ORIGINAL CIVIL.

Before Mr. Justice Robertson.

FAKIRUDDIN BIN AMIRUDDIN ZIAWOODDIN, PLAINTIFF, *v.* ABDUL HUSSEIN PEERBHOY, DEFENDANT.*

1910. *July* 19.

Mahomedan Law—Minor—Right to sell minor's property—Necessity—Bonâ fide purchaser without notice.

By a deed of conveyance dated 19th January 1904 one N. purported to convey on behalf of herself and her minor son, the plaintiff, certain immoveable property to the defendant for the consideration of Rs. 7,000. On the same day N. passed an indemnity bond in favour of the defendant indemnifying him against the claim of the plaintiff. The plaintiff sued to have the said deed of conveyance declared void and for a declaration that the plaintiff was entitled to the whole of the property purported to be conveyed.

Held, the plaintiff was entitled to succeed on the grounds that (1) there was absolutely no evidence that the sale was in any way necessary for the maintenance of the minor, (2) the purchaser was not a *bonâ fide* purchaser without notice of the plaintiff's rights.

The purchaser of an estate who takes with notice of a breach of trust is in the same position as the vendor who committed the breach of trust.

THE FACTS of this case appear sufficiently from the judgment.

Weldon and *Kanga* for the plaintiff.

There was no necessity for Noorbibi to sell the property. Even assuming such necessity, Noorbibi could not have sold the property without the order of the Court; *Baba* v. *Shivappa*[1], *Sita Ram* v. *Amir Begam*[2], *Pathummabi* v. *Vittil Ummachabi*[3]. Nor would the sale be binding even so far as Noorbibi's $\frac{1}{8}$th share in the property is concerned, since she has squandered the cash portion of her share as also the income of the whole property belonging to herself and the plaintiff; she has therefore lost her interest in this immoveable property, for if an account were taken she would be found indebted to her son. This being so the defendant, who is a purchaser from her, would simply stand in her shoes and could not possibly claim to be in a better

* Suit No. 82 of 1910.

(1) (1895) 20 Bom. 199.

(2) (1886) 8 All. 324.

(3) (1902) 26 Mad. 734.

1910.

FAKIRUDDIN
v.
ABDUL
HUSSEIN.

position. The income of the property was quite sufficient to maintain the minor.

The defendant was not a *bonâ fide* purchaser without notice of the plaintiff's rights. This is clear from the fact that when he bought the property he took from Noorbibi an indemnity bond.

Jaffer Rahimtulla for the defendant.

ROBERTSON, J.:—In this suit the plaintiff prays for a declaration that a certain sale-deed of the 19th January 1904, whereby Noorbibi purported to convey certain immoveable property, situate at Ripon Road, to the defendant, is void; that the said deed might be set aside and the plaintiff declared the owner of the whole of the said property; and further, that the defendant be ordered to reconvey the said property to the plaintiff and to deliver up possession. He also prays for an account of the rents of the said property since the 19th January 1904.

The plaintiff is the son of one Amiruddin, who died in Bombay intestate on the 2nd December 1894, leaving him surviving as his heirs and legal representatives his widow Noorbibi and the plaintiff. Amiruddin's brother Tamuzuddin had predeceased him on the 18th day of October 1892. He also died intestate leaving as his heirs and legal representatives his widow Jenaboo and two daughters and his full brother Shaik Amiruddin. After the death of the latter, Noorbibi on behalf of herself and her minor son, the plaintiff, filed a suit, being suit No. 363 of 1895, against Jenaboo and her daughters for an account of the estate of Shaik Tamuzuddin. In that suit a consent decree was passed on the 30th March 1897, whereby it was declared that the said Noorbibi and the plaintiff as the heirs of Shaik Amiruddin were entitled to a $\frac{5}{24}$ths share in the estate of the said Tamuzuddin, and that in satisfaction of the said share they were entitled to a sum of Rs. 6,505. By that consent decree it was further ordered and declared that Jenaboo on behalf of herself and her daughters should convey the property belonging to the deceased Tamuzuddin situate at Ripon Road to the said Noorbibi on behalf of herself and the plaintiff, and that property was to be taken as being of the value of Rs. 4,000, and that in addition to that Noorbibi was to be paid on behalf of herself and the minor

