

(1881) 02 CAL CK 0019

Calcutta High Court

Case No: None

Sarkies

APPELLANT

Vs

Prosonomoyee

RESPONDENT

Dossee and Others

Date of Decision: Feb. 28, 1881

Citation: (1881) ILR (Cal) 794

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Wilson, J.

The main question in this case is a pure question of law,---namely, whether, by the law in force in Calcutta, the widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life.

2. There is, so far as I can find, no express authority upon the question. It must, therefore, be dealt with upon consideration of principle.

3. The plaintiff's claim is founded upon two propositions,---1st, that, by the law of England, a widow would, under like circumstances, be entitled to-dower; 2nd, that the law of England governs the present case.

4. The first of these propositions is no doubt correct. The question is as to-the second. It is often said that the law administered by this Court is,--- except in certain matters affecting Hindus and Mahomedans, and except so far as statutory provisions have modified it,---the Common Law of England as it existed in 1726. But this statement, though, no doubt, in general sufficiently accurate, is not absolutely correct. The true principles to be followed by this Court, when called upon to apply a rule of English law not previously applied are clearly laid down by the Judicial Committee in *The Mayor of Lyons v. East India Co.* (1 Moore's I. A. 175).

5. The questions to be answered in each case are stated at page 272:---"Has the English law (upon the point in question) been introduced?" "If that law has never been introduced, has there been such an introduction of the English law generally, that those parts which have been introduced draw along with them the law in question?"

6. The rule of English law which the plaintiff in this case seeks to apply has, certainly, not been introduced into Calcutta by any express declaration; nor so far as I can learn, has it ever been sanctioned by any judicial decision. I cannot find any trace of it throughout the whole period during which the Supreme Courts and the High Courts have existed in the Presidency-towns.

7. Has then any branch of English law been so generally introduced as by reasonable implication to carry this law with it? I think not.

8. There is authority for saying that the English law of inheritance to real" estate was introduced: *Gardiner v. Fell* (1 Moore's I. A. 299) and *Freeman v. Fairlie* (1 Moore's I. A. 305). The rule that the heir-at-law takes subject to-the widow's right to dower, may well be regarded as a rule of the law of inheritance. And, accordingly, in some of the cases cited at the bar, the Supreme Court assigned dower to the widow as against the heir-at-law. But the rule that a wife's right to dower attaches by marriage, and follows the land in the hands of a purchaser, is a peculiar and characteristic doctrine of the feudal law, and can only, it seems to me, prevail in Calcutta, if it can be affirmed that the English law of real property was introduced into Calcutta in its entirety. But this proposition is expressly negatived by the Privy Council in the case to which I have referred. On this ground I am of opinion that the plaintiff's claim fails. It is, therefore, unnecessary to consider any of the other questions which have been discussed.

9. From this decision the plaintiff appealed.

10. Mr. Evans and Mr. Agnew for the Appellant.

11. Mr. Phillips and Mr. J. G. Apcar for the Respondents.

Evans, J.

12. There is only one right of dower--the old common law right--applicable. In Calcutta it has always been the practice for the wife to join to bar her dower. Lands in Calcutta have always been conveyed with regular investigation of title. They are held as freeholds of inheritance, and dower is assignable out of them. *Pontifex, J.*---It would take away from the mutuality of contract between husband and wife to hold that the widow is not entitled to dower as against a purchaser from the husband. The husband is entitled to an estate by the courtesy in his wife's lands. The Dower Act (XXIX of 1839) recites, that it is expedient to extend the amendments in the English law of dower to the territories of the East India Company in cases which, but for the passing of the Act, would be governed by the English law of dower as it

