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Therefore, it seems to me that I should be departing from the principles and practice both of this Court and of Courts in England, if I were to make any order directing security to be given in this case.

Summons will, therefore, be discharged.

Costs costs in the cause.

Attorneys for the plaintiff: Messrs. *Khunderao, Laud and Mehta.*

Attorneys for the defendants: Messrs. *Hiralal and Co.*

K. McI. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Robertson.

1910. *September* 22.

MANJI KARIMBHAI, APPELLANT AND SECOND DEFENDANT, *v.* HOORBAI, RESPONDENT AND PLAINTIFF.*

Civil Procedure Code (Act XIV of 1882), section 317, (Act V of 1908), section 66—Court-sale in execution—Certified purchaser—Benami—Mortgagee of certified purchaser—Protection—Doctrine of constructive notice—Transfer of Property Act (IV of 1882), sections 3 and 41.

The mortgagee of the certified purchaser at a Court-sale is entitled to rely upon the title of his mortgagor including such immunity from suit as the law provides in support of the statutory title. Section 66 of the Civil Procedure Code (Act V of 1908)—which may be called in aid for the purpose of assisting in the construction of section 317 of the Civil Procedure Code (Act XIV of 1882)—supports this conclusion.

Hari Govind v. *Ramchandra*(1), followed.

The doctrine of constructive notice applies in two cases, first, where the party charged had actual notice that the property in dispute was charged, incumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an inquiry after the charge or incumbrance of which he actually knew, and, secondly, where the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice.

* Appeal No. 21 of 1910. Suit No. 667 of 1905.

(1) (1906) 31 Bom. 61.

This does not conflict in any way with the statutory definition of notice in section 3 of the Transfer of Property Act (IV of 1882).

A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property as in other matters of business regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. This is what is meant by 'reasonable care' in section 41 of the Transfer of Property Act (IV of 1882).

Occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property.

THIS suit was filed by the plaintiff Hoorbai, praying (*inter alia*) for a declaration that she was absolutely entitled to a certain house purchased at a Court-sale by the first defendant,—who, the plaintiff alleged, was a *benami* purchaser for her—and mortgaged by him to the second defendant.

Beaman, J., before whom the suit came up for trial, decided in the plaintiff's favour. The second defendant appealed.

The facts of the case and the arguments are fully set out in the judgment of the Appeal Court.

Desai, with *Kanga*, appeared for the appellant.

Bahadurji, with *Jinnah*, appeared for the respondent.

SCOTT, C. J.:—The plaintiff alleged that she was one of the beneficiaries under a trust deed whereby her mother Fatmabai, widow of Haji Tar Mahomed Sajan, settled upon her son and daughter *inter alia* a house in Kumbekar Street.

That in suit No. 64 of 1899, to which the plaintiff and the heir of her sister Jumbabai were parties, it was by a consent decree declared that the plaintiff and Jumbabai or her children were to take the trust premises in equal shares.

That upon applications for execution made by some of the parties to the suit a warrant for sale of the right, title and interest of Fatmabai in the house was issued on the 15th of July 1901 and that at the suggestion of the defendant 1, who was her confidential adviser, the plaintiff supplied him with funds wherewith he purchased the house at a Court-sale held

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under the said warrant on the 18th of October 1901 for Rs. 9,300. That she advanced divers sums of money to the first defendant for payment of workmen and the purchase of material in connection with the repairs to the house but that the first defendant had not accounted for such advances. That the first defendant set up falsely a mortgage of the house to the second defendant with her approval and she claimed that any such transaction was void and that the second defendant must be taken to have had notice of her interest in the house in view of her having been throughout in possession thereof.

She prayed for a declaration that she was absolutely entitled to the house free of all incumbrances and for transfer of the same to her and delivery of documents of title.

The first defendant in his written statement stated that he agreed to buy the house for the plaintiff in his name and undertook to supervise the work of putting the same in thorough repair if the plaintiff would give him a half share in the net profits on resale after payment to her of all the moneys expended in purchase and repair of the properties with interest at 9 per cent. per annum; and that the plaintiff accepted his proposals and paid to him Rs. 9,600 for the purchase of the property of which the unused balance of Rs. 300 together with other advances made by the plaintiff aggregating Rs. 1,400 were spent in repairs; that as more moneys were required to put up an additional story and carry out extensive alterations the defendant asked plaintiff to put him in funds but being unable to do so she requested him to raise the further sums required by mortgaging the property. The defendant thereupon mortgaged the property to the second defendant and the title-deeds (which consisted of the decree in suit No. 64 of 1899 and the certificates of sale) which were handed over by the plaintiff when the property was mortgaged to the second defendant.

