Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1911
January 26.

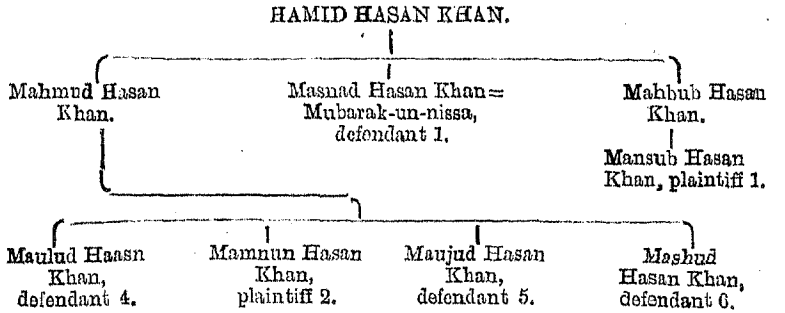
MUBARAK-UN-NISSA (DEFENDANT) v. MANSAB HASAN KHAN AND ANOTHER (PLAINTIFFS).*

Muhammadan law—Dower—Agreement between husband and wife as to satisfaction of wife's dower—Construction of document—Mortgage—"Mahabat."

A Muhammadan made over to his wife, to whom a dower of Rs. 1,25,000 was due, certain property. In the deed of transfer it was stipulated (1) that the wife was to take possession of the property in lieu of her dower and enjoy the usufruct; (2) that the property was to revert to the husband if the wife predeceased him, the dower debt being deemed to have been discharged; (3) that if the husband predeceased the wife the property was to become hers absolutely.

Held that the transaction was neither a mortgage by conditional sale nor a *mahabat*, but the wife obtained a right to enjoy the usufruct during her husband's lifetime, with the possibility of the interest developing into full ownership if the husband predeceased her.

THE following pedigree shows the relationship of the parties:—



Masnad Hasan Khan transferred certain properties to his wife, the appellant, by a deed of *tasfia-nama*, dated the 22nd of September, 1883, in which he admitted that Rs. 1,25,000 was due to her as dower. The *tasfia-nama* provided:—

"That the property shall be put in possession of the wife in lieu of the dower debt with the conditions that during her lifetime she shall collect and enjoy the profits of all the properties in lieu of the dower debt; that if she dies before the husband the dower debt shall be deemed paid up, no matter whatever portion thereof is realized by that time; that the dower debt being deemed as satisfied, the properties shall revert to the husband; that in such a case the wife's possession shall be deemed to be (one under) a *bil maktá theka*; that the annulment of this lease and the satisfaction of the debt shall be deemed from that time in the year of the wife's death in which she may make the last collection before her death of any portion of the profits from any property; and that if the husband dies before the wife the properties shall be owned by the wife in lieu of

* First Appeal No. 332 of 1907 from a decree of Achal Behari, Subordinate Judge of Shahjahanpur, dated the 9th September, 1907.

1911

MUBARAK-UN-NISSA v. MANSAB HASAN KHAN.

the dower debt remaining due at that time, no matter whatever amount it may be, and the husband's proprietary rights shall become extinct."

On the 7th of April, 1892, both husband and wife executed a deed whereby a greater portion of the property comprised in the *tasfia-nama* was declared to be *waqf*. In the year 1898 Masnad Hasan Khan inherited some property from his mother, which, along with some other property, passed into the hands of the wife as the result of a compromise between the two, by which the wife was to hold the property affected on the terms of the *tasfia-nama* of 1883, except that a life interest was given to him. On the 15th of August, 1903, the husband and wife executed a *tauliat-nama* appointing defendants 2 and 3 as *mutawallis* of the *waqf* property after the death of the wakifs. On the 9th of September, 1903, Masnad Hasan Khan executed a deed of relinquishment in favour of his wife by which he relinquished the life interest reserved to him under the compromise, in favour of his wife. Masnad Hasan Khan died on the 1st of March, 1905. This suit was brought by the plaintiffs respondents for their share in the property left by Masnad Hasan Khan at his death, on the allegation that the deed of *waqf* was invalid, and that the dower debt of the appellant had been satisfied out of the usufruct of the property. The lower court allowed the claim, holding the possession of the widow to be one analogous to that of a mortgagee. It further held that the *waqf* was an invalid one, executed chiefly to defeat the claims of the heirs after the death of Masnad Hasan Khan. The defendant appealed.

