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ordinate Court to inquire into any offence, other than that on which the order of discharge had been passed, which the evidence on the record showed to have been committed. It appears to me that the inquiry upon the charges under ss. 363 and 420 of the Penal Code were rightly held by the Deputy Magistrate, and that there is no pretence for impeaching his commitment. The cases of *Queen* v. *Seetul Pershad* (1) and *Petition of Mohesh Mistree* (2), are clearly distinguishable from the present, and my view of this matter in no way involves disagreement with any of the authorities quoted. The records are returned to the Sessions Judge, and he is directed to proceed with the trial of the accused Bhup Singh and Umrao Singh, under ss. 363, 420 and 109/420, in ordinary course.

FULL BENCH.

187[illegible] Augu[illegible]

Before Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

SUGRA BIBI (PLAINTIFF) v. MASUMA BIBI (DEFENDANT).*

Muhammadan Law—Dower.

Where a Muhammadan (Shia), on his marriage, being in poor circumstances, fixed a "deferred" dower of Rs. 51,000 upon his wife, and died without leaving sufficient assets to pay such dower, and his wife sued to recover the amount of such dower from his estate, *held* by STUART, C. J., (PEARSON, J. dissenting) that, it being nowhere laid down absolutely and expressly by any authority on the Muhammadan law that, however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death, the plaintiff was only entitled, under the circumstances, to a reasonable amount of dower.

Held by the Full Bench, on appeal from the decision of STUART, C. J., that a Muhammadan widow was entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower-debt.

THIS was a suit in which the plaintiff, the widow of one Tasadduk Husain, deceased, sued *in formâ pauperis* the defendants, the mother, brother, and two sisters of the deceased, his heirs, claiming

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(1) H. C. R., N.-W.P., 1873, p. 168: see also *Empress* v. *Kanchan Singh*, I. L. R., 1 All., 413.

(2) I. L. R., 1 Calc., 282.

* Appeal under cl. 10, Letters Patent, No. 3 of 1877. Reported under the special orders of the Hon'ble the Chief Justice.

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to recover from his estate Rs. 51,000, being the amount of her "deferred" dower. The defendant Masuma Bibi, mother of Tasadduk Husain, set up as a defence to the suit that Tasadduk Husain had settled a dower on the plaintiff "equal to the dower settled on Fatima, *viz.*, ten dirms, or Rs. 107, according to the law of Imamia prevailing among the Shias," to which sect the parties belonged. She alleged in her written statement as follows:—"In fact all the members of the plaintiff's family and that of Tasadduk Husain have acted all along in accordance with this custom: at the time of Tasadduk Husain's marriage his circumstances and those of his father and the family of the plaintiff were not in such a state as to admit of fixing the dower at such a large amount, the payment of which was impossible: if it was fixed it was merely for the sake of show, its payment not being intended." The Court of first instance found as a fact that the amount of dower settled on the plaintiff was Rs. 107, the material portion of its judgment being as follows:—"Although such a large sum of money is said to have been settled on plaintiff as dower, no deed of settlement is forthcoming: it is proved that Tasadduk Husain possessed no independent means at the time of his marriage with plaintiff, and had not commenced practising as a pleader: his father, who was employed as a mukhtar or agent in Azamgarh, although possessed of some property, was not in a position to settle a dower of Rs. 51,000 on his son's bride: nor is there any conclusive evidence to show that this was the proper dower of female members of the family of plaintiff's father: under these circumstances, I am unable to credit the statements of the plaintiff's witnesses, that Tasadduk Husain at once agreed to settle the above-mentioned dower on plaintiff, and incline to accept the testimony of defendant's witnesses, who unanimously testify that the dower of Fatima, or about Rs. 107, was settled on plaintiff, an amount which appears to be more reasonable and suited to the then circumstances of the parties: among the plaintiff's witnesses is her maternal uncle, Nisar Husain, whose testimony appears to be very exaggerated, and who declares that similar amounts of dower were invariably settled on each and every female member of the family of the bride and bridegroom, which appears to be absurd and is rebutted by the evidence of defendant's witnesses, who deny his presence at the time of the marriage-contract, and he moreover is shown to be biassed against

defendants: I therefore find as a fact that the amount of dower settled on plaintiff was Rs. 107 and not Rs. 51,000, and that the first defendant, who has succeeded to the estate of the deceased, is liable to pay it."

