

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Humeeda and others v. Mussumat Budlun and Government, from the High Court of Judicature at Fort William, in Bengal; delivered 26th March, 1872.

Present:

SIR JAMES COLVILLE.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THE origin of this suit was as follows:—

In the year 1857, one Ali Kureem, who was accused of participating in the rebellion, absconded, whereupon, on the 10th of July, 1857, an order was issued by the magistrate of Patna under the directions of the Commissioners of Circuit directing the Collector of the district of Patna to report what real property Ali Kureem possessed in the district, with a view to its confiscation.

The Collector reported that the mouzahs, and shares of mouzahs, which form the subject matter of this suit, together with some others, belonged to Ali Kureem, notwithstanding the intervention of his mother, Mussumat Beebee Budlun, claiming them as hers, which intervention the Collector designated as but an attempt to secure the property for an absconded party.

In pursuance of this report an order was made by the Judge of Patna adjudging the forfeiture to the Government under s. 2 of Act 25 of 1857, of all the property so claimed by Mussumat Beebee Budlun, whereupon the Government took possession of it, and sold it to several purchasers.

On the 22nd of March, 1859, Mussumat Beebee Budlun, instituted a suit against the Government

and the purchasers of the property, claiming to be in possession of it under a valid title.

Her title to all the mouzals, except two, was in substance this: that, upon her marriage with Moulvie Mahomet Ali, the father of Ali Kureem, a dower of 100,000 rupees and one gold mohur had been assigned to her, which, upon her husband's death, in 1844, was unpaid; that, thereupon, Ali Kureem, being unable to pay it, relinquished his right as heir of his father to a fourteen anna share of the paternal property to her, in satisfaction, or part satisfaction of her dower. The remaining two anna share she claimed as widow and heiress of her husband.

Her title to certain shares in the two excepted mouzahs (Burhownah and Punjkunnah) was of a different character. She alleged that she had bought them of her son in 1855 for 50,000 rupees, the payment of which she thus described.

She stated that, notwithstanding the relinquishment by Ali Kureem of his right of heirship, he appropriated to the purposes of his business (at some time which is not stated) 40,000 rupees of the paternal property. That that sum of 40,000 rupees was, in the first instance, secured on the two mouzahs in question, the rents of which were received by her in lieu of interest; but that on a subsequent treaty for the absolute sale of the property to her for 50,000 rupees, the said sum was treated as part of the purchase-money, and that the remaining 10,000 rupees were paid to him on the execution of the deed of sale on the 15th of March, 1855, whereupon these mouzahs which had been bought by Ali Kureem, and stood in his name, were transferred to hers.

These allegations were, for the most part, put in issue by the Defendants, whose case was that the Plaintiff's dower was no more than 40,000 rupees, and that it had been paid in the lifetime of her husband, that the asserted renunciation of heirship by Ali Kureem, and sale of the two Mousahs were fictitious and colorable, that Ali Kureem was the real owner of the property, and had so acted on many occasions after the supposed relinquishment and sale.

All the issues were found in favour of the Plaintiff by the Judge of Patna, who adjudged that the

Plaintiff was entitled to all the property absolutely.

The Government acquiesced in this judgment, but the other Defendants appealed from it to the High Court of Calcutta. The High Court found that the Plaintiff had a life interest only in all the property. From this judgment both parties have appealed, the Plaintiff on the ground that her interest was absolute and not for life only; the Defendants, on the ground that she had no interest whatever.

It now becomes necessary to refer, with more particularity, to some portions of the judgment of the High Court, and of the evidence on which they are based.

With respect to the property claimed by the Plaintiff as relinquished to her by her son in lieu of dower, the High Court thus expressed its opinion: "We consider that the Plaintiff has not established her plea of dower, nor does she hold her husband's estate in virtue of dower. She as widow, and one of the two heirs of her husband, inherited an eighth of his estate. The remainder devolved upon her son, Ali Kureem, who, for reasons best known to himself, permitted his mother, Budlun, to appear to occupy his share during his lifetime, but on the clear and recorded stipulation that, on her death, he would succeed to the whole estate."

