## APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton*

1937

December, 21

HAR NARAIN AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* BANK OF UPPER INDIA THROUGH H. HUNTER (DEFENDANT-RESPONDENT)*

*Transfer of property Act (IV of 1882), sections 5 and 100—Nankar—Cash-nankar decreed by Settlement Court but no mention of its being charge on village—Entry of Nankar in subsequent under-proprietary khewats and wajib-ul-arz—Mortgage, of cash-nankar—Nankar, whether charge on village—Constructive notice of charge—Auction-purchaser, if can be deemed to have notice of charge—Auction-purchaser, if a transferee and entitled to benefit of section 100—Purchase by auction-purchaser, if a transfer under Transfer of Property Act.*

Where cash *Nankar* was decreed by the Settlement Officer in 1864 in relation with a particular village and it was entered in the under-proprietary khewats of that and of subsequent years and in the *wajib-ul-arz* of that village, but the decree did not state that the Nankar was to be a charge on the village, *held*, that the Nankar did constitute a charge on the village and it was in the nature of under-proprietary rights and as such was heritable and transferable. The mortgagee of such Nankar is entitled to a decree for arrears of the Nankar against the auction-purchaser of the village. *Rudra Pratap Sahi* v. *Sheo Charan* (1), applied. *Ram Jiwan* v. *Jadunath* (2), and *Deputy Commissioner, Fyzabad for Ajudhya Estate* v. *Jagjiwan Baksh Singh* (3), referred to.

The auction-purchaser who in execution of his decree on the basis of a mortgage of the village had purchased it, must in all probability, have examined the khewats and the wajib-ul-arz, and in any case should have done so, and he must be deemed to have had constructive notice of the charge and consequently could not be a *bona fide* transferee without notice and even if he had no notice he was nevertheless bound by this charge.

In a sale by the court in execution of a decree it is impossible to hold that the court was a living person or a "party" under

*Second Civil Appeal No. 389 of 1935, against the decree of Shaikh Ali Hammad, Civil Judge of Hardoi, dated the 25th of September, 1935, setting aside the decree of Babu Tribeni Prasad, Munsif, South, Hardoi, dated the 11th of February, 1935.

(1) (1898) I O.C., 168. (2) (1915) 18 O.C., 380.
(3) (1916) 19 O.C., 49.

the meaning of section 5 of the Transfer of Property Act, nor could it be said that the decree-holder was the transferor in such a case. Therefore a purchase by an auction-purchaser is not a transfer to which the Transfer of Property Act applies and as the Transfer of Property Act does not apply to him, the Proviso to section 100 of the Act does not apply to him, and consequently he can get no benefit under it.

An auction-purchaser gets property subject to the same restrictions which the judgment-debtor himself was subject to and if the property is subject to any valid encumbrance the purchaser gets it subject to the same. The doctrine of equity does not here apply because while in private sales there is an implied warranty of title, there is none in an auction sale. An auction-purchaser cannot, therefore, assume the position of a *bona fide* transferee without notice. *Mangal Sen* v. *Mathura Prasad* (1), *Glastaun, J. C.* v. *Sonatan Pal* (2), and *Puran Mal* v. *Shiva Pal* (3), referred to.

Messrs. *Radha Krishna Srivastava*, *Hargovind Dayal* and *Raghubar Dayal Bajpai* for the appellants.

Messrs. *Ram Bharose Lal* and *Murli Manohar* for the respondent.

ZIAUL HASAN and HAMILTON, JJ.—These are two appeals against a decision of the Civil Judge of Hardoi, who decided two appeals nos. 18 and 19 of 1935 against the decision of the Munsif, South, Hardoi, in two suits nos. 174 and 175 of 1934, which were tried together. The suits were instituted by the plaintiffs-appellants as mortgagees of cash nankar against the defendant-respondent, who is an auction-purchaser of village Nirmalpur. The appellants claimed that they were the mortgagees of nankar rights and these nankar rights constituted a charge on the village of Nirmalpur and consequently they were entitled to arrears of the said nankar from the defendant auction-purchaser. The original court decreed the suit, but the learned Civil Judge allowed the appeal on the ground that there was no charge in any case, and even if there was a charge the appellant there, who is respondent here, was a *bona fide* transferee without notice, and, therefore, was not liable to pay the *nankar arrears*. The points urged before us

(1) (1935) A.L.J., 261. (2) (1925) Cal., 485.
(3) (1934) 32 A.L.J., 1260.

