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was divided and no property outside the village was taken and divided, and, thirdly, the Revenue Court could divide also the groves situate in the village. *Laute Ram's* case is therefore not in point and does not help the respondents. The case of *Dharam Singh* v. *Ram Dial Singh* (1) is in point and supports the view of the law I have taken. In my judgement the provisions of section 233, clause (*k*), of Act No. III of 1901 do not govern the present case.

BY THE COURT:—The order of the Court is that the decree of the learned Judge of this Court is set aside and the decree of the lower appellate court is restored with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

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February, 19.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

GUR DAYAL SINGH AND OTHERS (DEFENDANTS) *v.* KARAM SINGH AND ANOTHER (PLAINTIFFS).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 55 (4) (*b*)—*Sale—Vendor's lien—Lien not enforceable against subsequent purchaser without notice.*

The vendor's lien for unpaid purchase money provided for by section 55 (4) (*b*) of the Transfer of Property Act, 1882, cannot be enforced against the property in the hands of subsequent transferees for value without notice of the lien. *Webb* v. *Macpherson* (2) distinguished.

THE facts of this case were, shortly, as follows:—

On the 28th of August, 1903, the plaintiffs sold certain property to one Gur Dayal, who is the first appellant in this suit for Rs. 250. The vendors received Rs. 90 in cash and left Rs. 160 with the vendee for payment to their creditors. Gur Dayal did not pay any of the creditors, but sold the property to one Kundan, who in turn transferred it to the defendants Nos. 4 and 5. The creditors of the plaintiffs recovered their money from the plaintiffs, who thereupon brought the present suit against Gur Dayal and his transferees for recovery of the money. The

*Second Appeal No 533 of 1914, from a decree of Abdul Hasan, Subordinate Judge of Saharanpur, dated the 27th of January, 1914, modifying a decree of Priya Charan Agarwal, Munsif of Saharanpur, dated the 20th of January, 1912.

(1) (1914) 12 A. L. J., 1126. (2) (1903) I. L. R., 31 Calc., 57.

court below decreed the suit, holding the money to be a charge on the property. The defendants appealed to the High Court.

Mr. *Nihal Chand*, for the appellants:—

There is no charge on the property, which is in the hands of a purchaser for value and in good faith. The charge referred to in section 55 (4) *(b)* is only a lien which exists only between the vendor and the first vendee, but as soon as the first vendee sells the property to purchasers in good faith and for valuable consideration the charge is gone. In this case the subsequent transferees cannot be said to have notice of the charge. It was about six years after the first sale that Kundan purchased the property, and he was not bound to make inquiry, after such a long time, as to the existence of the charge about non-payment of the balance of the price. The suit ought therefore to have been dismissed.

The Hon'ble Mr. *Abdul Raoof*, for the respondent:—

The purchasers had notice from Gur Dayal's sale-deed of the existence of the seller's charge, and it lay on them to ascertain whether or not it had been satisfied. If the charge once existed, it continued to exist so long as it was not satisfied. If it existed in the hands of the first purchaser, it existed when the property was in the hands of subsequent transferees. Notice is defined in section 3 of the Transfer of Property Act. In the present case the purchaser was bound to make inquiry. The charge here is created by section 55 (4) *(b)* and the property remains burdened as under a charge created by act of parties. There is no difference between the two. *Maina* v. *Bachchi* (1), *Meghraj Vaish* v. *Abdullah Khan* (2), *Webb* v. *Macpherson* (3).

Mr. *Nihal Chand*, was not heard in reply.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit in which the plaintiffs seek to recover a sum of Rs. 476 principal and Rs. 83 interest, in all Rs. 559, against all the defendants, and in default, that certain property should be sold. The facts of the case were somewhat complicated, but for the purpose of the questions of law which we have to decide it is

(1) (1906) 3 A. L. J., 551. (2) (1914) 12 A. L. J., 1034.

(3) (1903) I. L. R., 31 Calc., 57.

