

deposited jointly with the mortgagee. As, then, we are of opinion in this case that there has been no valid deposit under section 83, it appears to us that the plaintiff is clearly entitled to the amount of his mortgage debt together with interest after the due date up to the date of payment, and we think that the justifiable omission on his part to take any notice of such a deposit as was made in this case clearly does not disentitle him to interest or to his costs of the suit. We therefore allow this appeal, set aside the decree of this Court and of the lower appellate Court, and modify the decree of the Court of first instance by allowing the plaintiff interest at the stipulated rate up to the date of payment and also his costs of suit. The plaintiff will be entitled to the costs of this appeal and also in all courts. We extend the time for payment up to the 15th of April 1904.

Appeal decreed.

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DEBENDRA
MOHAN RAY
v.
SONA
KUNWAR.

Before Mr. Justice Blair and Mr. Justice Banerji.

MASIT-UN-NISSA AND OTHERS (DEFENDANTS) v. PATHANI AND OTHERS
(PLAINTIFFS).*

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January 18.

*Muhammadian Law—Legitimacy—Presumption arising from relations
between the parents.*

Under the Muhammadan law the mere continuance of cohabitation under circumstances in which no obstacle to marriage exists is not alone sufficient to raise a presumption of marriage, but to raise such a presumption it is necessary that there should be not only a continued cohabitation but a continued cohabitation under circumstances from which it could reasonably be inferred that the cohabitation was a cohabitation as man and wife, and there must be a treatment tantamount to an acknowledgment of the fact of the marriage and the legitimacy of the children. *Khajah Hidayat Oollah v. Rai Jan Khanum* (1) and *Ashrafud Dowlah Ahmed Hossein Khan Bahadur v. Hyder Hossein Khan* (2) referred to.

THE suit out of which this appeal arose was brought by one Musammat Pathani and her four minor children to recover joint possession of a share in the property of a deceased Muhammadan, Wazir Muhammad Khan, who was alleged by the plaintiff Pathani to have been her husband, the father of her children, and for mesne profits of the property claimed.

* First Appeal No. 176 of 1901, from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 4th July 1901.

(1) (1844) 3 Moo., I. A., 295. (2) (1866) 11 Moo., I. A., 94.

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The defendants were Musammat Masit-un-nissa, admittedly a wife of the deceased Wazir Muhammad Khan, and her son and daughter. The defence set up raised two main contentions: (1) it was denied that Musammat Pathani was the wife or that her children were the legitimate children of Wazir Muhammad Khan, and (2) it was alleged that, even if the plaintiffs were respectively the wife and the legitimate children of Wazir Muhammad Khan, they could have no claim to certain immovable property which was alleged to have passed by gift from Wazir Muhammad to Masit-un-nissa and her daughter. The Court of first instance (Subordinate Judge of Saharanpur) found that Musammat Pathani was the wife, and her children the legitimate children, of Wazir Muhammad; and also found that the gift set up by Musammat Masit-un-nissa had not been proved. That Court accordingly decreed the plaintiff's claim in full. Against this decree the defendants appealed to the High Court.

The Hon'ble Mr. Conlan, Pandit Sundar Lal and Pandit Moti Lal Nehru, for the appellants.

Babu Jogindro Nath Chaudhri, Babu Satya Narain, Dr. Satish Chandra Banerji, and Babu Nemi Das, for the respondents.

BLAIR and BANERJI, JJ.—This suit was brought by one Musammat Pathani and her infant children for an award of joint possession and for mesne profits of shares in the property of a deceased Muhammadan, Wazir Muhammad Khan, alleged by the plaintiff Pathani to be her husband and father of her children. The defendants in the suit are a lady who is admittedly a wife of the deceased, her son, and her daughter. The statement of defence set up two contentions: (1) it is denied that Musammat Pathani was the wife of the deceased and that her children are legitimate children: (2) it is alleged that even if Pathani be the wife and her children the legitimate children of Wazir Muhammad, they can have no claim to certain immovable property alleged to have passed by gift from the deceased Wazir Muhammad to the first and third defendants. It is manifest that if the plaintiff's suit is defeated on the first point, the second would not arise. The Subordinate Judge of Saharanpur

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has found that Musammat Pathani was the wife and her offspring the legitimate children of Wazir Muhammad. He has also found that the alleged gift to Musammat Masit-un-nissa and her daughter is not made out. Both these findings are disputed in this appeal.

