(1870) 04 CAL CK 0008

Calcutta High Court

Case No: Regular Appeal No. 243 of 1869

Rani Risannissa Begum		APPELLANT
	Vs	
Mussamat Rani Khijarannissa		RESPONDENT

Date of Decision: April 23, 1870

Judgement

Loch, J.

The points raised in appeal are, first, that the claim in regard to that portion of the dower which is prompt is barred by the Law of Limitation; second, that the claim in regard to the portion of the dower which was deferred is also barred by limitation; third, that the document, i.e., the kabinnama, or deed of dower propounded by the plaintiff, and on which she relies, is a forged document, and was not executed by Enaet Hossein. The fact of the marriage of the plaintiff with Raja Enaet Hossein is admitted. It is also admitted that she separated from her husband about 1259 Mulki (1851), and was living separate from him, when he died in 1867, though there had been no divorce. The date of Raja Enaet Hossein''s death is not disputed.

2. We proceed to take up the objections raised in appeal in the order in which they are given above, and first as regard the application of the Law of Limitation to that part of the dower which is admittedly prompt.

3. Looking at the terms of the deed of dower, it is clear that one-fourth was prompt, i.e., payable at the time of the marriage, payable immediately. Looking to the authorities on Mahomedan law, Hedaya, Volume I, page 150 (Ed. of 1791), it appears that it is only by payment of the "prompt dower" that the husband is entitled to consummate the marriage; that till this be paid, the woman may refuse to allow her husband to have connection with her; and even if he should have had such connection, or been in complete retirement with her, she may refuse to admit him again, until she has received the whole of the prompt dower. Macnaghten in his Principles of Mahomedan Law says, page 59, Rule 20, in the Chapter on Marriage:--"A necessary concomitant of a contract of marriage is dower, the

maximum of which is not fixed, but the minimum is ten dirhems, and it becomes due on the consummation of the marriage (though it is usual to stipulate for delay as to the payment of a part), or on the death of either party, or on divorce." In Baillie"s Digest of Mahomedan Law, page 124 (and there appears to be no difference in this respect between the two sects) we have the same doctrine laid down: "A woman may refuse herself to her husband, as a means of obtaining "payment of so much of her dower as is moo■jjul or prompt; and in like manner her husband cannot, until such payment has been made, lawfully prevent her from going out of doors, or taking a journey, or going on voluntary pilgrimage." Again in page 126:--"When the parties have explained how much of the dower is to be moo■jjul, or prompt, that part of it is to be "promptly paid. Where, however, it has been stipulated that the whole is moo■jjul, or prompt, the whole is to be so to the rejection of custom altogether." It is clear, therefore, from the quotations above made, that prompt dower, unless delay be stipulated for and agreed to, becomes due, and should be paid at the time of the marriage.

4. It has been very properly pointed out to us by Mr. Money for the appellant, that all the cases given in Macnaghten"s Principles of Mahomedan Law are expositions of that law given by learned moulvis as known to and taught by them; that a Law of Limitation is unknown to the Mahomedan law, either as regards debts or dower, or any other claim; that as regards ordinary debts, the Law of Limitation introduced by the Regulations of 1793 has been held applicable, as also the recent Act XIV of 1859 and consequently there is no valid reason why that law should not be equally applicable to claims for dower which was always treated as debt by the Mahomedan law. It is contended, therefore, for the appellant, that, as the prompt dower became due on the date of the marriage, a suit to recover the amount should have been brought within twelve years, the period allowed by the law of 1793, from that date; that, if the Court, with reference to the judgment of the Privy Council in the cases of Ameeroonissa v. Mooradoonissa 6 Moore"s I.A., 211 and of Mussamut Beebee Jumeela v. Mussamut Mulleeka W.R., 1864, 252, think that, as no demand was then made, limitation will not run from date of marriage, then it is contended a distinct demand was made in 1861, when the plaintiff applied to the Court for permission to file a suit in form■ pauperis against her husband to recover the amount of the dower in the kabinnama. Her husband repudiated the claim, and denied having executed the document, and the plaintiff"s application was rejected on 27th January 1862.