The second defendant pleaded that he was a *bonâ fide* purchaser for value without notice.

In view of the sweeping condemnation of the first defendant contained in the judgment of the lower Court in discussing one of the questions in issue in this appeal, it is desirable to set out

in detail the somewhat peculiar course which the trial of this suit has taken.

It was called on for hearing on the 5th of March 1905 when by consent of all parties the hearing was adjourned and by consent of the plaintiff and the first defendant it was referred to a Special Commissioner to take (1) an account of the money dealings between the plaintiff and the first defendant in connection with the purchase and repairs of the premises mentioned in the plaint and (2) an account of the moneys expended by the first defendant for repairs and alterations made upon and to the plaintiff's premises mentioned in the plaint.

On the 26th April 1906 during the pendency of the reference to the Commissioner the first defendant died and his widow Asibai was placed on the record in his place. On the 15th of May 1907 the Special Commissioner made his report which was the subject of exceptions by the parties resulting in a remand to the Commissioner by the Court on the 19th August 1907.

On the 5th of December the Commissioner made his report on the remand.

This again was the subject of exceptions which resulted in a judgment by the Court on the 7th February 1908 wherein the conclusion was arrived at that Rs. 11,200 had been received by the first defendant from the plaintiff and that Rs. 3,800 in addition was proved to have been spent by him on the house, the Court held, however, that it had not been proved that this further sum had been spent by the first defendant out of his own pocket and that the plaintiff had failed to prove that she had supplied it.

An appeal from this judgment was dismissed on the 18th December 1908.

On the 19th of March 1910 the suit was heard as against the second defendant. Asibai, the widow of the first defendant, had died and the plaintiff not having placed anyone else on the record to represent the first defendant the suit abated as against him and his estate.

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The questions raised were—

(1) Whether the suit could be maintained against the second defendant having regard to the fact that it had abated against the first defendant ?

(2) Whether the suit was maintainable in view of the provisions of section 66 of the Civil Procedure Code of 1908 or the similar section 317 in the Code of 1882 ?

(3) Whether the second defendant was not a *bonâ fide* purchaser for value without notice to the extent of his advances and interest thereon ?

(4) Whether if the moneys advanced on mortgage by the second defendant had been spent in repairing the property the mortgage was not binding on the plaintiff's interest ?

The learned Judge in the lower Court decided all these questions against the second defendant and passed a decree declaring the plaintiff absolutely entitled to the house and ordering the second defendant to transfer it to the plaintiff's name and to hand over all documents of title relating to the house except his mortgage-deed, the Court further declared that the first defendant was only a *benamidar* of the plaintiff.

The first of these questions, which is based upon the abatement of the suit as against the first defendant, raises a point of difficulty which is not disposed of by reference to the decision in *Padgayi* v. *Baji*[1], cited by the appellant, a decision the correctness of which has been challenged in the Madras High Court: see *Muthu Vijia Raghunatha Ramachandra* v. *Venkatachallam Chetti*[2]. We think it unnecessary to decide the point for in our judgment this suit is not maintainable in view of the provisions of section 317 of the Civil Procedure Code of 1882 and the second defendant's plea of *bonâ fide* purchase for value without notice is also a good defence to the suit.

As regards the technical defence we adopt the reasoning of the learned Judges in *Hari Govind* v. *Ramchandra*[3] and we are unable to accept the view of the lower Court that a mort-

(1) (1895) 20 Bom. 549. (2) (1896) 20 Mad. 35.
(3) (1906) 31 Bom. 61.

gagee of the certified purchaser does not to the extent of his mortgage interest stand in his mortgagor's shoes. The mortgagee is entitled to rely upon the title of his mortgagor including such immunity from suit as the law provides in support of the statutory title. Section 66 of the Civil Procedure Code of 1908, which may be called in aid for the purpose of assisting in the construction of section 317 (see *Swift* v. *Jewsbury*[1] and *Morgan* v. *London General Omnibus Co.*[2]) contains, we think, a legislative recognition of the correctness of the view taken in *Hari Govind* v. *Ramchandra*[3] and supports the conclusion that a mortgagee claiming under a Court-sale purchaser enjoys the same immunity from suit as his mortgagor. In view however of the decision of the Judicial Committee in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall*[4] it is not clear what value would attach to the title created by the certified purchaser in a suit brought by his mortgagee against the purchaser's secret principal in possession. And as the question of the binding nature of the second defendant's mortgage has been definitely raised and considered by the lower Court we think it desirable to decide the question in this appeal.

