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[94] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

SHEKH ADAM ISUFBHAI (*Original Defendant*), Appellant v.
JAMNADAS RANCHORDAS AND OTHERS (*Original Plaintiffs*),
Respondents.* [8th October, 1891.]

Civil Procedure Code (Act XIV of 1882), s. 283—Suit to establish right to attach—Onus of proof—Right of defendant in such suit to set up the title of a third person where defendant's own title derived from such persons is tainted with fraud—Decree—Execution—Registration—Registration Act III of 1877, ss. 21 and 60—Description of property not contained in body of the deed of conveyance, but inserted as a foot-note.

Faizulla owned a house in Surat. On the 21st August 1882 he was adjudged a bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was then carrying on business as a merchant. On the 20th February 1884 he executed a conveyance of the house to Mr. Carew, the trustee in bankruptcy, for the benefit of his scheduled creditors, of whom the defendant was one. The defendant held a mortgage on the house for advances made by him to Faizulla. Mr. Carew had an agent in India, one Nazir Mahomed, with whom the defendant was a partner in business. On the 20th November 1884 the plaintiffs obtained a decree for Rs. 78,000 against Faizulla and another person, and in execution of this decree they attached the house in question as the property of Faizulla. Prior to the attachment the defendant, in consideration of the mortgage-debt due to him, had obtained a transfer of the house from Carew with possession. No further consideration was paid by him at the time of the transfer. On the attachment being levied by the plaintiffs, the defendant claimed the house as purchaser from Carew, and the attachment was raised. The plaintiffs then filed this suit under s. 283 of the Civil Procedure Code (Act XIV of 1882) to establish their right to attach the house as the property of their judgment-debtor. The plaintiffs (the respondents) contended that the transfer of the house by Carew to the defendant was fraudulent, the defendant being a partner of Carew's agent, and no consideration having been paid for the transfer. The defendant (appellant) contended that it was sufficient for him to show that Carew's title was good, and that, if the house had validly passed to Carew, it could not afterwards be attached for Faizulla's debt. The plaintiffs (respondents) on the other hand argued that the defendant ought not to be allowed to set up Carew's title; that the transfer by Carew to him was fraudulent, and that he ought not to be allowed to benefit by his own fraud.

Held, that the defendant was entitled to set up Carew's title as a defence, although he might have been guilty of fraud in his subsequent dealings with Carew. If Carew's title neither originated in, nor was upheld by, any fraud of the defendant, and if the plaintiffs' claim failed on proof of Carew's title alone, the [95] defendant would not benefit by his own fraud, but by the proof of a title paramount to that of both plaintiffs and defendant.

In a suit brought under s. 283 of the Civil Procedure Code (Act XIV of 1882) to establish the right to attach property, it is for the plaintiff to prove that the property in question is the property of the judgment-debtors. The onus of proof is upon him. He can have no right to attach property which is proved either never to have belonged to his judgment-debtor, or having been his, to have passed out of his possession and ownership, and become, in law, the property of others prior to the time at which attachment is sought. The defendant defending such a suit may, therefore, rely on the title of a third person.

A conveyance of immoveable property did not contain, in the body of the deed, a description of it sufficient to identify it. In a foot-note, however, such a description was given, and it was signed by the assignee only. The deed was accepted by the Registrar, and was registered, and a certificate to that effect was given under s. 60 of the Registration Act (III of 1877). The deed being tendered in evidence was objected to on the ground that it ought to be treated as unregistered, since it had been improperly accepted for registration by the Registrar.

* Appeal No. 88 of 1891.

Held, that the error in accepting it, if error there was, did not invalidate the registration; see *Sah Makhan Lal v. Sah Koondan Lal* (1).

[R., 25 B. 202 (206); U.B.R. (1897—1901), 270.]

APPEAL from the decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in suit No. 237 of 1885.