5. Two cases from the Select Reports have been quoted in support of the contention that the Law of Limitation is applicable to a claim for "prompt dower." The first is Meer Nujibollah v. Mussamut Doordana Khatoon 1 Sel. Rep., 103, and the Judges who disposed of the case say:--"With respect to the deed of settlement, it was held that the claim to the two-thirds of the dower which were not exigible during the marriage, or in other words, were payable on the decease of the husband, was not affected by the rule laid down in the Regulation of limitations, as, at the commencement of the present suit, twelve years had not elapsed since the husband"s death; but the recovery of the

remaining third, specified as payable on demand, was held to be barred by the Regulation, in consequence of the long period (about forty years), which had elapsed since it became due, without any demand "having been made." That case is similar in many respects to the one before us. The husband in that case settled 5,000 gold mohurs, or rupees 80,000, on his wife, of which one-third was moo■jjul, or payable immediately, and two-thirds moo■jjul, or not exigible, during the continuance of the marriage. The law officers, when consulted, gave it as their opinion that, under the Mahomedan law, the cognizance of claims for dower could not be limited to any specific term, and that both the part which was payable on demand, and that which was not exigible during marriage, were equally recoverable from the estate of the "husband." Yet, in the face of this opinion, the Judges held that the claim for the one-third prompt dower was barred by the Law of Limitation, so long a period having elapsed without any demand being made. The second case is Noorunissa Begum v. Nawab Syed Mohsan Allee Khan Bahadoor 7 Sel. Rep., 40. The judgment follows that in Meer Nujibollah v. Mussamut Doordana Khatoon 1 Sel. Rep., 103. In this case, however, the husband was alive, and the wife''s claim for the exigible dower was held to be barred by the Law of Limitation; and it was also held that no claim could lie for the dower not exigible until the death of the husband, or the dissolution of the marriage by divorce. In this case, though it appeared that the parties were living separately, there was no evidence of a divorce, and the appeal was dismissed.

6. We now turn to the case of Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211 decided by the Privy Council in 1855. In this case Mooradoonissa, the defendant, claimed a dower of rupees 48,000, recoverable from the estate of her husband, Syud Mustafa. The plaintiff in this case, Syud Abdulla, the heir-at-law, denied that Mooradoonissa had been married to his brother Mustafa, and further pleaded that, as the deed of dower set up by Mooradoonissa created a debt demandable and payable immediately, the claim was barred by the Law of Limitation, III of 1793, section 14, more than twelve years having elapsed since the alleged marriage. In disposing of the appeal, their Lordships of the Privy Council, after quoting the above section of Regulation III of 1793 in extenso, refer to the last words of the section, which run thus:--"Or shall prove that either from minority or other good and sufficient cause, he had been "prevented from obtaining redress," and they say, this may probably be a case fit to be dealt with, under the concluding part of this Regulation, there may be such "good and sufficient cause;" but their Lordships do not desire to put their decision on that point, the terms of the deed are "when demanded by my wedded wife."" They then refer to certain classes of obligation payable on demand, and others which contain no provision to pay on demand, and are therefore payable immediately; and after referring to certain cases disposed of in the Courts of law in England relating to cases in which it had been ruled that an express demand must be made before the action could be maintained, their Lordships go on to say:--"It is quite unnecessary that there should be any demand here. The deed of dower, or settlement by the husband in favor of his wife, and the intention of the parties was that the wife was to have, as a dowry, the sum of rupees 46,000; and it is important to

