The Ahmedabad Municipal Corporation of The City of Ahmedabad

Vs

Haji Abdulgafur Haji Hussenbhai

Civil Appeal No. 1161(N) of 1967

(V. Bhargava, I. D. Dua JJ)

18.03.1971

JUDGMENT

DUA, J. -

1. In this appeal on certificate granted by the High Court of Gujarat under Article 133(1)(c) of the Constitution of India the questions raised related to the liability of auction purchaser of property at court sale for the arrears of municipal taxes due on the date of sale to the municipal corporation of the City of Ahmedabad which dues are statutory charge on the property sold and of which the purchaser had no actual notice. On the question of constructive notice there is a sharp conflict of judicial decisions in the various High Courts and in the Allahabad High Court itself there have been conflicting expressions of opinion. In this Court there being no representation on behalf of the respondent the appeal was heard ex parte.

2. The property which is the subject-matter of controversy in this litigation originally belonged to one Haji Nur Mahammad Haji Abdulmian. He apparently ran into financial difficulties in February 1949 and insolvency proceedings were started against him in March, 1949. By an interim order receivers took charge of his estate and finally on October 14, 1950, he was adjudicated insolvent. The property in question accordingly vested in the receivers. Thus property had been mortgaged with a firm called Messrs. Hargovind Laxmichand. In execution of a mortgaged decree obtained by the mortgagee his property was auctioned and purchased at court sale by the plaintiff Haji Abdulgafur Haji Hussenbhai (respondent in this Court) for Rs. 22,300/-. He was declared purchaser on November 28, 1954. At the time of this purchase there were municipal taxes in respect of this property in arrear for the years 1949-50 to 1953-54, which means that the receives had not cared to pay the municipal taxes during all these years. The property was attached by the municipal corporation by means of an attachment notice, dated July 20, 1955, for the arrears of the municipal taxes amounting to Rs. 543.79 P. As the municipal corporation threatened to sell the property pursuant to the attachment proceedings the purchaser instituted the suit (giving rise to this appeal) for a declaration that he was the owner of the property and that the arrears of municipal taxes due from Haji Nurmohammad Haji Abdulmian were not recoverable by attachment of the suit property in the plaintiff's hand and that the warrant of attachment of the property issued by the municipal corporation was illegal and ultra vires. Permanent injunction restraining the municipal corporation from attaching the property for arrears of municipal taxes was also sought. The Trial Court declined the prayer for a declaration that the property was not liable to be attached for recovery of the arrears of municipal taxes. But the warrant of attachment actually issued in this case was held to be illegal and void with the result that an injunction was issued restraining the municipal corporation from enforcing the impugned warrant of attachment against the plaintiff in respect of the suit property. Both parties feeling aggrieved appealed to the District Court. The Assistant Judge who heard the

appeals dismissed both of them. The plaintiff thereupon presented a secondly appeal to the Gujarat High Court which was summarily dismissed by a learned single Judges. Leave to appeal to a Division Bench under Clause 15 of the Letters Patent was however granted. The Division Bench hearing the Letters Patent appeal in a fairly lengthy order allowed the plaintiff's appeal and decreed his suit holding that the plaintiff is the owner of the suit property and the charge of the municipal corporation for arrears of municipal tax is not enforceable against his property and also restraining the municipal corporation by a permanent injunction from proceeding to realise from this property the charge in respect of the arrears of Municipal taxes. On appeal in this Court three main questions were raised by Shri S. T. Desai, learned counsel for the appellant.

3. To being with it was contended that there is no warranty of title in an auction sale. This general contention seems to us to be well-founded because it is axiomatic that the purchaser at auction sale takes the property subject to all the defects of title and the doctrine caveat emptor (let the purchaser beware) applies to such purchaser. The case of the judgment-debtor having no saleable interest at all in the property sold such as is contemplated by Order XXI, Rule 91, C.P.C. is, however, different and is not covered by this doctrine. The Second point canvassed was that there is an express provision in Section 141(1) of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter called the Bombay Municipal Act) for holding the present property to be liable for the recovery of municipal taxes and, therefore, though the property was subject only to charge not amounting to mortgage and, therefore, involving no transfer of interest in the property, the same could nevertheless be sold for realising the amount charged, even in the hands of a transferee for consideration without notice. Section 141 of the Bombay Municipal Act is an express saving provision as contemplated by Section 100 of Transfer of Property Act, contended Shri Desai. This submission has no merit as would be clear from a plain reading of Section 100 of the Transfer of Property Act, 1882 and Section 141 of the Bombay Municipal Act, the only relevant statutory provisions. Section 100 of the Transfer of Property Act dealing with 'charges' provides :

> "Section 100. - Where immovable property of one person is by act of parties or 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 charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.
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> Nothing in this section applies to the charges of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of the person to whom such property has been transferred for consideration and without notice of the charge."

