

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Ross, J.

MURAT SINGH

v.

PHEKU SINGH.*

1928.

March, 17.

Transfer of Property Act, 1882 (Act IV of 1882), section 100—charge, whether can be created on the happening of a contingency—bona fide purchase for value, plea of, whether should be alleged in the pleadings.

Where in a usufructuary mortgage bond the mortgagor stipulated as follows :

“ In the case of the aforesaid creditor being dispossed of the holding in any way in that case he shall realize his dues from my one-anna share in mauza Dharwali and Gosainpur, ”

Held, that the deed created a present charge on existing property within the meaning of section 100, Transfer of Property Act, 1882, although it could only be enforced on the happening of a contingency.

Nand Lal v. Dharamdeo Singh (1) and *Imbichi v. Acham-pat* (2) followed.

Madho Misser v. Sidh Binaik Upadhya (3) and *Harjad Rai v. Naurang* (4), not followed.

The plea of a bona fide purchase for value is one which ought to be specifically alleged and proved by those who rely on it.

Where, therefore, the defendants did not plead that they were bona fide purchasers for value without notice and no issue was raised on this point which was for the first time taken in argument in the appellate court,

Held, that the defence was not available to the defendants at the appellate stage.

Attorney-General v. Biphosphated Guano Co. (5), *Wilkes v. Spooner* (6) and *Akshoy Kumar Bannerji v. Corporation of Calcutta* (7), followed.

*Appeal from Appellate Decree no. 1578 of 1925, from a decision of Maulavi Abdus Shakur, Subordinate Judge of Arrah, dated the 8th June, 1925, reversing a decision of Babu Debi Prasad, Munsif of Buxar, dated the 2nd February, 1924.

(1) (1924) 78 Ind. Cas. 457.

(2) (1917) 39 Ind. Cas. 867.

(3) (1887) I. L. R. 14 Cal. 687.

(4) (1906) 3 All. L. J. 221.

(5) (1879) 11 Ch. D. 327.

(6) (1911) 2 K. B. 473.

(7) (1915) I. L. R. 42 Cal. 25.

Query.—Whether a charge can be enforced against a bona fide purchaser for value without notice?

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Kishun Lal v. Ganga Ram (1), *Royzuddi Sheikh v. Kali Nath Mukherjee* (2), *Akshoy Kumar Banerji v. Corporation of Calcutta* (3) and *Musammam Maina v. Musammam Bachchi* (4), referred to.

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Appeal by the defendants-first party.

This appeal arose out of suit no. 52 of 1923 tried by the Munsif of Buxar. Gulzar Singh, the ancestor of defendants-second party, owned one anna share in mauza Dharauli, Tauzi no. 1342 and by a deed of the 25th of June, 1888, he executed a usufructuary mortgage of 10 bighas 17 kathas 10 dhoors of zirat land within that share in favour of Jai Koeri, the ancestor of defendants-third party, in consideration of a loan of Rs. 700. On the 13th of February, 1917, there was a Collectorate partition of this tauzi, as the result of which the land given in mortgage fell to the taktas of proprietors other than the mortgagor, and the mortgagee was dispossessed. On the 22nd of February, 1919, the plaintiffs purchased the interest of the mortgagee. The defendants-first party were the purchasers of the milkiat interest of the mortgagor at auction sale. The plaintiffs brought this suit to recover Rs. 700 with interest and to enforce a simple mortgage which they said was created by a clause in the deed above referred to. The clause ran as follows:

"In the case of the aforesaid creditor being dispossessed of the holding in any way, in that case he shall realize his dues from my one anna share in mauza Dharwali and Gasainpur."

The Munsif gave a decree for sale, holding that a simple mortgage had been created. The Subordinate Judge was of opinion that the clause quoted above did not create a mortgage but only a charge; but he confirmed the decree passed by the Munsif. The defendants-first party appealed against this decree.

(1) (1891) I. L. R. 18 All. 28.

(3) (1915) I. L. R. 42 Cal. 625.

(2) (1906) I. L. R. 39 Cal. 985.

(4) (1906) I. L. R. 28 All. 655.

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Parmeshwar Dayal and *D. N. Verma*, for the appellants.

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Lachmi Narain Singh and *S. P. Asthana*, for the respondents.

DAWSON MILLER, C. J. and ROSS, J.—(after stating the facts set out above proceeded as follows :) It is contended in Second Appeal in the first place that no charge was created, and reference was made to the decisions in *Madho Misser v. Sidh Binaik Upadhya* (1) and *Harjas Rai v. Naurang* (2). In these cases it was held, on the construction of the documents with which they were concerned, that no charge had been created; but it was observed that section 100 of the Transfer of Property Act speaks of something which operates as a charge upon land immediately it is executed and that the documents in question did not create a charge at the time, but merely the possibility of a charge ultimately arising on the land. Those decisions have been considered by this Court in *Nand Lal v. Dharamdeo Singh* (3) where the opinion of Coutts-Trotter, J., in *Imbichi v. Achampat* (4), was quoted with approval where he observed that if the cases above mentioned were supposed to enunciate the proposition that whenever you have a charge to secure a liability which will arise only, if at all, in the future, that cannot be a present charge within the meaning of the Transfer of Property Act, he refused to follow them. The deed dealt with in *Nand Lal v. Dharamdeo Singh* (3) in this Court was similar to the present except that it contained a hypothecation clause and amounted to a mortgage; but that makes no difference for the present purpose. In that case it was held that there was a present charge to meet a future contingency which is also the case in the deed now under consideration. The effect of the deed in the present case is to create a usufructuary mortgage of certain lands in lieu of interest on the debt, and also a charge

(1) (1887) I. L. R. 14 Cal. 687.

