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erroneous deductions from the bare fact of the endorsement of the promissory notes: and I would dismiss this appeal with costs.

MACKNEY, J.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Mosely.

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Mar. 1.

HABIBA *v.* SWA KYAN.*

Mahomedan law—Heir's distinct shares—Creditor's decree against one heir—Sale by creditor of estate property—Share of an heir not a party to suit—Share unaffected by sale—Representation of one heir by another heir—Creditor's suit for single debt not an administration suit—Principle of equity—Liability of heir to pay proportionate share of estate debt—Rule not applied in Burma.

It is a rule of Mahomedan law that on the death of the proprietor the property passes at once to his various heirs in their proper shares, and no heir has anything to do with the share of the other heirs. A Mahomedan heir is not bound by a decree which a creditor of the estate obtains against another heir when he is not made a party to the suit. Consequently the sale by the creditor of the estate property will not affect the share of such heir in the property. One heir cannot be represented by another heir nor be bound by a decree against another heir. Moreover a creditor's suit for his single debt cannot be regarded as an administration suit which could bind the interests of all the heirs.

The rule of equity that an heir who seeks a declaration as to the immunity of his share in the estate may be compelled to pay a proportionate share of the debt of the estate has never been applied in Burma.

Abbas Naskar v. *Chairman, District Board*, 24 Parganas, I.L.R. 59 Cal. 691; *Abdul Majeeth* v. *Krishnamachariar*, I.L.R. 40 Mad. 243; *Amir Dulhin* v. *Baij Nath Singh*, I.L.R. 21 Cal. 311; *Assamathem* v. *Roy*, I.L.R. 4 Cal. 142; *Bhagirthibai* v. *Roshanbi*, I.L.R. 43 Bom. 412; *Dhanpal Singh v. Fashiman*, A.I.R. (1935) Lah. 203; *General Manager of Raj Durbunga* v. *Maharaja Coomar Ramaput Sing*, 14 Moo. I.A. 605; *Imambandi* v. *Mutsaddi*, I.L.R. 45 Cal. 878; *Ishan Chunder* v. *Buksh Ali*, (1864) Marshall's Reports, 614; *Jafri Begam* v. *Amir Muhammad Khan*, I.L.R. 7 All. 822, discussed.

Meherunessa v. *Percira*, 10 L.B.R. 389, dissented from.

P. K. Basu for the appellant.

Eunoose for the respondent.

MOSELY, J.—In the suit under appeal, Habiba, a minor, sued for a declaration that her 7/72nds share

* Special Civil Second Appeal No. 277 of 1936 from the judgment of the District Court of Amherst in Civil Appeal No. 38 of 1936.

of the estate of her father, Din Mohamed, deceased, namely, three houses and their sites, was not bound by the sale in execution of the decree obtained against Din Mohamed's widow and five others of his children, who were sued for recovery of a debt due on a promissory note by the deceased by the decree-holder, the present respondent, Swa Kyan. The property was sold to the decree-holder in execution for Rs. 20 subject to a mortgage of one Tan Gwan Saing. The estate was in the possession of the widow, Halima Bi, with whom the minor, Habiba, was living, and there was nothing to show that Halima Bi was holding possession expressly on behalf of the minor, or that any one else was doing so. The trial Court gave a decree as prayed, on the ground that the minor, Habiba, was not a party to the decree, nor bound by the proceedings in it or in execution of it. In appeal, the learned District Judge set aside this decree, and directed that the suit be dismissed, holding that he was bound by *Meherunessa and others* v. *P. D. C. Pereira* (1), a decision of the Chief Court, passed in 1920, in which it was held that the widow, sued on a mortgage executed by the deceased and herself, being in possession of the estate, was liable to be sued on the mortgage, and was entitled to deal with the property in order to clear it.

That case was decided largely on old authorities on Hindu Law, where it was held that the widow who was in possession of the estate represented the joint family. The present suit, of course, deals with a Mohamedan estate. The only rulings on Mohamedan Law cited or discussed by the trial Court were an old ruling of the Allahabad High Court, *Hamir Singh* v. *Musammat Zakia* (2), which was over-ruled in the leading case of *Jafri Begam* v. *Amir Muhammad Khan* (3), two rulings of

(1) (1920) 10 L.B.R. 389. (2) (1875) I.L.R. 1 All. 57.
(3) (1885) I.L.R. 7 All. 822.

