APPELLATE CIVIL.

Before Mr. Justice Addison.

1928

Feb. 14.

MUSSAMMAT AHMAD BIBI (PLAINTIFF) Appellant

versus

SHAMAS DIN AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 2366 of 1927.

Muhammadan Law—Succession—to immoveable property —heirs succeed as tenants-in-common—possession by one heir —whether adverse to the others—Second appeal—question of fact.

Held, that co-heirs under the Muhammadan Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all co-heirs. Such possession is never considered adverse if it can be referred to a lawful title; nor can it become adverse in the absence of express ouster or denial of title of the other sharers or co-heirs. In each case it has to be found whether an entry by one sharer or co-heir was an entry on behalf of himself alone or on behalf of all and the finding is one of fact.

Corea v. *Appuhamy* (1), *Mubarak-un-Nissa* v. *Mohammad Raza Khan* (2), *Asiruddin Mondol* v. *Latifunessa Bibi* (3), *Murad Bibi* v. *Rahim Bakhsh* (4), and *Hasham Ali* v. *Umar Hayat* (5), followed.

Mussammat Zainab v. *Ghulam Rasul* (6), distinguished.

Mustafa Khan v. *Mst. Dulari* (7), not followed.

Shakur v. *Husaini Bibi* (8), and Rustomji's Law of Limitation, 4th Edition, pages 846, 848, referred to.

Second appeal from the decree of Pandit *Omkar Nath, Zutshi, Senior Subordinate Judge, Sialkot,*

(1) 1912 A. C. 230.
(2) (1924) 79 I. C. 174.
(3) (1925) 85 I. C. 763.
(4) (1921) 59 I. C. 346.
(5) (1922) 4 Lah. L. J. 57.
(6) (1923) I. L. R. 4 Lah. 402.
(7) (1921) 65 I. C. 75.
(8) (1923) 71 I. C. 653.

1928

MUSSAMMAT AHMAD BIBI v. SHAMAS DIN.

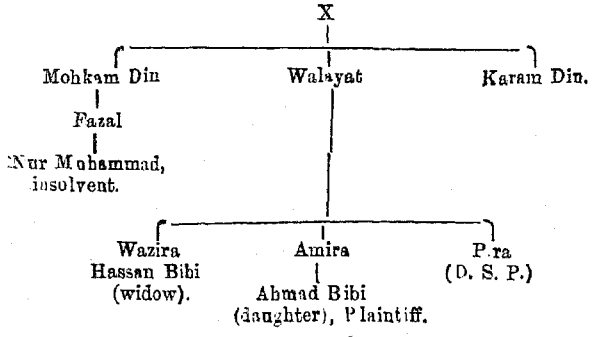
dated the 15th July 1927 varying that of Sardar *Ghulam Rasul Khan, Subordinate Judge, 4th class, Pasrur, dated the 8th March 1927, and declaring that the plaintiff is the owner of a 24/96 share in the house, etc.*

GHULAM RASUL, for Appellant.

BASHIR AHMAD, for Respondents.

JUDGMENT.

ADDISON J. ADDISON J.—The following pedigree-table is necessary for this appeal :—



Nur Muhammad was adjudicated an insolvent and in the insolvency proceedings Shamas Din purchased a one-third share of a house, which was alleged to belong to Nur Muhammad. *Mussammat* Ahmad Bibi raised an objection, but was referred to the civil Courts. Accordingly she instituted a suit for a declaration that the house belonged to her. The trial Court held that *Mussammat* Ahmad Bibi had become an absolute owner of the house by adverse possession and decreed the suit. On appeal the learned Senior Subordinate Judge came to the following findings :—

(1) The house originally belonged to the two brothers, Amira and Wazira. Amira first died and his half share went to his daughter, *Mussammat* Ahmad Bibi, and to Wazira in equal shares. When

1928

MUSSAMMAT AHMAD BIBI v. SHAMAS DIN.

ADDISON J.

Wazira died his widow got a half, his daughters 2/3rd and Nur Muhammad, the insolvent, 5/24th of his share. When *Mussammat* Hassan Bibi died her share went to her two daughters. Accordingly the shares in the whole house became as follows :—

Daughters of *Mussammat* Hassan Bibi and Wazira	...	57/96
Nur Muhammad	...	15/96
Mussammat Ahmad Bibi	...	24/96

(2) Wazira died more than twelve years before suit. It was on his death that Nur Muhammad, insolvent, became entitled to any share. After Wazira's death *Mussammat* Hassan Bibi, his widow, continued to live in the house up to a short time before suit when she died. The plaintiff *Mussammat* Ahmad Bibi came to live in the house along with Wazira's widow some time before 1914 at the time when her husband's house was sold. In 1914 she applied to the Municipal Committee to re-erect a wall, while later her son applied for permission to re-build another wall.

