APPELLATE CIVIL.

Before Mukerji and Guha JJ.

ABBAS NASKAR

v.

CHAIRMAN, DISTRICT BOARD, 24-PARGANAS.*

1931

July 17, 23.

Mahomedan Law—Succession—Vesting—Representative capacity, if any—Debts—Liability of heirs and of estate, principles of—Administration suit—Parties to suit—Justice—Equity—Good conscience—Suits by non-Mahomedans against Mahomedans, law governing.

If the estate of a deceased Mahomedan has been distributed after his death, each of his heirs would be liable for his debts to the extent only of a share proportionate to his own share of the estate.

Prithi Pal Singh v. *Husaini Jan* (1), *Ambashankar Harprasad* v. *Sayad Ali Rasul* (2), *Bussunteram Marwary* v. *Kamaluddin Ahmed* (3) referred to.

But in a case, in which there has, in fact, been no distribution, two questions arise :—*First*, whether the creditor may sue any heir in possession of the whole or any part of the estate without joining the other heirs as defendants, for realisation of the entire debt and, if so, whether a decree for the entire debt passed in such a suit may be enforceable against all the assets that are in his possession or only against that particular heir's share in the estate ; and *second*, what sort of decree should be passed in such a case.

So far as the first question is concerned the opinion of the Calcutta High Court has been consistently in the affirmative.

Muttyjan v. *Ahmed Ally* (4) and *Amir Dulhin* v. *Baij Nath Singh* (5) referred to and followed.

Jafri Begam v. *Amir Muhammad Khan* (6) referred to.

The right of each heir is several and distinct, and arises immediately on the death of the person whose heir he is. There is no intermediate vesting and no rule of Mahomedan law by which an individual heir, as such, may be taken to represent either the estate or the heirs generally.

With regard to the second question formulated above, the principle, which the Calcutta High Court has acted upon, treating the creditor's suit as an administration suit, cannot and should not be applied indiscriminately to all cases, in which some only of the heirs are sued for recovery of the entire debt. It has its limitations.

*Appeal from Original Decree, No. 265 of 1928, against the decree of Lalitmohan Basu, Third Additional Subordinate Judge of 24-Parganas, dated Dec. 21, 1927.

(1) (1882) I. L. R. 4 All. 361.
(2) (1894) I. L. R. 19 Bom. 273.
(3) (1885) I. L. R. 11 Calc. 421.
(4) (1882) I. L. R. 8 Calc. 370.
(5) (1894) I. L. R. 21 Calc. 311.
(6) (1885) I. L. R. 7 All. 822.

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There are weighty reasons why this principle should not be applied to suits other than those, in which some only of the heirs are sued as being in possession of a part or the whole of the estate or assets, not merely for themselves, but on behalf of all the heirs.

The above decisions of the Calcutta High Court sufficiently show that the suits concerned therein were against some of the heirs, who were in possession of the whole or the part so as to be bound to account for the same to the rest, or, in other words, were against some of the heirs, who were in possession of more than their share of the inheritance. It is only on such a footing that the analogy of an administration suit can, with any show of reason, be invoked.

Where, however, that is not the case, but the heirs are made parties as being in possession of their shares of inheritance only, the principle cannot possibly be of any application.

Where two of the heirs (defendants) had been absolved, the suit brought against them by a non-Mahomedan plaintiff, being dismissed because they were not properly represented,

held that the other heirs, if made liable for the entire debt, would have no right of contribution as against them.

Either under Mahomedan law or according to the principles of justice, equity and good conscience, which the court is bound to look to where, as here, both the parties to the suit are not Mahomedans (see section 24, Act VI of 1871) the plaintiff should not recover from the remaining Mahomedan defendants anything more than their proportionate share of the debt from out of the assets they have inherited in their shares.

Bussunteram Marwary v. *Kamaluddin Ahmed* (1) referred to.

FIRST APPEAL by defendants Nos. 3 and 5.

