not received at the Privy Council Office till the 25th of February, 1915, and the appeal not set down for hearing until June, 1916. Litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse.

1916

JHANDA SINGH *v.* WAHID-UD-DIN.

On the whole case their Lordships are of opinion that the decree appealed from was right and should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellant:—*Barrow, Rogers and Nevill.*

Solicitor for the 1st, 2nd and 54th respondents.—*Douglas Grant.*

J. V. W.

HAMIRA BIBI (PLAINTIFF) *v.* ZUBAIDA BIBI AND OTHERS (DEFENDANTS) AND AMINA BIBI AND OTHERS (PLAINTIFFS) *v.* ZUBAIDA BIBI AND OTHERS (DEFENDANTS).

*P.C.**
1916

May, 29, 30, 31.
June 1, 2.
August 1.

[On appeal from the High Court of Judicature at Allahabad.]

Muhammadan law—Dower—Interest on unpaid dower—Claim for, by widow allowed to take possession of her husband's estate to satisfy her dower-debt—Liability of widow in possession to account for profits of estate—Recognition by Muhammadan law of equitable principles in such a case.

Where a Muhammadan widow was allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income of it, and there was no agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower.

Held that on equitable considerations she was entitled to some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal rights to exact payment of her dower on the death of her husband; and such compensation for forbearance to enforce a money payment was best calculated on the basis of an equitable rate of interest. That appeared to be consistent with Muhammadan law [see the chapter on "The Duties (Adab) of the Kazi" in the principal works on that law], which clearly showed that the rules of equity and equitable considerations commonly recognized in the courts of Chancery in England are not foreign to the Musalman system, but are in fact often referred to and invoked in the adjudication of cases.

The decision in *Woomatool Fatima Begum* v. *Meerunmunnissa Khanum* (1) that "it would be inequitable to make the widow account for the profits, except

---

* *Present*:—Lord ATKINSON, Lord PARKER of WADDINGTON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1868) 9 W. R., 318.

1916

HAMIRA BIBI
v.
ZUBAIDA BIBI.

on the terms of allowing her reasonable interest on the dower-debt," was approved.

In suits brought by the other heirs against the widow for the taking of accounts, for a decree to the plaintiffs of their respective shares in case the dower-debt was shown to have been discharged, and for a decree for any sum received by the defendant in excess of her dower, the defendant set up a claim for interest on the unpaid dower-debt, and it being found that a portion of it remained unpaid, interest at six per cent. per annum was allowed on that amount.

APPEAL No. 3 of 1913, consisting of two consolidated appeals from two decrees (11th August, 1910) of the High Court at Allahabad, which reversed two decrees (15th September, 1906) of the court of the Subordinate Judge of Gorakhpur.

The main points for determination on this appeal were whether dower payable by a Muhammadan husband to his wife in consideration of marriage is in the nature of an ordinary debt; and whether or not the widow of a Muhammadan, placed in possession of her husband's estate in lieu of her dower, was entitled when called upon by her husband's heirs to account for the rents and profits received by her during the period of her possession, to claim interest upon the amount of the dower.

The facts are sufficiently stated in the report of the case in the High Court (Sir JOHN STANLEY, C.J., and BANERJI and KARAMAT HUSAIN, JJ.) which will be found in Indian Law Reports, 33 All., 182.

On this appeal—

Sir H. Erle Richards, K.C., and *B. Dube*, for the appellants, contended that Zubaida Bibi, the principal respondent, was not entitled to claim interest on her dower. There was no "written contract" or "express agreement" for interest and therefore the Interest Act (XXX II of 1839) was not applicable to the case. The question must, it was submitted, be determined by the Muhammadan law, by which the taking of interest is prohibited. The Muhammadan law was applicable under section 37, sub-section 1 of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), a matter relating to dower being a question as to "marriage" within the meaning of that section. The Oudh Laws Act (XVIII of 1876), section 5; and the Punjab Laws Act (IV of 1872), section 5, and other local Civil Courts Acts are to the same effect but varying in terms. That was the sole reason why the

