

## APPEAL FROM ORIGINAL CIVIL.

*Before Costello and Lord-Williams JJ.*

CORPORATION OF CALCUTTA.

v.

ARUNCHANDRA SINGHA.\*

1934

May 28, 29;  
June 5.

*Mortgage—Statutory charge—Holder of several statutory charges, if must sue on all charges in same suit—Construction of Statutes—Preamble, when to be considered—Transfer of Property Act, if exhaustive—Rules of English law, when may be applied—Transfer of Property Act (IV of 1882, as amended by Act XXI of 1929), s. 67A.—Calcutta Municipal Act (Beng. III of 1923), s. 205.*

Section 67A of the Transfer of Property Act does not apply to securities created by operation of law and, in particular, to statutory charges created under the provisions of section 205 of the Calcutta Municipal Act.

*Corporation of Calcutta v. Arunchandra Singha* (1) reversed.

Section 67A of the Transfer of Property Act restricts the rights of mortgagees and, therefore, must be construed strictly.

Where the enacting part of a statute is ambiguous, the preamble may be referred to, to explain and elucidate it.

*Raj Mal v. Harnam Singh* (2) and *Powell v. Kempton Park Race Course Company* (3) relied on.

The Transfer of Property Act does not profess to be a complete code and in cases not covered by the Act the court is entitled to apply rules of English law, which are not inconsistent with the Act.

*Satyabadi Behara v. Harabati* (4) and *Mayashankar v. Burjorji* (5).

### APPEAL by the plaintiff.

The first defendant in this case, Kumar Arunchandra Singha, is the present *shebâit* of the family deity, Sree Sree Gopaljee, and, as such, is the manager of various house properties belonging to the deity. The predecessor of this *shebâit* had granted a lease of the property, in suit, for seventy years and, under it,

\*Appeals from Original Decrees, Nos. 102 and 103 of 1933, in Original Suits, Nos. 746 of 1931 and 754 of 1931, respectively.

(1) (1933) I. L. R. 60 Calc. 1470.

(3) [1899] A. C. 143.

(2) (1927) I. L. R. 9 Lah. 260.

(4) (1907) I. L. R. 34 Calc. 223.

(5) (1925) 27 Bom. L. R. 1449.

1934  
 Corporation of  
 Calcutta  
 v.  
 Arunchandra  
 Singha.

the lessee was liable to pay the consolidated rates. The lessee had mortgaged the premises to the third defendant.

The Corporation's claim was for consolidated rates due from the fourth quarter 1928-29 to the fourth quarter 1930-31. The defence of the *shêbâit* was that the suit was bad under section 67A of the Transfer of Property Act and that the Corporation having accepted rates from the lessee ever since 1917 could not now recover it from the *shêbâit*.

Mr. Justice McNair dismissed part of the plaintiff's claim on the ground of the suit not having been properly framed under section 67A of the Transfer of Property Act (1). The plaintiff appealed against this judgment.

*Roy*, Advocate-General (with him *Page* and *N. C. Chatterjee*) for the appellant. In any event the suit should not have been dismissed.

Section 67A of the Transfer of Property Act relates to the case of a mortgage and cannot apply to a statutory charge.

[COSTELLO J. This section was intended to apply to the case of more than one mortgage on the same property.]

Exactly. Section 61 of the Act indicates it.

There must be a written document in order that section 67A may be applicable. The words "in the absence of a contract to the contrary" presupposes a right in the mortgagee to contract out of it.

The Corporation is not a mortgagee and the person liable for taxes cannot be said to have executed a mortgage. Also, there is no pre-existing debt payable on a future date.

Section 100 of the Transfer of Property Act cannot make section 67A applicable to a charge created under statute. Section 67A can only be

applicable when a charge is created by "act of parties." Section 100 talks of "so far as may be" and therefore cannot extend to statutory charges.

*S. N. Banerjee* (with him *Sudhis Ray*) for the respondent *Arunchandra Singha*. The suit is one for sale under Order XXXIV, rule 4.

If section 100 is not construed to mean that section 67A applies to a case like this, there would be no way in which the Corporation could enforce the statutory charge.

The new section, *viz.*, section 67A, has re-introduced the principle of consolidation, so far as the mortgagee is concerned, so that there cannot be any harassment of the mortgagor and no running up of costs.

This suit is clearly on the basis that section 100 makes section 67 applicable to such cases; *a fortiori* section 67A must also be applicable. *Vide* Mulla's Transfer of Property Act, page 365.

[*Roy*. In case of several houses within the municipal area, all belonging to the same persons, there would be difficulty about jurisdiction.]

In view of consolidation, the causes of action merge and the suit will lie in any court in which any one of the properties is situate.

*Page*, in reply. Section 67A is applicable to mortgages on the same property. As the section restricts the rights of the mortgagee, it ought not to be extended beyond what is necessary to give it a reasonable application. Maxwell's Interpretation of Statutes, 7th Edition, page 245.