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the Bombay High Court, *Khurshetbibi* v. *Keso Vinayek* (1) and *Davala* v. *Bhimaji Dhondo* (2), which were over-ruled in the leading case of *Bhagirthibai* v. *Roshanbi* (3) and the dissentient judgment of Markby J. in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (4), which has been followed in all later cases of the Calcutta High Court, but on quite different grounds, not that the widow represents the estate, but that a suit by a creditor against a person in possession of the whole estate is to be treated as an administration suit. It would appear that cases to the contrary effect, *Abdul Majeeth Khan Sahib* v. *Krishnamachariar* (5) and *Bhagirthibai* v. *Roshanbi* (3) were not cited to the Judge. Since then the trend of authority, with the exception of the High Court of Calcutta, has been wholly in the direction that a legal representative, not a party to a creditor's suit, is not bound by the proceedings therein, and, of course, the whole theory of representation of such a party has been demolished by the judgment of their Lordships of the Privy Council in the case of *Imambandi* v. *Mutsaddi* (6), a case which deals with the incapacity of the widow, (as *de facto* guardian), to deal with the property of the minor.

The leading case of Hindu Law cited in *Meherunnessa* v. *P. D. C. Pereira* (7) is *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (8), [wrongly quoted in *Meherunnessa* v. *P. D. C. Pereira* (7) as "1 Marsh, 614",] where Sir Barnes Peacock C.J. decided that if the mortgage debt for which the property was sold was not the widow's but her husband's debt, and the property sold also belonged to the husband, the widow, though a party to the record, must be held to have been sued

(1) (1887) I.L.R. 12 Bom. 101.
(2) (1895) I.L.R. 20 Bom. 338.
(3) (1918) I.L.R. 43 Bom. 412.
(4) (1878) I.L.R. 4 Cal. 142.
(5) (1916) I.L.R. 40 Mad. 243.
(6) (1918) I.L.R. 45 Cal. 878.
(7) (1920) 10 L.B.R. 389.
(8) (1864) Marshall's Reports 614.

in her representative character as representing her husband's estate, and the proceedings against her would be effectual against the estate, notwithstanding the fact that the son, (who, in that case, brought his suit to set aside the sale), was not a party to the suit. Their Lordships of the Privy Council affirmed the correctness of the principle laid down here in *The General Manager of the Raj Durbunga* v. *Maharaja Coomar Ramaput Singh* (1). This authority was followed without discussion in the Mohamedan case of *Khurshetbibi* v. *Keso Vinayek* (2), and again in *Davala* v. *Bhimaji Dhondo* (3), where it was said, startlingly enough, as Hayward J. put it in *Bhagirthibai* v. *Roshanbi* (4), that *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (5) was not a case based on the peculiar situation of a Hindu joint family. The Judges in *Davala*'s case (3) also relied on the dissentient judgment of Markby J. in *Assamathem Nessa Bibee*'s case (6). Markby J. there held that under Mohamedan Law the succession is of the kind known as universal, and the heirs in possession merely represent the estate, which does not vest in all the heirs immediately as owners, relying on the rules of procedure contained in the *Hedaya* for the disposal of the estate of a deceased Mohamedan. It was shown, however, by Mahmood J. in his exhaustive judgment in *Jafri Begam* v. *Amir Muhammad Khan* (7) that the *Hedaya* contained mere rules of procedure which were superseded by the Civil Procedure Code, and Mahmood J.'s inquiry into the principles of Mohamedan Law was accepted in the case of *Amir Dulhin* v. *Baij Nath Singh* (8) by a subsequent Bench of the Calcutta High Court.

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(1) (1872) 14 Moo. I.A. 605.
(2) (1887) I.L.R. 12 Bom. 101.
(3) (1895) I.L.R. 20 Bom. 338.
(4) (1918) I.L.R. 43 Bom. 412.
(5) (1864) Marshall's Reports 614.
(6) (1878) I.L.R. 4 Cal. 142.
(7) (1885) I.L.R. 7 All. 822.
(8) (1894) I.L.R. 21 Cal. 311.