1916

HAMIRA BIBI
v.
ZUBAIDA BIBI.

widow's lien for dower was recognized; and she is in respect of the dower-debt in the same position as any other creditor who is in possession as security for payment. Her lien extends only to the amount of the dower, and certain expenses connected with the property whilst she is in possession, and the lien ceases when the dower is paid off by what she receives from the property. Reference was made to Macnaghten's Principles of Muhammadan Law (Edition 1897), chapter XI, article 16, page 74; Baillie's Digest (Edition 1875), pages 776, 781, 801, 802; Hamilton's Hedaya, Volume IV, Book 48, page 199. The Usury Act (XXVIII of 1855), it was contended, did not repeal the Muhammadan law as to interest: see *Ram Lal Mookerjee* v. *Haran Chandra Dhar* (1), decided by PEACOCK, C.J., though that decision was not followed in *Mia Khan* v. *Bibijan* (2), decided by PHEAR, J. In the cases of *Ameeroonnissa* v. *Mooradoonnissa* (3), *Nawab Mahomed Ameenoodeen Khan* v. *Moozuffur Hossein Khan* (4) and *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (5) the question of lien for dower has come before this Board for decision, but the question of interest was not raised. Some unreported cases which will be found referred to in the judgement of the High Court were also cited as being in favour of the appellants. The Interest Act (XXXII of 1839) not being applicable interest was not recoverable as damages: see *London Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.* (6) and *Juggomohun* v. *Kaisreechund* (7). The Indian authorities show that interest will not be allowed unless it appears that it was intended that interest should be given: *Mansab Ali* v. *Gulabchand* (8). Interest on a decree was allowed in *Soorma Khatoon* v. *Attaffoonnissa Khatoon* (9) and *Hubeeboonnissa Khatoon* v. *Shumsood-deen Ahmed* (10), but that was under the Interest Act, in the latter case from the date of suit only, the filing of the plaint being treated as a demand under that Act. Interest was allowed in *Woomatool Fatima Begum* v. *Meerunmunnissa Khanum* (11), but if Muhammadan law should govern the case, as is now contended, it was wrongly decided.

(1) (1869) 3 B. L. R., O.C., 130 (135).
(2) (1870) 5 B. L. R., 500.
(3) (1855) 6 Moo. I. A., 211.
(4) (1870) 5 B. L. R., 570.
(5) (1871) 14 Moo. I. A., 377 (383, 386).
(6) [1893] A. C., 429 (437).
(7) (1862) 9 Moo. I. A., 260.
(8) (1887) I. L. R., 10 All., 85 (90).
(9) (1863) 2 Hay., 210.
(10) (1860) 16 S. D. A., Ben., 310.
(11) (1868) 9 W. R., 318.

1916

HAMIRA BIBI
v.
ZUBAIDA BIBI.