On these findings the lower appellate Court held that the plaintiff had not become an owner by adverse possession, and that she was merely an owner of a 24/96 share. Even if it was considered that the building of the wall in 1914 was an overt act, the suit had been instituted less than 12 years after the alleged overt act. Further, there was nothing to show abandonment by Nur Muhammad of his share of the house apart from the fact that he did not live in the house. The result was that the plaintiff, *Mussammat* Ahmad Bibi, had established that she was the owner of a 24/96 share of the house, and that she was in exclusive possession of the whole house, while the daughters

1928

MUSSAMMAT AHMAD BIBI v. SHAMAS DIN.

ADDISON J.

of *Mussammat* Hassan Bibi were entitled to a 57/96 share. She was, however, not entitled to exclude Nur Muhammad's purchaser from his 15/96 share. As a 1/3rd share had been sold and that was in excess of Nur Muhammad's 15/96 share, a declaration was granted to the plaintiff that she was the owner of 24/96 in her own right and was entitled to keep possession of the 57/96 share of *Mussammat* Hassan Bibi's daughters, but that she had no right to contest the sale of the 15/96 share belonging to Nur Muhammad. which had been purchased by Shamas Din. Against this decision this second appeal has been preferred.

Only two points were argued before me. The first was that the lower Court had wrongly calculated the shares. This appears to be correct and was not disputed. The lower appellate Court neglected to notice that *Mussammat* Ahmad Bibi was born after her father's death, so that her mother was then alive. This means that the mother should also have been given a share. It was admitted before me that the share of Nur Muhammad is for this reason only 55/384 and not 15/96.

The second point taken was that it should have been held that Nur Muhammad had lost his share by adverse possession. This point has been the subject of conflicting decisions and is a difficult one. The subject is discussed at length at pages 846 to 848 of Rustomji's Law of Limitation, 4th edition. He refers to a Privy Council decision, *Corea* v. *Appuhamy* (1), where it was held that one co-heir entering into possession must be held to have entered for the benefit of his co-heirs, the principle applicable being that possession is never considered adverse if it can be referred

(1) 1912 A. C. 230.

1928

MUSSAMMAT AHMAD BIBI v. SHAMAS DIN.

ADDISON J.

to a lawful title. The Courts below had found that the defendant had entered in his character of sole heir or plunderer in his own right and it was held that such a conclusion was not possible in law. His possession was (in point of law) the possession of his co-owners and he could not put an end to that possession by a secret intention. Nothing short of ouster could bring about that result. In that decision it was stated that the principle recognised in *Thomas* v. *Thomas* (1), held good, namely, "possession is never considered adverse if it can be referred to a lawful title."

The above decision was distinguished by Walsh J., in *Mustafa Khan* v. *Mst. Dulari* (2). It was held in this last case that adverse possession was established. It was observed:—If a brother of mine takes more than his share on my father's death, and I, not thinking it worth while to interfere, consent to his remaining in possession of more than his share, is it to be said that, because I acquiesced, the possession was not adverse?" Another Judge of the Allahabad High Court (Daniels J.) came to a different conclusion in *Shakur* v. *Hussaini Bibi* (3). He held that possession by a brother for nearly thirty years was not adverse to his sisters, though he did so with reluctance, because where parties had not put forward a claim to their share for a period of some thirty years, as happened in that case, it usually was the fact that they had all along intended to allow the brother to take the whole. There is, however, a clear decision of a Division Bench of the Allahabad High Court on this question, namely, *Mubarak-un-Nisa* v. *Moham-*

(1) (1855) 2 K. & J. 79. (2) (1921) 65 I. C. 75.
(3) (1923) 71 I. C. 653.

mad Raza Khan (1). It was held that a Muhammadan co-heir who obtains possession of the property of the deceased is in the position of co-sharer and his possession cannot be adverse to the other co-heirs in the absence of express ouster or denial of the title of the other co-heirs. This is a decision which followed the Privy Council decision already quoted. The same view has been taken by a Division Bench of the Calcutta High Court in *Asir-ud-Din Mondol* v. *Latifunissa Bibi* (2), where it was said that the entry and possession of one tenant-in-common is ordinarily deemed to be the entry and possession of all the tenants-in-common and this presumption would prevail in favour of all until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others.

