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the mortgage to the plaintiffs which is the first mortgage, the amount realized by them during the period of their possession, as purchasers under the decree obtained by them, should be set off against the amount due under their mortgage, and that on the other hand the plaintiffs-mortgagees are entitled to receive credit for the sum of Rs. 1,000 paid by them as purchasers to the mortgagor. It would be inequitable to allow the mortgagor to [467] retain this money, and at the same time to give him credit for the amount realized by the mortgage during the possession which must be considered as an unlawful possession. The order of the District Judge is accordingly modified in respect of the manner in which the account should be taken. The appellants are each entitled to receive their costs in their respective appeals.

Decree modified.

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[468] APPEAL FROM ORIGINAL CIVIL.

AGHORE NATH MOOKERJEE v. ADMINISTRATOR-GENERAL OF BENGAL.*
[9th February, 1903.]

Sale—Decree—Execution—Conditions of sale—Title, abstract of, not corresponding with original—Setting aside sale, application for—Purchase-money, return of.

A purchaser of property at the Registrar's sale in execution of a mortgage decree accepted the conditions of sale, whereby he was required to furnish requisitions within ten days after the actual delivery of the abstract of title. The purchaser did not furnish any requisitions.

On the 19th August 1899, by an order of the Court the purchaser was to pay the balance of the purchase-money into Court (he having already made deposit) without prejudice to his right to raise any question as to title or compensation. On the 31st August 1899 the purchaser paid the balance of the purchase-money under compliance of the order of the 19th August 1899. On the 26th April 1900, the purchaser applied for annulment of the sale or for compensation. On the 30th August 1900 the sale was set aside, but that order was reversed on appeal on the 28th February 1902.

After the order of the 28th February 1902, the purchaser asked for inspection of the title-deeds in order to compare them with the abstract, and upon ¹ having certain Persian writing, which he discovered amongst them, read by an expert, found that the abstract of title did not correspond with the original documents of title. The purchaser then having applied to have the sale set aside and his purchase-money refunded :

Held, that the purchaser, though he had not furnished his requisitions within the time allowed by the conditions of sale, was not debarred from applying to the Court to set aside the sale on the ground that the abstract was incorrect and contained a material misdescription; and that he was under the circumstances, entitled to have his purchase-money refunded.

In re Banister (1), *M'Culloch v. Gregory* (2), *Elise v. Elise* (3), *Upendra Nath Mitter v. Obhoy Kali Dasse* (4) referred to.

APPEAL by the defendant, Aghore Nath Mookerjee.

The defendant, Aghore Nath Mookerjee, purchased for Rs. 12,600 certain property which had been put up for sale by the Registrar of the High Court on the 8th July 1899, in [469] execution of a mortgage decree obtained by the Administrator-General as representative of the mortgagee, Nundo Lall Mullick, and the purchaser deposited Rs. 3,200. One of the conditions of sale being that the

* Appeal from Original Civil No. 29 of 1902 in Suit No. 652 of 1894.

Appellate Bench : Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Sale, and Mr. Justice Stevens.

(1) (1879) L. R. 12 Ch. D. 181, 150.

(2) (1855) 1 Kay and J. 286.

(3) (1871) L. R. 13 Eq. 196.

(4) (1901) 5 C. W. N. 598.

purchaser was to furnish his requisitions within ten days after delivery of the abstract of title, time being of the essence of the contract. On the 13th July 1899 the abstract of title was sent by the attorney acting for the Administrator-General to the attorney of the purchaser. On the 19th August 1899, the purchaser obtained an order giving him liberty to pay the balance of the purchase-money without prejudice to his right to raise any question as to title or compensation. On the 31st August 1899 the purchaser paid in the balance. On the 9th January 1900, the purchaser with his attorney inspected the title-deeds. On the 20th April 1900, the purchaser applied before Mr. Justice Sale for rectification of the boundaries or for compensation, or if he could not obtain compensation, for annulment of the sale. The Court gave an order for setting aside the sale. On appeal this order was reversed on the 28th February 1902, and the sale was directed to stand, and the matter was remanded for determination of the compensation. On the 8th May 1902, the attorney for the purchaser called for the original documents, and then discovered that this particular pottah was executed in Persian not by Munna Jan Begum, but by some other person, and upon that objected to accept the document as the document set up in the abstract ; and applied to have the sale set aside and his purchase-money refunded. This application came on before Mr. Justice Ameer Ali on the 3rd September 1902, who observed as follows :—

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“ In my opinion it is not open to me on an application of this kind to consider whether the document was in fact executed by Munna Jan Begum or not, nor can I go into the question when that lady died or what the effect of that document is. Supposing it is not executed by Munna Jan Begum, as I pointed out to the learned Advocate-General when he was arguing the matter, it is wholly impossible for this Court on an application of this nature to determine questions of the character referred to above.

