

go upon his land or maintain or erect a chabutra there was established. Under such circumstances we allow this appeal with costs, and, setting aside the decree of this Court, we restore and affirm the decree of the District Judge.

Appeal decreed.

1895

KAR SEN
v.
MAMMAN.

1895.

January 14.

Before Sir John Edge, Kt, Chief Justice and Mr. Justice Banerji.

MUHAMMAD KARIM-ULLAH KHAN (PLAINTIFF*) v. AMANI BEGAM AND OTHERS (DEFENDANTS).

Muhammadian law—Dower—Widow's lien for dower—Suit by heir claiming possession without payment of proportionate share of dower—Burden of proof as to nature of widow's possession.

When a Muhammadian widow is in possession, and has been for some time in undisturbed possession of property which had been of her husband in his life-time, and dower is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadian widow was not let into possession by her husband in lieu of dower or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs.

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Burkitt, J., in S. A. No. 940 of 1893, reported in I. L. R., 16 All. at p. 225. The facts of the case were as follows:—

The plaintiff sued as heir to one Mahmud Khan for partition of certain immovable property alleged to have been of Mahmud Khan in his life-time. He impleaded as defendants Musammat Amani Begam and Musammat Moti Begam the two widows of Mahmud Khan, Musammat Mahbub Begam the widow of one Umar Khan deceased, brother to Mahmud Khan, and certain other persons who, he stated, with himself comprised the entire list of the heirs of Mahmud Khan. He claimed possession by partition of 21 sihams out of 128 sihams in two houses specified in the plaint, of which the widows were apparently in possession, but he did not offer to pay any portion of any dower-debt which might be due to the widows or any of them, nor did he mention that any such dower-debt was due.

* Letters Patent Appeal No. 23 of 1894.

1895

MUHAMMAD
KARIM-
ULLAH KHAN
v.
AMANI
BEGAM.

Amani Begam, the principal defendant, pleaded *inter alia* that the property claimed was in possession partly of herself, partly of Mahbub Begam and partly of one Husaini Begam, the widow of a brother of Mahmud Khan (who, she alleged, was a necessary party to the suit, which was therefore bad for misjoinder); the possession of herself and of Mahbub Begam being in lieu of the respective dower-debts due to them. She also pleaded that the suit was a collusive suit brought at the instance of one of the defendants, who had purchased the rights of some of the other defendants as a speculation, and further denied the plaintiff's title as an heir to Mahmud Khan.

The defendant Mahbub Begam also pleaded possession in lieu of her dower-debt and denied that the plaintiff or the defendants Nos. 4, 5 and 6 had any title by inheritance. Those defendants admitted the plaintiff's claim and prayed to be exempted from costs. The defendants Moti Begam and Abdul Rahman (the alleged vendee of a portion of the property in suit) entered no appearance.

The Court of first instance (Munsif of Sambhal) found that the pedigree given by the plaintiff was correct; that Husaini Begam was not a necessary party to the suit; that the three principal defendants were in possession in lieu of their respective dower-debts, and that the plaintiff was not entitled to succeed on the plaint as framed. It accordingly dismissed the plaintiff's suit.

The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Moradabad) made an order of remand for decision of the issue.—“Did the widows of Mahmud Khan get possession of his estate in lieu of their dower with the consent express or implied of his heirs?”

This order of remand was set aside on appeal by the High Court, and the appeal to the lower appellate Court again came on for hearing, when the Court recorded the following finding:—“From the evidence on the record it is not conclusively proved that the defendant (*i.e.* the principal defendant Amani Begam) came into possession in lieu of dower-debt with the permission and consent of the

heirs of the husband. It is also worthy of consideration that the defendant (female) did not even consider the plaintiff as heir of her husband. Then there was no reason why she would have obtained his consent. The genealogical table filed by the plaintiff is proved to be correct, and it is also proved satisfactorily that the plaintiff is heir of Mahmud Khan. The sibams (shares) alleged by the plaintiff are correct according to Muhammadan law." The lower appellate Court then proceeded to decree the plaintiff's appeal.

The defendants Amani Begam and others thereupon appealed to the High Court, and the appeal coming on for hearing before Burkitt, J., was decreed and the decree of the Court of first instance restored on the 15th of February 1894.

The plaintiff then appealed under s. 10 of the Letters Patent.

