APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

SAHEBJAN BEWA

v.

ANSARUDDIN.*

1911

March 1.

Mahomedan Law—Dower—Possession—Right of Widow to retain husband's property until dower debt is paid off.

Under the Mahomedan Law, when a widow is in possession of the undistributed property of her deceased husband, such possession having been obtained lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid.

The possession need not necessarily be possession obtained by an agreement with her husband or his heirs.

Bibi Tasliman v. *Bibi Kasiman* (1) and *Amanat-un-nissa* v. *Bashir-un-nissa* (2) dissented from.

SECOND APPEAL by the defendant No. 1, Sahebjan Bewa.

This appeal arose out of an action brought by the plaintiff to recover possession of certain immoveable properties on a declaration of his title thereto. It appeared that one Sharafat died, leaving two widows, defendants Nos. 1 and 2, a son, now dead, by defendant No. 2, and two sons Askaruddin and Gyasuddin, by another wife who had predeceased him. He also left a nephew, the son of his brother, who is the plaintiff in the present suit. Subsequently Askaruddin died.

The plaintiff stated that defendant No. 2 sued for recovery of possession of her 5as., 13gds., 1c., 1kr., share, in the Court of the 2nd Munsif, Manickgunj, but during the pendency of the suit her son Hafizuddin died, leaving the defendant No. 1 and Gyasuddin as heirs: and on the death of Gyasuddin he

* Appeal from Appellate Decree, No. 2449 of 1908, against the decree of Tarak Chandra Das, Subordinate Judge of Dacca, dated Aug. 5, 1908, modifying the decree of Narendra Nath Chakravarti, Munsif of Manickgunj, dated July 31, 1907.

(1) (1910) 12 C. L. J. 584. (2) (1894) I. L. R. 17 All. 77.

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being his sole heir brought this suit for recovery of possession of the share of the properties which Gyasuddin was entitled to.

Defendant No. 1 contended, *inter aliâ*, that the plaintiff was not entitled to recover possession of the property without paying off her dower to the extent of 200 rupees. Defendants Nos. 3, 6, 9 and 21 who appeared and who were usufructuary mortgagees contended that the plaintiff was bound to recognize their mortgages.

The Court of first instance decreed the plaintiff's suit with mesne-profits subject to a mortgage in favour of defendants Nos. 3 and 6, and also to payment of Rs. 141 and odd out of the dower debt due to the defendant No. 1 from her late husband. On appeal by the plaintiff, the Subordinate Judge held that the plaintiff was entitled to recover possession from the widow, without payment of the dower debt, and that the widow might claim her dower by way of set off if the plaintiff should hereafter sue her for recovery of mesne profits.

Against this decision the defendant No. 1 appealed to the High Court.

Babu Mukunda Nath Roy, for the appellant.

Dr. Sarat Chunder Bysack, for the respondent.

Cur. adv. vult.

MOOKERJEE AND TEUNON JJ. This is an appeal on behalf of the first defendant in a suit for recovery of possession of land. The subject matter of the dispute originally belonged to a Mahomedan by name Sarafat, who died about the year 1897. He left two widows, who are the first two defendants in the present suit, a son, now dead, by the second widow, and two sons by another wife who had predeceased him. He also left a nephew, the son of his brother, who is the plaintiff in the present action. After his death his property, after successive devolutions to the details of which reference is not necessary for our present purpose, vested in his son Saiduddin. Upon the death of the latter, the plaintiff sues to

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recover possession of a two-thirds share by right of inheritance. The claim is resisted by the first widow as also by two usufructuary mortgagees, who have derived title from the heirs of the original owner. The first widow resists the claim on the ground that so long as her dower to the extent of two hundred rupees remains unpaid, she is entitled under the Mahomedan Law, to continue in possession. The Court of first instance found that the widow was entitled to the dower-debt, and made a conditional decree in favour of the plaintiff, that upon payment by him of a proportionate share thereof, he would recover possession. As regards the usufructuary mortgagees, the Court held that the plaintiff was bound to redeem them or to wait till the expiry of the term fixed in the mortgage instruments. Against this decree, the plaintiff appealed to the Subordinate Judge, who has affirmed the decree of the Original Court so far as the usufructuary mortgagees are concerned, but has varied it in so far as the widow is concerned. The Subordinate Judge has held that the plaintiff is entitled to recover possession from the widow without payment of the dower-debt, and that the widow might claim her dower by way of set off if the plaintiff should hereafter sue her for recovery of mesne profits. The widow has now appealed to this Court, and on her behalf it has been argued that the decree made by the Subordinate Judge is contrary to well-recognised principles of Mahomedan Law, and that the plaintiff is not entitled to recover possession from her till her dower-debt has been satisfied. In our opinion, this contention is well-founded and must prevail.

