PRIVY COUNCIL.

P. C.* 1872 *May* 31 & *June* 4.

RAMCOOMAR KOONDOO AND ANOTHER (DEFENDANTS) *v.* JOHN AND MARIA McQUEEN (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Vendor and Purchaser—Notice—Equitable Doctrine of secret Ownership.

It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances which ought to have put the purchaser on an enquiry that, if prosecuted, would have led to a discovery of the real title.

THIS was an appeal from a decision of the High Court at Calcutta, dated 2nd April 1869, reversing a decree of the Judge of Hooghly.

In August 1831 Sheikh Kazim executed in favor of Bebee Bunnoo a deed of sale of the land in dispute situated in Howrah. The land being leasehold, she was accepted as tenant by the zemindar. Bebee Bunnoo was in fact the mistress of one Alexander Macdonald, and they lived together in the house, and there was evidence that, while so living together, he built on the land. In 1834 Macdonald made his will, bequeathing the land in dispute to Bebee Bunnoo, stating that it had been taken in her name, and desiring that on her death it might go to his children by her. The female respondent was the surviver of those children. Macdonald died in 1834, and Bebee Bunnoo proved his will in the Supreme Court in the same year, and in the inventory filed in Court, she described this property as Macdonald's. In 1843 she executed a bill of sale in favor of the appellants' father, Ramdhone Koondoo, describing the land as her ancestral holding, and in no way referred to Macdonald. The bill of sale stated that she conveyed with the consent of the members of her family. They were however infants at that time. The price

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILE, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR LAWRENCE PEEL.

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was Rs. 945, the original price having been Rs. 130 when the lease was bought by Macdonald. The zemindar accepted Ramdhone as lessee in her place, and he got possession. He then built a house upon it, and let it to the male respondent, who, having married the female respondent, remained in possession, and having failed to pay the rent, Ramdhone brought an action of ejectment in the Supreme Court, which, being un defended, resulted in judgment against the casual ejector and possession being obtained. Soon afterwards, Bebee Bunnoo being dead, the respondents brought the present suit as devisees in remainder to eject Ramdhone's family.

In addition to issues as to *res judicata* and limitation which it is unnecessary to allude to, the material issues raised were whether the property was Macdonald's, whether it came by his will to Maria McQueen, and whether the appellants purchased *bonâ fide* for valuable consideration without notice. These issues were raised before the High Court when the case first came up on appeal on a finding as to limitation, and were disposed of by the High Court without a remand.

The decision of the High Court (L. S. Jackson and Markby, JJ.) was, so far as material for this appeal, as follows :—

"The third issue, as originally drawn, raised the question whether the defendants, the Koondoos, being purchasers from Bunnoo Bebee *bonâ fide* for valuable consideration and without notice, could maintain their title. This of course assumes that Bunnoo Bebee had an imperfect title, and that the plaintiff who now seeks to recover the property has a perfect one, and it is an attempt to introduce a very peculiar doctrine of the English Court of Chancery, which is there applied when both the parties claim the extraordinary assistants of that Court. But this doctrine, which is unknown to the general law of England, is equally unknown here. Neither here, nor in England, by the general law does a person gain a title by purchase either to moveable or immoveable property unless the vendor is the real owner, however completely he may act *bonâ fide*. Indeed, a proposition recently made to introduce by legislation a very limited instalment of the contrary doctrine, met with the strongest opposition here.

"The vakeel for the appellant, upon our intimating this view, has sought to amend his issue, and though he has not stated very clearly what he intends to raise, we will assume that he now raises what we

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consider to be the true question, namely, whether the Koondoos bought *bonâ fide* and for valuable consideration, being induced to believe that the property was Bunnoo Bebee's own absolutely, by the fact that the conveyance and pottah were in her name, and after having made all enquiries which a prudent man would have made under the circumstances, and being without notice of any other title. Now it is clear that, in support of this issue, the purchaser must give some evidence; he must not leave it on mere assertion. This is distinctly laid down by the Privy Council in a case which appears to have been the subject of some misconception, *Varden Seth Ram* v. *Luckpathy Royjee Lallah* (1), and that ruling we adopt. We do not say how much evidence or what sort of evidence the party must produce, that will depend on the circumstances of the case; but at any rate it must be made quite clear that every possible source of evidence has been exhausted, and that every search has been made, and every effort used to show affirmatively the complete good faith of the purchaser.

