

## PRIVY COUNCIL.\*

P. C.\*

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November 9,

10.

December 7.

SHRINIVASDAS BAVRI (PLAINTIFF) v. MEHERBAI AND OTHERS  
(DEFENDANTS).

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

*Vendor and Purchaser—Title, proof of—Contract to give a marketable title free from all reasonable doubts—Evidence of discharge of mortgage—Recitals in release—Registration Act (III of 1877).*

The question in this appeal was whether a vendor had made out "a marketable title free from all reasonable doubts," which he had contracted to do by a written agreement, dated 18th October 1913, to sell certain land in Bombay. There had been a mortgage effected on the property, on 26th April 1892, in favour of two joint mortgagees by an agreement of charge duly registered under the Registration Act (III of 1877) and the deposit of the title-deeds of the property with the mortgagees. To deduce a good title it became necessary to prove that the mortgage had been discharged. As proof of that fact the vendor produced a certified copy of a release dated 30th September 1902, which had been executed by only one of the joint mortgagees, but which recited the death of the other mortgagee, the facts that his co-mortgagee was his sole heir and the redemption of the property from the equitable charge created by the agreement of 26th April 1892. One of the title-deeds of the property was not produced by the vendor.

*Held* (reversing the decisions of the Courts in India) that the recitals in the release were not evidence against the joint mortgagee, and that the title contracted for had not been deduced.

APPEAL No. 156 of 1915 from a judgment and decree (11th of November 1914) of the High Court at Bombay, which affirmed on appeal a judgment and decree (1st August 1914) of a Judge of the same Court in the exercise of its Original Civil Jurisdiction.

On 18th October 1913, the respondents agreed by a written contract to sell certain property at Nepean Sea Road in Bombay to the appellant for Rs. 65,000. The agreement (*inter alia*) provided, (a) that the purchaser should pay Rs. 5,000 as earnest money on the execution

\* *Present.*—Lord Parker of Waddington, Lord Sumner, Sir John Edge, and Sir Lawrence Jenkins.

of the agreement, and that the purchase should be completed within two months of such execution; (b) that the vendors should deduce a marketable title to the property free from all reasonable doubts, and should at their own costs clear all defects in and complete the title; (c) that the vendors should soon after the execution of the agreement deliver to the purchaser all the deeds and documents relating to the property for the investigation of their title thereto; (d) that the purchaser should, within 20 days after such delivery, send in his objections to, or requisitions on the title; and (e) that if the vendors should be unable or unwilling to meet or comply with any such objection or requisition they should be at liberty to rescind the sale, and in that case should return the deposit with costs.

The title disclosed was that of the respondent's mortgagor one Ramdas Kessowji which purported to show, (a) that he had purchased the property on 7th August 1888 from one Purshotamdas, who had himself purchased it from one Vassanji Triikumji on 31st July 1888; (b) that some of the title-deeds of the property prior to these purchases related also to other property belonging to the vendor Vassanji Triikumji, and that the latter had retained these deeds, and covenanted to produce them to the purchaser when required; (c) that by a registered agreement dated the 26th April 1892 Ramdas Kessowji and one Dwarkadas Shamji had deposited (*inter alia*) certain title deeds relating to the property in question with two persons named Damodar Sunderdas and Gordhandas Sunderdas as security for a loan of one lakh of rupees with interest; (d) that by a release dated 30th September 1902, after reciting that on 9th August 1892, Ramdas Kessowji paid to Damodar Sunderdas and Gordhandas Sunderdas Rs. 51,243-2-5, and redeemed the said deeds and that Damodardas died on 4th July 1902, leaving Gordhandas his only heir and

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legal representative him surviving, it was witnessed that Gordhandas released the property from the said mortgage; and (e) that Ramdas Kessowji had on 3rd October 1902 mortgaged the property to one Narotamdas Munji who had on 3rd October 1911 assigned the said mortgage to the respondents; and that on the occasion of this, Ramdas had executed a declaration to the effect that the original conveyance of 31st July 1888, and the original release of 30th September 1902 had been lost or mislaid by him, and that they had not been deposited by him or by any person on his behalf as equitable security with any other person.

The only original documents produced to the appellant were the conveyance of 7th August 1888, and the mortgages of 2nd October 1902, and 3rd October 1911 respectively. Of the other documents, namely, the conveyance of 31st July 1888 and the agreement of 26th April 1892, and the release of 30th September 1902, the respondents only produced certified copies.

On 8th November 1913, the appellants delivered requisitions on title to the respondents of which the following only are material to this report. The answers were delivered on 2nd December 1913.