In support of his plea that he is a purchaser for value without notice, the second defendant has disposed that when he made advances on the mortgage of the house in May 1902 he believed it to be the property of the first defendant and that he had no reason to believe that the plaintiff had anything to do with it. He went to see the property before advancing the money and he saw that most of the house had been pulled down, the roof of the rear portion and the walls standing but the whole of the front being razed to the ground.

It is, however, alleged and it has been found by the learned Judge that he had constructive notice of the plaintiff's interest first because he failed to make any enquires as to the title to the property, and, secondly, because the plaintiff was in actual occupation.

Now, the doctrine of constructive notice, as was shown by Wigram, V. C., in the leading case of *Jones* v. *Smith*[5], applies

(1) (1874) L. R. 9 Q. B. 301 at p. 311.
(2) (1883) 12 Q. B. D. 201 at pp. 205, 207.
(3) (1906) 31 Bom. 61.
(4) (1872) 14 Moo. I. A. 496.
(5) (1841) 1 Hare 43.

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in two cases, first, where the party charged had actual notice that the property in dispute was charged, incumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an inquiry after the charge or incumbrance of which he actually knew, and, secondly, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice. This judgment is referred to with approval by the Judicial Committee in *Barnhart* v. *Greenshields*(1) and is accepted by the authors of Dart's Vendors and Purchasers as correctly stating the effect of the authorities subject to certain qualifications not material in this case. It does not appear to us to conflict in any way with the statutory definition of notice in section 3 of the Transfer of Property Act.

In section 41 of that Act, which has been treated by the learned Judge as applicable to the case, the word 'notice' is not used, so the statutory definition of that term need not be further discussed. We think that the following remarks of Lindley, L. J., in *Bailey* v. *Barnes*(2) indicate what is meant by 'reasonable care' in the section. "A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way."

The learned Judge apparently considered that the second defendant must be deemed to have notice of the plaintiff's interest by reason of the mere fact of her living in a room in that part of the house which was not pulled down at the date of the earlier mortgage to the second defendant in May 1902, quite irrespective of the question whether the second defendant had knowledge that she was living there. An examination of the authorities, however, will not show that occupation which

(1) (1853) 9 Moo. P. C. 18 at p. 38. (2) [1894] 1 Ch. 25 at p. 35.

has not come to the knowledge of the party charged is constructive notice of any interest in the property, for example, in the cases of *Taylor* v. *Stibbert*[1], *Daniels* v. *Davison*[2], *Allen* v. *Anthony*[3], the knowledge of the party charged of the fact of tenancy or occupation was beyond dispute. In the present case the evidence of the plaintiff and her witnesses does not bring home to the second defendant any knowledge of the plaintiff's occupation. The plaintiff was strictly cross-examined as to the question of her occupation and she admitted that before the Special Commissioner she might have said that she never resided in the house before it was purchased by her. She said that she lived in the house while the repairs were going on moving from floor to floor. Her witness, the Mistri engaged by the first defendant to execute the repairs, says that except a floor and a half the whole house was pulled down when he was engaged and that the whole building except a floor and a half was rebuilt, and that when the work began the plaintiff was living on the roof in a loft or garret. The plaintiff says that although the house is now a seven-storied house, there were no tenants during the repairs; that prior to the date of her purchase she had usually lived in the next house which she owned, and she admits that a side wall had been pulled down and that a chowk in the middle was constructed during the operations. The Mistri says that the repairs were carried out under the supervision of the first defendant, but the plaintiff was continually on the premises "breaking her head at the workmen all the time."

It is not alleged that the second defendant was ever informed by anyone that the plaintiff was living on the premises, and it cannot be assumed against his denial that his inspection of the house in its dilapidated condition disclosed to him the strange and changing occupation alleged by the plaintiff during the progress of the repairs.

The learned Judge further appears to have been of the opinion that the second defendant wilfully abstained from inquiry into facts which would have disclosed the plaintiff's title and is

(1) (1794) 2 Ves. Jr. 437. (2) (1809) 16 Ves. 249.
(3) (1816) 1 Mer. 282.