“ I propose therefore to apply myself to the only question which can be determined upon this application, viz., whether the document to which objection is taken answers the description set forth in the abstract of title. It is a Bengalee document. There is some Persian writing on one side. The name of Munna Jan appears in Bengalee. On another side the [470] Bengalee clerk of Carruthers & Co., who prepared the abstract of title, swears that he believed that the Persian writing on the right-hand side of the document bore the name of Munna Jan. The seal is undecipherable, and he accordingly in the abstract of title gave the following description :—

‘ 21st Aghrain 1226.

Signed by Munna Jan Begum in Persian character and a seal affixed.’

“ The Persian writing does not, as a matter of fact, contain the name of Munna Jan Begum, but the purchaser's attorney had, on the 9th of January 1900, in the company of his client, inspected these very documents, and it did not strike him to have the Persian writing read to him by somebody acquainted with the Persian language, and he took no steps to satisfy himself, whether the signature was by Munna Jan Begum.

“ The smallest exercise of common sense would have shown to him the necessity of having that writing read to him. There is no allegation that Carruthers & Co.'s clerk knew Persian and made a false statement regarding the signature in the abstract of title. He was unable to read the writing, and as he found the name Munna Jan in the Bengalee writing, he took the Persian to be her name. A great deal of reliance has been placed on the case reported in 5 Cal. Weekly Notes, p. 593. The facts of that case, however, appear to me to be totally different from the present. The misrepresentation was in fact made in the abstract of title regarding the interest of the deceased person. Here the only mistake is with reference to the signature by Munna Jan Begum in Persian, which appears to me due entirely to the ignorance of the Persian language on the part of Carruthers' clerk. The mistake, as I have mentioned already, could have been corrected at once if the least degree of caution had been exercised by the purchaser's attorney. It is entirely to his neglect of an obvious duty that the difficulty, if any, to which

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his client has been put in owing. I do not think that this is a case in which I ought to interfere. I was asked to refer the matter to the Registrar to enquire and report whether a marketable title could be given to the purchaser upon the documents set forth in the abstract of title. I think that it would be utterly impossible for that officer to determine a question of that character upon the facts of this case.

"Here there is a document executed in the year 1819. Since that time various transfers have taken place. Considerations of a very important character will arise when the matter of interest of the mortgagor in this case comes to be determined in a proper proceeding. I discharge the rule with costs."

From this decision the defendant, Aghore Nath Mookerjee, now appealed.

Mr. *Sinha* (Mr. *O'Kinealy* with him) for the Appellant. The only question is whether I have taken the objection to the abstract of title in time. If a person who has to make the abstract makes a mistake, he cannot say that the purchaser will have to bear the brunt of his mistake. The first inspection made by the purchaser of the abstract was on the 9th January 1900.

[471] The case of *Upendro Nath Mitter v. Obhoy Kali Dasse* (1) is an authority for showing that it is not necessary to make out a case of fraud in order to set aside a contract of sale.

On the authority of the above case and also the English case of *In re Bamster* (2), I am not precluded from raising the question as to the abstract of title on the ground of time.

This matter ought to go to the Registrar, on reference.

Mr. *Dunne* and Mr. *Knight* for the respondent. No application was made by the other side in the Lower Court to have the case referred to the Registrar at all.

The purchaser refrains from stating when he first saw the abstract of title. He must make his objections to title within ten days. Under the conditions of sale the purchaser had ten days to state his objections, which he did not do.

He has not proved that there is not a good title to the property. On the evidence it appears that the appellant was a resident of Khidderpur. "It is reasonable to suppose then, that he had heard of the former suits in which the *Mutwalli* of the Hooghli Imambaree asserted his title.

If the appeal be dismissed, the appellant is not without a remedy, in case he suffer any loss. He has an action for negligence against his attorney.

