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liberally construed, it would tend to cover all taxes, because in a loose sense, all taxes raised by the State can ultimately be said to be compensatory in a far-fetched manner, and in that way, the well-recognised constitutional difference between a tax and a fee will be obliterated and the provisions of Part XIII of the Constitution will lose all their significance. Part XIII contains provisions which constitute a self-contained code and we need not really travel outside the said provision in determining the validity of the tax imposed by the Act. Since we have come to the conclusion that the challenge to the validity of the retrospective operation of the Act cannot be sustained, we do not think it necessary to pursue this matter any further.

In the result, the appeals fail and are dismissed with costs.

Appeal dismissed.

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February, 11.

JANAPAREDDY LATCHAN NAIDU

v.

JANAPAREDDY SANYASAMMA

(P. B. GAJENDRAGADKAR, K. N. WANCHOO,
M. HIDAYATULLAH, K. C. DAS GUPTA and
J. C. SHAH, JJ.)

*Maintenance—Decree by court charging certain properties—
Nature of such decree—If can be executed against other prop-
erties—Code of Civil Procedure, 1908 (Act 5 of 1908), s. 47.*

The respondent, wife of the appellant, filed an execution petition for execution of a maintenance decree obtained by her which, in addition to the personal liability, created a charge for past and future maintenance on three lots of properties. After obtaining the permission of the Court she purchased two items of the properties subject to her maintenance charge. Later she

filed another execution petition seeking to bring to sale properties other than those purchased by her in the earlier execution. The appellant made an application under s. 47 of the Code of Civil Procedure to record full satisfaction of the decree on the ground that by purchasing the properties subject to her charge she could not maintain a fresh application for the sale of the other properties. The Subordinate Judge dismissed the execution petition as not maintainable. On appeal by the respondent the High Court reversed the decision of the Subordinate Judge and ordered the execution to proceed. On appeal by special leave, this court held :

Held, that an executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amounts cease. The whole of the charge continues over all the properties jointly and severally and as the charge is different from a mortgage, it is not permissible to seek an analogy from the case of a mortgage.

Held, further, that between the appellant and the respondent the executing court cannot order the respondent to proceed against properties in her possession even though it can make an election on behalf of the appellant and enforce the charge against one item in preference to another belonging to him; but the appellant cannot insist that the respondent should proceed against the properties acquired by her under the first sale.

CIVIL APPELLATE JURISDICTION : Civil Appeal
No. 194 of 1961.

Appeal by special leave from the judgment and order dated July 28, 1959 of the Andhra Pradesh High Court at Hyderabad in C. M. A. No. 120 of 1956.

P. Ram Reddy, for the appellant.

K. R. Choudhri, *E. Udayarathnam* and *V. C. Prashar*, for the respondent.

1963. February 11. The Judgment of the Court was delivered by

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HIDAYATULLAH, J.—The respondent who is the wife of the appellant obtained a decree for maintenance on August 9, 1949, by which the appellant was ordered to pay Rs. 3,000 per year to her on the 28th day of February of every year with interest at 6% per year if the payment was not made on the due date. The decree included ascertained amounts as arrears of past maintenance and other items to which detailed reference is not necessary. In addition to the personal liability the decree created a charge for past and future maintenance on three lots of properties.

The respondent filed execution petition No. 91 of 1952 for execution of the maintenance decree and sought to bring the properties charged by the decree to sale. She purchased two items of the properties for a sum of Rs. 20,200 subject to her maintenance charge after obtaining the permission of the Court. Later she filed execution No. 43 of 1955 seeking to bring to sale properties other than those purchased by her in the earlier execution. The appellant also filed an application under s. 47 of the Code of Civil Procedure to record full satisfaction of the decree on the ground that the respondent by purchasing the properties subject to her charge could not maintain a fresh application for the sale of the other properties. The Subordinate Judge of Visakhapatnam upheld the contention of the appellant and dismissed the execution petition as not maintainable. The respondent appealed to the High Court. The High Court reversed the decision of the Subordinate Judge and ordered the execution to proceed. The appellant has now appealed after obtaining special leave from this Court.

The short question is whether the decree must be held to be satisfied because the respondent purchased in an earlier execution one lot of properties subject to her charge for maintenance. Learned

counsel for the appellant contends that the respondent must now look to the properties purchased by her for satisfaction of her claim in respect of maintenance past or future. In the alternative he contends that execution against the properties in his possession cannot proceed till the respondent has first proceeded against the properties with her. In our opinion neither proposition is correct.

The maintenance decree passed by the Subordinate Judge of Visakhapatnam is not only a declaratory decree but also an executory decree. It provides that the appellant shall pay to the respondent Rs. 3,000 per year as maintenance on the 28th day of February of every year as long as she lives. When the first execution was levied the amounts due up to June 28, 1952, were realised by the sale of the properties of lots 1 and 2. The respondent as the auction-purchaser deposited Rs. 6,010 towards the balance of the purchase price after deducting the maintenance amount under the decree as it then stood. The present execution concerns the sum which fell due between June 28, 1952, and February 28, 1955. Included in this sum are Rs. 8,000 towards maintenance and Rs. 867-8-0 towards costs.

The contention of the appellant is that the respondent having purchased the first lot of properties subject to the charge cannot now recover this amount from the properties remaining with the appellant. In other words, the appellant contends that there is some kind of merger of the right under the maintenance decree with the right arising from the auction purchase and the respondent can enforce her right only against those properties which she has purchased and not against properties which remain with the appellant.

The argument involves a fallacy because it assumes that a charge created by a decree on a

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number of properties disappears when the chargeholder in execution of the charge-decree purchases one lot of properties. An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amounts cease. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge-holder and those that remain. It is not permissible to seek an analogy from the case of a mortgage. A charge is different from a mortgage. A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described as *jus in rem* and the latter as only a *jus ad rem*. In the case of a simple mortgage, there is a personal liability express or implied but in the case of charge there is no such personal liability and the decree, if it seeks to charge the judgment-debtor personally, has to do so in addition to the charge. This being the distinction it appears to us that the appellant's contention that the consequences of a mortgagee acquiring a share of the mortgagor in a portion of the mortgaged property obtain in the case of a charge is ill-founded. The charge can be enforced against all the properties or severally.

In the present case the respondent could proceed at her option to recover the arrears of maintenance as they fell due from any of the properties which were the subject of the charge, that is to say, those which were in the possession and ownership of

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the appellant and those in the possession and ownership as auction-purchaser. There is nothing in law which requires the respondent to proceed against the properties which she had earlier purchased. There is no question of marshalling of these properties. It is true that the Court may decide which of the properties charged should be sold and in what order and the Court does choose between different properties when ordering sale. To that extent the Court can assist a judgment-debtor. But this can only be in respect of the properties which the judgment-debtor holds and against which the charge-holder wants to proceed. But the Court cannot say to the charge-holder that he must exhaust his remedies over and over again against the properties purchased by him in execution of his charge-decree and subject to his own charge. Therefore, between the appellant and the respondent the Court cannot order the respondent to proceed against properties in her possession even though it can make an election on behalf of the appellant and enforce the charge against one item in preference to another belonging to him.

In our opinion the respondent was entitled to proceed against the remaining properties in the hands of the appellant which continued charged. The executing court may, of course, sell only such items as may be sufficient to meet the present dues under the decree but the appellant cannot insist that the respondent should proceed against the properties acquired by her under the first sale. We express no opinion on the question whether the decree can be personally executed against the appellant because that question did not arise here. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.