APPELLATE CIVIL.

Before C. C. Ghose and Mitter JJ.

AMINADDIN MUNSHI.

v.

TAJADDIN.*

1931.

June 23, 24.

Mahomedan Law—Mahomedan joint family—Law applicable to joint acquisition—Presumption—Evidence—Onus of proof—Plaintiff to prove that the former admissions were untrue.

When members of a Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used with regard to the Hindus.

Suddurtonnessa v. *Majada Khatoon* (1), *Hakim Khan* v. *Gool Khan* (2) and *Abdool Adood* v. *Mahomed Makmil* (3) referred to.

Under the Mahomedan law, there is not, as under the Hindu law, any presumption that acquisitions of the several members of a joint family are made for the benefit of the joint family.

Abdul Kadar v. *Bapubhai* (4), *Mahamad Amin* v. *Hasan* (5) and *Mohideen Bee* v. *Meer Saheb* (6) referred to.

Where, during the continuance of a joint Mahomedan family, properties are acquired in the name of one member of such family (who is proved to be the manager of the joint family), but are possessed by all the members of the joint family, the onus lies upon such member to prove that the said properties were his separate properties and not the properties of the joint family.

What a party himself admits to be true must necessarily be presumed to be so unless the admission was made under circumstances which does not make it binding on him or until it is explained or until it is shown to be untrue.

Chandra Kunwar v. *Chaudhuri Narapat Singh* (7) and *Slatterie* v. *Pooley* (8) referred to.

APPEAL by the defendant No. 1.

The material facts have been stated in the judgment.

Upendrakumar Ray and *Sureshchandra Majumdar*, for *Manmohan Banerji*, for the appellant.

Nasim Ali and *Nurul Huq Chaudhuri* for the respondents.

*Appeal from Original Decree, No. 248 of 1928, against the decree of Hemchandra Mitra, First Subordinate Judge of Tippera, dated Jan. 17, 1928.

(1) (1878) I. L. R. 3 Calc. 694.
(2) (1882) I. L. R. 8 Calc. 826.
(3) (1884) I. L. R. 10 Calc. 562.
(4) (1898) I. L. R. 23 Bom. 188.
(5) (1906) I. L. R. 31 Bom. 143.
(6) (1915) I. L. R. 38 Mad. 1099.
(7) (1906) I. L. R. 29 All. 184; L. R. 34 I. A. 27.
(8) (1840) 6 M. & W. 664; 151 E. R. 579.

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C. C. GHOSE AND MITTER JJ. This is an appeal by defendant No. 1 and arises out of a suit for partition. The appeal is from the preliminary decree for partition. The relationship between the parties to the suit is shown in the genealogical table which has been handed over to us and is admitted by both parties and which is appended to the end of our judgment. It appears from that tree that one Jainaddi died leaving behind him two sons, Tamijaddin and Najamaddin, and a daughter, Kalar *mâ*. Tamijaddin died some time in 1324 B. S., leaving behind him 3 sons, Aminaddin, who is defendant No. 1 to the suit, Abdul Majid (defendant No. 2) and Faijuddin (defendant No. 3) and two daughters Daragar *mâ* (defendant No. 4) and Nessa Bibi, who is defendant No. 5, in this litigation. Najamaddin died in 1322 B. S., leaving behind him Tajaddin and Ainuddi, two sons, who are plaintiffs Nos. 1 and 2 and Asmanterannessa, a daughter, who is plaintiff No. 3 in this litigation. Kalar *mâ*, the daughter of Jainaddi, died leaving behind her Kalimaddin, who is defendant No. 6 in the litigation.

The case of the plaintiffs, as stated in the plaint, is that originally Jainaddi was the owner of the disputed lands which are described in schedule *ka* to the plaint and that he died 40 years ago, leaving him surviving two sons, Tamijaddin and Najamaddin. Of the properties left by the said Jainaddi, his two sons became owners in two equal shares and were in joint possession thereof by living as members of a joint Hindu family. It is also stated in the plaint that, while the said brothers were in joint mess, some of the properties, which are included in schedule *kha* of the plaint, were acquired in different names out of the income of the joint properties, that is out of the profits of the properties described in schedule *ka* to the plaint. Then it is recited in the plaint that Najamaddin died about 13 or 14 years ago, leaving him surviving plaintiffs Nos. 1 and 2 and his sons, plaintiff No. 3 as his

