
(1910) 08 AHC CK 0010
In the Allahabad High Court

Musammat Hamira Bibi

APPELLANT

Vs

Musammat Zubaida Bibi and Others

RESPONDENT

Date of Decision : 11-08-1910

Acts Referred:

Citation : 7 Ind. Cas. 497

Hon'ble Judges : John Stanley, C.J;Karamat Husain, J;Banerji, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Karamat Husain, J.—The property in suit belonged to one Inayat Ullah, who died on the 10th of March 1892. Zubaida Bibi is his widow. Her dower, as found by this Court, (see 43, appellant's evidence) was one lakh of rupees and she was put into possession of the estate by her husband in lieu of her dower.

2 .The suit, out of which this appeal has arisen, was brought by the plaintiff-appellant for the recovery of her share (1 anna 2-2/5 pies out of 16 annas) in the estate in the possession of Zubaida Bibi on the allegation that Zubaida Bibi had been in possession of the said estate for more than 14 (fourteen) years, that her dower-debt of one lakh of rupees had been satisfied out of its usufruct, that she had realized a sum of Rs. 12,240-12-5 over and above her dower and that the plaintiff was entitled to Rs. 918-2-0 out of the excess. The plaintiff expressed her willingness to pay a share of the dower-debt proportionate to her share in the estate in case it was found that the dower-debt was still due to Zubaida Bibi.

3. The pleas raised in defence by Zubaida Bibi, which we have to consider in the appeal, were that she was entitled to interest at the rate of 8 per cent, per mensem on the entire dower debt amounting to one lakh of rupees, and that the plaintiff was not entitled to recover her share of the estate by paying off a proportionate share of the dower debt, but that she must pay the entire dower debt.

4. The Court below came to the conclusion that Zubaida Bibi was entitled to

interest at the rate of 6 per cent, per mensem on the whole dower debt, and that the plaintiff could not recover her share in the estate without paying it. On the above findings, the Court below dismissed the plaintiff's suit. That Court, in its judgment dated the 15th of September 1906, observed:

As the plaintiffs do not offer in terms to pay the whole dower debt due to defendant No. 1 (Zubaida Bibi) and they are not likely to pay a lakh of rupees to recover 4 annas of Inayat Ullah's property, I think the proper order to pass in the case would be to dismiss the suit.

5. Musammat Hamira Bibi appealed to this Court, and a Bench of this Court in view of the conflict of the authorities in this Court upon the right of the widow of a Muhammadan to recover her dower together with interest referred the case to the learned Chief Justice in order that he might appoint a larger Bench. The case by the order of the learned Chief Justice came on for hearing before a Bench of three Judges.

6. Two points only were argued before us. The first is that a Mahomedan widow in the absence of a contract to the contrary has no right to claim interest on her dower. The second is that an heir of her husband may recover his share in the estate by paying a share of the dower proportionate to the share claimed.

7. In support of the first point, it is urged that the parties to the case are Hanafi Mahommedans, that the question whether the dower due to a Hanafi widow is or is not to carry interest is a question regarding marriage, that, therefore, u/s 37(1) of the Bengal North-Western Provinces and Assam Civil Courts Act, 1887. (Act No. XII of 1887) the rule of the Hanafi School of the Mahom-medan Law must be the rule of decision, and that as soon as it is established that this case is to be governed by the Hanafi School of the Mahommedan Law, Zubaida Bibi cannot claim interest on her dower, for usury is strictly prohibited in Islam.

Those who devour usury shall not rise again save as he riseth whom Satan hath paralysed with a touch ; and that is because they say "selling is only like usury", but God has made selling lawful and usury unlawful and he to whom the admonition from his Lord has come, if he desists, what has gone before is hist; his matter is in God's hands. But whosoever returns (to usury) these arc the fellows of the Fire, and they shall dwell therein for aye. God shall blot out usury, but shall make alms-giving profitable for God loves not any sinful misbeliever.

The Quran by Palmer page 44:

Onlye who believe devour not usury doubtly doubled, but fear God, per chance ye may be prosperous; fear the fire which is prepared for the unbelievers, and obey God and His apostle, per chance ye may get mercy." Palmer, Vol. VI, page 62.

See also Hedayah by Grady" p. 289 ed seg and the Muhammadan Law of sale by Bailie p. 163 et seq, where the law on usury is discussed.

? i.e. his former conduct shall be pardoned.

