Privy Council Appeal No. 79 *of* 1922.

Allahabad Appeal No. 24 *of* 1919.

Musammat Maina Bibi, since deceased (now represented by Chaudhri Khalilul Rahman and others), and others - - - *Appellants*

v.

Chaudhri Vakil Ahmad and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1924.

Present at the Hearing:
LORD DUNEDIN.
LORD ATKINSON.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment and decree dated the 12th March, 1919, of the High Court of Judicature at Allahabad affirming the decree of the Subordinate Judge of Allahabad, dated about three years earlier, namely, the 18th March, 1916. The main, if not indeed the determining, question for decision by the Board in this case is the proper construction and effect of a certain decree of the Subordinate Judge of Allahabad dated the 28th November, 1903, duly affirmed on the 3rd July, 1906, by the aforesaid High Court on appeal thereto. This latter decree was made in a suit brought by the present respondents and others against the widow of the deceased owner of certain lands and premises described in the plaint in which she was then in lawful possession under a claim to hold the same until the dower-debt to which she was admittedly entitled should have been paid to her.

[108] (B 40—2615—6)T A

After the death on the 6th May, 1890, of this owner named Shaike Muin-ud-din, a considerable amount of litigation was set on foot between several persons claiming to be interested in or have claims upon his property. This litigation has been fully dealt with in the clear and admirable judgments delivered in this case by the Subordinate Judge and by the High Court respectively. It is only necessary, however, in this appeal to refer to such of the suits as bear directly upon the questions requiring decision by the Board.

In addition, all these learned Judges have in their judgments cited and criticised with acuteness a great many authorities, analysed the evidence, and dealt fully with the relevant facts proved. As their Lordships agree with them in the conclusions of law and fact at which they have arrived, it is scarcely necessary for the third time, to cite and criticise more than one of these authorities, or to deal with the established facts in great detail. In their view the application of some few well-established principles of the Mahomedan law to the salient facts of the case will enable the appeal to be satisfactorily disposed of.

The widow of the above-mentioned owner of the property in suit, immediately on the death of her husband, admittedly took possession of his immoveable property, including the property in suit, and procured her name to be entered on the registry as its possessor instead of his.

It appears to their Lordships that it will suffice to refer to only one of the authorities cited as to the rules of the Mahomedan law touching the rights and liabilities of Mahomedan ladies in relation to their claim for dower. That is the case (*Musammet Bibi Bachun* v. *Shaikh Hamid Husain* (14 Moo. I.A. 377), decided by this Board over fifty years ago, and accepted as a sound as well as a binding authority.

In that case a Mahomedan widow whose husband had died without issue was put into possession of her husband's estate as a coheir and to secure her dower. The point in controversy was whether, having been so put into possession, she was entitled to retain it until her dower-debt was paid, to the exclusion of the other heirs of the deceased. It was held that she was so entitled. Sir Montagu Smith in delivering judgment said "the claim of Musammet Bibi Bachun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower, for such a right does not arise by Mahomedan law as the consequence of any gift of dower, nor was there any agreement entered into on the part of the husband to pledge his estate for the dower. But the appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied, and the respondents cannot recover possession unless that satisfaction has taken place.

It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein* v. *Musammat Khadija*, 10 W.R. 369. Whatever the right may be called, it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband of which she has lawfully and without force or fraud obtained the possession until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This seems to be the ground upon which the claim of the widow to retain the possession of the property was put in the case of *Ameer-oon-Nissa* v. *Moorad-oon-Nissa*, 6 Moo. I.A., Case 211." This decision is well supported by many authorities. In the first-quoted sentences of his judgment Sir Montagu Smith alluded to a feature of the case with which he was dealing which distinguishes it from the case of mortgage usufructuary or other. In the case of a mortgage the mortgagee takes and retains possession, under an agreement or arrangement made between him and the mortgagor. Any rights the mortgagee may get are conferred upon him by the mortgagor. In the present case, as well as in that dealt with by Sir Montagu Smith, neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or the bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by the Mahomedan law. The husband, when he grants dower to his wife, cannot, according to Sir Montagu Smith, by any original hypothecation of his property, secure to her the payment of it. But the original and intentional hypothecation of the mortgaged property to secure the repayment of the mortgage debt is the very essence of every mortgage usufructuary or other. The difference between a usufructuary mortgage and an ordinary mortgage is not so much a difference in the kind of security created as in the method of enjoying it. In each case the property of the mortgagor is pledged to secure the debt, and when the amount secured is paid, the property pledged must be returned to the owner. The main difference between a usufructuary mortgage and an ordinary mortgage is that in the former it is part of the initial agreement by which the security is created that the mortgagee shall at once go into possession of the mortgaged property and apply the proceeds he may derive from the use and occupation of it to discharge the mortgage debt; while in the case of an ordinary mortgage of the usual sort it is in general not the initial intention of the parties that the mortgagee should go into possession of the property pledged immediately or at all, although he is empowered to do so if the interest on the mortgage money be not paid. Should he go into possession, he must account for the receipts just as must the