The facts and arguments appear in the judgment.

Nasim Ali for the appellants.

Santoshkumar Basu and *Santimay Majumdar* for the respondents.

Cur. adv. vult.

MUKERJI and GUHA JJ. This is an appeal by the defendants Nos. 3 and 5 from a decree, by which the plaintiff's claim for recovery of arrears of rent for a certain ferry, alleged to have been leased out to their father by the plaintiff, has been decreed against them and some others.

One of the contentions, which was attempted to be urged on behalf of the appellants, was that no lease was taken and so no money was due; but, in view of the evidence, oral and documentary, that there is on

(1) (1885) I. L. R. 11 Calc. 421.

the record and which amply establishes the fact that such a lease was taken and that the amount claimed was due under it, this contention was not eventually pressed.

The other contention, which is of considerable substance, is that the decree, such as it is, is not supportable. The appellants' father, Tamizuddi, died leaving his mother, a widow, three sons and three daughters. All these heirs were impleaded in the suit as defendants. Two of these heirs, namely, defendants Nos. 6 and 8, were minors and, as they were not properly represented, the suit as against them was dismissed. It was decreed against the others, on contest against the defendants Nos. 3 and 5 and *ex parte* as against the rest. The entire amount due from Tamizuddi, as claimed, was decreed against these defendants, they being held "liable for the "aforesaid decretal amount to the extent of the assets "of Tamizuddi inherited by them."

Now, all authorities are agreed that, if the estate of Tamizuddi had been distributed after his death, each of his heirs would have been liable for his debts to the extent only of a share proportionate to his own share of the estate [*Prithi Pal Singh* v. *Husaini Jan* (1), *Ambâshankar Harprasad* v. *Sayad Ali Rasul* (2), *Bussunteram Marwary* v. *Kamaluddin Ahmed* (3)]. What we are concerned with here is a case, in which there has in fact been no distribution. Two questions arise: *1st*, whether the creditor may sue any heir in possession of the whole or any part of the estate without joining the other heirs as defendants, for realization of the entire debt, and, if so, whether a decree for the entire debt passed in such a suit may be enforceable against all the assets that are in his possession or only against that particular heir's share in the estate; and *2nd*, what sort of decree should be passed in the present case.

So far as the first question is concerned, the opinion of this Court has been consistently in the

(1) (1882) I. L. R. 4 All. 361. (2) (1894) I. L. R. 19 Bom. 273.
(3) (1885) I. L. R. 11 Calc. 421, 428.

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affirmative. Two decisions in support of this view may be cited. In the case of *Muttyjan* v. *Ahmed Ally* (1), three earlier decisions, amongst others, were referred to, *viz.*, *Nuzeerun* v. *Ameerooddeen* (2), in which the analogy of a Hindu widow sued in her representative character was applied, *Assamathem Nessa Bibee* v. *Lutchmeeput Singh* (3), in which such analogy was ignored, but the procedure prescribed in the Hedâyâ for the guidance of Mahomedan law officers was relied upon, and a much earlier decision of the Sudder Dewani Adawlat in *Kishwur Khan* v. *Jewun Khan* (4), in which neither of the aforesaid two views was adopted, but it was held that creditors' suits were to be regarded as administration suits. The learned Judges held that the proper principle to apply was to treat the creditors' suit as an administration suit, and, as such, an heir in possession is bound to account for any assets that may have come into his hands and to that extent he is liable to pay the creditors and that the residue, if any, is to be divided amongst the heirs. The case was very unfavourably commented on by Mahmud J. in a very exhaustive judgment in the Full Bench case of *Jafri Begam* v. *Amir Muhammad Khan* (5). Notwithstanding that, it was followed in a later decision of this Court in the case of *Amir Dulhin* v. *Baij Nath Singh* (6). The learned Judges appear to have felt the force of the contention, that was urged against the view. They observed: "If we rightly "apprehended his argument, it was directed to this, "that the amount decreed ought to be proportionate "to the interest in the estate of the particular heir, "and that when it is sought to recover the whole of the "debt all the heirs ought to be before the Court. "Stated in that form the proposition is one of which "there is much in favour. An individual heir cannot "be said with strict propriety to represent his co-heirs "in a suit brought by a creditor to enforce his claim

