

I.L.R., 12 BOMBAY.

12 B. 1 = 12 Ind. Jur. 223 = Chitty's S.C.C.R. 154.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

MOTIVAHOO AND ANOTHER (*Plaintiffs*) v. VINAYAK VEERCHAND
(*Defendant*).^{*} [19th August, 1887.]

Vendor and purchaser—Auction sale by mortgagee of mortgaged property—Conditions of sale—Condition that purchaser shall take such title as vendor can give where vendor has no title at all—Construction—Such condition implies possession of some title in vendor.

R. having stolen from N. the title-deeds relating to a certain property in Bombay in which he had no interest, but which belonged to N., deposited them with the plaintiffs, to whom he also executed an indenture of mortgage of the property comprised in the deeds to secure the repayment of a loan advanced to him by the plaintiffs. The plaintiffs subsequently sold the property at an auction sale under the power of sale contained in the mortgage. The property was put up to auction under certain conditions of sale, of which the following was one:—
“The vendor shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him.” Before the sale commenced, a notice on behalf of N. was read out to the persons then present, which stated that she claimed the property as absolute owner, and that R., (who had mortgaged it to the vendors,) had no interest in it. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival he was told of N.'s claim. He was told nothing to make the above condition of sale misleading. He bid for the property, and ultimately became the purchaser for Rs. 1,075. He immediately paid Rs. 275 by way of deposit, and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently [2] ascertained that R. had no interest in the property, and thereupon he called upon the plaintiffs, (the mortgagees), to make out a good title, or to repay his deposit. The plaintiffs, however, relying on the above condition of sale, required him to complete his purchase; and he having failed to do so, they filed this suit against him, to recover the balance of the purchase-money.

Held, that the defendant was not liable to pay to the plaintiffs the balance of the purchase-money. The suit, although in form a suit to recover the residue of the purchase-money, was virtually one to compel specific performance, and was governed by the principles applicable to such a suit. The purchaser was entitled to say that the above condition of sale implied that the vendors had some title, however defective it might be, and he had received at the auction no information which could be regarded as giving him notice to the contrary.

[D. 13 M. 158 (163); 30 M. 284 (289) = 17 M.L.J. 167 = 1 M.L.T. 416.]

THIS was a reference by the Full Bench of the Bombay Court of Small Causes under s. 69 of the Small Cause Court Act XV of 1882.

The plaintiffs as mortgagees of a certain immoveable property in Bombay sold the mortgaged property by auction to the defendant for Rs. 1,075 on the 18th January, 1886. The defendant paid Rs. 270 as deposit at the time of purchase. The present suit was brought by the plaintiffs to recover from the defendant the balance (*viz.*, Rs. 805) of the purchase-money with interest. The defendant refused to complete the purchase,

^{*} Small Cause Court Reference Suit No. 11377 of 1886.

1887

AUG. 19.

ORIGINAL
CIVIL.

12 B. 1 =
12 Ind. Jur.
223 =
Chitty's
S. C. C. R.
154.

1887 unless the plaintiffs could give him a good title to the property; and
AUG. 19. required them, in the event of their being unable to do so, to refund the
deposit which he had paid.

ORIGINAL
CIVIL.

The following were the facts of the case:—

12 B. 1=
Ind. Jur.
223=
Chitty's
S. C. C. R.
154.

In April, 1848, one Vanarsibai, (wife of Damodar Jagannath), purchased the land in question for the sum of Rs. 800, which was her own separate property. At that time no deed of conveyance was executed. Subsequently, by a bond dated the 30th July, 1851, she mortgaged the land for Rs. 451 to one Gopikabai, who was the mother of her (Vanarsibai's) daughter-in-law, Nathibai; and on the same day she assigned her equity of redemption to Nathibai.

On the 31st December, 1851, Vanarsibai obtained a formal deed of conveyance executed to herself by her vendor.

On the 27th August, 1860, Nathibai, who, as above stated, had the equity of redemption vested in her, and who was then in occupation of the land, obtained from Gopikabai, (the mortgagee), an [3] assignment of her mortgage, and thus became absolute owner of the property.

In 1861 or 1862, Damodar Jagannath, (the husband of Vanarsibai), adopted a son, named Ramchandra, who, during the lives of Damodar and Vanarsibai and after their death, resided with Nathibai in the house situated upon the property in question. Damodar died in 1868, and Vanarsibai in 1874.

In 1878, Ramchandra became insolvent, and obtained his discharge under s. 47 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21). In 1883, during the absence of Nathibai, he, (Ramchandra), stole out of her box the title-deeds relating to the said property, and, after depositing them with the plaintiffs, executed in their favour a deed of legal mortgage with power of sale, dated the 8th June, 1883, to secure the repayment of Rs. 1,000 lent to him by the plaintiffs; and on the 21st January, 1885, he executed to them a deed of further charge for Rs. 500.

In 1885 he became insolvent a second time, and again obtained his discharge under s. 47 of the Insolvent Act. In his schedule he did not enter the plaintiffs as mortgagees of the property.

The plaintiffs, in execution of the power of sale contained in their mortgage, put up the property to auction, subject to certain conditions of sale; the ninth condition being in the following words:—"The vendors shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him."

