APPEAL FROM ORIGINAL CIVIL.

Before Derbyshire C. J. and Costello J.

1935

Mar. 12, 13, 14.
April 17.

RAMLAL SEN

v.

SURADHANISUNDAREE PAL CHAUDHURANI*.

Vendor and Purchaser—Street alignment, Non-disclosure of, when material defect.

Per DERBYSHIRE C. J. (COSTELLO J. concurring): The existence of a street alignment prevents the purchaser at a Registrar's sale from making a good title to the property; and the purchaser cannot be compelled to take the property with a compensation under clause 12 of the conditions of such a sale, where the street alignment has not been disclosed by the vendor. Such a sale is void and the purchaser is entitled to the return of the purchase money with interest thereon.

The subjection of the whole of the frontage of a property extending back twelve feet from the present front of the building to the restrictions and liabilities imposed by the street alignment is a very material burden or liability on this property.

Where the existence of the street alignment was undisclosed by the vendor and the purchaser in the absence of a notice of street alignment believed that he was buying an unrestricted freehold, but in reality he was actually buying a freehold subject to a substantial and material disadvantage by reason of the alignment and repudiated the contract two days after he discovered the street alignment,

held that the non-disclosure of the street alignment amounted to such an error or misdescription that it might reasonably be supposed that, but for that error or misdescription, the purchaser would never have entered into that contract at all; and under those circumstances the contract was avoided altogether and the purchaser was not bound to resort to the clause for compenstion.

The fact that adjoining property has been set back is not constructive notice of an undisclosed street alignment.

In re *Contract between Fawcett and Holmes* (1) followed.

Nursing Dass Kothari v. *Chuttoo Lall Misser* (2) and *Lallubhai Rupchand* v. *Chimanlall Manilal* (3) referred to.

Per COSTELLO J. The existence of the road alignment notice is something in the nature of a restriction upon the user and enjoyment of the property and something, which, had the purchaser known of it at the time of the court sale, might have prevented him from purchasing the property.

*Appeal from Original Order, No. 60 of 1933, in Suit No. 2386 of 1928.

(1) (1889) 42 Ch. D. 150. (2) (1923) I. L. R. 50 Cal. 615.
(3) (1934) I. L. R. 59 Bom. 83.

APPEAL FROM ORIGINAL ORDER by the purchaser at the Registrar's auction sale.

The facts of the case and the arguments advanced at the hearing of the appeal appear fully in the judgment of Derbyshire C.J.

S. N. Banerjee (Sr.), *S. N. Banerjee* (Jr.) and *S. B. Sinha* for the appellant.

S. M. Bose, Standing Counsel, and *S. C. Roy* for the plaintiff respondent.

S. C. Mitter and *S. B. Moitra* for the defendant respondent.

Cur. adv. vult.

DERBYSHIRE C. J. This is an appeal from an order of Mr. Justice Lort-Williams made on the 18th of May, 1933, whereby he dismissed the exceptions taken by the appellant Ramlal Sen to the report of the former Registrar of this Court, Mr. Maurice Remfry, dated the 15th of November, 1932, and confirmed the Registrar's report and the sale of certain property under an order of this Court to the appellant by the respondents—Sreemati Suradhanisundaree Pal Chaudhurani as plaintiff and Mohinimohan Talukdar as defendant.

The facts, which gave rise to this application, are as follows: In Suit No. 2386 of 1928, at the instance of the plaintiff, who was the first mortgagee, and the defendant who was the second mortgagee, two decrees were made, dated, respectively, the 18th of April, 1929 and the 19th of May, 1930, whereby it was ordered that the premises comprised in the said decree of the 19th of May, 1930, *viz.*, 183, Maniktala Street and 2, Ramkrishna Bagchi Lane should be sold by the Registrar of this Court to the best purchaser that could be got for the same. On the 31st of July, 1931, the Registrar put up for sale by public auction the said premises and the reserve put on them by the Court having been exceeded, the premises were sold at

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the said auction to the higest bidder for the aggregate sum of Rs. 24,750. The purchaser, the appellant, thereupon paid the deposit of 25 per cent. and he subsequently paid into Court the balance of the purchase money as well. The premises had been duly advertised for sale and were sold subject to the conditions of sale, usual in sales by this Court. The only clause of the conditions of sale which it is necessary to mention, is No. 12, which reads as follows:—

Where any error or mis-statement shall appear to have been made in the particulars or description of the property such error or mis-statement, where capable of compensation, shall not annul the sale nor entitle the purchaser to be discharged from his purchase, but a compensation shall be made to or by the purchaser as the case may be and the amount of such compensation shall be settled by a Judge in Chambers.

