

1878.

BHAVAN  
MULJI  
v.  
KAVASJI  
JEHANGIR  
JASA'WALA'  
AND  
PEROSHIA'  
MERWANJI.

This being so, we are of opinion that the shares, with the consequent right to receive any distribution of assets in respect of them, vested in the Official Assignee of Nágardás.

The questions, therefore, referred for the opinion of this Court must be answered in the affirmative, and judgment will be entered for the defendants. The plaintiff must pay the defendants' costs of reserving the said questions, and stating the same for the opinion of this Court, and the costs incidental thereto.

Attorneys for the plaintiff :—*Messrs. Jefferson and Payne.*

Attorneys for the defendants :—*Messrs. Ardasir and Hormasjee.*

[APPELLATE CIVIL.]

*Before Mr. Justice Melvill and Mr. Justice Kemball.*

UMEDMAL MOTIRAM (ORIGINAL PLAINTIFF), APPELLANT, v. DAVU.  
BIN DHONDIBA' (ORIGINAL DEFENDANT), RESPONDENT.\*

March 5.

*Incomplete contract—Act IX. of 1872, Section 39—Registration—Evidence—Act I. of 1872, Section 92, Proviso (4)—Oral agreement to rescind a registered contract.*

D sold a house to P, and executed a deed of conveyance which was duly registered. The purchase-money, however, was never paid by P, who, consequently, never obtained possession. Shortly after the conveyance had been registered, P returned it to D with an endorsement thereon to the effect that it was returned because P was unable to pay the purchase-money. The right, title, and interest of P in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued D for possession. The lower Courts threw out the claim, on the ground that the property had not passed to P, the sale to him being incomplete.

*Held—*

(1). The sale of the house by D to P was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to P, and P accordingly became the owner of the house.

(2). The endorsement on the conveyance, not having been registered, could not affect the property.

(3). The conveyance by D to P having been registered, no oral agreement to rescind it could be proved under the Indian Evidence Act (I. of 1872), section 92, proviso (4).

(4). The plaintiff, therefore, as purchaser of the right, title, and interest of P, became legal owner of the house, but subject to all P's liabilities; and as D had a lien upon the house for the amount of the unpaid purchase money, the plaintiff could not obtain possession without paying off this charge.

\* Second Appeal No. 818 of 1877.

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UMEDMAL  
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DAVU BIN  
DHONDIBA.

THIS was a second appeal from the decision of W. H. Newnham, Acting District Judge of Puna, affirming the decree of L. G. Fernandez, Second Class Subordinate Judge at the same place.

*Pándurang Balibhadra* for the appellant.

*Ghanashám Nilkanth Nádkarni* for the respondent.

The facts of the case are fully stated in the following judgment delivered by

MELVILL, J. :—The plaintiff is the purchaser, at a Court sale, of the right, title, and interest of one Pema, in a house.

The house originally belonged to the defendant Davu, who executed the conveyance (exhibit 13) in favour of Pema. This instrument was delivered to, and duly registered by Pema. Although it is distinctly stated in it that the purchase-money had been paid, and the house delivered to Pema, it has been found by the Courts below that the consideration was, in fact, not paid, nor the property delivered; but that, on the contrary, Pema, being unable to raise the purchase-money, returned the deed to Davu eleven days after it had been registered, and that thus (in the opinion of those Courts) the whole transaction of sale fell to the ground.

All this took place before the attachment and sale of the house; and the question is, whether Pema, under the above circumstances, had any interest in the house at the date of the sale, or whether the property in the house remained in the defendant Davu. The Courts below have treated the transaction as an incomplete contract; and we are asked to deal with it under section 39 of the Contract Act, which provides that, when a party to a contract has refused to perform his promise, the promisee may put an end to the contract. It is argued that Davu put an end to the contract, because Pema refused to pay the purchase money. But we think that the transaction cannot be so regarded. This was not a case of contract based on mutual promises. The deed of conveyance (exhibit 13) purports to make an immediate transfer of the ownership of the house, in consideration of value already received. It is not an agreement to convey, but a conveyance; and it is not open to the party who executed it to show that it was intended to be something quite different.

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When exhibit 13 had been executed, delivered, and duly registered, it operated as a conveyance, and Pema became the owner of the house. It is not pretended that he ever re-conveyed the house to Davu. What is alleged, would, if proved, amount to an agreement to rescind the purchase; but the evidence offered to establish such agreement is not admissible. The endorsement made on exhibit 13, when it was returned by Pema, cannot affect the property, because it is not registered; and as exhibit 13 has been registered, no oral agreement to rescind it can be proved (Indian Evidence Act, section 92, proviso (4)).

It follows that the plaintiff, as the purchaser of Pema's right, title, and interest, is the legal owner of the house. But he has acquired Pema's title subject to all Pema's liabilities. Even if the purchaser at a Court sale can be regarded as a purchaser for value without notice, the plaintiff cannot avail himself of that plea, since the defendant, and not Pema, was in possession at the date of the purchase. The defendant has a lien upon the house for the amount of the unpaid purchase-money; and the plaintiff cannot, any more than could Pema, obtain possession of the house without paying off this charge.

We reverse the decrees of the Courts below, and order that, if within six months from this date the plaintiff do pay to the defendant the sum of Rs. (162) one hundred and sixty-two, the house mentioned in the plaint be delivered by the defendant to the plaintiff; but that, in default of such payment, the plaintiff do forfeit his right to recover the said house. Each party will bear his own costs throughout.

*Decree reversed.*