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PROSUNNO KUMAR SANYAL v. KALI DAS SANYAL.

As the point appeared to be one of some importance, and the respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under section 244 of the Civil Procedure Code. An examination of those cases, of which it is only necessary to mention *Sakharam Govind Kale* v. *Damodar Akharam Gujar* (1) and *Kuriyali* v. *Mayan* (2) has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question.

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that, when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Wrentmore* and *Swinhoe*.

C. B.

ZAKERI BEGUM (PLAINTIFF) *v.* SAKINA BEGUM AND OTHERS (DEFENDANTS).

*P.C.** 1892 *March* 29. *May* 28.

[On appeal from the High Court at Calcutta.]

Mahomedan Law—Dower—Oudh, Law of, relating to reduction in amount of dower—Determination of amount of deferred dower recoverable from representatives of deceased husband married in but a non-resident of Oudh, not affected by law of that Province—Evidence Act (I of 1872), s. 32, cl. (2)—Entry in Mahomedan Marriage register of amount of dower, admissible in evidence to prove amount fixed.

A Mahomedan, a resident in Patna, since deceased, married the plaintiff, while he was for a time in Lucknow where she lived. Upon her claim, as

* *Present:* LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

(1) I. L. R., 9 Bom., 468. (2) I. L. R., 7 Mad., 255.

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his widow, for her deferred dower, it was found to have been contracted for at the amount alleged by her.

The question of the amount of her dower was *held* to be determinable without reference to a usage having the force of law in Oudh, rendering dower reducible in certain cases by the Court. The place of celebration of the marriage did not make this applicable.

A register of marriages kept by the Istahad, since deceased, who celebrated this marriage, in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within section 32, cl. (2) of the Evidence Act, 1872.

APPEAL from a decree (30th June 1885) of the High Court varying a decree (29th February 1884) of the Subordinate Judge of Patna.

This suit was brought for deferred (moajjal) dower, Rs. 50,000, by the plaintiff, now appellant, the only widow of the late Khaja Mahomed Ismail Khan, a member of the Shia, or Imamia sect, who died at Patna on the 14th November 1880, leaving no children and intestate. The defendants, among whom was Khaja Baker Ali Khan, nephew of Ismail, were relations, heirs, and sharers in the estate. Baker Ali died while this appeal was pending. A certificate, under Act XXVII of 1860, was granted to the plaintiff, as widow of Ismail; but Baker Ali and the other defendants continued to hold possession. The plaint, filed on the 8th January 1883, stated the plaintiff's marriage to Ismail on the 16th Rabi-ul-awal, 1284 Hijri, or 19th July 1867, at Lucknow, whence her husband took her to Patna, in which place he was a resident both before and after his marriage. The dower fixed was alleged to be Rs. 50,000.

Baker Ali and the other defendants jointly answered that the dower was fixed at Rs. 5,000 only, and that it had been satisfied. They also contended that if it had been fixed at the amount alleged it would have been excessive; and that it should be reduced, in accordance with the law in force in Oudh, by the Court.

The proceedings, issues, and facts are stated in their Lordships' judgment.

The Subordinate Judge, Rai Mothura Nath Gupta, found upon the evidence that the plaintiff's dower was fixed at Rs. 50,000.

This was in conformity with the Mahomedan law, and was not in excess of what was reasonable in regard to the position of the husband and wife. It would not have been a right exercise of discretion to reduce this amount even if the law of Oudh on this point had been applicable; and, in his opinion, it was not applicable. He referred to *Mulkah Do Alum Nowab Tajdar Bohoo* v. *Mirza Jehan Kudr* (1) and *Bedar Bukht Muhammed Ali* v. *Khurrum Bukht Yahya Ali Khan* (2).

The decision of the Subordinate Judge was varied by the High Court, which found that Rs. 5,000 only had been fixed as the dower.

The plaintiff now appealed.

