

Appeal No. 172.

1871.
June 10.

SA'VAKLA'L KARSANDA'S..... (Plaintiff) Appellant.

ORA' NIZMUDDI'N bin ABDUL

KARI'M (Respondent) Defendant.

Bonâ fide Purchaser without Notice—Title—Omission to make proper Inquiry into Title—Acquiescence of Owner—Building erected upon land by Purchaser—Owner lying by—Compensation.

In order that a purchaser of immoveable property from a Hindú in the Island of Bombay may be entitled, as against the beneficial owner of such property, to set up the defence of being a *bonâ fide* purchaser without notice, he must show that he has made all proper inquiries into the title and as to the state of the family of his vendor, and of his vendor's predecessors in title for a period of twelve years at least before the date of his purchase.

Where a purchaser claims to hold land which he has purchased from a third person on the ground that the owner of such land has acquiesced in the sale, the purchaser must show clearly that the real owner was aware of the sale at the time it took place.

Where the owner of land was not aware of its being sold by his father to a third person, but, having heard of such sale, subsequently stood by and allowed the purchaser to build upon the land, it was held that the owner could not recover the land without compensating the purchaser for the building erected by him upon the land, and three months were allowed to the owner within which to pay such compensation.

THIS was a suit instituted by the plaintiff to recover a piece of land, with a dwelling-house upon it, being No. 96, Duncan Road, in Bombay.

The suit was heard by GREEN, J., in August 1870, when the following facts were given in evidence for the plaintiff:—

One Mánikchand Náthábhái, the grandfather of the plaintiff, separated from his only brother's family in January A. D. 1831. Mánikchand had three sons—Jamnádás, Karsandás (the father of the plaintiff), and Purshotam. The eldest, Jamnádás, was born before the separation in 1831; the dates of the respective births of Karsandás and Purshotam did not appear from the evidence given, but Karsandás (and apparently Purshotam also) was born before the year 1843. In the lastmentioned year Mánikchand purchased the premises in Duncan Road, the subject of the present suit. He

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was then living jointly with his sons. No evidence was given as to the source from which the purchase-money of this house was derived by Mánikchand, but it appeared that Mánikchand kept a grocer's shop in the *Nal Bazár*, as well as a warehouse at the *bandar*, and traded to the Malabar Coast. The conveyance of the premises was taken in Mánikchand Náthábhái's own name. Jamnádas separated from his father, Mánikchand, in January 1849, when he received certain property as his share, and gave a release to his father. Karsandás, who was said to be a gambler and a man of very dissolute habits, did not formally separate from his father, but, shortly after Karsandás' separation, received some property from his father and went with his family to live separate from his father. Purshotam continued to live jointly with his father until the death of the latter.

On the 3rd of January 1861, Mánikchand made his will, and (amongst other things) thereby devised the Duncan Road premises and another house in Jagjivan Kíká Street to his grandson the plaintiff. The plaintiff was then about fourteen years of age. On the 4th of May 1861, a release, of which the following is a translation, was given by Karsandás to his father, Mánikchand:—

“Shri 1½. To Bhansáli Mánikchand Náthábhái; written by Bhansáli Karsandás, the son of the living Mánikchand. To wit: I give in writing to you as follows:—On the 5th day of Mágсар Vad, S. 1917 (3rd January 1861) you in your lifetime made your last will in the presence of Mr. Khanderáv Moroji the solicitor. In that will you have directed that there should be given to my son Chiranjivábhái Sávaklál, the son of (me) the living Karsandás, two houses: (*i.e.*) One house situated in Jagjivan Kíká Street, adjoining that of Gujá Jivá, and one house situated opposite to Durgá Devi on the Duncan Road. These houses you, of your own free will and pleasure, in your lifetime, have this day made over to me. The rent thereof from this day is given into my possession; and as to whatever deeds, papers, and vouchers relating to these houses there were with you, all these I have carefully taken possession of. For that I have executed this release and got a counterpart executed to me, and from this day I am to have power over the rent of the abovenamed houses. You have no claim thereon. 10th Chaitra Vad S. 1917 (4th May 1861).

(Signed) “KARSANDA'S MA'NIKCHAND.”

The plaintiff at the trial produced two letters, each bearing date the 4th of May 1861, which he stated had been signed

by his grandfather Mánikchand and given by the latter to him (the plaintiff). These letters were addressed to the tenants of the premises in Duncan Road and Jagjivan Kíká Street respectively, and required them to pay the rent of these houses thenceforth to the plaintiff. The plaintiff alleged that he took one of these letters to the tenant of Duncan Road premises and showed it to him, and that the tenant said: "How can I pay you the rent, as you are a minor? I will open an account in the name of your father and pay to him." The plaintiff was then living with his father. The other letter the plaintiff alleged that "he took to the tenant of the house in Jagjivan Kíká Street, who opened an account with the plaintiff on the back of the letter; that the plaintiff received rent under it for seven or eight months, after which his father, Karsandás, received the rent; that the letter was cancelled and given up to the plaintiff by the tenant when the latter vacated the house." These letters were not annexed to the plaint, but no attempt was made in cross-examination to impeach their genuineness.

