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DATTATRAYA SHANKER MOTE & ORS.

v.

ANAND CHINTAMAN DATAR & ORS.

October 3, 1974

[P. JAGANMOHAN REDDY, M. H. BEG AND A. ALAGIRISWAMI, JJ.]

B

Transfer of Property Act (4 *of* 1882) *s.* 100, *proviso—If protection is afforded to a simple mortgagee.—Compromise decree creating charge, if covered by s.* 100—*Transferee for consideration if includes mortgagee—'In the hands of meaning of*—Lis pendens *applicability.*

The appellants filed a suit for the recovery of a money debt against the respondents. The suit was compromised and by the compromise decree three items of the respondent's property were sought to be charged. The compromise decree was presented in the Registrar's office and was noted in Book No. 1, but, due to the negligence of that office only the charge on one item of property was specifically recorded in the registers mentioned in s. 51 and the Indices mentioned in s. 55 of the Registration Act. The appellants, after realising some money by the sale of the item of property with respect to which the charge was specifically recorded in the Registrar's office, filed on execution application for the recovery of balance of money by the sale of one of the items of property with respect to which the Registrar's office had not recorded the charge. That property, in the meanwhile, was mortgaged under two simple mortgages. The mortgagee, claiming to be ignorant of the prior charge, objected to its sale in the execution proceedings initiated by the appellants; but his objection was overruled and the property was sold in execution.

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The mortgagee under the two simple mortgages field a suit for recovery of the amount due to him. The suit was dismissed by the trial court on the ground that though he had no actual or constructive notice of the charge in favour of the appellants, yet, the charge had priority over the subsequent mortgages and could be enforced against the mortgagee in as much as a simple mortgage without possession, did not give the mortgagee the protection given by the amended proviso to s. 100 of the Transfer of Property Act, 1882, which provides that a charge shall not 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.

E

On appeals against the order arising out of the execution application of the appellants and against the judgment dismissing the mortgagee's suit, the High Court held against the appellants on the ground that the mortgage in favour of the respondent was protected under the proviso to s. 100 and was free from the charge in favour of the appellants.

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In appeals to this Court, on the question of competing priorities between a charge created by the decree and the subsequent simple mortgage,

HELD : (*Per* Curiam) : The appeals should be dismissed. [243 D-E; 258 C]

(Per Jaganmohan Reddy and Alagiriswami, JJ :)

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(1) The charge created by the terms of the decree is covered by s. 100 of the Act. A compromise decree, not being the result of a decision by the court, but an acceptance by the court of something to which the parties had agreed, if it creates a charge on immovable property and is duly registered, it amounts to the creation of security by act of parties within the meaning of s. 100 of the Act. [232 B-C]

(2) The finding of the courts below that the mortgagee had no notice actual or constructive of the prior charge created by the decree is correct. [231 E-C]

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(a) It was an admitted position that even on a careful inquiry the mortgagee would not have known that the property was charged in favour of the appellants, in as much as, neither the property cards nor the municipal records nor the indices contained a reference to the charge on the suit property. If the property

A which a person wants to purchase or which is being offered to him as mortgage or security for payment of any money is shown in Index II then he would have notice of such charge or mortgage and may wish to further probe by inspecting Index I and Book I. Merely inspecting Book I or Index I will not benefit him because all he can know is that there is a decree that has been registered which would not be helpful to him. [230 H—231B, C-D]

(b) The proviso to Explanation 1 to s. 3 of the Transfer of Property Act, provides that in order to amount to constructive notice it is necessary (i) that the B instrument has been registered and its registration completed in the manner required by the Registration Act; (ii) the instrument has been duly entered or filed in books kept under s. 51 of the Registration Act; and (iii) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indices kept under s. 55 of Registration Act. In the instant case constructive notice cannot be imputed to the mortgagee since the third condition required for the purpose was not satisfied. [231 D-F]

(3) The protection in the proviso to s. 100 does not apply to mortgages. In C order to make it applicable it has to be shown that, (a) the property against which the charge is to be enforced has been transferred for consideration; (b) the transferee had no notice of the charge, and (c) the property which is the subject-matter of the charge, is in the hands of the person to whom such property has been transferred. [236H—237B]

(i) The words "transferred for consideration and without notice of the charge" have never been used for describing a mortgage whether it be a simple mortgage or mortgage with possession. This expression has always been understood to D describe a sale and in antithesis to a transfer by way of gift. Throughout the Transfer of Property Act whenever a transfer of property is referred to without any qualification it is to the transfer of all the interests in the property. Thus the 'transfer of property' referred to in s. 100 is the transfer of the whole property and not a mere interest in or over the property like mortgage, lease etc.

[234 F-H; 236 B-E]

(ii) Under English Law, the expression 'purchaser for value' includes a mortgagee. Before the Transfer of Property Act came into force whenever any expres- E sion came up for consideration, in the absence of any specific definition under the Indian statutes, the meaning assigned in English law seems to have sometimes been applied in a general way. The usage of any term conveying a particular meaning in English Law and which subsequently has been incorporated in the definition of statutes in England cannot, on that hypothesis, be imported as if that word has the same meaning under the Indian Law when our statutes adopts different connotations. After the Act has come into force, if the Act intended to convey that a person has an absolute title it has used the word 'buyer'. Through in the marginal note in s. 56 the word 'purchaser' has been used, an analysis of the section shows F that the legislature has used different terminology for connoting different concepts and that it has used the word 'purchaser' as synonymous with 'buyer' and as not including the mortgagee or mortgagor or a lessee or a lessor as in English Law. [237C, E-G; 238A—B-G]

(iii) The expression 'in the hands of' in the proviso is a figurative expression and is intended to convey that a person has sufficient control over the subject matter, to enable him to do anything with it which the nature of that subject matter would permit. It is a multifaceted phrase connoting many meanings depending G on the context. In the context of the saving clause in s. 100, the phrase was intended to convey and does convey that the buyer, as a transferee for consideration without notice of a charge, was in possession, including constructive possession through a tenant who has attorned to him; and that the vendor had conveyed to him all his right, title and interest in the property including possession. If the intention of the Legislature was to make the proviso applicable even to a mortgage, there was no need for it to have used the words 'in the hands of a person to whom such property has been because, even if the proviso is read without these words, the effect sought for would ensue. [234 D-E; H 239 C-D, E-G]

Arumilli Surayya v. *Pinisetti Venkataramanamma and ors.* A.I.R. 1940 Mad. 701, referred to.

(4) The question of priority between a charge and a mortgage cannot be decided with reference to s. 48 of the Transfer of Property Act, because, that section deals with a case of transfers of interest in respect of the same immovable property created at different times while a charge is not a transfer of an interest in or over immovable property. In fact, the proviso to s. 100 was amended to get over the effect of certain decisions which have held that a charge was valid even against a subsequent purchaser without notice on the assumption that a charge creates an interest in property, because all provisions relating to a simple mortgage shall as for as may be, apply to a charge'. [232 F-H, 239A; 234 A-B; 240 D-E]

(5) But the doctrine of notice apart from the statutory provisions such as s. 53A of the Transfer of Property Act, s. 48 of the Registration Act and s. 27(b) of the Specific Relief Act, 1877 corresponding to s. 19 of the Specific Relief Act, 1963, is firmly embedded in the jurisprudence of this country as part of the equitable principles which courts administer in conformity with "justice, equity and good conscience". On this approach, the conclusion would be the same as if the proviso to s. 100 of the Act was applicable to mortgages also. [243 B-C]

(6) However, it is no answer to say that merely because the ultimate result is the same we should read the language of s. 100 ignoring the purpose for which the amendment was made or give it an interpretation which is totally at variance with the tenor of the entire Act in order that it may conform with the ultimate result. [243 C-D]

(7) Since the finding in the instant case is that the respondent did not have notice of the appellants' charge the mortgage will have a priority over the charge of the appellants. [243 D-E]

(8) There is no question of the appellants being protected by the doctrine of *Lis Pendens*. [230 B-C]

(*Per* Beg J :) : (1) The agreement between the parties which was embodied in the compromise decree satisfies the requirements of s. 100 of the Transfer of Property Act inasmuch as it is a charge created by the act of parties. If the rights of a simple mortgagee, who is not in possession of the mortgaged property, are not protected by the proviso to the section, the first part of the section will confer upon the charge-holder, the same rights as a prior simple mortgagee has against a subsequent simple mortgagee even though the charge does not amount to a mortgage. [246 D-E, G]

(2) There is no reason to differ from the views taken by the trial court and the High Court which preclude the existence of 'gross negligence' on the part of the respondent who had made such attempts as could be expected of a reasonable and prudent individual to find out whether the property to be mortgaged was subject to a previous charge. The failure of the respondent to learn of the prior charge on the mortgaged property could be ascribed only to the negligence of the Registrar's office for which the respondent could not be made to suffer. [248 F-G]

(3) The High Court was correct in adopting the view that the respondent, as a simple mortgagee, was not outside the protection conferred by the proviso to s. 100, because he was both a bona fide transferee for consideration with simple mortgagee rights 'in hand', as well as a person who had no notice, actual or constructive, of the prior charge of the appellants. [250 G-H]

(i) Section 58 of the Transfer of Property Act defines a mortgage as the 'transfer of an interest in specific immovable property' and 'property' is indicative of every possible interest a person can have. Therefore, a simple mortgage is a transfer of property within the meaning of s. 5 of the Act, and the mortgagee's rights are 'property in the hands of a person to whom such property had been transferred for consideration'. If a simple mortgage amounts to a transfer of property for the purposes of s. 100 it is immaterial that a transfer of property implies a transfer of the whole bundle of rights in the property which the transferor has for the purpose of situations dealt with by other sections. For example, s. 8 of the Act laying down the effects, incidents and implications of a transfer, em-

A bodies only a rule of interpretation and was meant to govern matters not expressly provided for in deeds of transfer. It was not at all intended to govern or lay down the meaning of 'transfer' whenever used in the Act. That has been done expressly by ss. 5 and 6. In view of the other provisions of the Act, the transferee under the proviso to s. 100 may be of even an interest in property. The words 'such property' do not stand only for 'full ownership of property'. If the transfer of an interest in property to a mortgagee, whether simple or usufructuary, is a transfer of property, 'such property' could only mean, in the B case of a mortgagee, the interest in property which has been transferred to the mortgagee because that is also property. [249F; 253 D-E; 254 A-C. F-G]