It cannot be disputed that under the Mahomedan Law when a widow is in possession of the undistributed property of her deceased husband, such possession having been obtained lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other heirs of her husband to retain such possession until her dower-debt is paid; but she must account to them for the profit received. This position is established by the decisions of the Judicial Committee in the cases of *Ameer-un-nissa* v. *Morad-*

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un-nissa (1) and *Buchun* v. *Hamid Hossein* (2). The same view has been uniformly adopted in this Court in the cases of *Woomatool Fatima* v. *Meerunmunnissa* (3), *Ahmed Hossain* v. *Khadeja* (4), *Bibee Tajein* v. *Syud Wahed Ali* (5), *Bakreedan* v. *Ummatul Fatima* (6), and *Umatul Mehdi* v. *Kulsum* (7). The cases of *Wahidunnissa* v. *Shubrattun* (8) and *Bazayet Hossein* v. *Doolichand* (9), do not militate against this view, as they are authorities merely for the proposition that a widow, though her dower remains unpaid, cannot follow the estate of her husband when it has passed into the hands of *bona fide* purchasers for value without notice of her claim. It has been contended, however, by the learned vakil for the plaintiff-respondent, upon the authority of the decision in *Bibi Tashliman* v. *Bibi Kasiman* (10), that the possession of the widow cannot be maintained as against the heirs, unless it is established that such possession was obtained by agreement with either her husband or his heirs. We are unable to adopt this view as a correct exposition of the law on the subject. The attention of the learned Judges who decided the case of *Bibi Tashliman* v *Bibi Kasiman* (10), was drawn only to the case of *Amanatunnissa* v. *Bashirunnissa* (11); their attention does not appear to have been invited to the later decision in *Muhammad Karimullah* v. *Amani Begam* (12), where the contrary view adopted in *Amani* v. *Karimullah* (13) was affirmed. In our opinion, the effect of the decision in *Amanatunnissa* v. *Bashirunnissa* (11), is to fritter away the rule laid down by their Lordships of the Judicial Committee and we are in agreement with the weighty criticism on that case by Sir Roland Wilson in his valuable treatise on Anglo-Mahomedan Law, 3rd edition, section 162. It is worthy of note that the view

(1) (1855) 6 Moo. I. A. 211.
(2) (1871) 10 B. L. R. 45; 14 Moo. I. A. 377.
(3) (1868) 9 W. R. 318.
(4) (1868) 10 W. R. 369.
(5) (1874) 22 W. R. 118.
(6) (1905) 3 C. L. J. 541.
(7) (1907) I. L. R. 35 Calc. 120.
(8) (1870) 6 B. L. R. 54.
(9) (1878) I. L. R. 4 Calc. 402; L. R. 5 I. A. 211.
(10) (1910) 12 C. L. J. 584.
(11) (1894) I. L. R. 17 All. 77.
(12) (1895) I. L. R. 17 All. 93.
(13) (1894) I. L. R. 16 All. 225.

