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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BHOLA NATH (DEFENDANT) *v.* MAQBUL-UN-NISSA (PLAINTIFF).*

Muhammadan Law—Dower—Decree for dower against heir of deceased Muhammadan — Decree held by creditor against heir personally — Priority of decree for dower—Civil Procedure Code, section 295.

A Muhammadan widow obtained against the other heir of her deceased husband a decree for her dower payable out of the estate of the deceased, and in execution thereof attached certain property of the deceased in the hands of the heir. A creditor of the heir having obtained a money decree against the heir for his personal debt, subsequently attached the same property in execution of that decree.

Held that, although the widow could not in virtue of her decree for dower claim a charge on any specific property of her late husband, her decree for dower was entitled to priority over the decree against the heir for the heir's personal debt, nor was the creditor of the heir entitled to the benefit of the provisions of section 295 of the Code of Civil Procedure. *Yasin Khan* v. *Muhammad Yar Khan* (1) distinguished. *Bazayat Hossein* v. *Dooli Chund* (2) and *Kinderley* v. *Jervis* (3) referred to.

THE plaintiff, Musammat Maqbul-un-nissa, the widow of one Chaudhri Said-ud-din Husain, obtained a decree for her dower against Yaqub Husain, the son and heir of Said-ud-din Husain, on the 27th of July 1899. In execution of that decree she attached, on the 19th of September 1899, certain shares in the property which had been of Said-ud-din in his life-time. The defendant Bhola Nath held a simple money decree against Yaqub Husain for a personal debt of the judgment-debtor, and in execution thereof proceeded to attach, on the 21st of November 1899, the same property which had previously been attached by Maqbul-un-nissa. He was about to sell the property so attached when Maqbul-un-nissa objected; but her objection was disallowed, and she thereupon brought the suit out of which this appeal arose, asking for a declaration that her decree for dower had priority over the defendant's decree against Yaqub Husain for his personal debt. The defendant pleaded that the plaintiff's decree for dower was a simple money decree merely, and that no property of Said-ud-din was charged by it, and

*Second Appeal No. 1390 of 1900 from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 5th of September 1900, modifying a decree of Babu Nihal Chandra, Subordinate Judge of Shahjahanpur, dated the 25th of May 1900.

(1) (1897) I. L. R., 19 All., 504. (2) (1878) I. L. R., 4 Calc., 402, S. C., L. R., 5 I. A., 211.

(3) (1856) 22 Beav., 1.

consequently the plaintiff had, as against him no preferential right to have her decree satisfied out of the assets of Said-ud-din. The Court of first instance (Subordinate Judge of Shahjahanpur) passed a decree in the following terms:—"that the plaintiff get it notified to intending purchasers (*i.e.*, of the attached property, which had belonged to Said-ud-din) that the amount of the decree held by the plaintiff can be realized from the property in dispute, and also from other property of Chaudhri Said-ud-din Husain which has not devolved on the plaintiff by inheritance." On appeal by the plaintiff the lower appellate Court (District Judge of Shahjahanpur) decreed the claim in full. The defendant accordingly appealed to the High Court.

Pandit *Moti Lal Nehru*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J.—The plaintiff in this suit, who is the widow of one Chaudhri Said-ud-din Husain, sued for a declaration that her dower, in respect of which she had obtained a decree on the 27th of July 1899, for Rs. 1,41,562-8-0, had priority over a judgment debt owing to the defendant Bhola Nath, by virtue of a decree in his favour passed against the defendant Yakub Husain, who is the son and heir of Said-ud-din. The plaintiff had attached in execution of her decree certain shares in the property of her husband on the 19th of September 1899. In execution of his decree Bhola Nath also attached the property in dispute on the 21st of November 1899, that is upwards of two months after the plaintiff's attachment of the same property, and was proceeding to sell the judgment-debtor's shares when the plaintiff objected to the sale. Her objection was disallowed, and hence the present suit. In answer to the plaintiff's claim, Bhola Nath pleaded that the plaintiff's decree in respect of her dower was a simple money decree, and that no property of Said-ud-din was charged by it, and that consequently the plaintiff had as against him no preferential right to have her decree satisfied out of the assets of Said-ud-din. The Court of first instance passed a decree in favour of the plaintiff in an unusual form. The decree was "to the effect that the plaintiff get it notified to intending purchasers (*i. e.*, of

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the attached property which had belonged to Said-ud-din) that the amount of the decree held by the plaintiff can be realized from the property in dispute, and also from other property of Chaudhri Said-ud-din Husain, which has not devolved on the plaintiff by right of inheritance." On appeal the District Judge decreed the plaintiff's claim in full. Hence the present appeal.

