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one against Sheik Palk Jan. She is interested in the mortgaged premises, not only as heiress to her father, but also as heiress to her mother; his latter interest is bound, but not the former. I am further of opinion that, even if any one of the executants of the mortgage had been in the position of near guardian to the infants, there is no sufficient evidence to warrant me in coming to the conclusion that it was absolutely necessary to charge their shares of their father's property.

There will be the usual mortgage decree with the necessary declarations; costs on scale No. 2 against the defendants other than Palk Jan. Costs of the guardian *ad-litem* to Banni Jan Bibee to be paid by the defendants on scale No. 2, and the amount added to the mortgage debt.

Suit decreed.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

BUSSUNTERAM MARWARY (PLAINTIFF) APPELLANT *v.* KAMALUDDIN AHMED AND OTHERS (DEFENDANTS) RESPONDENTS.*

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Mahomedan Law—Succession—Liability of one of several heirs to pay ancestors' debt, when but for his own action debt would be barred by limitation—Justice, equity and good conscience, Application of principle of Act VI of 1871, *s.* 24.

A a Hindu and a creditor of *B*, a deceased Mahomedan, sued *C*, *D*, *E* and *F*, his heirs, to recover a sum of money alleged to be due on a *roka*, alleging that they were in possession of *B's* estate, and praying for a decree against the estate upon that footing. It was not disputed that the debt would have been barred by limitation, but for a part payment made by *C*, and endorsed by him on the back of the *roka*. *D*, *E* and *F* were no parties to such payment, and it was found not to have been made with their consent. The first Court, considering that collusion existed between *A* and *C*, and having regard to the fact that *C* did not dispute his liability, gave *A* a decree for the full amount of the debt against *C* without finding whether the *roka* was genuine or not, and *held* that the shares of *D*, *E* and *F* in *B's* estate were not liable for any portion of the debt. *A*

* Appeal from Appellate Decree No. 368 of 1884, against the decree of W. Verner, Esq., Judge of Bhaugulpore, dated the 18th of December 1883, modifying the decree of Hafez Abdul Karim, Khan Bahadoor, Subordinate Judge of that district, dated the 31st of May 1882.

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accepted this decision and did not appeal. *C* appealed on the ground that he could only, under the Mahomedan law, be held liable for a part of the debt in proportion to the amount of *B*'s estate which had come into his hands. The lower Appellate Court decided in *C*'s favor, and varied the decree by directing that *A* was only entitled to recover two-fifths of the debt from *C*, that being the amount of *C*'s share. *D*, *E* and *F* were not made parties to that appeal.

A then specially appealed to the High Court, making *D*, *E* and *F* parties.

Held, that under the circumstances of the case, and having regard to the rule of Mahomedan law, *A* was not entitled to a decree against *C* for more than two-fifths of the debt.

Held, further, that, applying the principles of justice, equity and good conscience to the case, inasmuch as *A* was a Hindu, it would not, under the circumstances of the case, be equitable to hold *C* liable for the whole of the debt.

THIS was a suit for the recovery of a sum of Rs. 1,758-12-8 due upon a *roka* said to have been executed by one Furzund Ali, the grandfather of the defendants, who had died since its execution. The plaintiff sued the defendants as heirs of Furzund Ali, alleging that they were in possession of the estate, and asked for a decree against the estate of Furzund Ali, their ancestor. It was not disputed that but for a payment said to have been made by Kamaluddin, and endorsed by him on the back of the *roka*, the debt would have been barred, and it was contended on behalf of the other defendants that no such payment was ever made, and that the plaintiff and Kamaluddin were acting in collusion to defraud them, and, even if the payment was made, they were not bound by it.

The finding of the lower Courts, together with the nature of the evidence adduced, is sufficiently stated in the judgment of the High Court.

Mr. *Amir Ali* and Moulvie *Serajul Islam* for the appellant.

Munshi *Mahomed Yusoof* and Mr. *M. L. Sandel* for the respondents.

