Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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January, 24.

ALTAF BEGAM (PLAINTIFF) *v.* BRIJ NARAIN (DEFENDANT).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 6(*d*) *and* (*e*)—*Right to recover future maintenance—Transfer of personal allowance charged on immoveable property*—Kharch-i-pandan.

The question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under section 6 (*d*) of the Transfer of Property Act. Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under clause (*e*) of the section.

Kharch-i-pandan is a personal allowance, and, in the absence of any clear provision in the deed signed by the prospective husband, fixing the allowance in favour of his wife, that it was alienable, it could not be held so on the mere fact that the payment was secured by a charge on immovable property.

Gulab Kunwar v. *Bansidhar* (1), *Haridas Acharjia* v. *Baroda Kishore* (2), *Sher Singh* v. *Sri Ram* (3), *Ranee Annapurni* v. *Swaminatha* (4), *Khwaja Muhammad Khan* v. *Husaini Begam* (5) and *Harris* v. *Brown* (6), referred to; *Subraya Sampigethaya* v. *Krishna Baipadithaya* (7) and *Tara Sundari Debi* v. *Saroda Charan Banerjee* (8), followed.

Mr. *A. M. Khwaja* and Maulvi *Mushtaq Ahmad*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondent.

SULAIMAN and KENDALL, JJ.:—This is a plaintiff's appeal arising out of a suit for cancellation of a sale-deed, dated the 2nd of September, 1921, executed by the

*First Appeal No. 339 of 1925, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 23rd of May, 1925.

(1) (1893) I. L. R., 15 All., 371.
(2) (1899) I. L. R., 27 Cal., 38.
(3) (1908) I. L. R., 30 All., 246.
(4) (1910) I. L. R., 34 Mad., 7.
(5) (1910) I. L. R., 32 All., 410.
(6) (1901) I. L. R., 28 Cal., 621.
(7) (1923) I. L. R., 46 Mad., 659.
(8) (1910) 12 C. L. J., 146.

plaintiff in favour of the defendant, and in the alternative for recovery of the amount of the sale consideration. Under a hypothecation-bond, dated the 21st of September, 1913, the plaintiff's husband had undertaken to pay her a monthly allowance of Rs. 75 and had hypothecated his village Nagphan Risuya, valuing the deed at Rs. 10,800. There were certain misunderstandings between the husband and the wife, and it is an admitted fact that she could not for a long time recover her monthly allowance. Eventually she sued her husband for recovery of the arrears and in execution of her decree put the village to sale at auction. It was purchased by Hakim Zakir Husain Khan for a small amount, as the sale was apparently subject to the continuing charge. Thereafter she brought a second suit against her husband and the purchaser and obtained a decree on the 28th of February, 1920, for about Rs. 5,554. This decree also remained unrealized. On the 2nd of September, 1921, she executed the sale-deed in dispute in favour of the contesting defendant Brij Narain. The sale-deed as it stands purported to transfer the decretal amount aforementioned, the amount of her maintenance allowance which had fallen due since the decree and the future amounts which would fall due during the rest of her life with all rights to realize the same. The sale was for Rs. 7,500 which was to be paid in certain fixed instalments. There was a special covenant for forfeiture which we will discuss later on. The plaintiff's case was that she being a *pardanashin* and uneducated lady did not understand the terms of the deed thoroughly, which were not explained to her; that the defendant and her *pairokar* colluded with each other and falsely represented to her that only the arrears which had fallen due up to date were being transferred, and that she was never told that her future maintenance allowance for life would also be sold under the deed. She further asserted that there was an

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express understanding that if the defendant should make any default in the payment of any instalment, he would not be entitled to get back the amount received and the sale-deed would be cancelled, and that, accordingly, as there were defaults made the sale-deed has become void, and that it is invalid in law. These allegations were refuted in the written statement in which it was pleaded that the plaintiff executed the document after fully understanding its terms, that the penal clause was unenforceable and that it was never agreed that the sale itself would be cancelled.

