
(1945) 05 AHC CK 0005
In the Allahabad High Court

Mt. Khatoon Begam

APPELLANT

Vs

Saghir Husain Khan

RESPONDENT

Date of Decision : 11-05-1945

Acts Referred:

Encumbered Estates Act, 1934 — Section 4
Provincial Insolvency Act, 1920 — Section 45

Citation : AIR 1945 All 321 : (1945) 15 AWR 371

Hon'ble Judges : Mathur, J;Malik, J;Allsop, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Allsop, J.—This appeal arises out of a suit in which the plaintiff-appellant claimed a sum of Rs. 10,000 from her husband, Saghir Husain Khan, the defendant-respondent, on account of her dower. The defence was that the dower fixed was Rs. 32-8-0, that the plaintiff had been divorced by the defendant in the year 1935, that her suit, instituted in the year 1939, was barred by limitation and that the liability to pay dower had been discharged because the defendant had made an application u/s 4, Encumbered Estates Act, and the plaintiff had not put in any claim under the provisions of Section 9 of the Act.

2. The findings of fact were that the dower fixed was Rs. 10,000 and that there was no divorce in 1935. These findings are not disputed in appeal. It was, on the other hand, admitted by the plaintiff that she had made no claim during the proceedings following on her husband's application under the Encumbered Estates Act. The learned Judge of the lower Court dismissed the suit on the ground that the liability to pay dower was discharged under the provisions of Section 13 of that Act. The plaintiff claimed that the sum of Rs. 10,000 was payable on demand, that is to say, she alleged that the whole amount was prompt dower. The defendant did not plead on this part of the allegation. He merely alleged that the amount of dower was Rs. 32-8-0 and it is obvious on the allegation that there had been a divorce in 1935, that it was a question of no

importance whether the dower was prompt or deferred. The learned Judge has found as a fact that the dower was prompt and that the suit was within limitation because the first demand for payment was made in the year 1938. No evidence has been put before us to suggest that these findings of fact are wrong and therefore I would accept them. It has not been argued that any demand was made before the year 1938.

3. On the facts found we are left to decide certain questions of law which give rise to some difficulty. The appellant's contention is that her claim to dower could not be discharged under the provisions of the Encumbered Estates Act because it was impossible for her to obtain a decree from the Special Judge in proceedings under that Act. The first question which arises is whether a Muslim woman can institute a suit to recover her prompt dower without making a demand from her husband which is unequivocally refused by him. If the matter were *res integra*, it might perhaps be argued that a claim to prompt dower is dependent entirely upon the wishes of a wife and that the moment she wishes to recover the money she may institute a suit for that purpose against her husband, but it seems to me that we are bound by authority in this matter.

4. In *Nawab Bahadur Jung Khan v. Mt. Uzeez Begam* (1843) N.W.P. 180 the learned Judges said that the exigible dower was a debt payable generally on demand after the date of the contract which formed the basis of the obligations and payable at any period during the life of the husband on which that demand should actually have been made and, therefore, until the demand had been actually made and refused the ground of action at law could not properly be said to have arisen nor the law of limitation to have become applicable. This decision was approved by their Lordships of the Privy Council in *Mulleeka v. Jumela* ("73) LR IndAp Sup.135 140. Their Lordships said:

Their Lordships are of opinion that the case in *Nawab Bahadur Jung Khan v. Mt. Uzeez Begam* (1843) N.W.P. 180 was rightly decided and that in respect of prompt dower payable under the Mohamedan law limitation does not begin to run before the dower is demanded or the marriage is dissolved by death or otherwise.

In *Ranee Khajoor-oon-nissa v. Ranee Rayees-oon-nissa* ("75) 2 I.A. 235 their Lordships said:

Prompt or exigible dower may be considered a debt always due and demandable and certainly payable upon demand and, therefore, upon a clear and unambiguous demand and refusal a cause of action would accrue and the statute would begin to run.

In *Ameer-un-nissa v. Moorad-un-nissa* (1854) 6 M.I.A. 211 the question was whether a Muslim woman could claim her dower after her husband's death. There was a deed under which the dower was granted and its terms were that the dower would be paid "when demanded by my wedded wife." It was urged that a demand was necessary under the terms of the deed before dower could be

claimed but it was held by their Lordships that no demand was necessary. It is clear that the question there was not whether prompt dower could be recovered during the husband's lifetime without demand as the cause of action had arisen upon the husband's death and this ruling is no authority on the question before us. As for the other cases which I have quoted it has been urged by learned Counsel for the respondent that they deal with questions of limitation alone and that they do not lay down a rule that a suit cannot be instituted for the recovery of prompt dower before a demand is made, but the question of limitation turned upon the further question when a cause of action arose and it was found in all the cases that the cause of action arose on a demand by the wife and a refusal by her husband. It seems impossible to hold that a suit can be instituted before a cause of action has arisen. It was held by two learned Judges of this Court in Mohammad Taqi Ahmad Khan Vs. Farmoodi Begam, that a previous demand and refusal for payment of an unascertained sum of dower is not necessarily a part of the cause of action for the plaintiff, but that decision is not relevant to the present case in which it must be held that the whole sum of Rs. 10,000 was agreed to be paid as prompt dower and although that decision was followed by my brother Hamilton and myself in Bibi Rehana Khatun Vs. Iqtidar Uddin Hasan, . I must confess that I have some doubt whether the decision was defensible in view of the authorities. I would, therefore, hold that the cause of action for the recovery of the plaintiff's prompt dower did not arise till she had made a demand from her husband and he had refused it in the year 1938. This view is strengthened by the provisions of Article 103 of Schedule 1, Limitation Act. I may add that it would be sufficient for the purposes of this case to hold that the cause of action arose when the woman wished to recover her dower and expressed an unequivocal intention to claim it from her husband because there is no evidence that she expressed any such intention before her husband made his application u/s 4, Encumbered Estates Act.

