worshippers, with regard to some of the clauses in the scheme framed by the lower Court and concluded as follows:—]

Final scheme has been drawn up and passed to-day. Costs of all parties in Appeal No. 212 of 1930 will come out of the estate, Rs. 500 each to the four parties, Zamorin Raja, second defendant, Mallisseri Illom, first defendant, Hindu Religious Endowment Board, and plaintiffs. There will be no costs in Appeal No. 211 of 1930. No orders are necessary on the memoranda of objections. Second defendant (Zamorin Raja) will get the cost of printing out of the estate on presentation of vouchers accepted by the Deputy Registrar.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Krishnan Pandalai.

SOUDAGAR MUHAMMAD ABDUL RAHIM BAIG SAHEB (FIRST DEFENDANT), APPELLANT,

1930, November 28.

v.

SOUDAGAR MUHAMMAD ABDUL HAKIM BAIG SAHEB AND SIX OTHERS (PLAINTIFF, SECOND DEFENDANT AND LEGAL REPRESENTATIVES OF SECOND DEFENDANT), RESPONDENTS.*

Muhammadan Law—Co-heirs—Trade founded by a deceased Muhammadan continued as a family trade by his adult heirs —Whether contrary to Muhammadan Law—Relationship of the adult heirs to the other members of the family in such a business—If one of creditor and debtor, or one of co-ownership, or of trustee and cestui que trust.

The adult heirs of a deceased Muhammadan who founded a trade may carry on the same as a family trade for the benefit

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* Appeals Nos. 280 to 283 and 460 to 463 of 1924.

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of all the members of his family including minors and females. In such a case the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family, or all the legal consequences of a lawful partnership. It is a question of fact in each case whether the relationship between such adult heirs and the rest of the family is one of debtor and creditor, or one of co-ownership, or one of trustee and *cestui que trust*.

APPEALS against the decrees of the Court of Subordinate Judge of Bezwada, dated 30th June 1924, and passed in Original Suits Nos. 19, 68, 69 and 70 of 1921 respectively.

G. Lakshmanna and *P. Satyanarayana* for appellant.

B. Pocker with *Imam-ud-in* and *Rafi-ud-din* for first respondent.

R. Krishnaswami, Court-guardian for fourth to sixth respondents.

The JUDGMENT of the Court was delivered by

WALLACE J.

WALLACE J.—These eight appeals arise from four original suits which were disposed of by the lower Court in four judgments which are practically one judgment. The suit was filed in the following circumstances. A Muhammadan, Abdul Karim Baig, who was a cloth trader, died on 30th September 1912, leaving a widow, two major sons, two minor sons and three minor daughters. The widow, the minor sons and the youngest daughter are the plaintiffs in the four suits. The two major sons are the first and second defendants in the four suits. The plaintiffs' general assertion, apart from minor differences which will be dealt with later on, is, that, on the death of the father, defendants 1 and 2 continued his cloth trade as a family trade for the benefit of the family and made profits thereby, that although an attempt at partition was made in 1915 it did not alter the position of parties, that the

family trade was continued from 30th September 1912, the date of the father's death, till October 1918, when owing to disputes between first and second defendants it came to an end, that these defendants taking advantage of their position as eldest males in the family used, in that trade, the shares of the other members in their father's assets and thus became executors *de son tort* liable to account to the plaintiffs for the profits they have made by such use of the plaintiffs' moneys, and that the plaintiffs are therefore entitled to a decree for an account from 19th December 1918, and a division of the trade profits in proportion to their family shares. The various plaintiffs sue for various sums which they estimate to be due to them on such accounts.

The general defence was that the trade carried on by defendants 1 and 2 after their father's death was entirely for themselves, and, while they admit that in that trade they employed the shares of the other members of the family, these, they say, were treated as mere loans of capital for which interest has been allowed in the firm's books. The lower Court has awarded the plaintiffs the sums set out as due to each in the alleged partition of 1915, plus interest at 6 per cent from that date. All the four plaintiffs appeal. Their appeals are Nos. 460 to 463 of 1924. The first defendant has presented an appeal in each of the four suits. His appeals are Nos. 280 to 283 of 1924, objecting to some points in the lower Court's decree which will be dealt with later.

The main question for decision is what was the nature, both in fact and in law, of the business carried on by first and second defendants after the father's death, and what was the relation, in fact and in law, of the plaintiffs in that business. We have no doubt that, from the date of the father's death up to at least the

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date of the alleged family partition on 7th March 1915, the business was in fact carried on by defendants 1 and 2 as a family business. Prior to the father's death it was a "one man show", first and second defendants being mere helpers and not partners with their father, and the business was therefore one of the main assets left by the father to his family. After his death, his various heirs took in law their several shares under the Muhammadan Law. But, in fact, it appears that no attempt was then made to settle and distribute these shares. The trade was not wound up; the accounts, Exhibits V and XVII, were not closed; the trade accounts were continued on the same books as before; no change in the constitution of the firm is noted in the books; no list of partners after the father's death was drawn up; the same constituents were dealt with; all the old stock was taken over by, and the debts of the father's firm were collected as owing to, his successors. There is every indication in favour of, and none really contrary to, the view that between 1912 and 1915 the father's trade was continued by first and second defendants as a family business for the benefit of all the heirs of their father. It is only necessary to refer, in passing, to some of the more important documents throwing light on this matter. The original name of the firm was S. M. Abdul Karim Baig. To this, after the father's death, was added the words "and sons" and this is the sole feature in favour of the first defendant's contention on this point. But even here there is no indication that "and sons" was confined to the two adult sons. [His Lordship discussed the remaining oral and documentary evidence as to whether the business was carried on as a family trade for the benefit of the family and held as follows:—]

