

the land unless the parties can (without prejudice to any right of appeal) agree as to the same the lease to run from the 8th of December 1900 and the rent thereby reserved to run from that date; and there must be an undertaking by the Municipality to pay the rent that has accrued in the interim.

In case the Municipality elect not to take a lease as above provided, then there must be a decree for a sum to be hereafter determined for use and occupation from the 8th of December 1900 subject to the set-off hereinafter mentioned.

And there must be a decree in favour of the Municipality for the amount paid by them in excess of their obligations up to the 8th of December 1900, and this amount will be set off against the rent or amount payable for use and occupation as the case may be. I have on the score of convenience taken the 8th of December as the appropriate date having regard to what evidently was the understanding of the parties.

We will deal with the costs and possibly other details in the decree when we learn whether the Municipality intends to avail themselves of the declaration we have made in their favour.

Decree varied.

Attorneys for appellants:—*Messrs. Crawford, Brown & Co.*

Attorney for respondent:—*E. F. Nicholson, Esquire, Solicitor to Government.*

A. H. S. A.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

ATMARAM GANOJI NAIK NALVADE (ORIGINAL PLAINTIFF),
APPELLANT, v. BALKRISHNA MAHADJI PARULEKAR (ORIGINAL
DEFENDANT), RESPONDENT.*

Decree—Execution—Fraud upon the Court.

B (defendant) obtained two decrees against R, one for Rs. 150 and the other for Rs. 750, the latter amount being payable by yearly instalments of Rs. 250 each. About the same time, K obtained a decree against R for Rs. 47. B presented a

* Second Appeal No. 462 of 1903.

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darkhast for the recovery of Rs. 182-7-9 under his first decree; and K also about that time presented his *darkhast* to execute his decree. B then presented another *darkhast* in respect of money due under his second decree, in which he prayed for rateable distribution under section 294 of the Civil Procedure Code (Act XIV of 1882). In his first *darkhast* B prayed for attachment and sale of the property belonging to R: and the property was accordingly placed under attachment. Subsequently R made an application to the Court to allow him one month's time to raise money in order to satisfy K's decree and also the first decree of the defendant. The Court granted him one month's time and issued to him a certificate, as required by section 305 of the Civil Procedure Code (Act XIV of 1882), which expressly directed that the amount realized by sale or mortgage of the property should be paid into Court and not to the judgment-debtor. The property in dispute was sold by R to the plaintiff privately; and the plaintiff made two applications to the Court in which he stated that he had produced before the Nazir an amount of purchase money sufficient to satisfy K's decree and the first decree of B, and prayed that the property might be released from attachment. The Court granted the applications; but B on the same day applied to the Court asking the Court not to confirm the sale and withdraw the attachment, as the sale to the plaintiff was made to defeat his later decree. The Court held the sale to be fictitious and fraudulent. B then got the property attached and sold in execution of his later decree and purchased it himself with the permission of the Court. The plaintiff, shortly after this, filed a suit against B to recover possession of the property.

Held, that under the circumstances it was clear that a fraud was practised upon the Court, and that therefore the purchase by the plaintiff was vitiated by the fraud.

A purchase, which has received the sanction of the Court, will not be set aside upon slight grounds, but if the approval of the Court is obtained by misrepresentation, or by withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud and act accordingly.

Boswell v. Coaks⁽¹⁾ followed.

SECOND APPEAL from the decision of Mahadev Shridhar, First Class Subordinate Judge, A. P., at Ratnagiri, reversing the decree passed by M. M. Bhatt, Subordinate Judge of Malvan.

Suit to recover possession of immoveable property.

Balkrishna Mahadji Parulekar, the defendant, obtained two decrees against Ramchandra Sadashiv Kirloskar: the one in suit No. 9 of 1897 on the 12th February 1897 for Rs. 150 and the other in suit No. 379 of 1898 on the 19th May 1899 for Rs. 750.

⁽¹⁾ (1884) 27 Ch. D. 424 at p. 454.

The second decree for Rs. 750 was made payable by yearly instalments of Rs. 250 each, the first instalment being directed to be paid in January 1900. There was a third decree obtained by Anant Laxuman Kunte against Ramchandra Sadashiv Kirloskar for Rs. 47.

