Privy Council Appeal No. 90 *of* 1935

Allahabad Appeal No. 4 *of* 1934

Syed Sabir Husain and another - - - - *Appellants*

v.

S. Farzand Hasan and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1937.

Present at the Hearing:

LORD MACMILLAN

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

This appeal is brought by the plaintiffs from a decree of the High Court at Allahabad dated 31st October, 1933, affirming a decree of the Subordinate Judge at Moradabad dated 22nd January, 1930. The appellants are the father and mother of one Musammat Ejaz Fatma, who died on the 19th March, 1926, aged about 21 years. On 17th August, 1914, she had been married at the age of nine to the infant son of one Sibti Hasan. The husband's name was Farzand Hasan (defendant No. 1). At the time of the marriage he was only nine or ten years old. The amount of dower agreed upon at the time of the marriage was Rs.25,000: it is evidenced by the entry in the register of Ali Husain, the qasi who solemnised the marriage, and is not in dispute. Husband and wife lived together from 1921 till the wife's death in 1926. The appellants by their suit, which was brought on the 16th March, 1929, after the death of Sibti Hasan, claimed as heirs of Ejaz Fatma, their daughter, entitled between them to a one-third share of her estate. They impleaded her husband, Farzand Hasan, his mother, brother and sisters, and claimed from them as the heirs of Sibti Hasan, deceased, a one-third share (Rs.8,333-5-4) of the dower due to Ejaz Fatma, alleging that "this alliance was made at the desire of Saiyed Sibti Hasan and he had himself taken the personal liability of payment of the dower debt."

At the trial the appellants sought to prove that Sibti Hasan had at the time of the marriage made an express promise to become liable for the dower as a surety for his

son. This was disbelieved by the trial Judge, whose finding on the point was not impugned in the High Court. The respondents, on the other hand, denied that Sibti Hasan had been present at the marriage or had acted therein as the guardian of his son. This denial has been disbelieved by both Courts in India, and before the Board it is not in dispute that the marriage was entered into by authority of Sibti Hasan as father of the infant bridegroom and of the appellant Sabir Hasan as father of the infant bride. These two men indeed were relatives and on the same day the appellants' son was married to Sibti Hasan's daughter (defendant No. 3).

Now the parties are Shias; and before the Courts in India and before the Board the appellants have contended that, according to the Mahomedan law applicable to Shias, Sibti Hasan became liable to pay the dower of Ejaz Fatma by reason of the fact that his infant son Farzand Hasan had no means of his own at the time Sibti Hasan married him to Ejaz Fatma. For this proposition of law the appellants vouch the authority of the *Suraya* (*Shuraya-ool-Islam*). In Book I which treats of *Nikah* or Marriage the fifth chapter treats of *Mühr* or Dower. Of this chapter the third section, headed "the laws of dower", deals with 15 "cases" giving a statement of the law applicable to each. This is followed by five further cases described as "branches from the preceding" and of these the fourth is as follows:—

Fourth:—

> "If one should contract his infant son in marriage, and the child has independent means of his own, he is liable for the dower. If the child is poor, the obligation rests entirely on the father, and in the event of his death, must be discharged out of the whole of his property, whether the child should arrive at maturity and become wealthy, or die before it. If, therefore, the father should have paid the dower, and the youth should come to maturity and then divorce his wife before coition, the son and not the father has a right to reclaim half the dower, the payment by the father being considered in the light of the law, as a gift to the son."

