Privy Council Appeal No. 2 of 1918.

Musammat Fakrunissa, since deceased (now represented by Zahir-ul-Said and others) - - - - - - *Appellants*

v.

Moulvi-Izarus-Sadik and others - - - - - *Respondents.*

Moulvi-Izarus-Sadik and others - - - - - *Appellants*

v.

Musammat Fakrunissa, since deceased (now represented by Zahir-ul-Said, and others) - - - - - *Respondents*

(Consolidated Appeals)

FROM

THE COURT OF THE JUDICIAL COMMISSIONER FOR THE CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1921.

Present at the Hearing:

LORD BUCKMASTER.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD BUCKMASTER.]

The decision of this appeal depends entirely upon a simple question of fact, but this question has been so complicated by untrustworthy evidence, both verbal and documentary, that its determination is not easy.

The real point is whether the dower fixed on the marriage of Moulvi Zahur-ul-Islam and Musammat Sanai Fatma Begum on the 3rd September, 1881, was Rs. 25,000 or Rs. 1,25,000. The appellants, who represent the heirs of the husband, claim that it was the former sum; the respondents, who are the representatives of the wife, argue for the larger amount. That a dower was in fact fixed is beyond dispute. Some witnesses say that it was fixed at Rs. 25,000 in terms, others that it was fixed in terms at the higher figure; and between these two accounts

there is the evidence of other witnesses who say on the one side that it was fixed at Rs. 25,000, or on the other at Rs. 1,25,000, this being the customary sum.

The marriage took place at Banda, and whatever may be the amount of the dower, it is sufficiently established by the evidence that the kazi who was present made a note of the amount in his pocket-book at the time. After the marriage nothing of moment occurred until 1892, when the husband was injured by a tiger, and while he was still suffering from the effects of this injury he entered into an agreement with his wife which recites that a dispute had arisen between them owing to the lady having demanded from her husband her dower, amounting to Rs. 1,25,000. The agreement states that he cannot then pay it off, that he desires to give in her charge the villages in his Ilaqa, in the Damoh district, on certain conditions about which a dispute has arisen, and that to settle that dispute certain persons are appointed as arbitrators. The agreement is dated the 29th June, 1892, but it would appear that there must be some mistake in the date, for the award which was made under it was dated on the 20th June of the same year. This award recites the agreement, finds that there is no cash for payment of the debt, with the exception of the zamindari villages referred to in the agreement, that such estate is sufficient to cover the whole amount, and puts the wife in possession and dispossesses the husband. On the 6th July, 1892, a mukhtyarnama was executed by the wife in favour of her husband, stating that, as she was a pardanashin lady and could not manage the property, she appointed her husband to act on her behalf and gave him the fullest possible authority in that respect.

Following swiftly upon this award a quarrel took place between the husband and wife, which resulted in a separation, the wife, on the 16th September, 1892, having left her husband's house, to which she never returned until shortly before his death. It is unnecessary to examine the cause of this dispute. The evidence appears to establish that it was due to the feelings and self-respect of the wife having been grievously wounded by the husband having introduced into the establishment and installed as his mistress a low-caste woman. The wife went to live with her brother and for twelve months nothing happened, but she withdrew the power of attorney formerly executed in favour of her husband. The husband thereupon took proceedings to get the mutation register rectified, and succeeded, notwithstanding the opposition of his wife. He also instituted proceedings (No. 13 of 1895) against his wife for cancellation of the arbitrators' award. In these proceedings, among other issues an issue was raised as to whether the dower was in fact fixed at Rs. 25,000 or Rs. 1,25,000, and whether the plaintiff was estopped by the agreement from disputing the facts. In these proceedings the register kept by the kazi who had attended the marriage was produced in support of the husband's claim. It purported to be and it was put forward as being the original

register, and as an accurate and authentic record of the marriages which the kazi had kept ; it extended from 1877 down to the 3rd February, 1896. The pocket-book containing the notes from which the register was compiled was not produced. Objection was taken to the register on the ground that it was not the original document, in the sense that it had been made up from the note-books, and also on the ground that it appeared that the particular entry had been tampered with. There was no suggestion whatever that, subject to these criticisms, the register was not a perfectly genuine document.

The learned Civil Judge who tried the case distrusted the value of the particular entry and disregarded its effect. He regarded the evidence of the husband as to the sum of Rs. 25,000 as being quite inconsistent with the position and antecedents of the parties, and indeed he stated that it seemed to him quite incredible that the defendant's dower should have been fixed at so low an amount as Rs. 25,000, and he adds this :—

> "As a rule females of high and respectable families never claim their dower, and consequently it is fixed at a very high figure, which in several cases exceeds the total estates of the bridegroom. This is apparently done to maintain the high position and pride of the family and to ensure friendly relations between the wife and the husband ; it also exercises some check over a reckless husband."