5. The next question is whether a suit based on a cause of action which accrued after the date of the application u/s 4, Encumbered Estates Act, is barred if no claim has been made during the proceedings under that Act. Learned Counsel for the respondent has argued that the learned Judge of the Court, below was right in holding that it is so barred. He has relied strongly upon the definition of the term "debt" in the Act. The definition is that a debt "includes any pecuniary liability except a liability for unliquidated damages" and learned Counsel maintains that no distinction is made between an immediate and a prospective liability. Under the provisions of the Act, the applicant u/s 4 must give full particulars respecting the public and private debts to which he is subject or with which his immovable property or any part thereof is encumbered. The Special Judge must issue a notice u/s 9 to all creditors mentioned by the landlord and publish it in the official Gazette. All persons having claims in respect of private debts both decreed and undecreed against the person and property of the applicant u/s 4 must then present their claims to the Special Judge. It is then provided u/s 13 that

every claim decreed or undecreed against the landlord in respect of a private debt...shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged.

The argument is that the sum due to the plaintiff-appellant as prompt dower was a debt within the meaning of the definition, that it should have been claimed under the provisions of Section 9 of the Act and that a claim to it is now barred under the provisions of Section 13. I may say at once that I am not satisfied, even on the wording of these sections, that the debt itself must be deemed to have been discharged. I may point out that Sections 9 and 13 do not say that all sums due on all debts must be claimed or that all debts shall be deemed to have been discharged. They say merely that claims shall be made and that claims shall be discharged and even if we went no further into the Act, it would not be justifiable for us to assume that all debts would be barred even if there could be no valid claim for the recovery of money on the date when the application u/s 4 was made. The Act, however, must, in my judgment, be construed as a whole and it is, there, fore, necessary to consider the provisions of Section 14. Sub-section (2) of that section says that

the Special Judge shall examine each claim and after hearing such parties as desire to be heard and considering the evidence, if any, produced by them shall determine the amount, if any, due from the landlord to the claimant on the date of the application u/s 4.

In Sub-section (4) it is laid down that the Special Judge in examining each claim shall have and exercise all the powers of the Court in which a suit for the recovery of the money due would lie and shall decide the question in issue on the same principles as those on which such Court would decide them subject to certain provisions which are not relevant in this case. In Sub-section (7) it is said:

If the Special Judge finds that any amount is due to the claimant he shall pass a simple money decree for such amount, together with any costs which he may allow in respect of proceedings in his Court and of proceedings in any civil Court stayed under the provisions of this Act, together with pendente lite and future interest at a rate not greater than the rate specified in Section 27, and if he finds that no amount is due he may pass a decree for costs in favour of the landlord.

It is further said that "such decree shall be deemed to be a decree of a civil Court of competent jurisdiction." It seems that the intention of the Legislature was that the Special Judge should act exactly as he would have acted if the claim had been a plaint presented in his Court on the date of the application u/s 4 and that he should pass a decree on the basis of the claim or dismiss the claim just as he would have passed a decree on the basis of a plaint or have dismissal the suit based upon the plaint. In these circumstances, the Special Judge would have been bound to reject the claim of the plaintiff-appellant if she had made a claim in the proceedings under the Encumbered Estates Act. The issue would have been raised whether this claim was premature and the Special Judge would have

had to hold just as any other Court would Have held that the plaintiff had no cause of action on the relevant date. It is impossible to believe that the Legislature could have intended that a claimant who could not get his money by means of a decree passed by the Special Judge should be prevented from claiming it afterwards in the ordinary Court. In these circumstances if the term "debt" has the wide meaning for which learned Counsel for the respondent contends, then I think that a claim must be distinguished from a debt and the Legislature must have intended that a creditor should make a claim under the Encumbered Estates Act for any sum which could properly be claimed on the date when the application u/s 4 was made and that he should not be called upon to claim any sum which could not properly be recovered till some future date. If a decree could be passed in favour of the creditor by the Special Judge, then, if he had failed to ask for decree, he would be barred from filing a plaint thereafter in any Court. This interpretation of the Act is, in my judgment, also consonant with convenience and common-sense. If a debtor is bound to pay a sum of money at a future date, he should not be bound to pay the full sum at an earlier date. He would lose the use of his money for the period between the earlier and the later dates and, consequently, he would be entitled to a reduction on account of interest on his money, that is, he should be required only to pay the present value of the future debt. If the date of payment was certain, it would be possible to calculate the present value but if it was not certain, as in the case of dower under the Mahomedan law, it would be impossible to make such a calculation because it would be impossible to say when the money would fall due. No doubt it might be possible to make some complicated actuarial calculation, but it can hardly be supposed that the Legislature would have intended that such a calculation should be made in proceedings under the Encumbered Estates Act.