(ii) Under English Law, for the purpose of determining the priority between the owner of a legal estate and an equitable owner, a 'purchaser for value' includes a mortgagee. English equitable principle under the provision of the Transfer of Property Act, so that, although the term 'purchaser is not used in s. 100 of the Act, the proviso seems to have been meant to incorporate the doctrine of a bona fide purchaser for value. It speaks of 'a person to whom such property has been transferred for consideration without notice of the C charge', and the language used was designedly wide so as to confer the benefit of the proviso also upon persons other than purchasers of ownership rights. [251G; 252G—253B]

((iii) The expression 'in the hands of' could not be confined to tengible property which is actually in the physical possession of the transferee, because, property as defined in s. 6, includes both tangible and intangible property and extends to rights and interests in property. 'Possession' is only one of the meanings of the expression 'in hand' and whenever the concept of possession was intended D to be conveyed, the word 'possession' had been used as for example in Explanation II to s. 3. In the proviso to s. 100, the Legislature deliberately employed the concept of 'property in hand' in contradistinction to 'property in the possession of' a transferee, so as to include cases where a person has a right, which is intangible property, vested in him. The right of a simple mortgagee may be capable of being spoken of as 'possessed' by the mortgagee, but the right could more appropriately be spoken of as either 'vested in the transferee', or, as property 'in the hands of the transferee'. The object of employing this terminology in the proviso seems to be to include such rights as those of a simple mortgagee. E [249 G-H; 250 C-G]

Observation contra in *Arumilli Surayya v. Pinisetti Venkataramanamma & Ors.* A.I.R. 1940 Mad. 701 overruled.

(4) The appellants cannot contend that their prior rights would be protected by the principle underlying s. 48 of the Act because; (a) Apart from the qualifying words, 'so far as may be' in s. 100, one of the conditions for the applicability of s. 48 is that there must be an actual transfer of property, (b) Another condition is that the previous and the subsequently created rights cannot all exist or F be exercised to their full extent together, which condition is not satisfied in the present case. (c) The prior right of the charge holder could only obtain priority provided other things are not unequal. (d) The conditions of priority as between the holder of a previous charge and a subsequent simple mortgage are completely covered by s. 100. [251 B-E]

(5) If the same result on the question of a priority of a simple mortgage as against a charge, of which the mortgagee has no notice, can be reached by resorting to the principle of 'equity, justice and good conscience' s. 100 itself can be G read as a direct statutory recognition of the very principles, because, it contains comprehensively the requirements of equity, justice and good conscience. [254H—255B]

(6) A wide and liberal interpretation must be given to the proviso to extend the benefit of the amended section to mortgagees also, as *bona fide* transferees for value—the word 'purchaser' having been deliberately eschewed. The amendment, made to negative the view in some cases that a charge could be enforced even against a *bona fide* purchaser for value without notice, should be interH preted to amplify the remedy and suppress the mischief aimed at. Decisions had also been given until now, since the amendment of s. 100 in 1928, or the assumption that a simple mortgagee is also covered by the protection conferred by the amended powers. There is no reason why a new path or its meaning should now be taken. [225 D-F; 256 F-H]

(*) There is no question of the mortgage being struck by the doctrine of *Lis Pendens*. [258 A-C] A

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1882-1883 of 1967.

Appeals from the judgment and order dated the 12th November 1962 of the Bombay High Court in First Appeals Nos. 668 of 1957 and 40 of 1960. B

V. S. Desai, and *K. Raj Choudhry*, *for the appellants*.

Navnit A. Shah and *A. G. Ratnaparkhi*, for the respondents.

The Judgment of the Court was delivered by Jaganmohan Reddy J., M. H. Beg, J. gave a separate Opinion.

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JAGANMOHAN REDDY, J.—In both these appeals by certificate the question of competing priorities between a charge created by a decree and a subsequent simple mortgage has to be determined. The appellants had filed Civil Suit No. 741 of 1938 for recovery of a sum of Rs. 1,34,000/- with interest from respondents 1 to 7. On March 31, 1941 a compromise decree was passed under which a charge was created for the decretal amount on three pieces of property belonging to the said respondents 1 to 7. These properties comprise a house in Shukrawar Peth and Kekakuva Mansion in Budhwar Peth both at Poona and a chawl in Kalyan. This decree was registered on April 7, 1941 but due to inadvertence the charge on the Kakakuva Mansion in Budhwar Peth at Poona was not shown in the Index of registration. The significance of this omission will become evident when the full facts are narrated. Thereafter on June 27, 1949 the respondents 1 to 7 mortgaged the Kakakuva Mansion to the plaintiff respondent 14 for a sum of Rs. 1 lakh. The respondents created a further charge on September 13, 1949 in favour of the said plaintiff respondent 14 for Rs. 50,000/- On July 7, 1951 a charge was created by a decree in favour of respondent 15 for a sum of Rs. 59,521/11/- under an award decree. In the meantime the appellants had recovered some amounts by execution of their decree in Civil Suit No. 741 of 1938 by sale of the property at Shukrawar Peth at Poona and the chawl at Kalyan. In spite of these sales a large balance was still due, and in order to recover the balance of Rs. 1,57,164/- appellants filed Darkhast No. 32 of 1952 in the Court of the 3rd Joint Civil Judge, Senior Division at Poona for the sale of Kakakuva Mansion over which, as we have said earlier, there was a charge created in favour of the appellants by the decree of March 31, 1941. Notices were issued under O.21 r.66 of the Code of Civil Procedure to respondent 14 and other respondents. The Executing Court, however, held that the presence of plaintiff-respondent 14 was not necessary for the purposes of effecting the sale on the Darkhast of the appellants and accordingly, it vacated the notices. Against the said order of the Executing Court respondent 14 filed First Appeal No. 668 of 1957 in the High Court of Bombay, and he also filed on June 5, 1958 Civil Suit No. 57 of 1968 in the Court of the Joint Judge, Senior Division at Poona for a recovery of a sum of Rs. 2,18,564/- alleged to be due to him under the two mortgages dated June 27, 1949 and September 13, 1949.

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A It may be mentioned that while Suit No. 57 of 1958 was pending the property—the subject-matter of that suit—was put up for sale on the appellants' Darkhast and it was purchased by the appellants with the leave of the Court. In view of this development respondent 14 impleaded the appellants in the said Suit No. 57 of 1958 as the purchasers of the equity of redemption. The appellants resisted the suit on the ground that they had a prior charge in their favour and the B mortgage of respondent 14 was subject to that charge. It was also contended that s. 100 of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act') regarding notice was not obligatory in respect of the interest created in favour of respondent 14. The Trial Judge by his judgment dated July 21, 1959, while decreeing the suit of the plaintiff respondent 14 for recovery of Rs. 2,18,564/- held that C the appellants had a prior charge over the property and were bound by the mortgage in favour of the plaintiff-respondent 14 and 15 (defendant 8 in the suit). It further held that the rights of a simple mortgagee are not "property in the hands of" the mortgagee who could not be protected by the proviso to s. 100 of the Act.

Against the decree of the Trial Judge, respondent 14 filed First D Appeal No. 40 of 1960 in the High Court of Bombay. The two First Appeals, one arising out of the Darkhast filed by the appellants and the other arising out of the suit filed by respondent 14 were heard together on November 12, 1962. The High Court of Bombay by its judgment modified the decree of the Trial Judge holding that as the mortgage in favour of respondent was protected under the proviso to s. 100 of the Act it is free from the charge in favour of the appellants. E It also gave priority to respondent 15 for its dues, though it had not filed any appeal. Against this judgment and decree two appeals were filed, one in respect of First Appeal No. 40 of 1960 and the other in respect of First Appeal No. 668 of 1957.

It was contended before the High Court that whatever may be the F position under s. 100 of the Act, respondents Motes would still be protected by s. 52 by the doctrine of *lis pendens*. Overruling a preliminary objection that this point was not taken in the Trial Court, the High Court, after considering the admitted position, noticed that originally there was only a money debt due to defendants 9-13 from Datars. The appellants had filed Suit No. 741 of 1938 and practically three years thereafter at the time of passing of the decree, a charge by agree- G ment was created on the properties of Datars. Admittedly, the properties on which the charge was created were not the subject-matter of the suit ,and no issue was raised in that suit in respect of these properties. It was pointed out that for s. 52 to apply, two conditions have to be fulfilled, namely, (1) the suit or the proceedings must not be collusive and must be pending; and (2) the right to immoveable property was directly and specifically in question in the suit. Unless both H these conditions are satisfied, no protection can be claimed. The mere fact that a specific immoveable property becomes the subject-matter of a decree subsequently by agreement of the parties will not justify a claim for protection under s. 52. If the charge has been created by

consent of the parties it is something extraneous to the suit and accordingly no *lis* in fact exists in respect of that property nor can it be said that a *lis* had commenced at least from the date of the decree. There is no commencement at all so far as the *lis* is concerned which in that suit was a simple claim for money and nothing more. Apart from this, there was no Darkhast or execution application pending at the time when the simple mortgages in favour of the plaintiff were created in 1949. The High Court discussed several decisions in respect of the above conclusion and we are in agreement with the reasoning of the High Court. Since before us this point was not seriously argued, we do not think that there is any need to deal with this aspect in any detail.

