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time has rendered it unnecessary to go into that question, since the date fixed by the learned District Magistrate for payment of the last kist of 1334 has already passed. I am not satisfied that after the end of 1334 it would be difficult to manage the estate otherwise than through these thikedars; and I do not think that the order for resettlement for 1335 and subsequent years has been justified by proof of necessity. I therefore concur in the decision of my learned brother. After the end of 1334 no resettlement should be made with any of these thikedars or with anybody who may be a near relation or a benamdiar of any of them.

Order set aside

Case remanded.

APPELLATE CIVIL.

Before Kulwant Sahay and Ross, JJ.

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Muhammadan law—marriage with an idolatress or fire-worshipper, whether void or invalid—offspring, whether legitimate—acknowledgment when marriage uncertain, effect of.

Under the Muhammadan law a Muhammadan male may contract a valid marriage with a Muhammadan or Kitabia, i.e., a Christian or Jewess but not with an idolatress or fire-worshipper. If, however, he does marry an idolatress or a fire-worshipper, the marriage is not void (*batil*) but merely invalid (*fasid*) and the offspring of such marriage will be legitimate issue of their father.

When the marriage is uncertain, but it has not been disproved, an acknowledgment by the father has the effect of proving the legitimacy of the offspring.

*Appeal from Original Decree no. 45 of 1924, from a decision of Pandit Ram Chandra Chaudhari, Additional Subordinate Judge of Monghyr, dated the 27th August, 1923.

Mirza Sadik Husain Khan v. Nawab Saiyid Hashim Ali Khan(1), *Habibur Rahman Chaudhuri v. Altaf Ali Chaudhuri*(2) and *Syed Habibur Rahman Chaudhuri v. Syed Altaf Ali Chaudhuri* (3) followed.

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Appeal by the plaintiffs.

This appeal arose out of a suit instituted by the plaintiffs-appellants for recovery of possession of 1 anna, 6 gandas, 3 kauris odd share in Mahal Mohiuddinpur Katarmala and Sisauni, tauzi no. 654 of the Monghyr Collectorate.

The plaintiffs' case was that Haji Mohammad Amir Hasan Khan had two wives. By his first wife, Mussammat Bibi Kadirunnisa, he had a daughter Bibi Fazilatunnisa and two sons Hadi Hasan Khan and Mehdi Hasan Khan. Hadi Hasan Khan and Mehdi Hasan Khan died in the lifetime of their father, and the defendants 2—14, who were described as the defendants 2nd and 3rd parties, were the heirs of these two predeceased sons. The second wife of Amir Hasan Khan, according to the plaintiffs, was Bibi Kamrunnisa. The plaintiffs nos. 1 and 2 claimed to be the sons and the plaintiff no. 3 claimed to be the daughter of Amir Hasan Khan by this second wife. It was alleged that there were two other daughters, Saidunnisa and Kaniz Batul by the second wife, both of whom had died, and the defendant no. 16 was the daughter of Saidunnisa. She did not join in the suit and she was therefore made the defendant 5th party in the present suit.

The plaintiffs alleged that Amir Hasan Khan died on the 5th of October, 1896, leaving Fazilatunnisa, his daughter by the first wife, Bibi Kamrunnisa, his second wife, and the plaintiffs and their two deceased sisters, the children of the second wife, as his heirs according to the Muhammadan Law. The two sons by the first wife, Hadi Hasan Khan and Mehdi Hasan

(1) (1916-17) 21 Cal. W. N. 120.

(2) (1918-19) 23 Cal. W. N. 1.

(3) (1921-22) 26 Cal. W. N. 81.

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Khan having died in the lifetime of their father, their children were excluded from inheritance according to the Muhammadan Law. Amongst the properties left by Amir Hasan Khan was an 8 annas share in village Katarmala, the village now in dispute. According to the plaintiffs the share of Fazilatunnisa was $7/64$ ths and that of the second wife Kamrunnisa and her children amounted to $57/64$ ths in the properties left by Amir Hasan Khan. On the death of Amir Hasan Khan, various litigations took place between the daughter and the heirs of the two sons by the first wife and the second wife and her children, and it was asserted by Fazilatunnisa, the daughter by the first wife that Kamrunnisa was not the wife of Amir Hasan Khan and that her children were not the legitimate children of her father. It would be necessary to consider in detail the various litigations that took place between the parties.

