1869

THE COLLECTOR OF BOGRA v. KRISHNA INDRA ROY.

the special respondent to take this objection. Upon the two principal points in the case, the decision of the Judge is erroneous; first, he considered that the Government had not been dispossessed by the delivery of possession of the land in dispute to the decree-holder, under section 224, or by the planting of the bamboo. We think it clear that a landlord must be taken to be in possession of land which is occupied by his tenants from whom he is receiving rents. If a bamboo be planted, and proclamation made to the occupants of the property under the 224th section, that the land has been adjudged to some other person, we think the landlord is dispossessed in execution of the decree, or at least that he is so far put out of possession as to have a right to come in and ask for redress under the 230th section.

Upon the other point adverted to by the judge, *viz.* that a Mr. Payter (who appears by the way to be a different person from the original defendant) is now in possession as a farmer of Government of the lands in dispute, it does not, in our opinion, tend to show that the Government was not in possesion. We are unable to understand the argument of the Judge on this point. The case must be remanded to the Judge for a decision on the merits. The respondents must pay the costs of this appeal.

JACKSON, J.—I concur in the order which my colleague would pass in this case.

Before Mr. Justice Macpherson and Mr. Justice E. Jackson.

1869. *March* 8.

MIR MAHAR ALI (DEFENDANT) *v.* AMANI (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Mohammedan Law--Dower--Limitation--Succession.

Among Mohammedans, deferred dower becomes payable on the dissolution of the marriage, whether by divorce or by the death of either of the parties.

According to Mohammedan law, when the heirs of a woman claim dower from her husband, which was mowajjal or deferred, and not due or payable till her death, their claim is a simple money claim founded solely on the contract

* Regular Appeals, Nos. 59, 65, and 94 of 1868, from a decree of the Principal Sudder Ameen of Bhagulpore, dated the 9th December 1867.

1869

MIR MAHAR ALI v. AMANI.

made by the husband; and a suit for such dower must be brought within three years of the wife's death. (Act XIV. of 1859, section 1, cl. 10.)

The husband is not a trustee for his wife in respect of her dower, nor has the wife a lien on her husband's property,

Query as to the nature of the wife's claim for dower against the heirs of her husband.

Shahzada Mahomed Faez v. *Shahzadi Oomdah Begum* (1) commented on.

Mental derangement is no impediment to succession under the Mohammedan law.

Messrs. *G. C. Paul* and *C. Gregory* for appellant.

Mr. *R. E. Twidale* and Baboo *Debendra Narayan Bose* for respondent.

The facts are fully set out in the following judgment of

MACPHERSON, J.—Mir Kazim Ali died, leaving a widow, Nasirun, and three daughters, Khyratun, Amani and Hakimun. The defendant, Mir Mahar Ali, was married to Hakimun, who is now dead. The suit, out of which these three appeals arise, is brought by Amani. The case which she makes in her plaint is two-fold : *First*, that Nasirun being insane, her three daughters divided, amongst themselves, her (Nasirun's) share in Mir Kazim Ali's estate, and after Hakimun's death, Mir Mahar Ali forged a bill of sale in her name ; a deed conveying to him all Hakimun's interest in her mother Nasirun's share of Kazim Ali's estate, as well as the share in that estate taken by Hakimun in her own right : and *second*, that when Mahar Ali married Hakimun, he settled upon her a dower of 40,000 sicca rupees and 40 ashruffees, the whole dower being mowajjal or "deferred," and that no portion of the dower having been paid, the plaintiff Amani is, by right of inheritance, entitled, as one of the representatives of Hakimun, to a share of it, amounting to Company's rupees 7,253-5-4. The lower Court having decided in favor of the plaintiff, as regards the dower and as regards Nasirun's share in Kazim Ali's estate, Mahar Ali appeals to this Court, his appeal being No. 59 of 1868.

The main grounds of appeal are : That Hakimun having died before her husband, the dower never became payable at

(1) 6 W. R., 111.

1869

MIR MAHAR ALI v. AMANI.

all ; that the suit, as regards the dower, is barred by limitation, having been instituted more than three years after the death of Hakimun : that, Nasirun being alive, her daughter (whether she be insane or not) had no right to appropriate her share in Kazim Ali's estate, and therefore the plaintiff cannot sue for it ; and that Mahar Ali did not, in fact, settle on Hakimun a dower of 40,000 sicca rupees, as alleged.

