

(1943) 04 AHC CK 0004
In the Allahabad High Court

Qazi Ghulam Amir

APPELLANT

Vs

Mt. Masuda Khatun and Others

RESPONDENT

Date of Decision : 12-04-1943

Acts Referred:

Citation : AIR 1943 All 321 : (1943) 13 AWR 167

Hon'ble Judges : Verma, J

Bench : Division Bench

Judgement

Verma, J.—This appeal arises out of proceedings under the United Provinces Encumbered Estates Act (25 of 1934), in which the appellant, Qazi Ghulam Amir, was the landlord-applicant u/s 4 of the Act. In order that the questions that arise for decision may become clear, it is necessary to mention certain names and facts. The appellant's wife is Mt. Razia Khatun, who is respondent 8 in this appeal. They had a son, Ghulam Nazir, who was a Munsif. Ghulam Nazir first married Mt. Masuda Khatun, respondent 1, and had by her three daughters, Zhakia Khatun, Rafaat Khatun and Shaukat Khatun, who are respondents 2 to 4 in this appeal. He subsequently married Mt. Rashida Khatun, who is respondent 5, and had by her two sons, Hasan Amir and Ali Amir, who are respondents 6 and 7. On 30th November 1932, respondent 1, Mt. Masuda, instituted in the Court of the Subordinate Judge of Budaun Suit No. 40 of 1932 against her husband, Ghulam Nazir, for the recovery of a sum of Rs. 25,500 on account of her dower debt on the allegations that her dower had been fixed at 51,000 rupees without any specification as to the portion that was to be prompt and the portion that was to be deferred and that there was a custom in the family that in the absence of such specification, half of the amount fixed as dower was to be treated as prompt. She also claimed pendente lite and future interest This suit ended in a compromise which was reduced to writing on 9th January 1933, and the written compromise--of which we have only a certified copy before us--was presumably filed in Court on the same date, i.e., 9th January 1933. Paragraph 1 of this document stated that Qazi Ghulam Amir, the father of Ghulam Nazir (who up to that time had been the sole defendant), was to be impleaded in the suit as

defendant 2 and that Ghulam Amir had agreed to be so impleaded. Paragraphs 2 and 3 dealt with a monthly allowance which, by agreement of the parties, was fixed for the maintenance of the plaintiff and her daughters and was payable by both the defendants to the plaintiff and, upon her death, to her daughters in the manner stated in the said paragraphs. In para. 4, a certain sum was fixed for the expenses of the marriage of each of the daughters of the plaintiff which had to be paid by the defendants on the occasion of such marriage. The remaining paragraphs are important and must be quoted in extenso:

5. A decree for Rs. 17,000 on account of dower debt be passed in favour of the plaintiff against the defendants. The plaintiff has remitted the remaining amount of prompt as well as deferred dower.

6. Qazi Ghulam Amir, defendant 2, has hypothecated his property, detailed below, to secure payment of the charge of Rs. 17,000 on account of the dower debt mentioned in para. 6. Accordingly, a decree for enforcement of hypothecation lien in respect of the dower debt aforesaid be passed under Order 34, Rule 4. The personal liability of the defendants shall continue even after the auction sale of the property.

7. The decree for dower debt aforesaid shall be executable only in the following cases: (a) In case of the death of the plaintiff or of defendant 1. (b) In case the defendants fail to pay two consecutive instalments of the maintenance allowance mentioned in para. 2. (c) Even when the decree for dower debt becomes executable, the liability of the defendants for the payment of the maintenance allowance shall continue and not cease.

8. The decree for the dower debt shall not be executable in any other cases except those mentioned above. The plaintiff shall, of course, be at liberty to take out execution of the decree in respect of the maintenance allowance which remains unpaid, after waiting therefore for a period of three months.

9. The defendants shall pay to the plaintiff the entire costs of the suit within a month. The defendants shall be liable for payment of the said costs.

10. This decree shall be registered within one month at the expense of the defendants.

The case be decided in accordance with this compromise and the terms thereof be embodied in the decree.

