

Further, where section 27 is applicable it may still be open to the assessee, if he has a good case, to file an appeal and to show that the order under section 23, sub-section (4), was not justified.

Our view is supported by two Full Bench decisions of the Patna and Punjab High Courts, respectively, and they are *Kunwarji Ananda v. Commissioner of Income-tax* (1), and *Duni Chand v. Commissioner of Income-tax* (2).

Our answer to the issue No. 1, as resettled above, is that the Assistant Commissioner should have heard the assessee or his counsel and then should have decided whether the case really fell under section 23(4) of the Income-tax Act.

As no other question arises, we direct that a copy of this judgment be sent under the seal of the Court to the Commissioner of Income-tax. The Government must pay the costs of this reference to the assessee.

APPELLATE CIVIL.

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

AMIR HASAN KHAN (DEFENDANT) *v.* MUHAMMAD NAZIR HUSAIN (PLAINTIFF).*

1932
January, 18.

Transfer of Property Act (IV of 1882), sections 3 and 136—Actionable claim—Dower debt—Transfer to legal practitioner void—Muhammadan law—Widow in possession over her husband's property in lieu of dower—Transfer by the widow of the right to possession without transfer of the dower debt—Validity.

A claim to unpaid dower debt is an actionable claim as defined in section 3 of the Transfer of Property Act; and so a transfer of the dower debt in favour of a legal practitioner is void in view of the provisions of section 136 of the Transfer of Property Act.

*Second Appeal No. 1268 of 1929, from a decree of M. F. P. Herchenroder, District Judge of Cawnpore, dated the 12th of July, 1929, reversing a decree of Lakshmi Narain Tandon, Additional Subordinate Judge of Fatehpur, dated the 6th of November, 1928.

(1) (1931) I.L.R., 11 Pat., 187. (2) (1929) I.L.R., 10 Lah., 596.

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A Muhammadan widow in possession of her husband's property, if she obtained it peacefully and without force or fraud, is entitled to retain it till her dower is paid. But it is not the case that the claim to dower debt becomes merged in the widow's right to retain possession and has no separate existence. There is nothing to prevent the widow, in possession of her husband's property in lieu of her dower debt, from suing for a simple money decree in respect of the unpaid dower, or from validly assigning the dower debt.

A widow in such possession can transfer her right to possession if she also assigns her right to receive the unpaid dower. If, however, the widow transfers her right to possession without transferring her right to receive the dower, or the transfer of the latter right is void as having been made to a legal practitioner, the transferee cannot defend his right to possession as against the husband's heir *qua* the latter's share.

Messrs. *P. L. Banerji* and *M. A. Aziz*, for the appellant.

Mr. Zamirul Haq, for the respondent.

PULLAN and NIAMAT-ULLAH, JJ.:—This second appeal has arisen out of a suit brought by the plaintiff respondent for recovery of possession of a six anna share in village Bahrapur, district Fatehpur. The Subordinate Judge, in whose court the suit had been instituted, dismissed it; but on appeal by the plaintiff it was decreed by the District Judge.

Village Bahrapur above mentioned belonged to Saghir Husain, husband of Kulsum Bibi, defendant No. 2, and Munshi Amir Hasan Khan, a vakil practising in Fatehpur, in equal shares. The two do not appear to belong to the same family, and the fact that they were co-sharers may be due to circumstances which are not material for the purposes of this case. Saghir Husain died in or about 1920, leaving his brother Nazir Husain, plaintiff respondent, and Mst. Kulsum Bibi, defendant No. 2, as his heirs, the latter being entitled to one-fourth of Saghir Husain's property, and the former to the remaining three-fourths. The widow, however, entered into possession of the

entire 8 anna share belonging to her husband, and obtained mutation of names, as owner to the extent of two annas (one-fourth), and in lieu of dower to the extent of six annas (three-fourths). The plaintiff contested her claim in the proceedings for mutation, but was unsuccessful. He acquiesced in the order of the revenue court upholding the widow's right to remain in possession of the plaintiff's share till her dower debt was paid. She executed on the 22nd of September, 1925, a deed of sale in favour of defendant No. 1, the validity of which is in question in the present case. The deed recites that a large sum of money was due to the executant, Mst. Kulsum Bibi, in respect of her unpaid dower debt (the exact amount of which is not specified), and that she was in possession of six anna share in lieu thereof. The deed purports to convey the entire eight anna share to the vendee in consideration of Rs. 3,875, part of which was left with the vendee. The deed also purports to assign to the vendee the vendor's right to recover her dower debt and the right to remain in possession of six anna share until it is paid. Defendant No. 1 obtained possession of the entire eight anna sold by the defendant No. 2.