usufructuary mortgagee. The widow who holds possession of her husband's property until she has been paid her dower has no estate or interest in the property as has a mortgagee under an ordinary mortgage. Mr. De Gruyther called the attention of the Board to the provision of the 58th and following sections of the Transfer of Property Act, and urged their Lordships to apply, by analogy, the principles embodied in those sections, at least in the case of usufructuary mortgages, to this case; but there are essential differences between the position of a Mahomedan widow entitled to dower, who, like the widow in the present case, enters upon her deceased husband's property lawfully and peaceably, and only claims to retain that possession till her dower-debt is satisfied, and the position and right of a mortgagee usufructuary or other to whom an owner pledges his property to secure the repayment of a debt. There is no real or true analogy between the two. It has been well said that there is nothing more misleading than a false analogy. Their Lordships are therefore of opinion that in a case such as the present it would be on their part rash, if, indeed, not unwise, to attempt to apply either the provisions of those sections of the Transfer of Property Act or the principles these sections embody to the widows.

It is now necessary to turn to the examination of the pleadings filed in the suit of 1902, and the issues raised by them, with the view of ascertaining what was the *res* adjudicated upon in that case, and what was the effect upon the properties or other interests of the parties of the dismissal of that suit, or the non-payment by the plaintiff to the widow of the sum found to be due to her.

In the plaint in that suit the plaintiffs claimed, amongst other things, that it should be held that the defendant No. 1, Maina Bibi, the widow, was in possession of her late husband's estate in lieu of her dower-debt, and that if any portion of that debt still remained to be recovered from the said estate, then a decree for the possession of the said estate might be passed in her favour upon the condition of the payment of such a proportionate amount of that debt as might properly be chargeable against their share of the property. Musammat Maina Bibi, in answer to this claim, filed her written statement on the 22nd May, 1902. She alleged, amongst other things: (1) that her dower-debt, still unpaid, amounted to the sum of Rs. 51,000; (2) that her deceased husband had during his life-time given to her his entire immoveable property in lieu of her dower-debt and put her into possession and enjoyment of the same; and (3) that since she had been so put into this possession of the said property she had, without any objection from the plaintiffs or others, continued to hold that possession, as she was by every means entitled to do until the amount of her dower-debt had been fully paid. On these pleadings, issues were framed by the Subordinate

Judge. The second of those issues ran thus: Was the property in suit given by the deceased Muin-ud-din by way of gift to the defendant No. 1 in satisfaction of her dower, and, if so, is the gift binding on the plaintiffs? His finding on this issue is to the effect that no evidence was offered by the defendant No. 1 on the point, although she had raised the plea in her written statement; and that at the hearing the widow's pleaders accepted the finding arrived at in an earlier suit, in which she was defendant, that, she was, with the acquiescence of the heirs of her deceased husband, in possession of the property in suit in lieu of her dower.

