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consider any other issue. This suit has been brought on the mortgage deed of the 28th of October, 1892, by the assignee of that mortgage, and as their Lordships have held, that the mortgage was not made by Sheoraj Singh as the manager of the family, or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable; it was void and of no effect, and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which did not affect him or his interest in the estate.

Their Lordships will humbly advise His Majesty that the decrees of the High Court be affirmed and these appeals be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant :—*Pyke, Parrott & Co.*

Solicitor for the respondent Maharaj Singh :—*Douglas Grant.*

J. V. W.

APPELLATE CIVIL.

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January 15.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

GOPI NARAIN AND OTHERS (DEFENDANTS) V. KUNJ BEHARI LAL

(PLAINTIFF) AND SHEO DAYAL (DEFENDANT).*

Act No. II of 1882 (Indian Trusts Act), section 88—Trust—Trustee entering into dealings in which his own interest may come into conflict with his duty as trustee—Purchase of mortgage deed comprising property belonging at the time of purchase to the trust.

A member of a body of trustees purchased for a very low price at an auction sale in execution of a simple money decree held by the trustees as such a mortgage bond comprising, amongst other property, a village of which two-thirds had been previously purchased by the author of the trust and formed part of the trust property. Neither the purchaser nor the trustees had obtained the leave of the court to bid. The auction purchaser claimed the purchase for himself and sought to enforce the mortgage by suit.

Held that the auction purchaser could not be allowed to do this, but must, on the contrary, be taken to have made the purchase for the benefit of the trust. All that he was entitled to was to be repaid the actual sum which he himself paid for the mortgage deed at the auction sale.

THE facts of this case were as follows :—

One Fateh Chand on the 19th of June, 1887, executed a mortgage in favour ostensibly of Abdul Kafil, but really in favour of

* First Appeal No. 132 of 1910 from a decree of Pitambar Joshi, Subordinate Judge of Mainpuri, dated the 8th of February, 1910.

Abdul Jalil, a pleader of Cawnpore. The property mortgaged comprised three villages—Pali Kalan, Pali Khurd and Sadikpur. The mortgage money was Rs. 50,000, carrying interest at 14 annas per cent. per mensem. One third in each of these villages had been sold in discharge of prior debts.

Two-thirds of Pali Kalan was purchased by one Gaya Prasad in execution of a simple money decree on the 31st of May, 1896.

Of the remaining villages one Abdul Hamid purchased two-thirds of Pali Khurd in execution also of a simple money decree on the 20th of July, 1892, and the third village, Sadikpur, was purchased by one Sheo Dayal on the 20th of December, 1906, also in execution of a simple money decree.

Gaya Prasad died on the 16th of July, 1899, leaving a will, dated the 13th of July, 1899. By that will he bequeathed the bulk of his property to certain charities subject to certain legacies. The trustees under that will were Kunj Behari Lal as vice-president and Gopi Narain, as president of the board of trustees, and four other persons. Kunj Behari Lal was also one of the legatees under the will.

The mortgagee rights under the mortgage deed of 1887, were sold in execution of a money decree held by the trustees as representing the estate of Gaya Prasad against Abdul Jalil and purchased by Kunj Behari Lal on the 24th of January, 1905, or rather by one Sheo Prasad who, after the completion of the sale, gave out that he had been bidding for the plaintiff.

Kunj Behari Lal claimed that he made the purchase for himself and brought the present suit for sale of the property comprised in the mortgage. The court of first instance decreed the claim.

This was an appeal by the trustees other than the plaintiff and Abdul Hamid, Sheo Dayal having submitted to the decree of the lower court.