It may also be mentioned that the High Court, on the evidence, came to the conclusion that respondent 14 had no notice of the prior charge inasmuch as the search of the indices did not disclose that there was charge on the suit property. An attempt was made to show that the respondent 14 had feigned ignorance of the decree in favour of the appellants though his witness admitted that he had taken search of the records of the Sub-Registrar's office before he took the two mortgages. It was also contended that the plaintiff-respondent 14 had admitted that the mortgage Ext. 87 was registered in the Sub-Registrar's Office on May 17, 1941, and is noted as No. 1048-B in Book No. 1. Though this decree was entered in Index I, it was not entered in Index II. From the very fact that the decree was shown in Index I and having been so registered, it is sought to be contended that the High Court had, by ignoring the above evidence, held that respondent 14 did not have notice. It may be mentioned that the properties which are the subject-matter of the charge under the decree could only be shown under s. 21 of the Registration Act in Index II. Unfortunately, as we have said earlier, by inadvertence the property—the subject-matter of the suit—was not shown in that Index (Index II). A person who wishes to search the registers for any prior sale, mortgage or charge would necessarily inspect Index II, which under s. 55(3) of the Registration Act is required to contain such particulars mentioned in s. 21 relating to every such document and memorandum as the Inspector General from time to time directs in that behalf. Under s. 21 description of property and maps or plans have to be mentioned in all non-testamentary documents relating to immoveable property before they are accepted for registration, with further particulars as specified in sub-ss. (2) to (4) thereof. Under s. 55(1) there are to be four Indices I to IV. Sub-section (2) provides that Index I shall contain the names and addresses of all persons executing and of all persons claiming under every document entered or memorandum filed in Book No. 1 and Index II shall contain such particulars mentioned in s. 21 relating to every such document and memorandum as the Inspector General may from time to time direct in that behalf, Under s. 51(2) in Book 1 shall be entered or filed all documents or memoranda registered under ss. 17, 18 and 89 which relate to immoveable property, and are not wills. If the property which a person wants to purchase or which is being offered to him as a mortgage or security for payment of any money is shown in Index II,

A then he would have notice of such charge or mortgage and may wish to further probe by inspecting Index I and Book 1. Merely inspecting Book 1 or Index I will not benefit him because all he can know is that there is a decree that has been registered which may not be helpful. The High Court was right in not accepting the contention of the appellants that respondent 14 had notice of the decree because if in fact he had taken the trouble of going to the Sub-Registrar's Office B for inspection and search and to ascertain whether there was any charge, mortgage or other encumberance on the property in respect of which he wanted to advance such a large sum of Rs. 1,50,000/-, he would not, as a man of prudence, have advanced the said amounts if he had in fact known that there was a prior charge on that property. In fact the High Court observed that it was an admitted position that C even on a careful inquiry the plaintiff (respondent 14) would not have known that the property (Kakakuva Mansion) was charged in favour of defendants 9 to 13 (the appellants herein) inasmuch as neither the property cards, nor the Municipal Records, nor the indices contained a reference to the charge on the suit property. The Explanation in s. 3 of the Act which provides for fixing a party with constructive notice in respect of registered transactions, contains a proviso to D Explanation I that in order to amount to constructive notice, it is necessary that (1) the instrument has been registered and its registration completed in the manner required by the Registration Act and the Rules made thereunder, (2) the instrument has been duly entered or filed in books kept under s. 51 of the Registration Act, and (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indices kept under s. 55, of E that Act. It further observed that though in some cases by legal fiction, constructive notice may be imputed to a party, in the case before it, it cannot be imputed to the plaintiff (respondent 14), since the third condition required for the purpose was not satisfied. We would, therefore, accept the finding of both the Courts that respondent 14 had no notice of the prior charge created by the decree.

F The question which will arise for our consideration is whether the appellants by reason of the decree creating a charge on the suit properties have a priority over the subsequent simple mortgage created in favour of respondent 14. We need not go into other niceties, as to what would be the position where a sale deed is invalid for want of registration or whether a transaction intended to be a mortgage but not reduced to writing and registered will operate as a charge, G because in this case the competition is between a charge created by a decree which was registered and a subsequent mortgage without notice of a prior charge. It is contended that the provisions contained in s. 100 of the Act that "save as otherwise 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" means and implies H that where there is a charge and where the property is sold and is in possession of the purchaser for consideration, no charge so created prior to the sale can be enforced against a property in the hands of a person to whom such property has been transferred for consideration

and without notice of the charge. The words "save as otherwise provided" would imply that a charge can be enforced even against a purchaser without notice where a law expressly so provides. A

It is further contended that a charge created by the terms of a decree is not covered by s. 100 of the Act inasmuch as it is neither a security on immoveable property created by act of parties or by operation of law. Several decisions have been referred to before us which, in our view, have no application, because a compromise decree not being the result of a decision by the Court but an acceptance by the Court of something to which the parties have agreed if it created a charge on an immoveable property, and was duly registered, as indeed it was in this case, amounts to the creation of a security by act of parties within the meaning of s. 100 of the Act. In order to resolve the question before us it is necessary to analyse the provisions of s. 100 of the Act, the text of which is given below :— B C

> "Where immoveable 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 a 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. D
>
> 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." E

It is apparent from the provisions of the above section that a charge does not amount to a mortgage though all the provisions which apply to a simple mortgage contained in the preceding provisions shall, so far as may be, apply to such charge. While a charge can be created either by act of parties or operation of law, a mortgage can only be created by act of parties. A charge is thus a wider term as it includes also a mortgage, in that every mortgage is a charge, but every charge is not a mortgage. The Legislature while defining a charge in s. 100 indicated specifically that it does not amount to a mortgage. It may be incongruous and in terms even appear to be an anti-thesis to say on the one hand that a charge does not amount to a mortgage and yet apply the provisions applicable to a simple mortgage to it as if it has been equated to a simple mortgage both in respect of the nature and efficacy of the security. This misconception had given rise to certain decisions where it was held that a charge created by a decree was enforceable against a transferee for consideration without notice, because of the fact that a charge has been erroneously assumed to have created an interest in property reducing the full ownership to a limited ownership. The declaration that "all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as F G H

A may be, apply to such charge" does not have the effect of changing the nature of a charge to one of interest in property.

Order 34 r. 15 of the Code of Civil Procedure also provides for the remedy of enforcing a charge under which all the provisions of O.34 in so far as they are applicable to a simple mortgage would be applicable to a charge under s. 100 of the Act. This rule was sub-
B stituted for the old r. 15 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April, 1930. The old r. 15 of O.34 was as follows :

> "All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the
C meaning of section 100 of the Transfer of Property Act. 1882."

The words "as to the sale or redemption of the mortgaged property" which were in the old rule have been omitted, and instead it is now provided in general terms that the provisions applying to simple mortgages shall apply to charges. A charge-holder like a simple mort-
D gagee has a right to bring the property charged to sale or can enforce his charge against any portion of the property charged. Where a charge-holder is given possession of the property as a charge-holder, he can remain in possession of it until the amount due to him is satisfied; but if the possession is not attributable to the charge, he cannot insist on retaining possession until his dues are paid.

The reason for the above provision in s. 100 of the Act, read with
E O.34 r.15, is merely to declare that the rights and liabilities of a charge-holder are to be that which a simple mortgagee has under the provisions of the Act in so far as they may be applicable. The words "so far as may be" indicate that provisions which apply to simple mortgage may not be applicable to the charge. It has been held that ss. 56, 67(2), 68(3), 73(4), 83(5) and 92(6) are applicable to charges. On the other hand, s. 67A has been held to be applicable
F to charges created by act of parties and not to charges created by operation of law on the ground that the clause "in the absence of a contract to the contrary" occurring in that section is an essential part of it and cannot be given effect to in a statutory charge. If a charge carries with it a personal liability as in the case of a seller's charge for price not paid, the charge-holder is entitled under O.34 r.6 of the Code of Civil Procedure to a personal decree.
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The Privy Council had observed that in a suit for enforcement of a charge under s. 100 of the Act read with O.34 r.15 Code of Civil Procedure, a decree for sale, as in a suit for a mortgage, should have been passed : See *Ram Raghubir Singh Lal* v. *United Refineries*(1). The several aspects of the application of the provisions of a simple mortgage have not been and need not be considered by us as they
H are not relevant for our purpose. Our object is merely to illustrate the reason for a reference in s. 100 to a simple mortgage.

(1) [1933] 60 I. A. 183.

The question would then be: what is the purpose and intendment of 1929 Amendment adding the proviso to s. 100 of the Act? There may be several views as to why this amendment was effected, but certainly one of them is to get over the effect of certain decisions of the Courts which have held that a charge was valid as against a subsequent purchaser of property without notice on the assumption that a charge created an interest in property and since its effect is similar to a simple mortgage it being first in point of time has a priority over a subsequent sale to a purchaser of property who has taken it with consideration and without notice. It is contended that even after the Amendment of 1929 since no charge can 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, the saving clause applies to a simple mortgage as well as to mortgages with possession inasmuch as in both cases property which could be transferred under s. 6 of the Act can be said to be transferred. In other words, the saving clause is not confined only to an out and out sale.

On the other hand, the submission of the appellants is that the proviso to s. 100 applies only to cases of sale for consideration where the property is in possession of the purchaser. It is only in such a case where the purchaser has bought the property without notice of the charge that the charge cannot be enforced against him. It appears to us that if the intention of the Legislature was to make the proviso applicable even to a mortgage including a simple mortgage, there was no need for it to have used the words "in the hands of a person to whom such property has been" because if the proviso is read without those words the effect sought for would nonetheless ensue. The proviso read after the deletion of the words indicated by us would read:

> "Save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property transferred for consideration and without notice of the charge."

If mortgages were sought to be included, it would look somewhat incongruous because the words "transferred for consideration and without notice of the charge" in so far as we are able to ascertain have never been used in describing a mortgage whether it be a simple mortgage or a mortgage with possession. This expression has always been understood to describe a sale, because transfer of all the rights which the transferor has can also be legally effected without consideration and voluntarily as in the case of a gift. It is in anti- thesis of a transfer by way of gift that the expression "transferred for consideration" as indicating a sale has been used. A donee of property taking a property by way of gift even if he does so without notice of the charge cannot in any case claim the benefit of the proviso. If what is being dealt with in the proviso is a sale which in the case of an immoveable property of the value of Rs. 100/- or upwards has to be effected by a registered document, it is not necessary for the validity of such a sale that possession should also have been given. Where a sale has been

validly effected and possession has not been given, the purchaser has always the right to enforce a sale deed and obtain possession of the property.

