

(1926) 03 PAT CK 0022

In the Patna High Court

Muhammad Habibur Rahman and Another

APPELLANT

Vs

Qasim Hussain and Others

RESPONDENT

Date of Decision : 19-03-1926

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 1926 Patna 404

Hon'ble Judges : Ross, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—This is an appeal against an order of the Subordinate Judge of Patna, dated the 23rd June 1925, rejecting the claim of the appellants under Order 21, Rule 58, Civil P.C., and allowing an amendment of the application for execution of the decree. In order to understand the nature of the objection and the points raised in appeal it is necessary to set out the facts briefly; they are given in my judgment dated the 22nd January 1925, but in order to make this judgment self-contained, I state the facts again.

2. One Khajeh Azhar Hussain died on the 10th of June 1916 leaving a widow, Mt. Izatunnisa Begum and a sister Mt. Ahmadi Begum. According to the Mahomedan Law governing the parties, the sister, Mt. Ahmadi Begum, was the sole heir of Khajeh Azhar Husain. Before his death, Khajeh Azhar Husain executed two waqfnamas dated the 11th of June 1915 and 9th of December 1915, and a hiba-bil-ewaz dated the 27th of November 1915, By these three deeds the whole of the immovable properties owned by Khajeh Azhar Husain were alienated. On the 14th of June 1916 the widow Mt. Izatunnissa instituted a suit for recovery of her dower debt amounting to Rs. 40,015. In that suit the parties impleaded as defendants were Mt. Ahmadi Begum. Mirza Mehdi Ali Khan, son of Ahmadi Begum, Mt. Asghari Khanam alias Nanhu who was described as the concubine of Khajeh Azhar Husain, and Mt. Ahmadi alias Bibi Begum, the daughter of Mt. Asghari Khanam alias Nanhu: they were the Defendants 1 to 4 respectively. Defendants 5 to 10 were the other creditors of Azhar Husain. It was alleged in

the plaintiff that the two, waqfnamas and the hiba-bil-ewaz executed by Azhar Husain before his death were illegal, void and inoperative in law as against the plaintiff, and the Defendants Nos. 5 to 10; that they could not be bound by such fraudulent deeds advisedly executed; that the said deeds had been brought into existence simply with a view to evade payment of the dower debt of the plaintiff and the debts due to the other creditors; and that the plaintiff was fully competent to get the said three fraudulent deeds declared void and inoperative by Court and to cause the dower debt due to her to be recovered by the sale of the immovable properties left by her husband and entered therein that the said deeds had never been acted upon and enforced and that the Defendant No. 4 had never been and was not in possession and occupation on the basis of the said deeds and that the said deeds were altogether inoperative and fit to be cancelled. The prayers in the plaint run thus:

(1) The Court may be pleased to pass a decree for the recovery of Rs. 40,000 and one gold mohur worth Rs. 15 in all of the dower debt of Rs. 40,015 in favour of the plaintiff against the principal defendants-

(2) The properties detailed in Schedules Nos. 1 and 2 to the plaint which are in possession of the principal defendants may be declared to be the heritage of the late Khajeh Azhar Husain and the plaintiff be empowered to recover her decree therefrom.

(3) The costs in Court with interest thereon may be awarded to the plaintiff against the liable defendants.

(4) An order for attachment before judgment may be made till the disposal of this suit under Order 38, Rule 5, Civil P.C., against the properties detailed below.

(5) Such other reliefs as the plaintiff be deemed entitled to in the opinion of the Court may be decreed.

3. This suit was decreed by the learned Subordinate Judge on the 31st of January 1911, On the 18th of April 1918, a mortgage was executed by Ahmadi Begum and by the widow Izatunnisa in favour of the appellant Habibur Rahmam in respect of two properties out of the estate left by Khajeh Azhar Husain and of the decree dated 31st of January 1918. On the 1st of May 1918, another mortgage was executed by the said two ladies in favour of one Wajibunessa mortgaging the two properties and the decree which had already been mortgaged on the 13th of April 1918 and some other properties. On the 23rd of July 1922, Mt. Ahmadi Begum and Izatunnisa Begum again mortgaged the said two properties and the decree and some other properties to one Kuar Singh. On the 8th of July 1923, Mt. Ahmadi Begum sold two properties to Habibur Rahman and Mt. Khatoon Jannat for a sum of Rs. 38,000 out of which Rs. 17,281 was applied towards payment of three mortgages mentioned above.

