

APPELLATE CIVIL.

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

1912.

March 12.

MAGNIRAM VITHURAM MARWADI (ORIGINAL PLAINTIFF), APPELLANT,
v. BAKUBAI MARD RAKHMA LOHAR AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 325A—Transfer of Property Act (IV of 1882), section 43—Specific Relief Act (I of 1877), section 18—Attachment of lands—Transfer of execution proceedings to Collector—Letting out by Collector—Cesser of Collector's powers—Sale by the owner of his interest—Sale effective in favour of the purchaser.

The plaintiff was a creditor of the family of the defendants. The plaintiff's separated brother was also a creditor. The plaintiff's brother attached the family lands. The matter went in execution to the Collector who leased the lands to one Piraji. Subsequently the plaintiff and the defendants came to an understanding by which the plaintiff agreed to remit his mortgage debt and pay off his brother—the judgment creditor—and the defendants agreed to sell him one of the lands. The plaintiff then obtained possession of the family lands from which he was ejected by the defendants. Thereupon, the plaintiff having brought a suit to recover possession,

Held, allowing the claim, that the interest which the sale-deed purported to transfer to the plaintiff was the interest which the defendants had in the lands at the time of the transfer, and the Collector's powers having ceased by reason of the proceedings in attachment being closed, the conveyance of the defendant's interest to the plaintiff took effect in his favour.

Gangabai v. Baswanti(1) and *Mussamat Udey Kunwar v. Mussamat Ladu*(2), distinguished.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree of R. K. Bal, Subordinate Judge of Sinnar.

The facts of the case were as follows :—

The land in dispute and another of equal value belonged to and were mortgaged without possession by one Rakhma Lohar in 1893 to plaintiff's brother Rupchand for Rs. 200. Rakhma Lohar died in the year 1900 leaving him surviving his widow Baku, defendant 1, and two minor sons Piraji and Taty, defendants 2 and 3. At a partition between the plaintiff and his brother the mortgage bonds fell to the plaintiff's share.

* Second Appeal No. 333 of 1911.

(1) (1909) 34 Bom. 175.

(2) (1870) 6 Beng. L. R. 283.

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About ten years after the mortgage, that is, in the year 1903, the plaintiff obtained a sale-deed of one of the lands from defendant 1 in full satisfaction of the mortgage debt. The debt was settled at Rs. 300, the actual amount being Rs. 400, and Rs. 100 were added for payment to plaintiff's brother Rupchand who had obtained a decree against the defendants for about Rs. 172 and had attached their properties. The proceedings in execution were transferred to the Collector who let out both the properties to one Piraji at Rs. 31 per year and thus arranged for the satisfaction of the debt in six years. The plaintiff could not induce his brother to accept Rs. 100 in full satisfaction of his decretal debt. So Piraji, the tenant of the Collector, was induced to give up the lands and plaintiff himself got the lease in his favour and entered into possession. The plaintiff paid four years' rent, but he having made default in payment of the fifth year's rent in time, he was ejected and the lands were given in the possession of defendant 1. The plaintiff, therefore, brought the present suit against the defendants, alleging that he was the owner and was wrongfully dispossessed by the defendants.

The defendants answered that the property was their ancestral property and was not purchased by the plaintiff; that there being an old balance of debt due to plaintiff, he by undue influence as a creditor obtained a sale-deed from defendant 1, the transaction being in reality a mortgage. The defendants, therefore, prayed for accounts and redemption.

The Subordinate Judge found that the sale-deed of 1903 was executed by defendant 1 as a sale-deed; that there was no fraud on plaintiff's part as alleged by defendant 1; that the transaction was not a mortgage in any way; that defendant 1 was justified in selling the plaint property to plaintiff and the sale was binding upon defendants 2 and 3, and that the plaintiff was not wrongfully dispossessed by the defendants, but he was entitled to a declaration of his full title to the property by purchase. He, therefore, passed the following decretal order:—

I, therefore, declare that plaintiff is the full owner by purchase of this property and order that defendants do deliver possession thereof on or before 15th March 1910. Parties to bear their own costs.

