

1929

Both these cases unquestionably support the argument of the learned Counsel.

LAL  
NARSINGH  
PARTAB  
BAHADUR  
SINGH

MITSAMBAI  
MAMMAN JAN.

Hasan and  
Raza, JJ.

Having regard to the system of conveyancing prevailing in this country and particularly in the province of Oudh we are of opinion that the deed of transfer in question must be treated as evidencing a complete contract in writing between the transferor and the transferee. It not only purports to make a transfer of immoveable property mentioned therein on the part of the transferor but it also contains implied acceptance of the liability of the transferee to pay the annual rent to the transferor. The acceptance though contained in a unilateral document is really and in essence the acceptance made by the transferee.

We, therefore, allow this appeal, set aside the decree of the court below and restore the decree of the court of first instance with costs in all courts.

*Appeal allowed.*

### APPELLATE CIVIL.

*Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.*

1929  
April, 23.

CHAUDHARI FATEH ALI AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* GOBARDHAN PRASAD AND OTHERS (DEFENDANTS-RESPONDENTS).\*

*Transfer of Property Act (IV of 1882), sections 39, 40 and 41—Charge on immoveable property—Bona fide transferee for value without notice, whether bound by the charge—Sections 39 and 40 of Transfer of Property Act, 1882, applicability of.*

Where a particular right is charged on a specific immoveable property either by decree or by contract the subsequent transferee though for valuable consideration and without notice takes it subject to that charge. Sections 39 and 40 of the

\*Second Civil Appeal No. 411 of 1928, against the decree of A. C. Bose, 2nd Additional District Judge of Lucknow, at Unao dated the 18th of August, 1928, upholding the decree of Pandit Sheo Narain Tewari, Subordinate Judge of Unao, dated the 30th of July, 1927.

Transfer of Property Act, 1882, deal with personal rights in cases where such rights do not arise out of a specific charge on immoveable property. But where such a charge is created it would seem to follow by implication that it would bind the immoveable property on which it rests even in the hands of a transferee for consideration and without notice.

1929  
CHAUDHRI  
FATEH ALI  
S.  
GOBARDHAN  
PRASAD.

*Maina v. Bachchi* (1), *Kuloda Prosad Chatterjee v. Jageshwar Koer* (2), *Bhoje Mahadeo Parab v. Ganga Bai* (3), *Krishna Pattar v. Alamdu Animal* (4), *Kallappa Ramappa Deyannawar v. Balwant Daso Bettigeri* (5), *Srinivasa Raghava Aiyangar v. K. R. Ranganatha Aiyangar* (6), and *Mahadeo Prasad v. Anandi Lal* (7), relied on. *Madell v. Thomas & Co.* (8), referred to. *Syed Hasan Baqar v. Thakur Sheo Narain Singh* (9), *Royzuddi Sheikh v. Kali Nath Mookerjee* (10), *Akhoy Kumar Banerjee v. Corporation of Calcutta* (11), *Gur Dayal Singh v. Karam Singh* (12), and *Lala Parbhu Dayal v. Babban Lal* (13), distinguished.

Mr. M. Wasim, for the appellants.

Messrs. Bisheshwar Nath Srivastava and G. H. Thomas, for the respondents.

HASAN and MISRA, JJ. :—These two appeals arise respectively out of two suits disposed of by one judgment of the Subordinate Judge of Unao, dated the 30th of July, 1927, confirmed by one judgment of the Second Additional District Judge of Lucknow at Unao, dated the 18th of August, 1928.

One suit (No. 6 of 1927) was brought by the plaintiffs-appellants Chaudhri Fateh Ali, Chaudhri Sitwat Ali and Chaudhri Muhammad Sultan and by the Deputy Commissioner of Hardoi as Manager of the Court of Wards, Kakrali estate, who is now respondent No. 4, against one Gobardhan Prasad and two other persons. The relief prayed for was a declaration to the effect that

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| (1) (1906) I.L.R., 28 All., 655.   | (2) (1899) I.L.R., 27 Calc., 194.  |
| (3) (1913) I.L.R., 37 Bom., 621.   | (4) (1914) 16 M.L.T., 551.         |
| (5) (1904) 27 Bom., L.R., 434.     | (6) (1918) 36 M.L.J., 618.         |
| (7) (1924) I.L.R., 47 All., 90.    | (8) (1891) L.R., 1 Q.B.D., 230.    |
| (9) (1925) I.L.R., 1 Luck., 7.     | (10) (1906) I.L.R., 33 Calc., 985. |
| (11) (1914) I.L.R., 42 Calc., 625. | (12) (1916) I.L.R., 38 All., 254.  |
| (13) (1913) 1 O.L.J., 43.          |                                    |

1929

CHAUDHRI  
FATEH ALI

v.

