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the second mortgagee when he has obtained his security without notice of the prior charge. Formerly it was held that a second mortgagee of part of a property included in a previous mortgage could claim the benefit of marshalling even though he had notice of the earlier incumbrance: *Chunilal* v. *Fulchand*[1] and *Lakhmidas* v. *Jamnadas*.[2] But the new limitation on the rights of the second mortgagee furnishes no reason for putting a new meaning on the word 'notice.' The second mortgagee accepted his mortgage subject to this limitation, and subject also to the construction previously placed on the word 'notice,' and has no valid reason for complaint. The importance of upholding the effect of registration is the same now as when the decision was given in *Lakshmandas* v. *Dasrat*.[3]

For these reasons we confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

(1) (1893) 18 Bom. 160. (2) (1896) 22 Bom. 304.
(3) (1880) 6 Bom. 168.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.

CHITAMBAR SHRINIVASBHAT (ORIGINAL PLAINTIFF), APPELLANT, *v.* KRISHNAPPA (ORIGINAL DEFENDANT 2), RESPONDENT.*

1902. *March* 26.

Execution—Sale in execution of decree fraudulently obtained—Fraud—Innocent purchaser—Purchase for valuable consideration—Inadequacy of price—Suit to set aside sale.

An *ex-parte* decree was fraudulently obtained by the first defendant against the plaintiff, and in execution certain land of the plaintiff's, worth Rs. 2,000, was sold by auction and was purchased by the second defendant for Rs. 400. The plaintiff sued to set aside the sale and to recover possession of the land. The facts found by the lower Courts were (1) that the decree was obtained by fraud, (2) that the property was sold at a considerable undervalue. The purchaser had no knowledge of the fraud.

Held, dismissing the suit, that the plaintiff was not entitled, as against the purchaser (defendant 2), to have the sale set aside. When property is sold in execution of a decree fraudulently obtained, mere inadequacy of price apart from

* Second Appeal No. 387 of 1901.

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participation in or knowledge of the fraud is not in itself a circumstance sufficient to justify the setting aside of the sale.

Abdool Hye v. *Nawab Raj*[1] commented on.

SECOND appeal from the decision of R. Knight, District Judge of Dhárwár, reversing the decree of Ráo Sáheb Sheshgiri R. Koppikar, Joint Second Class Subordinate Judge.

Suit to set aside a sale of land held in execution of an *ex parte* decree on the ground that the decree had been fraudulently obtained.

On the 24th September, 1897, one Yellappa bin Chanbasappa (defendant 1) obtained an *ex parte* decree (No. 240 of 1897) against the plaintiff, and in execution thereof the land in question was sold by auction on the 15th December, 1898, and was purchased by the second defendant, Krishnappa, who obtained possession.

In October, 1899, the plaintiff filed this suit to have the sale set aside and to recover possession. He alleged that the decree had been fraudulently obtained against him by Yellappa during his (plaintiff's) absence in Northern India and without his (plaintiff's) knowledge; that the land in question, which was worth Rs. 2,000, had been fraudulently sold to the second defendant, Krishnappa, for Rs. 400 and had, subsequently to the sale, been collusively given up to the second defendant (the purchaser) by a tenant (defendant 3) who held it from the plaintiff on a lease for ten years.

Defendants 1 and 2 denied the statements in the plaint, and alleged that the decree had been obtained on a bond passed by the plaintiff to defendant 1 for valuable consideration. They denied that the decree had been passed in the plaintiff's absence, and alleged that he had full knowledge of it and of the sale in execution.

The Subordinate Judge passed a decree for the plaintiff, holding that the decree had been fraudulently obtained and that the auction sale was consequently void.

On appeal by defendant 2 (the purchaser) the District Judge reversed the decree and dismissed the suit. He held that, even

(1) (1868) 9 Cal. W. R. 196.

though the decree had been fraudulently obtained by the first defendant, the plaintiff had no remedy against the second defendant (the purchaser) unless by an application under section 622 of the Civil Procedure Code. He was of opinion that the innocent purchaser must be protected and the integrity of titles purchased from the Court itself upheld.

The plaintiff preferred a second appeal. Pending the hearing, however, he died and his son and heir Chitambar was brought on the record.

Shamrav Vithal for the appellant (plaintiff) :—Both the lower Courts have found that the decree which the first defendant obtained against the plaintiff was fraudulent. We submit that a sale in execution of a decree found to be fraudulently obtained confers no title upon the purchaser (defendant 2).

[JENKINS, C.J.:—But the purchaser was not a party to the decree and he had no knowledge of the fraud. He purchased the property for valuable consideration : how then can a suit lie against him ?]

We submit that the decree being tainted with fraud, a suit does lie : *Pran Nath Roy* v. *Mohesh Chandra*,(1) *Bwarka Prasad* v. *Lachhoman Das*,(2) *Radha Raman Shaha* v. *Pran Nath Roy*(3) ; and the decree can be set aside : *Abdul Mazumdar* v. *Mahomed Gazi Chowdhry*,(4) *Bhaswantapa* v. *Ranu*,(5) *Abdool Hye* v. *Nawab Raj*,(6) *Rewa Mahton* v. *Ram Kishen Singh*.(7) If the sale is set aside, the purchaser can have his remedy against the vendor (defendant 1).