In order to ascertain the true import of the terminology used in s. 100 of the Act, it is necessary to state clearly some of the basic concepts embodied in the Act which are beyond controversy. Section 5 defines "transfer of property" as meaning "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons", and "to transfer property" is to perform such act. Section 6 says that property of any kind may be transferred, except as otherwise provided by the Act or by any other law for the time being in force other than those mentioned specifically in clauses (a) to (i) which cannot be transferred. Section 8 deals with the operation of transfer and says that unless a different intention is expressed or necessarily implied, a *transfer of property* passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. It then narrates all such incidents having regard to the land, debt, etc. etc. Chapter III of the Act deals specifically with sales of immoveable property, the sale in s. 54 being defined as *transfer of ownership* in exchange for a price paid or promised or part-paid and part-promised. Mortgages are dealt with in Ch. IV where mortgage is defined in s. 58(a) as the *transfer of an interest* in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. Different kinds of mortgages are also specified in that section of which clause (b) states what a simple mortgage is, namely, "where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee".

A charge on the other hand under s. 100 of the Act is neither a sale nor a mortgage because it creates no interest in or over a specific immoveable property but is only a security for the payment of money.

Leases of immoveable properties are dealt with in Ch. V of the Act, of which s. 105 defines a lease as a *transfer of a right to enjoy* such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money etc. etc. Chapter VI deals with exchanges of ownership in one property for another. It is provided by s. 118 that a transfer of property in completion of an exchange can be made only in the manner provided for the *transfer of such property* by sale, so that in that section the mutual transfer which is referred to is the *transfer of ownership* of one thing for the *ownership of another* and in relation thereto the manner in which the exchange is to be completed is specified as

similar to the *transfer of property* as on a sale. In so specifying s. 118 of the Act equates the term *"transfer of property"* with the term *"transfer of ownership"*. Chapters VII and VIII deal with gifts and actionable claims which do not necessarily appertain to immoveable properties alone. A

It will thus be seen that throughout the Act whenever a transfer of property is referred to without any qualification, it is to the transfer of all the interest in the property. As already referred to, s. 8 says that "a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property". Section 10 when it says "where property is transferred" refers to all the rights in the property. Section 11 makes it still more clear when it provides that "where, on transfer of property, an interest therein is created absolutely in favour of any person" and contrasts the transfer of property with the creation of an interest in the property. Section 12, which refers to the property transferred, refers to the whole of the interest in the property. Section 13 refers to a transfer of property and creation of an interest therein and brings out the distinction between the phrase 'transfer of property' and 'creation of interest in the property'; so do ss. 14 and 15 Section 16 refers to the creation of an interest. Section 17 very obviously refers to the transfer of the whole of the property when it refers to the transfer of property. So also s. 18. Sections 19, 20, 21, 22, 23, 24, 26, 27, 28, 31 and 33 are like ss. 11 and 13. Section 38 again clearly refers to the transfer of the whole of the interest in a property. So do ss. 39, 40, 41. 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, and 53A. Thus it is clear that the transfer of property referred to in s. 100 of the Act is the transfer of the whole property and not a mere interest in or over the property like a mortgage, lease etc. B C D E

A careful scrutiny of the conspectus of the sections of the Act indicates clearly that the Legislature has adopted certain phraseology to connote different concepts of transfer to which we have referred above. Property is the most comprehensive of all terms inasmuch as it is indicative and descriptive of every possible interest it can have. The terms 'transfer of property', 'transfer of an interest in property', 'creation of an interest in or over property', 'transfer of a right to enjoy property', 'transfer of ownership' have been associated in the context of different sections with sale, gift, exchange, mortgage, lease etc. etc. In the case of a sale, after the sale there is no interest left in the seller : in the case of a charge the transferor has a subsisting interest though limited to some extent by the charge-holder's right to recover the monies due from the specific immoveable property. In a mortgage, the mortgagor has the equity of redemption of the mortgage left in him. In the case of a lease the lessor has the right of ownership in the property except the right of enjoyment which has been transferred to the lease under the agreement. A gift like a sale is transfer of all the rights which a person can have in the property with this difference, namely, while the sale is for consideration, gift is voluntary and without consideration. F G H

A reference to the proviso to s. 100 of the Act would show that in order to make it applicable it has to be shown that (a) the property

against which the charge is to be enforced must have been transferred for consideration; (b) the transferee has no notice of the charge; (c) the property which is the subject-matter of the charge is in the hands of the person to whom such property has been transferred. It is, therefore, necessary to ascertain as to what is meant by the expression "property in the hands of a person to whom such property has been transferred". There is no need and indeed it would be an incorrect approach to adopt a strained construction or to indulge in unnecessary exercise in semantics to make the proviso applicable to a simple mortgage by holding that the right a mortgage gets under a mortgage can also be said to be in the hands of the mortgagee. In *Berwick & Co.* v. *Price*,(1) Joyce, J., began his judgment by saying : "It is well settled that a purchaser (in which term I must be understood to include a mortgagee or a transferee of a mortgage).....". From this single passage, Halsbury's Laws of England (3rd Edn.) Vol. 14, p. 539, Foot Note (p) treats the case as an authority for the expression 'purchaser for value' as including a mortgagee. *Berwick's case*(1) had referred to the Conveyancing Act, 1882 (1881) 44 and 45 Vict. Ch. 41, which by s. 2(viii) defines a "purchaser", unless a contrary intention appears, to include a lessee, or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, "for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called". Similarly, s. 205(1)(xxi) of the Law of Property Act, 1925 which brought order from chaos created by forms of action, the distinction between legal and equitable remedies and the different courts which conferred the respective remedies, defined 'purchaser' to mean "a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property". Where the Act has intended to convey that the person who has an absolute title, it has used the word buyer. though in the marginal note to s. 56 the word 'purchaser' has been used. This merely shows that the legislature has used the word 'purchaser' as synonymous with 'buyer' and as not including a mortgagee or mortgagor or a lessee or lessor as in the English Act. Before the Act came into force in 1882, wherever any such expression came up for consideration, in the absence of any specific definition under the Indian Statute, the meaning assigned in the English law seems sometimes to have been applied in a general way. See *Bazayet Hossein* v. *Dooli Chand*(2) where it was held that the creditor of a deceased Mohammedan cannot follow his estate into the hands of a *bona fide* purchaser for value, to whom it has been alienated by the heir-at-law, whether the allenation has been made by absolute sale or by mortgage. Though it may appear at first flush that a purchaser for value would include a mortgagee, actually what was held was that a creditor cannot follow a property alienated by heir-at-law into the hands of an alienee whether the alienation is by way of an absolute sale or by mortgage. The emphasis is on alienation of the interest in immoveable property and not on the word 'purchaser'.

(1) [1905] Ch. D. 639.

(2) I. L. R. 4 Cal. 402 (P. C.)

The dangers inherent in relying on English cases rendered on the law of property are many, and we should be chary in allowing a particular technical meaning acquired by a word in that country to govern the interpretation of our Acts which have used that word in different connotations. The usage of any term conveying a particular meaning in the English law and which subsequently has been incorporated in the definition of a statute as in the case of the two statutes referred to above, cannot on that hypothesis be imported as if that word has the same meaning under the Indian law, when, as we have pointed out, our statute adopts different connotations. Nor would there be any justification to refer to the principles developed by the Chancellor's Court of Equity in England or the notion that equity follows the law, in their application to our law, because that would lead only to confusion. In our view, to interpret our statutory laws on the basis of the statutory provisions of England which were enacted to deal with the peculiarities of their laws is to show subservience to that law or to the legislature in that country in preference to ours, though the legislative sovereignty in India even in the British days did not make our laws subordinate to the English laws. It is much more so now long after the independence and the Constitution. This Court cannot accept such an approach, as is suggested.

We may by way of illustration refer to section 56 of the Act. It states : "If the *owner* of two or more properties *mortgages* them to one person and then *sells* one or more of the properties to another person, the *buyer* is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties *not sold* to him, so far as the same will extend, but not so as to prejudice the rights of the *mortgagee* or persons claiming under him or of *any other person* who has for *consideration acquired an interest* in any of the properties". A careful analysis of the above section would show that the Legislature has at one place used several words which we have underlined to convey different concepts. The words *owner, purchaser, buyer, sale* have been used for connoting an absolute transfer of all the rights vested in an owner; the words mortgage, mortgagor and mortgagee are used to connote a transfer of an interest in property. That apart, even a person who has acquired an interest in property, who may be like a mortgagee, is said to acquire *"an interest in property for consideration"*, which expression is certainly used to connote only a limited interest. This clearly indicates that the Legislature has used different terminology for connoting different concepts and would have in the proviso, if it intended to apply it to mortgages, used the appropriate language and expression.

Another indication from which the meaning, which we have ascribed, can be gathered is the use of the expression "in the hands of". This expression, and indeed the entire phraseology of the saving clause, is significant and lends itself to the construction that a charge-holder cannot enforce his charge against any property in a case where that property is "in the hands of a person to whom such property has been transferred for consideration and without notice of the charge." What then is the significance of the words "in the hands of" ? Do they mean "in the possession of" or "under the control of" ? If this is so, then a

A simple mortgage of a property is not covered by the proviso, as the property the subject of such a mortgage is not in the possession or control of the mortgagee, or do these words mean that whatever interest in property is created that interest can be said to be in the hands of a person in whose favour that interest has been created. In *Arumilli Suryya* v. *Pinisetti Venkataramanamma and Ors.*(1) Horwill, J., observed at p. 704 : "If the appellant is treated as a simple mortgagee, he cannot by B any stretch of the imagination be considered to have the property in his hands." The High Court in the judgment in appeal has disagreed with Horwill, J.'s view on the ground that if the words imply physical possession, then possession of an agent or tenant will not be included. According to the High Court the words "in the hands of" only mean the holding of the title and nothing else.

C The expression "in the hands of" appears to us to be a figurative expression intended to convey that a person has sufficient control over the subject-matter to which in the context the phrase is applied so as to enable that person to do whatever he can do with it as the nature of that subject-matter would permit. See *Edwardes' Menu Company Limited* v. *Chudleigh.*(2) The judgment of Kekewich, J., was confirmed D by the Court of Appeal Lindley, M. R., Chitty and Vaughan Williams, L. JJ., which is reported in the same Volume at p. 64. The actual control as compared to the possibility of obtaining control seems to be implied in the term. The proverb "a bird in the hand is worth two in the bush", would, in our view, appropriately convey the meaning of the phrase. No doubt, "in the hands of" may be a multi-faceted phrase connoting many meanings, of which the meaning applicable in the con- E text in which it is used, is the most appropriate. In the context of the saving clause, the inappropriateness of its applicability to a simple mortgage or in the setting of the entire phraseology its non-appjlication to other mortgages seems to us to be clear and evident.

