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within time. We affirm the order of the lower appellate Court and dismiss the appeal with costs.

Order affirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

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July 5.

USMANMIYA ABDULLAMIYA AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2) APPELLANTS v. VALLI MAHOMED HUSAINBHAI AND ANOTHER (ORIGINAL DEFENDANTS NO. 3 AND PLAINTIFF) RESPONDENTS.*

Mahomedan law—Acknowledgment of son—Acknowledgment of legitimate sonship—Inference of acknowledgment.

A Mahomedan cannot legally acknowledge as his son a person who is shown to be the son of another man. The acknowledgment must be not merely of sonship but of legitimate sonship; but the fact that the acknowledgment was of legitimacy as well as of sonship may be inferred from circumstances justifying that inference.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by K. K. Sunavala, Additional Subordinate Judge at Ahmedabad.

Suit to recover possession of certain share in property left by one Husainbhai. The plaintiff Sardarbibi claimed to be his wife; defendants Nos. 1 and 2 were his brothers; and defendant No. 3 claimed to be his acknowledged son.

The plaintiff alleged that as widow of the deceased, her share was one-fourth. She denied that defendant No. 3 was the acknowledged son of the deceased. Defendants Nos. 1 and 2 supported the denial.

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The Subordinate Judge held that the plaintiff was the widow of the deceased; that defendant No. 3 was his acknowledged son; that the share of the plaintiff was one-eighth; and that defendants Nos. 1 and 2 were not entitled to any shares.

On appeal, this decree was confirmed by the District Judge. The learned Judge held that defendant No. 3 was validly acknowledged as a son by the deceased, on the following grounds :—

As for the third point it is of course the case that a Mussalman cannot by acknowledgment make a person his son whom he knows not to be his son. The acknowledgment must be the expression by the acknowledger of an actual paternity which he believes to exist. The permission to acknowledge is really due to the prevalence in Mussalman households of old times of female slaves taken in war. The owner would use them as concubines, but they were not veiled and guarded like wives and might consequently become mother by fellow slaves, or friends of the house. If the master really believed that a certain child was his by such a woman he might acknowledge it, and this acknowledgment gave the slave a higher position (Umm Walid.) In some of the reigning houses there is no marriage and it is by this kind of descent alone that the succession is maintained. But it appears that in mordern times the right of acknowledgment is somewhat extended and that a person can acknowledge another as his son and that such acknowledgment may not be questioned as long as the acknowledgee is *Majhul-ul-nasab*, *i.e.*, one whose descent is unknown. Nasab is generally, though not absolutely exclusively, confined to paternal descent, on the other hand, a man is prohibited from acknowledging a man as his son even though the son acknowledged is certainly the begotten of the assertor, in case the intercourse which led to the son's conception was such as would expose the father to the penalty of the *hadd*. Such intercourse is called *zina* and is best translated by whoredom.

It would seem then that a person can acknowledge another to be his son if the acknowledged's paternity is unknown, or if the paternity be known to be in the acknowledger provided the acknowledged is not an *Ibn-uz-zina*. In the present case the origin, both paternal and maternal, of the defendant 3 is absolutely unknown, he himself is in considerable doubts as to his origin, but he has clearly acknowledged Hussainmiya as his father. His uncle defendant 1, also professes entire ignorance as to the origin of the defendant 3. The disqualification, *zina*, is, therefore, absent, and the qualifications, unknown descent and congruity of years, present. I think then the acknowledgment is good and that defendant 3 must be held to be the son of Hussainmiya.

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Defendants Nos. 1 and 2 appealed to the High Court.

G. S. Rao, for the appellants.—In this case the deceased himself admitted in his deed of gift (Ex. 142) that the parents of respondent No. 1 had died leaving him about twenty days old. Thus the deceased could not acknowledge the respondent No. 1, who was shown to be a son of other parents. Hamilton's Hedaya, p. 439; Baillie's Digest, Vol. I, p. 408; Amir Ali, p. 252; *Mussamut Jaibun* v. *Mussamut Bibee Nujeeboonissa*[1] and *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*[2]. Further, under the Mahomedan Law, mere acknowledgment of sonship will not do, there must be an acknowledgment of *legitimate* sonship: *Khajah Hidayut Oollah* v. *Rai Jan Khanum*;[3] *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hossein Khan*[4]; *Sadakat Hossein* v. *Mahomed Yusuf*[5] and *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim*.[6]

K. N. Koyajee, for respondent No. 1:—Here no *specific* person is shown to be the father of the acknowledged child, and thus the paternity of the child is doubtful: see *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*.[7] Whether respondent No. 1 is shown to have been the child of any particular person is a question of fact, which the lower Courts have decided in the negative in spite of the supposed admission in Ex. 142.

The Mahomedan Law does not require any express acknowledgment of legitimate sonship. It is enough if there are acts and conduct showing recognition of a child as a son: *Nawab Muhammad Azmat Ali Khan*

(1) (1869) 12 W. R. 497.
(2) (1888) 10 All. 289 at p. 340.
(3) (1844) 3 Moo. I. A. 295.
(4) (1866) 11 Moo. I. A. 94 at p. 115.
(5) (1883) 10 Cal. 663 at p. 668.
(6) (1893) 21 Cal. 666.
(7) (1888) 10 All. 289 at p. 317

v. *Mussumat Lalli Begum*[1] and *Saiyad Waliulla* v. *Miran Saheb.*[2] In *Abdul Razak's case*,[3] there was undoubted illegitimacy which necessitated an acknowledgment of legitimate sonship.

