

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

AMANAT-UN-NISSA AND ANOTHER (PLAINTIFFS) v. BASHIR-UN-NISSA AND ANOTHER (DEFENDANTS).*

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December 12.

Muhammadan law—Widow—Dower—Lien of widow for dower—Such lien not acquired by widow taking possession against the consent of the other heirs.

If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession, or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs of property to the possession of which they, and she in respect of her share in the inheritance, are entitled.

Mussumat Bebee Bachun v. Sheikh Hamid Hossein (1), Musummat Wahid-un-nissa v. Musummat Shabrattun (2), Syud Bazayet Hossein v. Dooli Chund (3), Mussumat Meerum v. Mussumat Najeebun (4), Ali Muhammad Khan v. Aziz-ullah Khan (5) and Bibi Mehrun v. Musummat Kubeerun (6) referred to. Woomatool Fatima Begum v. Meerunmun-nissa Khanum (7), Ahmed Hossein v. Musummat Khodeja (8) and Balund Khan v. Mussumat Janee (9) distinguished.

The facts of this case are as follows:—

The plaintiffs, Musammat Amanat-un-nissa and Musammat Mariam-un-nissa, respectively the mother and sister of a deceased Muhammadan, one Shaikh Khadim Husain, sued the two widows of the deceased Khadim Husain, Musammat Bashir-un-nissa and Musammat Khudayat-un-nissa for a declaration of their title, as heirs of the deceased, to 28 out of 72 sihams of the property left by him and for recovery of certain property, both movable and immovable, of which they alleged the widows to be in possession. The plaintiffs alleged that the defendants had taken possession of all except a small portion, specified in the plaint, of the property of the deceased shortly after his death, against the consent of the other heirs, and had got their names entered in the Revenue papers in respect of the immovable property. They offered, in case the defendants set up a claim that they were in possession of the property claimed from

*First Appeal No. 312 of 1893, from a decree of Shah Ahmad-ullah, Subordinate Judge of Saharanpur, dated the 8th September 1893.

(1) 14 Moo. I. A., 377; at p. 384.

(2) 6 B. L. R., 54.

(3) L. R., 5 I. A., 211.

(4) N. W. P., H. C. Rep., 1867, p. 335.

(5) I. L. R., 6 All., 50.

(6) 13 W. R., C. R., 49.

(7) 9 W. R., O. R., 318.

(8) 10 W. R., C. R., 230.

(9) N. W. P., H. C. Rep., 1870, p. 319.

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them in lieu of their respective dower debts, without admitting the defendants' right, to pay such proportion of the dower debts as might be found due in respect of the sihams claimed by them.

The defendant Bashir-un-nissa, after filing a defence, subsequently admitted the plaintiffs' claim.

The defendant Khudayat-un-nissa put forward the following pleas in defence to the suit :—That the suit was bad for misjoinder ; that without a prayer for settlement of the amount of dower due to her the suit was invalid ; that the claim for possession of entire houses without excluding her share was wrong ; that the movable property claimed was not in her possession, and that the clothes had been given in charity with the permission of the plaintiffs ; that the defendant was in possession of the immovable property in lieu of Rs. 11,000, her dower debt ; that she had spent Rs. 606-11-0 in the Fatiha ceremonies of Khadim Husain ; that Rs. 502-14-0 were due to her by Khadim Husain on account of her salary, and that unless all this money were paid off, the suit for the estate of Khadim Husain could not be maintained.

The Court of first instance (Subordinate Judge of Saharanpur) on the second issue framed by it, viz :—“ What is the amount of the dower of Musammat Khudaya, is she in possession of the immovable property left by Khadim Husain in lieu of that dower, and can under such circumstances a suit be brought to enforce inheritance ? ” —found as follows :—“ On the second issue it is admitted by the plaintiffs that Musammat Khudaya is a wife of Khadim Husain, deceased, and it is further admitted that Rs. 1,000 on account of her dower is still unpaid, though she has stated the amount of her dower to be Rs. 11,000. It is also admitted that the defendant has been in possession of the property left by her husband Khadim Husain ever since the day of his death. As the defendant says that her possession is in lieu of her dower-debt, which is still due by the deceased, it must be admitted that she is in possession of the property in lieu of her dower-debt. In such a case it must be admitted that, so long as her down-debt is not paid, inheritance

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cannot be enforced, nor can the plaintiffs get possession of their respective shares.

“It is suggested in the plaint that, if anything be proved to be due to the defendant, a conditional decree contingent on payment of the same may be passed in favor of the plaintiffs. As to this I say that the suit as it stands has not been instituted in a proper form; that is, it has not been stated what the amount of the defendant's dower is, what is due to her according to account, and what amount of dower-debt the plaintiffs are willing to pay, but the plaintiffs have brought a suit for possession of their share in the ordinary manner. Under such circumstances a conditional decree on payment of the dower-debt cannot be passed.”

