APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

RASHID KARMALI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHERBANOO (ORIGINAL PLAINTIFF), RESPONDENT.* 1904. *September* 15.

Khoja Mahomedans—Marriage by Mahomedan rites—Succession and inheritance—Hindu Law—Widow—Maintenance.

Although a Khoja and his wife are married according to Mahomedan rites, yet at the time of his death, so far as regards the succession of his property, he is a Hindu. If his brothers lived joint with him, his widow would be entitled to maintenance out of his estate while his property devolved on them.

According to Vyavahar Mayukh which governs Khojas for the purpose of inheritance and succession, when a person inherits the estate of the deceased, he takes it as an *universitas* with all the rights and liabilities annexed to it. Maintenance of those whom the deceased was bound to maintain and payment of his debts are liabilities which are annexed to the estate in the hands of those who take it.

APPEAL against the decision of Skinner Turner, Assistant Judge of His Britannic Majesty's Court for Zanzibar, at Zanzibar, in original suit No. 336 of 1903.

The plaintiff was the widow of one Naser Karmali, a Khoja Mahomedan of Zanzibar. Their marriage took place on the 30th December, 1900, and at the time of the marriage they entered into a contract in writing as follows:—

To wit (that) we the undersigned confess before the aforesaid Jamat by this writing that we are married to each other of our free will, consent, in possession of our senses and wisdom according to the tenets of the holy religion of "Shia Ithnashari" and according to the undermentioned conditions, rules and covenants and tenets of the holy religion of Shia Ithnashari and the customs of the aforesaid Jamat which may not be against its (rules) we promise to act according to these rules and we are bound ourselves to carry out these rules; these are as follows:

(1) Should any dispute or disagreement arise between us then in that case we agree to refer the same to the aforesaid Jamat and upon such reference should the aforesaid Jamat call one of us at the place and time appointed by them we agree to attend without delay at the place and time so appointed. If after attending and stating the points of dispute and

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disagreement (before) the aforesaid Jamat we or one of us should delay or neglect or make default in attending and without permission of the aforesaid Jamat we or any one of us go to some other place then in that case we give full power to the aforesaid Jamat to hear the claim *ex parte* and whatever they should decide about both the parties or send us (back) wherever we might have complained, we are bound to fulfil and act accordingly. Should any of us complain to the Government or Court in any way against the decision, we are bound even then to give respect and accept the decision of the aforesaid Jamat, there should be no dispute or objection about it.

(2). If any third person (party) should complain against us, the aforesaid or undersigned are bound to act in that dispute or disagreement as mentioned in the 1st paragraph (of this deed).

Some time after the marriage Naser Karmali began to show symptoms of consumption and he on the 20th Vaisakh 1957 (10th May, 1901) executed a deed of sale in the following terms:—

Written by me the undersigned Khoja Naser Karmali Sajnani. To wit, Bhai Ismail Karmali Sajnani. To wit, our father the late Karmali Sajnani died and power (of administration) of whose (estate) was obtained by you and me two persons together. Since that day and up to date all the property was and is joint (between) you and me. Now from this day I sell you this day all that my half of immoveable and moveable property, cash, whatever it may be, for a small price, because I have no children, and regarding you as my child, I sell to you with my free will and in sound mind my half share for Rs. 5,000. .... From this day you are the true owner of all the business, property moveable and immoveable, cash, outstanding debts and warkas which may be in my name. From this day neither I nor my heirs, executors have any right to all these, and if (any one) claims (it) is null and void.

On the 14th Asad 1958 (1st August, 1901) Naser Karmali executed a will whereby he appointed his two brothers Rashid and Esa (Ismail) Karmali his executors and probate thereof was granted to them at Zanzibar after the death of the testator which took place on the 20th January, 1902. The material provisions of the will were:—

1. I have sold my estate for Rs. 5,000 to my brother Ismail Karmali and the deed of sale was written in his favour on 20th Vaisakh 1957. Besides this there are golden ornaments the distribution of which has been made as noted below and should be considered valid. * * * * *

5. The value of the golden ornaments is between Rs. 1,500 and Rs. 1,600 and this I keep for my own use considering it my right to share. In the event

of my breathing last, both of my brothers Rashid Karmali and Ismail Karmali are my trustees.

