

On reading the explanation of the Magistrate and the orders which were passed by him on the application made at the time it appears that what occurred was that the investigating officer when in the witness-box was asked about a certain date and the names of certain persons and the Court directed him to give the date and the names from the police diary. This the witness did. The defence thereupon asked for an inspection of the whole diary. This was not allowed, but the Magistrate offered an inspection of the date and the names in respect of which the witness had refreshed his memory from the diaries. This, however, was refused. I can find nothing in the law which entitles the defence to an inspection of anything more than that portion of the diary from which the witness refreshed his memory, and in my opinion, there was no illegality or irregularity in the procedure of the Magistrate.

I see no reason to interfere and I would dismiss this application.

DAS. J.—I agree.

*Application dismissed.*

## LETTERS PATENT.

*Before Dawson Miller, C. J. and Mullick, J.*

SHEIKH ABDUR RAHMAN

v.

SHEIKH WALI MOHAMMAD.\*

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*Mahomedan Law—Dower—widow in possession of deceased husband's estate in lieu of dower—power of transfer—suit by husband's heirs against transferee for possession—Limitation.*

A Muhammadan widow in possession of her deceased husband's estate in lieu of dower is incompetent to transfer her lien on such property so as to be binding after her lifetime without also transferring the dower debt.

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[See *Mussammât Bibi Makbulunnissa v. Mussammât Bibi Umatunnissa*(1), Ed.]

A transfer of the property by such a widow is valid in her life-time unless the dower debt is discharged before then or is assigned.

Limitation for a suit by the deceased husband's heirs against a transferee of the property from a widow in possession in lieu of dower begins to run from the death of the widow and not from the date of the transfer.

*Maina Bibi v. Wasi Ahmad*(2) and *Beeju Bee v. Syed Mothiya Saheb*(3), referred to.

Appeal under the Letters Patent by defendant No. 2.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

*Muhammad Ishfaq*, for the appellant.

*S. Muhammad Tahir*, for the respondent.

DAWSON MILLER, C. J.—This is an appeal under the Letters Patent on behalf of Sheikh Abdur Rahman, the second defendant in the suit, against a decision of Bucknill, J., dated the 14th December last. The plaintiff, Sheikh Wali Mahommed, and the first defendant, Sheikh Ezid Baksh, are brothers and the appellant, the second defendant, is the son of Sheikh Ezid Baksh. The suit was instituted before the Munsif of Sassaram in January, 1918, claiming possession of a 6-annas share in the estate of his deceased brother, Sajjad Hussain, to which he was entitled as one of his deceased brother's heirs subject to the widow's right to retain possession as security for her unpaid dower. Sajjad Hussain, the elder brother of the plaintiff and the first defendant, died in 1899 leaving surviving him his widow, Mussammât Kabiran, and his two brothers. His widow whose unpaid dower debt is said to amount to Rs. 4,000 was left in possession of the estate of her deceased husband holding it in lieu of dower, as she

(1) *Post*, p. 84.

(2) (1919) 17 All. L. J. 629. (3) (1920) I. L. R. 43 Mad. 214, F.B.

was admittedly entitled to do, until, out of the profits of the estate, her dower debt had been discharged. The estate was a small one and we are not told what the net annual profits arising therefrom amounted to. It is not suggested, however, that the debt at the date of that lady's death in 1911 had been discharged. On the 15th October, 1900, Mussamat Kabiran transferred to the appellant the whole of her interest in her deceased husband's estate. As one of his heirs she was entitled by inheritance to a quarter-share in that estate and this she could undoubtedly transfer. The document, however, purports to transfer, in one place at all events, the whole of the interest which had come into her possession from her deceased husband and sets out in detail the properties which, it is agreed, included the whole of her husband's estate. It recites that the donor has been in possession of the estate by virtue of inheritance and in lieu of dower debt and that she wishes to give away all her properties in her life-time to the donee, subject to her right of maintenance during her life-time, which she reserves at the rate of Rs. 60 *per annum* which is to be a charge on the property. It then purports to sell without reserving the right of cancellation :

" the whole and entire property owned and possessed by me together with all rights and appurtenances, for a consideration of a monthly allowance of Rs. 5, amounting to Rs. 60 *per annum*, with effect from to-day up to my death. I have by making over this deed of sale to the vendee put him in possession of the vended property as absolute proprietor in my place."

It subsequently adds :

" In short the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale deed been transferred from me and become extinguished in so far as I am concerned and have devolved on and vested in the said purchaser and his heirs and representatives."

It is not absolutely clear from this document whether the vendor intended merely to transfer her own interest in the property, that is, the quarter-share which she acquired by inheritance, or whether she intended to transfer the whole of the interest of her husband of which she was then in possession. But whatever her intentions may have been it is clear and cannot be

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disputed that she had no power of disposition over the property beyond the quarter-share to which she was entitled by inheritance and to this extent alone could the transfer of the property be valid.