The learned Civil Judge who gave that judgment was a Judge to whose experience on these matters their Lordships must necessarily attach considerable weight, and it is indeed remarkable that such of the depositions of the witnesses as were present at that hearing and have been used again in the course of the present proceedings, who spoke as to the customary amount being the larger sum, do not appear to be challenged on cross-examination. Their Lordships have not before them all the depositions, nor would they indeed be admissible in evidence. They can only be used either for the purposes of cross-examination or for purposes of admissions made as against a litigant party, or of course in case of a witness being dead or unable to be found. That some evidence was given to the contrary effect does appear from the Judge's judgment, but the circumstances to which their Lordships have called attention are of some importance in relation to what subsequently transpired. So far, therefore, as the amount of dower was concerned, the Civil Judge decided in favour of the wife, but he found the award was collusive and of no effect. This judgment was affirmed in the Court of Civil Appeal in June of 1897 upon the latter point, the question as to the dower being wholly undecided.

The strained relations between the husband and the wife continued until 1903, when, in the early part of that year, the wife returned to her husband and lived with him until his death, which took place on the 15th June, 1903. After his death she took possession of the estate and claimed to hold it in lieu of dower, to the amount of Rs. 1,25,000. The heirs of the husband protested, and the wife thereupon instituted the proceedings which have ultimately led to this appeal.

The main defence was that the dower had never been fixed at the amount of Rs. 1,25,000, but at the lower figure of Rs. 25,000, and further that the plaintiff had been divorced.

The first hearing took place on the 14th December, 1910, before the District Judge, and on the trial, the register of the kazi was put in evidence from the depositions in the suit to set aside the award, the kazi himself not being obtainable as a witness, and with his mind influenced by this material the learned Judge held that the plaintiff had failed to establish her claim to the dower, and further, that she had been divorced.

From this decision an appeal was taken to the Court of the Judicial Commissioner for the Central Provinces, and upon the hearing of this appeal it transpired for the first time that the kazi's register was not what up to that moment everybody had believed it to be, a faithful record of marriages kept from one event to the other and made up from notes taken at the actual ceremony. It was found that the water-mark on the paper was 1893, and that consequently the whole document had been prepared shortly before the trial on the proceedings to set aside the award. The case was accordingly remitted for trial. It is, of course, clear that this event put an entirely new complexion upon the proceedings. Had the register been a genuine and an honest document, it was conclusive against the plaintiff unless it could have been established that there had been some mistake or, as appears to have been regarded by the learned Judge who heard the husband's application to set aside the award, that the particular entry had been tampered with. But when once the register was accepted as genuine, the Judge would be compelled to challenge and distrust all verbal evidence that contradicted its terms, and it would necessarily colour his view of the case. It is not, therefore, necessary to consider in detail the careful judgment of the learned Judge who first heard the suit, although the painstaking nature of its analysis would otherwise have demanded the closest attention.

The second trial took place before another District Judge, who delivered his judgment on the 12th January, 1914. He found that the plaintiff had not been divorced, but he held that the dower fixed was Rs. 25,000, and that this was the customary dower in the family. With regard to the kazi's register he held, after hearing all that the kazi had to say in explanation, that his explanations were untrustworthy and that the new register was prepared because he wanted to show that the amount of dower was Rs. 25,000 in order to favour the case of the husband; but he accepted it with regard to the witnesses of the marriage, and although he thought it had been changed with regard to the dower, he held it was a too far-fetched conclusion to think that the original showed the larger amount as the dower and was renewed to show the lesser sum. He most carefully examined the verbal evidence as to what transpired and accepted that for the defendants' side. The learned Judicial Commissioners differed from this view; they held that the evidence did support the larger sum, and from that judgment this appeal proceeds.