4. Izatunnisa died on the 7th of September 1923. Before her death she had attempted to execute her dower decree, and on the 25th of July 1918 she took

out execution of the decree in Execution Case No. 148 of 1918 and a sum of Rs. 1,000 was realized by sale of certain moveable properties. The second application for execution was made by Izatunnisa on the 31st of January 1921 in Execution case No. 47 of 1921. A house belonging to her husband's estate was attached; but the execution case was dismissed for default on the 17th of March 1921. The third execution was taken out after the death of Izatunnisa by her heirs who are the Respondents No. 1 to 3 in the present case. The execution case was however struck off for default on the 18th December 1923 as the heirs failed to produce a succession certificate. On the 20th of January 1924 the heirs of Izatunnisa made an assignment of a portion of the decree to three persons Dargo Singh, Bansi Pande, and Bhawani Mohan, and the present execution petition was filed on the 26th of January 1924 by the heirs of Izatunnisa and the assignees from the said heirs. In the application for execution, several properties were sought to be attached and sold, and the properties now in dispute which were purchased by Habibur Rahman and Khatoon Janat on the 8th of July 1923 were Lots Nos. 1 and 2 in the execution petition. On the 26th of February 1924 the decree-holders, viz., the heirs and assignees filed a petition saying that Habibur Rahman and Khatoon Jannat were iazidars for Ahmadi Begum and that Ahmadi Begum was really in possession of the properties, and that the said properties were liable to attachment and sale. The properties purchased by Habibur Babman and Khatoon Jannat were attached on the 16th of May 1924, and on the 28th of May 1924, Habibur Rahman and Khatoon Jannat preferred a claim as regards the two properties purchased by them under the provisions of Order 21, Rule 58, Civil P.C.

5. The learned Subordinate Judge rejected the claim by his order dated the 18th of September 1924. He was of opinion that the decree in the dower suit created a charge upon the properties purchased by the claimants and that the claim case was not maintainable. Against the order of the Subordinate Judge the claimants came up to this Court in revision, and on the 22nd of January 1925 it was held by this Court that the decree-holders having taken out execution of the decree as a money decree, and having asked for attachment of the properties as in execution of a money decree, and there being nothing in the execution petition to show that the decree-holders claimed a charge upon the properties, the learned Subordinate Judge was wrong in going into that question and in rejecting the claim of the claimants without an investigation of their claim as required by law. The case was, therefore, remanded to him for an investigation of the claim. When the matter went before the learned Subordinate Judge, the decree-holders admitted that the claimants were really in possession in their own rights and not as benamidars for the judgment-debtor Ahmadi Begum; but they said that the decree created a charge and that the claim case was not maintainable. They asked for amendment of their application for execution by stating that the decree was a decree creating a charge and they prayed for the addition of the names of the claimants Habibur Bahman and Khatoon Jannat as representatives; of the judgment-debtor, and they applied that the prayer for attachment of the

properties may be deleted. This amendment was opposed by the claimants, but the learned Subordinate Judge having relied upon his previous decision that the decree created a charge allowed the amendment, the effect whereof was that Habibur Rahman and Khatoon Jannat were added in the application for execution as representatives of the judgment debtor and the decree was sought to be executed as a decree creating a charge upon the properties sought to be sold. Against this order of the learned Subordinate Judge the claimants have come up in appeal to this Court.

6. The principal point argued on behalf of the appellants was that the decree in the dower suit did not create a charge upon the properties as held by the learned Subordinate Judge. In my opinion this contention is sound and ought to prevail. It is conceded on behalf of the decree-holders that a dower debt does not under the Muhammadan Law create a charge upon the properties of the husband. Having regard to the authorities, this position could not be challenged. I need only refer to the decision of the Privy Council in *Mt. Hamira Bibi v. Mt. Zubaida Bibi* AIR 1916 PC 46 where their Lordships observed that dower ranks as a debt and that the wife is entitled, along with other creditors, to have it satisfied on the death of her husband out of his estate; her right is, however, no greater than that of any other unsecured creditor. *Ameer Ammal v. Sankarayanan* (1902) 25 Mad 658 is to the same effect. The learned Subordinate Judge also conceded that the dower debt did not by itself create a charge upon the properties of the husband: he was, however of opinion that the decree in the dower suit had the effect of creating a charge. In order to see whether a charge was created by the decree, it is necessary to examine the nature of the suit in which that decree was passed. As I have said, the principal claim in the suit of *Izatunnissa* was a claim for recovery of her dower amounting to Rs. 40,015; but having regard to the alienations said to have been made by her husband, "she made a prayer in the plaint to the effect that it might be decided by the Court that the properties set out in the schedule attached to the plaint were really in possession of the principal defendants and that those properties formed the heritage of the late *Khajeh Azhar Husain*, and that the plaintiff was entitled to recover her debt from those properties. The suit was really a suit as contemplated by Section 53 of the Transfer of Property Act. The allegations in the plaint were that the transfers alleged to have been made under the two waqfnamas and the *Hiba-bil-ewaz* were really transfers with intent to defeat or delay the creditors of the transferor, and that such transfers were void and could not affect the creditors who were entitled to realize their debts by sale of those properties. The other creditors of *Azhar Husain* were also made parties and in paragraphs 21 and 22 of the plaint a clear allegation was made which would bring the case within the purview of Section 53 of the Transfer of Property Act. The real object of the suit was to have a declaration from Court that the properties covered by the waqfnama and the *Hiba-bil-ewaz* were still the properties forming the estate of the plaintiff's husband and that they were available to her for realization of her dower debt. The decree made in that suit had the effect of declaring that the transfers

