

rule 63, apply. The Appeal must therefore be dismissed with costs of tenth to thirteenth respondents.

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RAMESAM, J.—I agree and have nothing to add.

RAMESAM, J.

K.R.

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## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Ramesam.*

P. S. NARAYANA AYYAR (THIRD DEFENDANT), APPELLANT,

1921,  
September  
8.\*

v.

BIYARI BIVI AND OTHERS (PLAINTIFF AND FIRST AND SECOND DEFENDANTS), RESPONDENTS.\*

*Muhammadian Law—Dower—Wife in possession of her husband's property during his life-time—Undivorced wife's right to lien during her husband's life-time—Civil Procedure Code (Act V of 1908), sec. 64—Attachment of judgment-debtor's property—Subsequent decree on award—Submission to arbitration by judgment-debtor and another—Decree on award affecting attached property—Transfer under decree whether void under sec. 64, Civil Procedure Code—Private transfer.*

Under the Muhammadian Law, a wife, who has not been divorced from her husband, has, during his life-time, no lien for her unpaid dower over his property in her possession.

*Abi Dhunimsa Bibi v. Muhammad Fathi Uddin*, (1918) I.L.R., 41 Mad., 1026, explained.

Where, subsequent to an attachment of property of a judgment-debtor, a decree was passed in accordance with an award made on a reference to arbitration submitted to by the judgment-debtor and another person, and it appeared that such submission, award and the decree thereon were not a collusive proceeding resorted to for investing a private arrangement with the appearance of a public adjudication.

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\* Appeal No. 184 of 1920.

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*Held*, that the decree embodying the award was not a private transfer which could be treated as void under section 64, Civil Procedure Code.

*Qurban Ali v. Ashraf Ali*, (1887) I.L.R., 4 All., 219 (F.B.); and *Kasi Viswanatham Chettiar v. Ramaswami Nadar*, (1918) 35 M.L.J., 441, referred to.

APPEAL against the decree of P. VENKATARAMA AYYAR, Temporary Subordinate Judge of Madura, in Original Suit No. 14 of 1918 (Original Suit No. 111 of 1917 on the file of the Court of the Subordinate Judge of Madura).

In execution of a money decree obtained by the first defendant against the second defendant, the suit properties were attached on 11th December 1914. A claim petition was put in by the plaintiff, who was the wife of the second defendant; the claim was disallowed and the plaintiff instituted the present suit against the above defendant as well as the auction-purchaser, the third defendant, for a declaration of her right to the property. The plaintiff claimed an interest in the property under a decree passed in accordance with an award on a reference to arbitration which was held at the instance of both herself and her husband in the matter of an agreement, Exhibit A-3 (30th May 1909), which was unregistered, in respect of her unpaid dower and other matters. The submission was under Exhibit J, dated 30th November 1915, the award being Exhibit J-1, dated 29th January 1916, and the decree in accordance therewith being J-3, dated 5th January 1917. The Subordinate Judge held that the plaintiff was entitled to a charge for two lakhs of rupees, in respect of her dower, over the suit properties under the decree passed on the award, and that the sale to the third defendant in execution of the first defendant's decree was subject to the said charge. The third defendant preferred this Appeal.

*The Advocate-General (C. P. Ramaswami Ayyar) and K. Jagannatha Ayyar* for the appellant.—The attachment was prior to the submission to arbitration, the award and the decree in accordance with the award. The submission and the award are invalid against the claims enforceable under the attachment: see section 64, Civil Procedure Code. The contract, previous to the attachment, was one for sale; the arbitration and award were subsequent to the attachment. The award was to give a charge until the contract was performed. Even if a contract prior to attachment is not affected by the attachment, still a contract substituted for the original contract, that is, a charge in place of sale under the contract, is not protected by the supposed rule. *Kasi Viswanatham Chettiar v. Ramaswami Nadar* (1) is distinguishable, as the sale was in pursuance of the contract. The following cases were referred to and distinguished: *Qurban Ali v. Ashraf Ali* (2); *Chamiyappa Traragan v. Rama Ayyar* (3); *Obai Goundan v. Ramalinga Aiyar* (4); *Tuljaram v. Alagappa* (5); *Chandradaya v. Bhagaban* (6); *Venkata Reddi v. Yellappa Chetty* (7). There is no charge under Exhibit J-3 after possession is given to the plaintiff after paying off the lessee.

*K. Raja Ayyar, K. S. Vaikuntam Ayyar and M. Krishna Bharati* for respondent.—Attachment puts property in *custodia legis* and only private alienations by the judgment-debtor are prohibited by section 64, Civil Procedure Code. If contract is prior to attachment, performance of the contract after attachment is valid.

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(1) (1915) 35 M.L.J., 441.

(2) (1882) I.L.R., 4 All., 219 (F.B.).

(3) (1921) I.L.R., 44 Mad., 232.

(4) (1898) 8 M.L.J., 256.

(5) (1911) 21 M.L.J., 1 (F.B.).

(6) (1916) 23 C.L.J., 125.

(7) (1917) 5 L.W., 234.