In the context in which the phrase "in the hands of" has been used we have no doubt that it was intended to convey and does convey F that the buyer as a transferee for consideration without notice of the charge was in possession, including constructive possession through a tenant who has attorned to him and which for all intents and purposes, as far as transfer is concerned, has conveyed to him all the right, title and interest which the vendor had in the property including the possession. Before we part with this aspect, it is necessary to point out that Mulla's Indian Registration Act, 8th Edn., at p. 195, states on the G basis of the decision in *Chhaganlal* v. *Chunilal*(3) that "under section 100 of the Transfer of Property Act, 1882, as amended by Act 20 of 1929 a mortage has priority over a previous charge of which the mortgagee had no notice." This decision is one rendered under s. 48 of the Indian Registration Act and not under s. 100 of the Act though the arguments advanced thereunder were noticed (see pp. 191-192). It was in fact contended that s. 50 of the Amendment Act of 1929 H by which the proviso was added had retrospective effect similar to s. 63

(1) A. I. R. 1940 Mad. 701.
(2) 14 T. L. R. 47.
(3) A. I. R. 1934 Bom. 189.

of the Amendment Act, but it was repelled. Tyabji, J., at p. 192, said: "We cannot accordingly, accept the argument that we must decide this case in accordance with the amended s. 100." A

If the proviso to s. 100 of the Act does not apply to mortgages, then what is the position of a charge-holder vis-a-vis the subsequent mortgagee without notice of the charge. A charge not being a transfer or a transfer of interest in property none-the-less creates a form of B security in respect of immoveable property. So far as mortgage is concerned, it being a transfer of interest in property the mortgagee has always a security in the property itself. Whether the mortgage is with possession or a simple mortgage, the interest in the property enures to the mortgagee so that any subsequent mortgage or sale always preserves the rights of the mortgagee whether the subsequent dealings in the property are with or without notice. The obvious reason for this C is that in a mortgage there is always an equity of redemption vested in the owner so that the subsequent mortgagees or transferees will have, if they are not careful and cautious in examining the title before entering into a transaction, only the interest which the owner has at the time of the transaction.

In so far as competing mortgagees are concerned, s. 48 of the Act D gives priority to the first in point of time in whose favour transfer of an interest in respect of the same immovable property is created, if the interest which he has taken and the interest acquired subsequently by other persons cannot all exist or be exercised to their full extent together. This section speaks of a person who purports to create by transfer at different times rights in or over the same immoveable property, and since charge is not a transfer of an interest in or over the E immoveable property he gets no security as against mortgagees of the same property unless he can show that the subsequent mortgagee or mortgagees had notice of the existence of his prior charge.

A reference to s. 48 of the Indian Registration Act and s. 27(b) of the Specific Relief Act would, however, be necessary to spell out the implications of the competing priorities between a charge and a F mortgage. Before we examine these provisions it is necessary to note that under s. 54 of the Act, it is only a transfer of interest in the tangible immoveable property of the value of Rs. 100/- and upwards or of a reversion or other intangible thing that requires the transaction to be effected by a registered instrument. But in the case of a tangible immoveable property of the value of less than Rs. 100/- a registered instrument is not compulsory but only optional. A transfer of such G property can be effected either by registered instrument or by delivery of the property, *i.e.*, when the seller places the buyer or such person as he directs in possession of the property. Where an oral sale of property of the value of less than Rs. 100/- takes place accompanied or followed by possession a question may arise as to what would be the effect of a sale of the same property effected by a subsequent registered document? There was a conflict of decisions under the H old Registration Acts, viz., under Act 20 of 1866, Act 8 of 1871 and Act 3 of 1877, and the words "unless where the agreement or declaration has been accompanied or followed by delivery of possession"

were first added by Act 8 of 1871 to give effect to the preponderant view that where possession was given under the oral agreement the registered document did not take effect against an oral agreement. The rationale underlying these cases was, as explained by Muttusami Ayyar, J., in *Kannan* v. *Krishnan*(1) is, that the protection given to oral agreement accompanied with or followed by delivery of possession is equivalent to registration. The effect of registration, it may be said, is to invest the subsequent purchaser or any person who takes an interest in that property with notice. If notice of a prior transaction whether by delivery of possession or by registration is the basis of conferment of priority, then even in the case of a transaction which did not effect a transfer by delivery of possession but there were rights created in favour of the person by an oral or written agreement, then a person taking an interest in that property or who purchases that property with notice of the prior charge would take that property subject to the prior rights of which he had notice. That is why s. 53A of the Act and the amendment in s. 48 of the Registration Act recognise certain equities even where the transaction as required by law is not entered into by a registered instrument and would not, but for these provisions, amount to effecting a transfer of an interest or ownership in a specific immoveable property.

Section 48 of the Registration Act, 1908, as it now emerges after the amendment Act 21 of 1929, gives a priority to an oral agreement or declaration relating to a moveable or immoveable property where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force. The ordinary rule of s. 48 of the Registration Act is that non-testamentary documents duly registered under the Act relating to any property whether moveable or immoveable shall take effect against an oral agreement or declaration relating to such property subject to the exception stated above. In *Chhaganlal's* case (supra) the decision was concerned mainly with the question whether a charge can be an oral charge, or it must, like a mortgage, be created only by a registered instrument. That was a case of an oral charge competing to have a priority over a mortgage. Tyabji, J., after referring to s. 48 of the Registration Act said at p. 191 :

> "As there has been no delivery of possession in the present case, the exception may, for the present purposes, be disregarded."

This exception would, however, still leave a case where an interest in immoveable property is created without a registered instrument and without delivery of possession and that may be the case of a mortgage by deposit of title deeds as defined in s. 58 of the Act. For this purpose, the proviso to s. 48 of the Registration Act makes an exception in the case of mortgage by deposit of title deeds which neither requires delivery of possession nor constitutes notice of such a mortgage. This section does not give any indication as to what would be the position where a person taking a subsequent registered document had notice of an oral or written agreement in respect of an immoveable property

(1) I. L. R. [1890] 13 Mad. 324, 330.

which is not accompanied or followed by delivery of possession. Will the right created under an oral or written agreement take a priority over the interest created by a registered document? The answer appears to be in the affirmative, because, as we have stated earlier, the reason for a transaction relating to immovable property being effected by a registered document is to impute notice to all those who subsequently take an interest in that property and the same protection was afforded to transactions, which though not effected by registered instruments, nonetheless were accompanied or followed by delivery of possession. Any actual notice of a transaction effected by an oral or written agreement in respect of specific immoveable property though not accompanied or followed by delivery of possession should logically be accorded the same protection as against a subsequent transferee who takes it with notice.

Reference to s. 27(b) of the Specific Relief Act, 1877 (corresponding to s. 19(b) of the new Specific Relief Act, 1963) would furnish the answer. The old Act had provided certain illustrations, but the new Act has deleted them. Section 27(b) of the old Act is in the following terms :

> "27. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—
>
> (a) x x x x
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

The illustrations given in respect of clause (b) of s. 27 of the old Specific Relief Act are all cases of sale or out and out transfer of land. It is apparent from this clause that even a subsequent transfer is subject to a contract under which a right to obtain a transfer of specific property has been created. If a subsequent purchaser takes the risk of not ensuring himself of any prior rights in respect of the property to be purchased by him, he cannot be said not to have acted in good faith. But there may be instances where he has notice or but for his carelessness would have had notice of the prior charge and nonetheless has obtained a transfer, such as where the charge-holder is in possession of that property, or where the charge is registered but no inspection is taken of the Register of Charges, mortgages and transfers. If he has such a notice either by registration or by property being in the possession of the person who has dealt with it first or otherwise, then even the fact that he has a registered document and the right created in the property is only by a simple contract does not avail him. In the case to which the Specific Relief Act did not apply, Mitter, J., in *Nemai Charan* v. *Kokil Bag*(1) observed at pp. 537-538 :

> "It appears to us, that if we adopt the principle that no enquity (that is, equity arising from notice) is to be consi-

(1) [1881] I. L. R. 6 Cal. 534.

A dered where an oral agreement to alienate is not followed by possession, the 27th section of the Specific Relief Act, as illustrated, would be rendered a deed letter wherever it applies, when competition arises between an oral agreement to alienate unaccompanied by possession, and an alienation B by registered deed with notice of the previous agreement; but we are not compelled to adopt this conclusion."

The doctrine of notice, even apart from the statutory provisions, is firmly embedded in the jurisprudence of this country as part of the equitable principles which Courts administer in conformity with the maxim "justice, equity and good conscience". On this approach the C conclusion would be the same as if the proviso to s. 100 of the Act was applicable to mortgages also, but it is no answer to say that merely because the ultimate result is the same, we should read the language of s. 100 of the Act ignoring the purpose for which the amendment was made, or given to an interpretation which is totally at variance with the tenor of the entire Act in order that it may conform with D the ultimate result, which in any case has been reached, even if it was by a different road.

The result of a close examination of the several aspects of the question posed before us leads us to the conclusion that a subsequent mortgagee with notice of a prior charge takes the mortgage, subject to E the charge. But as in this case the finding is that the respondent did not have notice of the appellants' charge, the appeals will have to be dismissed, and are accordingly dismissed, but in the circumstances without costs.

F

BEG, J.—The two appeals before us, by certification of the case under Article 133(1)(a) of the Constitution of India, arise in the circumstances detailed below.