daughter, and Tamijaddin died about 10 or 11 years ago, leaving him surviving his three sons, defendants Nos. 1, 2 and 3, and two daughters, defendants Nos. 4 and 5. It is also alleged that, while the co-sharers other than plaintiff No. 3 and defendants Nos. 4 and 5, who had been married elsewhere, and who are also heirs, lived in joint mess and were in possession of the joint property, some of the remaining properties, included in schedule *kha*, were acquired out of the income of the aforesaid joint properties, and by their own efforts, that while in joint possession as owners of the disputed properties described in the schedules, the co-sharers in joint mess, namely plaintiff Nos. 1 and 2 and defendants Nos. 1, 2 and 3, quarrelled amongst themselves and became separate in mess, but the properties were being possessed as joint properties, and, as it has become inconvenient for the co-sharers to possess these properties jointly, the present suit for partition had to be instituted. It is not necessary to refer to the other defences taken in the suit except the defence which has been taken by defendant No. 1, by which he claims three of the *dâgs* mentioned in schedules *ka* and *kha* to the plaint, to which particular reference will be be made hereafter, as properties which were acquired by his mother one Manekanessa and the defence as regards five other *dâgs*, which are claimed as properties acquired either by defendant No. 1 himself or by his father. The Subordinate Judge, who tried the suit, has negatived the defence of the defendant No. 1 with reference to these eight plots, with which the present appeal is concerned.

The question raised by the defendant No. 1 in this appeal relates to these eight plots. A general argument has been advanced on behalf of the appellant to the effect that the judgment of the Subordinate Judge is vitiated by his misplacing the burden of proof on the defendant No. 1 for showing that the eight plots were either his self-acquisitions or were acquisitions by his mother and father. It has been strenuously contended that this error with

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regard to the burden of proof has so far coloured the judgment of the Subordinate Judge that that judgment should not be allowed to stand. Further, it is contended that the evidence put forward on behalf of the plaintiffs is quite insufficient to discharge the burden, which lay on them of establishing that the disputed eight plots are properties of the joint family. The true position with regard to the existence of any presumptions or otherwise regarding acquisitions by members of a joint Mahomedan family has been stated in numerous cases as follows: that where members of a Mahomedan family live in commensality, they do not form a joint family in the sense that expression is used with regard to Hindus and under the Mahomedan law there is not as under the Hindu law any presumption that acquisitions of the several members are made for the benefit of the joint family. Reference in this connection may be made to some of the cases which have been referred to at the bar and to other cases. The cases of *Hakim Khan* v. *Gool Khan* (1), *Suddurtonnessa* v. *Majada Khatoon* (2) and *Abdool Adood* v. *Mahomed Makmil* (3), were cases which were referred in the course of the argument before us. The other cases supporting the same view with reference to acquisitions of members of a joint Mahomedan family may also be referred to, as for instance, *Abdul Kadar* v. *Bapubhai* (4), *Mahamad Amin* v. *Hasan* (5) and *Mohideen Bee* v. *Meer Saheb* (6). The question, however, is different, when it is shown, as is disclosed by the evidence in this case (and it is common ground), that all the members now surviving of the family of Tamijaddin, Najamaddin and Kalar *mâ* were possessing the disputed properties jointly. It is not a question merely of the messing together of certain members of a Mahomedan family. They were possessing these properties in common and in

(1) (1882) I. L. R. 8 Calc. 826.
(2) (1878) I. L. R. 3 Calc. 694.
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(6) (1915) I. L. R. 38 Mad. 1099.

jointness, and the question arises whether the rule can apply to the present case, where, as has been shown by clear evidence on which the Subordinate Judge relied and which we have no reason for discrediting, that the defendant No. 1 was the managing member of such a family. Under those circumstances, it seems to us that the burden of proof would lie on the defendant No. 1 for establishing that the properties which were acquired during the jointness of the family and which are shown to stand in the name of defendant No. 1 do not really belong to the joint family. The defendant No. 1, on the evidence, occupies the position of a managing member, he is in the relationship of a fiduciary character to the other members of his family and has certain obligations to discharge with reference to the other members of the family. Under these circumstances, it seems to us that the Subordinate Judge has not gone wrong, with reference to some of these plots, where the properties are said to stand in the name of defendant No. 1, in finding that it is likely to presume that it was for the managing member to show that the property was not the property of the joint family. After making these general observations, we proceed to deal with the specific objections raised with regard to the eight plots now in controversy.

