

APPELLATE CIVIL

Before Justice Sir Edward Bennet and Mr. Justice Verma

RAI INDRA NARAIN (OBJECTOR) v. MUHAMMAD ISMAIL
AND OTHERS (OPPOSITE PARTIES)*

1939
July, 25

*Transfer of Property Act (IV of 1882), section 100 (as amended)
—Retrospective effect of amendment—Charge—Execution
purchase of property subject to a charge under a decree—
Purchaser without notice of the charge—Enforcement of
charge against the property in his hands—Transfer of Pro-
perty Act, section 2(d)—Transfer of Property Act, section
5—“Transfer of Property”.*

Section 100 of the Transfer of Property Act, as amended by Act XX of 1929, does not apply to auction sales or auction purchasers.

The word “transfer” in section 100 must be read as defined in section 5. This definition can not include an execution purchase, as the auction purchaser is not a person to whom the judgment-debtor has conveyed his property but is a person who has acquired the property by the order of the court.

Section 2(d) of the Transfer of Property Act provides that nothing in the Act shall apply to any transfer in execution of a decree, save as provided by section 57 and chapter IV of the Act. Section 100 is no doubt in chapter IV but it does not refer to auction sales. The reference in section 2(d) to chapter IV is doubtless to the repealed sections 85 to 90 which contained provisions for auction sales. According to section 2(d), therefore, section 100 can have no application to the case of an execution purchase.

So, where a decree awarded a monthly maintenance and charged the same on a certain property, and this property was subsequently purchased at an auction sale in execution of a decree, without notice of the charge, it was held that section 100 as amended could not apply and the charge could be enforced against the property in the hands of the execution purchaser.

The amendment to section 100 of the Transfer of Property Act, made by section 50 of the amending Act XX of 1929, has a retrospective effect.

Mr. B. Malik, for the appellant.

The respondents were not represented.

*Second Appeal No. 488 of 1937, from a decree of Shamsul Hasan, District Judge of Aligarh, dated the 10th of December, 1936, confirming a decree of Shankar Lal, Civil Judge of Etah, dated the 21st of September, 1935.

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BENNET and VERMA, JJ.:—This is an execution second appeal brought by Rai Indra Narain who objected to the execution of a decree by the decree-holder Muhammad Ismail and the objection was dismissed by the execution court and that order was confirmed by the lower appellate court.

The facts are that on the 12th of June, 1913, there was a compromise decree granted to the respondent Muhammad Ismail by which he was to get Rs.10 per mensem from his relatives and this sum was to be a charge on the property. Muhammad Ismail several times put his decree in execution and recovered his maintenance allowance. On the 20th of May, 1933, the appellant Indra Narain purchased this property at an auction sale on a decree against the owners Irshad Ali and Masum Ali who were apparently the persons liable under the decree of Muhammad Ismail or their descendants. The objection is that the auction purchaser had no knowledge of the charge and that he was a *bona fide* purchaser for value.

Learned counsel for the auction purchaser appellant claims that his client is protected by the amendment to section 100 of the Transfer of Property Act, which was made by section 50 of the amending Act (Act XX of 1929). This section deals with charges and the amendment provides that "save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge." The execution court wrongly held that this amendment did not have retrospective effect, but the amendment in section 50 of Act XX of 1929 is in a section which is not mentioned by section 63 of that Act as not retrospective and therefore the section 50 is retrospective.

The lower appellate court pointed out that the execution court was wrong in this respect but the lower appellate court considered that the rule of *lis pendens*

laid down in section 52 of the Transfer of Property Act would apply against the appellant. It is difficult to see exactly what the lower appellate court meant, as the decree on which Muhammad Ismail relies was of the 12th of June, 1913, and the matter has now arisen long subsequent to that decree, so there is no question of a transfer while litigation was pending. We cannot therefore justify the order of the lower court on the ground set forth by that court.

But it seems to us that the appellant is incorrect in relying on section 100 as amended. The appellant is an auction purchaser and the amendment is in regard to "any property in the hands of a person to whom such property has been *transferred* for consideration." Now, it appears to us that the word "transfer" must be read as defined in section 5. Section 5 states: "In the following sections 'transfer of property' means an act by which a living person conveys property . . ." This definition cannot include an auction purchaser as he is not a person to whom the judgment-debtor has conveyed his property. An auction purchaser is a person who has acquired the right, title and interest of the judgment-debtor by the order of the court. In section 2, sub-section (d) it is stated: "But nothing herein contained shall be deemed to affect, save as provided by section 57 and chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a court of competent jurisdiction." When we turn to section 57 we find that there is a definite mention of property sold in execution of a decree and the word "transfer" is not used. In chapter IV no doubt section 100 is one of the sections but it does not refer to auction sales. There were certain sections, Nos. 85 to 90, in the original chapter IV, which contained provisions for auction sale. Doubtless the reference in section 2(d) of the Transfer of Property Act to chapter IV is to these particular provisions in sections 85 to 90. As section 2(d) clearly provides that

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nothing in the Act shall apply to any transfer in execution of a decree other than as so provided in chapter IV, it is clear that section 100 as amended does not refer to auction sales or auction purchasers.

No ruling has been produced by learned counsel for the appellant to support his claim that his client was protected by section 100 as amended. The rulings cited are all previous to the amendment of section 100 and it is not necessary to consider them.

For these reasons we dismiss this second appeal. No costs are granted as no one appears for the other side in this appeal.

Before Sir John Thom, Chief Justice, and
Mr. Justice Ganga Nath

1939
July, 27

MAN SINGH AND ANOTHER (DEFENDANTS) v. BAIJ NATH SAHAI (PLAINTIFF)*

Agra Tenancy Act (Local Act III of 1926), section 227—Suit for settlement of accounts and share of profits against a collecting co-sharer—Defendant entitled to retain for himself not his share of the gross rental but only his proportionate share of the actual collections.

In a suit under section 227 of the Agra Tenancy Act the collecting co-sharer is not entitled to deduct his entire share in the whole jamabandi from collections which he has made from some of the tenants; he is only entitled to appropriate from his realisations an amount proportionate to his share in the khewat.

The right conferred by this section is not affected by the fact that the co-sharer who has collected has not acted as the agent of the co-sharer who is seeking to recover his share of the profits; nor is the extent of the liability of the collecting co-sharer dependent upon whether he acted in his individual capacity or as agent in making collections.

Kanhaiya Lal v. R. H. Skinner (1), dissented from.

Mr. Nanak Chand, for the appellants.

Mr. Jagnandan Lal, for the respondent.

*Appeal No. 41 of 1938, under section 10 of the Letters Patent.

(1) (1931) I.L.R. 54 All. 240.