

his possession by virtue of the auction sale, can impeach an alienation of that part of the property made by the father, where the joint family consists of the father and his sons.

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In view of the conclusion arrived at by us this appeal fails and is dismissed with costs.

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

IMTIAZ BEGAM (DEFENDANT) v. ABDUL KARIM KHAN AND OTHERS (PLAINTIFFS).\*

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June, 13.

*Muhammadian law—Dower debt—Widow in lawful and peaceable possession of the estate—Right to retain possession until payment—Consent of husband or his heirs to such possession not necessary.*

Where a Muhammadian widow lawfully and peaceably takes possession of her husband's estate, without any force or fraud, where her dower debt remains unpaid in whole or in part, she is entitled to retain possession against the other heirs of the husband so long as the debt has not been paid by them or satisfied out of the usufruct of the property, and in order to entitle her so to retain possession of the property it is not necessary that her possession should have originated with the consent express or implied of her husband or of his heirs.

*Amani Begam v. Muhammad Karim-ullah (1), Ali Balxshi v. Allahdad Khan (2), Ramzan Ali Khan v. Asghari Begam (3), Muhammad Shoab Khan v. Zaib Jahan Begam (4), Beeju Bee v. Syed Moorthiya Saheb (5) and Sahebjan Bewa v. Ansaruddin (6), followed. Amanat-un-nissa v. Bashir-un-nissa (7), Muhammad Karim-ullah Khan v. Amani Begam (8) and Sabur Bibi v. Ismail Shaikh (9), disapproved. Mussumat Bebee Bachun v. Sheikh Hamid Hossein (10) and Maina Bibi v. Chaudhri Vakil Ahmad (11), referred to. Hamira Bibi v. Zubaida Bibi (12), explained.*

\* Second Appeal No. 85 of 1928, from a decree of P. C. Agarwal, Subordinate Judge of Budann, dated the 26th of August, 1927, reversing a decree of Fran Nath Aga, Munsif of Sahaswan, dated the 27th of April, 1927.

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|-------------------------------------|-------------------------------------|
| (1) (1894) I. L. R., 16 All., 225.  | (2) (1910) I. L. R., 32 All., 551.  |
| (3) (1910) J. L. R., 32 All., 563.  | (4) (1927) I. L. R., 50 All., 423.  |
| (5) (1919) F. L. R., 43 Mad., 214.  | (6) (1911) I. L. R., 38 Cal., 475.  |
| (7) (1894) I. L. R., 17 All., 77.   | (8) (1895) I. L. R., 17 All., 93.   |
| (9) (1923) I. L. R., 51 Cal., 124.  | (10) (1871) 14 Moo. I. A., 377.     |
| (11) (1924) I. L. R., 47 All., 250. | (12) (1916) I. L. R., 38 All., 581. |

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Mr. *Harnandan Prasad*, for the appellant.

Mr. *Akhtar Husain Khan*, for the respondents.

SEN and NIAMAT-ULLAH, JJ. :—The property in dispute is a zamindari share in mauza Naithuwa which originally belonged to Musammât Imtiaz Begam defendant. She gifted the property to her husband Muhammad Khan, and his name was mutated in the revenue record in due course. Muhammad Khan died on the 15th of May, 1925. The name of Musammât Imtiaz Begam the widow was mutated by order of the revenue court, dated the 7th of June, 1926.

Plaintiffs as residuary heirs of Muhammad Khan brought the suit which has given rise to the present appeal for a declaration that they were the owners in possession of twelve out of sixteen sihams in the zamindari share left by Muhammad Khan. They prayed for possession in the alternative.

The defendant denied that the plaintiffs were the residuary heirs of her husband, and contended that after the death of Muhammad Khan she had lawfully and peaceably, without any force or fraud, taken possession of the property in lieu of her dower debt, and that the plaintiffs were not entitled to recover possession of it so long as her claim to dower was not satisfied.

The court of first instance held that the plaintiffs were the residuary heirs of Muhammad Khan. The claim, however, was dismissed upon the ground that the defendant had obtained possession of the property lawfully in lieu of her dower debt, and that she was entitled to retain possession of the said property so long as the dower was not satisfied.

There was some controversy as to the amount of dower due to the defendant. She claimed that her dower was Rs. 10,000. The plaintiffs alleged that her dower was only Rs. 500. The court of first instance

was inclined to the view that her dower was Rs. 10,000, but no definite finding was arrived at as regards the amount.

The lower appellate court has not gone into the question of the amount of dower due to the defendant. It affirmed the finding of the trial court that the plaintiffs were the residuary heirs of Muhammad Khan. It reversed the decision of the trial court upon the ground that although the defendant had obtained possession of the property in dispute lawfully and peaceably, without any force or fraud, she was not entitled to retain possession so as to defeat the claim for recovery of the share of the plaintiffs, because her possession did not originate from consent on the part of the husband or his heirs.

