Mahesh Prasad vs Mt. Mundar on 11 May, 1950

Equivalent citations: AIR1951ALL141, AIR 1951 ALLAHABAD 141

ORDER

Malik, C.J. and Agarwala, J.

1. The facts of this case are very simple, but, in view of the difference of opinion between the Oudh Chief Court and the Allahabad High Court before their amalgamation; it appears to us desirable that it be referred to a larger Bench of five Judges for decision.

2. Mt. Munder had filed a Suit No. 166 of 1913 in the Court of the Subordinate Judge of Allahabad for the following reliefs :

> (a) Rupees 60 per month or any amount which may be adjudged by the Court may be fixed as maintenance allowance. The said maintenance allowance of the plaintiff may be a charge on the whole or a sufficient portion of the family ancestral property as specified below in the list A, and the defendants may be ordered to pay the same every month to the plaintiff out of the income of the said property.
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> (b) One house out of the ancestral houses may be awarded to the plaintiff for her abode.
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> (c) Costs of the suit may be awarded against the defendants.
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> (d) Other proper directions which may be deemed necessary for doing justice to the plaintiff may be given by the Court."

To the plaint was attached a list of the family ancestral property in the possession of the defendants. The plaintiff, Mt. Munder, was the widow of one Kanhai Lal and the defendants to the suit were Bhagwan Das, Kanhai Lal's father, Bachchu Lal, Kanhai Lal's brother and three sons of Bachchu Lal, namely, Gaya Prasad, Vishnu Lal and Sarju Prasad. The suit was contested on behalf of the defendants on various grounds, but it is not necessary to set out those grounds now. The suit was dismissed by the trial Court on 21-9-1914. There was a First Appeal No. 34 of 1915--filed in this Court which was allowed by Richards C. J. and Sir Pramoda Charan Banerji J. on 21-2-1917. The Court fixed Rs. 20 a month as maintenance and created a charge on the family property. The relevant portion of the judgment of this Court is as follows:

> "The result is that we set aside the decree of the Court below and make a decree in favour of the plaintiff for maintenance at the rate of Rs. 20 a month and declare that it be a charge on the property of the family. She will be entitled to recover this

> maintenance from the date of the institution of this suit. The plaintiff will get her costs in both Courts in proportion to her success. . . . ."

The relevant portion of the decree of this Court in F. A. No. 34 of 1915 is as follows :

> "The decree be and is hereby passed in favour of the plaintiff appellant for recovery of the maintenance allowance at the rate of Rs. 20 a month from the date of the institution of the suit. It is hereby declared that such a maintenance allowance shall be a charge on the property of the family."

3. The plaintiff-decree-holder filed an application for execution of the decree (Execution Case No. 1 of 1944) for the arrears of maintenance due to her from 5-12-1940, to 4-1-1944. The application was filed against 17 persons, four of whom were those against whom the decree in Suit No. 166 of 1913 had been passed by this Court and the rest were transferees from them. Three of such transferees were Pandit Madan Mohan, Mt. Premwati and Bate Krishna Das. Pandit Madan Mohan is now dead and he is represented by his son, Mahesh Prasad, who is the appellant in Ex. F. A. No. 254 of 1945. Mt. Premwati is also dead and she is represented by Mt. Brij Rani. The third appellant is Bate Krishna Das. They are transferees of properties which were included in the list of ancestral properties given in the plaint of Suit No. 166 of 1913. The transferees claim that they are transferees for consideration who have purchased the property in good faith and without notice of the charge created under the decree passed by this Court in the year 1917. The lower Court was of the opinion that to a charge created by a decree Sections 39 and 100, T. P. Act had no application and the Court therefore allowed the decree to be executed by sale of the properties in the hands of the three appellants. The lower Court recorded a distinct finding that the transferees had purchased the properties without notice and in good faith and for proper consideration. Mr. Kedar Nath Gupta, holding the brief of Mr. A.P. Pandey, is not able to challenge that finding and we must, therefore, accept the finding of fact recorded by the lower Court.

4. Three points have been raised on behalf of the appellants : (1) That the decree was not executable by sale of the property over which the charge had been created under the decree passed by this Court in 1917; (2) That the view of the lower Court that Sections 39 and 100, T. P. Act had no application to a charge created under a decree was not correct and the transferees being bona fide transferees for value without notice were protected; (3) That there was no valid charge as no list of the properties tad been given in the decree.

5. The third point has no substance. The suit had been decreed with reference to the claim made in the plaint and there was a detailed list of the ancestral properties in the plaint. The mere fact that the decree-writer of this Court had not copied out that list in the decree, as he should have done, cannot invalidate the decree, nor is it possible to say that no charge had been created on any item of the family property. The two points, therefore, that remain for decision are, firstly, whether the decree could be executed by sale of the property over which a charge had been created without a fresh suit, and more or less inter-connected with this point is the other point, whether this charge could be deemed to be a charge created 'by operation of law' within the meaning of Section 100, T. P. Act. A further point that may arise for consideration is whether in a decree of this kind the doctrine

of lis pendens in Section 52, T. P. Act, is applicable. We do not think it would be right in this case to formulate the questions of law and it would "be much better to leave them for decision by the larger Bench to which we propose to refer this case. It might be that in the course of arguments other points of law might arise which the Bench might like to decide. We have, therefore, recorded our findings only on questions of fact and do not propose to formulate the points of law and refer the case for decision by the Bench.

6. We might mention that our attention was drawn to a five-Judge Full Bench decision of the Oudh Chief Court in Abdul Ghaffar Khan v. Ishtiaq Ali, 19 Luck. 1 : (A. I. R. (30) 1943 Oudh 354 F. b.) where it was held that Section 100 applied to a charge created under a decree. On the other hand, a Bench of the Allahabad High Court has held in Durga, Prasad v. Tulsa Kuar, 1939 A. L. J. 542: (A. I. R. (26) 1939 ALL. 579) that a charge create under a decree for future maintenance is not a charge created 'by operation of law' within the meaning of that phrase in Section 100, T. P. Act. Learned counsel has cited a large number of other cases, but we do not think it is necessary to discuss them at this stage.

Opinion of Full Bench Malik, C.J.

7. The main judgment in these connected appeals will be delivered by my brother Chandra Bhan Agarwala. I want briefly to express my opinion on the points of law involved.