The sale took place on the 18th January, 1886. Before it commenced, a notice on behalf of Nathibai was read out to the persons then present, which stated that she claimed the property as absolute owner, and that Ramchandra, who had mortgaged it to the plaintiffs (the vendors), had no interest in it of any kind. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun; but on his arrival he was told of Nathibai's claim. He, notwithstanding, bid for the property, and ultimately became the purchaser, for Rs. 1,075. He immediately paid Rs. 275 by way of deposit, and signed an [4] agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that Ramchandra had no interest in the property; and thereupon by a notice dated the 13th February, 1886, called upon the plaintiffs to make out a good title, or to repay him his deposit.

On the 5th March, 1886, the plaintiffs replied; and, relying on the ninth condition of sale, required him to complete the purchase within eight days. The defendant having failed to do so, the plaintiffs filed this suit on the 5th January, 1886, in the Small Cause Court to recover the balance of the purchase-money.

The suit was heard on the 29th July, 1886, by the Chief Judge, (Mr. Hart), who delivered the following judgment:—

“This is an action by the vendor of a house against the purchaser to recover the balance of the purchase-money. The facts are peculiar, and give rise to a question of law of some nicety. There is no real contest as to them. As admitted, not disputed or proved, they are as follow:—

“The land, on which the house now stands, was purchased in 1848 by Ravji *alias* Balkrishna Bhaskar from Moroba Narayansett with possession, but no conveyance was executed until the 25th April, 1848. The deed executed on that date expresses the consideration to be the payment of Rs. 600 to Moroba by Ravji, and contains covenants for title and further assurance. It was registered in the Collector's office on the 19th May, 1848. In the meantime on the 1st April, 1848, the purchaser Balkrishna had resold the land to Vanarsibai, the wife of Damodar Jagannath, for Rs. 800 with possession, but no conveyance was executed till the 31st December, 1851. This deed contains covenants for title, quiet possession, and further assurance, and was registered in the Collector's office on the 20th March, 1852.

“Of the consideration money (Rs. 800) to be paid by Vanarsibai to Ravji, Rs. 401 had been allowed to remain on mortgage of the land and house, (which is now mentioned for the first time), for the repayment of which Vanarsibai bound herself by a bond of even date with the sale to herself (1st April, 1848), in the penal sum of Rs. 802, conditioned for avoidance on payment of Rs. 401, with interest at $\frac{3}{4}$ per cent. per mensem.

“This bond, which is unregistered, after reciting the loan of Rs. 401, the agreement to repay it within four years, and the mortgage as collateral security, contains a power to Ravji of entry and sale in case of default on payment to him of the sum due within the stipulated time of four years. An endorsement, dated 30th July, 1851, shows that Rs. 300 were paid on account on that date, and an enfacement dated 10th May, 1852, shows that the bond was ‘paid in full’ on that day; and the execution and the attestation, one of the latter being that of Vanarsibai's husband Damodar, are cancelled by erasure.

“From two letters of the 28th July, 1851, passing between Damodar Jagannath and one Harischandra Ranchodji it appears that the premises were admittedly the [5] separate property of Vanarsibai, and that she was desirous at this date of raising by the mortgage of them the money necessary to pay off the mortgage to Ravji. Accordingly we find on the 30th July, 1851, a bond executed by Vanarsibai and attested by Damodar (among others) in the penal sum of Rs. 902 conditioned for avoidance on payment by Vanarsibai to Gopikabai, the wife of Harischandraji Ranchodji, of Rs. 451, with interest at $\frac{3}{4}$ per cent. per mensem within ten years.

“This bond, which is unregistered, after reciting the loan and agreement for repayment with interest, contains an assignment of the premises by way of mortgage by Vanarsibai to Gopikabai, together with deposit of title-deeds, building certificate, and bills for ground-rent and assessment, and a covenant against otherwise encumbering the property. Under date 27th July, 1882, is an endorsement of payment of Rs. 50 on account.

1887
AUG. 19.
—
ORIGINAL
CIVIL.
—
12 B. 1=
12 Ind. Jur.
223=
Chitty's
S. C. C. R.
154.

1887
AUG. 19.
—
ORIGINAL
CIVIL.
—
12 B. 1 =
12 Ind. Jur.
223 =
Chitty's
S. C. R.
154.

" On the same 30th July, 1851, Vanarsibai by an unregistered Marathi deed assigned her equity of redemption to Gopikabai's daughter Nathibai, the widow of Harischandra, a predeceased son of Damodar and Vanarsibai. The consideration for this assignment was said to be the contribution by Nathibai of a portion of the Rs. 451, (the consideration money for the mortgage to Gopikabai), and of the proceeds of her personal ornaments.

" On the 26th July, 1852, Gopikabai by another unregistered Marathi writing released to Vanarsibai all her claims in respect of interest (both past and future), on the above-mentioned loan of Rs. 451. In this deed are recited the mortgage of the premises by Vanarsibai to Gopikabai for Rs. 451 for the purpose of payment to Balkrishna Bhaskar, the deposit of the deeds by Vanarsibai with Gopikabai, and the agreement that for the future no interest should be charged on the mortgage to Gopikabai. The consideration for this arrangement is said to be the relationship between the parties, and the giving by Vanarsibai to Nathibai and Ganpatrav, her son by Harischandra, of an 'authority paper,' the reference apparently being to the last-mentioned Marathi assignment of the equity of redemption. The deed then closes with a provision that as no interest is to be charged, and it will be unnecessary to let any part of the house to a tenant, Vanarsibai and her husband should live in the house with their daughter-in-law, Nathibai, and their grandson, Ganpatrav.

