APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

AKHOY KUMAR BANERJEE 1914

June 8.

v.

CORPORATION OF CALCUTTA.*

Rates and Taxes, arrears of—Consolidated rate—Charge—Calcutta Municipal Act (Beng. III of 1899) ss. 223, 228—Arrear of consolidated rates whether a first charge on the land and buildings in respect of which it has accrued due—Charge and mortgage, distinction between—Transfer of Property Act (IV of 1882) ss. 55, 58, 100—Bengal Tenancy Act (VIII of 1885) s. 171—Constructive notice—Bona fide purchaser for value without notice.

Section 228 of the Calcutta Municipal Act is not controlled by Section 223 thereof, and makes the consolidated rate, as it accrues due from time to time, a first charge on the premises (subject only to arrears of land-revenue).

A mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property.

Narayana v. *Venkataramana* (1), *Tancred* v. *Delagoa Bay Co.* (2), *Burlinson* v. *Hall* (3) referred to.

Such a charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice.

Kishen Lal v. *Ganga Ram* (4) referred to.

The plea of purchaser for value without notice is a single defence, the onus of proving which is on the defendant.

Attorney-General v. *Biphosphated Guano Co.* (5) *Wilkes* v. *Spooner* (6) followed.

* Appeal from Appellate Decree, No. 2322 of 1909, against the decree of Mahim Chandra Sircar, Subordinate Judge, 24-Perganas, dated July 1, 1909, modifying the decree of Anil Chandra Datta, Munsif of Sealdah, dated Feb. 27, 1909.

(1) (1900) I. L. R. 25 Mad. 220, 237.
(2) (1889) 23 Q. B. D. 239, 242.
(3) (1884) 12 Q. B. D. 347, 350.
(4) (1890) I. L. R. 13 All. 28, 44.
(5) (1878) 11 Ch. D. 327, 337.
(6) [1911] 2 K. B. 473, 486.

1914

AKHOY KUMAR BANERJEE v. CORPORATION OF CALCUTTA.

Where property with such a charge is foreclosed by the mortgagee, constructive notice cannot be imputed to him to the same extent as to a purchaser at a private sale.

Radha Madhab v. *Kalpataru* (1), *Brahma* v. *Bholi Das* (2) referred to.

Still he should ascertain the true state of affairs before he becomes full owner thereof.

Although a purchaser without notice from a person who had notice, is protected [*Harrison* v. *Forth* (3)] here, purchasers from such a mortgagee cannot claim the protection as, before they acquire title, they might by enquiry from the municipal authorities ascertain the precise period for which the rates were in arrears.

SECOND APPEAL by Akhoy Kumar Banerjee and others, the defendants Nos. 2 to 5.

The facts are shortly these. One Srimatee Soudamini Dasi formerly owned the property in suit being premises No. 49 Tangra Road in Ward No. 19 within the limits of the Calcutta Municipality. On the 13th January 1903, one Hari Charan Ojha, the defendant No. 1 in this suit, purchased the said premises at a public auction in execution of a money decree, subject to a mortgage in favour of one Bankubihari Ghose, who obtained a foreclosure decree in 1914. After becoming full owner of the property on the 19th February 1907, he transferred it to the four persons who are the remaining defendants in this suit. On the 20th August 1908, the Calcutta Municipal Corporation instituted a suit in the Second Court of the Munsif at Sealdah against all the five defendants to enforce a charge on the property in their hands in respect of Rs. 92-7-3 being the arrears of consolidated rates which had accrued due during three years, *viz.*, from the 1st April 1903 to the 31st March 1906. On the 27th February 1909, the learned Munsif dismissed the suit against the defendant No. 1, but declared the

(1) (1912) 17 C. L. J. 209, 214. (2) (1913) 19 C. L. J. 352.
(3) (1695) Finch's Prec. Ch. 51.

plaintiffs' claim for rates to be a first charge upon the said premises and decreed the suit against defendants Nos. 2 to 5 who on appeal to the Subordinate Judge of Alipore merely succeeded in getting the personal liability set aside. Hence this second appeal by the said defendants to the High Court, on two grounds: *viz.*, (*i*) whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due; and (*ii*) if there is such a charge, whether it can be enforced against the property in the hands of the present appellants.