Mr. *J. H. A. Branson*, for the appellant, argued that on the evidence the judgment of the first Court should be restored. In regard to the law he referred to the cases mentioned above; also to Baillie, Imameea Code, Bk. 1, Ch. v. of muhr, or dower, and to *Sugra Bibi* v. *Masuma Bibi* (3), *Mussumat Mulleeka* v. *Mussumat Jumeela* (4).

Mr. *R. V. Doyne*, for the respondents, argued that the High Court had rightly decreed Rs. 5,000 only.

Mr. *J. H. A. Branson* replied.

Their Lordships' judgment was given by—

LORD HANNEN.—The plaintiff in these proceedings (the present appellant) is the sole widow of Khaja Mahomed Ismail Khan, a Mahomedan zemindar, resident at Patna in Bengal. The action was brought in the Court of the Subordinate Judge of Patna against the heirs of the deceased Mahomed Ismail, who are in possession of his estate, to recover from them Rs. 50,000, the amount of the plaintiff's dower, alleged to have been agreed upon at the marriage, and unpaid at the death of her husband. The marriage took place on the 19th July 1867 at Lucknow in Oudh, where the deceased was staying on a visit. The deceased died at Patna on the 14th November 1880.

(1) 10 Moo. I. A., 252.
(2) 19 W. R., 315; 2 Sutt. P. C. Judgts., 823.
(3) I. L. R., 2 All., 573.
(4) L. R., I. A., Sup. Vol., 135

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The defendants in their defence alleged that the amount of dower agreed on at the marriage was not Rs. 50,000, but Rs. 5,000, and that this was paid in the lifetime of the deceased. They also contended that, as the marriage took place at Lucknow, the contract of dower was regulated by the usages and customs of Oudh, and that by those usages and customs the agreed amount of dower, if excessive, might be reduced by the Court to an amount suitable to the circumstances and position of the husband and wife, and they claimed that if the agreed dower was Rs. 50,000, it was excessive and should be reduced.

The material issues in the cause were—(*i*) What was the amount of dower? (*ii*) Was it paid in the lifetime of the husband? (*iii*) Do the suages and customs of Oudh govern the case; and if so, was the agreed dower excessive?

In support of the plaintiff's case, of ten witnesses called, seven were present at the marriage. These seven, as might be expected, are all related to the plaintiff. They all agree that the dower was fixed at Rs. 50,000, and that this was the minimum dower used in the plaintiff's family, and it was proved that her sister had received a much larger dower. Their statements are all consistent with one another, except in one particular, namely, whether the dower was prompt or deferred. As the witnesses were speaking of what had occurred sixteen years before, it does not appear to their Lordships that this discrepancy should invalidate their testimony on the more important question in dispute, of the amount of dower agreed upon. The question whether the dower was prompt or deferred only affects the reliance to be placed on the witnesses' recollections, as the plaintiff was in any case not bound to sue for her dower till her husband's death, and it is not surprising that she did not do so sooner.

In addition to the testimony of the witnesses present at the marriage, the plaintiff offered in evidence the register of marriages kept by the Kazi, in which this marriage is recorded. No objection was taken, when the witnesses were examined, to the admissibility of this register: on the contrary, the defendants' pleader required that it should be inspected by the Court, as he alleged that it showed that the dower was at first entered as Rs. 5,000, and that it had been altered to Rs. 50,000. Some objection seems to have

been taken on appeal before the High Court, as that Court discusses the value of the register, on the assumption "that all the suggested difficulties, about the admissibility of this document are removed." What those difficulties were does not appear, but their Lordships are of opinion that the register was admissible and relevant evidence, within the meaning of the 32nd section of the Indian Evidence Act of 1872, as having been made by the Mujtahid in the discharge of his professional duty. This particular register appears to have been kept since the annexation of the province, and all marriages are recorded in it; it contains columns for the names and descriptions of the parties, the names of the vakils of the bride and bridegroom respectively, and the amount of the dower, together with the date of the marriage.