" By an unregistered English deed of the 27th August, 1860, Gopikabai, in consideration of natural love and affection, assigned to Nathibai the bond of the 30th July, 1851, and the debt secured, and all benefit derived therefrom, and all the estate, right, title, interest, property, claim, and demand whatsoever both at law and in equity of Gopikabai into or concerning the same.

" No further payment has been made on account of the bond so passed by Vanarsibai to Gopikabai and by her assigned to Nathibai.

" In 1861 or 1862, Damodar Jagannath adopted a son, Ramchandra Damodar, in the place of his grandson, Ganpatrav, who was the son of his predeceased son Harischandra, and who had died shortly before.

" On the 16th February, 1867, Vanarsibai mortgaged the property for Rs. 500 to Ramchandra Sakharam. This deed, attested by Damodar, was acknowledged [6] before the Sub-Registrar of Bhuleshvar on the 27th April, 1867, and by him registered on the 29th May, 1867. It contains covenants by Vanarsibai for repayment, title, quiet enjoyment, and further assurance, with a proviso for redemption and reconveyance and a power of sale to the mortgagee after one month's notice in case of default, and to call in the mortgage immediately in case of destruction or injury of the mortgaged premises by fire or tempest. Endorsements show the payment on account from time to time of various sums aggregating Rs. 340.

" In 1868, Vanarsibai died, and on the 16th December, 1872, her husband Damodar and adopted son Ramchandra executed a deed of further charge to Ramchandra Sakharam for a further advance of Rs. 300. After reciting the last-mentioned mortgage by Vanarsibai, and her death, leaving the present mortgagors her sole legal representatives, the deed purports to convey the premises to Ramchandra Sakharam in consideration of the sum of Rs. 800, with a proviso for redemption and reconveyance and covenants by the mortgagors for repayment and title and power of entry to the

mortgagee in case of default in payment, with a covenant for further assurance. There is also a power of sale to the mortgagee with a proviso that it shall not be exercised without default or notice, but is not conditional thereon, and provisos regarding the application of the purchase-money and the reservation of the right of foreclosure. This deed was registered on the 31st December, 1872. Default being made in payment of the mortgage last mentioned, the mortgagee exercised his power of sale by public auction on the 2nd January, 1878, when the property was knocked down to Lakshman Vishvanath for Rs. 925.

"The conveyance dated 5th January, 1878, executed by Ramchandra Sakharam to Lakshman Vishvanath, after reciting the last-mentioned mortgage, the death of Damodar in 1874 leaving Ramchandra Damodar his sole heir, the default in payment of the mortgage, and the auction sale, conveys the property to Lakshman in consideration of the sum of Rs. 925 and covenants for further assurance. Almost immediately after this, Lakshman Vishvanath resold and reconveyed to Ramchandra Sakharam for Rs. 1,000 on the 14th February, 1878.

"In 1878, Ramchandra Damodar filed his petition and schedule in the Insolvent Court, and entered Ramchandra Sakharam as an admitted creditor for Rs. 619. In the remarks column the insolvent admits the mortgage by his adoptive father and herself for Rs. 800, and states that the purchase at the auction sale was by the mortgagee in the name of a nominee for Rs. 925.

"To this point, then, it would appear that, despite the assignment to Nathibai of the equity of redemption and the mortgage-bond, Vanarsibai and her representatives had continued to act as though they were still absolutely entitled to deal with the property. But there is nothing to show that Nathibai was aware of their so doing.

"In 1879, Ramchandra Sakharam sued in this Court to eject Nathibai and Ramchandra Damodar, who still continued to live in the house. At the trial, Ramchandra Damodar swore he had no interest in the premises. Nathibai set up her present claim, and the plaintiff's pleader elected a non-suit.

"By an indenture of 8th June, 1883, Ramchandra Damodar mortgaged the premises to the present plaintiffs for Rs. 1,000, with powers of sale and entry and [7] covenants for title and further assurance, and on the 21st January, 1885, he executed a deed of further charge for Rs. 500.

"In a second schedule, filed in the Insolvent Court in 1885, Ramchandra Damodar has entered the present plaintiffs as admitted creditors for the sums of Rs. 1,000 and 500, which in the remark column he describes as due on 'bonds,' but without mention of any deed of mortgage or of the house as a security. Default having been made by Ramchandra Damodar in payment of the last-mentioned mortgage and further charge, the plaintiffs on the 8th January, 1886, advertised the property for sale by auction on the 18th.

"At or just before the sale, Nathibai caused printed hand-bills, dated the 17th January, 1886 to be distributed, setting up her title to the property as the rightful and absolute owner in possession for many years past, and denying that she had ever created or authorized Ramchandra Damodar to create any encumbrance, or that the plaintiffs or any one else had any right, title, or interest in the property.

"The sale, however, proceeded, and was held subject to certain conditions of sale, which were read aloud before the bidding commenced. The

1887
AUG. 19.
—
ORIGINAL
CIVIL.
—
12 B. 1=
12 Ind. Jur.
223=
Chitty's
S. C. C. R.
154.

1887

AUG 19.