consider how in convenient it would be if a married woman was obliged to brine an action against her husband upon such an instrument. It would be full of danger to the happiness of married life; and we think upon the true construction of this settlement, she had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately, or in his life-time. Their Lordships are therefore of opinion that the Regulation does not "apply as a bar to the claim, and that such defence entirely fails." It is contended by Mr. Money that their Lordships" judgment rests on the peculiar wording of the deed of dower in this case,-- "when demanded by my wedded wife;" that it was a case where a demand was to be made, and the right of action would accrue to the party from the date of such demand; but in the case before the Court, the only words used were "prompt" and "deferred," and that the prompt portion was payable at once. It was not like a note which ran in these terms:--"On demand I promise to pay," and so no demand was necessary. Looking however to the words of their Lordships, it appeared that, though the words, "when demanded by my wedded wife," were inserted in the deed of dower, yet no demand was necessary to give the wife a cause of action, for they say:--"We think upon a true construction of this settlement, she had a right of suit without a previous demand, and further, though she had this right, and might have exercised it any time, yet she was not obliged to sue her husband immediately, or in his life-time." And they further held that the Law of Limitation was not applicable to bar the claim, and why? because it would be inconvenient; were a married woman obliged to bring an action against her husband upon such an instrument, and it would be full of danger to the happiness of married life." It appears very clear that their Lordships did not rest their judgment on the words of the deed, but looked upon the dower as "prompt," for which a suit might be brought at any time without a demand; but that, for the sake of the domestic happiness of families, a suit to recover the amount must not be brought during the life-time of the husband, and consequently that the Law of Limitation then in force did not apply. I do not see that any other construction can be put upon their Lordships" words. If so, the fact that the present Law of Limitation, Act XIV of 1859, which was in operation when the present suit was brought, is more stringent in its terms, does not really affect the question, for it does not meet the reason assigned by their Lordships for holding the claim in the case of Ameeroonissa v. Mooradoonissa not to be barred 6 Moore"s I.A., 211. It was true that the parties had lived separately for a long time, but still they might have been reconciled, and the evidence for the plaintiff goes to show that the late Raja did make various attempts to be reconciled, and promised in his statement to the Magistrate to maintain his wife if she returned to his house. Had she brought a suit when they separated, or been obliged to do so within a certain period from the time they first quarrelled and separated, there would have been no hope of a reconciliation. But it is said that, in this case, a suit was actually brought in the life-time of the husband, and there was then a positive demand for the payment of the dower; and, under these circumstances, the present suit should have been brought within the period prescribed in clause 9, section 1, Act XIV of 1859.

7. Before however we proceed to consider this part of the question, it is necessary to refer to two other cases, Hosseinooddeen Chowdhree v. Tajunnissa Khatoon W.R., 1864,

199 and Mussamat Beebee Jumeela v. Mussamat Mulleeka W.R., 1864, 252. In the first of these cases, it was held (by Trevor and Glover, JJ.) that, according to Mahomedan law, moo■jjul, or exigible dower, is payable on demand at any time from the consummation of the marriage up to the death of the wife. Moo■jjul dower is payable on demand at any time during the wife''s life, but her heirs must be placed in the same category as all other suitors, and file their claim within twelve years of their obtaining the right to sue. The appellant''s allegation that the cause of action arose on the consummation of the marriage, is opposed to the Mahomedan law, and to the principle laid down by the Privy Council in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211. The dower was no doubt payable to Afsurunissa on that date, and she might have demanded it then had she been so minded; but she had equally a right to let it remain in her husband''s hands, he acting as her trustee; and as her power to claim it of him at any time ceased only with her life, the plaintiffs'' (respondents'') cause ''of action must be held to have commenced then, and not on ''their first demand for dower.'' The other case, Mussamut Bebee Jumeela v. Mussamut Mulleeka W.R., 1864, 199, follows the ruling laid down by the Privy Council in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211. In Mussamut Bebee Jumeela v. Mussamut Mulleeka W.R., 1864, 199, there was no deed of dower. The dower was granted verbally at the time of marriage, and nothing was then said of its being prompt or deferred. By Mahomedan law, Macnaghten''s Principles, page 59, Rule 22, if it be ''not expressed, whether the payment of the dower is prompt or deferred, it must be held that the whole is to be due on demand.'' The Judges who decided the case of Mussamut Bebee Jumeela v. Mussamut Mulleeka W.R., 1862, 252 held that, though by the Mahomedan law, owing to the absence of words defining the nature of the dower, it was actually exigible, yet that both parties, as shown by their conduct, considered it to be deferred; and therefore Jumeela, though separated from, and being on had terms with, her husband, did not sue, because she did not think the dower was ''claimable till after his death.'' The Judges conclude their judgment in these words:--''Considering therefore that, as nothing was determined at the marriage, whether the dower were to be exigible or deferred, it must, under the Mahomedan law, be considered exigible (prompt), and as such demandable and recoverable from the husband at any period during coverture, and also recoverable from him after divorce, or from his estate after death, if the action be brought within the period of limitation prescribed by law; and as it has been held by the Privy Council that such claim, though due, need not be sued for immediately, or during the life-time of the husband, ''and as the divorce has not been proved, we think the plaintiff has brought her suit in time.'' In Mussamut Bebee Jumeela v. Mussamut Mulleeka W.R., 1864, 252, it was urged that the judgment of the Privy Council in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211 did not apply, because there was no danger of destroying domestic felicity, as the parties had separated, being unable to live together. With regard to this argument, the Judges remark:-- ''It is sufficient to say that, if the ruling of the Privy Council goes to the extent of saying that exigible (prompt) dower, though demandable at any time during coverture, need not be sued for during the life of the husband, and we believe this to be the opinion of that Court, then the present plaintiff would not be debarred from bringing her suit after

