

(1980) 04 CAL CK 0028

Calcutta High Court

Case No: None

Nandarani Majumdar and
Another

APPELLANT

Vs

Indian Airlines and Others

Aruna Basu Mallik Vs Dorothy
Mitra

RESPONDENT

Date of Decision: April 25, 1980

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47
- Divorce Act, 1869 - Section 37
- Parsi Marriage and Divorce Act, 1936 - Section 40
- Special Marriage Act, 1954 - Section 17, 32, 37

Citation: 85 CWN 47

Hon'ble Judges: B.C. Chakraborti, J; A.K. Sen, J

Bench: Division Bench

Advocate: J.K. Roy, S.N. Chatterjee, T.K. Ghosh in Appeal No. 11 and Sobhendranath Tagore in C.R. No. 1529, for the Appellant; P.N. Chunder, D.K. Dey and Shakya Sen in Appeal No. 11 and K.J. John in C. R. No. 1529, for the Respondent

Final Decision: Dismissed

Judgement

1. A common question as to whether an order for permanent alimony and maintenance passed in terms of section 37 of the Special Marriage Act, 1954 (hereinafter referred to as the said Act) and incorporated in a decree of dissolution of marriage lapses on the death of the husband/judgment debtor or not having arisen for consideration in C. R. 1529 of 1979 and F. A. 11 of 1979, we have heard them together.

2. The above Civil Rule arises out of execution case No. 1 of 1977 now pending in the 5th Court of the learned Additional District Judge, Alipore, and is directed against an

order dated January 31, 1979, dismissing an objection u/s 47 of the CPC which was registered as A miscellaneous Case No. 3 of 1978. That objection was preferred by Smt. Aruna Basu Mullick, executrix to the estate of late Prafulla Kumar Mitra. It is not in dispute that the opposite party before us, namely, Smt. Dorothy Mitra instituted Matrimonial Suit No. 22 of 1961 against her husband, Prafulla Kumar Mitra and therein obtained a decree of dissolution of her marriage on May 2, 1962, under the provisions of the said Act, and the decree further provided "The petitioner do get Rs. 300/- per month as maintenance from the Respondent to be paid by the 1st week of each month following for which it is due until she remarries". It is also not in dispute that Prafulla Kumar Mitra during his life time having failed to pay the maintenance in terms of the decree, the opposite party instituted execution case No. 3 of 1962 which was disposed of on compromise, the said Prafulla Kumar Mitra agreeing to pay the current maintenance regularly and the arrears in instalments. Since then Prafulla Kumar Mitra died but in the will executed by him on March 31, 1965, he made no provision for discharge of his obligation under the above decree. Petitioner before us Smt. Aruna Basu Mullick obtained probate in respect of the said will in O. S. No. 1 of 1968. In that background when Smt. Dorothy Mitra instituted the aforesaid execution case No. 1 of 1977 for enforcement of her maintenance dues under the said decree, an objection u/s 47 was lodged by Smt. Aruna Basu Mullick on two-fold grounds, namely, (1) that the execution is barred by limitation it being in respect of a decree dated May 2, 1962 and (2) that the order for payment of maintenance though incorporated in the decree ceased to be enforceable on the death of the judgment debtor. Both the grounds being overruled, the learned Judge dismissed the petitioner's objection u/s 47. The learned Judge overruled the plea of limitation on the ground that the liability accrued from month to month and was acknowledged by occasional payments, last of such payments being made in December 1975. The learned Judge overruled the other pleas on the view that the decree holder is entitled to get her maintenance under the decree out of the estate left by late Prafulla Kumar Mitra. Feeling aggrieved, the said Smt. Aruna Basu Mullick has preferred the present revisional application and obtained the above Rule.