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Muhammad Ishaq*), for the appellant:—

Masnad Hasan Khan did not leave any estate at the time of his death. By the *tasfia-nama* of 1883 in case of the death of Masnad Hasan Khan the transaction was to be treated as a sale of the property comprised in the deed in lieu of the amount of the dower that might happen to be due then. It was an ordinary contract, and as a result of that the property became the wife's absolutely at the time of the husband's death. Again, both the husband and wife joined in executing a waqf of the whole of the zamindari property for certain purposes. They supplemented this waqfnama by the *tauliat-nama* of 1903. The waqf is quite

valid and the heirs have no right to claim a share in the property thus dedicated to pious uses. Thirdly, when the property subsequently acquired by Masnad Hasan Khan was made the subject of arbitration proceedings, the award only reserved a life interest to the husband, and as he effected a deed of relinquishment with reference to this and what had not formed part of the waqf of 1892, there was nothing left in him which the heirs could claim. On principle there is no difference between this and an ordinary sale. Either had the chance of enjoying the property free in case the other died. In a conditional sale the main object is the payment of money. It is not so here. As to the waqf, it is a perfectly valid one. The fact that the executant wanted to deprive their nephews is no argument against the validity of the deed of waqf. A good portion of the property has been endowed; *Kaleloola Sahib* v. *Nuseerudeen Sahib* (1), *Delroos Banoo Begum* v. *Nawab Sayad Asghar Ali Khan* (2), *Nizamudin Gulam* v. *Abdul Gafur valad Mainudin* (3), *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (4), *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (5), *Deoki Prasad* v. *Inaitullah* (6) and *Luchmiput Singh* v. *Amir Alum* (7).

There was nothing to prevent the wâqifs from including the small items for the support of their family. A waqf in favour of a wâqif's children is held to be valid by some writers.

The Hon'ble Pandit *Moti Lal Nehru* (with him Babu *Durga Charan Banerji* and Maulvi *Ghulam Mujtaba*), for the respondents.

The deed of 1883 created a usufructuary mortgage by way of conditional sale. The essence of a usufructuary mortgage is that possession is security for the debt and not the property itself. A usufructuary mortgagee has no right to bring property to sale. If a creditor is to pay himself out during his lifetime, it would not prevent the transaction being a mortgage. The parties could make its termination depend on any contingency they liked. It could not be anything else. Both parties retained their life interest with the expectancy of an absolute interest in the event

(1) (1894) I. L. R., 18 Mad., 201.
(2) (1875) 5, B. L. R., 167.
(3) (1888) I. L. R., 13 Bom., 264.
(4) (1870) 13 W. R., 235.
(5) (1889) I. L. R., 17 Calc., 498.
(6) (1892) I. L. R., 14 All., 375.
(7) (1882) I. L. R. 9 Calc., 176.

1911

MUBARAK-UN-NISSA v. MANSAB HASAN KHAN.

of one surviving the other. Neither party, however, could enforce his or her right till after the death of the other. Here the case is stronger than that in *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (1). On the one hand there is a right to retain possession till payment—all that a mortgagee can do; on the other there is a right to account—all that a mortgagor can claim. If the wife predeceased the husband, it was to be a *zar-i-peshgi* lease. If he died before the wife, she was to remain in possession. He did not part with his interest *in præsenti*. He continued to be the owner of the property; *Khajoorooonissa* v. *Rowshan Jehan* (2).

Having regard to Muhammadan law the transaction was a "mahabat." Certain principles of Muhammadan law had to be borne in mind. (i) A transfer or disposition *in præsenti* made in health (gift or sale or "mahabat") was valid. (ii) A disposition which took effect after death in whatever form, was a bequest and valid only to the extent of ⅓rd if made to a stranger and not valid at all if made to an heir without the consent of other heirs. (iii) A transfer *in præsenti* made on death-bed, had the same effect as a bequest. (iv) A transfer for inadequate consideration was a "mahabat," *i. e.*, it was a sale to the extent of the property covered by the consideration and a gift as to the excess. (v) Mahabat could be so made as to take effect immediately or after death, (*a*) if immediately and not made on death-bed, it was valid. (*b*) If after death, or immediately, but on death-bed it was valid only as to the property covered by consideration plus ⅓rds of the excess: if it was in favour of an heir it was wholly void. Here the wife was to become owner on death of husband in return for whatever was left due to her of the dower debt. That balance could be in excess of the value of property or fall short of it. In the former case there was no "mahabat", and she took possession of the whole, in the latter case it was a "mahabat:" Hidaya—p. 258 (Printed at the Haidri Press, Bombay); Kifaya.—A commentary on Hidaya, p. 289; Durrul Mukhtar, Part v., p. 667 (margin), Chapter of Emancipation in (mortal) illness; Ruddal Mukhtar, p. 667; Hidaya (edn. as above), p. 267; Bailey's Hidaya, Book 52, Ch. 2, pp. 676, 685.