One Faizulla was the owner of a house at Surat. On the 21st August, 1882, he was adjudged bankrupt by the Supreme Court of the Straits Settlements, within whose jurisdiction he was carrying on business as a merchant, and on the 20th February, 1884, he executed a conveyance of the said house to Carew, the trustee of the property of the bankrupt, for the scheduled creditors, of whom the defendant, Shekh Adam Isufbhai, was one. Carew had an agent in India, one Nazar Mahomed, with whom the defendant was a partner in business.

On the 20th November, 1884, the plaintiffs obtained a decree in Surat against Faizulla and one Abdulali for Rs. 78,000, and in execution of this decree they attached the house in question as the property of Faizulla. Prior to the attachment the defendant, who, as above stated, was a creditor of Faizulla and who held a mortgage on the house for advances made by him, obtained a transfer of the house from Carew as trustee in consideration of his mortgage-debt. No further consideration was paid by him at the date of the transfer. On the attachment [96] being made by the plaintiffs, the defendant claimed the house as purchaser from Carew, and the attachment was raised. The plaintiffs then filed this suit under s. 283 of the Civil Procedure Code (Act XIV of 1882) praying for a declaration that the house was the property of their judgment-debtor Faizulla, and that they were entitled to attach it.

The Court of first instance passed a decree for the plaintiffs, holding that the purchase by the defendant was void as against all the creditors of Faizulla, including the plaintiffs.

In appeal, a question was raised as to whether the house had ever belonged to Faizulla. The Court held, on the evidence, that it had been his property.

Vicaji (with *Gokaldas Kahandas Parekh*), for the appellants.

Branson, for the respondents.

JUDGMENT.

JARDINE, J., (holding, on the evidence, that the house had been Faizulla's property, continued):—The house which thus belonged to Faizulla was undoubtedly conveyed by him to Carew.

Exhibit 32 shows that Faizulla was adjudged bankrupt by the Supreme Court of the Straits Settlements on the 21st August 1882, and this adjudication was followed by a conveyance of the house executed by Faizulla on the 20th February 1884 in favour of Carew, who was the Sheriff of Singapore and trustee of the property of the bankrupt for the scheduled creditors (Ex. 85).

This conveyance was executed prior to any attachment of the property by the plaintiffs (prior indeed to their decree), and would have been a perfectly valid and legal conveyance under the law of this country. The only objection raised against its validity is that it ought to be treated as unregistered, since it was improperly accepted for registration by the Registrar of Bombay. This was the view taken by the Subordinate Judge, who, however, (as is here admitted) made a mistake in saying that it was

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registered too late, so that the case he relied on—*Baya v. Anapurnabai* (1)—has no application. But his other remark is true, viz., that “the assignment contains no description of the immoveable property sufficient to identify it” in the body of the deed, though such a [97] description is given in a foot-note. Section 21 of the Indian Registration Act, 1877, enacts that “no non-testamentary document relating to immoveable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same.” It does not particularise where the description shall be contained, and in the present case the Registrar may have thought that the provisions of the law were sufficiently complied with, in that the proper description was given in a foot-note signed by the assignee only, especially as Faizulla admitted the execution and genuineness of the document to him and signed an endorsement to that effect. Be this as it may, the document was registered, and a certificate to that effect was given under s. 60. The error in accepting it, if error there was, cannot, we think, be held now to invalidate the registration. The Judicial Committee of the Privy Council make the following observations in the case of *Sah Mukhun Lal Panday v. Sah Koondan Lal* (2):—“It is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21 or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general word “defect in procedure” in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance.” Section 21 of the Act there referred to (XX of 1866) is the same as s. 21 of the Act now in force (Act III of 1877). On this point of construction we have referred also to the Full Bench decision in *Hardei v. Ram Lal* (3) and the authorities on which it proceeds, and we are of opinion that the document must be held to have been registered in accordance with the provisions of the Act (see s. 49). The second point, therefore, is found in the affirmative.

