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whose marriage expenses have to be provided for out of its property, has never been held to deprive any of its co-parceners of the right of alienating his own share or of demanding a partition, though that may be a reason for upholding the alienation or allowing the partition subject to those expenses. In the present case it will be for the Court, if necessary, to decide upon the evidence and circumstances of the case, after taking into consideration the pleas of the respective parties, whether the partition claimed by the plaintiff should be allowed subject to any conditions warranted by Hindu Law.

As the lower appellate Court has dismissed the suit practically upon a preliminary ground, *viz.*, that the suit for partition cannot lie, we must reverse the decree and remand the appeal for disposal according to law. Costs to abide the result.

Decree reversed. Case remanded.

R. R.

PRIVY COUNCIL.*

[On appeal from the High Court of Judicature at Bombay.]

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February 6, 7, 8.
July 22.

CHABILDAS LALLUBHAI (PLAINTIFF) *v.* DAYAL MOWJI AND OTHERS (DEFENDANTS).

Vendor and Purchaser—Auction sale under power of sale in a mortgage—Condition of sale depreciatory of mortgagor's title—Solicitor of mortgagee acting for purchaser in preparation of deed of conveyance—Constructive notice—Conduct of mortgagees at sale inducing bidders to leave—Knowledge of purchaser of such circumstances—Notice—Proviso in mortgage to protect purchaser—Transfer of Property Act (IV of 1882), sec. 69.

At an auction sale under a power of sale in a mortgage on conditions one of which both the lower Courts found to be a depreciatory condition wholly unwarranted by the state of the mortgagor's title, the mortgaged property was knocked down to the appellant who the same day signed a written contract to purchase. In a suit by the purchaser against the mortgagor for possession of the property, to which suit the mortgagees were made parties, *Held* that the purchaser was not affected with constructive notice of the true state of the title

* *Present*: LORD MACNAGHTEN, LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

by reason of the fact that some days after the contract of sale was completed, he instructed the mortgagees' solicitor to act for him in the preparation of the deed of conveyance, and that the solicitor knew that the condition of sale was unjustifiable. The knowledge of the solicitor as to the title was not acquired in the matter for which he was the purchaser's agent and could not be used to upset a transaction of a date before that agency commenced. The sale was therefore not invalid on that ground.

The mortgage which was in the English form contained a proviso that upon the exercise of the power of sale "the purchaser shall not be bound to see or inquire whether any default has been made, or otherwise as to the necessity or expediency of such sale, or that the sale is otherwise improper or irregular, and notwithstanding any such irregularity, such sale shall, as far as regards the safety and protection of the purchaser be deemed to be within the aforesaid power, and be valid and effectual accordingly, and the remedy of the mortgagor shall be in damages only." It was found by the first court on the facts that at the sale the mortgagee defendants by themselves or their agents so conducted themselves with reference to the sale that bidders were induced to leave, and that the purchaser was present and had notice of those circumstances.

Held that the purchaser was affected with notice of the impropriety of the sale, and bought at his own risk, notwithstanding the proviso in the mortgage and the provisions of section 69 of the Transfer of Property Act (IV of 1882), and that these circumstances invalidated the sale.

APPEAL from a judgment (24th March 1904) and a decree (25th June 1904) of the High Court at Bombay, which modified a decree (26th February 1903) of the Judge sitting in exercise of the Original Civil Jurisdiction of the same Court.

The principal question involved in this appeal was whether the respondent Dayal Mowji was entitled to redeem a mortgage executed by him on 8th April 1896 notwithstanding a sale on 8th October 1900 of a portion of the mortgaged property to the appellant.

Dayal Mowji, in consideration of a loan of Rs. 30,000, executed the mortgage in suit of a house and land situate on Cowasjee Patel Tank Road, Bombay (together with other property in Bombay of which he was the owner), in favour of Lalji Doongersey and Jadowji Doongersey, the other respondents, on 8th April 1896. The deed was in the English form and provided for payment of the principal in three years, and for quarterly payments of interest at the rate of 7½ annas per month. It gave the mortgagees a power of sale on default in such payments, and

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after service of a notice requiring payment of the amount in default on the mortgagor. It also contained the following proviso:—

"Provided always and it is hereby agreed and declared that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see or enquire whether any such default has been made or whether any such notice has been given or affixed as aforesaid, or otherwise as to the necessity or expediency of such sale or that the sale is otherwise improper or irregular. And notwithstanding any such irregularity such sale shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf and be valid and effectual accordingly, and the remedy of the said mortgagor, his heirs, executors, administrators or assigns in respect of any irregularity in such sale shall be in damages only."