The present suit was instituted on the 18th. of May, 1927, for recovery of possession of six anna share belonging to the plaintiff but previously held by the widow (defendant No. 2) in lieu of dower. The validity of the sale deed, so far as it relates to six anna share belonging to the plaintiff, is impugned on the ground that defendant No. 2 had no right to transfer her dower debt and her right to possession of six anna share to defendant No. 1. According to the plaintiff the dower of defendant No. 2 stipulated at the time of her marriage with Saghir Husain was no more than Rs. 1,700. It was pleaded by defendant No. 1 in defence that the dower of defendant No. 2, agreed to by her husband, was Rs. 50,000, and that she was

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entitled to possession of her husband's share till the aforesaid amount was paid, which right she validly transferred to defendant No. 1.

The trial court held that the dower of defendant No. 2, stipulated at her marriage with Saghir Husain, was Rs. 50,000 and that she having transferred her right to receive dower as well as her right to retain possession of her husband's share in village Bahrapur in lieu of dower, the defendant No. 1 was entitled to remain in possession, the dower debt not having been paid by the plaintiff.

The learned District Judge took a contrary view in a well reasoned judgment, holding that the widow's claim to dower is an actionable claim as defined in the Transfer of Property Act, and that the defendant No. 1 being a legal practitioner was debarred from taking a transfer of such claim. Accordingly, the defendant No. 1 did not acquire the right to recover the dower debt and could not, for that reason, acquire an indefeasible right of possession of the six anna share which was previously in the hands of the widow subject to the lien for her unpaid dower debt. As regards the amount of dower the learned Judge held that the burden of proving the exact amount stipulated at the time of marriage lay on the widow, who failed to establish that it was Rs. 50,000. He laid stress on the recital in the sale deed which did not specify the amount of dower but mentioned it generally as a large amount. Apparently the learned Judge was of opinion that the sum of Rs. 50,000, alleged in the written statement, was the result of an afterthought.

It was contended before us by the learned advocate for the defendant appellant that the widow's right to recover her unpaid dower is not an actionable claim as defined in the Transfer of Property Act. Reference was made to *Shib Lal v. Azmat-ullah* (1) and *Arunachellam, Chetti v. Subramanian Chetti* (2). In

(1) (1896) I.L.R., 18 All., 265.

(2) (1906) I.L.R., 30 Mad., 235.

the first of these cases, which was decided by a Full Bench of this Court in 1896, it was held that the term "actionable claim" as used in section 130 of Act IV of 1882 means a claim in respect of which a cause of action has already matured and which, subject to procedure, may be enforced by suit. The debt in question in that case was due under a simple mortgage payable after a specified date. It was held that a mortgage debt, before it became payable, was not an actionable claim. The second case follows the first. In view of subsequent legislation, which materially altered the definition of "actionable claim", both the above cases have become obsolete in relation to transactions entered into after 1900, when the Transfer of Property Act was amended. An actionable claim is now defined to mean "a claim to any debt, other than a debt secured by mortgage of immovable property, . . . which the civil courts recognize as affording grounds for relief, whether such debt . . . be existent, accruing, conditional or contingent". In the Act as it stood before the amendment, section 130 defined "actionable claim" as "a claim which the civil court recognizes as affording grounds for relief, . . . whether a suit for its enforcement is or is not actually pending or likely to become necessary". A comparison of the two definitions makes it clear to us that there was room for argument before the amendment that a debt in respect of which no cause of action had arisen and which was not payable at the date of assignment did not amount to an actionable claim. The amended definition has excluded secured debts from the category of actionable claims on the one hand and included certain debts though they are "accruing, conditional or contingent". It is no longer possible to contend that a debt, which otherwise amounts to an actionable claim, is not such only because a cause of action in respect thereof has not arisen or the time for its payment has not arrived. Section 135, as it stood before

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the amendment and which was in question in *Shib Lal v. Azmat-ullah* (1), was repealed. It is not necessary to pursue this aspect of the case further, as we are satisfied that a claim to unpaid dower debt is an actionable claim as now defined in section 3 of the Transfer of Property Act. This being so, and the defendant No. 1 being a legal practitioner, section 136 of the Transfer of Property Act is undoubtedly applicable. It forbids a legal practitioner, among others, to buy any actionable claim. The prohibition being absolute, any transfer in defiance of section 136 is calculated to defeat its provision and as such is void.