The defendant contests this finding. The matter is not entirely free from doubt or difficulty. Under certain circumstances a Muhammadan widow has a right to retain possession of the property left by her husband. This right of retention is not a lien in the true sense of the term. Her right to retain and continue in possession of the husband's estate in lieu of her dower is a creature of Muhammadan law, and does not in the generality of cases originate from a contract with the husband or with his heirs. It must be remembered that the widow is not a secured creditor and, as regards the dower which is due to her, she ranks equally and rateably with the other creditors of her husband. Her dower is not a charge upon the assets left by her husband.

Upon the death of the husband succession opens out immediately to the heirs. This succession is not postponed till the debts to the creditor have been paid. The heirs of the husband, however, are not entitled to recover possession of the property so long as the debts have not been paid. Their right to the distributive shares in the assets of the husband comes into existence after the debts have been satisfied.

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It is settled law that where a Muhammadan widow lawfully and peaceably takes possession of her husband's estate, without recourse either to force or to fraud, and her dower in whole or in part remains unpaid, she is entitled to retain her possession against the other heirs of her husband so long as the dower has not been paid by them or remains unsatisfied out of the usufruct of the property.

There is considerable conflict of judicial opinion on the question whether the widow's right to retain possession of the property is dependent upon her possession originating with the consent express or implied of the husband or the husband's heirs. There is a preponderance of judicial opinion in favour of the proposition that no such consent is necessary.

We shall refer only to some of the important cases. In *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (1) their Lordships observed at page 384: "It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in the judgment of the High Court in the case of *Ahmed Hossein v. Mussamat Khodeja* (2). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she lawfully and without force or fraud obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, the subject of the claim, for the profits received. This seems to have been the ground on which the claim of the widow to retain possession was put in *Ameer-oon-nissa v. Moorad-oon-nissa* (3)."

Their lordships endorsed the same view in *Maina Bibi v. Chaudhri Vakil Ahmad* (4).

(1) (1871) 14 Moo. I. A., 377.

(2) (1868) 10 W. R., 369.

(3) (1885) 6 Moo. I. A., 211.

(4) (1924) I. L. R., 47 All., 250 (255).

In *Aman Begam v. Muhammad Karim-ullah* (1) BURKITT, J., held that where a Muhammadan widow was in possession of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it was due and unpaid, she was entitled as against the other co-heirs of her husband to retain possession of such property until her dower debt was paid, and that it was immaterial to such widow's right to retain possession that such possession was obtained originally without the consent of the other co-heirs. At page 227 of the report the learned Judge observes as follows:—"Their possession appears to be perfectly lawful as heiresses of their deceased husband according to the Muhammadan law, *and as creditors for their dower*. I can find no authority for the proposition that the widow's possession is unlawful unless she has got such possession with the consent of the other co-heirs."

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The same view was emphasised by a Division Bench of this Court in *Ali Bakhsh v. Allahdad Khan* (2). RICHARDS, J., observed:—"I think that a perusal of the report of the case *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* negatives the assumption that a Muhammadan widow cannot be 'lawfully in possession' unless by contract with her husband or with the consent of the heirs. I do not understand how such a widow can be said to obtain a 'lien' by contract. If the widow's right is only by virtue of a contract with her husband or with the other heirs, her right must be limited entirely by the terms of the contract. It is not a lien. In my opinion where a Muhammadan widow entitled to dower gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her dower debt is paid; subject to (as their Lordships have laid down) her liability to account for the

(1) (1894) I. L. R., 16 All., 225. (2) (1910) I. L. R., 32 All., 551.

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profits received." In *Ramzan Ali Khan v. Asghari Begam* (1), another Division Bench of this Court took the same view: "It seems to me that the balance of authority is in favour of the view that a widow, who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate is entitled to hold the estate against the other heirs until her claim to dower is satisfied, without being asked to show either consent on their part or on that of the deceased husband." The latest pronouncement on the same lines was made in *Muhammad Shoab Khan v. Zaib Jahan Begam* (2). In this case the rule of law laid down in the last mentioned case was cited with approval.

A Full Bench of the Madras High Court has taken the same view in *Beeju Bee v. Syed Moorthiya Saheb* (3) and it has been held that the widow is entitled to retain possession as against the other heirs until her dower is satisfied, even though such possession was not obtained with the consent (express or implied), or under an agreement with her husband or his other heirs, and that such property would not be divided among the heirs until the dower debt is satisfied. In *Sahebjan Bewa v. Ansaruddin* (4) MOOKERJEE and TEUNON, J.J., after a careful review of all the authorities came to the conclusion that under the Muhammadan law when a widow was in possession of the undistributed property of her husband lawfully and without force or fraud and her dower or any part of it was still due and unpaid she was entitled as against the heirs of her husband to retain such possession until her dower debt was satisfied, and that her possession need not necessarily be possession obtained by an agreement with her husband or his heirs.

