Phillips.]

Mr. *C. Venkatasubbaramiah* for the Appellant.

Mr. *C. P. Ramaswami Aiyar* for the Respondent.

ORDER OF REFERENCE TO A FULL BENCH.

The Chief Justice.—This is an appeal from a judgment of Bakewell, J., in a suit brought by the Receiver appointed in a creditor's suit for the administration of the estate of a deceased Muhammadan for a declaration that a sale-deed executed by the widow of the deceased was void and not binding on the creditors and was in any event inoperative except as to the extent of the widow's one-fourth share and for possession. The learned Judge held that the sale was valid only to the extent of the widow's one-fourth share, but gave the 1st defendant her alienee a charge on the whole property for Rs. 3,452 paid by him in satisfaction of a mortgage decree against the deceased with further interest on the mortgage money till the date of payment. The learned Judge after discussing the authorities came to the conclusion as against the creditors of the deceased on whose behalf the suit was brought, the widow, even though she was in possession of all the properties of the deceased, had no authority to take upon herself the administration of the estate even to the extent of selling the suit properties to raise money to satisfy the mortgage decree in respect of these very properties which had been passed against the deceased. For the appellant it is contended that this decision is opposed to *Pathummabi* v. *Vittil Ummachabi*(1).

(1) I.L.R., 26 Mad., 734. (2) I.L.R., 1 All.,

The whole subject is one of considerable difficulty. If a Muhammadan appoints an executor, the executor has no doubt power to sell for the discharge of the debts of the deceased, and in the absence of the executor this could have been done by the Kazi. The High Courts, as is well-known, have differed as to whether a sale under a decree obtained by a creditor against one of the coheirs in possession of property of the deceased is binding on the other co-heirs who were not parties to the suit, and the question has been answered in the affirmative both in Calcutta and Bombay. In *Davalava* v. *Bhimaji Dhondo*[1], this was limited to the case where as here one of the co-heirs was in sole *de facto* possession of the whole estate and this limitation was adopted in I.L.R., 26 Mad., 734, where it was further held that a co-heir in possession of the whole estate could equally sell property belonging to the estate in satisfaction of debts without any suit having been instituted and decree passed against such co-heir. At the same time the Court set aside as regards the other co-heirs the sale of item 11 to the 13th defendant in consideration of a debt of Rs 25 and a further payment of Rs 50, apparently on the ground that it was unnecessary and improper in the circumstances though this is not expressly stated. This case was cited with approval on another point by Abdur Rahim, J., in *Ayderman Kutti* v. *Syed Ali*[2], with reference to the validity of sales by the *de facto* guardian of a minor. The learned Judge in the couse of his judgment referred to the general rule relating to sales by a person professing to deal with another's property but without legal authority so to do, and observed that such sales are generally treated as *manquf* or dependent, and upheld if made of necessity or if they are manifestly beneficial, and similar considerations may possibly apply in a case like the present. Bakewell, J., was apparently of opinion that the decision in I. L. R., 26 Mad., 734 was inapplicable where as in the present case the alienation is being questioned by the other creditors. If the balance of convenience may be regarded, I am not sure that it is for the benefit of creditors any more than of co-heirs to lay down a rigid rule that alienations can be made only by the whole body of co-heirs in a suit to which they are parties. The question is one of importance and difficulty, and as the authorities are by no means consistent, we have decided to refer the following question to a Full Bench :—

When one of the co-heirs of a deceased Muhammadan in possession of the whole estate of the deceased or of any part of

(1) I.L.R., 20 Bom., 338. (2) I.L.R., 37 Mad., 514.

it sells property in his possession forming part of the estate for the discharge of the debts of the deceased, is such sale binding on the other co-heirs or creditors of the deceased, and, if so, to what extent?

Phillips, J.—In this case the plaint property was alienated by a Muhammadan widow, who was in sole possession of the whole property belonging to her late husband in order to discharge debts due by him. No doubt the sale was voluntary, but it purports to have been made because a creditor was threatening to execute a decree against the property, and the consideration for the sale was not paid until after execution had been taken out against the suit property, the widow and the other heirs being parties to the execution petition. Two of the other heirs admit that they took no interest in the property, because deceased's debts exceeded his assets but the Receiver of the deceased's estate now questions the validity of the alienation. If the sale to the appellant had been effected by Court it would apparently have been upheld both by the Calcutta and Bombay High Courts in accordance with the decisions in *Khurshetbibi* v. *Keso Vinayek*[1], *Davalava* v. *Bhimaji Dhondo*[2], *Muttyjan* v. *Ahmed Ally*[3], and *Amir Dulhin* v. *Baij Nath Singh*[4]. In Allahabad, however, it has been held by the Full Bench that when property of a Muhammadan intestate is sold in execution of a decree passed against the heirs in possession of the estate, the sale is not binding on an heir who was not a party, but in order to recover possession of his share that heir must pay the purchaser a proportionate amount of the decree debt, *Jafri Begam* v. *Amir Muhammad Khan*[5]. In this Court in *Pathummabi* v. *Vittil Ummachabi*[6], it was held that it was immaterial whether the sale was voluntary or effected by Court in execution of a decree, provided that the seller was in possession of all the effects of the deceased and the Bombay cases were followed, but in applying the law as regards sales in which only part of the consideration money was applied in discharge of a debt due by the deceased the principle laid down in I.L.R., 7 All., 822 was followed, although that case is not referred to in the judgment. In I.L.R., 7 All., 822 Mahmood, J., discusses fully the Muhammadan Law on the subject and criticises the rulings of the Calcutta HighCourt referred to above. The decisions in Bombay and Calcutta are not based on the same grounds and the view taken in I.L.R., 26 Mad., 734 appears

(1) I.L.R., 12 Bom., 101.
(2) I.L.R., 20 Bom., 338.
(3) I.L.R., 8 Cal, 370.
(4) I.L.R., 21 Cal, 311.
(5) I.L.R., 7 All., 822.
(6) I.L.R., 26 Mad., 734.

to be somewhat different to the view of other Courts. In these circumstances I agree in making the proposed reference to a Full Bench.

[This Appeal came on for hearing on the 30th and 31st days of October 1916, as per above order before the Full Bench as constituted above.]

Mr. *C. Venkatasubbaramiah* for the Appellant.

Mr. *C. P. Ramaswami Aiyar* for the Respondent.

OPINION.

Abdur Rahim, J.—The question referred to us is in these words: When one of the co-heirs of a deceased Muhammadan, in possession of the whole estate of the deceased or of any part of it, sells property in his possession forming part of the estate for discharging the debts of the deceased is such sale binding on the other co-heirs or creditors of the deceased and, if so, to what extent? The answer must be in the negative.

