

first question, that is of the interpretation of the will of the 6th of November, 1884, were also decided in favour of the plaintiff-appellant, his suit must be decreed in its entirety except that, to the extent of one-fourth only in the self-acquired property of Raja Ajit Singh as specified in the schedules attached to the plaint and discussed in the judgment of the trial Court under issue 5.

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Having regard to my finding on the first question I would dismiss this appeal with costs.

BY THE COURT—STUART, C. J., and HASAN, J.—
 For the reasons given in our separate judgments this appeal is dismissed with costs, granting separate set of costs to all the respondents who have had a separate interest in contesting the appeal.

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Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

MUSAMMAT SITARAN BIBI AND OTHERS (PLAINTIFFS-
 APPELLANTS) v. GANESH PRASHAD AND OTHERS
 (DEFENDANTS-RESPONDENTS).*

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 March, 15.

Muhammadan law—Dower—Alienation by a Muhammadan widow of property of which she is in possession in lieu of dower, validity of—Husband's heir's right to recover possession from alienee without paying dower debt—Widow's power to transfer her dower debt or the right to retain possession until the debt is discharged—Appellate Court—New plea involving questions of fact cannot be raised for the first time in the appellate Court.

A Muhammadan widow who obtains possession of her husband's property peacefully under a claim for dower has no

* Second Civil Appeal No. 213 of 1926 against the decree of Raghubar Dayal Shukla, Additional District Judge of Sitapur, dated the 17th of March, 1926, reversing the decree of Mahmud Hasan Khan, Additional Subordinate Judge of Sitapur, dated the 18th of September, 1925.

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right to alienate the property of which she is thus in possession. Her right to retain possession over it is conferred not by the agreement or bounty, of her husband but by Muhammadan law. If she alienates it her husband's other heirs are entitled to recover possession of it from the alienee without payment to him of the dower debt.

It is doubtful whether a widow could transfer her dower debt or her right to retain possession until the debt was discharged, but an alienation by her of the property itself is void. A transfer by a widow of the property itself cannot be treated as a transfer of her dower debt and the right to hold possession thereof until the debt was paid off. [*Maina Bibi v. Chaudhri Vakil Ahmad* (1), relied upon, and *Maina Bibi v. Wasi Ahmad* (2), referred to.]

A plea involving questions of fact and not raised before the trial Court cannot be raised in appeal.

Mr. *Akhlaq Husain*, for the appellants.

Messrs. *Hyder Husain* and *Rama Shankar Srivastava*, for the respondents.

STUART, C. J. and RAZA, J. :—This is an appeal from a decree of the District Judge, Sitapur, dated the 17th of March, 1926, setting aside a decree of the Subordinate Judge of Sitapur, dated the 18th of September, 1925.

The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows :—

One *Iltifat Ahmad*, a Hanafi Muhammadan, died on the 6th of November, 1918, leaving the property specified in list A attached to the plaint. He died leaving a widow (*Musammat Hafiz-un-nissa*), a daughter (*Musammat Akbari*), mother (*Musammat Sitaran*), four brothers and three sisters, as his heirs under the Muhammadan law. It is admitted that his widow had a one-eighth share, his daughter a half share and his mother, his brothers and

(1) (1925) L.R., 52 I.A., 145.

(2) (1919) I.L.R., 41 All., 538.

his sisters, the remaining three-eighth share in the property left by him. However, his widow, Musammat Hafiz-un-nissa, obtained possession of the entire property, peacefully, in lieu of her dower. She sold 10 bighas, 3 biswas out of 42 bighas, 19 biswas, 16 biswansis, possessed by her in lieu of her dower, to certain persons on the 7th of February, 1919. Hasan Ahmad, one of the brothers of Iltifat Ahmad, brought a pre-emption suit in respect of that property and his claim was decreed on the 16th of March, 1920. He died subsequently and was succeeded by his widow, his mother, his brothers and his sisters, who are the plaintiffs in this case. It appears that the said 10 bighas, 3 biswas land is still possessed by the plaintiffs. That property is not in dispute in the present suit. The dispute relates to the property specified in the second part of list A mentioned above. This property consists of three items. One of these (comprising 30 bighas, 13 biswas, 16 biswansis) was purchased by the defendants Nos. 4 to 6. The remaining two items were purchased by other persons (defendants Nos. 3 and 7 to 11). Thus the defendants Nos. 3 to 11 hold the property in dispute as transferees from the widow (Musammat Hafiz-un-nissa, defendant No. 1) and the daughter (Musammat Akbari, defendant No. 2) of Iltifat Ahmad, deceased.

