[ORIGINAL CIVIL JURISDICTION.]

Original Suit No. 698 *of* 1872.

Appeal No. 254.

1875. June 18.

HORMASJI TEMULJI .....*Appellant.*

MA'NKUVARBA'I .....*Respondent.*

Attorney and client—Vendor and purchaser—Constructive notice—Secrecy—Practice—Costs.

The Court will not presume notice to have been given to his client by an attorney where such notice would involve a confession by the attorney of a fraud practised by himself.

The Court will not apply the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect a purchaser.

Where the respondent had been guilty of such secrecy, the Appellate Court gave the appellant his costs in both Courts.

THIS was an appeal argued before WESTROPP, C.J., and GREEN, J., from the decision of Bayley, J., holding a purchaser to be affected with constructive notice of an existing mortgage. The facts of the case fully appear in the judgment.

Starling and *Agnew Turner* for the appellant.

Latham and *Lang* for the respondent.

WESTROPP, C.J :—This is one of the cases arising out of the frauds of Pestonji Dinshá, who was admitted to practise, as a solicitor and attorney of this Court, on the 28th of August 1866. He had served his articles in the office of Messrs. Hearn, Cleveland, and Peile, where he certainly had an opportunity of learning better principles than those by which he seems afterwards to have been guided. On the 6th of June 1868 he purchased from the liquidators of a certain insolvent Parsi the general assets of the insolvent's estate, consisting of immoveable property and debts. Some members of the

insolvent's family now allege that Pestonji Dinshá purchased the property of the insolvent at their instigation, and for the purpose of giving to them a portion of the assets he might succeed in recovering, after recouping himself for the expenses to which he might be put. However that may have been, we find that, on the 4th September 1868, a mortgage of the immoveable property was executed to Mánkuvarbái by Pestonji Dinshá, who wished to raise the sum of Rs. 25,000 on that security. Mánkuvarbái's usual solicitors were Messrs. Hearn, Cleveland, and Peile; but in this matter, much against her own wishes and at the special desire of Pestonji Dinshá, who stated that it would be very damaging to his credit and would injuriously affect him in his business if it were known that he was borrowing money, she consented to employ as her solicitor Pestonji Dinshá, the mortgagor himself. At his desire, too, and for the same reasons, though greatly against her own wishes, she abstained from advertising the intended mortgage. The 4th September 1868 was the day appointed for the execution of the mortgage deed and the payment of the money to Pestonji Dinshá. At the time of the purchase of the property by him, the deed of conveyance, dated the 6th June 1868, was made out, not in the name of Pestonji Dinshá himself, but of his father, Dinshá Mánikji; in fact, Dinshá Mánikji was trustee for his son Pestonji Dinshá, and for the purposes of this suit Pestonji must be regarded as the owner of the equitable estate, for the claim advanced by the members of the family of the insolvent, from whose liquidators he purchased, is of so shadowy a nature that we cannot now take it into consideration. The mortgage to Mánkuvarbái ought, therefore, to have been drawn up, making Dinshá Mánikji, the principal conveying party, and Pestonji Dinshá, as owner of the equitable estate, party of the 2nd part. This, however, was not done, and the mortgage deed was made out in the name of Dinshá Mánikji alone. On the 4th September 1868 the mortgage money was taken to Pestonji Dinshá's office before 5 P.M. by two persons, of whom one was Mánkuvarbái's general manager, and the other occasionally acted in the capacity of her

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legal adviser, and both were previously acquainted with Pestonji. It is in evidence that Dinshá Mánikji was in the habit of sitting in his son's office, and assisting in the work there during office hours. On this occasion, however, he was not forthcoming, and Pestonji said he had gone on board a steamer that day starting for Kurrachee. At Pestonji's suggestion the parties bringing the money accompanied him to the Apollo Bunder for the purpose of obtaining the execution of Dinshá Mánikji to the mortgage deed; but, on arriving at the bunder, they found neither the steamer nor Dinshá Mánikji. Pestonji Dinshá then said that he held a power of attorney from his father, by virtue of which he could execute the mortgage deed. He accordingly took the others back to his office, where he produced a paper which he said was the power of attorney. He, however, did not read it to them, nor even open it, but threw it down on the table, where Mánkuvarbái's agents allowed it to lie unopened, apparently satisfied with Pestonji Dinshá's assertion that it was the power of attorney, and neither of them read it or asked to have it read to them. There is no evidence, beyond that of Mánkuvarbái's two agents deposing to the fact of Pestonji Dinshá's assertion at the time, that the paper was a power of attorney. Pestonji Dinshá might have been called as a witness to speak to this, but we can understand the unwillingness of either side to call him. However, the fact remains that there is a total absence of any evidence of the existence of any power of attorney. The mortgage deed was then executed by Pestonji Dinshá, who signed it in the following form, "Pestonji Dinshá attorney for Dinshá Manikji." The disappearance of Dinshá Mánikji seems to point to the suspicion that he was purposely kept out of the way to admit of the property being dealt with, as it was in fact afterwards dealt with, and to allow an opportunity to raise money twice on the same property, first by mortgage, and afterwards by sale. It is to be noticed, that there was very gross negligence on the part of Mánkuvarbái's agents both in not inspecting the power of attorney, and also in taking Pestonji Dinsha's word for it

