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waiver (see *Mumford* v. *Peal* (1), *Cheni Bash* v *Kadum Mondul*(2), *Pupamma Row* v. *Toleti Venkaiya*(3), *Nagappa* v. *Ismail* (4), *Buddhulál* v. *Rekkhab Dás* (5)). It is true that the defendant has not been examined as a witness to contradict the evidence given by any of the plaintiffs' witnesses, and the plaintiffs are, therefore, entitled to treat such evidence as substantially and admittedly correct; but it is going too far to ask the Court to hold that the inherent defect and insufficiency of the plaintiffs' evidence is cured by the mere fact that the defendant has not been called to contradict it.

On the whole, therefore, I have come to the conclusion that the waiver contemplated by article 75 of the Limitation Act has not been proved in this case, and I am confirmed in this opinion by the fact that no such waiver is alleged in the plaint. I, therefore, find the issue "whether the plaintiffs' claim is barred by limitation" in the affirmative and for the defendant, and dismiss the suit.

I cannot, however, award any costs to the defendant, as his defence is a purely technical one, and is not only opposed to all principles of honesty and fair dealing, but is a very ungrateful return for the kindness and consideration shown to him by the plaintiffs. The parties must bear their own costs respectively.

Attorneys for plaintiffs :—Messrs. *Mathubhai and Jamietrám*.

Defendant in person.

(1) I. L. R., 2 All., 857.
(2) I. L. R., 5 Cal., 397.
(3) 5 Mad. H. C. R., 198.
(4) I. L. R., 12 Mad., 192.
(5) I. L. R., 11 All., 482.

ORIGINAL CIVIL.

Before the Hon. Mr. Farran, Chief Justice, and Mr. Justice Starling.

1895. August 8.

HURBA'I AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* HIRA'JI BYRAMJI SHANJA (ORIGINAL DEFENDANT), RESPONDENT.*

Mahomedan law—Minors—Mortgage by widow—Widow—Right to mortgage shares of minors.

In 1884 one Ismáil Ebráhim, a Mahomedan, died intestate, leaving a widow, two sons and two daughters. At the time of his death he was the owner of a certain house in Bombay. After his death his widow and his eldest son Ebráhim (without the consent

*Suit No. 69 of 1894; Appeal No. 853.

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of the other children who were minors) mortgaged the said house to the defendant. In 1894 a younger son and one of the daughters of Ismáil filed this suit, praying that their shares in the house might be ascertained and declared; that the house should be sold, and their shares in the proceeds handed over to them. The defendant pleaded that the plaintiffs' mother and adult brother Ebráhim had mortgaged the house to him in 1891 as a security for a loan of Rs. 3,500 which they wanted to pay off debts incurred in rebuilding the house and to defray the marriage expenses of the said Ebráhim. He contended that the mortgage was binding on the plaintiffs, having been made for the benefit of the family, and that, if not, the plaintiffs were bound to pay him the money due to him before claiming any share in the house.

Held, that the plaintiffs were entitled to their shares in the said house free and discharged of the mortgage executed to the defendant.

The Mahomedan law makes no provision with regard to mortgages, as such transactions are, strictly speaking, unlawful, as they involve the payment of interest. As, however, mortgages do now exist among Mahomedans, they must be governed by the rules applicable to sales. To authorise a sale by the guardian of a Mahomedan minor, there must be an absolute necessity for the sale, or else it must be for the benefit of the minor. The money raised by the mortgage in question was not raised for any purpose specially authorised by Mahomedan law, and the purpose for which it was raised was not for the benefit of the minor. Consequently, the widow had no authority to mortgage their shares.

THE plaintiffs were the children of one Ismáil Ebráhim, a Mahomedan inhabitant of Bombay, who died intestate about the year 1884. He left a widow (Yemnábái), two sons (Ebráhim Ismáil and the second plaintiff Rusul Ismáil), and two daughters, *viz.*, Bibibái (since deceased) and the first plaintiff, his heirs according to Mahomedan law. The first plaintiff attained majority about the year 1890, but the second plaintiff was still a minor at the date of this suit.

