

-and their rights are not proved to be limited to the agricultural use of the land. It is not possible, therefore, to attribute the order or the notice to any section of the Land Revenue Code under which the Revenue Authorities can be said to have the power to evict the present plaintiffs from the land in dispute. It follows, therefore, that the order and the notice are *ultra vires* of the Revenue Authorities. On these grounds it seems to me that it is not incumbent on the plaintiffs to have any order passed by the District Deputy Collector or the Collector or the Revenue Commissioner set aside.

I do not think that any injunction is necessary under the circumstances. It will be sufficient to declare that the plaintiffs are entitled to be confirmed in their possession of the land. I, therefore, concur in the order proposed by my learned colleague.

*Decree set aside.*

R. R.

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### APPELLATE CIVIL.

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*Before Mr. Justice Heaton and Mr. Justice Shah.*

VASUDEO RAGHUNATH OKA (ORIGINAL PLAINTIFF), APPELLANT, v.  
 JANARDHAN SADASHIV APTE (ORIGINAL DEFENDANT), RESPONDENT.\*

1915.

March 22.

*Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—  
 Transfer voidable at the option of the person defrauded—Purchaser at  
 Court sale not a subsequent transferee—Person having interest in the property  
 means person having interest at the date of the transfer.*

The plaintiff purchased certain lands in 1906. In execution of a money-decree against the vendor, the lands were sold at a Court auction and purchased by the defendant in 1909, with full notice of the sale of 1906. The defendant having been put into possession of the lands, the plaintiff sued to recover possession relying on the sale of 1906. The defendant contended that the sale

\* Second Appeal No. 683 of 1913.

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was not genuine and was not supported by consideration and was made with the object of defeating the creditors of the vendor. The trial Court negatived the contentions and decreed the plaintiff's claim. The lower appellate Court held that the sale of 1906 was bad under section 53 of the Transfer of Property Act, as the consideration was grossly inadequate, the sale was effected with the object of defeating and delaying the creditors of the vendor, and the plaintiff participated in the fraud. The plaintiff having appealed :—

*Held*, that the sale of 1906 could not be avoided, under section 53 of the Transfer of Property Act (IV of 1882), at the option of the defendant, who was not a creditor of the vendor, or a subsequent transferee or a person having an interest in the property, within the meaning of the section.

Having regard to the preamble as well as section 5 of the Transfer of Property Act (IV of 1882), a person who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of section 53 of the Act.

A person having an interest in the property within the meaning of section 53 means the person who has such interest at the time of the transfer objected to.

SECOND appeal from the decision of K. H. Kirkire, First Class Subordinate Judge, Appellate Power, at Ratnagiri, reversing the decree passed by J. A. Samant, Subordinate Judge at Chiplun.

Suit to recover possession of land.

The land in dispute belonged originally to one Purshottam. He sold it to the plaintiff on the 19th February 1906 by a sale-deed Exhibit 14.

A money-decree was passed, in suit No. 257 of 1903, against Purshottam at the suit of Gopal Mahadev Gadgil. In execution of the decree, the land in dispute was sold at a Court auction and purchased by the defendant on the 22nd January 1909. The defendant purchased with full notice of the sale of 1906. The possession of the land was given to the defendant on the 19th September 1909.

The plaintiff filed the present suit to recover possession of the land from the defendant, relying on his sale-deed of 1906.

The defendant contended *inter alia* that the sale-deed of 1906 was hollow and passed without consideration for the purpose of defeating and delaying the creditors of Purshottam; and that the plaintiff had fraudulently and collusively joined in the sale.

The Subordinate Judge held that the sale-deed of 1906 was not passed with intent to defeat or delay the creditors of Purshottam; and that it represented a *bona fide* transaction. He, therefore, decreed the plaintiff's claim.

This decree was, on appeal, reversed. The lower appellate Court found that out of the consideration of Rs. 1,200 for the sale-deed of 1906 only Rs. 500 had been paid; that the transfer was therefore for a 'grossly inadequate consideration within the meaning of section 53 of the Transfer of Property Act'; that the effect of the transfer was to defeat and delay the creditors of Purshottam; and that the plaintiff had actively participated in the fraud which Purshottam was practising upon the other creditors.

The plaintiff appealed to the High Court.

*H. C. Coyaji*, with *N. V. Gokhale* and *D. G. Dalvi*, for the appellant.

*Dewan Bahadur G. S. Rao* and *P. B. Shingne*, for the respondent.

SHAH, J. :—The question in this second appeal is whether the sale-deed of the 19th February 1906, under which the plaintiff claims, is voidable under section 53 of the Transfer of Property Act at the instance of the defendant, who is an auction-purchaser of the right, title and interest of the plaintiff's vendors in the *takshim*, with which we are concerned in this suit.

