BOMBAY HIGH COURT

Abdul Hamid Khan Mubin Khan

Vs.

Mohomed Ali Humayun

Second Appeal No. 786 of 1950

(Dixit, J.)

15.02.1951

JUDGMENT

Dixit, J.

1. This is a second appeal in execution in which Mr. Chandrachud for the appellant has raised two questions of law.

2. The decree giving rise to the execution application was obtained by the respondent against two persons, viz. Shaikh Taj Mahomed Shaikh Yunas and Shaikh Hasan Shaikh Yunas on 13th October 1947, in Suit No. 732 of 1947. That was a suit filed by the respondent against the defendants claiming a decree for a sum of Rs. 1,775-5-0 and all costs of suit and also claiming a decree that if the defendants failed to pay the amount, the plaintiff should recover the said amount by sale of the property mentioned in Para. 1 of the plaint. There was a prayer for a declaration that the plaintiff had got a charge under Section 55, Transfer of Property Act, on the property in suit and that a decree to the effect that the plaintiff should recover the decretal amount by sale of the property should be pissed. The decree, so far as material, runs as follows :

> "The plaintiff do recover from defendants 1 and 2 the sum of Rs. 1775-5-0, costs of the suit and further interest on the sum of Rs. 1700 at the rate of Rs. 6 per cent. per annum from the date of the institution of the suit till payment. A charge in respect of the amount due to the plaintiff is (hereby) kept on the property in suit."

3. Pursuant to this decree, the decree-holder filed on 11th December 1947, the present darkhast No. 1256 of 1947 to execute the decree against the defendants impleading the present appellant as an added defendant. He was impleaded because, according to the plaintiff, he was a purchaser of the property in dispute under a sale-deed executed in his favor on 8th July 1947. By the darkhast the respondent claimed to recover the amount mentioned in the darkhast by sale of the

property. The appellant filed a written statement which is Ex. 14 in the case in which he raised various contentions including the contention set out in para. 3 of the written statement which was that the darkhast could not proceed against the immoveable house (sic) and that a statutory charge could not be placed upon that property. The executing Court overruled the contention, and in directing darkhast to proceed, ordered the charged property to be sold.
4. From that decree, the appellant preferred an appeal in the District Court, Poona, and the learned Assistant Judge dismissed the appeal summarily under Order 41, Rule 11, Civil Procedure Code. From the appellate decree the added defendant has come up in second appeal.

5. Upon this appeal, Mr. Chandrachud for the appellant has raised two points. It is argued, firstly, that the charge created by the decree could not be enforced against the appellant who had no notice of the charge, and it is next argued that in any case the decree giving rise to the execution application was not binding upon him since he was not a party to the suit in which the decree was passed.

6. In dealing with the first contention it is necessary to bear in mind the facts leading up to Suit No. 732 of 1947. The property in dispute belonged to one Chandbibi. After her death two persons claiming to be her heirs agreed to sell the suit property to the respondent for Rs. 13,500 upon certain conditions and executed a sate-khat. The respondent paid Rs. 1,700 as earnest money. Since the vendors failed to fulfil the conditions stipulated in the sate khat, the respondent filed civil Suit No. 732 of 1947 for the refund of the earnest money paid by him and interest thereon. The Court gave him a decree for the amount claimed and a declaration that the respondent had a charge upon the property for the amount of the decree. Now, the agreement to sell took place in September 1946. Suit No. 732 of 1947 was filed on 16th July, 1947, and the appellant purchased the property on 8th July 1947, i.e., some eight days before the date of the institution of the suit. It is to be noted that in the written statement filed by the appellant, the appellant has not alleged that he purchased the property without notice of the charge. His contention was that the statutory charge could not lie upon the property.

7. The question has to be answered by reference to Section 55 (6) (b) and Section 100, T. P. Act. Section 55 (6) (b) creates a charge in favour of a buyer in respect of the amount of the purchase-money properly paid by the buyer in anticipation of the delivery and for interest on that amount and also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission provided the conditions mentioned in clause (b) are satisfied. In the first of these cases he must show that he has not improperly declined to accept delivery of the property, and in the second instance he has to show that he has properly declined to accept the delivery. In the present case the vendors were unable to comply with the conditions and so the respondent filed the suit. I think, therefore, it is clear that the respondent properly declined to accept delivery. He had, therefore, a charge in his favour for the earnest given to him under Section 55 (6) (b). Now, this charge is one which comes into existence from the moment the buyer pays part of the purchase-money or pays

earnest money towards the sale transaction and this charge is lost on account of the buyer's own subsequent default. In this case there was no default on the part of the buyer so that the buyer had a charge and the buyer's charge continued and was never lost. When the respondent filed the suit he asked for the amount of the earnest together with interest and asked for a recognition by a decree of his charge. That does not mean that the decree created a charge for the first time. The decree merely emphasized the charge already existing in favor of the buyer. It is to be remembered that Section 55 (6) (b) makes no reference to the subsequent purchaser being a purchaser with or without notice. But then Mr. Chandrachud for the appellant relies upon Section 100 which, so far as material, runs as follows :

> "Nothing in this section applies to the charge 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 a person to whom such property has been transferred for consideration and without notice of the charge."

