he would only be in the same position as the defendant, *viz.*, a purchaser for valuable consideration. But the defendant, being in this position, has taken the precaution to register his conveyance as a conveyance of immoveable property, whereas the plaintiff has only taken under a bond in these vague and uncertain words, and has failed to register it properly as a document relating to immoveable property.

We think that the decision of the Courts below must be reversed, and this appeal decreed with costs.

Appeal allowed.

Before Mr. Justice Pontifex and Mr. Justice Field.

DOORGA NARAIN SEN (PLAINTIFF) *v.* BANEY MADHUB MOZOOMDAR (DEFENDANT).*

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April 20.

Constructive Notice—Principal and Agent—Fraud by Agent—Liability to Third Persons.

When a person is proved to have had a knowledge of certain facts, or to have been in a position, the reasonable consequence of which knowledge or position would be, that he would have been led to make further enquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. There may be such wilful negligence in abstaining from enquiry into facts which would convey actual notice, as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an enquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied.

Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title; but not to the same extent where a Registration Act is in operation, as it would where no Registration Act prevails.

Agra Bank v. *Barry* (1) followed.

Appeal from Appellate Decree, No. 1631 of 1880, against the decree of J. P. Grant, Esq., Judge of Hooghly, dated the 28th of June 1880, reversing the decree of Baboo Sri Nath Roy, Subordinate Judge of that district, dated the 30th November 1878.

(1) L. R., 7 H. L., 135.

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If an agent, authorized to sell property, commits a fraud against his principal, the principal is the person who ought to suffer, and not a stranger.

***Hunter* v. *Walters* (1) and *Ram Coomar Koondoo* v. *McQueen* (2) followed.**

THIS was a suit to recover possession of certain property known as Chur Guptiparrah. It appeared that the defendant Baney Madhub Mozoomdar was convicted of an offence under the Penal Code, and was imprisoned. At the date of his conviction, he was the owner of Chur Guptiparrah under two leases from the two zemindars, who were proprietors of the Chur. One of these leases was in his own name, and the other was in the name of his cousin, named Bara Rakhal Das Mozoomdar. On the 29th October 1869, upon his imprisonment, Baney Madhub gave a power-of-attorney to Bara Rakhal Das Mozoomdar and to Dindyal Mozoomdar and Radha Gobind Mullick, which power contained an authority to any two of the attorneys to sell his property "if occasion arose." Previous to his conviction and imprisonment, the zemindar, under whom the second of these leases was held, had instituted a suit for arrears of rent. That suit was pending when Baney Madhub was convicted. A decree was made in the suit, and a sale of the tenure created by that lease was directed; and on the 5th November 1869, it was purchased in execution of that decree in the name of Baney Madhub's cousin, Gopal Das. Subsequently in August 1870, two of the persons named in the power-of-attorney, *viz.*, Bara Rakhal Das and Radha Gobind Mullick, conveyed the other lease of eight annas to Gopal Das and Chota Rakhal Das, Baney Madhub's brother, ostensibly for valuable consideration. Afterwards, about Christmas 1875, the plaintiff purchased both these leases. They were conveyed to him by a kobala executed by Gopal Das and Chota Rakhal Das. When Baney Madhub was discharged from prison, he took proceedings under the Criminal Procedure Code to obtain possession of these properties; and an order was passed in his favour, whereupon the plaintiff instituted this suit to recover possession, as a purchaser for value without notice, of the two properties from Gopal Das Mozoomdar and Chota Rakhal Das Mozoomdar. The lower Courts

(1) L. R., 7 Ch. App., 85. (2) 11 B. L. R., 58.

holding that the transactions were benami, dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Branson* and Baboo *Rashbehary Ghose* and Baboo *Uma Kali Mookerjee* for the appellant.

Mr. *Bell* and Baboo *Gurudas Banerjee*, Baboo *Srish Chunder Chowdhry*, and Baboo *Saroda Prosonno Roy* for the respondent.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

PONTIFEX, J.—We are of opinion that the judgment of the lower Appellate Court must be reversed, as we think that the learned District Judge has unduly stretched the doctrine of constructive notice against the plaintiff, appellant. That doctrine, so far as we have to consider it in this case, may be stated as follows: When a person is proved to have had a knowledge of certain facts, or to have been in a position, the reasonable consequence of which knowledge or position would be that he would have been led to make further enquiry which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. For there may be such wilful negligence in abstaining from enquiring into facts which would convey actual notice as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an enquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied. Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title; but not to anything like the same extent where a Registration Act is in operation, as it would where no Registration Act prevails—*Agra Bank* v. *Barry* (1). Even in England, where conveyancing is a science, and title is deduced by an abstract and production of deeds, it has been considered that the doctrine of constructive notice has been pushed to its extreme limit, and with the much laxer prac-

(1) L. R., 7 H. L., 135.