ORIGINAL
CIVIL.

12 B 1=

12 Ind. Jur.

223=

Chitty's

S. C. C. R.

154.

only one of these material to the present suit is the ninth condition, which runs as follows:—'The vendors shall not be bound to give any better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him.'

"The defendant, who is an assistant surveyor in the Collector's office on a salary of Rs. 90 *per mensem*, first heard of the intended sale on the day it took place. He knew nothing of the property, but was very anxious to buy, presumably for the purpose of reselling at a small profit during the month allowed him by the conditions of sale for completion. This he would probably not find much difficulty in doing, as the property is conveniently situated on the main road. He, accordingly, attended the sale shortly after the proceedings had commenced, but he heard this ninth condition read. He made the last and highest bid for Rs. 1,075, for which sum the property was knocked down to him.

"Nathibai's notice was not read to, or in the hearing of, the defendant, but while the bids were going on he heard the second plaintiff and his agent Bhiku announcing generally to the bystanders that the old woman living in the house claimed to be the absolute owner.

"After the property had been knocked down to the defendant, the Parsi auctioneer informed him that Nathibai was the claimant. Defendant then signed the conditions of sale and an agreement to pay the balance of the purchase-money within a month, and paid the deposit of Rs. 270, or 25 *per cent.*, as provided by the third condition of sale.

"On the 21st January, 1886, Ramchandra Sakharam sent through his solicitor a notice to the defendant, stating the mortgage and further charge to himself and his sale to, and subsequent purchase from, Lakshman Vishvanath in 1878, and required him not to complete the purchase. The defendant then making further inquiries discovered that Ramchandra Damodar had never had any title to the premises, and consequently that his mortgagees could make no title to them. He accordingly [8] through his solicitors sent the plaintiffs a notice of the 13th February, 1886, calling on them to satisfy him that they had a good title, or to refund the deposit. To this they replied through their solicitors on the 5th March, 1886, relying on the ninth condition of sale, and calling on the defendant to complete the purchase within eight days. The defendant not having complied with this requisition, this suit was filed on the 5th May, 1886, for the balance of the purchase-money, Rs. 805; and, under the eighth condition of sale, for interest thereon, Rs. 15-8, at 9 *per cent. per annum* from the 19th February, 1886, the date allowed by the fifth condition of sale for the completion of the purchase.

"It is clear, from the facts above stated, that the plaintiffs, as the mortgagees of Ramchandra Damodar, could give the defendants no title whatever to the premises, unless Ramchandra Damodar acquired one between the date of his declaration on oath in this Court in 1879 that he had no interest whatever in the property and the date of his mortgages to them in 1883 and 1885. It is not pretended that he ever acquired any such title, and in his own evidence in this suit he admitted that during the illness of Nathibai he purloined from her box the registered conveyance of the 25th April, 1848, and the 31st December, 1851, the unregistered cancelled bond of the 1st April, 1848, and a few municipal bills made out in Vanarsibai's name, and that he showed those without the authority or knowledge of Nathibai to the second plaintiff, who was thereby induced to take the mortgage from him, and retained in his own possession all the

documents so shown to him, except the cancelled bond, which he returned to Ramchandra Damodar, who put it back into Nathibai's box.

" But it is said though the vendors can give no title, they are excused from being called on to do so by the ninth of the conditions of sale under which the purchaser bought. The vendors do not pretend that they have any title. They simply sell as the mortgagees who have paid their money, it may be on an insufficient title, and now only want to get their money back without giving anything more than they got in exchange, when the purchaser will stand exactly in their place. Of course a man selling property to another without condition is impliedly bound himself to have and to give to his purchaser a title to that property. But equally of course he may relieve himself of that implied obligation by special contract; and if the purchaser chooses to buy subject to such terms, he will be bound by them. The question, then, is one of the construction of the condition of sale. The points to be considered in such a case are clearly pointed out in *Best v. Hamand* (1). Does the condition oblige the purchaser to assume a fact material to the title as proved; or does it merely exonerate the vendor from proving it? In the former case the purchaser must complete, even should he find on inquiry the fact assumed to be incorrect. In the latter he is only debarred from calling on the vendor to prove it; but, if he can himself show *alimunde* that it is incorrect, he will not be held to his bargain. Of the former class of cases *Spratt v. Jeffery* (2) is an instance; of the latter, *Waddell v. Wolfe* (3).

" The present case, I think, belongs to the former class. On a fair construction of the words of the condition as they stand, I think their object is not to relieve [9] the vendor from establishing a fact necessary to the title which it may be difficult or expensive or otherwise inconvenient for him to prove, but to oblige the purchaser to take only so much as the vendor has to give him. In fact, the words of this condition seem to me closely to resemble those of the condition in *Spratt v. Jeffery* (2) in which it was held that the purchaser agreeing to purchase the premises 'as the vendor held them' was bound to take them in spite of a defect in the vendor's title. This case has been disapproved in subsequent decisions; but see *Dart's Vendors and Purchasers* (5th ed.), Vol. I, pp. 145 and 146, and note (m) thereto.

