

LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and
Mr. Justice Mosely.

S.M.R.M. CHETTYAR

v.

P.L.A.R.M. FIRM AND OTHERS.*

1938

Nov. 22.

Rectification of instrument—Erroneous description of property sold—Purchaser's right against subsequent court-auction-purchaser of property—Right of third person in good faith and for value—Auction-purchaser bound by estoppels—Obligation of judgment-debtor to make valid conveyance—Specific Relief Act, s. 31—Transfer of Property Act, s. 2 (d).

Where a purchaser of immovable property is entitled under s. 31 of the Specific Relief Act to obtain rectification of an erroneous description of the property bought by him from his vendor he is equally entitled to such rectification against the auction-purchaser at a Court sale of such property attached subsequently by a decree-holder of the vendor. S. 2 (d) of the Transfer of Property Act expressly excludes from the scope of the Act any transfer in execution of a decree or order of a Court of competent jurisdiction.

An auction-purchaser at a Court sale is bound by estoppels which affect the judgment-debtor and must therefore be bound by an obligation binding the judgment-debtor to make a valid conveyance of property which the judgment-debtor has admittedly intended to convey but has not so conveyed in law by error.

Debendra Nath Sen v. Seraji, 10 Cal. L.J. 150; *Mahomed Hossein v. Roy*, I.L.R. 22 Cal. 909 (P.C.); *Nanda Lal v. Datta*, 36 Cal. L.J. 421; *Pareshnath v. Deb*, 9 I.A. 147; *U Po Hla v. Ko Po Sant*, [1938] Ran. 136, referred to.

Noor Mohamed v. Dinshaw, 45 Mad. L.J. 770 (P.C.), distinguished.

Surridge for the appellant

P. K. Basu for the 1st respondent.

Special Civil Second Appeal No. 261 of 1937 from the judgment of the District Court of Bassein in Civil Appeal No. 15 of 1937. It was heard and decided by

MACKEY, J.—The plaintiff-appellant P.L.A.R.M. firm or rather its predecessor received certain property in mortgage from one

* Letters Patent Appeal No. 7 of 1938 from the judgment of this Court in Special Civil 2nd Appeal No. 261 of 1937 against the judgment of the District Court of Bassein in Civil Appeal No. 15 of 1937.

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Ma U Ma in 1921. In 1933 Ma U Ma's heirs being unable to repay the loan taken in respect of this and other mortgages, by a registered deed of sale conveyed outright to the P.L.A.R.M. firm all the properties previously mortgaged in the deeds recited in the new conveyance deed, but unfortunately in the detailed description of the lands transferred, one holding was wrongly described as being in Kyonpyaw Township instead of Kyaunggon Township and as being in a *kwin* called Wetchaung West instead of Wetchaung East. The first mistake was caused by the carelessness of the copyist who omitted to notice that this was the only piece of land comprised in the deed which was not in Kyonpyaw Township and also owing to a mistake in the Assessment Roll of Land Records where the *kwin* was wrongly described as Wetchaung West instead of East. In the original mortgage deed the land was correctly described. After this transfer the plaintiff firm leased out the land to one of the heirs of Ma U Ma who in turn sub-let it to other persons. In 1935 the respondent Chettyar firm, S.M.R.M.V. Chettyar, attached this particular holding together with other property in execution of his decree against the heirs of Ma U Ma—the other respondents in this appeal. The land was attached as being in Wetchaung East *kwin*. The plaintiff firm not understanding that this particular holding had been attached, whilst applying for the removal of attachment of other property omitted to apply for the removal of attachment of this property. In consequence it was sold by a Court auction and the S.M.R.M.V. firm bought it in July 1935. Next year the S.M.R.M.V. firm sued Po Toke, the tenant of the P.A.L.R.M. firm for rent. This suit was filed on the 19th of May 1936. On the day before, the P.L.A.R.M. firm had instituted the suit out of which the present appeal arises for rectification of the sale deed of 1933 in respect of the mis-description of the land in question. The heirs of Ma U Ma admitted the correctness of the plaintiff's claim: but the S.M.R.M.V. firm disputed the right of the plaintiff to have the deed rectified at this late stage.