De Gruyther, K.C., and *Abdul Majid*, for the respondents, contended that the prohibition of interest among Muhammadans was to be treated as a religious prohibition, and not a legal one. In executive opinion it was not considered part of the municipal law, but as being long since obsolete and not to be enforced in the Civil Courts. The customary interest of the country had for a long time past been tolerated by both Muhammadans and Hindus. Reference was made to *Mia Khan* v. *Bibijan* (1) and Wilson's Anglo-Muhammadan Law, 4th Edition, page 28. The dower payable to the wife of a Muhammadan was a debt, and to be treated like any other debt; *Abdul Karim Khan* v. *Maqbul-un-nissa Begam* (2); no exception being made with regard to it as to interest. "Dower" stood on the footing of being only an ordinary debt, and when the widow was in possession in right of her dower, the whole foundation of her right as against the heirs was as being a creditor, and she was entitled to a reasonable amount of interest under the Acts XXXII of 1839 and XXVIII of 1855. There was no express text of Muhammadan law making a widow liable for mesne profits, or to account for them: she was in possession of her husband's estate as a matter of right: *Ameeroonnissa* v. *Mooradoonnissa* (3) and Macnaghten's Muhammadan Law, page 75, paragraph 19. There was no analogy whatever to the law of pledge: liability to account, and suits for an account are creations of English law and governed by equitable principles. Muhammadan law allows a widow compensation for her loss of interest on an unpaid dower-debt, as in *Woomatool Fatima Begum* v. *Meerunmunnissa Khanum* (4), which was followed in *Sahebjan Bewa* v. *Ansar-ud-din* (5); and also in *Chaudhri Wasi Ahmad* v. *Maina Bibi* (6) decided on 3rd July, 1906, by Sir J. STANLEY, C.J., and KNOX, J., who said:—"It has been argued, and very strenuously argued, that according to Muhammadan law interest is not chargeable in respect of dower. We have been referred to a number of authorities, but none of them bear out this proposition. On the contrary, it appears to be well settled law that dower is a debt ranking at least equally

(1) (1870) 5 B. L. R., 500 (507).
(2) (1908) I. L. R., 30 All., 315.
(3) (1855) 6 Moo. I. A., 211 (219).
(4) (1868) 9 W. R., 318.
(5) (1911) I. L. R., 38 Calc., 475 (481).
(6) Unreported.

with other debts; that it is a debt there can be no doubt but it appears to us to be clear that having been charged with the rents and profits, the widow certainly is entitled to reasonable interest in respect of so much of her dower-debt as remained undischarged by the rents and profits". Interest on dower was allowed in *Soorma Khatoon* v. *Attaffoonnissa Khatoon* (1); and in *Hubeeboonnissa Khatoon* v. *Shumsooddeen Ahmed* (2); and there is nothing to show it was allowed under the Interest Act. As no express provision is made by the Muhammadan law, the Court should act according to "justice, equity, and good conscience" as provided by the Bengal, North-Western Provinces and Assam Civil Courts' Act (XII of 1887), section 37, sub-section 2; see *Mullick Abdool Guffoor* v. *Muleka* (3). The doctrines of Muhammadan law need not be applied where they are unadapted to the social and economic life in India or the nature of the property in suit; *Ibrahim Goolam Ariff* v. *Saiboo* (4).

Dube in reply. Under the Muhammadan law a creditor was not entitled to any benefit in consideration of his not suing for his debt: Baillie's Digest (Edition 1875), page 781. No compensation therefore should be given if Muhammadan law is followed. Liability for mesne profits was known to Muhammadan law. A widow is liable to account for all receipts, except the expenses of managing and maintaining the property; *Ramzan Ali Khan* v. *Asghari Begam* (5) and *Ahmed Hossein* v. *Mussamut Khodeja* (6).

1916, August 1st:—The judgement of their Lordships was delivered by Lord PARKER:—

A short statement of the facts which have given rise to this litigation will explain the point for determination involved in these consolidated appeals.

One Shaikh Inayat-ullah, a Muhammadan inhabitant of the district of Gorakhpur, in the United Provinces of India, died in March, 1892, leaving him surviving a widow and a daughter, named respectively Zubaida Bibi and Najm-un-nissa; a sister, Hamira

(1) (1865) 2 Hay., 210.
(2) (1860) 16 S. D. A., Beng., 310.
(3) (1884) I.L. R., 10 Calc., 1112 (1123).
(4) (1907) I. L. R., 35 Calc., 1; L. R., 34 I. A., 167.
(5) (1910) I. L. R., 32 All., 563.
(6) (1868) 10 W. R., 369 (371).

1916

HAMIRA BIBI v. ZUBAIDA BIBI.