4. This section in unambiguous language lays down that no charge is enforceable against any property in the hands of a transferee for consideration without notice of the charge except where it is otherwise expressly provided by any law for the time being in force. The saving provision of law must expressly provide for enforcement of a charge against the property in the hands of a transferee for value without notice of the charge and not merely create a charge. We now turn to Section 141 of the Bombay Provincial Municipal Corporation Act, 1949, to see if it answers the requirements of Section 100 of Transfer of Property Act. This sections reads :

> "Section 141. - Property taxes to be a first charge on premises on which they are assessed -

(1) Property taxes due under this Act in respect of any building or land shall, subject to the prior payment of the land revenue, if any, due to the State Government thereupon, be a first charge, in the case of any building or land held immediately from the Government, upon the interest in such building or land of the person liable for such taxes and upon the movable property, if any found within or upon such building or land and belonging to such person; and, in the case of any other building or land, upon the said building or land and upon the movable property, if any, found within or upon such building or land and belonging to the person liable for such taxes.

Explanation. - The term 'Property taxes' in this section shall be deemed to include charges payable under Section 134 for water supplied to any premises and the costs of recovery of property taxes as specified in the rules.

(2) In any decree passed in a suit for the enforcement of the charge created by sub-section (1), the Court may order the payment to the Corporation of interest on the sum found to be due at such rate as the Court deems reasonable from the date the institution of the suit until realisation, and such interest and the cost of enforcing the said charge, including the casts of the suit and the cost of bringing the premises or movable property in question to sale under the decree, shall, subject as aforesaid, be a fresh charge on such premises and movable property along with the amount found to be due, and the Court may direct payment thereof to be made to the Corporation out of the sale proceeds."

Sub-section (1), as is obvious, merely creates a charge in express language. This charge is subject to prior payment of land revenue due to the State Government on such building or land. The section, apart from crating a statutory charge, does not further provide that this charge is enforceable against the property charged in the hands of a transferee for consideration without notice of the charge. It was contended that the saving provision, as contemplated by Section 100 of the Transfer of Property Act, may, without using express words, in effect provide that the property is liable to sale in enforcement of the charge and that if this liability is fixed by a provision expressly dealing with the subject, then the charge would be enforceable against the property even in the hands of a transferee for consideration without notice of the charge. According to the submission it is not necessary for the saving provision to expressly provide for the enforceability of the charge against the property in the hands of a transferee for consideration without notice of the charge. This submission in unacceptable because, as already observed what is enacted in the Second half of Section 100 of Transfer of Property Act is the general prohibition that on charge shall be enforced against any property in the hands of a transferee for consideration without notice of the charge and the exception to this general rule must be expressly provided by law. The real core of the saving provision of law must be not mere enforceability of the charge against the property changed but enforceability of the charge against the said property in the hands of a transferee for consideration without notice of the charge. Section 141 of the Bombay Municipal Act is clearly not such a provision. The second contention fails and is repelled.

5. The third argument, and indeed this was the principal argument which was vehemently pressed with considerable force by Shri Desai, is that the plaintiff must be deemed to have constructive