The Hon'ble Pandit *Moti Lal Nehru* (with him Dr. *Tej Bahadur Sapru* and Mr. *Jagmohan Nath Chak*) for the trustees other than the plaintiff:—

The trustees intended to purchase the property for the estate and had applied for leave to bid. The plaintiff himself being one of the decree-holders could not bid and would have required leave of

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court. It did not appear that leave was granted. Even if there was no dishonesty on the part of the plaintiff, every benefit he acquired was for the estate. He could not put himself in a position where his interest might conflict with that of the estate. It did not matter if there was nothing suspicious about it. The law is extremely jealous on the point, the principle is that a trustee should not be exposed to the temptation of benefiting himself at the expense of the *cestui que trust*: Lewin on Trusts, 11th edition, p. 304, Williams on Executors, 10th edition, Vol. II, p. 1488, Coote on Mortgages, 7th edition, Vol. II, p. 841. The same principle was enunciated in Story on Equity Jurisprudence, Grigsby's edition, p. 211, and Pomeroy, Equity, Vol. III, p. 2079, and the principle was the same as in the leading case of *Keech v. Sandford* (1), which was followed in *Griffin v. Griffin* (2).

So long as the relation subsisted and was of a fiduciary nature it did not really matter whether the property was the subject of trust or not: *Darcy v. Hall* (3).

Section 88 of the Trust Act dealt with trustees and covered the entire ground. The English cases only laid down the principle which was embodied in that section. The leading case was that of *Ex parte Lacey* (4), which was followed in *Lagunas Nitrate Co. v. Lagunas Syndicate* (5).

It was to the interests of the mortgagee to have the property sold, whereas as a mortgagor, it was the duty of the plaintiff to show that the mortgage was a bad one and Fateh Chand had been imposed upon. A case where a purchase by a trustee was held good was that of *Barwell v. Barwell* (6), which shows the steps he must take before a purchase by him can stand.

Maulvi Muhammad Ishaq (for *Abdul Hamid*), for the other defendant appellants, adopted the argument of the advocate for trustees.

Mr. B. E. O'Connor (with him Maulvi Ghulam Mujtaba and Pandit Baldeo Ram Dave), for the respondent, argued that consideration had passed and that there was nothing to restrict Fateh

(1) (1724) Sel. Ch. Ca., 61; 15 (4) (1802) 6 Ves. 625; 628; 31, R. R.

Ruling Cases, p. 455. 1228.

(2) (1804) 1 Sch. and Lef., 352; (5) [1899] 2 Ch., 44.
9 R. R., 51.

(3) (1682) 1 Vern., 49; 23 R. R., (6) (1865) 34 Beav., 371; 55 R. R., 678,
302.

Chand's right of alienation. The plaintiff could not be debarred from bidding in his personal capacity at a sale brought about by a body of persons of whom he was one. The effect of authorities was summed up rather widely in Lewin. The view of the other side went beyond provisions of the Indian Trusts Act. The essence of them was that the person holding a fiduciary position "should not avail himself of that character" to benefit himself. The English cases did not apply. Here he must not take advantage of his fiduciary position. The question had only reference to Pali Kalan which was the trust estate and not the other two villages.

RICHARDS, C. J., and BANERJI, J :—This appeal arises out of a suit on foot of a mortgage, dated the 19th of June, 1887. The mortgagor was one Fateh Chand, and the mortgagee was one Abdul Kafil. The mortgage was for Rs. 50,000 at 14 annas per cent. per mensem interest. It is clear now that Abdul Kafil was not the real mortgagee, but was only *benamidar* for one Abdul Jalil, a pleader in Cawnpore. This mortgage was subsequently attached and sold in execution of a simple money decree which Gaya Prasad had obtained against Abdul Jalil and which was being executed against the representatives of the latter. The certificated auction purchaser of this mortgage was Babu Kunj Behari Lal, the plaintiff in the present suit. This bond has been the subject of a good deal of litigation which, in the view we take of the case, it is not material to refer to. It was made, as already stated, by Fateh Chand in favour of his pleader, and one of the defences taken in the present suit is the plea that there was no consideration for the bond. The bond, no doubt, was of a very suspicious nature, made as it was in favour of the pleader of Fateh Chand. Fateh Chand was a man who managed to dissipate what must originally have been an estate of considerable value, and had the suit been one between Fateh Chand and Abdul Jalil, we might have had great difficulty in holding that anything like the full principal sum of Rs. 50,000 was due. We think, however, for reasons which we shall presently state, that the defendants appellants in the present appeal cannot be allowed to say that the bond was not for its full face consideration. Three villages were mortgaged, one called Pali Khurd, another called Pali Kalan, and third called Sadikpur. A one-third share in each of these villages has been sold in satisfaction of prior mortgages, but two-thirds of Pali

