APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911. *August* 15.

SAYAD NAHANNU PACHHASAHEB, *Vatmukhtiar* OF SHITI SABINIBIBI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SABINIBIBI AND TWO OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Fraud and collusion of predecessors in title—Parties by descent precluded from setting up fraud.

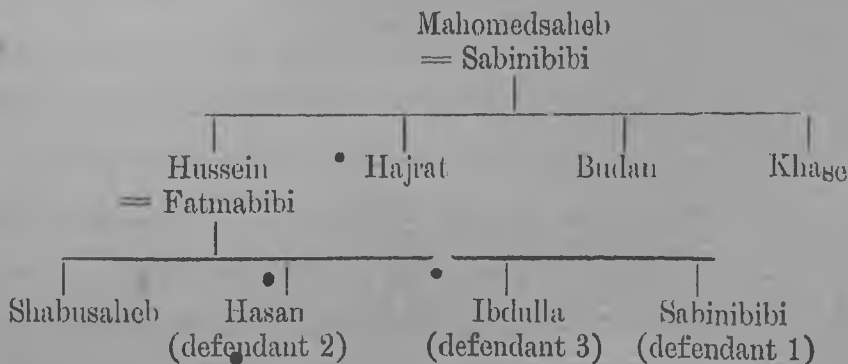
The property in dispute belonged originally to Mahomedsaheb, who in 1829 gave it to his wife Sabinibibi as dower. Sabinibibi sold it in 1863 to Sardarkhan one of the two brothers of her daughter-in-law Fatmabibi. Sardarkhan died in 1873 and in 1875 his brother Mahomedkhan gave it in gift to Shabusaheb, one of the sons of Fatmabibi. Subsequently on Shabusaheb's death, his creditor sued his son and obtained a decree against him. In execution the property was sold and was purchased at auction by one Ramchandra who having transferred his right to the plaintiff, her agent brought the present suit against Shabusaheb's sister and his two brothers to recover possession.

Held that the plaintiff was entitled to succeed. If all the said transactions were genuine, legal and valid, the defendants had no case at all, and if they were, as alleged by the defendants, fraudulent and collusive, the defendants were precluded, as parties by descent to the alleged fraud, from setting up their own iniquity to avoid the legal consequences of those transactions.

Doe, dem. Roberts v. *Roberts*[1], followed.

FIRST appeal against the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, in original Suit No. 274 of 1905.

Suit to recover possession. The facts were as follows :—



* First Appeal No. 20 of 1910.

(1) (1819) 2 B. & A. 367.

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The property in suit belonged originally to Mahomedsaheb. He gave it as dower to his wife Sabinibibi in the year 1829. He had four sons, Husseinsaheb, Hajratsaheb, Budansaheb and Khasesaheb. Hussein was married to Fatmabibi. In the year 1863 Sabinibibi sold the property to Sardarkhan, one of the two brothers of Fatmabibi. Sardarkhan died in the year 1873 and in 1875 his brother Mahomedkhan made a gift of the property to Shabusaheb, one of the sons of the sister Fatmabibi. After Shabusaheb's death, a creditor of his brought a suit against his son and having obtained a decree against him put up the property for sale in execution. At the auction sale the property was purchased by one Ramchandra Datto, who having applied for possession his application was, on the 17th December 1904, rejected on the resistance of Fatmabibi's daughter Sabinibibi. Thereafter, plaintiff Shiti Sabinibibi purchased from the said Ramchandra Datto his right, title and interest in the property and brought the present suit through her *Vatmukhtiar* (agent) against Sabinibibi as defendant 1 and her two brothers as defendants 2 and 3, praying for the setting aside of the order rejecting Ramchandra Datto's application and for recovery of possession and mesne profits. The plaintiff also prayed in the alternative that if Sabinibibi was found entitled to a share in the property, the plaintiff should be awarded the remaining portion.