The original section 61 took away the right of consolidation, which has reference only to mortgages on different properties. See Coote on Mortgages, 8th Edition, Vol. II, p. 881 and Ghose on Mortgage, 5th Edition, Vol. I, p. 29. The new section 61 applies to mortgages both on the same property and on different properties. *Subramania v. Balasubramania* (1). Therefore, section 67A should

1934  
Corporation of  
Calcutta  
v.  
*Arunchandra  
Singha*.

1934

Corporation of  
Calcutta  
v.  
Arunchandra  
Singha.

not be construed to cut down the rights of the mortgagor, as enunciated in section 61. Section 67A is designed to avoid the sale of the same property repeatedly under successive mortgage decrees, for then the equity of redemption loses in value. Both sections 61 and 67A are meant to protect the mortgagor.

There is nothing in section 67A to compel one suit and not simultaneous suits for charges on different properties. For otherwise, there will be conflict of jurisdictions and the charge-holder will have to give up one or more charges. Marginal notes of a section cannot be referred to in construing the section, for, in India, there is no evidence that the marginal notes form any part of the Act itself. *Balraj Kunwar v. Jagatpal Singh* (1).

The section cannot include equitable mortgages or charges.

Unlike a simple mortgage, in a statutory charge the debt comes first and the charge attaches later, no part of the debt can be said to become due.

*Sudhis Ray* (in appeal No. 103 of 1933) for the respondent. The mortgagor cannot compel the mortgagee to consolidate except that this new section gives him that power.

In section 67A, "suit" must mean a "competent suit." The section may not be applicable to the charge on moveables, which the Corporation has by virtue of section 205 of the Calcutta Municipal Act, but the Corporation is not bound to proceed against the moveables in the same suit.

The charge of the Corporation is a charge under section 100 of the Transfer of Property Act and therefore section 67A must apply to it. *Akhoy Kumar Banerjee v. Corporation of Calcutta* (2).

*Cur. adv. vult.*

(1) (1904) I. L. R. 26 All. 393 ;  
L. R. 31 I. A. 132.

(2) (1914) I. L. R. 42 Calc. 625, 627-

LORT-WILLIAMS J. In this suit, the Corporation of Calcutta claimed Rs. 134-4-9, on account of consolidated rates, payable in respect of premises No. 2, Pyari Das Lane, Calcutta, which are part of a *debattar* property, of which the first defendant is the *shebâit*, the second defendant a lessee, and the third defendant a mortgagee of the second defendant.

The defence of the first defendant, who alone contested the suit, was that the Corporation's claim arose by reason of a statutory charge, created under the provisions of section 205 of the Calcutta Municipal Act, that it had similar charges over other properties belonging to the same defendant, for the enforcement of which it had brought five other suits, four of which had been decreed by consent, and that by reason of the provisions of section 67A of the Transfer of Property Act, the Corporation must enforce all such charges in one suit.

Section 205, Calcutta Municipal Act, 1923, provides :—

The consolidated rate due from any person in respect of any land or building shall, subject to the prior payment of the land revenue (if any) due to the Government thereupon, be a first charge upon the said land or building and upon the moveable property (if any) found within or upon such land or building and belonging to the said person.

Section 67A, Transfer of Property Act provides :—

A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has the right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

Section 100, Transfer of Property Act provides :—

Where immovable 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; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

The learned Judge (McNair J.) decided in favour of the defendants, except with regard to that part of

1934  
 Corporation of  
 Calcutta  
 v.  
 Arunchandru  
 Singha.

1934

*Corporation of  
Calcutta*

v.

*Arunchandra  
Singha.**Lord-Williams J.*

the claim which referred to rates which became due prior to the 1st April, 1930, when section 67A came into force (1). As regards the rest of the claim, he held that the suit was incompetent and dismissed it. The Corporation has appealed against this decision.

In the first place, the Corporation draws attention to the serious inconvenience which would or might arise if the decision were correct. The Corporation before making any claim for rates, would have to make sure in every case whether the defendant or defendants had any other properties within the municipal area, which were subject to similar charges, and if they had, would have to ascertain further whether they were within the same jurisdiction, because the municipal area lies within the jurisdiction of more than one court. The statutory charge applies to both moveables and immoveables, and to both owners of moveables and immoveables and occupiers and sub-tenants and purchasers (sections 199, 200, 205 of the Calcutta Municipal Act). The inclusion of such various and over-lapping rights and obligations in one suit would or might lead both to confusion and hardship.

Nevertheless, these considerations would have little weight, if the words of the statute and the intention of the legislature were clear and unambiguous. The court would be obliged to give effect to them in spite of the consequences. Section 67A of the Transfer of Property Act is one which restricts the rights of mortgagees and therefore must be construed strictly. (Maxwell's Interpretation of Statutes, 7th Edition, 245.) The section seems to have been thrust into the Act without due consideration of its effect upon other sections, for example section 100. Presumably it was intended as a benefit to mortgagors. This may be so, when there is more than one mortgage on the same property and they are liable to foreclosure. But the section has been drawn wide enough to include mortgages on

(1) (1933) I. L. R. 60 Calc. 1470.

different properties which are liable only to sale, and it is difficult to appreciate how it can benefit a mortgagee to have to meet demands in respect of all such obligations at one and the same time.

