

(1950) 08 BOM CK 0007
In the Bombay High Court
Case No : Second Appeal No. 1238 of 1947

Mirvahedali Kadumiya and Others	Vs	APPELLANT
Rashidbeg Kadumiya		RESPONDENT

Date of Decision : 24-08-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 1951 Bom 22 : (1950) 52 BOMLR 884 : (1951) ILR (Bom) 169

Hon'ble Judges : Chagla, C.J.;Gajendragadkar, J

Bench : Division Bench

Advocate : K.N. Dharap and M.W. Pradhan, for the Appellant; S.A. Desai, B.K. Amin, S.A. Kher for Respondent No. 1 and B.G. Thakore, for Respondent 2, for the Respondent

Final Decision : Allowed

Judgement

Chagla, C.J.—The question that arises for our determination in this second appeal is the right of a Muslim wife to dower. The suit out of which this appeal arises was filed for the administration of the estate of one Inayat who died in 1980 leaving a widow Papabi and four daughters. Inayat had a brother living at the time of his death by the name of Kadumiya, and the parties arrayed on the two sides of the record are Inayat's children and the children of Kadumiya who also claim an interest in the estate of their uncle, and the question that we have to decide is whether the children of Inayat as the heirs of their mother Papabi who died in 1935 are entitled to retain certain properties till the dower that was due to their mother has been paid. It has been found by both the Courts that on the death of Inayat, Papabi went into possession of certain properties belonging to her husband. In this appeal we are only concerned with the properties mentioned in Schedules II and v which the heirs of Papabi claim to regain till the dower due to their mother was paid. It has also been found as a fact by both the Courts that dower in the sum of 40,000 Ashrufes which amount to Rs. 6,40,000 was fixed at the time of the marriage and that dower remained unpaid. A claim

has also been made by the heirs of Papabi in respect of this dower. On these admitted facts the question arises whether the claim made by the heirs of Papabi is justified according to Mahomedan law. 2. The right of a Muslim wife or widow to retain property has been compared to a creditor's lien, and as I shall presently point out the authorities lay down that the right of the wife to retain property arises provided the following conditions are satisfied : She must have entered into possession of the property lawfully and without force or fraud. There must be a debt due to her in respect of her dower and she should make a claim in respect of that dower. If these conditions are satisfied, then the wife is entitled to retain possession of the property till the debt is discharged. It is further clearly established that the debt in respect of dower is enforceable not only by the wife, but also her heirs. It is further established that the right of possession is a heritable right and not only the wife is entitled to retain possession, but also her heirs. Now, the position was considered by the Privy Council as early as *Mt. Beebee Bachun v. Sheikh Hamid Hossein* 14 M. I. A. 377 : 10 E. L. R. 45 and their Lordships held that a Mahomedan widow had a lien as a creditor on the estate of her husband for her deferred dower and was entitled to retain possession until her dower was satisfied. And their Lordships say this (p. 884):

"..... the Appellant (i.e. the widow), having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion, that she is entitled to retain that possession until her dower is satisfied, and the respondents cannot recover the possession of their shares unless that satisfaction has taken place."

2. Then their Lordships go on to state that it was not necessary to decide whether the right of the widow in possession was a lien in the strict sense of the term. Then they added (p. 884) :

"Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received."

Now, in the case before us the trial Court held in favour of the claim of the heirs of Papabi, The learned appellate Judge has taken a different view, and the only reason why he has taken that view is that according to him Papabi did not obtain possession of the property in lieu of her dower. According to the learned. Judge it is not sufficient that the widow should have been in possession lawfully and without force or fraud and that a debt for dower was due to her; but what was further necessary was that the widow should have entered possession upon a claim for her dower ; that the character of her possession must be that of a creditor and no other character. In our opinion this further limitation sought to be placed upon the right of the widow is not justified by the authorities. Reliance is placed on the observation of the Privy Council to which I have just referred and it is suggested that the Privy Council qualifies the possession of the widow by

stating ; ""under a claim to hold it as heir and for her dower". It is contended that the Privy Council made it clear that it is only when the widow obtains possession under a claim for her dower that her right to retain the property arises. In our opinion, that is not the correct interpretation of the passage in the judgment of their Lordships. What their Lordships are emphasising is the obtaining of actual and lawful possession. "Under a claim" does not qualify "possession", but it qualifies the phrase that follows upon those words, namely "to hold them as heir and for her dower". Therefore, the claim is not in respect of the possession originally obtained by the widow, but the claim is with regard to the right to hold the property for her dower,

3. There is another decision of the Privy Council on which also reliance has been placed.

That is *Hamira Bibi v. Zubaida Bibi* 43 I. A. 294 : A. I. R. 1916 P. C. 46. Their Lordships say this (p. 301) :

"..... 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."