BATCHELOR, J. :—The suit out of which this appeal arises was brought by one Sardarbibi as the widow of Husseinbhai Abdulabhai to recover possession of her one-fourth share of the deceased's property. Husseinbhai died in June 1904. He left no issue, but he left a widow, the present plaintiff, and two brothers, the 1st and 2nd defendants. The 1st and 2nd defendants did not dispute the claim of the plaintiff, but the 3rd defendant resisted the plaintiff's suit and claimed to be the acknowledged son of the deceased Husseinbhai. Both the lower Courts have acceded to the 3rd defendant's contention, and the present appeal is brought, not by the plaintiff, but by the 1st and 2nd defendants, who are represented before us by Mr. Rao.

The learned pleader for the appellants has taken two points in his clients' interests. The first of those points is that a Mahomedan cannot legally acknowledge as his son a person who is shown to be the son of another man. It appears to me that this legal proposition is well grounded, and among the numerous authorities which may be cited in its favour we may mention Hamilton's Hedaya at page 439, Sir Barnes Peacock's judgment in *Mussamut Jaibun* v. *Mussamut Bibee Nujeeboonissa*[4] and the elaborate judgments in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan.*[5]

But the question is, whether in the present case the 3rd defendant is shown not to have been the son of Husseinbhai. That is a question of fact and the decision

(1) (1881) L. R. 9 I. A. 8.
(2) (1864) 2 B.H.C.R. 285.
(3) (1893) 21 Cal. 666.
(4) (1869) 12 W. R. 497.
(5) (1888) 10 All. 289.

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of it rests with the lower Courts. Mr. Rao, however, urges that one of the necessary facts is the recital to be found in the deed of gift by Husseinbhai to the 3rd defendant, Ex. 142, in which occurs this passage: "The reason why these fields are given to you in gift is that your parents died leaving you only about twenty days old." It is, therefore, urged that we have no option but to infer that whosoever may have been the father of the 3rd defendant, that father could not have been the donor, Husseinbhai. We think the answer to this contention is that the admission which we have set out is only one fact among many other facts upon which the lower Courts had to determine the question whether the 3rd defendant was shown not to be the son of Husseinbhai. It cannot be said that the learned Judges below have omitted to consider the admission in the deed of gift, nor can it, we think, be said that by reason of that admission they were bound to come to the conclusion in the appellants' favour. What they have done is, we think, what they were bound to do. They have considered this admission as one piece of evidence, but on a general examination of all the evidence bearing upon this point, they have found that the 3rd defendant is not shown to have been the son of any person other than Husseinbhai. That conclusion of fact being perfectly open to the Judges below on the evidence is not, in our opinion, subject now to review in Second Appeal. And since that is the conclusion of fact, the position in law seems to us to be precisely that which, according to Mr. Justice Mahmood in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*[1], invites the application of the Mahomedan doctrine of *ikrar* or acknowledgment; for, the learned Judge says at page 335 of the Report: "The doctrine relates only to cases where either the fact of the mar-

[1] (1888) 10 All. 289.

riage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from disproved." So here, as we understand the judgments, both Courts hold that the probability is that defendant 3 is the son of Husseinbhai by a union of doubtful validity.

The only other argument submitted on behalf of the appellants was based upon the Privy Council decision in *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim*[1] which followed their Lordships' decision in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hossein Khan*.[2] The argument was that for an acknowledgment of sonship to be valid according to Mahomedan law, it must be an acknowledgment not merely of sonship but of legitimate sonship. It is clear, however, that the decision in the two cases which we have noticed must be read in the light of the facts which were then before the Privy Council, and in both of these cases the Court was concerned with a Mahomedan son born out of wedlock so that it was imperative to see that the acknowledgment relied upon was not a mere acknowledgment of sonship as opposed to an acknowledgment of legitimacy. In our present case there is not any such special reason for insisting upon a clear expression of the acknowledgment of legitimacy, and though the actual declaration of acknowledgment includes only an admission of sonship, yet that admission, when read according to the circumstances of this case, must we think, be regarded as tantamount to an acknowledgment of legitimate sonship. That is the view which both the Courts have taken upon the evidence as to the treatment which Husseinbhai gave to the 3rd defendant, as to the conduct which each of them pursued towards each other,

(1) (1893) 21 Cal. 666. (2) (1866) 11 Moo. I. A. 94.

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and as to the terms upon which they stood as disclosed in the deeds of gift. We are satisfied upon the same evidence that the acknowledgment, though in express terms only acknowledging sonship, must, in the circumstances now appearing, be taken to have amounted to an acknowledgment of legitimate sonship.

These being the only two points urged on the appellants' behalf and both of them, in our opinion, failing for the reasons stated, we confirm the lower Court's decree and dismiss the appeal with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

1915.

July 15.

MAJIDMIAN BANUMIAN (ORIGINAL DEFENDANT 1) APPELLANT *v.* BIBI-SAHEB JAN, WIDOW OF THE DECEASED NANUMIYAN BANUMIAN SHAIKH AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 2 AND 3) RESPONDENTS.*

Mahomedan Law—Dower—Right to retain property in lieu of dower—Heritable right.

The right which a Mahomedan widow, having a claim to dower, acquires on obtaining possession of her husband's property is a heritable right.

It is a substantial right and if she is wrongfully dispossessed she can maintain a suit to recover possession.

FIRST appeal against the decision of P. N. Sanjana, Joint First Class Subordinate Judge at Surat, in Suit No. 97 of 1909.

The facts were as follows :—

One Nanumiyan, a Sunni Mahomedan, the owner of the house in suit, died in May 1907. He left him sur-

* First Appeal No. 191 of 1913.