(1868) 11 CAL CK 0003

Calcutta High Court

Case No: None

Ahmed Hossein		APPELLANT
	Vs	
Mussamut Khadija and Others		RESPONDENT

Date of Decision: Nov. 13, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

The plaintiff in this suit claimed to be entitled, as cousin of the late Moulvi Mohammed Ibrahim to 12 annas out of the whole 16 annas of the entire estate left by the late Moulvi, and he commenced this suit, against the two widows of the late Moulvi, to whom a certificate had been granted, under Act XXVII of 1860, to set aside the certificate, and to be put into possession of the said 12 annas share, with mesne profits, from the date of the death of the Moulvi. In a schedule to his plaint, he detailed the property, which he claimed to belong to the estate. Nasiram and other persons who claimed to be entitled to a portion of the property specified in the schedule and who had not been made defendants in the suit, intervened and asked to be made defendants u/s 73 of Act VIII of 1859.

2. It is clear that, if the plaintiff in the suit, which he instituted against the two widows, had recovered a decree for any portion of the property which belonged to the interveners, and of which they are in possession, he could not have turned the interveners out of possession under the decree, nor would the rights of the interveners have been affected by the decree. The interveners, therefore, were not persons likely to be affected by the result of the suit, as originally framed, and they had, consequently, no right to intervene, and to be made parties to the suit. The Subordinate Judge, however, ordered them to be made parties, the plaintiff not having objected, and he laid down an issue as to what part of the property, comprised in the schedule, belonged to the estate of Mohammed Ibrahim, and what part of it belonged as of right to, and was in the exclusive possession of the widows and of the intervening defendants, respectively. In the case of Jaygobind Doss v. Goureepersaud Sahu and others 7 W.R. 202 and which was cited by Mr. Montriou in his argument, it was held that a person cannot be made a party to a suit, u/s 73, Act

VIII of 1859, unless ha is likely to be affected by the result of it. In that case it was said that it would be most inconvenient and contrary to all principle, if every person, claiming a title adverse to those set up, both by the plaintiff and the defendant in the suit, should be allowed to intervene, and be introduced into the suit.

3. What the plaintiff really wanted to try in this suit was whether he was entitled to succeed to a 12 annas share of the property of the late Moulvi Mohammed Ibrahim, and to recover from the widows the possession of that portion of the property. The widows did not dispute the fact that the property mentioned in the schedule, formed part of the estate of the deceased, or that they were in possession of it. The widow, Khadija, however, admitted Nasiram''s title. That admission would have been no ground for allowing the plaintiff to recover it from Nasiram as part of the estate of Ibrahim. It is clear, therefore, to my mind that the Subordinate Judge ought not to have ordered the interveners to be made parties to the suit.

4. Another of the issues, raised by the Subordinate Judge, was, whether, according to the Mohammedan law, the plaintiff was entitled, by right of inheritance, to 12 annas out of the whole estate of Mohammed Ibrahim, or whether the widows of the said Mohammed Ibrahim, on account of dower due to them, were entitled to retain possession of the whole estate.

5. The cases which were cited in argument (special appeal decided on 6th of February 1863 before the 1st Bench), Syud Atabur Ali v. Aliap Fatima and others, dated the 6th February 1863, which is not printed, and the case of Mussamut Janee Khanum v. Mussamut Amatul Fatima Khanum 8 W.R. 51 held that the widow of a Mohammedan, in possession of her husband''s estate, under a claim of dower, has a lien upon it as against those entitled as heirs, and is entitled to possession as against them, till her claim to dower is satisfied. The same point was held, as regards the Sheea sect, by the Privy Council in the case of Amironnissa v. Muradoonnissa 6 M.I.A. 211

6. One of the widows defendants in this suit, Mussamut Amatul Fatima entered into a compromise with the plaintiff, which has been carried into effect by the decree of the Subordinate Judge. The other defendant, Mussamut Khadija, defended the suit; and according to the decisions to which I have already referred, I think that she was entitled to a lien upon her husband''s estate for the amount of any dower which remained due to her.

7. The predecessor of the Subordinate Judge, who decided this suit, laid down an issue as to what was the amount of the dower of the widows; but the Subordinate Judge, Syud Saudut Hossein, by whom this case was decided, subsequently struck out that issue upon the ground, as I understand that it was not material to determine what was the amount due on account of dower; and that the material question was whether the widows were entitled to a lien for dower. It was admitted by the parties that some amount of dower was due. Assuming, then, that the

plaintiff, as the heir of the deceased Moulvi, was entitled to a 12 annas share of the whole of his estate, he was not according to the decisions to which I have referred, entitled to recover possession of that estate from the widows so long as any portion of the dower remained unsatisfied, nor could he be entitled to mesne profits.