GOBARDHAN  
PRASAD.Hasan and  
Misra, JJ.

the two annas' zamindari share situate in village Adaura, district Unao, which had been purchased by the defendant-respondent, Gobardhan Prasad, in execution of his money decree against one Chaudhri Ishrat Ali was subject to a charge of Rs. 250 per annum on account of certain religious expenses laid by the award of the Deputy Commissioner of Hardoi, dated the 30th of June, 1918. This award was made a rule of the court and a decree was passed thereon on the 22nd of October, 1918. A claim for Rs. 730 for the said expenses which were due and had not been paid was also made in the suit.

The other suit (No. 109 of 1926) was brought by two ladies, Musammat Razia Begam and Musammat Shafiqunnisa, both daughters of one Chaudhri Nusrat Ali of Sandila, for a declaration that the said two annas' share of the village Adaura, which had been purchased by Gobardhan Prasad, as already stated, was liable to a charge of Rs. 360 annually in favour of the plaintiffs on account of their maintenance under the award, dated the 17th of June, 1921 delivered by one Khan Bahadur Amjad Ali of Hardoi since deceased. This award was also made a rule of court and a decree passed on the basis thereof on the 23rd of June, 1921. The plaintiffs also claimed a sum of Rs. 692-11-0; Rs. 540 on account of arrears of maintenance and Rs. 102-2-0 as interest on the said amount. The case of the plaintiffs of both the suits, therefore, is that the liability for these sums of money is a charge upon the two annas' share of village Adaura and that they were entitled to recover them by sale of the said share.

The main defence of Gobardhan Prasad is that these items were not charged upon the property and even if they were the plaintiffs could not claim any relief against him because he had no notice of these charges and was a *bona fide* transferee for value.

The main question for trial in the suits were whether the items in respect of which the plaintiffs claimed relief in the two suits were charged upon the two annas' share of village Adaura purchased by the defendant, Gobardhan Prasad, and whether he had actual or constructive notice of those charges prior to his purchase; and further if the former question is answered in the affirmative and the latter in the negative, is the share released of the charge in the hands of the defendant.

1929  
CHAUDHRI  
FATEH ALI  
v.  
GOBARDHAN  
PRASAD.

*Hasan and  
Misra, JJ.*

The learned Subordinate Judge of Unao held that the two items in respect of which the plaintiffs claimed relief were no doubt charged upon the aforesaid two annas share but the defendant had no notice of these charges at the time of his purchase and consequently the share in his hands was not liable to satisfy the charge. In this view of the case he dismissed both the suits.

On appeal the learned Additional District Judge of Lucknow at the Unao has upheld the findings of the learned Subordinate Judge and has, therefore, dismissed both the appeals.

We have two second appeals before us. Appeal No. 411 of 1928 is in suit No. 6 of 1927 and Appeal No. 413 of 1928 is in suit No. 109 of 1926. The questions which arise for decision before us are the same as arose in the courts below.

Both the courts below have found that the defendant is not proved to have had actual notice of these charges prior to the date of his purchase. We have been led through the evidence on the record in proof of the said notice and after going through it we have come to the conclusion that the finding arrived at by the lower appellate court on this point cannot be disturbed. It is a finding of fact binding on this Court in second appeal and it has not been shown to be in any way vitiated by any error of law or procedure. We, therefore, confirm the

1929

CHAUDHRI  
FATEH ALI

v.

GOBARDHAN  
PRASAD.Hasan and  
Misra, JJ.

finding and hold that the defendant had no actual notice of these charges at the time of his auction purchase.

