APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Abdur Rahman.

SHEIK MUHAMMAD ROWTHER AND ANOTHER (DEFENDANTS), APPELLANTS,

1937, August 19.

v.

AYEESHA BEEVI (PLAINTIFF), RESPONDENT.*

Muhammadan law—Dower—Prompt or deferred—Rule of law in Madras Presidency—Presumption—Express stipulation—Absence of.

As regards the time for payment of dower, the rule of law in this Presidency is that unless the whole or any part of the dower is expressly postponed, it must be presumed to be prompt and payable on demand. The Full Bench decision in *Masthan Sahib* v. *Assan Bivi Ammal*(1) which laid down this rule of law intended that it should govern all classes of Mahomedans, whether Shias or Sunnis.

APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 59 of 1932 preferred against the decree of the Court of the District Munsif of Palni in Original Suit No. 431 of 1931.

The second appeal originally came on for hearing before VENKATARAMANA RAO J. when his Lordship made the following

ORDER :—

Three points have been argued by Mr. Rajah Ayyar in this second appeal, one relating to a question of fact and the other two relating to questions of law. The question of fact relates to the genuineness of Exhibit F, which is the document on which the suit claim for dower is based. There is a concurrent finding of both the Courts that Exhibit F is genuine, and it is not open to Mr. Rajah Ayyar to challenge it in second appeal.

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* Second Appeal No. 343 of 1933.

(1) (1900) I.L.R. 23 Mad. 371 (F.B.).

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The second point urged before me is that, as the contract, Exhibit F, does not fix any time for payment of the dower and as the parties are governed by Hanafi law, part of the dower must be presumed to be prompt and part deferred, and that the view of the lower Court following *Husseinkhan Sardarkhan* v. *Gulab Khatum*(1) is not correct. It is admitted that the parties to this suit are Hanafis. The text-writers on Muhammadan law seem to make a distinction between the Shia law and the Hanafi law in regard to the payment of dower where the contract does not fix the time for payment. In Shia law the presumption seems to be that, in the absence of a contract fixing the time for payment, the dower is prompt and payable on demand; but in Hanafi law the presumption seems to be otherwise. In *Mussammat Bibi Mahbooban* v. *Sheikh Muhammad Ammeruddin*(2) DAS J. states the rule of law thus: "It seems to be well settled that amongst the Sunnis, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of dower settled." According to the learned Judge, the presumption will apply even in a case where an agreement is set up but is not substantiated. This seems to be the view also of the Allahabad High Court in *Umda Begam* v. *Muhammadi Begam*(3). But Mr. Panchapagesa Sastri contends that so far as this Presidency is concerned no such distinction is drawn between Shia law and Hanafi law and that the Full Bench in *Masthan Sahib* v. *Assan Bivi Ammal*(4) must be deemed to have laid down the law for all Muhammadans. According to the said decision, unless payment of the whole or any part is expressly postponed, it must be presumed to be prompt and payable on demand. It is not clear, from the judgment or from a reference to the printed papers, whether the parties were Shias or Sunnis. In the argument of Mr. K. Srinivasa Ayyangar for the appellant before the Full Bench there is a statement to the effect that he contended that the parties were Shias. At any rate, both the Allahabad and the Patna High Courts are inclined not to treat that case as laying down any rule of Hanafi law but that

(1) (1911) I.L.R. 35 Bom. 386.
(2) (1929) I.L.R. 8 Pat. 645, 649.
(3) (1910) I.L.R. 33 All. 291.
(4) (1900) I.L.R. 23 Mad. 371 (F.B.).

the principle of that decision must be confined to Shias. I may observe that the decision in *Masthan Sahib* v. *Assan Bivi Ammal*(1) purports to follow a decision of the Privy Council in *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*(2) where the parties were Shias. It is not clear from the Full Bench decision whether it is intended to govern all classes of Muhammadans, whether Shias or Hanafis. In view of the decisions of the Allahabad and Patna High Courts which have taken a definite view on this matter, it is desirable that there should be an authoritative ruling whether the decision of the Full Bench in *Masthan Sahib* v. *Assan Bivi Ammal*(1) was intended to lay down the law for all Muhammadans, whether Shias or Sunnis. I accordingly refer the matter to a Bench for disposal.

The other point raised by Mr. Rajah Ayyar relates to the question of interest. This matter also will be disposed of by the Bench dealing with the second appeal.

The second appeal came on for hearing, in pursuance of the aforesaid order of reference, before the Bench constituted as above.

ON THE REFERENCE—

K. Rajah Ayyar for appellants.

S. Panchapagesa Sastri for respondent.

Cur. adv. vult.

JUDGMENT.

BURN J. BURN J.—The facts are all set forth in the judgment of my learned brother which I have had the advantage of perusing. Since I agree with his conclusions, it is not necessary for me to say more than a few words upon the subject for decision in this appeal.

