ALLAHABAD HIGH COURT

Musammat Maina Bibi

Vs

Chaudhari Wasi

(Rafique and Lindsay,JJ.)

12.03.1919

JUDGMENT

Rafique and Lindsay,JJ.

1. The following pedigree to the appeal are disputing:-will explain the right under which the parties SHAIKH SHAMSHER ALI |
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| | Shaikh Aminuddin = Khairunnisa Bibi, Shaikh Kazim Ali, | | Barkatunnisa=Maulvi Maslahuddin Ahmad, Shaikh Minuddin=Maina Bibi, | defendant No. 1.
| | _____ |
_____
_____ | | | | | | Chaudhari Chaudhari Chaudhari Ummahani Bibi= Muhibunnissa Muizunnissa Wasi Ahmad, Wakil Ahmad, Zubair Ahmad, Mir Riyait Bibi=Shaikh Bibi = Hakim plaintiff No. 1. plaintiff. No. 2. plaintiff No. 3. Husain. Mohd. Fakhir, Ahmad Hasan.
defendant No.7, | _____ |
_____ | | Shaikh Muhammad Nazir, defendant No. 8. Shaikh Muhammad Shakir, defendant No. 9.

2. Muinuddin died on the 6th of May 1890 possessed of immoveable property the inheritance to which is in dispute in the present case. He died leaving him surviving his widow, Musammat Maina, and his cousin, Musammat Barkatunnissa. Musammat Maina entered into possession of the entire estate and professed to remain in possession in lieu of her unsatisfied claim for dower. Musammat Barkatunnissa died on the 27th of June 1892 and her husband Maslahuddin died on the 17th of August 1897. Her mother Musummat Khairunnissa died on the 22nd of December 1898. We refer to the husband and the mother of Musammat Barkatunnissa as under the Muhammadan Law they and her children would be her heirs on her death. After her death and that of her mother and husband her sons became entitled to 72 sihams and her three daughters to 36 sihams in the estate of Muinuddin. Musammat Maina, the widow, was entitled to the

remaining 36 sihams. On the 13th of May 1899 two of her daughters, namely, Musammats Ummahani Bibi and Muizunnissa Bibi instituted a suit for the recovery of their share in the inheritance, namely, 24 sihams, impleading Musammat Maina and the other descendants of Musammat Barkatunnissa as defendants in the case. One of the pleas on behalf of Musammat Maina was that at the time of the death of Muinuddin, his aunt and his step aunt were alive and Barkatunnissa was not an heir under the Muhammadan Law to Muinuddin. She further pleaded that her dower debt was Rs. 51,000 and in lieu of it Muinuddin before his death had gifted the immoveable property to her. The pleas in defence were disallowed. The Court held that Musammat Barkatunnissa was an heir of Muinuddin; that the dower debt of Musammat Maina was Rs. 51,000; and that no gift had been made by Muinuddin of the property in question in lieu of dower, The claim of the two ladies was decreed for the recovery of 24 sihams on the payment of Rs. 3,913-12-10, the proportionate amount of dower payable by them. The money was paid and the two ladies recovered possession of their share. On the 25th of April 1902 the three sons of Barkatunnissa and her third daughter, Musammat Muhibunnissa, brought a suit for the recovery of 81 sihams impleading as defendants in the case Musammat Maina Bibi, Musammat Ayesha Bibi and Masammat Ummahani Bibi and Musammat Muizunnissa Bibi. The last two were pro forma defendants. Musammat Ayesha Bibi was impleaded as a defendant in the case on the allegation that her right to succeed to the property left by Muinuddin was set up by Musammat Maina in the suit of 1899. The plaintiffs alleged in their plaint that the dower of Musammat Maina was fatmi dower, that is Rs. 107 which had been realised by her from the income of the estate, and that they were entitled to immediate possession without payment of any sum. They, however, said that in case the Court found that any part of the dower had not been paid, they were willing to pay the amount determined by the Court. They accordingly prayed for possession of 7/12th of the property without payment or in the alternative on payment of such sum as the Court might find due. Musammat Maina was the chief contesting defendant in the ease. She pleaded that the dower was Rs. 51,000; that the entire property of Muinuddin was gifted by him to her in lieu of her dower; that the whole amount of the dower was still due; that she was entitled to interest on her dower at the rate of 1 per cent. per mensem. She also advanced a plea of jus tertii by stating that Musammat Ayesha Bibi was the step-aunt of Muinuddin and that the descendants of a real aunt were alive at the time. We may also mention that one Abdul Shakur and some others had brought, about the same time, suits to recover the property left by Muinuddin, on the allegation that they were his cousins. Musammat Ayesha Bibi had also brought a suit for the recovery of her share in the property by right of inheritance on the ground that she was the step-aunt of Muinuddin. All the suits including the one of the three sons of Musammat Barkatunnissa were transferred for trial to the Judge of the Small Cause Court. The suits of Musammat Ayesha Bibi and others in which the descendants of Musammat Barkatunnissa were also defendants with Musammat Maina were decided first and the learned Judge held that neither Musammat Ayesha Bibi nor Abdul Shakur and others were entitled to inherit the property left by Muinuddin, as they had failed to prove their alleged relationship. When the case of the sons of Musammat Barkatunnissa came to be tried, their title had already been settled by the decision of the other suits and the only points for determination were the