The position thus raised is one of great difficulty. Both the learned District Judge and the Judicial Commissioners have separately examined the value and weight of all the verbal evidence on each side, and some of the circumstances that led to its being regarded as untrustworthy in the one instance or the other are circumstances of a local character which it is not possible for their Lordships accurately to appraise. But they think the learned District Judge has not given due weight to some circumstances that are undisputed, nor does he appear to have considered the fact that the defendants deliberately attempted to fabricate a story as to a divorce to have any weight in considering the value of their evidence on the other parts of the case. This is an important matter, because while it is true that whatever misconduct the husband had been guilty of in regard to the first trial was not misconduct by which the heirs could be affected, nor would a statement made by him operate against them by way of estoppel, yet the plea of the divorce must have been one of their own creation, and it has been concurrently found to be wholly untrue. It is, therefore, necessary to see what is the true inference to be drawn from what took place when the agreement to submit to arbitration was challenged. It is found that the kazi's register was prepared for the purpose of advancing the husband's claim in that dispute. Now it is not disputed that the kazi did in fact keep a register which was not the one produced, and the explanation of its disappearance has been rejected. It is, of course, possible that the original register did not contain any information as to the dower, and that the fabrication was for the purpose of providing indisputable evidence upon a point which the original would have left ambiguous. It is possible, but it is not a probable explanation. The document produced contained in every instance the amount of the dower, and it is not suggested that it differed from the genuine document in this respect, and there is no explanation of why it should not have appeared in the particular instance, except that the marriage took place at a little distance from the kazi's own district. But three out of the six defendants' witnesses who spoke as to the amount fixed at the wedding, viz., D. 24, D. 25 and D. 33 declared that the kazi entered it in his note-book; and in the complete absence of any evidence whatever to suggest omission, their Lordships do not think that that is the probable explanation of what occurred. The probability is that the register did contain the entry of the amount, and as there is no choice with regard to any sum but the larger or the smaller sum mentioned, and no room for any ambiguity in the statement alleged to have been made, their Lordships think the circumstance affords a strong corroboration of the plaintiff's statement as to the larger sum. Further, this statement is found again in the agreement which submitted the alleged dispute to arbitration. It is in a written document, and though the purpose of the document was a sham, it does not, therefore, enable every detail in it to be disregarded. Nor, again, can the suggestion be entertained that the agreement was made

owing to the influence of the wife or because the husband was too weak to understand what he was doing. This evidence the husband himself specifically rejects, and after the wife had left him he made no objection as to the amount of the dower until he was dispossessed from management a year afterwards, thereby showing that it was not so much the amount of the dower to which he objected, but the dispossession during his life of the control over his property. Again, their Lordships find it difficult to accept without qualification the view that the customary dower was the smaller sum. It is true that there is a great deal of evidence in the present case to prove that this smaller sum was fixed on the marriage of many of the women in the family, but there is also evidence to show that in two instances at least the amount was much larger, and their Lordships have already referred to the fact that from the depositions of such of the witnesses as have properly been admitted in the present proceedings, there seems no challenge in cross-examination as to the customary sum being the larger amount. These considerations prevent their Lordships from regarding the evidence of Rai Nandlal, one of the plaintiff's witnesses, with the same indifference with which it was regarded by the District Judge. He is a barrister-at-law, and states that in 1902, which was shortly before the death of the husband, the husband came and asked his advice in the matter of the transfer of his villages in favour of his wife in lieu of her dower, which he stated to be the larger sum. The learned District Judge thinks that this was nothing but a repetition of his previous foolish act, and is consequently highly improbable. It must, on the other hand, be remembered that time had elapsed, that it was within a few months of his death, and that it is impossible to speak as to what were the motives that were then influencing him, one of which may have been the desire for reconciliation with his wife.

Another witness, Akil Mahommad Khan, speaks again to admissions made in 1897 or 1898, and once more they are regarded by the District Judge as improbable, but it appears to their Lordships that they are only improbable on the hypothesis that the dower was the smaller sum. If it was the larger sum, as had in fact been found by the Judge in the Court of first instance in the proceedings to set aside the award, the improbability disappears.

The chief witness for the defendants is Syed Kutbuddin, a man of undoubted position and authority. He says the marriage took place in his presence, and the dower was fixed at Rs. 25,000. It is most unfortunate that he was not cross-examined at all on this statement. No questions were put to test his memory or to explain whether the dower was fixed in his presence, or how the fact was brought to his knowledge and fixed in his memory. His recollection as to the witnesses appears to be faulty. It may also have been faulty on the more critical question, and their Lordships cannot accept it as sufficient to displace all the other matters to which they have referred.

In every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed ; there must be some balance in their favour, when all the circumstances are considered, to justify the alteration of the judgment that stands. Their Lordships are unable to find that this duty has been discharged. They have not gone into the question of the letters alleged to have passed between the husband and the wife. These documents have been held to be forgeries by the learned District Judge, and this view has been rejected by the Judicial Commissioners. There are suspicious circumstances connected with some of the letters, but suspicion is not proof. The conclusion however which their Lordships have reached is independent of such corroboration as the letters would afford were they genuine. They therefore express no opinion upon the point.

Upon the cross-appeal claiming interest on the amount of dower their Lordships think that the representatives of the wife are entitled to an allowance, not strictly as interest, but as the means of preventing her position being adversely prejudiced by the unsuccessful controversy raised by the appellants as to her rights, and they fix the amount at 6 per cent. This is in accordance with what was done in the case of *Hamira Bibi v. Zubaida Bibi* (43 I.A. 294).

Their Lordships will humbly advise His Majesty that the main appeal be dismissed and the cross-appeal allowed, and that the appellants do pay to the respondents their costs both in the appeal and the cross-appeal.

In the Privy Council.

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DELIVERED BY LORD BUCKMASTER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1921.