8. These three appeals are connected and arise out of connected proceedings. The respondent Mt. Mundar, widow of one Kanhai Lal, filed a suit No. 166 of 1913 against the other members of her husband's family for maintenance, at the rate of Rs. 60 per month on the ground that the property detailed in the plaint was the joint family property of the defendants and her husband and claimed that she was entitled to be maintained out of the income of such property and also to a charge on either the whole property or a sufficient part thereof. The defendants-pleaded that the widow was not entitled to any maintenance and that the property was not joint family property but had been subsequently acquired by the defendants in which Kanhai Lal had no share. The trial Court framed issues on all these points and dismissed the suit on 21-9-1914. Mt. Mundar filed First Appeal No. 34 of 1915 which came up for hearing before a Bench of this Court on 21-2-1917. The Court fixed a sum of Rs. 20 per month for maintenance and also created a charge on the family property. The operative portion of the judgment as also the relevant portion of the decree have been quoted in our Order of Reference. The decree-holder filed an application for execution--No. l of 1944 --in the Court of the Civil Judge at Allahabad. She claimed the maintenance allowance from 5-12-1940 to 4-1-1944, from the judgment-debtors and their transferees. The transferees were Madan Mohan, Mt. Premwati and Bate Krishna Das. Madan Mohan and Mt. Premwati are dead and their legal representatives have now been brought on the record. The three appeals relate to the three objections that were filed by Madan Mohan, Mt. Premwati and Bate Krishna Das that the decree was not executable against them as they were transferees for value and without notice.

9. The fact that they are transferees for value and without notice is not now disputed. Learned counsel in Exn. F. A. No. 254 of 1945 by Mahesh Prasad and Exn. P. A. No. 301 of 1945 by Mt. Premwati were not able to give us the dates on which the property passed to their clients and by

what process, but learned counsel appearing for them admitted that they were transferees from the judgment-debtors on some date after 1-4-1930, the date on which the amendments to the Transfer of Property Act made in 1929 came into force. Learned counsel appearing for Bate Krishna Das informed us that Madan Mohan, had a decree against Gaya Prasad, one of the judgment-debtors of Mt. Mundar, and in execution of that decree purchased some property on which a charge had been created by the decree of this Court dated 21-2-1917. This auction-purchase was made on 8-12-1934, and the property was sold to Bate Krishna Das under a sale-deed dated 1-7-1939. The lower Court held that the decree was executable against the transferees and dismissed their objections and it, is against the order of dismissal that these three appeals have been filed.

10. The points raised ,on behalf of the appellants are that Section 100, T. P. Act, and specially Sub-section (2) of that section, applied to all charge-holders and the charge was not enforceable against a transferee for consideration without Notice; secondly, that Section 39, T. P. Act applied with, the game result, that is, the right to receive maintenance from immovable property was not enforceable against a transferee, for consideration and without notice; and, thirdly, that the doctrine of lis pendens or of estoppel by record was not applicable.

11. Section 100, T. P. Act, as amended by Act XX [20] of 1929, is in these terms:

> "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 property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.
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> Nothing in this section applies to the 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."

It has been urged by learned counsel for the appellant that the section is exhaustive and includes all kinds of charge and there can be no charge which is not created by an act of parties or by operation of law. It is pointed out that there is no reason why if a charge could be created by a decree the Legislature should not have included it in this section.

12. The Transfer of Property Act, as its preamble makes it clear, defines and amend certain parts of the law relating to the transfer of property by act of parties and Section 5 defines, "transfer of property" as meaning an act by which a living person conveys property, in pre sent 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. It would be clear, therefore, that the Transfer of Property Act, in main, deals with only some kinds of transfers which, for the sake pf brevity, may be called transfers inter vivos. It also deals at places with cognate or allied subjects or rights, which sometimes accrue as a matter of law as a, consequence of certain transfers made by parties. It may

be on that account that a transfer created by a decree is not mentioned in this section. Where the suit is a contentious suit and in such a suit a charge is created it is very difficult to say that the charge has beer created as a result of acts of parties though in a consent or a compromise decree, or in a decree based on an award, it may be so called. I have pointed out in another case that the basis pf an award, which gives the arbitrator jurisdiction to pronounce it, is the agreement of reference. In a compromise the parties decide their own terms. In an agreement to refer to arbitration the. parties agree to abide by the judgment of the person agreed to by them, Where the decree is, however, not a consent decree but has been .obtained by contest it cannot, to my mind, be said that the charge was created by an act pf parties.

13. As regards charge by operation of law I understand it to mean where as a result of something happening a legal consequence follows without the intervention of any other agency. Where there is already a charge created by operation of law and the charge is merely embodied in a decree it may be said that the charge is by operation of law, but where the decree itself creates the charge I find it difficult to include it in the category of a charge by operation of law. It is true the Courts cannot create charges in all types of cases. If a man brings a suit for recovery of money lent by him it may not be possible to create a charge unless there was some agreement or some provision of law entitling the Court to do so, similar to the provisions contained in Section 5, U. P. Agriculturists' Relief Act: bat there are certain types of cases, for example, partition suits, suits for maintenance by Hindu widows etc., where Courts have considered themselves entitled to create charges. In the case of a Hindu widow she has no doubt got the right to recover her maintenance from her husband's estate but it cannot be said that she has any charge on any part of that property so long as it has not been created by agreement or under a decree. Similarly in a partition suit, where owelty is payable by one party to another to equalise the share, a charge may be created by the decree. There may be other similar cases.

14. It appears to me that a charge created by a decree cannot always be brought under the head of a charge created by act of parties or a charge "created by law.

15. As regards the second part of Section 100, I do not think the learned counsel's argument that it is wider than the first part can be accepted. The word "charge" in these two parts of the section must have the same meaning unless a different intention is indicated by the section itself. Even though I am of the opinion that Section 100 does not apply to all charges created by decrees there is no reason why the same incidents that apply to a charge under Section 100 should not apply to them.

16. Mr. A.P. Pandey, on behalf of the decree-holder, has urged that when a Court creates a charge for payment of maintenance allowance it is not a charge technically so called and the incidents, of a charge do not attach to it, that the Court merely ear-marks the property and ties it down as the property from which the maintenance allowance is to be recovered. The word "charge" has got a legal and a technical meaning and, when the word is used by the Courts, it must be understood that they intended to use it in its usual sense. A charge is not a transfer of interest in the property and to that extent it is different from a mortgage. It, however, ties down the property and being in the nature of an equitable right it acts on the conscience of the transferee and he cannot, therefore, if he knew of the charge, claim that it is not enforceable against him. Ordinarily a legal title, must always

prevail over an equitable title, but, when the person having the legal title has notice of the equitable title, the Courts presume that the man must have intended to act according to his conscience and when he had purchased the property with the notice of the charge he must be deemed to have intended to accept the charge and so the charge can be enforced against him.

17. I am, therefore, of the opinion that the question whether Section 100 applies or does not apply is not of much importance as, in any case, the question whether the transferee for value has or has not acquired the property with the notice of. the charge has to be considered if the charge has to be enforced against him.