The title deeds, which showed a good title in the respondent from the year 1810, were deposited with Messrs. Tyabji, Dayabhai & Co., the mortgagees' solicitors. On 18th January 1899, Messrs. Tyabji, Dayabhai & Co. gave notice to Dayal Mowji that as he was in default in payment of the interest, they proposed to sell the mortgaged property at the expiry of three months from the date of notice: but the sale was not proceeded with as Dayal Mowji, for further security, deposited with the mortgagees a mortgage executed in his favour by other persons. Further demands for payment were subsequently made on 23rd November 1899 and 15th March 1900. In exercise of their power of sale the mortgagees advertized for sale on 8th October 1900 the properties of Dayal Mowji mortgaged under the deed of 8th April 1896, under conditions of sale of which the 6th was as follows:—

"6. The vendors are the mortgagees selling the property by virtue of an indenture of mortgage dated the 8th day of April 1894 made between Thacker Dayal Mowji the mortgagor of the one part and Thacker Lalji Doongersey and Jadowji Doongersey carrying on business in partnership under the name, style and firm of Messrs. Doongersey Gangji & Co., the mortgagees of the other part and the purchaser shall accept such title as the vendors can give and shall not require the vendors to enter into any other covenant except a covenant that they have not incumbered and shall not raise any question or objection to the title and shall be held bound to accept such title as the vendors possess."

And the property now in suit, the house in Cowasji Patell Tank Road, was put up to auction on 8th October, and was knocked

down to the appellant, as purchaser, for Rs. 20,500. In spite of protests by Dayal Mowji a conveyance of the property so purchased was executed by the mortgagees on 20th October 1900, Messrs. Tyabji, Dayabhai & Co. acting as solicitors for the purchaser (the appellant) also. Dayal Mowji refused to deliver possession to the appellant, who thereupon instituted the suit out of which the present appeal arose on 26th August 1901, against Dayal Mowji. By order of the Court the mortgagees were subsequently added as defendants.

The plaint stated the fact of the auction sale, his purchase thereat, the execution of the conveyance in his favour, and the refusal of the defendant Dayal Mowji to give up possession of the house, and prayed for delivery of possession and payment of damages and costs.

Dayal Mowji the first defendant in his written statement alleged that the conditions on which the property was put up to auction were unnecessarily stringent and depreciatory and not adopted to the state of the title of the property, nor such as would be used in the disposal of his property by a prudent and reasonable owner selling in his own right; there was in the conditions no reference to the title of property which went back to 1810, but on the contrary the conditions provided that the purchaser should take such title as the vendor had; and before the sale the first defendant's solicitor had warned intending bidders that if the sale was proceeded with subject to those conditions he (Dayal Mowji) would take steps to set it aside. He also alleged that during the sale there were very few bidders present; that the bidding began at Rs. 10,000, but when it rose to Rs. 20,500 which was a bid by the plaintiff negotiations had been opened by the first defendant for the postponement of the sale for a month, to which the mortgagees agreed on certain conditions, and the parties adjourned to a firewood depôt adjoining the property for the purpose of coming to a settlement of the matter, but while the conditions were being reduced to writing by Balkrishna (Exhibit 23) the mortgagees made announcements which led the bidders and others present to suppose that the sale was adjourned, and consequently the bidders including the plaintiff went away; that

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the negociations fell through, the parties not being able to agree and the first defendant and Balkrishna, his solicitor, left the premises; that after they had gone the mortgagees continued the sale and there being no bids beyond that of the plaintiff for Rs. 20,500, the property was knocked down to him. The first defendant charged the mortgagees and the plaintiff with fraud and collusion in so selling the property at a price which they knew to be much below its value, and knowing also that the sale was postponed, and that the bidders and the defendant and his solicitor had gone away. The first defendant counter-claimed that the sale for these reasons should be set aside as invalid.

The mortgagee defendants stated that the conditions of sale were the usual conditions on which mortgaged properties were sold in Bombay and were not stringent nor depreciatory, it not being to their interest to make them so as they were anxious that their security should realize the highest price obtainable; that there were more than 40 bidders at the auction sale; that these defendants made no announcements that the sale had been postponed, but that when the first defendant found that the property was just going to be knocked down to the plaintiff he made proposals for a settlement merely for the purpose of gaining time; that the sale was continued after a very short interruption, and it was wholly untrue that the bidders had left and that none were present when the sale was resumed. They denied any fraud or collusion and alleged that the property was sold for its full value.