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not necessary to go with great detail into them. On the 28th of August, 1903, the plaintiffs sold certain property to Gur Dayal. This property was sold in consideration of Rs. 250. In the detail of consideration it is stated that the vendor has received Rs. 90 in cash and that he has left Rs. 160 for payment to certain creditors of the vendor. We may mention that the nature of the debt which was to be paid was a simple contract debt and not a mortgage debt. As a matter of fact the purchaser did not pay the creditors of the vendor. His alleged reason for not doing so was that he did not get possession of part of the property sold, and there certainly was a dispute about the matter. The vendor's title was by no means perfect. On the 1st of April, 1909, Gur Dayal sold the property (together with other property) to one Kundan. Kundan on the 27th of April, of 1909, resold the property to Jiwan Singh and Kapur Singh, the defendants 5 and 6. It will thus appear that neither Gur Dayal nor Kundan have any longer any interest in the property. The plaintiffs allege, that in consequence of the failure of Gur Dayal to pay Rs. 160 left in his hand, a suit was brought against them by the creditors and a decree was obtained against them and the appellants had to pay Rs. 390. Their present claim is made up of this sum together with interest and costs. The contention in favour of the plaintiffs is that under section 55, clause (4), of the Transfer of Property Act they have a charge against the property and that the property in the hands of defendants 5 and 6 is liable to be sold. The court of first instance gave the plaintiffs a decree, but only for Rs. 160 together with interest at 6 per cent. The lower appellate court thought that the plaintiffs were entitled to the full amount which they had to pay to satisfy the decree and made its decree accordingly. It seems difficult to understand how, under any circumstances, the property in the hands of defendants 5 and 6 could have been made liable for anything more than the amount of the Rs. 160 together with interest thereon. Section 55, clause (4), of the Transfer of Property Act provides that the seller is entitled where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money to a charge upon the property *in the hands of the buyer* for the amount of the purchase-money or any part thereof remaining unpaid and

for interest on such amount or part. Apart from authority, it seems difficult to treat the words "in the hands of the buyer" as mere surplusage. A vendor's charge for unpaid purchase-money is obviously one which in all cases ought to (and in most cases would) be promptly enforced. The broad contention of the plaintiffs is that the charge can be enforced against all subsequent transferees quite irrespective of notice. If this contention be correct every purchaser of immovable property buys with the possibility of there being a charge on the property in respect of every previous transfer; which would mean that no purchaser is safe and the door would be opened to any amount of fraudulent claims. The respondents rely on the case of *Webb* v. *Macpherson* (1). The facts in that case were very peculiar and very different from the facts in the present case. By an indenture, dated July 17th, 1892, one Lloyd conveyed certain property to one Tucker. The consideration was Rs. 81,210, of which Rs. 30,000 was paid in cash and the balance of Rs. 51,210 was to be *secured* by the formal undertaking of the purchaser. The indenture recited that this "formal undertaking" had been executed by the purchaser. The money was not paid, and Lloyd was allowed to retake possession. Macpherson subsequently purchased *three-fourths* of the property and it was from Lloyd that Macpherson got possession. Macpherson thus purchased the property with express notice that Lloyd had not been paid. Their Lordships no doubt held that Lloyd's executors had a charge on the whole property including the portion sold to Macpherson. In this connection it must be borne in mind that the meaning of the words "in the hands of the buyer" in section 55, sub-section 4, of the Transfer of Property Act were not considered. The case may fairly be said to be an authority for the proposition that, notwithstanding the words "in the hands of the buyer," the seller can enforce the charge mentioned in section 55, sub-section 4, against the property in the hands of a subsequent purchaser who has notice of the fact that the purchase-money in the first transfer, or some part of it, has not been paid. This would be in accordance with the general principles of equity, though it is going outside the provisions of section 55, clause 4, where their Lordships say we are to look to see the nature of the

(1) (1903) I. L. R., 31 Calc., 57.

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right. To hold, however, that the charge can be enforced against subsequent purchasers without notice would mean that the court should treat the words "in the hands of the buyer" as superfluous and meaningless and would in our opinion be extending the decision in *Webb* v. *Macpherson* (1)in a manner never intended by their Lordships. In our opinion the charge mentioned in section 55 (4) cannot be enforced against subsequent transferees for value without notice.

It is next contended that the subsequent purchasers in the present case had "notice." This contention is based on the following line of argument: In the sale-deed of 1903, it is mentioned that Rs. 160 had been left in the hands of the purchaser for payment to the creditor of the vendor, therefore it was the duty of Kundan who made the purchase on the 1st of April, 1909, to enquire if his vendor had fulfilled his contract and paid the creditor. Again it was equally the duty of defendants 5 and 6, when the third transfer was made, to examine the transfer to his vendor and having done so to ascertain if the Rs 160 had been paid. It is said that not having made these inquiries the defendants had *constructive* notice (see section 3, clause *(c)*, Transfer of Property Act). In our opinion it cannot be said, in the circumstances of the present case, that the transferees in 1909 "wilfully abstained from an inquiry or search which they ought to have made." In our opinion defendants 5 and 6 did not have notice of the alleged charge. We have already mentioned that in the present case the plaintiffs' contention is based on the fact that it appears from the deed of transfer that Rs. 160 was left with the buyer for payment to a creditor of the seller. In *Webb* v. *Macpherson*, at page 73 of the report, their Lordships say:—"There is no doubt, both on principle and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction may seem fine, but it is a real distinction, and it is one which, if made out, might have had the effect which the High Court have given to it." Their Lordships then go to deal with the particular terms of the conveyance in the case before them. There is a marked distinction between the terms of that conveyance and the present. It