In 1908 a suit was instituted by the present plaintiffs and their mother for a declaration of their title to their legal share in the village now in dispute. This suit was dismissed by the Subordinate Judge, and during the pendency of an appeal in the High Court a compromise was effected on the 5th of March, 1917, and a compromise decree was made under which the plaintiffs get 1 anna, 7 gandas, 3 kauris odd share from Zafar Hasan Khan, one of the sons of Mehdi Hasan Khan who is the defendant no. 2 in the present suit. Defendant no. 1 had, however, purchased the share of Zafar Hasan Khan in execution of certain decrees partly prior and partly subsequent to the suit in which the compromise was made. The plaintiffs allege that they got actual delivery of possession of the share they got under the compromise, but that they were dispossessed by the defendant no. 1 in September 1920. As the defendant no. 16 who is the daughter of one of the deceased sisters of the plaintiffs did not join in the suit, the present suit was instituted for recovery of possession of 1 anna, 6 gandas, 3 kauris odd share after excluding the share of the defendant

no. 16. The suit was contested by the defendant no. 1 the purchaser of the interest of Zafar Hasan Khan and by the defendant no. 15 who was a mortgagee from the defendant no. 1. The defendants nos. 17 and 18 who were the defendants sixth party in the suit were purchasers of the disputed property in execution of a mortgage decree against Zafar Hasan Khan and they did not contest the suit.

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The principal contention of the contesting defendants was that the plaintiffs were not the legitimate children of Amir Hasan Khan and were not his legal heirs; that the defendant no. 1 being the purchaser of the disputed share in execution of his decree against Zafar Hasan Khan, prior to the compromise decree of the 5th of March, 1917, was not bound by the said decree, and that the said compromise was fraudulent.

The Subordinate Judge has held that the plaintiffs were not the legal heirs and legitimate issues of Haji Muhammad Amir Hasan Khan, and that they had no title to the property in dispute and he had accordingly dismissed the suit.

Khurshaid Hasnain, Sultanuddin Husain and Syed Ali Khan, for the appellants.

C. C. Das (with him *Murari Prasad, Janak Kishore, G. N. Mukerji and Sambhu Saran*), for the respondents.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): The principal point argued in this appeal relates to the question raised by the seventh issue framed by the learned Subordinate Judge, viz., whether the plaintiffs are legal heirs and legitimate issues of the late Nawab Amir Hasan Khan. Soon after the death of Amir Hasan Khan disputes arose between the parties as regards the inheritance. Amir Hasan Khan died in October 1896, and in 1897 an application was made by Kamrunnisa and her children for registration of their names under the Land Registration Act in respect of their 57/64ths share in the 8 annas of majza

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Katarmala owned by Amir Hasan Khan. Objections were made by Fazilatunnisa and by the heirs of Hadi Hasan and Mehdi Hasan. A reference was made to the Civil Court under the provisions of the Land Registration Act, and the learned Subordinate Judge who heard the reference held by his decision, dated the 5th of December, 1898, (Ex. A) that the petitioners had no right to the possession of the property and were not entitled to have their names registered in the Collectorate. This decision was based on the finding that Kamrunnisa was not the wife and her children were not the legitimate issues of Amir Hasan Khan. The result was that the application of Kamrunnisa and her children for registration of their names was dismissed, and Fazilatunnisa, the daughter by the first wife was registered in respect of 4 annas, the heirs of Mehdi Hasan in respect of 1 anna 9 gandas and odd, and the heirs of Hadi Hasan in respect of 2 annas, 10 gandas odd in respect of the village in dispute.

We next find that in 1899 a suit was instituted by Fazilatunnisa in the Court of the Subordinate Judge at Muzaffarpur against Kamrunnisa and her children who were the defendants 1st party for a declaration that she was the only heir of her father Amir Hasan Khan. The heirs of her predeceased brothers Hadi Hasan and Mehdi Hasan were made the defendants 2nd party in this suit. The learned Subordinate Judge by his decision, dated the 20th of September, 1901, held that the present plaintiffs were the legitimate issues and their mother was the lawful wife of Amir Hasan Khan. This judgment of the Subordinate Judge was confirmed in appeal by three Judges of the Calcutta High Court on the 18th August, 1904. The judgment is Exhibit 2 in this case and is reported in IX C. W. N. 352.

