APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

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March 12.

HIMATLAL MOTILAL AND OTHERS (LEGAL REPRESENTATIVES OF ORIGINAL DEFENDANT 3 AND DEFENDANT 4), APPELLANTS, *v.* VASUDEV GANESH MHASKAR *alias* GANPATI BOA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3).*

Agreement by defendants 1 and 2 to sell property to plaintiff - Subsequent sale by the same defendants to defendants 3 and 4—Suit by the plaintiff for an order to execute a registered sale-deed and for possession—Burden of proof on defendants 3 and 4 to show that they were purchasers for value and bonâ fide *and without notice.*

Defendants 1 and 2 having agreed to sell their property the plaintiff, they subsequently sold the same property to defendants 3 and 4.

In a suit brought by the plaintiff for an order to execute a deed of sale and also for recovery of possession of the property.

Held, confirming the decree awarding the claim, that defendants 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff, defendants 3 and 4 were bound to show three things, namely, that (1) they were purchasers for value and (2) *bonâ fide*, and (3) without notice. The plaintiff under his contract having a prior equity was entitled to succeed.

One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge.

FIRST appeal against the decision of G. V. Saraiya, First Class Subordinate Judge of Ahmedabad, in Original Suit No. 417 of 1906.

The plaint alleged as follows:—

The village of Godadra situate in the Halol Taluka in the district of Panch Mahals was the inam of defendants 1 and 2 who on the 9th March 1906 agreed to sell it to the plaintiff for Rs. 36,251. The defendants on the same day passed to the plaintiff a "Banakhat" (agreement) on a stamp paper of one rupee and the plaintiff paid to them Rs. 101 on account of earnest-money. The plaintiff further gave to the defendants a Kabuliat (undertaking) of a respectable money-lender named Jethalal

* First Appeal No. 14 of 1910.

Harlochan and under the terms of the Kabuliat the defendants were to receive the remaining amount of the purchase-money after they had executed a regular deed of sale and had delivered possession of the village and also after the village had been transferred to the name of the plaintiff. Owing to the said undertaking by Jethalal he passed to the defendants a *chithi* (note). The plaintiff did all that he had to do under the contract when he gave Jethalal's Kabuliat to the defendants and was always ready and willing to perform his part of the contract, but the defendants failed to pass to him a regular registered deed of sale though they were repeatedly asked to do so. The plaintiff subsequently learnt that the defendants had dishonestly sold the said village under a registered deed for Rs. 40,000 to defendants 3 and 4, who had knowledge from the very beginning of the plaintiff's agreement of sale, dated the 9th March 1906. The transaction of defendants 3 and 4 was, therefore, null and void as against the plaintiff's agreement. The village in suit being adjacent to the plaintiff's village called Goraj the plaintiff had the right of pre-emption. The plaintiff, therefore, brought the present suit basing his cause of action in May 1906 for an order to defendants 1 and 2 to execute a deed of sale relating to the village of Godadra and to get it registered. He further prayed for the delivery of possession of the said village to him and for an injunction restraining the defendants from causing any obstruction in getting the village transferred to his name in the Government records. The plaintiff sued also in the alternative for recovery of Rs. 10,000 as damages and Rs. 101 paid to defendants 1 and 2 as earnest-money. The plaint was presented on the 14th July 1906.

On the 10th October 1906 defendants 1 and 2 filed a written statement but subsequently on the 27th July 1909, during the progress of the suit, they put in a substituted written statement in which they admitted the fact of the agreement with the plaintiff and stated that defendants 3 and 4, who were their creditors, threatened to do them harm if the village was sold to plaintiff and having undertaken to fight with the plaintiff, they passed to defendants 3 and 4 a deed of sale for Rs. 40,000,

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that owing to the said undertaking by defendants 3 and 4 they were given a copy of the "Banakhat" and of the *chithi* mentioned in the plaint and defendants 3 and 4 had, in collusion with some other persons, committed fraud.

