

such alienation not being binding on the reversioners. It would be different on the authorities if the female heir while in possession was dispossessed by a trespasser, or if such heir never got possession. In such a case the reversioner would be bound by the adverse possession obtained by the trespasser, if prolonged beyond the statutory limit, as also he would be bound by a decree adverse to the female heir affecting the property. But in the present case I am clearly of opinion that the suit is not barred by any rule, there being no adverse possession by a trespasser nor any adverse decree of Court affecting the property. I would therefore set aside the finding of the Subordinate Judge on the first issue and also his decree founded on that finding dismissing the suit, and, as his decree proceeds on a preliminary point, I would, under section 562 of the Code of Civil Procedure, remand the record to him for trial of the remaining issues.

Appeal decreed and cause remanded.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BAKHSI KISHEN PRASAD AND OTHERS (PLAINTIFFS), v. THAKUR DAS AND OTHERS (DEFENDANTS).*

Muhammadian law—Shias—Marriage between a Muhammadian woman and a Christian—Invalidity of such marriage.

A Muhammadian woman of the Shiah sect cannot contract a valid marriage according to Muhammadian rites with a Christian.

The suit out of which this appeal arose was one for redemption of a mortgage of a 9 biswa share in a certain village. The plaintiffs alleged that on the 8th of January 1865, Musammat Husaini Begam usufructuarily mortgaged to the defendants' ancestors Ganga Bishan and Mathura Das a 9 biswa share in mauza Rachora together with naglas Mohari, Sumerpur and Kachhia Nain, the mortgage being usufructuary for principal and interest; that after the death of Husaini Begam the entire mauza devolved upon her husband Mr. Linnæus Gardner, who, on the 21st December 1838, hypothecated the entire mauza to Bakhshi Nand Kishore and

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Burkitt, J.

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April 14.

* First Appeal No. 339 of 1895 from a decree of Babu Bepin Behari Mukerji, Additional Subordinate Judge of Aligarh, dated the 21st September 1895.

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Dwarka Das ; that on the 24th of June 1874 Nand Kishore and Musammat Champa, the widow of Dwarka Das obtained a decree against Linnæus Gardner, on the hypothecation bond for the sale of the entire mauza ; that in execution of this decree the mauza was sold and was purchased by Nand Kishore and Musammat Teja, mother and representative of the other mortgagee, who obtained possession ; that subsequently Musammat Teja transferred her half share to Kishore Lal, one of the plaintiffs, and Nand Kishore died and was succeeded by the remaining plaintiffs as his heirs ; that the mortgage in favour of the defendants had been fully satisfied by the usufruct, but that if anything remained due they were willing to pay the necessary amount.

The defendants resisted the suit upon various grounds, *inter alia* that Linnæus Gardner was not the legal heir of Husaini Begam. The ground of this contention was that Husaini Begam, being a Muhammadan of the Shia sect, could not, although she had gone through the ceremony of marriage with him according to the Muhammadan ritual lawfully become the wife of Linnæus Gardner, he being a Christian. On this point an issue was framed by the Court of first instance (additional Subordinate Judge of Aligarh) and was decided in the negative. The Court of first instance accordingly dismissed the suit. The plaintiffs appealed to the High Court.

Mr. *Amiruddin* and Babu *Ratan Chand*, for the appellants.
Babu *Jiwan Chandar Mukerji*, for the respondents.

BANERJI and AIKMAN, JJ.—This was a suit for redemption of a mortgage of a nine biswa share made by one Husaini Begam in 1865 in favour of the predecessors in title of the defendants. Husaini Begam was a Muhammadan lady of the Shiah persuasion, who had gone through the ceremony of marriage according to Muhammadan rites with Mr. Linnæus Gardner, who was a Christian. The plaintiffs derive their title under a mortgage made in favour of their ancestor in 1868 by the said Linnæus Gardner after the death of Husaini Begam. The plaintiffs obtained a decree upon that mortgage, and in execution thereof caused the

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mortgaged property, which included the nine biswas now claimed, to be sold at auction and purchased it themselves. It is by virtue of this purchase that they have advanced the present claim. The defendants were not joined as parties to the suit brought upon the mortgage of 1868. They resisted the present claim, on the ground, among others, that the plaintiffs had no title to redeem, inasmuch as their mortgagor Linnaeus Gardner was not the legal heir and representative of Husaini Begam, his alleged marriage with that lady being void under the Muhammadan Law. This plea has been sustained by the Court below, and the claim has been dismissed.