The only two questions material to this report were (*a*) as to the nature of the conditions of sale; and (*b*) as to whether there was or was not a postponement of the sale and if there was what was its effect. On these points the first Court (RUSSELL J.) after negativing the allegations of fraud and saying that it was clear to his mind "that Dayal Mowji and Balkrishna went to the sale determined to raise every possible objection to it," continued:—

"The 6th condition was undoubtedly of a depreciatory character and there is a considerable difference between 'depreciatory' and 'stringent'; but whether the power of sale as worded is sufficient to protect the mortgagees in this respect is a question which I do not deal with here, as it is unnecessary in my view of this case. It is inconceivable that any prudent man putting his own property up

for sale would allow a condition such as that with a title such as in the present case to be printed. The title of Dayal to this property is to my mind a far better one than is to be got in most cases in this country.

"The system disclosed in this case as to the so-called practice of some attorneys to leave the settlement of the conditions of sale entirely to an auctioneer who can and does know nothing whatever of the title and has never seen the title deeds is one which cannot be too strongly deprecated. It shows a recklessness within the meaning of the words I have quoted from Lindley L. J.'s judgment in *Kennedy* v. *De Trafford*(1).

"But all these questions do not affect the plaintiff unless he fraudulently colluded with defendants 2 and 3 as to them, or that he had distinct notice that owing to the depreciatory condition the sale could be set aside. There is no evidence whatever that he did collude and I am not satisfied that he had such notice; consequently on this point it appears to me that Dayal's case must fail.

"The next question that arises is, was the sale postponed or were the bidders present induced by the conduct of the mortgagees to leave under the impression that it was postponed? If this is answered in the affirmative, is the plaintiff affected thereby? The evidence in the first of these questions like the other evidence in the case is absolutely conflicting, but the following facts, I think, are established.

"There no doubt was a conference between Dayal and Lalji as to the postponement. There is no doubt that Lalji consulted Chandulal once or more than once with reference thereto. There is no doubt that Balkrishna wrote out exhibit 23 at Chandulal's dictation. I cannot conceive how this document was worded as it is by an attorney of the capacity of Chandulal if the arrangement to be carried out was merely conditional on Dayal signing the terms. The use of the word 'confirm' the postponing the sale for one month, the expression 'in the meantime' all appear to me to point to the terms not having been and not having been intended to be conditional. It is obvious that these terms, whether they were exactly repeated to the bidders or not must have affected the minds of the bidders. The plaintiff's witnesses admit that two bidders left, but they say they were called back again. This is quite possible, but I can see no reason to doubt the evidence of those would-be bidders whom Dayal called who say they did leave believing the sale was postponed. I really can't find these persons guilty of giving false evidence on this point. Then, again, there is the most striking fact that the plaintiff himself left the sale. I think I may fairly say that he was anxious to buy this property, and, if so, I cannot understand, if the postponement was merely conditional and might have come to an end at any time, how he could have left the place and run the risk of somebody else buying the property. Balkrishna's note in his diary Exhibit 5 and the draft letter he wrote on the 8th of October and the letter he wrote on the 9th are

(1) [1896] 1 Ch. 762, (772): Affirmed [1897] A. C., 180.

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evidence that bidders did leave. Balkrishna was subjected to cross-examination of a very unpleasant character to him, but he gave his answers to my mind fairly and directly. If I am asked, therefore, to find that the interlineation in his diary is a fabrication, I must also hold that the letters which have been put in were also fabrications containing statements false to his knowledge. I am not prepared to do this. He had, as I have pointed out, no reasons to be friendly towards Dayal; but on this point of the case I do not rely solely on Balkrishna but on the other direct evidence of bidders having left. Chandulal admits that after the parties came out of the depôt the crowd was appreciably less than before they went into the depôt. If I am right in this, therefore, it appears to me that there were circumstances which put in question the propriety of the sale and which were brought to the knowledge of the plaintiff. He bought with that knowledge and therefore he became a party to the transaction which is impeached (*Jenkins* v. *Jones*(1)), or in other words the defendants 2 and 3 by themselves or their agents so conducted themselves with reference to this sale that would-be bidders at it were induced to leave. The plaintiff had notice of those circumstances, using the word 'notice' as it is defined in the Transfer of Property Act. He therefore bought at his peril, and as the sale was not a *bond fide* auction sale it must be set aside. . . . . Further, we have the fact which I consider proved that Dayal and Balkrishna left the depôt and drove off at once whether Dayal protested *en route* or not against the sale going on does not seem to me to affect the question. It seems to me they must have stayed on to see the end of the sale if they thought the stoppage of it was merely temporary. If I am right in the view I have taken of the evidence it follows that the sale was not carried to its proper conclusion and must therefore be set aside."