8. I do not concur with the learned counsel, Mr. Montriou, that, as a matter of law, a lieu cannot be maintained for an amount which is not ascertained. A person may have a lien, as well as be entitled to a mortgage for a sum, the amount of which is not ascertained. If a person were to create a lien for a sum of money advanced, the lien would remain good, until the amount should be paid; and the lien would continue so long as any part remained unpaid although the parties might dispute as to the precise amount which remained due. So, a widow is entitled to a lieu for whatever dower remains duo to her, although there may be a dispute as to what is the amount actually due, having reference either to the amount originally fixed as dower, or to the amount satisfied by payments. Some amount being admittedly due on account of dower, the plaintiff''s suit in this case was misconceived; and instead of bringing a suit to turn the widow out of possession, so long as she had a lien upon the estate for her dower, he ought to have brought a suit for an account of what was due to the defendant for dower, add prayed that, upon satisfaction of that amount, he might be put into possession of his share of the inheritance: that is, substantially, what was decided by the Privy Council in the case to which I have referred.

9. That was a suit instituted by Syud Abdulla, the ancestor of the appellant, in which he claimed as the full brother and heir-at-law of Syud Mustifa and sought to recover very considerable, real as well as personal, estate belonging to his deceased brother, Syud Mustifa, with mesne profits. The respondent, Muradunnissa, was in possession, and she claimed a lien upon the same, as the widow of the deceased, under a deed of dower, executed by Syud Mustifa, in her favor, to the amount of rupees 64,000.

10. The Lords of the Judicial Committee, in delivering their judgment, say:-- "Lastly, there remains the question of the distribution and administration of the deceased''s estate. No such relief is asked by the plaint. The claim made by the plaintiff is, as sole heir against the defendants, charging them with collusion in keeping him out of possession. He does not claim in the alternative that, if the marriage of the respondent Muradunnissa and the deed of dower are proved, then that he may have his share of the estate. It is possible it might have been competent to the Court below in their discretion to have entertained such a question, it was a matter of discretion for the Judges of the Sadder Dewanny Adawlat. Independently of this Muradunnissa was in possession by the consent of the local authorities, a possession very analogous to that of a testatrix here that fact, however, is not sufficient to decide the point of right, but the plaintiff has not asked for an account. Again, he has burthened the record with a number of unnecessary parties, who

ought not to have been there, and that would have created very considerable inconvenience in taking accounts. He has also excluded all the moveable estates and that portion of the immoveable estate, of which he himself obtained possession. We are of opinion, therefore, that the Judges, before whom the case has been heard in India, took the right and convenient course in dismissing his suit, and leaving him to bring another suit to obtain an account that, no doubt, was the effect of their decision, though not in terms."

11. It appears to me that, according to the principle of that decision, this suit, which seeks to obtain possession and mesne profits before payment of the dower, ought to be dismissed, and that the plaintiff ought to have sued for an account of the dower due to the widow and to be let into possession upon payment of that amount.

12. Having decided in favour of the defendants'' claim of lien for dower, which disposes of the plaintiff''s suit, it is unnecessary for us to enter into the question of heir-ship, or any of the other questions raised between the plaintiff and the defendant Khadija, or to determine what part, if any, of the property mentioned in the schedule belonged to Khadija in her own right, or formed part of the estate of her late husband. Whether it was her own private property or formed part of the estate of her husband, is wholly immaterial for the determination of this suit; for whether it is the one or the other, the plaintiff is not entitled to recover possession and mesne profits, so long as any portion of the dower is due.

13. It is unnecessary for us, therefore, to enter into the question raised in the cross-appeal or into the questions which have been raised between the plaintiff and the interveners. The latter ought never to have been made parties to this suit. No decision of ours in this suit could be binding upon the widow Khadija, with reference to the question as to whether any portion of the property, mentioned in the plaint, belonged to her husband''s estate, or to the interveners. We are of opinion that the decision of the Subordinate Judge, as regards the widow Khadija''s lien on the estate, for her unpaid dower, ought to be affirmed, and the plaintiff''s suit dismissed, as regards Khadija, with costs in the lower Court. With regard to the intervening defendants, they were volunteers; they asked to be made parties to the suit, and the costs they have incurred, have been brought upon them solely by their own act of petitioning to be made parties to the suit. We think that the suit as against them, ought to be dismissed without costs, and the decree of the Subordinate Judge, awarding costs to them, reversed. The decision of the Subordinate Judge, as to their rights in the property, will then fall to the ground, and cease to have any effect. The decree, as to the other widow, will stand; there being no appeal here with regard to it. The appellant will pay the costs of this appeal as regards Khadija, but not those of the other respondents.