Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mirza Bedar Bukht Mohummed Ali Bahadoor v. Mirza Khurrum Bukht Yahya Ali Khan Bahadoor, from Oudh; delivered 15th March, 1873.

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THIS is an appeal from a decree of the Judicial Commissioner of Oudh, which dismissed the suit of the Appellant, thereby reversing the decree which had been made in his favour by the Civil Judge of Lucknow.

The suit was brought by the Appellant to recover from his father, the Respondent, the sum of 50,000 rupees, as his share of the dower alleged to have been settled on his mother, the late Oomrao Begum. His case was that his parents intermarried in December 1831; that the lady's mehr or dower was then fixed at the sum of nine lacs of sicca rupees; that the contract for the payment of that sum was on the occasion of the marriage, or shortly afterwards, embodied in the Kabinnameh annexed to the plaint, and set forth at page 3 of the record; that Oomrao Begum died in January 1868, leaving as her heirs, according to Mahomedan law, her husband, the Appellant, her only son, and three daughters, who were made joint Defendants to the suit; that the dower being unpaid, the Appellant as such co-heir thereupon became entitled to three-tenths of it; but that, in deference to the law which prevails in Oudh, by which the Courts of Justice are empowered to reduce extravagant dowers

to such an amount as, having regard to the circumstances of the husband, they may deem reasonable, he had limited his claim to 50,000 rupees.

The parties are of the Royal family of Oudh. The respondent's father, Muhammed Ali, at the date of the marriage was uncle to the then reigning King, but in 1837 he succeeded to the Throne, and, dying in 1842, was succeeded by the Respondent's elder brother, the late Amjud Ali, who was the father of Wajid Ali, the living ex-King.

The case of the Respondent was that the Kabinnameh produced was not genuine; that the stipulated dower was not nine lacs of rupees, but a much smaller sum, possibly not exceeding the Fatima dower of 500 dirhems; but that whatever was its amount it had been satisfied in the lifetime of Oomrao Begum, and during the reign of Muhammed Ali Shah by the payment of 7,000 rupees and the gift of a pair of armlets valued at 3,000 rupees. Other objections were also taken to the suit, which will be afterwards considered.

The issues originally settled were—

1. Whether the Plaintiff could maintain his suit without producing a certificate under the provisions of Act XXVII of 1860, Sec. 3, as one of the heirs of his mother.

2. Whether the Kabinnameh produced was genuine or not.

3. Whether the stamp was sufficient.

4. Whether the Defendant had paid, and his wife accepted the sum of 10,000 rupees in lieu of her claim to dower.

5. What was the extent and value of the Plaintiff's share.

Two other issues were afterwards added, viz., whether the Respondent was a minor at the date of his marriage; and, if so, whether that fact would invalidate the deed of dower according to Mahomedan law.

The two latter issues, and the second of the original issues were submitted to a jury chosen by consent of both parties, and were found in favour of the Plaintiff. But exception was afterwards taken to the regularity of this proceeding, and their Lordships will therefore treat the case as if there had been no regular finding of a jury on these points. The final result of the trial, however, in

the Court of First Instance was that the Judge found all the issues in favour of the Plaintiff. On appeal the Judicial Commissioner, confining himself almost entirely to the second and fourth of the original issues, concurred with the Civil Judge in his finding on the former; but upon the latter held that the Defendant had established his plea of satisfaction, and, therefore, dismissed the suit.

