

Patna High Court

Mohitan And Anr. vs Zubera And Ors. on 7 April, 1953

Equivalent citations: 1953 (1) BLJR 353

Author: Jamuar

Bench: Jamuar

JUDGMENT Jamuar, J.

1. This is an appeal by defendants 1 and 2 from a concurrent decision of the two Courts below. It arises out of a suit brought by the plaintiff for recovery of unpaid dower debt. The plaintiff, Bibi Zubara, is the widow of one Sheikh Hamid. Defendants 1 and 2 are the two brothers of Sheikh Hamid, and defendants 3 to 11 are cousins of the family. The plaintiff's case is that she was married to Sheikh Maid in 1940, and, at the time, dower was fixed at Rs. 7,000/- and ten gold mohurs. Hamid died on 9-12-1943, and the dower remained unpaid. The further case of the plaintiff was that her share in the properties left by Hamid was one-fourth, and that that share would be liable for the payment of one-fourth of the dower debt due to her, which sum was worked out at Rs. 1,750/- and 21/2 gold mohurs. The defendants' share in the properties left by Hamid would be the remaining three-fourths, and the plaintiff alleged that that would be liable for discharge of her remaining three-fourths of the dower debt. This three-fourths of the dower debt would amount to Rs. 5,250/- and 71/2 gold mohurs. The plaintiff alleged that, as the three-fourths of the properties inherited by the defendants would not be sufficient to satisfy this three-fourths of her dower debt, she was giving up her claim to a portion of it, and she claimed only Rs. 4000/- which amount was to be realised from the defendants' three-fourths share.

2. The learned Munsif, who tried the suit, gave a decree as prayed for by the plaintiff. An appeal was taken from the decision of the learned Munsif, and it was heard by the Additional Subordinate Judge of Bhagalpur who affirmed the decision of the learned Munsif.

3. The only point argued by Mr. U. N. Sinha, who has appeared for the appellants, was that the suit as framed was not maintainable. At the trial, the first issue framed was whether the suit as framed was maintainable; but this issue was not pressed. In the lower appellate Court, an argument was advanced in respect of this issue. The learned Subordinate Judge would appear to have been somewhat impressed by the argument but not to the extent of finding the issue in favour of the defendants. He, therefore, did not give effect to the argument advanced before him. As I have already stated, the plaintiff claimed to be in possession of one-fourth of the properties left by her deceased husband, as this would be her share in the properties. She further alleged that she was giving credit to the extent of one-fourth of her dower debt by reason of taking this property in her share. She, therefore, sued for the balance of her dower debt, giving again some further remission, which was to be realised from the share of the defendants. Mr. Sinha argued that this the plaintiff could not do. He relied upon the case of -- 'Mahomed Sharafat v. Wahida Sultan Begum', AIR 1915 Cal 655 (A).

His contention was that on the authority of this case, where a widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she may recover her dower by way of an administration suit or by a suit against the other heirs, provided" she offers to surrender

possession of the property in her possession, and that, if she adopts the latter alternative, the litigation really assumes the character of an administration suit. Mr. Sinha argued that the plaintiff cannot be allowed to retain a portion of the properties left by her husband, and to sue the defendants for her dower debt. Mr. Rahman, in reply, has distinguished the case relied upon by Mr. Sinha on the ground that in that case the widow was retaining a portion of the property left by her husband and yet was suing for the entire dower debt, which is not the case in the case before me.

In the present case, the plaintiff has given credit for one-fourth of her dower debt by reason of her inheriting one-fourth of the properties left by her husband, and she sued for the balance after giving some remission of the debt. Mr. Sinha frankly conceded that that was a point of distinction which could be well made in the present appeal before me. He, however, drew my attention to a passage in Ameer Ali's Mohammadan Law, 5th Edition, 2nd Volume, at page 449, where it is stated that "Dower is only a debt like other liabilities of the husband, and has priority over legacies bequeathed by the testator and the rights of heirs. A partition of the estate cannot ordinarily take place until the dower-debt has been satisfied. But a partition of the estate before payment of the dower-debt does not invalidate the partition, the heirs take the shares subject to the right of the widow for her 'mahr'."

The argument of Mr. Sinha was that in no case could the plaintiff retain a portion of the estate left by her deceased husband, and sue for the balance of her dower debt, if the plaintiff wanted to sue for the recovery of the dower debt, she must bring the entire estate left by her husband into what may be called a common hotchpot. I was not referred to any authority in support of this proposition. I do not think, therefore, that, in the circumstances of this case, it can be held that the suit as framed by the plaintiff was not maintainable.

4. I would, accordingly, dismiss this appeal with costs.