G A set of defendants (Nos. 1 to 7) of Original Suit No. 57 of 1958 (hereinafter referred to as "The Datars"), which is now before us in appeal No. 1883 of 1967, had become indebted to a number of creditors. One set of these creditors, Defendants Nos. 9 to 13 (hereinafter referred to as "Motes") of this suit had filed the suit No. 741 of 1938 for the recovery of a sum of Rs. 1,34,000/- with interest due to them from H the Datars under a simple loan. On 31-3-1941, the Motes had obtained a compromise decree in suit No. 741 of 1938 by which three sets of properties of Datars were sought to be charged. Two of these

properties were in Poona, one in Shukrawar Peth and the other in Budhwar Peth, whereas the third property was in Kalyan. After a copy of the compromise decree, showing a charge on all three properties, was duly presented before the Sub-Registrar for registration, on 13-5-1941, the document was noted at serial No. 1048-B in Book No. 1 kept by the Registrar, and a certificate complying with the provisions of Section 60, sub.s(2) of the Indian Registration Act was issued by the Sub-Registrar. But, presumably due to the negligence of the office of the Sub-Registrar, only the charge on the Shukrawar Peth property was specifically recorded as required by law in the registers mentioned in Section 51 and indices mentioned in Section 55 of the Registration Act.

The appellants, Motes, then got the Shukrawar Peth property and the small property in Kalyan sold in execution of the compromise decree. But, as the amount realised by the sale of these properties was not enough to satisfy their claim, the appellants, Motes, filed an execution application Darkhast No. 31 of 1952 in the Court of a Civil Judge at Poona for the recovery of Rs. 1,57,164/-.

The claim of the plaintiff-respondent No. 14 before us (hereinafter called "Oswal") had, meanwhile, come into existence by reason of two duly executed simple mortgages, dated 27-6-49 and 13-9-49, on the strength of which the Original suit No. 57 of 1958, before us in appeal No. 1883 of 1967, for the recovery of Rs. 2,18,564/- by enforcing the two simple mortgages, was filed. Oswal claimed that he had no knowledge of the alleged prior charge of the Motes.

The Budhwar Peth property was also sold in proceedings to execute the compromise decree started by the appellants, Motes, by Darkhast No. 31 of 1952 and purchased by Motes themselves. The Execution Court, in proceedings under Order 21, Rule 66, Civil Procedure Code, had dismissed the objection of the plaintiff-respondent. Against this dismissal an appeal was filed in the High Court which allowed it. Hence, the Motes filed appeal No. 1882 of 1967 in this Court against this dismissal by the common judgment of the High Court deciding the two appeals before it.

The Trial Court dismissed the suit No. 57 of 1958 brought by Oswal. It held that, although, Oswal had no actual or constructive notice of the charge in favour of the appellants, yet, the charge had priority over the subsequent mortgages and could be enforced against Oswal, the plaintiff-respondent, inasmuch as a simple mortgage, without possession, did not give the mortgagee a right to protection given by the proviso to Section 100 of the Transfer of Property Act. (hereinafter referred to as "the Act") against enforcement of a charge upon "any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge". The Trial Court held that the rights of a simple mortgagee are not "property in the hands" of the mortgagee who could, therefore, not be protected by the proviso to Section 100 of the Act. On appeal, the High Court of Bombay reversed the decree of the Trial Court and held the subsequent simple mortgages to be protected by the proviso.

A The High Court had also, in modification of the decree of the Trial Court, directed payment of the dues of the Maharashtra Bank—defendant No. 8, under the provisions of order 34, Rule 4, Civil Procedure Code. The principal question which arises in the two appeals now before us is : Does the protection given by the proviso to Section 100 of the Act against the enforcement of a charge extend to a simple mortgagee as a transferee for consideration without notice of the B charge ?

Section 100 of the Act reads as follows :

> "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 a charge on the C property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.
>
> 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 D 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".

One of the questions raised before us whether Section 100 of the Act has any application to a charge created by the terms of a decree. It was contended that such a charge has a binding force independently E of the provisions of Section 100 of the Act. In support of this submission several authorities were cited :

(1) *Seth Ghasiram Seth Dalchand Palliwal* v. *Mt. Kundanbai w/o Rameshwar Shukul & Ors.*(1)

(2) *V. S. V. Thangavelu Mudaliar* v. *G. Thirumalswami Mudaliar & Anr.*;(2)

F (3) *Seth Radhe Lal* v. *Ladli Parshad*;(3)

(4) *Jata Bhusan Chatterjee* v. *Smt. Krishna Bhamini Debi & Anr.*;(4)

(5) *Seethalakshmi Ammal* v. *Srinivasa Naicker & Ors.*(5)

(6) *Sri Rajah Mommadevara Naganna Naidu Bahadur* G *Jamindar Garu (died) & Ors.* v. *Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu & Ors.*(6)

(7) *Dhirendra Nath Sen & Ors.* v. *Santa Shila Devi & Ors.*(7)

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(1) AIR 1940 Nag. 163. (2) AIR 1956 Mad. 67.

H (3) AIR 1957 Pb. 92. (4) AIR 1957 Cal. 214.

(5) AIR 1958 Mad. 23. (6) AIR 1959 AP 622 (FB).

(7) AIR 1968 Cal. 336.

None of these is a case in which there was a compromise decree. They were cases decided by an application of the principles of *Res judicata* which bind parties to a decree and those who derive their rights and interests from such parties. It has been held by this Court in *Pulavarthi Venkata Subba Rao & Ors.* v. *Valluri Jagennadha Rao & Ors.*(1) with regard to a compromise decree (at page 322) :

> "The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties. The court did not decide anything. Nor can it be said that a decision of the court was implicit in it. Only a decision by the Court could be *res judicata,* whether statutory under s. 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests".

In several of the cases mentioned above the question arose whether the terms of the decree were sufficient to confer the rights upon the parties or their representatives in interest to execute the decree to satisfy the claim or a separate unit was needed. That question has not been raised before us. We are concerned here with a charge created by the terms of an agreement between the parties which was embodied in the compromise decree. This agreement satisfies the requirements of Sec. 100 of the Act inasmuch as it is a charge created by the act of parties. It is immaterial that the charge was subsequently incorporated in a decree. We also find that no contention was advanced either in the Trial Court or in the High Court that a charge under the terms embodied in the compromise decree operates or binds outside the conditions laid down by Sec. 100 of the Act for enforcing charges in general. I am not impressed by the argument.

I hold that a charge was created by the terms of the agreement embodied in the consent decree, which was actually registered even though, unfortunately for the charge holders, the provisions of Section 51 of the Registration Act were not fully complied with in keeping a record of the charge. That charge against Budhwar Peth property would be enforceable if the plaintiff-respondent is not protected by the terms of the proviso after its amendment by the Transfer of Property (Amendment) Act XX of 1929. If the rights of a simple mortgagee, who is not in possession of the mortgaged property, are not protected by the proviso at all, there is no doubt that the first part of Section 100 will confer upon the charge-holder the same rights as a prior simple mortgagee has against a subsequent simple mortgagee even though the charge does not "amount to a mortgage"

Before proceeding further I will deal with a question raised before the Trial Court, the High Court, and, again, before us, about the degree of diligence to be proved by a party setting up want of notice of a charge as a *bona fide* transferee for consideration. Section 3 of the Act lays down :

(1) [1964] 2 SCR 310, 322.

A "'a person is said to have notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I. Where any transaction relating to immovable property is required by law to be and has been affected B 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 sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on C 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;

Provided that—

D (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,

(2) the instrument (or memorandum) has been duly entered or filled, as the case may be, in books kept under section 51 of that Act, and

E (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.

Explanation II.—Any person acquiring any immovable property or any share of interest in any such property shall be deemed to have notice of the title, if any, F of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have 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 :

G 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".

It is no body's case that there was any wilful abstention from enquiry by Oswal whose agent Bhikam Dass deposed :

H "the search in Sub-Registrar's office was taken by me. I searched under No. 1 and 2 of property card. I did not see the register in which the decretal charge was noted. The

transactions in dispute were settled through me. I gave information to plaintiff".

Anant Sitaram Joshi, the Clerk of the Sub-Registrar's office, stated that, although the compromise decree was mentioned in Index No. 1, no entry about it was made in Index No. 2. Even in Index No. 1, it was not mentioned that the Budhwar Peth property was subject to a charge. He stated that it was not mentioned in Index No. 2 because the appropriate orders were wanting although it was property which should have been entered in the property cards as it bore CTS Nos. Hence, it is clear that an examination of the relevant property index No. 2 could not have disclosed the existence of the charge on Budhwar Peth property. A reasonably prudent person could not be expected to suspect that the misleading entries were incorrect, and, from a mere reference to a decree, imagine that property not shown as charged at all may also be included, and, therefore, attempt to find out all the particulars given in the decree itself, which should have been given in Index No. II. Section 55, sub. s.(3) of the Registration Act, lays down: "Index No. II shall contain such particulars mentioned in Section 21 relating to every such document and memorandum as the Inspector General from time to time directs in that behalf".

On the evidence on record, the Trial Court came to the conclusion "that only the property at Shukrawar Peth, Poona city, was mentioned in the various official records maintained by the Sub-Registrar and City Survey Officer as affected by the charge, though property in Budhwar Peth, which was also included therein, was not at all referred to therein", The High Court affirmed this finding and held:

> "that from inspection of the records it could not have been possible for any one to find out if the suit property was charged and the plaintiff, therefore, could not be fixed with notice, either actual or constructive, of the above decretal charge in favour of defendants Nos. 9 to 13".

After having been taken through the evidence mentioned above, I see no reason to differ from the views taken by the Trial Court and the High Court which preclude the existence of "gross negligence" on the part of the plaintiff who had made such attempts as could be expected of a reasonable and prudent individual to find out whether the property to be mortgaged was subject to a previous charge. The failure of the plaintiff to learn of the prior charge on the Budhwar Peth property could be ascribed to the negligence of the Sub-Registrar concerned for which the plaintiff Oswal could not be made to suffer.

Coming back to the principal question indicated above, which was most strenuously argued on behalf of the appellants, relating to the interpretation of the proviso to Section 100 of the Act, I think that the correct meaning of this provision will emerge by determining what its object is by: firstly, considering the language employed in the context of other sections of the Act defining the concepts involved; and, secondly, if there is any uncertainty left, by glancing at some legal

history so as to appreciate what the provisions could be aimed at achieving.