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The Madras High Court, first in *Pathummabi* v. *Vittil Ummachabi* (1) agreed that the rule governing the transactions of managing properties of joint families of Hindus could not be extended by analogy to the case of Mohamedans, though they followed *Davala*'s case (2) in holding that creditors could seek relief against the heirs in possession of the whole estate under Mohamedan Law. That *dictum* again was doubted in *Abdul Majeeth Khan Sahib*'s case (3) in the judgment of Abdur Rahim J. (page 257 *ibid*).

The Calcutta High Court has gone on an alternative theory that creditors' suits against the heirs in possession should be regarded as administration suits binding on all the heirs of a deceased Mohamedan. I think, it is difficult to see how a creditor's suit for a single debt can be regarded as an administration suit. It is a suit made on behalf of the particular creditor, and not on behalf of all the creditors and there is in it no preliminary decree giving public notice to all interested in it ; nor could it result in the satisfaction of all persons interested and in the final distribution of the estate as provided in the form of final decree prescribed in Order 20, rule 13, of the first schedule to the Civil Procedure Code. As Hayward J. said in *Bhagirthibai*'s case (4), there would be nothing to prevent such a suit being brought, if desired, in the proper form, and ample remedy for any practical inconvenience has already been provided by the creditor being able to compel one of the heirs on the spot to take out letters of administration or, failing that, to take out such letters himself. This argument meets the objection raised by the High Court of Calcutta in the case of *Amir Dulhin*'s case (5), where it was thought that injustice might be perpetrated

(1) (1902) I.L.R. 26 Mad. 734.
(2) (1895) I.L.R. 20 Bom. 338.
(3) (1916) I.L.R. 40 Mad. 243.
(4) (1918) I.L.R. 43 Bom. 412.
(5) (1894) I.L.R. 21 Cal. 311.

if a creditor was to be confined to the recovery of a portion of his claim although the assets may be wholly in the possession of the defendant, or if the creditor's relief was to be postponed until the estate had been distributed. In the latest case of the Calcutta High Court, *Abbas Naskar* v. *Chairman, District Board, 24 Parganas* (1), the Court has modified its views, and laid down that a creditor's suit cannot be treated as an administration suit where some only of the heirs are sued for recovery of the entire debt, but only where some of the heirs are sued as being in possession of the whole of the estate on behalf of all the heirs. The decision, however, does not meet the objections urged, I think, with great force, by Mahmood J. in *Jafri Begam*'s case (2) and by Heaton and Hayward JJ. in *Bhagirthibai*'s case (3) that such a suit cannot be treated as an administration suit at all.

Bhagirthibai v. *Roshanbi* (3) was followed in *Shahasaheb* v. *Sadashiv Sapdu* (4) and *Lala Miya* v. *Manubibi* (5). *Jafri Begam* v. *Amir Muhammad Khan* (2) has been consistently followed in the Allahabad High Court in, for example, *Dallu Mal* v. *Hari Das* (6) and *Ram Charan Lal* v. *Hanifa Khatun* (7), where it was incidentally held that a decree could not be passed against one co-heir for the whole debt, but only for a part thereof proportionate to the share that he had taken. It is a well established rule of Mohamedan Law that on the death of the proprietor the property passes at once to his various heirs in their proper shares, and no heir has anything to do with the share of the other heirs : *vide Dhanpal Singh* v. *Mt. Fahiman* (8).

(1) (1931) I.L.R. 59 Cal. 691.
(2) (1885) I.L.R. 7 All. 822.
(3) (1918) I.L.R. 43 Bom. 412.
(4) (1918) I.L.R. 43 Bom. 575.
(5) (1923) I.L.R. 47 Bom. 712.
(6) (1901) I.L.R. 23 All. 263.
(7) (1932) I.L.R. 54 All. 796
(8) A.I.R. (1935) Lah. 203.