It appears from the evidence of Syed Mahomed Ibrahim, by profession Istahad or priest, that the register was kept at the time of the marriage by his father, Syed Mahomed Taki, then the priest, who is now dead, and that it has been kept since by the witness himself. The witness acted as the vakil of the bride, and his father was the vakil of the bridegroom; they both of them read the nika, or marriage service. Speaking of the practice, the entry, he says, is made in the register on the day following the night of the marriage, when, as in this case, it is celebrated late at night. The witness, on looking at the entry of this marriage in the register, says that it is in the handwriting of Yad Ali, his servant, formerly servant of his father, and that the amount of dower was as first written Rs. 50,000, and that it has been altered to Rs. 5,000. The witness does not recollect the amount of dower fixed at the time of the marriage.

Yad Ali stated that he had no personal knowledge of the marriage, excepting the recording of it in the register, which he did by the order of Syed Taki, since deceased, whose writer and general agent the witness then was, as he still is of Syed Ibrahim the son. He made the entry in question the morning after the marriage. When the witness was examined under Commission at Lucknow, the original register had not been obtained from the Patna Court, where it had been deposited, but the witness identified a document (Exhibit B) as having been made by him and

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copied from the register, and he stated that the register contained the entry as detailed in that document.

The witness wrote the portion of Exhibit B, which he copied from the register on the application of Mirza Asgar Hossein. The witness's statement of what was the amount of dower recorded by him in the register was objected to, without the production of the register. The original register was afterwards produced, and Mirza Asgar Hossein, on whose application Exhibit B, copied from the register, was obtained, was examined and cross-examined as to that document. In it the dower is stated to be Rs. 50,000. The exact time when this copy was made does not appear, but it was not long before the commencement of these proceedings. Mirza Asgar Hossein was one of the plaintiff's witnesses present at the marriage, and he proves that the dower of Rs. 50,000 was agreed to by Mahomed Ismail, the deceased husband of the plaintiff. At some time not specified, after the death of Mahomed Ismail, this witness applied to Syed Ibrahim, the priest who had charge of the register, for a copy of the entry of the marriage. The witness obtained from Yad Ali the Exhibit B. Another more formal copy being required, he went with one Mahomed Zaki to Syed Ibrahim to obtain it; Yad Ali produced the register, and asked Mahomed Zaki to copy it. The witness then saw the register, and it contained Rs. 50,000 in the column of muhr (dower) "clearly Rs. 50,000. Now it appears a little blotted which makes it like Rs. 5,000."

Mahomed Zaki says that he went with Asgar Hossein to Syed Ibrahim, and saw the register, and copied the entry of the marriage at Yad Ali's dictation. "It was Rs. 50,000. It has been altered."

This was the evidence for the plaintiff, and appears to their Lordships clearly to establish the appellant's case, unless its effect can be shown to be overcome by clear and consistent counter testimony.

For the defence Mahomed Askeri was called. He is a nephew of the deceased, and is one of the defendants. He states that when Ismail Khan was ill, he said in the presence of the plaintiff that the dower was Rs. 5,000, and that it was paid. Three or four

years after, when again ill, he said the same in her presence; other persons (named but not called) were also present.

Munnu Khan, a servant of the deceased Ismail Khan, says that he went with him to Lucknow. At the time of the marriage he was with Ismail Khan. "I do not know the position of the plaintiff. I saw her house. It was in a very dilapidated state. Her dower was fixed at Rs. 5,000." In cross-examination he stated that since the dispute the plaintiff was not agreeable to his stopping in the house, and so he went away to the defendants.

Mir Khurshed Ali, a professional story-teller, says that he went to the marriage. The dower was fixed at Rs. 5,000. "Syed Ibrahim asked Mahomed Ismail, 'The dower of Mussumat Zakeri Begum is Rs. 5,000; do you agree to this?' Mahomed Ismail replied, 'I agree.'" The dower of witness's first wife was fixed at Rs. 30,000.

Mir Wazir Jan says he accompanied Mahomed Ismail to Lucknow, and was present at the marriage. "The dower was fixed at Rs. 5,000 . . . . On a sudden the amount of dower was fixed in the wedding party . . . . There was no conversation about the dower before."

These three were all the witnesses for the defendants said to have been present at the marriage. The only other witness who speaks on the subject of the dower is Mirza Yusuf Beg, who relates a conversation with Mahomed Ismail, which is not relevant evidence.