The plaintiff appealed from the decree of the Court of first instance to the High Court. The appeal came for hearing before a Division Bench composed of Stuart, C. J., and Pearson, J., by whom the following judgments were delivered:

STUART, C. J.—This is one of those extraordinary and embarrassing cases which the Muhammadan law offers as puzzles to the European mind. The plaintiff, appellant, is a pauper, and as such she sues to recover no less a sum than Rs. 51,000 from the estate of her deceased husband, although that estate, it was well known when the suit was brought, amounted only to something between rupees two and three thousand. Now, in any system of law appealing to one's sense of justice and claiming in that respect, I do not say respectful, but intelligible acceptance among rational beings, one would suppose that as regards the two sums I have named a Court of Law might be permitted to exercise a discretion by means of which the widow's claim might be reduced to the possibilities of the case. But it would appear that we are not allowed so to escape from a hopeless and helpless dilemma, for we are told that we must either give this pauper plaintiff Rs. 51,000, or Fatima's portion of 10 dirms amounting to Rs. 107. There is, it seems, no middle course. We are not even to substitute for the Rs. 51,000 the whole of the husband's estate of two or three thousand rupees, much less to apportion her such a sum as under such circumstances European widows are obliged to be content with. Such a case appears to be beyond the reach of intellectual apprehension, the suggested law is visionary, and the facts are of a somewhat intangible character.

But as to the facts, they appear to be these: The parties and their families were and are Shias. The plaintiff was married to her husband, Tasadduk Husain, on the 7th May, 1843, and the marriage subsisted until the 26th July, 1874, when Tasadduk Husain died. At the time of his marriage with the plaintiff, he settled upon her, according, it is said, to the custom of the family, a dower of Rs. 51,000,

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although at the time he possessed no independent means of his own, and had even then not been admitted as a pleader, although he afterwards appears to have practised in that professional position with some little success. What was the exact extent and value of the property he left at his death does not very clearly appear. One witness states that his profits were between four or five hundred rupees a year, and it is not unlikely that by means of professional savings and property inherited from his father, who, it is stated, practised as a mukhtar, Tasadduk Husain may have left behind him some two or three thousand rupees. It is, however, unnecessary to consider these and other figures of a similar kind, for the rule of the Muhammadan law which we are asked to recognise and administer in this case is one that puts the case quite beyond the limits of arithmetic in any aspect. Here is a case in which a woman, herself a pauper, seeks to recover dower to the extent of Rs. 51,000, although when the settlement of this dower was supposed to be made, the husband, the settler, had not a rupee in the world to call his own. Nevertheless the claim is stated to be justified by the Muhammadan law among the Shias, which, it is said, places no limit to the maximum of dower, no matter what the extent of the husband's estate may or may not be, or whether he had any estate at all. Now, even if such were really and undoubtedly Muhammadan law among Shias, I trust I may be pardoned if I hesitate to admit that it would be reasonable to expect the Judges of a High Court to administer such a law. But although it was strongly urged at the hearing that such was unquestionably sound Muhammadan law, I have not for myself been able to discover any rule of the kind so absolutely laid down in any recognised authority, whether Shia or Sunni. In Baillie's well-known Digest of Muhammadan law, published in 1865, dower is said to be "incumbent" on a husband; but how can it be incumbent on him that is imposed on him as a duty and obligation if the thing to be done is an impossibility, and that it relates to money and property which have no existence, a state of things which by the way that author himself recognises when he expounds that "when something is mentioned as dower which is not in existence at the time, as, for instance, the future produce of certain trees or of certain land, or the gains of a slave, the assignment is bad, and the woman is entitled to her proper