On the death of a Muhammadan, the inheritance vests in his heirs according to their respective shares, although in the administration of the estate the funeral expenses, debts and legacies must be paid first and it is only the residue that is available for distribution among the heirs. It is not correct to say that the devolution of the estate on the heirs does not take place or is postponed until the funeral expenses and the debts and legacies have been paid. This is evident from the following facts, if an heir designated by the law dies after the death of the propositus, his share descends on his own heirs and does not lapse to the general estate. Each heir is entitled to the income that has accrued since the testator's death, in proportion to his share and he can transfer his share by sale or gift subject, it may be, as to the latter form of disposition to such restrictions as are imposed by the doctrine of Musha.

The theory of Muhammadan jurisprudence, on which the right of succession and inheritance is based, is that even after death, the deceased's rights in his properties still inhere in him, to the extent necessary for meeting the funeral charges and the legal obligations and liabilities incurred in his lifetime and also for carrying out his wishes, as expressed in his last will and testament, within the limits laid down by the law. A deceased person is classed among persons of defective capacity and his rights and obligations are considered not merely with reference to matters pertaining to this world but also with

respect to his spiritual concerns. The payment of his funeral expenses and debts is described as his last need. And as for testamentary bequests, it is stated that, according to strict juristic theory, they should not be lawful at all but have been sanctioned in order that the testator might make up for his shortcomings in life by making gifts to deserving objects.

It is argued that as soon as a man is seized with 'death illness,' (*i.e.*, illness which results in his death), the right of succession of his relatives comes into existence, although it remains in an inchoate state that is, in the nature of a ***spes successionis*** until death actually takes place, and the heirs entitled to succession are not ascertained until then. It is upon this theory that the right to bequeath by will is treated as a concession to the deceased and is limited to one-third of his possessions. The result is, on the death of a person his estate is to be divided in this way, one portion for the deceased himself equivalent to so much of the estate as is necessary and sufficient for meeting his funeral expenses, debts, obligations and bequests the last not exceeding one-third of the estate and what remains is to be distributed among the heirs according to their respective shares. Funeral expenses, debts and legacies are given preference because they are allowed by virtue of the rights of the deceased.

As far back as 1878, the Judicial Committee in *Bazayet Hossein* v. *Dooli Chund*(1), held that an heir-at-law was entitled to alienate his share in spite of the fact that there were debts of the deceased still outstanding and it would not have been possible to hold this if the inheritance did not devolve on the heir on the death of the propositus. Mr. Justice Mahmood in *Jafri Begam* v. *Amir Muhammad Khan*(2) has fully discussed the question and I do not think it would be of any use to add anything more to his reasoning. As regards the nature of the tenure of the co-heirs' shares, the heirs of a deceased Muhammadan take their shares in severalty, their rights being analogous, to those of tenants-in-common, and not of members of a joint Hindu family. See *Abdul Khader* v. *Chidambaram Chettiyar*(3).

There cannot be the slightest doubt therefore upon the principles of Muhammadan Law and also upon the authorities that one heir has no right to deal with the shares of the other heirs. In the Muhammadan system such a tenure of property is called *Shirkat*

(1) I.L.R., 4 Cal., 402. (2) I.L.R., 7 All., 822.
(3) I.L.R., 32 Mad., 276.

which literally means "participation" and, in law, 'joint rights,' and which is translated as 'partnership' by Mr. Hamilton in his translation of the Hedaya.

The definition of *Shirkat* as given by him is : "*Shirkat*, in its primitive sense, signifies the conjunction of two or more estates, in such a manner, that one of them is not distinguishable from the other. The term *Shirkat*, however, is extended to contracts, although there be no actual conjunction of estates, because a contract is the cause of such conjunction. In the language of the law it signifies the union of two or more persons in one concern." (See Grady, Book XIV, p. 217). This definition, however, must be read with what follows and, so reading, it will be clear that *Shirkat* is a generic term of law and applies both to joint ownership and to contracts of partnership. The former is called *Shirkat-ul-Milk*, which is translated by Mr. Hamilton as "partnership by the right of property" ; and the latter, which is partnership proper in the sense of the English law, is called *Shirkat-ul-Akd*. In *Shirkat-ul-Milk*, the ownership acquired is either "optional" or "compulsive," to use the terms of Mr. Hamilton, and in the latter category are included the rights of co-heirs. With respect to such rights it is laid down, "In this species of partnership, (*i.e.*, the rights of two persons inheriting one property) therefore, it is not lawful for one partner to perform any act with respect to the other's share, without his permission each being as a stranger with respect to the other's share. It is, however, lawful for either partner (*i. e.*, one of the heirs) to sell his own shares to the other partner (*i. e.*, the co-heir) in all the cases here stated :— and he may also sell his share to others, without his partners' consent," excepting in certain cases with which we are not concerned.

This is absolutely clear authority in proof of the position that one heir has no authority, in law, to deal with the shares of his co-heirs. In face of it, it is not necessary to refer to other original text-books. It is stated, however, in *Pathummabi* v. *Vittil Ummachabi*(1), that, "if the creditor of the deceased can seek his relief against one of several co-heirs in a case where all the effects of the deceased are in the hands of that heir it can make no difference whether the heir meets the demand by a *bona fide* voluntary sale, or the property is brought to sale in execution of a decree obtained against him." To the same effect is a decision of the Allahabad High Court in *Hasan Ali* v. *Medhi Husain*(2). The statement in

Pathummabi v. ***Vittil Ummachabi***(1) was purely by way of ***obiter dictum*** and with all respect to the learned Judges, they failed to bear in mind that, the provision of the Muhammadan Law, that a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest, is part of the processual law of that system and is not based on the ground that a single heir, if he happens to be in possession of the estate of the deceased, represents the rest of the heirs for the purposes of administration generally. The ground on which a decree against one of the heirs, in such circumstances, is treated as *res judicata* is, as stated in the books, that the decree in such cases is, in law, against the deceased and not against the particular heir who is made defendant in the suit.