Babu Nagendra Nath Ghose, for the appellants. This is a test case by the Calcutta Corporation. The suit is based on s. 100 of the Transfer of Property Act, for a declaration that some quarters' arrears of rates for the premises in suit are a charge on the property, and for enforcement thereof by sale. The defendants are subsequent purchasers and were not the owner or occupier when the rates had fallen due. These defendants had paid arrears of rates for one year next before their purchase, for which he was liable under s. 223. (Refers to ss. 171 and 215 of the Calcutta Municipal Act). Section 215 deals with the distraint of moveable property of defaulter. Section 227 is the only section which enables a suit being instituted and that against the *defaulter* only. A charge confers no interest in land. An arrear of rates may be a *first* charge and thus have priority over other charges of earlier date even, but it is not a mortgage or a first mortgage. See s. 58 of the Transfer of Property Act. Section 227 is to be read along with s. 223 which shows that liability for only one year before purchase can be enforced by suit under s. 227, and s. 228 should be read with s. 227. If a charge under s. 228 attaches to every moveable of a defaulter, irrespective of notice, then

1914

AKHOY KUMAR BANERJEE v. CORPORATION OF CALCUTTA.

a purchaser of books, etc., and provisions would be liable for the rates of a defaulting shopkeeper. A charge is not a mortgage and it cannot bind purchasers unless it is proved that they purchased with notice, otherwise the Calcutta Municipality can acquire an interest in almost all the property in Calcutta by allowing it to fall into arrears.

Mr. S. P. Sinha (with him *Babu Debendra Chandra Mullick*), for the respondent. I submit that the decision of the question in issue depends on the interpretation of s. 228 of the Calcutta Municipal Act. There is the liablity of the person, original or inherited, and the liability of the property. The provision of distraint is only an additional remedy in favour of the Municipality. They are not obliged to distrain. They may bring a suit, arrest, attach property elsewhere, etc. In distraint they are only given an expeditious procedure in their favour. But that does not deprive them of the right that any creditor has to recover his dues. Additional and exceptional remedies are provided *re* owners' and occupiers' shares.

[MOOKERJEE J. The other side does not question all this. He says, how do you know I am a defaulter, and then his second point is that s. 228 has to be read along with s. 223.]

But s. 228 is not a corollary to s. 227.

[MOOKERJEE J. Is *defaulter* defined anywhere in the act?]

No. But *defaulter* means any one who is liable, but has failed to pay.

[MOOKERJEE J. It is quite conceivable that more than one person may be a defaulter with respect to the same sum].

The purchaser inherits one year's liability of defaulting owner. Consolidated *rates* are levied

because the property is benefited, while licenses, etc., are personal. The liability of the property is unrestricted (irrespective of the owner), whereas the liability of the person is limited, therefore, s. 228 provides that the property should be the security. Whoever may be the man during whose ownership the arrears fell due, though his person and moveables are liable only for one year's default, still so far as the immoveables are concerned the property is liable without any limitation for one year as is the case for personal liability of moveables. That is the scheme of the Act. Chapter XVIII deals with the special procedure for recovery of rates, etc. A charge is created by contract or by Statute (here, under s. 228) leaving the enforcement of the remedy (under the charge) to the ordinary law. First you have to determine who are personally liable, and then decide whether you will enforce that liability by distraint or by suit

[MOOKERJEE J. But is a charge enforceable against a *bona fide* purchaser without notice?]

This is a matter for the defence and not for the plaintiff to allege. Whoever takes the land does so subject to the charge, unless he proves that he purchased *without notice*. This does not create a title but raises a defence. This man paid one year's arrears, and therefore knew that the rates were unpaid.

[*Babu Nagendra Nath Ghose*. I am an auction-purchaser, or purchaser from him.]

The question of *bona fide* purchaser for value does not arise at all as it was not pleaded. My friend's reading of s. 228 would be this "shall be a first charge (only subject to land revenue) in the hands of the purchaser *for one year*." *Cf.* s. 65 of the Bengal Tenancy Act for first charge of rent.

1914

AKHOY KUMAR BANERJEE v. CORPORATION OF CALCUTTA.

Babu Nagendra Nath Ghose, in reply. It is argued that the charge attaches irrevocably to the property because the property is benefited. I am unable to conceive how the services of the Municipality, *e.g.*, gas, water, police, etc., stick to the land. It benefits the then owner, but not his successor; and s. 227 provides the only remedy by suit for the enforcement of charges.

