Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Mussumat Bebee Bachun and others v. *Sheikh Hamid Hossein and others, and Moulvie Abdool Azeez and others* v. *Sheikh Hamid Hossein and others, from the High Court of Judicature at Calcutta: delivered 21st December,* 1871.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THE principal questions in these Appeals arise from a claim made by the Appellant, as the widow of Sheikh Villayut Ally, a Mahometan, to a dower of 40,000 rupees and one gold mohur, and a further claim on her part to retain possession of lands belonging to her late husband until her dower is satisfied.

Other claims have been made by the parties in these suits, some of which have been included in the present Appeals, and to which it will be necessary hereafter to advert.

The Appellant and Sheikh Villayut Ally, who both appear to have belonged to wealthy Mahometan families in Behar, were married in 1820.

The husband died in March 1851, without issue, leaving the Appellant his only widow.

It is not now disputed that, on his death without issue, the Appellant became entitled as co-sharer to one-fourth share of her husband's estate, and that

the other three-fourths descended upon Mussumat Raheebun, a sister of Villayut Ally, who died shortly after her brother, leaving the present Respondents her heirs.

In April 1851, proceedings were instituted by the Appellant in the Collectorate Courts to obtain the entry of her name in the Register in place of her husband's. She alleged in her petition that she was in possession by right of inheritance, and also *on account of her dower*. Objection was made on the part of the Respondents, but it did not prevail; and the lands were registered by the collector in the name of the Appellant "without specification of share."

An Appeal was made on behalf of the Respondents to the Commissioner, who affirmed the decision of the collector, declaring in his Order that, if the objectors (the Respondents) had any claim, they were at liberty to find their remedy by suing in the Civil Court.

The Order of the Commissioner bears date on the 11th March, 1852.

These proceedings relating to the possession of the lands are material not only to show that the Appellant obtained the insertion of her name and possession soon after her husband's death, but principally because it is clear from them that she claimed to hold not merely her one-fourth share to which she was entitled as co-sharer with the heirs, but the entire estate "on account of her dower."

The Respondents, who were parties (objectors) in these proceedings, notwithstanding that they had the fullest notice of the Appellant's pretension to hold the estate for her dower, took no step to dispute her claim, or to disturb her possession of the entire estate, from the date of the above proceedings until the commencement of the present suits, a period of nearly ten years.

On the 31st December, 1862, both the suits, which are the subject of these Appeals, were commenced, one by the Respondents as the heirs of Mussumat Raheebun (deceased) sister and heiress of Villayut Ally against the Appellant (the widow) to recover three shares of the estate, admitting her right as widow to one-fourth share. The other was a suit by the Appellant against the Respondents to establish her claim to dower, on the

alleged ground that her claim to dower might otherwise be barred by the law of limitation.

The Appellant in both suits asserted that the dower agreed to be given on her marriage was the sum of 40,000 rupees and one gold mohur, and she claimed to hold the estate until this dower was paid; whilst the Respondents alleged that, in the family of Villayut Ally, the dower was always fixed at 500 dirrums, and that this was the agreed amount of dower on this marriage.

The claim of Mussumat 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 the Mahometan law as a consequence of the gift of dower, nor was there any agreement 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 that the Respondents cannot recover the possession of their shares 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 no doubt the right is so stated in a Judgment of the High Court in a case of Ahmed Hossein *v.* Mussumat Khodejee (4 Weekly Reporter, Civil Rulings, 368). 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 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 have been the ground on which the claim of the widow to retain the possession was put in Ameer oon Nissa and others *v.* Moorad oon Nissa and others (6 Moore's Indian Cases, 211). Whether the dower in this case has been discharged out of the proceeds of the estate, must, of course, depend on the determination of the principal question in the cause—What is the amount of the dower?

The question raised in the second Issue in the

Dower Suit was, whether the dower was fixed at 40,000 rupees and one gold mohur, as alleged by the widow, or at 500 dirrums, under the Mahometan law, as contended for by the Respondents.

In the Possession Suit, the issue (4th) was, whether Villayut Ally owed Mussumat Bachun 40,000 rupees and one gold mohur for dower or not.