Other points have been raised by Mr. Bell, at the bar, which will be afterwards considered; but their Lordships will deal in the first instance with the two material issues which have just been mentioned. They can see no ground for disturbing the concurrent judgments of the two Courts upon the first of them. It is no doubt true that the document relied upon did not come from that which would at first sight appear to be the proper place of custody, viz., the Dufter Khanah of Oomrao Begum. The admitted facts concerning its production are that, on the death of Oomrao Begum, and when some question had arisen touching her missing Mehrnamah, Nawab Moomtaz Mahal, the widow of a former King of Oudh, went to the house of the deceased lady, and, in the presence of both the Appellant and Respondent and also of other persons, produced a tin cylinder which she said she had received from Oomrao Begum some three years before; that on opening the cylinder this document with another was found in it; and that, with the father's assent, it remained in the possession of the son. The evidence as to the father's behaviour on this occasion will be considered hereafter when their Lordships come to deal with the other issue. Mr. Bell has commented strongly on the omission of the Appellant to prove by his own deposition, or otherwise, the identity of the document annexed to the plaint with that produced by Moomtaz Mahal. But that fact seems never to have been questioned in the Court below. The question of course remains whether the document so produced had really been delivered by Oomrao Begum to Moomtaz Mahal; and, if so, whether it was, what it purports to be, the Mehrnamah executed upon or shortly after her marriage. There is little, if any, evidence on this point except that of Moomtaz Mahal herself. She states that, when intending to go on a pilgrimage, she sent the tin case containing the Mehrnamah of her

adopted daughter to Oomrao Begum for safe custody; that afterwards Oomrao Begum returned the case to her in the state in which she produced it. Her evidence is not very clear or consistent as to her knowledge that the case, when returned, contained the Mehrnamah of Oomrao Begum also. It would seem that the only knowledge or information she had on the subject was derived from a statement which she says Oomrao Begum subsequently made to her to the effect that her "amaunt" was in the case. It is, moreover, to be observed that this story cannot be reconciled with the evidence of the two sisters of Oomrao Begum, who depose to having seen the document in the hands of their sister not very long before her death; except by supposing that, although they are speaking truly to the fact of its production to them, they are mistaken as to the date at which it was produced. The Judge of First Instance, however, seems to have given full credence to Moomtaz Mahal, and if the genuineness of the deed is otherwise proved, that fact will go far to support her testimony. The theory of the Judicial Commissioner that Oomrao Begum having been satisfied, became indifferent about the custody of the deed, and that it found its way in some unexplained manner into the hands of Moomtaz Mahal, is pure speculation, and depends upon the assumption that her claim for dower had really been satisfied, which is the question to be hereafter considered.

As to the genuineness of the instrument produced we have the evidence of his widow as to the seal of Amjud Ali, and the evidence of the half-brother of Oomrao Begum, to say nothing of that of the two sisters on which by reason of its inconsistency with that of Moomtaz Mahal it may not be safe to-rely.

That the dower was for the large, not to say excessive, sum specified in the deed is consistent with all we know concerning the customs of Mahomedans of the class of the Respondent. That a man of his rank should, on the occasion of his first marriage, fix the dower of his wife at 500 dirhems, or any trifling sum seems highly improbable. And there is evidence in the Cause that other women of Oomrao Begum's family had very large dowers secured to them on their marriage. Both Courts, as well as the Jurors, having the original document

with all the evidence relating to it before them, have, on that evidence, come to the conclusion that it was the genuine Mehrnamah. Nor can their Lordships see any sufficient grounds for impugning the correctness of that conclusion.

The next question to be considered is, whether the Respondent has made out that his wife's claim for dower was satisfied by him in her lifetime. The burthen of proving this issue of course lay upon him; nor was it made lighter by the circumstance that he disputed the contract which has now been established against him, and contended that the obligation, which he professed to have satisfied, was a very different one.

What then is the case of satisfaction which he made? It is that his father, who had then become King, gave to him out of the estate of his grandmother, and shortly after her death, 7,000 rupees in cash, and two armlets worth 3,000 rupees, and requested him to transfer both money and jewels to his wife, that he sent both to his wife by his servants, and afterwards personally waited on her; that on the occasion of that visit he told her that the things which he had sent were given in satisfaction of her dower, and asked her to give up her Mehrnamah; that she so accepted them and did give up the Mehrnamah; and that he afterwards gave that document, which he describes as written on red paper, to his Darogah, since deceased, by whom it was lost during the rebellion.

