

*Privy Council Appeal No. 45 of 1927.*

*Patna Appeal No. 15 of 1926.*

Saiyid Qasim Husain and others - - - - - *Appellants*

*v.*

Habibur Rahman and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1929.

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*Present at the Hearing :*

LORD CARSON.

LORD SALVESEN.

SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

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The appellants are the representatives of Izatunnissa Begam, the widow of one Azhar Husain, a Shia Mohamedan, 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 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 the 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. 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 widow's 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 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 throughout 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.

In the Privy Council.

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SAIYID QASIM HUSAIN AND OTHERS

vs.

HABIBUR RAHMAN AND OTHERS.

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DELIVERED BY SIR GEORGE LOWNDES.

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