[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

1878. March 5.

BASA'PPA' BIN MA'LA'PPA' AKI (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* DUNDA'YA' BIN SHIVLINGA'YA' (ORIGINAL PLAINTIFF), RESPONDENT.*

Court's sale under a decree reversed in appeal before confirmation.

Plaintiff's title to certain land in dispute was derived from the purchaser at a Court's sale, under a decree which was reversed in appeal subsequently to the sale, but before it had been confirmed.

Held that the Court, which had made the decree, ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree. Though the Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it, yet the act of the Court in completing the sale, was none the less without jurisdiction: and, being without jurisdiction, could confer no title.

If a decree be reversed after a sale under it has become absolute, and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree.

A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale and grant him a certificate, the purchaser ought to ascertain that the decree, under which the sale was ordered, is still in existence.

THIS was a second appeal from the decision of C. H. Shaw, District Judge of Belgaum, affirming the decree of A. M. Cantem, First Class Subordinate Judge at the same place.

Ghanashám Nilkanth Nádkarni for the appellant.

Pándurang Balibhadra for the respondent.

MELVILL, J.:—This is a suit in ejectment, and, although the appellant, who was a defendant, may have no title, the plaintiff (the respondent) must recover on the strength of his own title. The plaintiff's title to the land is derived from the purchaser at a Court sale. The decree under which the sale took place, was reversed in appeal. The reversal took place subsequently to the sale, but before the order was made, confirming the sale. It is well established that, if a decree be reversed after a sale under it

* Second Appeal No. 315 of 1877.

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has become absolute, and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree. But, in the present case, the decree was reversed while the sale was still incomplete; and from that moment the Court, which had made the decree, ceased to have jurisdiction to take any further steps to execute it. The Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it. But the act of the Court, in completing the sale, was none the less without jurisdiction; and, being without jurisdiction, could confer no title. We may refer on this point to the observations of the Judicial Committee in *Syud Tuffuzal Hossein Khán* v. *Raghunáth Prasád*.[1] In that case a Court had sold a mere expectancy or claim, which was not of such a nature as to be subject to attachment and sale. Their Lordships say: "The real objection to this sale, if sustainable in law, is not one of irregularity; it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a purchaser under a strictly regular sale. Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncancelled." In the present case, the want of jurisdiction in the Court arose from a different cause; but the principle applicable appears to us to be the same. A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale (*Calvert* v. *Godfrey*[2]), and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale, and grant him a certificate, the purchaser ought to ascertain that the decree, under which the sale was ordered, is still in existence.

For these reasons, we think that the plaintiff took nothing by his purchase; and we, therefore, reverse the decrees of the Courts below, and disallow the claim. As, however, it has been found that the appellant has set up a false case, we direct that he bear his own costs throughout. The plaintiff (respondent) must also bear his own costs in all Courts.

Decree reversed.

(1) 7 Beng. L. R. (P. C.) 186. (2) 6 Bea. 97.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Green.

1878. January 18.

BHAVAN MULJI (PLAINTIFF) *v.* KA'VASJI JEHANGIR JASA'WA'LA' AND PEROSHA' MERWANJI, LIQUIDATORS OF THE AMRAOTI MILL COMPANY (DEFENDANTS).*

Order and disposition—True owner—Indian Insolvent Act (11th and 12th Vic., Cap. 21, Sec. 23)—Constructive trustee.

N, an original allottee of five shares in the A Company, assigned them to B. No transfer was executed, and no notice of the assignment was given to the company, which subsequently went into liquidation. N became insolvent. B sued the liquidators of the company for the amount due in respect of the five shares on the first distribution of assets.

Held that at the time of N's insolvency the plaintiff was the true owner of the shares within the meaning of section 23 of the Indian Insolvent Act (11 and 12 Vic., c. 21), and that as he had omitted to give notice to the company, of the assignment to him, and as he had procured no transfer to be executed in his favour which the company, under their articles of association, were bound to recognize, he had consented that the shares should remain in the order and disposition of N, and, consequently, the shares and the right to receive any distribution of assets in respect of them, vested, upon N's insolvency, in the Official Assignee.

Semble—The principle that a person who is under an obligation to convey property to another is, in a Court of Equity, a trustee of such property for the latter, does not apply in cases where the reputed ownership clause of the Insolvent Act is in question.

Ex parte Littledale (1) and *In re Sketchley* (2) followed.

THIS was a case stated for the opinion of the High Court, under section 7 of Act XXVI. of 1864, by J. O'Leary, First Judge of the Court of Small Causes at Bombay.

The plaintiff sued to recover from the defendants the sum of Rs. 1,000, being the amount of the first distribution of assets in the Amraoti Mills Company, at the rate of Rs. 200 per share, in respect of five shares in the said company held by the plaintiff.

