

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

1912

July 8.

JOGEMAYA DASEE

v.

AKHOY COOMAR DAS.*

Review—Vendor and purchaser—Conditions of sale, effect of—Title—Commissioner of Partition, sale by, not sale by Court—Rules and orders of the High Court, r. 426, scope of.

Under an order of Court that he "be at liberty to sell" a Commissioner of Partition sold certain property by public auction. The conditions of sale, *inter alia*, stipulated that "there were no documents of title, except those mentioned in the abstract of title, that the purchaser should not be entitled to call for any other document, or to object to the title on the ground of the non-production thereof, and that no objection to the title should be allowed."

The purchasers at the auction subsequently obtained an order of Court directing the Registrar to enquire and report under rule 426 as to the vendor's title.

On an application for review of judgment :

Held, that the review must be granted on the ground that the sale was not a sale by the Court.

Golam Hossein Cassim Ariff v. Fatima Begum (1) and *Chandranath Biswas v. Biswanath Biswas* (2) followed.

The conditions of sale did not preclude the purchasers from raising the question of the vendor's title where it appeared (i) that the abstract of title commenced with a bond of indemnity which was in no sense a root of title, and (ii) that the abstract did not expressly disclose the nature of the title, or indicate that the property was subject to a permanent lease at a small rent.

APPLICATION.

This suit was instituted for the partition of the estate of one Kedar Nath Das, and a Commissioner of Partition was duly appointed.

* Application in original civil suit No. 400 of 1905.

(1) (1910) 16 C. W. N. 394.

(2) (1870) 6 B. L. R. 492a.

By two orders, made on the 23rd May 1910 and the 4th April 1911 respectively, it was, *inter alia*, ordered that the Commissioner of Partition “be at liberty to sell by public auction or private sale to the best purchaser or purchasers that could be got for the same, provided the said Commissioner should consider that a sufficient sum had been offered,” certain premises, including No. 60, Chingreehatta Road in Calcutta . . . , “and that all parties should join in the said sale and execute proper conveyance or conveyances in respect thereof in favour of such purchaser or purchasers.”

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The sale of the properties was duly advertised by the Commissioner to take place on the 29th July 1911: the notification of sale supplied a description of the properties, and intimated that “the abstract of title, plans of premises to be sold and conditions of sale may be seen at the office of the plaintiff’s attorney, etc.”

The abstract of title of the premises No. 60 Chingreehatta Road commenced with a bond of indemnity dated the 24th January 1904, indemnifying the past committee of a lunatic, and containing references to pedigree, but not particularly referring to the property itself.

Among the conditions of sale the following were relevant to the present application:—

“6. There are no documents of title, except those mentioned in the abstract of title; the purchaser shall not be entitled to call for any other document.

“7. The party having the carriage of the proceedings, shall within ten days after the sale deliver to the purchaser or his attorney an abstract of title to the lot purchased by him subject to the stipulations contained in these conditions.

“8. The parties to this suit have not in their possession or power; nor are they aware of the existence

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of, any documents of title except the abstracted documents, and the purchaser will not be entitled to call for the originals of any document or to object to the title on the ground of the non-production of any other documents.

“9. The purchaser shall assume the statement in the abstracted documents to be true, and shall accept the title as disclosed in the abstract and no objection to the title shall be allowed.

“12. Upon payment of the purchase money the purchaser shall be entitled to possession and shall be entitled at his own expense to obtain a sale certificate from this Honourable Court or a proper conveyance wherein all proper parties shall join The purchaser shall at his own cost take such steps as may be necessary for the purpose of obtaining possession of the lot purchased by him.

“17. The costs occasioned by the default of the original purchaser shall also be paid by him. An order containing these directions may also be obtained from a Judge in Chambers.

“18. The sale is to be deemed and treated for all purposes as a sale by the Court.”

On the 29th July 1911, the premises No. 60 Chingreehatta Road were sold by the Commissioner of Partition by public auction for the sum of Rs. 8,250 to one Hajee Alla Joga and others.

Being dissatisfied with the title, on the 29th April 1912 the purchasers took out a summons for an order “that it may be referred to the Registrar of this Honourable Court to enquire and report whether the title to the said premises is such as the said purchasers can be compelled to accept, and that in case the said Registrar should report that the title is not in order, the purchase

money may be refunded to the purchasers with interest or in the alternative that it may be referred to the Registrar to enquire as to the amount of compensation which should be allowed for the defect in the vendor's title, and for an order that the amount of such compensation be refunded to the purchasers”

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On the 6th May 1912, Fletcher J. disposed of the summons and in the presence of counsel representing the purchasers, the plaintiff and the defendant respectively, made an order whereby “it was referred to the Registrar of this Court to enquire and report whether a good title can be made to the said property, etc.”