Now, under Section 55 (6) (b), the charge is given to the buyer against the seller and all persons claiming under him. Mr. Chandrachud argues that unless it is shown that the appellant had notice of the charge he is not bound by the charge. Now, in the first place, he has not pleaded that he had no notice of the charge in the written statement to which reference has been made already. But apart from this consideration, it seems to me that the charge given to the buyer under Section 55 (6) (b) is available to the buyer irrespective of the question whether the purchaser under a seller has or has not notice of the charge. In 1929 Section 55 (6) (b) was amended; so too Section 100 was amended. The expression "with notice of the payment" which occurred in Section 55 (6) (b), T. P. Act was omitted and in Section 100 new words were added :

> "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 a person to whom such property has been transferred for consideration and without notice of the charge."

It is worthy of note that these changes were introduced by the same enactment and the change in the language was deliberate. This point of view was noticed by Wassoodew, J., in a case decided by him and which is reported in the case of *Hari v. Bhagu*[1], The head-note in that case runs as follows :

> "The statutory charge on the property which a buyer gets under Section 55 (6) (b), T. P. Act, 1882, for the purchase money paid by him to the seller in anticipation of the delivery of the property, is not in regard to notice, subject to the provisions of Section 100 of the same Act, and is operative against persons claiming *bona fide* under the seller even though they have no notice of the charge."

8. The weight of this decision could not have been disregarded, and Mr. Chandrachud for the appellant apparently conceded at one time that that decision ran counter to his contention, but he urged that the full significance of the words added in Section 100 was not appreciated and no argument was advanced upon that basis. I am not prepared to accept that contention because both Section 55 (6) (b) and Section 100 were referred to and discussed at the bar and I think it is highly unlikely that the learned advocate appearing for the party did not understand the full significance of the words used in the section and that the Court did not appreciate the full significance of those words. In fact the change in the language of the two sections was noticed and the decision is based upon, inter alia, the changes introduced in the respective sections. The difficulty, if any, which is created is by the use of the words "save as otherwise expressly provided by any

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law for the time being in force ..." and Mr. Chandrachud argues that there must, therefore, be an express provision which says that a purchaser under a seller to be bound must be shown to have notice of the charge. I think this argument would have had some force were is not for the fact that the Legislature deliberately omitted the words "with notice of the payment" in Section 55 (6) (b) and this suggests that the charge mentioned in Section 55 (6) (b) was available to a buyer as against a seller and all persons claiming under him whether or not the purchaser under the seller had notice of the charge. It is not in dispute that the appellant is a purchaser from the seller and so it is not again in dispute that he is a person claiming under the seller, so that the charge is available against the seller and every person claiming under the seller. The first contention must, therefore, be rejected.

9. The next point taken on behalf of the appellant is that the appellant is not bound by the decree inasmuch as he was not a party to the suit in which the decree was passed. It is true that the appellant was not made a party to the suit. The suit was filed eight days after the date of the sale in favour of the appellant. But it appears from an extract from the property register, which is Ex. 3, that the appellant's purchase was mentioned in the property register for the first time on 3-11-1947, which was after the institution of the suit and the respondent-plaintiff had no notice of this purchase at the date when he filed the suit. However, that may be, the question is whether the appellant is not bound by this decree. Mr. Chandrachud argues that since he is a purchaser before the suit, he cannot be said to be a purchaser from a defendant to the suit, much less can he be said to be a representative of the judgment-debtor because his purchase was antecedent to the suit itself, i.e. long before the decree was passed. But the difficulty in the way of the appellant is created by the language of Section 55 (6) (b). The charge is available to a buyer against a seller and all persons claiming under him, so that from the moment the purchase takes place, the purchaser becomes a representative of the seller, and if the charge comes into existence from the date when either part of the purchase price is paid or the amount of the earnest money is paid, it seems to me that the appellant is a representative of the defendants against whom the suit was filed. If a transfer takes place subsequent to the filing of a suit, the transfer is affected by lis pendens. But in this case the transfer has taken place before the date of the suit and that makes no difference because under Section 55 (6) (b) the plaintiff-respondent gets a charge not only against

the seller but also against the purchaser from the seller, the charge being in his favour from the moment part of the purchase money is paid or the amount of the earnest money is paid. I think on a true construction of Section 55 (6) (b), the charge which is a statutory charge and which is created by operation of law is enforceable not only against a seller but against all persons claiming under him. It seems to me, therefore, that the second contention urged in support of the appeal must equally fail.

10. In the result, therefore, the decree of the lower appellate Court will be confirmed and this appeal will be dismissed with costs.
Appeal dismissed.