The first and most important question is whether upon the evidence before him the Subordinate Judge rightly found the fact of marriage alleged to have taken place between Musammat Pathani and the deceased prior to the birth of her children. The evidence with which she came into Court was, firstly, the direct evidence of four persons all of whom deposed to the performance of a marriage ceremony between her and the deceased Wazir Muhammad at a time prior to the birth of any of the children. That evidence the Subordinate Judge has found himself unable to believe. We have examined it with careful scrutiny, and see no reason to differ from the conclusion at which he has arrived. The remaining evidence upon which he has felt himself bound to decide upon the issue of marriage or no marriage is the proof, which appears to us indisputable, that the plaintiff Musammat Pathani cohabited for years with the deceased Wazir Muhammad, and that the other plaintiffs were children begotten by him upon her. Other evidence there is none of an unambiguous kind. It appears beyond doubt that the plaintiff Pathani lived with him in a thatched house at some distance from the house inhabited by his undoubted wife Musammat Masit-un-nissa. It seems impossible to draw any inference from the fact that Pathani should not have been admitted to live in the same house as Masit-un-nissa, as it is explained by the fact that Pathani belonged to a caste and social stratum lower than that of Masit-un-nissa. Besides that there are cases no doubt where a Muhammadan wife resents the intrusion of a second wife and would much dislike to live with her. Under these circumstances we draw no inference as to whether the cohabitation of Wazir Muhammad and Pathani was a cohabitation as husband and wife. Beyond this fact there is absolutely no evidence as to the treatment of Pathani and her children from which it may be possible to infer either that Pathani was his wife or merely his concubine. Upon this state

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of facts the Subordinate Judge felt himself constrained by the decision of the Privy Council in the case of *Khajah Hidayat Oollah v. Rai Jan Khamum* (1). Their Lordships of the Privy Council, after referring to a statement of Mr. Macnaghten in his well known book on Muhammadan Law, observe:—"The effect of that appears to be that where a child has been born to a father of a mother where there has been not a mere casual concubinage but a more permanent connection and where there is no insurmountable obstacle to such a marriage, then according to the Muhammadan Law the presumption is in favour of such marriage having taken place." *Prima facie* the Subordinate Judge was right in accepting the doctrine laid down by the Privy Council and in putting upon it the most obvious and natural meaning. Upon that ruling the Subordinate Judge decided in favour of Pathani's marriage and the legitimacy of her children. That case, however, has been the subject of consideration by the Privy Council in the case of *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (2). The material passage is to be found on page 115. Referring to the previous case their Lordships said:—"The cohabitation alluded to in that judgment was continual; it was proved to have preceded conception, and to have been between a man and woman cohabiting together as a man and wife and having that repute before the conception commenced, and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment sufficed to prove legitimacy." Upon that interpretation, by which we are bound, it would be necessary to prove not only a continual cohabitation but circumstances from which it could be reasonably inferred that the cohabitation was a cohabitation as man and wife. The difference between the two interpretations is this; whereas taken literally the judgment in the earlier case apparently decided that continual cohabitation plus birth after such cohabitation without any other evidence or circumstances afforded a *prima facie* presumption of marriage under the Muhammadan Law, the later ruling held that not

(1) (1844) 3 Moo. I. A., 295; s. c.,
6 W. R., P. C., 52.

(2) (1866) 11 Moo. I. A., 94.

merely cohabitation and birth after cohabitation would amount to such a presumption, but that the cohabitation must be a cohabitation as man and wife and there must be a treatment tantamount to acknowledgment of the fact of the marriage and the legitimacy of the children. Probably if the Subordinate Judge's attention had been called to the construction put by their Lordships of the Privy Council upon the dictum in relation to evidence as laid down in the earlier case he would have arrived at a different conclusion. In this case there is no evidence whatever of treatment tantamount to acknowledgment, and we find it impossible to distinguish the cohabitation from a cohabitation between a man and his concubine. Upon the later ruling of the Privy Council, which we are bound to follow, we are constrained to decide that there is no evidence in this case upon which we could properly find the fact of Pathani's marriage or her children's legitimacy. Upon this finding it is unnecessary to consider whether the evidence of the gift to Musammam Masit-un-nissa and her daughter is sufficient to establish the case set up by them. The result is that the appeal is decreed, the judgment and the decree of the Court below are set aside, and the suit of the plaintiffs is dismissed with costs in both Courts.

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Appeal decreed.

PRIVY COUNCIL.

GANESH BAKHSH (DEFENDANT) v. HARIHAR BAKHSH
 (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh,
 Lucknow.]

Interest—Interest on arrears of rent, liability for—Under-proprietor—Act No. XXII of 1886, (Oudh Rent Act), section 141—Act No. IX of 1872 (Indian Contract Act), section 73—Suit for breach of Contract—Damages—Act No. XXXII of 1839 (Indian Interest Act)—Time at which rent is payable—Statute 3 and 4 Will. IV, C. 42.

Although an under-proprietor is not liable for interest on arrears of rent under section 141 of the Oudh Rent Act as not being a tenant within the meaning of that section—*Muhammad Mehndi Ali Khan v. Muhammad Yasin Khan (1)*—yet there is nothing in the Act or in that decision which excludes

Present:—Lord DAVEY, Lord ROBERTSON, and Sir ARTHUR WILSON.

(1) (1898) L. R., 26 I. A., 41; I. L. R., 26 Calc., 523.

 P. C.
 1904
 February 12,
 March 23.
