

arising out of an intestacy, so I think that in substance also the suit does not come under Article 123. We have here the very common case of Mahomedans who succeed to the property of a deceased relative, and by agreement amongst themselves instead of distributing that property by shares, hold it in common. They are entitled under our law to do this. They are not under an obligation to at once divide the property according to their shares. They can hold, and continue to hold, it in common, and having done so they hold it under an agreement. They can continue to do so for an indefinite period, but when they wish they can put an end to this common holding, and ask that there shall be a partition. The ground for asking for a partition in such a case is not that described in Article 123, but it is that one of the parties to the agreement by which hitherto they have held the property in common desires to put an end to that agreement and have the property partitioned. When he desires to do that he has a right to come to the Court to get the Court to do it for him. I think, therefore, the decision that this suit was barred by time was wrong and a preliminary decree for partition should be made as proposed.

1920.

KALLAN-  
GOWDA  
v.  
BIBISHAYA-

*Decree reversed*

J. G. R.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and  
Mr. Justice Heaton.*

MIR ISUB WALAD MIR INUS MALCHIKAR (ORIGINAL DEFENDANT No. 2),  
APPELLANT v. ISAB AND OTHERS, HEIRS OF THE DECEASED SHABAJI WALAD  
BAWASAHEB BALBALE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPON-  
DENTS\*.

1920.

January 12.

*Mahomedan Law—Widow as sole heir—Share taken by her—Return—  
Escheat.*

\* Second Appeal No. 511 of 1917.

1920.

Mrs ISUB  
v.  
ISAB.

Where a Mahomedan dies leaving a widow as his sole heir the widow will take one-fourth as her share and the remaining three-fourth by Return. The surplus three-fourth does not escheat to the Government.

*Bafatun v. Bilaiti Khanum*<sup>(1)</sup>, referred to.

SECOND appeal against the decision of T. R. Kotwal, Assistant Judge at Ratnagiri, confirming the decree passed by N. K. Mastakar, Subordinate Judge at Devgad.

Suit to recover possession.

The property in suit was owned in equal shares by two brothers Abdulla and Allisaheb who were Sunni Mahomedans. Abdulla died in 1888 leaving two widows Jamalbi and Latifa (who died in 1907) and his brother Allisaheb. On Abdulla's death, his widows took two annas out of his eight anna share and Allisaheb took six annas.

Allisaheb died in 1897 leaving a widow Amina who succeeded according to Mahomedan law to the fourteen annas share of her husband. Amina died in 1913.

The plaintiffs as the cousins of Amina sued to recover her fourteen annas share which was held by defendant No. 1, Jamalbi kom Kazi Abdulla.

Defendant No. 1 remained absent.

Defendant No. 2 who claimed as purchaser from Defendant No. 1 contended *inter alia* that Amina got one-fourth out of fourteen annas on Allisaheb's death and the remaining ten annas and six pies shafes went to Jamalbi as distant kindred; that one-third share of Amina was held by defendant No. 1 by virtue of a will executed by her husband, and that two-third of the plaint property had been held by him for more than

<sup>(1)</sup> (1903) 30 Cal. 683.

twelve years adversely to those under whom the plaintiffs claimed.

The Subordinate Judge overruling the defendants' contention allowed the plaintiffs to recover fourteen annas share as claimed by them.

On appeal, the Assistant Judge confirmed the decree.

Defendant No. 2 appealed to the High Court.

*N. V. Gokhale*, for the appellant.

*B. G. Rao* for *G. S. Rao*, for respondent No. 2.

MACLEOD, C. J.:—In this case Abdulla and Allisaheb were two Sunni Mahomedans who owned certain property as heirs of their father in equal shares. Abdulla died in 1888 leaving two widows, Jamalbi and Latifa, and his brother Allisaheb. Under Mahomedan law the widows would take two annas out of Abdulla's eight annas. Allisaheb would take six annas. Allisaheb died in 1897 leaving a widow Amina. She would succeed according to Mahomedan law to the fourteen annas of her husband. It has been argued that she would only be entitled to one-fourth of her husband's estate and in the absence of sharers, residuaries and distant kindred the three-fourths would escheat to the Crown. That is not Mahomedan law as we understand it. I may refer to Mulla's Mahomedan Law, 5th Ed., where the author deals in a simple manner with the doctrine of "Return". In the illustration of a Mahomedan dying leaving a widow as his sole heir, he says, the widow will take one-fourth as share and the remaining three-fourths by "Return". The surplus three-fourths does not escheat to the Government. He refers to *Mahomed Arshad Chowdhry v. Sajida Banoo*<sup>(1)</sup> and *Bafatun v. Bilaiti Khanum*<sup>(2)</sup>.

<sup>(1)</sup> (1878) 3 Cal. 702.

<sup>(2)</sup> (1903) 30 Cal. 683.

1920.

MIR ISUB  
v.  
ISAB.

It is obvious, therefore, that the defendant's contention cannot be sustained, and the plaintiff succeeds to the fourteen annas as the heir of Amina. The appeal is dismissed with costs.

*Appeal dismissed.*

J. G. R.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.*

1920.

January 13.

RAMCHANDRA RAGHUNATH SHIRGAONKAR (ORIGINAL PLAINTIFF),  
APPELLANT. v. VISHNU BABAJI HINDALEKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Landlord and tenant—Agricultural lease—Annual tenancy—Tenant building on a portion of the land to the knowledge of landlord—Suit in ejectment—Tenant bound to vacate—Landlord bound to compensate in equity for tenant's building.*

The defendant was for a number of years in occupation of plaintiff's land as an annual tenant. On a portion of the land, the defendant in 1832 erected a building to the knowledge of the plaintiff. The plaintiff after giving notice sued to eject the defendant in 1914 and prayed that the land be restored to him by removing the defendant's building. The trial court ordered the plaintiff to get possession on paying Rs. 2,000 to the defendant. The appellate Court reversed the decree on the ground that the defendant being allowed without objection to build on a portion of the land, the agricultural lease for a year had become a building lease. On appeal to the High Court,

*Held*, restoring the decree of the trial Court, that the plaintiff was entitled to get vacant possession at the expiration of the defendants' term of tenancy, but on the facts of the case he was in equity bound to compensate the defendant for retaining his building.

SECOND appeal against the decision of T. R. Kotwal, Assistant Judge at Ratnagiri, reversing the decree passed by Abraham Issac, Joint Subordinate Judge at Malwan.

Action in ejectment.

\* Second Appeal No. 160 of 1918.