The learned Township Judge was of the opinion that the legal representatives of Ma U Ma had intended to transfer this property and had in fact delivered possession of it to the plaintiff firm. As the defendant firm could purchase at the Court auction nothing more than the right title and interest of its judgment-debtor; it could have no better claim than the latter. Accordingly the plaintiff's suit was decreed. The plaintiff firm had asked in the alternative for a mortgage decree in respect of the property

on the ground that if the sale was of no effect then the mortgage must still be regarded as subsisting. Against this decree the P.L.A.R.M. firm appealed to the District Court. The learned District Judge was of the opinion that the title to the land in dispute had not been transferred to the plaintiff, that the judgment-debtors, the heirs of Ma U Ma, had the legal interest therein which had now been acquired by the P.L.A.R.M. firm and that as the plaintiff had been guilty of laches in asking for equitable relief only after the S.M.R.M.V. firm had purchased the land and asked for a delivery order, the plaintiff was not entitled to a relief under section 31 of the Specific Relief Act. The learned District Judge declined to deal with the alternative claim of the plaintiff on the ground that although his prayer for a mortgage decree had been dismissed he had not appealed against that order of dismissal. It is now admitted by the respondents that the learned District Judge should have considered the alternative claim of the plaintiff firm. The plaintiff having been successful in the trial Court was not required to appeal against the finding in regard to the mortgage, but when the opposite party had appealed against the decree obtained by the plaintiff it was open to the appellate Court to deal with the whole case and it should have done so under Order 41 rule 33 of the Code of Civil Procedure. On the findings above mentioned the learned District Judge allowed the appeal and dismissed the plaintiff's suit with costs in both Courts. The plaintiff now appeals to this Court against the appellate Judgment of the District Court.

The claim of the plaintiff is for relief under section 31 of the Specific Relief Act, the relevant portion of which reads as follows :

“When, through a mutual mistake of the parties, a contract, or other instrument in writing does not truly express their intention, either party may institute a suit to have the instrument rectified ; and if the Court find it clearly proved that there has been mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may, in its discretion, rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.”

Now, there can be no doubt that as between the P.L.A.R.M. firm and the other respondents Ko Po Thein, Ma Pan I and Maung Ba

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it would be reasonable for the Court to rectify the instrument as desired by the plaintiff. The plaintiff's vendors do not dispute the correctness of the plaintiff's claim. The deed itself by expressly stating that it was intended to transfer all such properties as were detailed in certain mortgage deeds specifically mentioned, one of which included the land in question, makes it amply clear that it was the intention of the parties that this land should be transferred outright to the P.L.A.R.M. firm. It is clearly shown how the mistake arose in the detailed description of the property which the deed of transfer contains. However, no one who reads the deed and compares it with the mortgage deed to which reference is specifically made could fail to understand that it was the intention of the parties to convey the land in question.

There is also the clearest evidence that the land was in fact transferred into the possession of the P.L.A.R.M. firm. The firm produced its books of account in Court and referred to them in giving evidence to show that it had received rent therefrom and had paid the revenue due thereon. The reference to the account books was made in cross-examination. The account books were not put in evidence: but they evidently were not challenged by the S.M.R.M.V. firm which of course was perfectly capable of reading Tamil accounts.

There is also the evidence of the transferees to show that the possession of the land was in fact delivered to the P.L.A.R.M. firm. The respondent has not been able seriously to contest this fact. He produced some evidence to show that the land had not in fact passed out of the possession of Maung Ba, an heir of Ma U Ma: but the evidence shows no more than that Maung Ba after the conveyance was leasing out the land.