Munshi *Madho Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

EDGE, C. J. and BANERJI, J.—This appeal has arisen out of a suit brought for possession by partition by one of the heirs of a deceased Muhammadan. The property in dispute was a house in which the Muhammadan had lived. Two of the defendants-respondents were widows of the deceased Muhammadan, and after his death they continued to live in the house in undisputed possession for more than a year. They resisted the suit on the ground that they were in possession for their dower. It is found that dower in fact was due. The case came before our brother Burkitt on appeal on behalf of the defendants. He allowed the appeal and dismissed the plaintiff's suit. This appeal has been brought by the plaintiff. What the Subordinate Judge found in first appeal with regard to possession for dower was this—"From the evidence on record it is not conclusively proved that the defendants came into possession in lieu of dower with the permission and consent of the heirs." It appears to us that when a Muhammadan widow is in possession and has been for some time in undisturbed possession, and dower is admitted or proved to be due to her, it lies

1895

MUHAMMAD
KARIM-
ULLAH KHAN
v.
AMANI.
BEGAM.

1895

MUHAMMAD
KARIM-
ULLAH KHAN
v.
AMANT-
BEGAM.

upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower, or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs. The Subordinate Judge put the *onus* upon the wrong party in our opinion. We adhere to our judgment delivered in *Amanat-un-nissa v. Bashir-un-nissa*. (F. A. No. 312 of 1893, decided on the 12th of December 1884. *Supra* p. 76) on the question as to whether a Muhammadan widow who is proved not to have obtained possession in lieu of dower either from her husband or with the consent or acquiescence of the heirs, has or has not a lien over the property. It appears to us that that judgment does not touch the present case. We have been again referred to a judgment of their Lordships of the Privy Council in *Mussumat Bebee Bachan v. Sheikh Hamid Hossein* (1), and it has been contended that it appears, as was assumed by our brother Burkitt in the present case, that in that case the Muhammadan widow had obtained possession in lieu of her dower after her husband's death. In our opinion that fact does not appear from the report. In 1851 the Muhammadan widow in that case instituted proceedings before the Collector to obtain mutation of names in her favor, her husband having died in the previous month. It is stated in the report—“She alleged in her petition that she was in possession by right of inheritance and also on account of her dower.” It was argued from the passage that it necessarily follows that she claimed to have obtained possession in lieu of her dower after her husband's death. That does not follow in our judgment. If she had been put in possession by her husband in his life-time in lieu of dower she would probably describe her possession after his death as a possession by right of inheritance and also on account of dower. In this case, it not having been found as a fact that these ladies had not obtained possession in lieu of dower with the consent or by the acquiescence of the heirs, the plaintiff failed to prove the right to partition without the payment of his proportionate share of dower.

(1) 14 Moo. I. A. 377.

Although we do not agree with the propositions of law of our brother Burkitt, we, for the above reasons, dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

GENDA MAL AND ANOTHER (DEFENDANTS) v. PIRBHU LAL (PLAINTIFF).*

Civil Procedure Code s. 373--"Order"--"Decree"--Appeal.

An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with liberty to bring a fresh suit on the same cause of action is not appealable, not being a decree within the meaning of s. 2 of the Code, nor one of the orders from which an appeal is allowed by s. 538. *Kalian Singh v. Lekhraj Singh*, (1), *Jagdish Chaudhri v. Tulshi Chaudhri* (2), *Zahuri v. Dina Nath* (3) and *Jogodindro Nath v. Sarut Sunduri Debi* (4) referred to. *Gangz Ram v. Data Ram* (5) not followed.

THE plaintiff sued in the Court of the Munsif of Pilibhit for the demolition of a wall which, he alleged, the defendants had wrongfully constructed upon land belonging to him. While the suit was pending in the Munsif's Court the plaintiff applied under s. 373 of the Code of Civil Procedure for leave to withdraw his suit with liberty to bring a fresh suit on the same cause of action, on the ground that since the filing of the plaint the defendants had made further erections upon land belonging to him. The Munsif rejected this application, and proceeding to try the suit on the merits, dismissed the plaintiff's claim.

The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Bareilly) holding that the first court should have allowed the plaintiff to withdraw, made an order under s. 373 of the Code in his favor.

Against this order the defendants appealed to the High Court. The appeal coming on for hearing before a single Judge, the respondent (plaintiff) took a preliminary objection that no appeal lay from

* Letters Patent Appeal No. 28 of 1894.

(1) I. L. R., 6 All. 211. (3) Weekly Notes 1893, p. 204.
 (2) I. L. R., 16 All. 19. (4) I. L. R., 18 Calc. 322.
 (5) I. L. R., 8 All. 82.

1895

MUHAMMAD
KARIM-
ULLAH KHAN

v.
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1895

January 14.