Defendants 3 and 4 answered *inter alia* that they did not admit the correctness of the allegations made against them in the plaint, that they had purchased from defendants 1 and 2 the village in suit under a registered deed of sale, dated the 21st May 1906, that they had obtained possession under their purchase, that they had no knowledge of plaintiff's agreement, dated the 9th March 1906, that the plaintiff had no right of pre-emption, that their purchase represented a real transaction, that the suit was bad for misjoinder of causes of action and that they were *bonâ fide* purchasers for valuable consideration without notice of plaintiff's agreement.

The Subordinate Judge found that the plaintiff's suit was maintainable in the form in which it was brought and was not bad for misjoinder of causes of action, that the "Banakhat" or the agreement relied on by the plaintiff and the sale-deed relied on by defendants 3 and 4 were proved and defendants 3 and 4 had notice of the plaintiff's agreement at the time of their deed of sale, that the plaintiff was ready and willing to carry out the terms of the agreement, that defendants 1 and 2 had broken the contract to sell, that the sale-deed of defendants 3 and 4 was not nominal and void and had been carried into effect, and that the plaintiff was entitled to recover possession of the property in dispute by way of specific performance of the agreement. The Subordinate Judge, therefore, passed a decree in the following terms :—

The result of my findings is that the plaintiff is entitled to a decree for specific performance. I, therefore, declare that the sons of the original defendant 3 and the defendant 4 to hold the plaint village of Godadra for the benefit of the plaintiff to the extent necessary to give effect to the contract of the 9th March 1906 (Exhibit 53), and order that upon all the defendants executing a proper deed of sale of the said village to the plaintiff (at the expense of the plaintiff) or to whom he shall appoint, such deed of sale to be settled by the Court in case the parties differ, the plaintiff do pay to the sons of the original defendant 3 and the defendant 4, Rs 36,150 and then to recover from

the defendants possession of the village mentioned in the plaint with the Sanad and Daftars relating to the said village. All the defendants to pay the costs of the suit.

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The legal representatives of defendant 3 who died while the suit was pending in the Subordinate Judge's Court and defendant 4 appealed.

G. S. Rao (Government Pleader), for the appellants (legal representatives of defendant 3 and defendant 4).

L. A. Shah, for respondent 1 (plaintiff).

M. K. Mehta, for respondents 2 and 3 (defendants 1 and 2).

RUSSELL, J.:—With regard to the first question we have to decide, namely, the question upon whom lies the onus of proof in this case, it appears that the plaintiff's agreement to purchase the property in question from defendants 1 and 2 is dated 9th February 1906. The agreement of defendants 1 and 2 with defendants 3 and 4, who are the purchasers of the same property (Exhibit 65) is dated the 21st May 1906. The defendants 3 and 4 therefore having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff must show three things, that they are purchasers for value, and *bonâ fide*, and without notice: *Mulji Jetha & Co.* v. *Macleod*[1]. The plaintiff under his contract has a prior equity. In *Varden-Seth Sam* v. *Luckpathy Royjee Lallah*[2], it was said:—

"The question to be considered is, whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value, *bonâ fide*, and without notice of this charge, whether legal or equitable, would have had in these Courts an equity superior to that of the plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this case furnishes no such proof."

This passage in the Privy Council judgment certainly seems to conflict with the statement of the law set out by West, J., in *Lalubhai Surchand* v. *Bai Amrit*[3], where he refers to several

(1) (1903) 5 Bom. L. R. 991. (2) (1862) 9 M. I. A. 307 at pp. 326-327.
(3) (1877) 2 Bom. 299 at p. 303.

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authorities in support of the proposition that in cases such as the present it is for the plaintiff to prove the notice. But it must be remembered that the burden of proof is not always a standing quantity. And West, J., at the bottom of page 303 says:—"The purchaser pleading absence of notice is 'held strictly to proof of the payment', that being an affirmative matter; but when he has thus far established his good faith, it devolves on the opposite party to prove notice or the circumstances from which the Court may infer a knowledge or means of knowledge of the previous transaction."

