

Jata Bhusan Chatterjee Vs. Sm. Krishna Bhamini Debi and anr.

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Court : Kolkata

Decided On : Mar-05-1956

Reported in : AIR1957Cal204,60CWN1080

Judge : Guha Ray, J.

Acts : [Transfer of Property Act, 1882](#) - Section 100; ;[Evidence Act, 1872](#) - Section 115

Appeal No. : A.F.A.O. No. 6 of 1955

Appellant : Jata Bhusan Chatterjee

Respondent : Sm. Krishna Bhamini Debi and anr.

Advocate for Def. : Nirmal Chandra Choudhury, Adv.

Advocate for Pet/Ap. : Lala Hemanta Kumar and ;Rabin Mitra, Adv.

Disposition : Appeal dismissed

Judgement :

Guha Ray, J.

1. The facts out of which this appeal arises are not ill dispute. They are briefly as follows:

2. Respondent No. 1 Krishna Bhamini Debi, widow of late Bibhakar Chatterji, obtained a decree against respondent No. 2 Amal Krishna Chatterji, her step-son, in Title Suit No. 268 of 1945. The decree was modified on appeal and this decree, so modified, is in the following terms:

"The appellant, namely, Krishna Bhamini Debi will recover past maintenance for three years at the rate of Rs. 10/- per month or Rs. 630/- in all. She will also get maintenance at the same rate since Jaistha, 1351 B.S. The amount of court-fees payable by the appellant in the two courts should be recoverable by the Government from the respondent No. 1 alone and will form a first charge on the property left by Bibhakar Chatterji. There will also be a second charge on the one-third share of the plaint lands for the maintenance of the appellant'.

It is this last sentence of the decree with which we are concerned in this appeal. Krishna Bhamini filed an execution petition which was registered as Title Execution Case No. 120 of 1948 for realisation of arrears of maintenance from Jaistha, 1351 B.S. to Aghrahaayan, 1355 B.S. by attachment and sale of a half share of the properties mentioned in the schedule to the application which are identical with the property in suit. The fact that this property to the extent of one-third share was subject to a charge under the decree in execution of which the property was sold was not mentioned either in the application for execution or in the sale proclamation. A half share of the property was auction-purchased by the appellant for Rs. 1005/- (one thousand and five rupees) only on the 25-11-1950, and the sale was confirmed in due course. Then, Krishna Bhamini filed an application to execute the decree in respect of arrears of maintenance from Pous 1355 B.S. to Chaitra, 1359 B.S. against respondent No. 2 who is Amal Krishna Chatterji against whom Krishna Bhamini had obtained the decree and also the present appellant Jata Bhusan Chatterji who had auction-purchased a half share of the property in the previous execution sale. Her allegation in the application for execution was that Jata Bhusan was merely a benamdar of respondent No. 2 Amal Krishna. To this execution the appellant Jata Bhusan objected under Section 47 of the Code of Civil Procedure. In this objection he denies the benami nature of his purchase and asserts that he was a bona fide purchaser for value and his objection is two-fold, namely, first that Krishna Bhamini was not entitled to enforce

the charge created by the decree in execution and secondly, that she was estopped from enforcing it after having put up the property to sale without disclosing the charge. The executing court found first that the appellant's purchase was not proved to have been benami and secondly that the charge was not legally enforceable in execution but was enforceable only by way of a suit and thirdly that the decree-holder had waived in the previous execution her right to enforce the charge. On these findings he allowed the appellant's objection under Section 47 of the Code of Civil Procedure and dismissed the application for execution. On appeal the lower appellate court confirmed the finding of the execution court that Jata Bhusan was not a benamdar of Amal Krishna but he found that the charge which had been created by a decree was enforceable in execution and that the mere fact that Krishna Bhamini did not mention the charge in her application for execution did not amount to a waiver on her part nor did it estop her from enforcing the charge. On these findings he set aside the order of the executing court allowing the objection, allowed the appeal with the result that Jata Bhusan's objection under Section 47 of the Code of Civil Procedure stood disallowed, and the execution case was directed to proceed. Jata Bhusan now appeals from this order.

3. The first question raised in this appeal is whether the charge that was created by the decree in favour of Krishna Bhamini is enforceable in execution. Mr. Lala on behalf of the appellant refers to Section 100 of the Transfer of Property Act and argues that, although the Calcutta decisions are against him, on a proper construction of the section as held in a number of cases to which I shall presently refer, the charge was not enforceable in execution.

4. The second point is whether even if the charge is enforceable in execution, in view of the facts that Krishna Bhamini did not mention its existence in her previous application for execution and that the sale proclamation also did not mention its existence there was a waiver of the charge by her or, at any rate she is estopped from enforcing it in this execution after having put up the property to sale once before without disclosing the existence of the same,

5. I shall take up the first point first, namely, whether the charge created by the decree was enforceable in execution. Section 100 of the Transfer of Property Act runs as follows:

'Where immoveable property of one person is by act of parties or by operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, as far as may be, apply to such decree.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution 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.'