amount of the dower, the alleged gift of the properly in lieu of dower and the rate of interest. The learned Judge held that the dower of Musammat Maina Bibi was Rs. 51,000 and not the fatmi dower; that Muinuddin had not made a gift of the property in suit in lieu of dower; that Musammat Maina Bibi was in possession of her deceased husband's estate in lieu of her dower; and that 3 per cent, per annum should be allowed to her by way of interest. He further held that she was liable to account for the profits received since the death of her husband. The accounts were taken and the proportionate amount due from the plaintiffs was found to be Rs. 25,387-5-5. A decree was accordingly passed in favour of the plaintiffs on the 28th of November 1903 for possession of 84 sihams out of 144 sihams, on payment of the said sum within six months, and in default the claim of the plaintiffs was to stand dismissed with costs. The plaintiffs appealed to this Court and Musammat Maina Bibi filed cross objections. The only point urged in appeal related to interest. Both the appeal and the cross objections were dismissed and the decree of the first Court was affirmed on the 3rd of July 1906. The plaintiffs did not pay the sum of Rs. 25,387-5-5 and did not recover possession of the 84 sihams. Musammat Maina Bibi exeouted two deeds of gift in respect of the property in question on the 16th of March 1907 and the 12th of June 1907 respectively in favour of Khalilur Rahman, Obaidur Rahman, Shafiur Rahman and Musammat Humairah Bibi, sons and daughter of Muhammad Isa, her nephew, that is, her sister's son. On the 5th of March 1908 Khalilur Rahman and Obaidur Rahman made a Wakf of a portion of the gifted property and appointed their father Muhammad Isa as Mutwalli. On the 22nd of July 1915 the suit out of which this appeal has arisen was instituted by Wasi Ahmad, Wakil Ahmad and Zubair Ahmad, the three sons of Barkatunnissa, for the recovery of 72 sihams out of 144 sihams in the estate of Muinuddin. Musammat Muizunnissa had died in the meantime. The plaintiffs impleaded in the case as defendants Musammat Maina Bibi, her donees, Muhammad Isa, the Mutwalli, and the husband and the two sons of Musammat Mohibunnissa. The last three were pro forma defendants. In their plaint the plaintiffs after reciting the former litigation of 1902 stated that a considerable part of the sum of Rs. 25,387-5-5 had been realised by Musammat Maina from the income of the estate, and that she having parted with possession of the property, the plaintiffs were entitled to possession of the 72 sihams without payment. In case the Court was of opinion that they could not get possession without payment, they were willing to pay whatever sum was found due by the Court in respect of the balance of the dower debt payable by them. They stated their cause of action to have arisen on the 18th of March 1907 and the 12th of June 1907, the dates on which the two deeds of gift were executed and possession passed out of the hands of Musammat Maina, and on the 1st of July 1915, the date of refusal by the donees to make over possession to them, the plaintiffs. The contesting defendants raised various pleas in defence. We need mention three of them only which have been pressed here before us, namely, that the claim was barred by res judicata; that the plaintiffs could not recover possession without payment of the proportionate sum found due for dower and that interest at 12 per cent. per annum should be allowed on the dower debt. The Court of first instance repelled all the pleas in defence, The objection based on the plea of res judicata was disallowed on the ground that the position of Musammat Maina Bibi who was in possession in lieu of her dower was analogous to that of a mortgagee, and that position was not altered or affected in any way by the decree (of