I have set out above the requirements of notice, both actual and constructive, found in Section 3 of the Act. So far as constructive notice is concerned, it is evident that the three Explanations lay down what is deemed to be notice under each of the three sets of circumstances dealt with separately by each Explanation. There is a presumption against redundence or meaningless overlapping of statutory provisions. Explanation I, within which the case of the plaintiff Oswal was sought to be brought by Motes, deals with a very different set of circumstances, and, apparently, dispenses with circumstances bringing in Explanation II which makes it clear that a person acquiring any share of interest in immovable property will be "deemed to have notice of the title, if any of any person who is in actual possession thereon". In other words, Explanation II constitutes an independent category of a deemed or constructive notice of entitlement of the person shown to be in possession. The significance of this provision is that it shows that, where actual possession was to constitute notice of entitlement, it is clearly and specifically dealt with in Section 3 of the Act. It indicates that reference to the factum of possession is made in the Act itself where this constitutes a part of a set of facts which has to be proved for establishing a right or liability.

The High Court had correctly held the view, in accordance with what was laid down by this Court in *Ahmed G. H. Ariff & Ors.* Vs. *Commissioner of Wealth Tax, Calcutta,*(1) that "property" is "the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have". Its amplitude as well as what is excluded from its definition are indicated by Section 6 of the Act. Section 58 of the Act defines a mortgage as "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced." There can be little doubt that a simple mortgage is a transfer of property within the meaning of Section 5 of the Act.

If a simple mortgage is a "transfer of property", as I think it is, the mortgagee's rights must vest in someone. In the context of the provisions set out above, it seems that a prior charge of which a transferee for consideration has notice becomes enforceable, by reason of Section 100 of the Act, against the person in whom a transferee's rights vest. The right vested in a person by virtue of a transfer for consideration is nothing more nor less than "property in the hands of a person to whom such property has been transferred for consideration". The expression "in the hands of" could not be confined to tangible property which is actually in the physical possession of the transferee. It is incontrovertible that the term "property" defined in Section 6 of the Act includes both tangible and intangible property. It extends to rights and interests in property too. When these vest in somebody they are property "in the hands of" that person.

(1) [1970] 2 SCR 19.

The word "hand" has acquired a number of extended meanings in the English language. It denotes power over or capacity to do or skill in doing various things. Its derivative "handle" may be an object one can physically grasp with one's hand, but "to handle" denotes capacity for management or control. The word "hand" is used in conjunction with "at" and "on" and "to" and "in". The various meanings of "in hand" given in *Webster's Third New International Dictionary* (p. 1026) are: (1) In one's possession (*e.g.* to have enough money in hand); (2) In control (*e.g.* to keep the children in hand by a system of rewards and punishments); (3) At one's disposal (*e.g.* to have a large property in hand because of one's position); (4) To spare (*e.g.* to have plenty of time in hand); (5) In preparation (*e.g.* a new play in hand); (6) Under consideration (*e.g.* matter in hand); (7) Under effective control or management (*e.g.* business in hand).

Thus, we see that to have possession of an object is only one of the several Dictionary meanings but not the only meaning of the expression "in hand". Moreover, the concept of possession in legal terminology is so well known that, whenever it is intended to convey what it signifies, lawyers and draftsmen do not hesitate to use the word possession just as we find it used in Section 3, Explanation II, relating to deemed "notice". It seems that, in the proviso to Section 100 of the Act, the legislature deliberately employed the concept of "property in hand", in contra-distinction with "property in the possession of" a transferee, so as to include cases where a person has a right, which is intangible property, vested in him.

The right of a simple mortgagee may be capable of being spoken of as "possessed" by the mortgagee. But, since it is an intangible right, even the word possession, when used in conjunction with mortgagee's rights, would not denote an actual physical handling of the right which is intangible. The right may be evidenced by a document kept in the vaults of a bank or in an almirah in a private home, but, the right itself is incorporeal. It is something distinct from the document which evidences it. It is incapable of being "handled" physically. The right could more appropriately be spoken of as either "vested in the transferee", or, as property "in the hands of the transferee". The object of employing this terminology in proviso to Section 100 of the Act seems to be to include such rights as those of a simple mortgagee. I, therefore, think that the Bombay High Court was correct in adopting the view that the plaintiff-respondent Oswal, as a simple mortgagee, was not outside the protection conferred by the proviso to Section 100 because he was both a bonafide transferee for consideration with simple mortgagee rights "in hand", as well as a person who had no notice, actual or constructive, of the prior charge of the Motes for reasons already mentioned above.

The only authority which learned Counsel for the appellants could cite against the view adopted by the Bombay High Court was a stray

A remark in *Arumilli Surayya* v. *Pinisetti Venkataamanamma & Ors.*,(1) where it was observed by Horwill, J. :

> "If the appellant is treated as a simple mortgagee, he cannot by any stretch of the imagination be considered to have the property in his hands".

B The High Court had considered it and dissented from it in the following words :

> "With respect there is no justification for construing the words "in his hands" literally. If the words were to be construed literally, the section would not apply to a purchaser, who is not in actual physical possession but is in possession through his agent or his tenant or his mortgagee. The words C "in the hands" can and must only mean "held by" or "owned by" and cannot mean physical holding of the property. They only mean the holding of the title and nothing else. These words do not indicate that the section was only intended to apply to a purchaser or a mortgagee in possession. Section 58 of the Transfer of Property Act does not make any difference between a mortgagee, who is a simple mort- D gagee, and a mortgagee with possession. It only slightly alters the rights that are available to the mortgagee, but the actual transfer is the transfer of a subordinate interest in the mortgaged property and that is the same in both the cases".

As explained above, even the literal meaning of the words "property in hand" could be said to be wider than that of tangible property in physical possession. After all, a literal meaning or the "plain ordinary meaning" of words used becomes what words employed have come, by common use, to mean and to find recognition as their "dictionary meaning". We need go no further here. For applying the literal Rule of interpretation, which ordinarily suffices unless there is good reason to depart from it, the Dictionary meaning has to be necessarily relied upon. This does not exclude other very useful aids F to construction, such as a glance at legal history to discover what a provision was aimed at achieving. An attempt to apply what is known as the mischief Rule will, I think, lead to the same result.

As equitable principles evolved by the Chancellor's Court in England underlie a number of provisions of our Transfer of Property Act, it is useful to remind ourselves of the equitable doctrine embodied G in the proviso to Section 100. This doctrine is stated as follows in *Halhsbury's Laws of England*—III Edn. Vol. 14, page 539 :—

> "1011. *The legal estate gives priority.* When there is an existing equitable interest in property, and an interest is subsequently created in favour of a purchaser for value without notice of the earlier interest, and that purchaser either gets H in the legal estate at the time of his purchase, or, in certain circumstances, after his purchase, his possession of the legal

(1) AIR 1940 Mad. 701.

estate gives him priority over the earlier equitable owner. The equities being equal except as regards time, the legal estate, properly got in by the owner of the later equitable interest, entitles him to hold the property either as absolute owner or until his mortgage is discharged, as the case may be. There is, in the absence of notice or of any other circumstances to postpone him, other than that of being later in point of time, no equity attaching upon his conscience by virtue of which the Court will deprive him of his legal advantage; and the subsequent purchaser is entitled to the like priority if he has the better right to call for a conveyance of the legal estate. The importance which courts of equity, in deciding priorities, attach to the legal estate, is an instance of the general principle that equity follows the law".

It will be seen that in the passage set out above, the term "holder of the legal estate" is obviously used for one who holds the property "either as absolute owner or *until his mortgage is discharged as the case may be*". In other words, for applying the equitable principle explained there, a mortgagee is equated with the absolute owner under an outright sale of rights of ownership. A reference to *Barwick & Co.* v. *Price*(1) also shows that the meaning of the term "purchaser for value" as including a mortgagee was so well settled in English law that it received statutory recognition in Section 2(viii) of the Conveyancing Act, 1882, there. Again, Section 205(1)(xxi) of the Law of Property Act, 1925, in defining "purchaser", made it abundantly clear, that both an outright purchaser and a mortgagee could fall under the protective cover of the doctrine of a "bonafide purchaser for value". This only meant that English law too gave statutory form and expression to doctrines evolved by Courts of Equity. A bare perusal of passages in *Pomeroy's Equity Jurisprudence*" is enough to show that the concept of a "bonafide purchaser for value includes the mortgagee and that a "legal mortgagee" has, for the purposes of applying the doctrine, a "legal estate". In a discussion of "what constitutes a bona fide purchase", the need to show a purchase of the whole interest which a transferor could pass finds no place (*See*: *Pomeroy's Equity Jurisprudence 5th Edn. Vol.* 3, *para* 745, pages 19-20). A distinction is made between the claims of a "legal mortgagee", who is described as "holding of course, the legal estate", and those of a merely "equitable mortagee" (See : *Pomeroy*, Vol. 3, para 741).

The question whether a bonafide "purchaser for value" includes a "legal mortgagee" or not could arise only in the context of use of the term "purchaser" which became attached to the concept for historical reasons. As we have seen above the concept covers the "legal mortgagee" in English law. In the case before us, the simple mortgagee is a legal mortgagee and not merely an equitable mortgagee. Although the term "purchaser" is not used in Section 100 of the Act, the proviso to it seems undoubtedly meant to incorporate the doctrine of a bonafide purchaser for value in speaking of transfer "for consideration".

(1) [1950] (1) Ch. 632.

A It seems to me that the proviso to Section 100 is less capable of giving rise to difficulty inasmuch as the term purchaser is not used here. It only speaks "of a person to whom such property has been transferred for consideration without notice of the charge". One cannot help thinking that the language used here was designedly wider so as to confer the benefit of the proviso also upon persons other than purB chasers of ownership rights. The only condition is that the property must have been transferred for consideration. This, of course, implies that the transfer covered should have been in accordance with law. That is the only condition imposed by the proviso upon the kind of transferee who can get the benefit of it. I see no reason for depriving a class of transferees of the benefit which was, I am convinced, meant to be conferred upon them also by this proviso.