In Hedaya the matter is discussed in the chapter relating to the duties of the Kazee and in some other text-books in the chapter dealing with claims, in which chapters the rules of procedure of the Muhammadan system are mostly laid down. In dealing with the question whether one of the heirs obtains a decree for the recovery of the property of the deceased in possession of a third person more than his share in that property should be made over to him in execution of the decree, it is stated that all the three Doctors, that is, Abu Haneefa and his two disciples, agree that the decree enures not only in favour of the heir who actually is the plaintiff but also of the heir who did not join on account of absence from the country though there is a difference of opinion as to whether the decree-holder shall be given possession of more than his share. This is how the principle is enunciated in the Hedaya (Grady, p. 349) " for anyone of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to, or by the deceased, whether it be debt or substance ; since the decree of the Kazee, in such case, is in reality either in favour of or against a deceased ; and any one of the heirs may stand as his representative with ***respect to such decree.***" The qualifying words " with respect to such decree" which I have italicised are a material part of the proposition, and, negative, by implication, the suggestion that apart from a decree of Court, a single heir represents the entire estate of the deceased and can deal with the shares of the co-heirs without their consent. In other text-books of Muhammadan Law, such as Bahrurraiq and Alimajullah, the same proposition is laid down under the heading of ' Claims.' Nowhere have I found any general statement that, apart from representation in suits, one heir

(1) I.L.R., 26 Mad., 734.

is entitled by his acts to bind the shares of the others. The dictum to the contrary, therefore, in *Pathummabi* v. *Vittil Ummachabi*(1), and the decision in *Hasan Ali* v. *Mehdi Husain*(2), seem to be without sufficient authority and inconsistent with clear statements of the law in books of authority.

There are a number of rulings, especially of the Calcutta High Court in which the rule of Muhammadan Law as to one heir representing the other co-heirs in suits, has been adopted. See *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*(3), followed by *Muttyjan* v. *Ahmed Ally*(4), *Bussunteram Marwary* v. *Kamaluddin Ahmed*(5) and *Amir Dulhin* v. *Baij Nath Singh*(6). In the Allahabad High Court, on the other hand, the decision of the Full Bench in *Jafri Begam* v. *Amir Muhammad Khan*(7), where it was held, dissenting from I.L.R., 4 Cal., 142, that this question is not governed by the Muhammadan Law, but by the Civil Procedure Code, has been followed in the later rulings of that Court, see *Dallu Mall* v. *Hari Das*(8). In Bombay (*Khurshet Bibi* v. *Keso Vinayek*(9), the view taken by the Calcutta High Court on this point has been adopted by the learned Judges, though proceeding to a considerable extent on the analogy of the Hindu Law.

It is not necessary for us to pronounce any definite opinion upon this class of cases which deal with the question how far a decree against one of the heirs of a deceased Mahammadan binds the others and under what circumstances.

So far as voluntary alienations are concerned, which alone form the subject-matter of reference, the Muhammadan Law is clear that one of the heirs of a deceased person is not competent to bind the other heirs by his acts,

Spencer, J.—I agree with the judgment of Mr. Justice Abdur Rahim just now pronounced.

Srinivasa Aiyangar, J.—I agree. In the absence of any right in one of the heirs to represent the co-heirs, one of several co-heirs can only deal with his or her interest in the ancestor's property inherited by them. My learned brother has shown that there is nothing in the Muhammadan Law giving such a right to one of the co-heirs who may happen to be in actual possession of the whole of the ancestor's estate ; such possession, it must be remembered, is presumably, on behalf of all the co-heirs.

(1) I.L.R., 26 Mad., 734.
(2) I.L.R., 1 All., 583.
(3) I.L.R., 4 Cal., 142.
(4) I.L.R., 8 Cal., 370.
(5) I.L.R., 11 Cal., 421.
(6) I.L.R., 21 Cal., 311.
(7) I.L.R., 7 All., 822.
(8) I.L.R., 23 All., 263.
(9) I.L.R., 12 Bom., 101.

He is not constituted the representative of the deceased and cannot administer his property even for the limited purpose of paying off his debts. In *Khiarajmal* v. *Daim*(1) Lord Davey referring to a sale by one of the heirs of a Muhammadan for discharging the debt due by the ancestor said "*prima facie* his conveyance would pass only his share", see p. 37. Representation in a suit may conceivably stand on a different footing for as stated by their Lordships in the same judgment at page 35, "The Indian Courts have exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control;" and they applied this principle in that very case to the estate of Nabibaksh. However, that is not the question here.

C.K. *Reference answered in the negative.*

FULL BENCH.

Appeal Against Order No. 73 of 1916.

Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.

15th November 1916.

P. L. S. P. PALANIAPPA CHETTY *alias* SHANMUGAM CHETTY —*Appellant (1st Defendant).*

v.

P. L. P. P. L. PALANIAPPA CHETTY and others—*Respondents (Plaintiffs and Defendants 2 to 12.)*

Civil Procedure Code (V of 1908), O. 40, R. 1 and O. 43, R.1, cl. (s)—Order that Receiver should be appointed, but no individual appointed thereby—Whether final and appealable.

Per Abdur Rahim and Srinivasa Aiyangar, JJ., (Spencer, J. contra).—The pronouncement by a Subordinate Judge that a Receiver should be appointed in the suit is a final order as contemplated by O. 40, R. 1 of the Civil Procedure Code, even though the petition on which the pronouncement was made, stands adjourned to a future date for selecting and appointing a particular individual as Receiver and no appointment has yet been made.

(1) L.R., 32 Ind. App., 23; s.c., I.L.R., 32 Cal., 296.

1956 SCC OnLine Pat 119 : AIR 1957 Pat 559

Patna High Court
(BEFORE RAMASWAMI, C.J. AND KISHORE PRASAD, J.)

Hakim Rahman Bux ... Appellant;
Versus
Muhammad Mahmood Hassan and others ... Respondents.

A.F.A.D. No. 394 of 1949
Decided on November 27, 1956

JUDGMENT

1. This appeal has been on behalf of the plaintiff Hakim Rahman Bux, against the decision of the first Additional Subordinate Judge of Bhagalpur dated the 7th February, 1949 reversing a decision of the Munisif, 1st Court, Bhagalpur, dated the 31st May, 1948.

2. The question debated in this appeal is whether the suit of the plaintiff is barred under Article 132 of the Limitation Act or whether section 20 of the Limitation Act applies and a fresh period of limitation should be computed from the date of payment made by defendant no. 1, Muhammad Mahmood Hassan one of the sons of Mahboob Ali, who had borrowed the money from the plaintiff on the basis of the mortgage bond dated the 25th of February, 1923.

