

Act had come into force. The Act therefore was in force at the date of the making of the application under section 53. I am therefore of opinion that the decision of the application must be based upon the interpretation of the section as approved of by the Legislature by means of the amending Act. This view is supported by the Full Bench decision of the Madras High Court in *Taticherla Pichamma v. The Official Receiver of Cuddapah* (1), in which case it was held that the amendment made by Act X of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Syed Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srinastava.

SHEO DULARE AND ANOTHER (PLAINTIFFS-APPELLANTS)
v. JAGANNATH AND OTHERS (DEFENDANTS-RESPONDENTS).*

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October, 16.

Transfer of Property Act (IV of 1882), section 55—Lien of purchaser of immoveable property on property purchased—Lien, if effectual against transferee for value with complete notice of the previous mortgage—Transferee for value without notice, position of.

It is a well-established principle of equity that a purchaser of immoveable property has a lien on the property purchased. This principle is recognised in clause (b) of sub-section (4), section 55 of the Transfer of Property Act. The lien will, however, be ineffectual as against a transferee for value and without notice but not in the case of a pur-

*Second Civil Appeal No. 237 of 1930, against the decree of Faadit Bishambhar Nath Misra, District Judge of Unao, dated the 5th of May, 1930, reversing the decree of Babu Sitla Sahai, Additional Subordinate Judge of Unao, dated the 30th of August, 1929.

(1) (1930) I.L.R., 54 Mad., 12.

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chaser at an auction sale with complete notice of the previous mortgage deed which states all the facts giving rise to the equities claimed.

Mahomed Rahimulla v. Esmail Aliarakhia (1), *Rose v. Watson* (2), and *Whitebread & Co. Limited v. Watt* (3), relied on. *Mata Din v. Iftikhar Husain* (4), and *Mahomed Mozuffer Hossein v. Kishori Mohun Roy* (5), referred to.

Messrs. *M. Wasim, Ali Zaheer and Khaliq-uz-zaman*, for the appellants.

Messrs. *A. P. Sen, Zahur Ahmad, Hyder Husain and Bhagwati Nath*, for the respondents.

HASAN, C.J., and SRIVASTAVA, J.:—This is the plaintiffs' appeal from the decree of the District Judge of Unao, dated the 5th of May, 1930, reversing the decree of the Additional Subordinate Judge of the same place, dated the 30th of August, 1929.

The facts of this case are somewhat complicated and the points of law raised on behalf of the plaintiffs at the hearing of the appeal were several. We have taken time to consider our judgment and having regard to the opinion which we have formed on one of these questions of law, it is not necessary either to state all the facts or all the questions of law.

The necessary facts bearing on the decision of this appeal may thus be stated chronologically:—

17th of April, 1914. Sheo Dulare, the father of the defendants Kedar, Mahipat, Bishunath and Gauri Shankar, executed a deed of mortgage in respect of 1 biswa 5 biswansis share out of 16 annas share situate in the village of Makoor, pargana Jhalotar Ajgain, in the district of Unao, in favour of Jagannath who is the chief defendant in the suit, out of which this appeal arises.

(1) (1924) L.R., 51 I.A., 286.

(2) (1864) 11 F.R., 1187.

(3) (1902) 1 Ch., 835.

(4) (1925) I.L.R., 5 Luck., 53.

(5) (1895) L.R., 22 I.A., 129.

20th of June, 1917. It appears that one Sri Krishna had obtained a simple money decree against Sheo Dulare and in execution of that decree he had attached and put up to sale the 1 biswa 5 biswansis share already specified. To this attachment and proposed sale the four sons of Sheo Dulare raised objections on the ground that their 1 biswa share was not liable to be sold in execution of a decree obtained against Sheo Dulare alone who was separate from them. The court rejected the objection and held that the sons' share was also liable for the legitimate debts of the father. The result was that the sale was allowed to proceed and the entire share of 1 biswa 5 biswansis was purchased at a public auction by one Ram Charan for a sum of Rs. 700 on the 20th of June, 1917.

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18th of July, 1917. Sheo Dulare executed the deed of mortgage in favour of the plaintiffs for a sum of Rs. 850 in respect of the entire share of 1 biswa 5 biswansis carrying interest at the rate of 12 per cent. per annum. In default of payment within ten years the mortgagees were entitled to the relief of foreclosure.

25th of July, 1917. Out of the mortgage money advanced by the plaintiffs under the deed of the 18th of July, 1917 a sum of Rs. 700 was paid to Ram Charan and the sale of the 20th of June, 1917 was set aside before Ram Charan could enter into the possession of the share purchased by him.

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6th of May, 1918. As a result of the claim made by Sheo Dulare's sons the mortgage of the 17th of April, 1914 was declared to be inoperative in respect of the sons' share of 1 biswa.

19th of March, 1919. Jagannath enforced his mortgage of the 17th of April, 1914, by means of an action against Sheo Dulare and the plaintiffs and obtained a decree for foreclosure in respect of the 5 biswansis share on the 19th of March, 1919. This share is now held by Jagannath in indisputable right and is no longer subject to any controversy.

20th of August, 1923. The 1 biswa share was again attached and put to sale in execution of a money decree held by Beni Madho and Dwarka against Sheo Dulare and his sons and at court auction Jagannath the defendant purchased it on the 20th of August, 1923. The sale and the purchase were expressly made subject to the mortgage of the 18th of July, 1917. It is against this 1 biswa share that the plaintiffs of the present suit ask for the relief of foreclosure.

For the purposes of the decision of this appeal we accept the finding of the learned District Judge that previous to the date of the mortgage in suit the family of Sheo Dulare and his sons had ceased to be a joint Hindu family and that a separation in status had taken place.