The plaintiffs brought the present suit against the widow and the daughter of Iltifat Ahmad (defendants Nos. 1 and 2) and their transferees (defendants Nos. 3 to 11) claiming a half share in the property specified in the second part of list A as heirs of Iltifat Ahmad, deceased. They admitted in their plaint that Musammat Akbari, daughter of Iltifat Ahmad, was entitled to a half share in the property in dispute, but they alleged that Musammat Hafiz-un-nissa had no share left in the said property, as she had accepted only the

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property specified in the first part of list A (i.e. 10 bighas, 3 biswas mentioned above) in lieu of her legal share and dower. It was by virtue of the alleged private arrangement that the widow was said to have had no right left to the items of the second part of list A and the plaintiffs' share in the property in dispute was alleged to have increased by one-eighth.

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The suit was not contested by the widow and the daughter of Iltifat Ahmad. The claim was, however, resisted by their transferees on various grounds.

Though the learned Subordinate Judge found that the widow Musammat Hafiz-un-nissa (defendant No. 1) had not accepted the said 10 bighas, 3 biswas land specified in the first part of list A, in lieu of her dower and legal share, as alleged by the plaintiffs, yet he gave the plaintiffs a decree for a half share in the property in dispute, holding that the price realized by the widow by sale of the said 10 bighas, 3 biswas land covered the amount of her dower and also the value of her legal share in her husband's property. It should be noted that the plaintiffs themselves had not alleged in their plaint that the price realized by the widow by sale of the said 10 bighas, 3 biswas land covered the amount of her dower and also the value of her legal share in her husband's property. They had set up a private arrangement or agreement which they failed to prove.

The defendants Nos. 4 to 6 (Ganesh Prasad, Baijnath and Ram Ratan) alone appealed from the decree of the learned Subordinate Judge and thereupon the learned District Judge reversed the whole decree and dismissed the suit with costs. He accepted the appellants' contention that the transferees were entitled to hold the property during the widow's lifetime till her dower was paid off. The plaintiffs have now come to this Court in second appeal.

We find that the ground on which the plaintiffs' claim was rejected by the learned District Judge was not one of the grounds on which the claim was resisted by the contesting defendants. The specific plea, that the transferees were in any case entitled to hold the property during the widow's lifetime till her dower was paid off, was never raised before the trial Court. If the learned Subordinate Judge was wrong in making a new case for the plaintiffs by finding that the dower debt was satisfied and the value of widow's legal share was also realised by sale of 10 bighas, 3 biswas land mentioned above, the learned District Judge was also wrong in allowing the contesting defendants to raise the plea that the transferees were entitled to hold the property during the widow's lifetime till her dower was paid off. No plea as to the amount of dower or the satisfaction or non-satisfaction of dower was raised before the trial Court. A plea involving questions of fact and not raised before the trial Court cannot be raised in appeal. Even granting that the contesting defendants could raise the plea in question before the lower appellate Court, we find that there is no substance in the plea. It is true that the widow Musammat Hafiz-un-nissa had obtained possession of the entire property left by her husband peacefully, under a claim of dower, but she had no right to alienate the property of which she was thus in possession. As pointed out by their Lordships of the Privy Council in the case of *Maina Bibi v. Chaudhri Vakil Ahmad* (1) the widow who holds possession of her husband's property until she has been paid her dower has no estate or interest in the property as has a mortgagee under an ordinary mortgage. There is no real or true analogy between the widow's right of retention and a mortgage usufructuary or

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other. In the case of a mortgage, the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor. The widow's right of retention is conferred upon her not by the agreement or bounty of her husband but by the Muhammadan law. The right of the widow to retain possession of her husband's property until satisfaction of the dower debt does not carry with it the right of selling, mortgaging or otherwise transferring the property.

If she alienates the property itself and delivers possession thereof to the alienee, her husband's other heirs are entitled to recover possession of the property from the alienee without payment to him of the dower debt. This may not affect her right to recover the dower debt from the other heirs of her husband out of his estate. It is doubtful whether a widow could transfer her dower debt or her right to retain possession until the debt was discharged, but an alienation by her of the *property itself* is void. A transfer by a widow of the property itself cannot be treated as a transfer of her dower debt and the right to hold possession thereof until the debt was paid off. [(See also *Maina Bibi v. Wasi Ahmad* (1)]. In the present case the transfers made by Musammat Hafiz-un-nissa were not transfers of her dower debt or of her right to retain possession until the debt was discharged. On the contrary, in the deeds in question she describes herself as the absolute owner of the property and purports to convey that absolute ownership to her transferees. She had no right to sell the property as she did and the transfers made by her are void. The plaintiffs who are admittedly the heirs of her husband and who have a six annas share in the property under the Muhammadan law are entitled to recover possession of the

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

same from the transferees without payment to them of the dower debt.