3. It appears that Mahboob Ali died and was succeeded by his heirs, namely, his widow, defendant no. 4 who had an interest to the extent of 4 annas, three sons, who had each an interest of 3 annas 6 pies, and all Iris daughters, who had an interest to the extent of 1 anna 9 pies each. It has been found by the lower court that defendant no. 1, had made part payments from the 13th of March, 1925, to the 20th of October, 1940, the total amount being Rs. 2000/-. It has also been found by the lower appellate court that defendant no. 1 did not make the payments as an agent on, behalf of the other defendants. In these circumstances, the question arises whether the suit is barred by the provisions of Article 132 of the Limitation Act. The lower appellate court has found that payment was made only by defendant no. 1 who was not liable to pay the whole debt and who did not make the payment as an agent on behalf of the other defendants. Defendant no. 1 had paid more than his own share of the debt and therefore a decree cannot be granted in favour of the plaintiff as against him. As against the other defendants, the suit was barred by limitation, since section 20 of the Limitation Act was not applicable.

4. In support of this appeal Counsel for the appellant put forward the argument that the payment by defendant no. 1 was payment made on behalf of all the other defendants, that the mortgage debt was one and indivisible and that payment made by defendant no. 1 saved limitation even with regard to the other defendants who are liable to pay the mortgage debt. In support of this proposition, Counsel relied upon *Badri Das* v. *Pasupati Banerji* ILR 12 Pat 93 : (AIR 1933 Pat 1) (A) and *Baijnath Prasad* v. *Sati Lal Sahu* 19 Pat LT 240 : (AIR 1938 Pat 383) (B). But we are unable to accept the argument, learned Counsel for the appellant as correct.

5. The legal position in the Muhammadan law is that upon the death of a Muhammadan the whole estate devolves upon his heirs at the moment of his death and the heirs succeed to the estate as tetants-in-common in specific shares. It is also established that each heir of a Muhammadan is liable for the debts of the deceased to the extent only of a share of the debts proportionate to his share of the estate (sections 1 and 43 *Mulla's Mo-hammadan Law*, 13th edition, at pages 32 and 35).

6. The cases upon which counsel for the appellant relied, namely ILR 12 Pat 93 : (AIR 1933 Pat 1) (A) and 19 Pat LT 240 : (AIR 1938 Pat 383) (B), must be distinguished because these were cases relating to Hindu joint families. We hold, on the other hand, that the present case is governed by the principle laid down in *Hakim Saiyid Fida Ali* v. *Rani Bhuvaneshwari Kuer* ILR 20 Pat 770 : (AIR 1942 Pat 73 (C). It was laid down by a division Bench of this court in, that case that though the mortgage contract was indivisible, there might be cases where the mortgage security becomes split up. One such case was where a Muhammadan mortgagor dies and his heirs succeed to the share of the property according to the shares defined in the Muhammadan Law.

7. In such a case there is no reason why the mortgagee could not give up his mortgaged lien on the share of any one of the mortgagors by making a proportionate deduction of the mortgage money and enforce his mortgage for the balance as against the shares of the other heirs who are on the record. That is the ratio of the decision in ILR 20 Pat 770 : (AIR 1942 Pat 73) (C). There is also a similar decision of another Division Bench of the Patna High Court consisting of Roe and Jwala Prasad JJ in *Sarabnarain Das* v. *Top Ojha*, AIR 1918 Pat 646 (1) (D).

8. It was held in that case that a payment by one of several co-mortgagors owning separate intersets in the mortgaged property did not extend limitation against the others. There is a decision of the Madras High court in *Muthu Chettiar* v. *Mohammad Hussain* AIR 1920 Mad 418 (E), expressing the same view. The learned Judges who decided that case (Spencer and Seshagiri JJ.) referred with approval to the decision of the Patna High Court in AIR 1918 Pat 646 (1) (D) and added that there was no distinction in Indian law between the case of co-mortgagors and co-mortgagees and there was also no distinction between simple debts and real debts as contemplated by the English statute of limitation.

9. It was also explained by the learned Judges in that case that section 21 of the Limitation Act is really an explanation to sections 19 and 20 of that Act. The object of that explanation was to provide that one only of the contracting parries shall not ordinarily impose a liability on the other by anything done by him. Limitation, whether treated as a right or a disability was prima facie personal, and unless the legislative so provided, a co-operative right or liability should not be imposed. We should also refer in this connection to another case *Azizur Rahman Osmani* v. *Upendra Nath Samanta*, 42 Cal WN 18 : (AIR 1938 Cal 129) (F) where a similar principle of law has been laid down.

10. There is also a decision of a Full Bench of the Allahabad High Court. *Muhammad Taqi Khan* v. *Raja Ram* ILR 1937) All 272 : (AIR 1936 All. 820) (G) which is a decision of Sir Shah Muhammad Sulaiman C.J. and Rachhpal Singh and Allsop JJ. It was observed by the Full Bench in the course of their judgment that it made no difference in Indian law whether the co-mortgagors are the original mortgagors themselves or whether they or some of them are the heirs or transferees of the original mortgagors. If at the time when the acknowledgment in question is made, the relation of joint contractors existed between the persons who were liable, then it is quite immaterial whether they were the original contractors or whether they were their legal representatives.

11. In our opinion, the law has been correctly laid down in the series of decisions to

which we have referred. Applying the ratio of these decisions to the present case, it is manifest that the suit of the plaintiff is barred as against all the defendants, except defendant no. 1 under Article 132 of the Limitation Act.

12. As regards defendant no. 1 himself, it is the admitted position that he has paid more than his quota of the debt and the plaintiff cannot be granted a decree also against defendant no. 1.

13. For these reasons we think that this appeal has no merit and must be dismissed with costs.

V.B.B.

14. *Appeal dismissed*.

1989 SCC OnLine AP 33 : AIR 1989 AP 318 : (1989) 3 ALT 168 : (1989) 1 ALT (NRC 1) 35

BEFORE K. RAMASWAMY, J.

Abdul Raheem ... Appellant;

Versus

Land Acquisition Officer-cum-Revenue Divisional Officer, Mahaboobnagar, and others ... Respondents.

Appeal No. 1502 of 1984

Decided on February 20, 1989

JUDGMENT

1. The only question that arises in this appeal is whether the appellant has got exclusive title over the property. This is the appeal against the judgment of the Principal Subordinate Judge, Mahaboobnagar, in OP. No. 741 of 1987 on reference being made under S. 30 of the Land Acquisition Act (for short 'the Act').

