property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy* v. *Debee Pershad Tewaree*.(1)"

This view receives support from the Judges of the Madras High Court, who in *Visalatchi* v. *Annasamy*(2) said :—" The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time :—'Property unjustly detained which could not be recovered before' is the import of the ordinance of Manu, chapter IX, sl. 209."

For these reasons we confirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

G. B. R.

(1) (1866) 6 W. R. 58 (Civ. Rul.). (2) (1870) 5 Mad. H. C. R. 150 at p. 157.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

MARDANSAHEB VALAD GANSUSAHEB RATIMANI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. RAJAKSAHEB VALAD KASHIMSAHEB AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2, 4) RESPONDENTS.*

1909. *August* 10.

Mahomedan law—Acknowledgment of son—Illegitimate son—Zina—Son by adulterous intercourse cannot be legitimised.

Under Mahomedan law, a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of *zina* (*i. e.*, fornication, adultery or incest).

Muhammad Allahdad Khan v. *Muhammad Ismail Khan*(1), followed.

* Second Appeal No. 740 of 1908.

(1) (1888) 10 All. 289.

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MARDAN-SAHEB v. RAJAKSAHEB.

SECOND appeal from the decision of T. D. Fry, District Judge of Bijapur, reversing the decree passed by V. G. Kaduskar, Subordinate Judge of Haveri.

Mardansaheb and others filed a suit to recover possession of property which belonged to their uncle Maulasaheb.

Their claim was resisted by one Miyasaheb (defendant No. 4) who contended that he was the acknowledged son of Maulasaheb who had willed the property in his favour.

Miyasaheb was born of Jainabi. She was the wife of another; but she was divorced by her first husband. Miyasaheb was born after the divorce and before she was remarried to Maulasaheb. It appeared that there existed criminal intimacy between Maulasaheb and Jainabi even before remarriage.

The Subordinate Judge decreed the plaintiffs' claim holding that Miyasaheb was not the acknowledged heir and son of Maulasaheb, and that the will relied on by him was not proved.

The District Judge on appeal reversed this decree and dismissed the plaintiffs' claim, holding that the will was proved and that defendant No. 4 was the acknowledged son and heir of Maulasaheb. His reasons were as follows:—

"Mahomedan law no doubt recognizes the rights of a duly acknowledged son but there are restrictions on the power to acknowledge so as to confer these rights.

"In 15 All. 396 it was held following 10 All. 289 that a Mahomedan could not by acknowledging him as his son render legitimate a child whose mother *at the time of his birth* he could not have married by reason of her being the wife of another man.

"Now when Maula married Jainabi by *nikka*, Jainabi had already given birth to Miyasaheb and, if at the time of the birth Jainabi was still the wife of another man then, under the authorities quoted, it will be incumbent on me to hold that the acknowledgment was invalid.

"By relying for the most part on Exhibits 24, 31 and 32, I hold that even if Jainabi's husband was still living when the child was born he had divorced his wife before that birth.

"It was thus open to Maula to 'acknowledge' Miyasaheb and in the state of the authorities as they now stand (10 Cal. 663), I should not be prepared to hold the acknowledgment was invalid even if it were proved that at *the time of conception* Maula was having adulterous intercourse with Jainabi.

"I hold that the 'acknowledgment' would not have been invalid in law."

The plaintiffs appealed to the High Court.

K. H. Kelkar for the appellant:—Under Mahomedan law, the doctrine of acknowledgment applies only to cases where the paternity of the child is doubtful and the evidence of marriage inconclusive. Here, Miyasaheb is born of *zina*: see *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*(1); *Nagar Mal* v. *Ali Ahmad*(2). He cannot therefore be legitimated. See *Ashrufood Dowlah Ahmed Hossein* v. *Hyder Hossein Khan*(3): Wilson's Anglo-Muhammadan Law, p. 162 (3rd Edn.); Ameer Ali, Volume II, p. 256 (3rd Edn.); *Mahammad Azmat Ali Khan* v. *Lalli Begum*(4); *Sadakat Hossein* v. *Mahomed Yusuf*(5); Baillie's Mahomedan Law, p. 411; Huneefa, p. 414; *Dhan Bibi* v. *Lalon Bibi*(6).

G. S. Mulgaonkar for the respondent:—When a boy is born before marriage, he can be legitimated by acknowledgment, for there was a possibility of marriage between the parties at the time the boy was conceived. Refers to *Abdool Razack* v. *Aga Mahomed Jaffer*(7); *Liaqat Ali* v. *Karim-un-nissa*(8); *Aizunnissa Khatoon* v. *Karimunissa Khatoon*(9).