existed previously; and Section 4 of that Act provides that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will. This shows that the Legislature considered that the English law of dower applied. Armenians have no law of their own and are governed by the English law; and an Armenian widow has been held to be entitled to dower---*Emin v. Emin* 1 Morley, 300; *Morton by Montriou*, 242. In the case referred to by the learned Judge in the Court below---*The Mayor of Lyons v. The East India Co.* 1 Moore I. A. 276 ---Lord Brougham says, that alien widows have had dower assigned to them. The law of dower is not of feudal origin. Its origin is uncertain---*Petersdorff's Abridgment*, Tit. Dower; but it was in existence before the conquest, and was in fact abridged by the feudal law. It attaches in England to lands of gavelkind and borough English tenure. The question is, whether the law of dower was introduced into this country; and if so, what law was it? English, or what other? The only law of dower we know is the English law, and its existence has been repeatedly recognized in these Courts. The only law applicable to British subjects other than Hindus and Mahomedans is the English laws: *Emin v. Emin* 1 Morley 300; *Morton by Montriou*, 242, *Stephen v. Hume* (Pulton, 224), *Musleah v. Musleah* (Fulton 420); 1 Boulnois 234, *Joseph v. Ronald* (*Morton by Montriou*, 111); In the matter of *Cachich* 1 Morley 375; *Morley's Introd.*, pp. 187, 298). There is no case which expressly decides that dower will attach as against a purchaser; but in *Dela Cruz v. Goorachand Seal* (*Clarke's Addl. Rules and Orders* 335) the Court considered that it would. Gaeth, C.J.---If we are to apply the law of dower at all, why should we stop at a particular point and refuse to apply it in its entirety? Pontifex, J.---Was the husband seised? The conveyance recites that he is seised and possessed of the property as and for an estate of inheritance in fee-simple. The learned Judge admits that dower attaches as against the heir, but refuses" to extend the law on the authority of *The Mayor of Lyons v. The East India Co.* 1 Moores I. A. 276. But that case is based on *The Attorney-General v. Stewart* 2 Mer., 160 which shows that laws having only a local effect, and applicable only to England, such as the Mortmain Acts, are not to be considered as introduced into a Colony. Dower does not come under this class of cases. The reasons given in *The Attorney-General v. Stewart* 2 Mer. 160 were followed in *The Advocate-General of Bengal v. Ranees Sumomoyee* 9 Moore I. A. 425. That lands in Calcutta are freehold of inheritance appears from *Gardiner v. Fell* 1 Moore I. A. 299 and *Freeman v. Fairlie* 1 Moore I. A. 305. 13. He was stopped by the Court.

Phillips, J.

14. There is no evidence that this is an estate of inheritance in fee-simple. The recital in the deed is not evidence against my client. It is merely the vendor's statement of his own title. There would be great inconvenience in extending the right of dower as against a purchaser from the husband. The natives of this country are not familiar with English law, and a Hindu purchaser would never think of enquiring whether

such a right existed. There is no such estate existing in this country as an estate of fee-simple in inheritance, and dower can only attach on such an estate. It was necessary to introduce a law of inheritance, and the English law was followed, and dower has been assigned as against an heir-at-law. But dower was only partially introduced; it cannot be assigned as against any one but the heir. This is an artificial conveyance, and the wife was not asked to join. That shows that the purchaser was not aware of her existence. The letter of the Court of Directors in 1792, Tagore Law Lectures, 1874, p. 283, shows, that the English law relating to land had not then been introduced. None of the cases go so far as to say that dower is assignable against a purchaser. They do say that it is assignable as against the heir, and so far they are binding; but the law should not be extended; the inconvenience and injustice of doing so would be very great. Garth, C.J.---There is no more injustice in enforcing that charge than any other. A purchaser must look to his title and see what incumbrances there are on the property. Pontifex, J.---If a Hindu governed by the Mitakshara law comes to Calcutta, and buys land here, and a Hindu governed by the Dayabhaga buys from him, he would buy subject to the rights of the vendor's sons, and could not contend that he was ignorant of the Mitakshara law. The only case in which it is expressly decided that a widow is entitled to dower is *Emin v. Emin* (1 Morley, 300; Morton by Montriou, 242), and that case goes too far, for it shows that dower would attach to lands in the mofussil. In none of the other cases is there any express decision to that effect, *Doedem and Savage v. Bancharam Tagore* (Morton by Montriou, 105), *Joseph v. Ronald* (Morton by Montriou, 111), *Jebb v. Lefevre* (Morton by Montriou, 152). The utmost reached in *Freeman v. Fairlie* (1 Moore I. A. 305) is, that an equitable fee exists, and that is not an estate out of which dower can be assigned. It is an incident of real estates in this country that they are assets in the hands of executors for the payment of debts. That shows that they are not technically estates of inheritance. Pontifex, J.---In England real estate may be assets in the hands of executors for the payment of debts: *Robinson v. Lowater* (17 Beav. 592; 5 D. M. G. 272). There must be a legal estate of inheritance in fee-simple in order that dower may attach. No case decides that such an estate exists in India. That point was not decided in *Freeman v. Fairlie* (1 Moore I. A. 305); the only question there was, whether a will attested by two witnesses passed land: it was enough to consider where the estate was to go, whether to the legal personal representatives or to the heir. The fact that was customary to levy fines to bar dower does not prove that fee-simple estates existed, but merely that it was thought advisable to take precautions to prevent the widow from claiming. The right to dower was swept away by the Succession Act. Section 4 provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries; and Sections 25-28 provide for the widow in case of intestacy. Garth, C.J.---Dower has the effect of a settlement on the marriage; it is a charge which the husband cannot alienate without the consent of the wife.---It cannot have been intended that a widow should get her dower and also the provision under the Act. He also referred to Section 17 of 21 Geo. III, p. 70.