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Khurd was purchased by the defendant Abdul Hamid and two-thirds of Pali Kalan was purchased by Gaya Prasad, both in execution of simple money decrees. Sadikpur was purchased by Sheo Dayal. The price paid for Pali Khurd by Abdul Hamid must clearly have been based upon the property being subject to a heavy incumbrance. In a written statement by Abdul Hamid in certain litigation between one Sheo Prasad and himself and others, he expressly admitted that at the sale of this property the mortgage of the 19th of June, 1887, was proclaimed and that he purchased the property subject to that mortgage. Pali Kalan was also purchased at a price which would have been an absurdly low value unless the property was subject to a heavy incumbrance. After the death of Gaya Prasad the defendants, Gopi Narain and the other trustees (who are the defendants appellants and are hereinafter referred to as "the trustees"), in their application for probate of the will of Gaya Prasad placed a very small value on the property and expressly stated that it was subject to this mortgage for Rs. 50,000 and interest. Neither the trustees nor Abdul Hamid have given any affirmative evidence of the want of consideration. Under these circumstances we think that the decision of the learned Subordinate Judge that the bond had been given for full consideration must be accepted.

It is now necessary to state some further facts upon which the other pleas taken in the suit are based. Gaya Prasad was a man possessed of considerable wealth. He made a will on the 13th of July, 1899, and thereby appointed certain persons to be his trustees, and amongst them the plaintiff in the present suit, Kunj Behari Lal. He named as president of the board of trustees the defendant appellant Gopi Narain and the respondent, Kunj Behari Lal, selected by his co-trustees as vice-president of the board. Under the will of Gaya Prasad both Kunj Behari Lal and Gopi Narain took considerable benefits. After some litigation the will was duly proved, and it was at the instance of the trustees that the decree already mentioned against Abdul Jalil was being executed against the latter's widows. It must be borne in mind that the trustees were at the time of the execution of decree in possession of the village of Pali Kalan under the will of Gaya Prasad, and that the mortgage which was attached in execution of the decree against Abdul Jalil affected this village as well as the other two villages already

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mentioned. The trustees executed a power of attorney on the 30th of January, 1900, in favour of Kunj Behari Lal. This document will be found at page 75 of the appellant's book. It sets forth that the trustees other than Kunj Behari Lal have other engagements and have no time to attend court in a body and look after and contest cases, and they then proceed to appoint Kunj Behari Lal, their general attorney, to act for them in all court matters; he was not, however, empowered to purchase or take property in mortgage or borrow money in their names. On the 7th of January, 1905, Kunj Behari Lal wrote to Gopi Narain, as president of the committee, a letter, which will be found at page 45 of the respondent's book. In this letter he points out that the mortgage of the 19th of June, 1887, would be sold on the 24th of January, 1905, and that in his opinion it would be most advisable for the trustees to purchase this bond. He says in the letter:—"If any stranger purchases this village and is successful in his suit the whole of the share in mauza Pali Kalan will be lost." He says further that if the trustees do not buy the bond, he himself would do so. No one can doubt the soundness of the advice given in this letter. Granted that the bond was a little shady and that some claim was being made to it by the widows of Abdul Jalil, it was still most advisable to purchase it. Kunj Behari lived at Etawah, the other trustees lived at Cawnpore. In the ordinary course of events the letter would reach Gopi Narain about the 8th of January and on the 10th of January an application was made in the execution case that the trustees should be permitted to bid for the bond of the 19th June, 1887, which was to be sold in execution of Gaya Prasad's decree. The will of Gaya Prasad provided for the holding of meetings of the trustees at stated times, and in the letter of Kunj Behari Lal to which we have already referred, he suggested that an extraordinary meeting of the committee should be called to consider the question of purchasing the bond. It appears from the evidence that a notice of a meeting was sent out and that on the agenda the question of the purchase of the bond was expressly mentioned. It also appears that there was no quorum at the meeting which was summoned for the 22nd of January, that is to say, two days before the sale. It therefore appears that there was no express resolution on the part of the trustees on the subject of the purchase of the bond. Kunj Behari Lal attended the sale.