On the first issue the Subordinate Judge found that the amount of the widow's dower was, in fact, Rs. 51,000, and that the plaintiffs in the suit had accepted that amount as accurate. These findings were not questioned on the appeal taken to the High Court; but in subsequent litigation the widow persisted in putting forward the defence, thus practically abandoned and never proved, that a gift had been made to her by her deceased husband of all his property in lieu of her dower. No satisfactory evidence has ever been given to support it. In addition to the claims for relief already mentioned, the plaintiffs put forward the following:—

That—

"(*b*) If it be held that defendant No. 1 is in possession (of the estate) in lieu of her dower-debt and that any portion of it is still to be recovered from the estate of Shaikh Moin-ud-din mentioned in lists 'A,' 'B' and 'C,' then a decree for possession may be passed on condition of payment of that proportionate amount of dower which may be charged against the plaintiff's share.

"(*c*) A decree for mesne profits from November, 1890, to April, 1902, or for any amount which may be found due by the court against defendant No. 1, may be passed in favour of the plaintiffs. It has presently been laid at Rs. 1,232 for payment of court fee, but in case the amount exceeds the above a further court fee will be duly paid.

"(*d*) *Mesne profits—pendente lite* and future till the date of possession together with interest and the costs of this suit and interest may be awarded to the plaintiffs against defendant No. 1.

"(*e*) Other necessary directions which may be deemed essential for justice to the plaintiffs may be given."

Upon these claims the Subordinate Judge arrived at the following findings:—

"25. If it be held that defendant No. 1 should render an account, then she is entitled to charge in that account interest at the rate of Re. 1 per cent. per mensem on the entire amount of the dower-debt, other debts, funeral expenses, cost of new construction and the amount spent on the repairs of the house.

"26. The claim for moveable property is time-barred.

"27. The claim for mesne profits is time-barred.

"28. The plaintiffs are not entitled to receive any mesne profits and the amount is excessive."

He took an account between the parties and came to the conclusion that the amount then due to Maina Bibi in respect of her

dowers amounted, after making all just and proper deductions, to Rs. 25,387-6-5, and on the 23rd November, 1903, made a decree, the curial part of which runs as follows :—

> " It is ordered and decreed that the plaintiffs be put in possession of a seven-twelfth share of the property specified in lists 'A,' 'B' and 'C' mentioned above on condition that they pay to defendant No. 1 Rs. 25,387 within six months from the date of the decree, in case of non-payment of the said amount within the said time, the plaintiffs' claim be dismissed with costs.
>
> " It is further ordered that defendants Nos. 1 and 4 do pay to the plaintiffs Rs. 659-8-0 on account of costs of this suit, which has been charged against them. And it is further ordered that in case the claim be dismissed the plaintiffs do pay Rs. 290-13-9 to defendant No. 1 on account of the costs of this suit which has been charged against them."

From this decree the plaintiffs appealed to the High Court of Allahabad. The appeal is numbered 6 of 1904. The grounds of appeal are stated to be—(1) that the Subordinate Judge should not have awarded interest to the first defendant as he did ; (2) that the profits of the property in suit up to the time fixed for payment should have been set off against the amount due ; (3) that the six months allowed for payment should have been directed to commence from the date of the decree becoming final. The appeal did not come on for hearing till the 3rd July, 1906. It was on that day dismissed with costs. The decree of the Subordinate Judge was confirmed, but modified by the provision that the time for payment of the amount found to be due should be extended to the 3rd December, 1906. No payment has, in fact, ever been made by the plaintiffs or any of them in discharge of the sum awarded to the widow by this decree of the 28th November, 1903, and the suit in which it was made accordingly stood dismissed.

It is a suit in which the plaintiffs claimed to be entitled to proprietary possession of a $\frac{7}{12}$th share in the property mentioned in the two lists attached to the plaint, they also claimed, in effect, to have been entitled to that possession, not only at the date of the plaint, but for the 18 months previous, because they claimed a decree for mesne profits from November, 1890, to April, 1892, which they would not otherwise have been entitled to, and also claimed mesne profits *pendente lite* and in the future till the date of possession. Their claim, therefore, is for immediate possession of this property. Their suit is a suit to recover that immediate possession, based upon the facts alleged in the 5th and 6th paragraphs of the plaint : (1) Namely that the only dower the widow was entitled to was *Fatimi* dower amounting to Rs. 107, and (2) that the dower-debt had long previously been paid from the properties mentioned in the list A, B, and C.

