

*Before Mr. Justice Richards.*  
 MAINA (PLAINTIFF) v. BACHCHI AND OTHERS  
 (DEFENDANTS).\*

1906  
 May 10.

*Act No. IV of 1882 (Transfer of Property Act), sections 39, 100—Maintenance—Charge—Decree on compromise creating charge—Bond fide transferees for value without notice.*

B. instituted a suit to recover certain property from M., who was entitled to maintenance. The suit resulted in a decree incorporating a compromise. M. sued B. and certain transferees for value without notice to recover arrears of maintenance by the sale of certain property charged by the above decree with the payment of the maintenance.

*Held (a)* that section 39 of the Transfer of Property Act had no application; *(b)* that, it being clear upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of section 100 of the Transfer of Property Act, the charge could be enforced against *bond fide* transferees for value without notice. *Harjas Rai v. Naurang* (1) distinguished.

THE following are the facts:—

The plaintiff appellant, Musammat Maina, sued Musammat Bachchi and certain assignees from Musammat Bachchi for arrears of maintenance and for a declaration that certain property was liable for the recovery of the maintenance with a prayer that the property might be sold, the suit being based on a compromise incorporated in a decree. The defendants, other than Musammat Bachchi, were donees from Musammat Bachchi, transferees for value from Musammat Bachchi and transferees for value from the donees of Musammat Bachchi. The Court of first instance (Munsif of Basti) decreed the claim. The lower appellate Court (District Judge of Gorakhpur) reversed the decree.

Munshi Gobind Prasad, for the appellant.

Pandit Baldeo Ram Dave, Munshi Iswar Saran, and Munshi Haribans Sahai, for the respondents.

RICHARDS, J.—The facts of this case, so far as they are necessary for the decision of this appeal are shortly as follows:—

---

\* Second Appeal No. 705 of 1904, from a decree of T. A. H. Way, Esq., District Judge, Gorakhpur, dated the 3rd May, 1904, reversing a decree of Babu Daya Nath, Munsif of Basti, dated the 20th January, 1904.

1906

MAYNA  
v.  
BACHCHI.

One Debi Din died leaving him surviving a daughter, Musammat Bachchi, and Musammat Maina, the widow of a son of Debi Din, who had predeceased him.

The widow, Musammat Maina, was in possession of certain immovable property belonging to the deceased Debi Din and a suit was instituted by Musammat Bachchi against her to recover possession. Musammat Maina was entitled to maintenance and the suit resulted in a decree incorporating a deed of compromise, dated the 16th January, 1897. By this decree it is provided that Musammat Bachchi should have possession of the immovable property which she sought to recover by her suit and then there is the following provision in the words of the deed of compromise:—"The plaintiff (Musammat Bachchi) and her representatives should pay to me, the defendant, during my life Rs. 100 annually for maintenance as detailed below. From January, 1897, they should pay Rs. 8 per mensem at the end of each English month and they should pay Rs. 12 in the last month of December of each year. They should pay the aforesaid monthly sum either on obtaining a receipt signed by the defendant or by money-order. If the plaintiff or her representatives should fail to pay to the defendant the aforesaid monthly sum at the end of each month, the defendant shall have power to recover the monthly sum with interest at Re. 1 per cent. per mensem, from the property decreed by instituting a suit as she should like. The defendant has an unmarried daughter. As regards her it has been agreed upon that if the plaintiff should get her married in her husband's family she (plaintiff) should not pay anything as marriage expenses: otherwise the plaintiff or her representatives should at the time of the marriage of the said daughter pay to the defendant Rs. 300 for expenses of the marriage of the said daughter. They should make this payment under a registered receipt. If they should refuse to make the payment, the defendant shall be at liberty to recover it by instituting a suit. The defendant shall be authorized to live during her life-time in the house in dispute, situate in manza Bankati, tappa Mathuli, pargana Mahuli, and occupied by the defendant, without any power to sell, mortgage and transfer it in any way. After the death of the defendant it shall be taken

by the plaintiff or her representatives. The whole of the rabi crop sown by me, the defendant, in mauza Chitauni, mauza Bankati and mauza Sajna Khar, shall be appropriated by me, the defendant. After having cut the standing rabi crop, I shall give up the land at once. The plaintiff is the owner of the said land." The plaintiff now sues for arrears of maintenance with interest, Rs. 300 for the expenses of the marriage of her daughter, and for a declaration that the property set forth is liable for the recovery of the maintenance and marriage expenses and that the plaintiff may be allowed to recover the same by auction sale of the property. The defendants are (1) Musammat Bachchi, (2) donees from Musammat Bachchi, (3) transferees for value from Musammat Bachchi, and (4) transferees for value from the donees of Musammat Bachchi.

A personal decree has been given against Musammat Bachchi both for the maintenance and the marriage expenses, and in the present appeal we have nothing to do with this personal decree. The lower appellate Court, however, held that the transferees for value were transferees for value without notice, and that the plaintiff could not enforce her right against the property in their hands having regard to the provisions of section 39 of the Transfer of Property Act, 1882. The parties all agree that the only question before me is whether or not the arrears of the *annuity* can be realized against the property in the hands of the transferees. This question alone has been argued. It is clear that so long as Musammat Maina had a mere right of maintenance section 39 applied; but in my opinion as soon as she got in lieu of her right of maintenance a decree fixing a definite sum and charging specific property with payment thereof, what was previously a mere right of maintenance became a right of quite a different nature and section 39 no longer applied. It has been argued, however, that the decree did not amount to a charge on specific property and that even if it did, such a charge cannot be enforced against the property in the hands of *bona fide* purchasers for value, which the respondents have been found to be. First as to whether or not the decree amounted to a charge. The question

1906

---

MAINA  
v.  
BACHCHI.

