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JUDAGI MALLAH v. KING-EMPEROR

CHATTERJI, J.

should be imposed. The evidence of Dasrath is that Deonarain the deceased hit the accused Judagi first and threw him down. Then it must also be borne in mind that Judagi had no motive in causing Deonarain's death. Both had gone to Calcutta together and returned from that place at the same time only a week before the occurrence. On that day both ate and drank together as friends, and if really Judagi intended to cause the death of Deonarain he would have waited a few minutes and inflicted the blow after the departure of Dasrath, who did not belong to that village and would have left him afterwards. The evidence of the Sub-Inspector shows that the accused was drunk when the accused was brought to him. He tried to record the statement of the accused but he was too drunk to answer. The act appears to have been committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel while the accused was in a state of intoxication. Although drunkenness by itself does not excuse the commission of an offence, this along with other circumstances may well be taken into account in considering the nature of the penalty to be inflicted.

In view of all the circumstances of the case, I agree with my learned brother that this is a fit case in which the accused should be sentenced to transportation for life.

PRIVY COUNCIL.*

J. C. 1929.

April, 15.

SAIYID QASIM HUSAIN

v.

HABIBUR RAHMAN.

Muhammadan Law—Widow's Dower—Construction of decree—Dower charged on husband's estate.

The widow of a Shia Muhammadan sued his sole heir and persons interested in alienations made by him claiming

*PRESENT: Lord Carson, Lord Salvesen and Sir George Lowndes.

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that the alienations were invalid, that she was entitled to a sum named as dower, and to recover that sum from the alienated properties. She obtained a decree declaring the amount of her dower and that the properties "be treated as the properties" of the deceased "from which the plaintiff is entitled to recover the decretal amount". After the decree the heir sold two of the named properties to purchasers who bought knowing of the decree.

Held, that the decree upon its true construction created a charge upon the properties for the amount of the dower debt and that the purchasers took subject to that charge.

Decree of the High Court reversed.

Appeal (no. 45 of 1927) from a decree of the High Court (March 19, 1926) reversing an order of the Subordinate Judge of Patna (June 23, 1925).

The sole question upon the appeal was whether a decree of January 31, 1918, created a charge upon the estate of a deceased Shia Muhammadan in respect of the dower debt due to his widow.

In execution proceedings the Subordinate Judge held that the decree in question had that effect, but the High Court (Kulwant Sahay and Ross, JJ.) held to the contrary.

The facts and the view of the High Court appear from the judgment of the Judicial Committee.

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March 8, 11.

Dube for the appellants. Upon the true construction of the decree of 1918, and having regard to the plaint and issues, the decree created a charge upon the properties in respect of the dower. In that respect its terms are at least as clear as the decree considered in *Bazayet Hossein* v. *Dooli Chund*(1) which was held to constitute a charge. In the first of the appeals there reported the alienation took place before the decree and consequently the widow failed. In the second the alienation was during, and with knowledge of, the suit, and the widow succeeded on the principle

(1) (1878) I. L. R. 4 Cal. 401; L. R. 5 I. A. 211.

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of lis pendens. That necessarily involved that a charge was there created; see also observation of Sir Montague Smith during the argument. Here the sale was after the decree and with knowledge of it and the purchasers therefore took subject to the charge.

Dunne, K. C. and *Abdul Majid* for the respondents. It is clear from the decision already cited and from *Hamira Bibi* v. *Zubaida Bibi*(1) that apart from an express charge the widow was merely an unsecured creditor. Her suit was not for the purpose of obtaining a charge, but to invalidate the alienations as fraudulent against creditors, so that the properties should form part of the estate available to all the creditors. The decree did not create a charge; its language used does not imply that one was intended to be created. The wording differs materially from that of the decree in *Bazayet Hossein* v. *Dooli Chund*(2).

Dube replied.

April 16. The judgment of their Lordships was delivered by SIR GEORGE LOWNDES. The appellants are the representatives of Izatunnissa Begam, the widow of one Azhar Husain, a Shia Muhammadan, who died in 1916. His sole heir according to the Shia law was his sister Ahmadi Begam. Izatunnissa Begam was entitled on her husband's death to a dower of Rs. 40,000 and one gold mohar of the value of Rs. 15. Azhar Husain in his life-time had executed certain deeds by which he purported in effect to denude himself of his immovable properties which were of considerable value. Shortly after his death Izatunnissa Begam took proceedings in the Subordinate Judge's Court at Patna to enforce her dower claim. She impleaded in her suit as the principal defendants, Ahmadi Begam and the other persons interested in Azhar Husain's alienations and as pro

(1) (1916) I. L. R. 38 All. 581, 588; L. R. 43 I. A. 294, 301.
(2) (1878) I. L. R. 4 Cal. 401; L. R. 5 I. A. 211.

forma defendants certain other creditors of the deceased. She claimed by her plaint that these alienations were invalid, and that she was entitled to recover her dower debt from the properties. She prayed for a decree for Rs. 40,015, for a declaration that the properties specified in the schedules to the plaint were "the heritage" of Azhar Husain, and that "the plaintiff be empowered to recover her decree from them". A specific issue was raised at the hearing

"whether the dower debt..... can be realised from the properties mentioned in the plaint."