18. Though I am of the opinion that a charge created, by a decree is like any other charge and is not enforceable against a transferee for consideration without notice, different considerations arise where the decree directs the sale of the property. If a suit is filed for the enforcement of a charge and a decree is obtained for sale of the property, the property can be sold in execution of the decree even in the hands of a transferee from a judgment-debtor. In such a case the transferee cannot plead that he had no knowledge that a decree for sale had been passed against his transferor Where the decree not only creates a charge but also provides that the property shall be sold in execution of the decree I do not see why the same result should not follow. In such a case also, the question whether the transferee has or has hot notice of the decree seems to me to be immaterial. When a Court has passed a decree for sale of a property, whether that sale is to take place immediately after the passing of the decree or on some future date or on the happening of a future contingency, the judgment-debtor cannot be permitted to defeat the rights of the degree-holder by transferring: the property, nor can, in such a, case, a transferee acquire rights which are higher than those of his transferor. If the decree is not an executable decree, under which the property can be sold without recourse to a second suit, the question whether the transferee had notice seems to be material.

19. Section 39, T. P. Act, as amended by Act XX [20] of 1929, is as follows:

> "Where a third, person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred . . . the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous but not against a transferee-for consideration and without notice of the right, nor against such property in his hands."

The section was substantially amended by the Amending Act XX [20] of 1929 and the words with the intention of defeating such right after the word 'transferred' were omitted and the words 'of such intention' after the word 'notice', were replaced by the word 'thereof'. This section relates to a case where no charge had been created but a person had a right to receive maintenance from the profits of immovable property. The section was amended to give better protection to a person entitled to receive, maintenance as it was difficult to prove under the old section that an improvident alienation was effected with the, intention of defeating the rights of the person entitled to maintenance. The argument of learned counsel for the appellant is that even under Section 39 a transferee for consideration but without notice is protected, and there is therefore no reason why the appellant

should be in a worse position than a transferee is under Section 39. Section 39 does not apply to a case where a charge has been created and the decree provides that in the event of non-payment the amount can be realised by enforcing the charge. To my mind, Section 39, T. P. Act is not relevant to this case and it need not be considered any further.

20. The next point for consideration is whether Section 52, T. P. Act, applied. If Section 52 applied then want of notice would be immaterial and the widow would be entitled to enforce the decree against the property in the hands of the transferee from her judgment-debtors even if the transferee had purchased the property for valuable consideration and without notice.

21. Section 52, as amended by Act XX [20] of 1929, is in these terms :

> "During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. Explanation.--For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

The section has been amended in certain material particulars. The word 'pendency' has been substituted for the words 'active prosecution.' The words 'any suit or proceeding which is not collusive' have been substituted for the words 'a contentious suit or proceeding," and the explanation has been added. These amendments were not with the object of changing the law of lis pendens, but to remove certain doubts and conflicts which had arisen in the decisions of the High Courts in India. There is no doubt that the amended section will apply to the transfers which have taken place after the amendment came into force. The only question is whether in a suit filed by a Hindu widow, claiming that she was entitled to be maintained out of the income of the properties mentioned in the plaint, which she claimed were joint family properties in which her husband had a share and asking for a charge to be created on the said property, any right to immovable property is directly and specifically in question. The right to be maintained out of the income of immovable property is no doubt right to immovable property. It may be mentioned that the words are not 'right in the immovable property,' but 'right to immovable property.' The fact that the Hindu widow claimed that this was property belonging to her husband, that she was entitled to be maintained out of the income of that property, and that she was entitled to have a charge created on the property, all raise questions relating to right to immovable property. The point, how-'ever, is whether 'right to such property' is "directly and specifically in question" or the main claim is for maintenance and it is

only collaterally that the property has been brought in. There is some difference of opinion on this point, but I am inclined to the view that in such a case it can be said that right to immovable property is directly and specifically in question. Any doubts that one may have had on the point must be deemed to have been set at rest by the decision of their Lordships of the Judicial Committee in Syud Bazayat Hossein v. Dooli Chund, 5 I. A. 211 : (4 Cal. 402 P.C.).

22. In that case a Mahomedan widow had claimed a right to be maintained out of certain properties detailed in the plaint and had also claimed that a charge be created, and when the property was transferred in disregard of the charge created in favour of the widow by the decree their Lordships of the Judicial Committee held that the doctrine of lis pendens applied. It is not for me to examine whether a Mahomedan widow is entitled to be maintained out of certain properties in the absence of an agreement merely on the ground that she is a Mahomedan widow. It is also not for me to consider whether the charge was rightly created, but that being the nature of the suit and a decree creating a charge having been passed their Lordships held that it operated as lis pendens, and that, to my mind, must set this point at rest. After the death of the debtor the creditor can realise his money only from the property left by the debtor, but when a creditor brings a suit to recover the money due to him it cannot he argued that to such a suit the provisions of Section 52, T. P. Act can be applicable; nor, does it appear to me to be possible, in such a case, for a Court to create a charge on the property left by the deceased debtor, in the absence of any agreement or some law giving it the right to create a charge.

23. The doctrine of estoppel by record is very akin to the doctrine of res judicata. The doctrine applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity of bringing before the Court, but if there be matter subsequent which could not be brought before the Court at the time, the party is not estopped from raising it. By the decree, the judgment-debtors and those; who claim under him, are alone bound and they cannot be heard to say anything in derogation of the terms of the decree. The question, however, remains whether a transferee for consideration without notice can be deemed to be a privy of the judgment-debtor by the mere fact that the decree created a charge on the property. It did not take away the judgment-debtor's right in the property and he could, therefore, transfer his title. It might be that the law does not permit a judgment-debtor to transfer a property, which is the subject-matter of litigation so as to defeat the decree that might be passed by the Court. This could mean that the doctrine of lis pendens would apply, but I do not think that estoppel by record can easily be applied against a purchaser for value without notice as his rights were not subject-matter of the decision in the previous case, nor can the charge be put any higher than a mere equitable right against the judgment-debtor which would fasten on the conscience of a transferee from him who has notice of the charge.

24. The last point urged is whether the decree was an executory decree or the decree-holder had to file a suit for the recovery of her money. The terms of the decree have been quoted in the referring order. From it it would appear that the decree fixed the date from which the maintenance allowance was to be paid at Rs. 20 a month. It said that it was being passed in favour of the plaintiff-appellant for recovery of the maintenance allowance and so far, therefore, as the recovery of that allowance is concerned there can be no doubt that it was not intended that the decree-holder should be driven to

the necessity of filing a suit for every instalment of the allowance remaining unpaid. It has, however, been urged that the decree merely declared a charge and it did not provide that the money would be realised by sale of the property without the necessity of a fresh suit. Reliance is placed on behalf of the judgment-debtor on Order 34, Rules 14 (1) and 15, Civil P. C, which are as follows:

> "14 (1) where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order 2, Rule 2."
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> "15. All the provisions contained in this Order which apply to a simple mortgage shall so far as may be, apply to a mortgage by deposit of title deeds within the meaning of Section 58, and to a charge within the meaning of Section 100, T. P. Act, 1882 (IV [4] of 1882)."