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for decision are whether the *nankar* is a charge on Nirmalpur which was bought at an auction sale by the respondent, and if so, whether the respondent was or was not a *bona fide* transferee without notice and, if he had no notice whether he can avoid the liability of payment of those arrears by virtue of section 100 of the Transfer of Property Act.

*Ziaul Hasan and Hamilton, JJ.*

The learned Civil Judge has himself found that the *nankar* was in the nature of an under-proprietary right and was heritable as well as transferable. He, however, went on to find that the decree of the settlement court which made the *nankar* payable did not create any charge on Nirmalpur village or on the rents and profits thereof. At the time of the first settlement the predecessor-in-interest of the plaintiffs had claimed sub-settlement as ancient proprietor. An enquiry was held by the Extra Assistant Commissioner and was submitted to the court of the Settlement Officer, who decreed payment of the cash *nankar* in accordance with the khewat prepared by the Extra Assistant Commissioner with the aid of arbitrators. This decree was passed in the year 1864 and was entered in the khewat of that year and in the khewats of subsequent years, as is shown by the copies of khewats of 1882, 1895 and 1930, which have been filed in this case. The decree did not state that this *nankar* was to be a charge on the village, and it is for this reason that the learned Civil Judge has come to the conclusion that no charge was created. He refers to 3 decisions: *Raja Rudra Pratap Sahi* v. *Sheo Charan* (1), *Ram Jiwan* v. *Jadunath* (2) and *Deputy Commissioner, Fyzabad for Ajodhya Estate* v. *Jagjiwan Baksh Singh* (3) which were quoted before him by the plaintiffs-respondents. The latter two cases differ from the present one as there it was clearly stated that a charge was created. On the other hand the only difference between the first of those cases and the present one is that there was no

(1) (1898) 1 O.C., 163. (2) (1915) 18 O.C., 380.
(3) (1916) 19 O.C., 49.

decree in that case while in the present one we have a decree of the Settlement Court. In *Raja Rudra Pratap Sahi* v. *Sheo Charan* (1) which is a Bench decision, it was held that cash *nankar* granted in lieu of the surrender of zamindari rights is an under-proprietary right and that it is an equity charged on the Zamindari rights so surrendered. This will, therefore, apply to the circumstances in the present case unless it be held that the silence in the decree as to the creation of a charge was deliberate and implied refusal of the constitution of a charge. No reason has been shown to us why there should have been such refusal in this case, and we think, therefore, that the omission of the mention of any charge in the decree was not intended to negative the creation of a charge. It was in fact, we think, an accidental omission to mention the charge. In Second Civil Appeal No. 258 of 1930, which is an unreported decision of a Single Judge of this Court, it was held that *nankar* in similar circumstances as those of the present case was a charge. We have already mentioned that this cash *nankar* has been entered regularly in the under-proprietary khewats, and in our opinion this is good evidence to establish that from the first settlement it was understood that this *nankar* did constitute a charge. Had this *nankar* been independent of the village land, which would have been the case if no charge had been created, it should not have been mentioned in the khewats, for khewats deal exclusively with rights in the land of a village. We are, therefore, in agreement with the decision in Second Civil Appeal No. 258 of 1930, and we find that there is a charge as urged by the plaintiff-appellants.

*Ziaul Hasan and Hamilton, JJ.*

The second point that we have to consider is whether the respondent had notice of this charge. It is admitted that the notice, if any, was constructive and no more. The auction-purchaser was the decree-holder and we presume that when he became the mortgagee of the

(1) (1898) 1 O.C., 163.