All this shows quite clearly that the business was regarded as a family business in which all the members

of the family were interested. The power of attorney is signed by all. Those regarded formally as members are all the males of the family and the designation "and sons" was therefore added. There is no break in the business after the father's death. Its credit and goodwill were taken over and used by the "and sons" Firm. The business is in fact continued just as if the father had not died. His assets, separately held in theory though they may be in law by the various heirs, continued as the assets of the business. It is quite clear that the first part of the plaintiffs' case that the business was in fact continued after the father's death as a family trade for the benefit of the family is fully justified.

The first defendant answers to this that, as in law there cannot be a Muhammadan joint family [see *Abdul Khader* v. *Chidambaram Chettiyar*(1)], therefore, there cannot be a family trade, and this is the argument which has found favour with the lower Court. It seems to us irrelevant. The point is not, whether this trade was one to which the law will impute all the incidents and legal implications of a Hindu joint family trade, but, whether in fact the business was carried on for the benefit of the whole family. There is nothing in law to prevent such a business being carried on by any one, of whatever race he may be. From what we have already said, we are satisfied that the trade was being continued as a family trade. The first defendant also regarded himself after his father's death as the guardian of the minors and acted as if he really were. This is plain from Exhibits A and X already noted [Referred to in portion of the judgment omitted.] No doubt he could not be guardian *de jure*, but that is again beside the point. It is plain that he was acting as guardian

(1) (1908) I.L.R. 32 Mad. 276.

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de facto. Thus he regarded himself as the representative of the minors in the trade and justified as such in using their moneys for it and protecting their interests. He looked upon himself as, to all intents and purposes, the eldest member of a Hindu joint family does, namely, as manager of a joint family business, and guardian of the minors, except that, as the family was Muhammadan, the family trade, in this case, was carried on by him on behalf of all the heirs of the deceased founder of the trade and thus on behalf of the females of the family also. It is not an uncommon thing in this Presidency, where members of the Muhammadan community live surrounded by Hindus, that they absorb and adopt Hindu social ideas and tend to look on their own social customs from a Hindu point of view. This tendency has been recognized in various rulings in this Court, in *Hussain Saib* v. *Hassain Saib*(1), for example, where it has been pointed out that it is common in this Presidency for descendants of Muhammadans to live and trade together, and the property is then held by the several members of the family in the shares to which they are entitled under Muhammadan Law. Clearly that is what has happened here. That the Courts will not apply Hindu Law to Muhammadans is obvious, but that is not the proper way to decide a case of this kind although it may be the way of least resistance. Such cases are not problems of law, nor does their decision depend on the ideas of law which the parties have put into their pleadings, but are concerned with questions of fact and have to be decided on the facts. The correct view, in our opinion, therefore, is that there is nothing contrary to law in Muhammadan adult members of a family carrying on such a family trade for the benefit of all the members of the family including the minors and the

(1) (1917) 5 L.W. 885.

females, and the Courts will therefore uphold it and such legal consequences as in law follow from it, although the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family or all the legal consequences of a lawful partnership.

What, then, are these legal consequences in this case? In the light of the facts which we have set out, it seems to us that the conclusion cannot be resisted that the first defendant by his conduct after his father's death put himself in a fiduciary relationship to the widow and the minor members of the family. He assumed the management of their father's business as if he was in law, what he conceived himself to be in fact, the manager of a family business for the benefit of all. He assumed the position of guardian of all the minors, male and female, and acted as such, a position obviously of fiduciary relationship; see *Sitha Boi* v. *Radha Boi*(1). He regarded the minor males as full members of the firm. He and the second defendant, in their self-imposed management of the family business, retained it intact as it had been at the father's death, did not wind it up or distribute to each sharer his quota, or allow it to be abstracted from the firm. They, by virtue of their position as the adult males, got possession of the shares of the widow and the minors and retained these in the firm. By this assumption of family management—it does not matter whether we call their position that of trustees *de son tort* or executors *de son tort*—the relationship in which the first defendant stood to the widow and the minors was essentially a fiduciary one. The present case is similar to *Vrandavan* v. *Parshottham*(2), in which a similar view was taken.

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(1) (1918) 36 M.L.J. 189. (2) A.I.R. 1927 Bom. 75.