dower," this "proper dower" being explained to be dower appropriate to the wife's family and social position. But it is further stated in the same work that "dower is unlimited in amount," but it is not said that it is unlimited irrespective of the actual extent and value of the husband's property. On the other hand, I find it laid down in a judgment of the Calcutta Sudder Dewany Adawlat, vol. 1, page 277, that any thing possessing a legal value may be given in dower, that is, of course, a legal value at the time of marriage and settlement. Did the Rs. 51,000 in the present case possess at that time, or did it ever possess, and does it possess now, a legal value? Then in another ruling of the same Court, page 267 of the same volume, it is laid down that the amount of dower is recoverable from the real and personal property left by the husband in preference to the claims of heirs, a ruling which appears to me to disparage and discredit such a dower claim as this. Again in the Tagore Law Lectures of 1873, page 348, it is asserted that property assigned as dower must be specified and in the husband's possession at the time of the assignment, which would otherwise be invalid; a proposition which does not appear to be intended to apply otherwise than to dower generally, whether prompt or deferred. Then in regard to the Shias, we are told by Mr. Baillie in his work on this system published in 1869, page 68, that among them "there are no bounds to the quantity or value of the dower, which is left entirely to the will of the husband and wife, so long as it is capable of appreciation, that is, not totally destitute of value, like a single grain of wheat, for example." But this also is a text which fails to determine the question under consideration within appreciable or intelligible limits. I could understand the doctrine laid down if it meant, or could be understood to mean, quantity or value of dower as a recoverable charge on the husband's estate. Then as to "the will of the husband and wife," such language is surely the idlest verbiage, unless it can be shown that there was something on which the husband and wife's will could be exercised upon. The expression, however, that the dower must be "capable of appreciation, *i. e.*, not totally destitute of value like a single grain of wheat," seems to bring the rule within one's powers of apprehension, although there appears to me to be no reason why the appreciation should not be equally applied to visionary or im-

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possible dower, to the case, for example, of the husband not having himself a single grain of wheat, but yet settling a dower of Rs. 51,000 on his wife. The result, in short, of the authorities appears to be that while some texts might possibly suggest the broad principle contended for in this appeal, it is nowhere laid down absolutely and expressly by any authority on the Muhammadan law that dower, limited or unlimited, is to be regarded without regard to the husband's estate, and that unlimited dower may mean and be accepted as dower of the value, it may be, of ten times the value of that estate, so that her husband at the time of his marriage, although not possessed of a single pice, might yet settle as dower upon his wife lakhs and crores of rupees! Now this is not too extravagant an ideal of the principle of Muhammadan law in question, for as a proposition, it must to that full extent be maintained, supported, and affirmed as Muhammadan law before the plaintiff, appellant, can succeed in this case.

As to the custom on this subject among Shia families, I am not satisfied that such a custom has been satisfactorily proved in this case, but even if it were undoubtedly the practice among Shia ladies, I should hesitate to allow such practice to determine so serious a question. Nor can I recognise, as a sufficient reason for such a practice, that among the Shias a childless widow is precluded from taking any share in the estate of her deceased husband, for surely that is a difficulty that could be met by an express settlement which would give the wife, at the time of the marriage, a reasonable share of, or if you please the whole of, her husband's property. This doctrine, in short, contended for, of unlimited dower infinitely transcends the necessity of the case as stated. But again, in excuse of this alleged singular and anamolous rule as to dower, it is suggested that it is intended to protect Muhammadan wives against the facility for divorce, which can be capriciously used against them by their husbands, seeing that dower takes effect from the wife's divorce or the husband's death. But this explanation I am unable altogether to appreciate, for the consequences of divorce might be fully guarded against by allowing the wife her proper dower, or even such dower as may comprise the whole of the husband's then available estate. Again, it has been said that the amount of the husband's estate, out of which the dower might