son a sum in cash of Rs. 2,505. In pursuance of that decree Jenaboo on the 20th November 1897 conveyed to Noorbibi on her own behalf and as guardian of her minor son, the plaintiff, the Ripon Road property; and by a release dated 20th December 1897 Noorbibi acknowledged that the possession of the said Ripon Road property was duly given to her and that the payments directed by the decree, that is, the payment of the said sum of Rs. 2,505 had duly been made to her on her own behalf and on behalf of her minor son the plaintiff.

It appears that on the 19th January 1904 Noorbibi purported to convey this Ripon Road property on behalf of herself and the minor plaintiff to the defendant for the consideration of Rs. 7,000. The plaintiff claims that this conveyance is invalid and that he is entitled to be declared the sole owner of the property.

It is admitted on both sides that of the $\frac{5}{24}$ths share of Tamuzuddin's estate the plaintiff was entitled to $\frac{7}{8}$ths and Noorbibi to $\frac{1}{8}$th. The plaintiff contends that for the $\frac{7}{8}$ths of the Ripon Road property he is clearly entitled to his decree. Mr. Jafferbhai contended that under the circumstances and having regard to the rules of the Mahomedan Law Noorbibi had power to convey the plaintiff's interest in the property. He admitted that if he could not establish that Noorbibi had that power under the Mahomedan Law he could not succeed in his defence. In support of his defence he cited MacNaghten's Moohummudan Law, page 64, paragraph 14, of the 4th edition. That says: "A guardian is not at liberty to sell the immoveable property of his ward, except under seven circumstances." Only the second of those circumstances was relied upon and that runs as follows:—"Where the minor has no other property, and the sale of it is absolutely necessary to his maintenance."

Without stopping to consider whether this passage correctly sets out the law upon the point, it is sufficient to say that there is in this case absolutely no evidence that the sale was in any way necessary to the maintenance of the minor. The defendant sought to establish this by suggesting that Noorbibi was entitled first to be repaid the costs of suit No. 363 of 1905, which he

1910.

FAKIRUDDIN v. ABDUL HUSSEIN.

estimated at about Rs. 1,000, secondly to be recouped for the maintenance of the plaintiff for fourteen years, which he estimated at Rs. 4,000, and thirdly to be repaid the marriage expenses of the plaintiff, which he estimated at Rs. 1,000. As to these three items I am asked to rely on conjecture as there is no evidence whatever. As to the amount of costs incurred in suit No. 363 of 1905 a consent decree was taken. No written statement was put in. There was apparently no contest. As to the maintenance of the plaintiff for fourteen years, Noorbibi was in receipt of all the rents of the Ripon Road property which has been variously estimated at from Rs. 60 to Rs. 80 per mensem. The plaintiff's share of these rents would be amply sufficient for his maintenance. As to the marriage expenses of the plaintiff, they were estimated by Munshi Abdul Rehman, the next friend of the plaintiff, to be some Rs. 400 or Rs. 500. This included ornaments worth Rs. 300 which remained in the possession of Noorbibi. Under these circumstances I am of opinion that no necessity has been shown for the sale and that the plaintiff has established his right as regards the $\frac{7}{8}$ths of the property.

This being so it is unnecessary to discuss the question whether the passage cited in Mr. MacNaughten's work applies to the case of a *de facto guardian*, or whether it correctly states the law as now applied in this Court: see *Baba* v. *Shivappa*[1], *Hurbai* v. *Hiraji Byramji Shanja*[2], *Moyna Bibi* v. *Banku Behari Biswas*[3].