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tice in this country it requires even more careful application against a purchaser for value. (His Lordship then stated the facts of the case as above, and continued.) Both of the Courts below have held, that the sales or conveyances to Gopal Das under the zemindar's decree, and to Gopal Das and Chota Rakhal Das from the two attorneys, were benami transactions for Baney Madhub; and that finding binds us on this appeal. Perhaps the evidence as it now stands may be sufficient to support such finding that these two sales or conveyances were actually benami; but speaking for myself, I must say that I am by no means fully satisfied that they were benami. But whether they were benami or not, does not appear to us to affect the present question. The question which we have to decide is, whether the plaintiff in this case is a purchaser for value without notice. In dealing with that question the District Judge has considered that the plaintiff had notice, at the time of his purchase, of all the circumstances which have been subsequently proved in evidence in this case—of all the circumstances which led both the Courts below to hold that the two original transactions were merely benami transactions. Now, what are these circumstances? *Firstly*, with regard to the first sale under the zemindar's decree, the learned District Judge has expressed his opinion that the rent was purposely allowed to fall into arrears. But he was hardly justified in pressing that against the plaintiff, because the rent-suit instituted by the zemindar was instituted previously to Baney Madhub's conviction, and therefore, if rent had been allowed to fall into arrears, it had been so allowed by Baney Madhub himself. *Secondly*, the learned Judge next relies upon the fact, as found by him, that Gopal Das, the ostensible purchaser at that sale, had no funds with which he could make the purchase. But though that may have been proved in this suit, it does not necessarily follow that the plaintiff was aware of it at the date of his purchase. Indeed, Gopal Das was entitled to a share in family property; and, from the circumstance that the plaintiff, on his purchase, took from Gopal Das a guarantee to which I shall refer presently, it might be inferred, that the plaintiff considered Gopal Das as a person not without means. *Thirdly*, the learned Judge relied on the fact proved

in this suit, that, after the purchase by Gopal Das, the rents of the property were paid out of the funds of Baney Madhub, and not out of the funds of Gopal Das; but the knowledge of this fact does not appear to have been brought home to the plaintiff. These circumstances might have been sufficient to support the findings of the Courts below, as between Baney Madhub and Gopal Das, but it by no means follows, that the purchaser had any knowledge, at the time he purchased, of the circumstances which have been proved at the hearing of this case; and if he was in honest ignorance at the time of his purchase, of course he ought not to be bound by any of such circumstances. With respect to the second conveyance by the two attorneys, the learned Judge considered that it was benami, because there was no proof of any pressure of liabilities which would justify the sale. But in reality there was then a debt due from Baney Madhub to one Deno Nath Mondul of Rs. 2,400. The conveyance to Gopal Das and Chota Rakhal Das was alleged to have been made in order to pay off that debt; and it is found by the Courts below, that that debt was paid off in the following manner, *viz.*, a kistbundi was taken by the creditor from Gopal Das and Chota Rakhal Das for the precise amount of Rs. 2,400, and Baney Madhub was released from his personal liability. Therefore, there was in this transaction a complete change of debtors to the creditor, and a discharge of the original debtor. One would have thought, if this was a benami purchase, that it would be a most unusual proceeding for mere benamidars to take upon themselves, by this kistbundi, the absolute liability for a debt of Rs. 2,400 to Deno Nath Mondul, and it would at least seem that Dino Nath Mondul must have considered the transaction a *bonâ fide* one; and that he was content to accept Gopal Das as a sufficiently responsible person for one of his sureties. The learned Judge has also relied upon the fact that there was no change of management on the occasion of these first conveyances; but he is scarcely justified in coming to that conclusion, for in a different part of his judgment, he also finds that the ryot's rents were paid in the name of the ostensible purchasers, and therefore, there was, to that extent at least, a change in the management. Next, with respect

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to the subsequent sale to the plaintiff, it seems to us that the Court below started on a somewhat wrong principle. The learned Judge says, that the plaintiff's case was, that he had acquired by his purchase the rights of his vendors. We are unable to find that that was the case made by his plaint. The plaintiff's case really was, that he had acquired by his purchase a title to the property as a *bonâ fide* purchaser for value without notice. But upon the principle assumed by the learned Judge, he considered that the plaintiff was bound to prove that his vendors were the real owners, which he, in the opinion of the lower Courts, failed to do. It appears to us, that the plaintiff was only bound at the outside, to prove that he had given full value for his purchase, and that the persons, purporting to have sold to him, were honestly considered by him as the true owners. Then the learned Judge takes the following circumstances as fixing the plaintiff with constructive notice. He says, that the plaintiff and the defendant resided in the same village; that the properties purchased were adjacent to the place where both lived; that the plaintiff was intimate with the defendant and his family; and that he was also connected by marriage with the defendant. Now it is true that the plaintiff was connected by marriage with the defendant, and it was also proved that he was intimate with the defendant's family; but it appears from the defendant's own evidence that there was enmity between himself and the plaintiff. The learned Judge next relies upon the recitals in the conveyances to the plaintiff as being sufficient to put him upon enquiry. These recitals set out that the property had belonged to Baney Madhub, who was in jail; that Baney Madhub had given a power or authority to his attorneys to deal with that property; and that those attorneys had sold to the plaintiff's ostensible vendors. Then the learned Judge proceeds to say, that, notwithstanding these recitals, the plaintiff admits that he made no enquiry. Now it is difficult to understand how the learned Judge came to that conclusion, because he afterwards finds that "the only enquiry, plaintiff says, he made, was a question to Dindyal, one of defendant's attorneys, whether there was any harm in buying—a question which Dindyal admits he answered in the negative." Now