2. Details of the property hypothecated by Ghulam Amir followed. It may be pointed out that Clause (e) of para. 7 is really in the nature of a proviso or explanation and is not a condition for the executability of the decree. On 10th January 1933, a decree was prepared on the printed form which is used for preliminary decrees for sale in mortgage suits brought on the basis of simple mortgages. It is headed: "Preliminary decree for sale (Order 34, Rule 4 when the Court declares the amount payable)." The relevant portion of the operative part of the decree was in these words:

This suit coming on this 10th day of January 1933 before ... Subordinate Judge in the presence of... pleader for the plaintiff and ... pleader for the defendant, it is ordered that the claim of the plaintiff be decreed according to the conditions laid down in the compromise, a decree be prepared in terms of the compromise and the decree be registered.

3. This was followed by the five paragraphs which are printed in these forms for such decrees and which are translations of the paragraphs to be found in Form No. 5-A of Appendix D to Schedule 1, Civil P. C. It is necessary to reproduce para. 1 and Clause (i) of para. 2 just as they are to be found in the decree in question:

It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this ... day of... is the sum of Rs. ... for principal, the sum of Rs. ... for interest on the said principal, the sum of Rs. ... for costs, charges, and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. ... for the costs of the suit awarded to the plaintiff, making in all the sum of Rs. ...

2. And it is hereby ordered and decreed as follows: (1) that the defendant do pay into Court on or before the...day of...or any later date up to which time for payment may be extended by the Court, the said sum of Rs....

4. It is important to note that the blank spaces were not filled up in this decree and were allowed to remain just as they were in the printed form. Attention may here be conveniently drawn to the opening words of para. 3 of Form No. 5-A of Appendix D, Schedule 1 of the Code, (which is printed in these vernacular forms as Clause (iii) of para. 2). They are as follows:

And it is hereby further ordered and decreed that in default of payment as aforesaid, the plaintiff may apply to the Court for final decree for the sale of the mortgaged property....

5. It is not clear--and it is not material--whether the amount fixed for maintenance--was paid in accordance with the terms laid down in paras. 2 and 3 of the compromise. Ghulam Nazir died on 31st August 1936. On 19th October 1936, Ghulam Amir commenced the proceedings out of which this appeal has arisen by filing an application u/s 4, U. P Encumbered Estates Act, in the Court of the Collector. In this application he did not mention the name of any person as opposite party. In para. 5 of this application he made the following statement:

The petitioner has a private debt of Rs. 17,000, only, the specification whereof is given in list B attached herewith and, apart from the said debt, there is no other liability on the petitioner.

6. The prayer made in the application was that the Encumbered Estates Act be applied and the petitioner be given the benefit of the said Act and the amount of the debt decreed may be allowed to be paid in 23 years in six-monthly

instalments and a suitable sum be left over for the subsistence of the petitioner. In list A appended to this application certain items of zamindari property were shown. In list B it was stated that the name of the applicant's creditor was Mt. Masuda Khatun, widow of Qazi Ghulam Nazir, that the amount of the debt was Rs. 17,000 and that it was due under the Decree No. 40 of 1932 of the Subordinate Judge's Court, Budaun. The application was, in due course, forwarded to the Court of the Special Judge in accordance with Section 6 of the Act. On 14th December 1936, the appellant filed in the Court of the Special Judge the written statement prescribed by Section 8 of the Act. In this written statement he again showed Mt. Masuda Khatun as his sole creditor and repeated the statements that the amount of the debt due to her was Rs. 17,000 and that it was due under Decree No. 40 of 1932 of the Court of the Subordinate Judge of Budaun. In pursuance of Clause (d) of Sub-section (1) of Section 8 he mentioned the name of his creditor as Mt, Masuda Khatun, widow of Qazi Ghulam Nazir, and gave her address. Upon the publication of the notice enjoined by Section 9 of the Act, Mt. Masuda Khatun on 3rd April 1937, presented to the Special Judge a written statement of her claim. In this written statement she stated that her maintenance allowance was in arrears for certain number of months and prayed that the maintenance allowance, at the rate of Rs. 100 per month, "be charged to Qazi Ghulam Amir, petitioner" from the date of the decree in Suit No. 40 of 1932. She further stated that the applicant, Ghulam Amir, had not shown certain houses belonging to him and certain moveable properties and cash which he had received from his deceased son, Ghulam Nazir. She also objected to any instalments being fixed for the payment of her dues. She concluded by praying that

the amount of decree No. 40 of 1932 mentioned above which comes to Rs. 17,800 in the aggregate up to date may be caused to be recovered from the mortgaged property and person of the petitioner opposite party.