Mánikchand Náthábhái died in the middle of the year 1863. The plaintiff and his father were then living together in a street near Duncan Road and Jagjivan Kíká Street. The father retained possession of the documents relating to the two houses, and received the rents of them. On the 13th of October 1864 Karsandás (as the plaintiff alleged, without his knowledge) sold the premises in Duncan Road, which then stood in the Collector's books in Mánikchand's name, to one Devji Hirji, who was at that time the tenant of the Jagjivan Kíká Street house. At the time of the sale to Devji Hirji there was no building standing on the Duncan Road property, the building that had originally stood upon it having fallen or been pulled down. Before Devji's purchase a *battáki* was beaten in the neighbourhood, in the usual manner. Devji Hirji about the same time purchased the house in Jagjivan Kíká Street from Karsandás. The plaintiff stated that he became aware of the sales of the two houses some time after they took place, from inquiries he made of workmen who were repairing the Jagjivan Kíká Street house;

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that thereupon he remonstrated with his father and asked him what he had done with the purchase-money, when his father became very angry and turned the plaintiff out of his house.

The plaintiff then went to live with his maternal cousin in another house in Jagjivan Kiká Street. Devji Hirji sold the premises in Duncan Road on the 9th of January 1865 to the defendant. Advertisements of the sale were inserted in the Native and English newspapers. After purchasing the property the defendant erected a shed upon it at a cost of about Rs. 1,420. The plaintiff gave notice of his claim in September 1869, and excused his delay by stating that he was young and without means when turned out of his father's house, and that for a long time he was unable to ascertain the name of the purchaser of the house in Duncan Road.

Upon the above facts, and not being satisfied with the truth of the plaintiff's story as to his ignorance of the sale to Devji, the learned Judge held that (even assuming that Mánikchand had power to dispose of his immoveable property by will in the manner he had done without the assent of Karsandás) the will of Mánikchand was revoked by the subsequent release of the 4th of May 1861; and that, even assuming that not to be so, the plaintiff knew of and acquiesced in the sale to Devji. A decree was made in favour of the defendant with costs.

From this decree the plaintiff appealed, and the appeal was argued before WESTROPP, C.J., and SARGENT, J., in June 1871.

Anstey and *Starling*, for the appellant:—There is no ground for questioning Mánikchand's power to devise this property. Mánikchand was a separated Hindú. To render him such, a formal partition proved by documentary evidence is not necessary: West and Bühler's Digest, Part II., Introduction, p. 12; *Sreemuttee S. Dossee v. Kartick Churn Mittra* (a); *Mussamat Deo Bunsee Kooer v. Dwarkanath* (b); *Lalla Moha-*

(a) Bourke's Rep., 326.

(b) 10 Calc. W. Rep., Civ. R. 273.

beer Pershad v. Mussamut Kundun Koowar (c). The doctrine is discussed in *Luximon R. Sadasew v. Mullar Row Bajee (d)*. The property being self-acquired, Mánikchand had full power to dispose of it by will under Mitákshará law, and Karsandás in any case had no right to dispose of it: *Muddon Gopal Thakoor v. Ram Buksh Pandey (e)*. The release is not a revocation of the will, but rather a recognition (and if necessary a ratification) of it by Karsandás. Under the terms of the release, when read by the light thrown on its meaning by the contemporaneous letters written by Mánikchand, Karsandás became a trustee and manager for his son the plaintiff: *Gopekristo Gosain v. Gungapersaud Gosain (f)*. The subsequent receipt of rent by Karsandás is, therefore, quite consistent with the meaning contended for. The only question that remains is, Did the plaintiff acquiesce in the sale by Karsandás to Devji? We contend that he did not. He was at that time under the *penumbra* of infancy, and, even if he knew of the sale, would be entitled to protection. Mere lying by under circumstances like the present does not amount to acquiescence: *Jorden v. Money (g)*. See, too, *Phillipson v. Gatty (h)*, *Gregory v. Gregory (i)*. There is (as is admitted by the court below) no direct evidence that the plaintiff knew of the sale to Devji Hirji, and the court will not presume such knowledge on the part of the plaintiff from the mere fact of his having been living with his father at the time, or from the fact that a *battáki* was beaten. Besides, Devji Hirji cannot be considered a *bonâ fide* purchaser without notice. There was enough to put him on inquiry. The land stood in Mánikchand's name, as also the title-deeds, and the purchaser was, therefore, bound to make full inquiries into the state of Mánikchand's family and whether he had made a will. He was not dealing even with the apparent owner, and is not entitled to protection: *Bishambur Naik v. Sudasheeb Mohapatter (j)*. The defendant,

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MUDDI'N.(c) 8 *Ibid.*, 116. (d) 2 Knapp, P. C. C. 60.

(e) 6 Calc. W. Rep., Civ. R. 71.

(f) Norton's L. C. on Hindú Law, 134; S. C. 6 Moo. Ind. App. 53.

(g) 5 Ho. Lo. Ca. 185, 213.