Both the learned Munsif and the learned Subordinate Judge, before whom the case came on appeal, took the view that the widow had no right to transfer the property beyond the extent of her own vested interest, *viz.*, a quarter-share and that, although she was in possession of the remainder in lieu of dower, she could not transfer the remainder or even the possession thereof so as to be binding after her life-time without also transferring her right to dower. The learned Munsif, however, considered that the plaintiff's right to sue accrued in 1900 when the deed was executed and the donee was put in possession and that therefore the suit which was instituted more than 12 years after that date was barred by limitation. The learned Subordinate Judge, on the other hand, came to the conclusion that the plaintiff's right to sue for possession did not arise until the widow's death in 1911 and that the suit having been brought within 12 years of that date was not barred.

On appeal to this Court Bucknill, J., took the same view as the learned Subordinate Judge and dismissed the appeal.

It does not appear to have been argued either in the trial Court or before the Subordinate Judge on appeal that the conveyance by the widow transferred to the appellant her dower debt. It was, however, argued before Bucknill, J., and the argument has been repeated before us in this appeal that, on a proper construction of the document, the dower debt must be taken to have been transferred. It was also contended that, even if the dower debt was not in fact transferred, the widow had a lien or charge upon the property as security for the enforcement of the debt which she could transfer, not only during her life-time, but even so as to enure for the benefit of the transferee after her death. The learned Judge, whose judgment is now

under appeal, carefully considered these questions and decided them against the appellant. In my opinion his decision was right. Although the instrument of transfer recites that the widow is in possession both by virtue of inheritance and in lieu of dower debt, it purports only to transfer the proprietary interest and all rights, title and interest which the vendor had in the vended properties. There is not a word, from first to last, relating to any transfer of her dower debt and I am unable to construe the document as purporting to transfer the dower debt. Nor, in my opinion, was it possible for her to transfer the lien on the property so as to be binding after her life-time without transferring also the dower debt. The lien on the property which gives the widow the right to possession until the debt has been discharged is not, in my opinion, an interest in property which can be severed from the right to dower and transferred as a separate interest. It is a right to the possession of the property by the person entitled to be paid the dower as long as the debt is not discharged either by the income from the property or by payment by the heirs or others interested in discharging the debt. It certainly gives the widow the right to possession and it may be assumed, I think, that as long as she does not transfer her dower debt and that debt remains undischarged, she may transfer for her life-time possession of the property the proceeds of which belong to her until the debt is paid off. The position of the transferee in such a case, might be regarded as constructively her possession, and, in this sense, it would not be severed from the dower debt. Just as she could dispose of the proceeds in any way she chose during her life-time and until the debt was discharged, so also I apprehend she could transfer possession of the property in the same circumstances, the transferee being entitled to the usufruct. But if she should transfer the dower debt or if she should die and her estate devolve upon her heirs or assignees the transferee's right to possession would be extinguished as the debt and the security cannot be severed thereby converting the security into a separate interest in the

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property. It would appear, therefore, that even if the instrument in question purported to transfer to the appellant possession of the property forming the security for the debt this would not enure to the benefit of the transferee after the widow's death when the dower debt passed to her heirs. The possession of the donee, in such a case, must, I think, be regarded as constructive possession of the widow. It is not an interest in property which is capable of absolute transfer. In any view of the case, therefore, in my opinion, the decision under appeal, upon this point, cannot be assailed.

It remains to consider the question of limitation. It is found as a fact, and cannot now be disputed, that the appellant was in actual possession of the whole of the property. He contends that from the moment he obtained possession, in the year 1900, his possession was adverse to that of the plaintiff who cannot, after more than 12 years have elapsed, he held to assert his right to the property. The plaintiff no doubt knew that the defendant was in possession but he was not entitled to possession himself as long as the widow was alive and the debt remained undischarged. It is not suggested that the debt was discharged during the widow's life-time. Had the plaintiff sued for possession before 1911, when the widow died, the appellant would have had a complete answer to such a suit. He was in possession of the property with the consent of Mussammat Kabiran, the only person at that time entitled to possession and the cause of action, which the plaintiff now seeks to enforce, had not at that time arisen and did not arise until after her death in 1911.

A further point, however, was taken by the appellant which must be considered. On the assumption that the widow retained her dower debt and did not transfer it to the appellant, he argues that the right to the dower debt does not belong to the plaintiff but to Mussammat Kabiran's heirs. It is not shown, however, that Mussammat Kabiran left any heirs and,

in the absence of such, the plaintiff, as the heir of her deceased husband, has a better title to his 6-annas share in the property than the appellant who has no title at all.

A further point, which does not appear to have been suggested before, was that in any case the Crown would be the ultimate heir to Mussammat Kabiran. It is not shown, however, in this case that the Crown, even if the point is one which is sustainable, had any better title than the present plaintiff and in these circumstances it seems to me that there is no force in this argument. In my opinion this appeal should be dismissed with costs.

MULLICK, J.—In my opinion there are only two points of any substance in this appeal. The first is the construction of the deed of transfer by Mussammat Kabiran in favour of Abdul Rahaman. Both Courts below have found that the document was a deed of sale for consideration, and that what the widow transferred was neither her dower debt nor the right to retain possession of the estate of her deceased husband as security for that debt but her interest in the property as proprietor of that estate which admittedly includes the three-eighths-share claimed by the plaintiff.