The only question to be decided is whether the rectification of the instrument can be done without prejudice to the rights acquired by the S.M.R.M.V. firm in good faith and for value. The learned District Judge seems to be of the opinion that the S.M.R.M.V. firm had not acquired the property in good faith and for value because it had bought it in execution of its decree for a debt due by the other defendants. I am, however, unable to follow the learned District Judge's reasoning on this point. If the value of the land was set off against the decretal amount it is obvious that the purchaser paid value therefor. There is no question of his lack of good faith because it has not been shown that he knew that the P.L.A.R.M. firm claimed to be the owner of this.

piece of property. True if he had made enquiry he could not have failed to have discovered that fact, but it cannot be said that a purchaser at a Court auction does not buy in good faith because he has not made rigorous enquiries as to the title to the property he proposes to purchase. These considerations are in fact irrelevant in such a case. The rights acquired by the S.M.R.M.V. firm are no other than the rights of its judgment-debtors. It cannot put itself in any better position than that in which its judgment-debtors stood. This is a well established principle.

In *Mahomed Mosuffer Hossein and another v. Kishori Mohun Roy and others* (1) the plaintiffs and defendants each holding a separate decree against the same estate had by leave purchased in execution. The plaintiffs' decree was for money against the representatives of the deceased owner of the property which before then had been mortgaged to the defendants by his widow. The mortgagees, the defendants, having got a decree upon their mortgage against the widow purchased at the sale in execution and defended against the plaintiffs the possession which they had obtained. The plaintiffs claimed to have bought the property free of the mortgage on the ground that the widow was holding only *benami* for her husband and was not the real owner. It was held that the owner having in his life-time authorized his wife to hold herself out as proprietor in her own right could not have succeeded in a suit to disentitle the mortgagees without proving that they either had taken the mortgage with such notice or that they had been put upon enquiry, and that the same principle applied to these plaintiffs because they had purchased the owner's right title and interest and were bound equally with him. So in the case before us it seems to me that the respondent Chettyar firm has bought only the rights of its judgment-debtors. It is quite clear that the judgment-debtors cannot set up any title to this land as against the plaintiff-appellant firm and they are in no position to dispute the plaintiff-appellant's prayer for rectification of the instrument of conveyance. It appears to me that the respondent S.M.R.M.V. Chettyar Firm cannot claim to be in any better position than these judgment-debtors. It is therefore immaterial whether the judgment-debtors were apparently in full possession of this piece of property or whether the plaintiff had shown negligence in seeking the equitable relief to which he was entitled so long as his suit is not barred by limitation. It might have been

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different if the respondent firm had bought otherwise than at a Court auction. The respondent firm knew quite well that it was not buying the property but whatever interest the judgment-debtors had in it, and that interest is not such as would enable the auction purchaser to claim that the Court should dismiss the plaintiff's suit for rectification. See *Debendra Nath Sen v. Mirza Abdul Samed Seraji and others* (1) where it is said :

“ The purchaser at the execution sale is bound by the same rule of estoppel as the judgment-debtor, on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage ”, and the Privy Council decision which I have cited was referred to and decisions to the contrary criticized as contradictory to the latter ruling. See also *Nanda Lal Agrani v. Jogandra Chandra Datta* (2). In my opinion this is a case in which the Court would exercise a proper discretion in allowing rectification of the instrument.

This appeal is therefore allowed, the finding and decree of the District Court are set aside and the decree of the Township Court is restored with costs to the plaintiff-appellant throughout. The costs shall be payable by the S.M.R.M.V. Chettyar Firm.

The respondent S.M.R.M. Chettyar obtained leave to appeal further under Clause 13 of the Letters Patent.

ROBERTS, C.J.—This is a Letters Patent appeal from the judgment of Mr. Justice Mackney who set aside the finding and decree of the District Court of Bassein and restored the decree of the Township Court of Kyaunggon in favour of the first respondents P.L.A.R.M. firm. The short question is whether these respondents are entitled to rectification of a conveyance of certain property dated October 21st, 1933, and made by way of satisfaction of a mortgage debt by Ma U Ma, the predecessor-in-title of the second, third and fourth respondents. One of the items sought to be conveyed was wrongly described in the conveyance : instead of

(1) 10 Cal. L.J. 150, 164.

