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In the present case there is no language indicating that the promise to re-sell should not be considered part of the consideration for the original sale and consequently the presumption that the parties intended the covenant to re-sell to be operative will justify a decision that such covenant was part of the consideration for the original sale-deed. I may remark that if the test laid down in *Alderson* v. *White* (1), and applied by their Lordships to transactions preceding the Transfer of Property Act, be applied, the result will be the same. There is in these deeds a provision for the calculation of interest at the time of re-sale, if such interest has not been paid. Such a provision may be said to have continued a relationship between the transferor and the transferee which cannot be regarded as anything but the relationship of creditor and debtor.

Ashworth, J.

For the above reasons I concur in the remand of the case as proposed by my learned brother.

Appeal allowed and cause remanded.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice King.

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June, 9.

NAWASI BEGAM AND ANOTHER (DEFENDANTS) *v.* DILAFROZ BEGAM (PLAINTIFF) AND ISHRAQI BEGAM AND OTHERS (DEFENDANTS).*

Muhammadan law—Dower—Suit to recover property of husband from widow in possession—Res judicata—*Claim of widow to interest on dower debt.*

The fact that a decree against a Muhammadan widow in possession of her husband's property in lieu of dower has lapsed because a provision as to the payment of a sum of money within a fixed period as a condition precedent to the delivery of possession of the property in suit was not complied with

* First Appeal No. 131 of 1923, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Farrukhabad, dated the 8th of February, 1923.

(1) (1858) 2 De Gex and J., 97 (105).

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will not bar a subsequent suit to recover possession of the same property based upon the ground that the dower debt has since been satisfied from the income of the property in possession of the widow. *Maina Bibi* v. *Wasi Ahmad* (1), followed.

A Muhammadan widow to whom her dower debt is due is not entitled to charge interest on the debt as a matter of course; but a discretion is vested in the Court to determine, on equitable considerations, whether interest should be allowed or not. The disproportion between the value of the property and the amount of the dower debt is a good ground for holding that interest cannot equitably be allowed. *Hamira Bibi* v. *Zubaida Bibi* (2) and *Bakreedan* v. *Ummatul Fatma* (3), referred to.

This was a suit for possession of certain immovable property together with mesne profits. The property belonged to one Afzal Shah, who died on the 9th of October, 1881, leaving as his heirs a nephew, Mansur Shah, and a widow, Zamani Begam. The former was entitled to three-quarters of the property and the latter to one-quarter. The widow retained possession of the whole property in lieu of her dower debt. The nephew assigned half of his share to Muhammad Zaman Khan and Usman Shah, and then, together with his transferees, instituted a suit against Zamani Begam on the 26th of April, 1892, for possession of his share. Zamani Begam asserted her right to retain possession until her dower debt had been discharged. The amount of the dower debt and of the profits received by the widow were disputed; but by the decree of the High Court, dated the 2nd of June, 1896, it was finally decided that the amount of dower debt was Rs. 50,000, and after making allowance for the profits received by Zamani Begam from the estate, and for the debts which she discharged, the plaintiffs got a decree for possession of the share, conditional on the payment of Rs. 35,223, minus the profits accruing from the date of the decree of the District Judge

(1) (1919) I.L.R., 41 All., 538; and (1924) I.L.R., 47 All., 250.
(2) (1916) I.L.R., 38 All., 581. (3) (1905) 3 C.L.J., 541.

up to the date of delivery of possession. The plaintiffs failed to pay anything and so they remained out of possession.

The present suit was instituted on the 18th of January, 1919, by Dilafroz Begam, a daughter of Mansur Shah, and one of his heirs. The defendants Nos. 3 to 9 were also heirs of Mansur Shah and were impleaded as *pro formâ* defendants since they had not joined in the suit. The plaintiff claimed a 7/72nd share of the property as an heir of Mansur Shah. The defendants Nos. 1 and 2 were the representatives of Zamani Begam and were in possession of the property. The defendants Nos. 10 to 29 were the representatives of the transferees, Muhammad Zaman Khan and Usman Shah.

The suit was resisted by the defendants Nos. 1 and 2 on a number of pleas, which were repelled by the trial court. In the result the plaintiff's claim was decreed, subject to the payment of Rs. 107 minus the profits accruing from the plaintiff's share in the property between the 30th of June, 1921, up to the date of recovery of possession. Defendants Nos. 1 and 2 appealed.