her husband''s death, though her domestic felicity had been destroyed "by his ill usage which led to their separation;" and then the Court go on to show why, from the conduct of the parties, notwithstanding the rule of Mahomedan law, the dower in this case was held to be deferred, and not prompt.

8. It may be as well, before proceeding further to ascertain, if possible, in what sense Macnaghten uses the words in Rule 22 of Chapter VII of the Principles "due on demand." Are they equivalent to the term "prompt," or have they the meaning on which they appear to be used in the judgments quoted above, a sum payable on a demand being made for the payment. In a note to case 29, page 278, cited in the Principles of a deed of dower not specifying whether the payment shall be prompt or deferred, he says:--"There may be a stipulation for prompt payment of dower or for deferred payment, or there may be no mention whether it is to be deferred or prompt. In the first case and the last, the prevalent doctrine appears to be that the whole should be paid promptly." This passage explains the meaning of the words "due on demand" to be equivalent to the word "prompt." Again, in a note to Case 30, Macnaghten observes:--"The usage of the country is the only legal rule to be observed in controversies of this description. Had there been no mention whatever, whether the dower should be prompt or deferred, the whole must be considered to be promptly due."

9. The rule laid down by the Privy Council in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211 appears to be this; that, though a woman''s dower be prompt, yet she is not obliged to sue for it immediately, nor in the life-time of her husband. "It may therefore be inferred," says Mr. Baillie in his Digest of Mahomedan Law, page 92, that the time for the limitation of a suit, for even the exigible part of a woman''s dower, does not begin to run until the dissolution of the marriage." But it is urged that neither the ruling of the Privy Council in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211, nor of this Court in Mussamut Bebee Jumeela v. Mussamut Mulleeka W.R., 1864, 252, are applicable to the present case; for, in neither of those two cases had any demand for payment been made; whereas in the case before the Court, a distinct claim for payment had been made by the plaintiff in 1861, and the claim denied by the defendant in distinct terms, and the plaintiff''s application to sue as a pauper to recover the said money was rejected in January 1862.

10. The Privy Council have assigned a reason why a claim for prompt dower need not be made till after the dissolution of marriage, viz., the danger that there would be to the continuance of domestic felicity were a woman compelled to make such a demand during coverture. In the present case there was no such reason for deterring the plaintiff from making the demand, nor was she deterred. She had long lived separate from her husband; and however willing he might have been to be reconciled to her, she was determined not to be reconciled to him, and made a demand for her whole dower during the life-time of her husband. Admitting therefore, as it has been ruled by the Privy Council, that "prompt dower" need not be sued for during the continuance of the marriage, and that "deferred dower" cannot be sued for during coverture; yet, if a party do exercise her right to claim prompt dower during her husband''s life, and, while the

marriage is in force, makes a demand for payment, does she not bring herself under the operation of the Law of Limitation? and if she fail to bring her action within the period allowed by law for bringing such suits, would not her claim to the prompt dower be barred as effectually as any other claim? If this be the law, it may be said that the reconciliation between the parties is almost hopeless, and the effect of the Privy Council''s ruling in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211 is evaded. Married people quarrel, and in anger, the wife demands her dower; they make friends, and live peaceably as man and wife again; in such case, can it be said that the wife must, within a fixed period, bring her action for the prompt dower, or lose her right to it? Quarrels of this kind may occur continually between married couples, who may afterwards be reconciled; but if the wife be compelled by law to bring her action for dower, an almost insuperable difficulty to reconciliation would arise; and after the husband''s death, the heirs would certainly plead limitation, on the allegation, true or false, that a demand for the dower had been made during the life of the husband, which had not been followed up by a suit in proper time, and so defeat the claim of the widow for that portion of the dower which was prompt.