Dindyal was the attorney who did not join in the conveyance of August 1870. But he admits that this enquiry was made of him, and that he made that answer; and it further appears that another of the attorneys was an attesting witness to the plaintiff's conveyance. We think, therefore, that the learned Judge was not justified in finding that the plaintiff made no enquiry; and it is difficult for us to say how he could make any other or more satisfactory enquiry than he actually did, from the authorized agents of the defendant. The defendant was himself in jail; and it was scarcely to be expected that the plaintiff would go and enquire of the defendant himself in the jail; the plaintiff in fact did the next best thing. He went to the authorized and trusted agents of the defendant and made enquiry of them, and the result of that enquiry was to the effect, that "there was no harm in buying," in other words, that he would be safe in purchasing from the ostensible vendors. Then the learned Judge further finds that the plaintiff must be fixed with constructive notice, because he did not ask for the accounts or zemindary papers, and did not obtain the deeds; but with respect to the papers, we understand that the zemindary papers were given up to the plaintiff on his purchase, and with respect to not obtaining the deeds, such negligence might be important as against a third person with whom they might have been deposited for value; but is of comparative unimportance as against Baney Madhub, who had placed his affairs in the hands of attorneys, one at least of whom had assured the plaintiff that he was safe in purchasing. Moreover the neglect to ask for deeds, in a country where registration prevails, applies with but slight force as already explained. But what the learned Judge seems principally to have relied upon, is the fact, that, in the conveyance to the purchaser from the ostensible vendors, there is a covenant or guarantee of title from them to him, to this effect, that they undertake or guarantee, that there is no other person having any right in the property. Now, the same observation applies to this guarantee as applies to the kistbundi, *viz.*, it is certainly unusual, and not to be expected that mere benamidars who have no interest whatever in the property, should take upon themselves the personal liabilities

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and responsibilities of a guarantee; and, if it is an unusual thing to have such guarantee in a deed of conveyance, the reason for its insertion may have been, that the plaintiff did make enquiries for the deeds, and with respect to the title, before he completed his purchase. He in fact made enquiries of the agents of the defendant. The agents of the defendant allowed him to believe that the sale was a proper one, and upon that he completed his purchase. We, therefore, think that there is no ground in this case for fixing the plaintiff with constructive notice of any of the circumstances, which, as the Courts below have held, prove that the conveyances to the ostensible vendors of the plaintiff were benami transactions; and this being so, and the first Court having held that he paid full value on his purchase, and the District Judge not having come to any contrary finding, we think he must be treated as a purchaser for value without notice, and that therefore his title is good, and that he is entitled to recover as against the defendant. It may be that there has been a fraud committed against the defendant by his agents, but if that is so, the principal is the person who ought to suffer for the fraud of the agent, and not a stranger—*Hunter* v. *Walters* (1), which case also shows how the doctrine of constructive notice may be attempted to be pushed to an almost absurd extent. This case in fact falls within the language of the Privy Council in the case of *Ram Coomar Koondoo* v *McQueen* (2), which case no doubt was very much stronger in its circumstances than the present case. But the language which I am about to quote is appropriate to the present case: "It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out, shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prose-

(1) L. R., 7 Ch. App., 85. (2) 11 B. L. R., 53.

cated, would have led to a discovery of it." Now neither of the Courts below in this case have held that there was actual notice; and we are of opinion that the circumstances stated in the judgment of the lower Appellate Court are not sufficient to fix the plaintiff with constructive notice, or ought to have put him upon an enquiry which, if prosecuted, would have led to the discovery that his ostensible vendors were benamidars.

One other question has arisen in this case which was not raised at the bar, and which certainly did not arise in the Courts below. No certificate having been granted in the sale to Gopal Das of the eight annas under the zemindar's decree, whether even an ostensible title would pass to Gopal Das which he could convey to the plaintiff. That question, as I have said, was not raised in the Courts below; and in fact it was admitted by the defendant in the pleadings that there was a sale under the zemindar's decree to Gopal Das. We think, therefore, it is too late now to raise any objection on that point. Upon the question being started by the Court, it was pointed out, that s. 259 of the former Code of Civil Procedure directs that, after the sale of immoveable property shall have become absolute, the Court shall grant a certificate, which is to be taken and deemed to be a valid transfer of such right, title, and interest. Even if any objection could now be taken on this point, we do not think these words contemplate that nothing would pass to a purchaser unless a certificate were issued; for we are of opinion, that the order affirming the sale would be sufficient to pass a title to the purchaser; and the certificate, which might afterwards be obtained by him, would be merely evidence that the property so passed. The appellant will be entitled to his costs of this appeal and of the Courts below.

After this decision, no order will be necessary in Rule No. 1343 of 1880, which will drop of itself.

Appeal allowed.