The defendant made *darkhast* No. 67 of 1898 for the recovery of Rs. 182-7-9 under his decree No. 9 of 1897. It was presented on the 1st February 1898, and sought to realize the amount by the attachment and sale of the property in suit. Anant Laxman Kunte also applied (*darkhast* No. 5 of 1899) to execute his decree. The defendant then presented another *darkhast* (No. 425 of 1899) on the 14th November 1899, seeking payment of the amount amended by his decree No. 379 of 1898 by rateable distribution of the assets (section 295 of the Civil Procedure Code, 1882) which might be realized by sale under his *darkhast* No. 67 of 1898 and Anant Luxman Kunte's *darkhast* No. 5 of 1899. As the property was sought to be attached and sold in execution of his decree No. 9 of 1897 and Anant Laxman's decree, the defendant did not apply for attachment and sale under his second *darkhast*, but only prayed for rateable distribution. Again, this decree was made payable by instalments which had not fallen due when the *darkhast* for execution was made, but the defendant prayed that in case the sale on the two other *darkhasts* did not take place until after the due date of the instalments, the whole amount of the decree should be paid him out of the assets by rateable distribution.

The attachment placed on the property in suit of Ramchandra Sadashiv Kirloskar in execution of defendant's *darkhast* No. 67 of 1898, was sought to be raised by Narayan Vinayak Joshi (father-in-law of Ramchandra Sadashiv), who claimed to have purchased the property from its owner Ramchandra Sadashiv under a registered sale-deed, dated the 1st July 1896, and contended that the property belonged to him and was not liable to be attached and sold in execution of a decree against Ramchandra. On the 12th November 1898, the Court held that the sale was not a *bond fide* transaction and confirmed the attachment.

The property in dispute was then sold at a Court-sale, but on the 17th June 1899, Ramchandra Sadashiv got the sale set

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aside on the ground of material irregularity in the publication of the sale resulting in the price raised being inadequate.

On the 20th November 1899, Ramchandra Sadashiv applied to the Court for one month's time to raise by privately mortgaging or selling the property under attachment the amount for which the *darkhaste* Nos. 5 of 1899 and 67 of 1898 were made. In this application the *darkhast* presented by the defendant in execution of his decree No. 379 of 1898 was entirely ignored; but the certificate under section 305 of the Civil Procedure Code (Act XIV of 1882) which was asked for in express terms mentioned the defendant's second *darkhast* along with the other two. The Court granted the certificate asked for. It stated that the permission to sell or mortgage his property privately was given to Ramchandra Sadashiv on the express condition that the amount for which the sale or mortgage might be made should be paid into Court and not to the judgment-debtor.

On the 13th December 1899, Ramchandra Sadashiv executed a sale-deed of the property to the plaintiff. In the sale-deed the Court's permission and the certificate under section 305 of the Civil Procedure Code were ignored and the sale was made a purely private sale. The consideration for the sale was recited in the sale-deed as Rs. 184-10-0 the amount of the defendant's decree No. 9 of 1897, and Rs. 50-11-6 the amount of Anant Kunte's decree, and Rs. 564-10-6 received in cash. With regard to the sale-deed, dated the 1st July 1896, passed in favour of Narayan Vinayak Joshi, the sale-deed recited "that the sale has been declared by the Malvan Second Class Subordinate Judge's Court to be a bogus transfer, but we have privately settled the amount of that purchaser and paid it off." The plaintiff then paid into Court only the amount sufficient to satisfy the defendant's first decree and Anant Luxman's decree; and applied to have the attachment raised. The Court raised the attachment. But on the same day, the defendant applied to keep up the attachment, contending that the sale to plaintiff was fictitious and fraudulent. The Court found that there was suspiciously undue haste in connection with the raising of the attachment; and granted the defendant's application.

The defendant thereafter got the property attached and sold in execution of his second decree; and purchased it himself with

the permission of the Court. The plaintiff did not intervene to prevent the sale, though a notice was issued to him in the execution proceedings under section 287 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff then brought a suit to recover from the defendant the possession of the property, basing his title on the sale-deed dated the 13th December 1899.

The defendant contended, *inter alia*, that Ramchandra Sadashiv executed a nominal sale-deed without consideration in favour of the plaintiff; and that the deed in favour of the plaintiff was executed by Ramchandra in fraud of and to defeat the claims of his creditors.

The Court of first instance held that the plaintiff's sale-deed was valid and *bond fide* transaction; and decreed the plaintiff's claim.

On appeal this decree was reversed and the plaintiff's claim dismissed by the lower Appellate Court, it being of opinion "that plaintiff is not a *bond fide* purchaser, but is merely a substitute for Ramchandra's father-in-law to screen the property."