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therefore affected with constructive notice. The evidence, however, does not support this conclusion. It is not disputed that the second defendant submitted the documents of title produced by his vendor to his Solicitors for their opinion as to the title disclosed. Those documents consisted of the consent decree in the suit relating to the interests of the beneficiaries under Fatmabai's trust-deed and the certificate of sale granted by the Court to the first defendant upon his purchase in October 1901. The Solicitors pronounced the title of the house to be defective because in their opinion it was possible that other members of the family of Fatmabai, who were not parties to the consent decree, might be interested in the property and subsequently put in a claim to it, and because the title-deeds of the house prior to the date of the consent decree were not forthcoming, but they never suggested that those claiming interests under Fatmabai were not bound by the consent decree and the certificate of sale. The plaintiff was one of those persons so far as was disclosed by the documents produced by the vendor. The action of second defendant in taking the mortgage after receiving the opinion of his Solicitors merely shows that he was willing to take the possible risk indicated and was prepared, as many persons in this country are prepared and as the Legislature apparently intended they should be, to accept the title disclosed by the certificate of sale. In our opinion there was nothing in the investigation of title which led to a suspicion that the plaintiff was beneficially interested in the property : nor does it appear that an examination of the bills presented by the Assessment Department of the Municipality would have disclosed anything beyond the fact that they were made out in the name of the plaintiff and her co-trustee Sidick Jakeria as trustees under Fatmabai's trust-deed at a date prior to the purchase by the first defendant.

The learned Judge further says that noting the relations which existed for a time between the first defendant and the second defendant, the conduct of the second defendant in regard to this matter of doubtful title would seem to suggest that he and the first defendant had come to an understanding upon

the matter and that the first defendant had induced him to advance his money upon a pretty clear comprehension of what the truth of the matter was. The learned Judge also states that he has very little doubt from the facts stated by the plaintiff in her evidence that the first defendant was a rogue who had deliberately planned to impose upon her and despoil her of all her property.

Now, having regard to the fact that the second defendant was advancing Rs. 4,500 upon the mortgage of May 1902 at a not exorbitant rate of interest, it is difficult to see what he could hope to gain by paying this sum to a person whom he believed to have no interest in the property offered as security. The plaintiff's counsel was unable to suggest any reason for disbelieving that the second defendant had advanced his money in good faith: nor does the learned Judge indicate what in his opinion the second defendant was to gain by the transaction as it presented itself to the lower Court. The fact that, owing to the second defendant being dissatisfied with the security of the house in its dilapidated condition, the first defendant added as security for the mortgage of May 1902 a small property of his own is quite consistent with his case that he was interested in the repairing of the plaintiff's house as she had agreed to give him a share of the ultimate sale proceeds. If this case is not true it is difficult to see why the first defendant should have worked for the plaintiff without any immediate remuneration.

Moreover we are unable to agree with the strictures passed by the learned Judge upon the first defendant. It is to be observed that so far as definite conclusions were arrived at by the Court in the proceedings to which we have referred on the very voluminous evidence recorded by the Commissioner, the statements made by the first defendant in his written statement as to the moneys received by him from the plaintiff were almost entirely substantiated; and the result arrived at, notwithstanding the disadvantage that the Court was under owing to the death of the first defendant and not having his evidence to show what money had been spent upon the repairs and from whence it had been received, was that over and above the

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advances proved by the plaintiff to have been made to the first defendant a sum of not less than Rs. 3,800 had been expended by him upon the property although the Court was not able to say that he had spent it out of his own pocket. This conclusion to say the least of it does not render it *primâ facie* improbable that the money advanced by the second defendant was expended by the first defendant, as he alleged against his interest in his written statement, upon the repairs of the house in question.

For these reasons, we are of opinion that the second defendant advanced his money upon the mortgage of the house in good faith and without notice that the plaintiff had any interest in it, and that his present mortgage of the 4th April 1903 is binding upon the property in the hands of the plaintiff; and we reverse the decree of the lower Court and dismiss the suit with costs throughout upon the plaintiff as between her and the second defendant.

Solicitors for the appellant: Messrs. *Manchershah and Narmadashanker.*

Solicitors for the respondent: Messrs. *Mehta and Dadachanji.*

Decree reversed.

K. McI. K.

ORDINARY ORIGINAL.

Before Mr. Justice Robertson.

1910.
November 11.

AISHABIBI AND ANOTHER, PLAINTIFFS, *v.* AHMED BIN ESSA AND OTHERS, DEFENDANTS.*

JASSEN BIN MAHOMED, PLAINTIFF, *v.* AHMED BIN ESSA AND OTHERS, DEFENDANTS.†

AHMED BIN ESSA, APPLICANT, *v.* MESSRS. THAKURDAS AND CO., RESPONDENTS.

Solicitor's lien for costs—Charge of Solicitors—Inspection of documents—Administration suit.

The right to be exercised by a Solicitor claiming a lien largely depends upon the circumstances under which he has ceased to act for his client, the test being whether the Solicitor has discharged himself or has been discharged by the client.

* Suit No. 423 of 1907. † Suit No. 517 of 1908.