Privy Council Appeal No. 3 of 1913.

Allahabad Appeals Nos. 1 and 2 of 1911.

Musammat Hamira Bibi, since deceased (now represented by Sheikh Ghulam Husain and others) - - - - - - - - - - *Appellants.*

v.

Musammat Zubaida Bibi, since deceased, and others - - - - - - - - - - - *Respondents,*

Musammat Amina Bibi and others - - - *Appellants,*

v.

Musammat Zubaida Bibi, since deceased, and others - - - - - - - - - - - *Respondents,*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST AUGUST, 1916.

Present at the Hearing:

LORD ATKINSON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PARKER OF WADDINGTON.]

A short statement of the facts which have given rise to this litigation will explain the point for determination involved in these consolidated appeals.

One Shaikh Inayat Ullah, a Mahommedam inhabitant of the district of Gorakhpur, in the United Provinces of India, died in March 1892, leaving him surviving a widow and daughter, named respectively Zubaida Bibi and Najm-un-nisa; a sister, Hamira Bibi; and two brothers, Khadim Hossain and Ihsan Ullah, all of whom became entitled under the Sunni

law, to which Inayat Ullah was subject, to certain specific shares in his estate. Besides the widow's share of one-eighth, Zubaida was entited to her unpaid dower. This has been found in a previous proceeding to have amounted to the large sum of one lakh of rupees. The other heirs of Inayat Ullah not being in a position to pay this sum without apparently alienating at least a considerable part of the estate, allowed the widow to take or remain in possession of the whole to satisfy her claim out of the rents and issues of the landed property. It is not clear whether the widow was let into possession in the lifetime of Inayat Ullah or after his death. But it is not disputed that since 1892 Zubaida has been in possession.

In 1902, the other heirs of Inayat Ullah brought a suit against her to recover possession of their shares. Their action was dismissed on the ground that it was misconceived inasmuch as it was not a suit for the purpose of taking accounts, and thus ascertaining what portion of the dower-debt was then unsatisfied. The present suits were instituted with that object on the 15th March, 1906, in the Court of the Subordinate Judge of Gorakhpur, one by Hamira Bibi and the other by the widow and sons of Khadim Hossain who had died either before or after the suit of 1902. The reliefs prayed for in both actions were the same, viz. (*a*) for the taking of accounts; (*b*) for decree to plaintiffs of their respective shares in case the dower-debt was found to be discharged; and (c) for an award to the plaintiffs of any sum found to have been received by her in excess of her dower. Zubaida in her defence among other pleas set up a claim for interest on her unpaid dower; she alleged that the income of the property was less than the interest she claimed; that, consequently, the debt was still unsatisfied and that the plaintiffs were accordingly not entitled to recover possession of their shares in Inayat Ullah's estate.

The Subordinate Judge, who tried the case in the first instance, considered the defendant was entitled to interest at 6 per cent. per annum on her dower; that the interest thus calculated exceeded the annual net income from the estate, and that, therefore, it was clear no portion of the debt was discharged. In the result, he dismissed both suits. On appeal to the High Court at Allahabad, the learned Judges took the same view as to the right of the widow, Zubaida, to receive interest; but they varied the decrees of the Court of first instance with regard to the total dismissal of the suits; they made a declaration that the plaintiffs should recover possession of their respective shares in the estate provided they paid to the defendant their quota of the dower-debt proportionate to such shares, which quota the learned Judges specified.

From these decrees of the Allahabad High Court the plaintiffs have appealed to His Majesty in Council, and the sole question for determination is whether the defendant Zubaida is entitled to any interest or compensation in respect of her dower unpaid at the time of Inayat Ullah's death.