7. On 2nd August 1937, the appellant Ghulam Amir, filed a document described as "supplementary written statement." It is not quite clear under what provision of the Act this supplementary written statement was filed. It has been suggested that upon the filing by Mt. Masuda of the written Statement of her claim in compliance with the provisions of Sections 9 and 10 of the Act, her role became that of a plaintiff and Ghulam Amir became a defendant and that he was consequently entitled to file a written statement in accordance with the provisions of the CPC which are applicable to proceedings under the Act. We need not pursue the matter and shall assume that that is so. In this written statement Ghulam Amir entirely changed the case which he had hitherto put forward and contended that the decree passed in Mt. Masuda's favour in Suit No. 40 of 1932 was a preliminary decree for sale under Order 34, Rule 4, Civil P. C., and that Mt. Masuda ought to have made an application for the preparation of a final decree for the sale of the mortgaged property under Order 34, Rule 5 of the Code, by 10th July 1936, and as she did not do so the said decree is consequently not a charge on the hypothecated property; on the other hand, it

has totally become null and void.

8. Paragraph 2 of this written statement was as follows:

The petitioner, under a misunderstanding thought that Masuda Khatun must have got a decree prepared under Order 34, Rule 5, but when an application for the preparation of a decree under Order 34, Rule 5 was presented on 30th November 1936, the petitioner filed this objection. The suit, after being postponed, was filed. Now the petitioner prays that the name of Mt. Masuda Khatun may not be entered in the list of petitioner's creditors.

9. In para. 3 Ghulam Amir denied his liability for the payment of the maintenance allowance, past or future. In paras. 4 and 5 he denied that he had any house property which he had failed to show in his application u/s 4 and written statement u/s 8 and that he had ever come into possession of any property left by his deceased son, Ghulam Nazir. Paragraph 6 was as follows:

The dower debt of Mt. Razia Khatun, as entered in the application, is indeed a liability on me, but I did not expect that she will demand her dower debt from me. Whatever portion of the dower may be held as prompt dower, may, after deducting Rs. 10,000 therefrom be ordered to be paid by instalments.

10. It is not quite clear to what "application" reference is made in this paragraph. Ghulam Amir himself had not mentioned Mt. Razia or her dower debt either in his application u/s 4 or in his written statement u/s 8. There is nothing in the printed paper book which can throw any light on this matter. We find, however, that there is on the record of the Court below a written statement of Mt. Razia which appears to have been filed on 28th July 1937. It may be pointed out that under the rules of this Court, the appellant ought to have included this document in his application for translation and printing. Thus a claim by Ghulam Amir's wife, Mt. Razia Khatun, was brought before the Court and Ghulam Amir admitted that claim. This explains how Mt. Razia Khatun became a party to the proceedings. The daughters of Ghulam Nazir by Mt. Masuda and his second wife Mt. Rashida, and her sons were evidently impleaded at some stage or other of the proceedings. On 27th August 1937, Mt. Masuda Khatun presented another written statement which was described as being one u/s 10 of the Act. In this written statement she gave details of the amounts due to her and of the property which Ghulam Amir had hypothecated as a security for the payment of the amount decreed to her on account of dower debt, alleged that she was entitled to get Rs. 2000 for the marriages of two of her daughters and also mentioned details of various items of property, moveable and immovable, which according to her, was in the possession of Ghulam Amir.

11. The Special Judge framed the following issues: (1) What is the amount of dower debt of Mt. Razia Khatun which is to be paid by the applicant to her? (2) Is the charge created by the applicant in favour of Mt. Masuda Khatun legally valid and enforceable in law? (3) Is the Decree No. 40 of 1932 barred by time? (4) Was the applicant in any way liable to pay the dower debt of Mt. Masuda Khatun?

If not, what is its effect on decree No 40 of 1932? (5) Is the decree of Mt. Masuda Khatun No. 40 of 1932 fraudulent and collusive and not binding on Mt. Razia Khatun? (6) What shall be the order of priority? (7) Whether Razia Khatun can challenge the decree No. 40 of 1932 in these proceedings? (8) What is due under decree No. 40 of 1982 to Masuda Khatun? (9) What is due to Mt. Masuda Khatun for her maintenance?