15. Mr. Agnew in reply referred to *Nekram Jemadar v. Iswari Prasad Pachuri* (5 B. L. R. 643) and *Jagadamba Dasi v. Grob* (5 B. L. R. 639).

Richard Garth, C.J.

16. The plaintiff is the widow of an Armenian gentleman, to whom she was married in the year 1837; and she claims, in this suit, to have her dower assigned to her out of certain lands in Calcutta, which belonged to her husband at the time of the marriage, but were afterwards sold by him to one Bungshee Dhur Dutt and Nobin Chunder Dutt by an indenture dated the 9th of May 1866.

17. The defendants' title is derived from the purchasers under that deed; and their contention, stated broadly, is, that the English law of dower is not applicable to a case of this kind.

18. The learned Judge in the Court below appears to have considered, that although lands held by Armenian subjects in Calcutta are subject generally to the English law of inheritance, and although the law of dower might have formed a portion of that law, yet, as there is no direct authority for the position that a widow in this country can enforce her right to dower as against a purchaser from her husband, he was not bound to extend the law of dower to such a case, and he therefore dismissed the plaintiff's suit.

19. Now, it being once established, that the law of dower has always been recognized as a part of the law of inheritance in this country, that Armenians are subject to that law, and that the property in question was held by the plaintiff's husband for an estate to which the law of dower would attach, I confess I should feel great difficulty in placing any arbitrary limit upon that law, and in denying the plaintiff, as against a purchaser from her husband, the rights to which she is admittedly entitled as against his heir.

20. Mr. Phillips, who argued the case on behalf of the respondents, seemed rather sensible, as I thought, of this difficulty; and he, therefore, preferred to take the bolder course of contending, not only that the law of dower has never been recognized here in the same way as it has been in England, but that estates held here by Europeans, although they might in one sense be estates of inheritance, were not estates of that particular character to which the right of dower could legally attach. And he has also relied on two or three other points, which I shall proceed to deal with in their proper place.

21. The case has been argued at some length, and our attention has been called to a great many authorities; but I am bound to say, that from first to last I have never entertained the slightest doubt, either that the law of dower has been recognized in this country, amongst Europeans and Armenians, as a branch of the law of inheritance, or that estates which have been held by British subjects under the name of freehold estates of inheritance are in all essential respects the same estates

which have been held in England under the same name.

22. Indeed, I should be extremely sorry to think that at this day any doubt could reasonably be thrown upon either of these propositions. For a long series of years estates of inheritance have been enjoyed and dealt with by British subjects here in the same way as they have been in England. They have been bought and sold as such. They have been transferred from hand to hand by modes of conveyance which are only applicable to English tenures, and meaningless as applied to any other tenures. They have been considered and treated as such by the Supreme Court since its first establishment; and they have been made the subject of real actions, which we all know constituted a machinery quite inappropriate to any other than English tenures. And lastly, they have over and over again been recognized and dealt with as such by the Indian Legislature.

23. In fact, if Mr. Phillips' argument is well founded, it seems to me, that not only proprietors of land themselves, but also the legal profession, and the Courts of law, and the Legislature, have all for years past been labouring under a very serious mistake.

24. So long ago as the year 1815, we have the direct authority of the Supreme Court in the case of *Emin v. Emin* (Morton by Montriau, p. 242) deciding--1st, that the English law of dower was at that time recognized, and enforced here as it was in England; and 2ndly, that Armenian subjects of the British Crown resident in Calcutta were amenable to that law.

25. In that case a bill was filed by the widow of an Armenian against the heir-at-law (being the eldest of two sons of her deceased husband), praying to have her dower assigned. Her husband was also an Armenian; and the lands out of which the dower was claimed, and of which the husband was alleged to have been seised for an estate of inheritance in fee-simple, were, for the most part, within, the town of Calcutta, though a small portion of them were situate in a neighbouring mouza.

