

that the Registrar can stay the proceedings. It seems to us that the act of the Registrar in asking the civil court to stay execution proceedings pending before it is a clear encroachment on the powers of the executing court and is in excess of his statutory powers and should have been ignored by the courts.

As a fresh certificate was issued by the Nazim in order to cure a defect that might be said to exist in the original certificate because of its having been sent by the Madadgar Nazim, it is unnecessary to consider the contention of the learned counsel that there was no proper certificate in this case and the proceedings in execution therefore were without jurisdiction.

The result therefore is that this appeal is allowed, the decisions of all the three courts below are set aside and the executing court is directed to proceed with the execution of the decree from the stage at which it was interfered with by the letter received from the office of the Registrar. In the circumstances of this case we will make no order as to costs of the proceedings throughout.

*Appeal allowed.*

[IN THE SUPREME COURT OF INDIA (HYDERABAD).]

KAPORE CHAND

*v.*

KADAR UNNISA BEGUM AND OTHERS

[MEHR CHAND MAHAJAN, R. S. NAIK and

KHALILUZZAMAN JJ.]

*Muhammadan Law—Dower—Widow in possession of husband's estate in lieu of dower—Whether entitled to priority over creditors—Nature of widow's lien for dower.*

A Muhammadan widow in possession of her husband's estate in lieu of her claim for dower with the consent of the other heirs or otherwise is not entitled to priority as against his other unsecured creditors. There is nothing inherent in the very nature of dower which entitles it to priority.

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*Ameer Ammal v. Sankaranarayana Chetty* (I.L.R. 25 Mad. 658), *Meer Meher Ally v. Mst. Amanee* (11 W. R. 212), *Mama Bibi v. Wasi Ahmad* (I.L.R. 41 All. 558), *Homira Bibi v. Zubaidi Bibi* (A.I.R. 1916 P.C. 46), *Imriaz Begum v. Abdul Karim Khan* (A.I.R. 1930 All. 881) referred to.

*Kulsum Bibi v. Shiam Sunder Lal* (A.I.R. 1936 All. 600), *Mst. Ghafooran v. Ram Chandra Das* (A.I.R. 1934 All. 168), *Mohamed Turabuddin v. Yasin Begum* (17 D.L.R. 224) disapproved.

*Maina Bibi v. Chaudhri Vakil Ahmad* (52 I.A. 145) explained.

APPEAL from a judgment of the High Court of Hyderabad under article 374 (4) of the Constitution of India : Civil Appeal No. 189 of 1950.

*Abdul Wahid Owasi*, for the appellant.

*Ahmed Saeed Khan*, for respondent No. 1.

1950. October 12. The judgment of the Court was delivered by

*Khaliluzzaman J.* KHALILUZZAMAN J.—This appeal arises out of execution proceedings. The appellant, Kapurchand, had a money decree, amongst others, against one Mir Hamid Ali Khan, husband of the respondent Mst. Kaderunnissa. In execution of the decree the house in dispute belonging to the deceased judgment-debtor was attached. To the attachment the widow of the deceased raised an objection on the ground that she was in possession of it in lieu of her outstanding dower and could not be dispossessed till her claim was satisfied. The objection was allowed by the executing court and it was ordered that the house be sold subject to the respondent's claim, the decree-holder being entitled to the surplus, if any, out of the sale proceeds. There was not much possibility of the house fetching more in the execution sale than the amount due on account of dower. The court took the view that the widow's claim for dower had priority over the debts due to other unsecured creditors and her position was analogous to that of a secured creditor. The decreeholder made an application in revision to the High Court but without any success. He then preferred an appeal to the Judicial Committee of the State and it is now before us under article 374 (4) of the Constitution.

The sole point for determination in the appeal is whether a widow in possession of her husband's estate in lieu of her claim for dower with the consent of the other heirs or otherwise is entitled to priority as against his other unsecured creditors. It is conceded that the husband died leaving the house in dispute and leaving outstanding a number of debts including the one due to the decree-holder. The house was not charged or mortgaged by him either in favour of his wife or in favour of any of the creditors. If the husband had created any charge in favour of his wife in lieu of her claim for dower, then it cannot be doubted that she would have priority over the unsecured creditors. No specific Quranic text or any other original authority on Muslim law has been cited in support of the contention that a widow's claim for dower stands on a higher footing than the claim of any creditor in respect of an unsecured debt. Reference was made to a text in Sur-ai-Nissa which enjoins a husband to pay the claim of his wife and it also says that widows and minors should be given favourable treatment. This text does not give an absolute protection to the claim of the widow as against other claims. On the other hand, a Muslim is enjoined to observe his engagements and to keep his contracts faithfully and to discharge his liabilities in an honest manner. No distinction is made between an injunction relating to the payment of dower on the one hand and the payment of the other debts on the other. The learned advocate for the appellant contends that a widow's claim for outstanding dower even when she is in possession of her husband's estate in lieu of her claim with the consent of other heirs of the deceased stands on no better footing than that of unsecured creditors, though in their absence she is entitled to be paid in full before the estate is distributed among the heirs. He drew our attention to certain passages from the holy Quran and from writings of other jurists on this subject. The learned counsel for the respondent, however, argued that a widow has a lien on her husband's estate for her outstanding dower and when she has entered into