The point upon which our learned brother VENKATARAMANA RAO J. felt some doubt was whether the Full Bench in disposing of the case,

(1) (1900) I.L.R. 23 Mad. 371 (F.B.). (2) (1873) 19 W.R. 315 (P.C.).

SHEIK MUHAMMAD v. AYESHA BEEVI.

BURN J.

Masthan Sahib v. *Assan Bivi Ammal*(1), intended to lay down the law for all Muhammadans whether Shias or Sunnis. If it did, there is no question about the binding nature of the decision so far as we are concerned, and since the decision is now thirty-seven years old, I should be very reluctant to suggest that it requires reconsideration, whatever the nature of the decisions in other Provinces might be.

I do not think there is any room for doubt upon this matter. The order of reference to a Full Bench, which gave occasion for the decision reported as *Masthan Sahib* v. *Assan Bivi Ammal*(1), states simply that the parties were "Muhammadans". It goes on to state that this Court in the case of *Tadiya* v. *Hasanebiyari*(2) in 1870 held that "*according to Muhammadan law* dower is presumed to be prompt in the absence of express contract". The ground of this decision was stated to be that "the authorities agreed that there was a *presumption of Muhammadan law* to this effect". Later in the order of reference the learned Judges draw attention to Ameer Ali's work on Muhammadan law in which a distinction is made between the Shia law and the Hanafi doctrines. Nevertheless in the *opinion* delivered by the Full Bench there is no reference to any difference between Hanafi doctrine and Shia doctrine. It cannot be presumed that the learned Judges overlooked the reference to Ameer Ali's work and the only conclusion I can draw from their opinion is that they deemed themselves to be laying down the law for all Muhammadans irrespective of sect.

(1) (1900) I.L.R. 23 Mad. 371 (F.B.). (2) (1870) 6 M.H.C.R. 9.

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There is undoubtedly a divergence of view between Macnaghten and Baillie in those parts of their treatises in which they were propounding the principles of *Hanafi* law. There was not I believe at any time any question about Shia doctrine on this point. According to Shia law, the whole dower is prompt when the contract is silent. I agree with my learned brother that the remarks attributed to Mr. K. Srinivasa Ayyangar in the report of his argument in *Masthan Sahib* v. *Assan Bivi Ammal*(1), "These parties are Shiahs", must be the result of incorrect reporting. If the parties had been Shias the contention put forward on their behalf could never have arisen. Macnaghten and Baillie differed. This Court in *Tadiya* v. *Hasanebiyari*(2) (which was a case affecting Shafis, i.e., Sunnis) followed Macnaghten in preference to Baillie and their Lordships of the Privy Council in *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*(3) expressed the opinion that the view laid down in Macnaghten's Principles was "the admitted rule". I am quite clear that we should do nothing now to indicate any doubt about the correctness of the decision in *Masthan Sahib* v. *Assan Bivi Ammal*(1).

On the question of interest no sufficient reason was shown for interference with the decree of the lower Court.

The appeal must be dismissed with costs.

ABDUR RAHMAN J.

ABDUR RAHMAN J.—This appeal arises out of a suit brought by one Ayeesha Beevi for the recovery of her dower amounting to Rs. 2,000 and for

(1) (1900) I.L.R. 23 Mad. 371 (F.B.). (2) (1870) 6 M.H.C.R. 9.
(3) (1873) 19 W.R. 315 (P.C.).

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subsequent interest. The suit was filed on the basis of a deed of dower which was silent on the point whether the dower was prompt or deferred. It was alleged on behalf of the plaintiff, however, that as the deed was silent on the point, the dower should be presumed to be prompt and in any case there was a communal custom prevailing to that effect in the Nallampillai community. In answer to this claim, her husband, the second defendant, pleaded that the deed filed on behalf of the plaintiff was a forgery and that a sum of 2,000 tangas only and not Rs. 2,000 (a tanga being one-third of a rupee) was fixed as dower between the parties and was so entered in a document which had also provided that the whole of the dower was deferred in character. It was also pleaded that the aforesaid dower of 2,000 tangas, i.e. Rs. 667, was, although deferred, already paid to the plaintiff. In the alternative it was pleaded that the plaintiff was not entitled to recover any mahar during the continuance of the Nikah and that there was no custom which would entitle her to claim it before dissolution of marriage.

Finding that the plea of payment raised on behalf of the defendants was not substantiated and that the deed of dower relied upon by the plaintiff was a genuine document, the trial Court did not give an explicit finding on the custom alleged on behalf of the plaintiff but referring to the question of law it stated that the view taken by the Bombay High Court was probably the more correct view. It therefore found that the whole of the dower was payable on demand and decreed the claim.