The plaint, which was presented as a petition in *formâ pauperis* in 1893, stated that Ismáil Ibráhim at the time of his death was the owner of a certain house in Bombay, and that after his death his widow Yemnábái and his eldest son Ebráhim mortgaged it to the defendant without the knowledge or consent of the plaintiffs, and that they (the mortgagors) had attorned as tenants to the defendant who had obtained a decree in the Small Cause Court of Bombay, directing them to vacate the said house; that the defendant had enforced the decree by execution, and in doing so had removed certain property belonging to the plaintiffs, and had forcibly expelled them from the house. The plaintiffs, however,

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re-entered it, and the defendant thereupon instituted criminal proceedings against them in the Police Court, which were pending at the date of the petition. The plaintiffs prayed that their shares in the said house might be ascertained and declared, and that the house should be sold, and their shares in the proceeds delivered to them, and that the Police proceedings might be restrained.

The defendant in his defence stated that the plaintiffs' mother and adult brother Ebráhim had mortgaged the house to him on 1st May, 1891, as security for a loan of Rs. 3,500, which they wanted (*inter alia*) to pay off debts incurred in rebuilding the house and to defray the marriage expenses of the said Ebráhim; that the mortgagors had attorned to him and had agreed to pay Rs. 31 per month for use and occupation. On their default in payment of the rent, he obtained a decree in the Small Cause Court against them. He further stated that on the 16th March, 1894, he had sold the house by auction to one Parshotam Virji.

He submitted that the mortgage and sale were binding on the plaintiffs, the mortgage having been made for proper and necessary purposes, and for the benefit of the family; that, if not, the plaintiffs were bound to pay to him the money due to him before claiming any share in the house.

The case was heard before Candy, J.

The plaintiffs appeared in person.

Viccáji and *Modi* for the defendant.

CANDY, J.:—I find on the first and second issues against the plaintiffs. On the third issue, that they are simply entitled to a declaration of their shares in the property in and subject to the mortgage lien of defendant. If defendant sells the mortgage property in satisfaction of the mortgage-debt, plaintiffs are declared to be the owners of their shares in the balance (if any) of the purchase-money. But this has never been denied by the defendant. I must, therefore, under section 412 of the Civil Procedure Code (Act XIV of 1882) order plaintiff Hurbái to pay the court-fees which would have been paid by her if she had not been permitted to sue as a pauper. Hurbái has been

ill-advised in bringing this suit; I am not sure that it has not been filed at the instigation of her mother Yemnábái. However that may be, she has entirely failed to show any reason why she should avoid the mortgage lien of the defendant. It is clear that Hurbái with her sister Bibi (since deceased) and her brother Rusul (still a minor and a party plaintiff in this suit) were quite young when their father Ismáil died. At that time Ismáil was the owner of certain leasehold Fazendári land on which stood a dilapidated chawl and two sugar-mills. Yemnábái, Ismáil's widow, was the natural manager of the family. She and her adult son Ebráhim were persuaded to remove the remains of the chawl and the sugar-mills, and to erect a pucka building, which no doubt might turn out to be a most profitable property. This they purported and were entitled to do for the benefit of the family. But they had, as might naturally be expected, to borrow money to erect the building, which was mortgaged as security for the debt. Then they got into the hands of the mortgagee. Yemnábái and Ebráhim are not parties to this suit; and there is no material on which this Court can form an opinion that the debt is not owing as shown by mortgage-deeds. Certainly the assertion, that the building was erected by borrowing money on the security of ornaments pledged with a Márvádi, is entirely unsubstantiated. It follows, therefore, that the plaintiffs are simply entitled to the declaration as to their shares in the property, subject to the defendant's mortgage lien. Plaintiffs must pay defendant's costs.