Their Lordships concur in the finding of the High Court, that the Plaintiff has not proved the amount of dower which she alleges, nor that she was in possession of her husband's property in right of dower, independently of an agreement with her son. There appears to have been no "Bai-Mokassa" whereby, in the lifetime of her husband, her dower was hypothecated so as to become a first charge upon his estate, consequently her claim, in respect of dower, would not have priority over the claims of other creditors.

Having regard, however, to the proof which was given, that shortly after the death of Mahomed Ali in 1844, his widow was put into possession of his property by the recorded consent of her son, who admitted her right to dower, and his inability to pay it; that, as acknowledged heiress to her husband's whole estate, she received payment of

debts due to it and incurred liability, enforced in one instance by an action, to pay debts owing from it; that at the time of these transactions no motive, such as that of defrauding creditors, was shown to account for Ali Kureem investing his mother with a fictitious ownership; and, further, that the whole value of the property was probably much less than that of the dower, taking it at 40,000 rupees, their Lordships see no sufficient reason to disbelieve the arrangement between the mother and the son, as it appears on the face of the documents put in by the Plaintiff.

The question remains, whether the effect of that arrangement was to give the Plaintiff the absolute interest, or an interest for life only.

The Judges of the High Court appear to have thought that a claim for unpaid dower, of whatever amount, was not the real consideration for the agreement between the mother and the son; but have found that, for some other consideration, not disclosed, it was agreed that the whole estate of Moulvie Mahomed Ali should be vested in his widow for her life, and, on her death, should devolve on her son. They reject the transaction pleaded, and substitute one which is hardly consistent either with the pleadings, or the proofs in the cause.

No document in the nature of an assignment, or an agreement defining the nature and expressing the terms of the arrangement between the mother and the son, has been produced or proved. The documentary proof of that arrangement consists chiefly of the proceedings, under which various portions of the landed property of Mahomed Ali were, immediately after his death, and, with the recorded consent of his son, transferred into the sole name of his widow, and of the proceedings relating to a sum payable to his estate, and to a debt recoverable from it.

The position of the mother and son on the death of Mahomed Ali was this:—the former, as sharer, was entitled to two annas; the latter as “residuary” was entitled to the remaining fourteen annas of the estate, both rights being subject to the debts of the deceased including deferred or unpaid dower (if any).

There does not appear to their Lordships to be

on the record the slightest proof of any agreement on the part of the mother, to convert her absolute interest in her two-anna share into a life interest; so as to give to her son a reversionary interest therein, capable of being seised or sold under the forfeiture or otherwise.

Again, if the widow had a claim for unpaid dower (and their Lordships think that, on the admission of Ali Kureem in 1844, it must be taken that she had such a claim), and that claim had not, by virtue of a Bai Mokasa executed by her husband, become a preferential charge on the estate, such a claim would constitute a debt payable *pari passu* with the demands of other creditors. In these circumstances it was competent to the son either to assign his share of his father's residuary estate to his mother by way of security for her dower, in which case she would take only a redeemable interest), or to relinquish it to her absolutely in satisfaction of her claim. In neither case would it have been essential in such a suit as this, which is for the recovery of the possession to which she was entitled, and from which she has been ousted, to prove the amount of her dower; although the omission to do so may be urged as an argument to show that the transaction pleaded, was not real, but fictitious.

The case made is, that the son relinquished his share in his father's possession in satisfaction of the claim for dower. Such relinquishment would be *prima facie*, absolute; and, if it were absolute, the widow would take the whole property, subject to the claims of other creditors. The subsequent acts of the parties are consistent with this state of things. It does not follow that, because she paid a small debt in full, she had not a valid claim for dower. The estate may have been sufficient for both; and even, if it were insufficient, she may have thought it better to satisfy than to litigate so small a demand.

