APPELLATE CIVIL.

Before Graham and Mitter JJ.

AKBAR ALI

v.

ADAR BIBI.*

1930

May 1, 8.

Mahomedan law—Sunni *School*—*Inheritance*—*Succession of distant kindred, whether governed by the doctrine of Imam Mahammad or Imam Abu Yusuf.*

The succession of distant kindred among *Sunni* Mahomedans is governed by the doctrine of Imam Mahammad in preference to that of Imam Abu Yusuf, which, though more simple and of easier application, has not been adopted by the majority of Mahomedan jurists.

Hossein Ali v. *Shahzadee Hazara Begum* (1), *Kulsom Bibee* v. *Golam Hossein Cassim Ariff* (2) and *Jinjira Khatun* v. *Mohammad Fakirulla Mia* (3) distinguished.

SECOND APPEAL by the defendant, Sheikh Akbar Ali.

The appeal arose out of a suit for declaration of plaintiffs' title to some lands and for recovery of possession of their share after partition. The plaintiffs' case was that the properties in suit were the ancestral properties of two *Sunni* Mahomedan brothers, Amir and Zamir, who each inherited a half share in them. Both of them were dead at the time of the suit, Zamir having left his two daughters the plaintiffs, his father and mother and widow as his heirs, while Amir left two wives, his brother Zamir's two daughters and his full sister Asiran Bibee's two sons and two daughters. The suit was contested by defendant No. 2, a son of the sister of Amir, who contended *inter alia* that Zamir was not a full, but a consanguine brother of Amir, and, that being so, the plaintiffs did not inherit anything from Amir under the Mahomedan law, as distant kindred, in

*Appeal from Appellate Decree, No. 1673 of 1929, against the decree of K. K. Datta, District Judge of Howrah, dated March 15, 1929, reversing the decree of Gopeswar Banerji, Subordinate Judge of Howrah, dated June 1, 1928.

(1) (1869) 12 W. R. 344. (2) (1905) 10 C. W. N. 449.
(3) (1921) I. L. R. 49 Calc. 477.

the presence of his full sister's sons, that Amir had transferred all his properties before his death, and that the properties that were jointly owned by Amir and Zamir were partitioned long before, amicably and in pursuance of a compromise decree of the court of the Munsif at Uluberia. The Subordinate Judge, who tried the suit held that such properties as were joint had already been partitioned before, that the suit was not *bona fide*, and that the plaintiffs had no cause of action. He, therefore, dismissed the suit with costs. On appeal, the Additional District Judge held that the transfer by Amir of some of the suit lands in favour of the defendants was not proved and that those lands were available for partition, that the plaintiffs had cause of action, that the compromise in the previous suit did not effect a partition, and that the plaintiffs, being daughters of his consanguine brother, were heirs of Amir to the extent of 1 anna 4 pies share and were not excluded from inheritance by his full sister's sons and daughters who inherited a 10 annas 8 pies share. The Additional District Judge, accordingly, allowed the plaintiffs' appeal and decreed the suit.

The defendant, thereupon, appealed to the High Court.

Rupendrakumar Mitra for the appellant.

Atulchandra Gupta and *Bhubanmohan Saha* for respondents.

MITTER J. This is an appeal by one of the defendants, Sheikh Akbar Ali, from a preliminary decree for partition passed by the Second Additional District Judge of Hooghly, reversing a decision of the Subordinate Judge of that district by which the plaintiff's suit was wholly dismissed. The properties, which are the subject matter of partition, are contained in two schedules to the plaint, namely, schedule *ka* and schedule *kha*. They belonged to one Amir, who is the brother of Zamir. It has been now found by both the courts below that Zamir was the consanguine brother of Amir and the plaintiffs to the