The court below has decided most of the issues against the plaintiff, but upheld her right to claim a forfeiture of Rs. 1,500 and has given her a decree for the unpaid balance with interest. The plaintiff has appealed and the defendant has filed cross-objections.

The first question to be considered is whether the plaintiff did not understand that her future maintenance allowance was also going to be sold. Connected with this is the further question whether any misrepresentation was made to the plaintiff. The learned Subordinate Judge has disposed of both these points together and has considered that the burden of proving both these matters lay on the plaintiff. He began his findings on issues Nos. 1 and 2 with the remark "To prove these issues the plaintiff, besides giving her own statement, has examined such and such witnesses." He has then remarked "To my mind the plaintiff has miserably failed to establish either of the two assertions" and has again said that her explanation that her relations and servants failed to explain to her the real nature of the sale was absolutely unbelievable. The learned Subordinate Judge has apparently lost sight of the fact that although the burden of proving any active misrepresentation was on the plaintiff, the onus of satisfying the court that the deed had been fully explained to and understood by the lady was on the defendant,

because the plaintiff is undoubtedly a *pardanashin* and uneducated lady. In spite of this error in the judgement, we are of opinion that the finding of the court below that the contents of the sale-deed so far as it relates to the transfer of her future maintenance allowance were fully understood by her. [The judgement then referred to the evidence on this point.]

The second point for consideration is whether it was covenanted that on failure of the payment of the instalments fixed in the deed the sale-deed would stand cancelled. [After discussing this question the Court came to the following conclusion.] We accordingly uphold the view of the court below, though on different grounds, that there was no covenant directing that the sale itself would stand cancelled if a default were made.

The third question is as regards the amount of which the plaintiff can claim forfeiture. This part of the clause also is ambiguously worded. According to the plaintiff the whole amount which would have been paid up to date would be forfeited if any default was made. According to the defendant only Rs. 1,500 which had been paid before the execution were to be forfeited. [The question was discussed and concluded as follows.] It is impossible to hold that this ambiguous clause was fully understood by the plaintiff in the way in which the defendant wants it to be interpreted. We would therefore be unable to enforce the deed without accepting the plaintiff's interpretation of it.

The argument on behalf of the defendant, that such a forfeiture clause cannot be enforced, cannot be accepted. The executant was a *pardanashin* and uneducated lady. If she is made to agree to sell her property on the understanding that a forfeiture clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be

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allowed to repudiate the forfeiture clause on the strength of which her consent had been obtained. Nor do we think that, having regard to the small consideration for which rights of considerable value were being transferred, and the necessity which the plaintiff felt for timely and regular payment being urgent, the terms of such a forfeiture clause were so improper and unreasonable as to demand relief in equity.

The last question to consider is whether a transfer of her future right to recover the maintenance allowance was legally valid. That there has been a considerable divergence of opinion on similar questions admits of no doubt. The counsel for the parties have placed before us a number of rulings, all of which are not reconcilable with each other.

So far as this Court is concerned it is now settled that a right to future maintenance cannot be attached and sold in execution of a decree—*Gulab Kunwar* v. *Bansidhar* (1), *Haridas Acharjia* v. *Baroda Kishore* (2), and *Sher Singh* v. *Sri Ram* (3). Although these cases may suggest the general policy of the legislature, they are not directly in point because they turn on the meaning of the expression "right to future maintenance" in section 266 of the old Civil Procedure Code.

The question before us is whether a private alienation of such a right is valid in law. This will depend mainly on the interpretation of section 6 (*d*) of the Transfer of Property Act. No case of our High Court which is directly in point has been cited before us. Opinions in the other High Courts are somewhat conflicting. In *Rance Annapurni* v. *Swaminatha* (4), a Bench of the Madras High Court thought that a right to recover maintenance was not property within the meaning of section 6 and expressed the view that although attachment and

(1) (1893) I. L. R., 15 All., 371.
(2) (1899) I. L. R., 27 Cal., 38.
(3) (1908) I. L. R., 30 All., 246.
(4) (1910) I. L. R., 34 Mad., 7.