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taken in the case of *Amanatunnissa* v. *Bashirunnissa* (1), is not in agreement with the earlier decision in *Baluud Khan* v. *Jance* (2), and that the decision in *Miran* v. *Najiban* (3), was disapproved in *Imdad Hossain* v. *Hossaine Bua* (4); consequently the decision in *Amiran* v. *Rahiman* (5), must also be taken to have been disapproved. In this divergence of judicial opinion amongst the learned Judges of the Agra and Allahabad High Courts, we must adhere to what has been recognised as the rule on the subject in this Court. It must further be observed that the limitation suggested would practically nullify the rule, for if a widow has got into possession by an agreement with her husband or his heirs, it is inconcievable how any case could come into Court for recovery of possession of the estate from her hands; in other words, to bring the case within the principle adopted by the Judicial Committee, namely, the possession of the widow to be maintained by a Court of Justice, must be possession lawfully obtained, without force or fraud, it need not necessarily be possession obtained by an agreement with her husband or with his heirs. We may add that the cases of *Mehrun* v. *Kubeerun* (6) and *Ali Muhammad Khan* v. *Azizulla Khan* (7), do not support the view taken in *Amanatunnissa* v. *Bashirunnissa* (1), because in the first of these cases, it does not appear that the widow had possession since her husband's death, and in the second, it was merely decided that the lien for dower claimed by the widow was personal to herself, and did not pass to a purchaser of the estate. The learned vakil for the respondent has, however, suggested that the possession of the widow in this case was not in her character as the widow of the original owner, entitled to realise her dower-debt from the income of the property, but was rather possession as heir or guardian of her infant step sons. This suggestion is ingenious, and does not appear to have been

(1) (1894) I. L. R. 17 All. 77.
(2) (1870) 2 All. H. C. R. 319.
(3) (1867) 2 Agra H. C. R. 335.
(4) (1869) 2 All. H. C. R. 327.
(5) (1867) 2 Agra H. C. R. 362.
(6) (1870) 13 W. R. 49; 6 B. L. R. 60.
(7) (1883) I. L. R. 6 All. 50.

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made at any stage in the Court below; but there is no substance in it, because, so far as we are able to gather from the materials on the record, the widow came into possession upon the death of her husband, and there is no reason why her possession should not be attributed to her character as widow of the original owner. In any event, there is nothing in her conduct to shew that her possession was inconsistent with the character now claimed by her. The real controversy in the Original Court was whether she was entitled to get Rs. 200 or 10 rupees on account of dower, while the argument addressed to the Subordinate Judge was that upon no principle recognised by Mahomedan Law, could she claim to retain possession as against the heirs. The suggestion, therefore, put forward for the first time in this Court, does not carry any weight. The plaintiff claims not as the direct heir of the original owner but as the heir of persons who were heirs of the original owner and acquiesced in the possession of the estate by the widow. In our opinion, the principle laid down in the two decisions of the Judicial Committee to which we have referred is applicable to the present case, and the appellant is entitled to continue in possession till her dower-debt has been satisfied.

The only other question which requires consideration is as to the form of the decree. The Court of first instance, as we have stated, made a conditional decree for possession in favour of the plaintiff upon payment of a proportionate share of the dower-debt. The widow was satisfied with this decree and did not appeal against it. The plaintiff appealed and took up the extreme position with success that he was entitled to an unconditional decree for possession. That decree, the widow has now convinced us, cannot be maintained, and, therefore, we are bound to consider what decree should be made: *Parichat* v. *Zalim Singh* (1). At one stage of the arguments we were inclined to adopt the view that an account ought to be taken of the profits received by the defend-

(1) (1877) I. L. R. 3 Calc. 214.

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ant from the share sought to be recovered by the plaintiff, that against such profits should be set off the interest upon the dower-debt and that then a decree in favour of the plaintiff should be made subject to the payment of the balance, if any, that may be found due to the widow. The suit, however, has not been so framed as it ought to have been according to the observations of Sir Barnes Peacock, C.J., in *Ahmed Hossein* v. *Khadeja* (1). The property is of small value; the plaintiff himself values it at Rs. 225. Consequently it is not an unreasonable assumption to make, as was made by Sir Barnes Peacock in the case of *Woomatool Fatima Begum* v. *Meeranmaunessa Khanum* (2), that the profits received by the widow may be set off against the interest on the dower-debt: in other words, it may reasonably be assumed for the purposes of this litigation, that if the widow had received her dower-debt immediately upon the death of her husband, she might have invested it in property which would have brought her approximately the same amount of profit that she has actually realised by possession of the property in dispute. In this view, she would be entitled to remain in possession till the principal amount of her dower-debt was paid to her, and this is in reality the decree which was made by the Court of first instance; that decree in this view is, on the whole, just and ought to be affirmed.

The result, therefore, is that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored. The appellant will have her costs from the plaintiff both here and in the Court of Appeal below.

Appeal allowed.

S. C. G.

(1) (1868) 10 W. R. 368.

(2) (1868) 9 W. R. 318.