12. The finding of the Special Judge on issue 1 was that the amount due to Mt. Razia on account of prompt dower was Rs. 7000 and that this debt, for purposes of priority, was of class six (vide Section 16 of the Act). On issue 5 he found that decree No. 40 of 1932 was not a collusive or fraudulent decree His finding on issue 7 was that he had no jurisdiction to permit Mt. Razia to challenge decree No. 40 of 1932. Under issue 6 the Judge found that the debts due to Mt. Masuda had priority over the debt due to Mt. Razia. The remaining issues were taken up together and the findings were as follows: (a) that the charge created by Ghulam Amir in favour of Mt. Masuda was legally valid and enforceable in law, (b) that decree No. 40 of 1932 was "not barred by time," (c) that Ghulam Amir was liable to pay the decretal amount, (d) that a sum of Rs. 17,000 on account of dower debt and a sum of Rs. 200 as arrears of maintenance allowance up to 19th October 1936, were due to Mt. Masuda from the applicant, and (e) that the entire property belonging to Ghulam Amir which was mentioned in decree No. 40 of 1932 was liable for the payment of the amount due to Mt. Masuda. The learned Judge further repelled a contention put forward on behalf of Ghulam Amir that he was liable to pay the debt due to Mt. Masuda only to the extent of half, the remaining half being payable by the heirs of Ghulam Nazir, and that the Court must apportion the debt accordingly. In conclusion, the following order was passed:

That a simple "money decree be prepared in the following way: The property noted in the written statement of the applicant, paper No. 7-A dated 14th December 1936 and the properties published in the U.P. Gazette, dated 1st January 1938 Part II page 25 shall be noted in the decree against which the learned Collector shall proceed in the liquidation scheme. The following creditors are entitled to get the following amounts: I. Creditor Mt. Razia Khatun is entitled to get up to 19th October 1936, Rs. 7000 as balance of her prompt dower. This debt is of class six. II. Creditor Mt. Masuda Khatun is entitled to get up to 19th October 1936 (a)Rs. 17,000 on foot of a decree No. 40 of 1932, Subordinate Judge, Budaun. Note here the properties noted in the decree. This debt is of class four; (b) Rupees 200 as maintenance up to 19th October 1936 on foot of a decree No. 40 of 1932, Subordinate Judge, Budaun. Note here the properties noted in the decree. This debt is of class four. Applicant to pay his own costs and pay costs of the creditor.

13. The only point which has been raised before us on behalf of the appellant is the one which was raised in the Court below for the first time by paras. 1 and 2 of the supplementary written statement filed by the appellant on 2nd August

1937, and to which the first three grounds of the memorandum of appeal are directed. It has been strenuously urged that the decree which was passed on 10th January 1933, in favour of Mt. Masuda in suit No. 40 of 1932 was a preliminary decree for sale of mortgaged property, properly passed in accordance with the provisions contained in Rule 4 of Order 34, Civil P. C. It is pointed out that the parties to that suit had themselves agreed, by the terms of the compromise embodied in the document dated 9th January 1933, that a decree for enforcement of hypothecation lien be passed under Order 34, Rule 4 and it is argued that the Court gave effect to that agreement of the parties and did pass a decree under Order 34, Rule 4. It is next contended that Mt. Masuda was, therefore, bound to apply, within the time prescribed by Article 181, Limitation Act, for the preparation of a final decree for sale. It is urged that the right to apply accrued either on the date of the decree, viz. 10th January 1933, or on a date six months thereafter, i. e., on 10th July 1938, and that consequently the latest date by which Mt. Masuda could have applied for a final decree was 10th July 1936. The argument is that, as she admittedly did not do so, the "preliminary" decree passed in her favour on 10th January 1933, became extinct and cannot now be relied upon by Mt. Masuda for any purpose and that therefore the Court below was wrong in holding that any debt remained due to Mt. Masuda under that decree.

