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because no reference to that evidence was made by the counsel who appeared for the appellant before him, and the evidence on the part of the defence was practically ignored in the argument. There is no doubt, however, that it was the duty of the Appellate Court to look into that evidence, and after dealing with it to come to a decision. For that reason we think it necessary that the case should go back for re-hearing. The appeal will be re-heard by the District Magistrate, and at the re-hearing of the appeal he should deal with the evidence on both sides.

E. H. M. *Case remanded.*

PRIVY COUNCIL.

P.C.[a]

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Nov. 12, 26.

AZIMA BIBI

v.

SHAMALANAND.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mortgage—Mortgage bond executed by male members of Mahomedan family—No proof of custom to exclude females as in Hindu family—Female members added as defendants in mortgage suit, though not executants of bond—Form of decree—Whether females were represented in the mortgage transaction by male members of family—Estoppel by conduct.

The appellants were the female members of a Mahomedan family which had adopted the Hindu religion in matters of worship, and as to which both Courts in India concurrently held that there was no custom proved excluding female members from inheritance, which was the case set up by the respondent. In a suit brought by the latter to enforce a mortgage bond which had been executed only by the male members of the

[a] *Present*: LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

family, in which suit the appellants were also joined as defendants, the first Court made a decree against the interests of the male defendants only in the property ; but the High Court decreed the suit against both the male and female defendants on the ground that, because the female members had not actively interfered in the management of the property, the male defendants must be taken to have represented them in the mortgage transaction. It appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females.

Held by the Judicial Committee (reversing the decision of the High Court), that the evidence did not prove that the male defendants had "represented" the appellants. The latter were *purdanashin* ladies, and naturally left the management of the property to their male relatives. There was nothing to show that the appellants had misled the respondent either by word or conduct to the belief that they had no proprietary interest in the property ; and he made no inquiries in the matter from them of their husbands as he might have done if he had any doubt in the matter. The decree of the High Court was therefore erroneous so far as it made the appellants liable, and should have been limited to making liable only the interests in the property of the male defendants, the executants of the mortgage bond.

APPEAL from a judgment and decree (6th April 1906) of the High Court at Calcutta, which varied a decree (11th January 1904) of the District Judge of Arrah.

Some of the defendants were the appellants to His Majesty in Council.

The suit out of which this appeal arose was one to enforce a mortgage bond, dated 13th September 1895, executed in favour of the respondent by the first, second, third and fourth defendants. The first three defendants were the sons of one Umed Ali Khan, and the fourth was his grandson. The other defendants included defendants 5 to 16 who were wives or other female relations of the first four defendants or descendants of such relations; and though they were not executants of the bond, they were included in the suit, because in 1898 and the following years, and subsequent to the execution of the bond in suit, their

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names were registered in the Collectorate as part proprietors of the lands covered by the bond.

This plaintiff's case, shortly, was that the family of the defendants, though Mahomedans, still followed the Hindu law of inheritance, and that female members were excluded from inheritance when there were sons in existence; that consequently after the death of the common ancestor the whole property passed to Umed Ali Khan, and after his death to the first three defendants and the father of the fourth defendant, and ultimately to the first four defendants; and that the mortgage bond was therefore executed by the full owners, and bound the whole property.

The execution of the bond was admitted.

The only defence now material was that of the female defendants, the present appellants, who pleaded that they were governed by the Mahomedan law of inheritance, and that their shares in the family property could not be affected by the mortgage bond executed only by the first four defendants.

Of the issues raised, the 3rd, 7th and 8th were alone material on this appeal: (3rd) "is the bond, if duly executed by defendants 1 to 4 binding on defendants 5 and 7 to 16? (7th) was there a custom among the defendants according to which property descended according to Hindu law? and (8th) are the defendants 5 and 7 to 16 estopped by their conduct?" On these issues, the District Judge held as to the 7th issue that the facts proved—

"were not strong enough evidence to justify a finding that there is a custom in the family depriving these Mahomedan females of the rights which the law of their faith expressly gives them. The fact of the management by the males is of little value. Such a state of things might easily exist in the most strictly orthodox Musalman family, if the members were on good terms with each other, a contingency which surely cannot be regarded as wholly impossible . . . Accordingly I find this issue against the plaintiff."