(1) (1871) 14 Moo. I. A., 377. (2) (1876) I. L. R., 2 Calc., 184.

The gift here was void:—Wilson's Muhammadan Law, section 313, page 332. It was not a gift *in præsenti*, for the rights of the wife were not to be complete till the death of the husband. His case was that either it was a mortgage or a testamentary disposition: *Saiad Kasum* v. *Shaista Bibi* (1). Any disposition to take effect after death was a testamentary disposition. There was no present gift: the husband continued in possession. Ownership was not to accrue to wife till his death. Even a sale for full consideration was a testamentary disposition under Muhammadan law if it took effect after death. But the Muhammadan law did not apply to sales in India. The value of the transaction was to be determined by circumstances as they prevailed at the time of death, it would be a sale if there was any dower due and it would be valid as the law governing sales was not Muhammadan law. But if the dower due was less than the value of the property, it would be a gift as to the excess and the Muhammadan law of gifts would apply, provided, of course, it was to take effect after death: Wilson's Muhammadan Law, section 283, page 309; *ibid.*, section 285, page 310; Bailey's Muhammadan Law, page 651.

As to validity of the waqf it was no substantial dedication of the property. The Privy Council had decided that point. There was no intention that interest should be paid. The case of *Hamira Bibi* v. *Zubeda Bibi* (2) only placed dower debt on footing of an ordinary contract. It did not award interest in all cases of dower debt.

The Hon'ble Pandit *Sundar Lal*, in reply:—

The word used in the deed was عوض (exchange). Property went in exchange for the debt. The wife acquired an interest in the property which was equivalent to a right of present enjoyment plus the right of ownership on death of the husband. It was a sale of property liable to be defeated if she died before him.

The question of "mahabat" did not arise. A present interest would be given to the wife which would not be the case in a "mahabat."

STANLEY, C. J., and BANERJI, J.:—The suit out of which this appeal has arisen was brought by the plaintiffs respondents for

(1) N.-W. P., H. C. Rep., 1875, p. 313. (2) (1910) I. L. R. 33 All., 182.

1911

MUBARAK-UN-NISSA v. MANSAB HASAN KHAN.

possession of a share of certain property which originally belonged to their deceased uncle, Masnad Hasan Khan. They claim as his heirs the share to which they are entitled under the Muhammadan law. They also pray for mesne profits.

Masnad Hasan Khan died on the 1st of March, 1903, leaving him surviving as his heirs, the first defendant Musammat Mubarak-un-nissa, his widow, and five nephews, two of whom are the plaintiffs. It is common ground that the dower of Musammat Mubarak-un-nissa was Rs. 1,25,000, and that this amount was due to her. In order to provide for the payment of the dower, Masnad Hasan Khan executed a document in her favour on the 22nd of September, 1883, by virtue of which she is admittedly in possession of his estate. The construction of this document is the principal question to be determined in this appeal. Whilst it is asserted in the plaint that the instrument was a lease granted to Mubarak-un-nissa for the realization of her dower and that she is bound to surrender the property on her dower being discharged, it is urged on her behalf that she has acquired an absolute interest in the property under the provisions of the document. The plaintiffs allege that she has realized the whole amount of her dower from the usufruct of the property, and they are therefore entitled to obtain possession of their share.

On the 7th of April, 1892, Mubarak-un-nissa and Masnad Hasan Khan jointly executed a deed of waqf in respect of a portion of the property, and by a later deed of the 15th of August, 1903, they provided for the management of the waqf and appointed the 2nd and 3rd defendants as their successors in the office of *mutawallis*. It is asserted by the plaintiffs that this waqf is nominal and fictitious; that Masnad Hasan Khan continued to be the owner of the property till his death, and that the waqf is also invalid under the Muhammadan law.

Upon the death of Masnad Hasan Khan's mother a reference to arbitration was made by him and Mubarak-un-nissa for the settlement of their claims in regard to the property inherited from the mother, and an award was delivered by the arbitrator on the 10th of October, 1898. This was made a rule of Court on the 30th of November, 1898. Subsequently, on the 9th of September, 1903, Masnad Hasan Khan executed a deed of relin-

quishment in favour of his wife. These transactions are alleged by the plaintiffs to be fictitious and collusive and made with a view to deprive them of the property.