The learned Judge found on the evidence that the value of the property in suit was as near as possible Rs. 25,000, and concluded :—

"Of course the undervalue, *viz.* Rs. 20,500, is not such as to be of itself evidence of fraud, but it is a material circumstance to be taken into consideration on this point."

The appeal from that decision was heard by Sir L. JENKINS, C.J., and BATTY, J., who on the question as to the postponement of the sale differed from RUSSELL, J., and held that there was no postponement. As to this they said :

"The mortgagor's case is that at the break there was an actual postponement of the sale, that before the parties went into the depôt there was an agreement for postponement independent of any document that was in contemplation and

(1) (1869) 2 Giff., 99.

that a postponement was announced by the auctioneer. The purchaser and the mortgagees on the other hand maintain that there was no actual postponement or agreement for a postponement; that at the mortgagor's instance the break was made in the sale in order that there might be a postponement in case the mortgagor signed certain terms to be embodied in a document; that the mortgagor failed to sign the document and so the sale was resumed; and that no announcement was made by the auctioneer. I agree with Mr. Justice Russell that the mortgagor and his attorney went to the sale determined to raise every possible objection to it; they were determined it should not be carried out if they could help it, and I think it is important to bear this in mind in estimating the conflicting evidence and contentions in this case."

After discussing the evidence at some length the judgment proceeded:—

"It may be that many of those present at the sale left when the adjournment to the depôt took place, and even left under the impression that an actual postponement had taken place; but as balancing that we have the fact that all did not leave, and that the auctioneer himself remained and restarted the sale.

"The conclusion then to which I have come on a consideration of all the circumstances is that there was no agreement for postponement and that no postponement was announced by the auctioneer, the mortgagees, or any one authorised by them to take that step.

"Nor do I think that in this connection 'there were circumstances which put in question the propriety of the sale and which were brought to the knowledge of the plaintiff.' The break in the sale may have induced some people to leave, but it was brought about by the mortgagor; he it was who initiated the negotiations; he thus was responsible for this break, and cannot take advantage in his own favour and to the prejudice of his opponents of that which was a reasonable consequence of it. If bidders were told to go away, I am confident this was not done by the auctioneers or any one on their behalf; I think however that the mortgagor's bawling out as described by Pundlik may have been taken by bidders as an intimation to those present that they might go. But obviously the mortgagees and their purchaser cannot be affected by this.

"Nor do I think that there is any ground for holding that the conduct of the mortgagees in relation to the terms they required to be inserted in the letter was such as to create any equity against them."

As to the question whether the conditions of sale were depreciatory the judgment after setting out condition 6 of the conditions of sale continued:—

"First then, was this condition depreciatory, in other words, was it so restrictive of the ordinary rights of a purchaser as that its natural tendency would narrow the number of bidders or lessen the price they would be prepared to pay?

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"If conditions ever can prejudicially affect a sale in Bombay, I cannot imagine how it can be suggested that this would not. Not merely does it impose on the purchaser the obligation to take such title as the vendors can give a stipulation that may well have created a doubt as the condition shows that the vendor's title went back only to the 8th of April 1896 but it goes on to provide that the purchaser shall not raise any question or objection to title. It is difficult to understand how any prudent man could be induced to buy or even bid under such a condition, for consistently with it he may have to pay the amount of his purchase money and obtain in return that to which there is practically no title. But can it be said that the state of the title demanded its use?"

After stating the true state of the title, and observing that there was no justification for the mortgagee's solicitors' approval of it the learned Chief Justice said :—

"I am therefore of opinion that the state of the title did not call for condition 6 and that it was unreasonably used ..... It has been said that in fact the condition did not depreciate, that the bidding was brisk, and that the sum realized was in substantial accord with the true value of the property.

"In *Dance* v. *Goldingham* (1), there are the following pertinent remarks by James, L. J.: 'Then it is said that this condition has not, in effect, depreciated the sale, because it is shown that the full value has been given for the property. Upon that point there is a large amount of contradictory evidence, some witnesses saying that more would have been given, and others saying that more would not have been given, and that the full price was obtained. That is precisely the things which the Court cannot enquire into.' So here we cannot inquire whether the 6th condition has in fact had a depreciatory effect: it had a depreciatory tendency and that is enough.