As to the 8th issue the District Judge said :—

"I think the females cannot possibly be held to be estopped by conduct from questioning the mortgage. In the present case, if it is admitted that the females did allow the males to hold themselves out as owners of the whole estate, an admission that could hardly be made without qualification yet that conduct of theirs ought certainly not to have influenced the plaintiff. It is not pleaded that he was unaware of the existence of the females, and being a pleader he knew well that under ordinary Mahomedan law they were entitled to share in the property. His plea is that he thought from their conduct that they still retained the Hindu law. But he must have known that this was an extremely unusual circumstance, and he assuredly ought to have satisfied himself that it really existed. He admits that he never questioned any of the ladies themselves; and if that was impracticable in the case of *purdahnashin* ladies, it was at any rate possible to consult their husbands and sons. The plaintiff, if he had acted with prudence, would have had his bond attested by some such representative of the ladies, and, in any case, ought to have made inquiries from them as to whether the unusual custom said to prevail in the family really existed. He did none of these things and cannot now plead that he had no notice of the right of the ladies in the property mortgaged to him. I find this issue against the plaintiff."

On the 3rd issue, the District Judge found as follows :—

"The decision of this issue follows on the decision of the last two issues. If the plaintiff has not proved the custom alleged by him and the females cannot be held to be estopped, the bond executed by the males cannot be held to be binding on them unless they were benefited under it. But the main consideration of the bond was the payment of the debt due in like manner on bonds executed by males alone, and there is no proof that those bonds were executed for the benefit of the females. This issue also must be found against the plaintiff."

The District Judge gave the plaintiff a decree on the mortgage bond, but only against the interests in the mortgaged property of the defendants 1 to 4; and he ordered the plaintiff to pay the costs of the female defendants.

An appeal by the plaintiff was heard by a Divisional Bench of the High Court (BRETT and HOLMWOOD JJ.) who in the 7th issue concurred with the finding

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of the District Judge that the evidence adduced by the plaintiff was not sufficient to establish the existence of a custom in the family which would deprive the female defendants of their rights under the Mahomadan law of inheritance.

As to the other two issues (3rd and 8th), the judgment of the High Court proceeded as follows :—

"The plaintiff's case was, however, in addition that, even if the female defendants had any interest in the properties covered by the bond, they had never asserted their rights but had allowed the defendants Nos. 1 to 4 for a long series of years to manage and deal with the property as if they were the actual sole proprietors, and so by their conduct had laid the plaintiff and others to believe that the defendants Nos. 1 to 4 were the sole proprietors of the property and to deal with it as such. Further, that in allowing the defendants Nos. 1 to 4 all along to deal with the property, they had constituted them their representatives in all transactions into which those persons had entered in connection with the property, and that in the mortgage loan which was taken for the benefit and protection of the whole of the property they must be held to have been represented by the defendants Nos. 1 to 4.

"The learned pleader for the defence has urged that this case was not distinctly raised in the issues, but we think it was raised by issues Nos. 8 and 3. . . . . And we think that in dealing with these issues the District Judge has been unduly influenced by his finding on the previous issue as to existence of the alleged custom in the family. Even though there may be no custom, the female defendants may still be estopped by their conduct from denying the plaintiff's claim. The two questions are entirely separate, as also the third, whether in the execution of the mortgage deed the female defendants were represented by the defendants Nos. 1 to 4.'

After discussing the evidence as to the transactions in respect of the property, the judgment continued :—

"In our opinion then the female defendants, whether they had any interest in the ancestral property or not, acted in such a way as to lead the plaintiff in common with others to believe that they had relinquished it, and the defendants Nos. 1 to 4 were the sole actual proprietors of the property, and we think that the plaintiff acted under the influence of that belief when he took the mortgage bond from the defendants Nos. 1 to 4. We are inclined to think, therefore, that in this case the conduct of the female defendants was such as to mislead the plaintiff, supposing it to be a fact that after marriage each of them retained any share in the family property.

