

1914

November, 17.

Before Mr. Justice Chamier and Mr. Justice Piggott.

GANESH (DEFENDANT) v. BABU RAM (PLAINTIFF) AND BADRI (DEFENDANT) *

Charge—Annuity—Charge on movable as well as immovable property—Sale of property charged in separate lots—Notice of charge to purchasers.

Movable property, at all events movable property which is not perishable or necessarily consumed by use, may be effectively charged with the payment of an annuity and may be sold subject to the charge, even in execution of a decree for arrears of the annuity. *Sahib Mirza v. Umda Khanam* (1) followed.

Where, however, an annuitant, in execution of a decree which he had obtained for arrears of an annuity, attached and sold part of such movable property without notice of the charge and the nature of the property was such that it was of no particular value apart from other property which was sold separately, it was held that such part must be taken to have been sold free of the charge.

THE facts are fully set forth in the judgement. Briefly stated they were as follows:—

The holder of an annuity which was charged upon certain property sued for recovery of arrears by enforcement of the charge. He obtained a decree and in execution put up the charged property to sale. Forming part of that property was a Pragwal's flag; it was purchased by the appellant without notice of the charge. In a later suit for the recovery of arrears for subsequent years the annuitant impleaded the appellant and sought to enforce the charge against the flag as well as other properties. The appellant contested the liability of the flag to be sold a second time. The suit was decreed against him by both the lower courts. The defendant appealed.

Pandit *Laclmi Narain Tewari*, (with him Mr. *A. P. Dube*), for the appellant:—

The flag having once been sold in execution of a decree obtained on the basis of the charge it cannot be sold a second time in enforcement of that charge. In the case of movable property complete and absolute title at once passes to the purchaser. Movable property cannot be subject to a recurring charge or annuity. The appellant being a purchaser without notice of the recurrent charge, that charge cannot be enforced against the property in his hands. The annuitant has allowed the auction purchaser to buy without

* Second Appeal No. 1205 of 1913 from a decree of Ram Chandra Chaudhri, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 31st of July, 1913, confirming a decree of Rup Kishan, Munsif of Allahabad, dated the 18th September, 1912.

(1) (1892) I. L. R., 19 Cal., 444.

notice of the recurrent charge in a suit in which he himself brought the property to sale. The existence of the recurrent charge was neither notified nor mentioned at any time during the execution and sale proceedings. In fact the decree-holder himself purchased some items of the property which had been charged; he led intending purchasers to believe that the property was offered for sale free of incumbrances and to pay full value for it. He is estopped from setting up the recurrent charge against the *bona fide* purchaser. The analogy of the following cases applies *Jaganatha v. Gangi Reddi* (1), *Kasturi v. Venkatachalapathi* (2), *Muhammad Hamid-ud-din v. Shib Sahai* (3), *Tukaram v. Ramchandra* (4).

There were no circumstances to put the purchaser on his guard. It was not his duty to go behind the order for sale and look up the file of the case. The compromise creating the charge was no doubt registered; but registration of a transaction, whereby movables are hypothecated without possession, is no notice whatsoever. In this case the notice to be effectual must be actual notice; *Nanhaji v. Chimna* (5).

Babu *Beni Madhab Ghosh*, for the plaintiff respondent :—

There is nothing in law to prevent the sale of movable property subject to a recurrent charge, and the same property may be brought to sale more than once on the basis of such a charge. The purchaser of movable property, which as a matter of fact, is subject to a charge, is bound to satisfy it, irrespective of the question of notice. The purchase was not a private *bona fide* purchase without notice; it was a purchase at a court sale in execution of a decree in a suit to enforce the recurrent charge itself. The decree itself gave sufficient notice of the existence of the charge. The suit was brought on the basis of that charge; there was no separate charge of which it would be the duty of the plaintiff decree-holder to give notice. Then, it is the appellant's case that he never took possession of the flag. He has, therefore, got no title to it as the property has not legally passed to him.

(1) (1892) I. L. R., 15 Mad., 303. (3) (1899) I. L. R., 21 All., 309.

(2) (1892) I. L. R., 15 Mad., 412. (4) (1876) I. L. R., 1 Bom., 314.

(5) (1908) 10 Indian Cases, p. 869.

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Munshi *Hribans Sahai*, for respondent No. 2 :—

The plaintiff having himself purchased a part of the property the integrity of the charge has been broken up and the liability ought to be apportioned.

Pandit *Lachmi Narain Tewari*, replied.

CHAMIER and PIGGOTT, JJ :—A suit brought by the respondent, Babu Ram, for possession of movable and immovable property was settled by an agreement dated the 17th of November, 1906, and duly registered, whereby the property then in suit was charged with the payment of an annuity of Rs. 200 to Babu Ram. In 1908 Babu Ram obtained a decree for arrears of the annuity against Brij Mohan, father of the respondent Badri, and in execution thereof part of the property, namely, a *birt jajmani*, some old books containing the names and genealogies of the clients (*jajman*) and a flag were brought to sale. The *birt jajmani* and the books were purchased by Babu Ram himself and the flag was purchased by the appellant Ganesh.

