1903.

GELL v. TAJA NOORA.

stances," and it is impossible to separate these few lines from the preceding paragraphs of the affidavit and the letter of the 17th March, 1902, since which time Mr. Gell does not suggest that he has given any fresh and independent consideration to the matter. Under these circumstances, I consider this case is on all fours with that of *Wood* v. *Widnes Corporation*,[1] and the appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for the petitioner-respondent—*Messrs. Smetham, Byrne and Noble.*

Attorney for the Commissioner of Police—*Mr. E. F. Nicholson* (Government Solicitor).

(1) (1898) 1 Q. B. 467.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903. *February* 9.

NATHA KUPAJI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MAGANCHAND MOTIJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Fraudulent conveyance—Transfer of Property Act (IV of 1882), section 53—Transfer to one creditor—Good faith.

One Byramji Kuverji died in June, 1896, indebted to several creditors. Immediately after his death his sons mortgaged his property to Moti Gelaji, one of his creditors. On the 11th August, 1897, another creditor, Jaitha Kupaji, obtained letters of administration to the estate of the deceased, and, as such administrator, sold the property to the son of the mortgagee, the latter having died. Subsequently the plaintiffs obtained a money decree against the estate and sued to establish their right to attach the property, alleging that the sale was void under section 53 of the Transfer of Property Act (IV of 1882). The lower Appellate Court held that the purchase was for value and that there was no evidence of fraud, and it dismissed the suit. On second appeal,

Held, (affirming the decree) that the sale was valid. The fact that it was a sale of the whole of the property of the deceased to one of his creditors made no difference. The only question was whether the transaction was in good

* Second Appeal No. 389 of 1902.

faith and for proper consideration. The test of good faith in such cases is whether the transfer is a mere cloak for retaining a benefit to the grantor. On the findings of the lower Court it appeared that in this case it was intended that the grantee should have the property and keep it.

SECOND appeal from the decision of H. L. Hervey, District Judge of Surat, reversing the decree of Ráo Sáheb M. B. Hora, Subordinate Judge at Surat.

The plaintiffs brought this suit to establish their right to attach and sell certain property in execution of a decree obtained by them on 28th September, 1899, against the estate of Byramji Kuverji, deceased, and his brother Manekji.

Defendants 1 and 2 claimed that the property was theirs, alleging that they had bought it on the 16th September, 1898, from the third defendant, who was the administrator of the estate of the deceased Byramji Kuverji, and the question raised in the suit was whether this sale was good against the plaintiff and other creditors of Byramji, having regard to the provisions of section 53 of the Transfer of Property Act (IV of 1882).

The plaintiff and one Moti Gelaji (father of defendants 1 and 2) and one Jaitha Kupaji were creditors of the deceased Byramji Kuverji and his brother Manekji Kuverji. Byramji died on the 24th June, 1896, intestate. On the 7th August, 1896, Byramji's three sons and his brother Manekji mortgaged the property in question with possession to Moti Gelaji (father of defendants 1 and 2) for Rs. 3,999, which sum was made up of Rs. 2,142-8-0 then due and a further advance of Rs. 1,856-8-0 made by the mortgagee at the time of the mortgage. Of the latter sum Rs. 1,000 was paid to Jaitha Kupaji and Rs. 856 to the plaintiffs, all of whom as above stated were creditors of the deceased Byramji and his brother Manekji.

At the date of this mortgage no letters of administration had been taken out to the estate of Byramji.

On the 11th August, 1897, Jaitha Kupaji (defendant 3) applied as one of the creditors for letters of administration and they were issued to him on the 5th July, 1898. Subsequently Moti Gelaji died, leaving two sons (defendants 1 and 2), of whom one (defendant 2) was a minor. A question as to the validity of the mortgage afterwards arose between the administrator

1903

NATHA v. MAGANCHAND.

(defendant 3) and defendant 1 which was referred to arbitration on the 31st July, 1898.

On the 1st August, 1898, the plaintiffs as creditors of the deceased gave notice to the administrator (defendant 3) not to alienate the property.

On the 5th August, 1898, an award was made in the arbitration, which recognised the mortgage made to Moti Gelaji. This was filed in Court and a decree in terms thereof was passed on the 30th August, 1898. The first defendant thereupon applied under section 257A of the Civil Procedure Code (Act XIV of 1882) and obtained the sanction of the Court for the satisfaction of the decree by the sale of the mortgaged property; and on the 16th September, 1898, the administrator (defendant 3) sold the said property to the first defendant for Rs. 4,999. This sum was made up of the mortgage debt, interest and charges and Rs. 300 paid in cash.

On the 28th September, 1899, the plaintiffs obtained a money decree against the estate of Byramji Kuverji and his brother Manekji Kuverji, and in the following November attached the said property in execution. The first defendant thereupon applied to the Court to raise the attachment. This application was granted and the plaintiffs were referred to a regular suit.

The plaintiffs accordingly in 1900 filed this suit to establish "their right to attach and sell the said property in execution," alleging that the sale thereof by the third defendant to the first defendant was fraudulent and collusive and without consideration.