After a great deal of evidence had been given in the suits, the Principal Sudder Ameen held that the Appellant had not made out that the dower was fixed at 40,000 rupees; and he also held that the statement of the Respondents that the dower was fixed at 500 dirrums, "was conjectural."

On the appeal the Judges of the High Court were of opinion that they could not declare that the Appellant was entitled to demand "the immense sum of dowry which she claims;" but they say—"In a Mahometan marriage between contracting parties of rank and influence, there must be of course some dowry, and it was probably a handsome one."

They also say: "The omission of the Defendants to sue for their share of the inheritance indicates a consciousness on their part that Bachun had a claim of dower to be satisfied from the estate, and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable to order that the Defendants receive no mesne profits, except what has accrued since the institution of their suit. With this modification we confirm the Judgment of the Lower Court in this case, with costs against Bachun."

Their Lordships are unable to consider this Judgment of the High Court as a final or satisfactory determination of the main question in the suit. The learned Judges, whilst holding that the evidence did not satisfy them that the dower was fixed at 40,000 rupees, declare that it "was probably a handsome one," and that the conduct of the Respondents indicates that it was "doubtless considerable." It appears to their Lordships that the widow, on the view taken by the High Court, was, at all events, entitled to a proper dower, to be ascertained according to Mahometan law. But

no attempt was made to arrive at what would be the proper dower, nor was any account taken of the proceeds of the estate. It is obvious, therefore, that the Court has set off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a Decree between hostile litigants, and therefore that the Decree so founded ought not to stand in its present shape.

Their Lordships, in this state of things, have thought it right to look carefully at the evidence, to see whether they can safely arrive at a conclusion which would prevent the necessity of renewed litigation; and whilst fully alive to the importance and propriety of their ordinary rule not to interfere, unless upon very clear grounds, with the findings upon questions of fact, where the Courts of First Instance and of Appeal have been in accord, they think this case comes before them under exceptional circumstances, there being in truth no explicit finding upon the question of the amount of dower.

The Appellant called nine witnesses who were present at the marriage ceremony in 1820, and these persons say that the dower agreed to be given was a deferred dower of 40,000 rupees. About an equal number of witnesses called by the Respondents, some of whom also say they were present at the marriage, state that the dower was fixed at 500 dirrums. It is clear from the evidence that Villayut and Bachun were both "in opulence from the time of their fathers," and it is consequently more probable that a high sum was fixed than such a low sum as 500 dirrums, indeed the learned Judges of the High Court came to this opinion. Their Lordships would have hesitated long before holding that the Appellant had established her right to the dower she claimed, if the proof had rested only on the oral testimony of the contract; but they think that that testimony receives very strong support and corroboration from the evidence given of what was usual in the district, and also from the conduct of the Respondents themselves.

The evidence of what was customary principally came from the Respondent's witnesses, and its truth may therefore be relied on. It shows that, in the Province of Behar, and in the caste of Sheiks, 40,000 rupees was amongst wealthy people the usual dower. This amount was not invariable, but it was a very common and usual sum, and numerous instances are cited by the witnesses. One witness, Sheikh Shahamut Ally, says:—"In the caste of Sheiks in the Province of Behar and in Mahoonee the custom is usually 40,000 rupees and one gold mohur, and the custom of inconsiderable dowers is of recent date."

It was pointed out by the learned counsel for the Respondents that, in some instances, this large amount of dower was fixed in marriages between persons, who, apparently, were not wealthy; but this circumstance rather tends to corroborate the evidence that it was a usual and well-known dower than to rebut it.

Three cases, also coming from Behar, were referred to from the Reports of the "Sudder Dewannee Adawlut," where this sum of 40,000 rupees was the amount of dower. These instances cannot, of course, be regarded as evidence in the cause, but as matter of history they are consistent with the testimony of the witnesses.

Their Lordships must not be understood to decide that the evidence of what was customary in the district would be sufficient in itself to fix the amount of dower, for if there had been no evidence of an agreed amount, it would have been necessary to make inquiries into the usual amount of dower in the family of the Appellant; but it is impossible not to see that this sum of 40,000 rupees was a most usual amount to be fixed, and that fact gives probability to the statements of the witnesses for the Appellant, who proved that such was, in fact, the dower agreed upon on this marriage.