sale were prohibited, there was no prohibition against private alienation. This case was however subsequently overruled by a Full Bench of the same Court in *Subraya Sampigethaya* v. *Krishna Baipadithaya* (1). The Bench which referred the case to a higher Bench thought that *Ranee Annapurni's* case was at variance with section 6. SCHWABE, C. J., came to the conclusion that the right to be maintained conferred on a widow under a written document was a purely personal right and therefore clearly inalienable. OLDFIELD, J., differed from the view expressed in *Ranee Annapurni's* case and also held that the rights conferred by the deed were clearly personal. COUTTS TROTTER, J., concurred. This case is also authority for the view that in order to ascertain whether the right was personal or whether the interest was intended to be restricted in its enjoyment to the owner personally one should ascertain the intention of the parties, and such intention is to be gathered from the deed and the attending circumstances.

Opinion in Calcutta also has not been unanimous; but a most exhaustive judgement of MOOKERJEE, J., reviewing all the leading previous authorities is to be found in *Tara Sundari Debi* v. *Saroda Charan Banerjee* (2). We propose to quote a passage from the judgement as we agree with the view expressed therein. At page 153 the learned Judge remarked: "A distinction appears to have been sought to be drawn between cases in which the maintenance was made a charge upon a definite property or was made payable out of a specific fund, and cases in which the grantee of the right of maintenance was not so protected. This distinction, however, in our opinion, does not furnish a true solution of the question, whether the right is assignable or not, because, if the allowance is regularly paid by the person liable, no question of enforcement of a charge upon any interest in immovable

(1) (1923) I. L. R., 46 Mad., 659. (2) (1910) 12 C. L. J., 146.

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property arises; unless a default has been made, and arrears are due, there is no charge to enforce. The answer to the question, therefore, whether the right to receive the maintenance is assignable or not, ought not to be made dependant upon the circumstance whether, in the event of failure of the grantor or his representative to make regular payments, the grantee is entitled to enforce a charge upon immoveable property". At page 157 the learned Judge examined the circumstances attending the grant of the maintenance allowance in order to ascertain the true intention of the parties, and came to the conclusion that the right from every point of view was essentially a personal one and that there was no room for reasonable doubt that such right was not assignable.

We agree with the view expressed in the Full Bench of the Madras High Court and by MOOKERJEE, J., that the question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under section 6 (*d*). Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under clause (*e*).

There being no advance by way of loan, the agreement in question does not amount to a mortgage-deed. It is an agreement to pay the monthly allowance with a charge on a specific immoveable property. Now there is a clear distinction between a mortgage and a charge, the former being a *transfer* of an interest in immoveable property as a security for the loan, whereas the latter *is not* a transfer, though it is nonetheless a security for the payment of an amount. The right to recover such allowance is not itself immoveable property, and indeed

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no question of enforcing the charge arises so long as the amount has not fallen into arrears.

In this view of the matter we must now proceed to examine the true nature of the maintenance allowance. The agreement of the 21st of September, 1913, was executed in anticipation of the marriage of the plaintiff and the sum of Rs. 75 per mensem was fixed as an allowance for her *kharch-i-pandan*, which has been translated inaccurately as pin-money. The prospective husband agreed in writing to pay the allowance *to the lady for her life* and if he failed to pay it the lady was entitled to realize the same. The agreement was to hold good during the lifetime of the lady and the payment was secured by means of a charge on immoveable property. The deed nowhere mentions that the amount could be claimed by the lady's representatives. Of course as the allowance was to subsist during her lifetime only, her heirs could not get it, but there is not even a mention that her transferee can recover it. Nowhere is it mentioned that the right would be alienable. From the very nature of the allowance, which was intended to enable her to meet her daily expenses, it was a personal allowance. All doubt on this point is in our opinion set at rest by the observation of their Lordships of the Privy Council in the leading case of *Khwaja Muhammad Khan* v. *Husaini Begam* (1). There, too, there was an agreement to pay an allowance as *kharch-i-pandan* charged upon immoveable property. At page 414 their Lordships remarked: "*Kharch-i-pandan* which literally means betel-box expenses is a *personal allowance, as their Lordships understand*, to the wife customary among Muhammadan families of rank, especially in Upper India, fixed either before or after the marriage and varying according to the means and position of the parties . . . Although there is some analogy between this allowance and the pin-money in the English system, it appears to stand

(1) (1910) I. L. R., 32 All., 410.