On the 10th of August, 1931, requisitions were put to the sellers (*i.e.*, the mortgagee's solicitors) with regard to the title of the property and amongst them this question "Is the property affected by any scheme "of alignment of the Calcutta Corporation or the "Calcutta Improvement Trust"? Answer—"Not to the "knowledge of the plaintiff." After that requisition had been answered, the purchaser's attorney caused searches to be made in the Surveyor's Department of the Corporation of Calcutta and on the 25th of August, 1931, discovered that the front portion of No. 183, Maniktala Street fell within and was affected by an alignment made by the Calcutta Corporation in 1910 under the Calcutta Municipal Improvement Act of 1899. The relevant sections of that Act are the same as and are replaced by sections 302 and 303 of the Calcutta Municipal Act, 1923. Section 302 of the Calcutta Municipal Act of 1923 provides as follows:—

(*1*) If the Corporation consider it expedient to prescribe for any public street a building-line or a street alignment, or both a building-line and a street alignment, they shall give public notice of their intention to do so:

Provided that no building-line shall ordinarily be prescribed for any street laid out and made before the commencement of this Act.

(*2*) Every such notice shall specify a period within which objections will be received; and a copy of the notice shall be sent by post to every owner of premises abutting on such street who is registered in respect of such premises in the books of the municipality:

Provided that failure or omission to serve such notice on any owner shall not invalidate proceedings under this section.

(3) The Corporation shall consider all objections received within the said period, and shall hear any objector who comes forward within such period as they may fix in this behalf, and may then make an order prescribing a building-line or a street alignment, or both a building-line and a street alignment for such public street.

A register or book with plans attached shall be kept by the Corporation showing all public streets in respect of which a building-line or street alignment has been prescribed, and such register shall contain such particulars as to the Executive Officer may appear to be necessary and shall be open to inspection by any person upon payment of such fee as may from time to time be prescribed by the Corporation.

(4) A building-line shall not be prescribed so as to extend further back than the main front wall of any building (other than a boundary wall) abutting on the street at its widest part.

(5) Every order made under sub-section (3) shall be published in the Calcutta Gazette, and shall take effect from the date of such publication.

Section 303 provides as follows:—

(1) No portion of any building or boundary wall shall be erected or added to within a street alignment prescribed under section 302:

Provided that the Corporation may, in their discretion, permit additions to a building to be made within a street alignment, if such additions merely add to the height of, and rest upon, an existing building or wall, upon the owner of the building executing, if required to do so by the Corporation, an agreement binding himself and his successors in interest—

(a) not to claim compensation in the event of the Corporation at any time thereafter calling upon him or such successors, by written notice, to remove any addition made to any building in pursuance of such permission, or any portion thereof, and

(b) to pay the expenses of such removal.

(2) If the Corporation refuse to grant the permission applied for to add to any building on the ground that the proposed site falls wholly or in part within a street alignment prescribed under section 302, and if such site, or the portion thereof which falls within such alignment, be not acquired by the Corporation within six months after the date of such refusal, they shall pay reasonable compensation to the owner of the site.

(3) No person shall erect or add to any building between a street alignment and the building-line without first obtaining the permission of the Corporation to do so:

Provided that it shall not be necessary to obtain permission under this sub-section to erect, between a street alignment and the building-line,—

(a) a porch or balcony, or

(b) along not more than one-third of the frontage, an outhouse not exceeding fifteen feet in height.

(4) If the Corporation grant permission under sub-section (3), they may require the applicant to execute an agreement in accordance with the proviso to sub-section (1).