Their Lordships are also disposed to attribute great weight to the presumptions which naturally arise from the conduct of the Respondents. It is plain that, from the pleadings in the Collector's Court, and from other transactions, they became aware shortly after Villayut's death of the claim for dower, and, although they opposed the widow's

claim to possession, showing they were alive to their rights, yet after she had obtained it they took no step for ten years to interfere with her possession.

The proper inference from this conduct is, that they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 dirrums, which they now set up, and which, of course, must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished to dispute it and to have the real amount ascertained, they might at any time have instituted a suit to obtain the possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty.

Whilst the Judges of the High Court treat this conduct of the Respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference which we think may be fairly done, that it is also indicative of a consciousness on their parts that what the Appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim.

In the result their Lordships have come to the conclusion that there was an agreed amount of dower on the marriage; and they are satisfied, concurring so far with the Courts of India, that the amount of dower set up by the Respondents has been disproved.

Their Lordships further think, for the reasons given, that there is reasonable evidence to support the case of the Appellant to the dower she claims.

The Appellant also objected to the Decree in the suit for possession, because certain tenements alleged to be her private property (in addition to the two tenements found by the Courts below to belong to her) ought to have been declared to be hers. But no evidence could be referred to by the

Appellant's Counsel in support of this contention, and there seems to be no ground for impeaching the concurrent Decrees of the two Courts on this point.

Their Lordships will humbly report to Her Majesty that the Appeals should be allowed in both suits, so far as they relate to the claim for dower; that the Decrees under Appeal should be reversed; and that it should be declared in both suits that the dower agreed to be given on the marriage was the deferred dower of 40,000 rupees and one gold mohur.

With regard to the suit for possession, their Lordships have considered whether they ought to advise Her Majesty to direct an account to be taken in that suit; but, considering the way in which the litigation has been conducted, that no account has ever been asked for by the Respondents, and that mesne profits were not even claimed in the suit, they think it will be more convenient to follow the course taken in the case already cited from 6 Moore s Indian Appeals, 211; and to advise Her Majesty that that suit, so far as it prays possession, should be dismissed as against the Appellant, without prejudice to any suit that may be instituted by the Respondents for an account and administration of Villayut Ally's estate, consistently with the above declaration as to the Appellant's dower.

Their Lordships are further of opinion, that the order to be made in the Appeal should, as far as possible, provide against the re-opening of any of the questions which have been litigated in these suits; the Order, therefore, which they will humbly recommend Her Majesty to make will be the following:—

That the Appeal be allowed, and that the Decrees under Appeal be reversed, and the following Decree be made in both suits:—

That it be declared that the dower agreed to be given on the marriage of the Appellant with Sheikh Villayut Ally deceased was the deferred dower of 40,000 rupees and one gold mohur; and that the Appellant, being in the possession of the estates of the said Villayut Ally, is entitled to retain such possession until the whole of what is due to her in respect of such dower has been paid and satisfied.

That it be further declared that the whole of the property claimed in the suit wherein the Respondents are plaintiffs, with the exception of Mouzah Poondareek and Mouzah Kurareea, and the sum of 300 rupees in the Decree of the Principal Sudder Ameen mentioned, belonged to and formed part of the estate of Sheikh Villayut Ally deceased; and that the Respondents, as the representatives of Mussumat Raheebun deceased, are entitled to three-fourths of the said property, subject to the claim thereon of the said Appellant in respect of her before-mentioned dower.

That it be ordered that the suit of the said Respondents, so far as it seeks to recover possession of their shares of the said estate, do stand dismissed as against the Appellant, but without prejudice to any suit that may hereafter be instituted by them for an account and administration of the estate of Villayut Ally, or to enforce their rights therein consistently with the above declarations.

That the costs of both the said two suits in the Zillah and High Courts should be apportioned between the parties, according to the practice of those Courts in cases wherein a litigant is only partially successful; and that the costs (if any) which have been paid by the Appellant under the Decrees under Appeal should be repaid to her.

That the causes be remitted to the High Court, with directions to carry out this Order.

The Appellant having failed as to part of the subjects of her Appeal, no costs will be given in this Appeal.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—30 12/71.