Mr. Lala contends that as Jata Bhusan purchased the property and as in the execution sale at which he purchased it the existence of the charge created by the decree was not disclosed, he has got to be held to be a transferee for consideration and without notice of the charge and so under the last part of the second paragraph of Section 100 of the Transfer of Property Act, this charge in favour of Krishna Bhamini was not enforceable at all, far less was it enforceable in execution. Three cases are relied on by Mr. Lala. The first is the Oudh Full Bench case in *Abdul Gaffar Khan v. Ishtiaq Ali*, AIR 1943 Oudh, 354 (A) in which their Lordships observed as follows:

'I see no reason why a charge created by a decree should not be considered to come within the purview of Section 100. Operation of law only means the working of the law and I do not see why the expression should be restricted in its application to such cases as fall under Section 55 or Section 73. In the present case it may be said that the charge resulted from the operation of law consequent on the act of parties. In referring their litigation to arbitration and upon the application of Musuq Ali to make the award a rule of the Court. There is nothing in Section 100 itself which would suggest an intention to exclude a charge created by a decree. The section apparently assumes that charges can be created only by act

of parties or by operation of law and paragraph 2 which was added in 1929 refers to charges generally. On this view I have no doubt that a charge created, by a decree is governed by Section 100'.

6. The next case he relies on is a Bombay case, namely, the case of Rustom Ali Gahurali Mirza v. Aftab Ali Khan Nasaf Ali Khan Mirza, AIR 1943 Bom 414 (B). In this case an agreement to pay a particular sum annually out of the income of some villages was treated as an agreement to charge the income of those villages for the payment of this annual sum. The observation, therefore, of his Lordship in this case made on the basis of the Full Bench decision in the Oudh case that there is no difference in principle between a charge created by act of parties and one created by a decree, is nothing more than obiter.

7. The next case relied on by Mr. Lala is another Full Bench case of the Oudh Court, namely, the case of Mt. Indrani v. Maharaj Narain . In a suit for maintenance by Mt, Indrani against two other persons, there was a decree on compromise, the property of the defendants being charged in the decree for the maintenance of Mt. Indrani. The respondents in the appeal, in execution of a decree obtained against these defendants after the consent decree in Mt. Indarani's case (C) put to sale and purchased the property charged of one of the defendants. The compromise which created the charge was made part of the decree but the decree itself, through oversight, omitted to mention the charge created on the property of the defendants. The decree, however, was amended after the respondent's purchase so as to insert in the decree the provisions of the compromise relating to the charge. Mt. Indrani tried to execute the decree of maintenance against part of the property charged, namely, what the respondents had purchased, and the respondents objected under Section 47 of the Code of Civil Procedure. This objection was overruled by the execution court, the lower appellate court, however, allowed it and Mt. Indrani appealed. The first question referred to the Full Bench was: Where a 'particular right is charged on specific immoveable property by a decree of court, can such charge be enforced against a subsequent transferee for valuable consideration and without notice? In answering this in the affirmative, their Lordships proceeded on the general ground that there is no difference in principle between a charge created by a decree and one

created by a contract. Evidently, this case is distinguishable from the facts of the present case because, though embodied in the decree, it was really a charge created by the compromise or by act of parties. These are all the cases Mr. Lala cited in support of his argument.

8. On behalf of the respondents a number of Calcutta and Patna decisions have been relied on. In the case of Sashi Bhusan Ghose v. bhupendra Nath Pal, AIR 1936 Gal 112 (D), in a Second Appeal by defendants Nos. 3 and 4 in whose favour a decree had been passed for money, the payment of which was made a first charge on a kiln, in answer to the contention on behalf of the plaintiffs respondents who had purchased the kiln in question in execution of a money decree of their own, M.C. Ghose, J. said

'where a charge was created by a decree, no question of notice arises and a subsequent purchaser would be bound irrespective of whether such purchaser had notice or not.'

This observation was made following the case of Hemalate Debi v. Bhawani Charan Roy 39 Cal WN 725 (E) which I shall discuss presently.

9. The next case is that of L.A. Creet v. Firm Gangaraj Gulraj : AIR1937 Cal129 . In this case the plain till respondent purchased the right, title and interest of the judgment-debtors, Arthur Jardine & Co., and the faigram Coal Co- Ltd., in 1124 bighas of coal land in the disputed colliery with equipments etc. Prior to the plaintiff's purchase there were two charge decrees obtained by the lessor appellant L. A. Greek and the question arose whether the plaintiff was affected by those decrees, though he had no notice thereof. The Subordinate Judge from whose decision the appeal arose held that he was not affected. Their Lordships say--

'But the Subordinate Judge does not seem to us. to be right in law, for it is established on authority that notice is not necessary in the case of a purchase at an execution sale. The position of a purchaser at a sale is the same as that of a judgment-debtor. His position is somewhat different from that of a purchaser 'at a private treaty. Execution 'purchaser's purchase is subject to all the charges and

incumbrances, legal and equitable, which would bind the debtors.'