"This brings me to the inquiry whether the purchaser in this case had such notice as would deprive him of the protection provided by the terms of the mortgage deed and the 69th section. The purchaser maintains that he had no notice of irregularity, but it is clear that even if for the sake of argument it be supposed that he was not present when the conditions were read out, or was unaware of their contents when he was bidding, yet he signed the conditions and must be taken to have been aware of their contents.

"Still though he had knowledge of the 6th condition it would not necessarily follow that he knew it was depreciatory: he might have thought, if he thought at all on the point that it was necessitated by the state of the title, which he had not then seen, though, if he had reflected on the matter at all it must have struck him that a title to which the condition was appropriate must have been of the weakest description, seeing that it not merely limited the title, to that of the mortgagees, but even on that forbade all questions and objections, and

(1) (1873) L. R. 8 Ch. 902 at p. 910: 42 L. J. Ch. 777 (779).

thereby on the face of the conditions imposed a restriction which could hardly under any circumstances be justifiable.

"Assuming for the sake of argument that no protest by Dayal at the auction came to the knowledge of Chabildas at the time of the auction, still can he claim that prior to the sale no knowledge came to him of the depreciatory condition? The sale to him, that is the conveyance, was on the 20th of October, and before that Tyabji Dayabhai & Co. had been engaged as his attorneys in the matter. Chabildas's evidence on this point is, 'Tyabji Dayabhai & Co. acted for me and the mortgagee. I told them to act for me as they know all about this case and the title. I don't know when I told him that. I can only say a few days after the sale to me.'

"What then is the legal consequence of Chabildas having employed Messrs. Tyabji Dayabhai & Co. under these circumstances and for this reason? Now it is the rule that where a man employs another to act as his agent the knowledge of his agent derived in the transaction must be imputed to him as though it were his own knowledge. This is not founded on technicality but on substantial justice for as was said by Lord Hatherley in *Rolland* v. *Hart* (1), 'Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of.'

"This principle has recently been applied by the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2). There one Kedarnath Dutt acted as attorney both for the mortgagor and the mortgagee. In the course of the transaction it came to his knowledge that the mortgagor was a minor and in reference to the circumstances of that case their Lordships said 'He stood in the place of the defendant for the purposes of the mortgage and his acts and knowledge were the acts and knowledge of his principal.'

"In *Fuller* v. *Benett* (3), it was said 'The general propositions—first that notice to the solicitor is notice to the client, secondly that where a purchaser employs the same solicitor as the vendor he is affected with notice of whatever that solicitor had notice in his capacity of solicitor for either vendor or purchaser in the transaction in which he is so employed; and thirdly that the notice to the solicitor which alone will bind the client must be notice in that transaction in which the client employs him—have not as general propositions been disputed at the bar.' It is not necessary however in the circumstances of this case to go as far as is here laid down.

"Mr. Chandulal of Messrs. Tyabji Dayabhai & Co. says, 'I acting for the mortgagees approved the conditions. At that time these title-deeds were in our possession as general attorneys for the mortgagees. I cursorily referred to these deeds when I approved the conditions. By cursorily I mean not very strictly.' Later he says—'I don't remember what I thought about the title when I examined it. When I approved the conditions of sale I did not recollect what

(1) (1871) L. R. 6 Ch. 678 (682).
(2) (1902) L. R. 30 I. A. 114: 30 Calc. 539.
(3) (1843) 2 Hare 394 at p. 402.

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I had thought of the title when I examined it. When I approved the conditions, I superficially considered the title. I did not think whether the title was good or marketable when I approved the conditions. When I approved the conditions, I don't remember what I did. I did not consider whether the mortgagee had a good or marketable title or no title at all. I don't remember if I thought or cared whether he had a title or not. I did not. I did not recollect then what I had found out in 1896. When I approved the conditions I must have looked at the title-deeds at the back of them. I must have looked at the back of them then, but I don't remember doing so. I don't remember if I found anything on the back of the deeds to make me look into them. If I had looked into the title then I would have charged for it.'

"From this we find that Chandulal knew in this particular transaction that the title-deeds in his possession went back to 1810 which from the cursory examination he made and the absence of any recollection of what he thought of the title when he examined it shows that the trifling defects on which he has subsequently relied as a justification at that time in no way influenced his judgment so that he could not even by honest mistake have been under the impression that the 6th condition was required by the state of the title. He moreover had distinct knowledge of the mortgagor's protests at the commencement of the auction. His knowledge therefore of the title was such as clearly to involve the consequences that the 6th condition was depreciatory, and its use as a breach of the duty owed to the mortgagor, for as he himself has admitted as an owner he would not have sold the property with that condition.