The defendants answered *inter alia* that the property belonged to their father Hussein and not to Shabusaheb, that Hussein's brothers were necessary parties and that the auction sale set by the plaintiff was fraudulent. They further contended at the hearing that the transactions from 1829 to 1875 had not been proved and even if they be proved, they were merely colourable transactions effected to save the property from creditors.

The Subordinate Judge found that the plaintiff purchased the property in dispute from Ramchandra Datto

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who had purchased it at a Court sale, that the property did not exclusively belong to the person whose right, title and interest therein was purchased by Ramchandra, that the Court could not ascertain in the suit that person's share and award it to the plaintiff, that all the necessary parties were not joined and that the plaintiff was entitled to be put in joint possession along with the defendants. He, therefore, passed a decree for the plaintiff for joint possession.

As regards the defendant's contention that the several transactions from 1829 to 1875, which were relied on by the plaintiff, had not been proved, the Subordinate Judge observed :—

The transactions have been held proved in judicial proceedings and I think that the judgments in those proceedings can be admitted in evidence to prove the previous history of the property in dispute. I therefore hold that the transactions have been proved.

Further on, however, the Subordinate Judge remarked :—

But looking to all the circumstances of the case I think that the several transactions were merely colourable. Defendants have produced a number of notices, etc., issued by Courts to show that suits had been filed against Mahomedsaheb and Husseinsaheb. Copies of judgments produced by the plaintiff herself show that the transactions were challenged in Courts of justice.

The plaintiff appealed.

Coyaji with *C. A. Rele* for the appellant (plaintiff) :— The lower Court held the several transactions proved. Under the deed of gift by Mahomedkhan to Shabusaheb, Exhibit 117, the latter became the owner of the property in suit. There is evidence to show that Shabusaheb was in exclusive possession till his death which occurred in 1900. Defendants 2 and 3 have admitted Shabusaheb's exclusive title and possession in Exhibit 43, a mortgage-deed passed by them and Shabusaheb in 1900 The defendants' contention was that the property in dispute belonged to their father Hussein and that they

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were entitled to shares according to Mahomedan law. It was not pleaded by them that the several transactions were hollow and entered into with the intention of defeating creditors. They never contended that the deed of gift in favour of Shabusaheb was made for his benefit and also for their benefit. No issues were raised on these points. We purchased the property *bonâ fide* at a Court sale and we cannot be affected by the fraud.

There is evidence in the case to show that all the said transactions were, in previous judicial proceedings, held to be genuine and given effect to. In those proceedings attachments levied on the property in suit at the instance of Hussein's creditors were raised on the ground that the property exclusively belonged to Shabusaheb. Fraud, if any, was carried out and Hussein and his heirs would be estopped from contending that the several transactions were colourable and fraudulent: *Doe, dem. Roberts* v. *Roberts*[1], *Sidlingappa* v. *Hirasa*[2], *Honapa* v. *Narsapa*[3].

Branson with *K. H. Kelkar* for the respondents (defendants):—Mahomedkhan had no title to the property and had no right to make a gift to Shabusaheb. All the transactions were confined to the members of the family. The lower Court has found that Shabusaheb was not in exclusive possession of the property. This is a case of tenancy in common and no new case was made out at the hearing which was not apparent to the plaintiff's mind. Issue No. 3 in the lower Court was:— Whether the property belonged exclusively to the person whose right, title and interest therein were purchased by Ramchandra? This was a wide issue to cover the point about the colourable nature of the transactions. The cases in *Sidlingappa* v. *Hirasa*[2] and

(1) (1819) 2 B. & A. 367.

(2) (1907) 31 Bom. 405.

(3) (1898) 23 Bom. 406.

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Honapa v. *Narsapa*[1] are distinguishable. No question of setting aside any colourable transaction arises in the case. The question is:—What was Shabusaheb's interest? The plaintiff as auction purchaser stands in the shoes of Shabusaheb.

Coyaji in reply.