The plaintiff appealed to the High Court.

C. H. Setalvad (with him *H. C. Ooyaji*) for the appellant.

M. B. Chaulal for the respondent.

CHANDAYARKAR, J. :—Whether section 53 of the Transfer of Property Act, upon which the judgment of the lower Appellate Court proceeds, is applicable to this case or not, it is clear upon the facts found proved by that Court that the sale, under which the plaintiff claims, was the result of a fraud practised upon the Court, whose sanction was necessary to give it validity, and that the plaintiff was a party to that fraud. The facts are that the defendant Balkrishna obtained two decrees against Ramchandra Kirloskar, one in suit No. 9 of 1897 for Rs. 150 and the other on the 19th May 1899 for Rs. 750, this latter amount being payable by yearly instalments of Rs. 250 each. About the same time one Kunte obtained against Kirloskar a decree for Rs. 47. The defendant presented *darkhast* No. 67 of 1898 for the recovery of Rs. 182-7-9 under his first decree and Kunte presented his *darkhast* No. 5 of 1899 about the same time. The defendant presented another *darkhast*, No. 425 of 1899, in respect

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of money due under his second decree, and in that *darkhast* he prayed for rateable distribution under section 294 of the Civil Procedure Code.

Now, on the 20th of November 1898, Kirloskar made an application asking the Court to allow him one month's time to raise money in order to satisfy Kunte's decree, and also the first decree of the defendant. The Court granted him one month's time and issued to him a certificate as required by section 305 of the Civil Procedure Code, authorizing a private sale or mortgage of the property now in dispute. The certificate expressly directed that the amount for which the sale or mortgage might be made should be paid into Court and not to the judgment-debtor. The property in dispute was then sold to the plaintiff privately. The plaintiff made two applications to the Court, Exhibits 61 and 62, on the 13th December 1899, in which he stated that he had produced before the Nazir an amount of the purchase money sufficient to satisfy Kunte's decree and the defendant's first *darkhast*. He, therefore, prayed that the property might be released from attachment.

It will be observed from these facts that, in the first place, the purchase money was not deposited in Court as required by the certificate. The plaintiff knew that he was buying the property under section 305 of the Civil Procedure Code and must be presumed to have had knowledge of the condition in the certificate. It is true that the Court granted his application for the deposit of an amount sufficient to satisfy the two decrees, but both the Courts find that there seems to have been something suspicious about the time and the circumstances under which these applications were made to the Court. The applications were made at 5 P. M. and the Court was not informed of all the facts. The plaintiff ought to have drawn the Court's attention to the condition in the certificate if he wanted to be relieved from compliance with it; but he suppressed the fact to derive advantage as against the defendant. Upon these findings of fact a fraud upon the Court is clearly established to bring the case within the principle of *Boswell v. Coaks*⁽¹⁾, that "a purchase which has received the

(1) (1884) 27 Ch. D. 424 at p. 454.

sanction of the Court will not be set aside upon slight grounds: but, if the approval of the Court has been obtained by misrepresentation, or by the withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud and will act accordingly." The plaintiff's purchase is therefore vitiated by the fraud practised on the Court.

For these reasons we confirm the decree of the lower appellate Court with costs.

Decree confirmed.

R. R.

FULL BENCH.

APPELLATE CIVIL.

*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Russell,
Mr. Justice Batty and Mr. Justice Aston.*

MANILAL HARGOVANDAS (ORIGINAL PLAINTIFF), APPLICANT, v.
VANMALIDAS AMRATLAL (ORIGINAL DEFENDANT), OPPONENT.*

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Civil Procedure Code (Act XIV of 1882), section 525—Reference to arbitration—Award—Question whether the matter had been referred and an award had been made—Question which the Court can and ought to decide.

When an application is made under section 525, Civil Procedure Code (Act XIV of 1882), to file an award as an award made in the matter which had been referred to arbitration, the question, if raised, whether the matter had been referred and an award had been made thereon, is one which the Court to which the aforesaid application has been made can and ought to decide.

Sam'l Nathu v. Jaishankar⁽¹⁾ explained.

The principle of *Stare decisis* is of undoubted value in its bearing on the law of property, but the doctrine is not of the same importance in the department of procedure when the practice of one Court is to be brought into conformity with the settled practice of other Courts and the plain terms of the Code.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of N. V. Samant, Additional Second Class Subordinate Judge

*Application No. 7 of 1905, under the extraordinary jurisdiction.

(1) (1884) 9 Bom. 254.