APPELLATE CIVIL.

1877
August 14.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.)

EIDAN (DEFENDANT) *v.* MAZHAR HUSAIN (PLAINTIFF).*

Muhammadan Law—Dower—Conjugal rights—Act VI of 1871 *(Bengal Civil Courts' Act), s.* 24.

When a Muhammadan sues his wife for restitution of conjugal rights, such suit is to be determined with reference to Muhammadan law (1) and not with reference to the general law of contract. Under Muhammadan law, if a wife's dower is "prompt," she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her her dower, and that notwithstanding that she may have left his house without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband may have already cohabited with consent since their marriage. *Abdool Shukkoar* v. *Raheemoonnissa* (2) followed.

When, at the time of marriage, the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to custom. Where there is no custom, it must be determined by the Court, with reference to the status of the wife and the amount of the dower.

Where a Court, following this rule, determined that one-fifth only of a dower of Rs. 5,000 not stipulated to be "deferred" must be considered "prompt," inasmuch as the wife had been a prostitute and came of a family of prostitutes it exercised its discretion soundly.

THIS was a suit by a Muhammadan for restitution of conjugal rights. The defendant pleaded that until her dower was paid the plaintiff was not, under the Muhammadan law, entitled to such restitution. This plea raised the question whether her dower was prompt or deferred. The dower had been fixed at Rs. 5,000, but

* Special Appeal, No. 444 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saháranpur, dated the 8th February, 1877, modifying a decree of Kazi Muhammad Imdad Ali, Munsif of Saháranpur, dated the 4th November, 1876.

(1) See also *Buzloor Raheem* v. *Shumsoonnissa*, 8 W.R., P.C., 3; S.C., 11 Moore's Ind. Ap. 551; in which the Privy Council held, under the law corresponding to s. 24 of Act VI of 1871, that a suit by a Muhammadan for restitution of conjugal rights must be determined with reference to Muhammadan law.

(2) H. C. R., N.-W. P., 1874, p. 94. As to the general power of a wife to refuse herself, see *Jaun Beebee* v. *Beparee*, 3 W.R., 93, where presumably the wife's dower was prompt.

1877

EIDAN v. MAZHAR HUSAIN.

at the time of marriage it was not specified whether the dower was prompt or deferred. The Court of first instance dismissed the suit. Relying on the doctrine set forth in Baillie's Digest of Muhammadan Law, the lower appellate Court held that, where at the time of marriage it was not specified whether dower was prompt or deferred, a portion of it must be considered prompt, that the amount of such portion was to be determined with reference to custom, and that, in the absence of custom, such amount was to be determined by the Court with reference to the position of the wife and the amount of dower. It overruled the contention of the defendant based on a passage in Macnaghten's Principles of Muhammadan Law, that where there was no specification, the entire dower was prompt. In order that an inquiry might be made as to whether any, and, if any, what custom existed as to the amount of dower exigible when it was not specified whether the dower was prompt or deferred, the lower appellate Court remanded the suit to the Court of first instance under s. 354 of Act VIII of 1859. The Court of first instance found that there was no custom in existence. The lower appellate Court therefore proceeded to determine the amount of dower exigible with reference to the defendant's position and the amount of dower. As it was admitted that the defendant had been a prostitute and came of a family of prostitutes, the lower appellate Court decided that it was sufficient to exact one-fifth of the dower. It accordingly gave the plaintiff a decree for restitution of conjugal rights conditional on the payment of Rs. 1,000 (1).

The defendant appealed to the High Court, again contending that in the absence of any stipulation that the dower was deferred, it should be considered prompt, and that under the circumstances the amount of dower awarded was too small. The plaintiff took certain objections under s. 348 of Act VIII of 1859, the first being that, as the defendant had not demanded her dower, the decree of the lower appellate Court should not have been conditional on the payment of dower.

Mr. *Conlan*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Mir *Zahur Husain*, for the appellant.

(1) In *Abdool Shukkoar* v. *Raheemoonnissa*, H. C. R., N.-W. P., 1874, p. 94, instead of a conditional decree being given the suit was dismissed as unmaintainable.