14. Learned Counsel for Mt. Masuda has contested the arguments mentioned above, and his arguments may be summarised as follows: (a) the decree in question was in reality not a decree in accordance with the provisions laid down in Order 34, Rule 4 of the Code, and the mere facts that the parties stated in the document embodying the compromise that a decree for enforcement of hypothecation lien be passed under Order 34, Rule 4, that the Court ordered that the claim of the plaintiff be decreed according to the conditions laid down in the compromise and a decree be prepared in terms thereof and that the office of the Court wrote out the decree on a form used for decrees under Order 34, Rule 4, cannot make it a preliminary decree in a suit for sale in accordance with Rule 4 of Order 34, if in law no such decree could be passed; (b) the parties also did not contemplate that it should be necessary for the decree-holder to apply for a final decree, but intended that very decree to be a final decree, for they spoke of that very decree being executable on the happening of certain events; (c) the charge on Ghulam Amir's property for the satisfaction of the dower debt was created by the decree itself and not by the compromise, as is argued by the appellant; (d) even if it was necessary for Mt. Masuda to apply for a final decree, the right to apply did not, and could not, accrue to Mt. Masuda for, in view of the fact that the decree fixed no amount which had to be paid by the judgment-debtors and no date by which such payment had to be made, it could not be said that there had been a default in payment which is a condition precedent for the accrual of the right to apply for a final decree (vide Rules 4 and 5 of Order 34 and para. 3 of Form No. 5-A, Appendix D, Schedule 1 of the Code which was embodied in the decree in question); (e) in any event, if the decree in question is held to be a

preliminary decree under Order 34, Rule 4 the only reasonable interpretation of para. 7 of the compromise is that Mt. Masuda was to have the right to apply for a final decree only on the fulfilment of the conditions laid down in that paragraph, and therefore it must be held that the right to apply for a final decree accrued to Mt. Masuda for the first time on 31st August 1936, when Ghulam Nazir died; and (f) even if a final decree was necessary, and Mt. Masuda failed to apply for it within the time prescribed the only result of that was that the remedy-- namely, the obtaining of a final, in other words, an executable decree--became barred, but the debt did not become extinct and therefore in these proceedings under the Encumbered Estates Act the Special Judge was not barred from taking into consideration the debt that was due to Mt. Masuda and incorporating it in the money decree passed by him under the provisions of the Act.

15. It has been urged on behalf of the respondent that Order 34 of the Code can only apply to suits which, from the very beginning, are based on mortgages and reference has been made to the heading of Order 34 "Suits relating to mortgages of immovable property." Reliance has also been placed on the opening words of Rule 4 of Order 34 "In a suit for sale." It has been contended that the suit, which was a simple money suit, could not be converted by the compromise into a suit for sale based on a mortgage. It has further been urged that legally what happened was that a charge was created by the decree and that, if and when Mt. Masuda wished to enforce that charge, she had to bring a suit for that purpose, and reliance has been placed on the ruling in *Posti Mal Vs. Firm Radha Kishan-Lal Chand*, . In support of the contention that the charge, or mortgage, was legally created by the decree and not by the document in which the terms of the compromise were laid down, reliance has been placed on the fact that it was the decree which was agreed to be registered and which, as a matter of fact, was registered and not the document of compromise dated 9th January 1933. Learned Counsel for the appellant, on the other hand, has argued that the parties to a money suit can by compromise convert it into a mortgage suit, that in the case before us the mortgage came into existence when the compromise was entered into on 9th January 1933, that the suit was also by that compromise converted into a suit for sale based on that mortgage and that the decree which was passed on 10th January 1933, was therefore a decree for sale under Order 34, Rule 4 of the Code, and reference has been made to the judgment of the Pull Bench in *(Sahu) Shyam Lal Vs. M. Shayamlal*, and to *Peda Linga Reddi v. Hanumayya* ("18) 5 AIR 1918 Mad. 1307. In reply to this the contention of the respondent has been that the effect of these rulings is merely this that a decree passed in a money suit and embodying the terms of a compromise by which a charge or hypothecation has been created is not an invalid decree and not that the decree becomes a preliminary decree in a mortgage suit in accordance with the provisions of Order 34 and that it is necessary to apply for a final decree. On behalf of the respondent reliance has been placed on *Ahmad Mirza Beg v. Allahabad Bank, Ltd.* ("26) 13 AIR 1926 Oudh 385.