8. This argument has no force. The law of Islam as interpreted by the Hanafi Doctors, no doubt, strictly prohibits receiving interest as well as paying it, but the provisions of Section 37(1) of the Bengal North-Western Provinces and Assam Civil Courts Act, 1887, have no application. The question whether a dower debt is or is not to carry interest can, by no stretch of language, be deemed to be a question regarding marriage

9. Another argument of the learned Advocate for the appellant is that u/s 37(2) of the Bengal North-Western Provinces and Assam Civil Courts Act, 1887, this Court acting "according to justice, equity and good conscience" should apply the Hanafi Law to the case just as it acting according: to justice, equity and good conscience" applies the Muhammadan Law of pre-emption and of gift to Mahommedans, and should hold that a dower debt due to Hanafi wife carries no interest. 1 his argument is also unsound and is based on a wrong notion as to the nature of dower debt and as to the scope of Section 37(2) of the Act,

10. In Abdul Karim Khan v. Maqbul-un-issa Begam 30 A. 315 : A.W.N. (1908) 113 : 5 A.L.J. 598, the learned Chief Justice quotes (at p. 318) the following passage from Mr. Ameer Ali (now the Right Hon"ble Syed Ameer Ali) with approval:

Dower is a debt like all other liabilities of the husband, and has preference over legacies bequeathed by the testator and the right of the heirs. A partition of the estate cannot take place until the dower debt has been satisfied. When the wife is alive she can recover the debt herself from the estate of her husband. If she be dead, her representatives stand in her place and are entitled to recover the same"; and goes on to say: "Dower, in fact, whether it be prompt or deferred, is a debt due from the husband to the wife.

11. In Chaudhri Wasi Ahmed v. Musammat Maina Bibi, First Appeal No 65 of 1904, decided on the 3rd of July 1906, it has also been expressly laid down that dower is a debt. Dower, therefore, cannot come within the purview of Section 37(2) which applies to such cases as are not provided for by Section 37(1) or by any other law in force in British India; but the question whether a debt is or is not to carry interest is not a question, which is not provided for by the Municipal Law of British India. The fact that dower debt owes its origin to a peculiarity of the Muhammadan Law of Marriage and is not the result of advancing money, can be no reason to divest it of the characteristics of a debt and to put upon it the limitations imposed by the Hanafi School of the Mahommedan Law on usury.

12. Supposing that the cases were to be governed by the dictates of justice, equity and good conscience, I would be the last person to deprive a Mahommedan widow of interest on her dower. Taking into account the helpless condition of a Mahommedan wife and the fact that when she is put into possession of the immovable property of her husband in lieu of her dower, that is more to the advantage of the husband and other members of the family than to

the advantage of the wife, I deem it highly unjust and inequitable that a Mahommedan widow in possession of the immovable property of her husband should be liable to account for the profits arising out of the property and should not be entitled to a reasonable rate of interest on her dower.

13. The suggestion that the motive, which made the law-giver of Islam sanction exorbitant dowers, is not a pecuniary gain to a wife but simply a check upon the capricious exercise of the unfettered power of divorce which her husband, has and that, therefore, the argument that it is inequitable to allow interest upon dower has no force. There is nothing, in the first place, to show that the motive for sanctioning large amounts of dower is to check the unlimited power of a husband to divorce. According to the Hanafis, it is a mark of the personal qualifications and the social status of the wife and is spoken of in the Hedayah page 44 as a token of respect for its object (the woman)."

14. In the second place, in dealing with the legal incidents of a dower debt, one has to look to its nature from the stand point of jurisprudence and not to the motives of the law-giver which brought it into being.

15. In the third place, there is no connection between the fact that a large dower is a check upon divorce and the fact that dower should carry no interest.

16. In the fourth place, if the object of sanctioning large dower be a check upon divorce, the rule that dower should carry interest would put an additional check and would further the end in view. Granting that dower is a debt, it follows that the legal incidents of it, after it has come into existence, are to be governed by the Municipal law of British India and not by the Hanafi, Law which prohibits usury. It is, however, urged that to some of the legal incidents of dower after its creation, the Hanafi Law has been applied and that, therefore, it should be extended to the remaining legal incidents of it. As instances of the application of the Hanafi Law the following cases are put forward.