1877

EIDAN v. MAZHAR HUSAIN.

Mr. *Mahmood* and Maulvi *Mehdi Hasan*, for the respondent.

The following judgments were delivered by the High Court:

PEARSON, J.—The view that dower, when the payment of it has not been stipulated to be deferred, should be deemed to be payable on demand, appears to me to be most reasonable and most in accordance with the dictates of common sense; but although it is stated by Macnaghten to be the rule of the Muhammadan law, I am constrained to hold in concurrence with the lower Courts that the greater weight of authority is in favour of the doctrine set forth in Baillie's Digest, p. 126 (1). The inquiry into the custom with the view of determining the portion of the dower-debt payable promptly was therefore proper; and when the question could not be decided by reference to custom, it was proper to determine it with reference to the status of the woman and the amount of the fixed dower. I see no reason to think that the lower appellate Court has not exercised a sound discretion in awarding one-fifth of the total amount of that dower as the portion of which the appellant may fairly claim prompt payment..... I would disallow the objections taken by the respondent under s. 348 of the Procedure Code..... The first is also bad, for the circumstance that the appellant did not demand her dower before leaving the respondent's house does not preclude her from demanding it when restitution of conjugal rights is claimed; and the circumstance that they have already cohabited with consent since their marriage does not preclude her from refusing further cohabitation until the portion of her dower payable to her has been paid (see *Abdool Shukkoar* v. *Raheemoonnissa*) (2). The case is one governed by the Muhammadan law and not by the general law of contract. The appeal should in my judgment be dismissed with costs.

STUART, C. J.—The question of dower in this case arises under peculiar circumstances and appears to demonstrate another anomaly in the Muhammadan law on this subject. The claim to dower is not

(1) See also *Fatima Bibi* v. *Sadruddin*, 2 Bom. H. C. R., 307, where the law stated in Baillie's Digest was followed. On the other hand, see *Jumeela* v. *Mulleeka*, W. R., 1864, p. 252, where the law stated in Macnaghten's Principles was followed; and *Tadiya* v. *Hasanebiyari*, 6 Mad. H. C. R., 9, where apparently the same law was followed.

(2) H. C. R., N.-W. P., 1874, p. 94.

1877

EIDAN v. MAZHAR HUSAIN.

made directly by the wife, but by way of answer to a suit at the instance of her husband the plaintiff for restitution of his conjugal rights. She on the other hand, while admitting her intimacy with the plaintiff and that she lived in his house, denies that she was ever married to him, and although thus contending that she is not his wife she nevertheless claims the rights of one. The Subordinate Judge finds as a fact (agreeing in this respect with the Munsif) that a marriage between the parties did take place. Any contract, however, between them as to dower is, from the very nature of the case, and especially having regard to the defendant's plea, necessarily excluded, and her claim to dower, therefore, must rest entirely on the Muhammadan law applicable to a woman in her position. She claims in the way explained Rs. 5,000 and that she is entitled to demand it as prompt dower, and to have it paid before she returns to the plaintiff's house. The plaintiff, the husband, admits the amount, but says that as there was no agreement as to the nature of it, it must be presumed to be deferred dower. It might be supposed reasonable that before a woman could put forward her claim to the dower at all she ought in the first place to put herself in the right position for asking it by doing her duty as a wife by her husband, and by returning to cohabitation with him, especially as it cannot be said that she left his house because of his refusing her dower. But this reasonable and natural state of things does not appear to find a place in Muhammadan law, according to the principles of which system, on the contrary, a wife can refuse herself to her husband till her dower, being prompt, has been satisfied. But in the present case although the amount is admitted, and, in the absence of proof to the contrary, must be regarded as prompt, yet the Subordinate Judge considers Rs. 5,000 to be excessive, basing the opinion apparently on his estimate of the defendant's character, whom he describes as a prostitute "belonging to a like family," and he considers that one-fifth of the amount claimed as prompt dower is sufficient. I am not disposed to quarrel with this conclusion, nor with his order as to costs. I would therefore dismiss the special appeal, and, as to costs of this Court, I would direct that both parties should bear their own.

Appeal dismissed.