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It has not been argued before us that the learned Judge, if he had the power to make the orders under appeal, ought not to have made them: and upon the merits of the orders I entirely concur with Mr. Justice Davar.

I agree, therefore, that these appeals should be dismissed with costs.

Attorneys for the appellant: *Messrs. Ardeshir, Hormasjee, Dinshaw & Co.*

Attorneys for the respondent: *Messrs. Matubhai, Jamietram and Madan.*

B. N. L.

APPELLATE CIVIL.

Before Chief Justice Scott.

1908. *July* 17.

JYANI BEGAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* UMRAV BEGAM AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Widow—Dower—Remission effective without acceptance by the heirs of husband—Money spent for the benefit of another—Obligation to repay.

According to Mahomedan Law a dower is a debt and its remission by a widow without acceptance by the heirs of the husband is effective.

It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises.

Ram Tuhul Singh v. *Biseswar Lall Sahoo*(1), and *Ruabon Steamship Company* v. *London Assurance* (2), referred to.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, modifying the decree of B. R. Mehendale, Joint Subordinate Judge of Násik.

The plaintiffs sued to recover possession by partition of their three-fourths share of the property described in the plaint as heirs of one Akbaralli from defendant 1, Akbaralli's widow and from her tenant, defendant 2, with past and future mesne profits.

* Second-Appeal No. 725 of 1907.

(1) (1875) L. R. 2 I. A. 131. (2) [1900] A. C. 6 at p. 15.

Defendant 1 replied that the plaintiffs could not sue for partition without giving to the defendant at least Rs. 2,000 for her dower for which the property was liable and that certain moveable and immoveable property (a house and a garden) should be brought into hotch-pot.

Defendant 2 was absent.

The plaintiffs presented a counter-statement alleging that the house being out of repairs was re-built by the plaintiffs at the cost of about Rs. 500 to the knowledge of the defendant, that the defendant could not claim a share in the house as she never objected to the re-building, that the defendant would not be entitled to a share in the house without contributing to the expenses of the re-building, that the moveable property mentioned in the defendant's written statement was not in existence, that the garden was not the joint property of the parties, therefore, it was excluded from the suit, that the plaintiffs had defrayed the expenses of Akbaralli's obsequies for which his share was liable, that the defendant's claim to the dower was time-barred and that she had remitted her right to it at Akbaralli's death.

The Subordinate Judge found that the plaintiffs had a three-fourths share in the property in suit, that the defendant was entitled to her dower amounting to 40,000 Ashrafis (Rs. 3,00,000), that her claim to the dower was time-barred and was not enforceable against the property in suit, that the house was liable to partition and plaintiffs had spent about Rs. 200 in improving it, that the defendant was liable to contribute Rs. 50 to the improvement, that the plaintiffs had expended about Rs. 100 on Akbaralli's obsequies and that the defendant should contribute Rs. 25 to those expenses. On these findings the Subordinate Judge passed the following decretal order:—

Defendant Umrao to pay to plaintiffs Rs. 75. Plaintiffs to get possession by partition of three-fourth of the properties described in the plaint. The rest of plaintiffs' claim is disallowed.

On appeal by the defendant the Judge found that she was liable to contribute Rs. 25 to the expenses on account of the obsequies, that she was not liable to pay Rs. 50 on account of the re-building of the house because the house was re-built without

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her consent, and that she was entitled to Rs. 3,00,000 for her dower. The Judge, therefore, modified the decree as follows:—

Accordingly I must modify the order of the Lower Court by directing that the plaintiff on paying the Mahr less the obsequies expenses, that is, Rs. 2,99,975 recover three-fourth of the property in suit.

The Judge made the following observations with respect to the dower:—

The dower is the most important question. Defendant's dower was fixed at 40,000 Ashrafies, that is, Rs. 3,00,000. It is the custom of the Indians to fix such enormous dowers that their dignity may be increased and divorces rendered impracticable. It is tacitly understood that they are not to be paid. Nevertheless if demanded by the widow they must be paid unless there be an effectual remission.

Further though there is much conflict on the point the preferable opinion seems to be that the widow's dower is payable before the division of the estate so that the defendant in this case if her claim to dower subsists is entitled to retain the estate till her dower be paid. Moreover the claim is not time-barred as the *me* would run from the time when division was sought.

