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with the accused, but had been discharged by the Magistrate. The learned Sessions Judge thought he would like to put further questions to another witness who had already given evidence. This he in fact did, and did so in the absence of the assessors, and he justifies having done that by placing reliance upon a decision of Mr. Justice WALSH, who, in the case of *King-Emperor* v. *Birbal and others* (1), decided on the 22nd of September, 1916, decided that a Judge after having discharged the assessors could nevertheless take further evidence. Now, Mr. Justice WALSH could have arrived at that decision only by the fact that the case of *Queen-Empress* v. *Ram Lal* (2) was not brought to his notice, because that case is a distinct authority for the very salutary proposition that evidence must not be taken by a Sessions Judge unless that Sessions Judge has the two assessors sitting with him; otherwise, if the Sessions Judge is sitting alone, he does not appear to be a Court, the Court being the Judge plus the assessors. We, therefore, think that the learned Sessions Judge was wrong in taking the evidence of Jaisukh, son of Sahibu, and the further evidence of Nanu Gara, and therefore we are obliged to set aside the conviction and sentence and we direct that the accused be tried *de novo* by the Sessions Judge of Saharanpur as soon as possible.

Conviction set aside re-trial ordered.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

ABDULLA (PLAINTIFF) v. SHAMS-UL-HAQ AND OTHERS (DEFENDANTS).*

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July, 10.

Muhammadan law—Muhammadan widow in possession of husband's property in lieu of dower Rights of widow—Transfer by widow—What acquired by transferee—Limitation—Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 134.

Where a Muhammadan widow is in possession of property belonging to her deceased husband "in lieu of dower," it is competent to her to sell it without necessarily selling her right to receive her dower. Such a transfer conveys

* Second Appeal No. 1074 of 1917, from a decree of I. B. Mundle, District Judge of Azamgarh, dated the 26th of May, 1916, confirming a decree of Rameshwar Dayal Sharma, First Additional Munsif of Azamgarh, dated the 10th of February, 1916.

(1) (1916) Cr. A. No. 580 of 1916. (2) (1893) I. L. R., 15 All., 136.

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to the transferees the right to remain in possession during the widow's lifetime or until the widow's dower, or the proportionate part thereof corresponding to the property transferred, is satisfied. *Mohammad Husain* v. *Bashiran* (1) distinguished. *Musammat Kummur-ool-nissa Begum* v. *Mahomed Hussun* (2) and *Ali Bakhsh* v. *Allahdad Khan* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellant.

Maulvi *Mukhtar Ahmad* (with him Mr. *Nihal Chand*), for the respondents.

RYVES and GOKUL PRASAD, JJ. :—The facts which have given rise to this appeal are briefly as follows :—One Sheikh Bakshu, who owned a 13 bigha 8 biswa and 10 dhur share, died after the mutiny leaving his two sons, Kadir and Amir, as his heirs. Amir left a widow, Musammat Azima, defendant No. 5, and a minor son Abdullah, plaintiff, as his heirs. Musammat Azima took possession of the whole of the estate of Amir deceased, that is of $\frac{1}{2}$ in her own right as an heiress and of $\frac{1}{2}$ in lieu of her dower. Later on Musammat Azima married her deceased husband's brother Kadir. So that as far as actual possession of the estate of Sheikh Bakshu was concerned, it was with Azima and Kadir. On the 7th of February, 1872, these two persons transferred half of the property which originally belonged to Sheikh Bakshu to Sheikh Rasai. One of the points for decision in this appeal would be as to what was sold under this deed and what effect the deed would have on the rights of the respective parties to this appeal.

The plaintiff's case is that what was actually sold was the half share of Amir over which Azima was in possession as mortgagee, and that Rasai and after him his representatives, defendants Nos. 1 to 4, have continued in possession as mortgagees. That the plaintiffs asked them "to return the mortgaged share on payment of a reasonable amount," but the defendants aforesaid refused and hence this suit. Defendant No. 5, Musammat Azima, the widow of Amir, has been impleaded on the inexplicable ground that she did not join in the suit. The contesting defendants 1 to 4 pleaded that what was actually

(1) (1914) 12 A. L. J., 1141. (2) N.-W. P., H. C. Rep 1866, 287.