3. Mr. Tagore appearing in support of this Rule has not challenged the decision of the learned Additional District Judge on the point of limitation but has seriously challenged the decision on the other point contending that when the maintenance was not secured by any charge over the husband's properties by the decree it should be held that the liability for paying the maintenance being personal to Prafulla Kumar Mitra lapsed on his death; it created no debt enforceable as such against the estate of the judgment debtor. Mr. John appearing on behalf of the decree holder/opposite party has contested the point thus raised by Mr. Tagore. According to Mr. John the decree created an obligation which did not lapse on the death of the judgment debtor but continued to remain enforceable against his estate.

4. A contrary view appears to have been taken by the learned Judge, 12th Bench, city Civil Court, Calcutta, in Title Suit No. 1582 of 1974. That suit was instituted by the plaintiff/appellant Smt. Nandarani Mazumdar (hereinafter referred to as the plaintiff) who, it is not in dispute had earlier obtained a decree dated May 31, 1966, dissolving her marriage with Capt. Ajit Kumar Mazumdar, the son of defendant No. 2 Shri Bibhuti Bhussan Mazumdar. The decree of dissolution, however, incorporated the following further direction, viz., "the petitioner also do get permanent alimony and maintenance at Rs. 350/- per month from the Respondent from the date of decree till her death or her re-marriage or any other act which would disentitle her from getting the amount". Capt. Ajit Kumar Mazumdar duly paid the said maintenance month by month upto and including the maintenance for the month of October 1972. Capt. Ajit Kumar Mazumdar who was a pilot in the employment of defendant No. 1 Indian Airlines died on December 18, 1972, leaving behind an estate of Rs. 2,00,916.00 in cash then lying with the Indian Airlines. In that background and obviously to enforce her claim of maintenance under the decree of dissolution of her marriage with Capt. Ajit Kumar Mazumdar, the plaintiff instituted the aforesaid Title Suit No. 1582 of 1974 against the defendant Nos. 1 and 2 for a declaration that she is entitled to a charge on the estate of Capt. Ajit Kumar Mazumdar, for the payment of permanent alimony of Rs. 350/- per month in terms of the decree dated May 31, 1976, for a decree for a sum of Rs. 8,750/- towards the arrears of alimony upto the date of suit, permanent injunction restraining the defendant No. 1 from disbursing the said sum of Rs. 2,00,916.00 without making adequate arrangement for the payment of the monthly alimony and for other incidental relief's. In this suit, two other persons were added as defendants 3 and 4 after defendant No. 1 filed a written statement disclosing that on their records those two persons claimed them to be the wives of the deceased Ajit Kumar Mazumdar.

5. This suit was contested by defendant Nos. 1, 2 and 3, each one of them having filed a separate written statement. The defendant No. 1 took the defence that the City Civil Court at Calcutta had not the jurisdiction to entertain such suit and that no suit is maintainable as against them since there being divergent claims to the money held by them they have directed the claimants to obtain the necessary letters of administration to the estate of late Capt. Ajit Kumar Mazumdar or a succession certificate in respect of the debts due to the deceased and that they are ready and willing to disburse the amount to whoever obtains such letters of administration or succession certificate. The defendant No. 2 in his written statement raised an objection that the suit as framed is not maintainable, that the order for maintenance ceased to be enforceable on the death of his son Capt. Ajit Kumar Mazumdar as no charge was created on the estate left by the deceased. He further took the defence that having obtained succession certificate from a competent court on notice to the plaintiff he alone is entitled to claim the money and claim, if any, which the plaintiff had, is barred by the order passed in the said proceeding. The defendant No. 3 in her written statement took the defence that after the death of Capt. Ajit

Kumar Mazumdar the plaintiff is not entitled to receive any more alimony under the decree.