26. A decree was made in favour of the plaintiff by Sir Edward Hyde East and Sir W. Burroughs, that the dower should be assigned by a commissioner in the usual way and a final decree was subsequently made confirming the commissioner's report, by a Court which consisted of Sir Edward Hyde East, Sir Francis Macanaghten, and Sir Anthony Buller.

27. From that time to the present, as far as we know, the correctness of this decision has never been questioned, and we have the further evidence that the law of dower was fully recognized, from the fact that a large number of fines have been produced before us from amongst the records of the Supreme Court, which have been levied from time to time for the express purpose of barring dower.

28. Then we have the Dower Amendment Act of 1839, passed by the Legislature of this country, corresponding in most of its provisions with the Dower Amendment

Act in England, the 3 and 4 Wm. II, Clause 105.

29. If the contention of the defendants were right, there could have been no such thing in this country as the law of dower, because there were no estate to which that law could legally attach. But the preamble of this Act distinctly affirms the existence of that law in India, and the necessity for amending it as it had been amended in England.

30. The various sections of the Act treat of the doctrine of "seisin," of "rights of entry," and of "equitable," as distinguished from "legal estates of inheritance," in language which would have no meaning, unless the English law of inheritance prevailed in this country.

31. It seems to me, therefore, that even if we entertained any doubt upon the subject, which I certainly do not, it would not be possible for us at the present day to ignore the existence of a law thus distinctly affirmed, both by the Supreme Court and the Legislature. As a matter of principle, there would seem to be at least as much reason, why amongst British subjects in India a provision should be made by law for a wife's maintenance as in England. And if this principle is conceded, it is difficult to see why a wife should have less power of enforcing her rights against a purchaser from her husband than she had in England.

32. It then being once established that the law of dower has prevailed in this country, we have no right, as it seems to me, to contest or modify that law according to our own notions of justice: we must administer it in its integrity; and we have no more right to deprive the plaintiff of the benefit of it by holding (contrary to its well-known rules) that her husband could deprive her of her dower, by aliening his lands to a stranger, then we should have to hold, that a tenant for life or in tail might sell the inheritance absolutely, to the prejudice of the reversioner or remainderman.

33. Besides, it seems to me, that Section 4 of the Dower Amendment Act is itself an authority, that, before the Act, a husband could not alien or devise his lands so as to deprive his wife of her dower. That section purports to deprive a wife of her right to dower in lands, which may have been aliened or devised by her husband in his lifetime, which means, if it means anything, that in the view of the Legislature, a wife, before the Act, had a right to dower in such lands. The section would not only be superfluous, but misleading, unless the wife had such a right.

34. The learned Judge in the Court below has alluded to the judgment of the Privy Council in the case of *The Mayor of Lyons v. The East India Co.* (1 Moore I. A. 175), as affording an authority, that the English law of inheritance was not introduced here in its entirety, but only so much of it as was applicable to the state of things in India. But that case, as I read it, does not mean to decide that the Courts of this country are justified in adopting just so-much of the law of inheritance or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points

out, that there are certain portions of our English Statute law, which from their very nature were only passed for reasons connected with England, and which would not be applicable to India, or any other Colony of the British Crown, as for instance, the Mortmain Acts, the law of Aliens, and the like.

35. That part of the law of dower, which we are called upon to administer in this case, is obviously quite as necessary to the due enforcement of the wife's rights in India as it would have been in England.

36. Then it was suggested, rather than argued, by the defendants' counsel, that although as against a European or any other purchaser (except a Hindu or Mahomedan), the wife might enforce her rights, Section 17 of 21 Geo. III, Clause 70, prevents her from enforcing them as against a Hindu purchaser.

37. That section enacts as follows:

Provided always, and be it enacted, that the Supreme Court of Judicature at Port William in Bengal shall have full power and authority to hear and determine, in such manner as is provided for that purpose in the said Charter or Letters Patent, all and all manner of actions and suits against all and singular the inhabitants of the said city of Calcutta, provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos: and where only one of the parties shall be a Mahomedan or Gen too, by the laws and usages of the defendant."

38. It is suggested that as against the defendants here, who are Hindus, the Hindu law of inheritance ought to prevail; and that as the Hindus recognise no rule of dower, the plaintiff cannot enforce that law as against the present defendants. This point, however, was not seriously pressed upon us. It may not be very easy to define what the concluding words of the section really mean; but whatever their proper construction may be, it is clear that they do not mean this, that where a Hindu purchases, land from a European, in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position as regards his purchase than a European purchaser would be. If the plaintiff's husband had no power to defeat her right by selling his land to a European, it is clear to me that he had no power to do so by selling to a Hindu or Mohomedan.