(3) (1910) I. L. R., 32 All., 551.

sold was the property which was owned and possessed by Kadir and Amir, implying that the mortgagee rights were not transferred as alleged by the plaintiffs. They further pleaded that Rasai, and after him they, had been in adverse possession as proprietors. They also pleaded in bar article 134 of the first schedule of the Limitation Act, IX of 1908. We are not concerned with the other pleas raised in defence.

The Munsif of Azamgarh came to the conclusion that the deed taken as a whole clearly shows that it purported to transfer a portion of that share which was held by the vendors as absolute owners. He further held that Musammat Azima sold 14 biswas 17 dhurs which she owned as a proprietor and the remainder out of the 6 bighas 14 biswas and 5 dhurs sold under the deed of 1872 was the property of Kadir. He further found that the defendants and their predecessor in title had been in possession as absolute owners since 1872. A portion of the property in dispute had been transferred by the widow of Rasai, the vendee, by deed of gift so far back as 25th of July, 1899, and the defendants and their transferees had been claiming the absolute ownership of the land from the very beginning. In the result he dismissed the suit.

The plaintiff went up in appeal, contested the finding of the Munsif as to the interpretation put by him on the sale-deed, claiming that the property which Musammat Azima sold was the property over which she was in possession in lieu of her dower debt, that is to say, as a mortgagee, and no question of adverse possession arose in the case. The District Judge, Mr. Mundle, was of opinion that the wording of the sale-deed was very ambiguous and was capable of several interpretations, but he did not come to any finding as to what was actually sold, inasmuch as he was of opinion that having regard to the ruling in the case of *Mohammad Husain* v. *Bashiran* (1) a decision of this question was immaterial, inasmuch as a widow in possession in lieu of dower could only transfer her possessory right along with the claim of dower and not otherwise, and as there was no assignment of the dower debt in this case, the possession of the transferee could not be that of a mortgagee. It could only be

(1) (1914) 12 A. L. J., 1141.

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adverse and the claim was barred by limitation. He, therefore, dismissed the appeal.

The plaintiff comes here in second appeal. His first contention is that Musammat Azima sold her possessory right in the property of Amir and, secondly, that the claim was not barred by limitation. The case has been argued fully and with great ability by Maulvi *Iqbal Ahmad* for the appellant and Maulvi *Mukhtar Ahmad* for the respondents. The first question we have to decide is what was, as a matter of fact, transferred under this deed. The deed begins with a recital that the property, namely, 13 bighas, 8 biswas, and 10 dhurs was "the ancestral property of the executants over which Shaikh Kadir was in possession as an heir and Musammat Azima was in possession both as an heiress and in lieu of dower; out of the aforesaid property we sell half, that is, 6 bighas, 14 biswas, and 5 dhurs to Sheikh Rasai *etc., etc.*" Now at first sight and according to the ordinary rules of interpretation it would appear that Kadir sold half out of the 6 bighas and odd aforesaid, and Azima sold the remaining half which included part of both the proprietary and possessory rights which she had in it, that is to say, her $\frac{1}{2}$ share as owner and her $\frac{1}{2}$ share of which she was the possessor. So that in any event the plaintiff's suit must fail as to the $\frac{1}{2}$ plus $\frac{1}{16}$, that is $\frac{9}{16}$ of the property in suit.

The next question which naturally arises is as to what is the legal consequence of the transfer by the lady of her possessory right in the $\frac{7}{16}$ mentioned above. It has been contended on behalf of the respondents that the widow could not have transferred her right to possession apart from the dower debt, and reliance is placed on the case of *Mohammad Husain* v. *Bashiran* (1). It is sufficient to say that the ground on which the older cases were differentiated was that in the older cases the suit had not been brought in the life-time of the widow. The present case has, as is clear from the facts stated above, been brought during the life-time of the widow and therefore, strictly speaking, the case mentioned above would not apply. It has been held in the case of *Musammat Kummur-ool-nissa Begum* v. *Mahomed Hussun* (2):—"At the same time we are satisfied that as the

