

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice
Ziaul Hasan

1934
October, 29

FAHIMAN, MUSAMMAT, AND ANOTHER (DEFENDANT APPELLANTS)
v. BULAQI AND OTHERS (PLAINTIFFS RESPONDENTS)*

Mahomedan Law—Mahomedan widow in possession of her husband's property in lieu of dower—Widow selling away and transferring possession to vendee—Widow and vendee not entitled to possessory lien after sale.

The right of a Mahomedan widow to retain possession of her husband's property, that after the sale, her lien to retain possession till her dower debt is satisfied must be taken to have become extinguished and her husband's other heirs are entitled to recover possession of the property from the alienee without payment to him of the dower debt. *Sitaran Bibi v. Ganesh Prasad* (1), *Mina Bibi v. Vakil Ahmad* (2), and *Bindeshri Pershad v. Afzal Khan* (3), followed. *Abdulla v. Shamsul-Haq* (4), dissented from. *Abdul Sattar v. Aqida Bibi* (5), and *Hafiz-un-nissa v. Jawahir Singh* (6), referred to.

Mr. T. N. Srivastava, for the appellants.

Messrs. *Bhagwati Nath Srivastava* and *Rauf Ahmad*, for the respondents.

NANAVUTTY and ZIAUL HASAN, JJ.:—This is a second appeal against the judgment and decree of the learned Additional Subordinate Judge of Lucknow, dated the 23rd of December, 1932, confirming the decree of the Munsif, North Lucknow, dated the 14th of July, 1932.

The defendant appellant No. 1, Musammat Fahiman, is the widow of one Jumman who owned a *pucca* house, situate in *ahata* Lal Khan and the plaintiffs respondents are the brothers and sisters of Jumman. The suit from which this appeal arises was brought by the respondents for partition of their three-fourths share in the house, the remaining one-fourth being the share of Musammat

*Second Civil Appeal No. 65 of 1933, against the decree of Babu Hiran Kumar Ghoshal, Additional Subordinate Judge of Lucknow, dated the 23rd of December, 1932, confirming the decree of Molvi Munir Ahmad Kirmani, Munsif, North Lucknow, dated the 14th of July, 1932.

(1) (1927) 4 O.W.N., 330.

(3) (1921) 19 A.L.J., 706.

(5) (1927) A.I.R., All., 319.

(2) (1924) 2 O.W.N., 180.

(4) (1920) I.L.R., 43 All., 127.

(6) (1921) 66 I.C., 24.

Fahiman as the childless widow of Jumman. The appellant No. 2 Musammat Puttan was impleaded as Musammat Fahiman had executed a deed of gift in respect of the house in question in her favour.

The defence was that the house had been gifted by Jumman to his wife Musammat Fahiman in lieu of her dower debt, and that in the alternative Fahiman had acquired title to the house by adverse possession for more than twelve years, it being stated that Jumman died about seventeen years ago.

Both the Courts below have held against the defendants on both these points.

In second appeal it is contended before us that even if the gift of the house by Jumman to Musammat Fahiman be considered to be not proved, she must be presumed to have been in possession of it in lieu of her dower debt and that so long as the dower was not satisfied, the plaintiffs could not claim possession of their shares of the house.

It is no doubt true that where a Hanafi Muslim widow has been in possession of her husband's property during his lifetime and has continued in possession for some time after his death, it will be presumed that her possession has been lawfully obtained and is in lieu of her dower debt [*vide* Tyabji's Muhammadan Law, second edition, page 182, paragraph 108(4)]. The same principle of law was laid down by the Allahabad High Court in the case of *Abdul Sattar v. Musammat Aqida Bibi* (1) and by the late Court of the Judicial Commissioner of Oudh in the case of *Musammat Hafiz-un-nisa v. Kunwar Jawahir Singh* (2). This principle cannot, however, be applied to the present case for two reasons. In the first place, this plea was never raised by the defendants in the trial court and it is doubtful if they can be allowed to raise it in second appeal having regard to the fact that it would be necessary to go into evidence as to the amount of the dower and as to whether or not the dower

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debt has been paid off by Fahiman's possession of the house. In the second place, both the defendants admit not only that Musammat Fahiman has transferred the house in question to Musammat Puttan by gift but also that possession of the house has been transferred by the former to the latter (*vide* paragraph 10 of Musammat Fahiman's written statement and paragraph 1 of Musammat Puttan's written statement). Now, in the case of *Sitaran Bibi v. Ganesh Prasad* (1), STUART, C.J. and RAZA, J., following the decision of their Lordships of the Privy Council in the case of *Mina Bibi v. Chaudhri Vakil Ahmad* (2), have held that 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 and that 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 is clear authority against the position taken up by the defendants in this appeal.

The learned counsel for the appellants relies on the case of *Abdulla v. Shams-ul-Haq* (3), in which it was held that where a Muhammadan widow is in possession of property belonging to her deceased husband in lieu of dower debt, it is competent to her to sell it without necessarily selling her right to receive her dower and that such a transfer conveys 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; but we prefer to follow the more recent decision of our Court in the case of *Sitaran Bibi v. Ganesh Prasad* (1), which is based on a ruling of their Lordships of the Privy Council. Moreover, a year after the decision of the case of *Abdulla v. Sham-ul-Haq* (3), a Bench of the

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Allahabad High Court itself consisting of the present Chief Justice and Mr. Justice TUBBALL held in a case in which the widow had sold her husband's property, that after the sale, the widow's lien to retain possession till her dower debt was satisfied must be taken to have become extinguished. The learned Judges further remarked that the widow's lien to retain possession did not remain in her because she no longer retained possession, nor did it pass to the vendee because it had not been transferred to him and so when she executed the sale deed, her possessory lien was not alive and the dower debt had also become extinguished and was barred by limitation and nothing passed to the vendee—*vide Bindeshri Pershad v. Afzal Khan* (1). These remarks are fully apposite to the case before us. Here also Musammat Fahiman is admittedly no longer in possession of the house in question and therefore her possessory lien over the house no longer exists.

For the reasons given above, we are clearly of opinion that Musammat Fahiman, having extinguished her lien over the house in question by transferring possession of it to Musammat Puttan, can no longer claim the benefit of the presumption under the Muhammadan Law about her possession being in lieu of her dower debt. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

SAKINA BEGAM, MUSAMMAT (DEFENDANT APPELLANT) *v.* SHAHR BANO BEGAM, PLAINTIFF AND ANOTHER, DEFENDANT (RESPONDENTS)*

1934
October, 30

Oudh Estates Act (I of 1869), sections 8, 22 and 32A—Talukdari estate entered in list 3 prepared under section 8—No

*Second Civil Appeal No. 13 of 1933, against the decree of Pandit Shiam Manohar Nath Shargha, District Judge of Gonda, dated the 22nd of October, 1932, upholding the decree of Babu Bhudar Chandra Ghosh, Subordinate Judge of Bahraich, dated the 23rd of December, 1931.

(1) (1921) 19 A.L.J., 706.

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