Mr. *Amir Ali* for the appellant.—Under the Mahomedan law the debts of the deceased are a first charge on the estate, and the heirs are bound to pay them before they distribute the estate amongst themselves, and, as the suit was properly

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framed against the defendants as representing the estate of the deceased, the plaintiff was entitled to a decree in full to be satisfied out of the estate. The question, therefore, in this case is, whether Kamaluddin is not liable for the whole debt. By the evidence Kamaluddin was shown to have been in possession of the whole of the estate, and that he made all the collections and the disbursements; and, therefore, inasmuch as the suit is in the nature of an administration suit, the whole estate in Kamaluddin's hands is liable for the debts of the deceased. The principle that the heirs of the deceased are liable for their share of the debt of the estate in proportion to the share of the estate they have received is inapplicable to this case, as Kamaluddin was in possession of the whole estate, and in any event it was competent to him to make the payment at the time he did as manager of the estate, and the other defendants would be bound by his actions—*Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (1); *Muttyjan* v. *Ahmed Ally* (2); *Hamir Singh* v. *Musammat Zakia* (3); and *Macnaghten's* Mahomedan Law, p. 88.

Munshi *Mahomed Yusoof* for the defendant Kamaluddin.—The suit is not an administration suit, and the principle that a creditor is only entitled to recover from each heir his share of the debt in proportion to his share in the estate would certainly apply if the Mahomedan law is held to apply at all, seeing that one party is a Hindu. In any event the plaintiff had his remedy in his hands, and did not choose to avail himself of it, as he did not appeal against the decree of the first Court, which held that the shares of the estate in the hands of the other defendants were not liable, and that being so, it would now be inequitable to allow him to saddle Kamaluddin with the whole liability.—*Sudaburt Pershad Sahoo* v. *Lotf Ali Khan* (4); *Hedaya, Book XX, ch. IV*; *Grady*, p. 349.

Mr. *Amir Ali* in reply.

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This was a suit brought by the plaintiff, one Bussunteram Marwary, against Sheikh Kamaluddin, the grandson, and three

(1) I. L. R., 4 Calc., 142.
(2) I. L. R., 8 Calc., 370.
(3) I. L. R., 1 All., 57.
(4) 14 W. R., 339.

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ladies, being the granddaughters of, and heirs to the estate left by, one Furzund Ali. There was also another defendant in the suit, *viz.*, one Azeezunnissa; but we think we may discard her from our consideration, because, as disclosed in the judgment of the Court of first instance, her husband, Yusoof Ali, the son of the said Furzund Ali, pre-deceased his father, and therefore she (Azeezunnissa) could not rank as an heir.

The suit was instituted for recovery of a sum of Rs. 1,758-12-8 due upon a *roka* said to have been executed by the said Furzund Ali; and the plaint alleged that, "after his death, the defendants, his 'heirs,' were in possession of his estate," and asked that judgment might be given for the money "against the estate of Furzund Ali, ancestor of the defendants."

The defendant No. 1, Kamaluddin, raised no other defence than that the account given in the plaint was not correct, and that the plaintiff was not entitled to recover the whole amount claimed.

Among the female defendants Osikunnissa and Ohidunnissa defended the suit upon the ground that the *roka* in question was not true, and that it was barred by limitation; and that the suit itself was the result of collusion between the plaintiff and Kamaluddin.

It appears that the plaintiff relied upon an endorsement said to have been made by Kamaluddin on the back of the *roka*, showing that before the *roka* was barred by limitation, Kamaluddin had paid a certain sum of money as part payment of the principal; and he (the plaintiff) therefore contended that the suit was within time. Kamaluddin was examined about this matter, and he admitted the said endorsement and payment, and alleged in the course of his evidence that the collections from the entire estate were in his charge, and that he had not as yet paid his sisters anything from the collections.

The Court of first instance, while suspecting that there was collusion between the plaintiff and Kamaluddin, and that the alleged part payment of the principal was not true, held that there was no authority in Kamaluddin to pay any money on behalf of the other heirs, and that the claim as against them was barred by limitation, but that the suit should be decreed against Kamaluddin, because he did not oppose the claim, and because

he admitted having made the said payment, which had the effect of saving the claim from being barred. The Court then found that Rs. 1,729-12-9 was due to the plaintiff, and gave him a decree for the whole amount as against Kamaluddin, and declared that the decree should be realized from, and by the share of that person alone, and that the shares of the other heirs should be exempted.