It is this claim to get immediate possession of the property in suit and this claim alone which has been dismissed, and yet it has been strenuously and ingeniously argued by Mr. de Gruyther that the right of the plaintiff to recover possession of this land at

any time subsequent to the decree, or under any circumstances however changed is absolutely barred—in fact, that the right is lost for ever.

The plaintiffs themselves are willing that in the circumstances mentioned in the plaint a condition for payment should be attached to any claim that may be made. That, however, does not alter the matter. The condition actually attached to the decree might have been performed at any time up to the 3rd December, 1906. It is the dismissal, which comes into effective operation on that day, not before, that, it is urged, has barred for ever the claim of the plaintiffs to recover possession.

The Subordinate Judge has, in their Lordships' opinion, stated with perfect accuracy in the following passage of his judgment what was the legal effect upon the rights of the parties of the non-payment of the sum directed to be paid on the 3rd December, 1906 :—He said

> "It is contended on behalf of the answering defendants that as the decree in the previous suit provided that the suit shall stand dismissed in the event of non-payment by the plaintiffs within the time fixed and that as the plaintiffs did not comply with that decree their proprietary right to the property claimed was extinguished and Musammat Maina Bibi became the absolute owner from the expiration of the period fixed for payment and that plaintiffs' claim is barred by the rule of *res judicata*. Having given my best consideration to that contention and to the various authorities cited on each side, I am unable to accept it as sound. The only interpretation which I can reasonably put on that decree is that it simply declared that if the plaintiffs wanted to have immediate possession of the property claimed, which Maina Bibi was entitled to hold till her dower-debt was satisfied, and discharged out of the usufruct or otherwise they must pay the amount found due to her by a certain date and that if they did not pay that sum they would not be entitled to immediate possession. The order of dismissal in the event of non-payment did not, I think, mean that if the plaintiffs failed to make the payment within the time fixed they would be deprived of their proprietary right to the property and of their right to recover the property when the dower-debt due to Maina Bibi should be discharged either out of the usufruct or by the plaintiffs at some future date. The effect of dismissal and the plaintiffs' failure to comply with the previous decree was simply that the parties were relegated to the position in which they were before that suit was brought."

The defence of *res judicata* is dealt with in section 11 of the Code of Civil Procedure of 1908.

That section runs as follows :—

> "11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

One asks oneself what was the *res* that was adjudicated upon, either on the 25th November, 1903, or in the Court of Appeal on the 3rd July, 1906? The things in dispute in the first case were (1) the right of the plaintiffs to recover immediate possession of the

land in suit, (2) the amount of dower, and (3) the rate of interest. The two latter matters have been decided in that suit and cannot be re-opened. The suit out of which this appeal arises only asks for an adjudication as to the account since 1903. The right to get immediate possession of land at the date when a suit to recover it is, in fact, instituted, is a wholly different thing, a wholly different *res*, from the right to recover it at some future time, and possibly under wholly altered circumstances. The non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right to recover immediate possession as actually claimed, and could not and did not, in their Lordship's opinion, extinguish the right of the plaintiffs to the inheritance of, or their rights to recover possession of, the lands at some future time. That fact prevents this section from applying. The matter in issue in the first suit was not directly and substantially raised in issue in the second, even if the provision as to the identity of the parties was satisfied.

In the deed of gift executed by Maina Bibi, dated the 18th March, 1907, the decree of the 3rd July, 1906, is recited. The non-payment by plaintiffs in the suit of 1902 of the sum found in that suit to be due, namely, Rs. 25,387-5-0, is also recited, and it is alleged that these plaintiffs have no longer any right to the estate of her husband, deceased, that the donees in that deed and the plaintiff in the last-mentioned suit were parties to the partition suit mentioned in the deed, and made no objections to it. Then follows a statement, purporting to be made on her behalf, running thus :—

> "As they (*i.e.*, the plaintiffs) have not yet deposited the amount in the Court, they have no longer any right whatever to the property, and I, the executant, have in every way become an absolute owner of the property specified below, and I have up to this day been in proprietary possession and enjoyment thereof, without the participation and interference on the part of anyone else. Hence I, the executant, while in a sound state of mind and body, and while competent to exercise all necessary and lawful appropriations, have, of my own free will and accord, without compulsion, coercion and inducement on the part of anyone else voluntarily made a 'hiba biltamlik' of the entire zamindari property specified below."