The plaintiff respondent's case is that the decree obtained by her for her dower gave her a charge on the estate of her husband, and that Bhola Nath cannot in execution of his money decree, passed against the heir of her husband for a personal debt of such heir, sell the estate of her husband without first discharging her debt. There can be no doubt that if the plaintiff had obtained a decree for her dower charging the estate of Said-ud-din with the payment of it, her claim in the present appeal ought to prevail. The decree, however, which she obtained did not purport to charge any portion of the assets of Said-ud-din with the payment of the debt. It was a decree in the following terms, namely, that the claim of the plaintiff for Rs. 1,41,562-8-0 with interest be decreed against the defendants, the heirs of Said-ud-din, not to be realized out of any portion of the plaintiff's share of the property of Said-ud-din; that is, in fact, a simple money decree. This raises the question whether or not a decree obtained against an heir in respect of the debt of his ancestor has priority over a decree obtained against the heir in respect of a personal debt, and has a preferential right over such last mentioned claim to be satisfied out of the assets of the ancestor.

The learned advocate for the respondent strongly relied upon the decision of a Bench of this Court in the case of *Yasin Khan* v. *Muhammad Yar Khan* (1). In that case, while a suit for the dower due to a widow was pending, the heirs of her deceased husband mortgaged certain property of the deceased; the heirs of the widow obtained a decree which could only be executed against the assets of the deceased husband. The Chief Justice Sir John Edge and Blair, J., purporting to follow the ruling of their Lordships of the Privy Council in the case of

(1) (1897) I. L. R., 19 All., 504.

Bazayet Hossein v. *Dooli Chund* (1) held that the decree obtained by the heirs of the widow took priority over the mortgagee's decree and a sale held in execution of that decree. We have examined the record of this case and discovered that the decree which was obtained by the heirs of the widow was a simple money decree, unlike the decree obtained in the case of *Bazayet Hossein* v. *Dooli Chund*, which was in the nature of an ordinary administration decree, and was operative to bind the property of the husband in the hands of his heirs. It appears to me that the learned Judges must have overlooked this fact. In the judgment of the High Court which is set forth in the report of the case in 5 Indian Appeals at p. 215, the nature of the decree is set forth as follows:—"The final decree made by the High Court was put into the form of an ordinary administration decree, and directed Najmood-din to account for the property of Khorshed Ali which was in his hands, and also to pay over the value in money of such property of Khorshed Ali which had been in his hands and which he had misappropriated." The judgment then proceeds:—"I need hardly say that a decree of this kind directing the person in whose hands the property was to account for it in order that it might be applied to the purpose of discharging the debts due from Khorshed Ali was a decree against that property and operative to bind it in the hands of Najmood-din, and therefore of any other person who took from Najmood-din with notice of the decree or under such circumstances as to make him affected by the doctrine of *lis pendens*." Sir Barnes Peacock in delivering the judgment of their Lordships, referring to the portion of the judgment which I have stated, says:—"Their Lordships agree in that view of the law, and are of opinion that the appellant in this case was bound by the decree obtained by the widow Tayyuban." The decrees in the two cases were therefore quite different; in the one case the decree was a decree for administration; in the other, a simple money decree, to be satisfied, however, out of the assets of the husband. It appears to me from this that the decision of their Lordships does not support the ruling in the case of *Yasin Khan* v. *Muhammad Yar*

(1) (1878) I. L. R., 4 Calc., 402, S. C., 5 I. A., 211.