6. On the pleadings as aforesaid, the learned Judge framed the following 8 issues :-

1. Is the suit maintainable in its present form
2. Is the suit bad for non-joinder of parties
3. Has the suit been properly valued
4. Is the plaintiff entitled to claim any lien or charge upon the estate of deceased Captain Ajit Kumar Mazumdar
5. Is the decree passed in the Matrimonial Suit No. 89 of 1964 still enforceable against the estate of the deceased Captain Ajit Kumar Mazumdar
6. Is the plaintiff entitled to recover the sum of Rs. 8750/- towards arrears of permanent alimony as prayed for
7. Is the plaintiff entitled to the declaration and permanent injunction, as prayed for
8. To what relief, if any, the plaintiff is entitled

7. In answering issue No. 1, the learned Judge overruled the specific objection raised on behalf of the defendant No. 2 that the suit as framed is barred by section 47 of the Civil Procedure Code. One of the reasons given by him is that defendant No. 1 in the present suit was not a party to the former suit nor is it the legal representative of the judgment debtor. The second reason assigned by the learned Judge I that the contesting defendants have now raised a defence that they are not bound by the decree for the maintenance. The learned Judge finally observed that when the maintenance decree obtained by the plaintiff is not executable as against the defendant No. 1 the suit as framed by her cannot be said to be barred by section 47 of the Code.

8. Issue No. 2 was not pressed and was answered in the negative.

9. Issue Nos. 4, 5, 6, 7 and 8 were considered together and were answered in the negative subject, however, to a decree for a sum of Rs. 700/- being the alimony for the months of November and December 1972. The learned judge took the view that in English law an order for payment of unsecured maintenance does not create a legal debt and cannot be enforced after the death of the husband against his estate, in that view the decree not creating any charge, the learned Judge held, would be of no help to the plaintiff even if there is direction upon the husband to pay her maintenance for her life since it is dependent on the life of the husband, the liability to maintain the wife being his personal liability. It was held that the decree being no longer executable against the estate, no charge can now be declared as prayed for.

10. So far as issue No. 3 is concerned, it was answered in favour of the plaintiff when the learned Judge found that the suit had been properly valued and stamped. In that view, by the judgment and decree dated November 3, 1978, the learned Judge decreed the plaintiff's suit in part for a sum of Rs. 700/- but dismissed her principal claims. Feeling aggrieved, the plaintiff has preferred the present appeal which is being contested by the defendant Nos. 1 and 2.

11. Mr. Roy appearing in support of this appeal has contended that the learned Judge in the trial court failed to appreciate the true legal effect of a decree for permanent alimony passed in terms of section 37 of the said Act. According to Mr. Roy the learned Judge went wrong in thinking that such a decree does not create any debt enforceable against the estate and that liability thereunder ceases on the death of the judgment debtor and such an error is due to the fact that though the learned Judge relied on English decisions he failed to take note of the distinguishing features of English statutes on the point. According to Mr. Roy, on the terms of the decree permanent alimony at the rate of Rs. 350/- per month had been secured to the plaintiff during her life time and so long she is not remarried and such a decree does not lapse only because the judgment debtor leaves behind an estate sufficient enough to provide such maintenance. According to Mr. Roy, such a decree creates a debt enforceable against the estate left behind by the deceased judgment debtor subject to such limitations as are inherent in case of an unsecured debt. Mr. Dey appearing on behalf of the defendant No. 2 has contested the point thus raised by Mr. Roy. Supporting the contentions raised by Mr. Tagore, Mr. Dey has contended that the learned trial Judge arrived at correct conclusion when he held that the decree ceased to be enforceable on the death of the judgment debtor. Mr. Dey in his turn has seriously assailed the correctness of the trial Judge's conclusion that present suit is not barred by the provisions of section 47 of the Code. According to him whether the decree is still enforceable or not whether it created a charge or not are all questions relating to execution, discharge or satisfaction of the decree which can be gone into by the court executing the decree and not by a separate suit as claimed by the plaintiff.