Aggrieved by this decree the defendants filed an appeal to the Subordinate Judge at Dindigul who went into the questions of fact carefully but disposed of the question of law with a statement that according to the Bombay High Court, if the document was silent on the point when the dower was to be paid, it should be taken to be payable at once.

Not being satisfied with the decrees of the trial and the lower appellate Courts, the defendants came up to the High Court. The appeal was heard in the first instance by my learned brother VENKATARAMANA RAO J. who came to the conclusion that the genuineness of the deed of dower could not be challenged in the second appeal. But, in view of a Full Bench decision of this Court reported as *Masthan Sahib* v. *Assan Bivi Ammal*(1) which followed a decision of the Privy Council in *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*(2) on the one hand, and the divergent views taken particularly by the High Courts of Allahabad and Patna in *Umda Begam* v. *Muhammadi Begam*(3) and *Mussammat Bibi Mahbooban* v. *Sheikh Muhammad Ammeruddin*(4) on the other, he considered it desirable to refer the case for an authoritative ruling and the case has consequently been sent to a Bench of this Court for disposal. This was done particularly as some doubt existed on the question whether the Madras Full Bench case and the Privy Council case, both of which have been cited above, intended to lay down the law for all

(1) (1900) I.L.R. 23 Mad. 371 (F.B.). (2) (1873) 19 W.R. 315 (P.C.).
(3) (1910) I.L.R. 33 All. 291. (4) (1929) I.L.R. 8 Pat. 645.

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Muhammadans whether of Shia or Sunni pursuasion or only for Muhammadans of the Shia sect. This doubt was natural as the Privy Council decision was given in the case of certain members of the ruling house of Oudh who were Shias and, although there was nothing in the records of the Madras Full Bench case of *Masthan Sahib* v. *Assan Bevi Ammal*(1) to show that the parties were Shias, a statement has been printed as having been made by Mr. K. Srinivasa Ayyangar, Counsel for the appellant, that the parties to that suit were Shias. This is surprising as this statement is preceded by the words: "Syed Ameer Ali in his work on 'Muhammadan Law', Vol. 11 at page 386, draws a distinction between Shias and Hanafis." If the Counsel for the appellant in that case were alive, as he must have been, to the distinction pointed out by Syed Ameer Ali, which laid down that under the Shia law, where no time was specified for the payment of the dower or where its nature was described only in general terms and it was not mentioned in the contract of marriage how much was prompt and how much deferred, the whole was to be considered as prompt, Mr. Srinivasa Ayyangar was contending for the appellant in that case that the dower in Muhammadan law, if not specified to be prompt, could not be presumed to be so. He is then stated to have cited in support of his contention the following words out of Baillie's Digest of Muhammadan Law:

"When the parties have explained how much of the dower is to be Moojjul or prompt, that part of it is to be promptly paid. When nothing has been said on the subject

(1) (1900) I.L.R. 23 Mad. 371 (F.B.)

both the women and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman and so much is to be Mooujjul or prompt, accordingly, without any reference to the proposition of a fourth or a fifth but what is customary must also be taken into consideration."

If the parties to the suit were on the other hand Shias, Baillie's Digest of Muhammadan Law, Vol. I, which deals with the law amongst Sunnis, would not have been quoted at all particularly when the Counsel had, as pointed above, admittted that in the case of Shias, the presumption would be otherwise. It might be stated here that Baillie discusses the Imamea law in the second volume of his work.

The contention that Mr. Srinivasa Ayyangar could not have made such a statement in *Masthan Sahib* v. *Assan Bivi Ammal*(1) was also supported by the Counsel for the respondent by a reference to Wilson's Muhammadan Law, who has pointed out that an admission of that nature would have been fatal to the appellant's case (pages 118, 119—5th Edition). I have gone through the records of the case of *Masthan Sahib* v. *Assan Bivi Ammal*(1) and find nothing there which would show that the parties to the suit were Shias. In view of what has been said, I have no hesitation in finding that the statement imputed to Mr. Srinivasa Ayyangar to the effect that the parties to that suit were Shias and printed at page 375 of the case of *Masthan Sahib* v. *Assan Bivi Ammal*(1) could not have been made by him. On the other hand, a reference to the other authorities which were cited by the Division Bench in referring the case

(1) (1900) I.L.R. 23 Mad. 371 (F.B.).

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to the Full Bench for decision and those which were cited before the Full Bench leads me to conclude that the Full Bench was dealing with a case between persons who were of Sunni persuasion and not those who followed the Imamea law.