The concurrent finding of the courts below that the liability in question amounted to a charge was not seriously disputed by the defendant before us and indeed on the construction of the two awards the finding is undoubtedly correct.

The last point, namely whether the said share in the hands of the defendant is liable to satisfy the charges in respect of which relief is claimed by the plaintiffs in the two suits, is a difficult point. We took time to consider our judgment and we now proceed to give it.

The question of rights of transferees for valuable consideration will be found to be discussed in books of English Law under the subject of "Equity."

Ashburner in Principles of Equity, Chapter IV (edition 1902) says :

"Where relief in equity is sought in respect of a proprietary right, . . . . the right follows the property into whatever hands it passes, and is only lost where the person in possession of the property can shelter himself as a purchaser for valuable consideration without notice . . . . It has long been settled that a judgment-creditor . . . is to be treated as a volunteer under the judgment-debtor."

The same question is dealt with in Halsbury's Laws of England (Vol. XIII), section 8, paragraph 87, page 78. Paragraph 87 runs as follows:—

"But the plea of purchase for value without notice still avails against a plaintiff who is not seeking to establish a claim to an equitable estate or interest, but merely to enforce an

equity, such as an equity to set aside a conveyance. Ordinarily an assignee takes subject to all equities to which the assignor was subject; and this is the case where the assignee is a volunteer, and also where he is a purchaser for value if he has notice of the circumstances which raise the equity. But if he is a purchaser for value without notice, the equity cannot be asserted against him . . . . judgment or execution creditors take only what was vested in the debtor; hence they do not rank as purchasers, but take subject to prior equities. A vendor's lien appears to be not a mere equity, but an equitable estate, and it avails against the purchaser and persons claiming under him, whether as volunteers or for value, other than a subsequent purchaser who takes the legal estate without notice; but the vendor may be postponed by his conduct."

1929

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CHAUDHRI  
FATEH ALI  
v.  
GOBARDHAN  
PRASAD.

Hasan and  
Misra, JJ.

In *Madell v. Thomas and Co.* (1), KAY, L. J., observed as follows:—

“Nothing is clearer than that on general principles . . . . an execution creditor would be bound by it just as much as the . . . . execution debtor himself . . . . An execution creditor is in privity with the . . . . execution debtor. He takes (under the execution debtor not like a purchaser for valuable consideration, and it has been decided over and over again that he only takes what was vested in the . . .

(1) (1891) L.R., 1 Q.B.D., 230 (236).

1929

CHAUDHRI  
FALEH ALI  
v.  
GOBARDHAN  
PRASAD.

Hasan and  
Misra, JJ.

execution debtor. Where property is subject to any rights by which it would be bound in the hands of the . . . execution debtor nothing can be more clear as a general proposition than that it would be subject to such rights as against the . . . execution creditor."

Under the English law, therefore, the execution creditor buys subject to the liabilities created by the judgment-debtor prior to the sale. This being so, the question of notice is wholly immaterial.

The principle of English law stated above does not appear to us to be founded on any technical rule or any peculiarity of that law. To us it appears that it rests on grounds of public convenience which are of universal application and should be followed by us as a rule of equity, justice and good conscience unless we find that its application is excluded by any rule of law of this country.

So far as the statutory law is concerned we find no provision by the force of which a decree-holder purchasing property of his judgment-debtor at an auction sale can avoid a specific charge created by the debtor on the property purchased on the ground of his being a *bona fide* purchaser without notice.

In the course of the arguments sections 39 and 40 of the Transfer of Property Act, 1882, were referred to. Textually those sections have no application to the present case. They both deal with personal rights in cases where such rights do not arise out of a specific charge on immoveable property. But where such a charge is created it would seem to follow by implication that it would bind the immoveable property on which it rests even in the hands of a transferee for consideration and without notice.

In a case decided by RICHARDS J. and reported in *Maina v. Bachchi* (1) it was held that section 39 of the Transfer of Property Act had no application to a case where a suit had been previously brought for recovery of maintenance out of certain property and a decree had been passed incorporating therein a charge upon a particular property.

1929  
CHAUDHRI  
FATEH ALI  
v.  
GOVARDHAN  
PRASAD.

Hasan and  
Misra, JJ.

