

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Richardson J.

NURSING DASS KOTHARI

1923

v.

Feb. 26.

CHUTTOO LALL MISSER*.

Vendor and Purchaser—Calcutta Improvement Acts 1911—1915, s. 63 (2), notice under—Non-disclosure, whether material defect—Transfer of Property Act (IV of 1882) s. 55 (1) (a)—Mutual mistake—Contract Act (IX of 1872) s. 20.

On the 29th November 1919 the defendant who was a Receiver appointed by this Court sold by public auction the land and premises No. 43, Burtolla Street, which formed part of the property in his charge. At such sale the plaintiff was declared the highest bidder at the price of Rs. 1,41,000 of which sum in accordance with the conditions of sale he deposited Rs. 35,000 with the defendant. The plaintiff subsequently discovered that at the time when the auction was held, there had been already published in the Calcutta Gazette a notice under section 63 (2) of the Calcutta Improvement Acts 1911—1915 on the 18th December 1918 which stated that the Board of Trustees for the Improvement of Calcutta had prepared a plan of a proposed public street known as proposed public street, Burrabazar alignment south-east section and that among other municipal holdings through which the proposed public street would pass were the premises No. 43, Burtolla Street. The notice further stated that objections to the matters contained in the notice had to be put in by the 31st March 1919. No mention was made of this notice in the sale notification or otherwise. It was admitted that the defendant found a copy of the notice among other papers which he received after the sale from the Official Receiver whom he succeeded in the receivership of the estate but personal knowledge was not imputed to the defendant nor did the defendant impute personal knowledge to the plaintiff of the fact of the said notice. It was also admitted that the property which formed the subject matter of the notice was about half the property in suit and was not an insignificant amount. The plaintiff refused to complete the purchase. Thereupon the property was put up for sale again and sold for Rs. 1,06,000. At this sale

* Appeal from Original Civil, No. 98 of 1922, in suit No. 2355 of 1921.

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the said notice was referred to. The plaintiff instituted this suit against the defendant for a declaration that his agreement for the purchase of the said premises was void and inoperative and for the recovery of the sum of Rs. 36,000 which the plaintiff had deposited as aforesaid. The suit was dismissed with costs by Buckland J. The plaintiff appealed.

Held, that the notice issued under section 63 (2) of the Calcutta Improvement Acts 1911—1913 and the consequent liability to restriction upon the use of the premises constituted "a matter of fact essential to the "agreement" and that in the circumstances, the case fell within the provisions of section 20 of the Indian Contract Act (IX of 1872) and the plaintiff was entitled to succeed.

APPEAL by the plaintiff Nursing Dass Kothari from the judgment and decree of Buckland J.

This appeal arose out of a suit brought by the plaintiff for a declaration that his agreement for the purchase of premises No. 43, Burtolla Street, was void and inoperative and for the refund to him of the sum of Rs. 36,000 together with interest deposited with the defendant in part payment of the agreed price and for damages and costs. The material facts of the case for the purpose of this report have been shortly stated in the head note and will be found fully stated in the judgment of Sanderson C. J. The suit came on for hearing before Buckland J. who held that the plaintiff was not entitled to refuse to complete by reason of the notice under the Calcutta Improvement Act, section 63 (2), and that it was not the duty of the defendant to disclose such notice and that the contract was not void and accordingly dismissed the suit with costs. The plaintiff appealed.

Sir Asutosh Chaudhuri (with him *Mr. S. C. Bose*), for the appellant. The result of the notice which had been published by the Improvement Trust was that half the premises might be taken for the purposes of the Act and consequently a restriction was placed on the use of the property by the purchaser. Such a

