The 6th January 1871

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Benamee transactions—Bona fides—Evidence.

Case No. 265 of 1870.

Regular Appeal, being Appeals Nos. 673 and 674 of 1869 of the Court of the Additional Subordinate Judge of Dacca, dated the 31st March 1871, against the decision of the Sudder Moonsiff of that District, dated the 27th August 1869, transferred to this Court for determination after the remand of the case on the 13th December 1870, upon the hearing of the Special Appeal No. 1236 of 1870.

Bhoobun Chunder Burral and others (Defendants), *Appellants,*

versus

Sreemuttee Nagoree Dassia (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Luleet Chunder Sein* for Appellants.

Baboos Gopal Lall Mitter and *Huree Mohun Chuckerbutty* for Respondent.

Registration of a deed does not affect the question of *bona fides*, nor is a conveyance to be considered *bonâ fide*, simply because there is proof of its execution, and some statement that money was on the occasion actually paid by the vendee into the hands of the vendor in the presence of witnesses unacquainted with the circumstances of the parties and the relation they bear to each other; but in coming to a conclusion, the circumstances and probabilities are to be carefully considered and weighed, *e. g.*, the object for the purchase, whether the purchase-money really belonged to the purchasers, and whether possession was taken after purchase, and, if not, why possession was not taken.

Mookerjee, J.—The present suit is instituted by the plaintiff, Nagoree, widow of one Nemy Churn, to have it declared that the property attached by her in execution of her decree is the property of her judgment-debtors; that the sales were fictitious and nominal; and that the judgment-debtors are still the parties beneficially interested in it, and are still in possession of it. The defence raised by the purchasers, defendants, are that the purchases were *bonâ fide*, and that they are in possession of the shares purchased by them.

It appears that Nemy Churn, the proprietor of this property, had two wives; by one wife he had 4 sons, Bindabun, Radhanath, Judoonath and Juggernath, and the other wife is the respondent. Radhanath and Judoonath have both died leaving Oma Tara and Russomonjoree as their widows.

On the 13th of June 1855, the plaintiff obtained a decree for maintenance against the sons of her co-wife, who denied she was entitled to any, on various grounds—unchastity and the like. It does not appear whether this decree is still satisfied or not, but the plaintiff was obliged again to sue the defendant for maintenance in 1868, when she obtained a fresh decree on the 15th August 1868.

The present suit arises from the proceedings had in execution of this last decree. When the plaintiff executed this decree, the purchasers, defendants, set up the plea under Section 246 to the effect that the property belongs to them, and cannot be sold for the debt of their vendors. The defendant Bhoobun Burral set up a purchase from his cousin Juggernath of his 4-annas share in the family dwelling-house. The defendant Heera Lall, the brother of Oma Tara, pleaded that he purchased the share of his sister and that of his brother-in-law Bindabun for 200 rupees each, though in different years. Lastly, the defendant Madhub, who is the father-in-law of Juggernath, states that one Gungabishen Dass held a decree against the said Juggernath and Russomonjoree, the widow of his brother Judoonath; that Gungabishen sold this decree to him; that in execution of that decree, he, Madhub, purchased the share of Judoonath in 1864, and had since been in possession of the same.

The plaintiff has examined several witnesses, relatives and next-door neighbours of the parties, who depose to the effect that the sales are collusive and benamee, made in the name of near relations of each of the judgment-debtors; that the judgment-debtors are still in possession of their respective shares as before; that the decree having been fraudulently obtained by Gungabishen, the brother-in-law of Juggernath, on the confession of Juggernath and *ex parte* as against Russomonjoree, he Gungabishen, sold the same to Juggernath's father-in-law, the defendant Madhub Chun-der, who executed the same and became [illegible] self the purchaser at the sale; that [illegible] chaser never took possession, but [illegible] four shareholders are in the bene[illegible] joyment of the property on their ow[illegible]

and that all these transactions are fraudulent and collusive. The first Court, believing the statement of these witnesses, and finding that the original judgment-debtors are still in possession of their shares in the dwelling-house, and disbelieving the story set up by one of the purchasers that he was in possession by receipt of rent from his relative as per a kubooleut executed in his favor gave a decree in favor of plaintiff.

In appeal it is contended before us by the defendants, private purchasers from the judgment-debtors, that they have proved their purchase of the property in question by their witnesses; that the witnesses prove that consideration actually passed; and that, although the judgment-debtors are all allowed to remain in possession of the house, they are allowed so to remain as they are near relatives whom persons, especially Hindoos, would not be disposed to evict.

We find on referring to the record that the purchasers are all near relatives of the judgment-debtors; that each of them has purchased an undivided share of 4 annas belonging to his own relative in this family-house for a sum of 200 rupees; that none of them has ever been in possession of the shares purchased, though the purchases were made so far back as 1862, 1863, and 1864; that though two kubooleuts are produced to show that the judgment-debtors were allowed to remain in possession as tenants, and therefore that the object of the purchase was to get a fair return of the outlay in the shape of rent, yet no rent has ever been demanded, much less paid. The other two purchasers give no reason why they purchased undivided shares of a family dwelling-house, and why, notwithstanding their purchase, no possession has been ever attempted to be taken.