Section 100, Transfer of Property Act purports to deal primarily with the incidence of the security, and not with the method of enforcing it, and declares that the provisions thereinbefore contained which apply to simple mortgages, shall apply to charges only "so far as may be." That all the provisions thereinbefore contained do not apply to charges, and that section 100 was not intended to apply to some statutory charges was decided in *Fotick Chunder Dey Sircar v. Foley* (1).

It is not easy to understand why charges created by operation of law have been included within the provisions of section 100. But for the fact that there are some other sections in the Act which refer to such charges, one would have thought that they had been included by inadvertence, because the Transfer of Property Act, 1882, is "an act to amend the law relating to the transfer of property by act of parties." This is expressly stated also in the preamble, and where the enacting part of a statute is ambiguous, the preamble can be referred to, to explain and elucidate it. *Raj Mal v. Harnam Singh* (2) citing *Doe v. Brandling* (3), *Fellowes v. Clay* (4), *Sussex Peerage Case* (5). In *Powell v. Kempton Park Race Course Company* (6), Lord Halsbury said:—

Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.

Careful examination of the terms of section 67A makes clear, in my opinion, that it was not intended to apply to securities created by operation of law,

(1) (1887) I. L. R. 15 Calc. 492.

(2) (1927) I. L. R. 9 Lah. 260.

(3) (1828) 7 B. & C. 643 ;  
108 E. R. 863.

(4) (1843) 4 Q. B. 313 ;

114 E. R. 917.

(5) (1844) 11 Cl. & Fin. 85 ;  
8 E. R. 1034.

(6) [1899] A. C. 143, 157.

1934  
 Corporation of  
 Calcutta  
 v.  
 Arunchandra  
 Singha.  
 Lort-Williams J.

such as statutory charges, but only to consensual securities which are created by act of parties. Thus, it applies to mortgages "executed by the same mortgagor", and provides that certain obligations shall arise "in the absence of a contract to the contrary." Both terms are inappropriate to a statutory charge. And even if it were arguable that the first refers only to mortgages, and may be ignored because section 100 applies the other provisions of the act to charges only "so far as may be", yet the power of contracting out is clearly an essential part of the section, and could not be given effect to, in a statutory charge, unless the particular statute so provided, which is not so in the present case.

Moreover, the language of the section is inappropriate in other respects to a statutory charge such as that created by section 205 of the Calcutta Municipal Act. This comes into being for the first time when the rates become due, whereas section 67 A clearly contemplates a security which is already in existence at the time when the "mortgage money has become due."

It is true that the logical result of this construction of section 67A is that section 67 also, which contains the same words "in the absence of a contract to the contrary," does not apply to securities created by operation of law, and thus the owners of such securities cannot avail themselves of the benefit of the provisions therein contained. But the Act was not intended to be exhaustive, and does not profess to be a complete code [*Satyabadi Behara v. Harabati* (1)] and does not deal with the transfer of moveables, or charges upon moveables, such as are referred to in section 205, Calcutta Municipal Act. In any case, not covered by the Act, the Court is entitled to apply rules of English law which are not inconsistent with the Act, *Mayashankar v. Burjorji* (2), and the holder of a statutory charge is entitled to a decree for sale.

(1) (1907) I. L. R. 34 Calc. 223, 228. (2) (1925) 27 Bom. L. R. 1449, 1451.



For all these reasons, I entertain no doubt that section 67A does not apply to statutory charges created under the provisions of section 205 of the Calcutta Municipal Act.

The result is that the decree must be modified. There will be a decree instead for Rs. 134-4-9 against all the defendants with costs, a declaration that the Corporation has a first charge on the premises No. 2, Pyari Das Lane, Calcutta, for this sum with interest at 6 per cent., and a decree under Order XXXIV, rule 4 of the Civil Procedure Code in Form No. 5A in Appendix D to the 1st schedule thereto, as amended by Act XXI of 1929, and this appeal is allowed with costs.

COSTELLO J. I agree.

*Appeal from Original Decree No. 103 of 1933.*

LORT-WILLIAMS J. For the reasons given in Appeal No. 102/33, the decree in this suit also must be modified. There will be a decree instead for Rs. 355-5-9 against all the defendants with costs, a declaration that the Corporation has a first charge on the premises No. 92, Upper Chitpur Road, Calcutta, for this sum with interest at 6 per cent., and a decree under Order XXXIV, rule 4 of the Civil Procedure Code in Form No. 5A in Appendix D to the First Schedule thereto, as amended by Act XXI of 1929, and this appeal is allowed with costs.

COSTELLO J. I agree.

*Appeals allowed.*

Attorney for appellants: *T. C. Mitra.*

Attorney for respondent: *J. K. Sarkar.*

S. M.

1934

*Corporation of  
Calcutta  
v.  
Arunchandra  
Singha.*

*Lort-Williams J.*