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cogent reason, in this particular case it seems to them that the Commissioner has exercised a right discretion. Under these circumstances their Lordships do not give weight to the objection against the admission of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson and Beard.*
 Solicitors for the respondent: Messrs. *Van Sandan, Gumming and Armitage.*

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

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 March 13.

ABDOOL ADOOD AND OTHERS (DEFENDANTS) v. MAHOMED MAKMIL
 AND ANOTHER (PLAINTIFFS.)*

Onus of proof—Hindu customs amongst Mahomedans—No presumption when no allegation of custom made.

A and B were two brothers, Mahomedans, who lived together in commensality: A, whilst so living with his brother, purchased certain lands under a conveyance executed by the vendor and A. In a suit by the heirs of B against the heirs of A to obtain possession of such lands, in which they alleged they had been dispossessed by the heirs of A, the Court found the land to be joint family property and to have been purchased with joint funds. On appeal, the onus of proving that the land was purchased by A alone was put upon A, held that there being no allegation that the parties had adopted the Hindu law of property, the Judge, by applying to Mahomedans the presumption of Hindu law, had cast the onus on the wrong party.

The plaintiffs in this case sued to recover possession of certain lands from which they had been dispossessed by the defendants.

The plaintiffs alleged that the land in question had been bought by two uterine brothers (the father of the plaintiffs and the father of the defendants) who were Mahomedans, living in commensality with each other. That on the death of the plaintiffs father, their mother and uncle lived together and held joint

* Appeal from Appellate Decree No. 1319 of 1882, against the decree of Baboo Ram Coomar Pal, Roy Bahadur, Subordinate Judge of Sylhet, dated 16th of May 1882, affirming the decree of Baboo Romesh Chunder Bose, Roy Bahadur, Munsiff of that district, dated 21st November 1881.

possession of the land, and that on the death of their mother they took possession of the share to which they were entitled, but that the defendants had dispossessed them, and this suit was therefore brought by the plaintiffs for the purposes above mentioned. Both parties to the suit were Mahomedans.

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The defendants contended that their father had purchased the land when living separate from the plaintiffs' father, and that the conveyance had been signed by their father alone.

The Munsiff found that the land was purchased by the father of the defendants, alone, at a time when he and the plaintiffs' father were living in commensality, and that therefore it must be considered to be joint family property, and he gave the plaintiff a decree.

The defendants appealed to the Subordinate Judge, who found that the conveyance was executed in the name of the defendants' father, but as the two brothers lived in commensality, the defendants not having proved that the purchase was made by the defendants' father on his own account, the plaintiffs were entitled to a decree. He, therefore, upheld the decision of the Munsiff.

The defendants appealed to the High Court.

Moonsi *Serajal Islam* for the appellants contended that the Judge was wrong in holding that, from the mere fact of the family living together, the property was therefore joint; the presumption of Hindu law ought not to have been applied to the case of Mahomedans, and that by thus presuming, the onus of proof had been wrongly put upon the defendants.

No one appeared for the respondents.

The judgment of the Court was delivered by

McDONELL, J.—This appeal is concerned with plot No. 1 only. The parties are Mahomedans. The property in dispute was purchased by a conveyance executed in the name of the defendants' father. The plaintiffs, however, claim a share on the ground that, although the conveyance was in the name of the defendants' father, the family was at the time living in commensality, and the funds with which the purchase was made were joint funds.

The Munsiff dealt with the question on the ground that the purchase was made from joint funds, and that therefore the plaintiffs were entitled to a share.

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The case then came on appeal before the Subordinate Judge. He first held that the suit in respect of this plot was barred by s. 13 of the Code of Civil Procedure.

A review was then applied for and granted, and upon the review he changed his mind as to the applicability of s. 13 and then proceeded to deal with the merits. He says in his judgment: "True that the kobalas of purchase were executed in the name of the defendants' father, but as the two brothers lived together at that time, the defendants should have proved that the purchase in question was made by the defendants' father alone, but this they have not been able to do."

It is now contended before us that in this passage the Subordinate Judge has applied to Mahomedans a presumption peculiar to Hindu law, and that by so doing he has cast the burden of proof upon the wrong side, that is, upon the defendants instead of upon the plaintiffs.

We think that this contention is correct. The Munsiff, as I have already said, although observing that the Mahomedans by living a long time amongst Hindus, had adopted the manners and customs of Hindus, did nevertheless decide the question, not upon any presumption of Hindu law, but upon evidence that the property was purchased with joint funds. There was no allegation, that by custom the parties to this suit had adopted the Hindu law of property, and this being so, we think that the Subordinate Judge was bound to decide upon the allegations and the evidence whether the property was purchased from joint funds. The burden of proving that it was purchased with joint funds was, of course, upon the plaintiffs, but by applying the presumption of Hindu law in the first instance, the Subordinate Judge has cast the burden of proof upon the defendants, and in this we think he has committed an error. We must, so far as regards plot 1, set aside the decree of the Subordinate Judge, and remand the case for a proper decision. The costs will abide the result.

Decree reversed in part and case remanded