I do not think these rules help the appellant. Where there is a mortgage or a charge created previous to the date of the decree a suit on the mortgage or that charge has to be brought if the mortgagee or the charge-holder wants to proceed against the property over which the mortgage or the charge has been created. Where, however, a charge is created by the decree itself these provisions do not seem to be applicable. The question would depend upon the interpretation of the decree and if from the terms of the decree it is clear that it was intended that on default of payment the property would be sold by the executing Court for realisation of the amount due it must be held that a separate suit is not necessary to obtain another decree for sale. The obvious intention of the decree was that the money should be paid regularly month by month and if the money was not paid, the decree-holder was given the right to recover the amount and she was given the right to proceed to realise the money due to her from the property earmarked for the purpose.

25. I am, therefore, of the opinion that the case was rightly decided by the lower Court.

26. The appeal has no force and must be dismissed.

Wall Ullah, J.

27. I agree with the opinion of the learned Chief Justice.

Wanchoo, J.

28. I agree with learned Chief Justice.

Seth, J.

29. I agree that these appeals should be dismissed.

Agarwala, J.

30. The facts are all given in the referring order and need not be recited again in detail. It is sufficient to mention that Sm. Munder filed a suit No. 166 of 1913 for the recovery of a maintenance allowance as a Hindu widow against the members of the family of her deceased husband. She prayed that the maintenance allowance might be made a charge on the whole or a sufficient portion of the ancestral property as specified in list A attached to the plaint and that the defendants might be ordered to pay the same every month to the plaintiff out of the income of the said property. The defendants contested the suit and one of the pleas raised by them was that the property in their possession was not ancestral and was not liable to be charged for the maintenance of the plaintiff. One of the issues framed by the Court, i. e., issue No. 3, was "Can the plaintiff's maintenance be charged on any of the family property?" The suit was dismissed by the trial Court but in appeal this Court passed a decree in favour of the plaintiff for maintenance at the rate of Rs. 20 a month and declared that the maintenance allowance shall be a charge on the property of the family and that the plaintiff will be entitled to recover the maintenance allowance from the date of the institution of the suit. It was not specifically provided in the decree that the plaintiff will be entitled to sell the property charged for the payment of the maintenance in execution of the decree. This decree is dated 21-2-1917. The defendants transferred some portions of the property to various transferees and some property was sold at auction in execution of a simple money decree against them. One, of the auction-purchasers was Madan Mohan, who purchased some property at auction on 8-12-1934. He sold one of these properties to Bate Krishna on 1-7-1939. The dates of the transfers in favour of other .transferees are not known, but the appeals have, been argued on the footing that all these transfers,, were effected after the Transfer of Property (Amendment) Act of 1929 had come into force. The decree was put in execution in 1944 for arrears of maintenance due to the plaintiff from 5-12-1940, to 4-1-1944. Three of the transferees objected to the proceedings on the ground that they were bona fide transferees for value without notice of the charge created by the decree. According to them the charge was not binding on the property in their hands, and the decree could not be executed by sale of that property and, in any case, the decree, being merely a declaratory decree, could not be executed without a fresh suit to enforce the charge. The lower Court held that the transferees had acquired the properties in good faith for valuable consideration and without notice of the charge created by the decree. It, however, held, that the decree could be executed by sale of the. property charged and that the transferees were, bound by the decree. The question whether the transferees were bound by the charge created by the decree was decided on the footing that Sections 39 and 100, T. P. Act, did not apply to a charge created by a decree.

31. Against this order, the transferees have filed three execution first appeals in this Court. When the matter came up before a Bench of this Court which referred this case to a Full Bench, the. finding of the Court below whether the transferees had taken the, transfer in good faith for valuable "consideration, and without notice pf the charge (Created by the decree was not questioned. Thus the finding of fact recorded by the Court below was accepted, It was also urged before the Bench that the decree created no valid charge as no list of the properties had been mentioned in the decree. This point was decided against the appellants for the simple reason that though the decree did not mention the properties the plaint did and the decree was to be read with the plaint.

32. The arguments .addressed before us by counsel for both sides raise the following points: (1) Whether the charge created by the decree in question is covered either by Section 39 or Section 100, T. P. Act; (2) Whether the doctrine of lis pendens as given in Section 52 of the amended T. P. Act, applies so as to affect the present transferees; (3) Whether the doctrine of estoppel by record affects the transferees and stops them .from taking a plea that the property in their hands is not liable under the plaintiff's decree; and (4) Whether the decree can be executed by sale of the property charged without bringing a fresh suit to enforce the charge.

33. First point :--Whether the charge created by the decree in question is covered either by Section 39 or, Section 100, T. P. Act. A Hindu widow's right to, maintenance as against persons other than her own son is a right to obtain maintenance put of her husband's estate or out of the estate in which her husband was a coparcener. This right, however, is not ipso facto a charge upon that property unless it is fixed, and charged thereon. This may be done by a decree of a Court or by agreement between, the widow and the persons, who hold the estate. Till it is so fixed and charged upon the property it is of an indefinite character. This-is now well settled (see Dan Kuar v. Sarla Devi, 1946 A. L. J. 466 : (A. I. R. (34) 1947 P. C. 8)). It is this right, which is not yet a charge, to receive maintenance put of the profits of immoveable property which is spoken of in Section 39, T. P. Act. This view will be confirmed, when we consider the history of Section 39.

34. Section 39 was amended in 1929, Before its amendment, the section protected a widow or other person who had a right to receive maintenance, etc., only if the property was transferred with the intention of defeating such right and the transferee had notice of such intention or the transfer was gratuitous. The old section, therefore, did not give sufficient protection to widows because it was difficult to prove the intention of the transferor and the fact that the transferee had not only the notice of the widow's claim to maintenance but also of the intention of the transferor to defeat that right or, in other words, that the transferee was a party to the fraud. Although the section did not expressly apply to Hindu widows (vide Section 2 (d) as it stood before its amendment in 1929), yet its principle was applied to the case of Hindu widows as well.

35. The section was, therefore, amended and the amended section was made applicable to Hindus. Under the amended section it is not necessary to prove any fraud. All that is necessary to prove is that the purchaser for consideration had notice of the widow's right. In this respect, the section has put the widow's right of maintenance which is an indefinite right and not a charge on property on practically the same footing as a charge under Section 100. The statement of the law in Mulla's Hindu Law, in para. 569 at p. 522 of the 10th Edn., has to be received with caution as the effect of the amendment in Section 39 has not been noticed.