1902). What was done in the former suit was that the account was settled between the parties up to a certain date and the plaintiffs were given the option of paying the amount found due by a certain date if they wanted to recover immediate possession." The second objection that the plaintiffs could not get possession without payment was rejected for the reason that Musammat Maina Bibi was no more in possession in lieu of her dower and the donees from her were not the donees of her dower debt. As to interest, the rate allowed in the former suit, viz. 3 per cent. per annum was maintained. The Judge, however, recorded a linding on the proportionate amount of dower payable by the plaintiffs after taking into consideration the profits of the estate received by Musammat Maina Bibi. He oame to the conclusion that the sum of Rs. 16,297-15-3 was due to her. The claim of the plaintiffs for possession was decreed without payment of any sum to Musammat Maina or her donees. The latter and the Mutwalli preferred the present appeal to this Court and Musammat Maina died during the pendency of the appeal,

3. The decree of the lower Court is challenged on three grounds only which we have already mentioned above. In support of the first ground, viz., that of res judicata, it is urged that the lower Court and the plaintiffs are under a misapprehension in thinking that the position of a Muhammadan widow in possession of the estate of her deceased husband in lieu of dower is analogous to that of a mortgagee or that a suit by his heirs against the widow for the recovery of possession of their share in his estate is similar to a redemption suit. It may be that in some cases her possession is described, for want of a better expression and in a loose way, as that of a mortgagee, but the incidents appertaining to the position of a mortgagee are wanting in her case. The case of Ghulam Ali v. Sagir-ul-nissa Bibi 23 A. 432 ; A.W.N. (1901) 124 is cited in support of the argument. In that case it was laid down that there was nothing to prevent a Muhammadan widow, who was in possession of the property of her late husband in lieu of dower, from suing to recover her dower from the heirs of her deceased husband. If the analogy of a mortgagee were applicable to a Muhammadan widow in possession of her husband's estate in lieu of dower, she could not sue for the recovery of her unsatisfied dower even by offering to surrender or surrendering her possession of the estate. The remarks of the learned Judges who decided the case of *Mirza Mohammad Sharafat Bahadur v. Shazadi Wahida Sultan Begum*[1] are relied upon to show that the suit by a widow for the recovery of her unsatisfied dower or by the heirs against her for the recovery of their share in the estate of her deceased husband is really in the nature of an administration suit, And where a decree in an administration suit is not executed and is allowed to be barred by lapse of time, no second suit would lie. It is further contended that if the position of a Muhammadan widow in possession of her husband's estate in lieu of her unsatisfied dower is analogous to that of a mortgagee, no second suit by the heir who shares in the inheritance would lie as was held in *Sheikh Golam Hussein v. Musammat Alla Rukhee*[2] and *Muhammad Zakariya v. Muhammad Hafiz*[3] In any ease the present suit is barred by the condition attached to the decree of 1903 to the effect that in case of default the suit was to stand dismissed. Reliance is placed on the case of *Lachman Singh v. Madsudan*[4]. For the plaintiffs-respondents the reply is that as far as this Court is concerned, it has been held more than once that the position of a Muhammadan widow in possession of her late husband's estate in lieu of her unsatisfied dower

is analogous to that of a mortgagee, vide *Anzullah Khan v. Ahmad Ali Khan*[5] and *Sita Ram v. Modho Lal*[6] is cited as authority for the proposition that a second redemption suit would lie where the right to redeem is not barred by act of the parties or by an order of Court. The case of *Lachman Singh v. Madsudan*[7] is distinguished on the ground that in that case the decree provided that if the redemption was not made within the time specified, the right to redeem would be barred. The learned Counsel for the plaintiffs-respondents contends that his right to inherit the property left by Muinuddin was not in dispute in the litigation of 1902. All that was in dispute in that case was whether the then plaintiffs could recover their share in the property without payment or if on payment, on the payment of what sum. The amount of dower as also the rate of interest were in dispute in that case. The amount of dower, the rate of interest and the amount payable at the time of the decree were determined by the Court and are questions which cannot be re-opened. In the present case the plaintiffs are asking for an adjudication on the accounts since 1903. Their cause of action for the present suit is quire distinct from that in the suit of 1902. As to the conditions attached to the decree, that in case of non-payment within sis months the suit should stand dismissed, the order did not extinguish the right of inheritance but only the right to get immediate possession.

4. In order to decide the point under discussion we must first have a clear idea of the position of a Muhammadan widow in possession of her deceased husband's estate in lieu of dower. Under the Muhammadan Law her position is described by Macnaghten in his wellknown book of Principles and Precedents of Muhammadan Law. Case X, at page 356 is as follows:

Question 1.--A man dies being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower, in preference to the other heirs?
Reply 1.--If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband, except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, a prior claim on account of her dower on the property left by her husband, whether real or personal. The residue, after her claim of dower is satisfied, will be divided between her and the other heirs, according to their respective shares of inheritance.