The case has been elaborately argued on both sides and a large number of authorities have been cited. On behalf of the plaintiffs it has been argued with considerable force that the Mussulman law prohibits usury and usurious dealings between Moslems; that dower is a liability springing under the provisions of that law from the status of marriage; and that, therefore, all incidents and rights connected therewith must be subject to the Mussulman law. It was further contended that the Mahommedan widow's lien on the husband's estate for unpaid dower is the only creditor's lien which has been recognised and maintained intact by British Courts of Justice, and that it ought not to be extended beyond what the Mussulman law itself permits by allowing interest when it is not contracted for. On the other side it is argued that the Mahommedan law prohibiting usury has been repealed in India by Act XXVIII of 1855, and that consequently there is no bar to Mussulmans receiving or paying interest, and that the practice of receiving interest is common among them both in India and other countries. It is further urged that, in any event, the widow is entitled to some interest by way of damages for non-payment of dower at the due time.

In the view their Lordships take of the case it is unnecessary in their opinion to examine much of the argument addressed to the Board or to discuss the numerous cases cited at the Bar.

There is a conflict of judicial opinion in India on the question whether the Mussulman rule relating to usury was or was not abrogated by Act XXVIII of 1855. Sir Barnes Peacock, C.J., sitting with Mr. Justice Macpherson held, in the case of *Ram Lal Mookarjee* v. *Haran Chandra Dhar** that it was not. "Hindu law," he said, "did certainly as between Hindus restrict the rate of interest to be charged; and I do not think that Act XXVIII of 1855 was ever intended to repeal the Hindu or Mahommedan law as to interest." Then after reciting the preamble of the Act, he added as follows: "That Act" (meaning Act XXVIII of 1855) "did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury." In a later case,† Mr. Justice Phear sitting with Markby, J., took a different view. In the ordinary course, on this difference of opinion arising between two Division Benches of the same Court, the case should have been referred to a Full Bench. But Phear, J., did not take that course and decided the point differently, holding that the Act of 1855 had abrogated the Mussulman law prohibiting usury. Their Lordships do not think it necessary to decide on the present occasion which view is right, nor do they think that Act XXXII of 1839 has any application.

Dower is an essential incident under the Mussulman law to

* 3 Beng. L.R., O.C., p. 130.

† Mia Khan *v.* Manu Khan, 5 Beng. L.R. 500.

the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called *prompt*, payable before the wife can be called upon to enter the conjugal domicil; the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board.

When a widow is allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband. Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. This appears to be consistent with the chapter on "The Duties (*Âdâb*) of the Kazi" in the principal works on Mussulman law, which clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases.

In the case of *Womatul Fatima Begum* v. *Meerunnisa Khanum*,* the plaintiff, who had held possession of her husband's estate under a lien for dower, was dispossessed by a decree of the Court. She then sued one of the heirs for a proportionate

* 9 "Sutherland's Weekly Reporter," p. 318.

amount of her dower. Among other questions raised, the defendant claimed that the plaintiff must account for mesne profits during the period she held possession. Sir Barnes Peacock, sitting with Jackson and Macpherson, JJ., after remarking that the "plaintiff does not ask to receive interest upon her dower, but she asks that she may not be compelled to account for the profits of the land during the term she held it in lieu of her dower," discussed various considerations which led him to think that it would be inequitable to make her account for the profits, except on the terms of allowing her reasonable interest on her dower debt. The annual rents and profits being less than such reasonable interest, the claim for mesne profits was disallowed. Their Lordships think that this was in accordance both with sound sense and with law.

In the present case the Courts in India have allowed the defendant, on taking her accounts, 6 per cent. per annum, by way of equitable compensation.

It was not contended that, if interest by way of compensation were allowed at all, this rate was too high under the circumstances. The contention was that no interest by way of compensation could be allowed at all.

Their Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

MUSAMMAT HAMIRA BIBI

v.

MUSAMMAT ZUBAIDA BIBI.

MUSAMMAT AMINA BIBI

v.

MUSAMMAT ZUBAIDA BIBI.

DELIVERED BY
LORD PARKER OF WADDINGTON.

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