36. It will be noticed that the section speaks of a right to receive maintenance etc., from the profits of immoveable property and not by sale of immoveable property, whereas a charge authorises the sale of the property charged for the payment of the amount due.

37. For the proposition that Section 39 does not apply to a charge created by a decree, reference may be made to Kuloda Prosad v. Jageshwar Kuer, 27 Cal. 194, which has been recently quoted with approval by the Privy Council in Dan Kuer v. Sarla Devi, 1946 A. L. J. 466 : (A. I. R. (34) 1947 P. C.

8); and also to Ghasi Ram v. Kundan Bai, A. I. R. (27) 1940 Nag. 163 : (I. L. R. (1941) Nag. 513); Maina v. Bachhi, 28 ALL. 655 : (3 A. L. J. 551); and Razia Begam v. Ishrat Ali, A. I. R. (16) 1929 Oudh 316 : 5 Luck. 172.

38. Does a charge created by a decree fall under Section 100, T. P. Act ? Section 100 runs as follows:

> "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.
>
> 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."

39. The first paragraph may be said to contain the definition of a charge. But it confines itself to charges created (a) by act of parties and (b) by operation of law. A charge created by a decree cannot be said to be created by "act of parties" unless the decree merely incorporates a compromise between the parties or an award of an arbitrator. In these two cases the decree may be said to be nothing more than an embodiment of an act of parties themselves, because the charge in such a case has already been created by the compromise or the award and the decree merely gives effect to them. But where there is no compromise or award and the decree, as in the present case, creates, a charge for the first time by its own force, it cannot be said that the charge was created by "act of parties."

40. Nor can it be said that such a charge was created by "operation of law." "Law" is the body of rules prescribed by the State for the conduct of its citizens. A decree is an order, of a Court of justice declaring the rights of a party as against another when there is a dispute between the two. A charge created by "operation of law" is a charge that comes into existence on certain state of facts happening simply because of a rule of law coming into operation, without the intervention of any agency. A charge created by a decree of a Court does not come into existence merely because of the operation of a rule of law but because of the conscious exercise of its judicial discretion by a Court of law.

41. When the Court creates a charge on specific immoveable property, in a case like the present, it does so under its inherent jurisdiction, acting according to the rules of equity, justice and good conscience. The Court creates a charge where none existed before in other cases as well. For instance, in a suit for partition of joint Hindu family property where property of large value has been allotted to one party and of lesser value to another party the Court may create a charge on the property allotted to the first party for the amount of the deficiency in the value of the property allotted to the second party: see Jyoti Bhushan v. Shiva Prasad Gupta, 1948 A. L. J. 531 : (A.I.R. (30)

1943 P. C. 205). Sometimes the Court has been given the power to create a charge by statute. For instance, under Section 3, Agriculturists' Relief Act, a Court may create a charge on the debtor's property for the payment of instalments. There can thus be no doubt that charges may be created by Court.

42. That transfers created by "operation of law" and "by or in execution of a decree or order of a Court" are two different things, will also be apparent when we consider Section 2(d), T. P. Act itself.

> "Nothing herein contained shall be deemed to affect. . . . . .
>
> Save as provided by Section 57 and Ch. IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction."

If transfers created by, or in execution of, a decree or order of a Court were included within the term "by operation of law," there was no need, of using the two different expressions. I have no doubt that para, 1 of Section 100 does not refer to charges created by decrees or orders of a Court.

43. It is then urged that para. 2, at any rate, refers to charges in general and is not confined to charges created by act of parties or by operation of law. To my mind, this argument is without any force. The second paragraph is in the nature of a proviso and according to the ordinary rule of construction the effect of a proviso is "to except out of the earlier part of the section something which, but, for the proviso, would be within it"

> vide Duncan v. Dixon, (1890) 44 Ch. D. 211 at p. 215 : (59 L. J. Ch. 437); M. & S. M. Rly. Co. Ltd. v. Bezwada Municipality, A.I.R. (31) 1944 P. C. 71 : (711. A. 113). The second paragraph limits the operation of the first para., and the word "charge" there used must have reference to the charge mentioned in the first para. Section 100, therefore, has no reference to a charge such as the one created by the decree in question.

44. It has been urged that although a charge created by a decree may. not fall within the purview of Section 100, there is nothing to suppose that its characteristics will be, in any way, different from those of a charge that falls under Section 100.

45. There is much force in this suggestion but it is not wholly true. When a charge is created by a decree, it is none the less a charge and the very fact that it is called a charge shows that it has the weakness that all charges have, namely, that they are of no avail against a purchaser, for value without notice. But at the same time it must be remembered that a charge created by a decree is not a mere charge but has super-added to it an order of the Court. The question is what difference the order of a Court makes in the characteristics of an otherwise ordinary charge. To my mind, the difference is to be sought in the nature of the decree itself. But before we do that, let us bear in mind the features which distinguish a charge from a mortgage.

46. A simple mortgage is very nearly the same as a charge. In both immovable property is made security for the payment of money. In both when the payment is not made the creditor is entitled to sue the debtor or the holder of the property for enforcing the payment by sale of the property mortgaged or charged. Both are encumbrances on another man's property. But there are three differences between them, (i) A mortgage is made for securing the payment of a present or future loan, debt or the performance of an engagement which may give rise to a pecuniary liability. A charge is made for the payment of money which is not necessarily by way of loan, debt or performance of an engagement, e. g., a provision for maintenance charged on specific immovable property or a settlement of property charged with, the payment of money settled. In other words, charge may be a mere grant and may not be a, loan or debt or a liability arising out of an engagement, (ii) In a simple mortgage, the mortgagor binds himself personally to pay the mortgage money. In a charge, the person) creating the charge need not necessarily bind himself to pay the mortgage money personally. We are not concerned with these two differences in the present discussion, (iii) A mortgage is a transfer of an interest in specific immovable property by way of security. A charge is very often said to be not the transfer of an interest at all and this is said to be its chief characteristic, and it is because of this difference that, a charge is said to be not binding upon a purchaser for value without notice.

47. In support of this view, it is urged that if a charge were an interest in immovable property, then a transferee can take no more than what a transferor possesses and, therefore, a charge would also be binding upon a transferee for value without notice. There is much force1 in this argument, and the text books and case law amply support this view. But two Privy Council decisions support the view that a charge is some sort of an interest in property. In Dayal Singh v. Inder Singh, A.I.R. (13) 1926 P. C. 94 : (531. A. 214 P.C.) a charge was said to be an interest in immovable property. The Allahabad High Court, while dealing with the provisions under the Electricity Act, held that a charge is an interest created by a transfer or assignment of a property: vide U. P. Government v. Manmohan Das, I. L. R. (l94l) ALL. 691 : (A. I. R. (28) 1941 ALL. 345 F. B.). This view has been recently upheld by the Privy Council in P. C. As. Nos. 27, 28 and 29 of 1946, Manmohan Das v. U. P. Government, D/-19-12-1949 : (A. I. R. (37) 1950 P. C. 85).