In a case decided by their Lordships of the Calcutta High Court (GHOSH and RAMPINI, JJ) and reported in *Kuloda Prosad Chatterjee v. Jageshar Koer* (2) the same view was taken. It was held that section 39 of the Transfer of Property Act did not protect a transferee for consideration when the immovable property transferred had already been declared by a decree of court subject to a charge of maintenance.

In *Bhoje Mahadev Parab v. Ganga Bai* (3) the learned Judges of the Bombay High Court (BACHELOR and SHAH, JJ.) endorsed this proposition as will appear from the judgment of BACHELOR, J. on page 628, where the learned Judge remarked as follows :—

“I am also of opinion under the authority of *Kuloda Prosad Chatterjee v. Jageshar Kocr* (2) that the plaintiff's purchase was subject to the charge in favour of the first defendant irrespective of the question whether the plaintiff had or had not notice of that charge.”

In *Krishna Pattar v. Alamelu Ammal* (4) the learned Judges of the Madras High Court (TYABJI and SPENCER, JJ.) took the same opinion as will appear from the following passage, which is to be found on page 561 :—

“Had the decree been passed, and had the claim of the transferee arisen after the decree, it

(1) (1906) I.L.R., 28 All., 655.

(2) (1899) I.L.R., 27 Cal., 194.

(3) (1913) I.L.R., 37 Bom., 621.

(4) (1914) 16 M.L.T., 551.



1920

CHAUDHRI  
FATEH ALI  
v.  
GOBARDEHAN  
PRASAD.

is clear that the transferee would have taken subject to the charge.”

The case reported in *Kuloda Prosad Chatterjee v. Jageshar Koer* (1) was quoted with approval.

In *Kallappa Ramappa Deyannawar v. Bahwant Daso Bettigeri* (2) the learned Judges of the Bombay High Court (Sir NORMAN MACLEOD, K.T., C. J., and Mr. Justice CRUMP took the view that in a case where the charge was created by a decree, the full proprietary rights in regard to the property transferred, which was originally in the possession of the judgment-debtor, were reduced from full ownership to a limited ownership, and that if the ownership of the judgment-debtor was thus reduced the execution creditor could not acquire more than what was possessed by the judgment-debtor himself.

In *Srinivasa Raghava Aiyangar v. K. R. Rangana-tha Aiyangar* (3) the learned Judges of the Madras High Court (SADASIVA AIYAR and SPENCER, J.J.) held that where there was a charge of immoveable property to secure payment of a sum of money a purchaser of the immoveable property although without notice of the charge, took it only subject to the charge. Mr. Justice SADASIVA AIYAR, observed as follows:—

“As regards section 40 of Act IV of 1882, an obligor who executes a bond creating a charge on specific immoveable property does, in my opinion, transfer an interest therein and the obligee is entitled to an interest in the property and not merely to the benefit of an obligation annexed to the obligor's ownership of immoveable property within the meaning of section 40 of Act IV of 1882. The ‘obligation’ contemplated in that section is a personal

(1) (1899) I.L.R., 27 Cal., 194. (2) (1924) 27 Bom., L.R., 434.

(3) (1918) 36 M.L.J., 618.

obligation correlative to a personal right in the obligee such as a right to obtain a mortgage-deed or a sale-deed (which deed, it is, that transfer the interest contracted to be transferred). The subsequent purchaser from a man who has already created a valid charge is as much bound by it as the creator himself on the same principle that the subsequent purchaser for valuable consideration from a simple mortgagor is bound by the mortgage, the question of actual notice to him being immaterial.''

1929

CHAUDHRI  
PATEL ALI  
v.  
GOBARDHAN  
PRASAD.

Hasan and  
Misra, JJ.

In *Mahadeo Prasad v. Anandi Lal* (1) the learned Judges of the Allahabad High Court (DANIELS and NEAVE, JJ.) held that the position of a charge holder under the Transfer of Property Act is stronger than that of a person holding a merely equitable charge under English law, and though there might be cases in which a mere equitable claim would not be enforced against *bona fide* transferees for value without notice, yet it was much too broad a proposition to state that in all cases where by act of parties or by operation of law immovable property of one person was made security for payment of money to another and the transaction did not amount to a mortgage, the security would not be enforced against such transferee.