17. The rule that a Mahommedan widow, who obtains possession of the immovable property of her husband without force or fraud, can retain it until her dower is paid [see *Musammat Bibee Bachun v. Sheikh Hamid Hossein* 14 M.I.A. 377 : 10 B.L.R. 45 : 17 W.R. 113 and the cases which follow it]. The rule that a Mahommedan widow is entitled to the whole of the dower which her husband on marriage agreed to give her irrespective of his pecuniary means. [*Sugra Bibi v. Masuma Bibi* The rule that where the marriage contract is silent as to whether the payment of the dower is to be prompt or deferred, the whole or a portion of it, is presumed to be prompt (see *Wilson's Anglo-Muhammadan Law* page 121, 3rd Edition.)

18. The above instances, in my opinion, are exceptions to the general rule and do not establish the proposition that all the legal incidents of dower, after it has become due, are to be governed by the Banafi Law. I may observe in passing that the right of a Mahommedan widow to hold the property of her husband until her dower is paid is a rule of the Hanafi Law of debt and not the law of dower.

The rule that a husband is bound to pay the dower he agreed to pay, no matter how excessive it be, is hardly an incident of dower debt.

19. The rule that in cases in which the marriage contract is silent on the point, the whole or a portion of the dower is presumed to be prompt is according to the original authorities regulated by the local custom and cannot, strictly speaking, be deemed to be an incident of dower debt.

20. Coming to the case law on the point, I find that the preponderance of authority is in favour of the rule that interest is chargeable on dower. The first case is that of *Musammat Soomia Khatun v. Altaf-un-nissa Khatun* 2 Hay's R. 210. The suit was for dower and an objection as to the awarding of interest was taken. The learned Judges who decided the case observed: "Now with regard to the objection regarding interest, this being a case simply for recovery of debt, the principles of Mahomedan Law have no bearing upon it." (See page 211 of the report).

21. The second case is *Woomatool Fatima Begam v. Meer-un-nissa Khanum* 9 W.R. 318. In this case it was contended that the widow in possession of the estate of her husband was liable to account for the profits of the land; while on behalf of the widow, it was urged that she was entitled to interest on her dower. Peacock, C.J., observed: "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 time that she held it in lieu of her dower. If she had had a lakh of rupees paid to her when she first entered into possession of the land in 1845, she would not have been bound according to the tenets of the Mahomedan religion to keep it in a box and take out of the box from time to time as much as she had occasion to spend; but she would have been allowed to invest her money in the purchase of land and to have lived upon the rents of her estate, even if she was prevented by her religion from lending her money at interest. If she would have been prevented from purchasing Government securities and receiving interest from Government instead of receiving it from an individual, there were many other modes in which she might have invested the money if she had received her dower. It Would have been a poor investment in this country if this lady could not have realized from her money at least 5 per cent. An investment which would have given her 5 per cent, for her capital would have yielded Rs. 5,000 a year, whereas taking the profits of the whole estate as six times the amount of the wasilat assessed upon the 1-6th of it, she received only Rs. 4,692 a year. If, therefore, she is to account for the profits of the land during the whole time that she held it in lieu of her dower, she will, in fact, have received nothing instead of receiving the Rs. 5,000 a year, which she would have received from the investment of her money, if paid to her on her husband's death."

22. The third case is that of *Bakreedau v. Ammatul Fatima* 3 C.L.J. 541. In this case it was contended that the widow was entitled to interest upon her dower and the learned Judges observed: In the next place, it is contended that the

widow is entitled to charge interest upon her dower. The Subordinate Judge has disallowed interest, because it is forbidden by the Prophet. The question was discussed in the case of *Mian Khan v. Bibi Bibijan* 5 B.L.R. 500 : 14 W.R. 308 and it was held that, for a considerable period of time past, the prohibition of the Quran and of the Hedayah against the taking of interest has not been treated by the executive and by the persons charged with the administration of justice in this part of India as forming part of the active Municipal Law of the country. As moral precept, it will, no doubt, always be influential with those who acknowledge its authority, but as a part of Municipal Law, if it ever had existence as such, it has long been obsolete. We are not aware of any case in this Court which has tended to shake the authority of that decision."

23. The interest was, however, disallowed on the ground that it could not have been in the contemplation of the parties that interest would be chargeable on such excessive dower (Rs. 41,000 and one gold mohur).