The auction-purchaser, Madhub Chunder, examines no witnesses and gives no proof of the *bona fides* of his purchase. He is admittedly the father-in-law of the judgment-debtor, Juggernath, and though he purchased the decree from the brother-in-law of the said Juggernath, who was the original holder of it for value, and though he took the trouble and incurred the expense of executing that decree against his own son-in-law, and [p]urchasing in execution in 1864 the right title of Russomonjoree, Juggernath's as alleged having been sold by him [m]oobun before, yet we find that he [n]either take actual possession, nor seek [to]e any benefit from his purchase. [Rus]somonjoree is no friend of Madhub, and there is, therefore, an utter absence of any explanation for forbearance except in the theory propounded by the plaintiff, that all these transactions of decree, purchase, and sale having been made by and with the money of Juggernath, he, Juggernath, remained in the beneficial enjoyment and possession of the same as before, under the new title acquired in the name of Madhub Chunder.

It is next contended by the pleaders on behalf of the appellant that there is no proof on the part of the plaintiff that the money was the money of the judgment-debtors; but there is proof that the bills of sale were executed and registered, and the witnesses speak of considerations having actually passed. The Lower Court who examined the witnesses disbelieved their testimony for reasons which appear to us to be correct and proper. Many of these witnesses are unacquainted with the relationship between the vendor and the vendee, and appear from their own statement to be wholly ignorant as to who is in possession of the premises after the sale. Others are near relatives and dependants of the vendors, who state that the purchasers are in possession by receipt of rent from the judgment-debtors having taken kubooleuts from them. The pleader for the appellant, however, did not think it proper to make any allusion to rent having been either paid by, or intended to be received from, the judgment-debtors, the argument being confined to the simple fact that, being relatives, the purchaser could neither evict them nor demand rent. We find, however, that beyond the two kubooleuts from two of the judgment-debtors, there is not a particle of evidence to show that any rent has ever been demanded, much less received.

Registration of the deeds does not affect the question of *bona fides*, for even in undoubted cases of fraudulent and colorable transactions, parties would resort to registration for the object of creating a belief that the transactions are honest and above board. A conveyance is not to be considered a *bonâ-fide* one, simply because there is proof of the execution of the deed, and some statement that money was on the occasion actually paid by the vendee into the hands of the vendor in the presence of witnesses, who are unacquainted with the circumstances of the parties and the relation they bear to each other; but in coming to a conclusion as to whether a purchase is honest and

bonâ fide, the circumstances and probabilities are to be carefully considered and weighed. It should be seen what could have been the object for the purchase by the vendees, whether the purchase-money really belonged to the purchasers, or was the money of the vendors themselves paid into the purchaser's hands to be repaid to the vendor before the attesting witnesses—whether possession was taken by the purchasers after the purchase, or what explanation, if any, is given for not taking possession of properties for which it is alleged valuable consideration has been paid. Here, in this case, besides the near relationship of the parties, the absence of any satisfactory explanation as to why possession was not taken, notwithstanding that the purchases were made 6 or 7 years ago, the purchaser buying an undivided one-fourth share, the exact share of each of their own relatives who are proved to have been in debt at the time there are many other badges of fraud which throw the greatest suspicion on the *bona fides* of the purchases made by the defendant. No evidence has been adduced to show that the money belonged to the purchasers; that they had any object in the purchases; that any of them got actual possession or ever demanded rent or received it; the purchasers themselves do not come forward to speak to the honesty of their purchase : they merely content themselves by examining some witnesses who are either strangers to the family, and had been only called on to witness the execution of the deed or are dependants of the vendors, who speak in such a vague and general way as to the passing of the consideration that we are unable to place any credence on their testimony. On the whole circumstances of this case, we come to the conclusion that the purchases are not true and honest; that the consideration-money which the witnesses speak of, if ever it passed, belonged to the vendors themselves; and that the judgment-debtors are the parties beneficially interested in the purchase ostensibly made in the names of their relatives. We, therefore, uphold the decision of the first Court, and dismiss the appeal with all costs.

Jackson, J—I also think that the appeal should be dismissed on the grounds stated by my learned colleague.

The 6th January 1871.

Present :

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges*.

Sale for arrears of rent—Notice—Jurisdiction —Section 13, Act VIII. (B. C.) of 1865.

Case No. 1365 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 19th April 1870, reversing a decision of the Moonsiff of Satkaniah, dated the 17th November 1869.

Nugendro Chunder Ghose and another (two of the Defendants), *Appellants*,

versus

Musruff Bibee (Plaintiff), *Respondent*.

Ba[illegible] Nil Madhub Sein for Appellants.

Baboo [illegible]anee Madhub Dutt for Respondent.

The fact of no notice having been served in the mofussil is sufficient ground for setting aside a sale for arrears of rent.

An appeal to the Collector is not necessary as a condition precedent to a suit in the Civil Court under Section 13, Act VIII. (B. C.) of 1865.

Mookerjee, J.—THE point urged in this special appeal is that the Judge was wrong in not trying the question whether the rent had been paid by the plaintiff as alleged by him, and that no suit lies in the Civil Court under Section 13, Act VIII. of 1865, B. C., when there was no appeal to the Collector on the ground of irregularity.

As regards the first point, we find there were two objections raised b[illegible] plaintiff before the Courts below; fir[illegible] no notice had been published, as req[illegible]