

## APPELLATE CIVIL.

*Before Harrison and Tek Chand JJ.*

JANKI DAS, AUCTION PURCHASER, (DEFENDANT)

Appellant

*versus*

GULZAR (PLAINTIFF) LOKMAN DAS-TARA  
CHAND AND ANOTHER (DEFENDANTS) Respondents.

1931

Feb. 18.

Civil Appeal No. 1933 of 1926.

*Civil Procedure Code, Act V of 1908, Order XXI, rule 63*  
—Onus probandi—allocation of—Transfer of Property Act,  
IV of 1882, section 53—Fraudulent transfer—to defeat decree-  
holder.

*Held*, that it is settled law that in a suit under Order XXI, rule 63 of the Code of Civil Procedure, the *onus* lies upon the plaintiff, who had unsuccessfully objected before the executing Court, to establish both consideration and good faith for the transaction on which he relies.

*Held also*, that in a case like this, if a substantial portion of the consideration is held to be fraudulent and fictitious, the whole transfer must be treated as fraudulent and effected with the object of defeating the decree-holder and, therefore, voidable at the option of the person adversely affected by it, on the principle enunciated in section 53 of the Transfer of Property Act.

*Mula Ram v. Jivanda Ram* (1), *Madan Gopal v. Lahr Mal* (2), and *Maharaja Sir Mohammad Ali Mohammad Khan v. Mst. Bismillah Begam* (3), relied upon.

*Second appeal from the decree of Pandit Kundan Lal Basisht, District Judge, Hissar, dated the 11th March 1926, reversing that of Chaudhri Kanwar Singh, Subordinate Judge, 2nd Class, Hissar, dated the 15th June 1925, declaring that the plaintiff shall*

(1) (1923) I. L. R. 4 Lah. 211. (2) 1930 A. I. R. (Lah.) 1027.

(3) (1930) 35 Cal. W. N. 324 (P.C.).

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*have a valid charge of Rs. 2,330 only on the house in suit.*

SHAMAIR CHAND and QABUL CHAND, for Appellant.

NAZIR HUSSAIN, for ZAFRULLAH KHAN, for Plaintiff-Respondent.

TEK CHAND J.

TEK CHAND J.—In execution of a money decree obtained by defendant No. 1 against defendant No. 2 a house belonging to the latter was put to sale and purchased by defendant No. 3. The plaintiff, who is a relation of the judgment-debtor (defendant No. 2) preferred an objection before the executing Court that the house had been previously sold to him for Rs. 4,000. The objection was disallowed. Thereupon he instituted a suit under Order XXI, rule 63, for a declaration that the house in question was his property and was not liable to attachment and sale in execution of the aforesaid decree. The auction purchaser was also made a party to the suit. In support of his claim the plaintiff produced a registered sale-deed, in which the consideration was described as having been paid as follows:—

|                                 | Rs.       |
|---------------------------------|-----------|
| (1) Paid to Hira Lal, mortgagee | ... 2,330 |
| (2) Paid in cash to the vendor  | ... 1,670 |
| Total                           | ... 4,000 |

The trial Court held that the second item was wholly fictitious and not a farthing actually passed. As to the payment to Hira Lal the finding was that Rs. 1,200 only was due by the vendor to him on foot of a mortgage. As the vendor and the vendee were related to each other and a large part of the consideration was fictitious, the Court held that the sale was

fraudulent and was entered into to defeat the creditors. It accordingly dismissed the suit.

On appeal the learned District Judge agreed with the finding of the trial Court that Rs. 1,670 had not been paid and was fictitious, but he held that Rs. 2,330 was the amount due by the vendor to Hira Lal on two mortgages, and that that sum had been paid to him by the plaintiff. He accordingly accepted the appeal and passed a declaratory decree to the effect that the sale to the auction purchaser (defendant No. 3) was subject to a charge of Rs. 2,330 in favour of the plaintiff.

From this decree the plaintiff and defendant No. 3 have preferred separate second appeals, the latter asking for a total dismissal of the suit and the former praying that it be decreed in full.

The finding that Rs. 1,670 was fictitious and was not paid by the vendee to the vendor is one of fact and cannot be challenged in second appeal. This being the only point raised in the plaintiff's appeal it is incompetent and must be dismissed.

In the appeal preferred by defendant No. 3, Mr. Shamair Chand on behalf of the appellant has pointed out several errors in the judgment of the learned District Judge. But the appeal must succeed on the short ground that the sale is not proved to have been effected in good faith and as it had the effect of delaying and defeating the vendor's creditors, it is voidable at the instance of such a creditor. It is settled law that in a suit under Order XXI, rule 63, the *onus* lies upon the plaintiff, who had unsuccessfully objected before the executing Court, to establish both consideration and good faith for the transaction on which he relies. See *Maharaja Sir Mohammad Ali Mohammad Khan*

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v. *Mussammatt Bismillah Begam* (1). There is no doubt that in the present case, the plaintiff has failed to establish both these points. Out of the sale price Rs. 1,670 has been found to be fictitious; the vendor and the vendee are related to each other; the vendor was admittedly indebted to defendant No. 1 and other persons at the time of the sale; and there is no question that the transaction had the effect of defeating these creditors. On these facts, the sale was obviously effected in bad faith, and it is not necessary to decide whether out of the remaining consideration Rs. 2,330 was paid as held by the District Judge, or Rs. 1,200 only as found by the trial Court. As laid down in *Mula Ram v. Jiwanda Ram* (2), in a case like this, if a substantial portion of the consideration is held to be fraudulent and fictitious, the whole transfer must be treated as fraudulent and effected with the object of defeating the decree-holder; and therefore voidable at the option of the person adversely affected by it, on the principle enunciated in section 53 of the Transfer of Property Act. See also to the same effect *Madan Gopal v. Lahri Mal and Janki Das* (3), where the question has been discussed at length.

This being so, it is not necessary to consider the other points argued before us, as on the finding recorded above the plaintiff's suit must be dismissed.

I would accordingly accept the appeal of the auction purchaser (Civil Appeal No. 1933 of 1926) and dismiss that of the plaintiff (Civil Appeal No. 1709 of 1926) with costs throughout.

HARRISON J.

HARRISON J.—I agree.

A. N. C.

*Appeal accepted.*

(1) (1930) 35 Cal. W. N. 324 (P.C.). (2) (1923) I. L. R. 4 Lah. 211.  
(3) 1930 A. I. R. (Lah.) 1027.