6. It may seem that it is somewhat unfair to a creditor, who is entitled to recover money, say on a bond payable on some future date, if his debtor is allowed to make an application by which the whole of his property is taken over for the payment of his present debts and nothing is left to discharge his future liability to his creditor, but if one considers the matter, any person who accepts an unsecured bond to pay on some future date always runs the risk that the debtor may alienate his property and he would have no redress if the debtor did alienate his property before the money became due unless there was some question of fraud or the provisions applied about setting aside transfers intended to defeat or delay creditors. There is little difference between an alienation of property and the effect of an application under the Encumbered Estates Act. The real difficulty arises out of debts secured by mortgages. Under a usufructuary mortgage, the debtor has no personal liability to pay and there may be cases where money cannot be claimed by the mortgagee or the mortgage redeemed before a future date. On the whole, however, I think it is clear from the provisions of the Encumbered Estates Act that the Legislature intended that there should be a special provision that all mortgages should be redeemed as the result of an application under the Encumbered Estates Act whatever may have been the

contract between the parties and consequently that the Court should pass a money decree in favour of the mortgagee on the assumption that the mortgage was redeem-able on the date when the application under the Encumbered Estates Act was made. A bench of this Court had before it in *Bakhtawar Lal v. Parmeshwari Dayal* First Appeal No. 61 of 1939, decided on 17th March 1942 case in which the applicant under the Encumbered Estates Act had executed a security bond before the date of his application but had not incurred any liability at that date although he had incurred a liability afterwards. The learned Judges held that a claim on the basis of the security bond was not barred by the provisions of Section 18 of the Act. This decision strengthens the opinion which I have already expressed. If the plaintiff's claim to prompt dower was barred it would seem that all claims even to deferred dower would be barred unless a claim had been made during the proceedings under the Encumbered Estates Act. On the reasoning of learned Counsel for the respondent, a claim to deferred dower would be a debt within the meaning of the Act and all claims made on the dissolution of the marriage by death or divorce would be barred unless the money had been claimed during the proceedings under the Act. It seems to me that the Legislature could not have intended to produce this effect, that is to make the husband pay immediately a sum of money which he would ordinarily not be bound to pay till some future unknown date. There might be a case where a man had taken a lease for a long period and promised to pay rent monthly or yearly. Here again, I do not believe that the Legislature would have intended that rent could be claimed in advance during the proceedings under the Act. I may add that there is no provision in the Encumbered Estates Act corresponding with the provisions in Section 45, Provincial Insolvency Act.

7. On the whole I am satisfied that the plaintiff's claim was not barred and I would, therefore, allow the appeal, set aside the decree of the learned Judge of the Court below and give the plaintiff a decree for Rs. 10,000 with pendente lite and future interest at 3 1/4 per cent, together with costs in both Courts. As the plaintiff instituted the suit in forma pauperis, the plaintiff should pay the court-fees to the Government. There is a cross appeal No. 84 of 1941 in which the defendant is the appellant. He objects to the direction of the Court below that he should pay the court-fees. There might have been some force in this appeal on the assumption that the suit was rightly dismissed, but now that I have held that the plaintiff's appeal should be allowed, there can, in my opinion, be no force in this appeal and I would dismiss it with costs.

Malik, J.

8. The facts of this case so far as they are necessary for the decision of the points that have arisen before us have been set out in the judgment of my brother Allaop. The first question that I propose to consider is, what are the debts which must be claimed in proceedings under the Encumbered Estates Act and which, if not claimed, are liable to be discharged u/s 13 of the Act. It is clear from the various sections of the Act that the Act is intended to give relief only

