APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

1889. April 10, 12.

KHATIJA AND OTHERS (DEFENDANTS NOS. 3, 8 AND 9), APPELLANTS,

v.

ISMAIL AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 7 AND 10), RESPONDENTS.*

Jurisdiction—Withdrawal of part of claim—Canarese Navayats—Common management of family property—Muhammadan Law—Sale of an undivided share—Limitation—Burden of proving validity of sale by a gosha woman.

Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Muhammadans called Navayats. The property sold was the vendor's share as heiress of her father, brother and sister who died in 1856, 1866 and 1871, respectively: but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff during the suit withdrew his claim against that part of the immovable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants who had it in their possession, and pursued his claim against the other immovable property and obtained a decree. On appeal:

Held, (1) that the suit was not barred by limitation:

(2) that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bonâ fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit:

(3) that the plaintiff having discharged the burden of proving that the conveyance to him was voluntarily executed and that the transaction evidenced by it was real and *bonâ fide*, the conveyance was operative.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of South Canara, in original suit No. 18 of 1887.

The plaintiff claimed under a registered sale-deed, dated 10th March 1879, and filed as exhibit A executed to him by one Fatima Bibi, an aged gosha lady. This document recited that she was entitled by inheritance "under the law of our caste" (Navayat) to a share in certain property and acknowledged the receipt of Rs. 2,000 from the plaintiff, and proceeded:—"I have sold to "you for Rs. 2,000 on account of urgency all my right and

* Appeal No. 63 of 1888.

"Swamithva (right of ownership) on the $\frac{75}{640}$ share to which I "am entitled out of the whole immovable and movable property "hereinmentioned." The plaint prayed for the partition and delivery of possession of the above share. Part of the immovable property was at Mangalore which is within the local limits of the jurisdiction of the Subordinate Court and part at Bhatkal which is beyond them. The plaintiff withdrew his claim in respect of the land at Mangalore, having compromised with the defendants in whose possession they were; but he pursued the rest of his claim and obtained a decree in respect of it.

Some of the defendants raised a plea of limitation as to which the Subordinate Judge said:—"As to the second issue, it has to "be remembered that, though these people are Muhammadans by "religion, they conform to Hindu customs and manners to a very "great extent. They belong to a class called 'Navayats' or new-"comers, being the descendants of a party of Arab merchants, who "migrated to Bhatkal near Goa some 770 years ago and took for "their wives converts from the Hindu Konkanis of the place. "Konkani is still the home-language of these people, and it is clear "from the evidence of several witnesses that, like their Konkani "neighbours, they are not overfond of division. Though Sayyed "Mahomed Sahib, the common ancestor, died in 1856, his estate "was never divided among his heirs, but managed quite in the "Hindu fashion by his eldest son Sayyed Mohidin Sahib till his "death in 1866 and since by the first defendant. That such "management was for the benefit of all the heirs of Sayyed Maho-"med Sahib is indeed clear from the admissions of the parties, and "there is no evidence whatever on record that the character of "the management has ever since changed or that the first defend-"ant's management had ever become hostile to her till her death. "First defendant himself admits that his management has always "been on behalf of Bibi Fatima and all other heirs of his father "and does not plead limitation in respect of the plaintiff's claim, "and the defendants Nos. 3, 8 and 9, who now raise the plea, do "not contend that they are in exclusive possession of any portion of "the ancestral estate. If their defence holds good, first defendant's "possession of that estate has been as hostile to them as to deceased "Bibi Fatima, because they were all living apart from that defend-"ant and not allowed any regular allowances out of the common "property, and, though Bibi Fatima and other female heirs were

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"permanently residing in their husband's houses since Sayyed "Mohidin's death, they are also shown to have often been living in "the family-house with the first defendant. Since the first defend- "ant's management of the family-estate admittedly commenced in "1866, in succession to his deceased brother, as manager or agent "for all the heirs of their father, Sayyed Mahomed Sahib, the "presumption of the continuation of such management on their "behalf must necessarily prevail till the contrary is shown, and, as "no hostile possession against Bibi Fatima's interests has been "proved for the last twelve years preceding the institution of this "suit, I would find the second issue for plaintiff."

Defendants Nos. 3, 8 and 9 preferred this appeal against the decree of the Subordinate Judge.

The further facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Bhashyam Ayyangar and *Narayana Rau* for appellants.