The first contention raised in this appeal has reference to the correctness of the finding of the lower Court against the validity of the marriage of Linnaeus Gardner with Husaini Begam. The Subordinate Judge has based his decision upon passages to be found on pages 30 and 40 of Baillie's Digest of Muhammadan Law, Imameea Code. It is there laid down that if the wife of a Kitabee should embrace the faith of Islám, that circumstance would cancel the marriage. The author infers from this that a Muhammadan cannot be legally married to anyone who is not of that faith. At page 40 it is stated that a Muhammadan woman cannot enter into a *moota* contract with any other than one of her own religion. Since a *moota* or temporary marriage cannot be entered into by a Muhammadan woman with any one other than a Muhammadan, it follows as a natural inference that a permanent marriage valid according to Muhammadan Law cannot be contracted under similar circumstances. No authority to the contrary has been shown to us on this point. We think that the decision of the Court below must be upheld. As the alleged marriage of Linnaeus Gardner with Husaini Begam was thus an invalid marriage, the property left by that lady could not be inherited by him, according to Muhammadan Law.

It is next contended that under a custom prevailing in the family to which Husaini Begam belonged, such a marriage was regarded as valid. The evidence as to this is in our opinion

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insufficient to establish the custom set up, and does not justify our acting upon it.

The defendants mortgagees were not bound to surrender the mortgaged property to anyone who could not establish a title to the equity of redemption as against them. As the person from whom the plaintiffs derived title had, according to the above finding, no right to the property mortgaged to the defendants, the plaintiffs acquired no higher title than that possessed by their mortgagor, and they had no right to claim redemption.

It was urged on behalf of the appellants that the defendants mortgagees were by their conduct precluded from denying the title of the plaintiffs. This contention was based on the fact that in 1872 the defendants brought two suits upon two simple mortgages executed by Husaini Begam in which they described Linnaeus Gardner as the heir and legal representative of Husaini Begam, and it is stated that by reason of the defendants so describing Linnaeus Gardner the plaintiffs were induced to purchase his interest in the property now in question. Had it been shown that it was in consequence of the description of Linnaeus Gardner above referred to that the plaintiffs purchased the property, the provisions of section 115 of the Indian Evidence Act might have applied, and the defendants might have been held estopped from denying the plaintiffs' title, but anything which took place in 1872 could not have induced the predecessors in title of the plaintiffs to take a mortgage of the property from Linnaeus Gardner in 1868, or the plaintiffs to purchase that property in execution of the decree obtained on that mortgage. In our opinion therefore the plea of estoppel cannot be sustained. We affirm the decree below and dismiss the appeal with costs.

There are objections under section 561 of the Code of Civil Procedure on behalf of the respondents, as to the disallowance of costs to the respondents by the Court below. Those objections are in our opinion untenable.

It appears that in *dakhil kharij* proceedings the defendants stated that until the plaintiffs brought a suit for redemption they

would not be entitled to obtain possession of the property. In those proceedings they did not deny the plaintiffs' title. Under these circumstances the Court below exercised a proper discretion in not allowing costs.

We dismiss the objections.

Appeal dismissed.

FULL BENCH.

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April 15.

*Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji,
Mr. Justice Burkitt and Mr Justice Aikman.*

BALMAKUND AND ANOTHER (PLAINTIFFS) v. MUSAMMAT SANGARI
AND ANOTHER (DEFENDANTS).*

Civil Procedure Code section 43—Act No. IV of 1882 (Transfer of Property Act) section 85—Cause of action—Rights inter se of two mortgagees of the same property from the same mortgagor.

Two persons each held a mortgage over the same property from the same mortgagor. The mortgages were both executed on the same day. The mortgagees each instituted a suit for sale on the same day and obtained decrees, in execution of which they had the mortgaged property put up for sale, and each purchased it at the sale under his decree respectively. Neither mortgagee made the other a party to the suit on his mortgage. The representative of one of the mortgagee decree-holders, Musammat Sangari, got possession of the mortgaged property and held it as against the other mortgagee decree-holder or his representatives. Thereupon the representatives of the other mortgagee brought their suit for possession of a moiety of the property, or in the alternative for redemption of the other mortgage.

Held that such suit was not barred either by the provisions of section 43 of the Code of Civil Procedure or by reason of those of section 85 of the Transfer of Property Act, 1882.

The facts of this case are fully stated in the judgment of Knox, J., as also in those of Banerji, J. and of Burkitt, J.

Pandit *Sunder Lal* and Maulvi *Ghulam Muhtaba*, for the appellants.

Babu *Durga Charan Banerji* and Babu *Satyra Chander Mukerji*, for the respondents.

* Second appeal No. 183 of 1894, from a decree of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 14th October 1893, confirming a decree of Maulvi Mazhar Hasau, Subordinate Judge of Aligarh, dated the 24th December 1892.