#### Requisitions.

5. The conveyance dated 31st July 1888 contains a covenant for production of the originals of the title-deeds mentioned in Schedule B in favour of the purchaser and his assigns. The original title-deeds must be procured by the vendors for inspection by the purchaser. The whereabouts of the same must be ascertained and the purchaser must be apprised by the vendors as to who are the present lawful custodians of the title-deeds.

#### Answers.

5. The vendors do not know with whom the deeds now are. To guard against any difficulty of this sort certified copies of all documents have been kept with the title-deeds, so as to preserve a continuous record of title.

## Requisitions.

7. On the 26th of April 1892 an equitable charge by way of mortgage was created in favour of Damodardas Sunderdas and Gordhandas Sunderdas by deposit of title-deeds. It is recited in the release dated 30th September 1902 that the said Damodardas died on 4th July 1902 leaving the said Gordhandas as his only heir and next of kin according to Hindu Law. The pedigree of Damodardas Sunderdas and Gordhandas Sunderdas must be established to the satisfaction of the purchaser as also the fact that the said Gordhandas was the only heir and next of kin of Damodardas Sunderdas at the time of his death. The vendors should at their cost procure a declaration, as to their pedigree and as to the fact that the said Damodardas has no other heirs than the said Gordhandas Sunderdas, of some respectable persons acquainted with the family of the said Damodardas Sunderdas and Gordhandas Sunderdas.

8. Did the said Damodardas Sunderdas die testate or intestate? Was any representation taken out to his estate? If so, by whom and when?

9. By the declaration of Ramdas Kessowji dated 6th October 1911, Ramdas declares on oath that the original conveyance dated 31st July 1888 from Vassanji Trijumji to Purshotamdas Shivilal and the original release dated 30th September 1902 from Gordhandas Sunderdas to Ramdas Kessowji are lost. The vendors must indemnify the purchaser against any possible rights that may have been created by parting with the said deeds or against any loss or damage that might ensue to the purchaser by the deeds being outstanding.

## Answers.

7. The release itself shows that the moneys were paid off to Damodardas and Gordhandas and the documents were redeemed from them and the release was merely formal. As the mortgage was by way of deposit of title-deeds, the return of deeds to Ramdas was sufficient. The vendors are unable to procure and cannot undertake to procure the declaration.

8. The vendors have no information in the matter.

9. The vendors must decline to give any such indemnity.

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Correspondence passed between the solicitors of the respective parties, but no further answers were given to the requisitions, and on 2nd February 1914, the appellants' solicitors wrote to the respondents' solicitors that unless the respondents could make a marketable title to the property the usual consequences must follow, and that unless all doubts and defects pointed out in the title were cleared to the satisfaction of the purchaser by the 7th February, the appellant would treat the contract as cancelled. The respondents' solicitors replied that they had made out a marketable title, and that the objections made by the appellant were unfounded but that they were making further inquiries; and subsequently on 25th February, they wrote stating that the title-deeds prior to 1888 were with Sir Vassanji Tri-kumji, but not offering to procure inspection of them; and on the same day the appellants' solicitors replied that as the respondents had not complied with their letter of 2nd February the contract was cancelled, and asked for the return of the earnest money, but the respondents refused to return it, and the appellant on 14th July 1914 brought the present suit against the respondents by originating summons on the original side of the High Court (under Rule 210 of the High Court Rules) praying that the following questions might be decided by the High Court:—(1) whether the plaintiff has rightly cancelled the contract of sale by his solicitors' letters of 2nd and 25th February 1914; (2) whether the defendants are not bound to return to the plaintiff the earnest money of Rs. 5,000, with interest and all the costs incurred by the plaintiff in the matter of the sale? (3) whether the defendants have up-till-now made out a marketable title free from all reasonable doubts pursuant to clause 5 of the agreement referred to in the plaint? (4) whether the defendants were not bound to comply with any and which of the

requisitions on title referred to in paragraph 8 of the plaint, and if so, in what manner and to what extent? (5) whether the plaintiff is bound to carry out and complete the contract for purchase paying interest on the unpaid balance of the purchase money as demanded by the defendants.

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The High Court (MACLEOD J.) held with regard to the 5th requisition that as the respondents had offered certified copies of the original deeds, and had stated with whom the originals were, they had done all they were bound to do under the agreement; and as to the 7th 8th and 9th requisitions that the fears of the appellant were unreasonable, and he consequently answered the 3rd question in the affirmative and dismissed the suit.