No effect could be given to exhibit A simply because it was signed by Fatima and registered. In the case of a document obtained from a pardah-nashin lady the burden lies on the person claiming under it to show that there was consideration. *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(1), *Ashgar Ali* v. *Delroos Banoo Begum*(2), *KalianBibi* v. *Safdar Husain Khan*(3), *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(4).

In any view of the evidence the suit is in part barred by limitation. For Sayyed Mahomed Sahib, the father of the plaintiff's vendor, died in 1856; Sayyed Mohidin, her brother, died in 1866, and her sister died in 1871; her claim was therefore barred at least in part under section 1, clause 13, of Act XIV of 1859, according to which limitation runs from the date of the death of the person whose property is claimed, or from the date of the last payment on account of the share; and there was no payment on account of the share. If the right is barred under that Act, then it could not revive under the later Act. Under Act XV of 1877, article 123, "for distributive share of the property of an intestate," the time runs from the date when "the share becomes deliverable."

[*Muttusami Ayyar, J.* :—Article 127 applies in the case of joint family property.]

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(1) L.R., 1 I.A., 192.
(2) I.L.R., 3 Cal., 324.
(3) I.L.R., 8 All., 265.
(4) 11 M.I.A., 551.

The presumption of Hindu law as to joint property is not applicable here although the family may have lived in commensality. *Hakim Khan* v. *Gool Khan*(1).

The *Acting Advocate-General* (Hon. Mr. *Spring Branson*) and *Ramachandra Rau Saheb* for respondents Nos. 1, 3 and 8.

Ambrose for respondent No. 2.

Sankaran Nayar for respondents Nos. 6 and 7.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the following

JUDGMENT:—This was a suit to recover from the defendants the distributive share of a Muhammadan lady named Bibi Fatima upon a sale-deed executed by her in the plaintiff's favor for Rs. 2,000 on 10th March 1879. The parties to this appeal belong to that class of Muhammadans on the West Coast who are descendants of Arab merchants that settled several centuries ago at Bhatkal in North Canara and who are designated by the people in that part of the country "Navayats" or new-comers. In course of time the settlers appear to have adopted Konkani, the language of the people, as the language of their homes together, as appears from the evidence in this case, with some of the incidents of the family system obtaining among them. The subject of the sale in suit consists of the shares to which the plaintiff's vendor was entitled under Muhammadan Law in the property of her father, Sayyed Mahomed Sahib, who died in 1856, of her elder brother, Sayyed Mohidin, who died in 1866, and of her sister, Bibi Sha, who died in 1871 or 1872. The plaintiff's case was that the property, part of which he purchased, was that of the family to which his vendor belonged, that, though its devolution and distribution were regulated by the rules of Muhammadan Law, the Hindu system of managing joint family property by a male coparcener was in vogue amongst Navayats, that according to that usage the property now in litigation was managed from 1856 to 1866 by Sayyed Mohidin, then by Sayyed Abdul *alias* Babu Sahib, and afterwards by the defendant No. 1, and that the several managing members were his vendor's brothers and that their management was avowedly on behalf of themselves and their co-heirs under Muhammadan Law. Sayyed Mahomed Sahib, the common ancestor, left three sons and four daughters and their names and those of their

(1) I.L.R., 8 Cal., 826.

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survivors and their connection with the defendants are mentioned in the pedigree set out in the original judgment. After the institution of this suit, the plaintiff entered into a compromise with defendants Nos. 4 to 7 and withdrew his claim in respect of properties specified by the Subordinate Judge in paragraph 8 of his judgment, and the claim therefore that remained to be adjudicated upon by the Court below was as between the plaintiff and defendants Nos. 3, 8 and 9, and in reference to properties at Bhatkal, items 17 to 35 in schedule A and Nos. 1 to 30 and 40 to 49 in schedule B attached to the plaint. The Subordinate Judge disallowed part of the claim and decreed the remainder. From his decision defendants Nos. 3, 8 and 9 appeal so far as it is against them, and the plaintiff objects to it under section 561 so far as it disallows his claim to a share in items of land 15 and 16 and his costs.