that there were no title deeds, which in fact there were. The mortgage deed was not lodged for registration until December of the same year, and the delay was at the request of Pestonji Dinshá, on the ground that his father might return from Kurrachee. However, the deed was ultimately lodged for registration on the 24th December 1868; but Pestonji Dinshá was not required to acknowledge his execution, and no summons was issued to compel him to do so until April 1870, and on the 5th May 1870 he did acknowledge the execution. Another curious circumstance is that, although Mánkuvarbái's agents knew that Dinshá Mánikji had returned from Kurrachee before they had succeeded in obtaining Pestonji Dinshá's acknowledgment of the execution of the mortgage deed, yet they had no communication with him either about the deed or the power of attorney. This was negligence, which largely contributed to the fraud.

On the 11th January 1869 Dinshá Mánikji, in whom the legal estate was vested, executed a bargain paper to the appellant, Hormasji Temulji, agreeing to sell him a house, part of the property included in the mortgage deed of 1868. Hormasji, before concluding this transaction, advertised the intended purchase in the *Times of India* of the 1st February 1869, and in a Guzerati paper of the 2nd February 1869. He was guilty of no attempt at secrecy. Mánkuvarbái's manager saw neither of these advertisements, but that was not Hormasji's fault.

On the 2nd March 1869 a regular conveyance of the house by Dinshá Mánikji was executed to Hormasji, and was registered on 31st March 1869; so there was no delay on his part. The fact of the registration of the conveyance shows that Dinshá Mánikji might have been brought to the Registrar's office to acknowledge the execution on his behalf by Pestonji of the mortgage deed of 1868, had he been pressed to do so. At the time of the execution of the conveyance by Dinshá Manikji the title deeds of the house were handed over by him to Hormasji at Pestonji's office, and in the presence of Pestonji.

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On the 9th February 1871 Mánkuvarbái first became aware of Hormasji's claim through a letter written by his solicitor. There is no doubt that Hormasji paid his purchase money. So we have two parties here, who have paid their money, and we are now asked by the first purchaser to apply to the second the doctrine of constructive notice, for it is admitted that Hormasji had no actual notice. The ordinary doctrine is, no doubt, that if a solicitor is mortgagor himself, or is solicitor for a mortgagor, and so is aware of the existence of a mortgage, and afterwards becomes solicitor for a purchaser, that purchaser is affected by the knowledge of his solicitor. Of course, there are certain exceptions recognized in equity, but that is the general rule. When the parties are equally innocent, the purchaser is taken to have the knowledge of his solicitor.

There is a case, *Kennedy* v. *Green* (*a*), in which Lord Brougham refused to affirm that the solicitor must be taken to have communicated his own fraud to the purchaser. Now, we are strongly inclined to think that case would be applicable on the present occasion, because here was a double fraud on the mortgagee: first, the statement that there was a power of attorney, and that there was a legal estate being conveyed to her; and, second, the assertion that there were no title deeds, which there were. Coupled with this there was gross negligence on the mortgagee's part in not looking at the alleged power of attorney, and accepting without question the assertion as to the non-existence of title deeds. But it is not on the authority of that case that we decide; we decide on the ground of the secrecy preserved by the mortgagee.

We think that the doctrine of constructive notice is only to be resorted to where the parties are on a level in equity, and that it is a doctrine not to be extended, and we decline to presume notice in favour of a person who contributed to make the transaction secret. Mánkuvarbái employed her solicitor for the very purpose of concealment. Further,

(*a*) 3 M. and K. 699.

though she knew of the practice of advertising, she did not avail herself of it. Again, she delayed lodging her deed for registration until the 5th May 1870. Now, if the purchaser had gone to search the register before that date, he would not have found any record of the mortgage, as the deed was lying in Pestonji Dinshá's office, and was not registered until after Hormasji was in possession of the property and had his conveyance registered. Under these circumstances we think that we should be acting inequitably if we presumed notice to Hormasji of a transaction which Mánkuvarbái had done everything in her power to keep secret. It is against all probability that the solicitor would ever communicate to Hormasji the previous transaction.

It is impossible to say that these parties stand on an equal footing. Hormasji has done everything above board, and Mánkuvarbái has done everything to maintain secrecy. That secrecy in such a transaction will militate against a party to it, is clear: *Sharpe* v. *Foy* (*b*), which in one respect is a stronger case than this, for there the secrecy of the defendants was in the very matter in which they sought to affect the mortgagee with constructive notice; but the principle is there admitted that, if the secrecy is contributed to by the party who seeks to apply the doctrine of constructive notice, the Court will refuse to apply it. It is quite manifest that Mánkuvarbái concurred with Pestonji Dinshá in rendering the transaction secret as far as she could, and that Hormasji was induced to enter into the transaction in consequence. Under these circumstances we must reverse the decree of the Court below, and with costs, inasmuch as we think that the conduct of Mánkuvarbái has led Hormasji into the trouble which has reduced him to pauperism, and that it would be a very great hardship if he were not recouped his expenses throughout this litigation.

Decree reversed with costs.

(*b*) L. R. 4 Ch. Ap. 35.