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If it is a sale under an award, it is *a fortiori* valid. If a sale is valid, a charge for the same amount is also valid. The award gives a charge for dower as under the Muhammadan Law: see *Beeju Bee v. Syed Moorthiya Sahab*(1); Mulla's Muhammadan Law, pages 154, 217, 218, 223 to 225. Wife has a lien for dower on her husband's property lawfully in her possession, even during his life-time.

There is no authority that the wife's lien for dower over her husband's property does not exist in her husband's life-time: see Tyabji's Muhammadan Law (Second Edition), pages 182, 187, page 193, paragraph 11, *Abi Dunimsa Bibi v. Mahammad Fathi ud din*(2), *Meer Meher Ally v. Mussamat Amanee*(3), *Syud Imdad Hossein v. Musumat Hoseinee Buksh*(4), *Hamira Bibi v. Zubaida Bibi*(5), *Amanat-un-nissa v. Bashir-un-nissa*(6), *Reference under Act I of 1879*(7).

The decree should be construed in the light of the award: see *Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty*(8). An award is itself a judgment, and here there is further a decree of Court: the transaction effected by the award and decree is not a private transfer and is not hit at by section 64, Civil Procedure Code. The following cases show what are private alienations: *Anand Chandra Pal v. Panchlal Sarma*(9); *Venkatasami Naidu v. Gurusami Aiyar*(10); *Raghunath Das v. Sundar Das Khetri*(11); *Pethu Ayyar v. Sankaranarayana Pillai*(12); *Sadayappa v. Ponnama*(13); *Laldas v. Bai Lala*(14); *Krishna Pattar v. Alamelu*

(1) (1920) I.L.R., 43 Mad., 214 (F.B.).

(3) (1869) 11 W.R., 212.

(5) (1916) I.L.R., 38 All., 581 (P.C.).

(7) (1895) I.L.R., 17 All., 211 (F.B.), 271.

(9) (1870) 5 B.L.R., 691 (F.B.).

(11) (1915) I.L.R., 42 Calc., 72 (P.C.).

(13) (1885) I.L.R., 8 Mad., 554.

(2) (1918) I.L.R., 41 Mad., 1026.

(4) (1870) 2 N.W.P. H.C.R., 327.

(6) (1895) I.L.R., 17 All., 77.

(8) (1912) I.L.R., 35 Mad., 75.

(10) (1920) 38 M.L.J., 441.

(12) (1917) I.L.R., 40 Mad., 955.

(14) (1909) 11 Bom. L.R., 20.

*Ammal*(1). Plaintiff is entitled to a charge; if sale under the award and decree is valid, a charge in place of sale is *a fortiori* valid.

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*K. Jagannadha Ayyar* in reply.—Under the Muhamadan Law the respondent has no right to retain possession nor has she a lien on her husband's property during his life-time. There is no text of Muhamadan Law to that effect. Under the decree, she has no charge: the decree is clear and should not be construed by looking at the award: the decree is at variance with the award; decree ought to be and has not been amended. As the decree stands, the respondent has no charge for her dower.

The Court delivered the following JUDGMENT:—

The decision appealed against gives plaintiff a charge for two lakhs of rupees on the properties purchased by third defendant, appellant, at a sale held in execution of first defendant's money decree against second defendant, after the dismissal of plaintiff's claim.

The nature and extent of plaintiff's right over the properties depends on the effect of a series of transactions originating in the liability of second defendant, her husband, for mahar settled at £22,500 when their marriage took place in 1884. This liability is referred to in exhibits E and F and is not disputed before us, although those documents are not registered and may not effect the security for its satisfaction, to which they refer. This attempt to provide security was due to second defendant becoming indebted; and in 1909 he further gave Exhibit A, undertaking (1) to repay to plaintiff a loan taken for the discharge of his debts within five

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years from the income of the properties, which had fallen to him as his share under the partition, Exhibit G, and (2) to sell her at the end of five years those properties for two lakhs of the mahar debt or to give her possession thereof, apparently as security for that sum. This document also was unregistered and therefore was valid only as an agreement to sell. On this the loan was, as Exhibits H series and K show, advanced; but nothing was done in pursuance of the provision for sale or delivery and on 11th December 1914, the properties were attached by first defendant. Second defendant, however, in defiance of his obligations under Exhibit A and the attachment, gave a lease for three years, Exhibit B, for an advanced rent of Rs. 7,500 to P.W. 1 and another; and this was followed within two months by a reference on the part of plaintiff and second defendant to arbitrators of the differences, which, according to the muchilika, Exhibit J, had arisen between them, the arbitration ending in an award, Exhibit J-1, which was made a decree of Court, Exhibit J-3. It is with the effect of Exhibit J-3 that we are concerned, its terms being that (1) second defendant should within, one month, execute a sale-deed conveying to plaintiff the properties referred to in Exhibit A or that in case of his default the Court should execute one on his behalf, (2) he should borrow Rs. 7,500 from plaintiff, repay the lessee under Exhibit B the amount received from him and then put plaintiff in possession of the properties which, until he did so, should be charged with two lakhs of rupees for her benefit, (3) he should repay the plaintiff within two years another amount already borrowed on pro-note.