The learned Judges of the High Court (Niamat Ullah and Collister JJ.) state that the *Sharah Loma* gives the same rules, and that they have not been able to find any book of authority on Shia law which conflicts with these authorities upon the point. On this footing it would seem to follow from the well known principle established by the Board's decision in *Deedar Hossein* v. *Zuhoor-oon-Nirsa*, (1841) 2 M.I.A. 441, 447, that the doctrine of the *Suraya* should be applied to the present case. Both Courts in India have, however, refused to apply it. The learned trial Judge considered that it was not consonant with justice, equity and good conscience. The High Court rightly noticed that if it be deemed to be a rule regarding "marriage" or "any religious usage or institution" then section 37 of the Bengal, Agra and Assam Civil Courts Act (XII of 1887) applies the Mahomedan law as such. But they did not think that the phrase "any religious usage or institution" covered

the present case nor that the rule relied upon was a convenient or equitable rule, particularly in view of the practice prevalent in the province to stipulate for excessive sums as dower. They observed:—

> " The only contention which, in our opinion, can be put forward is that the question arising in this case is one ' regarding marriage '; but it seems to us that the rule laid down in Shuraya-ul-Islam is no more than a canon of interpretation. The author is of opinion that where a guardian for marriage agrees, on behalf of his minor ward, to pay a certain amount of dower, there is an implication, that, in case the minor has no means to pay, the guardian would be deemed to be a surety for due payment. The Sunni doctors, on the other hand, do not construe such an agreement as implying a personal undertaking. The rule may also be considered as a rule of evidence in so far that a personal undertaking by the guardian to pay dower, in case the minor is found to have no means of paying it, should be presumed. In any view of the matter, the vicarious liability of the father arises not from any substantive rule of Shia law relating to marriage but is the result of deduction from given circumstances, and as such British Indian Courts are to be guided not by Muhammadan law but by rules of construction generally applicable or by the Indian Evidence Act. We entertain no doubt that a Shia father entering into any other contract, as guardian of his minor son, involving a pecuniary obligation cannot be saddled with personal liability by British Indian Courts. The agreement to pay dower in the same circumstances cannot be placed on a different footing. The liability, if it exists, arises from a civil contract and should be determined by the law applicable to contracts made by an authorised guardian.
>
> " There is no rule of general law in force in this province which justifies an inference that a guardian, entering into a contract on behalf of his minor son, renders himself liable as surety in the absence of an express contract to that effect nor is there anything in the Indian Evidence Act which justifies a presumption from the circumstances of such a case that a guardian makes himself personally liable."

This decision of the High Court does not proceed upon the view that the question concerning dower in the present case is not one " regarding marriage "; nor do they in the end dispute that the substantive law applicable to questions of dower under the Act of 1887 is the Mahomedan law of the school or sect to which the parties belong. This has, however, been disputed before the Board and their Lordships think it necessary to examine the matter with some care.

In the provinces of Oudh, the Punjab, the Central Provinces, the North-West Frontier Province, and Ajmere Merwara, " dower " is one of the topics expressly mentioned by the Act which regulates the Civil Courts as subject-matters to which, in cases where the parties are Mahomedans, the Mahomedan law is to be applied as the rule of decision. Whether the position is in any way different in the provinces of Bengal, Bihar, Agra, Assam, under the Act of 1887, or in Madras under the similar language of Act III of 1873, is the question at issue. The phrase used in these Acts is " any question regarding succession, inheritance, marriage or caste or any religious usage or institution." The topics of divorce, dower, betrothal, family relations, are not