She bases her claim to absolute ownership of her husband's property, not as formerly on a gift from him *inter vivos*, but on the default of the plaintiffs in the suit of 1902 to pay the money directed to be paid by them to her. This is a wholly absurd claim. The deed of the 12th June, 1907, is as to this point substantially to the same effect as the former, and both are ineffective for the purposes apparently designed by those who framed them.

The present suit was commenced on the 22nd July, 1915, 9 years and 19 days after the date of the decree in the High Court in the first suit, namely, the 3rd July, 1906.

It was instituted by the three sons of Musammat Barkat un Nisa, who was a cousin german of the deceased owner Shaikh Muin-ud-din (and were therefore the latter's right heirs according

to the Mahomedan law), against Maina Bibi, the donees in the two deeds of 1907, and others.

The plaint contains a very lengthy and detailed statement of all the previous litigation between the party litigants, its results, and what the plaintiffs contend are their rights. The relief they now pray for runs as follows :—

That—

"The plaintiffs may, without paying any amount, be put in proprietary possession of the zamindari property specified in list (C) the share in suit of the houses specified in list (D) left by Muin-ud-din as against defendants Nos. 2 to 6.

"If the Court hold that the plaintiffs are not entitled to obtain possession without paying the remaining proportionate amount of dower-debt they may, as against defendants Nos. 2 to 6, be put in possession of the zamindari property specified in list (C) and the share in suit of the houses specified in list (D) conditional on their paying the amount which may, after deducting the profit of the property, be found under account to be payable by the plaintiffs.

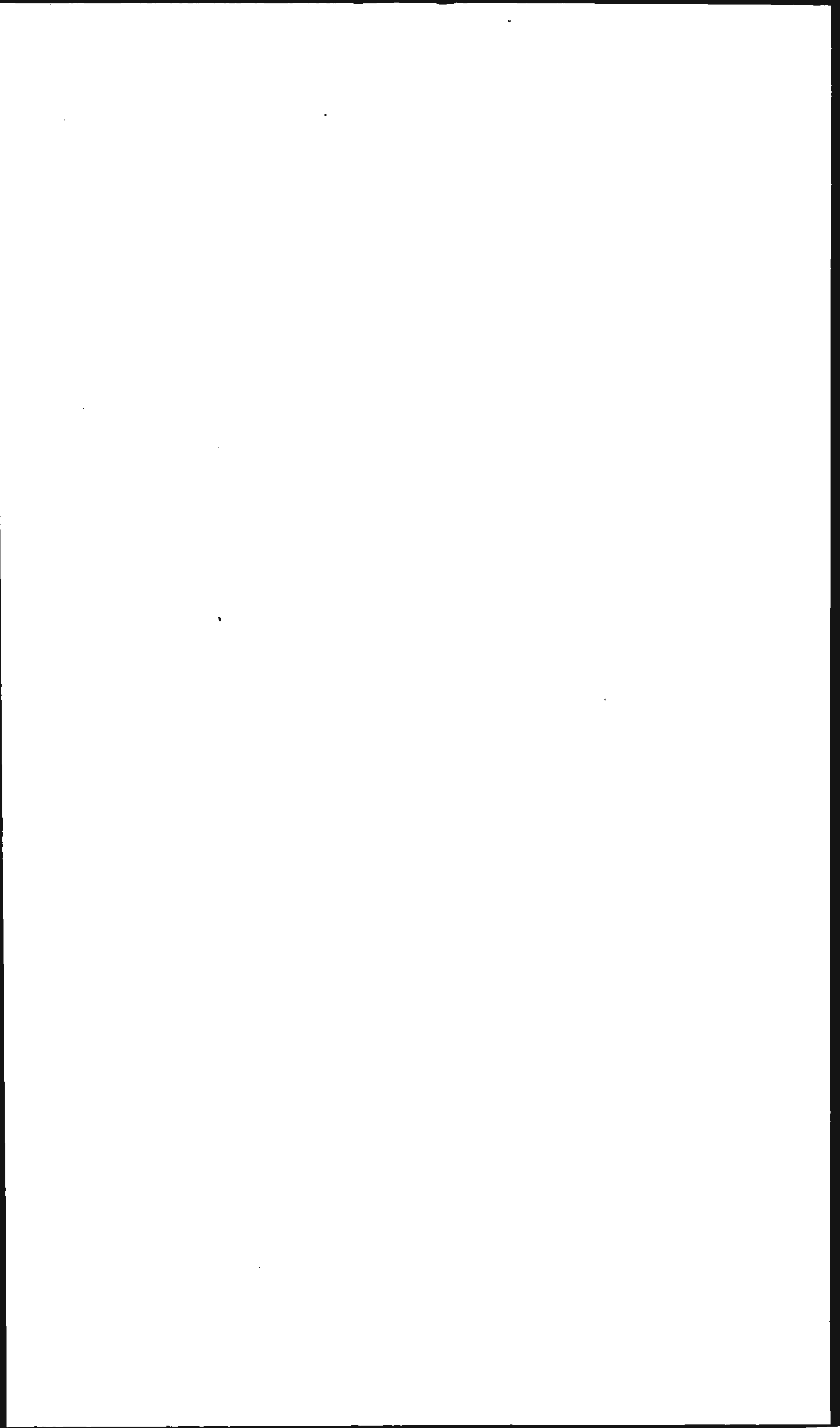
"Costs of this suit may be awarded against contesting defendants."