notice of the arrears of municipal taxes and as an auction purchaser he must be held liable to pay these taxes and the property purchased must also be held subject to this liability in his hands. In support of this submission he cited some decisions of our High Courts. The first decision relied upon by Shri Desai is reported as Arumilli Surayya v. Pinisethi Venkataramanamma in which relying on Creet v. Ganga Ram Gool Rai (ILR (1937) 1 Cal 203 : AIR 1937 Cal 129.) it was observed by Harwell, J. that Section 100 of the Transfer of Property Act does not apply to auction sales because the transfer within the meaning of the Transfer of Property Act does not include an auction sale. It was added that the position of a purchaser at an execution sale is the same as that of the judgment-debtor and his position is somewhat different from that of a purchaser at a private sale. Execution purchasers, according to this decision purchase the property subject to all the charges and encumbrances legal and equitable which would bind the debtors. We do not agree with the view taken in this decision. We, however, do not consider it necessary to go into the matter at length because we find that this decision was expressly overruled by this Court in Laxmi Devi v. Mukand Kunwar ((1965) 1 SCR 726 : AIR 1965 SC 834 : (1965) 2 SCJ 656.) and the High Court, relying on this Courts decision, had also repelled a similar contention pressed on behalf of the Municipal Corporation there. This Court pointed out in Laxmi Devi's case (supra) that the provisions of Section 2(d) of the Transfer of Property Act prevail over Section 5 with the result that the provisions of Section 57 and those contained in Chapter IV of the Transfer of Property Act must apply to proceedings by operation of law. Section 100, it may be pointed out, falls in Chapter IV. Reliance was next placed on a Full Bench decision of the Allahabad High Court in Nawal Kishore v. The Municipal Board, Agra. According to this decision the question of construction notice is a question of fact which falls to be determined on the evidence and circumstances of each case. But that Court felt that there was a principle on which question of constructive notice could rest, that principle being that all intending purchasers of the property in municipal areas where the property is subject to a municipal tax which has been made a charge on the property by statute have a constructive knowledge of the tax and of the possibility of some arrears being due with the result that it becomes their duty before acquiring the property to make enquiries as to the amount of tax which is due or which may be due and if they fail to make this enquiry such failure amounts to a wilful abstention or gross negligence within the meaning of Section 3 of the Transfer of Property Act and notice must be imputed to them. The reference to the Full Bench in the reported case was necessitated because of conflict of judicial opinion between in that Court and Oudh Chief Court. The earlier decision of a Division Bench in Municipal Board, Cawnpore v. Roop Chand Jain (ILR 1940 All 669 : AIR 1940 All 1940 All 456.) was overruled and the Bench decision of Oudh Chief Court in Municipal Board Lucknow v. Ramjilal (ILR 1916 (16) Luck 607 : AIR 1941 Oudh 305 : 193 IC 290.) was approved. The next decision to which reference was made by Shri Desai is reported as Akhoy Kumar Banerji v. Corporation of Calcutta. (ILR 42 Cal 625.) In this case, after distinguishing a mortgages from a charge, it was observed that the statutory charge in that case could not be enforced against the property in the hands of bona fide purchaser for value without notice. While dealing with the question whether the appellants in that case were purchasers for value without notice, it was observed that they had not pleaded in their written statement that they were purchasers for value without notice. Having not pleaded this defence they were held disentitled to avail of it. Having so observed the Court dealt with the case on the assumption that the defence though not expressly taken in the pleadings was available to the defendants. The court said :

> "But even if we assume that the defence, though not expressly taken in their written statement, is available to the defendants, they are in a position of difficulty from which there is no escape. The appellants are private purchasers of the property and if they had enquired at the time of their purchase, they would have discovered that the

> rates were in arrears; as a matter of fact, they would be personally liable under Section 223 for the arrears of the year immediately prior to the date of their purchase, and they admit that they have satisfied such arrears, though they do not disclose whether by enquiry they had ascertained the existence of the arrears before they made the purchase".

6. The Court then proceeded to deal with the position of the vendor from whom the appellants had purchased the property in order to see if he could raise the defence of being a purchaser for value without notice. The appellant's vendor was a mortgagee who had acquired titled by foreclosure - an involuntary alienation by his mortgager - and it was held that to him constructive notice could not be imputed to the same extent as to a purchaser at a private sale. But had he made enquiries from the municipal authorities he could still have ascertained whether any arrears of consolidated rates were due. When he had taken the mortgage he was aware that if the rates were not paid the arrears would be first charge on the property with the result that before becoming full owner by foreclosure he should have ascertained the true state of affairs. On this reasoning he was held to have constructive notice and the purchasers from him could not claim grater protection. These circumstances clearly disclose that the reported case is not similar to the one before us and is of little assistance.