12. Thus on the rival contentions raised before us the principal point of controversy is over the nature of obligation which an order for payment of the permanent alimony in terms of section 37 of the said Act imposes on the husband. While according to Mr. Tagore and Mr. Dey such an order creates a personal obligation which does not survive the death of the husband, according to Mr. John and Mr. Roy it imposes an obligation in the nature of a debt which can be enforced in law as against the estate of the husband. In order to find a solution to the controversy thus raised before us it would be useful to refer to the evolution of English law on the point since the provisions in the Indian statutes were codified in the light of those in England. Matrimonial Causes Act, 1857, in constituting a court with exclusive jurisdiction then exercised by the ecclesiastical court in England to such a court, made a statutory provision for alimony in favour of a wife on dissolution of

marriage. Section 32 of the Act provided :

The Court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the court secure, to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties;

13. It also provided for making of interim orders for alimony. It should be noted that this earliest statutory provision contemplated an order for secured payment only by way of alimony. This provision, however, was supplemented by section 1 of the Matrimonial Causes Act, 1866, which incorporated an additional provision authorizing the court to make an order for monthly or weekly payment to the wife for her maintenance and support. Referring to section 1 of the Matrimonial Causes Act, 1866, provided :

In every such case it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable : provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid and again to revive the same order wholly or in part, as to the court may seem fit.

Thus, in addition to an order for secured payment by way of alimony the statute introduced for the first time a provision for making an order for payment of maintenance during the joint lives and obviously the latter imposing a personal obligation on the husband binding on him during his natural life.

14. In the background of the law as above than prevailing in England, the Indian Divorce Act, 1869, in section 37 adopted the same scheme when it provided :

The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved or on any decree of judicial separation obtained by the wife and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved or on any decree of judicial separation obtained by the wife order that the husband shall, to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable and for that purpose may cause proper instrument to be executed by the necessary parties.

In every such cause the court may make an order on the husband for payment to the wife of such monthly or weekly sum for her maintenance and support as the court may think reasonable :

Provided that, if the husband afterwards from any cause becomes unable to make any such payments, it shall be lawful for the court to discharge or modify the order, or temporarily suspend the same as to the whole or any part of the money so ordered to be paid and again to revive the same order wholly or in part as to the court seems fit.

15. This section 37 in incorporating provisions parallel to those in the Matrimonial Causes Act, 1857, supplemented by the Matrimonial Causes Act, 1866, made a distinction as between an order for secured payment by way of alimony and an order for maintenance. The Special Marriage Act, 1872, made no independent provision with regard to alimony or maintenance but by section 17 authorised the court to invoke the material provisions of the Indian Divorce Act. Section 40 of the Parsi Marriage and Divorce Act, 1936, made the same provision as in section 37 of the Indian Divorce Act, 1869.

16. In England the law on the point had undergone changes from time to time but the distinction between the two types of payments, namely, (1) secured payment and (2) payment of maintenance appears to have been maintained throughout, thereby indicating that the liability sought to be imposed by an order for payment of maintenance was one of personal character as against the husband. Matrimonial Causes Act, 1907 repealed section 32 of the Matrimonial causes Act, 1857, as supplemented by section 1 of the Matrimonial Causes Act, 1866, but comparable provisions were made by section 1; sub-section (1) provided for an order for secured payment to the wife by way of alimony while subsection (2) provided for monthly or weekly payment to the wife for her maintenance and support in addition to or instead of an order under subsection (1). This provision in its turn was repealed by the Judicature (Consolidation Act, 1925). Section 190 of the latter Act replaced section 1 of the Act of 1907 again making parallel provision; subsection (1) provided for an order for secured payment by way of alimony to the wife and it further provided that the court may for the said purpose direct the parties to execute a proper deed or instrument; subsection (2) provided for an order either in addition to or instead of an order under subsection (1), directing the husband to pay to the wife during their joint lives such monthly or weekly sum for her maintenance and support as the court may think reasonable; subsection (3) provided for interim orders. This provision was amended by section 10 of the Matrimonial Causes Act, 1937 though by such amendment the basic structure was not altered and the amendment is otherwise of no relevance for our present purposes.