with respect to debts up to a certain date. The provisions of the Act are in the nature of insolvency legislation. The landlord has to give a complete list of his property and a list of his debts up to a certain date. If the landlord leaves out any debt or any property the creditors can supply the omission. The Special Judge has to investigate and make a complete list of all such debts and then the Collector liquidates the same in accordance with the provisions of the Act. The question is what are the debts that can be proved in proceedings under the Encumbered Estates Act. From Section 4 of the Act, it is clear that the landlord applicant has to give a complete list of the debts he "is subject to" on that date. This is also made clear by Section 14, Sub-section (2) which says: "The Special Judge shall examine each claim and...shall determine the amount, if any, due from the landlord to the claimant on the date of the application u/s 4." It would be noticed that, while in Section 4 the language used is "is subject to" in Section 14 the language used is "due from the landlord." A reference to Section 7 is, to my mind, very important as it lays down two different procedures for debts incurred before and after a certain date. u/s 7, Sub-section (1) all proceedings relating to debts to which the landlord is subject or with which his immovable property is encumbered shall remain stayed and no fresh suit or other proceedings shall be instituted with respect to debts incurred before the passing of the order u/s 6, evidently because all such debts incurred before the passing of the order u/s 6 are to be dealt with under the Encumbered Estates Act. Here again, it would be noticed that the words used in Clause (a) of Sub-section (1) of Section 7 are "debt to which the landlord is subject", while in Clause (b) they are "the debt which has been incurred before the passing of the order." If I may point out here, Section 7 was not properly drafted. While Sections 4 and 14 deal with debts that the landlord "is subject to" and are "due on the date of the application u/s 4", in Section 7 the classification of debts is slightly different and Section 7, subs, (1) deals with debts incurred before the order u/s 6, while Sub-sections (2) and (3) of Section 7 deal with debts incurred after such order. In practice, however, no difficulty has so far arisen, as an order u/s 6 is made by the Collector forwarding the application to the Special Judge, generally on the same day on which the application u/s 4 is filed before him. Sub-sections (2) and (3) of Section 7 deal with private debts incurred by the landlord after the passing of the order u/s 6 and lay down certain restrictions against the creditor's rights to proceed against the landlord applicant or his property for the realisation of his debt. In Section 7 debts are classified as debts incurred prior to the order u/s 6 and debts subsequent to the order u/s 6. There is no provision for debts incurred between the date of the application u/s 4 and the date of the order u/s 6, though Section 7 was obviously intended to be exhaustive.

9. In the Encumbered Estates Act the word "debt" has been given a very general meaning and it has been defined as including any pecuniary liability except a liability for unliquidated damages. It is clear from the definition that the Legislature did not intend to give the word "debt" any technical meaning but gave it as wide and general a meaning as possible. If in Section 4 we substitute

the word "pecuniary liability" for "debts" it would read that the landlord applicant has to give a complete list of all his pecuniary liabilities up to that date. In Section 7 again, if the word "debt" is substituted by the words "pecuniary liability" it would read any pecuniary liability incurred by the landlord before the passing of the order u/s 6. Now, in this sense, debt would include not only amounts actually payable on the date of the application u/s 4 but all pecuniary liabilities which have come into existence or have been incurred before the relevant date. To my mind, Section 7 read as a whole clearly indicates that the Act intends to deal with all pecuniary liability incurred before a certain date as it stays all proceedings then pending and prohibits the institution of any new proceedings after that date. In other words, all such pecuniary liabilities are placed under the jurisdiction of the Special Judge and are to be dealt with and liquidated under the Encumbered Estates Act.

10. Some difficulty may arise from the use of the words "due from the landlord" in Section 14, Sub-section (2), Encumbered Estates Act. As I have already pointed out, the Legislature seems to have used indiscriminately the three words "subject to" "incurred" and "due" and, to my mind, the word "due" has not been used in its technical sense, that is, due and immediately payable, but in the larger sense of the existence of a liability. If the word "due" is understood in the sense indicated by me above, then all debts, whether immediately payable or payable in future, in respect of which the liability is fixed and determined as opposed to unliquidated damages or contingent liability which may or may not arise, are covered by and included in the administration of the estate of the landlord applicant under the Encumbered Estates Act, and all debts on the basis of instalment bonds or hundis maturing after the date of the application, mortgages payable after the application, usufructuary mortgages or price of goods sold on credit payable after a certain period, must be brought in and claimed in proceedings under the Encumbered Estates Act. If this meaning is not given to the word "due," it would create this anomaly and lead, to my mind, to this absurdity that all those debts which may have been incurred by the landlord applicant before his application u/s 4, Encumbered Estates Act, but which by reason of a contract with him were payable after that date, would be entirely unprovided for. The proceedings under the Encumbered Estates Act being in the nature of insolvency or administration proceedings, I cannot believe that the Legislature was capable of this absurdity that the entire property of the landlord applicant was made payable for only a part of his debts incurred up to a particular date and the rest of it was left entirely unprovided for.

11. The intention of the Legislature seems to have been that all debts, incurred by the landlord applicant up to the date when he filed his application u/s 4 or up to the order u/s 6, which practically mean the same thing, should be liquidated in the Encumbered Estates Act proceedings so that the landlord applicant may start with a clean slate. If he incurs debts after his application and if people lend him money after he has applied under the Encumbered Estates Act, they must wait and take their chance and the Encumbered Estates Act proceedings cannot be

used to help them. The Legislature had to draw a line and consider debts up to a certain date, otherwise the proceedings under the Encumbered Estates Act could never be finished and it has, in its wisdom, chosen the date of the application u/s 4 or the order u/s 6 as the relevant date, but to my mind, it must be understood that it meant all the debts incurred by the landlord applicant up to that date and not only some of the debts which had become due, and the others which were to fall due, either the next day or ten days after or after some time to be absolutely unprovided for. There seems to be no reason why a creditor who has given the landlord applicant some time to pay should be treated in such a harsh manner by the Legislature. The only other provision that need now be considered in this connexion is Section 14, Sub-section (i) which lays down:

In examining each claim the Special Judge shall have and exercise all the powers of the Court in which a suit for the recovery of the money due would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them....