"How completely this duty has been neglected in the present case, it is hardly necessary to point out. Only two witnesses are called who speak at all to the circumstances under which the Koondoos purchased, Ram Kristo Banerjee, a karpardaz (agent) of Ramdhone Koondoo, and the person who wrote the documents, but they really proved nothing more than appears on the face of the documents.

"We have no doubt whatever that a prudent purchaser, who wished to act honestly, would, when purchasing from a woman in Bunnoo Bebee's position, have instituted a very strict inquiry as to how she became possessed of the property, and every step in that enquiry would, in all probability, have put the purchaser more and more on his guard; and we see no reason in this case to presume, what indeed they do not venture to assert, that it was impossible for the Koondoos to show what that enquiry was, and what was the result of it.

"In truth, the defendants have not made any real effort to prove this issue at all; what they have really tried to do is to prove that the property was in fact Bunnoo Bebee's own, but in this they have failed.

"It appears to us therefore that this issue, when raised in its proper form, should be found against the defendants."

The decree gave the plaintiffs the property, and against that decree the defendants appealed to Her Majesty in Council,

Sir *R. Palmer* Q. C., and Mr. *Leith* (Mr. *Doyne* with them)

(1) 9 Moore's I. A., 303.

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for the appellants.—The judgment proceeds on a strange misapprehension of the doctrine as to the rights of a *bonâ fide* purchaser for value without notice. It is not a peculiar doctrine of the Court of Chancery which we seek to apply, but the simple and broad principles of equity. Here is a case where we purchased, and actually as owners let to the persons now setting up the adverse title of our vendor having only held benami. What was there to put us on enquiry? We bought from Bunnoo Bebee as owner. Even if we had bought from her as executrix, we should have been protected by Fergusson's Act (1) —*Doe* d. *Cullen* v. *Clark* (2). But our case is much stronger. Here is the real owner looking on and actually dealing with us as owners, and seeing us build a large house, and now coming forward and saying that our vendor had only a benami title combined with a life-interest given by the person for whom she was benamidar. This cannot be allowed—*Ramsden* v. *Dyson* (3). Express notice we had none, nor had we even constructive notice. What enquiries could be made? There was nothing in the conveyance to her or in her holding from the zemindar to put us on enquiry. The zemindar accepted Ramdhone as lessee, and there was nothing to cause even suspicion. Even the action of ejectment was not defendant, or any doubt there thrown on the purchaser's title. Bebee Bunnoo was not the wife of Macdonald.

Mr. *Cowie* and *Mr. J. D. Bell* for the respondents.—The slightest investigation would have shown the appellants' father that the title was a doubtful one. It was notorious in the neighbourhood that Macdonald was the owner, and had built on the premises, and the wording of the conveyance that Bebee Bunnoo had had the consent of her family to convey must have shown that she had only a limited right. Why were not enquiries made as to what this family consisted of, and whether they did consent? They were infants. There was enough to put him on enquiry, and he must take the consequences of not enquiring—*Worthington* v. *Morgan* (4), *Whitbread* v. *Jordan* (5),

(1) 9 Geo. IV., c, 33.
(2) Morton's Rep., 76.
(3) Law Rep., 1 H. of L., 129.
(4) 16 Sim., 547.
(5) 1 Y. & C., 303.

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Bisco v. *Earl of Banbury* (1), and *Varden Seth Ram* v. *Luckpathy Royjee Lallah* (2).

Their LORDSHIPS gave the following judgment :—

Their Lordships do not think it necessary to call upon Mr. Leith to reply, having come to the conclusion that the judgment of the High Court cannot be sustained.

The suit was brought by the respondents to recover 3½ bigas of land and some buildings erected upon it, situated at Howrah, near Calcutta. The land had been purchased by the deceased father of the appellants, Ramdhone Koondoo, from a Mahomedan woman, of the name of Bunnoo Bebee, in June 1843. Their father and they, since his death, have held undisputed possession from that time until the present suit was brought, a period of 24 years.