In 1908 the present plaintiffs and their mother instituted a suit no. 416 of that year in the Court of the Subordinate Judge at Muzaffarpur challenging

the decision of the Subordinate Judge of Monghyr in the reference under the Land Registration Act. This related to the 8 annas share in mauza Katarmala which lay in the district of Monghyr and to two houses situated in the district of Muzaffarpur. The learned Subordinate Judge held that the plaintiffs had no cause of action in respect of the two houses as they had passed out of the hands of Amir Hasan Khan in his lifetime, and as regards the claim to the share in mauza Katarmala he held that the property was situated in the district of Monghyr and that he had therefore no jurisdiction to entertain the suit and he dismissed it on that ground on the 4th of November, 1910. Against the decision of the Subordinate Judge an appeal was taken to the High Court in which the compromise was effected on the 5th of March, 1917, as stated above.

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We thus find that the question as regards Kamrunnisa being the wife and the plaintiffs being the legitimate issues of Amir Hasan Khan was differently decided at different times. In the present case the oral evidence adduced on either side is inconclusive. Muhammad Hyder Khan is the only witness examined on the side of the defendants to prove that Kamrunnisa was not the lawfully married wife of Amir Hasan Khan and that her children were not the legitimate issues of their father; but his cross-examination makes it clear that he is not a witness upon whose testimony it can be definitely said that the plaintiffs are not the legitimate issues of Amir Hasan Khan. As regards the documentary evidence reliance is placed on the side of the defendants, on three documents, viz., a will (Exhibit V), dated the 10th of November, 1884 and two mukarrari deeds (Exhibits T and U), dated the 6th of December, 1884, and 1st of July, 1890. The first document, although it is called a will, is really a gift by Amir Hasan Khan of considerable properties to his daughter Fazilatunnisa and to the children of his two deceased sons Hadi Hasan Khan and Mehdi Hasan Khan. The argument is that in the

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genealogy contained in this document no mention is made of the second wife or of the children by the second wife, nor is there anything in the body of the deed to show that Amir Hasan Khan had another wife and children by that wife. This document was executed by Amir Hasan Khan in order to provide for the children of his two predeceased sons who on account of the death of their father were excluded from inheritance and the absence of any mention of the plaintiffs and their mother does not necessarily lead to the conclusion that he had no second wife and children by that wife. In the mukarrari puttās (Exhibits T and U) there is no doubt that the mother of the plaintiffs is described as Mussammāt Kuaur, daughter of Lalji, resident of Dulighat, one of the quarters of Patna City, and the mukarrari was granted to her in consideration of faithful services rendered by her to Amir Hasan Khan and to his wife and this is no doubt a strong evidence in favour of the defendants. The explanation, however, given by the plaintiffs is that Amir Hasan Khan felt a certain amount of delicacy in openly declaring Kamrunnisa to be his wife and her children to be his legitimate issues, and in 1892 when Amir Hasan was going on pilgrimage to Mecca he acknowledged Kamrunnisa to be his lawful wife and her children to be his legitimate issues. This acknowledgment is contained in an am-mukhtar-nama, dated the 25th of November, 1892 (Exhibit 15). In this mukhtar-nama the plaintiffs nos. 1 and 2 are described as his sons and Bibi Kamrunnisa is described as his second wife. Again, in a kabala, dated the 4th of April, 1893, (Exhibit 14) executed by Amir Hasan Khan the plaintiffs nos. 1 and 2 are described as his minor sons; and in his will, dated the 21st April, 1893 (Exhibit 13), there is a clear acknowledgment that Kamrunnisa was his second wife and the present plaintiffs and their two deceased sisters were his sons and daughters and they were all his legal heirs. We thus find that in the will (Exhibit V) and in the two mukarrari puttās (Exhibits T and U) there is an omission to describe Kamrunnisa as his wife and

she is described as the daughter of Lalji, while in the am-mukhtarnama (Exhibit 15) in the kabala (Exhibit 14) and in the will (Exhibit 13) there is a clear admission that she was his second wife and that her issues were his legitimate issues. It is no doubt the case of the plaintiffs that Kamrunnisa was born of Muhammadan parents and was married in the regular legal form, while the case of the defendants is that she was a Hindu, born of Lalji Kahar and married to one Ruplal Kahar, and that she was working as a maid-servant in the household of Amir Hasan Khan and that Amir Hasan Khan had illicit intercourse with her. The recitals in the two mukarrari puttās lend some support to the defendants' allegation that the plaintiffs' mother was a Hindu and was the daughter of Lalji; but the evidence that she was married to Ruplal is entirely insufficient. Under the Muhammadan Law a Muhammadan male may contract a valid marriage with a Muhammadan woman or with a kitabia, i.e., a Christian or a Jewes but not with an idolatress or fire-worshipper, but if he does marry an idolatress or a fire-worshipper the marriage is not void (*batil*) but merely invalid (*fasid*) [see Mulla's Principles of Muhammadan Law, Section 200; Sir Rowland Wilson's Digest of Muhammadan Law, Section 39-A; and Amir Ali's Muhammadan Law, Volume II, page 388 (4th edition)]. Therefore, even if it be assumed that Kamrunnisa was originally a Hindu named Mussammāt Kuaur, still in the absence of proof that she had already been married before her marriage with Amir Hasan Khan or that, if married, her husband was living at that time, her marriage with Amir Hasan Khan will not be void but merely invalid, and the offspring of such marriage will not be illegitimate but legitimate issues of their father (Section 206, Mulla's Principles of Muhammadan Law).