17. Section 19 of the Matrimonial Causes Act, 1950, replaced the provision of section 190 of the Act of 1925 by provisions materially similar ; subsection (1) provided for interim orders ; subsection (2) provided for order for order for secured payment by

way of alimony ; and subsection (3) provided for monthly or weekly maintenance during the joint lives in addition to or instead of an order under subsection (2). This section again in its turn was replaced by sections 15 and 16 of the Matrimonial Causes Act, 1965 ; section 15 provided for interim orders and section 16 provided for maintenance and application of property in case of divorce. This provision introduced a new innovation by way of lump sum payment as an alternative and provided as follows :-

16 (1). On granting a decree of divorce or at any time thereafter (whether before or after the decree is made absolute), the court may if it thinks, fit and subject to subsection (3) of this section make one or more of the following orders :-

- a) an order requiring the husband to secure to the wife, to the satisfaction of the court, such lump or annual sum for any term not exceeding her life as the court thinks reasonable having regard to her fortune (if any) his ability and the conduct of the parties;
- b) an order requiring the husband to pay to the wife during their joint lives such monthly or weekly sum for her maintenance as the court thinks reasonable ;
- c) an order requiring the husband to pay to the wife such lump sum as the court thinks reasonable ;

(2) Where the court decides to make an order under paragraph (a) of the foregoing subsection, it may -

- a) direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties, and
- b) If it thinks fit defer the grant of the decree until the instrument has been duly executed.

(3)

18. These provisions were replaced by sections 1 and 2 of the Matrimonial Proceedings and Property Act, 1970, incorporating parallel provisions which again in their turn were replaced by sections 22 and 23 of the Matrimonial Causes Act, 1973. Section 22 of the Matrimonial Causes Act, 1973, provides for maintenance pending the suit. The material part of section 23 provides as follows :-

23(1). On granting a decree of divorce, a decree of nullity of marriage, or a decree of judicial separation or at any time thereafter (whether in the case of a decree of divorce or a nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say :-

- a) An order that either party to the marriage shall make to the other such periodical payment for such term as may be specified in the order.

b) An order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be specified.

c) An order that either party to the marriage shall pay to the other such lump sum or sums as may be specified....

19. Section 30 further provides that where the court decides to make a financial provision order requiring any payment to be secured or a property adjustment order it may direct a proper instrument to be executed by all necessary parties and may further defer the grant of the decree until such instrument has been duly executed.

20. The evolution of the law on the point in England indicates that it started with a provision for an order for secured payment by the husband in favour of the wife by way of alimony but latter the law provided for orders for maintenance and/or lump sum payments as financial arrangement in case of a decree dissolving the marriage. It is only in the context of such distinction contemplated by law as between the two things, namely, (1) an order securing gross sum or annual sum by way of alimony and (2) an order for payment of a monthly or weekly maintenance and in view of the further fact that the statute authorized making of both such order in supplement to each other, that courts in England have held that an order or the latter kind always created a personal obligation which never survived the death of the husband.

21. The decisions relied on by Mr. Tagore can well be explained from that point of view. In the case of (1) *In re : Hedderwick*, 149 L. T. 188 the Court was considering the nature of the liability in respect of arrears of alimony pendente lite under an order of the court. Considering the position in law *Luxmoore J*, in the Chancery Division differing from *Gergeant J*, held that such an order for alimony ceases to be enforceable after the death of the husband and that is created no legal debt. The same principle was reaffirmed in the case of (2) *In re : Woolgar* 1942(1) AER 583 where again the Court held that arrears of alimony due under an order not being an order for secured payment was not enforceable against the estate where the husband died. Strong reliance was no doubt placed by Mr. Tagore on the decision in the case of (3) *Sugden v. Sugden* 1957(1) AER 300 where the court made an order directing the husband depenentto pay the wife until further order or until the children attains the age of 21 years, an amount by way of maintenance for the children and the question being raised whether the liability created by such an order would survive the death of the defendant and would be enforceable against his estate or not, it was held that on true construction of the order the obligation imposed was personal and did not extend beyond the defendant's life time. But here again, the court arrived at such a conclusion in view of the fact that even for children the law provided for secured payments and non-secured payments and the order sought to be enforced not being one made u/s 26(3) of the Matrimonial Causes Act, 1950, was not intended to be a secured provision. These decisions is our