48. But even if a charge is an interest in immoveable property, it is an interest of a nebulous character an interest, which does not, before an order for the sale of the property is made, so immutably fix itself on the property, as to be available against a purchaser for value without notice.

49. But once an order for sale has been made, all distinctions between a mortgage and a charge cease. The reason is that both the charge and the mortgage merge in the decree and after the order is passed, a definite interest in the property has been created in favour of the judgment-creditor. Such an order as we shall see later on, is binding not only against the judgment-debtor, but also against his privies including purchasers for value without notice.

50. This, however, cannot be said of a merely declaratory decree. A declaratory decree, though creating a charge, does not order the sale of the property and, so long as an order for sale has not been passed, the interest created by the charge remains a nebulous one not available against a purchaser for value without notice.

51. Second point: Whether the doctrine of lis pendens applies to the decree in question. Assuming, however, that the charge in question partakes of the nature of a charge described in Section 100, we have still to consider the effect of Section 52, T. P. Act, because, the rule, embodied in Section 100, to the effect that "transferees for valuable consideration without notice of the charge will not be effected thereby", is subject to the provision "save otherwise expressly provided by any law for the time being in force."

52. Section 52 embodies the doctrine known as the doctrine of lis pendens. The principle on which the doctrine rests was spoken of by Cranworth L. C. in the leading case of Bellamy v. Salina, (1857) 1 De. G. & J. 566 at p. 578 : (26 L. J. Ch. 797) as follows :

> "It is not correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Court often so describes its operation. It affects him not because it amounts to a notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.
>
> Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them, by alienations made pending the suit, whether such alienees bad or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."

53. Section 52, T. P. Act, was amended by the Transfer of Property Amendment Act, 1929. By that amendment the pendency of the lis has been made to continue till the satisfaction or discharge of the decree. The transfers in the present case in favour of the appellant were either made, or have been, with common consent, assumed to have been made, after the coming into force of the Amending Act. The transferees will, therefore, be bound by the principle embodied in Section 52, as amended provided that there was "a right to immoveable property directly and specifically in question in the suit" the other conditions of the section having been admittedly fulfilled.

54. Now a "charge" is certainly a "right". It is a right to receive payment of a debt out of a particular fund or property. That this right-was directly and specifically in question also can admit of no doubt. The plaintiff claimed the right to a charge on the immoveable property. The right was denied by the defendant. An issue was framed upon it and the plaintiff's claim was upheld and a decree was passed specifically creating a charge on specific immoveable property.

55. Is the claim with regard to a charge in respect of specific immoveable property a claim with regard to a "right to immoveable property"? I have no doubt that it is.

56. In Bazayet Hossein v. Dooli Chund, 4 Cal. 402 : (5 I. A. 211 P. C.), there was a suit by a Mohammadan widow for the recovery of her dower and for possession of the property left by her husband on the ground that the defendant was not the heir of her husband. The prayer for

possession was refused, but the Court passed a decree for recovery of the dower-money creating a charge on the property left by the husband. There was a transfer of some of the properties during the pendency of the suit. Phear J. delivering the judgment of the High Court said:

> "I need hardly say that a decree of this kind, directing the person in whose hands the property was to account for it in order that it might be applied for the purpose of discharging the debts due from Khorshed Ali, was a decree against that property and operative to bind it in the hands of Majmooddin, and therefore of any other person who took from Najmooddin with notice of the decree or under such circumstances as to make him affected by the doctrine of lis pendens."

Their Lordships of the Privy Council agreed with this view of the law and held that the transferee was bound by the decree, even though he had no notice of the charge created by the decree. This case was followed by the Madras High Court in Dose Thimmanna v. Krishna Tantri, 29 Mad, 508 : (16 M. L. J. 413). In this case a claim for maintenance by a Hindu widow was decreed and the decree created a charge on immoveable property for the realisation of the maintenance allowance. A similar view was held in a number of other cases, Seetharamacharyulu v. Venkatasubbamma, 54 Mad. 132 : (A. I. R. (17) 1930 Mad. 824) Ramaswami Pillai v. Trichinopoly Co-operative Credit Bank, A. I. R. (22) 1985 Mad. 867 : (158 I. C. 778), overruling a contrary decision in Official Receiver v. Subbamma, A. I. R. (14) 1927 Mad. 403 : (99 I. C. 564); Hiranya Bhusan v. Gauri Dutt Maharaj, A. I. R. (30) 1943 Cal. 227 : (208 I. C. 75); Sudhamoyee Singha v. Jessors Loan Co. Ltd., A. I. R. (32) 1945 Cal. 322 : (49 C. W. N. 68); Ram, Chandra Gururao v. Kamalabai, A. I. R. (31) 1944 Bom. 191 : (I. L. R. (1944) Bom. 274) and Kallawa Shidlingappa v. Parappa Sankappa, A. I. R. (33) 1946 Bom. 207 : (I. L. R. (1945) Bom. 885).

57. Besides 'the Madras case reported in Official Receiver v. Subbamma, A. I. R. (14) 1927 Mad. 403 : (199 I. C. 564), which was overruled in Ramaswami Pillai v. Trichinopoly Co-operative Credit Bank, A. I. R. (22) 1935 Mad. 867 : (158 I. C. 778), reference has been made to two other cases as upholding the contrary view on this point.

58. One is the case of Indra Narain v. Mohammad Ismail, I. L. R. (1939) ALL. 885 : 1939 A. L. J. 849 : (A. I. R. (26) 1939 ALL. 687). In this case without any discussion the learned Judges considered that the lis ended with the passing of the decree. The explanation appended to Section 52 was obviously overlooked by their Lordships. That the amended Section 52 applied to that case is obvious as the transfer which was sought to be affected by the doctrine of lis pendens was made after the coming into force of the amended Act of 1929.

59. The other case is of Abdul Ghaffar Khan v. Ishtiaq Ali, 19 Luck. 1 : (A. I. R. (30) 1943 oudh 354 F.B.). In that case, Bennett J. observed :

> "It may also, I think, be considered question able whether proceedings involving a charge on immoveable property imply that a right to immoveable property is directly or specifically in question. A person who has a charge on property cannot claim that property; he has no right to the property, merely a right to have his claim satisfied out

> of it. . . . . .
>
> All that is in question in such cases is a right affecting immoveable property, not a right to the property itself nor even a right to any interest in the property."