The one-third of the amount realized from the sale of the above ornaments should be spent in the performance of my funeral ceremonies and other religious right rites . . . . . and the balance divided between my above trustees and other heirs according to the law of "Shia Ithnashari."

The plaintiff in the year 1903 brought the present suit against the executors Rashid and Ismail Karmali, alleging that her deceased husband had by his will absolutely ignored her rights as a widow and praying that the sale-deed dated the 20th Vaisakh 1957 (10th May, 1901) be set aside and it be declared that the deceased died intestate with respect to the property conveyed therein; that the plaintiff's share in the said property be determined and that a receiver be appointed to take charge of the properties, assets and books of accounts in the hands of the defendants. The plaint further alleged that the consideration, namely, Rs. 5,000, mentioned in the sale-deed was wholly inadequate.

The defendants contended, *inter alia*, that the sale-deed was a legal and valid document and defendant 2, Esa (Ismail), had thereby become absolutely entitled to the property thereby transferred; that the value of the property was Rs. 35,000; that the deceased Naser Karmali was a Khoja and the law, in the absence of proof of custom to the contrary, applicable to all matters relating to his property and the inheritance and succession thereof was Hindu law and that the plaintiff was not entitled to any share or interest in his property.

The Judge held that the plaintiff being the widow of a Khoja was only entitled to maintenance at a reasonable rate so long as she remained unmarried and chaste, and reserved liberty to parties to apply if they came to no arrangement as to maintenance. Subsequently the parties having applied for a review of the judgment, the Judge fixed the rate of plaintiff's maintenance at Rs. 35 per month and directed that it should be made a charge on the immoveable properties acquired by Esa (Ismail) from plaintiff's husband.

The defendants appealed.

S. V. Bhandarkar (with *M. M. Karbhari*), for the appellants (defendants).

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There was no appearance for the respondent (plaintiff).

RUSSEL, J.:—(After stating facts)—The following issues were raised by the Judge—1 and 2 the material ones were:—

1. By what law are the parties governed in this case?

2. Is the deed of 10th May, 1901, invalid? If so, what is the share of the plaintiff in the intestacy thus created?

In his first judgment the learned Judge did not decide either of these issues specifically, but held as follows:—

> I hold therefore that on the document (the marriage contract) the parties remained Khojas, governed therefore in matters of inheritance and succession by Hindu law. Under these circumstances the plaintiff is only entitled to maintenance while she remains unmarried and chaste; and it is not necessary for me to decide the question of the validity of the document of 20th Vaisakh (10th May, 1901). I therefore declare that as the widow of a Khoja, the plaintiff is entitled to maintenance only while she remains unmarried and chaste, and she must have this at a reasonable rate, considering the condition of life of her husband. Costs to come out of the estate. Liberty to apply if parties can come to no arrangement as to maintenance.

The defendant applied for a review of this judgment and the following is the note of the learned Judge of the arguments:—

> *Framroze*, for plaintiff, shows cause.
>
> *Wilson*, for defendants.
>
> *Framroze*: Section 623 no objection for dealing with the minutes of judgment.
>
> *Wilson*: She gets ¼ of ⅔ under the will. Is she entitled to maintenance as well. Consent to amplify it.

These last words are to our mind most important as they show that the defendants' attorney consented to the plaintiff getting more than the will gave her.

