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fakirs interested in his own particular *gaddi*, but also the *fakirs* of the neighbouring *gaddis* of the same sect. In our opinion we ought to accept the finding of the court of first instance on this question.

It is next said that the *mahants* who purported to depose Puran Atal from the *gaddi* had no power to do so. The learned District Judge was satisfied that there was a usage which entitled the *mahants* to depose a *gaddi-nashin* for misconduct, and that they were entitled in the same way to elect a successor. So far as the election of a successor is concerned, it would appear that Puran Atal owes his seat on the *gaddi* to selection carried out in the very same manner in which the plaintiff, Darshan Das, was selected in the present case, the only difference being that in the case of Puran Atal his immediate predecessor disappeared, it is supposed, in consequence of his being murdered.

Some slight effort has been made to show that Darshan Das is not a fit and proper person to be a *mahant*. This was no part of the defendant's original case. Darshan Das has been selected by the body of *fakirs* as a fit and proper person, and we agree with the learned District Judge that it is well, so far as possible, to accept the selection of the sect as to the person who ought to occupy the *gaddi*.

In our opinion the appeal altogether fails. We accordingly dismiss it with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

RASHID-UN-NISSA (DEFENDANT) v. MUHAMMAD ISMAIL KHAN AND ANOTHER (PLAINTIFFS),*

Mortgage—Decree on mortgage - Decree set aside as against one mortgagor—Second suit to recover proportionate share of the debt maintainable.

A mortgagor died leaving him surviving a brother, two daughters and an illegitimate son. The four sons of the brother took an assignment of the mortgage from the mortgagee, and subsequently brought a suit for sale of the mortgaged property against the children of the mortgagor, and, inasmuch as they were themselves owners of part of the mortgaged property, framed their suit as one

* First Appeal No. 330 of 1910 from a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 16th of June, 1910.

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for the recovery of specific shares of the mortgage money from the portions of the property in the possession of each of the defendants. They obtained in this suit an *ex parte* decree, which, however, was set aside as against one of the daughters upon the ground that she was a minor and not properly represented therein.

Held that the plaintiffs were not precluded from maintaining a fresh suit against this defendant for the recovery of a share in the mortgage debt proportionate to her share in the property.

The facts of this case were as follows :—

One Sardar Khan mortgaged three biswas out of his ten biswas in the village Gessupur to one Achal Das on the 31st of January, 1882. He died sometime in May, 1888, leaving two daughters, Rashid-un-nissa and Ulfat-un-nissa, a brother, Mauladad Khan, and an illegitimate son called Abdul Majid. Before his death Sardar Khan executed a deed of gift in favour of his son on the 27th of March, 1888, of one biswa in the village. After his death there was an arbitration among his heirs, and in the distribution of the property Rashid-un-nissa, who was a minor at the time and was represented by her sister, got 2½ biswas instead of 3 biswas, her share under the Muhammadan law, and her sister received an equal share. Mauladad Khan also got one biswa and odd, and Abdul Majid, who was no heir under the Muhammadan law, got 2 biswas and 12 biswansis. The award was dated the 12th of June, 1889. On the 8th of April, 1889, the bond of January, 1882, was assigned by Achal Das to Ismail Khan, Taj Muhammad Khan, Niaz Muhammad Khan and Dost Muhammad Khan, the four sons of Mauladad Khan. Niaz Muhammad was married to Rashid-un-nissa. The assignees brought a suit on the bond on the 4th of January, 1894, against the two daughters of Sardar Khan and against Abdul Majid, and got a decree on the 28th of August 1894. The decree was satisfied in part by Ulfat-un-nissa and Abdul Majid, who transferred their shares under the award to the four assignees by sale deeds bearing date August 1897. So far as Rashid-un-nissa's share of liability was concerned, the other 3 sons of Mauladad Khan sold their interests in the decree to Niaz Muhammad Khan, the husband of Rashid-un-nissa, and in consideration got a bond from him, dated the 19th of August, 1897. Rashid-un-nissa then brought a suit to set aside the award and the decree on the ground that she had not been properly represented in those proceedings, and her suit was finally decreed by the Privy Council in July, 1909, *cf. Rashid-un-nissa v. Muhammad Ismail Khan* (1),

(1) (1909) I. L. R. 31 All. 572.

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and she was given her full share, *i.e.* 3 biswas, in the property of her father, the award and the decree being declared not binding on her. In the meantime a suit was brought against Niaz Muhammad Khan on his bond of the 17th of August, 1897, but it was dismissed on the 29th of November, 1909, after the judgement of the Privy Council in Rashid-un-nissa's case on the ground that there was no consideration for the bond.

The present suit was brought by two of the brothers of Niaz Muhammad Khan against Rashid-un-nissa for the proportion of mortgage money due on bond of 1882, chargeable against her share of the property. The claim was minus the share of Niaz Muhammad Khan in the amount due. Out of the 3 biswas originally mortgaged, her share was 16 biswansis and odd. Abdul Majid was also made party to the extent of ten biswansis.