In pursuance of this the lease Exhibit B was terminated and plaintiff alleges that she was put in possession of the properties, her claim was made and dismissed and third defendant purchased at the sale,

which followed. In her suit plaintiff asked generally for a decree vacating the order on her claim and declaring that the properties were not liable to be sold. But the lower Court refused the latter relief on the ground that she had not perfected her right by obtaining a sale-deed; and it is not suggested on her behalf that this refusal was wrong. The question is only whether the lower Court was entitled to grant her a charge for two lakhs on the property.

The charge it allowed was not created by Exhibit A, which was unregistered, and therefore it must be supported, if at all, as created by Exhibit J-3. That decree was, however, passed after the attachment of the property; and it is argued with reference to section 64, Civil Procedure Code, that as the award, which it embodied, resulted from the consent of plaintiff and second defendant to a reference to arbitration, it must be regarded as a private transfer of the property attached or, consistently with plaintiff's case, of an interest in it and as void against third defendant's claim, which is enforceable under the attachment. It is not necessary to consider whether a decree embodying an award can be so regarded, in case it is proved that the reference to arbitration was collusive and the whole proceedings a device to invest a private arrangement between the parties with the appearance of a public adjudication. For the learned practitioners, who appear for third defendant, have expressly disclaimed any intention to attack the lower Court's finding that the contrary was the case. And then in accordance with *Qurban Ali v. Ashraf Ali*(1) and *Kasi Viswanatham Chettiar v. Ramaswami Nadar*(2), the former being a decision of a Full Bench and proceeding on general principles, not on any of the particular

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(1) (1882) I.L.R., 4 All., 219 (F.B.).

(2) (1918) 35 M.L.J., 441.

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facts before the Court, we must hold that a decree such as Exhibit J-3, which embodies an award, is not a private transfer, which can be treated as void under section 64.

Plaintiff has, however, still to establish that the charge she is claiming is created by Exhibit J-3. The lower Court held that she did so on the ground that, as her claim to two lakhs, as part of her mahar, was in fact accompanied by possession of the suit properties, she had under Muhammadan Law a lien on them and a right to retain possession until that mahar debt was discharged. It referred in support of this to Mulla's Principles of Muhammadan Law, 4th Edition, 206, 207; and before us the dictum of SESHAGIRI AYYAR, J., in *Abi Dunimsa Bibi v. Mahammad Fathi ud din*(1) that "a Muhammadan wife has a lien over the property of her husband in her possession for unpaid dower," has been relied on. But this contention rests on a misapprehension, due perhaps to indiscriminate use by the learned author and the learned Judge just referred to of the term "wife" to denote both a divorced wife and a widow, since the law recognizes such a lien as that now claimed in both of these cases. We have not however been shown that the right of the wife to a lien before dissolution of her marriage is recognized by any authority; and in fact the context of the learned Judge's dictum with its references to "the estate of the deceased husband" and to two cases, in which only a widow's possession of such an estate was in question, shows that he had no such extension of this well-defined doctrine, as plaintiff requires, in mind. This failing, it is necessary to consider her claim, as it is put forward before us, with direct reference to the terms of Exhibit J-3.

(1) (1918) I.L.R., 41 Mad., 1026.



One term relied on provides that "defendant (here second defendant) shall, after paying the lessees and redeeming the lease, put the plaintiff in possession of the properties covered by it and till then the properties shall be under a mortgage charge for Rs. 2,00,000." This is the only provision for a charge and in fact the decree directs elsewhere as regards the mahar generally that plaintiff is entitled to it during second defendant's lifetime, only when he pays it of his own accord; and it is therefore on this term, if at all, that plaintiff can succeed. Read as it stands, it provides for a charge to continue only until plaintiff is given possession, as she was shortly after Exhibit J-3 was passed; and, if so, it had ceased to be operative before the present suit began and no claim to relief therein can be founded on it. Plaintiff, however, contends that the words "till then" cover, not only the contingency specified in their immediate context, but also the performance of the other obligation imposed on second defendant in the preceding portion of the decree, the execution within a month of a sale-deed, and further that this interpretation is in accordance with the award in the terms of which the decree is drawn up. The answer is firstly that the words "till then" can most naturally be read in connexion with the contingency, the transfer of possession, referred to in the distinct clause in which they stand, and that after that transfer, when plaintiff would be in enjoyment of the property, the right to a charge would be useless, since it would not assist her to obtain performance of second defendant's remaining obligation, the giving of a sale-deed, her remedy by execution being available. And secondly, although it is true, that for some purpose, which is obscure, Exhibit J-2, the award, provides in clause 9 (b) in accordance with plaintiff's contention for a charge "for a period extending from this day to the date of

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the completion of the said sale," we are not at liberty to import those words into a decree, which is easily intelligible in itself and without them, which was passed at plaintiff's own instance, against which she did not appeal and which had become final in its present form, before third defendant made his purchase.

The grounds, on which plaintiff claims a charge, being unsustainable, the appeal must be allowed and her suit must be dismissed with costs in both Courts.

*Brightwell and Moresby*, Solicitors for appellant.

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