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possession of his house after his death she cannot be dispossessed till her claim is satisfied either by the heirs or by the unsecured creditors. He placed reliance on a decision of the Hyderabad High Court and also of some other High Courts in India.

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*Khaliluzaman J.*

A careful examination of the various authorities on the subject shows that the proposition of law on this subject has been correctly enunciated in Tyabji's *Muhammadan Law* (1940 Edn.) in these terms: (1) A widow by her lien does not have any priority over other creditors; (2) Mehr as a debt has priority over other heirs' claim to have the estate distributed among themselves. These two considerations are not affected by the fact of her being in or out of possession of the estate. It seems clear that unless the husband by his own act has placed the widow in a better position than his other creditors, her claim for dower is in the nature of an unsecured debt and she has no priority of any kind against the other unsecured creditors of her husband. The Quranic text in Surai-Nissa, Ruku 4, enjoins the payment of dower in preference to bequests and inheritance but it is silent on the question of priority of dower debt in relation to other creditors. In *Mubsoot Sarkhasi*, Vol. 29, *Kitabulfaiaiz*, page 137, it is pointed out that payment of debts has priority over bequests and wills. In the administration of the estate of a deceased Muslim the rule laid down by early text writers and Fatwas, such as *Fatwa-e-Alamgiri*, is that in the first instance the funeral expenses of the deceased should be paid out of the estate and that having been done, the estate should be divided between the legatees and the heirs after payment of the debts due from him. No priority has been indicated in respect of a dower debt of a widow over other unsecured creditors even if she has taken possession of her husband's estate after his death.

It was said that the nature of the widow's claim for dower is such that it amounts to a lien on the husband's estate. The claim for lien is based on the assumption that the dower debt is consideration for the marriage and is not merely a voluntary debt incurred due to the

respect to the wife. According to Hamilton's Hedaya (1870 Edn., page 44), the leading text book on Hanafi law, if a person specifies a dower of ten or more diams and should afterwards consummate his marriage, or be removed by death, his wife in either case can claim the whole of the dower specified, because by consummation her claim for dower becomes absolute. The dower debt becomes her property and it devolves on her heirs and has to be paid out of the estate of the husband. It has been described as a debt upon the husband to be paid out of his estate. The dower of a Muslim woman is a settlement in her favour made prior to the marriage contract and is similar to the *donatio propter nuptias* of the Romans but is of such an obligatory nature that if it is not mentioned before or at the time of the marriage, it is presumed to exist to the extent of a proper dower amount. Among the Hebrews the dower settled on a wife was for her use after the termination of marriage and among the Jews marriages without similar consideration were invalid. As pointed out by Mr. Ameer Ali in his book on Muhammadan Law, the custom originated in ancient times with the payments made by husbands to their wives as a means for their support and as a protection against the arbitrary exercise of the power of divorce. The Muslim concept of dower has no reference to the price that under some systems of law was paid to the father of the bride when she was given in marriage. On the other hand, it is considered a debt with consideration (for the submission of her person by the wife). The result of the above discussion is that dower is purely in the nature of a marriage settlement and is for consideration. It is a claim arising out of contract by the husband and as such has preference to bequests and inheritance, but on no principle of Muhammadan Law it can have priority over other contractual debts. In our view, therefore, a dower debt cannot be given any priority over other debts on any equitable consideration or on the ground that there is something inherent in its very nature which entitles it to priority.