Bibi; and two brothers, Khadim Husain and Ihsan-ullah, all of whom became entitled under the Sunni law, to which Inayat-ullah was subject, to certain specific shares in his estate. Besides the widow's share of one-eighth, Zubaida was entitled to her unpaid dower. This has been found in a previous proceeding to have amounted to the large sum of one lakh of rupees. The other heirs of Inayat-ullah not being in a position to pay this sum without apparently alienating at least a considerable part of the estate, allowed the widow to take or remain in possession of the whole to satisfy her claim out of the rents and issues of the landed property. It is not clear whether the widow was let into possession in the life-time of Inayat-ullah or after his death. But it is not disputed that since 1892, Zubaida has been in possession.

In 1902, the other heirs of Inayat-ullah brought a suit against her to recover possession of their shares. Their action was dismissed on the ground that it was misconceived, inasmuch as it was not a suit for the purpose of taking accounts, and thus ascertaining what portion of the dower-debt was then unsatisfied. The present suits were instituted with that object on the 15th of March, 1906, in the court of the Subordinate Judge of Gorakhpur, one by Hamira Bibi and the other by the widow and sons of Khadim Husain who had died either before or after the suit of 1902. The reliefs prayed for in both actions were the same, viz. *(a)* for the taking of accounts; *(b)* for decree to plaintiffs of their respective shares in case the dower-debt was found to be discharged, and *(c)* for an award to the plaintiffs of any sum found to have been received by her in excess of her dower. Zubaida in her defence, among other pleas, set up a claim for interest on her unpaid dower; she alleged that the income of the property was less than the interest she claimed; that, consequently the debt was still unsatisfied and that the plaintiffs were accordingly not entitled to recover possession of their shares in Inayat-ullah's estate.

The Subordinate Judge, who tried the case in the first instance, considered the defendant was entitled to interest at 6 per cent. per annum on her dower; that the interest thus calculated exceeded the annual net income from the estate, and that, therefore,

it was clear no portion of the debt was discharged. In the result, he dismissed both suits. On appeal to the High Court at Allahabad, the learned Judges took the same view as to the right of the widow, Zubaida, to receive interest; but they varied the decrees of the court of first instance with regard to the total dismissal of the suits; they made a declaration that the plaintiffs should recover possession of their respective shares in the estate provided they paid to the defendant their quota of the dower-debt proportionate to such shares, which quota the learned Judges specified.

From these decrees of the Allahabad High Court the plaintiffs have appealed to His Majesty in Council, and the sole question for determination is whether the defendant Zubaida is entitled to any interest or compensation in respect of her dower unpaid at the time of Inayat-ullah's death. The case has been elaborately argued on both sides and a large number of authorities have been cited. On behalf of the plaintiffs it has been argued with considerable force that the Musalman law prohibits usury and usurious dealings between Moslems; that dower is a liability springing under the provisions of that law from the status of marriage, and that, therefore, all incidents and rights connected therewith must be subject to the Musalman law. It was further contended that the Muhammadan widow's lien on the husband's estate for unpaid dower is the only creditor's lien which has been recognized and maintained intact by British Courts of Justice, and that it ought not to be extended beyond what the Musalman law itself permits by allowing interest when it is not contracted for. On the other side, it is argued that the Muhammadan law prohibiting usury has been repealed in India by Act XXVIII of 1855, and that consequently there is no bar to Musalmans receiving or paying interest, and that the practice of receiving interest is common among them both in India and other countries. It is further urged that, in any event, the widow is entitled to some interest by way of damages for non-payment of dower at the due time.

In the view their Lordships take of the case it is unnecessary in their opinion to examine much of the argument addressed to the Board or to discuss the numerous cases cited at the Bar.