In this case therefore it devolved upon the defendants 3 and 4 to prove payment of the consideration before they got notice of the plaintiff's contract. And the question has arisen whether that means payment of the whole consideration money or whether the position of defendants 3 and 4 is not made secure by reason of their conveyance having been registered, when *it* was, and part payment made by them before they got notice of the plaintiff's contract. The defendants' contract was registered on the 22nd May 1906. Possession was delivered to them on the 26th May 1906. Before this suit was filed it appears that Rs. 2,500 exactly was paid by them to defendants 1 and 2. The summons in the suit was served upon them on the 9th August 1906. As security for the payment of the residue of the purchase-money they had given Chithis for Rs. 6,001 and Rs. 4,224 and they appear to have paid of those Chithis subsequently. It must be taken, therefore, that they had notice in any event on the 9th August 1906 when the summons was served upon them, as I have said.

Mr. Rao in arguing for defendants 3 and 4 laid great stress upon the fact of registration, but in our opinion, that point does not avail him: see *Chunder Kant Roy* v. *Krishna Sunder Roy*[1]. The head-note of that case it as follows:—"Where a *bonâ fide* contract, whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent

(1) (1884) 10 Cal. 710.

purchaser, although the latter's purchase may have been registered and although he has obtained possession under his purchase." After referring to a case, *Nemai Charan Dhabal* v. *Kokil Bag*[1], to which, however, section 27 of the Specific Relief Act did not apply, their Lordships set out section 27 of that Act, and say, "this shows, that where a party has notice of a prior contract for sale, he cannot, by any purchase that he may subsequently make, over-ride it."

Now in England it has been held that notice before actual payment of the whole of the purchase-money, even although it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice had before the contract; for although the purchaser had no remedy at law against the payment of the residue, for which he gave his security, yet he would be entitled to relief in equity, on bringing his bill and showing that though he has given a security for payment of the residue of his purchase-money, yet he had since had notice of an incumbrance, under which circumstances the Court would stop payment of the money due on the security: *Tourville* v. *Naish*[2], *Story* v. *Lord Windsor*[3], *More* v. *Mayhow*[4] and *Jones* v. *Stanley*[5]. And it appears to us that under the law in India the same principle must hold good. It is to be observed that in clause (*b*) of section 27 of the Specific Relief Act the words are :—"except a transferee for value who has paid his money in good faith and without notice of the original contract." There is nothing inconsistent in these words with the English rule above referred to.

Mr. Rao referred us to section 91 of the Indian Trusts Act which is as follows :—

Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

(1) (1880) 6 Cal. 534.
(2) (1734) 3 P. Wm. 307.
(3) (1743) 2 Atk. 630.
(4) (1664) 1 Ch. Ca. 34.
(5) (1731) 2 Eq. Abr. 685 pl. 9.

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The word 'acquire' is quite consistent with the English rule that the purchase should be complete both by payment and conveyance before notice in order to defeat a person having a prior equity. Upon this ground alone the case may be decided in favour of the defendants.

But this Court is also of opinion that there is no good reason for dissenting from the conclusion arrived at by the learned Subordinate Judge that under the circumstances of the case the appellant should be held to have had knowledge of the plaintiffs' contract prior to the date of the conveyance. We do not propose to go in detail through this evidence but merely to set out the circumstances which have led us to infer that defendants 3 and 4 must be held to have had such knowledge. The first is that the sale of a village for a large amount of money, such as in the present case, must inevitably have been a matter of notoriety throughout the adjoining districts. Goraj where the plaintiff's agreement was executed is only 21 miles from Kalol where the defendants' agreement was executed. A considerable number of persons were present at the execution of both the contracts. The plaintiff's contract, Exhibit 53, was attested by Jethalal, Girdhar, Swarupgir, and written by Bhagwanji. There were 6 arbitrators who fixed the price which defendants 3 and 4 were to pay, 3 for defendants 1 and 2, and 3 for defendants 3 and 4. For defendants 1 and 2 the arbitrators were Bhagwanji, who lived at Halol, 7 miles from Kalol; Swarupgir of Kadochhala, where defendants 1 and 2 lived, which is 17 miles from Kalol, and Girdhar of the same place. The arbitrators for defendants 3 and 4 were Damodar of Godra, 15 miles from Kalol; Jagjivan also of Kalol and Mathur also of Kalol. Girdhar and Bhagwanji were the clerks it appears of defendants 1 and 2. We find it very difficult to believe that the existence of the plaintiff's contract was not referred to during the negotiations for the defendants' contract, and that defendants 3 and 4 were not aware of it.