(3) (1924) 78 Ind. Cas. 457.

(2) (1906) 3 All. L. J. 221.

(4) (1917) 39 Ind. Cas. 867.

on the property of the mortgagor for the principal sum which may be enforced if the creditor is dispossessed of the lands. This is not a mere possibility of a charge. A present charge on existing property is created, though it can only be enforced on the happening of a contingency. There is nothing in section 100 of the Transfer of Property Act to exclude such an instrument from the definition of a charge.

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The second argument advanced is that the defendants-third party had no right to assign their interest under the deed of 1888 which, after the Collectorate partition, was a mere right to sue for damages. This argument is without substance. This is not a suit for damages but is a suit for a sum of money advanced, with interest, to be realised out of property charged with the debt. There is nothing in section 6 of the Transfer of Property Act which bars the transfer of such a right.

The third and last argument is that as the defendants-first party are bona fide purchasers at an auction sale for value without notice of the charge, the charge cannot be enforced against them.

There appears to be a conflict of opinion in India as to whether a charge can be enforced against a bona fide purchaser for value without notice. In *Kishun Lal v. Ganga Ram* (1) Mahmood, J., expressed the opinion, obiter, at page 46 that a charge could not prevail against a bona fide transferee for value without notice. In *Royzuddi Sheikh v. Kali Nath Mukherjee* (2) Mukherjee, J., referred to this dictum and repeated it, saying that a charge can be enforced against a transferee only if it can be shown that he has taken with notice of the charge. Assuming that this proposition is correct in so far as it relieves the property from the charge in the hands of a purchaser without notice a further question would arise whether the burden of proof is not wrongly thrown in the

(1) (1891) I. L. R. 13 All. 28.

(2) (1906) I. L. R. 23 Cal. 955.

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proposition as stated. The question is more fully dealt with in *Akshoy Kumar Banerji v. Corporation of Calcutta* (1)—a case of a statutory charge. There Mukherji, J., speaking of the owner of the property subject to the charge, said: "The owner was not in the position of a mortgagor, who has in him nothing beyond the equity of redemption and can consequently convey to the transferee no larger interest in the property. From this principle, the conclusion is inevitable that the charge cannot be enforced against the property in the hands of a bona fide purchaser for value without notice; in other words, where a mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, a charge can be enforced against the transferee, only if he has taken with notice of the charge," and he refers to the two preceding decisions.

The opposite view is taken in *Musammatt Maina v. Musammatt Bachchi* (2) where Richards, J., expressed the opinion that there is nothing in the Transfer of Property Act to justify any distinction being drawn between the enforceability of mortgages and charges in this respect and that it is much too broad a proposition to state that in all cases where by acts of parties or operation of law immovable property of one person is made security for payment of money to another, and the transaction does not amount to a mortgage, the security will not be enforced even against such transferees. It may be mentioned that this decision is referred to by Mukherji, J., in *Akshoy Kumar Banerjee v. Corporation of Calcutta* (3) but the point of the reference is not clear.

It is however not necessary to decide this question because the argument may be disposed of on the point of onus. The defendants did not plead that they were bona fide purchasers for value without notice and no issue was raised on this point, which was merely taken in argument in the appellate Court.

(1) (1915) I. L. R. 42 Cal. 625.

(2) (1906) I. L. R. 28 All. 655.

(3) (1915) I. L. R. 42 Cal. 635.

In *Attorney General v. Biphosphated Guano Co.* (1) the Court of appeal said that the defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it, and the Court was of opinion that the objection was well-founded, that the trial Judge was not justified in deciding the case upon want of notice to persons as regards whom the fact of notice was not put in issue. This decision was followed by Farwell, L.J. in *Wilkes v. Spooner* (2). Both decisions are referred to and relied upon by Mukherji, J. in *Akshoy Kumar Bannerji v. Corporation of Calcutta* (3) where he held that if the defendants wished to avail themselves of the defence that they were purchasers for value without notice, they should have pleaded it. It is sufficient on this part of the case to say that, without deciding the question whether a charge is or is not available against a bona fide purchaser for value without notice, the argument is not open to the appellants because this defence was not taken and the issue was not raised.

The appeal is dismissed with costs.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Ross, J.

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Code of Civil Procedure, 1908 (Act V of 1908), Order XIII, rule 1, scope of—trial court, discretion of, to admit evidence at a late stage—appellate court, interference by, with that discretion.

March, 20.

The provision of Order XIII, rule 1, Code of Civil Procedure, 1908, which requires the parties or their pleaders to

*Appeal from Appellate Decree no. 1395 of 1925, from a decision of Babu Promotho Nath Bhattacharji, Subordinate Judge of Saran, dated the 30th April, 1925, confirming a decision of Maulavi Saiyid Ahmad, Additional Munsif of Siwan, dated the 1st March, 1924.

(1) (1879) 11 Ch. D: 327.

(2) (1911) 2 K. B. 473, 486.

(3) (1915) I. L. R. 42 Cal. 685.