There is a conflict of judicial opinion in India on the question whether the Musalman rule relating to usury was or was not abrogated by Act XXVIII of 1855. Sir BARNES PEACOCK, C.J.,

1916

HAMIRA BIBI v. ZUBAIDA BIBI.

sitting with Mr. JUSTICE MACPHERSON held, in the case of *Ram Lal Mookerjee* v. *Haran Chandra Dhar* (1) that it was not. "Hindu law," he said, "did certainly as between Hindus restrict the rate of interest to be charged; and I do not think that Act XXVIII of 1855 was ever intended to repeal the Hindu or Muhammadan law as to interest." Then after reciting the preamble of the Act, he added as follows:—"That Act" (meaning Act XXVIII of 1855) "did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury." In a later case (2) Mr. JUSTICE PHEAR sitting with MARKBY, J., took a different view. In the ordinary course, on this difference of opinion arising between two Division Benches of the same Court, the case should have been referred to a Full Bench. But PHEAR, J., did not take that course and decided the point differently, holding that the Act of 1855 had abrogated the Musalman law prohibiting usury. Their Lordships do not think it necessary to decide on the present occasion which view is right, nor do they think that Act XXXII of 1839 has any application.

Dower is an essential incident under the Musalman law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called *prompt*, payable before the wife can be called upon to enter the conjugal domicil; the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this

(1) 3 B. L. R., O.C., p. 130.

(2) *Mia Khan* v. *Bibijan* 5 B. L. R., 500.

is the only creditor's lien of the Musalman law which has received recognition in the British Indian Courts and at this Board.

When a widow is allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made, as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband. Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. This appears to be consistent with the chapter on "The Duties (*Adab*) of the Kazi" in the principal works on Musalman law, which clearly shows that the rules of equity and equitable considerations commonly recognized in the Courts of Chancery in England are not foreign to the Musalman system, but are in fact often referred to and invoked in the adjudication of cases.

In the case of *Woomatul Fatima Begum* v. *Meerunmunnissa Khanum* (1) the plaintiff, who had held possession of her husband's estate under a lien for dower, was dispossessed by a decree of the court. She then sued one of the heirs for a proportionate amount of her dower. Among other questions raised, the defendant claimed that the plaintiff must account for mesne profits during the period she held possession. Sir BARNES PEACOCK, sitting with JACKSON and MACPHERSON, JJ., after remarking that the "plaintiff does not ask to receive interest upon her dower, but she asks that she may not be compelled to account for the profits of the land during the term she held it in lieu of her dower," discussed various considerations which led him to think

(1) (1868) W. R., 318.

1916

HAMIRA BIBI v. ZUBAIDA BIBI.

that it would be inequitable to make her account for the profits, except on the terms of allowing her reasonable interest on her dower debt. The annual rents and profits being less than such reasonable interest, the claim for mesne profits was disallowed. Their Lordships think that this was in accordance both with sound sense and with law.

In the present case the courts in India have allowed the defendant, on taking her accounts, 6 per cent. per annum, by way of equitable compensation.

It was not contended that, if interest by way of compensation were allowed at all, this rate was too high under the circumstances. The contention was that no interest by way of compensation could be allowed at all.

Their Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants —*Barrow, Rogers and Nevill.*

Solicitor for the respondent—Najmunnissa Bibi: *Douglas Grant.*

J. V. W.

APPELLATE CIVIL.

1916.

May, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

BAIJNATH PRASAD SINGH AND OTHERS (DEFENDANTS) *v.* TEJ BALI SINGH (PLAINTIFF).*

Hindu Law—Impartible estate—Succession—Primogeniture—Estate once in the possession of a family regranted after loss of possession to one member of the same family——Construction of grant.

The question whether a certain estate is impartible or not is one of fact in each case.

Where an impartible estate is lost to a certain family and on the representation of a member of that family the Government puts him into possession making a grant in his favour without any special term or condition in the grant, the property so restored would be joint family property in the hands of the member of the family to whom the grant is made.

When the Government makes a grant of an estate it can determine the nature of the grant; but in the absence of specific terms in the grant the surrounding circumstances must not be ignored.

* First Appeal No. 90 of 1915, from a decree of E. Bennet, Subordinate Judge of Mirzapur, dated the 3rd of March, 1915.