7. Chandu Ram v. Municipal Commissioner of Kurseong Municipality (AIR 1951 Cal 398 : 54 Cal WN 455.) was the next decision cited. The Bench in that case followed the Full Bench decision of the Allahabad High Court in Newal Kishore's case (supra). A Division Bench of the Oudh Chief Court in Municipal Board, Lucknow v. Lala Ramji Lal (AIR 1941 Oudh 305 : ILR 16 Luck) disagreeing with the Bench decision of the Allahabad High Court in Roop Chand Jain's case (supra). observed that it must be presumed that a person who buys house property situate in a municipality is acquainted with the law by which a charge is imposed on that property for the payment of taxes. The charge having been expressly imposed by the Municipal Act upon the property for payment of municipal taxes the municipality was entitled to follow the property in the hands of a transferee who had not cared to make any enquiry as to whether the payment of taxes was in arrears. The Court approved the Calcutta decision in Akhoy Kumar's case (supra). The next decision cited is reported as Laxman Venkatesh Naik v. The Secretary of State for India (XLI BLR 257.) but being case of Takkavi loans it is of no assistance in the present case.

8. We may now turn to the full Bench decision of the Allahabad High Court in Roop Chand Jain's case (supra). The reasoning for the view adopted there may be reproduced :

> "A bona fide purchaser takes property he buys free of all charges of which he has no notice actual or constructive. He is said to have constructive notice when ordinary prudence and care would have impelled him to undertake an inquiry which would have disclosed the charge. If for instance the charge is created by a registered document then the purchaser would be held to have constructive notice of that charge inasmuch as a prudent purchaser would in ordinary course search the registers before effecting the purchase. There is no register, as far as we know, of arrears of taxes or of charges in respect thereof, it has not been shown that the municipality of Cawnpore intimate to the public in the 'Press' or by other publication a list of the properties which are charged in respect of arrears of taxes. There is nothing upon the record to justify the conclusion that the defendants could have demanded any information from the municipality in regard to charges on immovable property within the municipal limits."

9. The Court then notice the fact that the Kanpur Corporation had allowed 11 years arrears of taxes to accumulate and it was observed that no intending purchaser was bound to presume that taxes upon the property, he contemplates purchasing had not been paid in the ordinary course, in the absence of special intimation by the municipality. On this reasoning the suggestion of constructive notice was negatived.

10. According to Section 3 of the Transfer of Property Act which is described as interpretation clause, a person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an enquiry or search which he ought to have made or gross negligence he would have known it. There are three explanations to this definition dealing with three contingencies when a person acquiring immovable property is to be deemed to have notice of certain facts. Those explanations are :

> "Explanation I. - Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument any person acquiring such property or any part of, or share or interest in such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under section (2) of Section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated :
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> Provided that -
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> (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,
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> (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and
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> (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.
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> Explanation II. - Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.
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> Explanation III. - A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :
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> Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

11. Now the circumstances which by a deeming fiction impute notice to a party are based, on his wilful abstention to enquire or search which a person ought to make or, on his gross negligence. This presumption of notice is commonly known as constructive notice. Though originating in equity

this presumption of notice is now a part of our statute and we have to interpret it as such. Wilful abstention suggests conscious or deliberate abstention and gross negligence is indicative of a higher degree of neglect. Negligence is ordinarily understood as an omission to take such reasonable care as under the circumstances is the duty of a person of ordinary prudence to take. In other words it is an omission to do something which a reasonable man guided by considerations which normally regulate the conduct of human affairs would do or doing something which normally a prudent and reasonable man would not do. The question of wilful abstention or gross negligence and, therefore, of constructive notice considered from this point of view is generally a question of fact or at best mixed question of fact and law depending primarily on the facts and circumstances of each case and except for cases directly falling within the three explanations, no inflexible rule can be laid down to serve as a straight-jacket covering all possible contingencies. The question one has to answer in circumstances like the present is not whether the purchaser had the means of obtaining and might with prudent caution have obtained knowledge of the charge but whether in not doing so he acted with wilful abstention or gross negligence. Being a question depending on the behaviour of a reasonably prudent man, the Courts have to consider it in the background of Indian conditions. Courts in India should, therefore, be careful and cautious in seeking assistance from English precedents which should not be blindly or too readily followed.