5. The same question in another form is given in Case No. XXIV at page 275:Question.-Is the debt claimed by the defendant legally proved and if so, the whole of the property, real and personal, of her deceased husband being absorbed in such debt is it to belong of right to his widow, or is it to be distributed among the heirs generally?

Reply.-It has been proved, by the testimony of three competent witnesses, that the debt due to the defendant from her deceased husband on account of dower amounted to ten thousand gold mohurs and twenty-five thousand rupees, and a debt legally proved cannot be satisfied but by compromise of liquidation; so long as the debtor lives he is responsible in person, and on his death, his property is answerable but there is this distinction between money and other property

in cases of dower, namely, that the widow is at liberty to take the former description of property, over which she has absolute power, but as to the other property, she is entitled to a lien on it as security for the debt and it does not become her property absolutely, without the consent of the heirs or a judicial decree. Where the debt is large and the estate small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate.

6. After some conflict of authority in the case-law in the second quarter of the last century, the position described above was conceded to the Muhammadan widow. In the case of Musammat Janee Khanum v. Musammat Amatool Fatima Khanum 8 W.R. 51 it was laid down that the widow of a Muhammadan in possession of her husband's estate under a claim for dower has a lien upon it as against those entitled as heirs and is entitled to possession as against them till her claim for dower is satisfied. The same view was taken in the case of *Ahmed Hossein v. Musammat Khodeja*[8] note. In that case too, the learned Judges said that a Muhammadan widow in possession of her late husband's estate in lieu of her dower has a lien on the property as! against the other heirs of her husband. The same point came up for decision before their Lordships of the Privy Council in the case of *Musammat Belee Bechun v. Sheikh Hamid Hossein*[9] Their Lordships held that a Muhammadan widow was entitled to retain possession of her late husband's estate in lieu of her dower as against his heirs. As to the nature of her possession, they observed as follows: "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 the case of *Ahmed Hossein v. Musammat Khodeja*[10] note. 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 dower debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This expression of opinion has been uniformly and consistently followed by the Courts in this country since. We have referred to the text and the case-law applicable to Sunnis. The parties to this appeal belong to the Sunni seat. The same view has, however, been adopted in the case of Shias also, tide *Ameeroonnissa v. Mooradoonnissa*[11]

7. From the authorities quoted above and from the various treatises on Muhammadan Law it appears that the position of a Muhammadan widow with respect to the right to retain possession of her deceased husband's estate is a peculiar one.

8. Where she has obtained possession lawfully, i.e., without force or fraud, she is entitled as against the other heirs to retain possession of the entire estate until her claim for dower is satisfied. On the other hand 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 debt ranks equally with the claims of other creditors of her husband.

9. It may be that the Use of expressions like "lien" and "security" in describing the right of the widow against the coheirs to which we have just referred is calculated to produce confusion and it may be that these expressions as used in works on Muhammadan Law do not import all that is meant when they are used by English lawyers. And it may certainly be conceded that the widow's position with regard to her co-heirs is not in all respects that of a usufructuary mortgagee.

10. But it is not to be denied that in some respects her position does resemble that of a mortgagee in possession and whatever language may have been used from time to time for the purpose of describing her position compendiously, it cannot be doubted that as against the co-heirs she has the right to remain in possession till her claim for dower is satisfied subject to an obligation to account to them for profits, and the co-heirs cannot eject her without payment of that portion of the dower debt which is chargeable to their share of the estate.