In the view which I take of the case, it will be unnecessary for me to consider the last of these grounds of appeal. As to the first point, I think there is nothing in it, being clearly of opinion that deferred dower becomes payable on the dissolution of the marriage, whether by divorce or by the death of either of the parties (see Macnaghten's Mohammedan Law, page 59, also 275 and 278, Cases 23 and 29. Baillie's Mohammedan Law, page 96 ; 1 Hedaya, 155 ; *Hosseinooddin Chowdree* v. *Tajunissa Khatoon* (1).

As regards the second point, I think that the plaintiff's claim is barred by the law of limitation, and therefore that the defendant, Mahar Ali, is entitled to a judgment. The plaintiff's suit was instituted more than three, but less than six, years after the death of Hakimun : and the question is whether when the heirs of a woman, who dies in her husband's life-time, sue the husband for her dower, which was mowajjal, their suit must not be brought within three years of the origin of their cause of action, namely, the death of the woman. On the one hand, it is contended that the right to deferred dower arises solely from the husband's contract to pay it, and that the suit is a simple suit for the breach of a contract within the meaning of clauses 9 and 10 of section 1 of Act XIV. of 1859. On the other hand, it is argued that the suit is not merely for a breach of contract, but is against the husband who holds the dower in his hands, as trustee for his wife who (and her heirs after her death) has a lien on his property to the extent of the unpaid dower : and it is urged that the period of limitation is either 12 years, under clause 12 of section 1 of Act XIV. of 1859, or at any rate six years under clause 16.

(1) W. R., 1864, 199.

1869

MIR MAHAR ALI v. AMANI.

But the plaintiff's claim, as regards this dower, is simply for a money debt. I can find nothing in the Mohammedan law to warrant the idea that where there is a contract to pay deferred dower, that contract of itself gives the woman a lien on her husband's property. In the case of *Woomatool Fatima Begum* v. *Mirunmunnissa Khanum* (1), NORMAN and SETON-KARR., JJ. are said to have held, that a widow has a lien for her dower, whether 'prompt' or 'deferred.' But they so held merely with reference to the special case before them, which was one, in which the widow, having got possession of her husband's estate held it in lien of her dower for many years, before the heirs of the husband turned her out. The learned Judges say: "These "texts and cases seem to us to establish the position that the "widow of a Mussulman in *possession of her husband's estate* "upon a claim of dower, has a lien upon it *as against those* "*entitled as heirs*, and is entitled to possession of it as against "them till the claim of dower is satisfied."

The authorities show, that one who has a claim for dower is exactly on the same footing as any other ordinary creditor and ranks *pari passu* with other ordinary creditors, having no special charge on the estate or preference of any sort, though dower, like every other debt, must be paid before the heirs are entitled to take anything. In Macnaghten's Precedents "Of debts and securities" Case 10, page 356, the question is put: "A man dies, being indebted to his wife for her dower "Has she a lien on the personal property left by her husband, "in satisfaction of such dower, in preference to the other heirs?" The answer is, that if the other heirs pay her dower, she has no claim on her husband's property except for her share as one of his heirs; but that, if they do not pay her dower, she has a "prior claim" against the estate. But this contains no indication of any opinion that the wife has a lien for her dower; it merely shows, that, as to which there is no doubt, *viz.*, that the dower, like any other debt, must be paid before the estate, divisible among the heirs, can be ascertained.

(1) 9 W. R., 318.

1869

MIR MAHAR ALI v. AMANI.

In case 32 of the Precedents of "marriage, dower," &c., 282, the question is asked: "Is there any fixed period, according to "the Mohammedan Law, beyond which a claim of debt cannot be "preferred? and is a debt of dower considered in the same light "as other debts, or are there any peculiarites attending it?" The reply is as follows:—"There is no fixed period beyond which "payment of dower cannot be claimed, and a claim of dower is "considered in the same light as other claims, which cannot be "defeated without satisfaction by the debtor or relinquishment by "the creditor, as is laid down in the Kafi.—A debt of dower "is viewed in the same light as any other debt which has been "contracted by a stranger, and the claim of payment cannot be "defeated until the debtor liquidate it, or the creditor relinquish "his claim. So also in the *Fusuli Imadeya*: Payment of a "wife's dower is incumbent on the husband, in like manner as "the payment of his other debts, and, until satisfaction is made, "the estate cannot be distributed among his heirs."

In Case 23, page 274, it is expressly said in one of the answers to a question put: "The law makes no distinction between a "claim of dower and other debts. No peference is given to "one description of claim over another, and a *pro ratâ* distribution "must be made with respect to all."