view go to show that when the law provides for both secured payment and unsecured payment, an order for unsecured payment must necessarily mean to create a personal obligation on the defendant which would not survive the defendant's death. This again explains the law enunciated by Halsbury 4th Edition Vol. 13 Article 1213 strongly relied on by Mr. Tagore when it was summarised "Payment of arrears due under a maintenance order cannot be enforced after the death of the party obliged to make payment, whether his estate is solvent or insolvent and since maintenance payment are intended for support of the payee and not to be hoarded, more than one year's arrears cannot be recovered without leave of the Court". This recital should be read in the light of Article 1102 of the same volume. Therein it was made clear that where an order to secure periodical payment is made, the party in favour of whom the order is made has an enforceable claim which is maintainable after the death of the other party against that party's estate, whether or not the effect of the order is to create a charge on property of that other party and the order may be enforced against his or her personal representatives. Reference may be made to the decisions on the point in the cases of *Hide v. Hide* 1948 (1) A.E.R. 362 and *Mosey v. Mosey and Barkar* 1955 (2) A.E.R. 391.

22. It will now be our endeavour to consider what is the true nature of obligation intended to be imposed on the husband by section 37 of the Special Marriage Act, 1954, when there is an order made thereunder. We have indicated hereinbefore that the Special Marriage Act, 1872, which was repealed by the said Act adopted the material provisions regarding secured payment and maintenance of the Indian Divorce Act, 1869, which we have set out hereinbefore. In the said Act, however, independent provision has been made in section 37 which provides as follows : -

37. (1) Any Court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability (the conduct of the parties and other circumstances of the case), it may seem to the court to be just.

(2) If the district court is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life it may, at the instance of the husband vary, modify, or rescind any such order and in such manner as the court may deem just.

23. This section like section 32 of the Matrimonial Causes Act, 1857, and corresponding provisions of later Acts in England provides for an order directing the husband to secure such gross sum or such monthly or periodical amount as the court considers just to be paid to the wife for a term not exceeding her life. It adopts the scheme of secured payment as envisaged by the English statutes to assure a provision for a wife whose marriage has been dissolved for a term not exceeding her life. Had it been the intention of the legislature to impose a personal obligation on the husband limited to his life to provide maintenance to such a wife, the legislature would have said so by adopting a provision similar to those providing for monthly or weekly payment during joint lives as in English statutes. The statutory mandate of securing a gross sum or periodical amounts to the wife for her life is not consistent with the idea that it sought to impose a personal obligation on the husband limited to his life only. According to Mr. Tagore and Mr. Dey if the order does not create any charge on the husband's property, the order must be construed to create an obligation personal to the husband which would never survive his death. It is difficult to accept such a contention. A charge merely secures the payment of a debt so that if the order directing the husband to secure a gross sum or a monthly or a periodical amount by itself does not create any debt which would survive his death any order to secure implementation of such an order by creation of a charge cannot certainly change the character of the liability. On the other hand, the very fact that a liability created by such an order be enforced even after the death of the husband if it is charged on the husband's properties goes clearly to show that the liability contemplated is a debt and not a personal one. When such a liability is not secured it for its enforcement by any security it retains the character of an unsecured debt but still enforceable as such as against the estate of the husband. It may be useful to refer once more to the decision in the case of *Mosey v. Mosey* (supra) where it was pointed out that the order by itself creates an enforceable claim even if no charge is actually created. Referring to sub-sections (2) and (3) of section 37, it was sought to be contended by Mr. Tagore that when the right to have the order varied, modified or rescinded is given to husband and not to his legal representatives, the necessary implication is that the obligation imposed by the order is personal to him and limited to his life. It is not necessary for us in this case to consider whether the term "at the instance of husband" would exclude his legal representatives or not. But even assuming it to be, so that in our view would not justify a construction of sub-section (1) by implication in such a way as would be inconsistent with or hardly justified by the terms thereof. We have indicated hereinbefore section 37 (1) of the said Act in clear terms incorporated that provision of the English law which provided for an order to secure periodical payments in contra-distinction to maintenance orders during the joint lives and such orders to secure periodical payments always create an enforceable claim enforceable against the husband's estate.