For this view their Lordships relied on a number of English decisions and, at least, one Indian case. The English decisions are *Wickham v. New Brunswick & Canada Rly. Co.* (1865) 1 PC 64 (G) and *Madell v. Thomas & Co.* (1891) 1 QB 230-(H), & *Fateh Ali v. Gobardhan prosad*, AIR 1929 Oudh 316 (I).

10. The next case relied on by the plaintiff is that of 39 Cal WN 725 (E). In this case the plaintiffs appellants obtained on compromise a decree creating a charge for maintenance on certain properties which were, subsequent to the decree, auction-purchased by one of the defendants respondents at a rent sale and they asked for a declaration that the properties in the hands of the defendants were subject to the charge and also for recovery of arrears of maintenance by sale of the charged properties or by the appointment of a receiver. In this case the defence was that Section 47 of the Code of Civil Procedure was a bar and that the defendants having had no notice of the charge were not bound by it. The Subordinate Judge found for the defence on both the points. Their Lordships repelled the first argument by saying that there was nothing in the decree by which it could be said that the parties intended the charge to be enforced in the course of execution and referred in this connection to two earlier decisions of this Court, namely, the cases of *Aubhoyessury Dabee v. Gouri Sunkur*, ILR 22 Cal 859 (J) and *Kashi Chandra v. Priyanath Batishi* : AIR1924 Cal645 . The first was a consent decree by which the decretal dues were made payable in instalments and the properties annexed to the decree stood charged for the payment of the instalments. It was held by their Lordships in that case that the properties could not be brought to sale in execution of the decree but a suit under Section 67 of the Transfer of Property Act had to be instituted. In the second case, *Mukherjee J.* distinguished *Aubhoyessury's* case (J) by pointing out that there was no express provision in the decree, as there was in the case of *Kashi Chandra* (K) that the decree-holder would be entitled to realise his dues by execution. In *Hemlata's* case (E) their Lordships finally concluded that on a proper construction of the decree *Hemlata*, the plaintiff-appellant, must be held to have intended that the arrears should be realised by execution of a personal decree against some of the defendants and that the suit to enlarge the decree was competent. On the other

point, their Lordships following the decision in *Kuloda Prosad Chatterjee v. Jageshar Koer*, ILR 27 Cal 194 (L) held that where a charge created by a decree was concerned, no question of notice arose. The earliest case, however, on the point on which reliance was placed on behalf of the respondent is that of *Asutosh Bonerjee v. Lukhimonee Debia*, ILR 19 Cal 139 (FB) (M) which is a Full Bench case. In that case the respondent obtained a consent decree directing some of the defendants to pay out of the estate of the respondent's husband which was in their hands a certain maintenance and charging certain properties with the payment of the maintenance at a certain rate during her life. The question whether this maintenance could be recovered in execution was the precise question referred to the Full Bench and it was answered by it in the affirmative. This decision was given in 1891. At the time this decision was given, Section 100 stood in a somewhat different form. It contained the same definition of a charge as it does now and the second clause of the first paragraph of the section after 'all the provisions hereinbefore contained' ran as follows:

'All the provisions as to a mortgagor shall, so far as may be, apply to the owner of such property and the provisions of Ss. 81 and 82 and all the provisions hereinbefore contained as to a mortgagee instituting, a suit for the sale of the mortgaged properties shall, so far as may be, apply to the person having such charge.'

The second paragraph consisted only of the first clause. The subsequent amendments, however, of the section really do not alter the law but merely make it clearer as to the rights and liabilities of a charge-holder.

11. The only other cases relied on on behalf of the respondents are *Snh Radha Krishna v. Mt. Bechni Debi*, AIR 1937 Pat 654 (N) and *Sheo Nandan Panday v. Mt. Asarfi Kuer* AIR 1946 Pat 216 (O) both of which cases follow the case of ILR 19 Cal 139 (FB) (M). As pointed out in the second of the Patna cases, * claim arising under a charge decree does not really arise under the charge but under the decree itself so that Section 100 of the Transfer of Property Act is not attracted to such decree.

