

1926

Act has been the subject of discussion in a number of cases. We will, however, refer to only two of them here, *Cohen v. Cassim Nana* (1) and *Mulchand Chandolia v. Kundanmull* (2). It appears from these that it is not necessary for the plaintiff to prove that on the due date he had the goods actually in his possession. It is quite sufficient if he is able to prove that he had control of the requisite goods or that he had the capacity to deliver them to the purchaser when called upon to do so, in other words, that he was in a position to fulfil his part of the contract on the due date on a demand being made by the purchaser.

KANWAR BHAN-
SUKHA NAND
v.
GANPAT RAI-
RAM JIWAN.

[*Their Lordships having applied this test to the facts of the case, accepted the appeal and restored the decree of the Subordinate Judge with costs throughout—Ed.*]

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Jai Lal.
MUSSAMMAT BHURI AND OTHERS (DEFENDANTS)

1926

Appellants

versus

March 17.

MST. ASGHARI BEGAM (PLAINTIFF) Respondent.

Civil Appeal No. 556 of 1922.

Second Appeal—whether defective for want of attaching a copy of the decree passed in the cross-appeal by the lower Appellate Court—Dower—claimed as fixed—whether Court can allow a suitable amount.

Plaintiff sued for Rs. 5,000, as her fixed dower, and obtained a decree for Rs. 3,000 in the trial Court. Both parties appealed to the District Judge who dismissed both appeals. The defendants then presented a second appeal in the High

(1) (1876) I. L. R. 1 Cal. 264. (2) (1919) I. L. R. 47 Cal. 458.

1926

MUSSAMMAT
BHURI

v.

MST. ASGHARI
BEGAM.

Court unaccompanied by a copy of the decree dismissing the cross-appeal of the plaintiff.

Held, that the appeal was not defective because of the failure to attach a copy of the decree in the cross-appeal.

Jogul Kishore v. Chammo (1), and *Ghansham Singh v. Bhola Singh* (2), followed.

Bhan Singh v. Gokal Chand (3), and *Muhammad Din v. Mst. Zeb-un-Nisa* (4), not followed.

Held also, that, as plaintiff claimed her dower as fixed at the time of her marriage, the lower Courts, on finding that no sum was fixed, could not allow the sum of Rs. 3,000, as being a suitable amount, but could only allow the amount which the defendant admitted or agreed to pay.

Fazal Khan v. Mst. Karm Begam (5), followed.

Second appeal from the decree of J. Coldstream, Esquire, District Judge, Delhi, dated the 9th November 1921, affirming that of Lala Dwarka Parshad, Subordinate Judge, 2nd class, Delhi, dated the 29th March 1921, directing the defendants to pay the plaintiff the sum of Rs. 3,000.

MEHR CHAND MAHAJAN, for Appellants.

OBEDULLA, for Respondent.

The judgment of the Court was delivered by—

HARRISON J.—In this appeal a preliminary objection is taken by the respondent relying on *Muhammad Din v. Mst. Zeb-un-Nisa* (4) and *Bhan Singh v. Gokal Chand* (3). The facts are that the plaintiff brought a suit claiming Rs. 5,000 as her dower, and a sum of Rs. 3,000 was decreed by the trial Court. Both parties appealed and the result of the two appeals was that the order of the trial Court was maintained and both appeals were dismissed.

(1) 85 P. R. 1905 (F. B.).

(3) 1919 I. L. R. 1 Lah. 83.

(2) (1923) I. L. R. 45 All. 506 (F.B.). (4) (1922) I. L. R. 3 Lah. 215.

(5) 105 P. R. 1914.

The co-widow of the plaintiff's husband and her co-defendants have presented this second appeal accompanied by a copy of the decree in which her own appeal to the District Judge was dismissed. No copy of the decree dismissing the cross-appeal was presented, although one had been obtained. No copy of the judgment of the trial Court accompanied the memorandum of appeal. Both these omissions were pointed out to the appellants who put in both the required copies after the period of limitation had expired. According to the view taken in *Muhammad Din v. Mst. Zeb-un-Nisa* (1) and *Bhan Singh v. Gokal Chand* (2) the decree, against which an appeal has not been preferred and which does not accompany the memorandum, stands good and therefore the appeal proper cannot proceed, as at the best the only possible result would be that one and the same decree would at the same time be set aside by this Court and remain good in virtue of the operation of the law of *res judicata*. Counsel for the appellants has referred us not only to *Ghan-sham Singh v. Bhola Singh* (3), a recent Full Bench ruling of the Allahabad High Court but also to *Jogal Kishore v. Chammo* (4), which apparently was not referred to at the time the cases reported as *Bhan Singh v. Gokal Chand* (2) and *Muhammad Din v. Mst. Zeb-un-Nisa* (1) were argued. We consider ourselves bound by the decision of the Full Bench of this Court and we therefore overrule the objection that the appeal is defective because of the failure to attach a copy of the decree in the cross-appeal.

So far as the copy of the first Court's judgment is concerned, we see that an application for a copy was made on the 7th of February within limitation and

1926

MUSSAMMAT
BHURI
v.
MST. ASGHARI
BEGAM.

(1) (1922) I. L. R. 3 Lah. 215. (3) (1923) I. L. R. 45 All. 506 (F.B.).
(2) (1919) I. L. R. 1 Lah. 83. (4) 85 P. R. 1905 (F.B.).

1926

MUSSAMMAT
BHURI
v.
MST. ASGHARI
BEGAM.

it was only because of inordinate delay in the preparation of this copy that the appellants were unable to present it with the memorandum. Under the circumstances we extend time under section 5 of the Limitation Act and allow the appeal to proceed.

On the merits the point urged by the appellants rests on the clear authority, namely, *Fazal Khan v. Mst. Karm Begam* (1). Plaintiff in this case claimed a dower as fixed between the parties at the time of her marriage. The finding throughout by both the trial and the appellate Courts has been that no sum was fixed, and the amount Rs. 3,000 was allowed as being a suitable amount having regard to the history and position of the family. It is laid down in the clearest possible terms in *Fazal Khan v. Mst. Karm Begam* (1) that where these are the findings the only amount of dower, which the Court can allow, is the amount which the defendant admits or agrees to pay. The plaintiff has wholly failed to establish the position taken up in the plaint, and no question of custom having been raised, the Court was not competent to decide the matter as it did.

We accept this appeal and allow only Rs. 32, the amount admitted by the defendants. We dismiss the remainder of the plaintiff's claim. The legal position was apparently not understood until the parties reached this Court and was certainly not put before the District Judge. We therefore order the parties to bear their own costs throughout.

C. H. O.

Appeal accepted.