The question then is whether the dower was remitted. Dower can be remitted to the husband or his heirs and a remission to one heir is an effectual release of all. It is the form of gift known as "iskat" and remission must take place according to the ordinary rules for gifts.

The form given by the witnesses "I have given my dower for the sake of God and his apostle" savours of Sadak but in either case the rules are the same. What was given is a thing capable of Tamlik or Seizin and the gift is therefore incomplete unless one of the donees accepts it.

It is now necessary to see whether the defendant ever offered to surrender her dower, and if so, whether she did so by "gift."

The evidence certainly shows that she did pronounce the formula mentioned above thrice after the death of the deceased but it is not conclusively shown that such pronouncement was even in the presence of any of the heirs and it is not alleged that any of the heirs accepted that remission.

This being so the remission is ineffective. The estate is accordingly liable to a payment of Rs. 3,00,000 less the amount spent on obsequies which is Rs. 25.

Plaintiffs preferred a second appeal.

N. A. Shiveshvarkar for the appellants (plaintiffs):—The Judge found as a fact that the defendant remitted her claim to the dower after her husband's death. But he held that the remission was ineffectual as it was not accepted by the heirs of the deceased,

nor were any of the heirs present when the remission was made. We do not dispute this finding. What we submit is that accepting the finding the Judge's view of the law is erroneous. The principle of the remission of dower is based upon a text of the Koran : Sacred Books of the East, Vol. VI, p. 71 ; Ameer Alli's Mahomedan Law, 3rd edition, p. 109.

A widow's claim for dower is only a debt against the husband's estate. According to Mahomedan Law the remission of a debt extinguishes it and it is not necessary that there should be any acceptance of the remission on the part of the debtor : Ameer Alli's Mahomedan Law, 3rd edition, pp. 106, 107 ; Baillie's Mahomedan Law, Book VIII, Chap. III.

Next we contend that it was an error to absolve the defendant from contribution to the expenses relating to the house. We are entitled to it : section 70 of the Indian Contract Act ; *Damodara Mudaliar* v. *Secretary of State for India*(1).

R. R. Desai, for the respondents (defendants) :—The formula pronounced shows that the remission is in the form of a *Sadak* (religious gift). The Judge has also found to this effect. No part of Mahomedan Law deals with remission. It is a part of Mahomedan Law of gift. A gift requires tender and seisin : Hidaya, p. 482. It is found that at the time of the remission the heirs of the husband were not present. The intention of the donor must be declared in the presence of the donee. In the case of *Sadak* seisin is necessary : Hedaya, p. 489.

As regards the expenses in connection with the house, we submit that we are not liable. The house was always in plaintiff's possession. They repaired the house for their convenience without pressure on our part.

SCOTT, C. J. :—The plaintiffs sue the defendants to recover possession by partition of three-fourths of the property of one Akbaralli.

The 1st defendant, who is Akbaralli's widow, is in possession of some of the property of the deceased. The defendants are in possession of a house which forms part of the same estate.

(1) (1894) 18 Mad. 88.

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The plaintiffs' share in the inheritance is three-fourth; that of the defendant one-fourth.

The defendant *inter alia* pleaded that the plaintiffs could not sue for partition without the defendant receiving at least Rs. 2,000 for her dower for which she contended the property in her possession was liable.

Upon an issue "Whether the defendant was entitled to dower, and if so, to what amount" the Subordinate Judge found that she was entitled to 40,000 Ashrafis (Rs. 3,00,000) but that the claim was time-barred. He also held that the dower had been remitted by the defendant but doubted whether the remission was effectual. He passed a decree for the plaintiffs for three-fourth of the property mentioned in the plaint including the above-mentioned house which the plaintiffs sought to exclude from the actual partition.

The District Judge in dealing with the question of remission of dower says "the evidence certainly shows that she (defendant) did pronounce the formula mentioned above thrice after the death of the deceased but it is not conclusively shown that such pronouncement was even in the presence of any of the heirs and it is not alleged that any of the heirs accepted that remission. This being so, the remission is ineffective. The estate is accordingly liable to a payment of Rs. 3,00,000 less the amount spent on obsequies."