(2) 36 Cal. L.J. 421.

describing it as Kyaunggon myo the words "Lagaung myo" were used. It is common ground that as between the transferee and the other respondents, the former could have obtained rectification of the instrument of conveyance in conformity with section 31 of the Specific Relief Act, 1877; but the appellant was a creditor and had obtained a money decree against the mortgagor and her heirs, and in execution of this decree had attached the property in August 1935. It was put up for sale by order of the Court and the appellant purchased it for value in part satisfaction of his money decree. The question as framed by Mackney J., whose judgment sets out the facts in detail, is whether rectification ought to be decreed since it can only be done "without prejudice to rights acquired by third persons in good faith and for value."

In *U Po Hla and another v. Ko Po Sant and another* (1) it was pointed out that a decree-holder who was attaching property under the process of execution cannot seize property which his judgment-debtor holds subject to restrictions and ignore those restrictions. But the case of *Noor Mohamed Peer-Bhoy v. Dinshav Hormusji Motiwala* (2) was cited to us to show that where there was an agreement to sell immovable property the contractee had no right to specific performance against the auction purchaser in the absence of notice given of the contract to the latter before purchase; and it was contended that this case is analogous and that rectification of the conveyance ought not to be decreed. Their Lordships of the Privy Council, having decided that section 64 of the Code of Civil Procedure, which deals with private alienation of property after attachment, had no bearing on the case, proceeded to refer to section 40 of the Transfer of

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(1) [1938] Ran. 136.

(2) (1923) 45 Mad. L.J. 770.

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Property Act. In the terms of that section, if the plaintiff were a person entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, he would only be entitled to enforce it against a transferee provided notice had been given. In the special circumstances of the Madras case it was held that no notice had been given and, consequently, the decision proceeded upon this ground.

But section 2 (d) of the Transfer of Property Act expressly excludes from the scope of the Act any transfer in execution of a decree or order of a Court of competent jurisdiction; and it has been held in *Pareshmath Mookerjee v. Anathmath Deb* (1), (which was decided after the passing of the Specific Relief Act), that an auction-purchaser was bound by an estoppel operating against a judgment-debtor and could not put himself in a better position than he was as a mortgagee.

The present appellant being auction-purchaser at a Court sale, the cases cited by the learned Judge in second appeal appear to me to be conclusive in favour of the respondents. The reasons given in his judgment for decreeing rectification appear to me, with respect, to be entirely correct, and, accordingly, this appeal must be dismissed, with costs, advocate's fee fifteen gold mohurs.

MOSELY, J.—The facts of this case have been set out at length in the judgment in second appeal of this Court against which this Letters Patent Appeal has been instituted.

The present first respondent, the P.L.A.R.M. Chettyar Firm or its predecessor took certain properties in mortgage from Ma U Ma, deceased, whose legal representatives are the other respondents.

(1) (1882) 9 I.A. 147.

In 1933 Ma U Ma's heirs conveyed by registered deed of sale the mortgaged property to the P.L.A.R.M. Chettyar Firm but the property now in question was misdescribed by error, the township and *kwin* being wrongly given, though these particulars had been correctly entered in the mortgage deed.

In 1935 the defendants, the present appellants, the S.M.R.M.V. Chettyar Firm, attached this property in suit and other properties in execution of a decree against Ma U Ma's heirs and purchased this property in execution, setting off the price against the decree.

Some nine months later the P.L.A.R.M. Chettyar Firm instituted the present suit against Ma U Ma's heirs and the S.M.R.M.V. Chettyar Firm for rectification of the sale deed in question or, in the alternative, they applied to fall back on their mortgage and prayed for a mortgage decree.

It was held in second appeal by this Court that the decree for rectification which had been passed by the Trial Court and set aside in appeal by the District Court should be restored.

Section 31 of the Specific Relief Act (Act I of 1877) gives the Court, if fraud or mistake is proved, discretion to rectify the instrument so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

The sale to the S.M.R.M.V. Chettyar Firm was for value and, if in good faith, it is not denied that a purchaser other than one at a Court sale would have acquired a right to this property, having no notice of the mistake. Illustration (a) to the section itself gives a case of this kind,—one where the conveyance was fraudulently procured by the vendee.