The learned Judge then gave his judgment on the review application and began it thus:—"The parties have now agreed on an application for a review of my judgment by the defendants, that I should review it to the extent to which I did not decide (1) the validity of the document of 20th Vaisakh and (2) what property is to be charged with the plaintiff's maintenance and it seems to me I have power to do this." He accordingly held "that the said document judged by Mahomedan law was valid, that the property so transferred was subject to the Hindu law as

to maintenance, that Esa Karmali had knowledge of the intentions of his brother so as to bring him within the provisions of section 39 of the Transfer of Property Act, that the property conveyed by the deed of 20th Vaisakh was conveyed subject to the right of hers (plaintiff)." He therefore fixed the rate of maintenance for the plaintiff at Rs. 35 per month and directed that this be made a charge on the immoveable properties acquired by Esa from Naser.

An appeal was filed from this decree and was argued before Chandavarkar, J., and myself. But unfortunately the plaintiff-respondent was not represented before us. From the above statement of what took place before the learned Judge we should be prepared to hold that the defendants by their attorney having apparently consented to the plaintiff's being decreed more maintenance, it is not now open to them to argue that she is not entitled to any. But this would not, we think, be a satisfactory way of disposing of the case and we proceed to deal with it on its merits and to consider the law applicable thereto. Nor would it be satisfactory to decide the case upon the ground that no vendee being mentioned in the deed of sale the property therein comprised did not pass to any one.

But it appears to us that the point of time to be considered is the death of Naser Karmali. Although he and plaintiff were Mahomedans married according to Mahomedan rites, yet at the moment of his death so far as regards the succession to his property he was a Hindu. The living Mahomedan by operation of law became a dead Hindu. His brothers living joint with him, Naser's wife would on his death be entitled to maintenance out of his estate while his property devolved on them.

According to Vyavahar Mayukh which governs the parties as Khojas for the purpose of inheritance and succession, when a person inherits the estate of a deceased he takes it as an *universitas* with all the rights and liabilities annexed to it. Maintenance of those whom the deceased was bound to maintain and payment of his debts are liabilities which are annexed to the estate in the hands of those who took it. Therefore although Khojas are governed by Hindu law for the purposes of succession and inheritance the limited application of the said law attracts with it all the consequences which attach to it under that law.

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To hold otherwise would be a manifest injustice to the widow of a deceased Khoja or Mahomedan as he might on the one hand deprive her of her right of inheritance under Mahomedan law and of her right to maintenance under the Hindu law: *See* Mayne, page 592, section 458, 6th edition, where it is stated "the obligation extends even to the King when he takes the estate."

The case of *Lakshman Ramchandra* v. *Satyabhamabai*[1] is in point. Applying the principle laid down in that case, his brother's widow at the time of the sale to Esa had an equity to a provision which the Court will enforce to guard her against attempted fraud. What Esa purchased whether in furtherance of a fraud upon her or with the knowledge of a right which would be thus prejudiced, was liable to her claim from the first, and both Esa and Naser must have known that plaintiff's right as a (possible) widow of the latter must be prejudiced by the deed of sale. Esa bought the property with knowledge that if the plaintiff survived Naser she would be entitled to maintenance thereout. The sale was for a wholly inadequate consideration. It is not necessary to decide whether the inadequacy was such as to be evidence of fraud. In our opinion Esa, when he bought the property, must have known, as Naser must also have known when he sold it, that there was an inchoate right in the plaintiff to maintenance which would on Naser's death ripen into an actual and existing right. We therefore have come to the conclusion that the plaintiff has got the right to maintenance which the learned Judge has decreed her.

The next question is the amount thereof.

Applying the principles laid down in *Adhibai* v. *Cursandas Nathu*[2] and taking the value of Naser's estate at Rs. 35,000—the amount the defendants value it at—in our opinion Rs. 35 per month is the proper sum to fix for plaintiff's maintenance.

This amount is declared to be a charge upon the immoveable property left by Naser.

We therefore confirm the decree of the Court below.

Decree confirmed.

(1) (1877) 2 Bom. 494. (2) (1886) 11 Bom. 199.