The court below has held that under the instrument of the 22nd of September, 1883, Masnad Hasan Khan made a usufructuary mortgage in favour of his wife for the amount of her dower; that the transaction was at least analogous to a mortgage; that Mubarak-un-nissa was in possession in lieu of her dower; that the waqf is invalid and that the plaintiffs are entitled to possession on payment of the balance of dower due to Mubarak-un-nissa. It has accordingly made a decree in favour of the plaintiffs for possession of their share of the property (except movables and house property, in respect of which they abandoned their claim), on condition that they do pay to Mubarak-un-nissa their proportionate share of Rs. 43,482 which it has found to be the balance of dower due to her.

The defendant, Mubarak-un-nissa, has preferred this appeal. The plaintiffs have filed the connected appeal No. 21 of 1908 in which they question the correctness of the finding of the court below as to the amount of the dower due to the defendant.

The decision of this appeal hinges mainly on the construction of the instrument, dated the 22nd of September, 1883, mentioned above. That document was executed both by Masnad Hasan Khan and Mubarak-un-nissa, and the material portion of it is thus translated:—

"In order to make arrangement for repayment of the dower debt and to shake off the liability of the husband both in this and the next world, the husband and the wife have made settlement as follows:—That is to say, all the properties detailed below, now possessed by the husband, shall be put in the possession of the wife in lieu of the dower debt, with the conditions that during her lifetime she shall collect and enjoy the profits of all the properties in lieu of her dower debt; that if she dies before the husband, the dower debt shall be deemed paid up, no matter whatever portion thereof is realized by that time; that the dower debt being deemed as satisfied, the properties shall revert to the possession of the husband, that in such case the wife's possession shall

1911

MUBARAK-UN-NISSA v. MANSAB HASAN KHAN.

be deemed to be (one under) a *bil makta theka* (lease for a fixed sum); that the annulment of this lease and the satisfaction of the debt shall be deemed from that time in the year of the wife's death at which she may make the last collection before her death of any portion of the profits from any property; and that if the husband dies before the wife, the properties shall be owned by the wife in lieu of the dower debt remaining due at that time, no matter whatever amount it may be, and the husband's proprietary rights shall become extinct."

The scope of the document is three-fold: (1) the wife is to take possession of the property in lieu of her dower and enjoy the usufruct; (2) the property is to pass to the husband, if the wife predeceases him, and the dower debt is to be deemed to be discharged; and (3) if the husband predeceases the wife, she is to become absolute owner of the property, whatever may be the balance of dower due. It is claimed on behalf of the wife that as her husband is dead, she has acquired the absolute ownership of the property. We are unable to agree with the court below in the view that a mortgage was effected. The property of the husband was not made security for the wife's dower, and it was not pledged for the dower. The mere fact that possession was delivered to the wife did not create an hypothecation of the property for the amount of the dower. This, in our opinion, is the effect of the decision of their Lordships of the Privy Council in the case of *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (1), and we do not think the learned Subordinate Judge has correctly appreciated it. Their Lordships observed:—"The claim of Mussumat Bebee Bachun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower—for such a right does not arise under the Muhammadan Law as a consequence of the gift of dower, nor was there any agreement on the part of the husband to pledge his estate for the dower." In the document before us we fail to find any provision which may be construed to be a hypothecation or pledge of the property. The learned advocate for the respondent contends that the document must be deemed to be a will. We cannot accede to this contention.

(1) (1871) 14 Moo. I. A., 377.

There was no disposition of the property to take effect only after the husband's death. Nor do we think the transaction was of the nature of what is known in Muhammadan Law as *muhabat*. In our opinion the property was, by the instrument in question, vested in Musammat Mubarak-un-nissa *in præsenti* in lieu of her dower, subject to the condition that in the event of her predeceasing her husband it should go to her husband alone to the exclusion of her other heirs. It was a conveyance of the property in lieu of dower subject to a contingency which has not happened and to a condition the validity of which we are not called upon to determine. The interest created was, as Mr. *Sundar Lal* aptly put it, a right to enjoy the usufruct of the property during the lifetime of the husband, which was to develope into full ownership on the happening of a contingency, namely, the death of the husband in the lifetime of the wife. That contingency having happened and the husband of Musammat Mubarak-un-nissa being dead, she has become the absolute owner of the pro-property, and the plaintiffs as some of the heirs of her husband are not entitled to recover any portion of it from her.

In this view it is unnecessary to consider whether the waqf created by her is or is not valid under the Muhammadan Law. Even if it is invalid, the plaintiffs have no right to question it.

Furthermore by the deed of relinquishment executed by Mansad Hasan Khan on the 9th of September, 1903, property of all descriptions was vested in Mubarak-un-nissa. The plaintiffs' suit must therefore fail.

We accordingly allow the appeal, set aside the decree of the court below and dismiss the suit with costs in both courts.

Appeal allowed.