" But, then, another point arises, not so much on the words of the condition, as on their effect. It is the duty of the vendor to inform the purchaser of all facts within his own knowledge material to the title; and though the words of the condition may be quite explicit, yet if by reason of the misstatement or suppression of a fact, which the purchaser was entitled to know and the vendor bound to communicate, their effect is to mislead the purchaser, he will not be bound.

" In the present case there is nothing misleading in the actual words of the condition. They do not pretend that the vendors have or can make any title. On the contrary they seem to me rather to suggest the possibility that the vendor's title may be defective. Nor does there seem to me any pretence for saying that the vendors knew, either when they took the mortgage or, when they advertised the sale, that they had no title. The fact that they advanced on the security of the premises a sum nearly, if not quite, equal to their full value, is to my mind an argument against the former theory more cogent than any inference to be drawn from the fact that

1887
AUG. 19.

ORIGINAL
CIVIL.

12 B. 1=
12 Ind. Jur.
223=
Chitty's
S. C. C. R.
154.

(1) L.R. 12 Ch. Div. 1.

(2) 10 B. & C. 249.

(3) L. R. 9 Q. B. 515.

1887
AUG. 19.
ORIGINAL
CIVIL.
12 B. 1=
12 Ind. Jur.
223=
Chitty's
S. C. C. R.
154

the document shown to them by Ramchandra Damodar when obtaining the loan discloses no legal title in himself. For it must have been a fact notorious in the neighbourhood that he was the adopted son of Damodar Jagannath and Vanarsibai, and their only representative on their death. Nor is there anything to show that, in the interval between the mortgage and the sale, any fact had come to the knowledge of the mortgagees tending to show any defect in their title.

"But at the time of the sale the plaintiffs knew of Nathibai's claim as stated in her handbill, and the case of *Heywood v. Mallalieu* (1) is an authority for holding that even where the condition is explicit yet if there be within the knowledge of the vendor at the time of the sale a material fact not disclosed by the condition as to which he then makes an insufficient statement, the condition will be held to be misleading. In that case the condition of sale stated explicitly that the property comprising a dwelling-house was sold subject to all existing easements, but specified no particulars of any easement. Before the sale the vendor's solicitors had been informed of the particulars of an alleged easement, which, if it existed, would practically render the house useless as a dwelling, but he forbore to make any further inquiry as to its existence at the time of the sale. In answer to questions regarding the alleged easement, he replied, in general terms, that certain rights were claimed, but he could not tell whether there were any, and the auctioneer thereupon told the purchasers that they might dismiss from their minds all [10] thoughts about the rights in question, as he was sure they would never be heard of again. In these circumstances it was held that the condition was misleading and not binding on the purchaser.

"In the present case the vendors were informed of Nathibai's claim only just before the sale, when they had no opportunity to make any inquiry into it, and then only in the most general possible terms. All the information they had at the time they admittedly imparted in full to the defendant.

"But the defendant says they also stated that the old woman had no claim. Of course if they made this as a statement of fact which they had actually ascertained to be true, it would be a misstatement such as would make the condition misleading, and at the least throw on the vendors the *onus* of proving that the purchaser was not misled by it. I am of opinion that, if these words were used, they were merely as a statement of opinion, not of fact, for the defendant admits that they were not said in answer to any question, nor addressed to any person in particular. And he says that, from his own experience as a surveyor in the Collector's office, he is of opinion that on such occasions old women, who have no real rights in the property, generally do advance unsustainable claims in similar terms.

"Lastly, I am of opinion that it is by no means satisfactorily proved that these words were used by the vendors. The misstatement was no part of the defendant's original case. It is not alleged in the correspondence, nor did he say a word about it in his examination-in-chief. It was only in his cross-examination, when obliged to admit that he had been informed by the vendors that the old woman who lived in the house claimed to be the absolute owner, that he added, but they said she had no claim. No other witness than the defendant himself speaks to the use of

(1) L.R. 25 Ch. Div. 357.

such words by any one, and he is somewhat vague as to the exact words used and the person who used them. On the other hand, there was no necessity for the vendors to use such words. After imparting, as they did, all the information they had from Nathibai's handbill regarding her claim, they might safely rely on their conditions of sale, and there was no reason for them to discuss the goodness or badness of her claim. I must, therefore, hold that no case has been made out of a misstatement such as would render the condition misleading. That condition, in my opinion, not being a misleading one in itself, and obliging the purchaser to accept only such title as the vendors have to give, it follows that my judgment must be for the plaintiffs for the amount claimed, and costs.

"Verdict for plaintiffs Rs. 820-8 and costs Rs. 51 certified."

From this judgment the defendant appealed to the Full Court composed of the Chief and Second Judges, who granted him a rule for a new trial, on the three following grounds:—

- (i) That the Court had no jurisdiction to entertain the suit ;
- (ii) That on the facts as found the suit should be dismissed ;
- (iii) The discovery by the defendant of fresh evidence subsequent to the hearing.