24. That apart, the English decisions relied on by Mr. Tagore and Mr. Dey being based on the special nature of the obligation created by the English statutes would not be solid ground for us for accepting the contention raised by the learned advocates in the present case in support thereof. It should be noted that there are authorities to show that in India even a personal decree for maintenance, if it was meant to be for the life of the person to be maintained, would not lapse on the death of the judgment debtor but would be enforceable against his estate. Reference may be made to a Full Bench decision of the Madras High Court in the case of Karpakambal v. Subbayyan, ILR 5 Mad 234. There, a question having been raised as to whether a decree for maintenance passed against a Hindu directing an annual payment to be made by him to the decree holder during her life time can be executed after the death of the judgment debtor, it was held :

The decree can be executed against the sons for arrears which have accrued since their father's death only as representatives of their father and until his assets are exhausted, it being of course understood that, on the father's death the interest he had in his life time in the joint ancestral property lapsed, and would not be available as assets.

25. In this view, we must overrule the points raised by Mr. Tagore and by Mr. Dey that an order u/s 37 of the Act directing the husband to secure monthly payment as in these cases did not create any enforceable claim but merely created a personal obligation which lapsed on the death of the husband.

26. On the conclusion as above, the revisional application in Civil Rule 1529 of 1979 must fail and the order of the executing court must be upheld. The said Rule is, therefore, discharged. There will be no order as to costs.

27. So far as the first appeal is concerned, though Mr. Roy succeeds on the principal point argued before us yet in our view the appeal must fail for the simple reason that if the decree in favour of the plaintiff created an enforceable claim it is to be enforced in execution and no suit would be maintainable for the said purpose, section 47 of the code standing in the way. The defendants have no independent liability in law to pay maintenance to the plaintiff which could be enforced by a suit as against them. Liability, if any, arises only out of the order which requires to be executed. We have set out hereinbefore the claim made by the plaintiff in the suit and the relief's prayed for. In our view, the learned judge in the trial court was wrong in thinking that impleading of defendant No. 1, the Airlines Corporation makes any difference. The said Corporation was made a party only for the purpose of enforcing her own claim under the decree as against the money belonging to her late husband lying in their hands. Her real claim was against the heirs and legal representatives of her late husband for enforcement of her claim as against the estate which devolved upon such heirs and legal representatives on his death. Her claim for a declaration that she is entitled to a charge on the estate of late Capt. Ajit Kumar Mazumdar is clearly misconceived and unsustainable. She was entitled to

such a relief as against her husband when she initially obtained the order for secured payment. It was then open to the court to create a charge on a specific property of the husband but that not having been done, the order does not create any floating charge on the entire estate left by her late husband. That apart, again the question whether the order for payment incorporated in the decree created a charge or not is a question which can be determined only by the executing court.

Therefore, in our view the relief claimed in the suit in their substance relate to enforcement of her rights under the decree, which is a matter for execution and not by an independent suit. Such being the position in law, the suit itself was not maintainable and we must uphold the decree of dismissal as passed by the learned trial judge though on grounds different from those assigned by the learned judge. The appeal, therefore fails and is dismissed. There will be no order as to costs.

Chakravorti, J.

28. I agree.