12. Adverting now to the case before us, as already noticed, the property in question had vested in the receivers in insolvency proceedings since March, 1949, by an interim order, and in October, 1950, the original owner was adjudicated as an insolvent and the property finally vested in the receivers in insolvency. The plaintiff purchased the property in November, 1954 and in our opinion it could not have reasonably been expected by him that the receivers would not have paid to the municipal corporation since 1949 the taxes and other dues which were charged on this property by statute. According to Section 61 of the Provincial Insolvency Act, 1920, the debts due to a local authority are given priority, being bracketed along with the debts due to the State. Merely because these taxes are charged on the property could not constitute a valid ground for the official receiver not to discharge this liability. In fact we find from the record that on January 15, 1951, the receivers had submitted a report to the insolvency Court about their having received bills for Rs. 628-3-0 in respect of municipal taxes of the insolvent's property and leave of the Court was sought for transferring the said property to the names of the receivers in the municipal and Government records. The Court recorded an order on February 8, 1951, that the municipal taxes had to be paid on the receivers stating that they did not possess sufficient funds the Court gave notice to the counsel for the opposite party and on February 24, 1951 made the following order :

> "Mr. Pandya absent. The taxes have to be paid the Receivers state that they can pay only by sale of some properties of the insolvent from which they want. Sanctioned. The property in which the insolvent stays should first be disposed of. The terms are according authorised."

It is not known that happened thereafter. It is however difficult to appreciate why after having secured the necessary order from the Court municipal taxes were not paid off by the receivers and why the municipal corporation did not purse the matter and secure payment of the taxes due. May be that the municipal corporation thought that since these dues were a charge on the property they need not pursue the matter with the receivers and also need not approach the insolvency Court. If so, then this, in our opinion, was not a proper attitude to adopt. In any event the plaintiff could not reasonably have though that the municipal corporation had not cared to secure payment of the taxes due since 1949. On the facts and circumstances of this case, therefore, we cannot hold that the plaintiff as a prudent and reasonable man was bound to enquiry from the municipal corporation

about the existence of any arrears of taxes due from the receivers. It appears from the record, however, that he did in fact make enquiries from the receivers but they did not give any intimation. The plaintiff made a statement on oath that when he purchased the building in question it was occupied by the tenants and the rent used to be recovered by the receivers. There is no rebuttal to this evidence. Now, if the receivers were receiving rent from the tenants, the reasonable assumption would be that the municipal taxes which were a charge on the property and which were also given priority under Section 61 of the Provincial Insolvency Act, 1920, had been duly paid by the receivers out of the rental income. The plaintiff could have no reasonable ground for assuming that they were in arrears. From the plaintiff's testimony it is clear that he did nevertheless make enquiries from the receivers if there were any dues against the property though the enquiry was not made specficially about municipal dues. Apparently he was not informed about the arrears of municipal taxes. This seems to us explainable on the ground that the receivers had, after securing appropriate orders, for some reason not clear on the record, omitted to pay the arrears of municipal taxes and they were, therefore, reluctant to disclose the lapse on their part. On these facts and circumstances we do not think that the plaintiff could reasonably be fixed with any constructive notice of the arrears of municipal taxes since 1949. So far as the legal position is concerned we are inclined to agree with the reasoning adopted by the Allahabad High Court in Roop Chand Jain's case (supra) in preference to the reasoning of the Full Bench of that Court in Nawal Kishore's case (supra) or of the Division Bench of Oudh Chief Court in Ramji Lal's case (supra). We do not think there is any principle or firm rule of law as suggested in Nawal Kishore's case (supra) imputing to all intending purchasers of property in municipal area where municipal taxes are a charge on the property, constructive knowledge of the existence of such municipal taxes and of the reasonable possibility of those taxes being in arrears. The question of constructive knowledge or notice has to be determined on the facts and circumstances of each case. According to the Full Bench decision in Nawal Kishore's case (supra) also the question of constructive notice is a question of fact and we do not find that the material on the present record justifies that the plaintiff should be fixed with any constructive notice of the arrears of municipal taxes.

13. We may add before concluding that as the question of constructive notice has to be approached from equitable considerations we feel that the municipal corporation in the present case was far more negligent and blameworthy than the plaintiff. We have, therefore, no hesitation in holding that the High Court took the correct view of the legal position with the result that this appeal must fail and is dismissed. As there is no representation on behalf of the respondent there will be no order as to costs.

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