[11] At the argument of the rule the Full Court were unanimously of opinion that the rule should be discharged on the first and third grounds, and took time to consider their decision on the second; and on the 9th November, 1886, the following judgments were delivered:—

Mr. SPENCER, Second Judge.—"This suit is brought to recover from the defendant the balance of the purchase-money of a house which was put up for sale by auction under the instructions of the plaintiff, and knocked down to the defendant as the highest bidder. The Chief Judge has found, on the evidence, that the plaintiff as mortgagee never acquired any title whatever to the property, and that consequently he could give none to the defendant. It follows that, if the defendant is required to pay the purchase-money, he will get no consideration whatever for his payment. The sale was subject to certain conditions, the ninth of which runs as follows:—'The vendors shall not be bound to give a better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him.' The tenth condition further provides for an abstract of title being prepared by the vendors. The question we have to decide is whether, having regard to the facts as found under the conditions above quoted, the defendant can be compelled to complete his purchase. I gather, from the Chief Judge's judgment, that it was in some way orally made known to the purchaser at the sale that the plaintiff was selling as mortgagee; but the conditions of sale themselves, which is a most inartificially prepared document, do not state in what capacity he is selling—whether as mortgagee or as a previous purchaser, or one who has succeeded to the property by inheritance. The conditions simply state that some property will be put up for sale. There is no description of the property, though the conditions state what consequences shall follow if the description proves to be incorrect, and they conclude with the clause I have already set out.

"Furthermore, no abstract of title was prepared for inspection by the purchasers. They were left in entire ignorance of the title they were buying. The Chief Judge in his judgment observes: 'Of course a man selling property to another without condition is impliedly bound himself

1887
AUG. 19.
ORIGINAL
CIVIL.
12 B. 1 =
12 Ind. Jur.
223 =
Chitty's
S. C. C. R.,
134.

1887

AUG. 19.

ORIGINAL
CIVIL.

12 B. 1=

12 Ind. Jur.

223=

Chitty's

S. C. G. R.

184.

to have and to give to his purchaser a title to that property. But equally of course he may relieve himself of that implied obligation by special contract; and if the purchaser chooses to buy subject to such terms, he will be bound by them.' The question, then, is one of the construction of the condition of sale. Does such a condition, as we have in this case, protect a man who sells, not with a defective title, but with no title whatever? No doubt the text books when treating on particulars and conditions of sale do state the proposition in very broad terms, that a purchaser 'is bound by a clear stipulation as to title, *e. g.*, an agreement by assignees of a bankrupt to sell his estate "under such title as he recently held the same, an abstract of which may be seen;" or that the purchaser should only have the receipt and conveyance of A., (an equitable mortgage), and the assignees; an agreement by ordinary vendors to convey "such title as they have received from [12] A. and B.;" and a condition that the purchaser should accept the vendors' title "without dispute;" or should "accept such title as the vendor has" —*Dart's Vendors and Purchasers*, Vol. I, p. 150. But, so far as I have been able to refer to the cases cited in support of this proposition, there is not one in which the Courts have compelled a purchaser to complete his contract when the vendor has no title whatever to give. In all the cases there has been some defect of title on which it has been held the purchaser has precluded himself, under the conditions of sale, from relying to get out of his bargain. The object of special conditions of sale, according to the reported cases, is, first, to protect the vendor from inquiries which he himself may be unable to satisfy, and against objections which he cannot explain away; or, secondly, to oblige a purchaser to assume a particular fact material to the title as proved. A series of decisions have established the distinction between these two classes of cases, but I have been unable to discover any case which has gone beyond them. The cases of *Best v. Hamand* (1) and *Spratt v. Jeffery* (2) are good examples of the latter class of cases. In *Best v. Hamand* (1) the defendant had contracted to purchase land which had once belonged to a railway company and had been sold by the company as surplus land. One of the conditions of sale was that the purchaser should assume that the company had done all that was required by the Land Clauses Act to enable them effectually to sell and convey the land as surplus land. On inquiry it was ascertained that the former owner of the land had not waived his right to pre-emption, and the title was objected to on that ground. The Court, however, held that the purchaser was bound by the stipulation to admit the title of the company to sell to the vendor. In *Spratt v. Jeffery* (2) the plaintiff sold to the defendant two leases of claim premises with the good will of the business carried on therein 'as he held the same without requiring the lessor's title.' The lessors were trustees, and one of the leases was in reversion which they had no power to grant. The Court held that the meaning of the agreement was that the vendee was to purchase the leases without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title. The circumstances of these two cases differ entirely from the present. In both of them the purchasers would undoubtedly receive some consideration for their money. In *Best v. Hamand* (1), if the first owner exercised his right of pre-emption, he would have been bound to recoup the purchasers his outlay. In *Spratt v. Jeffery* (2) the assignor of the leases was in actual possession

(1) L. R., 12 Ch. Div. 1.

