1910
November 29.

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

UMDA BEGAM (PLAINTIFF) *v.* MUHAMMADI BEGAM AND OTHERS (DEFENDANTS.)*

Muhammadan law—Sunnis—Dower—No determination at marriage whether dower is to be prompt or deferred—Presumption—Civil Procedure Code (1908) order II, rule 2—Estoppel.

In the case of Muhammadans of the Sunni persuasion, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of the dower settled. *Eidan* v. *Mazhar Husain* (1) and *Taufik-un-nissa* v. *Ghulam Kambar* (2) followed.

A suit, therefore, brought by the wife during the lifetime of her husband for the recovery of the prompt portion of her dower will be no bar to a subsequent suit for the recovery of the deferred portion.

THIS was a suit brought by one Musammat Umda Begam, against the heirs of her husband to recover a portion of her dower debt. The plaintiff was the wife of one Muhammad Ali Bahadur Khan, and her dower had been fixed at Rs. 1,25,000, but it had not been determined at the time of the marriage whether such dower was prompt or deferred. In 1886, during the lifetime of her husband, the plaintiff had sued for the recovery of Rs. 25,000 out of her dower, which she said was payable to her as "prompt" dower. The defence was that the whole of the dower was "deferred," but this contention was overruled, and a decree passed in favour of the plaintiff upon the finding that, under the rules of Muhammadan law governing the parties, the amount claimed was recoverable. The present suit sought to recover a further sum of Rs. 30,000, the plaintiff relinquishing her claim to the balance. The suit was defended on the ground, amongst others, that the whole amount of the plaintiff's dower was recoverable at the time when she instituted her suit in 1886, and that, as she did not then claim the whole amount, the present suit was barred by the provisions of order II, rule 2, of the Code of Civil Procedure, 1908. The court of first instance (Subordinate Judge of Moradabad) accepted this contention and dismissed the suit. The plaintiff appealed to the High Court.

* First Appeal No. 301 of 1909 from a decree of Nihal Chandra, Subordinate Judge of Moradabad, dated the 15th of July 1909.

(1) (1877) I. L. R., 1 All., 488. (2) (1877) I. L. R., 1 All., 506.

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The Hon'ble *Nawab Muhammad Abdul Majid*, for the appellant.

Messrs. *C. Dillon* and *Abdul Raoof*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit brought by the plaintiff appellant for a portion of her dower. She is the widow of Muhammad Ali Bahadur Khan, and it is admitted that the amount of her dower was Rs. 1,25,000. During the lifetime of her husband she brought a suit in 1886 to recover Rs. 25,000 out of her dower, which she said was payable to her, as it had not been settled at the time of her marriage whether her dower was to be prompt or deferred. In answer to her claim her husband alleged that according to the contract entered into by the parties at the time of the marriage the whole amount of the dower was deferred. The court overruled this contention and made a decree in the plaintiff's favour on the 26th of June, 1886, holding that the amount claimed was recoverable under the rules of Muhammadan law governing the parties. Muhammad Ali Bahadur Khan having since died, the plaintiff brought the suit out of which this appeal has arisen to recover Rs. 30,000 out of the balance of her dower, and she relinquished her claim to any sum in excess of that amount.

The suit was defended on the ground, among others, that the whole amount of the plaintiff's dower was recoverable at the time when she instituted her suit in 1886, and that as she did not claim the whole amount of her dower in that suit the present claim is barred by the provisions of order II, rule 2, of the Code of Civil Procedure, 1908, which corresponds with section 43, Act XIV of 1882. This contention has found favour with the court below, which has dismissed the claim.

This appeal is perferred by the plaintiff, and it is urged that the court below has erred in holding that the whole amount of the dower was recoverable at the time when the suit of 1886 was instituted. In our opinion this contention is well founded, and the weight of authority is in support of it. In *Eidan* v. *Mazhar Husain* (1) Sir ROBERT STUART, C. J., and PEARSON, J., held that when at the time of marriage the payment of dower has not been stipulated to be deferred, payment of a portion of the

(1) (1877) I. L. R., 1 All., 493.

dower must be considered prompt; and the amount of such portion is to be determined with reference to custom; where there is no custom it must be determined by the court with reference to the status of the wife and the amount of the dower.