11. In this sense and to this extent the right of the widow is analogous to that of a usufructuary mortgagee.

12. Bearing this position in mind, let us examine the former litigation and compare it with the present one. In the suit of 1902 the findings were that Musammat Maina Bibi was in possession in lieu of dower; that her dower was Rs. 51,000; that she was entitled to interest at 3 per cent. per annum on the dower debt; and that the proportionate amount due to her from the then plaintiffs was Rs. 25,387-5-5. The claim was decreed subject to the condition of payment of Rs. 25,000 odd within 6 months of the date of the decree. The decree further provided that in case of default in payment within the prescribed time, the claim should stand dismissed with costs, The proprietary title of the plaintiffs now before us or of those in the suit of 1902 was never in dispute in either case. The plaintiffs were admittedly heirs entitled by inheritance to a share in the estate of Muinuddin. The right of the plaintiffs to recover possession from the widow was not disallowed but was allowed conditionally, that is, on the payment of the sum found due to the widow. In the litigation of 1902 the plaintiffs were held to be entitled to secure possession on the payment of Rs. 25,000 odd. Since then the situation has considerably altered. Musammat Maina Bibi was a party to the present suit, but she was not in possession of the estate of her deceased husband in lieu of her unsatisfied dower. She had parted with possession to her donees about eight years prior to the institution of the suit. The heirs seek possession of the property and that can only be obtained from the donees of Musammat Maina. The right to retain possession has not been transferred (according to the contention of the plaintiffs) to the donees, but the property itself has been transferred and this according to the Muhammadan Law and the case-law the lady could not do The cause of action, therefore, is distinctly different from that in the former suit and the principle of res julicata does not apply.

13. If on the other hand it be said that the transfer by Musammat Maina Bibi to the descendants of her nephew was a transfer of her dower debt, still, in our opinion, the present suit is

maintainable. In the case of 1902 the amount of the dower, the rate of interest and the sum payable by the plaintiffs before obtaining possession, up to the date of the decree, were determined. These three points are not in issue in the present case and if either party raised them in the pleadings in the Courts below, they must be considered to be res judicata. In the present case if accounts have to be gone into, they would have to begin from the date of the decree in the former suit, namely, the 28th of November 1903. In other words, the present suit seeks for an adjustment of accounts since the decree in the first suit. The decree of 1902 did not extinguish the right of the plaintiffs to inherit the estate of Muinuddin, and, therefore, they can maintain the present suit for the ascertainment of the sum now payable by them. Some cases were cited on behalf of the plaintiffs-respondents in support of this view, which we may note here. *Roy Dinkur Doyal v. Sheo Golam Singh*[12] *Sita Bam v. Madho Lal*[13] and *Rama Tulsa v. Bhagchand*[14]

14. All the three cases arose out of redemption suits. The cases relied upon by the learned Counsel for the appellants do not cover the facts of the present case. The case of Shaikh *Gholam Hussein v. Musammat Alla Rukhee*[15] was a case where a mortgagor sued for redemption and obtained a decree. It was found by the Court that the whole of the mortgage money had been satisfied and that the mortgagor was entitled to immediate possession. The mortgagor did not put the decree in to execution and after it had become barred by time brought a fresh suit. The Court held that a second suit did not lie and for a very good reason, namely, that the relationship of mortgagor and mortgagee had been determined in the first suit, because of the finding that the mortgage had been satisfied. The case of *Muhammad Zakariya v. Muhammad Hafiz*[16] is also distinguishable. The facts of that case were that "a mortgage bond provided, among other things, that interest would be paid to the creditor monthly and if for any reason the interest was not paid for six months, the creditor would be competent to realise by suit without waiting for the expiry of the term either the unpaid interest or the principal and interest with costs," It was further stipulated that if the bond was not paid within the period fixed, then the whole amount, principal and interest, would be realised by the creditor by suit. The mortgagee first sued for the recovery of interest only as default was made in the payment of it. He obtained a decree without contest, Subsequently he sued for the recovery of money, principal and interest, due on the mortgagedeed and one of the pleas in defence was that the claim was barred by Order II, Rule 2, Civil Procedure Code. The Court held that the claim was so barred. In the appeal before us no such omission was made by the plaintiffs and Order II, Rule 2, Civil Procedure Code, has no application. As to the case of *Lachman Singh v. Madsudan 29 A. 481 ; 4 A.L.J. 447 : A.W.N. (1907) 137(Supra)* we think it is also inapplicable to the present case. We have already remarked above that the right of the plaintiffs to inherit the property, of Moinuddin was not extinguished by any order in the decree of the 28th of November 1903. The words in the decree were that in case of non payment within the prescribed time, the suit shall stand dismissed. " Similar words were used in the case of Sita Earn v. Madho Lal 24 A. 44 ; A.W.N. (1801) 194 (Supra)where the decree said that in case of non payment of the redemption money within the prescribed time, the decree will be considered nonexistent. We, therefore, find that the present claim of the plaintiffs is not barred by the principle of res judicata.