The Court accordingly passed a decree dismissing the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid* and *Maulvi Ghulam Mujtaba*, for the appellants.

Mr. *Amir-ud-din*, for the respondents.

EDGE, C. J. and BANERJI, J.—This appeal has arisen in a suit brought by two of the heirs of a deceased Muhammadan of the Sunni sect against two of the widows of the deceased to obtain possession of their share of the inheritance which came to them on the death of the deceased Muhammadan. In their plaint the plaintiffs expressed their willingness to pay a proportionate part of any dower-debt which might be found to exist in favor of the defendants. One of the defendants confessed judgment. The parties to the suit admitted that the dower-debt amounted to Rs. 1,000, in favor of *Musammat Khudayat-un-nissa*, but the Subordinate Judge dismissed the suit on the ground that “as the defendant (*Musammat Khudayat-un-nissa*) says that her possession is in lieu of her dower-debt, which is still due by the deceased, it must be admitted that she is in possession of the property in lieu of her dower-debt. In such case it must be admitted that so long as her dower-debt is not paid inheritance cannot be enforced, nor can the plaintiffs get possession of their respective shares.” From that decree of dismissal this appeal has been brought.

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The Subordinate Judge with all his experience should have known better than to have stated in a judgment that he acted upon the statement of one of the parties as to a fact not admitted by the other side and not found on evidence to be true. As to whether Musammat Khudayat-un-nissa was in possession in lieu of her dower, that is, whether she was in the enjoyment of a lien for her dower, there is no evidence to show that either by contract with her deceased husband, or by any act of his or of the other heirs, or with their consent, she was put in possession of the property with the object of her having a lien on it for her dower. On her behalf some proceedings in a Court of Revenue were relied on as showing that she had an actually vested lien on the property for her dower. In those proceedings the Court of Revenue, adversely to the heirs, put Musammat Khudayat-un-nissa in possession in lieu of her dower. The Court of Revenue had no power or jurisdiction to put this lady or anyone else in possession in lieu of dower, or to adjudicate on the question of her alleged right of lien. So far as the question before us is concerned the order of the Court of Revenue is not only not decisive, but is beside the question which we have to decide.

What, according to the judgment of the Subordinate Judge, admittedly took place was this, the lady was not in possession at the time of her husband's death, but immediately on his death seized his property in order to have a lien for her dower. We cannot regard her possession as having been lawfully obtained within the meaning of the judgment of their Lordships of the Privy Council in case of *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (1). So far as we are aware neither a Muhammadan widow nor any other creditors can give themselves a lien by taking possession, without the consent or the authority of the persons entitled, of property to the possession of which those other persons are entitled. If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs,

(1) 14 Moo. I. A., 377 at p. 384.

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on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien. In such case the Muhammadan widow on taking possession would obtain a lien for her dower. Of course, whether she obtains a lien or not, she can, if her claim is not barred by limitation, obtain contribution from the heirs in satisfaction of such part of her dower as is not proportionately represented by the share of the inheritance which comes to herself.

We are led to the above conclusion from the inference to be drawn from the case of *Musummat Wahid-un-nissa v. Musummat Shabrattun* (1) and the approval of that decision by their Lordships of the Privy Council in the case of *Syud Bazayet Hossain v. Dooli Chund* (2). The view we have taken is supported by the decision of this Court in *Mussumat Meerun v. Mussumat Najeebun* (3) and in *Ali Muhammad Khan v. Aziz-ullah Khan* (4) and also by the decision in *Bibi Mehrun v. Mussammatt Kubeerun* (5). We hold in this case that Musammatt Khudayat-un-nissa has failed to prove that she had any lawful lien on the property left by her deceased husband. We were referred by Mr. *Abdul Raof*, who appeared for the respondent, to the cases of *Woomatool Fatima Begum v. Meerunmun-nissa Khanum* (6) and of *Ahmed Hossein v. Mussammatt Khodeja* (7) and *Balund Khan v. Mussumat Janee* (8) but it does not appear in those cases that the widow had taken possession without the consent or authority of the persons interested.

We set aside the decree of the Court below, and, the case having been decided on this preliminary point, we remand it under s. 562 of the Code of Civil Procedure to be decided on its merits.

Costs here and hitherto will abide the result.

Cause remanded.

(1) 6 B. L. R., 54.

(2) L. R., 5 I. A., 211.

(3) N.-W. P., H. C. Rep., 1867, p. 335.

(4) I. L. R., 6 All., 50.

(5) 13 W. R., C. R., 49.

(6) 9 W. R., C. R., 318.

(7) 10 W. R., C. R., 369.

(8) N.-W. P., H. C. Rep., 1870, p. 319.