The plaintiffs appealed, and contended that their shares in the house were not subject to the defendant's mortgage, and that the mortgage was not for necessary family purposes and was not binding on them.

The appellants appeared in person.

Viccáji and *Modi* for the defendant.

Girráj Bakhsh v. *Kázi Hamid Ali*[1], *Succárám Morárji* v. *Kálidás Kaliánji*[2], and the Tágore Law Lectures, 1893, p. 127, were referred to.

(1) I. L. R., 9 All., 340. (2) I. L. R., 18 Bom., 631.

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STARLING, J :—One Ismáil Ebráhim was possessed of a piece of Fazendári land in Khetwádi Back Lane, on which stood a chawl and two oil-mills. Ismáil Ebráhim died in 1884, leaving him surviving a widow Yemnábái, a son Ebráhim, then of full age, another son Rusul, and two daughters, Bibibái (since deceased unmarried) and Hurbái, who were all minors. After the death of Ismáil, Yemnábái determined to build upon the land; pulled down the chawl and oil-mills, and after obtaining a building certificate from the Municipality borrowed a sum of Rs. 1,000 from one Hormusji Máneckji Dádáchanji, and on the 9th November, 1885, she (on her own behalf and that of her minor children) and Ebráhim executed a mortgage of the said piece of land. On the 4th May, 1886, she borrowed a further sum of Rs. 1,000, and on the 9th November, 1886, another sum of Rs. 500, and on each occasion she (on behalf of herself and the minors) and Ebráhim executed a further charge for the amount borrowed. According to Yemnábái's account, some of the money borrowed was misappropriated by a contractor, and as far as she knows, the balance was spent in erecting a new house, but it is impossible to say how much was so spent, as all the money she received she handed over to the contractor, or an agent, to spend on the new house, and no accounts of its expenditure were produced at the trial. To make up the amount misappropriated by the contractor, Yemnábái says she sold the ornaments of her two daughters. In 1891, Hormusji tried to sell the property mortgaged to him. Notices from some of the heirs of Ismáil were issued at the time of the sale, and no sufficient price being offered, the sale was stopped.

On the 1st May, 1891, Yemnábái borrowed from the defendant the sum of Rs. 3,500, and she and Ebráhim executed a mortgage for that sum. In the mortgage all the previous deeds were recited, and it was stated that it was a mortgage with immediate possession of the hereditaments mortgaged, including the interest of the said minors, and the deed purported to convey the interest of the minors in the property mortgaged, but Yemnábái only signed the deed in her own name and not also as guardian of the minors. Out of this sum the previous mortgage and further charges were paid off, the cost of the mortgage-deed, stamps and registration were paid, and the balance handed to Yemnábai. According to a recital

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in the deed, the mortgage was executed to raise money to pay off the previous mortgages, to repair the house, and for the marriage of Ebráhim. Subsequently to the date of the mortgage, the defendant got into possession of the house and land, and the petitioners Hurbái (she having now attained her majority) and Rasul (a minor) presented a petition to be allowed to sue in *formâ pauperis* and recover their respective shares in the property free from the mortgage to the defendant. The case was tried by Candy, J., and he passed a decree declaring that the petitioners were entitled to $\frac{40}{288}$ and $\frac{98}{288}$ parts, respectively, of the mortgaged property, subject nevertheless to the mortgage to the defendant. Against this decree the plaintiffs have appealed, and the question we have now to determine is whether Yemnábái, as the natural guardian of her minor children, had power to charge their interest in the property under the circumstances hereinbefore set forth.

