

APPELLATE CIVIL.

1894
July 20.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*CHUHI BIBI (PLAINTIFF) v. SHAMS-UN-NISSA BIBI AND OTHERS
(DEFENDANTS).**Muhammadan Law—Dower—Mortgage by widow in possession in lieu of dower.*

A Muhammadan widow in possession of immovable property of her late husband in lieu of her dower has no power to mortgage such property.

THIS was a suit for the recovery of possession of certain immovable property and for cancellation of a mortgage deed, executed by the first defendant (a Muhammadan widow in possession in lieu of her dower debt) in favor of the second and third defendants.

The plaintiff alleged that one Shaikh Sajjad Husain, own brother of the plaintiff, was the proprietor of certain immovable property; that Sajjad Husain died in 1885, leaving a childless widow, Musamat Shams-un-nissa Bibi, defendant No. 1; that defendant No. 1 in lieu of an alleged dower debt of Rs. 1,000 took possession of the immovable property of her late husband, and subsequently sold part of it for Rs. 1,500, the whole of which she retained, and again mortgaged another portion to defendants Nos. 2 and 3 for Rs. 400, in spite of the plaintiff having informed the said mortgagees of her claim against the property. The plaintiff claimed as above cancellation of this mortgage and possession of the mortgaged property.

The first defendant pleaded that the dower debt was Rs. 51,000 and not Rs. 1,000 as stated in the plaint; that the plaintiff was therefore not entitled to sue upon satisfaction only of Rs. 1,500 out of the above amount; and that the plaintiff had in fact acquiesced in her possession and allowed her name to be entered in the Government papers as proprietor.

The second and third defendants set up their title as mortgagees in good faith from the defendant No. 1, and pleaded that

* Second Appeal No. 539 of 1893, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 29th of March 1893, reversing a decree of Babu Framothes Nath Banerji, Munsif of Jaunpur, dated the 9th of March 1892.

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they could not be ejected without payment to them by the plaintiff of the mortgage money advanced by them to defendant No. 1.

The Court of first instance (Munsif of Jaunpur) found that the dower debt was Rs. 1,000 and not Rs. 51,000, as alleged by defendant No. 1; and that it had been more than satisfied by the sale by the said defendant of a portion of the property for Rs. 1,500. It also found that the defendants-mortgagees might and should have been aware of the nature of the title of their mortgagor, and it decreed the plaintiff's claim in full.

The defendants appealed. The lower appellate Court (Subordinate Judge of Jaunpur) found that the dower debt was in fact Rs. 51,000, and as a consequence of this finding decided that the defendant No. 1 was entitled to retain possession, and that the plaintiff's suit was premature. It accordingly decreed the appeal and dismissed the plaintiff's suit without deciding any of the other issues.

The plaintiff appealed to the High Court.

Mr. *T. Conlan* and *Baba Becha Ram Bhattacharji*, for the appellant.

Maulvi Ghulam Mujtaba and *Pandit Sundar Lal*, for the respondents.

EDGE, C. J., and BANERJI, J.—This was a suit for possession of immovable property and for the cancellation of a mortgage. The suit was brought against a Muhammadan widow and two men who held as mortgagees under her. She was in possession of the property in lieu of her Muhammadan dower, and had no other title to it. She, however, granted a mortgage to the other two defendants. The plaintiff would be the person entitled to possession of the property, if the widow had no right to possession in lieu of her dower.

The Privy Council have held that where a Muhammadan widow is lawfully in possession in lieu of her dower, her possession cannot be disturbed except on payment of the dower debt: consequently

this suit, so far as it claims possession, must fail, the dower debt being still due.

It has been held on several occasions in this Court that a Muhammadan widow in possession in lieu of her dower cannot sell any portion of the property. She cannot give a good title to any portion of the property, inasmuch as her position is only that of a widow in possession in lieu of her dower. It has never been held, so far as we are aware, that a Muhammadan widow, under such circumstances, can grant a valid mortgage of any portion of the property in her possession in lieu of dower, and the principle of the decisions in which it has been held that she may not sell, appears to us to apply equally to the case of her attempting to mortgage.

We allow this appeal to the extent of giving the plaintiff a decree declaring that the mortgage is inoperative and passes no title to the male defendants.

In other respects we dismiss the appeal. Each party will bear its own costs.

Decree modified.

*Before Sir John Edge, Kl., Chief Justice, Mr. Justice Knox, Mr. Justice Blair,
Mr. Justice Banerji and Mr. Justice Burkitt*

AMRIT RAM AND ANOTHER (DEFENDANTS) v. DASRAT RAM AND OTHERS
(PLAINTIFFS).*

Civil Procedure Code, ss. 525, 526—Arbitration—Objection to application to file an award in Court that one party had not agreed to refer any matter to arbitration—Jurisdiction of Court to determine whether the parties had or had not referred the matter in question to arbitration.

An objection to an application made under s. 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. *Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa* (1); *Samal Nathu v. Jaishankar Dalsukram* (2); *Venkatesh Khando v. Chanappavda* (3);

* Reference to the Full Bench in First Appeal No. 244 of 1892, decided on the 7th November 1894.

(1) L. R., 3 I. A. 209. (2) I. L. R., 9 Bom., 254.

(3) I. L. R., 17 Bom., 674.

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