

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Chabildas Lalloobhai v. Dayal Mowji and
others, from the High Court of Judicature
at Bombay; delivered the 22nd July 1907.*

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal from a judgment and decree, dated the 25th June 1904, of the High Court of Bombay sitting on appeal from a judgment and decree passed, on the 26th February 1903, by Russell J. in exercise of the ordinary original civil jurisdiction of the same Court.

Most of the facts now material to the case are not disputed. On the 8th April 1896 the first Respondent (herein-after called the mortgagor) executed a mortgage of certain properties, including premises in Cowasjee Patell Tank Road, in the City of Bombay, which are the subject of this Suit and Appeal, in favour of the other Respondents (herein-after called the mortgagees) to secure an advance of Rs. 30,000 and interest.

The mortgage was of the English type and contained a power of sale in an ordinary form. A proviso followed that—"Upon any sale pur-
" porting to be made in pursuance of the
" aforesaid power . . . the purchaser . . .
" shall not be bound to see or inquire whether
" any such default has been made . . . or
" otherwise as to the necessity or expediency

“ of such sale or that the sale is otherwise
“ improper or irregular. And notwithstanding
“ any such irregularity such sale shall as far
“ as regards the safety and protection of the
“ purchaser be deemed to be within
“ the aforesaid power and be valid
“ and effectual accordingly and the remedy of
“ the mortgagor shall be in damages
“ only.”—This last proviso is in substance an
echo of S. 69 of the Transfer of Property Act,
1882.

On the 8th October 1900 the mortgagees, purporting to act under the power of sale in the mortgage, caused the property in question to be put up for sale by auction, and it was knocked down to the Appellant. On the same day he signed a written contract to purchase; and on the 20th October 1900 the mortgagees executed a conveyance to the purchaser.

The mortgagor had remained in possession of the premises; and on the 26th August 1901 the purchaser instituted the present suit in the High Court. The claim was for possession of the premises in question and for other connected relief. The original Defendant was the mortgagor alone, on whose application the mortgagees were subsequently added as Defendants.

Another suit was brought by the mortgagor against the mortgagees, in which he claimed to redeem the property in question and to recover damages. This suit was brought up, with the necessary amendments, before the Court of Appeal, so that it might be dealt with in one decree together with the principal suit. This was done, and it is necessary to mention the circumstance only in order to appreciate the decree of the Court of Appeal. For the purposes of the present Appeal the matter is not material.

It is unnecessary to examine the further pleadings or the issues settled. It is enough to say that the case came on for hearing before

Russell J., and that at the trial what had to be determined, stated broadly, was whether the sale was such, under its circumstances, as to give a good title to the purchaser as against the mortgagor. Russell J. held that it did not, for reasons that will shortly be examined. The Appeal Court came to the same conclusion, but for different reasons, which will also be considered.

In the earlier stages of this litigation many points were raised relating to the circumstances of the sale, but these have now all been eliminated except two. The remaining two are those which formed the basis of decision in the two Courts below respectively.

Of these points the one that naturally comes first in order is this :—The 6th of the conditions of sale said that, “The purchaser shall accept
“ such title as the vendors can give, and shall
“ not require the vendors to enter into any
“ other covenant except a covenant that they
“ have not incumbered, and shall not raise any
“ question or objection to the title, and shall be
“ held bound to accept such title as the vendors
“ possess.” Both the Courts in India held this to be a depreciatory condition, wholly unwarranted by the actual state of the title. So far they are agreed. Russell J., however, held that there was nothing in the facts to affect the purchaser with notice or knowledge of the depreciatory character of the condition. The Court of Appeal, on the other hand, held that the purchaser was affected with constructive notice of the true state of the title, by reason of the fact that, some days after the contract of sale was completed, the purchaser instructed the mortgagees’ solicitor to act for him in the preparation of the deed of conveyance, and that that solicitor knew enough of the real title to

show that the condition in question was unjustifiable.

When the contract of sale was signed the transaction was completed so far as it rested in contract, and the rights and liabilities of the parties arising out of that contract were ascertained and were enforceable. Down to that point the attorney was not acting for the purchaser. The only thing in which he did so act was the subsequent preparation of the conveyance. The view of the Court of Appeal imputes to a principal the knowledge of an agent, not acquired in the matter for which he was agent, and uses it to upset a transaction of a date before the agency commenced. This is an extension of the doctrine of constructive notice in which their Lordships cannot concur. They therefore think the judgment and decree under appeal cannot be supported on the grounds relied upon by the Court of Appeal.

The only point that remains to be considered is that which formed the ground of Russell J.'s judgment. To appreciate the point it is necessary to refer briefly to what occurred on the day of sale. The sale was announced for 4.30 o'clock, and it seems to have actually commenced soon after 5. The bidding was at first pretty brisk, and reached the sum of Rs. 20,500, which was bid by the purchaser, the now Appellant.

At this point the sale was in fact stopped, and the parties concerned retired to an adjoining wood-shed, where they spent about half an hour endeavouring to agree to written terms of settlement. The endeavour failed, and then the auctioneer by the instructions of the mortgagees' solicitor, purported to resume the sale. The purchaser's previous bid of Rs. 20,500 was called out several times, and no competitor appearing the property was knocked down to him at that price. This is said to have happened at 6.10.

It was contended that the sellers, who unquestionably stopped the sale, did so under such circumstances as naturally to lead bidders to suppose that the sale was over at least for that occasion, and to go away from the place of auction. It was said that the bidders did go away when the sale was stopped; and that the purchaser who was present, and who saw and heard what passed, was affected with notice of the impropriety of the alleged sale. The case thus indicated was, if established, sufficient to invalidate the sale.

The questions thus raised were questions of fact. The evidence was both voluminous and conflicting. Russell J., who saw and heard the witnesses, examined that evidence in his judgment with great care, and has indicated in more than one passage of that judgment his estimate of the comparative credibility of witnesses. The case is peculiarly one in which their Lordships would be reluctant to reject the finding of the learned judge who tried the case, provided that there was sufficient evidence to support his finding. Their Lordships think there was ample evidence to support the finding of the learned judge and that his conclusion from that finding is correct. That finding and that conclusion are thus stated:—"The Defendants two and three
 " (the mortgagees) by themselves or their agents
 " so conducted themselves with reference to this
 " sale that would-be bidders at it were induced
 " to leave. The Plaintiff (the purchaser) had
 " notice of those circumstances, using the word
 " notice as it is defined in the Transfer of
 " Property Act. He therefore bought at his
 " peril, and as the sale was not a *bonâ fide*
 " auction sale it must be set aside."

For the foregoing reasons their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant will pay the costs of the first Respondent, and the mortgagees will bear their own costs.

