1887

LALA PARBHU LAL v. MYLNE.

mortgage, and declare the plaintiff entitled to charge the remaining mouzahs mortgaged with their proportionate share of the debt; and to make a final decree accordingly.

With this slight modification we affirm the judgment of the lower Court with costs of this appeal.

H. T. H. *Decree varied and case remanded.*

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1887 *March* 21.

KHAJA MAHOMED ASGHUR (DEFENDANT) *v.* MANIJA KHANUM *alias* BAKKA KHANUM (PLAINTIFF.)*

Mahomedan Law—Dower—Evidence—Written contract, Effect of failing to prove when alleged.

A suit was brought by a Mahomedan wife for dower alleged to be due to her under a *kabinnamah* executed by her husband at the time of the marriage. She alleged the amount of dower to be Rs. 10,000, of which Rs. 5,000 was prompt and Rs. 5,000 deferred, and she claimed to be entitled to the whole on the ground that she had lawfully divorced her husband in pursuance of power reserved to her in that behalf by the *kabinnamah*. At the hearing she failed to prove the *kabinnamah*, but the Court gave her a decree, holding that there was evidence to show that a dower of Rs. 10,000 was usually payable in the plaintiff's family, and that, in the absence of evidence to the contrary, the whole amount must be considered *prompt*, but as the plaintiff only claimed Rs. 5,000 as prompt, the decree was limited to that amount.

Held that the Court was wrong in decreeing the case upon an oral contract not alleged in the plaint nor admitted by the defendant, the suit being based upon a written agreement, which the plaintiff failed to prove.

THIS was a suit brought by the plaintiff to recover her dower to the amount of Rs. 10,000 settled, as alleged in the plaint, by a *kabinnamah* executed by her husband, the defendant, on the occasion of her marriage. Rs. 5,000, it was alleged, was prompt dower and the other Rs. 5,000 deferred dower.

The plaintiff alleged that the *kabinnamah* reserved to her power to divorce her husband, and she alleged that she exercised that power and gave him notice to pay up the whole amount of the dower. As to the prompt dower she alleged that her

* Appeal from Original Decree No. 135 of 1886, against the decree of Baboo Beni Madhub Mitter, Rai Bahadur, Subordinate Judge of Dacca, dated the 22nd March, 1886.

cause of action arose in the year 1288 (1881-82), the date of the first notice to pay the prompt dower, and as to the deferred dower, from the time of the *talak*, the 29th Bysack 1290 (11th May, 1883).

The *kabinnamah* was not produced. The plaintiff alleged in her plaint that it was in the custody of her father; and a summons was served upon him to produce it. He stated that he had no recollection of its ever having been executed, and said that all papers pertaining to his family had been made over to his son, whom he had appointed matwali of his whole estate. The son was cited as a witness. He stated that he knew nothing about this *kabinnamah*, and that probably none had been executed.

The plaintiff herself being examined on commission stated that she had only once seen this document some five or six years after her marriage, her marriage having taken place when she was twelve or thirteen years old, and she being now past forty. She only knew of the contents by hearsay, and had only seen the document in a folded-up state in her father's possession.

Two witnesses were cited by her who deposed to the execution of the *kabinnamah* and as to the sum fixed for dower.

The lower Court admitted this secondary evidence of the contents of the document, but when it came to deliver judgment it found that the evidence did not prove the execution of any such document at all, and it found that there was no trustworthy evidence as to the plaintiff's alleged right to divorce her husband. But the lower Court was of opinion, upon the evidence of the two witnesses who attempted to prove the document and its contents, that the amount of dower was Rs. 10,000, which evidence the Court considered was supported by the admissions of the defendant and by the evidence of the witnesses called by him, which tended to show that the custom of the plaintiff's family was that a dower of Rs. 10,000 should be fixed on the occasion of daughters marrying; and the Court held that the defendant had contracted to pay that sum.