We offer now to refund the purchase money paid by the purchaser. The property is worth more than Rs. 2,000, and yet it was sold to him for Rs. 400. The purchaser's conduct is suspicious. He was already in possession as a mortgagee of the adjoining land and desired to get possession also of the plaintiff's land. He was concerned in the proceedings connected with the sale, though no doubt he was not a party to the fraudulent decree. The lower Courts have found that the consideration was inadequate, but the lower Appellate Court refused to set aside the sale because there was no irregularity in the proceedings.

(1) (1897) 24 Cal. 546.
(2) (1899) 21 All. 289.
(3) (1901) 28 Cal. 475.
(4) (1894) 21 Cal. 605.
(5) (1881) 9 Bom. 87.
(6) (1868) 9 Cal. W. R. 196.
(7) (1886) 13 I. A. 106 ; 14 Cal. 18.

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S. R. Bakhle (for *Daji Abaji Khare*) for the respondent (defendant 2):—It does not appear in what the alleged fraud consisted. The lower Appellate Court has held that the Court sale was in no way irregular or collusive.

The ruling in *Jan Ali* v. *Jan Ali Chowdhry*(1) supports our contention and it explains the decision in *Abdool Hye* v. *Nawab Raj*.(2) See also *Mohesh Chunder* v. *Dwarka Nath*.(3) A sale cannot be set aside if it is *bonâ fide* and for valuable consideration: *Rewa Mahton* v. *Ram Kishen Singh*.(4) Unless the purchase at a Court sale is tainted with fraud, the Court will not set it aside. Mere inadequacy of consideration is not a ground for setting aside a sale, unless there is some irregularity which has caused the inadequate price: *Zain-Ul-Abdin Khan* v. *Muhammad Asghar Ali Khan*,(5) *Mothura Mohun* v. *Akhoy Kumar*,(6) *Yellappa* v. *Ramchandra*.(7)

There is a clear finding by the lower Appellate Court that there was no fraud on our part. This is a finding of fact.

Shamrav in reply:—The lower Courts have found that the consideration was totally inadequate and that the decree under which the sale took place was fraudulent.

The fact that the price paid by the purchaser was wholly inadequate amounts to an irregularity which invests the Court with jurisdiction to set aside the sale. We have offered to pay the purchaser his Rs. 400. The course adopted by the Full Bench in *Abdool Hye* v. *Nawab Raj*(2) may be followed.

The case stood over after argument in order that the appellant's offer to pay Rs. 400 might be communicated to the defendant. Subsequently the Court was informed that the defendant declined to accept that sum or to part with the land.

JENKINS, C.J.:—The question on this appeal is whether the plaintiff is entitled to set aside a sale, effected in execution of an *ex parte* decree fraudulently obtained against him in his absence. The District Judge of Dhárwár has on appeal decided against

(1) (1868) 10 Cal. W. R. 154.
(2) (1868) 9 Cal. W. R. 196.
(3) (1875) 24 Cal. W. R. 260.
(4) (1886) 13 I. A. 106; 14 Cal. 18.
(5) (1887) 10 All. 166.
(6) (1888) 15 Cal. 557.
(7) (1896) 21 Bom. 463.

the plaintiff, holding that he "has no remedy as against the auction purchaser unless it be by an application to the High Court under section 622, Civil Procedure Code . . . . The innocent purchaser must be protected and the integrity of titles purchased from the Court itself upheld."

From this decision the plaintiff has appealed. The material facts fall within a very small compass. They are: (1) the decree was obtained by fraud, (2) the purchaser under the sale in execution of it is not proved to have been a party to the fraud, and (3) the purchase-money was considerably below the true value of the property. Fraud at all times affords a claim to equitable relief and "if a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of a Court of Equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud . . . . . Upon fraud clearly established no lapse of time will protect the parties to it or those who claim through them against the jurisdiction of equity depriving them of the effects of their plunder": *Bowen* v. *Evans*.[1] With the qualification imported by the Indian Limitation Act the principles here enunciated by Lord Cottenham are equally applicable in this Court. The establishment of fraud gives the Court jurisdiction; the question is, against whom will it be exercised? Clearly against all who are parties to the fraud; but Mr. Shamrav Vithal for the appellant contends that this is not the limit of the jurisdiction, and for this purpose he cites *Abdool Hye* v. *Nawab Raj*,[2] where, in answer to a reference whether a *bonâ fide* purchaser for valuable consideration and without notice at a sale in execution of a decree was protected from having the sale set aside, it was said by a Full Bench of the Calcutta High Court: "We are of opinion that the decisions do not go to the extent of saying that, under no circumstances, can a sale be set aside as against a purchaser.

(1) (1848) 2 H. L. C. 257 at p. 281. (2) (1868) 9 W. R, 196.