39. Then it was also contended, that assuming the plaintiff to have had an inchoate right to dower at the time when the Indian Succession Act (X of 1865) passed, she was deprived of her right by virtue of that Act. It was argued that Section 27, which provides what property of the husband the wife shall be entitled to in the event of his dying intestate, impliedly, though not expressly, deprived her of any other provision to which she was entitled at the time of the passing of that Act. But I think we cannot put any such construction on Section 27. If the plaintiff had an inchoate

right to dower at the time of the passing of the Act, nothing short of express words could deprive her of that right.

40. Indeed, Section 4 seems to exclude the notion of a wife, who was entitled to dower when the Act passed, being deprived of it by Section 27. It enacts that "No person shall by marriage acquire any interest in the property of the person whom he or she marries." That is evidently a prospective provision; and it is intended, as it seems to me, to leave rights unaffected which had already been acquired before the Act passed.

41. The only remaining point argued by Mr. Phillips was one of a somewhat technical nature. It is not noticed in the judgment of the lower Court, and was evidently considered of no weight; and if I thought there was anything in it, I should certainly have been disposed to allow the plaintiff to call additional evidence.

42. It is said that there was no sufficient proof in the Court below that the husband's estate in the property in question was an estate in fee-simple.

43. Mr. Phillips called no evidence on this point, nor offered to call any; nor did he pretend to say that the estate which his client's ancestors had bought from the plaintiff's husband was other than an absolute estate, which is known here by the name of a fee-simple. His bare contention was, that the plaintiff was bound to prove that the estate sold was an estate of inheritance, and that she had failed in that proof.

44. The conveyance, however, under which the defendants claim, and which was put in by the plaintiff, contains a recital that the vendor "is seised of, or otherwise well entitled to, the property intended to be sold for an estate of inheritance in fee-simple," and it purports to convey that estate to the purchasers.

45. Although, therefore, as between the plaintiff (who was no party to the deed) and the defendants, there was no estoppel, which would prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet as the purchasers bought the property as and for an estate of inheritance, and paid for it as such, I consider that is clearly prima facie evidence against them and the defendants as claiming under them, that the estate was what it purported to be.

46. It is one of those admissions by conduct of parties which amounts to evidence against them. If a written contract was made between buyer and seller with regard to the purchase of a horse, that contract (quite apart from any question of estoppel) would be prima facie evidence as against both buyer and seller that the thing sold was a horse. It would of course be perfectly competent for either of them to show that the thing sold was not a horse but prima facie their contract and their conduct would be evidence the other way.

47. I am of opinion, therefore, that as against the land in the possession of the defendants, the plaintiff is entitled to have her dower assigned; and that the usual

decree should be made, appointing a commissioner for that purpose.

48. I think also that the plaintiff ought to have her costs in this Court and in the Court below on scale 2.

Pontifex, J.

49. I also am of the same opinion. The very learned argument of Mr. Phillips might have had some weight in a bygone age dusty with the lore of Fearne and Preston. But it seems to me, for the reasons stated by my Lord, to be now of purely antiquarian interest; and even if it could have had any successful issue before the Courts, and the Legislature had, as Mr. Phillips argues, been misled by a false analogy, it is now propounded unfortunately about a century too late.

50. I will add one word with respect to Section 17 of 21 Geo. III, Clause 70. It seems to me, though the language is a little confusing, that the true construction of section must confine the words "their inheritance and successson" to questions relating to inheritance and succession by the defendants. The present is a question of the plaintiff's succession, and therefore not determinable by the laws and usages of the Gentoos.

Richard Garth, C.J.

51. A question has been raised between the parties upon this judgment, from what time the defendants are bound to account to the plaintiff for the profits of the property. We find that, in the case of *Emin v. Emin* (1 Morley, 300; Morton by Montriou, 242), an account of the profits was ordered from the death of the plaintiff's husband; and probably in a suit for dower against the heir or devisee of the husband that would be the ordinary rule. But in the present case, it does not appear that the defendants had any notice, until the suit was brought, that the plaintiff claimed her dower out of the property in question. She might reasonably have supposed that she had no such claim; and we think that it would be unjust, under such circumstances, to order an account against them prior to the date of suit.

52. The decree, therefore, will direct an account of the profits to be taken in the usual way from that date.