This closed the case for the defendants.

Upon this evidence the Subordinate Judge, in a carefully considered judgment, came to the conclusion that the dower was fixed at Rs. 50,000 and had not been paid, and on inspection of the register he says that "there is not the least doubt that 50,000 has been changed to 5,000." He also held that the law of Oudh was not applicable to this case, but that if it were the amount of dower was not extravagant, and that no ground had been shown for reducing it.

On appeal the High Court reversed the judgment of the Subordinate Judge, but gave the plaintiff a decree for Rs. 5,000 out

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of her husband's estate, thus rejecting the defendant's evidence that the dower had been paid.

The reasons given for refusing to credit the plaintiff's witnesses are—(*i*) That the plaintiff "was not married with the publicity of a *shadi* marriage," and that after the marriage she was only treated with the respect "naturally paid to a second or nika wife during the lifetime of the first," and that under these circumstances the amount of dower was very large. No evidence was given on this subject, and no authority has been referred to in support of the suggestion that a simple nika marriage amongst Mahomedans would indicate inferiority on the part of the wife to one "married with the publicity of a *shadi* marriage." (*ii*) That there was no *kabinnama*, or written contract; but it was proved in the course of the plaintiff's case, and not contradicted by any witness for the defendants, that though the dower is always fixed, there are sometimes written contracts of dower and sometimes not. Here, as it is alleged, the dower was fixed and written in the register. (*iii*) That the plaintiff herself did not give evidence. But having regard to the unwillingness of Mahomedan ladies to give evidence, and the fact that the dower would naturally be arranged by her relatives, several of whom were called, their Lordships do not consider that the plaintiff's absence as a witness should invalidate the testimony of those who were called. (*iv*) That the male relative, in whose house and in whose charge she was living at the time of the marriage, has not been called. There appears to be some misapprehension as to this. The marriage is proved to have taken place in the house of Mahomed Mirza *alias* Miran Saheb, and this witness has been called, and proved that Mirza Mahomed Wazir, the oldest member of the plaintiff's family, settled this marriage a fortnight before it took place, and that this person is dead. (*v*) That the witnesses differ as to whether the dower was prompt or deferred. This has been already dealt with.

Then it is said that the plaintiff's witnesses are "contradicted on the other side by other witnesses of much the same kind and class as the plaintiff's," and the judgment of the High Court proceeds—"Under these circumstances, if the matter had stood thus, we should have found it impossible to accept the plaintiff's

story," and the Judges say that as "the plaintiff's witnesses were examined on commission," they are "in the same position in estimating their evidence as the Judge of the Court below was." It is to be observed, however, that the witnesses for the defence were examined *viva voce* before the Subordinate Judge, and that one of the defendants was disbelieved on a most material point, on which he gave distinct evidence, namely, that the deceased stated twice in the presence of the plaintiff that the dower had been paid. This evidence must have been equally discredited by the Judges of the High Court, since they gave the plaintiff judgment for the Rs. 5,000, said to have been already paid, and this notwithstanding the absence of the plaintiff as a witness, on which adverse comment was made. This does not merely invalidate the evidence as to that particular fact, but casts doubt on the defendant's case. The Judges then proceed to consider the effect of the register, and say that "assuming that all the suggested difficulties about the admissibility of this document are removed, it proves nothing." The register was produced for the inspection of the Judges, and they accept the evidence of Syed Ibrahim, against whom they say no suspicion was suggested, that the amount had been altered from Rs. 50,000 to Rs. 5,000, but they say that there is nothing to show that this was not a *bonâ fide* correction of a mistake made at the time. This is scarcely reconcilable either with the evidence of those who saw the register as already noticed, or with the view presented, apparently for the first time, in the following passage in the judgment: "Having regard to the place where the marriage was celebrated, and all the circumstances connected with it" (what these were is not stated), "we think it just as likely that if Rs. 50,000 was entered in the register at the time, it was not entered as any record of an actual contract to pay Rs 50,000, but as a sort of form of courtesy intended to raise the honour and dignity of the parties."