11. It is very questionable whether the Privy Council, in laying down the general rule in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211 contemplated a case like the present where the wife living for many years separate from her husband formally demanded, as is alleged in Court, her dower from him. Had the question before their Lordships been that which is before us, it is not improbable that they might have held, under the circumstances, that the claim for prompt dower was barred by limitation. At any rate, their ruling in Ameeroonissa v. Mooradoonissa 6 Moore''s I.A., 211 does not, I think, meet all the requirements of the case. All they laid down in respect to the dower, which was prompt, was that the wife had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately or in his life-time. If however she did make the demand, and that not in a period of momentary anger, after some domestic squabble settled as speedily as excited, and from which no abiding interruption of domestic felicity ensued; but after many years of separation, when all attempts at reconciliation had failed, and that demand was made openly, deliberately, and publicly, it appears to me that, to such a case, the ruling of the Privy Council so frequently quoted, cannot, and does not, apply, and that a party making such a demand is as much barred from bringing her suit to enforce her claim within the period allowed by law, as is any other person seeking to enforce a written contract.

12. But it is said that no demand has been made; that plaintiff''s application in 1861 to sue as a pauper can at best be looked upon as a notice, but not as a demand. On 3rd May 1861, the plaintiff filed a petition of plaint in the Court of the Principal Sudder Ameen, setting forth that, on the occasion of her marriage with Raja Enaet Hossein, a kabinnama, by which a lakh of rupees had been settled upon her, was executed by her husband; that of this, part, or one-fourth, was prompt, and part, or three-fourths, deferred; that, of the prompt dower, her husband had on various occasions paid her rupees 2,000; and she now sued to recover the balance; but being devoid of means, and unable to pay the

stamp fees, she prayed that she might be allowed to file her suit as a pauper. On the 1st July following, a petition on the part of Raja Enaet Hossein was put in by his authorized vakeels, Moulvi Afzal Ali, Charles Chapman, and Moulvi Farzand Ali, to the effect that the plaintiff was not a pauper, the Raja at the time of her marriage having given her jewels and cash to the value of rupees 10,000; that the kabinnama produced by the plaintiff was a forgery; and that plaintiff''s dower was never fixed at a lakh of rupees, nor was a deed of any kind drawn up and executed; but according to the custom of the family, the plaintiff''s dower was verbally fixed at rupees 5,000. Further objections are taken to the deed that it does not bear the Raja''s seal; that the Cazi''s seal thereon was obtained by collusion between him and members of the plaintiff''s family; that the claim for the prompt portion of the dower was barred by limitation, not having been sued for within twelve years of the marriage, and that the suit for the remainder of the dower was premature. He denies having ever paid any part of the prompt dower; and urges that, if any such payment had been made, it would have been entered on the back of the deed, had that deed been a genuine document; and he adds that the allegation of payment is made to avoid the effect of the Law of Limitation.

