therefore, must have seen the occurrence. Ordinarily, therefore, he should have been examined on behalf of the prosecution. However, the Sub-Inspector suspected that he was tampering with the evidence of the three girls, namely, his daughters and niece and this led the Sub-Inspector to have the statements of the girls recorded under section 164 of the Criminal Procedure Code. In the Session Court the girls resiled from their statements and this was evidently due to Ram Pratap's influence, and so Ram Pratap was not expected to tell the truth. Therefore this is a reasonable ground for the prosecution not to have examined him. I think that in spite of this it would have been much better if Ram Partap had been examined and from his statement the Court would have probably received the assistance which the evidence of Mussammat Musan, wife of the accused, as pointed out in the earlier part of this judgment, has afforded to the Court in respect of the fact that she was concealing the name of the real assailant, namely, her husband. However, as there were reasons for the prosecution to treat Ram Partap as an untruthful witness, the trial is not vitiated.

The result is that I agree that the conviction of and the sentence passed on the appellant be upheld.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

MUSSAMMAT BIBI MAHBOOBAN

v.

SHEIKH MUHAMMAD AMMERUDDIN.*

1929.

Jan., 11, 17.

Muhammadan Law—Sunni School—Dower—no specification at the time of marriage—part prompt and part deferred—principle applicable in fixing proportion.

*Appeal from Original Decree no. 28 of 1927, from a decision of Babu Kamla Prasad, Subordinate Judge of Patna, dated the 17th June, 1926.

MUSSAMMAT BIBI MAHBOOBAN v. SHEIKH MUHAMMAD AMMER-UD-DIN.

Under the Sunni School of Muhammadan Law, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part is presumed to be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of the dower settled.

Umda Begum v. *Muhammadi Begam* (1), followed.

Masthan Sahib v. *Assan Bivi Ammal* (2), distinguished.

This presumption will apply even when a definite case of agreement is set up but is not substantiated.

Appeal by the plaintiff.

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

Khurshaid Husnain (with him *Syed Ali Khan* and *H. R. Kazmi*) for the appellant :—In the absence of proof of specification and in the absence of any custom, there is a presumption of law that a portion of the dower is prompt and a portion deferred. Vide *Taufik-un Nissa* v. *Ghulam Kambar*(3), *Eidan* v *Mazhar Hussain*(4) and *Fatma Bibi* v. *Sadruddin*(5). This is so even where the plaintiff has failed to make out the case of a settling of prompt dower set up in the pleadings. The legal presumption will be available in cases where either there is no plea or proof of a settlement specifying the nature of dower or where a settlement is pleaded but not proved : Vide *Masthan Sahib* v. *Assan Bivi Ammal*(2). In such cases, in order to find out what portion is prompt and what deferred, the status of the wife has to be taken into consideration. (Vide cases cited). In *Hussein Khan Sardarkhan* v. *Gulab Khatum*(6), it was, however, laid down that the whole of the dower may be presumed to be prompt.

(1) (1911) I. L. R. 33 All. 291. (4) (1876-78) I. L. R. 1 All. 483.
(2) (1900) I. L. R. 23 Mad. 371. (5) (1864-66) 2 Bom. H. C. R. 291.
(3) (1876-78) I. L. R. 1 All. 506. (6) (1911) I. L. R. 35 Bom. 386.

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Sir Sultan Ahmad, (with him *A. H. Fakhruddin*) for the respondents: The presumption will apply only where the parties have not by contract specified the nature of dower. (Wilson's Anglo-Muhammadan Law, page 125). The case of *Masathan Sahib* v. *Assan Bivi Ammal*(1) does not apply to the present case where admittedly a portion of the dower was pleaded to be prompt. There cannot be any presumption under the Muhamadan Law where the nature of the dower is alleged to have been settled. If a party fails to prove the case of settlement set up in he pleadings, he cannot, in the alternative, fall back upon the presumption of law.

(Das, J.—Why should not the law operate when the plaintiff has failed to make out the case set up by her? If the party put her case too high but fails to prove it, why will she not get at least that much which the law gives her?

The party cannot have it both ways. She must be pinned down to the case set up in the pleadings. If, on the plaintiff's own showing, there was some settlement, the presumption will apply. *Masthan Sahib* v. *Assan Bivi Ammal*(1) deals with a Shia case and has been distinguished in the case of *Umda Begum* v. *Muhammadi Begum*(2).

(Das, J.—On the question of the amount of dower.)

The proportion of the prompt dower should be fixed with reference to the status of the husband.

Khurshaid Husnain, in reply.

Cur. Adv. Vult.

S. A. K.

17th Jan. 1929.

DAS, J.—This is an unfortunate litigation and should never have been allowed to be brought in a court of law. The plaintiff is the wife of the defendant, and sues for recovery of Rs. 20,000 the amount of the

(1) (1900) I. L. R. 23 Mad. 371. (2) (1911) I. L. R. 33 All. 291.