Their Lordships can find no justification for this suggestion, which has not been made either on the pleadings or by any of the witnesses examined. The evidence is uncontradicted that the plaintiff was of good family, and that a dower of as much as Rs. 50,000 was usual in it. Her sister received a much larger dower, and others as large are proved.

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The Judges of the High Court next consider the evidence of the three witnesses who state that the register remained unaltered from Rs. 50,000 at a recent date, and criticise their testimony unfavourably, because they differ as to the order in which copies were made; and they speak of Zaki as "a person who had no connection with the matter at all, a mere outsider, whose intervention is by no means satisfactorily explained." The order in which the copies were made is a very unimportant matter, in which disagreement, if it exists, might easily arise, and there does not appear any necessity for further explanation of why an "outsider" was employed to examine the register and procure a copy.

The Judges conclude that this evidence appears to them "to be not of a satisfactory kind, but to leave the whole question as to when the alteration in the register was made in uncertainty." It is obvious, however, that it cannot be suggested that the alteration from Rs. 50,000 to Rs. 5,000 was made in the interest of the plaintiff, and their Lordships can see no reason for holding that the evidence of the three witnesses that the entry remained Rs. 50,000 at a recent date should be rejected.

The Judges of the High Court do not deal with the other points named, as the grounds relied on by them disposed of the case from their point of view. Their Lordships agree with the Subordinate Judge that the usages and customs of Oudh as to dower were not applicable to the marriage in question, but if they were, no reason has been shown why the Subordinate Judge should in the exercise of his discretion have reduced the dower in this case. No evidence was given of the value of the husband's property, or any other relevant circumstances tending to show that Rs. 50,000 was excessive. Dower is often high among Mahomedans, to prevent the husband divorcing his wife, in which case he would have to pay the amount stipulated.

After a careful consideration of the whole evidence in the case, and adopting the view that the testimony of the plaintiff's witnesses have received material corroboration from the entry in the priest's register of marriages, their Lordships are of opinion that the judgment of the High Court should be reversed with costs, and that of the Subordinate Judge restored, and they will humbly advise Her Majesty accordingly. The respondents, other than

the Deputy Registrar of the High Court, will pay the costs of this appeal.

Appeal allowed.

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Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

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APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

HURRO DOYAL ROY CHOWDHRY (PLAINTIFF) *v.* MAHOMED GAZI CHOWDHRY AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891 *May* 27.

Putni Taluq—Sale of Putni tenure for arrears of rent—Bengal Regulation VIII of 1819, *s.* 8, *cl.* 2—*Onus of proof of publication of notice before sale of Putni taluq for arrears of rent—Notice of sale of Putni taluq, onus of proof of publication of—Suit to set aside sale.*

In a suit to set aside a sale of a putni taluq, held under the provisions of section 8 of Regulation VIII of 1819, on the ground that the notices required by sub-section 2 of that section had not been duly published, it lies upon the defendant to show that the sale was preceded by the notices required by that sub-section, the service of which notices is an essential preliminary to the validity of the sale.

In such a suit, where there was no evidence one way or the other to show that the notice required by that sub-section to be stuck up in some conspicuous part of the Collector's kutcheri, had been published, *held*, that the plaintiff was entitled to a decree setting aside the sale.

THIS was a suit brought by the plaintiff to have a sale of a putni taluk, held under the provisions of Regulation VIII of 1819, set aside on the ground of non-publication of the notices required by clause 2 of section 8 of the Regulation, the allegation being that such non-publication was due to fraud on the part of the defendants, the result being that property of the value of Rs. 400 had been sold for Rs. 60 only. The plaintiff alleged that defendant No. 1, Mahomed Gazi Chowdhry, was the proprietor of the zemindari, within which the putni taluq was situated, and of

* Appeal from Appellate Decree No. 831 of 1890, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Tipperah, dated the 7th April 1890, reversing the decree of Baboo Nogendro Chunder Mitter, Munsiff of Chandpore, dated the 8th of May 1889.