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By this alignment an area of 27 feet 6 inches (the whole of the frontage of 183, Maniktala Street) long by 12 feet (*i.e.*, extending back 12 feet into the property) was marked as being within the alignment. The part of the premises within the alignment consists of two small one-storey buildings, one on each side of the entrance, such buildings being useful for *baithakkhânâs*. Two days after the purchaser discovered this alignment, he wrote to the solicitor for the vendors (mortgagees) drawing attention to this alignment; claimed to reject the title on the ground that it was bad for non-disclosure of material defect, *viz.*, the alignment; claimed to set aside the sale, and asked for the refund of the deposit money. The vendors' solicitors declined to set aside the sale and refund the deposit money, and consequently a petition was filed by the purchaser in this Court asking for the setting aside of the sale and the refund of the deposit money.

It is agreed by both parties that the sale of the property was and was intended to be of a freehold property. On the 8th of January, 1932, this Court made an order under the petition whereby the matter was referred to the Registrar of this Court to enquire and report on the following, *viz.*—

"(*a*) whether a good title can be made out to the said property;

(*b*) what compensation, if any, the purchaser is entitled to; and

(*c*) whether from a commercial point of view the purchaser by his purchase was getting a different property from that, which he had bargained for, by reason of the said road alignment."

On the 16th of February, 1932, and the six following days, the Registrar held his enquiry and found (*a*) that a good title could be made out to the property; (*b*) that no compensation was payable; and (*c*) that the purchaser was not getting a property

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sufficiently different from that, which he bargained for, to justify setting aside the sale to him. On the 18th of May, 1933, the above report came before Mr. Justice Lort-Williams, who made the order as set out above, dismissing the purchaser's objections. From that order the matter comes to us by way of appeal.

The only question on appeal was whether the existence of the alignment prevented the purchaser from making a good title to the property and whether the purchaser could be compelled to take the property with a compensation under clause 12 of the conditions of sale mentioned above. It was mentioned during the hearing that the property on the other side of Ramkrishna Bagchi Lane had been set back in accordance with the alignment and it was contended that the purchaser should have seen this and drawn from it the inference that there was an alignment. In other words, that he had constructive notice of the alignment. With that contention I cannot agree. Many reasons might have caused the owner of the property across Ramkrishna Bagchi Lane to set it back, and the fact that it has been set back was not constructive notice of an alignment.

In the case of *Nursing Dass Kothari* v. *Chuttoo Lall Misser* (1), the plaintiff bought by auction some property in Calcutta and subsequently discovered that, before the auction was held, there had been already published in the Calcutta Gazette a notice under section 63 (*z*) of the Calcutta Improvement Acts 1911-1915, which stated that the Trustees for the Improvement of Calcutta had prepared a plan of a proposed street known as proposed public street, Barhabâzâr alignment, south-east section and that among other municipal holdings, through which the proposed public street would pass, were the premises bought, namely, No. 48 Barhtala Street. About half the property bought was affected by the alignment notice. The purchaser refused to complete and the

(1) (1923) I. L. R. 50 Cal. 615.

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vendor, after due notice, sold the property again. The plaintiff brought a suit for a declaration that his agreement to buy the property was void and inoperative and claimed the return of his deposit. It was held on appeal in this Court that the notice issued under section 63 (*2*) of the Calcutta Improvement Acts 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. The words of section 20 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.

I cite the foregoing case merely to show the trend of judicial opinion in this Court. Many cases were cited on both sides, some in favour of the purchaser and some in favour of the vendor. Each case must be decided upon its own particular facts and the law applicable to contracts of vendor and purchaser. In my view this subjection of the whole of the frontage of this property extending back twelve feet from the present front of the building to the restrictions and liabilities imposed by the alignment is a very material burden or liability on this property. At any time the owner and the occupier may find their premises cut down at the instance of the Calcutta Corporation and all the time until then they are under fear of the property being cut down, and are restricted in their use and development of this property by the alignment. The purchaser in this case said that he would never have bought the property with a *golmâl* (disturbance) in it. In fact, he repudiated the contract two days after he discovered the existence of the alignment. In the enquiry before the Registrar, none of the surveyors were able to quantify the compensation that should be allowed in respect of the alignment, although some say that it was very slight. The purchaser is a doctor, who says that he bought

the premises for his own use. The removal of the two front rooms might be a serious handicap to him in his professional duties.