2. The appellants, Shaik Ali and Shaik Mohiuddin are the sons of one Abdul Khader. It is the case of the appellant that Survey No. 30 consisting of Acs. 5.30 guntas and Survey No. 31 consisting of Acs. 2.05 guntas coming to a total extent of Acs. 7.35 guntas situated in Kalvakurthy was purchased by his father Abdul Khader and that at a partition between himself and his brothers (respondents 1 and 2 OP. 741 of 1977), the property fell to his share under unregistered preparation list and thereby he has got exclusive title to the property. Therefore, he is entitled to the payment of the entire

compensation. One Mohd. Jahangir the fourth respondent before the lower Court died pending proceedings in the lower Court and respondents 4 to 6 his legal representatives have been brought on record and they claimed that Jahangir had exclusive title to the extent of Acs. 2.05 guntas in Survey No. 31. The Court below held that Jahangir has not established that he has acquired title to the property in Survey No. 31 consisting of Acs. 2.05 guntas and that, therefore, the appellant and respondents 2 and 3 herein are entitled to payment of compensation in the ratio of 1:3. Assailing the legality thereof, the appeal has been filed.

2. The contention of Sri C.R. Pratap Reddy, the learned counsel for the appellant, is that the partition fist clearly demarcates that the lands under acquisition had fallen to the share of the appellant and that, therefore, he has got exclusive title to the property. In the column relating to possession and title the name of the appellant has been entered in the Pahanipatrikas from the year 1973 and that, therefore, he has got exclusive title and the Court has committed grievous error in not granting the amount to the appellant to the exclusion of respondents 2 and 3. I find no force in the contention. This doctrine of joint family status in inapplicable to the Muslim members under their personal law. The right, title and interest, if any, is to be extinguished only by execution and registration when the value of the land is more than Rs. 100/- under S. 17 read with S. 49 of the Registration Act. Then and then alone, right, title and interest in the land held by the person stands extinguished and stands vested in the other person. In this case, no registered partition deed has been executed and

registered. Thereby the pre-existing right, title and interest as co-owners by the three brothers namely the appellant and respondents 2 and 3 has not been extinguished and their position is one of co-owners. The position of one co-owner enures to the benefit of another co-owner unless the one co-owner assets his exclusive right, title and interest to the knowledge of the other co-owners and the other co-owners acquiesces to the same and continues to remain so for over 12 years from the date of the assertion of the title and then alone one co-owner acquired adverse title against the other co-owners. In this case, alleged partition list is of the year 1973 and the acquisition was made in the year 1977. Therefore, the doctrine of adverse possession does not come to the aid of the appellant. It is then contended that the partition deed Ex. B-7 clearly discloses the pre-existing partition of the properties between the parties. But this partition list would be applicable provided the doctrine of joint family status applicable to Hindu joint family applies to the Muslims. But the doctrine of Hindu joint family does not apply to the Muslims, and therefore, the partition list is not applicable to the parties in this case. The Court below found that Jahangir, the fourth respondent therein was not entitled to the property and the appellant and the respondents 2 and 3 are entitled to the property in equal shares and accordingly granted compensation at the ratio of 1:3. The legal representatives of Jahangir have not challenged the judgment of the Court below by filing any appeal. Thereby it has come final Thereby the appellant and the respondents 2 and 3 are entitled to the compensation in the ratio of 1:3 as co-owners. The appeal is accordingly dismissed but in the circumstances without costs.

4. The claimants are entitled to all the benefits of the Land Acquisition (Amendment) Act and this will be subject to the result of the Supreme Court. In the event of the Supreme Court holding that the Amendment Act has no application to the pending cases, it is open to the State to file an application to amend the decree.

Appeal dismissed.

not to be a source of nuisance or disturbance to other villagers. For that purpose it should be situated towards the western extremity and the opening of the temple should face the west and there should be no accessory regions attached to the temple for other subordinate festivities. Apparently the defendants cannot be satisfied with these conditions. In these circumstances I think the Subordinate Judge's decree is right and the second appeal is dismissed with costs of the plaintiffs-respondents.

N. R. R. *Appeal dismissed.*

Appeals Nos. 280 to 283 and 460 to 463 of 1924.

Wallace and Krishnan Pandalai, JJ.

28th November, 1930.

SOUDAGAR MUHAMMAD ABDUL RAHIM BAIG SAHEB ...
Appellant (*1st Defendant*).

v.

SOUDAGAR MUHAMMAD ABDUL HAKIM BAIG SAHIB and others.
Respondents (*Plaintiff, 2nd Defendant and L.Rs. of 2nd Defendant*).

Mahomedan Law—Joint family—Family trade—Adult male members can carry on trade for the benefit of all the members of the family including minors and females.

It is not an uncommon thing in the Madras Presidency where members of the Mahomedan community live surrounded by Hindus, that they absorb and adopt Hindu social ideas and tend to look on their own social customs from a Hindu point of view. There is nothing contrary to law in Mahomedan adult members of a family carrying on a family trade for the benefit of all the members of the family including the minors and the females, and the Courts will therefore uphold it and such legal consequences as in law follow from it, although the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a joint Hindu family or all the legal consequences of a lawful partnership. In such a case the Mahomedan adult male members carrying on the business can be found as a question of fact to stand in a fiduciary relationship to the other female and minor members of the family.

Vrandavan v. *Parsottham* (1): Followed.

Appeals against the decrees of the Court of the Subordinate Judge of Bezwada, dated 30th June 1924 and passed in O.S. Nos. 19, 68, 69 and 70 of 1921 respectively.

Messrs. *G. Lakshmanna* and *P. Satyanarayana* for the Appellant.

Messrs. *B. Pocker, Inamudin, Rafiuddin* and *R. Krishnaswami* for the Respondents.

(1) A.I.R., 1927 Bom., 75.

MUHAMMAD ABDUL RAHIM *v.* MUHAMMAD ABDUL HAKIM.

JUDGMENT.*

These eight appeals arise from four original suits which were disposed of by the lower Court in four judgments which are practically one judgment. The suit was filed in the following circumstances. A Mahomedan, Abdul Karim Baig, who was a cloth trader, died on 30th September 1912, leaving a widow, two major sons, two minor sons, and three minor daughters. The widow, the two minor sons and the youngest daughter are the plaintiffs in the four suits. The two major sons are the 1st and 2nd defendants in the four suits. The plaintiffs' general assertion apart from minor differences, which will be dealt with later on, is that on the death of the father defendants 1 and 2 continued his cloth trade as a family trade for the benefit of the family and made profits thereby, that although an attempt at partition was made in 1915 it did not alter the position of parties, that the family trade was continued from 30th September 1912, the date of the father's death, till October 1918, when owing to disputes between 1st and 2nd defendants it came to an end, that these defendants taking advantage of their position as eldest males in the family used in that trade the shares of the other members in their father's assets and thus became executors *de son tort* liable to account to the plaintiffs for the profits they have made by such use of the plaintiffs' monies, and that the plaintiffs are therefore entitled to a decree for an account from 19th December 1918, and a division of the trade profits in proportion to their family shares. The various plaintiffs sue for various sums which they estimate to be due to them on such accounts.