evidenced by the waqfnamas and the Hiba-bil-ewaz were fraudulent transfers made with intent to defeat the claims of creditors. No charge was created by the decree in favour of the plaintiff upon the properties set out in the schedules to the plaint in that suit. The learned Subordinate Judge has referred to Issue No. 3 raised in the dower suit which ran thus:

Whether the dower debt, if any can be realized from the properties mentioned in the plaint.

7. This issue was answered in the affirmative, and the learned Subordinate Judge says that this had the effect of creating a charge. In my opinion the learned Subordinate Judge has taken an erroneous view of the decision of the Issue No. 3 in the dower suit. Having regard to the pleadings of the parties, it is clear that all that was intended was to hold that the properties covered by the waqfnamas and the Hiba-bil-ewaz were still available to the plaintiff and the other creditors as forming part of the estate of Azhar Husain. I am, therefore, of opinion that no charge was created by the decree under execution.

8. Reliance has been placed on behalf of the decree holders upon the decision of the Privy Council in *Mahomed Wajid v. Tayyuban* (1879) 4 Cal 402. This appeal was heard by the Judicial Committee along with another appeal: *Bazayet Hossein v. Dooli Chund* (1879) 4 Cal 402. In dealing with the case of *Bazayet Hossein v. Dooli Chund* (1879) 4 Cal 402 their Lordships held that a creditor of a deceased Mahammadan cannot follow his estate into the hands of a bona fide purchaser for value to whom it had been alienated by his heir-at-law. In dealing with the case of *Mahomed Wajid v. Tayyuban* (1879) 4 Cal 402 their Lordships observed that this case was similar to the case of *Bazayet Hossein v. Dooli Chund* (1879) 4 Cal 402 with one exception, viz., that the appellant Mohammed Wajid claimed under a sale in execution of a decree upon a mortgage bond executed by Najmuddin to Abdul Aziz on the 30th of October 1867 and the great distinction between this case and the case of *Bazayet Hossein* was that in this case the mortgage bond was executed pending the suit brought by the widows, whereas in the other case the mortgage bond was executed before the institution of the widow's suit; and their Lordships agreed with the decision of the High Court which held that the purchaser from Najmudin was bound by the decree as he was affected by the doctrine of *lis pendens*.

9. It has been contended that in the present case Habibur Rahman made his purchase with knowledge of the decree in the dower suit and that, therefore, he must be held bound by the decree and that the properties purchased by him were available to the decree-holder as he was affected by the doctrine of *lis pendens*. In my opinion this contention is not sound. The principle applied by their Lordships in the case of *Mohammed v. Wajid* (1879) 4 Cal 402 was an equitable principle. Here in the present case we find that Mt. Izatunnisa, the predecessor in interest of the present decree-holder, executed three mortgages in respect of the properties purchased by the claimants. The decree under execution was also mortgaged and by the purchase of the 8th of July 1923 the

claimants satisfied the previous mortgages executed by Mt. Izatunnisa along with Ahmadi Begum and the effect of it was to release the decree under execution and free it from the mortgages created by Izatunnisa and Ahmadi Begum. Izatunnisa herself never treated the decree as a decree creating a charge. She took out executions in her own lifetime treating the decree as a money decree. Her heirs also took out execution of the decree treating it as a money decree. The purchasers Habibur Rahman and Mt. Khatoon Jannat are certainly bona fide purchasers for value and it will be opposed to all principles of equity to hold that the properties purchased by the present claimants are liable to be sold in execution of the dower decree. I am, therefore, clearly of opinion that the learned Subordinate Judge was wrong in holding that the decree created a charge and that it could be executed as such.

10. Having regard to this finding, it becomes unnecessary to consider whether the learned Subordinate Judge had jurisdiction to allow amendment of the application for execution at the stage at which he ordered the amendment. Various rulings have been cited on both sides some of which are conflicting; but, as I have said, having regard to the fact that the decree under execution did not create a charge, it is not necessary to consider the question.

11. It is stated by the learned Subordinate Judge in his order under appeal that if the decree be held not to create a charge then the claim of the claimants must be allowed. I would, therefore, set aside the order of the Subordinate Judge and allow the claim of the plaintiffs and direct that the properties purchased by them be released from attachment and sale. The appellants are entitled to their costs in this Court as well as in the Court below.

Ross, J.

12. I agree.