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It is now convenient to examine the decided cases on this subject. In *Ameer Ammal v. Sankaranarayanan Chetty* <sup>(1)</sup> a Bench of the Madras High Court held that a claim for unpaid dower constitutes a debt payable *pari passu* with the demands of other creditors and is not a preferential charge on the estate. In *Maina Bibi v. Chaudhri Vakil Ahmad* <sup>(2)</sup> it was held that where the widow is not in the position of a secured creditor and is otherwise in possession of the husband's estate with the consent of the heirs, she is entitled to retain possession of it until her dower debt is satisfied. Their Lordships observed that it was not necessary to say whether the right of the widow in possession is a lien in the strict sense of the term. Whatever the right may be called, it appears to be founded on the power of a 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 possession until her debt is satisfied. This decision does not place the widow on a higher footing than any other creditor. As against the heirs all creditors are to be paid in priority before the estate can be distributed. In *Meer Meher Ally v. Mst. Amanee* <sup>(3)</sup> it was held that the lien of the widow over the property in her possession is not a lien in the ordinary legal sense of the term and that a claim for dower is in the same position as that of any other ordinary creditor and ranks *pari passu* with them and like other debts has to be paid before the heirs are entitled to take anything. In *Maina Bibi v. Wasi Ahmad* <sup>(4)</sup> it was held that she has no right of possession against the creditors, not being a secured creditor herself. At page 547 the following observations occur:—

“she cannot set up any such right of possession against creditors claiming to have the debts owing to them from the husband satisfied out of the estate. She is not a secured creditor; her claim for her dower

(1) I.L.R. 25 Mad. 658.

(3) 11 W.R. 212.

(2) 52 I.A. 145.

(4) I.L.R. 41 All. 598.

debt ranks equally with the claims of other creditors of her husband."

In *Hamira Bibi v. Zubaida Bibi* (1) it was observed that dower ranks as a debt and the wife is entitled along with the other creditors to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor. Qua the heirs she has a creditor's lien. In *Imtiaz Begum v. Abdul Karim Khan* (2) the same view was expressed. In para. 295 Mr. Mulla in his book on Muhammadan Law has adopted the view that dower ranks as a debt and that the widow is entitled along with other creditors to have it satisfied out of the estate and that her right is not greater than that of any other creditor. The learned counsel for the respondent relied on the decision in *Kulsum Bibi v. Shiam Sunder Lal* (3), in which it was held that a widow in possession of her husband's estate is entitled as against the other heirs of her husband and as against the creditors to retain possession until her dower is satisfied. The same view had been taken earlier in *Mst. Ghafooran v. Ram Chandra Das* (4) by a single Judge. It was said that her possession could not be disturbed till her dower debt was satisfied. In *Mohamed Turabuddin v. Yasin Begum* (5) a Bench of the Hyderabad High Court held that the claim of a widow for dower was in the nature of a secured debt. There was no other creditor in that case which arose between the heirs and the widow. However, in *Wahidunnissa Begum v. Yasin Begum* (6) it was pointed out that the claim of the widow for dower does not create any interest or charge on the property and that the position of a widow is not only that of a creditor where her dower remains unpaid but also of an heir.

The result of the authorities is that excepting the two Allahabad decisions mentioned above and a decision of the Hyderabad High Court, the consensus

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(1) A.I.R. 1916 P.C. 46.

(4) A.I.R. 1934 All. 168.

(2) A.I.R. 1930 All. 881.

(5) 17 D.L.R. 224.

(3) A.I.R. 1936 All. 600.

(6) 82 D.L.R. 421.

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of authority is against the proposition that a widow as an unsecured creditor has any priority over the other unsecured creditors of her husband. In our opinion, the above mentioned two Allahabad decisions do not lay down the law correctly on this point and the rule has been correctly laid down in *Ameer Ammal v. Sankaranarayanan Chetty* (1). There is nothing repugnant or inequitable according to the principles of Muhammadan Law in the estate of a deceased Muslim being rateably distributed between the unsecured creditors.

For the reasons given above we hold that the objection raised by the widow had no substance in it and the executing court should have directed the property to be sold and the sale proceeds distributed rateably amongst the decreeholders and the widow. In the result we allow this appeal, set aside the judgments of the two courts below and direct the executing court to proceed with the execution in accordance with the observations made herein. In the circumstances we will make no order as to costs of these proceedings.

*Appeal allowed.*

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Oct. 13.

[IN THE SUPREME COURT OF INDIA (HYDERABAD).]

NARHARI AND OTHERS

v.

SHANKAR AND OTHERS.

[MEHR CHAND MAHAJAN, R. S. NAIK and

KHALILUZZAMAN JJ.]

*Res judicata—Several appeals arising out of same suit—Appeal disposed of by same judgment—Separate decrees drawn up—Appeal from one decree only—Maintainability—Res judicata—Limitation Act, 1908, s. 5—Extension of time—Sufficient cause—Conflict of decisions.*

A instituted a suit for possession of two-thirds share in an estate against B and C who claimed a one-third share each in it. The suit was decreed by the trial court. B and C preferred

(1) I.L.R. 25 Mad. 658.