APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.
August 8.

MEHERJAN BEGAM (ORIGINAL APPLICANT), APPELLANT, *v.* SHAJADI BEGAM AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS;*

AND

NAWAB MIR NURUDIN (DEFENDANT-OPPONENT), APPELLANT, *v.* AMTULNISSA (DECEASED) BY HER HEIRS, HER DAUGHTER MEHERJAN BEGAM AND OTHERS (PLAINTIFFS, &c.), RESPONDENTS.*

Mahomedan law—Inheritance—Residuary—Sister a residuary with daughters.

A Mahomedan lady died, leaving a husband, two daughters, a sister, and the son of her father's paternal uncle.

Held, that the sister was entitled, in preference to the paternal kinsman, to the residue of the deceased's estate after the husband and daughters had taken their shares.

APPEAL from the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge of Surat.

In 1896 one Waliunnissa Begam and others obtained a decree for partition of certain joint property against Nawab Mir Nurudin Husein Khan.

On the 11th June, 1898, during the course of the execution proceedings, Waliunnissa Begam died, leaving a husband, two minor daughters, and a sister Meherjan Begam.

Thereupon a dispute arose as to who were the heirs and legal representatives of the deceased according to Mahomedan law.

Meherjan Begam applied to the Court to place her name on the record as the residuary heir of the deceased.

This application was opposed by Nawab Mir Nurudin, who urged that he was the paternal cousin of the deceased's father, and as such was a residuary of the first class, entitled to succeed in preference to the sister.

The Subordinate Judge held that the sister was no heir, being excluded by the daughters of the deceased, and that the paternal kinsman was a very remote and not a recognised residuary. He, therefore, passed an order declaring that the daughters and the husband were alone the heirs of the deceased both as sharers and residuaries by return. Their names were accordingly entered on the record in place of the deceased.

* Joint Appeals, Nos. 20 and 44 of 1899.

Against this order both Meherjan Begam and Nawab Mir Nurudin preferred separate appeals to the High Court.

Gokaldas Kahandas Parek for Meherjan Begam.

Ganpat Sadashiv Rao for Nawab Mir Nurudin.

PARSONS, J.:—The Subordinate Judge says that "the applicant as sister of the deceased is no heir, because she is excluded by the daughters of the deceased, who are first class heirs." This is not correct. Daughters as sharers take a specific portion of the estate, but they do not take the whole.

In this case Waliunnissa died leaving a husband, two daughters and a sister. As sharers the husband takes ¼th of her estate and the daughters take ⅔rds. Whether they take ⅔rds of her estate or ⅔rds of the remainder has not been argued before us, and it is not necessary for us to decide this point. In either case a residue is left, and the only question at issue in this appeal is to whom this residue goes. The applicant claims it as being the sister of the deceased; the opponent claims it as the son of the uncle of the father of Waliunnissa. It appears to us to be quite clear, on the authorities, that the sister is entitled to it in preference to the paternal kinsman. Macnaghten in his Principles and Precedents of Mahommedan Law in para. 25 at page 5 says: "Where there are daughters or son's daughters and no brothers, the sisters take what remains after the daughters or son's daughters have realized their shares." In Wilson's Digest in para. 233 it is said: "If there be no residuaries of the first or second class and no brothers, but daughters or son's daughters whose existence will prevent sisters (full or consanguine) from taking as sharers, such sisters or sister will take the residue, if any." The residuaries of the first and second class are described in para. 224 to be: "Class I.—Sons and son's sons, daughters and son's daughters when not sharers. Class II.—Father (and true grandfather)."

Paternal uncles, great-uncles and their male descendants in the male line are entered as coming within Class IV. Syed Amir Ali in his work on Mahommedan Law, second edition, though he classes sisters with daughters as residuaries *together with others*, says at page 59 that "when a person dies leaving behind him several relations who may be classed as residuaries of the different kinds indicated, preference is given to propinquity to

1899.

MEHERJAN v. SHAJADI.

the deceased, so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first," and he gives this illustration: "Thus when a man has died leaving a daughter, a full sister, and the son of a half-brother by the father,—one-half of the inheritance is given to the daughter and the other half to the sister, who is a residuary *with* the daughter and nearer to the deceased than the brother's son. So, also, when there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance."

We must, therefore, amend the order of the Subordinate Judge and direct that the name of the applicant be entered on the record as the person entitled to the residue of the estate of Waliunnissa. Costs to be costs in the proceedings.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *August* 9.

SUNDARABAI (ORIGINAL DEFENDANT NO. 3), APPELLANT, *v.* JAYAVANT BHIKAJI NADGOWDA (ORIGINAL PLAINTIFF), RESPONDENT.*

Damdupat—Mortgage—Redemp ion—Mortgage with possession—Mortgagee to take rent in part payment of interest—Remaining interest to be paid by mortgagor every year.

The *damdupat* rule applies in all cases as between Hindu debtors and creditors both in respect of simple as also of mortgage debts. (2) It does not, however, apply where the mortgagee has been placed in possession, and is accountable for profits received by him as against the interest due. (3) But where these profits are by the terms of the bond received for only a portion of the interest on the mortgage debt, the general rule of *damdupat* will govern such mortgage accounts.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, confirming the decree of Ráo Bahádur L. G. Limaye, First Class Subordinate Judge.

Suit for redemption and possession of certain land.

The plaintiff had purchased the land from the defendants Nos. 1 and 2. It had been mortgaged on 24th June, 1861, by their ancestor to defendant No. 3 for Rs. 250. The plaintiff now sought to redeem this mortgage on payment of such sum as might be found due.

The following was the material part of the mortgage deed:—

* Second Appeal, No. 167 of 1899.