24. The fourth case is that of *Mian Khan v. Bibi Bibijon* 5 B.L.R. 500 : 14 W.R. 308. This case is not an authority for the particular proposition that a widow is entitled to charge interest upon her dower but it is an authority for the broader proposition that the Courts in British India do not refuse to decree interest to a Mahommedan on the ground that he is disentitled by Mahommedan Law to recover it. The rule laid down certainly covers the case of a widow if she claims interest upon her dower. As the passage bearing on this point is instructive and shows the attitude of the Courts in British India towards awarding interest to Mahommedan suitors, I quote it in extenso:-- "The learned first Judge appears to be of opinion that, if the Act of 1855 be put upon one side, the law, which the Civil Courts of this country are bound to administer between Mahommedan suitors does not allow a Mahommedan to charge another Mahommedan any interest whatever. It seems to me that, this view is erroneous. No doubt, the passage in the Hedayah to which the learned First indge refers, and other passages in the Quran, do, as they are commonly understood, forbid the taking of interest and certainly as far as I have the means of judging, I should suppose that a very considerable number of religiously inclined persons of the Mahomedan faith consider themselves bound to observe these precepts and conscientiously keep themselves out of all transactions which, appear to infringe them. But, on the other hand, it is notorious that there are in India Mahommedan dealers in money, and traders of unquestionable respectability and that it has been the practice among this class for a very long period to take interest even from their o-religionists in the way of their business. Mr. Harington in his Analysis, first Vol : page 182, after remarking that the Mahommedan Law forbids the taking of interest for the me of mmey upon loans from one Musslman to another, and that the Hindu Law permits interest to be taken atpresoribed rates only, goes on to say: The Hindu legislators have expressly sanctioned and the Mussulman Government of India appear to have tolerated directly or indirectly the customary interest of the country which, in the plan for the administration of the justice proposed by the Committee of Circuit in 1772, is

stated to have amounted to the most exorbitant usury. **** I cannot learn that our Courts have, in any case which is of authority, refused to decree interest to a Mahommedan, on the ground that he was disentitled by Mahomedan Law to recover it. On the whole it seems to me that, for a considerable period of time past, the prohibition of the Quran and the Hedayah against the taking of interest has not been treated by the executive and by the persons charged with the administration of justice in this part of India, as forming part of the active Municipal Law of the country. As a moral precept it will, no, doubt always be influential with those who acknowledge its authority, but I think that, as a part of the Municipal Law, if it ever had existence as such, it has long been obsolete."

25. The fifth case is an unreported ruling of this Court in Chaudhri Wasi Ahmed v. Mussammat Maina Bibi, First Appeal No. 65 of 192⁴, decided on the 3rd of July 1906, and is a direct authority for the proposition that interest is chargeable on dower debt. The learned Chief Justice in his judgment observed:-- It has been argued, and very strenuously argued by Mr. Rahmat Ullah that according to the Mahomedan Law, interest is not chargeable in respect of dower. We have been referred to a number of authorities but none of them bear out this proposition. On the contrary, it appears to be well-settled law that dower is a debt ranking at least equally with other debts. That it is a debt there can be no doubt. Whether or not Musammat Maina Bibi was bound to account for the rents and profits during the time she was in possession is perhaps a question open to some doubt; but it appears to us to be clear that having been charged with the rents and profits, she certainly is entitled to reasonable interest in respect of so much of her dower debt as remained undischarged by the rents and profits."

26. The above are the authorities in favour of the proposition that interest is chargeable on dower debt. There are two unreported rulings of this Court which are against it. The first is First Appeal No. 204 of 1895, decided on the 3rd of July 1897. The learned Judges who decided that case observed: The appellant put forth a claim to interest upon her dower. Such a claim we never heard raised before. No authority, it was admitted, could be produced in support of it. We overrule it."

27. The second is First Appeal No. 3 of 1881 decided on 1st of January 1882. The learned Subordinate Judge of Gorakhpur in his judgment dated the 24th of September 1880 in the case of Sheikh Mnjib Ullah v. UnmeL Bibi (No. 42 of 1880) said; "Under the Mahommedan Law, the defendant is not entitled to get interest on the amount of dower" and the learned Judges of this Court on appeal from the decree of the Subordinate Judge of Gorakhpur in the case already mentioned observed: In the case of Sheikh Mnjib Ullah, respondent, we find no force in the pleas inugning the principle on which account has been prepared in respect of allowance on account of commission and of interest. The appellant's pretensions in these respects are untenable."

28. In Musammat Zamani Begam v. Syed Manmr Shah, First Appeal No. 107 of 1893, decided on the 2nd of June 1896, the question of dower debt was involved

but no interest on it was claimed.