liability constituted a "material defect" in the property within the meaning of section 55(1) (a) of the Transfer of Property Act. The defect need not be in the actual physical subject matter of the contract. It may consist in the existence of some liability of which the other party is ignorant. Fry on *Specific Performance*, 6th Edition, p. 406 : *Ballard v. Way* (1). Property did not become vested in a Receiver. A Receiver was the agent of parties and notice to a Receiver was notice to the parties themselves. *Wilkinson v. Gangadhar Sirkar* (2). The defendant's predecessor the Official Receiver had express notice of the proceedings instituted by the Improvement Trust and consequently the defendant must be taken to have notice of such proceedings. Referred section 3 of the Transfer of Property Act. It was the defendant's duty to disclose the existence of such notice to the buyer. The notice was "a matter of fact essential to the agreement" within the meaning of section 20 of the Indian Contract Act. It was unknown both to the plaintiff and the defendant at the time of the plaintiff's purchase. Both parties were under a mistake as to facts; the agreement was therefore void. Referred to sections 18 and 20 of the Indian Contract Act.

The Advocate-General (Mr. S. R. Das) (with him *Mr. S. N. Bannerjee*), for the respondent. It is admitted that the defendant at the time of the sale was not in fact aware of the existence of the notice constituting the alleged defect in the property. He could not therefore be called upon to disclose that of which he was not aware. The knowledge referred to in section 55(1) (a) of the Transfer of Property Act was knowledge in fact and not constructive knowledge such as has been contended. It did not follow that because proceedings

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(1) (1836) 1 M. & W. 520.

(2) (1871) 6 B. L. R. 486.

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under section 63 had been initiated by the Improvement Trust, any farther steps would be taken. Other stages had to be gone through and the premises could not be acquired until the proposed public street had first become a projected public street and had then found its way into an improvement scheme. The existence of the notice, therefore, did not constitute a "material defect" within the meaning of section 55(1) (a) of the Transfer of Property Act nor could it be said to be "a matter of fact essential to the agreement" within the meaning of section 20 of the Indian Contract Act. Where there had been only an innocent misrepresentation, it was not a ground for rescission of contract unless it was such as that there was a complete difference in substance between the thing bargained for and that obtained so as to constitute a failure of consideration. *Kennedy v. Panama & Mail Co.* (1). The rule that no property becomes vested in a Receiver is like all other rules subject to modification by the Legislature. The Code of Civil Procedure empowers the Court to confer upon a Receiver all such powers as the owner himself. *Haji Cassim Mamroji v. K. B. Dutt* (2).

Sir A. Chaudhuri, in reply.

SANDERSON C. J. This is an appeal from the judgment of my learned brother, Mr. Justice Buckland, who dismissed the suit of the plaintiff with costs.

The suit was brought for the purpose of obtaining a declaration that a certain agreement for the purchase of the land and premises No. 43, Burtolla Street, Calcutta, is void and inoperative and to recover a sum of Rs. 36,000 with interest which the plaintiff had deposited as part payment of the purchase price.

(1) (1867) L. R. 2 Q. B. 580.

(2) (1914) 19 C. W. N. 45.

The date of the agreement in question was the 29th of November 1919. The defendant was a Receiver appointed in a certain suit by this Court, and he sold by auction the property in pursuance of an order of the Court. The plaintiff was the highest bidder, and purchased the property for Rs. 1,41,000 and made a deposit, as I have already said, of Rs. 36,000. Subsequently, the plaintiff discovered that a notice had been published under section 63,* sub-section (2) of the Calcutta Improvement Act which affected these premises. That notice had been published on the 18th of

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* Section 63 (2) of the Calcutta Improvement Act (as amended by Beng. III of 1915) runs as follows :—

(2) When a plan of proposed public street has been made under sub-section (1), the Board shall prepare a notice stating—

- (a) the fact that such plan has been made,
- (b) particulars of the land (shown in such plan) through which the proposed public street will pass,
- (c) the place at which the said plan and particulars may be seen at reasonable hours, and
- (d) the period (which shall be not less than sixty days) within which objections to the said plan may be submitted to the Board,

and the Board shall thereupon—

(i) cause the said notice to be published weekly for two consecutive weeks in the *Calcutta Gazette* and in local newspapers, and in such other manner as the Board may direct, and

(ii) forward a copy of the said notice to any person whose name appears in the Municipal assessment book as being primarily liable to pay the owner's share of the consolidated rate, or the rate on the annual value of holdings, as the case may be, in respect of any land included within the proposed public street, and

(iii) forward a copy of the said notice and of the plan to which it relates to the Chairman of the Corporation and, if any area in the neighbourhood of the Calcutta Municipality is included in such plan, to the Chairman of the local authority administering any portion of such area, and

(iv) cause copies of the said notice and plan to be delivered to any applicant on payment of such fee as may be prescribed by rule made under section 133.

