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In *Maina Bibi v. Vakil Ahmad*, the Privy Council explained the right of retention thus: the possession of property being once peacefully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her under Muslim law. It is not exactly a lien, nor a mortgage.

The widow, who holds possession of her husband's property until she has been paid her dower, has no interest or estate in the property as a mortgagee under an ordinary mortgage has. In this case, on the death of her husband in 1870, the widow, Maina Bibi, entered in possession of her husband's property. In 1902, some heirs of the husband filed a suit to obtain possession of their share.

The widow, *inter alia* pleaded that her possession was in lieu of her dower in the exercise of her right of retention. In 1903, the trial court passed a decree in favour of the heirs on the condition that they paid certain sum of money together with interest to the widow towards her dower. No amount was paid to the widow, and she continued in possession of the property. In 1907, the widow made a gift of his property which was challenged by the heirs. The Privy Council held that the widow merely had a right of retention of possession till she was paid; she could not alienate or otherwise deal with the property.

It is settled law that the widow must have come into possession of the property lawfully and without force or fraud. There is still some controversy whether the possession of the widow or divorcee (the wife) should be with the consent, express or implied, of the husband or the heirs. The controversy

arises on account of certain observations made by the Privy Council in Hamira Bibi v.

Zubaida Bibi. The High Courts of Calcutta, Patna and Allahabad held that the consent is necessary. On the other hand, the High Courts of Madras and Bombay held that such consent is not necessary. It is submitted that in view of the nature of the right of retention, the latter view is preferable. When the wife was in possession of her husband's property during his life time, and continued to be in possession, after his death, the presumption is that she lawfully obtained possession and the consent of the husband is implied. If in mutation proceedings the name of the widow is entered into the Record of Rights with knowledge of the heirs, their consent will be implied. Once a Muslim widow or divorcee lawfully obtains possession, she has the right to retain it, until her dower-debt is satisfied. However, she is liable to account to those who are entitled to property, subject to her claim to profits received.

It should be clearly understood that the right of retention does not confer on her any title in the property. The right of retention only entitles her to remain in possession, and, if dispossessed, she can sue for the recovery of possession. In such a case, in respect of immovable property, the period of limitation is six months from the date of dispossession, and in respect of movable property, three years from the date on which she first learnt in whose possession the property was. The title in the property vests in the heirs, including the widow. The widow's right as heir should not be confused with her right of retention which is different and distinct from the former. As an heir, she has the rights and remedies of an heir, which are distinct from the rights and remedies of a widow whose dower has not been paid. The

implications of the right of retention are: (i) The widow is liable to render full account of all the income and profits, (ii) She has no right of alienation of the property, and (iii) Her possession of the property in the exercise of her right of retention is not a bar to her suit for the recovery of the dower-debt. (i)

Liability to render full account: It is a well established proposition of law that the widow or divorcee is liable to render full account of the rents and profits of the property received by her to those who are entitled to the property, the heirs in the former case, and the husband, in the latter case.

She is entitled to compensation for forbearing to enforce her right of the dower-debt; such compensation is in the form of interest on the principal amount of the dower. The widow may give up her right of compensation. She has the right to satisfy her dower-debt out of the rent and profits of the property. (ii) No right of alienation: The right of retention does not confer on her any right of alienation, for value or gratuitously, for the satisfaction of her dower-debt or otherwise.

However, if she makes an alienation, it will be valid to the extent of her share qua heir, as her husband's widow (we should remember that under Muslim law a widow is always an heir to her husband). Any alienation made by the widow cannot affect the share of other heirs, and to that extent, will be void. If alienation is made by the widow, but she retains possession, such as when she executes a mortgage without giving possession, the other heirs have a right to get a declaration that the alienation is void, but they will not be entitled to the possession of the property; the possession will remain with the widow. But, if, with alienation, she hands over the possession to the alienee, the heirs get an immediate right of possession, and when they sue

for declaration that alienation is null and void, they, immediately, on the passing of the decree in their favour, become entitled to possession.

Possession cannot be restored to the widow, since she has voluntarily transferred it to the alienee.

The heirs have the right of alienating their shares in the estate and if they alienate them, the alienation will be valid, but the alienee will take the property subject to the widow's right of dower-debt, and he cannot disturb her possession. (iii) No bar to suit for recovery of dower possession: The mere fact, that the widow is in possession of the estate of her husband, is no bar to a suit by her for the recovery of her dower-debt from the heirs of her husband. But in such a suit, she must offer to give up possession in the event of a decree being in her favour. If a widow sues only for part of her dower, she cannot file a fresh suit for the recovery of the balance, since the implication is that by suing for a part she has relinquished her claim to the rest.

**When right of retention is lost:**

The right of retention is lost in the following three cases: (a) when from the income and profits of property her dower-debt is satisfied; (b) where she alienates the property together with possession to the alienee, the other heirs get a right to immediate possession of property; and (c) where she voluntarily hands over possession of the property to other heirs.

**Widow's right of retention vis-a-vis other heir's rights:**

The widow's right of retention of the possession of the property does not prevent the heirs from exercising their rights over that property; the heirs

have a right to the recovery of possession of their respective shares of property. When even an heir files a suit for the recovery of the possession of his share of property, the court will pass a decree subject to his paying the proportionate amount of dower-debt within a specified period. Suppose, a decree is passed in favour of the heir, but, eventually, it is dismissed, as the heir did not pay the dower-debt.

The dismissal of the suit, in such circumstances, does not create a bar of res judicata, or any other bar, for a subsequent suit for possession when the dower-debt is satisfied out of the rents and profits from the property. A decree obtained by the creditors of the heirs for possession, can also not be enforced so long as the widow's right of retention subsists.

**Right of retention: whether heritable:**

The question, whether the right of retention is heritable and transferable, remains still unresolved. One view is that, since the right of retention is a personal right, it is neither transferable for value or gratuitously, nor it is heritable.

The other view is based on the assumption that the right of retention is not a mere personal right, but is a property, and, therefore, it is both transferable and heritable. In some cases, it has been held that the right of retention is heritable. Such cases leave open the question whether it is also transferable. In *Ghouse Yar Jang v.*

*Khenur Fatima*, the Court, dissenting from *Lohair Ahmed v. Jai Nandan* took the view that right of retention is both alienable and heritable. A further question arises: can the right of retention be transferred independently of <https://assignbuster.com/in-or-estate-in-the-property-as/>

the dower-debt? In some cases it has been held that the right of retention cannot be severed from the dower-debt, and, therefore, when the right of retention is transferred, the dower-debt also stands transferred.

**Period of Limitation:**

The period of limitation for the recovery of dower-debt is three years. But if she is in possession of her husband's property, she can retain it, till her dower is paid and the period of limitation of three years will not apply.

**Court's jurisdiction:**

Suppose the marriage of parties take place at A. Marriage is consummated at place and thereafter parties live at place C. The court of which place will have jurisdiction and entertain wife's suits for the recovery of dower. In *Nasira Begum v.*

*Rizwan Ali*, the court said that the place, where the agreement to pay dower was entered into, will be the place where the suit will lie. It is submitted that it will not merely be the place where marriage took place but also the place, where the husband is residing, will have jurisdiction, since dower is personal obligation.

**Suit for recovery of dower:**

No petition or suit lies for the recovery of the sum of dower in the family court or in any civil court, but in the Magistrate's court under Section 3, Muslim Women (Protection of Rights on Divorce) Act, 1986.