16. A number of other rulings have been cited on both sides. We do not consider

it necessary to deal with each one of them individually. The legal position in our judgment is as follows. The Code of Civil Procedure, and therefore Order 34 of the Code, is not exhaustive and it is open to the parties, even in a suit for sale brought on foot of a simple mortgage, to settle by compromise the form of the decree, (provided that there is nothing in the compromise which is opposed to public policy). For example, they can agree that the decretal amount shall be payable by the judgment-debtor by instalments extending over a much longer period than the period of six months laid down in Order 34, Rule 2. It is also open to them to agree that the very first decree passed in the suit shall be an executable decree and thus do away with the necessity of the passing, first, of a preliminary decree and, then, of a final decree as provided in Order 34 of the Code. On the other hand, if the agreement between the parties is that on the happening of certain events the decree-holder shall have the right to apply for a final decree, it will be necessary for the decree-holder to apply for a final decree for sale within the prescribed period of limitation: *Abir Paramanik v. Jahor Mahmud Mandal* ("07) 34 Cal. 886; *Kora Lal v. Punjab National Bank, Ltd., Multan* ("21) 8 AIR 1921 Lah. 384; *Mangar Sahu v. Bhatoo Singh* ("20) 7 AIR 1920 Pat. 731, *Sital Singh and Others Vs. Baijnath Prasad and Others*, *Hemendra Lal v. Fakir Chandra* ("23) 10 AIR 1923 Cal. 626 *Askari Hasan Vs. Jahangiri Mal and Others and Mohammad Unis Vs. Janeshar Das and Others*.

17. It seems to us that the soundness of the appellants' argument that the parties to a money suit can by compromise convert it into a mortgage suit is at least open to doubt. The rulings relied upon by the learned Counsel for the appellant in this connexion (*Peda Linga Reddi v. Hanumayya* ("18) 5 AIR 1918 Mad. 1307 and (*Sahu*) *Shyam Lal Vs. M. Shayamlal*,) do not support that argument and what the respondent's learned Counsel has said as to the effect of those decisions is, in our opinion, correct. We may also say that we are greatly impressed by the judgment of the Chief Court at Lucknow in *Ahmad Mirza Beg v. Allahabad Bank, Ltd.* ("26) 13 AIR 1926 Oudh 385, mentioned above. We do not, however, consider it necessary to express a definite opinion on this point for we have come to the conclusion that the respondent's contention mentioned under (d) in an earlier part of this judgment, where we have summarised the arguments put forward on behalf of the respondent, is well-founded. It seems to us perfectly clear that a decree-holder can apply for a final decree only when there has been a default on the part of the judgment-debtor in the payment of the amount specified in the preliminary decree by the date specified therein. It follows that where no amount is specified and no date is fixed it is not possible for the decree-holder to say that there has been a default by the judgment-debtor in payment as directed by the decree. As we have pointed out above, the blank spaces in the printed form in the decree in question were not filled up. The result was that no amount was mentioned and no date was fixed. In these circumstances, we have no hesitation in accepting the contention of the respondent's learned Counsel that time never began to run against Mt. Masuda under Article 181, Limitation Act, for the making of an application for the

preparation of a final decree. The appellant's contention cannot therefore be accepted.

18. We are also of the opinion that the argument of the respondent's learned Counsel mentioned under (e) above is not without force. The appellant cannot have it both ways. The decree in question must be either a preliminary decree or a final executable decree. The parties themselves, in our opinion, clearly contemplate in paras. 7 and 8 of the compromise that that very decree is to be executable on the happening of certain events. If, in spite of this, the decree is to be treated as a preliminary decree, some meaning must be given to the words "shall be executable" used by the parties, and the interpretation contended for by the respondent's learned Counsel, namely that Mt. Masuda was to have the right to apply for a final decree only on the fulfilment of the conditions laid down in para. 7, commends itself to us. The result is that on either view the decree obtained by Mt. Masuda in suit No. 40 of 1932 has not become extinct. It can therefore serve as the foundation of a claim by her as a creditor of the landlord-applicant in these proceedings under the Encumbered Estates Act. For the foregoing reasons, our conclusion is that this appeal is without force and must be dismissed. We accordingly dismiss it with costs.