Now it is admitted that it is the plaintiff who is the sole proprietor of that three-eighths-share by right of inheritance and that Mussammat Kabiran had no proprietary interest in it, and that if she did not sell her dower debt together with the right to possession of the property as security, then the plaintiff has a good title against her transferee.

The Munsif, however, found that the transferee came into possession in 1900 immediately upon the sale and was in adverse possession as against the plaintiff from that date. The Munsif has accordingly dismissed the suit on the ground that the suit has not been brought within 12 years of the date from which possession became adverse.

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The Subordinate Judge agrees with the Munsif as to the construction of the document but not as to the question of limitation. He is of opinion that as the plaintiff was not entitled to eject the transferee during the life-time of the widow, the possession of the latter could not have been adverse to him and that, therefore, limitation began to run only from the date of the widow's death which took place in 1911. He finds that the suit having been instituted in 1918, it was within time and he has given a decree to the plaintiff in respect of the disputed share.

That judgment was affirmed by Bucknill, J., and there can be no doubt that his construction of the deed of sale is correct. Except in the preamble which states that Mussamat Kabiran is in possession of her husband's estate by right of inheritance and in lieu of dower debt, there is no mention in the document of the dower debt. Throughout the transferor purports to transfer her proprietary interest in the whole and entire estate of her husband together with all rights and appurtenances. She sums up the effect of her dispositions in the following words :

"In short, the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale deed been transferred."

It is contended on behalf of the appellant that the words of transfer are perfectly general and must be construed as meaning that it was intended to include not only a proprietary interest in the land in suit, which she thought she possessed but which it is now admitted she did not, but also the dower debt and the right to retain possession till it was paid. In my opinion this contention cannot be accepted. In *Maina Bibi v. Wali Ahmad* (1) their Lordships of the Allahabad High Court had to construe a deed of gift of which the terms were very similar, and it was argued in that case that the greater right includes the lesser and that if the transferor had no right of ownership in the property, she at least had the right to retain

(1) (1919) 17 All. L. J. 629.



possession of it and she should be taken to have transferred that right. The recital in that deed stated that the widow was in possession by virtue of two separate titles: the first was in lieu of dower and the second by virtue of a former decree under which the heirs of her deceased husband having failed to pay her dower debt within the time appointed by the Court, she claimed to have become absolute owner. Their Lordships declined to accede to the contention that because she transferred the whole property believing herself to be the owner of it, she should in the absence of clear and definite words, be taken to have transferred also her dower debt and her right to retain possession.

In the present case the conditions are similar and I think it will be wrong without express words indicating an intention to transfer the dower debt to assume that the debt was also transferred.

The right of a Muhammadan widow to retain the possession of her husband's estate in lieu of dower has been sometimes described as a lien and sometimes as a charge. Strictly speaking, it is neither, but it is agreed that she has a right to transfer the debt coupled with the security and that the transfer will be binding upon her co-heirs till they discharge the debt. She may also during her life-time transfer the right of possession apart from the debt, but that is a matter between herself and her transferee and the transfer will not be binding upon the co-heirs after her death. That is the meaning of the proposition that a Muhammadan widow in possession of her husband's estate in lieu of unsatisfied dower cannot alienate the estate. This view of the law is in accord with the decision of the Full Bench in *Beeju Bee alias Zulaiika Bee v. Syed Moothiya Saheb* (1) and in my opinion the defendants in the present suit have no answer to the plaintiff's claim.

The second point in the case relates to the question of limitation. Now, the onus of proving adverse

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possession for more than 12 years is clearly upon the defendants; the plaintiff was obviously not entitled to take possession during the widow's life-time and there is no evidence that when the transferee took possession in 1900 the plaintiff had any notice that he was claiming to hold adversely to him.

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The Munsif finds that possession became adverse from the moment of the transfer but that finding has been set aside by the Subordinate Judge and in second appeal upon the facts found no case of adverse possession arises.

It was finally contended that the widow's heirs and, perhaps remotely, the Crown may have a right to resist the plaintiff's possession, but such a case was not made in the Courts below and cannot be inquired into at this stage. On the findings there is nothing to show that any one has at present a better right than the plaintiff.

The appeal should, therefore, be dismissed.

*Appeal dismissed.*

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## APPELLATE CIVIL.

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*Before Coutts and Das, J.J.*

MUSSAMMAT BIBI MAKBULUNNISSA

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*Mahomedan Law—Dower—widow in possession of deceased husband's property in lieu of dower—transfer of the property, effect of—distinction between transfer of the property and assignment of the security.*

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\*Appeal from Appellate Decree No. 271 of 1921, from a decision of J. F. W. James, Esq., District Judge of Patna, dated the 14th December, 1920 and 8th January, 1921, modifying a decision of Babu Ananta Nath Mitra, Subordinate Judge of Patna, dated the 27th May, 1919.

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