(h) 7 Hare 523. (i) Cooper 201. (j) 1 Calc. W. Rep. 96.

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of whose purchase it is not even pretended that the plaintiff was aware, is in no better position than his vendor.

Mayhew and Latham, for the respondent :—We admit that there need not be documentary evidence to prove partition, and that the *factum* of Mánikchand's will is proved ; but we contend that the release is in its terms clearly an instrument of gift of the houses to Karsandás, and, therefore, *pro tanto* a revocation of the will. It is impossible to believe that the plaintiff was ignorant of the sale made by his father, with whom he was then living, yet admittedly he took no step to prevent it or warn the purchaser. Having thus stood by, and allowed an innocent person to purchase, he will not now be allowed to set that sale aside. His want of *bona fides* is proved by his delay in bringing his suit or giving notice. Even when, as he admits, he went to the premises in 1865-1866 (and the building of the shed was then going on), he gave no notice. Under these circumstances, we contend, he cannot now recover the property : *Ramsden v. Dyson* (*k*), recognised as law in India in the case of *Náráyan v. Bholá-gir* (*l*) ; *Bassett v. Norworthy* (*m*). The cases relied on by the appellants are cases in which *ceux qui trustent* sued their trustees, and not innocent purchasers from the latter, which is the case here.

WESTROPP, C.J. :—We should feel great difficulty in this case in saying, from the evidence before the court, that the plaintiff has acquiesced in the sale made by his father of the premises in Duncan Road. He was a very young man at the time his father sold the house, having then only just attained his majority, and from the mere fact of there having been afterwards a dispute between him and his father about the purchase-money of the house, and of his subsequently standing by and taking no steps, it would be difficult for us to infer that he knew of the sale at the time when it took place. It lies upon the defendant to satisfy us upon that point before we can give effect to the plea that he derives his title from

(*k*) Law Rep. 1, Eng. & Ir. App. 129, 140.

(*l*) 6 Bom. H. C. Rep., A. C. J. 80.

(*m*) 2 Wh. & Tu. L. Ca. Eq. 19.

a purchaser who rests his title, as against the plaintiff, upon an alleged acquiescence of the latter in the sale. But though we feel this difficulty upon that point of the defendant's case, we are perfectly satisfied that the plaintiff must have known of the building of the shéd upon the land by the defendant and Dhondu his agent. From this, however, we cannot infer that the plaintiff was cognisant of the sale at the time it took place, though he must have known of it subsequently, as the plaintiff himself admits that he went to the premises in 1865 or 1866, when, it is proved, the building was actually going on. The question therefore arises, whether, before the plaintiff can recover the land, the defendant is not entitled to compensation for the building he has erected upon it. Upon that point we are willing to hear counsel. As to the will, we do not think that it was revoked by the document that has been called the release (exhibit E). That document is explained by the contemporaneous letters written by the testator, into the genuineness of which, seeing that no attempt has been made to impeach them in the Division Court, we do not think that we ought now to inquire. The plaintiff being the owner of the property, and not having been proved to have been aware of the sale at the time it took place (though he must have known of it subsequently) it lay upon the purchaser, claiming to be a *bonâ fide* purchaser without notice, to show that, before he completed his purchase, he did everything that he ought to have done and made all proper inquiries. But that he has not done. He ought to have inquired how the property, which within twelve years before the date of his purchase stood in the name of Mánikchand, came to Karsandás, and how Karsandás came to sell it, and what was his right to do so. Not having taken ordinary precaution, he cannot now be allowed to benefit by his own want of care. He ought to have been able to satisfy the court that he had inquired into the title at least during the twelve years preceding his purchase. We are ready to hear counsel upon the question whether, on our view of the case—namely, that the plaintiff did not know of the sale at the time it took place, but subsequently heard of it, and afterwards remained silent when he must

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have known that the defendant was building upon the land —the latter is entitled to compensation for the money he has expended in improving the property.

Latham and Mayhew, for the defendants, were heard on this point, and cited *The Earl of Oxford's Case* (n). [WESTROPP, C. J., referred to *Powell v. Thomas* (o), and *East India Co. v. Vincent* (per Hardwicke, C. J.) (p).] *Savage v. Foster* (q) and *Jones v. Smith* (r) were also cited.

Starling was heard in reply on the question of the amount of compensation to be allowed to the defendant and on the question of costs.

PER CURIAM:—The decree of the Division Court must be varied by ordering that the plaintiff do recover from the defendant the Duncan Road house on payment by the plaintiff, within three calendar months from this 10th day of August, of the sum of Rs. 1,240, and in the event of the plaintiff paying to the defendant the said sum within such period each party is to bear his own costs; but in the event of the plaintiff failing to pay the said sum within three calendar months, then the decree must be for the defendant with costs.

Decree accordingly.

Attorneys for the plaintiff: *Jefferson and Payne.*

Attorneys for the defendant: *Shápurji and Thákurdás.*

(n) 2 Wh. & Tu. 548 (3rd ed.).
 (q) 9 Mod. 35.

(o) 6 Hare 300.
 (r) 1 Hare 43.

(p) 2 Atk. 83.