(2) 10 B. & C. 249.

of the property, and it did not appear that the defendant, the assignee, would have been disturbed during the currency of the lease, and if he were, he had a remedy against the trustees in damages. In both cases the Court decided that the stipulations were a fair warning to the purchasers that there was something doubtful in the title as to a particular point. I do not think that from either of these cases can the principle be deduced that the Court would have compelled performance of the contracts if the vendors had no title whatever. The strongest case I have [13] been able to find in support of the plaintiff's contention is *Freme v. Wright* (1), which was a sale by the assignee of a bankrupt under such title as the bankrupt recently held the same, an abstract of which may be seen. I have not been able to refer to the report of this case, and am, therefore, ignorant of its facts; but the observations of Page Wood, V.C., on the case in *Edwards v. Wickwar* (2) are pertinent to the present inquiry. His Lordship observes:—'There may be cases like *Freme v. Wright* (1) where assignees of a bankrupt have stipulated that such title only as the bankrupt had should be required by the purchaser, but even in that case it has been thought a stretch of the jurisdiction of the Court to force the title on a purchaser.' What I have cited was, no doubt, an *obiter dictum*, but it is the *dictum* of a very eminent equity Judge, who was afterwards Lord Chancellor. I have said that if the conditions of sale are unambiguous, the Courts will compel a purchaser to accept a defective title. It may be asked what is a defective title? Is a scintilla of title sufficient to enforce performance? The answer to this is that no hard and fast rule can be laid down; each case must depend on its own special circumstances and the conditions of sale. It is sufficient to say that, in my opinion, a Court of Equity will not decree specific performance when property has been sold with such a condition as we are now considering if the vendor has (as it has been found in this case) absolutely nothing to sell. For the reasons I have given, I am of opinion that this suit cannot be maintained, and ought to be dismissed."

Mr. HART, Chief Judge.—"I am unable to concur unreservedly. Though I felt and still feel doubt as to the correctness of my original judgment, yet as all the points suggested by the learned Second Judge were present to my mind and considered by me before delivering it, I think the best course would be for me to adhere to it, and obtain the opinion of the High Court on a reference which I should have been willing to make in the first instance had I been asked to do so.

"The doubt which most pressed me was that which apparently most influenced the Second Judge in arriving at a contrary result, *viz.*, that the reported cases in which the purchaser was held to his bargain seem to be cases in which what was sold was a defective title, whereas here it is no title. But this seems to me a question of degree only, not of principle. If the purchaser is bound by the condition to pay for whatever the vendor can give, I apprehend the principle is the same whether what can be given is all or a good deal or little or nothing. Stress is laid on the *obiter dictum* in *Edwards v. Wickwar* (2) throwing doubt on *Freme v. Wright* (1). In spite of the great respect undoubtedly due to the opinion of the learned Judge enunciating that *dictum*, I am unable to attach great importance to it, not only because it was not necessary to the decision of the case before him, nor because he omits to specify any case or authority in which or by which the decision in *Freme v. Wright* was held to be a stretch of the

(1) 4 Madd. 364.

(2) L.R. 1 Eq. 63 (70).

1867 jurisdiction of the Court,' but also because that decision is cited without
 AUG. 19. disapproval as settled law in all the latest editions of all the best text-writers :
 — see Davidson's Conveyancing (4th ed.); Dart's Vendors and Purchasers
 ORIGINAL (5th ed.); and Fry's Specific Performance (2nd ed.). On the other hand,
 CIVIL. *Hume v. Pocock* (1) is an authority for holding that a condition of sale may
 — preclude a purchaser from [14] showing that the vendor has no title, and
 12 B. 1= is so cited in Seton on Decrees (4th ed.).

12 Ind. Jur.
 223=
 Chitty's
 S. C. C. R.
 154.

"Another doubt that suggested itself to my mind was, whether the plaintiffs having notice, in general terms, of a claim by Nathibai were bound to postpone the sale for the purpose of sifting it. I can find no authority for saying a vendor is bound to investigate his own title. That is the duty of the purchaser. No doubt, if the vendors had sifted Nathibai's claim, and found the title was in her, and not in them, and had then misrepresented or suppressed the result of their investigation, as in *Heywood v. Mallalieu* (2), the sale would not be upheld. But they made no such investigation, and there is no reason for saying they ought to have made it, but did not, because they knew or suspected what the result would be. Probably they thought, as the purchaser admits he thought, that 'old women generally do make such claims without any grounds.' On the other hand, they did give the purchaser all the information they had themselves, viz., that Nathibai claimed to be the absolute owner of the property.' He, however, chose to buy admittedly 'on his own judgment,' and because he thought 'old women generally do make such claims without any grounds.' In other words, he bought, subject to the ninth condition of sale, a chance which he thought at the time to be a good one, but which turned out to be a bad one. It is not, therefore, in my opinion, strictly correct to say that the defendant purchased without any consideration whatever. I am unable to see that the fact, that no abstract of title was prepared before the sale for the inspection of intending purchasers, affects the question. The tenth condition does not provide for this, and it was not contended before me that the vendors were bound to follow such a course, which would certainly be an unusual one.

"On re-consideration, then, I adhere to my former opinion, that the plaintiff is entitled to recover, and that this rule ought to be discharged."

It will be seen, from these judgments, that the point on which the Judges differ is not as to the meaning of the words in the ninth condition of sale, but as to the effect which the Court ought to give to that condition.

The question, then, which we respectfully submit for the opinion of their Lordships the Judges of the High Court is, whether the defendant purchasing under the said ninth condition of sale in the facts hereinbefore set forth is liable to pay to the plaintiffs the balance of purchase-money. If the answer be in the affirmative, the present decree for the plaintiffs will stand, and execution, which has been stayed pending this reference, will be ordered to issue thereon. If the answer be in the negative, the decree will be set aside, and the suit will be dismissed with costs to the defendant, to be paid by the plaintiffs, Rs. 51; costs of the rule for a new trial, also Rs. 51, will abide the result of the reference.