29. Considering the facts that dower is a debt, that as a debt it is to be governed by the Municipal Law of British India and not by the Hanafi Law, that it would be extremely inequitable to make a Mahommedan widow in possession of her husband's property in lieu of her dower liable to account for the profits of the property without giving her a right to claim interest upon her dower, and the rulings which are in favour of interest, I would without the least hesitation hold that a Mahommedan widow in possession of her husband's estate in lieu of her dower could claim interest on it, and that the Courts in British India should not refuse to grant her a decree for it on the ground that the Mahommedan Law prohibits usury.

30. As regards the plea that the plaintiff is entitled to recover her share of the estate of Inayat Ullah on payment of the part of the dower proportionate to the share in the estate it would ordinarily be not a valid plea.

31. In the particular circumstances of this case we think it would be inequitable to direct the plaintiff to pay the full amount of the dower as the share which the defendant Musammat Zubaida Bibi inherited from her husband and which is in her possession is also liable for her dower. Further, we have before us two spits brought by two sets of heirs claiming their respective shares in the estate. Both sets of the plaintiffs cannot be directed to pay the whole amount of dower, as that would have the effect of awarding to Zubaida Bibi double the amount of her dower. The liability of the heirs of the husband for the dower is not personal and the dower is recoverable from the assets left by the husband. It would, therefore, be inequitable to direct each set of the plaintiffs to pay to the defendants more than a share of the dower proportionate to their share in the estate. Besides the two sets of plaintiffs and the defendant Zubaida Bibi there are no other claimants of the estate. It seems, therefore, reasonable to direct the plaintiff in this case to pay her share of the dower in order to enable her to recover her share of the inheritance. Similarly the plaintiffs in the other case will have to pay their share of the dower to get their share of the inheritance. If the plaintiff were ordered to pay the whole dower and to get the whole estate, other heirs of Inayat Ullah including Zubaida would have to sue her for their shares and this would lead to multiplicity of actions. This is undesirable. The plaintiff should, therefore, get a decree for her share in the property which has been found to belong to Inayat Ullah on condition that she do pay her share of the dower of one lakh of rupees found to be due to Zhabaida Bibi.

Stanley, C.J.

32. I am also of opinion that the main question raised in this appeal, namely, whether Musammat Zubaida Bibi, who was put into possession by her husband of his estate in lieu of her dower debt, is entitled when called upon by her husband's heirs other than herself to account for the rents and profits received by her during the time of her possession, to claim interest at a reasonable rate

upon her dower debt must be answered in the affirmative. The plaintiff is one of the heirs of Inayat Ullah, the deceased husband of Zubaida Bibi and she claims her share of the estate discharged of Zubaida Bibi's dower on the allegation that the dower debt has been satisfied out of the rents and profits. In the judgment, which has just been delivered, my brother Karamat Husain has dealt with the question at length and has quoted the authorities bearing on the subject. The weight of authority appears to me entirely to support the view which he has taken and I see no reason to disagree with him in the conclusion at which he has arrived.

33. As regards the form of the decree, it appears to me that the rights of the parties can be adjusted in two ways, either by a sale of the property and payment out of the proceeds of the sale the dower debt and by a division of the balance between the heirs according to their rights therein, or if the parties desire to retain the estate unsold, there being apparently no other debts of Inayat Ullah, to give their shares in the estate to Zubaida Bibi, Hamera Bibi and Amina Bibi and others, Hamera Bibi and Amina Bibi and others first paying to Zubaida Bibi the rateable proportion of the dower debt proportionate to their shares, respectively in the estate of Inayat Ullah. In the circumstances of the present case, the last mentioned course appears to me to be equitable.

Banerji, J.

34. I do not express any opinion on many of the various points discussed by my brother Karamat Husain in the elaborate judgment just now delivered by him. The question whether interest can be allowed on the dower due to the widow of a deceased Mahomedan is not free from difficulty, but the weight of authority is in favour of the view that if the widow has been placed in possession of her husband's estate in lieu of her dower, the Court has the discretion to award her interest at a reasonable rate and I am not prepared to dissent from this view. I agree in the order proposed.

35. The order of the Court is that we allow the appeal, set aside the decree of the Court below and make a decree in favour of the plaintiff for possession of the share claimed by her, save and except the property mentioned in list No. 1 annexed to the written statement of the defendant Zubaida Bibi, conditional upon payment by her of Rs. 12,500 within six months from this date to Musammam Zubaida Bibi on account of her dower. If such payment be not made within the time mentioned above, her suit will stand dismissed with costs including fees in this Court on the higher scale. In the event of her paying the said amount the parties will bear their own costs in both Courts.