One Nágardás Parmanandás had been the original allottee of these shares, for which, however, no certificate had been issued. The only document which he had obtained, showing his right to the shares, was a receipt signed by the secretaries and treasurer of the company for the amount of the first call.

* Small Cause Court Reference, Suit No. 15,753 of 1876.

(1) 6 DeG., M. & G. 714. (2) 1 DeG. & J. 163.

In November 1874, Nágardás Parmanandás assigned the shares in question to the plaintiff, and handed over to him the above-mentioned receipt. No transfer was ever executed, and no notice of the assignment was given to the company. By the articles of association the company was not bound to recognize any interest in a share other than that of a registered shareholder. Subsequently to the assignment to the plaintiff, Nágardás became insolvent, and in October 1875 the Amraoti Mills Company went into liquidation.

The First Judge of the Small Cause Court found for the defendants on the ground that the right of Nágardás Parmanandás to the shares was only a chose in action; and as no notice of the assignment to the plaintiff had been given, the shares remained in the order and disposition of the insolvent Nágardás Parmanandás at the date of his insolvency, and thereupon passed to his assignee.

On behalf of the plaintiff the opinion of the High Court was required on the following questions:—

1. Whether plaintiff was the owner of the five shares in question within the meaning of the 23rd section of the Indian Insolvent Act (11 and 12 Vic., cap. 21)?

2. Whether, supposing plaintiff was the true owner as aforesaid, the said shares were in the order and disposition of said Nágardás Parmanandás at the time of his insolvency?

Inverarity for plaintiff.

Mayhew for defendants.

The judgment of the Court was delivered by

GREEN, J.:—The action in this case was for the recovery of the sum of Rs. 1,000, being the amount of the first distribution of assets in the above-mentioned company (in liquidation), at the rate of Rs. 200 per share, in respect of five shares in the company held by the plaintiff.

The facts appearing from the case, stated by the Judge, were as follows:—

That five shares in the company were allotted to one Nágardás Parmanandás before the 30th November 1874; that no share certificates were ever issued; that the only document which Nágardás

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ever obtained, as evidencing his right to the five shares, was a receipt for Rs. 1,250, the first call on five shares in the company, which receipt was signed by the then secretaries and treasurer of the company. The receipt was in the following form :—

"Received from Nágardás Parmanandás, Esq., the sum of rupees one thousand two hundred and fifty, being the amount of first call on five shares of Amraoti Cotton Mills, as per allotment No. 132.

Bombay, 27th October 1874.

(Signed) VOLKART BROTHERS."

It was further found by the Judge that, on or about the 39th November 1874, Nágardás, by a certain document (a copy of which is annexed to the case) of that date and for valuable consideration, purported to assign his right in the said shares to the plaintiff.

This document, signed by Nágardás, and stamped, was in the following form :—

"To M. Bhowanji Mulji written by Nágardás Parmanandás. To wit. I have this day sold to you five shares, namely, five shares of the Amraoti Cotton Mills Company, Limited, on receiving Rs. 750, namely, seven hundred and fifty, in cash, at the rate of Rs. 150, namely, one hundred and and fifty, per 1 share. I have given in writing (this) receipt of the first call in respect of these above-mentioned shares, and if any one makes any objection in respect of these shares, I am duly to make answer to you, and if any profit or loss ensued regarding these shares, all (that) is on your head, and you are duly to pay the calls in respect of these shares, which may have to be paid hereafter."

It is found, further, that no notice of this assignment was given to the company ; that the company went into liquidation in October 1875 ; that there were surplus assets distributed among the shareholders ; and that Nágardás had become insolvent, and his property had passed to the Official Assignee under the Indian Insolvent Act. The date at which he filed his petition for the benefit of the Act is not stated in the case.

The action, it appears, was for the amount of assets alleged to be payable to the plaintiff in respect of the said five shares, of which he claimed to have become and to be the holder.

The Judge at the hearing passed a verdict for the defendants on the ground, chiefly, that the right of Nágardás Parmanandás to the shares in question was only a chose in action; and as no notice of the assignment had been given, the shares remained in the order and disposition of the insolvent Nágardás at the date of his insolvency, and, therefore, passed to his assignee. Such verdict was, however, upon the request of the plaintiff's attorney for the statement of a case for the opinion of the High Court, made subject to the opinion of the High Court on the following questions :—

1. Whether plaintiff was the true owner of the five shares in question within the meaning of the 23rd section of the Indian Insolvent Act?

2. Whether, supposing plaintiff was the true owner as aforesaid, the said shares were in the order and disposition of the said Nágardás Parmanandás at the time of his insolvency?

The words of section 23 of the Indian Insolvent Act (11 and 12 Vic., cap. 21) on which the present question arises, are as follows:—"If any insolvent shall, at the time of filing his petition, &c., by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such insolvent so as to become vested in the Official Assignee, &c."