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on a different legal footing arising from difference in social institutions." Although both *kharch-i-pandan* and pin-money were regarded by their Lordships as being amounts for the personal expenses of the wife, there was a difference inasmuch as no obligation to spend the money during coverture attached to the *kharch-i-pandan*. In the case of *Harris* v. *Brown* (1), which is relied upon by the respondent's counsel, the question whether the maintenance allowance was a personal one restricted in its enjoyment or not was never raised before their Lordships nor discussed.

In the present case, it is inconceivable that there should have been an intention that the right would be transferable to strangers. At any rate, in the absence of any clear provision in the deed that it is alienable, we are not prepared to hold that it is so. The mere fact that the payment is secured by a charge on immoveable property is by itself, as observed by MOOKERJEE, J., by no means conclusive. We would therefore hold that the right to recover future allowances as they fall due has not been validly transferred.

As it is obvious that the cash consideration offered by the vendee was for the whole contract of transferring her right to maintenance, past and future, and one part of such contract is not enforceable in law, the whole contract on which the transfer is based must fall to the ground. The plaintiff herself claimed the relief to have the transaction set aside. It would also be unfair to the defendant that he should be compelled to pay the whole consideration and yet not get any right to recover the future maintenance allowances. In these circumstances we think it just and equitable that the sale-deed dated the 2nd of September, 1921, should be cancelled and declared to be null and void and the plaintiff given a decree for recovery of the property so transferred on condition of the

(1) (1901) I. L. R., 28 Cal., 621.

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plaintiff depositing in the court below within six months from this date the whole of the amounts received by her together with interest at 6 per cent. per annum, simple, as set forth in paragraph 11 of the plaint, after deducting any amount that the defendant shall have received by execution of the decree for past arrears or by a separate suit. As on the disputed points both parties have failed partially we direct that they should bear their own costs in both courts. The amounts realized by the defendant will be credited to the plaintiff on the dates of such realization and interest to that extent would cease to run from such dates. If the amount is not deposited within the time allowed, the suit will stand dismissed in both courts.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

DASAMI SAHU (DEFENDANT) *v.* PARAM SHAMESHWAR (PLAINTIFF) AND CHITTARANJAN MUKERJI (DEFENDANT.)*

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Hindu law—Religious endowment—Dedication to idol—Revocation—Adverse possession as against idol by donor himself.

In the absence of fraud, undue influence and misrepresentation, if a valid dedication has once been completed, there would be no power left in the donor to revoke it. And no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it.

Adverse possession exercised by the donor himself, to the ouster and knowledge of the *shebait* who alone held the property on behalf of the idol, would mature into title after the lapse of the prescribed period.

Sri Thakurji v. *Sukhdeo Singh* (1) and *Ram Dhan* v. *Prayag Narain* (2), distinguished. *Jadu Nath Singh* v. *Thakur Sita Ramji* (3), referred to. *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (4), *Chitar Mal* v. *Panchu Lal* (5) and *Damodar Das* v. *Lakhan Das* (6), followed.

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* First Appeal No. 87 of 1926, from a decree of Hanuman Prasad Verma, Subordinate Judge of Benares, dated the 23rd of December, 1925.

(1) (1920) I. L. R., 42 All., 395.
(2) (1921) I. L. R., 43 All., 503.
(3) (1917) I. L. R., 39 All., 553.
(4) (1904) I. L. R., 32 Cal., 129.
(5) (1925) I. L. R., 48 All., 348.
(6) (1910) I. L. R., 37 Cal., 885.