No sum has been ordered to be deposited in this Court to cover the costs of the reference, as is usual, as this is not a reference sought by either of the parties, but is necessarily made by the Court on a difference

(5) 1 Ch. 379.

(2) L.R. 25 Ch. Div. 317.

of opinion between the Judges, under the provisions of s. 69 of the Small Cause Court Act.

No one appeared for the plaintiff.

[15] *Vicaji*, for the defendant.—Although this suit is, in form, to recover a sum of money, it should rather be regarded as a suit for specific performance, to compel the defendant to complete the purchase. There is no provision in the Specific Relief Act and no decision in any Court in which a vendor, having neither title nor possession, has been given specific performance against the purchaser.

The ninth condition of sale implies that the vendors can give a positive title of some kind ; but here neither the vendors nor their mortgagor can make out any title at all. In an unreported case of this Court, *Byramji Jijibhai v. Parmanandas Jwandas*; it was decided that a condition of sale similarly worded imported some title to be given by the vendor. That decision was based on the case of *Seaton v. Mapp* (1), which showed that special conditions of sale, excluding the purchaser's ordinary right of obtaining a good title, ought to be strictly construed against the vendor and in favour of the purchaser. The cases cited in the Court below are distinguishable from the present, inasmuch as in every one of them the vendor had some title to give to the purchaser.

Assuming the ninth condition covered a case of no title on the part of the vendors, who acted at the auction-sale of the 18th of January, 1886, with the utmost good faith, there was a common mistake on the part of both parties to the sale. Both of them believed that there was some title to be made by the one and accepted by the other ; and, according to *Cooper v. Phipps* (2) and cases of that class cited by Pollock in his Principles of Contract (2nd ed.), p. 427, the purchaser must be relieved from the effects of that common mistake. It was also within the special knowledge of the vendors that their mortgagor had become insolvent in 1885, and they ought to have made mention of that circumstance in their conditions of sale, so as to have put intending purchasers on enquiry. *In re Banister* ; *Broad v. Munton* (3) and *In re Marsh and Earl Granville* (4) show that the vendors are bound to disclose the whole of the truth within their knowledge.

JUDGMENT.

SARGENT, C. J.— It must be taken as found, for the purposes of this reference, that the vendor had no title whatever, being a [16] mortgagee under one Ramchandra Damodar, who had stolen the title-deeds from one Nathibai, the real owner of the property in question, who is now and always has been in possession. It has also been found that, just before the property was knocked down to the defendant, he was informed that Nathibai made a claim ; but that he was not told, as the defendant contended he was, that there was nothing in her claim ; and, lastly, that he was not told anything making the ninth condition misleading.

The question referred to us is, whether under these circumstances, the defendant was bound to complete his contract of purchase having regard to the ninth condition of sale under which the property was advertised for sale, and which is in the following terms :—“The vendors shall not be bound to give any better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him.” This present action is, in form, to

(1) 2 Coll. 556.

(3) L. R. 12 Ch. Div. 131.

(2) 2 L. R. H. L. Cas. 149.

(4) L. R. 24 Ch. Div. 15 and 17.

1887
AUG. 19.

ORIGINAL
CIVIL.

12 B 1 =

12 Ind. Jur.

223 =

Chitty's

S. C. C. R.

154.

1887
AUG. 19.
—
ORIGINAL
CIVIL.
—
12 B. 1 =
12 Ind. Jur.
223 =
Chitty's
S. C. C. R.
154.

recover the residue of the purchase-money, but it is virtually one to compel specific performance, and must be governed by the principles applicable to such a suit.

Apart from any special consideration arising from the information given to the defendant at the sale, the question for determination is whether, having regard to the ninth condition of sale, the Court should compel the purchaser to complete the purchase when the vendor has no title of any sort, and not even the possession to offer to the purchaser.

In *Freme v. Wright* (1), where the property of a bankrupt was sold by the assignee under a similar condition, the purchaser was compelled to take such title as the bankrupt had. But all that appears in that case is that the bankrupt had not a "good title."

However, in *Edwards v. Wickwar* (2), Vice-Chancellor Wood referring to *Freme v. Wright* says that, notwithstanding the special circumstance, in that case, of the vendor being the assignee in bankruptcy, "it has been thought a stretch of jurisdiction of the Court to force the title on the purchaser." It may doubtless be said that such a condition of sale gives the bidder notice that the [17] vendor's title is a questionable one, and if he chooses to purchase with that knowledge, he ought to be kept to his bargain. But no purchaser reading that condition would suppose that the vendor had no claim of any sort or kind to the property, not even such *prima facie* title as is evidenced by possession.

In *Seaton v. Mapp* (3) Vice-Chancellor Knight Bruce states in admirable language the principle on which conditions of sale are to be construed. He says: "I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." Applying this principle to the present case, the purchaser is, in our opinion, entitled to say that the stipulation contained in the ninth condition implied that the vendors had some title, however defective it might be. As to the information the defendant received at the auction, it certainly gave him no notice to the contrary. The question referred to us must, therefore, be answered in the negative.

Plaintiffs in person.

Attorneys for the defendant:—Messrs. *Balkrishna and Bhagwandas*.

(1) 4 Madd. 364.

(2) L.R. 1 Eq. 68.

(3) 2 Coll. 556 (562).