An application was thereupon made by the defendant, Akhoy Coomar Das, to have the order set aside on the ground that the counsel briefed by him was unavoidably prevented from being present at the hearing of the summons, and his brief was held by another counsel who was not conversant with the facts and was so unable to place the defendant's case before the Court. This application was refused.

Thereupon the present application was made by the defendant for a review of the order of the 6th May 1912, and for an order that the same may be set aside on the ground of there being errors on the face of the record. The errors referred to in the petition for review were—(i) the sale of the premises not being a sale by the Court, the order of the 6th May should not have been made; (ii) having regard to the conditions of sale, the purchasers were not entitled to an enquiry as to whether a good title could be made to the premises.

Mr. B. C. Mitter, for the defendant-petitioner, Akhoy Coomer Das. An application for a review of

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judgment will lie where there is an error of law on the face of the judgment: *Sharup Chand Mala v. Pat Dasee* (1). The order of the 6th May 1912 was erroneous, inasmuch as this Court could interfere only in respect of a sale *by* the Court. The sale in question was not a sale *by* the Court, but *under the authority of* the Court. The form of the orders of the 23rd May 1910 and 4th April 1911 was that the Commissioner of Partition “*be at liberty to sell, etc*”: see *Chandranath Biswas v. Biswanath Biswas* (2), and *Golam Hossein Cassim Ariff v. Fatima Begum* (3), where a sale by a Receiver was held not to be a sale by the Court. This being so, rule 426 of the Rules and Orders has no application: rule 426 applies only to sales by the Registrar. Accordingly the Court should not have ordered the enquiry directed by the order of the 6th May 1912.

Secondly, the purchasers were not entitled to the enquiry as to title, as they were bound by the conditions of sale. The purchaser is bound by clear stipulations as to title in conditions of sale: *Dart's Vendors and Purchasers*, 7th edition, Vol. I, p. 163. Conditions 6, 8 and 9 of the conditions of sale were clear and unambiguous, and the purchasers were precluded from going behind the title as shewn in the abstract, and were not entitled to dispute or raise any question as to the vendor's title: *Hume v. Bentley* (4), *Nunn v. Hancock* (5), *In re National Provincial Bank of England and Marsh* (6).

Mr. Pugh, for the purchasers, Hajee Alla Joga and others. No ground has been made out for a review of judgment. The sale was a sale by the Court. It took place as the result of an order of Court in a

(1) (1887) I. L. R. 14 Calc. 627.

(2) (1870) 6 B. L. R. 492n.

(3) (1910) 16 C. W. N. 394.

(4) (1852) 5 De Gex. & Sm. 520.

(5) (1871) L. R. 6 Ch. App. 850.

(6) [1895] 1 Ch. 190.

partition suit. When a Commissioner of Partition by sells leave of the Court, he has no inherent power to sell, and he must be selling as the hand of the Court. It is in effect the same as a sale under the Partition Act when the Court sells. It makes no difference whether the Court sells through its Registrar or through a Receiver or a Commissioner of Partition. Persons rely on these sales as sales by the Court. In any event, there is an express condition (condition 18) which stipulates that the sale is to be treated as a sale by the Court, and it must be treated as such.

The conditions of sale do not preclude the purchasers from raising a question of title on a material encumbrance. It appears *aliunde* that the property is subject to a permanent lease at a small rent. It would be manifestly unfair if the purchasers were compelled to pay so substantial a sum as Rs. 8,250 for such a return. In order that the purchaser may be so precluded, the conditions of sale must clearly state the defect of title in express words and provide for it. General words will not cover such a defect Dart's Vendors and Purchasers; Key and Elphinstone's Precedents in Conveyancing.

FLETCHER J. This is an application for the review of a judgment dated the 6th May 1912. The matter is in my opinion an exceedingly unfortunate one. On the 6th of May 1912 the purchaser at a sale held by the Commissioner of Partition under the provision of an order of the 23rd of May 1910 applied to the Court that a reference should be directed to the Registrar of the Court to enquire and report under rule 426 as to whether the vendor could make a title to the property. That order was made, and it was not then discussed as to whether the order was made in respect of an ordinary sale by the Court, or whether it was a sale out

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of Court. Subsequently an application was made to have that order set aside on the ground that it was *ex parte*. It appearing, however, from the records of the Court that the persons who had the carriage of the proceedings were not unrepresented, that application was dismissed, and now an application is made to review the judgment on the ground that the sale was not by the Court, and also on the ground that it appears from the conditions of sale that the purchaser bound himself to accept whatever title the vendors might have in the property. The application is made on the ground that there is an apparent error on the face of the record.

