SIRIAH v. MUCKANÁCHÁRY.

v. *Abhesang Mera* (1)—in considering that if there is notice or reasonable cause to suppose that there is no debt due, the Court not only can, but ought to satisfy itself on the point.

The second question is: "Whether if as the result of an inquiry held under s. 287 a Court finds either that a garnishee admits a debt or that it is proved to be due by him to the judgment-debtor, a Court is imperatively bound to put such debt up for sale, or whether it may order the same to be paid into Court by the garnishee instead of proceeding to sell it?"

If the Court is satisfied that there is a subsisting debt, the debt must be sold (s. 284); and delivery is to be made under s. 301. Under s. 268 the debtor may pay the amount of his debt into Court, but the code does not empower the Court to compel the debtor to pay the money into Court, while it does expressly provide for the mode in which sale and delivery of the debt attached is to be made. A power to compel the debtor to pay the amount of his debt into Court cannot be imported by reason of greater convenience of the course suggested by the Subordinate Judge, nor from the fact that such a course is not expressly forbidden by the code.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1886. November 16. 1887. January 26.

CHEKKONEKUTTI AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

AHMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mapillas—Muhammadan Law—Gift to take effect at an indefinite future time.

Gifts to take effect at an indefinite future time are void under Muhammadan law.

THIS was a suit for a declaration of the plaintiffs' title to certain property under a deed of gift. By that deed Ahmed Haji, a Mapilla, conveyed the land in question to his wife, Mama, for life, and after her death to his daughter, Pathuma, and children born to her. Pathuma had no issue at the date of the deed, but subsequently had two children, the plaintiffs in this suit. She

(1) I.L.R., 4 Bom., 323.

* Second Appeal 454 of 1886.

predeceased her mother, on whose death the defendants took possession of the property as her heirs.

The suit was dismissed by K. Kunjan Menon, Subordinate Judge of North Malabar, and his decree was affirmed on appeal by W. P. Austin, District Judge of North Malabar.

Plaintiffs appealed.

Mr. *Shephard* and *Sankara Menon* for appellants.

Mr. *Wedderburn* and *Anantan Nâyar* for respondents.

The facts and arguments appear sufficiently for the purposes of this report from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—The property which forms the subject of the present suit was given by one Ahmed Haji to his wife Mama by Exhibit A. The deed, after setting forth the particulars of the property, goes on : "I have agreed that the said properties should be perpetually enjoyed by you, as long as you are alive, and after your death by Pathuma who is born to me in you, and children born to her."

At the date of the deed, Pathuma had no children, and she died before her mother Mama, but left two children (the plaintiffs) surviving her. The plaintiffs now claim the property under the deed A, on the death of Mama.

The parties are Mapillas of North Malabar and are governed by Muhammadan Law. The sole question argued in the appeal is, whether the gift to an unborn person is valid. It is admitted that the question does not arise in the present suit as it is framed, whether Pathuma took a vested interest and whether plaintiffs could claim as heirs to Pathuma.

The District Múnsif held that the gift was void under Muhammadan Law by reason of its indefiniteness ; and the District Judge that it was void as regards Pathuma, because it was never rendered complete by seisin on her part, and was void *ab initio* in the case of her unborn children, since no one could make seisin for such a class.

Cases have been quoted at the bar to show that such a gift over to unborn children would be invalid according to Hindu Law, but no ruling under Muhammadan Law has been cited. Such a gift would not contravene the provisions of s. 12 of the Transfer of Property Act. But s. 129 of that Act directs that nothing in that Chapter, viz., VII, relating to gifts, shall be deemed to affect

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any rule of Muhammadan Law. We have therefore to consider whether such a gift is prohibited by the special law by which the parties are governed.

Referring to the principles of Muhammadan Law collected in the standard work of Mr. Macnaghten, we find prohibitions against a gift being made to depend on a contingency, or being referred to take effect at a future definite period (Rule 3, page 50), also in the case of a gift made to two or more donees, the interest of each must be defined, either at the time of making the gift or on delivery (Rule 7). In the present case, the gift to Pathuma and to any children that might be born to her was contingent upon their surviving Mama; and assuming such a gift to be valid subject to Mama's previous life interest, there is the condition that the interest of each donee must be defined at any rate on delivery.

Had the deed declared that on the death of Mama the property should be divided in certain definite shares between Pathuma and such of the children born to her as might be living at that date, the gift then would be defined; but as the words stand, they would include as sharers any children that might be born to Pathuma after the death of Mama. At the date of the gift, the interest of Mama alone was defined, but that of Pathuma was incapable of definition, since it would depend on the number of children that might be born to her. Even granting that the seisin required by Muhammadan Law could be postponed by Pathuma and her children till the death of Mama, no one could make seisin for an indefinite number of future children.

It may be urged that the result of English decisions in dealing with a gift to a class is to ascertain first, at what period the class is to be ascertained, and that the gift takes effect in favor of such of the class as are then capable of taking, after-born members of the class being simply excluded; but in India, in cases arising under Hindu Law, the course of decisions has been to establish that a gift whether vested or contingent which includes or might include persons unborn at the date of the gift is wholly void, that no one can take under a gift who is not in existence and thus capable of taking at the date from which the gift speaks: *Ram Lal Sett* v. *Kanai Lal Sett.*(1) The view however which the learned Judge took in that case implied some doubt as to whether the

(1) I.L.R., 12 Cal., 663.

previous decisions had not been carried too far; and the gift was allowed to stand with respect to persons alive and capable of taking at the date of the gift, but was set aside with regard to persons unborn at the date of the gift.

The principles of Muhammadan Law which prohibit indefinite gifts and gifts *in futuro* appear to us equally to exclude the validity of such gifts to take effect at an indefinite future time. The rules referred to would seem to indicate that Muhammadan Law tends to correspond more closely with Hindu than with English Law in its principles. We dismiss this Second Appeal but without costs, as in the Court below, the point being a novel one, and by no means free from difficulty.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

LAKSHMAYYA (PLAINTIFF), APPELLANT,

and

JAGANNATHAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887. February 18. March 9.

Limitation Act—Act XV of 1877, *Sch. II, Art.* 85—*Mutual current accounts—Reciprocal demands.*

A employed B as his agent. B alone kept written debit and credit accounts. A sued B for a balance due on the account between them:

Held, that the debit and credit account showed reciprocal demands between plaintiff and defendants, and that the account was a mutual open and current account within the meaning of Limitation Act, 1877, Schedule II, Art. 85.

THIS was an appeal against the decree of H. LeFanu, District Judge of Kistna, in appeal suit No. 199 of 1884, modifying the decree of Subba Rao, District Múnsif of Masulipatam, in original suit No. 631 of 1883.

Defendant No. 1 (the other defendants being undivided members of his family) worked certain harbour boats belonging

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* S.A. 472 of 1886.