[MOOKERJEE J. If that is so, would it not have come after s. 228?]

It is a right arising under Statute and can therefore be enforced only by the method provided in the same statute. It would be absurd to say that the security to the Municipality would vanish, if the charge be not treated as a mortgage. The onus is on the Municipality to show that I am bound by this charge. A new issue ought to be framed and sent down for trial as to my being a *bona fide* purchaser for value without notice.

Cur. adv. vult.

MOOKERJEE J. This is an appeal by four of the defendants in a suit to enforce payment of money charged upon immoveable property. The land and buildings in suit lie within the jurisdiction of the Municipal Corporation of Calcutta and were originally owned by Saudamini Dasi. On the 11th September 1897, she executed a mortgage of this property by way of conditional sale. On the 13th January 1903, her right, title and interest were sold in execution of a decree for money against her and were purchased by Hari Charan Ojha, the first defendant to this suit. In 1904, the mortgagee, Bankubihari Ghose, sued to enforce his security, obtained the usual foreclosure decree, and ultimately, when the decree was made absolute, became full owner of the property. On the

19th February 1907, Bankubihari Ghose transferred the property to the four persons who are defendants other than the first defendant to this suit. On the 20th August 1908, the Corporation of Calcutta commenced this action against the five defendants to enforce a charge on the property in their hands in respect of arrears of consolidated rates. These arrears had accrued due during the three years from the 1st April 1903 to the 31st March 1906.

The first defendant resisted the claim on the ground that she was not the owner in possession of the property and that no personal decree could be made against her. The remaining four defendants contended that there was no statutory charge enforceable against the property in their hands, and that as the arrears had accrued due more than one year before they became owner of the property, no personal decree could be made against them. The Courts below have dismissed the suit against the first defendant, as also the claim for a personal decree against the other defendants. But they have made a decree which entitles the Corporation to realize the arrears by sale of the land and buildings, if the decretal amount is not paid within thirty days of the decree. In the present appeal, which has been preferred by the defendants, other than the first, two points require consideration, namely, *first*, whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due; and, *secondly*, if there is such a charge, whether it can be enforced against the property in the hands of the present appellants.

The answer to the first question, namely, whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due, must depend upon the true construction of the

1914

AKHOY KUMAR BANERJEE v. CORPORATION OF CALCUTTA.

MOOKERJEE J.

provisions of the Calcutta Municipal Act, 1899. For this purpose, reference may briefly be made to the relevant sections. The fourth part of the Calcutta Municipal Act deals with the subject of taxation, and comprises Chapters XII to XIX which include sections 147 to 235. Chapter XII treats of rates. Section 147 specifies four different classes of rates, which the Corporation is authorised to impose upon buildings and lands within its jurisdiction. Section 149 lays down that these rates are to be levied as one consolidated rate. Section 171 makes the consolidated rate payable in equal halves by the owner and the occupier. Sections 178 and 186 specify the circumstances under which the entire consolidated rate may be levied from the owner, or from the occupier. We next come to Chapter XVIII, which defines the special procedure for recovery of the consolidated rate. Section 212 lays down that the provisions of the Chapter shall be deemed to be in addition to and not in derogation of any powers conferred in other Chapters for the collection or recovery of the consolidated rate. Section 215 provides for one mode of realization of the rate, namely, by distress. Sub-section 3 of section 222 places a restriction upon the recovery by distress against the occupier of an arrear due from the owner; no arrear of the consolidated rate can be recovered by distress from any occupier or subtenant, if it has remained due for more than one year; or if it is due on account of any period, for which such occupier or subtenant was not in occupation of the premises on which the rate is assessed. Section 223 defines the extent of the liability of the purchaser of any building or land for his vendor's share of arrears of consolidated rate; the purchaser is liable for the amount due on account of the owner's share for any period not exceeding one year prior to his