Now, the first point is one I have dealt with before. In *Golam Hossein Cassim Ariff v. Fatima Begum* (1), I tried to point out the difference between a sale by the Court and a sale under the authority of the Court, or out of Court, a distinction which is well recognized in England, but is not so carefully recognized in this country. In one case the Court makes the title to the purchaser; in the other case the Courts only authorize either the parties to the suit or the person having the carriage of the proceedings to sell the property and to make a title to the purchaser. *Chandr Nath Biswas v. Biswanath Biswas* (2) decided by Mr. Justice Macpherson is to the same effect, and there he decided that the addition of a condition that the conveyance should be settled by the Judge in Chambers, if the parties disagree, did not make the sale one by the Court. There is no doubt this is a matter of considerable importance in this country, as sales by this Court are taken to be of considerable value as establishing the title of the purchaser, and I cannot help regretting that in the present case, where it appears from the order of the 23rd of May 1910 that the Commissioner

(1) (1910) 16 C. W. N. 394.

(2) (1870) 6 B. L. R. 492a.

of Partition was only given liberty to sell by public auction, that conditions of the nature of condition 18 should be inserted in the conditions of sale. Condition 18 states that the sale is to be deemed and treated for all purposes as a sale by the Court, and the other conditions are all liable to lead the purchaser to believe that he is buying property, the title of which is going to be made to him by the Court: for instance you come across such a statement in the conditions as "the party having the carriage of the proceedings" and other conditions which would lead any person to believe that the sale was one by the Court. It seems to me that on that point the sale is not one by the Court, but is one made by the Commissioner of Partition under the authority of the Court.

The other argument which was addressed to me by Mr. B. C. Mitter is one of much graver import, because the one as to whether this is a sale by the Court or a sale out of Court is merely one of procedure as to whether the purchaser can apply on a summary proceeding in this suit to have the question decided, or whether he has to be relegated to a separate suit. The other point Mr. Mitter has raised goes to the root of the whole matter, because he says on conditions of sale like this the purchaser is bound whether the title is good, bad or indifferent, and whether the vendor can make any title or no title to the purchaser; the purchaser has bound himself by these conditions of sale that on the sale by the Commissioner of Partition he will take the title whatever it may be without enquiry or requisition, and the two conditions that he relies upon are first of all condition 6, which states that there are no documents of title except those mentioned in the abstract of title, and the purchaser shall not be entitled to call for any other document. The point that Mr. Mitter makes on that

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is with reference to a document in the abstract. That document it is true is not a document dealing with the title of the property at all, but is a bond of indemnity. True it is that it contains recitals of importance relating to the pedigree, but not in any way of itself affecting the title to the property. He said the abstract commences with such a document and precludes the purchaser from requiring any evidence of title under condition 6. On the authorities I am not satisfied that that is so. The document of title with which the abstract commences or purports to commence has got to be, *prima facie*, a document which is a proper root of title, and a deed of indemnity indemnifying the past committee of a lunatic obviously has nothing to do with the title at all, and that document is in no sense a root of the title.

Then the other condition that he relied on is condition 9: "the purchaser shall assume the statement in the abstracted document to be true, and shall accept the title disclosed in the abstract, and no objection to the title shall be allowed." The first point Mr. Mitter has made on that is with reference to this deed of indemnity. The deed of indemnity not affecting the title, the purchaser is not bound to accept the recitals in that document as conclusive on matters relating to the title, unless he has by express condition contracted to do so.

The other portion of the conditions Mr. Mitter has relied upon is as to the purchaser accepting the title as disclosed in the abstract, and that no objection to the title shall be allowed. He says that the purchaser has agreed to buy whatever title the vendors may be able to transfer to him, though that title may be the mere right to receive a pepper-corn as rent from the property in perpetuity, or it may be nothing at all. 'That I do not agree with at all.' It seems to me if you

are going to sell property to which you have got no title, or a remote or shadowy title, you ought to tell the purchaser in express and clear words what you intend to sell to him. It is not sufficient to dress the matter up and say that the purchaser shall accept the title as disclosed by the abstract and no objection shall be allowed, because that pre-supposes that an absolute title is to be shown by the abstract; but if it appears *aliunde*, as Mr. Pugh says, that they have evidence which, so far from showing that the vendors have an absolute right to convey to the purchaser, shows that the property is subject to a permanent lease at a small rent, then I have no doubt myself that the purchaser is not bound to accept such a title. It seems to me to hold otherwise would be a perfect scandal, that by a condition stating that the purchaser was to accept the title disclosed by the abstract the purchaser has bound himself to pay Rs. 8,000 in order that he might get nothing. I regret myself that the conditions of sale have been drawn in this form, and that a review of judgment must be granted on the ground that this is not a sale by the Court.

I think this is a case where I ought to make no order for costs.

Application allowed.

Attorney for the petitioner: *S. K. Deb.*

Attorneys for the opposite party: *G. C. Chunder & Co.**

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