Mr. *B. E. O'Conor*, Dr. *Surendra Nath Sen*, Maulvi *Iqbal Ahmad* and Maulvi *Mahmud-ullah*, for the appellants.

Sir *Tej Bahadur Sapru* and Hafiz *Mushtaq Ahmad*, for the respondents.

The judgement of the Court (MEARS, C. J., and KING, J.), after setting forth the facts as above, thus continued :—

The defendants Nos. 1 and 2 have raised three points before us in appeal. Firstly, it is argued that the suit was barred by the rule of *res judicata*. The contention is that the decree obtained by the plaintiff's

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predecessor in interest in 1896 bars the present suit, and that decree itself is no longer enforceable.

The court below, relying mainly upon the decision of this High Court in the case of *Maina Bibi* v. *Wasi Ahmad* (1), held that the present suit was not barred by reason of the fact that the plaintiff's predecessor in interest had obtained a decree for possession of the said property in 1896 on condition of paying a certain sum. In the case of *Maina Bibi* a suit was brought against the widow, who was in possession in lieu of dower, by some of the heirs of her husband in 1902 and was decreed on condition of payment of a sum of Rs. 25,000 within a certain time: in default of which the suit was to stand dismissed with costs. The sum was never paid. In 1915 the plaintiffs, who had sued in 1902, again brought a suit for possession alleging that in the meantime the dower debt had been satisfied and that they were entitled to possession without payment of anything. It was held that the suit would not be barred by the principle of *res judicata* as the suit was only for adjustment of accounts since the decree in the suit of 1902. The points in issue in the suit of 1902 were the amount of dower, the rate of interest and the sum payable by the plaintiffs before obtaining possession, up to the date of the decree. None of those points were in issue in the suit of 1915. Also it was held that the plaintiffs' failure to pay the sum necessary for recovering possession under the decree in the suit of 1902 did not extinguish their right to recover possession at a future date by a separate suit.

The decision of this High Court in *Maina Bibi's* case was upheld on appeal by their Lordships of the Privy Council, whose judgement is reported in I.L.R., 47 All., 250. Their Lordships remark (at

(1) (1919) I.L.R., 41 All., 538.

page 260) :—" The suit out of which this appeal arises only asks for adjudication as to the account since 1903. The right to get immediate possession of land at the date when a suit to recover it is in fact instituted, is a wholly different thing, a wholly different *res*, from the right to recover it at some future time and possibly under wholly altered circumstances. The non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right to recover immediate possession as actually claimed, and could not and did not, in their Lordships' opinion, extinguish the right of the plaintiffs to the inheritance of, or their rights to recover possession of, the lands at some future time."

These observations apply to the present case, and in the face of this authoritative ruling it is impossible to hold that the suit is barred by the rule of *res judicata*, or that it is not maintainable.

The next question for our decision is whether the representatives of the widow are entitled to interest upon their dower debt. The amount of the dower debt was fixed by the previous decree of the High Court in 1896 as Rs. 35,223. The defendants claim that they are entitled to charge interest upon this sum, and rely upon the case of *Maina Bibi*, which has already been referred to, and the case of *Hamira Bibi* v. *Zubaida Bibi* (1). In the case of *Maina Bibi* interest was allowed at the rate of 3 per cent., but it was not definitely laid down that a Muhammadan widow can, in all cases, claim interest on her dower as a matter of right. In the case of *Hamira Bibi* v. *Zubaida Bibi* (2), Mr. Justice KARAMAT HUSAIN went so far as to lay down (at page 193) that " a Muhammadan widow in possession of her husband's estate

(1) (1916) I.L.R., 38 All., 581. (2) (1910) I.L.R., 33 All., 182.

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in lieu of her dower could claim interest on it, and that the courts in British India should not refuse to grant her a decree for it on the ground that the Muhammadan law prohibits usury." This seems to indicate that interest could be claimed as a matter of right. But when this case came before the Privy Council in appeal (reported in I.L.R., 38 All., 581), their Lordships did not lay down any rule of law to the effect that the widow was entitled to claim interest on dower debt in all cases, but held that she was entitled to interest on certain equitable considerations.