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December 1918, and objections to matters contained in the notice had to be put in by the 31st of March 1919, so that, if it is material for the consideration of this case, it is to be noted that the time for making objections had expired before the date of the sale to the plaintiff. No mention of this notice was made in the sale notification. The facts relating to this matter are to be deduced from the memorandum which was agreed to by the parties in the trial Court. It is as follows :—

“ With reference to the question of knowledge it is stated by Mr. Mitter on behalf of the plaintiff that he does not impute personal knowledge to the defendant and accepts the defendant’s denial in regard thereto until after the contract was entered into. He, however, imputes to him prior constructive notice of the intended acquisition by reason of the public notification and by reason of the fact that particular notice had been served on the Official Receiver who preceded him as a Receiver. Mr. Das on behalf of the defendant similarly says that he does not impute personal knowledge to the plaintiff and accepts the denial with regard thereto, but he relies upon the constructive notice of the intended acquisition afforded by the public notification. Mr. Das also admits that the property, which formed the subject matter of the notice, was about half the property in suit and was not an insignificant amount.”

The defendant was not the first Receiver in this matter. It appears that the Official Receiver had been appointed Receiver, and the defendant was appointed as a Receiver to succeed the Official Receiver: and the learned Judge in his judgment stated, “ it has, however, been admitted by the defendant’s counsel that the defendant found a copy of this notice among other papers which he received after the sale from

“the Official Receiver whom he succeeded in the “receivership of this estate.” So, it is clear that the defendant himself did not know of this notice until after the sale of November 1919. The plaintiff refused to complete the purchase. The result was that the Receiver put up the property for sale again, and on that occasion it fetched one lakh and six thousand rupees. We were informed that at this sale the notice, which had been published by the Improvement Trust Board, was referred to.

The learned Judge came to the conclusion that under the provisions of section 63 of the Calcutta Improvement Act, nothing more had been done than to prepare a plan of a proposed public street and to publish the requisite notices, and possibly, to apply to the Local Government for sanction, but as to that no information had been forthcoming nor would it affect the matter, and that the result was that at the time of the sale by auction the land sold was subject to no disabilities or burden or restrictions on the owner's use, whatever might be the most appropriate expression. The learned Judge further said that he did not think that in such circumstances it was the duty of the defendant to disclose the existence of a notice which in fact might not and did not in law, as a necessary consequence, result in detriment to the purchaser of property by curtailing his right as owner.

The learned counsel on behalf of the plaintiff urged in the first place that a possible result of the notice, which had been published by the Improvement Trust, was that half the premises might be taken by the Improvement Trust for the purposes of the Act. It is not necessary for me to go through the provisions of section 63 in detail. It is sufficient for me to say that it seems to me on the facts of this case that

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the position may be stated as follows: proceedings had been put in train by the Improvement Trust which, if brought to completion, might result in a restriction being placed upon the use of the property by the purchaser and that that restriction might apply to no less than half the property which was admitted in the abovementioned note to be "not an insignificant amount."

The learned counsel for the appellant argued in the first place that such a liability constituted a material defect in the property within section 55 (1) (a) of the Transfer of Property Act. The section runs as follows: "The seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware and which the buyer could not with ordinary care discover."

The learned counsel argued further that the seller, *i.e.*, the defendant, must be taken to have been aware of the material defect in the property, and consequently it was his duty to disclose it to the plaintiff, the buyer.

In my judgment, the learned counsel cannot bring the plaintiff's case within that section. It is admitted that at the time of this sale the defendant was not in fact aware of the notice, constituting the alleged defect—if it may be so called—in the property. The learned counsel, however, said that inasmuch as the defendant's predecessor, the Official Receiver, had express notice of the proceedings instituted by the Improvement Trust, the defendant also must be taken to have had notice of such proceedings: and, he referred to the definition of "notice" in section 3 of the Transfer of Property Act. I am not prepared to accept that argument.

