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ZAHIRUDDIN MOHAMMAD v. BUDHI BIBI.

SCROOPE, J.

DeRozario v. *Gulab Chand Anundjee*(1), *Golap Jan* v. *Bhola Nath Khettry*(2) and *K. Sheikh Meeran Sahib* v. *C. Ratnavelu Mudali*(3) are very clearly distinguishable from the present case, in which there was an order for issuing summons on the accused and for search of his house and, in my opinion, it makes no difference that he came to Court before the processes were actually issued. The stage at which he came to Court may affect the question of the amount of damages, but the fact that he came before the summons and the search warrant had actually been issued does not, in my opinion, justify his case being thrown out. In my opinion his prosecution had started and the plaintiff was entitled to have the question of damages investigated. I agree with my learned brother that the case should be remanded and the damages assessed on the lines indicated by him. I entirely agree also that the claim as assessed at Rs. 5,250 about which no details have at all been given is quite fantastic and at best the plaintiff would be entitled to little more than nominal damages.. The case arises out of a family dispute which it was desirable to settle without recourse to the courts, but both sides seem firm in their determination to fight the matter to the end.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

Before Wort and James, JJ.

MAHADEO LAL JWALA PRASAD
v.
MUSAMMAT BIBI MANIRAN.*

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Dec. 21, 22, 23.
Jan. 13,

Muhammadan Law—Dower—payment postponed until demanded by the wife—whether prompt dower—transfer of

* Appeal from Original Decree no. 22 of 1930, from a decision of Babu Narendra Nath Chakravarti, Special Subordinate Judge of Daltonganj, dated the 5th August 1929.

(1) (1910) I. L. R. 37 Cal. 858.
(2) (1911) I. L. R. 38 Cal. 880.
(3) (1912) I. L. R. 37 Mad. 181.

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property by husband in lieu of real dower debt, whether can be impeached—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 53.

A dower the payment of which may be postponed until demanded by the wife would be classed as prompt dower.

A transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the power of the creditors for the benefit of the debtor. As soon as it is found that the transfer was made for adequate consideration in satisfaction of a genuine debt and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies.

Musahar v. *Lal Hakim Lal*(1), followed.

Therefore, a transfer of property by a Muhammadan husband in favour of his wife, in lieu of a real dower debt equal to or exceeding the value of the property transferred, cannot be impeached under section 53 of the Transfer of Property Act, 1882, on the ground that it defeated or delayed other creditors, so long as it is a genuine transfer.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of James, J.

P. Dayal and *Raghosaran Lal*, for the appellants.

Hasan Jan and *A. A. Syed Ali*, for the respondents.

JAMES, J.—The plaintiff in this litigation is the wife of Munshi Jamaluddin, formerly a prosperous merchant of Daltonganj, whose prosperity has declined during the last nine or ten years. In 1927 a firm of Daltonganj obtained judgment against him in a suit for money, in execution of which certain houses were attached. Jamaluddin's wife, Bibi Maniran, preferred a claim to these houses under Order XXI. rule 58, on the strength of a baimokasa deed executed on the 9th of March, 1926, by which Jamaluddin had

(1) (1915) I. L. R. 43 Cal. 521, P. C.

conveyed to her property to the value of ten thousand rupees, including these houses, in satisfaction of a dower debt. The Munsif in whose court the execution was proceeding rejected the claim of Bibi Maniran, finding that her dower had been fixed at a very much lower sum than that which she alleged, and that the transfer was a colourable transaction made only for the benefit of the judgment-debtor. Bibi Maniran thereupon instituted this suit praying for a declaration that the two houses were her property and that they were not liable to attachment and sale in execution of a decree against her husband. She alleged that her dower had been fixed at forty thousand rupees and five ashrafis, payable on demand, and that the conveyance of the houses had been made in good faith in part satisfaction of that debt, of which she had remitted the balance. The suit was contested by the firm who had attempted to execute the decree, who denied that the dower had been fixed at anything like forty thousand rupees, and alleged that the baimokasa deed had been executed merely in order to place the property beyond the reach of creditors; that the transaction was merely colourable, and that possession had not passed to Bibi Maniran. The learned Subordinate Judge found that the dower had been fixed as claimed by the plaintiff; that the baimokasa deed had been executed in good faith in satisfaction of her claim, and that title and possession had actually passed to Bibi Maniran. He, therefore, dismissed the suit. The decree-holder-defendants appeal from that decision.