"Now let us turn back to the reasons which induced Chabildas to employ Chandulal's firm: it was because they knew all about the case and the title. 'I told them to act for me as they knew all about this case and the title.' If then this knowledge was the motive for the employment it (in my opinion) follows of necessity that the knowledge of Chandulal must be imputed to Chabildas just exactly as if he himself had possessed it, for in the words of the Privy Council Chandulal stood in the place of Chabildas for the purposes of the sale. But if Chabildas had possessed Chandulal's knowledge he would have known that the mortgagees were selling under conditions which were a breach of their duty to the mortgagor and so when the transfer was made to him on 20th October have bought with notice of that breach of duty.

"In my opinion, therefore, Chabildas is protected neither by the mortgage-deed nor by section 69 of the Transfer of Property Act, and is in no better a position than the mortgagees to resist the mortgagor's claim to redeem the property."

After finding that there was no acquiescence by the mortgagor which precluded him from now insisting on his objection to the sale, the learned Chief Justice concluded :—

"The only question is as to the form of decree and this arises out of the fact that the suit is one to set aside the sale without a prayer of redemption.

All the cases I have been able to find include a prayer for redemption and in *Faulkner* v. *The Equitable Reversionary Interest Society* (1), the V. C. evidently assumed that was the proper relief, for he there says 'what relief would they seek? They would say that they were entitled to recover the property upon paying the mortgage money.'

"This is not a mere matter of form; as against the mortgagees the purchaser has a good title; it is only as against the mortgagor that he fails. But before the mortgagor can recover the property he must redeem, and if by some means he loses his right to redeem then there is no one who can effectually disturb the purchaser's title. At the same time section 42 of the Specific Relief Act places an obstacle in the way of a mere declaration. The best way out of the difficulty perhaps will be to transfer the redemption suit to this Bench and pass one decree in both suits after Mr. Chabildas has been made a party to it. But this order can only be made in the other suit after hearing any objection that may be urged."

The other suit mentioned above was one instituted on 24th September 1901 by Dayal Mowji against the mortgagees and Chabildas Lallubhai to redeem the mortgage dated 8th April 1896, or in the alternative in case the sale the subject of the first suit, was upheld to redeem the remaining properties and recover damages. This suit was accordingly transferred to the appellate Bench which heard the suit setting aside the sale to Chabildas Lallubhai; and it was agreed that the whole of the evidence in that suit should be evidence in the transferred suit. Judgment was delivered in it on 15th April 1904; and on 25th June 1904 a final decree was made in both suits setting aside the sale and for the redemption of the mortgage.

On this appeal,

Sir Robert Finlay, K. C., and *C. W. Arathoon* for the appellant contended that the appellate Court was wrong in deciding that neither the provisions of the mortgage-deed nor section 69 of the Transfer of Property Act (IV of 1882) protected a person who purchased with notice of depreciatory conditions of sale. Reference was made to section 3 (as to "notice") of the Transfer of Property Act, and section 229 of the Contract Act (IX of 1872); and the oral evidence was referred to to show that the appellant, the purchaser, had no notice of the depreciatory conditions; that no protest had been made with reference to condition 6; and that the mortgagor respondent's own witness, Balkrishna,

(1) (1858) 28 L. J. Ch. 132 at p. 140: 4 Drew. 352 (356).

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admitted that that condition did not deter bidders. And the evidence was also referred to to show that that condition was a usual condition in sales in Bombay when a mortgagee sold under the power of sale in a mortgage; and that the present mortgagees had themselves sold a property under the same conditions. The decision of the appellate Court was also wrong as regarded the doctrine of constructive notice as affecting the appellant. The knowledge of Chandulal of the firm of the mortgagees' solicitors as to the mortgagor's title was not obtained in the course of the business transacted by him for the appellant. When he was agent for the appellant the contract of purchase had been signed and the deposit money paid by the appellant; besides he was not employed at all by the appellant to investigate the title. Reference was made to *Wyllie* v. *Pollen* (1). It was further contended on the evidence that the view taken by the appellate Court as to there being no postponement of the sale was correct, and that the first Court was in error in deciding the suit on a contrary view of the evidence as to what happened at the auction sale: and it was submitted that under the circumstances the sale to the appellant was valid and should be upheld, and the appeal consequently allowed.