particularised as in the enactments of other provinces, but in their Lordships' view this does not import an intention that the social and family life of Muslims should be differently regarded from province to province; or that in Bengal, Agra or Madras Muslims are not to be governed in such matters by their own personal law. The terms of section 37 of the Act of 1887 merely repeat those of section 24 of Act VI of 1871, which in turn reproduce those of section 15 of Bengal Regulation IV of 1793, to which the Company's Courts had always given a wide interpretation and to which indeed they had in practice added [*Zohoroodeen* v. *Baharoollah Sircar* [1864] W.R. 185]. This Board in *Moonshee Busloor Ruheem* v. *Shums-oon-nissa Begum* [1867] 11 M.I.A. 551 and the Full Bench of the Allahabad High Court in *Abdul Kadir* v. *Salima* [1886] I.L.R. 8 A. 146, have in no uncertain terms accepted these enactments as securing to the Mahomedan community the application of their own law to their domestic relations. The right of the wife to her dower is a fundamental feature of the marriage contract: it has a pivotal place in the scheme of the domestic relations affecting the mutual rights of the spouses at more than one point. "The marriage contract is easily dissoluble and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the lawgiver intended to restrain by rendering the rules as to payments of dower stringent upon the husband" (per Mahmood J. in *Abdul Kadir* v. *Salima supra* at 158). The period which has elapsed since the Regulation of 1793 and the area to which its language has been applied are too great to permit of much doubt remaining as to the substantive law of dower among Mahomedans in British India. A review of the cases upon dower decided under the Act of 1887 or its predecessors shows that while by Mahomedan law marriage itself is viewed as a civil contract and "the agreement to pay a certain amount of dower is a part of the contract of marriage" [*Qasim Husain Beg* v. *Kaniz Sakina* [1932] I L.R. 54 A. 806, 809] the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient of themselves to account for the main features of the law of dower. A summary of the results of many decisions was given by Lord Parker of Waddington when delivering the judgment of the Board in *Hamira Bibi* v. *Zubaida Bibi* [[1910] I.L.R. 33 A. 182 [1916] 43 I.A. 294 at 300]—an appeal from a Full Bench decision of the High Court at Allahabad:—

> "Dower is an essential incident under the Mussulman law to 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. . . . But the dower ranks as a debt,

> and the wife is entitled, along with the 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."

This passage illustrates how Mahomedan texts and the principles of Mahomedan law have been applied to determine every facet of the law of dower among Mahomedans—whether dower is payable apart from express agreement; what principles determine its amount if unspecified; whether it can be agreed or added to after marriage; whether in whole or in part it is to be deemed to be "prompt" or "deferred"; whether prompt dower is payable on demand or otherwise; whether non-payment of prompt dower is a defence to a husband's suit for conjugal rights before consummation; or after consummation; whether the promise of an excessive sum as dower can be enforced; whether the wife is a mere unsecured creditor for dower; whether a widow having obtained possession of her husband's estate in lieu of dower has a right to retain possession until the debt is satisfied. On all these matters, as is well known, the Courts will apply the Mahomedan law in Bengal, Bihar, Agra, and Madras, as well as in the other provinces. Nor is it reasonable to suppose that any other law could be applied to determine whether dower can be remitted by the wife's father; or by the wife herself; what is the effect upon the wife's right to dower of her exercising her "option of puberty"; of her being divorced before consummation; of her husband dying before consummation. In *Muhammad Siddiq* v. *Shahab-ud-din* [1927] I.L.R. 49 A. 557, the parties were Sunnis and the High Court of Allahabad were not satisfied that the father became liable by the Hanafi law as a surety for his son by reason of his arranging the marriage. But their Lordships do not gather that the Division Bench in that case doubted that the matter fell to be decided by the appropriate Mahomedan law, and in their Lordships' opinion there is no room for doubt upon the point.

Their Lordships desire to advert particularly to the circumstances of the marriage contract in the present case. Although the Indian Majority Act (IX of 1875) does not affect the capacity of any person to act in the matter of marriage or dower (section 2) the husband in the present case was by his own personal law a minor at the time of his marriage. He was married by his father in the exercise of a father's right so to do (the right of *jabr*). What law, save the Mahomedan law, makes any contract to pay dower binding upon the minor? In *Waghela Rasanji* v. *Masludin*

[1887] 14 I.A. 89 at 96, Lord Hobhouse pointed out that according to the general law of India there is no rule which gives a guardian power to bind his infant ward by a personal covenant. The father's power as natural guardian to do so in respect of dower is the creature of the Mahomedan law of marriage, and the learned Judges of the High Court invert the true position when they proceed upon the view that there is no rule of *general* law which makes a guardian liable as surety when he enters into a contract on behalf of his minor son. If the general law is to control the matter the question will not arise. It is difficult to see why this particular doctrine of the Mahomedan law should be required to conform to a particular feature of the general law or should be interpreted in the light of it.