purchase. Section 227 authorises a suit for recovery of arrears of consolidated rate in substitution for or in addition to the summary remedy by distress and sale. Section 228, which makes the consolidated rate a first charge on the premises, is in these terms. "The consolidated rate, due in respect of any building or land, shall, subject to the prior payment of the land revenue, if any, due to the Government thereupon, be a first charge upon the said building or land and upon the moveable property, if any, found within or upon such building or land and belonging to the person liable for such rate." The language of this section is perfectly plain, and the intention of the Legislature to make the consolidated rate a first charge upon the premises is obvious. But an earnest endeavour has been made, on behalf of the appellants, to restrict its scope and operation by a reference to Section 223. It has been argued that as the purchaser of the premises is liable for arrears of consolidated rate, which have accrued due before title vested in him, only to the extent of arrears for the year immediately prior to his purchase, section 228 should be so interpreted as to restrict the charge on the property in his hands, only to arrears for which he is liable. This contention is clearly fallacious, as the two sections are concerned with two entirely distinct aspects of the matter. Section 223 deals with the question of the personal liability (liability *in personam*) of the purchaser of the premises for arrears unsatisfied when the title vested in him. Section 228 deals with the question of the liability of the premises (liability *in rem*) for the rates due thereon. Section 228 is perfectly general in its terms and makes the consolidated rate, as it accrues due from time time, a first charge on the property (subject to arrears of land revenue). The objects of the two sections are radically distinct and

1914

AKHOY KUMAR BANERJEE v. CORPORATION OF CALCUTTA.

MOOKERJEE J.

section 228 cannot be controlled by Section 223. We may add that no attempt has been made here to support the view unsuccessfully put forward in the Court below, that the expression "belonging to the person liable for such rate" in section 228 qualifies, not only the expression "moveable property" but also the expression "building or land." We hold accordingly that section 228 makes the consolidated rate, as it accrues due from time to time, a first charge on the premises.

The answer to the second question, namely, whether such charge can be enforced against the property in the hands of the appellants, must depend upon the nature and incidents of the charge. A charge is defined in Section 100 of the Transfer of Property Act in the following terms :

"Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property". The distinction between a mortgage and a charge, thus indicated in section 100, is of a fundamental character, and was explained by this Court in the case of *Royzuddi* v. *Kali Nath* (1) *Sub-nom Royzuddi* v. *Kritarathanath* (2). There is this well marked distinction between the two, that a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property : *Narayana* v. *Venkataramana* (3), *Tancred* v. *Delagoa Bay Co.* (4), following *Burlinson* v. *Hall* (5) where Day J. observed as follows: "A charge differs altogether from a mortgage : by a charge, the title is not transferred, but the person creating the charge

(1) (1906) I. L. R. 33 Calc. 985.
(2) (1906) 4 C. L. J. 219.
(3) (1900) I. L. R. 25 Mad. 220, 237.
(4) (1889) 23 Q. B. D. 239, 242.
(5) (1884) 12 Q. B. D. 347, 350.

merely says that out of a particular fund, he will discharge a particular debt."

To the same effect is the decision in *Gobinda Chandra* v. *Dwarka Nath* (1): "a mortgage is a transfer of an interest in specific immoveable property; a charge only secures payment of money out of that property." When liability has been imposed upon property by act of parties, a question of some nicety may arise, whether a mere charge has been created or whether the property itself has been hypothecated. The point is of great practical importance, because, whether the one view is taken or the other, has an important bearing upon the question, whether the property can be followed in the hands of a *bona fide* purchaser for value without notice: *Maina* v. *Bachchi* (2). No such question, however, arises, where, as here, only a charge has been created by express words of the statute, and not a mortgage as in cases under Section 13 of the Patni Regulation or Section 171 of the Bengal Tenancy Act. What, then, is the position? The consolidated rate, as it accrued due, became a first charge upon the property, but no interest in such property was transferred by operation of law to the Corporation. The owner continued to be the full owner of the property; the entire interest therein remained vested in him; when he transferred his right, title and interest in the property, the transferee acquired the whole interest therein. The owner was not in the position of a mortgagor, who has in him nothing beyond the equity of redemption and can consequently convey to the transferee no larger interest in the property. From this principle, the conclusion is inevitable that the charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice; in other words, while

(1) (1908) I.L.R. 35 Calc. 837, 843. (2) (1906) 3 All. L. J. R. 551.

1914

AKHOY KUMAR BANERJEE v. CORPORATION OF CALCUTTA.