C The effect of provisions of our Act is that a legally valid charge, even though Section 100 makes it a legally enforceable claim, is not a transfer of property which, as Section 58 of the Act shows, a mortgage is. Nevertheless, a charge for purposes of enforceability would rank equally with a transfer of interest in property provided the transD feree had notice of that charge within the meaning of "notice" as defined by Section 3 of the Act. If a simple mortgage amounts to a transfer of property for the purposes of Section 100, as it does, it is immaterial that a transfer of property implies a transfer of the whole bundle of rights in property which the transferor has for the purposes of situations dealt with by other Sections. For example, Section 8 of the Transfer of Property Act reads as follows :

E "8. *Operation of transfer.*

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the F easements annexed thereto, the rents and profits thereof accruing after the transfer and all things attached to the earth;

and, where the property is machinery attached to the earth, the movable parts thereof;

and, where the property is a house, the easements annexG ed, thereto, the rent thereof accruing after the transfer and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

H

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect".

Now this section, laying down the effects, incidents, and implications of a transfer begins with words showing that its operation is subject to express terms of transactions which restrict the rights of transferees to less than those of ownership. A mortgage is a transfer of property but not of ownership. Section 8 embodies only a rule of interpretation for transactions or acts of purported transfer. It corresponds to Sections 60(1) and 62 of the English Law of Property Act, 1925. Transfers may be either of the whole or a part of the interest of the transferor. Section 8, in my opinion, was meant to govern matters not expressly provided for in deeds of transfer. It was not, I think, intended at all to govern or lay down the meaning of the term "transfer" whenever used in the Act. That has been done expressly by Section 5 read with Section 6 of the Act. Various Sections of the Act, such as Section 58, dealing with various types of transactions, specifically lay down whether a transaction of particular kind is a transfer or not.

A number of other provisions of the Act to which references have been made in the course of arguments do not, in my opinion, really help us in arriving at the correct meaning of the transferee of property contemplated by the proviso to Section 100 of the Act. It is enough, for the purposes of interpreting Section 100, to reach the conclusion, as I think we have to in view of other provisions of the Act, that the transferee may be of even an interest in property.

I regret that I am unable to share the view that the Bombay High Court, in the Judgment under appeal, stretched the meaning of the words "in the hands of" too far to read something into Section 100 of the Act which is not there. On the other hand, I think that we will have to add some words if we import a limitation, which is not there, into the words : "any property in the hands of a person to whom such property has been transferred for consideration". We will have to so read them as to confine the meaning to a transfer of "full rights of ownership in property". To do that, we will have to at least alter the words "such property" into "rights of ownership in such property". The words "such property" do not, it seems to me, stand only for "full ownership of property'. They obviously denote that property which has been transferred. If the transfer of an interest in property to a mortgagee, whether simple or usufructuary, is a transfer of property, "such property" could only mean, in the case of a mortgee, the interest in property which has been transferred to the mortgagee because that is also "property". The words used could not, in the context, stand only for the whole bundle of rights which ownership of such property may be made up of. In any case, what the mortgagee has in hand is only an interest in property, so that this, and nothing more, is "property in the hands of" a mortagee. When his case is under consideration that is all we are concerned with. We need indulge in no semantic refinements at all to reach this result which flows directly from the words used in the section. And, we need not unnecessarily cut down the apparent amplitude of their scope.

If we can reach the same result on the question of priority of a simple mortgage as against charge, of which the mortgagee has no notice

A by resorting to the principles of "equity, justice and good conscience", the question arises : why can we not read Section 100 of the Act itself as a direct statutory recognition of those very priciples when this provision contains, comprehensively, as it appears to me to be meant to do, the requirements of equity, justice, and good conscience, on the question B of priority between a charge-holder and other possible transferees including a simple mortgagee against whom the question of enforceability of a prior charge could arise? To answer this question satisfactorily I think we are, of necessity, driven to seek light from the principles developed by the Chancellor's Court of Equity in England which a number of our statutory provisions are intended to incorporate into our C statutory law just as a number of them have been embodied in English statutory law now. If the maxim of equity is that "equity follows the law", it is no less true that statutory law generally purports to follows the behests of equity, justice, and good conscience.

A wide and liberal enough interpretation of the proviso to Section, D 100 of the Act to extend the benefit of it, as amended and clarified by Section 50 of the Transfer of Property (Amendment) Act XX of 1929, to mortgagees also as bona fide transferees for value (the word "purchaser seems to have been deliberately eschewed), is supported by an examination of all such relevant cases decided by different High Courts on the amended provision as have come to my notice, with the solitary E exception of *Arumilli Surayya's* case (supra) of the Madras High Court containing an observation, quoted already, by Horwill, J. The amendment was apparently made to negative the view expressed in some cases that a charge could be enforced even against a *bona fide* purchaser for value without notice. The proviso should, I think, be so interpreted as to amplify the remedy and to suppress the mischief aimed at by the F amendment. I may mention some cases decided on the assumption that the mortgagees were also protected by the proviso.

In Chhaganlal Sakharam & Anr. v. *Chunilal Jagmal & Ors.*,(1) the question arose of priority of two mortgagees by registered deeds over a previous charge in favour of the appellants. The mortgagee was G given the benefit of the amended Section 100 of the Act.

In *Barhu Mahto & Anr.* v. *Srimati Jasoda Devi & Ors.*,(2) Fazl Ali, C.J., and B. P. Sinha, J., held that plaintiff who brought a suit to enforce a right under a mortgage bond obtained priority over a previous charge under a compromise decree. The learned Judges remanded the H case to the Trial Court for framing an issue and deciding the question

(1) AIR 1934 Bombay 189. (2) AIR 1945 Pat. 426.

whether the transferor of the rights of the plaintiff under the mortgage bond (defendant 23) had notice of the charge upon which the Defendants-Appellants relied.

In *Goswami Maheshpuri Guru Ramkrishnapuriji vs. Ramchandra Sitaramji & Anr.* (1) the plea of a Defendant chargeholder under a decree was repelled as against the plaintiff-respondent who had brought a suit to enforce a subsequent mortgage because the mortgagee had no notice of the charge, Grille, C.J., observed with regard to the distinction between the unamended and amended sections (at page 5) :

> "The main difference to be noticed in the two sections is that the section as amended explicitly states that no charge would be enforced against a person taking the property for consideration and without notice of the charge. The amendment was made in order to set at rest the conflict of decisions that existed before. The view taken by the Judicial Commissioner's Court, Nagpur, before the amendment was that no charge could be enforced against property in the hands of a person to whom such property had been transferred for consideration and without notice of the charge : 15 N.L.J. 141. This view was approved in 30 N.L.R. 303 at p. 305. The view taken in several other cases was that inasmuch as there is no transfer of interest in property in a charge while there is such a transfer of interest in a mortgage a charge would be good against subsequent transferees such as mortgagees or purchasers only if the subsequent transferees had notice of the prior charge : 33 Cal. 985, at p. 993, 38 All. 254 at p. 258 and 42 Cal. 625".

Of course, the precise question raised before us was not actually raised in the cases mentioned above, and, therefore, it was not decided there. But each of these decisions rests on the assumption that a simple mortagagee is also covered by the protection conferred by the amended proviso. If this has been the basis on which decisions have been given until now since the amendment of sec. 100 by Act XX of 1929, we should, I think, be most reluctant to tread a new path on the meaning of such a statutory provision unless we could not avoid doing so because some clear misconception of the law is revealed.

Another contention advanced on behalf of the appellant was that their prior rights would be protected by either the terms of or the principles underlying Sec. 48 of the Act which reads as follows :

(1) AIR 1944 Nag. 1.

A

> "S. 48. Where a person purports to create by transfer at different times rights in or over the same inmovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created".

B

The contention was that, although a charge may not be described as "a transfer", yet, the result of Section 100 of the Act was to equate it with a simple mortgage which is a transfer because Section 100 says : "all the provisions hereinbefore contained which apply to a simple C mortgage shall, so far as may be, apply to such charge". I, think that, apart from the qualifying words, "so far as may be", used by Section 100 of the Act, a condition essential to the applicability of Section 48 of the Act is that there must be an actual transfer of property. Furthermore, another condition for invoking Section 48 of the Act is that the previous and the subsequently created rights "cannot all exist D or be exercised to their full extent together". In the case before us, this does not appear from facts found. In any case, the prior right of the charge-holder could only obtain priority provided other things are not unequal. This follows from words used indicating that each of the two or more transactions must at least be a "transfer". Furthermore, E the conditions of priority as between the holder of a previous charge and a subsequent simple mortgage are completely covered by Section 100 of the Act. The principle underlying Section 48 is one expressed in the maxim of Equity : *"Qui prior est tempore potior est jure"* (first in time is stronger in right). This principle, applied to ranking between rival equitable claims, is applied by Section 48 to contending claims of F otherwise equal legal validity. The effect of Section 100 is that while a charge, which is not a "transfer" of property, gets recognition as a legally enforceable claim, that enforceability is subjected by the proviso to the requirements of a prior notice in order to give it precedence over a legally valid transfer of property. The rights of the appellants charge-holders could only be exercised, on facts found, subject to the priority G obtained by the respondent mortagagee's rights. This clear result of the law, as contained in Section 100 of the Act, cannot be defeated by invokng either the terms of or the principles underlying Section 48 of the Act read with the first part only of Section 100 of the Act. If the respondent simple mortgage Oswal could not have claimed the benefit of the proviso to Section 100, the first part of Section 100, read with H Section 48 of the Act, could have come to the aid of the applicants. But, on the view adopted by me, this line of reasoning does not help the unfortunate chargeholders at all.

Lastly, learned Counsel for the appellants suggested that the mortgages made subsequent to the charge by a decree in favour of the Motes were struck by the doctrine of *Lis Pendens*. The Bombay High Court had repelled this contention on two grounds: firstly, the properties which were subsequently charged with the payment of the debts to the Motes were not the subject matter of suit No. 741 of 1938; and secondly, there was no Darkhast or execution application pending at the time when the simple mortgages in favour of the plaintiff respondent Oswal were created in 1949. I agree with these reasons for holding that the doctrine of *Lis Pendens* had no application on the facts of the case before us.

The result is that, finding myself in agreement with the views expressed and the conclusions reached by the Bombay High Court, I would dismiss these appeals. But, in the circumstances of this case, the parties must bear their own costs.

V. P. S. *Appeals dismissed*

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