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He never obtained any express leave on his own account to bid at the sale, although undoubtedly he was one of the decree-holders. It does not appear from the evidence whether any order was made on the application of the trustees for leave to bid, and strictly speaking, Kunj Behari Lal had no right to bid at the sale either on his own behalf or on behalf of the trustees without leave of the court, but he nevertheless attended the sale, and it appears that he and one Sheo Prasad bid at intervals from the commencement of the sale, and that the last bid was made by Sheo Prasad. We may here mention that Sheo Prasad was also a general attorney for the trustees. He was also attorney for Kunj Behari Lal. The bond was knocked down for the sum of Rs. 3,115. Kunj Behari Lal was examined and he states that the purchase was made by Sheo Prasad for him, that he had not money with him and that he borrowed it from Gopi Narain. Gopi Narain lent him the money not out of the trust fund but out of private moneys of his own, and the amount was subsequently repaid to him. He says also that after he had purchased the document, that is to say, the bond in question, Gopi Narain asked him to give the document to the committee "and I said that I would not give it." A number of the notices issued for the subsequent meetings of the trust committee have been put in evidence, and these show that time after time amongst the list of business to be transacted is the question of the purchase of the bond, but no resolution was ever come to on the subject either by the trustees to surrender any rights they might have or for the taking of any steps against Kunj Behari Lal. The matter finds a place in the agenda for the last time in the notice, dated the 2nd of July, 1905. Kunj Behari Lal did not obtain a sale certificate for some three years after the date of purchase, and in the meantime the bond had been claimed by the widows of Abdul Jalil. In our opinion the inference to be drawn from the evidence is that Kunj Behari bid for the bond in the first instance possibly with the intention of allowing the trustees to have the benefit of it. It is equally possible that when he found that before the sale the trustees had come to no resolution, he bid for the bond on his own behalf intending to keep it for himself. We do not believe that the trustees as a body ever intended that Kunj Behari Lal should purchase the bond for himself, and we are satisfied that they never gave him such permission. The application for leave to bid strongly

suggests that the trustees at once saw the soundness of the advice given them by Kunj Behari Lal, namely, that it would be advantageous to purchase the bond. We are satisfied also that after the purchase had been made they would have been glad to take over the purchase from Kunj Behari Lal. This is shown by the fact that time after time the question of the bond is placed upon the agenda of the meetings of the trustees, and also by the fact that Gopi Narain asked Kunj Behari Lal to let the trustees have the bond. We think that it is most probable that Kunj Behari Lal having succeeded in getting the property knocked down to him or to his attorney at a very low price, determined to keep it himself, and that the trustees thought they could not compel him to give it up. Kunj Behari Lal was probably supposed to know more of court matters than his co-trustees and they considered that they were at his mercy.

The question then arises, can Kunj Behari Lal under those circumstances retain the benefit of his purchase? We are of opinion that he cannot. Section 88 of the Indian Trusts Act provides:—"Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person, the advantage so gained." Illustration (h) is as follows:—"A, a guardian, buys up for himself incumbrances on his ward B's estate at an under value. A holds for the benefit of B the incumbrances so bought and can only charge him with what he has actually paid." This section incorporates and codifies the law which prevails in England on the subject of purchases made by trustees. The authorities will be found collected in Lewin on Trusts, page 304, 11th Edition, Williams on Executors, page 488, 10th Edition, and Coote on Mortgages, Vol. II, page 841.