The only points argued before me were whether remission of dower by a widow without acceptance by the heirs of her husband was effective and whether the plaintiffs were entitled under section 70 of the Indian Contract Act to recover Rs. 50 from the defendant as her contribution to repairs effected by the plaintiffs to the house in their possession.

The recognized authorities on Mahomedan Law accessible to this Court all expressly recognise the right of a woman to remit her dower during the life-time of her husband (see Koran, Chapter III, para. 4, Sacred Books of the East, Vol. VI, p. 71; Hidayah, Vol. I, Book II, Chapter III; Baillie's Mahomedan Law, Book I, Chapter VII, section 10). Her right to remit dower after her husband's death is stated in Ameer Alli's Mahomedan

Law, 3rd Edition, Vol. I, p. 109, where it is said '"a woman may release her dower to her deceased husband" that is, the widow is entitled to exonerate or discharge the estate of her deceased husband from the liability for her dower debt.'

In considering whether dower can be remitted by a widow without acceptance by the husband's heirs it is necessary to refer to the Mahomedan Law on the subject of the extinction and transfer of debts, treating dower as a debt due by the deceased.

According to Mahomedan Law a debt remitted is a debt extinguished. No acceptance is required.

Baillie (Book VIII, Chapter III) citing Hidayah and Kifayah gives the following explanation "a debt considered with reference to the prospect of payment is *mal*, or corporeal property, and is susceptible of *tumleek*. Considered with reference to its present state, it is *wusf*, or quality (indebtedness), and is susceptible of *iskat*, or extinction. Hence a gift of it to the debtor himself, which is an extinction, is valid, both by analogy and on a favourable construction; but a gift of it to another, which is *tumleek*, is valid only on the latter ground."

This passage I understand to mean that an assignment of a debt to a third party is property capable of seizin and requires acceptance but a remission of a debt to a debtor results in its extinction. It is obvious that for the purpose of debt remission the heirs of a debtor must stand in the same position as the debtor himself.

To the above effect is a passage in Ameer Alli, 3rd Edition, at p. 107. Again on p. 106 of the same work it is said that the received doctrine is that even if the heirs of a debtor should reject a discharge of the debt, there would be no liability.

I therefore hold that the District Judge was not warranted by the Mahomedan Law in holding the remission of her dowry by the defendant to be ineffective.

In my opinion the point must be decided according to Mahomedan Law and not by reference to the provisions of the Indian Contract Act.

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It follows that the property is not liable to any lien for dowry and it is unnecessary to consider whether a lien for Rs. 3,00,000 should have been declared in a suit in which the defendant only claimed Rs. 2,000.

It remains to consider whether the plaintiffs are entitled to credit from the defendant for Rs. 50 in respect of repairs effected upon the house in their occupation. The facts as stated in the plaint are that the plaintiffs in their own right were entitled to $2\frac{1}{2}$ shares out of $3\frac{1}{2}$ shares in a house in Násik and as heirs of Akbaralli to $\frac{3}{4}$ths of the remaining one share. Akbaralli died in 1897. The plaintiffs in 1898-99 effected repairs to the house which was old. (It does not appear whether the repairs were confined to the portion belonging to Akbaralli's heirs or extended to the whole $3\frac{1}{2}$ shares). The plaintiffs were and still are in exclusive possession of the whole house and seek to exclude Akbaralli's portion of it from partition in this suit though they say that "on the share in the house defendant's share is a charge." They allege that the defendant never objected to the repairs.

These facts do not justify the conclusion that the expenditure on repairs or any part of it was incurred 'for' the defendant so as to entitle the plaintiffs to claim compensation from her under section 70 of the Indian Contract Act.

It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises: see *Ram Tuhul Singh* v. *Bisesswar Lall Sahoo*[1], and *Ruabon Steamship Company* v. *London Assurance*[2].

I allow the appeal and set aside the decree of the District Judge and decree that the plaintiffs do recover by partition $\frac{3}{4}$th of the property in the possession of the defendants and that the first defendant do recover by partition $\frac{1}{4}$th of Akbaralli's portion of the Násik house No. 27/57 in the possession of the plaintiffs, that the defendant do pay Rs. 25 to the plaintiffs on account of expenditure on the obsequies of the deceased and that each party do bear their and her own costs throughout.

Decree set aside.

G. B. R.

(1) (1875) L. R. 2 I. A. 131. (2) [1900] A. C. 15.