Mr. Parmeshwar Dayal on behalf of the appellants argues in the first place that the learned Subordinate Judge was not justified by the evidence in his finding that the dower was fixed at forty thousand rupees and five ashrafis. He points out that in coming to this decision, the learned Subordinate Judge has given some weight to a remark of the late Mr. Ameer Ali in his book on Muhammadan Law, to the effect that forty thousand rupees is generally

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speaking the customary dower in Behar, without taking into account Mr. Ameer Ali's qualifications, that this applies only to the upper middle class. But the learned Subordinate Judge appears to have recognised that this amount of dower was only customary among high class Muhammadans; and he has come to the conclusion that the plaintiff was of a sufficiently respectable family to make it possible that such a dower should be fixed at her wedding, particularly in view of the fact that her husband was then a man of means. The plaintiff's case depended on oral evidence; her own evidence, that of her brother Abdul Ali Khan and her uncle Asgar Khan, and of two men of Sasaram, Mirza Sultan Beg and Walait Hussain, who were present at the wedding. There was also the evidence of one Abdul Wahab Khan of Palamau district, who said that he had gone with Jamaluddin to Sasaram at the time of his marriage; and that of a copyist in the Deputy Commissioner's office at Daltonganj, a native of Sasaram, who also said that he was present at the marriage, and added that in marriages of Muhammadan ladies in Sasaram of the class of the plaintiff, the dower was invariably fixed at forty thousand rupees and five ashrafis. The formal witnesses of the marriage are dead; but the Kazi who performed the ceremony is still living, working as a school-master at a village named Kora. The Kazi was not summoned on behalf of the plaintiff; and Mr. Parmeshwar Dayal naturally argues that an inference adverse to the plaintiff should be drawn from that fact; but if the plaintiff chose to rely on the witnesses whom she did examine, it was for her to decide whether she would or she would not summon any more; and if the Kazi's evidence would have been in favour of the defendants they could have called him as a witness on their behalf. When the plaintiff was giving evidence in the summary proceeding under Order XXI, rule 58, she was brought into court in a closed dooli and gave her evidence from inside it. The Munsif recording her evidence understood her to say

that her dower was forty rupees and five ashrafis; but when this evidence was read over to her she did not admit it to be correct, saying that the amount which she had stated was forty thousand rupees and not forty. The Munsif noted this fact, remarking that the question had been repeated twice and that she actually had said twice that her dower was forty rupees. She says now that the Munsif could not have heard her clearly when she spoke from inside the dooli; and that from the sound of the Munsif's voice, it appeared that she was at some distance from him. The learned Subordinate Judge came to the conclusion, taking her evidence before the Munsif as a whole, that her explanation was correct, that the Munsif did not hear her correctly when she was giving evidence and that she could never have said that her dower was only forty rupees and five ashrafis. Whatever may be thought regarding the probability that a sum of forty thousand rupees would be fixed as her dower, it must at least be regarded as far more probable that such a sum would be fixed, in view of the circumstances of the parties, than the sum of forty rupees which would indeed be incredibly low. Sh. Fariduddin and Wali Mohammad of Daltonganj both say that they were present at Jamaluddin's marriage at Sasaram when the dower fixed was forty rupees; but Sh. Fariduddin has been present at several marriages of persons of this class and he can mention no other in which the dower was so low. The defendants' witness Shamsuddin is the step-son of the plaintiff who has a claim against his father on account of his mother's deferred dower which he says was fixed at forty thousand rupees and five ashrafis. The learned Subordinate Judge considering his evidence came to the conclusion that in the matter of social status there was no practical difference between Shamsuddin's mother and the plaintiff; and this witness Shamsuddin also made the damaging statement that the minimum dower among persons of the plaintiff's class in Sasaram is eleven thousand rupees and two ashrafis. There would

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appear to be no justification for differing from the finding of the learned Subordinate Judge that at the plaintiff's wedding the dower was fixed at forty thousand rupees and five ashrafis.