In the present case Kunj Behari Lal purchased for Rs. 3,115 a mortgage for Rs. 50,000 and the value of two-thirds of the village Pali Kalan if unincumbered must have been over Rs. 25,000. He

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was not only one of the co-trustees and therefore bound to do all in his power to protect the interests of the trust estate, but he was also the general attorney of the trustees. It seems to us that when he made the purchase of this incumbrance, he must be held to hold it for the benefit of the trust and can only charge the trust with the amount which he actually paid for it. The case seems to us to fall within the second part of section 88 of the Indian Trusts Act. It is quite clear that his interests as purchaser of this bond were or might be adverse to the interests of the trust estate as owner of the equity of redemption in the village of Pali Kalan. The mortgage, however, affected not only the village of Pali Kalan but also the village of Pali Khurd and Sadikpur, and the plaintiff therefore is entitled to a decree against the purchaser of Pali Khurd, that is, Abdul Hamid, and against the purchaser of Sadikpur, but his decree against these villages must only be for the proportion which they ought to bear, having regard to the value of these villages as compared with that of Pali Kalan. These two villages formed no part of the trust estate. As against the village of Pali Kalan, the suit must be dismissed upon the terms that the trustees do pay to the plaintiff that portion of the price paid by him for the purchase of the bond which is proportionate to the value of the village Pali Kalan as compared with the value of the two other villages. He should get the said amount of the purchase money, together with interest, at the rate of $10\frac{1}{2}$ per cent. per annum, the rate fixed in the bond. If the defendants, trustees, fail to pay such sum, the decree of the court below should stand. The parties have agreed as to the respective values of the three villages, and we are thus enabled to fix the amount for which the decree ought to be made against the villages of Pali Khurd and Sadikpur in the event of the defendants trustees paying the apportioned amount of the price paid by Kunj Behari and interest, and we are also able to fix the proportionate amount of such price. By agreement this price with interest up to the date fixed for payment, namely, the 24th of March, 1912, amounts to Rs. 2,260. We accordingly modify the decree of the court below as follows: In the event of the trustees paying into court the sum of Rs. 2,260 as aforesaid, the other defendants, viz., Abdul Hamid and the heirs of Pathak Sheo Dayal, shall pay to the plaintiffs on or before the 5th of July, 1912, the sum

of Rs. 50,327-10-9 (i. e., Rs. 38,272 principal and Rs. 12,055-10-9 interest up to the aforesaid date), together with costs in both courts and future interest at 6 per cent. per annum, but in the event of the said defendants, Abdul Hamid and the heirs of Sheo Dayal not paying the said sum of Rs. 50,327-10-9, together with costs and future interest as aforesaid a two-thirds share of Pali Khurd, pargana Bharthana, district Etawah, and mahal Rani Indumati of mauza Sadikpur, pargana Bharthana, district Etawah, shall be sold. In case the trustees do not pay the said sum of Rs. 2,260, as aforesaid, all the defendants shall pay to the plaintiff on or before the 5th of July, 1912, the sum of Rs. 85,475, (i. e., Rs. 65,000 principal and Rs. 20,475 interest, up to the date above-mentioned), together with costs in both courts and future interest at 6 per cent. per annum. On failure by the defendants to pay the said amount on or before the date above-mentioned, the plaintiff will be entitled to bring to sale Mahal Gopi Narain of mauza Pali Kalan, pargana Bharthana, district Etawah, and mahal Rani Indumati of mauza Sadikpur, pargana Bharthana, district Etawah, and two-thirds of mauza Pali Khurd, pargana Bharthana, district Etawah. In the event of the trustees paying the said sum of Rs. 2,260 they will have their costs in the court below and in this Court to be paid by the plaintiffs, but in calculating the costs of the trustees in this Court they will only be allowed one-third of the costs of translating and printing.

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Decree modified.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

KHADIM HUSAIN (PLAINTIFF) v. BHARAT SINGH AND ANOTHER
(DEFENDANTS).*

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Act No. XVI of 1908 (Indian Registration Act), sections 33, 73, 77—Registration—Refusal by Sub-Registrar to register—Appeal to Registrar—Refusal to register based on inability to procure attendance of executants—Suit to compel registration.

A sale deed was presented for registration, but the executants did not appear before the Sub-Registrar, who, after four months from the date of execution, reported the fact to the Registrar and was directed by the latter not to register it. Registration was accordingly refused. An appeal against that order

* First Appeal No. 33 of 1911, from a decree of Pratab Singh, Subordinate Judge of Moradabad, dated the 9th of September, 1910.