In re *Contract between Fawcett and Holmes* (1) was a case, where a property was put up for sale and described as containing 1,372 square yards. One of the conditions of sale was as follows:—

> The property is believed and shall be taken to be correctly described but if any error, mis-statement, or omission in the posters, plans, or particulars, or in the special or these general conditions, be discovered, the same shall not annul the sale, but, if pointed out before the completion of the purchase, and not otherwise, compensation shall be allowed by the vendor or purchaser as the case may require. The amount of such compensation shall be settled by arbitration.

Actually, the property when sold contained only 1,033 square yards. It was a builders' yard. In that case it was held that the purchaser got substantially what he had contracted for (he had seen the property) and that the deficiency of quantity, though considerable, did not so affect the substance of what he had bargained for as to take the case out of the condition, and it was held that the purchase must be completed with compensation. Lord Esher M.R. in his judgment said at page 156—

> The principal question, then, is, whether the error in the present case comes within the condition. It is contended on the one side that the condition applies, however great the error may be; it is contended on the other side that the condition only applies where the error is trifling. I think that neither view is right. Contracts, substantially in the same terms, have often been before the courts, and have not been construed according to either of those extreme views. The courts have said that such a condition is not applicable to every misdescription, for instance it would not apply to a fraudulent one, nor to one the compensation in respect of which could not be ascertained. Are there any other kinds of misdescription to which it will not apply? I think that in *Flight* v. *Booth* (2), Tindal C. J. lays down a rule which is easy to be understood though often difficult of application. 'In this 'state of discrepancy between the decided cases, we think it is, at all events, 'a safe rule to adopt, that where the misdescription, although not proceeding 'from fraud, is in a material and substantial point, so far affecting the subject 'matter of the contract that it may reasonably be supposed, that, but for such 'misdescription, the purchaser might never have entered into the contract 'at all, in such case the contract is avoided altogether, and the purchaser is 'not bound to resort to the clause of compensation.'

(1) (1889) 42 Ch. D. 150.

(2) (1834) 1 Bing. (N. C.) 370 (377); 131 E. R. 1160 (1162-3).

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This is a negative proposition, but a pregnant one. If the error is of such consequence that it may be reasonably supposed that but for the misdescription the purchaser would not have bought, the error is not within the condition. In each case therefore the question depends on the view of the court as to the importance of the misdescription. Is, then, the error in the present case such as to fall within the rule laid down by Tindal C. J. ?

In my view, the alignment is a material and substantial disadvantage to the property, so far affecting the subject matter that the purchaser would never have entered into the contract had he known of it. The promptness, with which he repudiated the contract, when he learnt about the alignment, supports me in this view. The operative words of clause 12 are substantially those of the corresponding clause in *In re Contract between Fawcett and Holmes* (1). Applying the principles enunciated by Lord Esher M.R. and Tindal C. J. in the cases above cited, I find that the existence of the alignment was undisclosed by the vendor; the purchaser, in the absence of a notice of alignment, believed that he was buying an unrestricted freehold. Actually, he was buying a freehold subject to a substantial and material disadvantage by reason of the alignment. The non-disclosure of the alignment, in my view, amounts to such an error or misdescription that it may reasonably be supposed that, but for that error or misdescription, the purchaser would never have entered into the contract at all. Under these circumstances, as pointed out by Lord Esher M.R. the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation.

In my judgment, the sale is void and the purchaser is entitled to the return of his purchase money with interest thereon. The purchaser is entitled to his costs in this Court and in the proceedings below prior to the 18th of May, 1933, which will include the costs of the reference. As regards costs of the proceedings before Mr. Justice Lord-Williams on May 18th, 1933, we make no order.

The cross-objection not being pursued is dismissed.

(1) (1889) 42 Ch. D. 150, 156.