In this state of the evidence all that we can say is that the marriage of Amir Hasan Khan with Kamrunnisa is uncertain. It cannot be said that it

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has been disproved. Under the circumstances the acknowledgment of Amir Hasan Khan contained in the am-mukhtarnama, the kabala and the will (Exhibits 15, 14 and 13) would undoubtedly go to prove the legitimacy of the present plaintiffs *Mirza Sadik Husain Khan v. Nawab Saiyid Hashin Ali Khan*⁽¹⁾, *Habibur Rahman Chaudhuri v. Altaf Ali Chaudhuri*⁽²⁾ and *Syed Habibur Rahman Chowdhury v. Syed Altaf Ali Chowdhury*⁽³⁾. Under the circumstances and having regard to the unequivocal acknowledgment of Amir Hasan Khan it must be held that the plaintiffs are the legitimate issue of Amir Hasan Khan.

If the plaintiffs are the legitimate issue of Amir Hasan Khan then Zafar Hasan, the defendant no. 2 had no title to the share claimed by him and the defendant no. 1 acquired no title under his purchase in execution of his decree against Zafar Hasan Khan.

The question was raised in this appeal on behalf of the defendants that the plaintiffs' suit was barred by limitation. The issue as regards limitation was not pressed before the Subordinate Judge and he was of opinion that the suit was not barred by limitation. The evidence has been placed before us, and the evidence of plaintiffs' witnesses nos. 1, 3 and 4, and the fact of the delivery of possession in execution of the compromise decree of March 1917 go to show that the plaintiffs were in possession within 12 years of the suit and the plaintiffs' suit is not barred by limitation.

The plaintiffs, however, forego their claim to more than 14 gandas share of the village in dispute and they in this appeal limit their claim only to 14 gandas of the village in dispute. The defendant no. 1 has given a sudbharna of his interest in the village to the defendant no. 15. This defendant does not oppose the plaintiffs' claim provided there is no prejudice to

(1) (1916-17) 21 Cal. W. N. 130. (2) (1918-19) 23 Cal. W. N. 1.

(3) (1921-22) 26 Cal. W. N. 81.

him as against his claims under the mortgage against the defendant no. 1. The defendants nos. 17 and 18 who are the subsequent purchasers in execution of a mortgage decree do not oppose the plaintiffs' claim. Under the circumstances a decree will be made in favour of the plaintiffs declaring their title to 14 gandas share of the village in dispute and awarding them possession thereof.

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Having regard to the fact that the contesting defendants have come to an agreement as regards the share to which the plaintiffs are entitled the plaintiffs do not press their claim to mesne profits which is disallowed.

The result is that the decree of the Subordinate Judge will be set aside, a declaration will be made that the plaintiffs are the legitimate issues of Haji Amir Hasan Khan, and a decree will be made awarding them possession over 14 gandas of the village in dispute; each party will bear his own costs.

Ross, J.—I agree.

Decree set aside.

APPELLATE CRIMINAL.

Before Allanson and Sen, JJ.

RAMCHARITER SINGH

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Trial by Jury—Misdirection—evidence against accused meagre, duty of judge when—Code of Criminal Procedure, 1898 (Act V of 1898), sections 289 (2) and 423 (2)—Penal Code, 1860 (Act XLV of 1860), section 26—"Reason to believe", omission to explain meaning of.

Although, in a trial by jury, the existence of a mere scintilla of evidence does not justify the judge in leaving the

*Criminal Appeal no. 66 of 1927, against an order of W. H. Boyce, Esq., I.C.S., Sessions Judge of Patna, dated the 1st April, 1927.