12. It is clear, therefore, on the authorities that the Calcutta decisions are all against the appellant and so are the two Patna decisions, cited. Apart from the fact that I am bound by the Calcutta decisions, I must, with due respect to the learned Judges of the Oudh and the Bombay Courts who take a different view, say that the Calcutta decisions lay down the law correctly. The first part of Section 100 of the Transfer of Property Act defines a charge and those are only charges contemplated by Section 100. Any charge that would be outside the limits of this definition would be outside the scope of Section 100 of the Transfer of Property Act. Of the two varieties of charges contemplated by this section, one, (namely, a charge created by the act of parties, does not present any difficulty but as to charges created by operation of law, two different views have been taken, one being that it includes a charge created by a decree and the other being that it does not include such a charge. In my opinion, a charge created by a decree would be one by operation of law only where the decree merely embodies a charge which exists in law apart from the decree itself. If a decree embodies a charge which has no existence in law independently of the decree itself, this, in my opinion, would be outside the definition of Section 100 of the Transfer of Property Act. A Hindu widow's right to maintenance is not, however, in the fullest sense of the term, a charge on her husband's estate, though she has a right to be maintained out of that estate because it does not necessarily bind any part of such property in the hands of a purchaser. It becomes a complete charge if it be fixed and charged upon such property or a portion thereof by a decree or by an agreement or by a Will. That being so, a charge for the payment of maintenance of a widow out of her late husband's estate, though created by a decree, may from one point of view be said to be one by operation of law and from another point of view one not by operation of law but by a decree only. Assuming, however, that it is a charge created by operation of law, though embodied in the decree, the question is whether the last part of paragraph 2 of Section 100 really prohibits the enforcement of this charge against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge; In this connection, it must be noticed that the prohibition in the last part of the second paragraph of Section 100 is preceded by a qualification embodied in the phrase 'save as otherwise expressly provided by any law for the time being in force'. This,

to my mind, is quite significant. Where a charge is created by a decree, the instrument creating the charge is at the same time a decree. Therefore, it has a 'double character and is distinguishable from one which is merely an instrument creating a charge and not at the same time a decree. If it were merely an instrument creating a charge, it could be enforced only by a suit according to the first part of Section 100 but as it is at the same time a decree, it is capable of execution according to the provisions of law. That, to my mind, makes a charge created by a decree enforceable in execution as held in the Calcutta Full Bench Case (M), already referred to.

13. There is also another aspect of the matter. The judgment-debtor Jata Bhusan who purchased a half of the properties in question at the first auction sale merely acquired the right, title and interest of the judgment-debtor. The judgment-debtor's interest was undoubtedly subject to the charge. Therefore, as pointed out in Creet's case (F) by their Lordships, what the judgment-debtor acquired was subject to all the charges and incumbrances, legal and equitable, which would bind the judgment-debtor. That being so, in the case of an auction-purchaser at a court sale, no question of notice arises. In this view, the finding of the lower appellate court that the charge was enforceable in execution must be held to be quite correct.

14. The only other point argued by Mr. Lala on behalf of the appellant is that there was a waiver on the part of Krishna Bhamini or, at least, she is estopped from enforcing it in execution after having put up the property to sale with a disclosure of the charge. Krishna Bhamini's omission to disclose the charge in her application can hardly be treated as a waiver on her part for all time. At best, it was a waiver on her part in the first execution case. As regards the question of estoppel, Mr. Lala relies on the case of *Manick Ram v. Ram Autar* 27 Ind Cas 611: (AIR 1915 Oudh 185(P)) where it has been held that where a person stands by and allows another to advance or spend money on a property over which he has a charge or incumbrance, he may be estopped by his conduct or acquiescence. In that case the appellant who was a party defendant in the suit had an opportunity to notify his lien when the property mortgaged was put up to sale but deliberately refrained from doing so and it was held that he was estopped later. The mere fact that

Krishna Bhamini omitted in her first application for execution to mention the existence of the charge would not, to my mind, estop her under Section 115 of the Evidence Act because there is nothing to indicate that by her omission she intentionally caused or permitted Jata Bhusan to believe that the property in question was not subject to a charge and to act upon, such belief. The omission might have been quite accidental or due to oversight. Until & unless there is something to indicate that her omission was meant intentionally to cause or permit another person to believe that the property was not subject to a charge and to act upon such belief, there is no question of estoppel under Section 115 of the Indian Evidence Act. Besides, in this case the pleader who acted for Jata Bhusan in that auction sale admits in his cross-examination, as pointed out by the learned appellate court, that he heard Phani Babu, Pleader for the decree-holder, saying something regarding the charge but he did not lend his ears to that. It is obvious, therefore, from this statement of Jata Bhusan's lawyer that the decree-holder's lawyer had made it clear that the property was subject to a charge. There can be no question of estoppel in such circumstances.

15. The result then is that both the contentions of Mr. Lala on behalf of the appellant must fail, and the decree passed by the lower appellate court confirmed and the appeal dismissed with costs.