The appellate High Court (SIR BASIL SCOTT C. J. and DAVAR J.) held as to the 5th requisition that though the deeds had not been produced there was no reason to suppose they were not forthcoming, and their non-production raised no such reasonable doubt as would entitle the purchaser to refuse to complete; that as to the 7th and 8th requisitions there could not be any reasonable doubt that the charge in favour of Damodardas and Gordhandas had been satisfied; and that as to the 9th requisition it was very unlikely that any mortgage had been created by deposit of the deed of 31st July 1888, even if there was no evidence to the contrary and that there was the solemn statement of Ramdas Kessowji that he had not created one. The appellate Court, therefore, affirmed the decision of the first Court, and dismissed the appeal.

On this appeal.

*Uppjohn, K. C.* and *Sir W. Garth*, for the appellant contended that the respondents had failed to give any information as to the deeds prior to 31st July 1888 until

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February 1914, and then merely stated the name of the person with whom they were: they did not produce them as they were bound to do under the agreement, and also under section 55, sub-section 1 (b), of the Transfer of Property Act (IV of 1882). The original mortgage was one to two mortgagees, Damodardas and Gordhandas who had a joint interest in it. It was not produced and there was no proper evidence tendered of its release by Damodardas who had died: see Contract Act (IX of 1872), section 45 and the illustration to it; *Matson v. Dennis*<sup>(1)</sup> and *Powell v. Brodhurst*.<sup>(2)</sup> The title was incomplete without proof that the right and interest of Damodardas in the mortgage was extinguished: the recitals in the release were not evidence as against him; and the registration of the release was not evidence of the fact of the release of the mortgage, but only of the existence of the document. The indorsement by Gordhandas proved nothing except that he executed the deed. The deed of 1888 was not produced. The interest of the deceased joint mortgagee was not extinguished by the limitation law. Reference was made to the Limitation Act (IX of 1908), section 28, and Schedule 1, Articles 132, 147. As to the latter Article *Vasudava Mudaliar v. Srinivasa Pillai*<sup>(3)</sup> was cited; a title cannot be forced on the purchaser which depends on whether the period of limitation is 60 years by Article 147 or 12 years by Article 132. There should also be evidence that the period of limitation was not extended by acknowledgment or part payments under sections 19 and 20 of the Limitation Act. Reference was made to *Scott v. Nixon*<sup>(4)</sup> and *Games v. Bonnor*.<sup>(5)</sup> The title deduced was, it was submitted, not a compliance with the contract which was for a marketable title reasonably free from doubt; nor was it deduced in a

<sup>(1)</sup> (1864) 4 De G. J. & S. 345. <sup>(3)</sup> (1907) 30 Mad. 426; L. R. 34 I. A. 186.

<sup>(2)</sup> [1901] 2 Ch. 160,

<sup>(4)</sup> (1843) 3 Dr. & War. 388 at p. 402.

<sup>(5)</sup> (1884) 54 L. J. Ch. 517.

reasonable time, and the appellant was justified in cancelling the contract.

*Cunliffe, K. C.* and *E. B. Raikes*, for the respondents contended that they had never refused to procure production of the earlier title-deeds, and after the appellant learnt where they were he had never required production of them. The system of registration in Bombay was strict. Since 1866 no document unless registered can affect the title to immoveable property there. Analogies of the practice of deducing titles in England must be applied with care. The correspondence showed that the vendors were ready and willing to satisfy all reasonable requisitions. The agreement as to a marketable title meant such a title as any reasonable purchaser would accept. There was no obligation on the vendors to produce documents not in their possession: see clause 5 of the agreement and section 55, sub-section 1 (b) of the Transfer of Property Act, 1882. The mortgage of April 1892 was created by the deposit of the deeds; the memorandum of deposit was only evidence of the terms; Evidence Act, 1872, section 114, illustration (i): it was unnecessary to produce it: all the purchaser had to be satisfied of was that the deeds were returned and in the possession of the mortgagor. That was shown by the recitals in the registered release, and the declaration by Ramdas Kessowji which were satisfactory evidence of its having been discharged. Any claim by or through Damodardas was barred by the 12 years period of limitation under Article 132, Schedule I of the Limitation Act, 1908, and there was nothing to show any extension of the period. Reference was made to *Sham Chand Pal v. Protap Chandra Pal*.<sup>(1)</sup> There was, it was submitted, a sufficiently good title to satisfy the terms of the contract of sale, which had consequently been wrongly cancelled by the appellant.

<sup>(1)</sup> (1897) 25 Cal. 78: L. R. 24 I. A. 186.

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The appellant was not called on to reply.

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LORD PARKER :—This appeal arises in a vendor and purchaser summons on the Original Side of the Bombay High Court under Rule 210 of the High Court Rules. The vendors were bound by their contract of the 18th October 1913, to deduce “a marketable title free from all reasonable doubts” to the property they contracted to sell. The question is whether they have discharged this obligation. Both the Judge of first instance and the High Court on appeal have answered this question in the affirmative. The purchaser is now appealing to His Majesty in Council.