(1) (1914) 12 A. L. J., 1141. (2) (1866) N. W. P., H. C Rep., 287 (290).

property in suit formed a portion of Umda Begam's husband's estate, the whole of which was in her possession as security for her dower. the widow would have had the power to mortgage such hypothecated interest and that, during her life-time, the defendants, except by payment of the dowry, could not have released the mortgage." This case was quoted with approval in the case of *Ali Bakhsh* v. *Allahdad Khan* (1), where their Lordships observed :—" The right is one which the widow secures as a creditor for her dower and it is one to continue holding until her debt is satisfied. Such a right is property, and *primâ facie* in the absence of any law or contract to the contrary, it is property which is both heritable and transferable." So that the argument of Maulvi *Iqbal Ahmad*, that the sale of her possessory rights by Musammat Azima, unaccompanied by a transfer of the dower debt, was not warranted by law and therefore invalid, falls to the ground, and on this basis alone the plaintiff's claim could not fail as being barred by the defendants having acquired adverse proprietary title in the property because of an invalid sale in their favour.

Let us examine this position from another standpoint. It is now settled law that adverse possession can be acquired over limited rights such as those of a mortgagee also, but adverse possession against a mortgagee would not of necessity be adverse to the mortgagor. So that the right which Rasai and his successors acquired by virtue of taking possession under the invalid deed, admitting it for the sake of argument to be invalid, would be the acquisition of the rights of Musammat Azima, but would not of necessity extinguish the rights of the other heirs. There is nothing in the present case to show that there was anything which tended to destroy the rights of the heirs. We have already said that the deed itself shows the nature of the possession of Kadir and Azima over the property which they purported to transfer, and the purchaser Sheikh Rasai could not be said to have been unaware as to the rights which he was purchasing. Article 134 of the first schedule of the Limitation Act would not, therefore, apply. This was so held in the case of *Drigpal Singh* v. *Kallu* (2). We are, therefore, of opinion

(1) (1910) I. L. R., 32 All., 551. (2) (1915) I. L. R., 37 All., 660.

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that the suit is not barred by limitation. The result of the view which we take in this case is that the plaintiff's suit must fail as regards $\frac{9}{16}$ of the property in dispute. As to the remaining $\frac{7}{16}$ of the property, the plaintiff is entitled to a decree for possession on payment of such proportion of the dower debt of Musammat Azima as might be chargeable against that share. The question of the amount of the dower debt of Musammat Azima has not been tried by either of the Courts below. [Their Lordships remitted an issue to determine it.]

Issue remitted.

REVISIONAL CIVIL.

1920
July, 10.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

MUHAMMAD UBED-ULLAH AND OTHERS (DEFENDANTS) *v.* MUHAMMAD INSHA ALLAH KHAN (PLAINTIFF).*

Act No. IX of 1872 (*Indian Contract Act*), *section* 131—*Surety—Liability of heirs of surety for default occurring after surety's death—Construction of document.*

Two persons engaged themselves as sureties in behalf of a peon in the Postal department. The bond which they executed was in a prescribed form of general application. It bound both the sureties personally and their representatives after their death; but the bond further provided that a surety could terminate his liability in respect of the future by giving six months' notice to the prescribed postal authority.

The bond in the present case was executed in 1902. In 1910 one of the sureties died. In 1916 the person on whose behalf the bond was given embezzled a sum of money, which was recovered by the Postal department from the surviving surety. The surviving surety then sued the heirs of the deceased surety for contribution.

Held that the plaintiff was entitled to recover.

THE facts of this case are fully stated in the judgment of Gokul Prasad, J.

Pandit *Sham Krishna Dar* and the Hon'ble Munshi *Narain Prasad Ashthana*, for the applicants.

Pandit *Uma Shankar Bajpai*, for the opposite party.

GOKUL PRASAD, J.:—The facts which have given rise to this revision are as follows:—It seems that Syed Zahur-ul-Hasan was a candidate for service in the Postal department and had to furnish two sureties for good conduct during his term of

* Civil Revision No. 93 of 1919.