As for the decision given by their Lordships of the Privy Council in *Mirza Bedar Bukht's* case(1), it is true that the parties to that suit must be presumed to have been Shias as the ruling family of Oudh was a Shia family. But a reference to the judgment in that case shows that their Lordships of the Judicial Committee did not, while considering this question, refer to Shia texts but to those which were applicable to Sunnis. There is nothing to show in fact that they intended to differentiate between the two schools of thought. The observations which they made in that case were wholly general in character. It would thus follow that the Full Bench case reported as *Masthan Sahib* v. *Assan Bivi Ammal*(2) is binding on us and is really based on the observations made by their Lordships of the Privy Council in *Mirza Bedar Bukht's* case(1), in which they preferred to follow the law as laid down in Macnaghten's Principles and Precedents, Chap. VII, *vide* article 22, to the effect that

> "where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand".

Had the Full Bench case not been based on the law laid down by the Privy Council, it would have been necessary to consider whether, in view of the pronouncements of the learned Judges of the Allahabad and Patna High Courts

(1) (1873) 19 W.R. 315 (P.C.). (2) (1900) I.L.R. 23 Mad. 371 (F.B.).

based as they are on the dicta of learned authors like Baillie and Ameer Ali, it would not be advisable to refer the case to another Full Bench. But in view of the conclusions arrived at by me, I do not feel called upon to do so. Moreover, while examining the original authorities referred to by Ameer Ali and Baillie, I came across an original text from Hammadeyah—a work of great authority and fully recognised to be so amongst the Sunni Mussalmans in India—in which the position of the law has been stated as described by Macnaghten in his Principles of Muhammadan Law. I find at page 89 of Vol. I of Hammadeyah (1825 Edn.) a passage which, rendered into English, would read as follows:—

"The dower is not free then from one condition and other. It would either be with a condition of immediate payment (i.e., Moojjil) or with a condition of its being deferred (Movajjal) or it may be silent. But if it is with a condition of immediate payment or is silent, it would become immediately payable (Muajjal) for it is a contract with consideration and is therefore required to be equal on both the sides. As the woman (wife) has established the husband's right, it is essential that he (husband) may establish hers and this would be established on payment."

The learned author then proceeds to refer to expressly deferred dower with which we are not concerned here.

It is true that Ameer Ali has based his opinion on Fatawa Alamgiri which relies for its authority on a passage from Fatawa Kazi Khan. I have consulted both these original authorities and find that the statement of the law as given by them has been correctly put down by Ameer Ali in his well-known work at page 499 (Vol. II) and by Baillie in his Digest at page 127 (1875 Edn.).

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ABDUR RAHMAN J.

But the fact remains that Hammadeyah lays it down differently and this view of law was propounded by Macnaghten and recognised by the Privy Council in *Mirza Bedar Bukht's* case(1) and followed subsequently by this High Court in *Masthan Sahib's* case(2).

This rule of law is more commendable as it makes it more exact and workable in practice and fits in with the advancing state of society which gives more rights to helpless ladies in getting what they do not generally get on account of their dower—a liability which flows from the contract of marriage and which was although generally discharged previously, yet from which the husbands have latterly tried to escape in spite of a contract of which they have taken full advantage themselves.

As in *Masthan Sahib's* case(2), the defendants in this case appear to have entertained the view themselves that the dower was payable on demand as, in spite of the plea that it was deferred, they pleaded payment of the whole sum and thus, as pointed out in *Masthan Sahib* v. *Assan Bivi Ammal*(2), showed their consciousness that it ought to have been so paid.

At all events it would be dangerous to go back upon or overrule decisions which are not manifestly erroneous. They have stood the test of time and must be deemed to have influenced a majority of Muhammadans living in this Presidency at least into a belief that if the character of dower is not specified, it would be taken to be prompt.

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(1) (1872) 19 W.R. 315 (P.C.). (2) (1900) I.L.R. 23 Mad. 371 (F.B.).

The question of interest was not seriously contested and there is no reason why the plaintiff should not get it at the rate allowed by the lower Court, when she has been deprived of the use of her dower for such a long time although it has been found to have been payable to her on demand.

For the reasons given I would dismiss the appeal with costs throughout.

A.S.V.

APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and Mr. Justice Madhavan Nair.

VARADA NARAYANA AYYANGAR (SECOND DEFENDANT), APPELLANT,

v.

VENGU AMMAL AND TWO OTHERS (PLAINTIFF AND DEFENDANTS 3 AND 4), RESPONDENTS.*

1937, September 30.

Hindu Law—Adoption—Testator giving strong directions in his will to his widow to adopt and appointing some executors to be in possession during minority of adopted son—Refusal of widow to adopt—Absence of right to compel her to adopt—Claim by her of estate in the hands of executors—Resistance by executors on the ground that she might change her mind—Illegality of.

A testator by his will directed his widow to adopt his nephew S and stated that if S's father refused to give his son in adoption she should adopt another boy. The will provided that the executors should remain in possession of the property during the minority of the adopted son, but on his attaining majority they should hand over the estate to him. The

* Appeal No. 38 of 1932.