(1) (1903) I. L. R., 31 Calc., 57.

would appear in this case that the agreement was to pay, not the vendor, but the creditor of the vendor. In *Webb* v. *Macpherson* the agreement was to pay Lloyd (the vendor) himself. In this case it was only when the buyer neglected to pay the creditor and the creditor got a decree against the seller that the latter brought or was entitled to bring the present suit. In *Abdulla Beary* v. *Mammali Beary* (1), which was a case very like the present, and in which *Webb* v. *Macpherson* was cited, the Madras High Court held that the vendor had no charge on the ground that the consideration undischarged by the buyer was an agreement to pay the creditor and not unpaid purchase-money.

In the case of *Meghraj Vaish* v. *Abdullah Khan* (2), Mr. Justice SUNDAR LAL considered that the case of *Webb* v. *Macpherson* applied and he further considered that there had been a finding of fact by the lower courts (binding on him in second appeal) that the subsequent transferee had notice.

In the case of *Tehilram Girdharidas* v. *Kashibai* (3), the sale-deed recited that the consideration had been paid, and the court held that the vendor could not enforce a charge against a subsequent mortgagee without notice. It is true the court held the vendor estopped and decided the case on that ground. At page 61, JENKINS, C. J., says:—"I will assume that the defendant, under section 55 (4) a seller, has a charge upon the property transferred not only in the hands of the buyer, but also of one who claims under the buyer, and that the decision in *Webb* v. *Macpherson* did not turn on the special circumstances of that case." BATCHELOR, J., says, at page 67—"The section gives the charge over the property 'in the hands of the buyer,' but for the purposes of this case we may assume, though the point is by no means clear, that in *Webb* v. *Macpherson*, it was intended to decide that the charge was extended to persons claiming through the buyer." These remarks by the learned Judges seem to indicate that they thought it doubtful whether their Lordships of the Privy Council intended to decide in *Webb* v. *Macpherson* any principle outside the facts and circumstances of that particular case.

(1) (1910) I. L. R., 33 Mad., 446. (2) (1914) 12 A. L. J., 1034.

(3) (1908) I. L. R., 33 Bom., 5

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In our opinion the Rs. 160 was not "unpaid purchase-money." The consideration was Rs. 90 in cash and the agreement of the vendee to pay the creditor.

We allow the appeal, set aside the decrees of both the courts below and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

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January, 29.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MAHADEO PRASAD AND OTHERS (DEFENDANTS) *v.* JAGAR DEO GIR (PLAINTIFF) AND SUNDAR CHAUDHARI AND OTHERS (DEFENDANTS). *

Pre-emption—Wajib-ul-arz—Owners of resumed muafi land—Co-sharers.

Held that the owners of a plot of resumed *muafi* land assessed to revenue separately from the rest of the village, which constituted one 16 anna mahal, was not a co-sharer with the owners of the mahal, so as to give him a right of pre-emption on sale of the mahal, under the terms of the wajib-ul-arz which declared a right of pre-emption to exist, on a sale by a *co-sharer*, in favour of other *co-sharers* in the village.

Kallian Mal v. *Madan Mohan* (1), *Narain Das* v. *Ram Saran Das* (2), *Raghunath Prasad* v. *Kanhaya Lal* (3), *Ahmad Ali* v. *Najam-un-nissa* (4) and *Battu Lal* v. *Bhola Nath* (5) referred to. *Narain Prasad* v. *Munna Lal* (6) not followed.

THE facts of this case are fully stated in the judgement of the Court.

The Hon'ble Dr. *Sundar Lal*, Munshi *Gulzari Lal* and Munshi *Lakshmi Narain*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, Dr. *Surendra Nath Sen*, Munshi *Harnandan Prasad* and Maulvi *Iqbal Ahmad*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.:—This is defendant vendee's appeal arising out of a pre-emption suit based on village custom, which has been decreed by the court below. The last four pleas in the memorandum of appeal have not been pressed. The first three grounds of appeal raise only one question, viz. whether under the custom of pre-emption prevailing in the village of Amwa Singh, the plaintiff has any right at all to pre-empt the property in suit.

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* First Appeal No. 275 of 1914, from a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 24th of June, 1914.

(1) (1895) I. L. R., 17 All., 447.
(2) (1898) I. L. R., 20 All., 419.
(3) Weekly Notes, 1902, p. 68.
(4) (1905) 2 A. L. J., 145.
(5) (1913) 19 Indian Cases, 119
(6) (1908) I. L. R., 30 All., 329.