(1) (1910) I. L. R., 32 All., 563. (2) (1927) I. L. R., 50 All., 423.  
(3) (1919) I. L. R., 43 Mad., 214. (4) (1911) I. L. R., 38 Cal., 475.

There are certain cases on the other side of the line. In *Amanat-un-nissa v. Bashir-un-nissa* (1) and in *Muhammad Karim-ullah Khan v. Amani Begam* (2) EDGE, C.J., and BANERJI, J., had taken the view that the widow was not entitled to retain possession against the other heirs of her husband, unless she obtained possession in lieu of dower debt after her husband's death with the consent or by the acquiescence of the heirs. The latter of the two decisions follows the earlier. In the former decision reference has been made to a number of cases. We have examined these cases for ourselves and we do not find that they support the view which commended itself to their Lordships. No original texts have been cited and we do not agree with their construction of *Mussumat Bebee Bachun's* case (3). In *Sabur Bibi v. Ismail Shaikh* (4) RANKIN and GHOSE, JJ., have ruled that under the Muhammadan law the widow has for her dower all the rights of an ordinary creditor, and may be given, by the consent of her husband or his heirs, a right to the possession of the estate until by the rents and profits the debt has been liquidated. This view has been founded upon the decision of the Privy Council in *Mussumat Bebee Bachun v. Sheikh Hamid Hossein* (3) which has already been adverted to, and upon the observations of the Judicial Committee in *Hamira Bibi v. Zubaida Bibi* (5). It may be observed with respect that the view taken by the learned Judges does not find support in the decision of the Privy Council in *Beebe Bachun's* case. The Privy Council did not lay down the proposition that in order to entitle the Muhammadan widow to retain possession of the property against the other heirs of the husband, the consent of the husband or of his heirs was necessary. In *Hamira Bibi's* case their

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(1) (1894) I. L. R., 17 All., 77.

(2) (1895) I. L. R., 17 All., 98.

(3) (1871) 14 Moo. I. A., 377.

(4) (1923) I. L. R. 51 Cal., 124.

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Lordships of the Privy Council do make certain observations at page 588 which support the view of the Calcutta High Court: "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 and 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." In this appeal, to quote the words of the Privy Council at page 587, "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 Inayatullah's death." The point as to whether the right of the widow to retain and continue in possession of the husband's estate was dependent upon the consent of the husband or his other heirs was not the question in issue in the case. It does not arise from the pleadings, and was not a point in issue in the original or the appellate courts. Indeed the point was not argued at the Bar before their Lordships. We are of opinion therefore, that the observation of the Judicial Committee referred to above, although entitled to the very greatest weight, ought not to be construed literally. The decision of this Court in *Ramzan Ali Khan v. Asghari Begam* (1) was before their Lordships. It was referred to in another connection which need not be detailed. Their Lordships do not dissent from the view taken in the cases which were cited to them. We are clearly of opinion that the long string of authorities of this Court for the contrary proposition are not affected by the observation of the Judicial Committee and we are bound to follow the decision of this Court notably in *Ramzan Ali Khan v. Asghari Begam* (1).

(1) (1910) I. L. R., 32 All., 563.



We are, therefore, of opinion that where a Muham-  
 madan widow lawfully and peaceably takes possession  
 of her husband's estate without any force or fraud  
 where her dower debt remains unpaid in whole  
 or in part, she is entitled to retain possession against  
 the other heirs of the husband, so long as the debt has  
 not been paid by them or has been satisfied out of  
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The result is that we allow the appeal, set aside  
 the decree of the lower appellate court and restore that  
 of the court of first instance with costs.

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 REVISIONAL CRIMINAL.
 

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Before Mr. Justice Boys.

EMPEROR v. NAZIR HUSAIN.\*

*Criminal Procedure Code, section 258(1)—Failure of complain-  
 ant and witnesses to attend for cross-examination after  
 charge has been framed—Acquittal.*

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Where, after a charge had been framed against the ac-  
 cused person at a trial for causing simple hurt, the com-  
 plainant and his witnesses failed to attend on the date fixed  
 for their cross-examination, and the Magistrate was of opinion  
 that there were no good grounds for adjourning the case :  
*Held* that the Magistrate could thereupon find the accused  
 not guilty and acquit him, acting under section 258(1) of the  
 Criminal Procedure Code.

The Assistant Government Advocate (Dr. M.  
 Wali-ullah), for the Crown.

The opposite party was not represented.

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\* Criminal Reference No. 233 of 1930.