One written statement in answer to this plaint was filed by defendants 1 to 5 and another by Chaudhri Muhamad Isa, one of the donees in the deed of 1907. In both of these statements it is admitted that this lady was, as an heir of her husband, entitled to one quarter of his immoveable estate, and alleged that she was, and still continued to be, in possession of the entire of this estate in lieu of her dower-debt of Rs. 51,000. It is also admitted that the plaintiffs in the suit of 1902 failed to pay the sum awarded to the widow on or before the 3rd December, 1906, or, indeed, at all. Several of the pleas put forward were found by the Subordinate Judge to be quite unsustainable. The only pleas of any importance relied upon were (1) that the suit instituted in July, 1915, was barred by section 11 of the Code of Civil Procedure, and that the claim of the plaintiffs was barred under the provision of that statute by a lapse of 12 years between the date of the decree in the first suit and the commencement of the second suit.

These pleas have been already dealt with. They are, in their Lordships' view, quite unsustainable. It was contended, as their Lordships understood, that Musammat Maina Bibi had by the deeds of 1907 assigned both her dower-debt and her right to hold possession of her husband's estate until that debt was paid. It is doubtful whether she could have done either of these things, but however that may be, it is clear she, in fact, never purported or attempted to do either of them. On the contrary, in those deeds she describes herself as the absolute owner of the property of her deceased husband, and purports to convey that absolute ownership to her donees. There is no ground for the contention, if it has been really put forward, that because these deeds fail to effect a transfer of the absolute interest with which they purport to deal they operate to transfer the widow's dower-debt and her right to hold possession of the lands till that debt is paid. By giving up the possession of

the lands, as in her deeds she alleges she has done, she has undoubtedly lost her right to hold the possession of them. Their Lordships express no opinion on the point whether her representatives may not be entitled to recover the unsatisfied balance of the dower-debt. If she has that right this judgment does not alter it or interfere with its exercise in any way.

She and her advisers have, in their Lordships' opinion, taken an entirely erroneous view of the effect of the non-payment by the plaintiff in the suit of 1902 of the sum decreed to be due to her. That failure did not convert her into the absolute owner of the immoveable property of her deceased husband, of which she had been in possession, nor did it confer upon her any proprietary interest in it or any right to dispose of it. The judgment appealed from was, in their Lordships' opinion, for the abovementioned reasons right, and should be affirmed, and this appeal be dismissed with costs, and they will humbly advise His Majesty accordingly.



In the Privy Council.

MUSAMMAT MAINA BIBI, SINCE DECEASED (NOW REPRESENTED BY CHAUDHRI KHALILUL RAHMAN AND OTHERS), AND OTHERS

v.

CHAUDHRI VAKIL AHMAD AND OTHERS.

DELIVERED BY LORD ATKINSON.

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