1906  
 MAINA  
 v.  
 BACHCHI.

whether immovable property of one person has, by a document executed by the parties, been made security for the payment of money to another, *i.e.* whether the latter person has a charge on the property within the meaning of section 100 of the Transfer of Property Act, must depend upon the construction to be placed on the document. No special words are necessary: the intention of the parties must be ascertained from a proper consideration of the nature of the document and the provisions it contains. In the present case, I think it is quite impossible to come to any conclusion other than that Musammat Maina and Musammat Bachchi by the deed of compromise which was incorporated into the decree, intended to make the specific property which was given over to Musammat Bachchi, security for the payment of the Rs. 100 in lieu of maintenance to Musammat Maina. (It is now admitted that the Rs. 300 marriage expenses is not charged.) No doubt the property was only to be sold in the event of non-payment, but the property was nevertheless by the decree made security for the payment of the annuity. It was not a mere contract to give security at some future date, no further document was contemplated by either party, and the object and intentions of the parties were to be carried out by a decree following the terms of the deed of compromise. I have been referred to a case—*Harjas Rai v. Naurung* (1). It was held in that case that, on the true construction of the document then in question, a charge had not been created upon specific property. In that case the circumstances that gave rise to the alleged charge were entirely different to the circumstances in the present case. The words “alleged to create the charge” occurred in a sale-deed. In the present case they occur in a decree incorporating a deed of compromise. Furthermore, the words used are quite different. In the case cited the money said to be secured was to be recovered “from our persons or the sold property or any other property.” The introduction of the words “from our persons” “and any other property” may well have influenced the Court in coming to the conclusion that, on the true construction of the document in question, “immovable property had not been made security for the payment of money.” I now come to deal with the next contention, which is that even if the

(1) Weekly Notes, 1906, p. 82.

1906

---

MAINA  
v.  
BACHORI.

property was made security, it cannot be enforced against the property in the hands of *bond fide* transferees for value without notice. This contention is urged upon the ground that in every case where immovable property of one person has been made security in favour of another person and the transaction does not amount to a mortgage, the latter is in exactly the position of a person who, according to English Law, has a mere charge in equity. I can find no sanction for such a proposition. I do not mean to say that there are no cases in which it would not be right and proper to apply the doctrine that a mere equitable claim will not be enforced against *bond fide* transferees for value without notice. But it is much too broad a proposition to state that in *all cases* where, by act of parties or operation of law, immovable property of one person is made security for payment of money to another and the transaction does not amount to a mortgage, the security will not be enforced even against such transferees.

The Transfer of Property Act recognises in the clearest manner that immovable property can be made security for the payment of money by way of charge, just as it recognises the various kinds of mortgages. It equally recognises the right to enforce the mortgage or charge. It would appear that the provisions as to registration contained in the Registration and Transfer of Property Acts apply to charges (when created by acts of parties) just as much as to mortgages, and if they do so apply I can see very little reason for drawing a distinction between mortgages on the one hand and charges (within the meaning of section 100) on the other, more particularly as registration amounts to notice. The Transfer of Property Act contains no provision that charges within the meaning of section 100 shall not be enforced against transferees for value. The absence of such a provision is particularly significant when we compare section 40, which contains an express provision that rights to restrain the enjoyment of property and obligations arising out of contract, but not amounting to an interest in the property, are not to be enforced against a transferee for consideration and without notice. It may very well be said that if the Legislature intended that charges within the meaning of section 100 were not to be enforced against transferees for value, section 100 would have contained a provision

1906

MAINA  
v.  
BACHCHI.

similar to that contained in section 40. It is clear that the deed of compromise having been incorporated into the decree, registration was not necessary.

In my judgment the property in the present case having been made security for the payment of the Rs. 100 to Musammât Maina by the decree of the Court, Musammât Bachchi, when she attempted to transfer the property, was attempting to give away something more than was her's to give. She could only give the property subject to the burden of making good the annuity to Musammât Maina. In my opinion the security can be enforced against the property in the hands of the defendants unless some reason not at present appearing exists why Musammât Maina cannot enforce her right. Having regard to what I have said, I consider that the case should be remanded to the lower appellate Court under the provisions of section 562. All parties present during the argument agree that this is the proper course. I allow the appeal, set aside the decree of the lower appellate Court, and remand the case to the lower appellate Court to dispose of the same in due course having regard to what I have stated above. The appellant will have her costs of this appeal against such of the respondents as appealed against the decision of the Court of first instance. Other costs will abide the result.

*Appeal decreed and cause remanded.*

1906  
May 14.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

GAJADHAR LAL AND ANOTHER (DEFENDANTS) v. THE ALLIANCE  
BANK OF SIMLA, LIMITED (PLAINTIFF) \*

*Mortgage—Act No. IV of 1882 (Transfer of Property Act), sections 88, 89,  
90—Decree for sale—Sale partly in India, partly in England—Act No.  
XV of 1877 (Indian Limitation Act), schedule II, article 178.*

A mortgagee obtained a decree under section 88 of the Transfer of Property Act for sale of all the property included in the mortgage, and in pursuance of the decree some of the mortgaged property was sold in India, and, at the request of the mortgagor, to enable a better price to be obtained, some of it was subsequently sold in England.

The mortgagee then applied for a decree under section 90. *Held* that the sale which took place in England must be treated as a sale had in connection with the decree passed in this country, and that the defendants appellants

\* First Appeal No. 304 of 1904, from a decree of Babu Ishri Prasad, Subordinate Judge of Cawnpore, dated the 18th of September 1905.