MOOKERJEE J.

a mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, a charge can be enforced against a transferee, only if he has taken with notice of the charge: *Kishan Lal* v. *Ganga Ram* (1), *Royzuddi* v. *Kali Nath* (2). The question, consequently, arises whether the appellants are purchasers for value without notice. Here, it is worthy of note that they did not, in their written statement, plead that they were purchasers for value without notice. If they wished to avail themselves of this defence, they should have pleaded it. It was ruled in *Attorney-General* v. *Biphosphate Guano Company*(3), and *Wilkes* v. *Spooner*(4), that it is not a case of, first a defence that the defendant is a purchaser for value, and then a reply that he had notice, but of a single defence that the defendant is a purchaser for value without notice, the onus of proving which is on the defendant. But even if we assume that the defence, though not expressly taken in their written statement, is available to the defendants, they are in a position of difficulty from which there is no escape. The appellants are private purchasers of the property, and if they had enquired at the time of their purchase, they would have discovered that the rates were in arrears; as a matter of fact, they would be personally liable under Section 223 for the arrears of the year immediately prior to the date of their purchase, and they admit that they have satisfied such arrears, though they do not disclose whether by enquiry they had ascertained the existence of the arrears before they made the purchase. But let us assume that they had notice of the arrears at the time of their purchase; still, as a purchaser with notice may shelter himself under the title of the person from whom he purchased,

(1) (1890) I. L. R. 13 All. 28, 44.
(2) (1906) I. L. R. 33 Calc. 985, 993.
(3) (1878) 11 Ch. D. 327, 337.
(4) [1911] 2 K. B. 473, 486.

if the latter could successfully raise this defence, we must examine the position of the vendor of the appellants: *Sweet* v. *Southcote* (1), *M'Queen* v. *Farquhar* (2), *Barrow's case* (3), *Wilkes* v. *Spooner* (4). Now, as regards the position of Banku Behari Ghose, the mortgagee who acquired title by foreclosure, he was no doubt not in the position of a private purchaser, and if he had enquired of his mortgagor or the subsequent purchaser of the equity of redemption, neither of them would have been bound to give him any information, such as a vendor is under an obligation to furnish under section 55 of the Transfer of Property Act, to an intending purchaser of his property. The mortgagee, therefore, was in reality a person who acquired title under an involuntary alienation by his mortgagor; to a person in this position, constructive notice cannot be imputed to the same extent as to a purchaser at a private sale: *Radha Madhab* v. *Kalpataru* (5), *Magu Brahma* v. *Bholi Das* (6). But, by enquiry from the Municipal authorities, he could still have ascertained, whether any arrears of consolidated rate were due. When he took the mortgage, he knew full well that if the rate was not duly paid, the arrears would become a first charge upon the property and would gain priority over his debt; and in our opinion, before he became full owner by foreclosure, he should have ascertained the true state of affairs. He is consequently in the same position as if he had made such enquiry; and the purchasers from him are in no higher position, because, although a purchaser without notice from a person who had notice is protected [*Harrison* v. *Forth* (7)] the appellants cannot claim such protection, as

(1) (1786) 2 Brown C. C. 66.
(2) (1805) 11 Ves. 467.
(3) (1879) 14 Ch. D. 432.
(4) [1911] 2 K. B. 473.
(5) (1912) 17 C. L. J. 209, 214.
(6) (1913) 19 C. L. J. 352.
(7) (1695) Finch's Prec. Ch. 51.

1914

AKHOY KUMAR BANERJEE v. CORPORATION OF CALCUTTA.

MOOKERJEE J.

before they acquired title, they might have by enquiry from the Municipal authorities ascertained the precise period for which the rates were in arrears. We hold accordingly that the appellants are not entitled to protection as purchasers for value without notice.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT J. I agree.

G. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before N. R. Chatterjea and Beachcroft JJ.

1914

June 10.

SAHADORA MUDIALI

v.

NABIN CHAND BORAL.*

Homestead Land—Suit for rent—Jurisdiction—Protected under-tenure—Revenue Sale Act (XI of 1859) s. 37, cl. (4)—Garden—Incumbrances annulment of, on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art 8—Second appeal—Civil Procedure Code (Act V of 1908) s. 102.

Section 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than house rent although the value thereof does not exceed Rs. 500 : *vide* Art. 8 of Schedule II of the Provincial Small Cause Courts Act.

Soundaram Ayyar v. *Sennia Naickan*(1) distinguished.

*Appeal from appellate decree, No. 1125 of 1912, against the decree of H. P. Duval, Additional District Judge of 24-Parganas, dated Feb. 19, 1912, reversing the decree of Surendra Krishna Ghose, Munsif of Sealdah, dated April 26, 1911.

(1) (1900) I. L. R. 23 Mad. 547.