The next circumstance is the unusual rapidity with which defendants' agreement was carried out. It was executed on the 21st May 1906; it was registered on 22nd May 1906 and

possession was delivered on 26th May 1906. In our opinion this is a very important circumstance as it shows an extraordinary and unusual carrying through of a contract in this country where proceedings as a rule are much more leisurely.

The next circumstance to be borne in mind is that defendants 1 and 2 had previously entered into a contract with Haribhaktiwala to sell the same property to him for considerably less sum than they had contracted to sell to the plaintiff. The Sanad relating to the property was redeemed by defendants 3 and 4 from Haribhaktiwala on 28th November 1906. This circumstance shows that defendants 1 and 2 were anxious to sell the property to the highest bidder totally regardless of any prior contracts that they may have entered into with other persons.

The next circumstance is the very considerable increase (about 4,000 rupees) in the purchase-money to be paid by defendants 3 and 4, as compared with the sum contracted to be paid by the plaintiff, with regarl to which no satisfactory evidence it appears to us, has been given in explanation. Again the wording of the contract between defendants 1 and 2 and 3 and 4 is very peculiar. See p. 68. Why should any provision have been made for "Safildars" "neighbours making a claim or causing obstruction" if such a claim was not anticipated? Lastly the defendants 3 and 4 were mortgagees with a long standing mortgage in the village and this would account for their eagerness to acquire the equity of redemption at a higher rate than the intending purchaser, the plaintiff. In our opinion, therefore, defendants 3 and 4 must be taken to have had notice of the previous contract of defendants 1 and 2 with the plaintiff.

The only other point that was argued was that plaintiff was not ready and willing to carry out his contract, and that he thereby committed a breach thereof. And great stress was laid upon the fact that in para. 2 of his plaint, (which we take as read), the terms of the plaintiff's contract are not correctly set out. But we do not think that this para. of the plaint should be read so strictly as against the plaintiff for the addi-

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tional term to the contract set out therein may be taken to give the plaintiff's view of the agreement after he became aware of the contract between defendants 1 and 2 and defendants 3 and 4 with reference to the purchase of the village or a legal point suggested by the draftsman of the plaint. There is no evidence whatever to show that assuming the plaintiff did commit a breach of his contract defendants 1 and 2 accepted such breach. But there is one circumstance on this point which seems to us to dispose of this part of the case of defendants 3 and 4, and that is this, that if the plaintiff broke his contract and defendants 1 and 2 knew or acquiesced therein, they must have mentioned the fact of such breach and acquiescence or knowledge to defendants 3 and 4 before the latter entered into their contract, but it is not suggested anywhere in the evidence that any such mention was made.

The other point that was made was that Jethalal the Banker was not in a position to pay the money which the plaintiff had agreed should be paid to defendants 1 and 2, but we do not think, upon the evidence, that it would be possible to hold that Jethalal was not in a position to call up or to pay the money required.

Under these circumstances, it is not necessary to award damages to the plaintiff as against defendants 1 and 2.

Accordingly, we are of opinion, that the decree of the lower Court which has been carefully and correctly drawn should be confirmed, and the defendants pay the costs throughout.

Decree confirmed.

G. B. R.