Against this decree of the first Court the plaintiff preferred no appeal; but the appeal that was made was by the defendant Kamaluddin, complaining that the decree as passed against him was erroneous. The District Judge has held that the claim as against Kamaluddin is not barred by limitation, though it is barred against the other heirs, but that under the Mahomedan law no more than an amount proportionate and equal to his legal share, which was two-fifths, in the estate left by Furzund Ali, could be decreed against him. The Judge accordingly decreed the claim for a two-fifth share of the money due under the *roka*.

Dissatisfied with this judgment, the plaintiff has appealed to this Court; and in this appeal he has enlisted, not only Kamaluddin as a respondent, but also the other heirs, who were not parties in the lower Appellate Court. His counsel has urged the following points before us:—

First.—That under the Mahomedan law the debts of the deceased, being a prior charge, the heirs cannot take the estate before the said debts are paid; and therefore a decree should have been awarded for the amount due to the plaintiff against the whole estate of Furzund Ali.

Second.—That this being an administration suit, and Kamaluddin being shown to be in possession of the whole estate in his representative capacity, a decree should be awarded charging the whole of the assets in his hands.

Third.—That, at any rate, a decree should be passed for the whole amount as against the share of Kamaluddin.

There can be no doubt that, according to the Mahomedan law, next to the duty of meeting the funeral expenses of the deceased, it is incumbent upon the heirs to discharge his debts, and that the whole estate is answerable for the same. If in this case the

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claim under the *roka* was not barred by the law of limitation as against the other heirs, a decree might have been properly given charging the whole estate. But the Munsiff held, and there was no appeal against his decision by the plaintiff, that the claim was barred against those persons, and accordingly exempted their shares from liability. If the plaintiff was desirous of obtaining a decree against the whole estate, he should have appealed to the higher Court; and we hold that it is not now open to him to ask that the claim should be adjudged against the estate generally. We may also observe that, as a matter of fact, although the question was raised by the said defendants, no decision was come to by the first Court upon the question whether the *roka* itself was genuine. That Court simply proceeded upon the admission of Kamaluddin in decreeing the claim as against him. But before any decree could be awarded, binding the other heirs and the whole estate, the debt should have been proved and found to be true—[*See Hedaya, Bk. XXXIX, ch. I,* and *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (1).

Mr. *Amir Ali* however contends that Kamaluddin being shown to be in possession of the whole estate, he must be taken to be in such possession in his representative character, and therefore he should be called upon to account for the assets in his hands, and a decree passed accordingly against such assets. But it must be remembered that the suit of the plaintiff as laid in the plaint was not of that character. The plaintiff in his plaint distinctly alleged that all the heirs were in possession of the estate, and asked for a decree against the estate upon that footing. It was not even suggested that Kamaluddin was in possession in his representative capacity, and no prayer was made to call for an account from him. It is indeed true that Kamaluddin in the course of his evidence said that the entire collections of the property were in his charge; but, in the first place, this was no part of the plaintiff's case; and, in the second place, neither the first nor the second Court accepted that statement, and found that this was so, but on the contrary the Munsiff suspected that there was collusion between the plaintiff and Kamaluddin, and that

(1) I. L. R., 4 Calc., 142.

the payment of Rs. 200, said to have been made by Kamaluddin, if made at all, was not made on behalf of the other heirs.

In this state of things we are unable to treat the case as an administration suit brought against Kamaluddin, in his representative character, and to give the plaintiff relief as against the whole estate, three-fifths of which was, as a matter of fact, exempted from the plaintiff's claim by the decree of the first Court, and in which decree the plaintiff acquiesced.