As regards the remaining $\frac{1}{8}$th the position is somewhat different. The defendant contends that Noorbibi being legally entitled to $\frac{1}{8}$th of the property, the conveyance of the 19th January 1904 was effective at any rate so far as her $\frac{1}{8}$th is concerned. He asserts in his written statement that he was a *bonâ fide* purchaser without notice. Now, as to this it is clear that he had notice of the trust. That appears clearly from the conveyance by Jenaboo to Noorbibi of the 20th November 1897 which was handed over to the 1st defendant at the date of the conveyance. It would also appear from the indemnity bond

(1) (1895) 20 Bom. 199. (2) (1895) 20 Bom. 116.
(3) (1902) 29 Cal. 473.

passed on the same date (that is the 19th January 1904) that the 1st defendant was, at *that* time in extreme doubt as to the validity of the conveyance of this property to him by Noorbibi. That being so, I see no reason why I should not give full weight to the express admission of the 1st defendant made in answer to a question put by his own Counsel. The question which was put to him was this: "At the time of the execution of exhibit B were you aware that Noorbibi had appropriated to her own use a sum of Rs. 2,505 and the other property of Tamuzuddin and Amiruddin?" His answer was: "Yes. I was aware of this." His Counsel then asked liberty to repeat the question and the question was repeated twice and fully explained to the witness. He again answered: "Yes, I knew it." No further questions were then asked by his Counsel, nor was the permission of the Court asked to put further questions. It is, therefore, impossible to hold that the 1st defendant was a *boná fide* purchaser without notice of the trust and secondly of its breach.

If that is so, then it only remains to consider what is the position of a purchaser for full value who has notice of the trust and of its breach. The rule is laid down in these terms in Lewin on Trusts, 10th edition, page 1045[1]:—"But if the alienee be a *purchaser* of the estate at its full value, then if he take with *notice* of the trust . . . he is bound to the same extent and in the same manner as the person of whom he purchased." Of the authorities referred to by Mr. Lewin, it is only necessary to refer to one: *Mackerth* v. *Symmons*[2]. In *Dunbar* v. *Tredennick*[3] Lord Chancellor Manners lays down the rule thus:—"Why then, what is the situation of a purchaser with notice of a fraudulent title? It certainly may be stated as a general proposition, that a purchaser with notice, is, in equity, bound to the same extent, and in the same manner, as the person from whom he purchased; or as Lord Rosslyn states it in *Taylor* v. *Stibbert*[4]:—'If he is a purchaser, with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents, would be bound to do by the decree'."

(1) 12th Edn. p. 1,100.

(2) (1808) 15 Ves. 329 at p. 350.

(3) (1813) 2 Ball & B. 304 at p. 319.

(4) (1794) 2 Ves. Jun. 437 at p. 439.

1910.

FAKIRUDDIN v. ABDUL HUSSEIN.

That same rule has been applied in the case of *Mancharji Sorabji Chulla* v. *Kongseoo* (1). Sir Richard Couch says: "The established doctrine of Courts of Equity is, that if a purchaser of an estate at its full value takes with notice of a trust, he is . . . bound to the same extent and in the same manner as the person of whom he purchased."

It remains, therefore, only to consider what was the position of Noorbibi at the date of its conveyance. It appears that Noorbibi, to use the words of the defendant himself, appropriated to her own use Rs. 2,505 paid to her under the consent decree on behalf of herself and the plaintiff. I take it, therefore, as clear having regard to the fact that her share in the whole of the Rs. 6,505 awarded to her and the plaintiff by consent decree amounted to only Rs. 813, that she having appropriated the whole of the Rs. 2,505 to herself held the whole of the Ripon Road property, which was valued at Rs. 4,000, on behalf of the plaintiff. Assuming for a moment that the value of the Ripon Road property is to be taken at Rs. 7,000, her share of that would only come to some Rs. 870 and her share of Rs. 2,505 to about Rs. 310 making Rs. 1,180 altogether. If, therefore, it is assumed that Noorbibi took this Rs. 1,180 out of the Rs. 2,505 as representing her share of the Rs. 2,505 plus her share of the Ripon Road property, there still remains a balance of Rs. 1,425, which as between her and the plaintiff, Noorbibi was liable to make good to the trust at the date of the sale to the defendant.