On behalf of the respondents reliance was placed upon a decision of ours in *Syed Hasan Baqar v. Thakur Sheo Narain Singh* (2). The question for decision in that case was whether the lien which the vendor had under section 55(4)(b) of the Transfer of Property Act as against the property sold for the whole or any portion of the purchase money could be enforced against a subsequent transferee for value and without notice of

(1) (1924) I.L.R., 47 All., 90.

(2) (1925) I.L.R., 1 Luck., 7.

1929  
 CHAUDHRI  
 FATEH ALI  
 v.  
 GOBARDHAN  
 PRASAD.

the said lien. It was held by us that this lien was only an equitable lien and could not, therefore, be enforced against a subsequent transferee for value and without notice.

Hasan and  
 Misra, JJ.

Reliance was also placed on behalf of the respondents on two cases of the Calcutta High Court, *Royz-uddii Sheikh v. Kali Nath Mookerjee* (1) and *Akhoy Kumar Banerjee v. Corporation of Calcutta* (2); one case of the Allahabad High Court, *Gur Dayal Singh v. Karam Singh* (3); and one case of the late Court of the Judicial Commissioner of Oudh, *Lala Parbhu Dayal v. Babban Lal* (4).

In *Rozuddi Sheikh v. Kali Nath Mookerjee* (1) the question for decision was whether an instrument, by which the payment of money is secured on land must be taken to create an interest in specific immovable property. Their Lordships on the interpretation of that document held that an instrument by which payment of money was secured on land might be treated to create a charge but in order to create an interest in specific immovable property there must be a clear indication to that effect in the deed.

In *Akhoy Kumar Banerjee v. Corporation of Calcutta* (5) the question was whether a purchaser of a certain property at an auction sale could escape the liability of certain dues payable to the Municipal Board and it was held that the purchaser could not be considered to be a *bona fide* transferee for value since if he had made inquiries he would have ascertained that the municipal rates had not been paid and were in arrears.

In *Gur Dayal Singh v. Karam Singh* (3) the question for decision was one of vendor's lien for unpaid purchase money.

(1) (1906) I.L.R., 33 Calc., 965.

(2) (1914) I.L.R., 42 Calc., 625.

(3) (1916) I.L.R., 38 All., 254.

(4) (1913) 1 O.L.J., 43.

(5) (1914) I.L.R., 42 Calc., 625.

In *Lala Parbhu Dayal v. Babban Lal* (1) MR. LINDSAY, J. C. held on the interpretation of a particular will that although a charge had been created upon the property in respect of a certain maintenance, yet it did not amount to an interest in specific immoveable property.

It will thus appear that there is a consensus of opinion in all the High Courts in this country that where the right is charged on a specific immoveable property either by decree or by contract the subsequent transferee though for valuable consideration and without notice takes it subject to that charge.

We are, therefore, of opinion that the decree of the court dated the 23rd of June, 1921 passed on the award of the 7th of June, 1921 in the one suit and the decree of the court dated the 22nd of October, 1918, passed on the award of the 30th of June, 1918, in the other suit entitled the plaintiffs of the two suits to enforce their claims against the two annas' share of the village of Adaura, in the district of Unao now held by the defendant, Gobardhan Prasad.

The result is that we allow both these appeals, set aside the decrees of the courts below and decree the reliefs prayed for in the two suits with a direction that the amount of the two decrees shall be paid by the defendant, Gobardhan Prasad, to the plaintiffs of the two suits respectively within three months of today. In the event of default the two annas' share of the village of Adaura shall be sold and the proceeds of the sale shall be utilized for the purpose of satisfying the two decrees. The defendant, Gobardhan Prasad, shall also pay the costs of the plaintiffs in the two suits and shall bear his own costs in all the courts.

*Appeal allowed.*

(1) (1913) 1 O.L.J., 43.

1929

CHAUDHRI  
FATEH ALI  
v.  
GOBARDHAN  
PRASAD.

*Hasan and  
Mitra, JJ.*