

the lower appellate court to the court of first instance for decision on the merits. Costs here and hitherto will be costs in the cause.

1910

ALI BAKSH
v.
ALLAHABAD
KHAN.

Appeal decreed.

Before Mr. Justice Richards and Mr. Justice Tuddall.

BAMZAN ALI KHAN (PLAINTIFF) v. ASGHARI BEGAM (DEFENDANT)
AND RUSTAM KHAN (PLAINTIFF).*

1910.
April 25.

*Muhammadan law—Dower—Rights of widow in possession in lieu of dower—
Proof of consent of husband or heirs not necessary.*

A Muhammadan widow to whom dower is due who enters into possession of her husband's property on his death is entitled to hold the estate against the other heirs until her claim to dower is satisfied, subject to her liability to account for the profits which she may receive while so in possession. It is not necessary for her to show that the deceased husband or his heirs consented to her getting into possession. *Amanat-un-nissa v. Bashir-un-nissa* (1) dissented from. *Mussumat Bebee Bachan v. Sheikh Hamid Hossein* (2), *Ameer-oon-nissa v. Moorad-oon-nissa* (3) and *Amani Begam v. Muhammed Karim-ullah* (4) referred to.

THE facts of this case were as follows:—

The plaintiff sued as one of the heirs of one Gulsher Khan to recover his share of the estate, which was in the possession of the widow of Gulsher Khan, the defendant Musammam Asghari Begam. She resisted the suit upon the ground that her dower debt was unpaid and that she was therefore entitled to remain in possession until it was satisfied. The lower appellate court found that the defendant's dower was Rs. 5,000 and was still undischarged. It consequently gave the plaintiff a decree conditional upon his paying the sum of Rs. 5,000. The plaintiff appealed, urging that the widow was not lawfully in possession, and that therefore he was entitled to a decree without paying off her dower debt.

Babu Benoy Kumar Mukerji, for the appellant.

Babu Jogindro Nath Chaudhri, for the respondents.

RICHARDS.—This appeal arises out of a suit brought by the plaintiff as one of the heirs of Gulsher Khan for his share of the

* Second Appeal No. 599 of 1909, from a decree of H. J. Bell, District Judge of Aligarh, dated the 25th of February, 1909, confirming a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 11th of May 1908.

(1) (1894) I. L. R., 17 All., 77.

(3) (1855) 6 Moo., I. A., 211.

(2) (1871) 14 Moo. I. A., 377.

(4) (1894) I. L. R., 16 All., 225.

1910

**BANZAN ALI
KHAN
v.
ASGHARI
BEGAM.**

estate. The defendant, Musammat Asghari Begam, is the widow of the said Gulsher Khan. The latter pleaded that she was in possession of her deceased husband's property; that her dower debt remained undischarged, and she claimed to remain in possession until the dower debt was discharged. The lower appellate court has found that the defendant's dower debt is Rs. 5,000, and it remains undischarged. It gave the plaintiff a decree conditional upon his paying the sum of Rs. 5,000. The plaintiff appeals and claims that he is entitled to possession, notwithstanding that the dower debt remains undischarged. He relies upon the fact that when the defendant applied for mutation of names, she merely claimed mutation as sole heir of her deceased husband and that therefore she was not lawfully in possession in such a way as to entitle her to maintain possession until her dower debt was paid.

The lower appellate court says in the course of its judgement :—“The mutation proceedings commenced within a very few months of the death of Gulsher Khan, and I am not shown anything to the effect that it was ever even alleged that the lady had taken possession without the consent of the other heirs. On the other hand one of the plaintiffs expressly acquiesced in her possession and her claims. Thus the plaintiffs have failed to discharge the burden which lay upon them to prove the unlawfulness of her possession. And in fact, in all probability what happened was that the lady on her husband's death simply continued in possession of the properties, which for all practical purposes she possessed along with him, living with him as his wife, for Rustam Khan in the mutation proceedings spoke of her as having separate possession.”

The appellant relies on the ruling in *Amanat-un-nissa v. Bashir-un-nissa* (1). In that case the learned Judges, after referring to the case of *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (2), say as follows:—“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 person entitled, of property to the possession of which those other persons are entitled. If a Muhammadan

(1) (1894) I. L. R., 17 All., 77. (2) (1871) 14 Moo, I. A., 377.

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." The appellant contends that inasmuch as it is not shown in the present case that the widow had been placed in possession either by her husband in his lifetime, or by the heirs after his death, she has no right to retain possession, even though her dower debt remains undischarged. With all due respect to the learned Judges who decided the case to which I have just referred, I do not think that the proper regard was paid to the facts in the case of *Mussumat Beebe Bachun v. Sheikh Hamid Hossein*. It appears from the report of that case (at page 382) that the widow had got mutation of names in spite of the opposition of the other heirs, and (at the top of page 382, 14 Moore's L. A.) their Lordships of the Privy Council say that there was no agreement on the part of the husband to pledge his estate for the dower. Accordingly, in my opinion, it is not correct to say that unless a Muhammadan widow has obtained possession either by contract with her husband or with the consent of the heirs, she cannot be lawfully in possession so as to give her a right to retain possession until her dower debt is paid. It seems to me that if the widow obtains possession peacefully and quietly and without fraud, she is entitled to remain in possession until her dower debt is discharged, subject to her liability to account for the profits that she has received whilst so in possession. In my opinion this is the law as laid down by their Lordships in the case to which I have just referred.