But the Courts in England have gone further and have held that under such circumstances the sale by a trustee of his share in joint property in breach of trust to a purchaser who takes with notice of a trust is wholly void. In the case of *Boursot* v. *Savage* (2) the facts were as follows:—One of the three trustees executed an assignment of leasehold property held jointly by them to a purchaser and forged the signatures of his two co-trustees, and also the requisite assent of the *cestui que trust* to the sale. The trustee was a solicitor and acted as such on behalf of the purchaser. It was held that the circumstances attending the transaction

(1) (1869) 6 Bom. H. C. O. C. J. 59. (2) (1866) L. R. 2 Eq. 134.

were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; and that he had constructive notice of the trust through the knowledge of the trustee who was his solicitor. But it was also held, further, that though the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser, the actual and constructive notice of the trust disentitled him to the beneficial interest, and a reconveyance was ordered. In his judgment Kindersley, V. C., says: "Being of that opinion, I cannot hesitate to conclude that *quoad Boursot and Stone* (the two trustees) the deed of assignment has no operation whatever. But as *Holmer* (that is the fraudulent trustee) actually executed, I think the effect of this deed of assignment was to vest the legal interest of one-third of the leasehold property in the defendant. Assuming then that the legal interest in one-third of the property passed to *Savage* by the assignment, how is it as to the beneficial interest in that one-third?" He then discusses the evidence and comes to the conclusion that the defendant had actual notice of the existence of the trust sufficient to put him upon inquiry and that as he had completed the purchase without making any inquiry, he could not maintain it against the real owners. And he closes his judgment by saying: "It appears to me, therefore, that even on the ground of actual notice, and at all events on the ground of constructive notice, *Savage* (the defendant) cannot maintain a right to the beneficial interest even of the one-third which was assigned to him by *Holmer*."

On both these grounds, it appears to me that the plaintiff is entitled to the relief he claims in respect not only of the $\frac{7}{8}$ths of the property, which admittedly belonged to him, but also in respect of the $\frac{1}{8}$th of the property which originally belonged to Noorbibi.

It only remains to record my findings on the issues. As to the 1st issue, no finding is necessary.

2. In the affirmative.

3. As to the first part I do not think it is necessary to record any definite finding. It is sufficient to say that the evidence

1910.

FAKIRUDDIN v. ABDUL HUSSEIN.

regarding the execution of the mortgage is very defective. As regards the second part of the issue, I am of opinion that there is no evidence whatever that the real intention of the mortgage was to raise money for executing repairs to the property or that any such repairs were in fact executed by Noorbibi.

4. I am of opinion that at the date of the sale to the defendant Noorbibi had no share of her own in the property in suit.

5. I am of opinion that she had no power to sell.

6. I find that the defendant had notice and was not a *bonâ fide* purchaser.

7. I find that Noorbibi had appropriated to her own use the sum of Rs. 2,505 mentioned in paragraph 7 of the plaint and she thereby committed a breach of trust.

8. I find in the negative for the reasons already given in deciding the 3rd issue.

9. I find in the negative.

10. It is unnecessary having regard to my decision to find on this issue, but if it had been necessary I should find in the affirmative.

There must be a decree for the plaintiff in the terms of prayers (*a*), (*b*) and (*c*) to the prayer of the plaint.

The Commissioner to take an account of the rents received by the defendant since the 19th January 1904.

The defendant must pay the costs of this suit and of the reconveyance.

Attorneys for the plaintiff: Messrs. *Ardeshir Hormusji and Dinsha.*

Attorneys for the defendant: Messrs. *Thakordas and Co.*

Suit referred to the Commissioner.

B. N. L.