We will first take up the plots which are alleged to belong to the mother. [Their Lordships then discussed the evidence as regards plot No. 3594, and, referring to the written statement and the record-of-rights, held as follows:]—The written statement is a clear admission that this plot 3594 comprised in the *mokarrari jamâ* belonged to all the members of the joint family and an admission must be presumed to be true until it is explained or until it is shown to be untrue. As has been pointed out by the Judicial Committee of the Privy Council in *Chandra Kunwar* v. *Chaudhuri Narpat Singh* (1), quoting the

(1) (1906) I. L. R. 29 All. 184; L. R. 34. I. A. 27.

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observations from the case of *Slatterie* v. *Pooley* (1) that what a party himself admits to be true must necessarily be presumed to be so, and it is for him to establish by evidence that the admission was made under circumstances which does not make it binding on him. The only explanation which has been given in the evidence, as also in the written statement of defendant No. 1, is that the entry in the record-of-rights was a mistake. Nothing has been said with regard to this clear admission he has made in the written statement. We are, therefore, clearly of opinion that, having regard to the entry in the record-of-rights, the admission made in the written statement, the unsatisfactory nature of the evidence regarding the purchase money having been found by the mother from the proceeds of the sale of the cow, the Subordinate Judge has arrived at a correct conclusion that plot No. 3594 belongs to the joint family and must be made the subject of the partition.

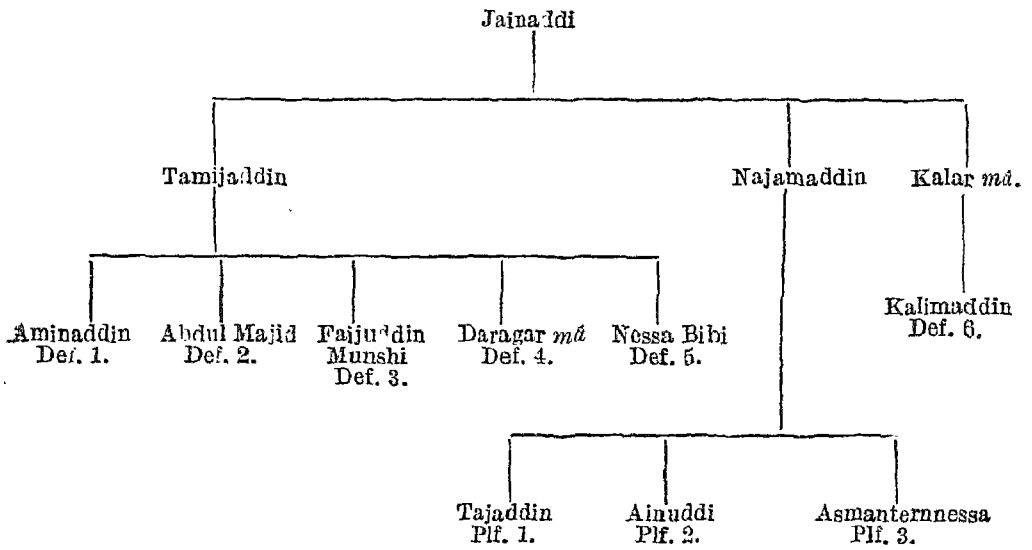
[Their Lordships then discussed the evidence relating to the remaining seven plots, *viz.*, Nos. 913, 901, 3057, 3058, 934, 935 and 927, and upheld the findings of the learned Subordinate Judge as regards the first six plots and reversed the findings as regards the last plot, No. 927. As regards plot No. 803 also, their Lordships agreed with the court below that it was joint property. They then ordered as follows :—]

The result is that the decree of the Subordinate Judge is varied only with reference to plot 927 which would be declared to be the exclusive property of defendant No. 1 and will be omitted from the partition. The rest of the judgment and decree of the Subordinate Judge will stand.

The respondents who have appeared will get two-thirds of their costs of this appeal from the appellant.

(1) (1840) 6 M. & W. 664 ; 151 E. R. 579.

Genealogical Table referred to in the judgment :—



Decree modified in part.

A. K. D.