(1) (1882) I. L. R. 8 Calc. 370.
(2) (1875) 24 W. R. C. R. 3.
(3) (1878) I. L. R. 4 Calc. 142.
(4) (1799) 1 Mac. Sel. Rep. 33.
(5) (1885) I. L. R. 7 All. 822.
(6) (1894) I. L. R. 21 Calc. 311, 316, 317.

"against the property of the deceased proprietor. "The right of each heir is several and distinct, and "arises, as has been said, immediately on the death of "the person whose heir he is. There is no "intermediate vesting in any one, and no rule of "Mahomedan law by which an individual heir, as "such, may be taken to represent either the estate of "the deceased or the heirs generally." Having made these observations and quoted *Jafri Begam's* case (1) (*supra*) and other cases in support of them, the learned Judges referred to the case of *Muttyjan* v. *Ahmed Ally* (2) (*supra*) and followed it giving some additional reason in support of the decision in that case. The reason why they did so was put in the following words:—"And we think that apart from "the consideration that it is an authority of this "Court which has remained unquestioned now for "several years, it embodies a salutary rule and one to "which effect ought to be given." The principle enunciated in *Jafri Begam's* case (1), which as already stated was also acknowledged as correct in *Amir Dulhin's* case (3), though not acted upon therein, has been adopted in later decisions in Allahabad [*Dallu Mal* v. *Hari Das* (4)], and in the more recent decisions in Bombay [*Bhagirathibai* v. *Roshanbi* (5), *Shahasaheb* v. *Sadashiv* (6) and *Miya* v. *Manubibi* (7)], and has also been approved of in Madras [*Abdul Majeeth* v. *Krishnamachariar* (8)]. In a recent decision [*Lakshan Chandra Mandal* v. *Takim Dhali* (9)], this Court has reaffirmed the proposition that in Mahomedan law there is no representation of the family as under the Hindu law by one or more members of it, and expressed an opinion that the decisions of this Court, which have proceeded upon an assumption that the doctrine of representation is applicable to Mahomedan families, may require reconsideration. Notwithstanding all this, we should

(1) (1885) I. L. R. 7 All. 822.
(2) (1882) I. L. R. 8 Calc. 370.
(3) (1894) I. L. R. 21 Calc. 311, 316, 317.
(4) (1901) I. L. R. 23 All. 263.
(5) (1918) I. L. R. 43 Bom. 412.
(6) (1918) I. L. R. 43 Bom. 575, 581.
(7) (1923) I. L. R. 47 Bom. 712.
(8) (1916) I. L. R. 40 Mad. 243.
(9) (1923) 28 C. W. N. 1033.

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not be prepared to make a reference to the Full Bench to examine a settled view of law, as propounded in this Court ever since the days of the Sudder Dewani Adawlat [*Kishwur Khan* v. *Jewun Khan* (1)] and which was upheld in *Amir Dulhin's* case (2) in a considered judgment, in which the force of the observations in *Jafri Begam's* case (3) was fully recognised.