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litigation are the daughters of Zamir and some of the defendants to the suit, amongst whom the appellant is one, are the children of Asiran Bibi, full sister of Amir. Several defences were taken in the suit, some of which it is necessary to mention, having regard to the points raised in this Second Appeal. The first defence taken was that, with regard to the *kha* schedule properties, Amir conveyed during his lifetime, by deeds of sale, in favour of some of the defendants and that, consequently, the plaintiffs could not get by inheritance the *kha* schedule properties. This defence prevailed in the court of first instance. That court came to the conclusion that there was an admission in the plaint that Amir did execute these deeds of sale in respect of the *kha* schedule properties and that plaintiffs' only contention was that these deeds were executed by Amir at the time when he was in his death-bed illness, when he was not of sound mind and that these deeds were extorted from him by some of the defendants. The Subordinate Judge negatived the plaintiffs' case that Amir was not of sound mind. He found that the deeds were really executed by Amir in full possession of his senses and that the case made by the plaintiffs of coercion employed for the purpose of wresting these deeds from Amir was not true. It is to be observed that the defendants did not produce in court the deeds by which the *kha* schedule properties were said to have been conveyed to the defendants. On appeal, the learned Additional District Judge rightly held that these transfers by Amir, during his lifetime, in respect of the *kha* schedule properties have not been proved by the production of the deeds of sale. It has been argued, in Second Appeal, on this part of the case, that the lower appellate court was wrong in holding that these transfers have not been proved, seeing that the plaintiffs themselves admitted in their plaint that Amir did execute these deeds. He raised the contention that those deeds were executed under circumstances to which I have already referred. Paragraph 5 of the plaint was read to us and it

appears clear from that paragraph that there was no admission by the plaintiffs of the execution of these deeds by Amir. Consequently, there being no such admission, it did not relieve the defendants from the burden of establishing these transfers, which can only be proved by the production of the deeds of transfer. In the absence of these deeds, the learned District Judge has rightly come to the conclusion that the transfer during Amir's lifetime of the *kha* schedule properties had not been proved. Another defence, which it is necessary to mention, was that, with regard to the *kha* schedule properties, there was a compromise in the suit of 1922. To that compromise, Karimannessa, the widow of Zamir and the mother of the present plaintiffs, was not a party and consequently, that compromise was not binding on the present appealing defendant. The answer to that contention is that the defendant was a party to the compromise. He did take the benefit under the compromise, having got a certain portion of the *kha* schedule lands on the basis of the compromise, and it is not open to him to raise the contention that the compromise was not binding, because all the necessary parties interested in the *kha* schedule properties were not parties to the compromise. This contention of the appellant must, therefore, fail.

The only point of substance argued before us is that the learned District Judge should not have granted a preliminary decree, following the system of Imam Mahammad, one of the disciples of Abu Hanifa, who is the founder of the Sunni School of Mahomedan law, by which the present case is governed. It is contended that the system which the District Judge should have followed is the system of Abu Yusuf, one of the two disciples of Abu Hanifa, and reference has been made in this connection to several authorities. The first case upon which reliance has been placed is the decision of Kemp and Markby JJ. in the case of *Hossein Ali* v. *Shahzadee Hazara Begum* (1). Reference has also been made to

(1) (1869) 12 W. R. 344.

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the decision of Mr. Justice Woodroffe, sitting on the Original Side, in the case of *Kulsom Bibee* v. *Golam Hossein Casim Ariff* (1). Another case relied on is the decision of Sir Asutosh Mookerjee in the case of *Jinjira Khatun* v. *Mohammad Fakirulla Mia* (2). All these cases, however, it is to be noticed, are not cases on that branch of law, namely, the law of inheritance with which we are at present concerned. But they are cases relating to the law of *wâkf*. Consequently, these cases are of no assistance. In the present controversy, the question to be considered is whether, in reference to the succession of a distant kindred, the authority of Abu Yusuf should prevail over the authority of Imam Mahammad. It appears, on an examination of the authorities, that the preponderance of opinion of the jurists dealing with Mahomedan law is in favour of the system of Imam Mahammad in connection with the succession of the class of distant kindred. As I have already stated, the controversy in the present case is with regard to the partition of the properties of Amir, as between the full sister's children on the one side and the consanguine brother's daughters on the other. Both of them fall within one class of distant kindred and it appears that Abu Hanifa's opinion is in favour of Imam Mahammad's system with regard to "*zâvil "arhâm*" or succession of distant kindred. In this connection reference may be made to the "Principles "of Mahomedan Law," Edition 1919, by Mr. Justice Tayebji of the Madras High Court. At page 892, the learned author points out that Abu Hanifa's opinion appears to have been in favour of Imam Mahammad's system. A query, however, is put by the learned author to the effect as to whether the courts in British India will not prefer Abu Yusuf's system for its simplicity—see section 629 (A). In the comment to that section, the learned author quotes a passage from Fatawa-i-Alamgiri, a book on *faraiz*, which is to the following effect: "Be it known (i) "that there are two reports about Abu Hanifa's view

(1) (1905) 10 C. W. N. 449, 488. (2) (1921) I. L. R. 49 Calc. 477, 486.