The purchase by the defendant from Carew has been held by the lower Court to be void as against Carew and all the creditors [98] of Faizulla, including the plaintiffs, because the defendant who purchased the property was the partner of Carew's agent, Nazar Mahomed, and no consideration was paid for the transfer. It has not been attempted by argument in this Court to contest this point, the counsel for the appellant being content to rest his case upon the assignment to Carew under which the legal title to the property in suit had passed from Faizulla.

It was, however, contended on behalf of the respondents, that to allow the defendant thus to rest his defence on proof of Carew's title would be to set up a new case for him, and would also enable him to benefit by his own fraud. Neither of these contentions are, in our opinion, sound. It is no new case for the defendant to allege that the property could not be attached, because it had been conveyed to Carew, and, therefore, no longer belonged to Faizulla. Such a plea was raised in the Court of first instance, embodied in an issue and decided. The abandonment, or rather the abstention from argument in this appeal of the further point, whether the defendant purchased from Carew, cannot make the case a

(1) 10 B.H.C.R. 98.

(2) 15 B.L.R.P.C. 228 (235) = 2 I.A. 210 (216).

(3) 11 A. 319.

new one, for the case remains the same, only it is curtailed by the omission of a final link which, if redundant, need never have been added, but of which, if essential, the omission would be fatal. The contention that to allow the defendant to rely on Carew's title will be to enable him to benefit by this own fraud rests on a misconception. It is plain that, if Carew's title neither originated in, nor is upheld by, any fraud of the defendant, and if the plaintiffs' claim fails on proof of Carew's title alone, the defendant will benefit not by his own fraud, but by the proof of a title paramount to that of the plaintiffs and that of the defendant himself, and as injurious, therefore, to the defendant as to the plaintiffs. We think, therefore, that, if the defendant can under ordinary circumstances set up against the plaintiffs' claim the title of a third person, he can clearly set up the title of Carew in the present case, though he may have been guilty of fraud in subsequent dealings with Carew.

This brings us to the question whether a defendant can rely on the title of a third person in defending a suit like the present, brought under the permission given in s. 283 of the Code of Civil Procedure (Act XIV of 1882). The words of that section are [99] "the party may institute a suit to establish the right which he claims to the property in dispute." The right here claimed by the plaintiffs is the right to attach the property in dispute in execution of the decree they obtained against Abdulali and Faizulla on the 20th November, 1884, for the sum of 78,000 and odd rupees. It is, we think, plain that they can be held to have established their right to attach this property under that decree only if they prove that it is the property of their judgment-debtors. They can have no right to attach property which is proved either never to have belonged to their judgment-debtors, or having been theirs to have passed out of their possession and ownership, and become in law the property of others prior to the time at which attachment is sought. The onus of proving that the property is their judgment-debtors' must lie on the plaintiffs, and whether or not the defendant has a title, the plaintiffs must prove their right to attach, *i.e.*, the title of their judgment-debtors. In the present case it is not proved that Abdulali ever had any title in the property in suit; on the contrary, it is proved that Faizulla was the owner thereof; it is also proved that Faizulla on the 20th February, 1884, conveyed the property to Carew, and that Carew was the legal owner thereof at the time of the attachment of it by the plaintiffs, and Carew is still the legal owner of the property if there has been no valid transfer of it from him to the defendant. Whether there has been a valid transfer or not, is a point for determination in a contest between him and Carew, not in a contest between the plaintiffs and the defendant. Indeed, the point is in no way material in the present suit, for no fraud committed by the defendant against Carew could have the effect of divesting Carew's title and re-vesting the property in the plaintiffs' judgment-debtor Faizulla.

For these reasons we are of opinion that it is unnecessary to decide whether or not the property was purchased by the defendant from Carew; we hold that the title of Carew can be relied on by the defendant; and since it is proved that the plaintiffs have no right to attach the house in execution of their decree we reverse the lower Court's decree, and order that this suit be dismissed with costs throughout on the plaintiffs.

Decree reversed.

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