We now arrive at a point, where it becomes necessary to consider the second question formulated above. The principle, which this Court has acted upon, treating the creditors' suit as an administration suit, in our opinion, cannot, and should not, be applied indiscriminately to all cases, in which some only of the heirs are sued for recovery of the entire debt. It has its limitations. There are weighty reasons why it should not be applied to suits other than those, in which some only of the heirs are sued as being in possession of a part or the whole of the estate or assets, not merely for themselves, but on behalf of all the heirs. The decisions of this Court, to which we have referred as adopting this principle, sufficiently show that the suits concerned therein were against some of the heirs, who were in possession of the whole or the part so as to be bound to account for the same to the rest, or, in other words, were against some of the heirs, who were in possession of more than their own share of the inheritance. It is only on such a footing that the analogy of an administration suit can, with any show of reason, be invoked. Where, however, that is not the case, but the heirs are made parties, as being in possession of their shares of inheritance only, the principle cannot possibly be of any application. In the present case, all the heirs were made parties, suggesting that each was in possession of the share he or she had individually inherited. In our opinion, it would be wholly wrong to apply this principle to such a case. Here, two of the heirs, namely, the defendants Nos. 6

(1) (1799) Mac. Sel. Rep. 33. (2) (1894) I. L. R. 21 Calc. 311.
(3) (1885) I. L. R. 7 All. 822.

and 8, have been absolved, the suit against them being dismissed, because they were not properly represented; and the other heirs, if they are made liable for the entire debt, will have no right of contribution as against them. Either under the Mahomedan law or according to the principles of justice, equity and good conscience, which we are bound to look to where, as here, both the parties to the suit are not Mahomedans (see section 24, Act VI of 1871), the plaintiff should not recover from the remaining defendants anything more than their proportionate share of the debt from out of the assets they have inherited in their shares. This view is supported by the decision of this Court in the case of *Bussunteram Marwary* v. *Kamaluddin Ahmed* (1). A Hindu creditor of a deceased Mahomedan sued his heirs, four in number, to recover money due from him alleging that they were in possession of the estate left by him; the debt was barred against three of the heirs, but not against the fourth, one Kamaluddin, who had made a part payment. In the Court below the entire claim was decreed against the fourth heir, the suit against the other three being dismissed. It was held that, under the circumstances of the case and having regard to the rule of Mahomedan law, the creditor was not entitled to a decree against Kamaluddin for more than his own proportionate share of the debt and that, on principles of justice, equity and good conscience, it would not be equitable to hold him liable for the whole of the debt. The learned Judges observed:—"What "the Mahomedan law says is that it is only when the "estate is completely involved that the heirs cannot "take the estate and a division amongst them cannot be "allowed before the debts are discharged. We, "therefore, hold that in the circumstances of the "present case the plaintiff, under the Mahomedan law, "can only obtain as against the two-fifths share of "Kamaluddin a proportionate share of the money due "to him..... The debt due to the plaintiff is

(1) (1885) I. L. R. 11 Calc. 421, 428.

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"indeed an indivisible one; and the plaintiff would, "under ordinary circumstances, be entitled to realize "his dues from the whole estate, or from any portion "of it, as he might choose. But the circumstances that "have occurred in the present instance are such that "it would be inequitable to insist that Kamaluddin's "share should bear the whole of the debt. The claim "of the plaintiff as against the other heirs is now "barred by the law of limitation, and their shares "having been exempted Kamaluddin would not be "entitled to demand contribution from them, in the "event of the whole debt being realized from him or "from his share. That being the case, it would not "be just or equitable to hold the share of Kamaluddin "answerable for the whole claim..... If "Kamaluddin was in a position to call upon the other "heirs for contribution, there would be no difficulty "in decreeing the whole claim as against his share. "But, in the circumstances of this case, we are of "opinion that the plaintiff is not entitled to charge the "share of Kamaluddin with any more than a "proportionate share of his dues."

The result is that, in our opinion, the appeal should be allowed in part and the decree made by the court below in favour of the plaintiff and as against the defendants, other than the defendants Nos. 6 and 8, should be modified by reducing the amount of claim to $71/88 \times$ Rs. 6,479-2-9 = Rs. 5,227-8-3, representing the share of the debt proportionate to their share of inheritance. In other respects the said decree will stand. The costs of this appeal will be awarded to the parties in proportion to their success.

Appeal allowed in part; decree modified.

G. S.