"But in our opinion, for the purposes of this appeal, it is not necessary to go beyond the point which we consider was raised in the 3rd issue, *viz.*, were the female defendants in the mortgage transaction with the plaintiff represented by the defendants Nos. 1 to 4. In our opinion that question must be answered in the affirmative. Accepting for the purpose of argument the supposition that the female defendants retained any share in the family property after their marriages, we find that for a long series of years all transactions and litigations in connection with the family property were carried on by or in the names of the defendant No. 1 as manager of the family of defendants Nos. 1 to 4, and that the female defendants either personally or through their husbands never inter-meddled in any way with the property. No mention is made in any document or proceeding of the interests of the female defendants till 1898 when their names were registered in the Collectorate. If then the properties were acquired from joint family funds, and if the female members of the family had any interest in the properties, undoubtedly, in all the transactions connected with them, they were represented by the defendants Nos. 1 to 4. The mortgage bond on which the suit was brought, was executed by defendants Nos. 1 to 4 in respect of a loan taken by them for the benefit of the whole family and to save the property from being sold in satisfaction of the two decrees which had been obtained and in execution of which the properties were advertised for sale. In our opinion, the female defendants, if they had any interest in the property, were represented in the mortgage transaction by the defendants Nos. 1 to 4 and are bound by the mortgage bond. The circumstances under which the female defendants were registered in respect of shares of the family properties after the execution of the mortgage bond leave in our minds no doubt that the registration was applied for at the instance of and through the defendants Nos. 1 to 4 with the object of fraudulently depriving the plaintiff of a portion of his security.

"Disagreeing, therefore, with the District Judge, we find the 3rd issue in favour of the plaintiff, and hold that the interests of the female defendants in the property (if any) were bound by the mortgage entered into by the defendants Nos. 1 to 4."

The appeal was consequently allowed and a decree was made against the male as well as the female defendants. From that decision the female defendants appealed to His Majesty in Council.

On this appeal, which was heard *ex parte*,

Ross, *K.C.*, and *G. Considine O'Gorman*, for the appellants, contended that the High Court had erred

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in giving the respondent a decree with reference to a case not raised in the pleadings. It was not suggested in the pleadings or in the first Court that the appellants had in all transactions with the property been represented by the defendants 1 to 4; and there was nothing in the evidence to show that those defendants had represented the appellants in the mortgage transaction in the suit. Nor, it was submitted, were the appellants estopped by their conduct from questioning the mortgage. The judgment of the High Court was based upon an erroneous view of the effect of the evidence in the case. The Courts below had concurrently held that there was no custom proved which would deprive the appellants of their right as Mahomedan ladies to inherit; and the respondent was well aware of the rights they had in the property. The view taken by the District Judge was correct, and should be restored.

Nov. 26.

The judgment of their Lordships was delivered by LORD MACNAGHTEN. This appeal was heard *ex parte*.

The appellants are the female members of a Mohamedan family which in matters of worship have adopted the Hindu religion. There is no evidence that there is any custom in the family by which the Mohamedan law in regard to the descent of property has been altered or varied.

The respondent is a pleader of some standing. He took a mortgage of ancestral property from the male members of the family. He was under the impression that the Hindu law of descent prevailed in the family, and that the female members had no proprietary interest. He made no inquiry of any of the female members or of their husbands. They were

purdahnashin ladies, and naturally left the management of the property in the hands of the males.

The respondent brought this suit to enforce his security against the family property, making both the males and the females parties. The District Judge gave him a decree against the males, but dismissed the suits against the females with costs. On appeal, the High Court passed a decree against the females as well as against the males, and ordered the appellants to pay the costs of the appeal to the High Court.

The learned Judges of the High Court held that the male members "represented" the females in the transaction, because the females had not actively interfered with the property, and it appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females. There was no proof, nor indeed was there any suggestion, at least in the evidence, that the appellants or any of them had misled the respondent, either by word or by conduct.

In their Lordship's opinion the decree of the High Court is against all principle and authority.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court should be discharged with costs, and that the decree of the District Judge should be restored.

The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

J. V. W.