In the first place, I do not understand how the seller can be called upon to disclose that of which he

is not aware: and, in the second place, when I look at the last sentence of section 55, I find this provision—“An omission to make such disclosures as are mentioned in this section, paragraph (1) clause (a), paragraph (5) clause (a), is fraudulent.” Consequently, if the seller does not disclose to his buyer any material defect in the property of which he is aware and of which the buyer is not aware and which he could not discover with ordinary care, the omission is declared by the provisions of the section to be fraudulent: consequently, in my judgment, having regard to the facts of this case and to the fact that the defendant had no knowledge of the notice at the time of the sale, the plaintiff's case does not come within that section. It is not, therefore, necessary for me on this appeal to consider or decide whether the facts, to which I have referred, constitute a material defect in the property. The first point, therefore, upon which the learned counsel for the appellant relied, fails.

The second ground upon which the learned counsel for the appellant relied, was that the case comes within section 20 of the Indian Contract Act. That was considered by the learned Judge, and he came to the conclusion that the alleged defect in the property was not essential to the agreement for the reasons which I have already mentioned and which were the basis of his judgment. It is necessary, therefore, for me to consider this question.

It appears to me that the notice issued by the Improvement Trust and the liability to restriction upon the use of the premises, to which I have already referred, consequent upon the proceedings initiated by the Improvement Trust may be said to be, “a matter of fact essential to the agreement.” The learned Advocate-General argued that it did not follow

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that, because proceedings under section 63 had been initiated by the Improvement Trust, any further steps to carry out street improvements would be taken. That is true. On the other hand, the converse is equally true, and the proceedings under section 63 having been initiated, the Improvement Trust might eventually carry out street improvements which would affect the premises. That essential matter of fact was unknown both to the plaintiff and the defendant at the time of the plaintiff's purchase; consequently, by reason of the provisions of section 20 of the Contract Act, the agreement is void. The words of the section are, "where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." For these reasons and on the abovementioned ground, I am of opinion that the plaintiff is entitled to the declaration for which he asked, namely, that the agreement is void, and he is further entitled to a decree for the return of the deposit of Rs. 36,000.

The result is that the appeal is allowed, the learned Judge's judgment and decree are set aside. A declaration will be made that the agreement is void and there will be a decree in favour of the plaintiff for rupees thirty-six thousand.

The defendant must pay the costs of the plaintiff in this Court and in the trial Court.

RICHARDSON J. I agree. It is common ground that neither party knew of the defect consisting in the liability created by the notice in the Gazette. An attempt was made by the learned Advocate-General by a close examination of the provisions of section 63 of the Calcutta Improvement Act as amended by Act III of 1915, to minimise the liability to which the property is subject. He said that every house in

Calcutta is subject to a possibility that it may be acquired under the Improvement Act for the purposes of the Act and that the notice issued by the Board of Trustees under section 63 stating that a plan had been made of a proposed public street which would pass through this particular house carried the liability of the house to be acquired under the Act very little further. There were other stages to be gone through and the premises could not be acquired until the proposed public street had first become a projected public street and had then found its way into an improvement scheme sanctioned by the Local Government under section 48 of the Act. But, in my opinion, the notice in the Gazette did crystallize the general liability to which this property in common with other properties in Calcutta, is subject in such a way as to entitle the buyer to say that he would not be getting a property of the description which at the time of the sale he thought he was getting. He would be getting a property which he might not be able to keep and instead of which he might in the result be entitled merely to a sum of money by way of compensation. Where section 20 of the Contract Act is in question, it may not always be easy to say whether a mistake has been made as to a matter of fact "essential to the agreement." In my opinion, however, the present case falls within the section, and with great respect to the learned Judge, I am of opinion that this appeal should be allowed.

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Appeal allowed.

Attorney for the appellant : *N. C. Bose.*

Attorney for the respondent : *S. C. Mitter.*

A. P. B.