To my mind, all that was intended by the sub-section was that in determining claims the same law would be applied, but the Legislature having already in the previous sections, as I have indicated, intended to provide that all debts the landlord applicant was subject to on the date of the application u/s 4 or debts that he had incurred before the date of the order u/s 6, the same must be taken into account in the proceedings under the Encumbered Estates Act. I do not consider that by this provision it was intended that all claims which would have been premature if a suit had been filed on the basis thereof because the time for payment had not yet arrived on account of the private contract between the parties should be ruled out as debts which could not be proved under the Encumbered Estates Act. I am strengthened in this view by the words used in Sections 4 and 8, Encumbered Estates Act, which are the two sections which lay down what debts the landlord applicant should include in his application. He must include all debts which he "is subject to." This must mean debts which had been already incurred whether the date for their payment had or had not arrived. The word "due" does not occur till we come to Section 14, Encumbered Estates Act. The landlord applicant being required under Sections 4 and 8 to give a complete list of all debts incurred by him or that which he is subject to, with the name and address of his creditors, notices are issued to all of them. These creditors must, to my mind, include all those who have pecuniary claims against the landlord applicant, whether the date of payment has or has not yet arrived. Having required the landlord applicant to give a complete list of all his debts and having required all the creditors to put in their claims u/s 9, Encumbered Estates Act, on the penalty of forfeiture u/s 13, it seems to me unreasonable that, when these creditors come before the Court, they should be told that their claim is premature, because if they had filed suits the suits would have been premature. We must remember that, though there is some analogy between a creditor's putting in a claim u/s 9 and a suit, they cannot be put on exactly the same basis. A suit is filed by a creditor at his own initiative and may be premature. I,

however, find it difficult to hold that a claim, put in by a creditor at the invitation of the Legislature, should also be held to be premature simply because the date for payment had not yet come. There can be no doubt that the words "subject to" in Section 4, would include all debts which had been incurred by the landlord applicant whether the date for payment of the same had or had not matured. The word "incurred" in Section 7 would clearly have the same meaning. To my mind, the words "due from the landlord" in Section 14 must be used as synonymous with the words "subject to" and "incurred" mentioned in the other sections.

12. To my mind, it is obvious that only such debts can be discharged u/s 13, Encumbered Estates Act, which can be proved under that Act i.e., all debts or pecuniary liabilities that have been incurred before the application u/s 4 whether the date of payment had or had not expired before the date of the said application. Having come to this conclusion, I have now to find out what is the nature of a dower debt under the Anglo-Muslim law. The application of modern conceptions to an old system of law, when the ideas and the legal principles in the minds of those who laid down the law were entirely different, is apt to lead to confusion and difficulties. Dower may loosely be said to be a debt, but, to my mind, it would lead to unhappy and inconsistent results if we were to consider dower to be exactly synonymous to our idea of a commercial debt. There can be no doubt that dower is not a sum of money which the husband has borrowed from the wife. It is not a gift, as even under the Mahomedan law transfer of possession is necessary in a gift. It will be absurd to apply to it the analogy of sale price. Mahmood J. in *Abdul Kadir v. Salima* ("86) 8 All. 149 has fully dealt with the nature of a dower debt and has explained that, though, loosely speaking, it may be called sale price, but that is a misleading analogy and that conception came into existence merely because Mahomedan lawyers were more familiar with the contract of sale and purchase. Liability to pay a dower debt is, to my mind, a liability which is peculiar and cannot be brought into our modern conceptions of jurisprudence. It is a promise to be redeemed in future under certain contingencies. I may mention here that, according to our modern conception, any contract to be binding between the parties has to be for consideration. A study of the nature of a dower debt would show that dower may be fixed after the marriage: see *Kamarunnissa Bibi v. Husaaini Bibi* ("81) 3 All. 266. Again the amount of dower may be increased after the marriage. The question of the rights of the wife to remain in possession of her husband's property in lieu of her dower has arisen in several cases before the Privy Council, and their Lordships in (1925) 48 MLJ 667 (Privy Council) pointed out that it does not strictly come within the principles of lien, nor under the law of contract, but yet the wife is entitled to remain in possession., If the dower debt is to be considered synonymous with an ordinary commercial debt, then, in accordance with the principles laid down by me in the first portion of my judgment, not only prompt dower but also deferred dower must be claimed in proceedings under the Encumbered Estates Act, the claim being extinguished if it is not made, and it

would then lead to this further absurdity that deferred dower which is not payable till divorce or death of the husband would have to be paid by the Collector long before it is really payable under the personal law of the landlord applicant.