60. I may respectfully observe that the word "to" in the context means "in respect of" or "in connection with". The word "to" does not necessarily imply the idea of appropriation. In Webster's International Dictionary it is stated, referring to the word "to" --

> "Its sphere verges upon that of, "for" but it contains less the idea of design or appropriation as, "these remarks were addressed to a large audience;" "let us keep this seat to ourselves"; "a substance sweet to the taste"; "an event painful to the mind"; "duty to God and to our parents"; a dislike to spirituous liquor."

61. The expression "right to immoveable property" therefore, is not necessarily confined to a right to the possession of, or to the title to a property or any interest therein, but also includes rights affecting specific immoveable property.

62. A similar expression is used in Section 17(b) and (e), Registration Act and it is well settled that charges require to be registered : see Imperial Bank of Indian. Bengal National Bank Ltd., 58 Cal. 136 : (A. I. R. (28) 1931 Cal. 223) overruled On another point in Imperial Bank of India v. Bengal National Bank, 59 Cal. 377 : (A. I. R. (18) 1931 P. C. 245); Khoo Sain Ban v. Tan Guat Tean, 7 Rang. 234 : (A. I. R. (16) 1929 P.C. 141) and Dayal Singh v. Inder Singh, A.I.R. (13) 1926 P. C. 94 : (53 I. A. 214 P. C.).

63. In Maqsood Ali v. Hunter, A.I.R. (30) 1943 Oudh 338 : (210 I. C. 163 F. B.), Bennett J. and the other Judges of the Full Bench who agreed with him, held that a charge was a "right" in immoveable property, though not an "interest" in immoveable property. To my mind, if anything, "a right to immoveable property" is a wider phrase than "a right in immoveable property".

64. In Pomeroy's Equity Jurisprudence, vol. II, para. 635, it is stated that the doctrine of lis pendens "extends to all equitable suits which involve a title to a specific tract of land or charge brought to establish any equitable estate, interest or right in an identified parcel of land or to enforce any lien, charge or encumbrance upon the "land."

To my mind, the law laid down in Section 52, T. P. Act, gives effect to the above statement of the law.

65. It is true that Courts of equity have not looked upon the doctrine of lis pendens as affecting a bona fide purchaser for value without notice, with favour. It is for this reason that both in England and in America statutory provision has been made for protecting the rights of such purchasers. It is now provided, vide Section 3(1), Land Charges Act, 1925, (15 George v. c. 22) that a pending action does not bind a purchaser without express notice thereof unless it is for the time being registered in the register of pending actions.

66. It is unfortunate that there is no such provision in India. So far as charges created by decrees or orders are concerned, they are now required to be registered under Section 17(1)(e), Registration Act. Unless so registered, the charge created by decrees or orders will not be operative. This removes the hardship of transferees for value without notice after the decree. This amendment to Registration Act was, however, made in the year 1929. Before that, no registration of such decrees was required and the decree in the present case is governed by the law as it stood prior to the amendment of 1929.

67. I may add that since the doctrine of lis pendens as enacted in Section 52, T. P. Act, continues so long as the decree is not discharged or satisfied, it follows that where a decree is merely a declaratory one and does not admit of execution proceedings being taken, the lis ends with the passing of the decree and any transfer made by the judgment-debtor after the date of the decree will not be affected by the doctrine of lis pendens. As will be presently seen hereafter, the decree in the present case is not merely a declaratory decree but is an executable decree and the transfers in dispute having been made before the decree had been fully satisfied, the transferees are bound by the decree, irrespective of the fact that they had no notice of the charge created by the decree.

68. Third point -- Estoppel by record. In view of my decision on the question of the applicability of the doctrine of lis pendens to the transfers in question, it is not necessary to decide whether the transferees are bound by the doctrine of estoppel by record. As the question has been raised before us, I will briefly express my opinion on the same.

69. As already observed, when a charge is created: by a decree of a Court, the charge has one characteristic in addition to an ordinary charge not so created. This additional factor is that to the charge has been superadded an order of the Court. The question then is really not "on whom the charge is binding ?" but, "on whom the decree or order embodying the charge is binding."

70. The binding nature of judgment or decree can be considered from three aspects : (a) Any decision on a matter which came directly, not collaterally or incidentally, in issue on one action is conclusive in a second action between the same parties. This is dealt with in the Indian law under the heading of res judicata, Section 11, Civil P. C. (b) Where former proceedings for the same cause of action by the same plaintiff had resulted in defendant's favour, the second proceeding on the same cause of action against the defendant will be barred by reason of the former judgment. This principle is called in England res judicata, and in India is dealt with under Order 2, Rule 2, Civil P. C. (c). A decree is binding on the judgment-debtor and its execution cannot be questioned by him. Now it is well settled that in all these three matters the judgment is binding not only against the judgment-debtor but also against his privies.

71. The word, privies means persons claiming or deriving title under the judgment-debtor. Privies are of three classes--(i) privies in blood, as ancestors and heirs, (ii) privies in law, as executor or official receiver in bankruptcy and (iii) privies in estate, as testator and revisee, vendor and purchaser, lessor, and lessee.

72. In para. 481 of Halsbury's Laws of England, Hailsham Edition, Vol. 13, liability of a privy is thus stated :

> "In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to show (apart from his taking with a notice of a pending action), that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment, or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived. Purchasers of land are not estopped by proceedings commenced after the purchase; and a judgment obtained against the mortgagor of land after completion of the mortgage, setting aside his purchase of the land on the ground of fraud, is not even evidence against the mortgagee who was not a party to the action."

73. The liability of a privy in the matter of execution of a decree has been stated in para. 15, of Halsbury's Laws of England, Hailsham Edition, Vol. 14, p. 11 :

> "The rights and liabilities of the judgment creditor or judgment-debtor (except a merely personal liability) may, by reason of alienation, bankruptcy, or death, devolve upon some other person who may then issue or be the subject of, a process of execution, but in certain cases of equitable execution fresh proceedings may have to be commenced and the personal representative of a deceased judgment-debtor brought before the Court."

74. In India, the principle of res judicata embodied in Section 11, Civil P. C., has been made to apply not only as between parties to the previous litigation but also "between parties under whom they or any of them claim, litigating in the same title." A transferee of a property which was the subject-matter of the dispute in a previous litigation is a person claiming .under the former party.

75. As regards the binding character of a decree against transferees in execution proceedings, we may refer to Order 22, Rule 10, Civil P. C., which read with Rule 12 applies to execution proceedings.