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The first defendant argues, in addition to the argument with which we have already dealt, that what is not legally correct cannot be actually possible, one or two points: first, that the matter of guardianship was never raised in the plaints. That is true; the two leading points in the plaints were family trade and executor *de son tort*. But the guardianship matter is merely a plank in that platform, and the matter of fiduciary relationship does not rest on that alone or chiefly, but on the general assumption by defendants 1 and 2 of management of their father's trade for the benefit of all his heirs. The matter of guardianship was raised in the lower Court at the time of trial and is dealt with by the Subordinate Judge, but with the same erroneous notion that one who cannot be a guardian *de jure* cannot act as guardian *de facto* and carry on a business as such. The decision in *Abdul Khader* v. *Chidambaram Chettiyar* (1), relied on by the first defendant, is not really in point. The question there was, whether the act of a guardian *de facto* of a Muhammadan minor could in law bind the minor *adversely* to his interests. We think therefore there is no force in this contention by the first defendant.

The next point was that the first defendant cannot be, in law, styled an executor *de son tort* because he did not do any act which belongs to the office of executor. It seems to us to matter very little what sort of name we give him in law, or whether the plaintiffs were right in their plaints in describing him as an executor *de son tort*. The relationship in which he stood to the plaintiffs was, as we have held, clearly fiduciary.

Then first defendant argues that, as he was legally in the position of co-owners with his co-heirs, he must

(1) (1908) I.L.R. 32 Mad. 276.

be conceived to have been in possession of their shares as co-owner, and therefore not in a fiduciary capacity, as the relationship of co-owner is not in law a fiduciary one: see *Abdul Khader* v. *Chidambaram Chettiyar*(1) and *Abdul Samad Khan Khiladar* v. *Bibijan*(2). Here again it is a question not of law but of fact, and to our minds it is quite clear from the facts we have set out that the first defendant was assuming a position much more of trust than of a mere co-owner, and that he came into possession of the assets of the other members, not because of his co-ownership but because of the fiduciary relationship he adopted towards them, into which he entered on their behalf.

Apart from the general question of whether the first defendant is liable to account to the plaintiffs for the profits made by him on the ground that he made these profits in a fiduciary capacity, the first defendant urges that at least the profits got by foreign trade from 1912 to 1915, shown as Rs. 11,864-10-0 in Exhibit II, should not be included.

[His Lordship discussed the evidence in respect of this foreign trade and continued :—]

This attempt, to isolate a particular branch of the family trade and earmark it for defendants 1 and 2 alone, cannot therefore be upheld.

A dividing line, however, both in fact and in law, has to be drawn between the period 1912—1915, and the period 1915—1918. In March 1915, owing to one minor sister having come of age and having demanded her share, the firm's accounts were looked into and an attempt was made to ascertain the assets of the firm not on that date but on the date of the father's death, and to partition these assets among the various

(1) (1908) I.L.R. 32 Mad. 276. (2) (1925) 49 M.L.J. 675.

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heirs. It was really rather a hopeless task owing to the failure of defendants 1 and 2 to close the firm's accounts at the time of their father's death and the resultant figures are only approximate. This partition is evidenced by Exhibit II. As it stands, it allotted all the profits between 1912 and 1915 wholly to the first and second defendants on the footing that the trade after their father's death was not a family trade but their own exclusive trade. Another minor daughter came of age in 1918 and also was then given her share according to Exhibit II. These two daughters gave release deeds Exhibit VI dated 1st April 1916 and Exhibit VI (*a*) dated 1st July 1918. Exhibit II and the partition which it represents were forced on defendants 1 and 2 by the demand of one co-heir for her share and it was carried through by these defendants alone. The process by which they came to the result that the profits between 1912 and 1915 were their own private profits and were not divisible as assets among the family can be regarded as barely honest. They had on their case used for themselves exclusively the whole credit and goodwill of their father's firm which had been going on for about 30 years, a very definite asset which ought to have been valued and divided between the co-heirs. Further, having obtained control of the shares of the other members of the family by the simple process of constituting themselves trustees and guardians for them, they used these shares in the business to obtain the profits which they under Exhibit II proceeded to divide between themselves alone. We are satisfied that, after the death of the father, the first defendant along with the second defendant carried on the father's business as a person bound in a fiduciary capacity to protect the interests of the plaintiffs. Sections 23 (*f*) and 88 of

the Trusts Act will consequently apply. He was therefore bound to hold for the benefit of the plaintiffs any advantage he gained by availing himself of his fiduciary character and by utilizing the plaintiffs' shares in their father's assets for his own pecuniary advantage; and the measure of that advantage up till 7th March 1915 is the figure of profits both on his own trade and on the foreign goods as set out in Exhibit II. The plaintiffs are therefore each entitled to the profits between 1912 and 1915 arising to each of them proportionate to their share of the capital employed. The plaintiffs do not now challenge the figures in Exhibit II, although the figures are merely approximate, but only the method of division. The figures of profits therein given from 1912 to 1915 are Rs. 13,402-13-0 on the local trade and Rs. 11,864-10-0 on the foreign trade.

[His Lordship dealt with the further evidence in the case and held that, after the partition of 1915, the first and second defendants did not carry on the business as a family trade, and that thereafter the relationship between them and the other members of the family was not a fiduciary one and that the use by them of the share due to their mother in the trade could only be as capital lent for which they were liable to pay interest. His Lordship also gave directions as to the calculation of the figures and costs in the various appeals.]

G.R.