Upon what grounds then ought it to be held, that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself? The creation of such a life estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. The only grounds on which

it can be inferred that the Plaintiff was to take only a life interest, seem to be the expressions in the Foutehnamah at p. 77, and in the Plaintiff's petition recited in the proceeding at p. 75, for the mutation of names in the case of Mouzah Muzdumpore Doomree. The judgment, in that case, finds generally that she is in possession of the entire property left by Mahomed Ali, "in lieu of Den Mohr, receivable by her," without any qualification as to the extent of her interest. Their Lordships conceive that the expressions in question may be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life; and that Ali Kureem, as her heir, would succeed to them after her death. They are, at all events, of opinion that these expressions, taken in connection with the rest of the evidence, are too weak to prove a transaction, so improbable amongst Mahomedans, as an alienation by the son for the life only of his mother (a transaction consistent with the case of neither party), and that the Zillah Judge came to the right conclusion when he found that the Plaintiff took an absolute interest in the properties left by her husband.

It should be further observed, with reference to this part of the case, that the interest of Mahomed Alim Mouzah Shackpore Doomree was in the nature of a mortgage interest under a Zur-i-peshgee lease; and that Ali Kureem, by a deed of July 29, 1844, the validity of which does not appear to be impugned, purchased the rights of the mortgagor in this property. It appears therefore to their Lordships that, at the date of the forfeiture, Ali Kureem was entitled to this property subject to the mortgage; and that his rights would pass to the purchaser under the forfeiture and consequent sale; and that there should be a declaration to that effect in the Decree.

It remains to consider so much of the judgment as relates to the shares in Mouzahs Burhownah and Punjkunwah, alleged by the Plaintiff to have been purchased by her of her son in 1855.

The High Court disbelieve this sale, relying on the improbability of the account of it and of the payment of the purchase-money, and also upon a

petition, presented by the Plaintiff in 1852, in a proceeding of attachment against the property of Ali Kureem, wherein she claimed these mouzahs, on the ground that they had belonged to her late husband, who had purchased them "benamee" in the name of his son, and that they were transferred to her, together with the rest of her husband's property, under the before-mentioned arrangement with her son, a statement manifestly inconsistent with her contention in this suit.

So far their Lordships concur with the High Court, but are unable to concur with their finding which follows that the Plaintiff possessed a life interest in these mouzahs—a finding which appears to their Lordships to be neither in accordance with the allegations nor with the proofs in this suit.

The High Court were undoubtedly justified in treating the fact of the Plaintiff having, in her petition of 1852, told a story inconsistent with her present case, as throwing discredit on that case and affecting her credibility, but, in their Lordships' opinion, were not justified in treating her allegation in that petition of a "benamee" purchase by her husband as proof in her favour of that fact in this suit wherein she does not even allege it. If the Plaintiff is entitled to recover possession of the two mouzahs in this suit, it must be on the sole ground which she has pleaded, viz., a purchase from her son, and on her failing to prove this, judgment must be pronounced as to so much of her claim, for the Defendants.

Their Lordships will therefore humbly report to Her Majesty as their opinion that both the Appeal and the Cross Appeal ought to be allowed, and that the Decrees of the High Court of Judicature at Fort William in Bengal of the 25th November, 1863, and likewise the Decree of the Zillah Court of Patna of the 8th March, 1861, ought to be reversed, and that, in lieu of the said Decrees, it should be ordered and declared by Her Majesty in the following terms:—

1. That it should be ordered and declared that the Plaintiff was, and is absolutely entitled to whatever interest belonged to her late husband in the several properties sued for, other than the $5\frac{1}{2}$ annas of the entire 16 annas of Talooka

Kusba Burhownah; and likewise, other than the one-third share of the entire 16 annas of Mouzah Budara Punjkunwah, and that she is entitled to recover the possession of such properties with mesne profits from the date of dispossession, but subject, as to Mouzah Shackpore Doomree, to the right of redemption vested in Moulvie Ali Kureem, by virtue of the conveyance from Ameroonissa Begum of the 29th of July, 1844, which is hereby declared to have passed to and become vested in the Defendant, the purchaser of that property under the forfeiture and sale.

2. That it should be declared that the Plaintiff, having failed to establish her title to the shares of the two Mouzahs above excepted, her suit as to those properties ought to be dismissed.

3. That it be ordered that the costs of the litigation in India in both Courts ought to be apportioned between the Plaintiff and Defendants, according to the course of the Courts of India in cases where the Plaintiff is only partially successful, and that each party pay their own costs of this Appeal.

4. That the cause be remitted to the High Court to give effect to these orders and declarations, and carry the same into execution.