This story is, to a considerable extent corroborated by Moonga Begum and Musseeta Begum, who state that they were present during the conversation between the husband and wife, but both these witnesses expressly say that no document was given up by her in their presence to the Respondent. Two other female witnesses speak to verbal admissions made by Oomrao on subsequent occasions to the effect that she had no longer any subsisting claims for dower. And a servant who was called to prove that he carried the money and jewels to Oomrao Begum's house, has deposed that, on the following day, he saw a red paper in the Respondent's hands, which he gave to the Darogah to keep saying it was his wife's Mehrnamah.

The document now proved to be the Mehrnamah is written, not on red, but on white paper.

It appears to their Lordships, as it appeared to the Judge of First Instance, that this evidence is too weak to establish the plea of satisfaction. The Document said to have been returned to the Respondent cannot have been the document now proved to be the real Mehrnamah, which, upon the evidence, their Lordships believe to have remained for years afterwards in the possession of Oomrao Begum, and to have been sent by her to Moomtaz Mahal. And in this conclusion their Lordships are confirmed by the account which the witnesses, including the Respondent himself, give of his behaviour on the occasion of the production of the document by Moomtaz Mahal. A question had then arisen touching his liability for the dower. Is it credible that when the missing document was produced, he should merely have said I am "burree" (free) from its obligations, and allowed it without remonstrance to pass into the hands of the party interested in enforcing it. Is it credible that, if his story were true, he should not have said "This is not the genuine Mehrnamah; or, if genuine, it must have been fraudulently obtained from my Darogah to whose custody I committed it."

It need hardly be observed that, the case which this weak and inconsistent evidence is produced to establish is one that involves startling improbabilities. It must now be taken to be an established fact that the stipulated amount of dower was 9 lacs of rupees. One reason for fixing these excessive dowers is notoriously the desire to protect the woman from capricious repudiation. It is in the highest degree improbable that Oomrao Begum should, within ten years of her marriage, relinquish that protection for so small a sum as 10,000 rupees. On the other hand, if the money and jewels really passed from the husband to the wife, their amount and value are not so large as to be inconsistent with the hypothesis that they were a free gift from the son of a reigning king to his wife. And, if not a gift, the transaction may have been in the nature of a payment on account. Whether the money or jewels really passed or not, their Lordships are of opinion that the Respondent has failed to prove that in consideration of them his wife wholly relinquished her claim to dower; and consequently that the Judgment of the Judicial Commissioner on this issue cannot be supported.

Mr. Bell, however, has taken other objections to the suit which must now be considered.

He has argued that by the general Mahomedan law, and at all events by the law of Oudh as modified by the Punjab Code, the dower was not payable except upon the dissolution of the marriage by divorce, or upon the death of the husband; and consequently that no suit for its recovery by the representatives of the wife will lie during the husband's lifetime.

Their Lordships do not think that the general law on this point is controlled or affected by the Punjab code. The only articles which could have this effect are the 10th and 11th of the 6th section of the part entitled Principles of Law. These, like the other portions of this somewhat informal code, consist of a statement or recital of what the general law is, followed by provisions for the modification of it, in its practical application to the Punjab. These recitals cannot be taken to have altered the law, because they contain an imperfect or inaccurate statement of it. And the particular articles under consideration certainly do not contain an exhaustive exposition of the Mahomedan law relating to dower, and the circumstances under which it becomes demandable. The first contemplates only the event of a divorce; the other that of the husband's death; neither makes any distinction between prompt and deferred dower, and both assume the dower to be excessive. If then by the general law, dower, whether prompt or deferred, may be claimed from the husband by the heirs of the wife on the dissolution of the marriage by her death, that part of the law is not abrogated by the Punjab Code; although it may be true, as their Lordships think it is, that the power given to the Courts to modify excessive dowers is capable of being exercised in such a case, as well as in the particular cases expressly mentioned in the recitals.