The lower Court then went on to determine how much of the dower was prompt and how much deferred: and referring to the authorities cited before it—Macnaghten's Principles of

1887

KHAJA MAHOMED ASGHUR v. MANJA KHANUM.

Mahomedan Law, p. 217; *Mirza Bedar Bukht Mohummed Ali Bahadur* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadur* (1); *Mussamut Beebee Jumeela* v. *Mussamut Mulleeka* (2); Bailie's Digest of Mahomedan Law, pp. 91-92; Hedaya, p. 87; Tagore Law Lectures, 1873, pp. 352, 359, 360—came to the conclusion that, in the absence of any definite evidence upon the point, the whole dower should be held to be prompt; but inasmuch as the plaintiff had claimed to have only Rs 5,000 prompt dower, and she was not entitled to claim any deferred dower by reason of the divorce of her husband, which she was not competent to effect, it made a decree for Rs. 5,000 only as prompt dower due to her.

Against that decree the defendant now appealed.

Munshi *Mahomed Yusoof* and Munshi *Serajul Islam* for the appellant.

Baboo *Durga Mohun Das* and Baboo *Lal Mohun Das* for the respondent.

The case of *Sheikh Akbar* v. *Sheikh Khan* (3) was referred to at the hearing of the appeal.

The judgment of the High Court (TOTTENHAM and O'KINEALY, JJ.), after stating the facts, proceeded as follows:—

It is clear to us upon the facts of the case that the plaintiff would be entitled to receive some dower, and probably not less than Rs. 5,000, if she had framed her suit in such a way that the Court could give it to her; but we find ourselves, to our regret, unable to sustain the decree of the lower Court. The suit was brought upon a written contract and upon nothing else. That written contract was not produced, and in the opinion of the lower Court the evidence admitted was not sufficient to establish its execution, and as to that finding we see no reason to differ from the Court below. In the first place it is very difficult to say whether the plaintiff made out any case for the admission of secondary evidence. We are not convinced that there ever was any valid written document in existence, and we are

(1) 19 W. R., 315. (2) W. R., 1864, 252.
(3) I. L. R., 7 Calc., 256.

1887

KHAJA MAHOMED ASGHUR v. MANIJA KHANUM.

certainly not convinced that, if there was, it was in the possession of her father or her brother the Nawab Ashanoollah. That being so we think that the lower Court was not right in decreeing the suit upon the basis of the oral contract not alleged by the plaintiff and not admitted by the other side. If it could be held that the conduct or pleadings of the parties in the suit led the Court below to treat the question at issue as one depending on the existence of any custom in the family to give a dower of Rs. 10,000, and if the evidence of that were sufficient to establish it, we might have been able to leave the decree undisturbed. But we do not find that, in reality, although the issue laid down was a tolerably wide one, the defendant went into evidence as to the custom of the family in fixing the dower. The evidence as to which the defendant went to the trial with regard to custom was as to what portion of her dower was prompt and what portion deferred, and as to the custom of reserving the right of divorce to the wife.

We think that the plaintiff has failed to establish the case set up by her, and that she cannot obtain a decree upon the basis that she did not set up.

We reverse the decree of the Court below and dismiss the plaintiff's suit with costs.

H. T. H. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

E. TAYLOR AND ANOTHER (PLAINTIFFS) *v.* THE COLLECTOR OF PURNEA (DEFENDANT).*

1887 *February* 15.

Land Acquisition Act (X of 1870), ss. 15, 30 and 55—District Court, Powers of—Compensation, its principle and measure—Lands severed from a factory.

The Land Acquisition Act provides for two classes of reference to the Judge, one to assess compensation under s. 15 and the other to apportion compensation under s. 38. The power of the District Court is limited to the determination of these questions and questions of title incidental thereto. There is no power in the Judge or the High Court in appeal to decide on any such reference a question arising under s. 55.

* Appeal from Original Decree No. 90 of 1886, against the decree of F. W. V. Peterson, Esq., Judge of Purneah, dated the 1st of February, 1886.