MACLEAN, C. J. On the 8th of July 1899 the present appellant became the purchaser of certain property which was put up for sale by auction under a decree in mortgage suit; and, on the same day he made a deposit of 3,200 rupees, the purchase-money of the lot he purchased being 12,600 rupees. Under the seventh condition of sale the abstract of title was to be delivered within seven days from the certificate; and, the purchaser was to make his requisitions within ten days after the actual delivery of the abstract, and in this respect time was to be deemed as of the essence of the contract, and the title was to be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions if any.

[472] The abstract was duly delivered within the seven days, but no requisition or objections were taken by the purchaser within the ten days limited by the condition.

(1) (1901) 5 C. W. N. 593.

(2) (1879) L. R. 12 Ch. D. 131.

On the 19th of August, an order was made in the suit that the present appellant, the purchaser, should be at liberty to pay into Court the balance of the purchase-money without prejudice to his right to raise any question as to title or compensation; and, this order was complied with on the 31st of August by the purchaser paying in the balance.

On the 26th of April 1900, the purchaser applied for the annulment of the sale or for compensation, on certain grounds which he alleged: and on the 30th of August 1900 the sale was set aside. That order, however, was reversed by the Court on appeal on the 28th of February 1902, this Court holding that it was not a case for setting aside the sale, but for a compensation. For present purposes nothing turns upon these orders.

On the 9th January 1900, the purchaser asked for inspection of the title-deeds, and, as to this he stated in his petition, which is verified by affidavit, and, in substance not contradicted, that "the petitioner being desirous of looking into the documents relating to the property purchased by him and set out in the abstract of title called with his attorney, Babu Bepin Behari Banerjee, at the office of Messrs. Carruthers & Co., to inspect the same, and a bundle of documents relating to this, as also of other property, including a Bengalee pottah, were produced and shown, and he looked into the Bengalee writings in the said pottah, but your petitioner and his attorney were unable to understand the Persian writings, and had no notice whatever or any reason to suppose that the pottah produced was not in accordance with the abstract." The pottah is referred to in the abstract of title in these terms: "By a Bengalee pottah of the 21st of *Aughran* 1226 B.S. (5th December 1891), granted by Munna Jan Begum to Chaytan Mandal, *bastoo* land 4 cottahs and *patit* land 3 cottahs (total 7 cottahs of land), to be held and enjoyed in succession of son and grandson with power of sale and gift, on payment of annual rent of Re. 1-8. Signed by Munna Jan Begum in Persian character and seal affixed."

[473] After the order of the 28th February 1902, the purchaser again asked to inspect the title-deeds, to compare them with the abstract of title, and this request was complied with. And this, as appears from the petitioner's verified petition, is what occurred: "20. On receipt of the said document," that is, the pottah in question, "from the plaintiff's attorney, your petitioner caused the said pottah to be read out by an expert, who thoroughly understands the Persian language and character, and he then found out that the said pottah was neither granted by Munna Jan Begum nor was it signed by her, but it appears from the Persian writings therein that the same was signed by " certain other person named in that paragraph. "A copy of translation of the said pottah as made by one of the sworn translators of this Honourable Court is hereunto annexed and marked with the letter B." "21. That your petitioner then came to know that the first abstracted document, namely, the pottah granted by Munna Jan Begum in favour of Chaytan Mandal and signed by Munna Jan Begum, does not correspond with the document as described in the abstract of title. The said document is described in the abstract of title thus—"I need not read it again, as I have read it just now—" but it appears from the original pottah sent by Messrs. Carruthers & Co. on the 5th day of May last that the said document was not granted by Munna Jan Begum, but by one Jonab Nawab Syed Ali Khan Bahadur, Mutwalli of the said Emambaree of Hooghly.

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Upon that the purchaser made the present application by which he asks to have his purchase-money refunded with interest and costs: and, the question we have to decide is whether under these circumstances, which are practically undisputed, he is entitled to that relief. The learned Judge in the Court below concluded that he was not, and hence the present appeal.

It is clear that the description given in the abstract of title, of this pottah, which is admittedly the root of title to the property sold, is wholly at variance with the document itself. In point of fact there is no pottah granted by Munna Jan Begum, nor was any such pottah ever signed by her. In other words, the title-deed, which is made the root of title, does not exist. Under these [474] circumstances the purchaser says that the vendors cannot make out a title, and that he is entitled to have the contract rescinded and his purchase-money returned.

The vendors, in reply, say that the purchaser is barred by condition 7 from now raising this objection. I dissent from that view. That condition cannot apply to a case where the abstract delivered is incorrect, and contains a most material misdescription of the document which is made the root of title. That condition presupposes that the abstract of title delivered will be an accurate and true one.