The general defence was that the trade carried on by defendants 1 and 2 after their father's death was entirely for themselves, and, while they admit that in that trade they employed the shares of the other members of the family, these, they say, were treated as mere loans of capital for which interest has been allowed in the firm's books. The lower Court has awarded the plaintiffs the sums set out as due to each in the alleged partition of 1915, plus interest at 6 per cent from that date. All the four plaintiffs appeal. Their appeals are Nos. 460 to 463 of 1924. The 1st defendant has presented an appeal in each of the four suits. His appeals are Nos. 280 to 283 of 1924, objecting to some points in the lower Court's decree which will be dealt with later.

The main question for decision is what was the nature, both in fact and in law, of the business carried on by 1st and 2nd defendants after the father's death, and what was the relation, in fact and in law, of the plaintiffs in that business. We have no

*Delivered by Wallace J.

doubt that from the date of the father's death up to at least the date of the alleged family partition on 7th March 1915 the business was in fact carried on by defendants 1 and 2 as a family business. Prior to the father's death it was a "one man show", 1st and 2nd defendants being mere helpers and not partners with their father, and the business was therefore one of the main assets left by the father to his family. After his death his various heirs took in law their several shares under the Mahomedan law. But it in fact appears that no attempt was then made to settle and distribute these shares. The trade was not wound up, the accounts, Exs. V and XVII, were not closed, the trade accounts were continued on the same books as before, no change in the constitution of the firm is noted in the books, no list of partners after the father's death was drawn up, the same constituents were dealt with, all the old stock was taken over by, and the debts of the father's firm were collected as owing to, his successors. There is every indication in favour of, and none really contrary to, the view that between 1912 and 1915 the father's trade was continued by 1st and 2nd defendants as a family business for the benefit of all the heirs of their father. It is only necessary to refer in passing to some of the more important documents throwing light on this matter. The original name of the firm was S.M. Abdul Karim Baig. To this after the father's death was added the words "and sons", and this is the sole feature in favour of the 1st defendant's contention on this point. But even here there is no indication that "and sons" was confined to the two adult sons. In support of the view that no real change was effected we may note, as a sample, press book, Ex. E, letters mark 7 and 8, page 20 of the print, mark 11, page 27, mark 17 and 18, pages 26 and 27. That the change meant little or nothing is clear from the letter mark 14, page 38 to the Accountant-General dated 17th February 1913 in which the 1st defendant reports that the business is still carried on in the name of Abdul Karim Baig Sahib without the addition of "and sons". In the press-book, Ex. E. 4, mark 4, page 62, the firm reports on 1st May 1913 that it has been established for nearly 30 years. There is no hint in any of the correspondence that the old business has been wound up or is going to be wound up or that any different business has been started. The correspondence throughout implies that the old business is being continued. The 1st defendant regards orders given to the old firm as made to its successor (Mark 22 and 23, page 29 of the print and mark 26, page 31). The stamp of the father's firm is still used (mark 26, page 32). In a letter (page 37) asking for payment of the amount for which the father was insured in the Sun Life Assurance Company the 1st defendant

enters the names of the widow and the minors also as heirs and urges prompt payment because "we merchants are losing interest." Most important is the power of attorney, Ex.A, executed on 1st March 1913 in favour of 2nd defendant by all the members of the family, 1st defendant holding himself out as guardian of the minors, "....to transact.....all our affairs and business in our own names and all and every other business of what kind or nature so ever in British India" is the style of this power of attorney. There is no foundation for the contention now advanced that these words are to be restricted to the mere registration of documents. The 1st defendant himself says the power of attorney was for the purpose of collecting debts. It is perfectly general in its wording and if it was intended to exclude the cloth business, no doubt it would have said so. Also, very important is Ex. 10, dated 5th September 1914, a report of the firm in answer to a circular from the Bank of Madras, Guntur, asking them to report the names of the members of the firm. In that letter defendants 1 and 2 report that the members of the firm are their two selves and their two minor brothers by guardian, 1st defendant. The latter's effort to get rid of this evidence by saying that he signed a blank paper is wholly disingenuous, and we are surprised that the lower Court gave any credence to such an obviously self-interested disclaimer. Ex. 10 is an act of the firm signed by 1st defendant himself as well as 2nd defendant, and is clearly binding on both. The argument now put forward that 1st defendant by Ex. 10 was merely declaring his intention to admit to partnership the minor brothers when they come of age is not put forward by himself and there is no reason to accept it. Minors may be admitted by partners to the benefits of a partnership. (See Sect. 247 of the Indian Contract Act). In 1921 the 1st defendant examined in a criminal case said " We eight persons are not partners in the firm of AK and sons. We divided our shares in the year 1915" (See Ex. XIII, a very clear implication that the firm continued as it was originally until 1915. The various disingenuous statements of the 1st defendant made in this deposition and in his deposition in this trial to explain away such matters as Ex. A and Ex. X and the absence of entries of any changes in the accounts, the use of his minor brothers' names or initials in aliases of the firm indicates that his conduct in this matter has not been straightforward. To all this may be added the testimony of P.W. 3, a gumasta of the deceased father and after him of the defendants 1 and 2 until 1916, who says that after the father's death 1st defendant continued his father's trrade with all its assets and liabilities, and the evidence of P. W. 4, another gumasta of the

firm from 1911 to 1918 to the same effect. All this shows quite clearly that the business was regarded as a family business in which all the members of the family were interested. The power of attorney is signed by all. Those regards formally as members are all the males of the family and the designation " and sons " was therefore added. There is no break in the business after the father's death. Its credit and goodwill were taken over and used by the " and sons " firm. The business is in fact continued just as if the father had not died. His assets, separately held in theory though they may be in law by the various heirs, continued as the assets of the business. It is quite clear that the first part of the plaintiffs' case that the business was in fact continued after the father's death as a family trade for the benefit of the family is fully justified.