The real question, then, is whether Mr. Bell's proposition is supported by the general Mahomedan law. It clearly cannot be maintained as to dower which is prompt, and therefore exigible by the wife during the coverture. If there be any doubt on this subject it would be set at rest by Cases XXIX, XXXIII, and XXXV, in Macnaghten's "Precedents," pp. 278, 286, 288. But the

note to the first of these cases shows that there is some room for doubt in the case of deferred dower. It is, of course, indisputable that the term to which payment is to be deferred may be fixed by the contract; that, for example, the husband is at liberty to stipulate that the dower shall not be payable until divorce, or his own death. The difficulty is to say what is the rule in the absence of express stipulation, as where the dower is merely described as "Mowujjil," or deferred. Case XXX of Macnaghten's "Precedents," p. 280, seems to show that questions of this kind are to be determined by local usage. On the other hand, Case XXXIX of Macnaghten's "Precedents," p. 293, seems to be an authority for holding that the heirs of the wife may sue the husband in his lifetime for deferred dower.

The Hedaya appears to be almost silent on the precise question; but there is a passage at pp. 155, 156, of vol. i, which in some measure favours the conclusion that the heirs of the wife, who has pre-deceased her husband, cannot claim the dower until he also has died.

Mr. Baillie, in his Digest of Mahomedan Law, p. 92, states broadly that deferred dower is not exigible till the dissolution of the marriage. The authority which he cites is that of Omduton Nisa Begum, 1 S. D. A. Reports, p. 276. That was a case between Sheahs, in which it was held that a very considerable sum which had been settled as dower by deed was recoverable by the wife; although, out of regard to the letter of the law, a very moderate sum had, on the performance of the ceremony, been verbally declared by the priest to be the dower. In the course of the suit questions were put to the law officers, and in their answer to one of these they say, "It is the custom to make one-half or a third of a dower Moujjil, or demandable immediately, and the remainder Mowujjil, or payable at a future period; the payment of the former part should be immediate; the latter part becomes payable on divorce or death." This dictum is not precise upon the point, since the death referred to may be that of the husband; and the authority is of little value, since it is clear (the suit having been commenced by the wife in the husband's lifetime) that the dower

in that case must have been prompt. He died pending the suit, and the contest was ultimately between the wife and his heirs.

An authority of greater value is the case of Gholam Husan Ali *v.* Zeinub Beebee at page 48 of the same volume of Reports. There the dower was partly prompt, and partly deferred. Certain questions in the course of the suit were put to the law officers; and the 5th and 6th of them raised the question now under consideration. In the answers to them it is broadly stated that "the dower is payable by the husband like other debts, on the demand of the wife or her heirs;" and again, that "the wife or her heirs could claim the appointed dower from Jafur Ali (the husband) in his lifetime; or from his heirs after his death." But even this case does not involve an adjudication upon the question whether the deferred dower could be recovered from the husband in his lifetime; since, although the wife predeceased him, the suit was not instituted by her heirs until after his death, and was brought against his heirs.

Upon the whole, then, this question cannot be said to be so concluded by authority, as to be free from doubt or difficulty. Clear proof of local usage might have some bearing upon it; but it ought not to be determined by mere considerations of convenience.

There may, no doubt, be great inconvenience in allowing the heirs of a wife to ruin the husband by exacting one of the enormous dowers which are so frequently stipulated for in India. But that is only one of the many inconvenient consequences of this preposterous custom. For there is also great and obvious inconvenience in allowing the assets applicable to the payment of his just and ordinary debts to be diminished; and his other heirs to be disinherited by the exaction of an enormous dower after the husband's death. Nevertheless, it has been frequently ruled by the Courts of the Regulation Provinces, and their decisions have been confirmed by this Tribunal, that such contracts are strictly enforceable against the husband's estate. If the Mahomedans of India were content to fix the amount of dower, according to the true spirit and intention of their law, at a moderate sum, it would be perfectly agreeable to reason, that that which is intended to form part of the woman's estate, should

become hers on the dissolution of the marriage, whether by her own or her husband's death.