Cohen, K. C., and *DeGruyther* for the mortgagor respondent, while contending that the auction sale was invalid for the reasons given by the appellate Court, relied chiefly on the decision of Mr. Justice Russell as to the postponement of the sale and the conduct of the mortgagees which he held vitiated it. The evidence showed that there was a prior arrangement by the mortgagees which they failed to carry out when the terms were written out at the wood depôt; and conclusively established that the appellant had notice of the depreciatory character of the conditions, and that the purchase was therefore made at his risk. He was not protected by the mortgage-deed nor by section 69 of the Transfer of Property Act, and he acquired no valid title at the sale. Reference was made to *Dance* v. *Goldingham* (2); *Falkner* v. *Equitable Reversionary Society* (3); and *Bailey* v.

(1) (1863) 32 L. J. Ch. 782.
(2) (1873) L. R. 8 Ch. 902 at p. 910: 42 L. J. Ch. 777 (779).
(3) (1858) 4 Drew. 352 (356): 28 L. J. Ch. 132 (140).

Barnes (1). The English decisions were the proper guide where an English Act was concerned, and on this point the Transfer of Property Act was based on the English Conveyancing Act, 1881. It was only applicable to the three Presidency Towns. *Ganesh Bakhsh* v. *Harihar Bakhsh* (2) and *Agra Bank, Limited* v. *Barry* (3) were referred to: and on the point that possession was notice of such title as the person in possession had, and any one who purchases the property of which such person is in possession did so at his own risk, reference was made to *Sharfudin* v. *Govind* (4); *Bhikhi Rai* v. *Udit Narain Singh* (5) and section 50 of the Registration Act (III of 1877).

Cowell for the mortgagee respondents, with reference to the decree of the High Court granting redemption, asked for costs from the mortgagor respondent in case of the appeal being allowed.

Sir R. Finlay, K. C., replied.

1907, July 22nd.—The judgment of their Lordships was delivered by

SIR ARTHUR WILSON:—This is an appeal from a judgment and decree, dated the 25th June 1904, of the High Court of Bombay sitting on appeal from a judgment and decree passed, on the 26th February 1903, by Russell, J., in exercise of the ordinary original civil jurisdiction of the same Court.

Most of the facts now material to the case are not disputed. On the 8th April 1896 the first respondent (hereinafter called the mortgagor) executed a mortgage of certain properties, including premises in Cawasjee Patell Tank Road in the City of Bombay, which are the subject of this suit and appeal, in favour of the other respondents (hereinafter called the mortgagees) to secure an advance of Rs. 30,000 and interest.

The mortgage was of the English type and contained a power of sale in an ordinary form. A proviso followed that—"Upon any sale purporting to be made in pursuance of the aforesaid

(1 [1894] 1 Ch. 25.
(2) (1904) L. R. 31 I. A. 116, (121) 26 All. 299 (310).
(3) (1874) L. R. 7 H. L. 135.
(4) (1902) 27 Bom. 452.
(5) (1903) 25 All. 366.

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power . . . the purchaser . . . shall not be bound to see or inquire whether any such default has been made . . . . or otherwise as to the necessity or expediency of such sale or that the sale is otherwise improper or irregular. And notwithstanding any such irregularity such sale shall as far as regards the safety and protection of the purchaser . . . . be deemed to be within the aforesaid power . . . . and be valid and effectual accordingly and the remedy of the mortgagor . . . . shall be in damages only."—This last proviso is in substance an echo of section 69 of the Transfer of Property Act, 1882.

On the 8th October 1900 the mortgagees, purporting to act under the power of sale in the mortgage, caused the property in question to be put up for sale by auction, and it was knocked down to the appellant. On the same day he signed a written contract to purchase; and on the 20th October 1900 the mortgagees executed a conveyance to the purchaser.

The mortgagor had remained in possession of the premises; and on the 26th August 1901 the purchaser instituted the present suit in the High Court. The claim was for possession of the premises in question and for other connected relief. The original defendant was the mortgagor alone, on whose application the mortgagees were subsequently added as defendants.

Another suit was brought by the mortgagor against the mortgagees, in which he claimed to redeem the property in question and to recover damages. This suit was brought up, with the necessary amendments, before the Court of Appeal, so that it might be dealt with in one decree together with the principal suit. This was done, and it is necessary to mention the circumstance only in order to appreciate the decree of the Court of Appeal. For the purposes of the present appeal the matter is not material.

It is unnecessry to examine the further pleadings or the issues settled. It is enough to say that the case came on for hearing before Russell, J., and that at the trial what had to be determined, stated broadly, was whether the sale was such, under its circumstances, as to give a good title to the purchaser as against the mortgagor. Russell, J., held that it did not, for reasons that

will shortly be examined. The Appeal Court came to the same conclusion, but for different reasons, which will also be considered.

