amount decreed, at the same rate, from the date of the decree until payment, and by striking out therefrom the words "নিম্ন আদালতের সুদের আদেশ ও চারি কিস্তিতে খাজনা আদায় হইবার সিদ্ধান্ত রহিত হয়।"

1893

WATSON v. SREEKRISTO BHUMICK.

We make no order as to costs.

Decree varied.

C. S.

PRIVY COUNCIL.

SULEMAN KADR (DEFENDANT) *v.* MEHDI BEGUM SURREYA BAHU (PLAINTIFF).

*P. C.** 1893 *June* 20. *July* 8.

[Appeal and cross appeal from the Court of the Judicial Commissioner of Oudh.]

Mahomedan law—Dower—Law in Oudh—Discretionary power of the Courts over the amount of dower—The Oudh Laws Act (XVIII of 1876), s. 5.

In a suit by a wife for her dower the Appellate Court altered the amount decreed by the First Court, as a reasonable sum payable in lieu of an excessive one, which the husband had on the date of the marriage nominally entered in a *nikahnama* as the wife's dower. Both Courts acted under the Oudh Laws Act, XVIII of 1876, section 5. The Judicial Committee having examined the grounds on which each of the Courts had exercised its discretionary power, considered the reason given by the First Court to be sound and restored its decree.

APPEAL and cross appeal from a decree (11th June 1889) of the Judicial Commissioner, varying a decree (28th March 1888) of the District Judge of Lucknow.

This suit was brought by the plaintiff, now respondent and cross-appellant, against her husband who now appealed, for a decree for dower. The wife claimed ten lakhs of rupees, together with one year's arrears of an allowance of Rs. 150 monthly. She claimed also a decree entitling her to payment of the same amount monthly during her life. Both Courts concurred in reducing her claim for the ten lakhs to Rs. 25,000. But the Judicial Commissioner, besides decreeing to her that amount, decreed to be payable

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU.

monthly to her Rs. 150, which the District Judge had refused to decree. This difference in the exercise of powers under the Oudh Laws Act, 1876, section 5, by the Court of first instance and the Appellate Court, both, however, concurring as to the lump sum, gave rise to this appeal.

The parties were Shias, and were of the former royal family of Oudh. On the day of the marriage, 2nd August 1871, a *nikahnama* or marriage contract was executed, in which it was stated that the marriage had taken place in consideration of a dower of ten lakhs of rupees and Rs. 150 a month to be paid by the husband to the wife; the monthly sum being stated to be fixed for her daily expenses as part of the dower, and this payment was secured by a bond and mortgage. Until July 1886 the defendant continued to pay the Rs. 150 every month, and he also paid a further sum of Rs. 50 at the same time. Then both allowances were discontinued and the husband and wife separated. Nothing more was paid. The plaint, filed 2nd August 1887, stated the marriage and agreement, claiming payment of ten lakhs and a decree for future monthly payments of the allowance. The defendant's answer admitted the facts alleged. His defence as to the whole agreement for dower was that it was invalid for uncertainty, and that no amount exceeding Rs. 500 was recoverable: that the sum of ten lakhs had been entered in the agreement for mere ostentation and was not a substantial amount ever intended to be paid. A further defence was that according to the custom of the ex-king's family, dower could not be recovered during the life of the husband, and that the plaintiff having left him could not sue for it. He stated that his whole income was Rs. 2,933 by the month and that his personal estate was worth about Rs. 60,000.

Six issues were recorded which raised the questions whether the contract of dower was void for uncertainty; what was a reasonable dower with reference to the position of the parties; whether the payments of Rs. 150 and Rs. 50 were made under contract; and lastly, whether the plaintiff had forfeited her rights.

For the defence the evidence of witnesses was given who were *mujtahid* or persons learned in the law of the Shias. They

stated that according to that law a dower made up of a fixed sum and a monthly allowance to the wife was void for uncertainty, as the two together formed a single dower, and the part consisting of the allowance was uncertain as it could not be known how long the recipient would live. Extracts from legal works of authority to the same effect were placed on the record.

The District Judge in his judgment expressed the opinion that the dower was not invalid for ambiguity or uncertainty. As to the wife's refusal to live with her husband, the Judge considered that the law laid down in a former decision in Oudh, justified a wife in so doing until settlement of her claim for dower. As to the defendant's means and resources he accepted his evidence. He was of opinion that the sum stated to be the wife's dower at the marriage was "plainly fixed for show." He assigned to the plaintiff a lump sum of Rs. 25,000, in full discharge of all her claims for dower. He ordered money down as likely to prevent future trouble, giving no decree for future monthly payments.

The plaintiff appealed from this decree on the ground that the whole dower ought to have been awarded; that, if not, the sum of Rs. 25,000 was insufficient; and that the Judge ought to have allowed the arrears claimed and future monthly payments of Rs. 150.