It was contended by the learned advocate for the appellant that the transaction evidenced by the deed dated the 22nd of September, 1925, should not be viewed as (1) an assignment of dower debt by Mst. Kulsum Bibi and (2) a transfer of her right to possession, taking the two separately, and that it amounted only to a transfer of the widow's right to possession in lieu of dower. The argument was that the claim to dower debt became merged in the widow's right to retain possession and had no separate existence as an assignable right. It was emphasised that the widow could not institute a suit for recovery of her dower and that her only remedy in respect of it was to remain in possession till she was paid off. We are unable to accede to this argument. A widow in possession of her husband's property, if she obtained it peacefully and without force or fraud, is entitled to retain it till her dower is paid. No exception can be taken to this statement of the law on the authorities of this Court. It implies the existence of the dower debt and the liability of the heirs to pay it before they can take possession of their shares. There is nothing to prevent a widow from instituting a suit for her dower for the purpose of obtaining a simple money decree against all the assets of her husband, including the

property in her possession, at least by surrendering possession of such property in her hands. We refrain from deciding that she must in all cases surrender possession as a condition precedent to her obtaining a decree against the assets of her husband; but we entertain no doubt that she can sue for her dower, if she is so advised, and obtain a decree against the assets of her husband, subject to her claim being unaffected by the law of limitation.

The right of a Muhammadan widow, who has entered into possession of her husband's property peacefully and without force or fraud in lieu of her dower debt, has been held by this Court to be heritable so as to entitle her heirs to remain in possession until the debt is satisfied. See *Ali Bakhsh v. Allahdad Khan* (1). The possession of heirs who inherited not only her right to receive the dower but also her right to remain in possession is thus not open to question. It was also laid down in that case that a widow could transfer her right to possession, if she also assigned her right to receive the unpaid dower. One of the learned Judges observed that he knew of "no valid reason in law why she should not be entitled to transfer her debt together with her right to continue in possession". The heirs of the widow had, in that case, transferred part of their right to receive the dower and to possession of her husband's property to strangers, who were jointly in possession with them and were defendants in the suit brought by the heirs of the husband for possession. We are bound to follow the cases of this Court, even if we thought differently; but as already stated, we take exactly the same view. If the right to receive dower and the right to remain in possession of certain property in lieu of such dower are vested in the same person, he cannot be ousted by the heirs of the husband. If, however, the widow transfers her right to possession or the property itself, without

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transferring her right to receive dower, the transferee cannot defend his right to possession as against the heir *qua* the latter's share. The ownership being vested in the heir of the husband, the only person who can stand between him and what belongs to him is the person who is entitled to the dower and to possession of the property in lieu thereof. In the present case the defendant No. 1, who has not in law acquired the widow's right to receive dower, is not entitled to retain possession, which the widow could not transfer without validly transferring her right to receive the dower debt.

The result is that this appeal fails and is dismissed with costs.

Before Mr. Justice Mukerji and Mr. Justice Bennett.

GIRDHARI LAL AND ANOTHER (DEFENDANTS) v. BISHUN CHAND (PLAINTIFF).*

1932
January, 19.

Limitation Act (IX of 1908), article 64—"Account stated"—Unilateral account and no mutual demands—Statement of account should be within period of limitation from last transaction—Acknowledgment—Burden of proof—Contract Act (IX of 1872), section 25—Express promise to pay necessary.

The plaintiff was a firm of money lenders from whom the defendants borrowed from time to time, entries of the loans and of any repayments being made, according to agreement, in the plaintiff's account book. The defendants used to make repayments in part from time to time, but at no time were the defendants in the position of creditors. There were no other transactions between the parties. The last item was a loan to the defendants dated the 9th of August, 1921. On the 26th of September, 1925, the account between the parties was struck and a certain sum was found due to the plaintiff. The defendants signed an acknowledgment for this amount in the plaintiff's account book. The plaintiff's suit for the amount was brought on the 17th of August, 1927. *Held* that article 64 of the Limitation Act or section 25(3) of the Contract Act did not apply to the

*First Appeal No. 83 of 1928, from a decree of Maheshwar Prasad, Subordinate Judge of Shahjahanpur, dated the 14th of September, 1927.