It remains, therefore, to consider the distinction drawn by the learned Judges in the present case between " a substantive rule of the Shia law relating to marriage " and what is variously called a " canon of interpretation," a " rule of construction " and a " rule of evidence." Even where Mahomedan law applies to the subject matter, the Courts in British India are governed by their own methods and procedure and do not apply those rules of the Mahomedan law which Mahmood J. in the case of *Jafri Begum* v. *Amir Muhammad* [1885] I.L.R. 7, A. 822, 841, described as " provisions which go only to the remedy, *ad litis ordinationem,* being matters purely of procedure as to array of parties, production of evidence, *res judicata,* and review of judgment, etc."

Their Lordships cannot agree, however, that the passage from the *Suraya* upon which the appellants rely expresses anything less than a substantive rule of law or that it can be described as a canon of interpretation or construction or a rule of evidence. The passage itself and its context are alike against this suggestion. To a doctrine which enlarges the right of the wife or improves her security in respect of dower an important purpose must be attributed; and in their Lordships' view it would only mutilate the substantive law laid down by the *Suraya* if its rule as to the liability of the husband's father were to be ignored.

The learned Judges of the High Court interpret the rule as follows:—

> " According to the rule laid down in *Shuraya* the father makes himself a surety for the due payment of dower in case his minor son has no means of paying it. The underlying principle is that the son's inability to pay must have been known to the father and if in spite of such knowledge he agreed on behalf of his indigent son to pay what was beyond the latter's means he should be deemed to have guaranteed the payment of the stipulated dower."

Their Lordships are not called upon in the present case to say whether this interpretation of the rule is in all respects correct. The matter was not fully argued at the bar, and no materials to illuminate the meaning of the text have been laid before the Board. Their Lordships are only prepared

to hold that the appellants should recover against the heirs of Sibti Hasan on the footing that the decree of the trial Judge against Farzand Hasan is set aside. No point was taken in the Courts in India or at the hearing of this appeal upon the maintenance deed which Sibti Hasan executed on 15th August, 1914, or on the omission of the plaintiffs to implead the other heirs of Ejaz Fatma. In their Lordships' view the proper form of decree is against each of the heirs of Sibti Hasan for that proportion of the appellants' joint claim which corresponds to the share of each heir in the estate of Sibti Hasan. The decree will only be enforceable against each heir to the extent of assets come to his or her hands in accordance with section 52 of the Civil Procedure Code. As materials for ascertaining the share of each defendant are not before their Lordships the exact terms of the decree must be framed by the High Court on receipt of His Majesty's order as to this appeal, unless the terms are settled by agreement at an earlier stage. Their Lordships do not consider that in this case the appellants have shown any right to an order for interest for the period prior to decree; and they find it unnecessary to consider whether in view of the Board's decision in *Hamira Bibi* v. *Zubaida Bibi* (*supra*) interest could in any circumstances be awarded in such a case as the present where the wife was never in possession of her husband's property in lien of dower. The ultimate decree, however, will carry interest at 6 per centum from the date of the Order in Council as to this appeal.

Their Lordships' conclusion is that this appeal should be allowed, that the decrees of the Courts in India should be set aside, and that in lieu thereof there should be a decree in favour of the appellants against each defendant, payable out of the assets of Sibti Hasan, come to the hands of such defendant for such fraction of Rs.8,333-5-4 as corresponds to the share of such defendant in the estate of Sibti Hasan. The defendants must pay the appellants' costs throughout. Interest on the total sum decreed will run from the date of the Order in Council at 6 per centum per annum. Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

SYED SABIR HUSAIN AND ANOTHER

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