Here again emphasis is placed on the expression "to satisfy her claim", but it is clear that their Lordships were by this decision in no way altering the law as stated by them in *Mt. Beebee's case* 14 M. I. A. 377 : 10 B L. R. 45 . In this passage their Lordships are emphasising the two conditions, namely the entering into possession lawfully and the fact that the widow has a claim for dower which she wants to be satisfied. Now, this decision of the Privy Council led to certain conflict of authorities in the different High Courts in India; but the conflict turned on this narrow question as to whether by this decision of their Lordships, their Lordships intended that the consent, express or implied, of the husband or this heirs was necessary before the possession of the widow could be considered lawful. The Calcutta High Court in *Sahur Bibi v. Ismail Shaikh* 61 Cal. 124 : A. I. R. 1924 Cal. 308 decided that such consent was necessary. A Full Bench of the Madras High Court in *Beeju Bee v. Moorthuya Saheb* 43 Mad. 214 : A. I. R. 1920 Mad. 666 took the contrary view. The Allahabad High Court also took the same view as Madras in *Zamin Ali and Another Vs. Mt. Azizunnissa and Others* and our High Court in *Hasnumiya Dadamiya Vs. Halimunnisa Hafizulla*, took the same view as Madras and Allahabad. But it should be noticed that it was never suggested that apart from the question of consent there was any other limitation on the right of the widow to retain possession of the property for her dower. The learned appellate Judge, with respect to him, has suggested another and a different limitation, and that limitation is that the character of her original possession should be such as must be referable to her claim as a creditor. We

may point out that in *Har Bilas Vs. Dalla and Another*, Mukerji J. Acting Chief Justice, and Bennet J. in their judgment at p. 144 point out that it was not shown that the defendants took possession in lieu of their dower debt, but it was shown that they were actually in possession and that the dower debt was still due to them. Therefore, according to these learned Judges what was material and relevant was not, in what character the widows took possession of the property, but the fact that they were actually in possession and the dower debt was still due to them. Therefore, in our opinion, if it is found that a widow is in possession of the property of her husband, if it is further found that a dower debt is still due to her and she is still claiming that dower debt, then her right to retain the property exists and it is immaterial in what character she came into possession of the property provided she came into possession lawfully and without force or fraud.

4. In this case the learned Judge has taken the view that the case of the heirs of Papabi was that their mother had come into possession of the property under an oral gift by her husband which she alleged and according to the learned Judge, as Papabi came into possession of the property under a deed of gift she could not have taken possession of the property in right of her claim for dower. But whatever the character of her possession was, as soon as she or her heirs put forward the claim for dower the possession become the possession of a creditor of the estate and the creditor had the right to retain the property till that debt was discharged.

5. Mr. Desai has attempted to argue that Papabi's possession was not exclusive possession but joint, possession with other heirs. Now, whether she was in exclusive possession or in joint possession is a question of fact and both the Courts have proceeded on the assumption that Papabi went into possession of the property after her husband's death, that her possession was exclusive, that after her death her heirs went into possession. It has nowhere been suggested that her possession was joint with any other heirs of her husband. We therefore cannot permit Mr. Desai to raise that contention in second appeal.

6. The result is that in our opinion the learned trial Judge was right in the conclusion he came to with regard to the properties mentioned in Schedules II and v. The appeal will therefore be allowed, the decree of the lower appellate Court set aside and that of the first Court restored. Mr. Dharap has been very fair and he has not pressed for the costs of this appeal. There will be no order as to costs of this appeal. The order of costs of the lower appellate Court will stand.