13. Considering the nature of a dower debt with reference to limitation for suits for prompt dower their Lordships of the Privy Council have in several cases, *Mt. Muleeka v. Jumela* ("73) I.A.73 PC 135 and *Ranee Khajoor-oo-nissa v. Ranee Rayees-oon-nissa* ("75) I.A. 2PC 235 held that the amount does not become due and payable till demand is made. Ordinarily a debt payable on demand means a debt payable forthwith and limitation to pay the same would begin to run from the date of the debt. Prompt dower, though it is payable on demand by the wife, is not payable, as has been pointed out by their Lordship, for reasons which would be found in the decisions referred to by me above, till demand is made and no limitation, therefore, runs before the demand. This decision of their Lordships is now incorporated in Article 103, Limitation Act. Though prompt dower is not payable till demand is made, it is transferable by the wife, and if the husband so desires he may pay the same or transfer his property for payment of the same and the transfer would be deemed to be for consideration. No interest runs on a dower debt until a demand has been made : see *Hamira Bibi v. Zubaida Bibi* ("16) 3 AIR 1916 P.C. 46. Dower is not fixed in view of the capacity of the husband to pay. On the other hand, there is a tendency both in the family of the husband as well as of the wife to inflate the dower, as the higher the dower the greater is supposed to be the respectability of the parties; and, so far as I know, from such little experience as I have, the parties feel glorified in the huge amount of the dower that is fixed at the wedding. If dower were a debt, as we understand it, almost every Mahomedan husband would have to begin life as an insolvent as the amount of the dower is generally beyond his capacity to pay, but I have not seen any Mahomedan husband feeling worried, because at his wedding the dower has been fixed at a figure much beyond his capacity and is higher than what he can reasonably be expected to pay. In the vast majority of cases where the relationship between the husband and wife is cordial, the wife never claims the dower and it is never taken into account between them that it is a liability that the husband is subject to. Prompt dower is generally claimed when parties fall out and then the husband makes all sorts of attempts to evade liability.

14. To my mind, the word "dower" can only be loosely called "a debt" within the meaning of that term under the Encumbered Estates Act. A dower debt is a liability of a special kind which, though it does not crystallize before demand, is transferable and may crystallize and become a "debt" on the happening of certain contingencies as provided for under the Mahomedan Law or it may become a debt at the option of the wife or of the husband. It is not a commercial debt till either party recognizes it as such. Many wives, as I have already said, never do in fact make a claim and the large percentage even give it up. Several cases have been cited before us to show that their Lordships have used the word

"debt" for the word "dower." But, as has been said so often, a ruling is only an authority for the proposition that it lays down for the particular facts of the case. The point has never arisen with reference to the Encumbered Estates Act and we have to consider the nature of a dower debt with reference to this Act. It has been held by their Lordships of the Privy Council, and has been pointed out by my brother Allsop, that the liability for the payment of a prompt dower comes into existence when the wife demands her dower and if no demand is made, then there is no cause of action for the same. It may be that if a case arose where a suit had been filed without a demand, the Courts may consider that the demand and the filing of the suit were both simultaneous and the suit was maintainable, but it is not open to this Court, after their Lordships' decision, to hold that a cause of action for a dower debt arises before a demand is made. If no demand is made, then prompt and deferred dowers are both payable on dissolution of the marriage by divorce or death. Now divorce is a contingency which may never arise. Death is more certain, but it is indefinite in date. All the cases, so far as I have been able to consider them and which lay down that dower is a debt, deal with the position when, either by reason of a demand or divorce or death, the claim has crystallized into a claim which is due and payable, and at that juncture undoubtedly dower is a debt. Having carefully considered the matter with reference to the question that has arisen before us I am of the opinion that we must hold that a dower is merely an inchoate liability and not a pecuniary liability so long as it is not payable by reason of demand or divorce or death. The plaintiff was, therefore, not bound to claim her prompt dower in the proceedings under the Encumbered Estates Act. It could not, therefore, be said that, by reason of a failure to claim the same, her right to the prompt dower was extinguished.

15. In view of what I have said above, I think it is necessary for me to make it clear that, in my opinion if the husband has included the prompt dower due to his wife in the list of his debts, the Special Judge cannot dismiss the claim on the ground that the wife had not made a demand before the filing of the application u/s 4, Encumbered Estates Act. Similarly, if the wife has put in a claim for her prompt dower, u/s 9, Encumbered Estates Act, without having made a demand previous to such claim or previous to the application filed by her husband u/s 4, the claim is not liable to dismissal, on that ground. If, however, the wife had made a demand or claimed her prompt dower before the husband had filed his application u/s 4, Encumbered Estates Act, she is bound to put in her claim u/s 9 of the Act and, if she does not do so, the claim would be deemed to have been satisfied for all purposes u/s 13 of the Act. Deferred dower, however, cannot be claimed u/s 9, Encumbered Estates Act, unless the contingencies which entitle the wife to claim the same under the Mahomedan law have happened before the relevant date. It is well settled that a wife can transfer her claim to dower and that her creditors can attach the same and sell up her rights to the same. I do not think that what I have said in any way conflicts with those decisions. I am, therefore, of the opinion that the plaintiff's claim was not barred. I would, therefore, allow Appeal No. 175 of 1941, set aside the decree of the Court below

and give the plaintiff a decree for Rs. 10,000 with pendente lite and future interest at 3 1/4 per cent. together with costs in both Courts. I would dismiss First Appeal No. 84 of 1941 for the reasons given by Hon''ble Allsop J. I would give the plaintiff costs in both the appeals.

Mathur, J.