BEAMAN, J.:—We think that in this case there can be no doubt. Speaking for myself I am sorry that it is so, because it is with some reluctance that we come to the conclusion that the defendants 1, 2 and 3 must be turned out of property in which doubtless they honestly believed they have, and in fact perhaps have been exercising, rights. The law appears to us to be clear against them.

The material facts are that the propositus one Mahomedsaheb, who originally owned this property, gave it to his wife Sabinibi as dower, somewhere about the year 1829. Of that gift there is no direct evidence, but there were judicial proceedings in 1862, in which the gift was brought in question and appears to have been recognized. Again speaking for myself, I entertain considerable doubt whether a judgment in such a proceeding could be evidence.

The learned Judge below, without going very far into this question, was clearly satisfied that in fact Mahomedsaheb did make a gift of this property to his wife Sabinibi, though he entertained his own opinion of the conditions under which the gift was made and its true character.

In 1863, Sabinibi sold this property to Sardarkhan, the brother of her daughter-in-law. The sale-deed is exhibited in this case and there can be no question about its genuineness. What happened between 1863 and 1873, in which year or thereabouts Sardarkhan died, we have no means of knowing. But in 1875 Mahomed-

(1) (1898) 23 Bom. 406.

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khan, the brother of Sardarkhan, made a gift, by a deed, of the property now in suit to Shabusaheb.

The present plaintiff bases her claim thus: A creditor sued the son of Shabusaheb, after Shabusaheb's death, and obtained a decree against him. In satisfaction of that decree the plaint property was put up and sold at a Court auction in which one Ramchandra became the purchaser. It appears that Ramchandra attempted to enforce his rights against some of the present defendants but was resisted, and he then transferred what he bought at the auction to the present plaintiff.

It, therefore, becomes perfectly clear that if the transactions, we have just narrated, commencing with the gift in 1829 to Sabinibi and ending with the gift by Mahomedkhan to Shabusaheb in 1875, are held to be binding transactions, then what the plaintiff obtained from Ramchandra is the right, title and interest of Shabusaheb in the house in dispute; and those transactions show that that right is complete and exclusive. It is true that there is a gap in the chain of title between Sardarkhan and Mahomedkhan, but it is equally clear that so far as the present defence is concerned the property passed entirely out of the hands of all members of the family who had originally owned it, by the sale to Sardarkhan in 1863; and since no prescriptive right or right by adverse possession has been alleged, the questions to be answered are to be answered by reference to the transactions set forth.

In our opinion what is really in controversy may be very briefly stated thus. Either these transactions from first to last were fraudulent and collusive and therefore invalid and not binding in law, as alleged by the defendants; or they were what they purport to be on the face of them genuine, legal and valid transactions. If the latter, then the defendants have no case at all. If the former, then it is equally clear that the defendants

are precluded, as parties by descent to the alleged frauds, from setting up their own iniquity to avoid the legal consequences of those transactions. Both the rule and the principle of law are so well understood that speaking for myself I think that it would admit of no argument. But out of deference to the eminent counsel who has argued the case for the defendant and who has contended that here there is no question of a fraudulent party seeking to set aside his own fraud, we would point out that that is exactly what must be done, before the defence raised by the defendants could be successful. It is indeed exactly the case of *Doe, dem. Roberts* v *Roberts*(1) in every detail and particular.

Entertaining this view we allow this appeal, reverse the findings and decision of the Court below and declare that the plaintiff is entitled to exclusive possession of the plaint property and should now be put in possession of it. The defendants must bear all costs of the suit and the appeal.

Decree reversed.

G. B. R.

N. B.—After the second appeal was decided, the defendants applied for a review and a *rule nisi* was issued by Beaman, J., upon the plaintiff to show cause why a review of judgment should not be granted on the ground that plaintiff was entitled only to the interest which she bought and the extent of that interest should not be determined in the suit. The rule was made absolute and the second appeal was re-heard by Scott, C. J., and Chandavarkar, J., who, on the 16th September 1912, passed the same decree on the ground that the plaintiff had made out the title which was challenged by the defendants.

(1) (1819) 2 B. & A. 367