The same view was held by PEARSON and OLDFIELD, JJ., in *Taufik-un-nissa* v. *Ghulam Kambar* (1). This is in accordance with what is stated in Mr. Ameer Ali's work on Muhammadan law, Vol. II, page 483. The learned author observes:—"Under the Hanafi doctrines, each case will be decided on its own individual merits. 'When it has been explained how much of the dower is prompt that much should be promptly paid. When this has not been done, regard should be had to the [qualifications of the] woman and the dower mentioned in the contract, with the object of determining how much of such dower should be considered prompt in the case of such woman; and the amount so determined is to be prompt accordingly, without regard to the proportion of a fourth or a fifth, but what is customary is also to be considered'." In support of this view he refers to the Fatawa Kazi Khan, the Fatawa Alamgiri and the Radd-ul-Muhtar. He distinguishes the rule of the Hanafi School from that of the Shia School, under which the whole of the dower is considered prompt, when the nature of it is not mentioned in the contract of marriage, that is, how much of it is prompt and how much is deferred. The same doctrine of the Hanafi School is also stated in Baillie's Moohummudan Law (Hanifeea), p. 127, and in Shama Charan Sarkar's Tagore Law Lectures, 1873, p. 359.

The parties to this case are governed by the Hanafi doctrines, they being Sunnis. Therefore the rule referred to above applies to them and not the doctrine of the Shia School.

Mr. *Dillon*, the learned counsel for the respondents, relies on a passage in Sir William Macnaghten's Principles and Precedents of Muhammadan law, page 59, and also on the case of *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor* (2). In Macnaghten's Muhammadan law it is stated that where it was

(1) (1877) I. L. R., 1 All., 506. (2) (1875) 19 W. R., 315.

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not stipulated at the marriage whether the dower was to be prompt or deferred, the whole amount of the dower should be regarded as prompt. This undoubtedly is the rule of the Shia School of Muhammadan law. As pointed out in the Tagore Law Lectures for 1873, no authority is cited in support of the view propounded in Sir William Macnaghten's work, and it may be that the proposition which he lays down is the rule of the Shia School. In *Mirza Bedar Bukht* v. *Mirza Khurrum Bukht* their Lordships of the Privy Council after referring to the passage in Macnaghten's Muhammadan law, at page 59, relied upon by the learned counsel for the respondents, held that when it is not stated whether the dower is to be prompt or deferred, the whole amount of the dower should be held to be prompt. That case was manifestly one governed by the Shia School of Muhammadan law. The parties to it were, as the judgement points out, members of the royal family of Oudh, and it is well known that the royal family of Oudh followed the Shia School of Muhammadan law; see introduction to Baillie's Moohummudan Law (*Imameea*). That case, therefore, must be regarded as an authority in the case of persons subject to the Shia School.

The ruling of their Lordships was followed by the Madras High Court in *Masthan Sahib* v. *Assan Bivi Ammal* (1). The arguments of counsel in that case clearly show that it was a case to which the Shia law applied. These rulings, therefore, do not support the respondent's contention.

In *Inayat Husain* v. *Muhammad Husain* (2), which is also relied upon by Mr. *Dillon*, a Bench of this Court held, following the decision of their Lordships of the Privy Council to which we have referred and the dictum in Macnaghten's Principles and Precedents of Muhammadan law, that where it was not expressed whether the payment of dower was to be prompt or deferred, it must be held that the whole was due on demand. It does not appear from the report or from the paper book of the case, to which we have referred, whether the parties to it were governed by Shia doctrines or by the doctrines of the Hanifia School. If the learned Judges intended to lay down as a general rule applicable to all Muhammadans that the whole amount of the

(1) (1899) I. L. R., 23 Mad., 371. (2) Weekly Notes, 1889, p. 153.

dower in a case like this was to be deemed to be prompt, we are, with all deference, unable to agree with them. As we have pointed out above, the decision of their Lordships of the Privy Council, which the learned Judges followed, related to the case of persons governed by the Shia law, according to which the whole amount of the dower would, in such circumstances, be deemed to be prompt. But the weight of authority, as shown above, in the case of persons of the Sunni persuasion, is in favour of the view that the amount of dower payable to a wife, where it was not settled, at the time of the marriage whether it was to be prompt or deferred, would be regulated by custom, or in the absence of custom by the status of the parties and the amount of the dower settled. In this view the court below was wrong in holding that the whole amount of the plaintiff's dower was payable to her when she instituted her suit in 1886, and that her present claim offends against the rule laid down in order II, rule 2.

We may also observe that the decision in the previous suit precludes the defendants from raising the contention which they put forward. One of the issues laid down in that suit was what was the amount of dower which the plaintiff could at time of that suit claim according to Muhammadan law, legal enactments and custom. The defendant's case was that the whole amount of the dower was deferred. The court repelled that contention and held that the plaintiff was entitled to claim Rs. 25,000, i.e., one-fifth of the whole amount of her dower. This was the case of the defendants. In the face of that decision, it seems to us that it is no longer open to the defendants to dispute the correctness of the plaintiff's contention that the whole amount of her dower was not payable at the date of the former suit.

We accordingly allow the appeal and set aside the decree of the court below, and, as the suit was erroneously decided on a preliminary ground, we remand it to that court under the provisions of order XLI, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and dispose of the other questions which arise in the case according to law. The appellants will have their costs of this appeal. Other costs will abide the event.

Appeal decreed : cause remanded.