There is no dispute about the fact that the defendant purchased the right, title and interest of the heirs of

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the original owner Purshottam Oke in the *takshim* on the 22nd January 1909 in execution of a money-decree against the said Purshottam by one Gopal Mahadev Gadgil with full notice of the sale-deed in favour of the plaintiff. There was another similar sale-deed of the same date in favour of one Deodhar. But the claim on that sale-deed between Deodhar and the defendant has been compromised. It is common ground now that the plaintiff must succeed in this suit, if his sale-deed is good and operative. The objection taken by the defendant in the trial Court was that it was not a real transaction but entered into without consideration and with the fraudulent object of defeating the creditors of the vendors, whose right, title and interest he had purchased. The trial Court found that the transaction was real, and that there was consideration for it, and that it was not entered into with the object of defeating or delaying the vendor's creditors. On these findings the plaintiff's claim was decreed by that Court. In appeal, however, the learned First Class Subordinate Judge with Appellate Powers came to the conclusion that though a part of the consideration was proved it was grossly inadequate, that the sale was effected with the object of defeating or delaying Purshottam's creditors and that the plaintiff was aware of and participated in the fraudulent intentions of the vendors and was not a transferee in good faith. Apparently it was not contended that apart from the objection under section 53 of the Transfer of Property Act the transaction was sham and not real. The issues raised in both the Courts covered the controversy between the parties relating to section 53 of the Transfer of Property Act, and did not indicate that the defendant really contended that the transaction was not real but a mere cloak for concealing the true ownership which remained with the vendors. The lower appellate Court accordingly

reversed the decision of the trial Court and dismissed the plaintiff's claim.

In the appeal before us Mr. Coyaji has argued on behalf of the appellant that section 53 of the Transfer of Property Act cannot help the defendant, as he is not a person, at whose option the deed is voidable under the section. He concedes that it is quite open to the defendant to raise the plea that the transaction is sham and colourable or that it is voidable under section 53 of the Transfer of Property Act. As regards the former contention, he says that though it was raised in the written statement, no issue was framed on the point, and that in any event after the finding of the trial Court, it was practically given up. This position has not been seriously contested by Mr. Rao on behalf of the defendant. In my opinion, therefore, it must be assumed for the purposes of this case that whatever infirmity there may be in the transaction in virtue of the provisions of section 53, it was not a sham but a real transaction between the vendors and the plaintiff. The findings recorded by the lower appellate Court on the issues arising under section 53 do not negative this assumption, and on the pleadings it would not be possible to say that the question was specifically raised or that it was urged before the lower appellate Court.

The appellant, therefore, relies upon the wording of section 53 of the Transfer of Property Act, and argues that the transaction is not voidable at the instance of the defendant, even though the findings of the lower appellate Court that the object of the sale was to defeat the creditors of the original owner and that the plaintiff was not a transferee in good faith be accepted. It is quite clear that the defendant is not the person, to defraud, defeat or delay whose claim this sale-deed could have been executed. The only persons whose

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claims were intended to be defeated were Purshottam's creditors as suggested in the lower Courts. It is quite clear that the defendant is not a creditor and that he does not seek to avoid the document for the benefit of any creditors. It was suggested, however, that the defendant would be a subsequent transferee or a person having an interest in the property within the meaning of section 53, paragraph 1. But the defendant is an auction-purchaser at a Court sale, and not a transferee by any act of the original owner. Having regard to the preamble as well as section 5 of the Act, it seems to be clear that a person, who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of section 53. He is clearly not a person having an interest in the property within the meaning of the section, which apparently refers to interest, which exists in fact at the time of the transfer objected to. It is clear, therefore, that the deed is not voidable at the option of the defendant.

It remains to notice the argument of Mr. Rao that apart from section 53, when it was proved that the plaintiff was not a transferee in good faith, and that he had participated in the fraudulent intentions of the transferor, no Court ought to help the plaintiff. The argument, in order to be effective, must amount to this that the sale-deed was not real and that the vendors really continued to be the owners. I have already dealt with this aspect of the case, and in my opinion there is a real and substantial difference between a sham transaction and a transaction, which is voidable under section 53 in consequence of fraud at the instance of the person defrauded. It is difficult to understand how the defendant can succeed unless he is a person defrauded or the transaction is merely sham and colourable. As he is not a person at whose option the deed could be

avoided and as the deed is not a sham transaction, I do not see how the mere finding that the plaintiff is not a transferee in good faith can help the defendant.

I would, therefore, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the defendant.

HEATON, J. :—I agree.

*Decree reversed.*

R. R.

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ORIGINAL CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Davar.*

R. D. SETHNA (APPELLANT AND PLAINTIFF) v. JWALAPRASAD GAYAPRASAD, A FIRM (RESPONDENTS AND DEFENDANTS).<sup>\*</sup>

1914.

August 27.

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*Shah Jog Hundi—Payment to the Shah—Fraudulent Hundi—Duty of Shah to trace the drawer—Payment of Hundi not as Shah but as indorsee for collection of the Hundi—Custom of Marwari merchants—In case of fraud, notice, when to be given—Laches.*

On the 10th June 1912 the defendants presented to the plaintiff for payment a hundi for Rs. 3,000 purporting to be drawn by one R in favour of M on the plaintiff payable at sight to a *Shah*. The plaintiff having had no advice regarding the said hundi refused to pay the said sum of Rs. 3,000. On the next day the plaintiff received a letter purporting to be written by R from Harpalpur, enclosing a railway receipt for 300 bags of linseed, stated to have been consigned by R from Ranipur Station, and asking the plaintiff to sell the goods and in the meantime to accept and pay on presentment two hundis, each for Rs. 3,000, drawn by R in favour of M on the plaintiff, payable at sight to a *Shah*. The same day the plaintiff handed over the said railway receipt to one K and received payment of Rs. 5,600. The plaintiff thereupon paid Rs. 3,000 together with one day's interest to the defendants in respect of the hundi which had been presented by the defendants to the plaintiff on the

<sup>\*</sup> Appeal No. 17 of 1914 : Suit No. 1219 of 1912.