have to be paid, could not be known at the time of the contract. But that does not appear to me to get rid of the difficulty, or I had rather said the preposterous and visionary absurdity of the alleged rule which has no foundation in any rational hope or expectation, but is solely referable to an idle and nebulous fiction which, in the case of parties like those in this appeal, could never be imagined to descend to the earth in the shape of actual cash or property. But it has also been urged that to allow a wife in the name of dower to carry off the whole of the husband's available estate instead of a fixed sum, however large, might have the effect of defeating the rights of the heirs, or, in other words, might finally determine the inheritance of his property. My answer to this, however, is that such a result entirely depends upon the extent of the husband's property, for, as in the present case, a dower might be named so large as hopelessly to absorb the whole property, leaving the heirs with nothing but the mere name of heirs. Altogether I must decline to accept such a view of Muhammadan law, and unless compelled to do so by the supreme ruling of Her Majesty's Privy Council, I must decline to administer or apply it in any case.

In conformity with the tenor of the remarks I have offered, I might have felt disposed to have given the plaintiff reasonable dower out of her husband's estate—say one-third or even half of all the property he left—but that it appears I am not permitted to do. On the other hand, her claim and contention in the suit is so visionary and intangible that I feel unable to reduce her dower to any palpable character or amount beyond the minimum given by the Subordinate Judge. I would therefore affirm the judgment of the Subordinate Judge and dismiss this appeal, but, under the circumstances, without costs.

PEARSON, J.—In my opinion the evidence adduced by the plaintiff is better entitled to credit than the evidence adduced by the defendant, respondent, and the reasons assigned by the Subordinate Judge for his decision of the issue relating to the amount of the dower in question are not valid. Deeds of settlement are not usual, but it is not unusual to settle a dower out of proportion to the means of the husband; probably not many Muhammadans at the time of their marriage are possessed of much independent estate or means.

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The absence of a deed of settlement in this instance, and the circumstance that Tasadduk Husain was not possessed of large means at the time of his marriage, are insufficient grounds for discrediting the claim and the averments on which it is based. Tasadduk Husain would naturally be expected to fix a dower for his wife similar in amount to the dower which had been usually fixed for the ladies of her family on the occasions of their marriage; and that amount is shown to be Rs. 51,000. The plaintiff's witnesses are mostly her relations, but they are persons who are likely to know the real facts in question, *viz.*, what was the usual dower in the family, and what was the dower actually agreed to be given by Tasadduk Husain. Inasmuch as, according to the doctrine of the Shia sect, a childless widow is precluded from taking any share in the estate of her deceased husband, it is not surprising that the relatives of ladies about to be married should stipulate for the settlement on them of a dower that would constitute an adequate provision for them in the event of their surviving their husbands. It may be that the estate of Tasadduk Husain will not furnish more than such a provision for the plaintiff, his widow. I would reverse the lower appellate Court's decree, and decree the claim and appeal with costs recoverable from the estate left by Tasadduk Husain aforesaid.

The plaintiff appealed from the judgment of Stuart, C. J., to the Full Bench, under cl. 10 of the Letters Patent.

Munshi *Kashi Prasad* and *Shah Asad Ali*, for the appellant.
Munshi *Hanuman Prasad*, Mir *Akbar Husain*, and Maulvi *Mehdi Hasan*, for the respondent.