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Khan. The important fact in the earlier case is the fact that the widow's suit was a suit for the administration of her husband's assets, and that a decree was passed against the husband's property, which was operative to bind that property in the hands of his heirs. Whilst such a suit was pending the mortgagee took a transfer of the property from the heir. The doctrine of *lis pendens* clearly applied, and having regard to the nature of the suit, the mortgagee was held to be bound by the decree subsequently obtained by the widow. The nature of an administration suit is essentially different from an ordinary suit for money brought by a creditor of a deceased person against his heir, and it is impossible to hold that a suit to recover a debt from the heir of a deceased person, which is not in the nature of a suit for the administration of the assets of such deceased person, can be regarded as an administration suit from the fact that the decree obtained in it is a decree to be satisfied out of the assets of the deceased. There is no doubt that the creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage. This was so held in the case of *Bazayet Hossein* v. *Dooli Chund,* to which I have referred. In their judgment in that case their Lordships cited with approval the ruling in the case of *Musammat Wahidunnissa* v. *Shubrattun* (1). In that case it was held that the widow's claim for dower under the Muhammadan Law is only a debt chargeable against the husband's estate, and does not give the widow a lien on any specific property of her deceased husband so as to enable her to follow that property, as in the case of a mortgage, into the hands of a *bonâ fide* purchaser for value. It appears to me that upon these authorities the contention which has been pressed before us on behalf of the respondent must fail. The decree which she obtained was not a decree in a suit for the administration of her husband's assets, and was not operative to bind the estate or create any specific lien on the property in dispute.

There is another aspect, however, from which the plaintiff's claim must be regarded, to which our attention was not directed

(1) (1870) 6 B. L. R., 54.

during the original argument. We invited the attention of the learned advocates to it, and have since heard their arguments upon it. The appellant is a creditor of the heir of the respondent's husband, and as such has obtained a money decree against such heir. He is not a purchaser or mortgagee of any portion of the estate. The respondent, on the other hand, has recovered a judgment against the heir of her deceased husband in respect of a debt of her husband, which, as the decree directs, is to be satisfied out of the assets of the husband. The property in dispute was attached by the respondent as such judgment-creditor on the 19th of September 1899, and it was not until the 21st November 1899 that the appellant attached the same property in execution of his personal decree against the heir. Can a creditor of the heir under such circumstances compete with the creditor of the ancestor in the administration of the assets of such ancestor? Does a judgment, in other words, passed against an heir for his personal debt amount to such an alienation of assets as will, to any extent, defeat the ancestor's creditors? Would such a judgment enable the judgment-creditor in execution of his decree to take and sell the immovable property of the ancestor without making a provision for the satisfaction of the ancestor's debts, or does it merely affect the beneficial interest in the property of the judgment-debtor? According to the principles of the Muhammadan Law, "debts are claimable before legacies, and legacies must be paid before the inheritance is distributed" (Macnaghten's Muhammadan Law, Chapter I, Rule 5); also "all the debts due by the testator must be liquidated before the legacies can be claimed" (*id.* Chap. VI, on Wills, Rule 6), and again:—"Heirs are answerable for the debts of their ancestor as far as there are assets," (*id.* Chap. II on Debts, Rule 1). It cannot be disputed that the liquidation of the debts of a deceased Muhammadan should precede the distribution of his property amongst the heirs. Here the immovable property of the respondent's husband is intact and available for the satisfaction of his debts. It has not been sold or mortgaged, and it appears to me only just and equitable that it should be applied in satisfaction of the respondent's debt before a creditor of the heir can

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realize out of it his claim. The property is under attachment to satisfy the respondent's claim, and I see no good reason why it should not be realized, and her claim satisfied in priority to the claim of a creditor of the heir. Although the plaintiff's debt is not a specific charge upon the assets of her husband, it nevertheless constitutes a general charge upon them, not, it is true, such a charge as would defeat a *bond fide* purchaser or mortgagee from the heir, but a charge which would prevail against a creditor of the heir. The assets of her husband are liable, in the first place, to satisfy her husband's debts, and, subject thereto, belong to the heir. The heir, in fact, takes no beneficial interest except subject to and after payment of the debts of his ancestor. The case of *Kinderley* v. *Jervis* (1) is an instructive one upon this question. I therefore am of opinion that the plaintiff respondent is entitled substantially to succeed in this appeal. I am not disposed to think that section 295 of the Code of Civil Procedure, which directs in certain events rateable distribution of assets realized by sale in execution of a decree, if it were applicable, opposes any obstacle to the granting of the relief which the plaintiff seeks. The decree obtained by the respondent is a decree against Yakub Husain as representative of her deceased husband, whilst the decree obtained by the appellant is against Yakub Husain in his personal capacity. The two decrees have not, in fact, been obtained against "the same judgment-debtor." The attached property forms part of the assets of Said-ud-din in the hands of his heir, and as such is primarily liable to satisfy the debts of Said-ud-din. It is not possible, I think, to hold in such a case that a judgment-creditor of the heir in respect of a personal debt of such heir is entitled to rateable distribution of the assets of Said-ud-din along with a creditor of Said-ud-din. If this were not so, it would seem to me necessarily to follow that the creditor of an heir in respect of a judgment obtained in the life-time of his ancestor would be entitled to share in the distribution of the assets of such ancestor equally with a creditor of the ancestor. No distinction can be drawn, so far as I can discover, between the case of a judgment-creditor whose judgment was entered up