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village he endeavoured to find out the value of the property mortgaged to him. As the property was a taluqdari estate in Oudh it was obviously of the utmost importance for him to see to the names of the under-proprietors and their shares as the profits accruing to the superior proprietor would be considerably affected by the existence of under-proprietors. We think, therefore, that he must have examined the khewats and the wajibularz of this village.

*Ziaul Hasan and Hamilton, JJ.*

We have already shown that this cash *nankar* has been entered throughout in the khewats and we find it entered also in the wajibularz of the village, which is exhibit 5. The learned Civil Judge has apparently held that there was no constructive notice because these documents contain nothing to indicate that the decreed *nankar* was a charge. As we have found that the *nankar* was a charge on the village, the argument of the learned Civil Judge is no longer tenable. We hold that the respondent in all probability did examine the khewats and the wajibularz, and in any case should have done so, so that he had constructive notice of the charge. Consequently he cannot at all be a *bona fide* transferee without notice. Finally even if we hold that he had no notice we think he is nevertheless bound by this charge.

It has been repeatedly held that an auction-purchaser gets property subject to the same restrictions which the judgment-debtor himself was subject to, and if the property is subject to any valid encumbrance the purchaser gets it subject to the same. The doctrine of equity does not here apply because while in private sales there is an implied warranty of title, there is none in an auction sale. In this connection we may refer to *Mangal Sen and another* v. *Mathura Prasad and others* (1) and to *J. C. Glastaun* v. *Sonatan Pal and others* (2). There are many other cases, but we do not think it necessary to refer to any more. An auction-purchaser cannot, there-

(1) (1935) A.L.J., 261. (2) (1925) Cal., 485.

fore, assume the position of a *bona fide* transferee without notice.

Apart from that, however, there is the question whether an auction-purchaser is a transferee in good faith for consideration without notice. In *Puran Mal and another* v. *Shiva Pal and another* (1) which is a Bench decision, it was held that it may be very doubtful whether the word "transferee" in the Proviso to section 43 of the Transfer of Property Act would expressly cover an auction-purchaser. There was no decision on this point as it was not necessary to express any final opinion on it, but it was pointed out that the preamble to the Transfer of Property Act suggests that it was to define and amend certain parts of the Law relating to transfer of property by act of parties. The Transfer of Property Act starts as follows:

> "An act to define and amend the law relating to the transfer of property by act of parties."

Preamble:

> "Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties . . ."

"Transfer" is defined in section 5 of the Act as follows:

> "In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, . . .; and 'to transfer property' is to perform such act" . . . . "In this section 'living person' includes a company or association or body of individuals, whether incorporated or not . . ."

Dr. Gour in his Transfer of Property Act in the notes on section 5 on the meaning of "transfer" writes:

> "An alienation by will, or in execution of a decree, or on insolvency would, really speaking, be as much a transfer as those dealt with in the Act, but these have been designedly excluded from its consideration. The term must therefore be read in the Act in the narrow and artificial sense conferred on it by the section".

(1) (1934) 32 A.L.J.R., 1260.

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The learned Counsel for the respondent has been asked by us to state who, according to him, was the transferor in accordance with section 5 of the Transfer of Property Act, and he has suggested that it was the judgment-debtor. We find ourselves quite unable to accept this contention. This sale was not a sale by the judgment-debtor to his decree-holder, but a sale by the Court in execution of a decree, and it is impossible to hold that the Court was a living person or a "party" under the meaning of section 5 of the Transfer of Property Act. We do not see either how could it be urged that the decree-holder was a transferor. This being so we are driven to the conclusion that a purchase by an auction-purchaser is not a transfer to which the Transfer of Property Act applies. As the Transfer of Property Act does not apply to him the Proviso to section 100 of the Act does not apply to him, and consequently he can get no benefit under it.

We find, therefore, that the *nankar* is a charge, that the respondent cannot plead that he was a transferee, and even if he was, he had constructive notice and as an auction-purchaser he takes the property of the judgment-debtor subject to the charge on that property.

We, therefore, allow the appeals, restore the decision of the original court and grant the appellants their costs in all the courts.

*Appeal Allowed.*