The 1st defendant answers to this that as in law there cannot be a Mohamedan joint family, (See *Abdul Khader* v. *Chidambaram Chettiar* (1) therefore there cannot be a family trade, and this is the argument which has found favour with the lower Court. It seems to us irrelevant. The point is not whether this trade was one to which the law will impute all the incidents and legal implications of a Hindu joint family trade, but whether in fact the business was carried on for the benefit of the whole family. There is nothing in law to prevent such a business being carried on by any one of whatever race he may be. From what we have already said, we are satisfied that the trade was being continued as a family trade. The 1st defendant also regarded himself after his father's death as the guardian of the minors and acted as if he really were. This is plain from Exs. A and X already noted. No doubt he could not be guardian *de jure*, but that is again beside the point. It is plain that he was acting as guardian *de facto*. Thus he regarded himself as the representative of the minors in the trade and justified as such in using their monies for it and protecting their interests. He looked upon himself as to all intents and purposes the eldest member of a Hindu joint family does, namely, as manager of a joint family business, and guardian of the minors, except that as the family was Mohamedan the family trade in this case was carried on by him on behalf of all the heirs of the deceased founder of the trade and thus on behalf of the females of the family also. It is not an uncommon thing in this Presidency where members of a Mahomedan community live surrounded by Hindus, that they absorb and adopt Hindu social ideas and tend to look on their own social customs from a Hindu point of view. This tendency has been recognised in various rulings in this Court. In *Hussain*

(1) I.L.R., 32 Mad., 276.

Sahib v. *Hassain Sahib* (1) for example, where it has been pointed out that it is common in this Presidency for descendants of Mahomedans to live and trade together, and the property is then held by the several members of the family in the shares to which they are entitled under Mahomedan law. Clearly that is what has happened here. That the Courts will not apply Hindu Law to Mahomedans is obvious, but that is not the proper way to decide a case of this kind although it may be the way of least resistance. Such cases are not problems of law nor does their decision depend on the ideas of law which the parties have put into their pleadings, but are concerned with questions of fact and have to be decided on the facts. The correct view in our opinion therefore is that there is nothing contrary to law in Mahomedan adult members of a family carrying on such a family trade for the benefit of all the members of the family including the minors and the females, and the Courts will therefore uphold it and such legal consequences as in law follow from it, although the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family or all the legal consequences of a lawful partnership.

What, then, are these legal consequences in this case? In the light of the facts which we have set out, it seems to us that the conclusion cannot be resisted that the 1st defendant by his conduct after his father's death put himself in a fiduciary relationship to the widow and the minor members of the family. He assumed the management of their father's business as if he was in law, what he conceived himself to be in fact, the manager of a family business for the benefit of all. He assumed the position of guardian of all the minors, male and female, and acted as such, a position obviously of fiduciary relationship. (See *Sitha Boi* v. *Radha Boi* 2). He regarded the minor males as full members of the firm. He and the 2nd defendant in their self-imposed management of the family business retained it intact as it had been at the father's death, did not wind it up or distribute to each sharer his quota or allow it to be abstracted from the firm. They by virtue of their position as the adult males got possession of the shares of the widow and the minors and retained these in the firm. By this assumption of family management it does not matter whether we call their position that of trustees *de son tort* or executors *de son tort*—the relationship in which the 1st defendant stood to the widow and the minors was essentially a fiduciary one. The present case is similar to that in *Vrandavan* v. *Parshottham* (3) in which a similar view was taken.

(1) 5 L.W., 835. (2) 36 M.L.J., 189.
(3) A.I.R., 1927 Bom., 75.

The 1st defendant argues, in addition to the argument with which we have already dealt, that what is not legally correct cannot be factually possible, one or two points: first, that the matter of guardianship was never raised in the plaints. That is true ; the two leading points in the plaints were family trade and executor *de son tort*. But the guardianship matter is merely a plank in that platform, and the matter of fiduciary relationship does not rest on that alone or chiefly but on the general assumption by defendants 1 and 2 of management of their father's trade for the benefit of all his heirs. The matter of guardianship was raised in the lower Court at the time of trial and is dealt with by the Subordinate Judge, but with the same erroneous notion that one who cannot be a guardian *de jure* cannot act as guardian *de facto* and carry on a business as such. The decision in *Abdul Khader* v. *Chidambaram Chettiar* (1) relied on by the 1st defendant is not really in point. The question there was whether the act of a guardian *de facto* of a Mohammedan minor could in law bind the minor adversely to his interests. We think therefore there is no force in this contention by the 1st defendant.

The next point was that the 1st defendant cannot be in law styled an executor *de son tort* because he did not do any act which belongs to the office of executor. It seems to us to matter very little what sort of name we give him in law or whether the plaintiffs were right in their plaints in describing him as an executor *de son tort*. The relationship in which he stood to the plaintiffs was, as we have held, clearly fiduciary.

Then 1st defendant argues that, as he was legally in the position of co-owner with his co-heirs, he must be conceived to have been in possession of their shares as co-owner, and therefore not in a fiduciary capacity, as the relationship of co-owner is not in law a fiduciary one. *Abdul Khader* v. *Chidambaram Chettiar* (1) and *Abdul Samad Khan Khildar* v. *Bibijan* (2). Here again it is a question not of law but of fact, and to our minds it is quite clear from the facts we have set out that the 1st defendant was assuming a position much more of trust than of a mere co-owner, and that he came into possession of the assets of the other members not because of his co-ownership but because of the fiduciary relationship he adopted towards them into which he entered on their behalf.

Apart from the general question of whether the 1st defendant is liable to account to the plaintiffs for the profits made by him on the ground that he made these profits in a fiduciary capacity, the 1st defendant urges that at least the profits got by

(1) I.L.R., 32 Mad., 276. (2) 49 M.L.J., 675.

foreign trade from 1912 to 1915 shown as Rs. 11,864-10-0 in Ex. II, should not be included. His argument is that this figure represents profits on a brokerage trade in Manchester cloths which was started after his father's death, the capital for which he and the 2nd defendant obtained from the insurance money of the Oriental Life Insurance Company, which was left to them exclusively by their father. With this sum they say they opened on 27th January 1913 a National Bank account, Ex. IV, on which they operated for their foreign trade. But it is clear from that account itself and from the 1st defendant's own evidence at page 260 of the print, that the foreign trade was not in fact separated from the ordinary cloth trade. The items of both are mixed up together. The 1st and 2nd defendants in fact seem to have regarded the Oriental Life Insurance Company's policy amount as a loan by them to the family firm, and in the settlement, Ex. II, it appears that interest has been allowed to them therefor, being included in the figure of Rs. 580 at page 133 of the print. Out of this National Bank fund certain shares in the Buckingham Mills were purchased for Rs. 2,925 and again that figure is included in Ex. II (a part of the amount shown on deposited with Binny & Co. page 116) in the trade assets available for distribution to all members of the family, though the interest on the shares is regarded as the perquisite of 1 and 2 defendants only (Page 134-5). This attempt to isolate a particular branch of the family trade and earmark it for defendants 1 and 2 alone cannot therefore be upheld.