13. On 7th January 1862, Raja Enaet Hossein was examined in Court by the Principal Sudder Ameen, and the first question put to him was, "You have stated in your answer that ornaments to the value of rupees 10,000 were given by you to the petitioner, Rani Khijarannissa; that some of these ornaments to the value of rupees 6,000 were pledged by the petitioner for a sum of rupees 3,000 to a mahajan, which were afterwards redeemed and sent by you to the rani, the plaintiff. When were they sent, and are they now with the plaintiff, or have they been disposed "of?" In reply to this question, the Raja gives the same details as are given in his petition of 1st July 1861 regarding these ornaments, and adds what was also stated in that petition, that the plaintiff was in receipt of an allowance of rupees 25 a month from her brother Sifallah. After this examination, a proceeding dated 27th January 1862 was drawn up by the Principal Sudder Ameen, in which he states that the plaintiff had filed a suit to recover the amount of her dower under a deed bearing date 8th Rabiassani 1254 = 18th Asar 1246 Mulki (July 1st, 1870); that she prayed for permission to sue as a pauper; that the case came on, Munshi Ahmed being pleader for the plaintiff, and M. Afzal Ali, M. Farzand Ali, and Mr. Chapman, pleaders for the defendant; and after reading the record, and hearing argument, it was ordered that the application of the petitioner to be allowed to sue as a pauper be rejected with costs. These proceedings appear to have been conducted under the provisions of section 305, Act VIII of 1859, and related only to the question whether plaintiff was or was not a pauper, and this was decided against her; but this much may be gathered from these proceedings, that Raja Enaet Hossein adopted the petition of 1st July 1861, put in by his vakeels in his name as his own, and must be considered to have accepted the statements made in it. He does not repudiate any part of it; but when the question is put, "You said in your answer," i.e., 1st July 1861, he replies by repeating statements found in that answer or petition, which also contains a direct and distinct repudiation of plaintiff''s demand for dower. But still it is said that, as the application to sue as a pauper was

rejected, there was no demand, but only notice of a claim. I cannot consider the application in that light. It was drawn up as a plaint in a regular suit; and had the application for permission to sue as a pauper, which is written at the foot of the plaint been allowed, the petition would, under the provisions of section 308, Act VIII of 1859, have been numbered and registered, and been deemed to be the plaint in the suit. By a ruling of the High Court in Golucknath Dutt v. Seetaram Gowar 1 Hay"s Rep., 378, it was held that the suit was commenced when the application to sue in form■ pauperis was filed; and in another case, Vinayak Dhavle v. Bhau Samvat 4 Bom. H.C. Rep., A.C.J., 39, it was held that a pauper suit commences for the purpose of limitation on the day when the petition to sue in form■ pauperis is presented to the Court, and not on the day when the application being granted, it is numbered and registered. It cannot be said that Raja Enaet Hossein was ignorant of this demand, or that the petition of 1st July 1861, in which he distinctly denied the plaintiffs claim to dower, was not written with his knowledge and consent, seeing that it was presented by his authorized pleaders who were also present, and argued the case when the application was rejected, and he himself, when examined by the Principal Sudder Ameen, admitted it to be his answer, though he did not speak to all its details. Looking, therefore, upon the Rani"s application to be permitted to sue as a pauper, to be a clear, distinct, and positive demand made in a public Court to recover her dower, a demand which was as distinctly rejected by the Raja, I think her claim for so much of the dower as is prompt must be held to be barred by the Law of Limitation, clause 9, section 1, Act XIV of 1859; the suit not having been brought within three years from the date of the cause of action, viz., the refusal on the Raja"s part to pay the demand then made.

14. On the 2nd point taken before us in appeal, we are against the appellant, for it is clear, both from the Mahomedan law and the current of decisions, that deferred dower can be demanded only when the marriage is dissolved, either by divorce or by the death of the husband. If, however, the wife does demand this dower during the period of coverture, her claim can only be treated as premature; for such demand and refusal on the part of the husband do not give her any immediate cause of action, from which the period of limitation is to be counted, for her cause of action for deferred dower can, under no circumstances, arise during the continuance of the marriage. . . . . .

Hobhouse, J.

15. I agree in the judgment of Mr. Justice Loch. I think the suit for that part of the dower which is prompt, is barred by the application of the Statute of Limitations, clause 9, section 1, Act XIV of 1859. I observe that, by the preamble to that Act, it is provided that all suits shall be governed by the periods of limitation declared by that Act, any law to the contrary notwithstanding.

16. Then this suit is admittedly a suit on a written contract not registered; and by clause 9, section 1 of the Act, it is provided that to such suits the period of limitation applicable shall be three years from the date of the breach of contract. Now here the breach of contract

seems to me clearly to have occurred either at the time of the marriage, or at the latest when the plaintiff demanded, and her late husband refused to pay the dower claimed on the contract. That was in 1861, and the suit was not instituted until 1868, and so was not in time for the prompt dower.