We have to see now what relief or reliefs are the plaintiffs entitled to against the defendants in the present suit. The defendants Nos. 4 to 6 (respondents) hold 30 bighas, 13 biswas, 16 biswansis under the sale-deed, dated the 25th of March, 1922 (exhibit 2) executed by Musammat Hafiz-un-nissa and Musammat Akbari jointly. The defendants Nos. 7 to 11 hold 1 bigha, 12 biswas under the sale-deed, dated the 17th of January, 1921 (exhibit 3) executed by Musammat Hafiz-un-nissa alone. The defendant No. 3 holds 11 biswas land under the sale-deed, dated the 25th of May, 1922 (exhibit 4) executed by Musammat Hafiz-un-nissa alone. The learned Subordinate Judge has given the plaintiffs a decree for possession of half of the properties comprised in the three sale-deeds mentioned above and also for Rs. 150 mesne profits, against all the defendants jointly. The defendants Nos. 3 and 7 to 11 have preferred no appeal from the decree passed by the learned Subordinate Judge. The decree has become final, so far as the said defendants are concerned. They are not parties to this appeal and were not also parties to the appeal before the learned District Judge. The plaintiffs are thus entitled to get possession of half of the properties comprised in the sale-deed dated the 17th of January, 1921, and the 25th of May, 1922 (exhibits 3 and 4). They are also entitled to a decree for mesne profits to that extent against the defendants Nos. 7 to 11 and defendant No. 3.

Musammat Akbari, who has admittedly a half share in the property left by her father, Iltifat Ahmad, could validly transfer 21 bighas, 9 biswas, 18 biswansis (i.e. half of 42 bighas, 19 biswas, 16 biswansis) to the defendants Nos. 4 to 6. The plaintiffs

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cannot, therefore, question the validity of the sale-deed, dated the 25th of May, 1922 (exhibit 2) to the extent of that share. Musammat Hafiz-un-nissa can claim no share in the property comprised in this sale-deed, as the property already transferred by her by the sale-deed, dated the 7th of February, 1919 (exhibit 1) exceeds her legal share. The plaintiffs are, therefore, entitled to a decree for possession of (30 bighas, 13 biswas, 16 biswansis minus 21 bighas, 9 biswas and 18 biswansis) 9 bighas, 3 biswas, 18 biswansis only out of the property comprised in the sale-deed, dated the 25th of May, 1922 (exhibit 2), against the defendants Nos. 4 to 6. They are also entitled to a decree for mesne profits to that extent.

The result is that we allow the appeal and setting aside the decree of the learned District Judge, modify the decree of the learned Subordinate Judge. The plaintiffs will now get a decree for possession of the property comprised in the sale-deed, dated the 25th of May, 1922 (exhibit 2) to the extent of 9 bighas, 3 biswas, 18 biswansis out of 30 bighas, 13 biswas, 16 biswansis against the defendants Nos. 4 to 6. They will also get a decree for possession of half of the properties comprised in the sale-deeds, dated the 17th of January, 1921 and 25th of May, 1922 (exhibits 3 and 4) against the defendants Nos. 7 to 11 and the defendant No. 3. They will also get a decree for mesne profits to the extent of the shares decreed in their favour against the three sets of the defendants mentioned above. There are not sufficient materials on record to enable us to determine the mesne profits in respect of the properties severally decreed in favour of the plaintiffs. We pass a decree for possession of the properties directing an inquiry as to mesne profits from the institution of the suit until the delivery of possession, under order XX, rule 12, schedule I of the Code

of Civil Procedure. The first Court will pass a final decree in respect of the mesne profits in accordance with the result of such inquiry. The decree for mesne profits should not be passed against all the defendants jointly. The liabilities of the three sets of defendants mentioned above, should be severed with due regard to the properties held by them separately under the three sale-deeds mentioned above. The plaintiffs will get one-third of their costs of the suit from the defendants Nos. 4 to 6, the principal contesting defendants in the case, in all the three Courts. The said defendants will get three-fourth of their costs from the plaintiffs in all the Courts.

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Appeal allowed.

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JAGESHWAR AND OTHERS (PLAINTIFFS-APPELLANTS) v.
MANNI RAM AND ANOTHER (DEFENDANTS-RESPONDENTS).^{*}

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March, 16.

*Hindu law—Debts of Hindu father—Joint family property,
liability to be taken in execution of decree against father
—Partition suit filed after the decree against father,
effect of—Execution of decree for father's debts against
joint family property.*

Where a Hindu family consists of a father and sons and the father has incurred debts and a decree has been passed against him on the basis of those debts the estate can be taken in execution proceedings unless the debts had been incurred for immoral purposes; and in no circumstances can that liability of the estate to be taken in execution proceedings be removed by the subsequent filing of a suit for partition.

^{*} Second Civil Appeal No. 409 of 1926, against the decree of E. M. Nanavutty, District Judge of Fyzabad, dated the 22nd of September, 1926, upholding the decree, dated the 31st of May, 1926, of Sheogopal Mathur, Munsif of Fyzabad, dismissing the plaintiffs' claim.