The defendant filed objections to the decree, alleging that the Court ought to have found that the dower was invalid, and that by the Mahomedan law no more than 500 drachmas (about Rs. 105) was payable. He also objected to the finding of the Judge as to the effect of the plaintiff's refusal to live with her husband.

The Judicial Commissioner affirmed the decree of the District Judge, but varied it by awarding a future monthly payment of Rs. 150 from the date of the decree.

Mr. *J. D. Mayne*, for the appellant, after referring to the *nikah-nama* of the 3rd August 1871 as of questionable validity to determine the dower, contended that on the facts found, the sum awarded by the Judicial Commissioner was not proportionate to the means of the defendant, and was therefore excessive. The

1893

SULEMAN KADE v. MEHDI BEGUM SURREYA BAHU.

award of the first Court was the more correct of the two. It was questionable whether the law of the dower contemplated, or was applicable to, a monthly allowance; but there were other reasons why the sum of Rs. 25,000, as to which the Courts below had concurred, should not have received the addition made by the Judicial Commissioner. For even if dower was not forfeited by the wife's withdrawal from her husband, the monthly allowance, being a personal gift for maintenance, must be regarded as no longer payable. He referred to the Oudh Laws Act, 1876, section 5, and to Baillie's Digest of Mahomedan Law, Part II, Imamia Law, Chapter V, and to part of the judgment in *Mulka Do Alam Nawab Tajdar Bohoo* v. *Jehan Kadr* (1).

Mr. *R. V. Boyne* and Mr. *A. J. S. Darwood*, for the respondent and cross-appellant, argued that the Judicial Commissioner was right in holding that there was no such ambiguity or uncertainty in the contract as to have invalidated it; and that he was right in adding the monthly allowance to the lump sum awarded by the First Court. The discretion vested in the Court by the Oudh Laws Act, 1876, section 5, applied to the monthly allowance as included in the contract of dower. The separation had no effect to deprive the wife of either her claim to the ready money, or to the allowance fixed in the *nikahnama*, the latter not being distinguishable from the former, but both constituting dower. For the respondent as a cross-appellant, it was insisted that both the monthly allowance and the Rs. 25,000 were insufficient, if due regard were paid, and effect given, to the wife's real requirements and the husband's position His means were quite adequate to the wife's claim, and he should have been ordered to pay the sum which he had admitted to be customary in his family, *viz.*, two lakhs. The arrears also of the wife's allowance should have been added in the decree.

Mr. *J. D. Mayne* replied.

Afterwards, on the 8th July 1893, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiff in this suit is the wife of the defendant, and she sues to obtain the dower which on their marriage he contracted to pay. The defendant has in all the stages

(1) 10 Moo. I. A., 252.

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU.

of the litigation, until the argument at this Bar, contended on several grounds that he is not liable to pay any dower, but those defences have been overruled in the Courts below, and have rightly been abandoned on the argument of this appeal. There is now no question except as regards the amount to be paid by the husband to the wife.

The marriage took place on the 2nd August 1871. On the 3rd two deeds were executed by the defendant. One written in Persian, declares the contract completed. After a florid exordium, relating mainly to the excellence of the married state, it states that the defendant had, in consideration of a marriage settlement and dower of the sum of 10 lakhs of rupees and Rs. 150 *per mensem*, brought within the net of perpetual marriage the plaintiff, whose personal merits it extols in highly extravagant terms. The other deed, written in Urdu, is more business-like. It makes the same statement as to the amount of dower, and adds that the second item, *viz.*, the annuity, is for the lifetime of the wife, and for the purposes of her personal expenses. And the defendant then goes on to mortgage a bond for Rs. 8,500 and his own dwelling-house valued at Rs. 20,000 by way of security for the annuity.

The parties lived together till the year 1886, when the wife withdrew from her husband's society. Legally speaking, her withdrawal has no effect on her claim to dower. Practically it led to a discontinuance of her annuity and to the present suit, in which she asks for a performance of the contract, and for the arrears of her annuity.

It is so common a thing among Mahomedans in this part of the world to put into marriage contracts for dower sums far larger than the husband can pay, or than the wife expects to receive, that Courts of Justice are armed with large powers over that class of contract. By the Oudh Laws Act, 1876, it is enacted:—

"Where the amount of dower stipulated for in any contract of dower by a Mahomedan is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by decree in favour of the plaintiff, or by allowing it, by way of set-off lien or otherwise, to the defendant; but the amount of the dower to be allowed by the Court shall be

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BANU.

reasonable with reference to the means of the husband and the status of the wife."

In this case the lady is of high status, being, as her husband is, a member of the Royal family of Oudh. But with respect to the means of the husband, it was found by the District Judge that they consisted of property worth Rs. 60,000 which was his absolutely, and of an income of Rs. 2,940 *per mensem*, which was his for his life. It further appears that at the date of the marriage he had two married wives, and three temporarily married wives; and he must then have had some children, for in the year 1887 he had four sons, two daughters, and eight grandchildren.