The Subordinate Judge held that the sale was fraudulent and collusive, and he therefore set aside the sale and decreed the plaintiffs' claim.

On appeal, the District Judge found that "defendant 1 was a *bonâ fide* purchaser for value of the property which plaintiffs seek to attach and that he is not shown to have acted in fraud of the creditors of Byramji's estate." He therefore reversed the decree passed by the Subordinate Judge and dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

1903.

NATHA v. MAGANCHAND.

M. B. Chaubal and *M. K. Mehta* for the appellants (plaintiffs):—They referred to sections 269 and 282 of the Succession Act (X of 1865) and *Doe Woodhead* v. *Fallow*.[1]

Manubhai Nanabhai for the respondents (defendants).

CHANDAVARKAR, J.:—This was a suit brought by the appellants (plaintiffs) against the three respondents (defendants) to establish their right to attach and sell certain lands in execution of a decree obtained by them on the 28th of September, 1899, against the estate of one Byramji Kuverji, deceased, and against his brother Manekji Kuverji.

Defendants 1 and 2 contested the claim on the ground (*inter alia*) that they had purchased the property on the 16th of September, 1898, from defendant 3, who had obtained letters of administration to the estate of the deceased Byramji. Defendant 3 admitted the sale to defendants 1 and 2, and pleaded that as the cause of action against him was different from that against defendants 1 and 2, he had been improperly made a party to the suit.

The Subordinate Judge who tried the suit decreed the plaintiffs' claim, but in appeal the District Judge of Surat has rejected it.

It is necessary to state at the outset certain facts, which are either admitted or undisputed, as on them turn the questions of law which arise in the case. Byramji Kuverji and Manekji Kuverji were brothers. The plaintiffs, defendant 1's father and defendant 3 were their creditors. Byramji Kuverji died on the 24th of June, 1896, leaving him surviving his widow Meherbai and three sons, Pestonji, Framji and Hormasji, and his brother Manekji Kuverji. On the 7th of August, 1896, Byramji Kuverji's three sons and Manekji Kuverji mortgaged the property in dispute to defendant 1's father for Rs. 3,999. Out of this sum Rs. 2,142-8-0 formed the debt due to the latter from Byramji Kuverji and Manekji Kuverji, and the remaining Rs. 1,856 were paid in cash by the mortgagee. Out of this sum of Rs. 1,856, Rs. 1,000 were paid to defendant 3 and Rs. 856 to the plaintiffs, both of these being creditors of the two brothers.

(1) (1822) 2 Cr. & Jer. 481.

1903.

NATHA v. MAGANCHAND.

At the time of this mortgage no letters of administration had been taken out to the estate of the deceased. The mortgage was, therefore, invalid. But on the 11th of August, 1897, defendant 3, as one of the creditors of the deceased, applied for letters of administration and obtained them on the 5th of July, 1898. On the 31st of July, 1898, defendant 1 and defendant 3 referred to private arbitration the question as to the validity of the mortgage obtained by the former. On the 1st of August, 1898, the plaintiffs, as creditors of the deceased, gave notice to defendant 3 not to alienate the property. On the 5th of August, 1898, the private arbitration resulted in an award recognising the mortgage in favour of defendant 1's father. On the 23rd of August defendant 1 filed the award in Court, and obtained a decree in terms thereof on the 30th of August, 1898.

Defendant 1 applied for and obtained sanction from the Court to settle the decree under section 257A of the Code of Civil Procedure. Accordingly, on the 16th September, 1898, defendant 3, as administrator of the property, sold it to defendant 1 for Rs. 4,999. This amount of the consideration for the sale was made up as follows: Rs. 3,999, which was the consideration of the mortgage; Rs. 500 interest on Rs. 3,999; Rs. 70 for the stamp and registration fees of the sale-deed; Rs. 94 due on a *samadaskat* dated the 27th of April, 1896; and Rs. 300 paid in cash. It is this sale by defendant 3 to defendant 1 which the appellants seek to set aside as a fraudulent and collusive transaction. The District Judge has found that it is neither fraudulent nor collusive, but his finding is impeached before us mainly on the ground that he has not considered the question, material to the case on the pleadings, whether, though there was no collusion or fraud, there was an intent on the part of defendants 1 and 2 to defeat or delay creditors.

Mr. Chaubal, in arguing this second appeal, has taken his stand on the first clause of section 53 of the Transfer of Property Act. The proviso to that section, however, lays down that nothing in the preceding part of it shall impair the rights of a transferee in good faith and for consideration. Here the District Judge has found that there was proper and sufficient consideration for the sale, and the question is whether his finding that