The short facts are these :—Alexander Macdonald, who lived in Calcutta, and cohabited with Bunnoo Bebee as his mistress, had two children by her,—Alexander Macdonald, who is dead ; and Maria, one of the respondents, who maried Mr. McQueen, the other respondent. The father died in 1834. The history of the property appears to be this :—The land, which is perpetual leasehold, at a fixed rent, was conveyed in August 1831 by the then proprietor to Bunnoo Bebee by a deed of sale, and the price paid at that time was only Rs. 130. In the following September the deed was registered, and thereupon the zemindar granted a fresh pottah to Bunnoo Bebee, at the fixed rent of Rs. 35. It does not appear with any certainty that Macdonald, the father, was in possession of the land of the buildings. At all events, it is not clear upon the evidence that he ever resided upon the property. There are two witnesses who speak to his residence. One of them says that he did not live in the new bungalow, and the other says he did. The evidence is far from satisfactory to establish the fact that he really did reside upon the property. But it is clear that after his death, Bunnoo Bebee did go to reside upon it, and she resided there for some time. She afterwards let it, and received the rent

(1) 1 Ch. Cases, 287. (2) 9 Moore's I. A., 303.

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from the tenants. Then, in June 1843, she sold the property to Ramdhone Koondoo, and conveyed it to him by a deed of sale. The price she obtained was Rs. 945, and there is nothing to show that that was not the full value of the property. At the time she sold, she made a surrender to the zemindar of the leasehold interest, and a fresh pottah was granted to the purchaser, under which undisputed possession was held for 24 years. During that time the purchaser erected important buildings upon the land, and increased the value to such an extent that the property is valued in the present suit at Rs. 40,000. Bunnoo Bebee died before the commencement of the present suit; there is a contest as to the time of her death, which was material only as regards the question of limitation; and as it is not now necessary to consider that point, it becomes immaterial to determine the precise period of her death, whether in 1856 or 1861. Their Lordships, however, see no reason to dissent from the view which the High Court have taken of that fact in the case.

The claim put forward in this suit is that the purchase, although in the name of Bunnoo Bebee, was a purchase benami by Macdonald; that he was the real purchaser, but had used her name in making the purchase. His will is put in evidence, and the respondents claim under it. Undoubtedly, if the purchase was a benami purchase, they have established a *primâ facie* title to this estate, or at least to a moiety of it.

The answer of the appellants is that their father purchased the estate of Bunnoo Bebee without any notice of the benami title, and that they are entitled to hold it, notwithstanding there may have been, originally, a resulting trust in favor of Macdonald. It certainly would require a strong case, to be established on the part of the respondents, to defeat a possession for so long a period, of property for which full value had been given to the person in the apparent ownership of it. The burden of proof lies very strongly on them in such a case. They have of course to establish, in the first instance, the fact that the purchase was really made by Macdonald, and with Macdonald's money, on his own behalf. Their Lordships cannot help observing that the evidence, even on that cardinal fact, is

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extremely scanty. It rests almost entirely on the admission made by Bunnoo Bebee in the inventory made by her after Macdonald's death, in which she treats the property as part of the estate of Macdonald. There is some evidence that Macdonald improved the property after the purchase, by building a new bungalow upon it; but that evidence, without the admission, would clearly be insufficient to establish the fact that the purchase, contrary to all the documents, was made by Macdonald and with his money. Their Lordships however do not feel it necessary to express any definite opinion upon the fact of the purchase being benami, having come to the conclusion that, assuming it was so, the appellants have established their right to hold the property against the benami title.

It is scarcely suggested that the purchaser had any notice that the title was other than or different from the apparent one. None of the documents give any notice whatever that the transaction was other than it appeared to be. On the contrary, all the documents are entirely consistent with the purchase having been made by Bunnoo Bebee herself, or by somebody for her benefit. The case, therefore, cannot be put on the ground of actual notice, but it was said,—and this appears to have been the ground upon which the High Court decided in favor of the respondents,—that there were circumstances, which ought to have put the purchaser upon inquiry, and that if he had inquired, he might have discovered the real title.