It was argued on behalf of the plaintiff that the operation of the section of the Insolvent Act, above cited, was excluded by the fact that the bankrupt Nágardás was a trustee of the five shares for the plaintiff, and that the case was governed by *Re Bankhead's Trust.*(1) It was there held that the bankrupt had constituted himself a trustee of certain policies of insurance (retained, however, in his own possession) for the purpose of answering certain appropriations to his own use of trust funds in his hands. It was held that the bankrupt, being trustee of the policies for the purpose aforesaid, was the proper person to be in possession of them, and was, in fact, himself the real owner of them within the meaning of the provision of the English Bankrupt Law as to reputed ownership by a bankrupt, of

(1) 2 K. & J. 560.

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goods and chattels; and that the provision in question applied only where the bankrupt and the real owner were distinct persons. That authority does not, however, we think, apply to the present case, for the reason that we do not consider that the insolvent Nágardás, for the purposes, at least, of this case, was in any proper sense of the word a trustee of the shares in question here. The instrument of assignment of the 30th November 1874 does not purport to be a declaration of any trust. It is, no doubt, as an instrument of assignment, ineffectual to transfer the shares, having regard to clauses 16 to 22 of the articles of association of the company (which were put in evidence at the hearing before us), though it would, we consider, have had effect given to it as an agreement to transfer, had the plaintiff brought a suit against Nágardás to have a regular transfer executed, which would be in conformity to the articles of association of the company. Though, no doubt, in a certain sense one who is under an obligation to convey property to another is, in a Court of Equity, a trustee of it for the latter, yet this principle has not, it seems, been applied in cases where the reputed ownership clause of the Bankrupt Act is in question, as may be seen from the cases of *Ex parte Littledale*,(1) and *Re Sketchley*.(2) A number of authorities were cited in the argument which had more or less bearing on the questions under consideration. But we consider that the two cases we have just mentioned are more distinctly in point. From a consideration of these authorities we are of opinion that, at the time of the insolvency of Nágardás, the plaintiff was the real owner of the shares in question within the meaning of section 23 of the Indian Insolvent Act, and that inasmuch as he had omitted to give to the company any notice of the assignment to him, and had, in fact, no transfer or assignment at all executed in his own favour which the company, under their articles, were bound to act upon or in any way to recognize, he, the plaintiff, had consented that the shares in question should be in the "order or disposition" of the insolvent. There was nothing done, in our opinion, which would have prevented Nágardás from executing a formal transfer of the shares, in conformity with the articles of association, to another person, which transfer the company would have been bound to recognize.

(1) 6 DeG., M. & G. 714. (2) 1 DeG. & J. 163.

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This being so, we are of opinion that the shares, with the consequent right to receive any distribution of assets in respect of them, vested in the Official Assignee of Nágardás.

The questions, therefore, referred for the opinion of this Court must be answered in the affirmative, and judgment will be entered for the defendants. The plaintiff must pay the defendants' costs of reserving the said questions, and stating the same for the opinion of this Court, and the costs incidental thereto.

Attorneys for the plaintiff :—*Messrs. Jefferson and Payne.*

Attorneys for the defendants :—*Messrs. Ardasir and Hormasjee.*

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

March 5.

UMEDMAL MOTIRA'M (ORIGINAL PLAINTIFF), APPELLANT, *v.* DAVU BIN DHONDIBA' (ORIGINAL DEFENDANT), RESPONDENT.*

Incomplete contract—Act IX. of 1872, *Section* 39—*Registration—Evidence—Act I. of* 1872, *Section* 92, *Proviso* (4)—*Oral agreement to rescind a registered contract.*

D sold a house to P, and executed a deed of conveyance which was duly registered. The purchase-money, however, was never paid by P, who, consequently, never obtained possession. Shortly after the conveyance had been registered, P returned it to D with an endorsement thereon to the effect that it was returned because P was unable to pay the purchase-money. The right, title, and interest of P in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued D for possession. The lower Courts threw out the claim, on the ground that the property had not passed to P, the sale to him being incomplete.

Held—

(1). The sale of the house by D to P was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to P, and P accordingly became the owner of the house.

(2). The endorsement on the conveyance, not having been registered, could not affect the property.

(3). The conveyance by D to P having been registered, no oral agreement to rescind it could be proved under the Indian Evidence Act (I. of 1872), section 92, proviso (4).

(4). The plaintiff, therefore, as purchaser of the right, title, and interest of P, became legal owner of the house, but subject to all P's liabilities; and as D had a lien upon the house for the amount of the unpaid purchase money, the plaintiff could not obtain possession without paying off this charge.

* Second Appeal No. 818 of 1877.