It was held by this Court in *Murad Bibi* v. *Rahim Bakhsh* (3), that the heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred unless and until the other heirs set up an adverse right to the knowledge of that heir. A Division Bench of this Court in *Mussammat Zainab* v. *Ghulam Rasul* (4), held that limitation in the case of Muhammadan co-heirs runs against each from the date when the succession opened out. That, however, was a case which may be distinguished on this ground that the male descendants of the deceased had divided the property between them in practically equal shares and held it for more than twelve years, and it was held that a suit by the female descendants for their shares would be barred by time under article 144. If it is taken that the act of parti-

(1) (1924) 79 I. C. 174.
(2) (1925) 85 I. C. 763.
(3) (1921) 59 I. C. 346.
(4) (1923) I. L. R. 4 Lah. 402.

1928

MUSSAMMAT AHMAD BIBI v. SHAMAS DIN.

ADDISON J.

tion by the male descendants amounted to an overt act, declaring their exclusive right to the property, no difficulty arises in view of the decision in that case. For that reason I do not think it is necessary for me to follow it in view of the Privy Council decision in *Corea* v. *Appuhamy* (1). I, therefore, hold that co-heirs under the Muhammadan Law are in the position of tenants-in-common and the entry and possession of one of such co-heirs must be deemed to be on behalf of all co-heirs. It was observed by Broadway J., in *Hasham Ali* v. *Umar Hayat* (2), also a case between Muhammadans, that in each case it has to be found whether an entry by one sharer or co-heir was an entry on behalf of himself alone or on behalf of all, and the finding is one of fact.

The finding of the lower appellate Court in the case before me is that there was no adverse possession. *Mussammat* Hassan Bibi, widow of Wazira, continued in possession after her husband's death and was later joined in that possession by *Mussammat* Ahmad Bibi, her niece, when the latter's husband's house was sold. *Mussammat* Ahmad Bibi was one of the co-heirs and was admitted into possession. The fact that Nur Muhammad never desired to get into possession did not mean that the possession of these females was adverse to him. No overt act was certainly committed till 1914, and that act was within twelve years of the dispute which has arisen. Besides, an application to build a wall by a tenant-in-common, does not amount to a denial of title. I have, therefore, no hesitation in holding that the claim of the purchaser from Nur Muhammad has not lapsed by reason of adverse possession against Nur Muhammad.

(1) 1912 A. C. 230. (2) (1922) 4 Lah. L. J. 57.

1928

MUSSAMMAT AHMAD BIBI v. SHAMAS DIN.

ADDISON J.

The appeal, however, must be partly accepted on the first ground that the share of Nur Muhammad is only 55/384. I accept the appeal to this extent that plaintiff has no right to contest the sale of a 55/384 share belonging to Nur Muhammad, which has been purchased by Shamas Din. As the respondent Shamas Din has succeeded in the main, he will get 3/4th of his costs in this Court. The order as to costs in the lower appellate Court will stand.

N. F. E.

Appeal accepted in part.

APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Addison.

MUHAMMAD BAKHSH AND ANOTHER (DEFENDANTS) Appellants

versus

FATEH MUHAMMAD (PLAINTIFF)
ABDUL RAHIM (DEFENDANT) } Respondents.

1929

Jan. 24.

Civil Appeal No. 1799 of 1927.

Muhammadan Law—Succession—to immoveable property —heirs succeed as tenants-in-common—possession by one heir —whether adverse to the others.

Held, following *Corea* v. *Appuhamy* (1), and *Mussammat Ahmad Bibi* v. *Shamas Din* (2), that the heirs of a deceased Muhammadan succeed to his immoveable property as tenants-in-common and the possession of one of such co-heirs must be deemed to be on behalf of all co-heirs in the absence of express ouster or denial of title of the other co-heirs.

Miscellaneous appeal from the order of G. C. Hilton, Esquire, District Judge, Ambala, dated the 21st May, 1927, reversing that of Sayed *Muhammad*

(1) 1912 A. C. 230. (2) (1929) I. L. R. 10 Lah. 842.