It is not necessary to say whether this case is to be decided upon the principles on which the English Court of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience, which bind the Courts in India, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his

secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.

The High Court treat the defence as an attempt to introduce "a very peculiar doctrine of the English Court of Chancery." Their Lordships cannot think that this is a correct view of the defence which is set up in this case. It is one to which, no doubt, the Court of Chancery in England gives effect, but it only gives effect to it in a peculiar manner, because of the distinction in England between legal and equitable estates, and legal and equitable remedies. If this case had arisen in England, the respondents would have had no *locus standi* whatever in a Court of Law, and must have resorted to a Court of Equity.

After the discussion which has taken place, the case seems to result in this:—Whether or not, under the circumstances of this case, the purchaser ought to have inquired? The High Court think that he ought to have made inquiry, because of the *status* and position of Bunnoo Bebee. The learned Counsel, who has argued this case for the respondents, does not himself rely upon that circumstance as one which ought to have put the purchaser upon inquiry, and their Lordships cannot see that there is anything in her position as a Mahomedan woman living with her children upon this estate, and sometimes letting it, which should have put any one upon inquiry whether she was the real owner or not. It is admitted that, if an inquirer had gone to the office of the zemindar, or to the public registry, he would have found that she was the owner. She was in possession, and her former life led to no presumption that she might not have had money to purchase for herself, or that others might not have purchased by way of gift to her; on the contrary, the circumstance that she had cohabited with one or two persons of some property might have fairly led to the supposition either that she had acquired money, or that gifts had been made to her for her advancement and comfort in life.

But circumstances have been relied upon at the bar which were not adverted to by the High Court. In cases of this

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kind the circumstances which should prompt inquiry may be infinitely varied; but, without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular inquiry ought have been made. It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry, which might be expected o lead to some result. Mr. Cowie, feeling that the case must really depend upon the existence of such circumstances, has referred to two: first, he says that, if any inquiry had been made, it would have been found that Macdonald had been in possession, and had improved the property. It has been already observed that the facts do not show, with anything like distinctness, that Macdonald was in possession during his lifetime. There is evidence that he had built upon the property, but, supposing inquiry had been made, and the fact ascertained, it would not lead to the inference that, contrary to the apparent title, he had purchased the land for himself; for it is quite probable to suppose that he would spend money to improve property which belonged to the woman with whom he was living.

The other circumstances relied on is that, in the deed of sale itself from Bunnoo Bebee to the appellants' father, she says she made the sale with the consent of her family. If this had been shown to have been an unusual clause, or that it had been only usual to insert it in deeds where the consent of the family was really required and obtained, there might have been some ground for the superstructure of argument which was built upon it, but their Lordships have no evidence and no suggestion that this is not in common form on the contrary, it appears that, in the deed of sale to Bunnoo Bebee herself from her own vendor, the same expression occurs. It appears to their Lordships that the clause is one without any specific force or meaning, inserted, like many other general phrases in Indian deeds, to exclude any possible objection that might be raised against them. It is very like that which so frequently occurs after a full conveyance:—"I and my heirs have no longer any claim."

Those words are often unnecessary, but they are of very frequent occurrence. Their Lordships therefore think that the two facts relied on as those which ought to have put the purchaser on inquiry do not support the contention made at the bar, and that the whole case of the respondents fails on its substantial merits.

Other questions have been raised in the case with which it is not now necessary to deal. Their Lordships, in the result, are glad to come to a conclusion by which it is quite evident substantial justice will be done. There has not been a suggestion throughout of any collusion between the purchaser and Bunnoo Bebee, or that the purchase was not made entirely *bonâ fide* on his part, and without notice of any title other than that he took from her.

In the result their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the judgment of the High Court. Their Lordships will further advise Her Majesty that the suit be dismissed, and that the appellants should have the costs in India and of this appeal.

Appeal allowed.

Agents for appellants Messrs. *Walters* and *Gush*.

Agents for respondents: Messrs. *Clarke, Son*, and *Rawlins*.