The following judgments were delivered by the Full Bench:

PEARSON, J.—The first two grounds of the appeal appear to be incontrovertible. The plaintiff is doubtless entitled to the whole of the dower which her late husband agreed to give her, and which was fixed not in reference to his means at the time of marriage, but to the value which she possessed in the matrimonial market, that value being mainly determined by the local position and traditions, the surroundings and antecedents of her family. The contract cannot be set aside or treated as a nullity because he was compara-

tively poor when he married, or has not left assets sufficient to pay the debt, but on the contrary may be enforced so far as is possible. But in this instance it happens that, if a dower of Rs. 51,000 had not been agreed to by him, she would have been entitled to a dower of that amount, because such an amount has been customarily fixed as dower for ladies belonging to the family of which she is a member. Her claim is maintainable irrespectively of any contract on the part of her husband, but I nevertheless allow in full the third ground of the appeal, and would only add that, as the estate left by Tasadduk Husain is probably not worth Rs. 5,000, it was wholly needless for the plaintiff to have falsely represented her dower as amounting to Rs. 51,000. All that she can gain would be equally gained by representing the amount to have been Rs. 5,000. There is, however, no reason to doubt that her real dower is Rs. 51,000, although she will be unable to realise more than a small portion of it.

With these additional remarks I adhere to my judgment of the 30th April last, and would decree the claim and this appeal with costs in all the Courts.

TURNER, J.—However great the objections which may be taken to it, it is unquestionably the practice for Muhammadan gentlemen to settle on their wives dowers without regard to the extent of their own incomes, and when satisfactory proof is adduced that a settlement of dower has been made *bonâ fide*, a lady is entitled to enforce her claim for the whole amount, although it may be in excess of the fortune which on her marriage the husband possessed or could have been expected to acquire. No doubt when a large sum is claimed on account of dower, the lady is bound to meet the improbability suggested by the quantity of the claim, but if the evidence produced by her is sufficient to establish the claim, the Court cannot reduce her dower to an amount which it deems reasonable, nor can it refuse her a decree altogether for any sum in excess of the amount which her opponents are willing to concede her. Regard being had to the usage in this country, the dower claimed by the appellant is not preposterously large, that we could on this ground only refuse credit to her witnesses. It is true that large dowers are less common among Shias than among Sunnis,

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but even among the former they are occasionally settled: the usage of the lady's family is perhaps more regarded than adherence to the advice of some of the doctors of the laws.

In the case before us, we consider the appellant's witnesses are more reliable and generally of better position in life than the witnesses called by the respondent. They have sworn, and we see no reason to doubt their evidence, that the appellant's dower was fixed at Rs. 51,000, and in corroboration of their statements on this point they also appear to be stating the truth in asserting that this dower was not in excess of the sum usually settled on ladies of the appellant's family. We would therefore decree the appeal, and reversing the decrees of the Division Bench and of the Court of first instance, decree the claim with costs.

SPANKIE, J.—I agree with the opinion expressed by Mr. Justice Pearson, delivered when the suit was heard by the Division Bench. It appears that there is nothing to add to it. If we believe the evidence for the plaintiff, then the dower was specified, and there was no doubt or uncertainty about it. The weight of evidence is in favour of the plaintiff's case, since the amount fixed is stated by the witnesses, members of the family and others likely to know, to be Rs. 51,000. I would therefore decree the appeal with costs.

Appeal allowed.

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July 28.

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

BABU LAL AND OTHERS (DEFENDANTS) v. ISHRI PRASAD NARAIN SINGH (PLAINTIFF.)*

Res judicata—Mortgage—First and second mortgagees.

In 1870 *M* granted a certain person a lease of a certain zamindari share, for a term of years, at an annual rent, *L*, as the lessee's surety, hypothecating a mauza called *A* as security for the payment of such rent. In 1871 *L* gave *B* a bond for the payment of certain moneys, hypothecating mauza *A* as security for their payment. In 1872, and again in 1873, *M* obtained a decree in the Revenue Court against his lessee and *L* his surety for arrears of rent. In execution of the decree of 1872 *M* caused *L's* rights and interests in mauza *A* to be put up for sale, and

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* Appeal under cl. 10, Letters Patent, No. 2 of 1878. Reported under the special orders of the Hon'ble the Chief Justice.