The learned Subordinate Judge has accepted the evidence of the plaintiff to the effect that the dower debt was payable, not at the time of the marriage, but when it should be demanded by the wife, and he therefore describes it as deferred dower, although it would not be deferred dower in the technical sense of being payable only at the dissolution of marriage by death or divorce. In her deposition in the proceeding under Order XXI, rule 58, the plaintiff said that her dower was deferred dower; and her witness Abdul Ali Khan in that court said the same. A dower the payment of which may be postponed until demanded by the wife would be classed as prompt dower, but since such a dower would be in a sense deferred, it can hardly be assumed that these witnesses when they spoke of deferred dower necessarily meant a dower debt which would not become due until the dissolution of the marriage-partnership.

Mr. Hasan Jan on behalf of the respondents argues that the finding of the learned Subordinate Judge on this point should be accepted; but he contended also that the point is not of great importance because even if the dower was deferred, in the strictly technical sense of the term, the husband could at any time cancel the postponement, and treat the debt as immediately payable, in which case it would be a valid debt immediately due from the husband. On this point he cites the decision in *Suba Bibi* v. *Balgobind Das*(1) where Mr. Justice Straight citing from the *Fatwai Kazi Khan* held that payment in circumstances similar to that now before us of deferred dower was payment of an existing debt; but the finding of the learned Subordinate Judge may be accepted that the dower fixed was payable on demand by the wife.

(1) (1886) I. L. R. 8 All. 178.

There appears to be no doubt that Jamaluddin was indebted at the time when the baimokasa was executed and that the alienation of this property was likely to make him unable to satisfy his other creditors. It would appear from the evidence of Shamsuddin that one reason which may have led Jamaluddin to execute this baimokasa deed was the possibility that Shamsuddin's sister would institute a suit for her share of her own mother's dower. The plaintiff herself says that she pressed for it because she saw his business declining and wished to be secure; but if there was a real debt due to the plaintiff, equal to or exceeding the value of the property transferred, the transfer cannot be impeached under section 53 of the Transfer of Property Act on the ground that it defeated or delayed other creditors, so long as it was a genuine transfer, as has been pointed out in many cases, of which I need only mention the decision of the Judicial Committee of the Privy Council in *Musahar* v. *Lal Hakim Lal*(1) in which it was held that a transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the power of the creditors for the benefit of the debtor. As Lawrence Jenkins, C.J. remarked in that case, so soon as it is found that the transfer was made for adequate consideration in satisfaction of a genuine debt and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies. In the present case if the creditors on being apprised of this transaction in the proceeding under Order XXI, rule 58, had taken steps for the adjudication of Jamaluddin as an insolvent debtor, the transaction might possibly have been set aside; but they cannot impeach it as a transfer defeating or delaying creditors within the meaning of section 53 of the Transfer of Property Act, unless they can show that the debtor reserved some benefit for himself.

On this last point it is argued that the learned Subordinate Judge ought to have found that the trans-

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action was benami. The learned Subordinate Judge has considered the evidence regarding possession and has come to the conclusion that possession of the property conveyed by the baimokasa has actually passed to the plaintiff. It appears that a new lease of the sites of the houses transferred has been executed by the superior landlord in favour of the plaintiff in place of Jamaluddin, and that the tenants of these houses now pay rent to Abdul Ali Khan the son of the plaintiff who manages the property for her. On behalf of the defendants, Naumi Lal Deo, a tenant whose house has now been let to the Singer Company, says that in 1926 or 1927 he paid rent for it to Jamaluddin producing a small scrap of paper which purports to have been given by somebody on behalf of Jamaluddin for payment made on the 6th of November, 1926. On the other hand, we have for this payment exhibit 2, an entry in the plaintiff's counterfoil receipt book, indicating that the formal receipt was granted on behalf of Maniran Bibi. Ganesh Lal Sao, who occupied part of one of the houses from Jamaluddin in 1926, says that he paid rent to Jamaluddin in July and August of that year, producing entries of payments in his own account book but not producing the receipts which were granted. It does not appear that the witness personally made these payments; and from the fact that the formal receipts are withheld, it may be fairly inferred that they were granted on behalf of the plaintiff, whether for the sake of convenience Jamaluddin took the money on her behalf or not. The finding of the learned Subordinate Judge may be accepted that the transaction was not benami, and that Jamaluddin retained no benefit for himself.

In this view of the facts the decision of the learned Subordinate Judge must be affirmed and I would dismiss this appeal with costs.

WORT, J.—I agree.

Appeal dismissed.