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In each case it will be for the Court which tries the case to determine whether it will be in accordance with the principles of justice, equity and good conscience that the sale ought to be set aside or not." Inadequacy of price, it is contended, is a circumstance that will induce the Court to exercise its jurisdiction, and for this we have been referred to *Rewa Mahton* v. *Ram Kishen Singh*,[1] not because it was there expressly held that adequacy of consideration was essential to a purchaser's protection, but because the fact that their Lordships expressly found the price was adequate indicates, it is argued, that in their opinion that was a material element in the case.

It will be instructive to examine at this point certain well-known English and Irish decisions to see how the position has there been regarded. In 1813, the case of *Gore* v. *Stacpoole*[2] came before the House of Lords on appeal from a decree of Lord Clare in Ireland, and Lord Redesdale, after adverting to the dismissal of the bill by Lord Clare, said (page 29): "He believed it was done on the ground (in addition to the lapse of time) that John Stacpoole, of Craig-Brien, was a purchaser under decree of Court for valuable consideration without notice of the fraud. He very much doubted, however, whether this was a protection, as he held it clear, that a purchaser under such circumstances was bound to see that, at least as far as appeared on the face of the proceedings before the Court, there was no fraud in the case. That case, however, had not been brought before their Lordships and, therefore, it was unnecessary to say anything further upon it." In *Bowen* v. *Evans*[3] Sir Edward Sugden (afterwards Lord St. Leonards), after referring to this passage, said: "That goes a great way; and I should act upon that opinion with very great precaution. If I found a purchaser buying where fraud appeared clearly on the face of the decree, I should hold him to have notice of it: but I should have much hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud, which was not discovered by the Court, or the officers of the Court, or the counsel concerned in the cause, whose duty it is not to permit the Court to make a decree not warranted

(1) (1886) L. R. 13 I. A. 106; 14 Cal. 18. (2) (1813) 1 Dow. 18.
(3) (1844) 1 J. & L. 178 at p. 257.

by the facts of the case." Sir Edward Sugden in his judgment discusses at length and critically all the cases bearing on this question, and it will suffice for us to refer to what he has there said. In *Colclough* v. *Bolger*[1] a sale at an undervalue was no doubt set aside, but Lord Eldon held that the purchaser was perfectly cognizant of all the circumstances which affected the sales. Their Lordships of the Privy Council, in *Lalla Bunseedhur* v. *Koonwur Bindeseree*,[2] thus deal with the matter: "The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other."

Now in none of these cases has mere undervalue in the purchase-money, apart from participation in, or knowledge of, the fraud, been held to be a circumstance in itself sufficient to justify the setting aside of a sale under the decree, nor is any principle enunciated in them—apart possibly from the Full Bench decision in 9 Cal. W. R. 196—that would justify such a result. No doubt this Full Bench decision is couched in very general terms, but that it was not intended to cover the case of a sale at an undervalue is, I think, apparent from a later decision of Sir Barnes Peacock by whom the Full Bench judgment was delivered. That judgment was given on the 31st January, 1868, and on the 8th of June in the same year *Jan Ali* v. *Jan Ali Chowdri*[3] was decided by Sir Barnes Peacock and Mitter, J. The suit was one to set aside a sale in execution. The Munsif before whom the suit was heard set aside the sale, and his decree was affirmed by the Judge on the ground that there was "a sufficient presumption of fraudulent collusion between Bhairab and the auction purchaser which would afford good ground for cancelling the

(1) (1816) 4 Dow. 54.

(2) (1866) 10 Moore's I. A. 454 at p. 473.

(3) (1868) 1 Beng. L. R. 56.

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sale." The case thereupon went to the High Court on second appeal, when Sir Barnes Peacock, in delivering judgment, said: "The main points upon which the Judge has found there was fraud between the Ijardar and the auction-purchaser are, first, that enmity existed between the purchaser and the plaintiff; secondly, that Bhairab Chandra, the Naib of the Ijardar, was present at the sale; thirdly, the inadequacy of the price realized; and fourthly, the ignorance in which the plaintiff was kept of the intended sale. We by no means intend to say that the Judge arrived at an erroneous conclusion of fact, but we think there was not in strictness any legal evidence to warrant it. The case ought to be remanded in order that the question of fraud and collusion between the auction-purchaser and the plaintiff in the decree may be tried." It is then clear from this that the learned Judges did not consider inadequacy of price a sufficient ground alone to set aside the sale, for though there was a finding to that effect binding on them in second appeal, they remanded the case for determination on proper materials whether there was fraud or collusion to which the auction-purchaser was a party.

In our opinion this is the true view to take: a purchaser for valuable consideration without notice is regarded with favour by a Court of Equity and against him it does not adversely exercise its jurisdiction. At the same time, mere undervalue does not exclude a man from the category of such purchasers; for if the consideration be valuable, its adequacy will not be investigated. "In purchases the question is not whether the consideration be adequate, but whether it be valuable; for if it be such a consideration as will make the defendant a purchaser within the Statute 27 Elizabeth, and bring him within the protection of that law, he ought not to be impeached in equity": *Basset* v. *Nosworthy*.[1] The respondent in this case answers this description; therefore, in our opinion, his sale should not be set aside, and we would accordingly confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

(1) White and Tudor's Leading Cases, 7th Ed., Vol. II, p. 100.