(1) (1856) 22 Beav., 1.

against the heir before the death of the ancestor, and the case of a judgment which has been entered up after such death. It cannot be, I would say, that property which *primâ facie* belongs to the creditors of a deceased person is applicable to the payment of the debts of his heir until the debts of the deceased have been discharged. This would, in fact, be to pay the heir's debt out of another man's property. The conclusion, therefore, at which I have arrived under the circumstances of this case is that the plaintiff is substantially entitled to hold the decree which she has obtained. There appears to me to be no substance in the objection that the suit in its present form does not lie. The decree of the lower appellate Court requires to be slightly modified. The learned District Judge decreed the plaintiff's claim in full. The plaintiff claimed a declaration that the defendant was not entitled to bring the property in dispute to sale without payment of the amount of the decree held by her. To this declaration she is not entitled. She appears to me to be entitled merely to a declaration that she has priority in respect of the amount of her decree over the decree obtained by the defendant appellant, and that the defendant appellant can only bring the property in suit to sale in execution of his decree subject to the plaintiff's rights under the decree obtained by her. The decree should, I think, be modified in this respect. As the appeal has substantially failed the appellant should bear the costs of it.

BANERJI, J.—Upon the first question which arises in this case, I am in full accord with the learned Chief Justice and have nothing to add. The second question, however, is not wholly free from difficulty, and it does not appear to be covered by the authority of any reported case. It seems to me upon general principles of equity that since the debts of a deceased person are payable out of his assets, they constitute, as observed by Sir John Romilly, Master of the Rolls, in *Kinderley* v. *Jervis* (1), a general charge upon the assets, "but not so that a *bonâ fide* purchaser of the lands from the heir or the devisee is bound to see to the application of the purchase-money as he would be in the case of a particular mortgage on any portion of

(1) (1856) 22 Beav., 1.

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the lands themselves." It would be inequitable to make one man's property pay the debt of another. Under the Muhammadan law, although upon the death of the ancestor, his estate devolves immediately upon his heirs, the heirs take it subject to the payment of his debts, and therefore although there may not be a specific charge upon the estate for the payment of the debts, the debts may be deemed to constitute a general charge on the estate. That being so, the plaintiff, who is the creditor of the father of the appellant's debtor, has priority over the appellant in respect of her debt. Since the plaintiff has, as I have said above, a general charge over the estate, no question of rateable distribution under section 295 of the Code of Civil Procedure can arise between her and the appellant. I therefore agree in the order proposed.

BY THE COURT.—The order of the Court is, that in lieu of the decree passed by the learned Subordinate Judge the following decree be substituted, namely, a decree declaring that the plaintiff respondent has priority in respect of the amount of her decree over the decree obtained by the defendant appellant, and that the defendant appellant can bring the property in suit to sale in execution of his decree subject to the plaintiff's rights under the decree obtained by her, and also that the defendant appellant do pay the cost of this appeal.

Decree modified.

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Before Mr. Justice Blair and Mr. Justice Banerji.

ROSHAN SINGH (JUDGMENT-DEBTOR) *v.* MATA DIN AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Limitation—Act No. XV of 1877, *(Indian Limitation Act) section* 20—*Debt—Civil Procedure Code, section* 258.

Held that for the purpose of deciding whether or not an application for execution is barred by limitation, it is competent to the executing Court to take into consideration a payment made out of Court by the judgment-debtor in part satisfaction of the decree, although such payment may not have been certified in the manner provided for by section 258 of the Code of Civil Procedure. *Kishan Singh* v. *Aman Singh* (1), and *Tukaram* v. *Babaji* (2) followed. *Mitthu Lal* v. *Khairati Lal* (3) overruled.

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*First Appeal No. 126 of 1902 from an order of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 30th of July 1902.

(1) (1894) I. L. R., 17 All., 42. (2) (1895) I. L. R., 21 Bom., 122.
(3) (1890) I. L. R., 12 All., 569.