The purchase-money is still in Court, and the sale has not been confirmed, and the purchaser having discovered, under the circumstances, I have stated, the true facts of the case, there is nothing to prevent him from bringing them before the Court, and asking for the return of his purchase-money.

It is said he was guilty of carelessness on the 9th January 1900, in not doing then what he subsequently did, namely, having a translation made of the pottah and seeing what the document really was.

I do not know that it lies in the mouth of the vendors to say this, for the purchaser may retort that he was entitled to rely on the statement in the abstract as to the nature of the pottah: any way it is not sufficient to prevent him from now raising the question.

The sale in question was one under the direction of the Court: and, it was pointed out by Lord Justice Cotton in the case of *In re Banister* (1) what is the duty of the Court in cases akin to the present. His Lordship says:—

“In a case of this sort where the sale is by the Court, the Court is bound to take more special care, if possible, that there shall be nothing in the conditions, or in the representations therein contained, which by possibility can mislead a vendor, because the purchaser has a right to assume that the Court will take very good care that there shall be nothing that can in any way mislead him as to the title he is getting.”

Such cases as *M'Culloch v. Gregory* (2), *Else v. Else* (3), which are commented upon in a recent case in this Court by Mr. Justice [475] Stanley [*Upendra Nath Mitter v. Abhoy Kali Dasse* (4)], support the principle that, under circumstances such as the present, the purchaser is entitled to have his purchase-money refunded. There is no such pottah as is represented in the abstract, and there has been a material misrepresentation, as to this.

For these reasons the order of the Court below must be discharged.

(1) (1879) L. R. 12 Ch. D. 181, 150.

(2) (1855) 1 Kay and J. 286.

(3) (1871) L. R. 13 Eq. 196.

(4) (1901) 5 C. W. N. 593.

As regards the precise order to be made, we will give Mr. Dunne's client a week to consider whether, under the circumstances, he thinks it worth while to have a reference to title, the present appellant not objecting to such reference if the other side so desire.

We will deal with the question of costs after Mr. Dunne's client has decided what he will do.

STEVENS, J. I concur.

SALE, J. In assenting to the order which the learned Chief Justice proposes to make in this matter, I wish to say that I entirely agree with the view which has been taken as regards the operation of condition 7 of the conditions of sale. I agree that it does not operate so as to preclude the purchaser from raising a question as regards misrepresentation after the period mentioned in the condition for raising objections to the abstract of title. I also agree, that sitting here as a Court of Equity, we ought not in a case where there has been admittedly serious misrepresentation as regards a material document of title, to hold the purchaser to his bargain without a previous reference as to title.

[At the expiration of a week their Lordships made the following order:—]

MACLEAN, C. J. This case stood over for a week to give Mr. Dunne's clients an opportunity of saying whether they desired to have a reference to title. Mr. Dunne tells us this morning, that they do not ask for such a reference, and I think they are wise in the conclusion they have come to.

The result, then, will be that there will be an order for the return of the purchase-money to the appellant, and the appellant, [476] the purchaser will have his costs of this appeal and in the Lower Court.

SALE, J. I concur.

STEVENS, J. I concur.

Attorney for the appellant: *Bepin Behari Banerjee*.

Attorney for the respondent: *G. C. Chunder*.

30 C. 477 (=7 C. W. N. 431).

[477] ORIGINAL CIVIL.

MACKERTICH v. NOBO COOMAR RAY.* [20th February, 1903.]

Contract—Breach of contract—Damages, measure of—Delivery, specific period for—Seller's option—Notice of inability to perform contract.

If a vendor has any specific period of time allowed to him to deliver goods, and before the time has elapsed gives notice to the purchaser that he will be unable to complete the delivery, the purchaser not rescinding the contract, the measure of damages is the difference between the contract price and the price of the subject-matter on the last day of the period within which the delivery ought to have been made.

The terms "shipment at seller's option during August-September" in a contract do not mean that the seller has an optional period of two separate months in which he can deliver, but they refer merely to the character of the delivery.

Leigh v. Paterson (1) referred to.

ORIGINAL SUIT.

The plaintiff contracted to buy from the defendant and the defendant contracted to sell to the plaintiff, by bought and sold notes, dated the 19th July 1889, 2,000 *kutch* bales of jute of a particular quality at

* Original Civil Suit No. 776 of 1901.

(1) (1818) 8 Taunt, 540.

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