In the earlier stages of this litigation many points were raised relating to the circumstances of the sale, but these have now all been eliminated except two. The remaining two are those which formed the basis of decision in the two Courts below respectively.

Of these points the one that naturally comes first in order is this:—The 6th of the conditions of sale said that, "The purchaser shall accept such title as the vendors can give, and shall not require the vendors to enter into any other covenant except a covenant that they have not incumbered, and shall not raise any question or objection to the title, and shall be held bound to accept such title as the vendors possess." Both the Courts in India held this to be a depreciatory condition, wholly unwarranted by the actual state of the title. So far they are agreed. Russell, J., however, held that there was nothing in the facts to affect the purchaser with notice or knowledge of the depreciatory character of the condition. The Court of Appeal, on the other hand, held that the purchaser was affected with constructive notice of the true state of the title, by reason of the fact that, some days after the contract of sale was completed, the purchaser instructed the mortgagees' solicitor to act for him in the preparation of the deed of conveyance, and that that solicitor knew enough of the real title to show that the condition in question was unjustifiable.

When the contract of sale was signed the transaction was completed so far as it rested in contract, and the rights and liabilities of the parties arising out of that contract were ascertained and were enforceable. Down to that point the attorney was not acting for the purchaser. The only thing in which he did so act was the subsequent preparation of the conveyance. The view of the Court of Appeal imputes to a principal the knowledge of an agent, not acquired in the matter for which he was agent, and uses it to upset a transaction of a date before the agency commenced. This is an extension of the doctrine of

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constructive notice in which their Lordships cannot concur. They therefore think the judgment and decree under appeal cannot be supported on the grounds relied upon by the Court of Appeal.

The only point that remains to be considered is that which formed the ground of Russell, J.'s judgment. To appreciate the point it is necessary to refer briefly to what occurred on the day of sale. The sale was announced for 4-30 o'clock, and it seems to have actually commenced soon after 5. The bidding was at first pretty brisk, and reached the sum of Rs. 20,500, which was bid by the purchaser, the now appellant.

At this point the sale was in fact stopped, and the parties concerned retired to an adjoining wood-shed, where they spent about half an hour endeavouring to agree to written terms of settlement. The endeavour failed, and then the auctioneer by the instructions of the mortgagees' solicitor, purported to resume the sale. The purchaser's previous bid of Rs. 20,500 was called out several times, and no competitor appearing the property was knocked down to him at that price. This is said to have happened at 6-10.

It was contended that the sellers, who unquestionably stopped the sale, did so under such circumstances as naturally to lead bidders to suppose that the sale was over at least for that occasion, and to go away from the place of auction. It was said that the bidders did go away when the sale was stopped; and that the purchaser, who was present, and who saw and heard what passed, was affected with notice of the impropriety of the alleged sale. The case thus indicated was, if established, sufficient to invalidate the sale.

The questions thus raised were questions of fact. The evidence was both voluminous and conflicting. Russell, J., who saw and heard the witnesses, examined that evidence in his judgment with great care, and has indicated in more than one passage of that judgment his estimate of the comparative credibility of witnesses. The case is peculiarly one in which their Lordships would be reluctant to reject the finding of the learned Judge who tried the case, provided that there was sufficient

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evidence to support his finding. Their Lordships think there was ample evidence to support the finding of the learned Judge and that his conclusion from that finding is correct. That finding and that conclusion are thus stated :—"The defendants two and three (the mortgagees) by themselves or their agents so conducted themselves with reference to this sale that would-be bidders at it were induced to leave. The plaintiff (the purchaser) had notice of those circumstances, using the word notice as it is defined in the Transfer of Property Act. He therefore bought at his peril, and as the sale was not a *bonâ fide* auction sale it must be set aside."

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of the first respondent, and the mortgagees will bear their own costs.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent Dayal Mowji: *Payne & Lattey.*

Solicitors for the mortgagees respondents: *Ashurst, Morris, Crisp & Co.*

J. V. W.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

TRIKUMDAS GAMODHAR AND OTHERS (PLAINTIFFS) *v.* HARIDAS MORARJI AND OTHERS (DEFENDANTS).*

1907. *March* 5.

Construction of will—Uncertainty—Bequest for purposes of popular usefulness or for purposes of charity.

By her will N. after making various bequests bequeathed the residue of her estate as follows :—

"As to whatever immoveable (and) moveable (property) and property in cash belonging to me may be in excess or may remain over as surplus after a disposition shall have been made in accordance with what is stated in the clauses

* Original Suit No. 113 of 1906: Appeal No. 1461.