In Case 24, page 275, the question being whether the whole of the property, real and personal, of the husband being absorbed by the debt (dower), the property belonged of right to the widow or was to be distributed among the heirs generally: the answer is "It has been proved, by the testimony of three "competent witnesses, that the debt due to the defen-"dant, from her deceased husband, on account of dower, "amounted to ten thousand gold-mohurs and twenty-"five thousand rupees, and a debt legally proved can-"not be satisfied, but by compromise or liquidation. So long "as the debtor lives, he is responsible in person, and, on his "death, his property is answerable; but there is this distinction "between money and other property in cases of dower, namely "that the widow is at liberty to take the former description of "property, over which she has absolute power; but as to other "property she is entitled to a lien on it as security for the debt, "and it does not become her property absolutely without the con-

1869

MIR MAHAR ALI v. AMANI.

"sent of the heirs of a judicial decree. Where the debt is large "and the estate small, the former necessarily absorbs the latter, in "spite of any objection urged by the heirs, who, until they pay "the debt, have no legal claim against the creditor in posses- "sion to deliver up the estate. Here, no doubt, there is the ex- "pression she has a lien." But it is evident that the word is used merely with reference to questions as to the distribution of the estate, and that it is not mentioned in any degree to lay down that a woman has a lien on her husband's estate in the ordinary and legal sense of the term lien. It is not intended to say anything more than that the widow has a right to be paid her dower before the heir takes anything for himself.

In the case of *Shahzada Mahomed Faez* v. *Shahzadi Oomdah Begum* (1), it is said in general terms, that a "Mohammedan wife's "dower, even though it is in the hands of her husband, is con- "sidered to be her estate held by him, in trust for his wife, and "on her death becomes divisible among her heirs. The Limi- "tation Law applicable to a suit by those heirs is not that re- "lating to suits on contracts, but that relating to suits to recover "inheritance. The suit is not founded on the contract, but on "the withholding of the widow's estate from the heirs." In that case, the lower Court (whose judgment was upheld) was of opinion that, as the suit was a suit to recover, by right of inheritance, the estate of the deceased wife, it could not be deemed a suit founded on contract. What the precise facts were, does not clearly appear; nor does the meagre report, with which we are furnished, give any indication of the matter having been argued or discussed, and the decision is therefore, of little value as a precedent. But it is wholly unnecessary for me to consider what is the law of limitation applicable to a case in which the wife's dower "is in the hands of the husband"; because in the present instance, the whole dower being deferred, and not having become due until the wife's death, there is no ground for saying, that it is "in the hands of her husband," and that, therefore, he is to be deemed a trustee, any more than there is ground for saying that every debt, which is not

(1) 6 W. R., 111.

1869

MIR MAHAR ALI v. AMANI.

paid on due date, remains in the hands of the debtor, who therefore is a trustee for his creditor. The case of the widow, who after her husband's death, claims her dower as against the husband's heirs, is very different from that of the heirs of the wife who claim her mowajjal dower as against the surviving husband.

On the whole, I have no doubt whatever that, according to Mohammedan law, when the heirs of a Mohammedan woman claim, from her husband, dower which was mowajjal or deferred, and not due or payable until her death, their claim is a simple money claim founded solely on the contract entered into by the husband: and that the rule of limitation applicable is that contained in clauses 9 and 10 of section 1 of Act XIV. of 1859. And I think that the present suit, not having been instituted till more than three years had elapsed from the death of the wife, is barred, so far as the claim for dower is concerned.

Mir Mahar Ali is also entitled to have the decree of the lower Court reversed, so far as it relates to Nasirun's share of the estate of Kazim Ali. Supposing Nasirun is insane, that does not preclude her from inheriting, for mental derangement is no impediment to succession (Macnaghten's Mohammedan Law "Precedents of Inheritance" Case 10, p. 89). Kazim Ali is stated in the plaint to have died in Magh 1267, and as Nasirun is still alive, it is clear that neither the plaintiff nor Hakimun has any title to the share to which Nasirun was entitled by right of inheritance. No agreement come to by the three daughters of Nasirun could entitle them to divide her share amongst themselves, and the plaintiff's case fails, simply because, on her own shewing, she has no possible right to that which she seeks.

It appears to me, that the plaintiff's suit ought to have been dismissed altogether, and I think that the decree of the lower Court, so far as it is appealed against by Mahar Ali, ought to be reversed, and that the plaintiff's suit ought to be dismissed as against him with all costs both here and in the court below.