16. This appeal and the connected appeal No. 84 of 1941 arise out of the same suit. Mt. Khatoon Begam brought a suit in forma pauperis for recovery of Rs. 10,000 as her prompt dower against her husband Saghir Husain Khan, on the allegations that she was married to the defendant on 22nd June 1921 and that a sum of Rs. 10,000 was fixed as her prompt dower, that in 1935 the defendant took another wife and turned her out but in spite of her demands never paid her dower to her. A number of pleas were raised in defence. It was pleaded that the dower agreed to be paid was not RS. 10,000 but Rs. 32-8-0 only, that the defendant had divorced the plaintiff before his second marriage in 1935 and therefore the suit was barred by three years'' limitation and lastly that the plaintiff was not entitled to sue because she did not lay a claim for her dower before the Special Judge when the defendant filed an application under the Encumbered Estates Act. The findings of the learned Civil Judge of Meerut were that the dower debt agreed upon was Rs. 10,000 and that the claim was not barred by time as it was within three years from the first demand. He however held that as the plaintiff failed to put forth her claim in the Encumbered Estates Act proceedings her dower debt would be deemed to have been discharged and she was not entitled to bring a suit. On this ground he dismissed the suit. The points raised in this appeal are firstly, because the plaintiff's dower had not become due before the demand was made it cannot be deemed to be discharged u/s 13, Encumbered Estates Act. Secondly, because the plaintiff appellant was not bound to prove her debt in the proceedings under the Encumbered Estates Act. Thirdly, because the plaintiff was no party to the proceedings under the Encumbered Estates Act and she having been fraudulently kept in ignorance of the said proceedings by the defendant-respondent the defendant-respondent could not take advantage of his own fraud and cannot be allowed to plead Section 13, Encumbered Estates Act, in his defence in the plaintiff's suit.

17. While dismissing the plaintiff's claim, the learned Civil Judge ordered the defendant to pay the court-fee on the grounds that the suit fails on a technical ground and the plaintiff is unable to pay the court-fee. It is against this order that the defendant has come in appeal and filed a First Appeal No. 84 of 1941. These appeals were first heard by a Bench consisting of myself and Allsop J., but as in our opinion a point of some difficulty and importance was involved they were referred to a Full Bench. After hearing the counsel for the parties, I am of opinion that the plaintiff's appeal No. 175 of 1941 should be dismissed, while the defendant's appeal No. 84 of 1941 should be allowed. The first ground of appeal is that the plaintiff's dower had not become due before the demand was made and, therefore, it could not be made the basis of a claim before the Special

Judge. It is not denied, and could not be denied, that dower is a debt within the definition given to that word in the Encumbered Estates Act as it is certainly a pecuniary liability. u/s 9, Encumbered Estates Act, it is laid down that the Special Judge shall publish in the Gazette a notice in English, Urdu and Hindi calling upon all persons, having claims in respect of private debts both decreed and undecreed against the person or the property of the landlord by or on whose behalf the application has been made u/s 4, to present to the Special Judge within three months from the date of publication of the notice a written statement of their claims. Section 13 then lays down that

every claim decreed or undecreed against the landlord in respect of a private debt other than a debt due to a co-operative society registered under the Co-operative Societies Act 2 of 1912 by its members, shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged.

From a reading of these sections, it will appear that, the plaintiff had a claim in respect of her dower which was a private debt and was undecreed. She was bound u/s 9, Encumbered Estates Act, when so called upon to lay her claim within time and in the manner required by the Act and if she failed her debt will be deemed for all purposes and on all occasions to have been discharged. But it is argued on the strength of Section 14, Clause (2) that since the Special Judge is only required to examine those claims which are due from the landlord on the date of the application u/s 4, the plaintiff was not bound to lay any claim as her debt was not due on that date, on account of the fact that she had not made a demand, and therefore the penalty provided by Section 13 would not be attracted. This leaves it to be determined as to what is meant by the words "the amount due from the landlord on the date of the application u/s 4" and whether the prompt dower debt, if no demand is made for payment of the same before the date of the application would be an amount not due on the date of the application. It has been argued with great force on the strength of the case in *Nawab Bahadur Jung Khan v. Mt. Uzeez Begam* (1843) N.W.P. 180 (F.B.) approved by the Privy Council in *Mt. Mulleeka v. Jumela* ("73) I.A. Sup. PC 135, that in respect of the prompt dower payable under the Mahomedan law limitation does not begin to run before the dower is demanded or the marriage is dissolved by death or otherwise. In *Mohammad Taqi Ahmad Khan Vs. Farmoodi Begam*, , Dar J. who delivered the judgment made the following observations:

The question therefore which arises for our consideration is whether dower debt is one of those obligations in which a creditor has to seek his debtor and the demand is an essential part of the contract or it is one of those debts in which the debt is always payable and demand is not a vital part of the contract and cause of action. When the prompt dower of a Mahomedan wife is an ascertained sum under a contract or under a custom it may be possible to hold under the terms of the contract as a matter of construction that the demand for payment of dower was a part of the contract and an integral part of the cause of action.

There can be no manner of doubt that a suit to recover a prompt dower cannot be brought unless a previous demand is made for the same, as the demand is considered to be an integral part of the cause of action. But all these considerations do not arise with respect to a claim under the Encumbered Estates Act. The Act is designed to relieve the encumbered estates and its very object would be frustrated if all the debts, for which a suit could not be brought on account of the fact that the sum had not actually fallen due or some formality had to be observed, were left out of account. As a matter of fact, the creditors are called upon to make their claims u/s 9 without any restriction and with the penalty provided, that if they do not respond to the notice their claim would be deemed to be discharged on all occasions and for all purposes. Thus, in my opinion, the mere fact that a creditor could not enforce his claim on the date of the application would not relieve him from the necessity of putting forward his claim.