Upon the evidence in the case we see no reason to doubt that Bibi Fatima executed exhibit A with full knowledge of its contents. Three witnesses deposed to its execution and it was registered after the Sub-Registrar examined her in her house. She survived its execution for about three years and the appellants who lived at Bhatkal did not impugn it during her life. The terms on which she lived with the plaintiff and his children raise a presumption in favor of its voluntary execution. Though the appellants alleged fraud and undue influence, there is no evidence worth the name in support of their plea. It is true that several witnesses cited by the appellants stated that Bibi Fatima was imbecile, paralytic and of unsound mind, but their evidence, as observed by the Subordinate Judge, is vague and general, and the weight due to it appears to be small when regard is had to their means of knowledge and the probabilities of the case. Considerable stress is laid by the appellants' pleader upon Bibi Fatima's position as an aged gosha lady and he also dwells at great length on the law as to onus of proof as laid down in *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(1), *Ashgar Ali* v. *Delroos Banoo Begum*(2), *Kalian Bibi* v. *Safdar Husain Khan*(3), *Moonshee Buzloor Ruheem* v. *Shumsoonnisa Begum*(4). There is of course no doubt that it lies on the plaintiff to show that exhibit A was voluntarily

(1) L.R., 1 I.A., 192.
(2) I.L.R., 3 Cal., 324.
(3) I.L.R., 8 All., 265.
(4) 11 M.I.A., 551.

executed and that the transaction which it evidences was real and concluded *bonâ fide*. But there is no reason for the suggestion that the Subordinate Judge has cast the burden of proof on the wrong party. As to the question, whether the burden has been sufficiently discharged by the party on whom it rests, the answer to it must depend on the circumstances of each case. Having regard to the subsequent conduct of the appellants and of several other members of the family concerned in this litigation and to the nature of the evidence on both sides, we are of opinion that the Subordinate Judge rightly came to the conclusion that the plaintiff has sufficiently discharged himself of the burden resting upon him.

It is urged for the appellants that the transaction was not a real sale, but only a semblance of it designed to disguise what was really an invalid gift under Muhammadan Law. It is contended on the other hand by the learned Advocate-General that the transaction was in reality a sale and that the suggestion now made is an after-thought. There was no averment that a gift was disguised as a sale in the written statement nor at the time when issues were settled, though there was an assertion in a general way that the sale was fraudulent. Turning to the mode in which the appellants attempted to establish their case, this view appears to us to receive some corroboration. Their witnesses suggested that exhibit A was concocted in Fatima Bibi's name and advantage was taken of her unsound mind. Though they also deposed that the plaintiff was possessed of land which yielded but 23 muras of paddy and 500 cocoanuts, yet there was evidence that the plaintiff's son who took part in this transaction and the plaintiff's brother were men of means and in a position to lend comparatively large sums of money. We also observe that the plaintiff produced evidence to prove the payment of purchase money. His first witness stated that he saw the money paid and his second and third witnesses deposed that Fatima Bibi acknowledged receipt of the purchase money and their evidence is corroborated by a similar acknowledgment endorsed by the Sub-Registrar on exhibit A. Though there is no distinct evidence on the record as to whence plaintiff obtained the specific sum which he paid to Fatima Bibi or as to what Fatima Bibi did with it after it was paid to her, yet we are not prepared to press this circumstance against the plaintiff as we should be disposed to do if the specific form of fraud now

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suggested were suggested in the Court below and the attention of the parties was directed to it before they went into evidence. There is thus positive evidence as to payment of the purchase money; there is the fact that the plaintiff's son and brother were in a position to advance it; there is also the natural presumption that if as alleged it was then known that a gift would be invalid, the parties concerned would avoid a fraudulent contrivance rather than resort to it, and there is further the presumption arising from the appellants' conduct in not impeaching the transaction during the life-time of Bibi Fatima. Again, the appellants falsely imputed to her unsoundness of mind and alleged coercion and undue influence, and did not set up collusion between her and the plaintiff in the Court below. The Subordinate Judge who had the attesting witnesses before him believed them, and we are unable to say that their evidence is unworthy of credit. As regards the pleas of limitation and self-acquisition, the evidence against them which is sufficiently set out by the Subordinate Judge is documentary and appears to us to be conclusive. We have no hesitation in holding that they were properly disallowed. As to the plea to the jurisdiction of the Subordinate Court, it was raised for the first time in appeal. It is not denied that the Subordinate Judge had jurisdiction over the suit when it was filed. As originally framed, it embodied a claim to a share of immovable property situated partly in Mangalore and partly in Bhatkal. The subsequent withdrawal of the claim in regard to the property at Mangalore on the ground that there was a compromise entered into with the defendants who had it in their possession, could not in the absence of a positive rule of law, operate to take away the jurisdiction which had once vested, unless the compromise was shown to have been otherwise than *bonâ fide* and a mere contrivance to defeat or a fraud upon the policy of the rule of procedure as to local jurisdiction. For these reasons we consider that the appeal cannot be supported and we dismiss it with costs.