"as regards this, and of the two the better known "report is that as regards all the rights of the '*zâvil* "'*arhâm*' (distant kindred) he agrees with Imam "Mahammad, and the 'Fatwa' is upon the same view, "but (ii) Shaikh Asbijabi has said in the 'Mabsut' "that the view of Imam Abu Yusuf is more correct, "inasmuch as it is more easy of application and (iii) "the author of the 'Muhit' states that the Shaikhs of "Bukhara have adopted in such questions the opinion "of Imam Abu Yusuf." The other jurists, dealing with Mahomedan law, who favour the system of Imam Mahammad are W. H. Macnaghten (reference may be made to his "Principles on Mahomedan Law "of Inheritance"), Baillie (reference may also be made to his "Mahomedan Law of Inheritance," page 92), Rumsey (reference may be made to his "Principles "on Mahomedan Law of Inheritance," page 62), and Syed Ameer Ali (see his book on "Mahomedan "Law," Vol. II, page 78). At page 83 of the third edition of Mr. Ameer Ali's Mahomedan Law, the tradition that the master Abu Hanifa's opinion was in favour of Imam Mahammad's system is accepted as the correct tradition and, generally speaking, it is a general rule of interpretation of the Hanafi law that, where there is a difference of opinion between Abu Hanifa and his two disciples Abu Yusuf and Imam Mahammad, the opinion of the disciples will prevail, and where there is a difference of opinion between Abu Hanifa and Imam Mahammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf, but where the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally to be preferred. But these rules are not to be taken as inflexible. Sir Dinshah Fardunji Mulla, in his book on the "Principles of Mahomedan Law," while dealing with the subject of succession of distant kindred, made the following observations which are quite pertinent to the present controversy. The learned author observes "It is when we come to the class of distant kindred "that we find a remarkable difference of opinion

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"between Abu Yusuf and Imam Mahammad, the two "great disciples of Abu Hanifa. The doctrine of Abu "Yusuf is very simple, but unhappily it has not been "accepted by the Hanafi Sunnis in India. It is the "doctrine of Imam Mahammad that is followed in "India and this doctrine is much too complicated. "Moreover, the doctrine of Imam Mahammad is "followed by the author of the Sirajiyyah, and "apparently by the author of the Sharifiyya. The "Fatawa-i-Alamgiri does not express any preference "either way," and the learned author further observes that, since the opinion of Abu Yusuf is not followed in India, he confined his remarks on this branch of the law to the doctrine of Imam Mahammad. The only view which seems to favour the contrary opinion is of Professor Wilson and, in his book on "Anglo-"Mahomedan Law," the learned author says this, "It is suggested that Abu Yusuf's opinion should be "adopted both because it is more reasonable in itself "on account of its simplicity and because it has a "considerable weight of authority behind it, as noted "in the Fatawa-i-Alamgiri." The learned author seems to rely on a passage from Fatawa-i-Alamgiri, which is also referred to in Mr. Justice Tayebji's "Principles of Mahomedan Law." Mr. Justice Tayebji has put a *quaere* whether the doctrine of Imam Mahammad should not be followed in preference to Abu Yusuf as regards the right of distant kindred, for the latter view is more simple and is of eassier application. No authority of this Court has been cited to us to show that the opinion of the majority of the Mahomedan jurists, to which I have referred, with regard to the succession of distant kindred under the Hanafi law, to the effect that the system of Imam Mahammad should be followed, is not the right view.

For the above reasons, we think the learned Additional District Judge was right in relying on the opinion of Imam Mahammad in preference to that of Abu Yusuf. It is conceded that if that is the correct view, the decree of the Subordinate Judge

with regard to the shares which have been declared in favour of the plaintiff is correct. The result is that the appeal fails on all the points and must, therefore, be dismissed with costs.

GRAHAM J. I agree.

Appeal dismissed.

A. A.