The learned Judge in second appeal, however, held that other considerations arose in the case of a Court sale, where the right, title and interest of the

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judgment-debtor only are acquired by the auction purchaser, and he held that the S.M.R.M.V. Chettyar Firm was bound by any equities that bound Ma U Ma's heirs, who admitted the error and the plaintiff's claim for rectification.

It is contended by the learned advocate for the appellants here that this was mistaken and that, as the legal title to the land still remained with Ma U Ma's heirs at the date of the Court sale, the appellants had acquired a good title to the property. It is pleaded that the right acquired could only be affected by covenants running with the land, and it is said that the obligation of rectification was only a personal one.

In this connection the case of *Noor Mohamed Peerbhoy v. Dinshaw Hormusji Motiwala* (1), a decision of their Lordships of the Privy Council, is quoted. It was discussed in that case whether an auction purchaser was bound under section 40 of the Transfer of Property Act by an antecedent contract to sell the property to a third party. All that was held there was that, assuming section 40 applied to a purchaser at Court sales, it could only apply if the purchaser bought with notice of the contract. The second paragraph of section 40, which is the portion of the section in point, deals with obligations arising out of contract and annexed to the ownership of immovable property but not amounting to an interest therein. I do not think it can be said that the P.L.A.R.M. Chettyar Firm's claim for rectification of a contract of sale of land, which it was admittedly intended to sell to them and which admittedly passed and has been since in their possession, can be described as such an obligation. It may be remarked here that a purchaser at a Court sale is a transferee by operation of law and not, therefore, a

(1) (1923) 45 Mad. L.J. 770.

transferee within the meaning of this section, for section 2 (d) of the Transfer of Property Act says that nothing contained in the Act (with certain exceptions in which section 40 is not included) shall be deemed to affect any transfer in execution.

There is a long series of decisions which lay down that a Court auction purchaser merely acquires the right, title and interest of his debtor. It was said recently in another Letters Patent Appeal of this Court,—*U Po Hla and another v. Ko Po San and another* (1)—, that a judgment-creditor in bringing to sale the right, title and interest of his judgment-debtor is bound by all the equities which were binding on the property in the hands of the judgment-debtor, that is to say, of course, all the equities prior to the date of attachment for the judgment-creditor is not bound by anything done by the judgment-debtor subsequent to that (section 64, Code of Civil Procedure).

The learned advocate for the respondents has directed our attention to several decisions both in England and India on the point—*Madell v. Thomas & Co.* (2), *Dorab Ally Khan and Abdool Azeez and another* (3) and *Jiban Krishna Roy and Brojo Lal Sen* (4).

The learned Judge in second appeal cited two cases: *Mahomed Mosuffer Hossein and another v. Kishori Mohun Roy and others* (5), a decision of their Lordships of the Privy Council, and *Debendra Nath Sen v. Mirza Abdul Samed Seraji and others* (6) where it was held that an auction purchaser of the interest of the mortgagor is as much bound by the rule of estoppel not to dispute the validity of the mortgage as the mortgagor himself.

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(1) [1938] Ran. 136.

(2) (1891) 1 Q.B. 230.

(3) (1877) 5 LA. 116.

(4) (1902) 30 I.A. 81.

(5) (1895) I.L.R. 22 Cal. 909 (P.C.).

(6) 10 Cal. L.J. 150, 164.

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In another case, *Nanda Lal Agrani v. Jogendra Chandra Datta* (1), it was held by Asutosh Mookerjee J. that when the mortgagor had admitted an intention to convey certain property by the deed of mortgage neither he nor the purchaser at a Court sale of his right, title and interest could dispute the title of the mortgagee but were estopped from doing so. It is immaterial that the judgment concluded by a finding that the defendant there was not a purchaser for value without notice.

If, as is settled law, a Court purchaser is bound by estoppels which affect his judgment-debtor, all the more, in my opinion, must he be bound by an obligation binding the judgment-debtor to make a valid conveyance of property which the judgment-debtor has admittedly intended to convey but has not so conveyed in law by error.

In my opinion this Letters Patent Appeal must clearly fail and be dismissed. I agree with the order as to costs.