Their Lordships, however, do not think it necessary in this case to decide whether deferred dower, whenever no time for its payment is expressly limited by contract, must be presumed to be payable on the dissolution of the marriage by the death of either husband or wife; or whether it becomes demandable only on the death of the husband. For upon the true construction of the contract in this case they are of opinion that the dower was prompt. The admitted rule seems to be that laid down in Macnaghten's Principles, chap. 7, article 22, to the effect that "when it may not have been expressed whether the payment of the dower is to be prompt or deferred it must be held that the whole is due on demand. And this seems to have been the view taken of the contract in the Courts below; since the objection taken to the suit on the ground that the dower could only be claimed on the divorce of the wife or death of the husband was founded upon the decision of Sir George Couper, which is set out at page 11 of the Record; a decision which, as it made no distinction in this respect between prompt and deferred dower, but applied the rule to a dower of the former class, appears to their Lordships to be clearly erroneous.

Another point insisted upon by Mr. Bell was that the suit could not be maintained, because the Plaintiff (the Appellant) not having obtained a certificate under the provisions of Act XXVII of 1860, sec. 3, was not entitled to sue for or recover a debt due to the estate of Oomrao Begum; or the proportionate share of that debt to which as one of her heirs he was entitled. The point was taken in the Court below, was decided against the respondent by the Civil Judge, and is not made one of the grounds of this appeal to the Judicial Commissioner. This, in their Lordships' opinion, would be a sufficient answer to the objection if it were merely formal; as it would be in the case of a person who, being plainly entitled to the whole debt, might be suing for it without a certificate. Their Lordships, however, have come to the conclusion that the objection involves considerations which constitute substantial objections to the manner in which this suit is brought. The latter is obviously, as is

shown by the amount of the stamp and the statements in the plaint, limited to the recovery of the Plaintiff's share in the dower. Though his sisters are made formal parties, the plaint does not ask for a binding declaration as to the gross amount of the whole dower. It cannot be contended that a debtor to a Mahomedan estate is liable to be vexed by a separate suit by every co-sharer in that estate for his share of the debt. The Act invoked was probably in part designed to protect the debtor against a multiplicity of suits. And as between the co-sharers there are obvious objections to allowing a scramble for shares in an entire debt, since the first who takes out execution may exhaust the whole means of the debtor. Again, if the Respondent be treated as the sharer in possession of the estate of Oomrao Begum, and the suit as one in the nature of an administration suit, it ought to be framed as an administration suit. No co-sharer would be entitled to receive his share until the debts of the deceased had been ascertained, and provision made for the payment of them. Until that is done the amount of the share is uncertain: and if the Appellant had clothed himself with the character of an administrator by obtaining a certificate under the Act, he must have given security for the due administration of whatever he might recover.

Lastly, having regard to the provisions of the Punjab Code, their Lordships are disposed to agree with the Judicial Commissioner in holding that it was incumbent on the Civil Judge to consider and determine more particularly than he has done what amount of dower it was reasonable, with reference to the Respondent's means, to award. There should have been an express issue on that point, and a finding thereon binding on all the heirs. Their Lordships have not before them the materials for making such an award; nor, perhaps, would it be proper for them to attempt it in the absence of the daughters of Oomrao Begum.

The conclusion, therefore, to which their Lordships have come is, that they will humbly recommend Her Majesty to reverse both the Decree under Appeal and that of the Civil Judge; to declare that the Mehrnamah on which the suit is brought is a genuine document; and that the dower stipulated

thereby was the sum of nine lacs of sicca rupees; that the amount of such dower is subject to modification according to the law and practice of the Courts of Oudh; and that, subject to such modification, it was a debt due from the Respondent to the estate of Oomrao Begum at the date of her death. They will further advise Her Majesty to remit the cause to the Judicial Commissioner of Oudh, with directions to have it duly ascertained what, having regard to the law and practice of Oudh, is the gross amount of the dower payable by the Respondent to the estate of his deceased wife; which, if any, of her debts remain unpaid; and what, after providing for the payment of such debts, is the share of the dower awarded which is due to each co-sharer in her estate. When this is done the Appellant will of course be entitled to sue out execution for his share only. In fixing the amount to be recovered, and in awarding execution, the Court will, of course, have regard to such special considerations (if any) as, under the Mahomedan law, arise out of the relation of the parties to each other, viz., that of parent and child.

Their Lordships, considering the peculiar circumstances of this case, are of opinion that each party should bear his costs of this Appeal.

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