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COSTELLO J. I am of the same opinion. Although in form this is an appeal against two orders made by Mr. Justice Lort-Williams, in substance it is an appeal against a decision of the learned Registrar of this Court. In the report which the Registrar made, I find that he said this:—

> In this state of the evidence I must come to the conclusion that the effect of the road alignment notice on the value of the property is negligible. That being so, and applying the principle enunciated in *In re Contract between Fawcett and Holmes* (1) I must hold that the road alignment notice so little affects the property from a business point of view as to be an idle and frivolous objection and one which may be disregarded in the absence of any Act such as would compel the Court to give effect to the objection.

The learned Registrar, therefore, found that the existence of the road alignment notice was not a defect in the title. I am unable to agree with the view taken by the learned Registrar. It seems difficult to understand how he was applying the principle enunciated in the case of *In re Contract between Fawcett and Holmes* (1). As my Lord the Chief Justice has already pointed out, Lord Esher in that case laid it down that "the question depends on "the view of the Court as to the importance of the "misdescription". The learned Registrar seems to have thought that the existence of the road alignment notice was a matter of such trivial importance that there was no defect in the title at all. But the real question which has been argued in the appeal before us, is whether the vendors could take advantage of clause 12 of the Conditions of Sale. That question again depends upon the view which the court should take as to the materiality and importance of the restriction which is found to exist. I agree that the existence of the road alignment notice is something in the nature of restriction upon the user and enjoyment of the property and something, which, had the purchaser known of it at the time of the Court sale, would have prevented him from purchasing the property. The point we have been considering is analogous to the point which came before the Bombay

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High Court in the case of *Lallubhai Rupchand* v. *Chimanlall Manilal* (1), where the relevant authorities were reviewed by Mr. Justice Broomfield. In that case a contract had been entered into between the parties on the 26th of February, 1927, whereby the plaintiff, who was the owner of the property—the subject matter of the suit—had agreed to sell that property to the defendant for a sum of Rs. 8,251. The defendant paid Rs. 500 as earnest money and the balance was payable on the execution of the conveyance. On the 5th of April, 1927, the plaintiff sent a notice to the defendant to complete the sale. On the 19th of April, 1927, the defendant replied demanding inspection of title deeds. Inspection was given in the office of the defendant's pleader. On the 27th of May, 1927, the defendant wrote a letter taking various objections as follows:—(1) that at the instance of the Surat Municipality Government had decided to acquire the property along with others in the same locality under the Land Acquisition Act, and that a notification to that effect had been published in the Bombay Government Gazette, dated August 22, 1912; and then followed certain other objections, which are not material for the purpose of this case. On 11th of June, 1927, the plaintiff filed a suit for specific performance of the contract. The defendant on his side filed a suit for a return of the earnest money paid under the contract. The Subordinate Judge, who tried the case, held that the Government Notification of 1912 of the acquisition of property under the Land Acquisition Act could not be said to constitute a defect in the plaintiff's title, for in case the property was acquired the purchaser would get compensation and would not be a loser. The matter went to the High Court on appeal and Mr. Justice Broomfield after referring to a number of authorities said:—

> Applying these principles to the facts of the present case, I am of opinion that the liability of this property to be compulsorily acquired may fairly be said to amount to a material defect. The buyer is entitled to say that he

(1) (1934) I. L. R. 59 Bom. 83, 90.

wants a house and not a right to compensation, and the learned trial Judge in dealing with this part of the case has obviously applied the wrong criterion.

The effect of this Bombay case is to enunciate once more that the defect, if material, must be of such a nature that one might reasonably suppose that the buyer, if he had known of it, might not have made the contract, because he was getting something different from what in fact he intended to buy. In the present instance it is clear upon the evidence that, had the purchaser known of the existence of the road alignment notice, he never would have made a bid at the auction or thought of buying this property at all. In all the circumstances I think the learned Registrar was quite wrong in coming to the conclusion that this defect was only of a trivial character. I think we are bound to hold that the defect was of such a character as could not be cured by reference to clause 12 of the Conditions of Sale: especially having regard to the fact that the evidence of the expert witnesses shows that it is extremely difficult—indeed impossible—to arrive at any satisfactory basis of compensation. The appeal, in my opinion, should be allowed.

Appeal allowed.

G. S.

Solicitor for appellant: *A. D. Banerjee.*

Solicitors for respondents: *T. B. Roy* and *P. N. Sen & Co.*