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DAS, J.

prompt dower and for setting aside a sale deed executed by her husband in favour of his daughters by his first wife, defendants 2 and 3. The defendant was first married to Bibi Waslan and had two daughters by her, defendants 2 and 3. Bibi Waslan died on the 18th March, 1915. Thereupon defendant no. 1 married the plaintiff. The plaintiff's case is that her dower was fixed at Rs. 40,000 of which half was payable on demand. She accordingly claims judgment against the defendant for Rs. 20,000. It appears that on the 5th February 1924 defendant no. 1 executed a deed of sale in favour of defendants 2 and 3 in respect of certain properties which defendant no. 1 inherited from his mother. The case of the defendant on this point is that the dower payable to Bibi Waslan was Rs. 40,000 and as most of that money had become payable to defendants 2 and 3, the deed of sale in question was executed in satisfaction of the claim of defendants 2 and 3 against defendant no. 1. The defendant contested the suit on the ground that the plantiff's dower was fixed at Rs. 2,100 and that no portion of it was payable on demand. The learned Subordinate Judge has come to the conclusion that the plaintiff's dower is Rs. 40,000. The finding has not been challenged before us by the learned Counsel appearing on behalf of the defendant. But then the question arises whether any portion of it was payable on demand. The learned Subordinate Judge on a review of the evidence has come to the conclusion that the plaintiff has not established her case on this point. I have considered the evidence for myself; and I am unable to say that the decision of the learned Subordinate Judge on this point is erroneous.

But then arises the important question which was not properly discussed in the judgment of the learned Subordinate Judge. Mr. Khurshed Husnain contended before us that according to the Muhammadan Law a dower being consideration for marriage is,

unless payment of the whole or part of it is expressly postponed, presumed to be prompt and payable on demand. Mr. Khurshed Husnain relies upon the decision in *Masthan Sahib* v. *Assan Bivi Ammal* (1). That was, however, a decision in a Shia case and is not of authority amongst the Muhammadans of the Suni persuasion; but it seems to be well-settled that amongst the Sunis, where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of the dower settled [See *Umda Begum* v. *Muhammadi Begam* (2)]. The learned Subordinate Judge has taken the view that once the plaintiff comes to Court with a definite case of an agreement as to prompt dower, it is impossible for her to rely upon the Muhammadan Law. With this contention I am unable to agree. I read the finding of the learned Subordinate Judge as a finding to the effect that it was not settled at the time of the marriage whether the plaintiff's dower was to be prompt or deferred. Now if this be so, under the law part will be prompt and part deferred. It is impossible for us in this Court to determine what part should be regarded as prompt. We must therefore remand the case to the Court below for decision on this point. The learned Subordinate Judge in deciding this case will be guided by the principle established in *Umda Begum* v. *Muhammadi Begum*(2)

In regard to the other question, namely, whether the plaintiff is entitled to have the deed of sale of the 5th February 1924 set aside, I entirely agree with the decision of the learned Subordinate Judge that the plaintiff is not so entitled. The plaintiff has a money claim as against the defendant; and it would

(1) (1900) I. L. R. 23 Mad. 371. (2) (1911) I. L. R. 33 All. 291.

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be impossible for the Court to give the plaintiff a relief as against the properties belonging to defendant no. 1, especially before the plaintiff has established her claim to a definite sum of money. I must therefore allow the appeal on the question as to how much out of the sum of Rs. 40,000 is payable to the plaintiff immediately. The learned Subordinate Judge will consider the matter and give the plaintiff a decree for whatever sum he considers to be payable to the plaintiff on demand. Costs will abide the result and will be disposed of by the learned Subordinate Judge.

ADAMI, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Ross and Chatterji, JJ.

LACHMI NARAIN TEWARI

v.

RAMSARAN TEWARI.*

1929.

Jan., 15, 18.

Bengal Tenancy Act, 1885 (Act VIII of 1885), section 22(2), whether applies to non-transferable occupancy holding—co-sharer landlord purchasing holding in execution of money decree—purchase, effect of—co-sharers, whether entitled to khas possession.

Section 22(2), Bengal Tenancy Act, 1885, has no application to a non-transferable occupancy holding.

Lakhi Kant Das v. *Balabhadra Prasad*(1) and *Bipro Das Paul* v. *Surendra Nath Basu* (2), followed.

*First Appeal nos. 125 and 134 of 1926, from decisions of Babu Kamla Prasad, Subordinate Judge of Muzaffarpur, dated the 26th January, 1926, and the 27th March, 1926, respectively.

(1) (1914) 19 Cal. L. J. 400. (2) (1918) 43 Ind. Cas. 467.