The mortgage of the 18th of July, 1917, was executed by Sheo Dulare for the express purpose of raising money to recover the 1 biswa 5 biswansis share from the hands of Ram Charan and it is now agreed that out of the mortgage money a sum of Rs. 700 was paid to Ram Charan by the plaintiffs and in consequence

thereof, the 1 biswa 5 biswansis share was again restored to Sheo Dulare and his four sons in equal shares. On these facts the plaintiffs' contention is that they have acquired a charge by operation of law on the 1 biswa share and are therefore entitled to recover the sum of Rs. 700 by sale of that share.

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We are of opinion that the contention is well founded. The mortgage of the 18th of July, 1917 was a perfectly valid mortgage, though a second mortgage, in respect of Sheo Dulare's share, that is, 5 biswansis; and it is also clear that Ram Charan had acquired proprietary title to the entire 1 biswa 5 biswansis share which he had purchased on the 20th of June, 1917 at a court auction. Within this purchase must fall the 5 biswansis share in respect of which we have said that the mortgage of the 18th of July, 1917 was a valid mortgage. It follows that the act of the plaintiffs in making the payment to Ram Charan and in recovering from his hands the 1 biswa 5 biswansis share was not an officious act. The plaintiffs for the purpose of protecting the 5 biswansis shares mortgaged to them, had to pay the entire sale price which Ram Charan had paid to purchase the whole share. It follows that by the effect of the rule of subrogation the plaintiffs acquired all the rights which Ram Charan the purchaser had acquired over the 1 biswa 5 biswansis share by reason of the sale of the 20th of June, 1917, in his favour. They lost this right in the 5 biswansis share as a result of the decree dated the 19th of March, 1919, in favour of Jagannath; but we are of opinion that they still retain it in the rest of the 1 biswa share. One of us had occasion to consider this question in the case of *Mata Din v. Iftikhar Husain* (1). In the judgment of that case reference is made to several decisions of their Lordships of the Judicial Committee and also to cases decided in England. It seems to us that the present case entirely falls within the principle

(1) (1929) I.L.R., 5 Luck., 53.

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of the decision of their Lordships of the Judicial Committee in the case of *Mahomed Rahimtulla v. Esmail Allarakhia* (1).

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What were then the rights of Ram Charan? It is a well established principle of equity that a purchaser of immoveable property has a lien on the property purchased—*Rose v. Watson* (2) and *Whitebread & Co., Limited, v. Watt* (3). This principle is recognised in clause (b) of sub-section (4), section 55 of the Transfer of Property Act. The lien will, however, be ineffectual as against a transferee for value and without notice. In the present case, as we have already stated, the defendant Jagannath bought the 1 biswa share at the auction sale of the 20th of August, 1923 with complete notice of the mortgage in suit. The deed of mortgage states all the facts giving rise to the equities to which the plaintiffs now contend they are entitled. We are not unmindful of the fact that Ram Charan had purchased the 1 biswa share at an auction sale and not by means of a private contract. This fact, however, does not appear to us to have the effect of killing the equitable lien which accrued in favour of Ram Charan on the 20th of June, 1917 when he purchased the share in question. In the case of *Mir Mahomed Mozuffer Hossein v. Kishori Mohun Roy* (4) their Lordships of the Judicial Committee applied a principle of equitable estoppel in favour of one auction purchaser against another auction purchaser of the same estate.

We accordingly allow this appeal set aside the decree of the courts below and decree the plaintiffs' suit for a sum of Rs. 700 and interest at the rate of 6 per cent. per annum from the 18th of July, 1917, till realisation. If the sum hereby decreed is not paid within three months of today, the 1 biswa zamindari share out of 20 biswas of village Makoor, which now under partition amounts to 6 biswas out of 20 biswas

(1) (1924) L.R., 51 I.A., 236.

(2) (1864) 10 H.L.C., 672 S.C., 11 E.R., 1187.

(3) (1902) 1 Ch., 835.

(4) (1895) L.R., 22 I.A., 129.

in mohal Sitla Din situate in the same village shall be sold for the satisfaction of the decree. As to the costs we order that the plaintiffs shall be entitled to their costs in proportion to their success in all the three courts. Except Jagannath defendant no other defendant has contested this suit. The costs will therefore be paid by Jagannath alone.

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Appeal allowed.

APPELLATE CIVIL.

Before Syed Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

BRIJ RAJ KUAR, MUSAMMAT (DEFENDANT-APPELLANT) v. RAM DAYAL, PLAINTIFF AND ANOTHER, DEFENDANT (RESPONDENTS).*

1931

October, 16.

Transfer of Property Act (IV of 1882), sections 39, 53 and 128—Hindu widow's right of maintenance in her husband's property—Maintenance of a Hindu widow—Widow's right of maintenance, when becomes a charge on her husband's property—Gift by a husband in favour of his wife—No differences between husband and wife but creditor of her husband—Transaction with the object of relations cordial—Wife, whether can be regarded as giving one creditor preference over another, validity of—Universal donee—Whole property must be covered before transferee can be regarded as a universal donee.

Where a Hindu husband who was heavily indebted, executed a deed of gift of his unencumbered property in favour of his wife by way of providing maintenance for her and for paying certain specified debts and there was no suggestion that at the time of the gift any differences had arisen between them entitling her to claim separate maintenance, rather the relations between them were most cordial and affectionate, held, that at the time of the execution of the deed of gift in favour of the wife she had no charge for her maintenance on the husband's estate and she could not be regarded as a creditor. Her right of maintenance against her husband was merely a

*Second Civil Appeal No. 336 of 1930, against the decree of M. Mohammad Hasan, Additional District Judge of Lucknow, dated the 10th of October, 1930, confirming the decree of Babu Bhagwat Prasad, Subordinate Judge of Lucknow, dated the 14th of May, 1930.