The Calcutta High Court in the case of *Bakreedan* v. *Ummatul Fatma* (1) took the view that where the dower is fixed at a sum very much larger than the value of the entire property belonging to the husband, the widow is not entitled to claim interest on the dower. If that principle is applied to the present case, the defendant would not be entitled to claim interest, since the value of the property left by the husband is much less than the dower. The value of the property would not be more than Rs. 18,000, whereas the dower is Rs. 50,000. It would appear, therefore, that some discretion is allowed to the courts in determining whether interest should be allowed, and the disproportion between the value of the property and the dower is a good ground for holding that interest cannot equitably be allowed. In the present case we are decidedly of opinion that no interest should be allowed.

But, apart from equitable considerations, we hold that the claim to interest is barred by the principle of *res judicata*. In the earlier litigation the widow claimed no interest. She certainly could

(1) (1905) 3 C.L.J., 541.

and should have claimed interest if she had not deliberately omitted such claim. So the decree in the former suit must be taken as having decided that no interest should be allowed. The widow's representatives are precluded from claiming interest in the present suit.

Lastly, the appellant claims that 10 per cent. should be allowed for the costs of collection. It appears from the Commissioner's report that 7½ per cent. on collections was allowed on account of ordinary village expenses and expenses of settlement and of suits, but nothing was allowed on account of collection charges. The Commissioner did not allow anything on account of collection charges because no instructions to this effect had been given to him. The trial court allowed 2½ per cent. extra on collections so as to raise the total allowance to 10 per cent. But the appellant claims that he is entitled to 7½ per cent. on account of village expenses, et cetera, in addition to 10 per cent. on account of collection charges. In our opinion the allowance of 10 per cent. for collections is reasonable and it is usually given in cases of this sort. It has been contended for the respondent that the defendant in paragraph 23 of the written statement did not claim a deduction of more than 10 per cent. both on account of village expenses and collection charges, and this is exactly what has been allowed. It appears, however, that the 10 per cent. which was asked for was on the gross rental and not on the actual collections, so the defendant has not received the full amount of allowance which he claims. We hold that the defendant should be allowed 10 per cent. on the actual collections. It has been agreed between the parties that on this finding the additional sum payable to the defendants comes to Rs. 2,147. We, therefore, add this to the amount which the plaintiff has to

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pay to the defendants Nos. 1 and 2 before taking possession. We, therefore, alter the decree of the court below to this extent only that we substitute the sum of Rs. 2,254 instead of Rs. 107. In all other respects the decree of the trial court is upheld. As the respondents have succeeded on the principal issues we allow two-thirds of the respondents' costs and one-third of the appellants' costs in this Court. We do not disturb the order of the lower court as to costs.

Decree modified.

Before Mr. Justice Sulaiman and Mr. Justice Boys.

1926
June, 14.

DWARKA SINGH AND OTHERS (PLAINTIFFS) *v.* SHEO SHANKAR SINGH AND OTHERS (DEFENDANTS).*

Pre-emption—Plaintiff pre-emptor joining with himself persons who have no right to pre-empt.

If a plaintiff who has a right of pre-emption associates with himself persons who have no such right, he becomes disentitled from claiming pre-emption. *Bhawani Prasad* v. *Damru* (1), *Bhupal Singh* v. *Mohan Singh* (2), *Gupteshwar Ram* v. *Rati Krishna Ram* (3) and *Rahima* v. *Razzaq Ali* (4), referred to.

This was a suit for pre-emption. There were three plaintiffs, Dwarka Singh, plaintiff No. 1, being the lambardar and the other two plaintiffs co-sharers in the same *thok* in which the property sold is situated. The suit related to two taluqas, each of which is a separate mahal called Dhodhwa Asli and Saraiya Asli. The plaintiffs did not admit that the consideration mentioned in the sale-deed was the true consideration. The defendants maintained that the consideration mentioned in the deed was the true consideration and denied the existence of a custom of pre-emption and

* First Appeal No. 58 of 1923, from a decree of Hanuman Prasad Varma, Additional Subordinate Judge of Benares, dated the 10th of January, 1923.

(1) (1882) I.L.R., 5 All., 197.
(2) (1897) I.L.R., 19 All., 324.
(3) (1912) I.L.R., 34 All., 542.
(4) (1923) 21 A.L.J., 184.