CHANDAVARKAR, J.:—It is found by the lower appellate Court that the second respondent, Miyasaheb *valad* Maulasaheb, who was defendant No. 4 in the suit, which has led to this second appeal, was acknowledged by Maulasaheb as his son, and that the acknowledgment fulfils all the requirements of, and is therefore valid according to, Mahomedan law. This latter finding as to the legal validity of the acknowledgment is impugned before us upon the ground that, on the facts found, the second respondent must be held to have been born of what in Mahomedan law is called *zina*, fornication or adultery, and that such a boy cannot, according to that law, be acknowledged as son.

The findings of the learned District Judge in appeal are not sufficiently clear. He holds upon the evidence that "even if

(1) (1888) 10 All. 289.
(2) (1888) 10 All. 396.
(3) (1866) 11 Moo. I. A. 94.
(4) (1881) 8 Cal. 422.
(5) (1883) 10 Cal. 663.
(6) (1900) 27 Cal. 801.
(7) (1893) L. R. 21 I. A. 56.
(8) (1893) 15 All. 396.
(9) (1895) 23 Cal. 130.

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Jainabi's husband was still living when the child was born, he had divorced his wife before that birth." But that leaves the question still open whether, at the time of conception, Jainabi had been divorced. On that point all the learned Judge says is that he "should not be prepared to hold the acknowledgment was invalid, even if it were proved that *at the time of conception* Maula was having adulterous intercourse with Jainabi."

It is, however, not necessary to send the case back for a finding on that question, because even upon the facts, so far found definitely, the acknowledgment cannot be legal, according to Mahomedan law.

Jainabi's marriage with Maulasaheb was subsequent to the birth of the second respondent. Whether at the time of conception, she was still the wife of her former husband, not having been divorced by him, or had ceased to be his wife by reason of divorce, the illegitimacy of the respondent in question is a proved fact in either case and he is a child born of *zina*, which includes both fornication and adultery.

In the Full Bench case of *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*[1] Straight, J., said (at p. 317) :—

"Birth during wedlock, that is to say, legitimate birth, necessarily confers a right to inherit; illegitimate birth, that is, without wedlock subsisting between the father and mother at the date of the child's begetting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another, who claims him as his son, according to the authorities I have quoted from, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category."

Mahmood, J., said (at p. 334) :—

"Children born of *zina* (which means fornication, adultery or incest) can never be legitimated or entitled to inherit from their father. Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a *proved and established* fact."

This view of the Mahomedan law has been followed in *Liaqat Ali* v. *Karim-un-nissa*[2] and *Dhan Bibi* v. *Lalon Bibi*[3]. See

(1) (1888) 10 All. 289. (2) (1893) 15 All. 396.
(3) (1900) 27 Cal. 801.

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also Mr. Ameer Ali's Personal Law of Mahommedans, Volume II, Edition of 1908, page 256.

The decree appealed from must be reversed and that of the Subordinate Judge restored with costs throughout on the respondents.

Decree reversed.

R. R.

APPELLATE CIVIL.

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

1909. *August* 11.

BHIMAPPA *bin* TAMAPPA (ORIGINAL OPPONENT 10), APPLICANT, *v.* KHANAPPA *alias* VENKAPPA *bin* HANMAPPA AND ANOTHER (ORIGINAL APPLICANT AND OPPONENT 9), OPPONENTS.*

Curator's Act (XIX of 1841), sections 3, 4 and 14—Oath's Act (V of 1840)—Death of representative Vatandar—Deceased's widow representative Vatandar—Death of the widow—Application by the nearest heir of the deceased male Vatandar for possession—Six months, calculation of—Property claimed by right 'in succession'—Inquiry upon solemn declaration—Affidavit upon solemn affirmation.

One Kotrappa, representative Vatandar of Deshagat Vatan, died in 1892. His widow Basawa was entered on the Vatan Register as representative Vatandar and she held the Vatan property until her death in 1907. Within six months of Basawa's death, Khanappa, who claimed to be the nearest heir of Kotrappa, applied for possession of the property under the Curator's Act (XIX of 1841) and the Judge granted his application. One of the opponents to the application thereupon moved the High Court under the extraordinary jurisdiction contending that,

(1) Under section 14 of the Curator's Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the date of the application, and

(2) In granting the application the Judge did not follow the procedure which is made imperative by the words of section 3 of the Curator's Act (XIX of

* Application No. 61 of 1909 under the extraordinary jurisdiction.