The plaintiffs are governed by Mahomedan law. According to Macnaghten, Chapter VIII, pl. 14, a guardian is not at liberty to sell the immoveable property of his ward except under seven circumstances, of which we need only mention the following:—1st, where he can obtain double its value; 2ndly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3rdly, where the late incumbent died in debt which cannot be liquidated except by the sale of such property; 5thly, where the produce of the property is not sufficient to defray the expenses of keeping it. Nos. 1, 2 and 5 are clearly applicable to a case of sale only. No. 3 would be applicable to a case of sale or mortgage, but there is no allegation here that Ismáil left any debts at the time of his death, or if he did, it is clear that the money was not borrowed for the purpose of paying them off. In the reported cases it is laid down that, to authorize a sale by the guardian of a Mahomedan minor, there must be an absolute necessity for the sale, or else it must be for the benefit of the minor. See *Mussamut Bukshun* v. *Mussamut Dookhin*[1]; *Mussamut Syedun* v. *Syud Velayet*[2]. The same principles have been recognized in other reported decisions, but we do not refer to them, as they turned mainly on other con-

(1) 12 W. R. Civ., 337. (2) 17 W. R. Civ., 239.

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siderations. The Mahomedan law makes no provision for mortgages, as such transactions were, strictly speaking, unlawful, as they involved the payment of interest on money borrowed. As, however, mortgages do now exist here among Mahomedans and between Mahomedans and other sects, they must be governed by the same principles as apply to sales. There is this difference, however, between them. It may be for the benefit of a minor that his guardian by selling property should have money in hand; but, in the case of a mortgage, the amount of money received will probably be less than on a sale, and although the property is not absolutely parted with, it is burdened with a charge which must go on increasing unless the interest payable is paid regularly, and eventually the property, if sold by the mortgagee, may not produce sufficient to pay the mortgage-debt and interest.

In the present case the land at the date of Ismáil's death was worth something, out of which the minors might have got their share if it had been sold. Now, although there is a house built on it, the whole property is burdened with such a debt that it seems improbable that the minors will ever get anything if the decree of Candy, J., is allowed to stand. Besides this a portion of the money is recited in the defendant's mortgage-deed to have been borrowed for the marriage of Ebráhim. We do not know if any portion was so applied, but such a purpose is clearly not one for which the share of the minors could be charged. We think it clear, therefore, that the money was not raised for any purpose specially authorised by Mahomedan law, and that the purposes for which it was raised were not for the benefit of the minors; consequently, Yemnábái had no authority to mortgage their shares.

The necessity for this suit has doubtless arisen from the inveterate habit people here have of looking at everything through Hindu eyes, and thus the two mortgagees treated Yemnábái as if she were the widow of a Hindu, instead of being the widow of a Mahomedan who was governed by Mahomedan law; but it must not be taken that we intend by this to determine whether the transaction could have been upheld even if Yemnábái had been a Hindu.

Mr. Viccáji suggested that the plaintiffs ought only to get their share of the land in any event, and not any portion of the house, but the money was spent on the house without their consent, and it stands on their land; consequently, as the house goes with the land, they are entitled to their shares of the whole. Besides this it is possible, although the learned Judge in the Court below does not place any reliance on the evidence of Yemnábái, that the whole of the money originally borrowed may not have been spent on the house, but may have been made away with by the contractor, in consequence of which Yemnábái may have had to use the proceeds of Hurbái's ornaments to make up the deficiency, and a portion of the amount last borrowed was certainly alleged to be wanted for Ebráhim's marriage for the repayment of which the share of the minors was in no way liable. Further, both mortgagees had all the facts of the case before them, and ought to have known the risk they were running. Consequently, there is no hardship upon the defendant in being deprived of a portion of the house as well as a portion of the land.

The decree of Candy, J., must, therefore, be varied by declaring that the plaintiff Hurbái is entitled to $\frac{49}{288}$ parts and the plaintiff Rasul Ismáil to $\frac{98}{288}$ parts in the said property more fully described in the schedule to the said decree free and discharged from the mortgage executed to the defendant by Yemnábái and Ebráhim Ismáil on the 1st May, 1891, and by ordering the defendant to bear his own costs in the Court below and of this appeal and to pay the court-fees of the plaintiffs both in appeal and in the Court below.

Decree varied.

Attorney for the defendant :—Mr. *K. D. Shroff.*