The Subordinate Judge on the 31st January, 1918, decided in Izatunnissa's favour and by his decree it was ordered

"and decreed that this suit be decreed with costs and interest at the rate of 6 per cent. per annum from this date up to the date of realization, that Rs. 40,000 (forty thousand) and one gold Mohar worth Rs. 15 be declared the dower debt of the plaintiff, that the properties entered in schedules nos. 1 and 2 to the plaint be treated to be the properties of Khaja Azhar Husain from which the plaintiff is entitled (to recover) the decretal money."

There was no appeal from this decree which is therefore binding between the parties, and the only question now is whether on a proper construction of the decree the dower debt was charged upon the properties.

In July, 1923, while the greater part of this debt was still unsatisfied, Ahmadi Begam as the heir of Azhar Husain sold two of the scheduled properties to the first and second respondents who alone are contesting this appeal. It is admitted that they had full knowledge of the decree in the dower suit, and in fact they claim that the decree was mortgaged to them by Izatunnissa. If therefore the decree created a charge upon the properties, it is clear that (apart from any question of the mortgage) they bought the properties subject to the charge.

Izatunnissa died in September, 1923, leaving as her heirs the first, second and third appellants, who assigned a share in the decree to the other appellants.

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On the 26th January, 1924, the appellants applied for execution of the decree by sale of the properties, including those sold to respondents 1 and 2 which were attached at the instance of the appellants. The contesting respondents applied to set aside the attachment. The Subordinate Judge held that the decree created a charge upon the properties and that therefore the respondents' claim was not maintainable. If this view is correct it was probably unnecessary to attach the properties in realisation of the decree. Proceedings were taken in review of this order, and the case was remitted by the High Court for further investigation. The Subordinate Judge then allowed an amendment of the application for execution bringing the first and second respondents on the record as representatives of the judgment-debtors and making it clear that execution was sought by way of enforcement of the charge. Allegations were made by the respondents that Izatunnissa had been a party to certain mortgages executed by Ahmadi Begam in their favour and had also mortgaged her decree to them. These allegations were denied by the appellants. The documents are not on the record of this appeal, nor is there any material from which it would be possible for their Lordships to come to any safe conclusion on this part of the case.

In the event the Subordinate Judge affirmed his previous decision that the decree created a charge upon the properties and finally rejected the respondents' claim.

On appeal to the High Court the learned Judges say that the principal point argued before them on behalf of the present respondents was that the decree in the dower suit did not create a charge upon the properties, and upon consideration of the pleadings in the suit and the wording of the decree, they came to the conclusion that no charge was created. They thought that the only object of the suit was to free the properties from the alleged alienations of Azhar Husain and to make them available to satisfy the

widows' claim for dower on the same footing as the other debts of the estate. It has not been disputed before their Lordships that a widow claiming dower from her deceased husband's estate is in no better position than any ordinary creditor, and that, apart from the decree, a bona fide purchaser for value from the heir would get an unassailable title. Their Lordships however are unable to agree with the interpretation put by the Judges of the High Court upon the decree. It is in their Lordships' opinion clear that the plaintiff in the suit was not seeking merely to be put in a position to execute a money decree against the estate, but was asking the Court by its decree to imprint upon the properties a specific liability to satisfy the dower debt, or in other words to charge the properties with the payment of this particular debt. They are therefore in agreement with the Subordinate Judge that the decree created a charge upon the properties and that the respondents 1 and 2 having bought with notice of the decree, their purchase was subject to the charge. Whether the charge was rightly decreed or not in the first instance is immaterial, though their Lordships see no reason to doubt that it was within the competence of the Court to make such a declaration. But the decree was not appealed against, and is clearly binding on the parties and those claiming under them.

A question was raised in the High Court as to the propriety of the amendment which brought respondents 1 and 2 upon the record, but the Judges thought it unnecessary to determine this question, and no reliance has been placed upon this contention before their Lordships.

It only remains to consider what the effective result of the appeal should be. Their Lordships are not for the reason already stated in a position to deal with the claim of respondents 1 and 2 to be themselves mortgagees of the dower decree. All they can do is to declare that the decree created a charge upon the scheduled properties including those purchased by

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respondents 1 and 2 for the balance due under it for the dower debt. This charge will in any case have to be worked out by the executing Court, and when this question is taken up it will be open to the respondents 1 and 2, if so advised, to set up their claim as mortgagees from Izatunnissa Begam.

Inasmuch as the only competent question throughcut the proceedings has been that of construction of the decree, upon which the appellants have succeeded, their Lordships think that the costs both here and below should be borne by the contesting respondents, and they will humbly advise His Majesty that the decree of the High Court should be set aside and the appeal allowed upon the terms of this judgment.

Solicitor for appellants: H. S. L. Polak.

Solicitor for respondents: Francis and Harker.

APPELLATE CIVIL.

Before Terrell, C.J., and James, J.

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April, 27, 29, 30. May, 2.

RAJA MADHUSUDAN DEB

v.

KHESTABASI SAHU.*

Hindu law—Mitakshara law of alienation, whether applicable to impartible estates governed by rule of primogeniture—Estate Patia Killah in Orissa, whether alienable in absence of custom.

The Mitakshara law of alienation is inapplicable to an impartible estate in which the rule of primogeniture prevails.

The Killajat Mahal of Orissa known as Patia Killah is, in the absence of any custom to the contrary, alienable.

*Circuit Court, Cuttack. First Appeal no. 20 of 1927, from a decision of Babu Brajendra Kumar Ghose, Subordinate Judge of Cuttack, dated the 23rd August, 1927.