The next question that arises is, whether, failing to obtain a decree against the whole estate, is the plaintiff entitled to charge the share of Kamaluddin alone for the entire amount of his claim. This question is not free from difficulty; but, on considering the matter in all its bearings, we are of opinion that he is not so entitled. Under the Mahomedan law *(vide Hedaya, Bk. XX, ch. IV)*, each of the heirs is bound to pay his own share of the debt; and it is only in the event of one of them being in possession of all the effects that the creditor is entitled to have recourse to him. And it also appears that if the estate be completely overwhelmed with debt, neither composition nor division among the heirs is lawful; but if the estate is not so completely involved such a composition or division prior to discharge of the debts is allowable—(*Hedaya, Bk. XXVI, ch. III*). Now, in the present case, it is not the plaintiff's case that Kamaluddin is in possession of the whole property; and, although there may not have been any division, properly so called, among the heirs, the plaint admits that they were in possession of the estate, and this must be taken to be a possession of their respective shares according to the Mahomedan law. The Allahabad High Court in two cases, in following the tenets of the Mahomedan law alluded to above, distributed the liability among the several heirs, and adjudged to the creditor a proportionate share of the debt—*Hamir Singh* v. *Mussammat Zakia* (1) and *Pirthipal Singh* v. *Husaini Jan* (2), and we agree with that Court in thinking that this was the proper course to adopt. In one of those cases—*Pirthipal Singh* v. *Husaini Jan* (2)—the facts were somewhat similar to those we have before us. It may be said that the Allahabad High Court proceeded upon the principle of the debt being small

(1) I. L. R., 1 All., 57. (2) I. L. R., 4 All., 361.

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in amount, and that the debt in the present case is not small, but of considerable amount. But it is not shown what is the extent and value of the estate left by Furzund Ali. 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.

We propose, in the next place, to deal with the question of Kamaluddin's liability according to the principles of justice, equity and good conscience; for that is the rule of law laid down, when both the parties to the suit (as it is here) are not Mahomedans, in s. 24, Act VI of 1871 (the Bengal Civil Court's Act), and it may be doubtful whether the questions involved in the present appeal are questions falling within the first paragraph of that section, under which the Mahomedan or Hindu law, as the case may be, is to be administered.

Now, it appears to us that the position of the parties is this: The judgment of the Court of first instance—a judgment which was not questioned on appeal by the plaintiff—declared, as we have already mentioned, that the claim of the plaintiff was barred by limitation as against the other heirs, save and except Kamaluddin; and that the shares of those heirs should be exempted from liability. This judgment is final, and the plaintiff is not now entitled to touch any of those shares. The only share now in the hands of Kamaluddin is, that which has devolved upon him according to the Mahomedan law, and which might be answerable for the plaintiff's demand. The debt due to the plaintiff is 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 of the 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 had not helped the plaintiff in keeping alive his claim by payment of a certain sum of money, he (the plaintiff) would not be in a position to get any decree at all. And we think that it would be unjust to hold that Kamaluddin by his acts and conduct (which the first Court suspected to be the result of collusion between the plaintiff and Kamaluddin) not only kept the claim alive, but made his share answerable for the whole demand. 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.

We therefore see no ground for disturbing the judgment of the Court below, and dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

NITYE GOPAL SIRCAR (OBJECTOR) *v.* NAGENDRA NATH MITTER MOZUMDAR (PETITIONER).

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Will, Attestation of—Witness—Signature—Mark—Indian Succession Act (X of 1865), s. 50.

The direction contained in s. 50, cl. 3, of the Indian Succession Act as to each of the witnesses signing the will is not satisfied by the witnesses affixing their marks, and it is necessary for the validity of a will that the signature, as distinguished from a mere mark of at least two witnesses, should appear on the will. *Fernandez* v. *Alves* (1) followed; *In the goods of Wynne* (2) dissented from.

If a testator on presenting his will for registration admits a signature on the will to be his before a Registrar, and is identified before him by a witness, and both the Registrar and the identifier sign their names on the will as witnesses to the admission of the testator, such attestation is sufficient

* Appeal from Original Decree No. 86 of 1884, against the decree of T. D. Beighton, Esq., Judge of Burdwan, dated the 20th of February 1884.

(1) I. L. R., 3 Bom., 382. (2) 13 B. L. R., 392.