A dividing line, however, both in fact and in law, has to be drawn between the period 1912-1915 and the period 1915-1918. In March 1915, owing to one minor sister having come of age and having demanded her share, the firm's accounts were looked into and an attempt was made to ascertain the assets of the firm not on that date but on the date of the father's death, and to partition these assets among the various heirs. It was really rather a hopeless task owing to the failure of defendants 1 and 2 to close the firm's accounts at the time of their father's death and the resultant figures are only approximate. This partition is evidenced by Ex. II. As it stands, it allotted all the profits between 1912 and 1915 wholly to the 1st and 2nd defendants on the footing that the trade after their father's death was not a family trade but their own exclusive trade. Another minor daughter came of age in 1918 and also was then given her share according to Ex. II. These two daughters gave release deeds, Ex. VI dated 1st April 1916 and VI-A dated 1st July 1918. Ex. II and the partition which it represents were forced on defendants 1 and 2 by the demand of one co-heir for her share and it was carried through

by these defendants alone. The process by which they came to the result that the profits between 1912 and 1915 were their own private profits and were not divisible as assets among the family can be regarded as barely honest. They had on their case used for themselves exclusively the whole credit and good will of their father's firm which had been going on for about 30 years, a very definite asset which ought to have been valued and divided between the co-heirs. Further, having obtained control of the shares of the other members of the family by the simple process of constituting themselves trustees and guardians for them, they used these shares in the business to obtain the profits which they under Ex. II proceeded to divide between themselves alone. We are satisfied that after the death of the father the 1st defendant along with the 2nd defendant carried on the father's business as a person bound in a fiduciary capacity to protect the interests of the plaintiffs. Sects. 23 (f) and 88 of the Trusts Act will consequently apply. He was therefore bound to hold for the benefit of the plaintiffs any advantage he gained by availing himself of his fiduciary character and by utilising the plaintiffs' shares in their father's assets for his own pecuniary advantage; and the measure of that advantage up till 7th March 1915 is the figure of profits both on his own trade and on the foreign goods as set out in Ex. II. The plaintiffs are therefore each entitled to the profits between 1912 and 1915 arising to each of them proportionate to their shares of the capital employed. The plaintiffs do not now challenge the figures in Ex. II although the figures are merely approximate, but only the method of division. The figures of profits therein given from 1912 to 1915 are Rs. 13,402-13-0 on the local trade and Rs. 11,864-10-0 on the foreign trade.

But after this partition of 1915 the position in fact and in law changed radically. From the date of Ex. II separate *khatas* for each member then remaining in the family were kept and their own individual credits and debits entered therein, Ex. XVII-B. None of the plaintiffs has attacked the fact of this partition. It is true that in their plaints the plaintiffs in appeals 281 to 283 speak of 1st and 2nd defendant having "purported" to partition and of some properties having been omitted. But the first issue in all the suits clearly shows that all the plaintiffs accepted the partition as a fact, and the only question about it which fell to be decided was, what was the value of each share. Such a position it is obviously difficult to maintain when the family trade has ceased to be a family trade because the family members themselves have partitioned. Any combination actual or theoretical, between the members of the family ceased at such a partition, and the plaintiffs must be

regarded as having accepted that position. It is true that none of them categorically pleads that the family trade had then come to an end ; all plead that the defendants were even after the partition in the position of executors *de son tort* in dealing with the respective shares of each plaintiff ; but such a contention cannot be upheld in the circumstances. There is no question here of renunciation of a trust to which Sect. 46 of the Trusts Act would apply. The mother, for example, must be taken, in the absence of evidence to the contrary, which she does not provide as she has not gone into the witness-box, to have known of the partition and accepted it as putting her own separate share at her disposal. If she then allowed it to be used for the trade, she was perfectly aware that there was no longer a family trade for her benefit and the continued use of her share could only then be as capital lent to the firm consisting of defendants 1 and 2. She cannot therefore contend that the 1st defendant was any longer dealing with her share in a fiduciary capacity. Similarly the minors who now accept the partition of the various shares cannot plead that the trade by two separated members was any longer being conducted as a family trade for the benefit of the rest. It is true that no independent person represented them at the partition, but they have not complained of that or made it a ground of action. We conceive then that it is not open to them to maintain that after the partition the family trade continued as a family trade for their benefit, and therefore the 1st defendant was any longer engaging in it in a fiduciary relationship towards them. No case was put forward in the plaints that after 1915, when the family trade had ceased, the 1st defendant remained guardian *de facto* or *quasi* trustee, and therefore responsible to the minors as guardian *de son tort* or as trustee *de son tort*. Any claim that he remained executor *de son tort* will not avail as it is not shown that he was engaging in any act which belongs to the office of executor. As to partnership, the suit was not on the footing of partnership nor is there any basis for the contention that after 1915 the other members of the family were admitted to the benefits of the partnership within the meaning of Sect. 247 of the Indian Contract Act. We are therefore of opinion that from 7th March 1915 the plaintiffs are entitled only to interest on their individual shares in the firm, regarded as loans of capital. That interest has been awarded by the lower Court at 6 per cent and no attack on that rate has been raised in the pleadings or before us.

The net result in Appeals 460 to 463 of 1924 is that the share of each plaintiff will be re-calculated on the figures of Ex. II, including for general distribution the figures of profits on

the " godown " and " foreign goods." On each total so ascertained interest will be allowed at 6 per cent. per annum up to the date of payment. The proportion of shares is, to the widow 11/88, to each minor son 7/44 and to the daughter 7/88. We do not see any sufficient reason for allowing any special remuneration under Sect. 95 of the Trusts Act to the 1st defendant as manager in view of our opinion that his conduct has not been straight-forward. From the totals so ascertained payments admitted as directly made to the plaintiffs in Appeals 460, 461 and 462 by the 2nd defendant, namely, Rs. 12,000 in Appeal 460, Rs. 8,000 in Appeal 461 and Rs. 6,000 in Appeal 462 must be deducted, and also the amounts shown as drawn out in cash by each plaintiff in his or her separate *khata*, Ex. XVII, on which counter interest at 6 per cent. must also be allowed. These latter deductions were left by the trial judge to be disposed of in a collateral suit between the parties about the partition of immoveable property ; but as they were not so disposed of we have now to provide for them here.

These deductions are the matters raised in Appeals 280 to 283 of 1924. The 1st defendant, the appellant in these appeals further claims that the amount of these deductions should be increased because of an arrangement between himself and the 2nd defendant under Ex. VII lessening to some extent the proportion of his liability in the family trade. Obviously this private arrangement cannot be used to curtail the plaintiffs' rights and this request must be disallowed.

The decrees of the lower Court are therefore set aside and amount due to each plaintiff will be calculated on the above footing and decreed.

N. R. R. *Decrees set aside.*