18. It is quite another matter if the debt is not in existence on the date of the application, u/s 4, as in that case it would not be an encumbrance on the estate or against the landlord and no relief could be given with regard to that under the Act. If the debt was due, even if it was not payable on that date, a claim has to be made on its basis. It is not denied and cannot be denied that the Encumbered Estates Act applies even to usufructuary mortgages where ordinarily the mortgagee can never sue for the mortgage money until he is in possession of the property and also to bonds where a period has been fixed for payment but that period has not expired. The only question for consideration is as to what is the position of a prompt dower debt before a demand is made for its payment. I will in this connexion refer to the observations of Sir James Montague E. Smith made by his Lordship in delivering the judgment of the Judicial Committee in *Ranee Khajoor-oon-nissa v. Ranee Rayees-oon-nissa* (1875) 2 I.A. JC 235:

Prompt or exigible dower may be considered a debt always due and demandable, and certainly payable on demand, and therefore upon a clear and unambiguous demand a cause of action would accrue and the statute would begin to run.

19. It would be clear from this remark that the prompt dower is a debt which is always due from the date it is incurred but that it is only payable on demand. A distinction has been drawn between a debt due and a debt immediately payable. In this view of the matter, the prompt dower was certainly due on the date of the application u/s 4 although it was not immediately payable, and could be investigated u/s 14 of that Act. It was held in *Ramjatan Pandey Vs. Someshwari Prasad Dube and Others*, that the Act did not apply to the debts advanced to a landlord applicant after the date of the application. Similarly, in the unreported case, in *Bakhtawar Lal v. Parmeshwari Dayal* First Appeal No. 61 of 1939, decided on 17th March 1942 it was held in the case of a security bond executed by the landlord Parmeshwari Dayal on 7th August 1935, before the date of an application made u/s 4, Encumbered Estates Act, on 22nd November 1935, that it could not be investigated u/s 14 of the said Act because the liability under the

security bond arose for the first time in the middle of July 1936. It was held that no amount whatever was due under the security bond on 22nd November 1933, when the application u/s 4, Encumbered Estates Act, was made and consequently the Special Judge was right in refusing to determine the amount due under the same bond. There is yet another case from Oudh reported in AIR 1944 299 (Oudh) In that case the applicant landlords had in their written statement u/s 8, Encumbered Estates Act, shown property in which they claimed proprietary rights and in this they included the property in dispute which was in the possession of a certain person as a mortgagee. Upon receiving a notice u/s 9, he filed a written statement claiming that the mortgage had been extinguished and the landlords applicants had no right to redeem the property. It was found that under an agreement between the parties the usufructuary mortgage was only to be redeemed on breach of a condition and as that condition was not broken there was no debt under the mortgage within the meaning of the Act on which a claim could be made under the Act. It appears to me that these cases are clearly distinguishable and can be no authority for the proposition that the debt in order to form the subject-matter of a claim and in order that it may be investigated by the Special Judge should be actually payable on the date of the application. A distinction has further to be made between a debt which is due but is not immediately payable and a debt which arises on the happening of a contingency, because in the latter case the contingency may never occur and the debt may never be actually due. The point has been prominently brought out in *Banoharam Majumdari v. Adyanath Bhattacharja* ('09) 36 Cal. 936 and is succinctly put in the following observations:

A sum of money which is certainly and in all events payable is a debt without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened.

20. I am thus satisfied that the amount due as prompt dower was a debt on the date of the application and there was no difficulty for the Special Judge in determining the amount due from the landlord on the date of the application u/s 4. therefore agree with the view of the Special Judge that the omission of the plaintiff to make a claim u/s 9, Encumbered Estates Act, attracted the provisions of Section 13 of the same Act by which her debt was discharged and she was not competent to bring a suit to recover that debt. Point No. 2 is covered by the above discussion and point No. 3 has got no force, as no fraud was pleaded or proved. I would therefore dismiss First Appeal No. 175 of 1941 with costs. I would allow First Appeal No. 84 of 1941 because having regard, to the provisions of Order 33, Civil P.C., the defendant was not liable to pay the court-fee when the plaintiff's suit was dismissed on a technical ground. The costs generally abide the result of the suit and there is no reason for making an exception in this case when the suit was dismissed. I would therefore allow the appeal of Saghir Husain Khan and set aside the order by which he was made liable for the payment of the court-fee. I would make no order as to costs of this appeal.

21. In accordance with the view of the majority, First Appeal No. 175 of 1941 is allowed, the decree of the Court below is set aside and the plaintiff's suit for recovery of RS. 10,000 with pendente lite and future interest at 3 1/4 per cent, is decreed together with costs in both the Courts. As the plaintiff instituted the suit in forma pauperis, the plaintiff should pay the court-fees to the Government. First Appeal No. 84 of 1941 is dismissed with costs.