The appeal now before us arises out of a second suit brought by Babu Ram for recovery of further arrears of the annuity by sale of the movable and immovable property charged by the agreement of 1906. Brij Mohan (since deceased) and his son, the respondent Badri, were impleaded as the persons in possession of the immovable property, and the appellant Ganesh was impleaded as the purchaser in possession of the flag. The claim was decreed by the first court and its decision was confirmed by the lower appellate court. This is a second appeal by the defendant Ganesh, in which he repeats all the pleas put forward by him unsuccessfully in the courts below.

His first point is that the flag having been once brought to sale by the respondent, Babu Ram, cannot be brought to sale by him again. It was indeed suggested that movable property cannot be charged with the payment of an annuity, but such a contention cannot be accepted. In the case of *Sahib Mirza v. Umda Khanam* (1) both movable and immovable property was charged with the payment of an annuity. The property was sold repeatedly subject to the annuity in execution of decrees passed for arrears of the same, and there were many suits between the

(1) (1892) I. L. R., 19 Calo., 444.

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annuitants and the holders of the property, and between the holders of the property, *inter se*. *Sahib Mirza v. Syed Mohamad* (1) is an example of them. It is clear that movable as well as immovable property, at all events movable property which is not perishable or necessarily consumed by use, may be effectively charged with the payment of an annuity and may be sold subject to the charge, even in execution of a decree for arrears of the annuity. The property now in question is of a peculiar character: the flag is one of those used by Pragwals at the confluence of the Ganges and the Jumna for the purpose of attracting pilgrims. Each flag bears a distinctive device which may be recognized by an old client. His flag and his books are the ordinary *paraphernalia* or stock in trade of the owner of a *birt jajmani*. Together, the *birt jajmani*, the books and the flag often form a valuable property, and we may assume for the purposes of this case that such property may be charged with the payment of an annuity and may be sold subject to that charge even in execution of a decree for arrears of the annuity.

This brings us to the appellant's second point, namely, that the flag was not sold to him subject to the annuity, and that the respondent Babu Ram is by his conduct estopped from asserting that it was. Babu Ram was of course not bound to have the flag sold subject to the annuity. It was open to him to have it sold free of the charge, and such a course would often be advantageous to the owner of the annuity in the case of movable property of a wasting character. Whether by accident or design, it appears that nothing was said about the property remaining subject to the charge. The case appears to be analogous to those cases in which it has been held that a person who brings property to sale in execution of a decree, without disclosing the existence of a mortgage which he holds on the property, cannot afterwards set up the mortgage against the purchaser, at all events where the purchaser had no notice of the mortgage. See for example *Muhammad Hamid-ud-din v. Shib Sahai* (2), *Jaganatha v. Gangi Reddi* (3) *Kasturi v. Venkatachalapathi* (4) and *Ramchandra v. Jairam* (5). It is not suggested that the appellant had

(1) Select Cases (Oudh) No. 303. (3) (1892) I. L. R., 15 Mad., 303.

(2) (1899) I. L. R., 21 All., 309. (4) (1892) I. L. R., 15 Mad., 412.

(5) (1897) I. L. R., 22 Bom., 686.

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any notice of the charge, or that there was anything to lead him to suspect that the flag was being sold subject to a continuing charge for an annuity. On the contrary Babu Ram's own action in allowing the *birt* and the books to be sold separately from the flag suggests that he intended that the flag, the *birt* and the books should all be sold free of the charge for the annuity, for the flag without the *birt* and the books will produce no income. For these reasons we are of opinion that the flag held by the appellant was sold to him free of the charge for the annuity and that the respondent Babu Ram is estopped from contending the contrary. We allow the appeal and dismiss the suit as against the appellant with costs throughout.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

SHEO HARAKH (PLAINTIFF) v. RAM CHANDRA (DEFENDANT). *

Act No XII of 1887 (Bengal, N.-W. P. and Assam Civil Courts Act), sections 21 and 22—Notification by the High Court authorizing appeals from Munsifs to be "preferred to" Subordinate Judges—Jurisdiction.

Held that where the High Court in the exercise of powers conferred upon it by section 21 (4) of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887, issued a notification that appeals from the decrees of any particular Munsif should be "preferred to" the court of Subordinate Judge named or designated therein, the Subordinate Judge in question had power not merely to receive such appeals but also to hear and decide them. *Sohan Lal v. Baldeo Pershad* (1) approved.

The facts of this case appear from the following order of reference to a Division Bench :—

"SUNDAR LAL, J.—This application for revision raises a very important question of law. The plaintiff in this case filed a suit in the court of the Munsif of Mirzapur who on the 21st of July, 1913, decreed the claim. The defendant preferred an appeal against the said decree to the court of the Subordinate Judge of Mirzapur on the 30th of August, 1913. The learned Subordinate Judge proceeded to hear the case and on the 21st of November, 1913, decreed the appeal, dismissing the plaintiff's claim. Mr. *Shiva Dayal Singh* has filed this application for revision against the said decree, and the point that he has taken and pressed in revision is that the learned Subordinate Judge, in the absence of an order of the District Judge transferring the appeal to him for disposal, had no jurisdiction to hear the appeal. Under section 21 of the Bengal Civil Courts Act, appeals from decrees

* Civil Revision No. 84 of 1914.

(1) (1903) 7 O. C., 321.