15. The next point urged is that the plaintiffs cannot recover possession of their share of the property without payment of a proportionate amount of the dower debt. It is contended on behalf of the appellants that the right of a Muhammadan widow in possassion of her husband's estate in lieu of dower is heritable and that a suggestion has been thrown out in some cases of this Court that it is also transferable. It is true that Musammnt Maina by her deeds of gift transferred the property describing herself as the owner of it, but, it is argued, the larger right includes the lesser one and if she had no right of ownership in the property she at least had the right to retain possession of it and she should be taken to have transferred whatever rights she had in the property. The case of Ali Bakhsh v. Allahdad Khan 6 Ind. Cas. 376; 32 A. 551; 7 A.L.J. 567(Supra) is relied upon. We have examined the language of the two deeds of gift and we find that Musammat Maina did not profess to transfer her dower debt or her right to retain possession of the property of her husband in lieu of her dower, to the donees. She describes herself in the two deeds as the owner of the property for two reasons, viz., first, that the property in question had been gifted to her by her husband in lieu of her dower during his lifetime, and secondly, a default having been made in the payment of the decree of 1902, she had become the absolute owner of the property. It is, therefore, quite clear that she did not transfer nor did she mean to transfer her dower debt or her right to retain possession of the property to her donees. We are not prepared to accede to the contention of the learned Counsel for the appellants that because she transferred the whole property believing herself to be the owner of it, she should be taken to have transferred her dower debt and her right to retain possession in lieu of it. Under the Muhammadan Law it is distinctly laid down that a Muhammadan widow in possession of her husband's estate in lieu of unsatisfied dower, cannot alienate the estate, vide Wilson, paragraph 162. A similar point arose in another case before this Court. In the case of Mohammad Husain v. Bashiran 26 Ind. Cas. 109; 12 A.L.J. 250 a Muhammadan widow, who was in possession of her husband's property in lieu of dower, had made a gift of the property in favour of her son. The heirs sued for possession of their share after her death. They were met with the plea that they could not obtain possession without payment of the dower debt. They replied that the donee was the donee of the property and not of the dower debt, and, therefore, could be sued for possession. A learned Judge of this Court after reviewing the authorities on the point came to the conclusion that the gift by the widow being a gift of the property and not a gift of the dower debt, the donee could not resist the suit of the heirs. Assuming that the right of a Muhammadan widow to remain in possession of her husband's property in lieu of her dower is a transferable right which can only be transferred along with the dower debt, we think that on the language of the deeds of gift in this case, no such transfer of the dower debt or of the widow's right to remain in possession of her husband's property was made. The defendants-appellants cannot, in our opinion, resist the present claim on the ground that the plaintiffs-respondents should pay their proportionate share of the dower debt of Musammat Maina.

16. The last point urged on behalf of the appellants is about the rate of interest. In view of our finding that the plaintiffs are entitled to possession without payment, the question really need not

be decided, but we think it better to express an opinion on the point raised, The question of the rate of interest was in issue between the present plaintiffs and Musammat Maina in the litigation of 1902 and was decided against Musammat Maina. The appellants derive their title through her and, therefore, they are bound by the findings arrived at in 1902, and even if the finding is not binding upon the appellants, we think that no case has been made out to make us differ from the lower Court and allow a higher rate of interest than 3 per cent, per annum. The result is that the appeal fails and the decree of the first Court is upheld. We dismiss the appeal with costs, including fees in this Court on the higher scale.

Cases Referred.

128 Ind. Cas. 191 ; 19 C.W.N. 502 ; 21 C.L.J. 319
23 N.W.P.H.C.R. 62
341 Ind. Cas. 233 ; 15 A.L.J. 557 ; 39 A. 506
4 29 A. 481 ; 4 A.L.J. 447 : A.W.N. (1907) 137
57 A. 353; A.W.N. (1885) 54 ; 4 Ind. Dec. (N.S.) 574
624 A. 44 ; A.W.N. (1901) 194
729 A. 481 ; 4 A.L.J. 447 : A.W.N. (1907) 137
814 M.I.A. 377 ; W.R.C.J. 28
914 M.I.A. 377 ; 17 W.R. 113 ; 10 B.L.R. 45 ; 2 Suth. P.C.J. 531 ; 3 Sar. P.C.J. 39 ; 20 E.R. 828 (P.C)
1010 W.R. 368 ; 3 B.L.R.A.C.J. 28
116 M.L.A. 211 ; 1 Sar. P.C.J. 533. 19 E.R. 79
1222 W.R. 172
1324 A. 44 ; A.W.N. (1801) 194
1427 Ind. Cas. 249 ; 39 B. 41 ; 16 Bom. L.R. 687
153 N.W.P.H.C.R. 62
1641 Ind. Cas. 233 ; 15 A.L.J. 557 ; 39 A. 506