76. Where however the decree is merely a declaratory decree, there is no question of execution and the doctrine of the decree being executed against privies can have no application. Where, therefore, a mere declaration of the right of a Hindu widow to realise a sum of money by way of maintenance with a charge on the property has been made, no question of execution and its binding nature on alienees after the passing of the decree arises. In such a case, even the principle of res judicata will not apply. The point for determination in a subsequent suit based upon a charge created by the declaratory decree will be whether the transferee is bound by the charge, and this question was never decided in the previous case because there were no transferees till then.

77. The doctrine of the binding nature of a decree creating a charge, either by way of res judicata or otherwise, will, therefore, have no application as against transferees for valuable consideration and without notice, in the case of a merely declaratory decree. The law was, in my opinion, correctly laid down in the case of Ghasi Ram v. Mt. Kundanbai, I. L. R. (1941) Nag. 513 : (A.I.R. (27) 1940 Nag.

163).

78. Where, however, the decree is executable and the property charged under the decree can be sold in execution of the decree, the transferees will be bound by the decree by the general principle of law stated above, and in such a case it is wholly immaterial whether the decree itself created a charge or the charge was created by a compromise or an award which was embodied in the decree.

79. This question may be approached from another aspect. The fundamental difference between a declaratory decree, creating a charge, and an executable decree under which the charge can be enforced is that in an executable decree the Court has already ordered, expressly or impliedly, the sale of the property charged. But as we have already seen when once an order for sale has been passed, there remains no difference between the incidents of a mortgage and of a charge. Henceforward, the rights and liabilities of the parties, or those who claim under them, must be the same. But so long as an order for sale has not been made, or, in other words, so long as an executable decree by sale of the property charged has not been passed, the charge retails its inherent infirmity, that when it meets a purchaser for value without notice, it becomes powerless to effect the property in his hands. As will be seen later, the decree in the present case is an executable decree by sale of the property charged and is, therefore, binding upon the transferees of the property.

80. Fourth point--Whether the decree is executable by sale of the property charged. We have already noticed the terms of the decree. The decree contains directions (a) for the recovery of the maintenance allowance and (b) for a declaration that such maintenance allowance shall be a charge on the property of the family. If there were no decree for the recovery of the maintenance allowance, and there were a mere declaration about the right of the plaintiff to recover future allowance, the decree would, undoubtedly, have been unfit for execution. The decree in question, however, is, executable at least for the recovery of the maintenance allowance. The question is whether, if the decree is executable for the recovery of the allowance, can the allowance be recovered by a sale of the property charged under the decree? I have no hesitation in holding that the decree does give that right to the decree-holder.

81. A charge, as we have already seen, is a right to receive a certain sum of money. This recovery of the money from the property can be effected only by sale of the property. The right to property sold for the recovery of the amount, for which the property is charged, is-inherent in the idea of 'charge'. The sale of the property charged, however, can only be made through the Court. Where, therefore, a charge has been created by an act of the parties or by operation of law, there can be no recovery of the amount charged on the property by sale of the property unless there is a suit and an order of the Court for sale has been obtained. Where, however, there has already been a suit and the Court has declared that the money is recoverable from a specific property, the declaration amounts to an order of the Court for the usual rights that the charge holder has to recover the amount by sale of the property. In my opinion, whenever a decree is executable for a certain sum of money and a charge has been created for the recovery of that amount, the property charged is, in the absence of anything to the contrary, saleable in the execution proceedings and no fresh suit is necessary to be instituted. It would be very anomalous indeed if, after having filed a suit and obtaining a decree for recovery of the amount due and also getting at declaration from the Court about the charge on the property, a

party were to be required: to bring a fresh suit for the enforcement of the charge. This will be an unnecessary multiplication of litigation without any advantage to anybody and would be contrary to the public policy which looks with disfavour upon such multiplicity.

82. The provisions of Order 34, Rules 14 and 15, Civil P. C., do not apply to a charge created by a decree. Order 84, Rule 14 provides:

> "Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising; under the mortgage, (by virtue of Rule 15 we may add 'or under a charge'), he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage."

The rule clearly refers to a decree for money simpliciter, the claim for money having arisen under a mortgage existing prior to the passing of a decree. Obviously, therefore, Rules 14 and 15 do not apply to a mortgage created by the decree itself or for a claim for money which was not secured by a mortgage before the passing of the decree. The decree, in the present case, itself created the charge and the claim for maintenance allowance for which the suit was filed was not secured or charged upon any immovable property.

83. It may be that when there is a claim for a simple money debt, and in a compromise respecting that claim there is an agreement that the claim shall be charged upon a certain immovable property, and the compromise is embodied in a decree of the Court and there is nothing to indicate that the parties agreed that the property charged may be sold in execution of that very decree, the property charged may not be sold in execution of that decree and Order 34, Rules 14 and 15 may come into play.

84. The same may be said when a charge is created by an award and the award is made a rule of Court and there is nothing to indicate that the arbitrator intended that the charged property should be sold in execution of the decree.

85. The present case, as I have already observed, is, however, quite different from both these cases.

86. The view, I have expressed above, has been adopted in numerous cases in various Courts in India, vide Sabitri Thakurani v. Mrs. F.A. Savi, A. I. R. (20) 1933 Pat. 306 at p. 400 : (12 Pat. 359), Brajasunder Deb v. Sarat Kumari, 2 Pat. L. J. 55 : (A. I. R. (3) 1916 Pat. 252), Amba Lal v. Narayan Tatyaba, 43 Bom. 631 : (A. I. R. (6) 1919 Bom. 56), Prem Narayan v. Jhado, A. I. R. (18) 1931 Nag. 129 : (27 N. L. R. 186 F.B); Mt. Kawtikabai v. Bachraj Jaman Lal, A. I. R. (21) 1934 Nag. 147 : (30 N. L. R. 325); Venkat Rao v. Zunkari Marwadi, A. I. R. (21) 1934 Nag. 83 : (148 I. C. 196).

87. In Posti Mal v. Radha Kishan Lalchand, 54 ALL. 763 : (A. I. R. (19) 1932 ALL. 439), the charge was not created by the decree itself but was created by the compromise on the basis of which the decree was passed.

88. Similarly, in Rameshwar v. Subbkaran, 8 A. L. J. 418 : (10 I. C. 481), the charge was created by the compromise. In Ghasi Ram v. Mt. Kundanbai, I.L.R. (1941) Nag. 513 : (A.I.R. (27) 1940 Nag. 163), although the decree was similar to the decree in the present case, the learned Judges did not decide the question for themselves, but held that the decree was not executable because it had been so held in previous execution proceedings by the Courts below which decision had become res judicata between the parties.

89. In my opinion, the decree in the present case was executable by sale of the proper, ties charged and no fresh suit for enforcing the charge was necessary.

90. I would, therefore, dismiss these appeals with costs.