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The judgments of the Chief Court of Oudh quoted are not very helpful. One judgment cited from an unauthorized report was *Mt. Kaniz Abbas* v. *Lala Bala Din* (1), where it was held, (at page 336), that under Mohamedan law suits could be effectually brought by a creditor against a legal representative of the deceased who is in actual possession of the assets, so as to make the decree binding on all the legal representatives, including those who were not parties to the suit. This case, however, largely depended on the wrong assumption that Abdur Rahim J. had decided to this effect in *Abdul Majeeth's* case (2). In another case of that Court, *Amir Jahan Begam* v. *Khadim Husain Khan* (3) it was admitted that a voluntary alienation by the heirs of a deceased Mohamedan for the purpose of paying the debts of the deceased is not binding on the heirs.

It is clear that, unless by operation of some special principle of Mohamedan law, the decree now in suit could not bind the minor's interests as she was in no way represented. I am of opinion, too, that it is clear that one heir cannot be represented by another heir, nor be bound by a decree against another heir. The heirs take as tenants-in-common, and each is an independent owner of his own share. Nor can the suit be possibly regarded as an administration suit which could bind the interest of all the heirs. I must, therefore, dissent from the decision in *Meherunessa* v. *P. D. C. Pereira* (4), and hold that the plaintiff-appellant, Habiba, was not bound by the decree now in question, to which she was not a party.

The question then arises whether, if it be held that the sale is not binding on Habiba, and if it is proved, as must be the case here, that the debts have been paid out of the proceeds of the sale, she ought to be put

(1) A.I.R. (1925) Oudh, 330.
(2) (1916) I.L.R. 40 Mad. 243.
(3) 132 I.C., Oudh, 75.
(4) (1920) 10 L.B.R. 389.

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on terms as a matter of equity, and required to pay her proportionate share of the debt before she is granted the declaration sought for. See on this Mulla's " Principles of Mahomedan Law ", tenth edition, page 22.

It was held by Mahmood J. in *Jafri Begam* v. *Amir Muhammad Khan* (1), following *Hamir Singh* v. *Musammat Zakia* (2), that a decree in a suit for possession by a minor should be contingent on the payment by the plaintiff of her share of the debts for the satisfaction of which the sale was effected. The learned Judge quoted Story's " Equity Jurisprudence ", where, as an illustration of the maxim that he who seeks the aid of equity must do equity, it was said that in many cases where the instrument is declared void by positive law or on other principles, Courts of equity will impose terms upon the party, if the circumstances of the case require it. This principle was not followed in *Dallu Mall*'s case (3), which was a case where the decree-holder sought to bring to sale property, and it was held that the transferees of the co-heirs, who were not impleaded in the suit, were entitled to remain in possession. It is possible that the transferees could have been put on terms in that case, but the question was not discussed. The Chief Court of Oudh has taken the same view as that taken by the Allahabad High Court in *Amir Jahan Begam*'s case (4) cited above, which was a suit for a declaration.

I can see no valid distinction between a suit for possession and a suit for a declaration that the plaintiff is entitled to remain in possession and is unaffected by the decree.

The objection, however, to enforcing such a principle of equity in this province is that it has never

(1) (1885) I.L.R. 7 All. 822.
(2) (1875) I.L.R. 1 All. 57.
(3) (1901) I.L.R. 23 All. 263.
(4) 132 I.C., Oudh, 75.

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been put in force, to my knowledge, against the legal representatives of a deceased Burman Buddhist under similar circumstances. The legal representatives of a deceased Burman Buddhist are also co-tenants in common in whom the estate vests at once on the death of the owner. This principle of equity was never applied in old decisions of this Court, and in recent years the rules of procedure have been sufficiently established so as to make the creditor realize that he must make all the legal representatives of the deceased parties to a suit against the estate. I do not think the rule could be applied to Mohamedans in this province, (following similar rules applied to Mohamedans in other provinces), when it is not so applied by the Courts in the vast majority of such cases that come before them, which are cases relating to the estates of Burmese Buddhists.

The result is that the decree of the lower appellate Court will be reversed, and the decree of the trial Court restored, allowing the declaration sought for, with costs in all Courts.