there was neither fraud nor collusion necessarily implies that it was a *bonâ fide* transfer. It was said that defendant 3 had sold the whole of the property to one of the creditors (*i. e.*, defendant 1) for an existing debt and a cash advance, and that that was a badge of fraud because the deed of sale was nothing less than a preference of this particular creditor; but in *Alton* v. *Harrison*(1) it was held that it makes no difference in regard to the Statute of Elizabeth whether the deed sought to be set aside as void deals with the whole or a part of the grantor's property; and that view was followed in *Ex parte Games*.(2) In the former of those cases the assignment was for an existing debt and in the latter, as in the present, it was for an existing debt and a cash advance. The only question in such cases is whether the transaction is *bonâ fide*, *i. e.*, whether it is protected by good faith. The test of *good faith* which has been applied in English decisions on similar cases arising under Statute 13 Eliz., c. 5, from which section 53 of the Transfer of Property Act is substantially borrowed, is whether the transfer is, to use the words of Sir G. M. Giffard, L.J., in *Alton* v. *Harrison*,(1) "a mere cloak for retaining a benefit to the grantor." See also *Ex parte Games*, *In re Bamford*.(2) And it must be taken on the District Judge's findings here that the deed was not a mere cloak, but that it was intended thereby that the grantee should have the property and keep it.

But Mr. Chaubal has presented several arguments with a view to show that the finding as to consideration is not sound in law. In the first place, he contends that as the mortgage to defendant 1 by the sons and brother of the deceased Byramji Kuverji was invalid, having been made at a time when no letters of administration to the deceased's estate had been taken out, it could not form a proper consideration for the sale. The mortgage was undoubtedly invalid; but the fact stands, apart from the mortgage, that Rs. 2,142-8-0 were due from the mortgagors, that Rs. 2,142-8-0 were due from the deceased Byramji to respondent 1, that Rs. 1,856 were received by the mortgagors in cash at the date of the mortgage and paid to two of the deceased's creditors, of whom the appellant was

(1) (1869) L. R. 4 Ch. 622 at p. 626. (2) (1879) 12 Ch. D. 314.

1903.

NATHA v. MAGANCHAND.

one. Had the mortgage been set aside, defendant 1 would have been relegated to the position of a creditor of the deceased's estate to the amount at least of Rs. 2,142-8-0; and the remaining amount of Rs. 1,856 having been paid by him for the benefit of the deceased's estate and having gone into the pockets of the deceased's creditors, it was quite within the power of defendant 3, as administrator of the deceased's estate, to recognise it as a debt due from that estate to defendant 1. The Subordinate Judge in this case doubted whether after the mortgage defendant 1 could have fallen back on his original right as a creditor; but as the mortgage was not one by any person legally representing the deceased's estate, that defendant could as against it claim still as its creditor, if the estate could repudiate the mortgage. It was not contended before us that as to this amount of Rs. 1,856 there could be no privity between defendant 1 and the estate so as to make the latter liable for it; nor could such contention avail the plaintiffs, seeing that, as found by the District Judge, they had been assenting parties to the transaction. The mere fact, then, that the mortgage was invalid, is not sufficient in law to deprive the sale of the consideration which in substance existed.

Secondly, Mr. Chaubal attacked the consideration for the sale on the ground that part of the debt due to defendant 1 was barred by limitation at the date of the sale. The amount of this part is only Rs. 873, and even assuming that it was barred, it cannot be held on that account that there was no consideration for the sale and that the deed is void *in toto*. If the purchaser under such circumstances proves that the greater part of the consideration has been satisfied, the fact that a small part of it is still legally due is not sufficient to vitiate the sale for want of consideration. The argument that part of the consideration was barred at the date of the sale rests on the allegation that there is no evidence to show that Rs. 72 were paid by Barjorji as Byramji's agent. But neither in the Court of first instance nor in the District Court was any point raised questioning Barjorji's agency; at any rate the District Judge's judgment does not show that it was raised, and his finding as to Rs. 2,142-8-0, which admittedly included Rs. 801 minus Rs. 72

paid as interest by Barjorji, must be accepted as one amounting to a finding that Rs. 801 were not barred at the date of the sale.

But it was urged that, supposing the main consideration for the sale was not the mortgage but the amount of the debt due to defendant 1 from the deceased's estate, according to section 282 of the Indian Succession Act he as one of the creditors had no right of priority over others, and that it was the duty of defendant 3 to divide the assets of the deceased equally and rateably among all the creditors, instead of selling the deceased's property to defendant 1 and thereby in effect giving him priority which he could not have legally claimed. That, however, raises a question which does not arise in the present case. The plaintiffs sue here to set aside the sale to defendant 1 as fraudulent and collusive and without consideration. If the sale is not tainted on any of the grounds alleged, their action must fail. Under section 269 of the Indian Succession Act defendant 3 could sell the property as he thought fit. It may be—as to which we express no opinion—that the plaintiffs have a right of action against defendant 3 and defendant 1 on the ground that there has not been a proper administration of the estate of Byramji; but they must bring a suit for administration claiming proper relief on behalf of all creditors: *Burjorji* v. *Dhunbai.*[1] The present suit is brought by the plaintiffs in their own interests to try the validity of the deed of sale to defendant 1, and as the deed is protected by good faith and consideration, the suit must fail. If any authority were required for that, *Alton* v. *Harrison*,[2] already referred to, supports it. We must confirm the decree with costs.

Decree confirmed.

(1) (1891) 16 Bom. 1. (2) (1869) L. R. 4 Ch. 622.