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On appeal by the defendants the District Judge reversed the decree and dismissed the suit. His reasons were as follows:—

It is admitted that this arrangement as to the sale and settlement of the decretal debt was entirely unknown to the Collector: *a fortiori*, then, there was no written permission of the Collector to sell: the Collector was at the time of the sale, it is admitted, exercising powers under what is now section 7, Schedule III, of the Code of Civil Procedure. Accordingly the sale was in contravention of section 11 of that schedule and the defendants were incompetent to sell. Plaintiff's sale-deed, therefore, confers no title on him. He is not entitled to possession under that sale-deed now or at any future time.

The plaintiff preferred a second appeal.

P. D. Bhide and *H. V. Athavale* for the appellant (plaintiff).

P. B. Shingne for respondent 1 (defendant 1).

SCOTT, C. J.:—The facts necessary for the disposal of this case are concisely stated by the District Judge. The plaintiff was a creditor of the family of the defendants. The plaintiff's separated brother was also a creditor. The plaintiff's brother attached the family lands. The matter went in execution to the Collector. The Collector leased the family lands to one Piraji. The plaintiff and the defendants came to an agreement by which the plaintiff agreed to remit his debt he being a mortgagee and to pay off his brother the judgment creditor, and the defendants agreed to sell him one of the lands. The plaintiff then obtained possession of the family lands from which he was ejected by the defendants and he now sues to recover possession.

The lower Court found that the defendant 1 executed the sale-deed in suit and that it was intended to convey the interests of the defendants by way of sale, that there was no fraud, that the sale was binding on the minor defendants, and that the plaintiff was entitled to possession after the expiration of the lease of Piraji.

At the hearing in the District Court arguments were confined to the point whether the sale was void. It was admitted that the arrangement as to sale and settlement of the decretal debt was entirely unknown to the Collector and

that the Collector was at the time of the sale exercising his powers under section 325A. The learned District Judge holds that upon these facts the sale was in contravention of the provisions of the Civil Procedure Code and that the defendants were incompetent to sell, that the plaintiff's sale-deed, therefore, conferred no title on him and he was not entitled to possession under that sale-deed then or at any future time.

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There is no doubt that the effect of section 325A would be to invalidate such a sale as we now have to consider as against a lessee or transferee from the Collector exercising his powers under the Civil Procedure Code: see *Ganga Prasad v. Ganga Bakhsh Singh*⁽¹⁾. But that does not dispose of the question whether, after the Collector's powers have ceased by reason of the proceedings in attachment being closed, the conveyance of the defendants' interest will not take effect in favour of the purchaser. The statutory provisions bearing upon the point are section 43 of the Transfer of Property Act: "Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists"; and section 18 of the Specific Relief Act which provides that where a person contracts to sell certain property having only an imperfect title thereto, the purchaser has the right, if the vendor has subsequently to the sale acquired any interest in the property, to compel him to make good the contract out of such interest.

In the present case it is not disputed that the interest which the sale-deed purported to transfer to the plaintiff was the interest which the defendants had in the lands at the time of the transfer; and this circumstance distinguishes the case from that reported in *Gangabai v. Baswant*⁽²⁾ and *Mussamat Udey Kunwar v. Mussamat Ladu*⁽³⁾, for we are not concerned with

(1) (1907) 29 All. 415.

(2) (1909) 34 Bom. 175.

(3) (1870) 6 Beng. L. R. 283.

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any interest other than the interest which the defendants purported to convey. Under these circumstances we think that the defendants, after the incompetence has been removed, could be compelled to make good to the plaintiff the interest which they purported to convey under the sale-deed. In *Holroyd v. Marshall*⁽¹⁾ it is stated, "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired . . . For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained." Upon the same principle a *vatandar* incompetent without the sanction of Government to mortgage his *vatan* land has been held estopped as against the mortgagee from denying his title to mortgage, *Narayan Khandu Kulkarni v. Kalgaunda Birdar Patel*⁽²⁾, and an occupancy tenant incompetent to transfer without the consent of the *khot* has been estopped from contending that the consent had not been obtained: see *Hillaya Subbaya v. Narayanappa Timmaya*⁽³⁾.

We, therefore, think that we should apply in this case the principle underlying section 18 of the Specific Relief Act and hold that now that the Collector has ceased to exercise his powers under the attachment, the conveyance by the defendants to the plaintiff must operate.

We reverse the decree of the District Court and restore that of the Subordinate Judge with costs throughout upon the defendants.

Decree reversed.

G. B. R.

(1) (1862) 10 H. L. C. 191 at p. 211. (2) (1889) 14 Bom. 404.

(3) (1911) 36 Bom. 185.