There is some evidence of his having had other property at some time; but it is clear enough that a contract by a man situated as the defendant was, to pay a million of rupees down, besides an annuity of Rs. 1,800 a year for the life of his wife, is a mere piece of bravado, allowed or possibly required by custom, but never intended for actual fulfilment.

In the exercise of the discretion given him by law, and under the above-stated circumstances, the District Judge found that Rs. 25,000 was a reasonable sum to cover all demands by the wife. The plaintiff appealed from his decree, and the defendant lodged objections. Each party took the same grounds before the Judicial Commissioner as before the District Judge.

The Judicial Commissioner found no evidence to show that the means of the husband were any larger than the District Judge had concluded, and he refused to grant the plaintiff any larger sum in actual cash than Rs. 25,000. But he added, "I do not however perceive why the Lower Court has "not granted the appellant the continuance of the monthly "stipend of Rs. 150, which was expressly selected by the defend-"ant as the mode in which he will always pay part of the "plaintiff's dower." And he decided that the monthly allowance of Rs. 150 ought, under all the circumstances of the case, to be also decreed to the plaintiff. From the decree so modified both parties have appealed to Her Majesty in Council.

Their Lordships feel much difficulty in interfering with the exercise of a discretionary jurisdiction such as this.

Nevertheless, when the first Appellate Court has overruled the discretion of the primary Judge, and has altered his decree, an ulterior Court not of appeal can hardly refuse to examine the grounds on which the alteration is made. Now, the Judicial Commissioner states that he could not perceive why the District Judge did not decree payment of the annuity. But the reason is to be found in the judgment of the District Judge, *viz.*, that to give a lump sum is likely to avoid future trouble. That is a reason which strikes their Lordships as having considerable weight. Moreover, it clearly shows that the District Judge was looking at the case as a whole, and was considering what payment it was reasonable to substitute for the entire contract which could not take effect. The Judicial Commissioner also holds in one part of his judgment that the annuity is an integral part of the dower; but when he comes to fix the reasonable amount, he separates the two items; he makes a distinction between that part of the dower which was payable at once because no time was fixed, and that which was payable by monthly instalments; and he thinks that the latter ought to be more specifically executed than the former. It appears to their Lordships that the District Judge took the course indicated by the Statute, in considering whether the dower as a whole was excessive in reference to the means of the husband, and in considering what as a whole was a reasonable amount to be substituted. They are not intimating any general opinion against the award of an annuity in preference to, or in addition to, a sum down. Each case must depend on its own circumstances. In this case, however, they do not find any expression of opinion on the part of the Judicial Commissioner, that, having regard to the defendant's means, the District Judge had awarded too little. He does not address himself in terms to that question, he only states that the defendant had selected an annuity as a mode of paying part of the dower, and that he could not perceive why the Court had not decreed it. Certainly the sum of Rs. 25,000 does not seem to be a small sum for a man to settle who has only Rs. 60,000 in absolute interest, and who had at the time of his marriage, and has now, many family obligations to answer out of his life income. But their Lordships are not in a good position for

1893

SULEMAN KADR v. MEHDI BEGUM SURREYA BAHU.

forming any opinion of their own as to what is a reasonable amount. They prefer to maintain the decree of the District Judge because he seems to have addressed his mind most directly to that which the Oudh Act requires, and his reason seems to have been overlooked by the Judicial Commissioner.

The result is that they will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, to dismiss the plaintiff's appeal to the Judicial Commissioner with costs, and to restore the decree of the District Judge. The plaintiff must pay the costs of these appeals.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for the appellant and cross respondent: Messrs. *Young*, *Jackson*, and *Beard*.

Solicitors for the respondent and cross appellant: Messrs. *Walker* and *Row*.

C. B.

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*P.C.** 1893. *June 27 and 28, and July 15.*

DAKHINA MOHAN ROY (PLAINTIFF) *v.* SARODA MOHAN ROY AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Voluntary payment—Money paid for benefit of another—Payment of revenue by the claimant of an estate while temporarily holding it under a decree in his favour, afterwards reversed—Liability of owner for money so paid for his benefit.

Where a claimant having obtained possession of an estate under a decree in good faith, has paid the revenue and cesses (in default of which payment the estate would have been sold), although the decree may have been reversed afterwards, and he may have been deprived of possession, he nevertheless is entitled to be repaid the amount by his opponent, who benefits by it, provided that he has not realized, or failed through any fault of his own to obtain, enough out of the rents and profits during his possession to cover this expenditure.

The plaintiff had paid revenue and cesses in such a case: *Held*, that on his accounting for mesne profits, and all that he had received, or might have received from the estate, he should recover from the defendants, in whose favour the decree was ultimately made, the difference between his, the plaintiff's, payments and receipts.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.