In the case of *Amani Begam v. Muhammad Karim-ullah Khan* (1) a learned Judge of this court points out that the possession of the widow entitled her to remain in possession pending the payment of her dower, does not depend upon the consent of the co-heirs. At page 227 the learned Judge says:—"I can find

1913

 RAMZAN ALI
 KHAN
 v.
 ARGHARI
 BEGAN.

(1) § (1894) I. L. R., 16 All., 225.

1910

RAMZAN ALI
KHAN
2.
ASGHARI
BEGAN.

no authority for the proposition that the widow's possession is unlawful unless she has got such possession with the consent of the co-heirs." The learned Judge then goes on to refer to the case of *Mussumat Bebee Bachum v. Sheikh Hamid Hossein*.

In the case of *Ameer-oon-nissa v. Moorad-oon-nissa* (1), which is quoted in the case of *Mussumat Bebee Bachum v. Sheikh Hamid Hossein*, the widow never professed to have been put into possession during her husband's lifetime, or with the consent of the co-heirs. The latter (i.e., the co-heirs) did not even admit that she had been the wife of the deceased.

In my opinion the view taken by the learned Judge was correct except in one particular. He has ascertained the dower debt as being Rs. 5,000, and he has granted a decree to the plaintiff conditional upon his paying this sum. I think that having regard to the decision of their Lordships of the Privy Council the widow was bound to account for the profits received while she was in possession. However, the value of the estate is not great and the appellant has not taken any objection to this part of the decree in his memorandum of appeal. The plaintiff never undertook to pay the dower, and under all the circumstances I do not think that the ends of justice require that the case should be sent back to ascertain the profits received by the widow while in possession. I would dismiss the appeal.

TUDBALL, J.—I fully concur. It seems to me that the balance of authority is in favour of the view that a widow, who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate is entitled to hold that estate against the other heirs until her claim to dower is satisfied, without being asked to show either consent on their part or on that of the deceased husband. She has of course to account for the income of the estate to other heirs. The nature of her right seems to be referable to the rule of Muhammadan law which was stated by the law officers in *Ameer-oon-nissa v. Moorad-oon-nissa* (1), viz., that any creditor of a deceased Muhammadan was entitled to help himself to any money or chattels not exceeding the value of his claim or to sell lands of the deceased and repay himself

out of the proceeds. This rule of Mubammadan law, no doubt, has been modified and is not applicable in the present age, but the widow's right to retain possession of her husband's estate in lieu of her dower has sprung from this and is therefore not dependent on the consent of her co-heirs.

BY THE COURT.—The order of the Court is that the appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Tudball.
TAFAZZUL HUSAIN (PLAINTIFF) v. THAN SINGH AND ANOTHER
(DEPENDANTS).*

Pre-emption—Muhammadan law—Partition after sale but before decree—Effect on suit.

The plaintiff sued for pre-emption of zamindari property, basing his claim upon the Mubammadan law and the fact that he was a co-sharer in the property sold. After the suit, but before decree, the property was partitioned and the plaintiff and the vendors became owners of different *mahals*. Held that the plaintiff was no longer, after the partition had been completed, entitled to a decree for pre-emption.

THE facts of this case were as follows :—

The suit was one for pre-emption—based on the Muhammadan law—of zamindari property. At the date of the sale sought to be pre-empted, the plaintiff pre-emptor and the vendor were both co-sharers in the village (mauza Kherua, pargana Jahanabad, district Pilibhit), and the plaintiff had a right of pre-emption as against the vendee. Some time after the institution of the suit for pre-emption by the plaintiff, he and other co-sharers applied for perfect partition of the village to the Revenue Court against the vendee as opposite party. This application was subsequently withdrawn; and then the vendee and other co-sharers, except the plaintiff, applied for perfect partition, and it was made and came into force before the pre-emption suit proceeded to a decree. As a result of the partition the plaintiff and the vendor became owners of different *mahals*. The Subordinate Judge dismissed the plaintiff's suit on the ground that by reason of the partition the plaintiff was no longer a co-sharer of the vendor within the

1910

RAMZAN ALI
KHAN
v.
ASGHARI
BEGAM.

1910
April 29.

* Second Appeal No. 677 of 1909, from a decree of W. H. Webb, District Judge of Bareilly, dated the 10th of May 1909, confirming a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 9th of July, 1907.