The Hon'ble Nawab *Muhammad Abdul Majid*, for the appellant:—

The decree of 1894 was still subsisting. It was against the two sisters and Abdul Majid and was a joint decree. It was against the entire property mortgaged and could have been recovered from any one of them. The Privy Council did not set aside the decree but only declared that it was not binding on Rashid-un-nissa. The decretal money could be realized from the other two, and then they could come for contribution against Rashid-un-nissa. They have got a decree for Rs. 4,000: they cannot get another decree. That the Privy Council did not set aside the entire decree is manifest from the report in I. L. R., 31 All., 572.

Maulvi *Muhammad Rahmatullah* for Maulvi *Ghulam Mujtaba* (with the Hon'ble Pandit *Moti Lal Nehru*), for the respondent, was not called upon to reply.

RICHARDS, C. J., and BANERJI and CHAMIER J J.:—The suit out of which this appeal has arisen, was brought to enforce a mortgage of the 31st of January, 1882, executed by one Sardar Khan, in favour of one Achhal Das, under the following circumstances. The property comprised in the mortgage was 3 biswas out of 10 biswas. Sardar Khan died in 1888, leaving him surviving two daughters, a brother and an illegitimate son. The appellant, Rashid-un-nissa, is one of these daughters. The mortgage of the 31st of January, 1882, was assigned by Achhal Das, the mortgagee, to the plaintiff.

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iffs and their brothers, who were the sons of Mauladad Khan, the brother of Sardar Khan. The plaintiffs, in 1894, along with their brothers, brought a suit upon their mortgage, against the two daughters of Sardar Khan and against Abdul Majid, his illegitimate son, and they obtained a decree on the 28th of August, 1894. In 1897, Rashid-un-nissa brought a suit to have this decree set aside. We may mention that before the suit of 1894 was brought, an arbitration award had been made under which certain shares were allotted to the daughters, the brother and the illegitimate son of Sardar Khan. The object of Rashid-un-nissa's suit was to have the decree and the award set aside in so far as they affected her interests. She obtained a decree from the Privy Council in 1909, and under that decree she was restored to possession of three biswas out of the 10 biswas owned by Sardar Khan. After the passing of the Privy Council decree to which we have referred, the plaintiffs, who are two of the assignees of the bond of 31st of January, 1882, brought the suit out of which this appeal has arisen, and they seek to recover from Rashid-un-nissa's share of the mortgaged property her proportionate share of the mortgage debt. The court below has decreed their claim.

It is contended here that as the plaintiffs had already obtained a decree on the mortgage of 1882, they could not maintain a second suit on the basis of the same mortgage, and the foundation for the contention is that the decree obtained in 1894 was a joint decree against the whole of the mortgaged property, and could be enforced against any part of that property, and is, therefore, capable of enforcement as against the property of the heirs of Sardar Khan other than Rashid-un-nissa, present appellant, for the full amount alleged to be due for her share of the mortgage debt.

On referring to the decree we find that the prayer in the suit in which it was passed was that for the amount claimed, the mortgaged property should be ordered to be sold according to the specification given in the plaint, and in the specification given at the foot of the plaint, the share of each heir is separately specified. In the decree also the share of each heir is separately specified, as also the amount of demand against each of those shares. This was a natural claim in view of the fact that the integrity of the mortgage had been broken up by reason of the plaintiffs having

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acquired the share of their father Mauladad Khan, which was also liable for the mortgage debt. It further appears that the plaintiffs had purchased at auction another part of the mortgaged property. So that it is manifest that the mortgage did not subsist as one indivisible mortgage, but each of the persons liable was only liable to the extent of his or her proportionate share of the debt. It was for this reason that the plaintiffs in the suit of 1894, claimed from each heir a proportionate part only of the mortgage debt and sought to bring to sale the share of that heir only for the realization of that part. This was the claim which was decreed, and therefore we must hold that the decree was in effect a separate decree against each of the heirs for the proportionate liability of that heir. That being so, Rashid-un-nissa's share was, according to that decree, liable for her proportionate share of the mortgage debt. By the decree of the Privy Council obtained by her that decree having been set aside, the plaintiffs are entitled to recover from her the portion of the mortgage debt for which she is liable.

It is next urged that the court below ought to have given credit to the appellant for any amount which Abdul Majid may have paid in excess of his quota of liability. This contention is, in our opinion, untenable, and the view taken by the court below in regard to it, is correct.

We, accordingly, dismiss the appeal with costs. We extend the time for payment of the mortgage money for a period of six months from this date.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji,

LALI JAN (DEFENDANT) v. MUHAMMAD SHAFI KHAN (PLAINTIFF).*

Muhammadian law—Hanafi law—Gift—Construction of document—Condition in derogation of the grant invalid.

A deed of gift of certain property provided as follows:—

'My son Naki Khan, will remain owner (*malik*) of the remaining two-thirds and of the said two-thirds Naki Khan will remain full and absolute owner of one-third (*malik kamal o katai*), and he shall have the powers of an owner with respect to it, and Naki Khan will be owner (*malik*) of the other third also, and his name will be entered in the khewat, but the income of it is given for the

* Appeal No. 144 of 1911 under section 10 of the Letters Patent,

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April 26th.