The material facts may be stated as follows :—On the 26th April, 1892, Ramdas Kessowji, the then owner of the property contracted to be sold, joined with Dwarkadas Shamji, the owner of an adjoining property, in mortgaging both properties to Damoderdas Sunderdas and Gordhandas Sunderdas to secure a lac. of rupees, with interest at  $7\frac{1}{2}$  per cent. per annum. The mortgage was effected by an agreement of charge duly registered. It appears from this agreement that the sum to secure which the mortgage was given was a debt due from the mortgagors to the mortgagees. The title-deeds relating to both properties are stated to have been deposited with the mortgagees. The principal debt is made payable by two instalments of 50,000 rupees each on the 30th September, 1892, and the 20th April, 1893, but the mortgagors were entitled to pay each instalment before its due date with interest up to the date of actual payment. Both mortgagors join in charging the properties. The agreement contains a proviso that on payment of either instalment with interest the mortgagors, or

either of them, shall be entitled to redeem the title-deeds of one of the properties, and that a memorandum of such payment and redemption shall be endorsed on the agreement.

In order to make a title to the property the vendors must show that this mortgage has been cleared off. Their case is that about the 9th August, 1892, Ramdas Kessowji paid to the mortgagees the first instalment of 50,000 rupees with interest, and redeemed the title-deeds of the property contracted to be sold. As evidence of this they produce a certified copy of a release, dated the 30th September, 1902 (less than eleven years before the date of the contract), and duly registered, whereby, after reciting such payment and redemption, and also the death of Damoderdas Sunderdas on the 4th July, 1901, leaving Gordhandas Sunderdas his only heir and legal representative, Gordhandas Sunderdas released the property contracted to be sold from the equitable charge created by the agreement of the 26th April 1892. Obviously if it be the fact that when this release was executed Damoderdas Sunderdas was dead, and Gordhandas Sunderdas was his sole heir and legal representative, the equitable charge was effectually released. The purchaser, therefore, asked for evidence of these facts, but the vendors refused to supply such evidence on the ground that the recitals in the release itself were sufficient proof of the facts recited.

In their Lordships' opinion, it is quite clear that the recitals in a deed are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them. If, therefore, at the date of the release Damoderdas Sunderdas were living, or if, though dead, Gordhandas were not his heir or legal representative, there would be nothing to prevent either Damoderdas Sunderdas himself or those claiming

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through him from disputing the truth of the recitals contained in the release. The learned Judges in the Court below appear to have thought that the provisions of the Registration Act, 1877, had some bearing on this point, but if those provisions be referred to, it is quite clear that they have no effect on the value as evidence of recitals contained in a registered instrument.

Although, however, recitals in a deed are only evidence as against the parties to the deed or those who claim through or under them, it has long been the custom of conveyancers, at any rate in this country, to provide in contracts of sale and purchase that recitals in deeds of a certain age shall be sufficient to satisfy a purchaser of the truth of the fact recited. The existence of such a custom is material whenever a purchaser is bound to accept a marketable title, for the insertion of a usual condition in a contract of resale could not be depreciatory. In this country the usual condition (now recognised by statute) is confined to deeds dated not less than twenty years before the contract, and there is no evidence of any custom among Bombay conveyancers relating to more recent deeds. In their Lordships' opinion, a condition making the recitals in the release of 1902 evidence of the facts recited would have been depreciatory, especially having regard to the fact that the vendors cannot produce one of the title-deeds deposited for the purpose of the equitable charge or the equitable charge itself.

It was argued that Damoderdas Sunderdas, if living, or, if dead, his heirs or legal representative, must be barred by the Limitation Act. This point was not taken in either of the Courts below, and it is doubtful whether it be open to the respondents to take it before this Board. Their Lordships, however, do not consider the point to be a good one. It is perfectly possible that

there have been payments on account of the principal or interest secured by the equitable charge which would preclude the operation of the statute.

Their Lordships conclude, therefore, that the purchaser was justified in requiring evidence that Gordhandas Sunderdas was sole heir and legal representative of Damoderdas Sunderdas, and that the vendors having refused to supply such evidence have not deduced the marketable title which they were bound to deduce.

Under these circumstances their Lordships will humbly advise His Majesty to reverse the orders appealed from with costs here and below, and to order the return to the purchaser of his deposit with interest at the usual rate allowed in such cases by the Courts in Bombay (or in case the parties differ, at a rate to be fixed by the High Court), and the cost of investigating the vendor's title.

Solicitor for the appellant: Mr. *G. C. Farr*.

Solicitors for the respondents: Messrs. *E. F. Turner & Sons*.

*Appeal allowed.*

J. V. W.

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