

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sreemanchunder Dey v. Gopaulchunder Chuckerbutty and another, from the High Court of Judicature at Fort William, in Bengal: delivered on the 16th November, 1866.*

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Present:

LORD WESTBURY.

SIR JAMES W. COLWILE.

SIR EDWARD VAUGHAN WILLIAMS.

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SIR LAWRENCE PEEL.

THE Appellant in this case became the purchaser of the talook under a decree for sale obtained by judgment creditors of the owner.

A summary application, to set aside the sale, having been refused, the Respondent brought the present action for the purpose of having it declared that the purchase did not effect any transfer of the ownership of the talook.

The Respondent is not himself a judgment creditor, but he is the assignee of a judgment creditor. It appears that the Respondent is a tenant upon the estate, and that, after some dispute had arisen between the tenants and the Appellant, he purchased this outstanding judgment, and, by virtue of that purchase and a transfer of the judgment has taken the present proceedings. The issue which was raised in the action so brought by the Respondent, and the affirmative of which he has to maintain, is that the talook in question is still the property of the judgment debtors, and not the property of the Appellant, who was the purchaser. The affirmative lies upon the Respondent; he is to prove his case.

Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the Appellant; but in matters of this

description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony.

The case relied upon by the Respondent is mainly this,—that the purchase-money, which appears to have been actually paid by the Appellant, was not in reality the money of the Appellant.

In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate. We have here a statement made by the Respondent himself, that the talook was worth about 19,200 or 19,300 rupees, and we find that it was sold at the sale at which the Appellant (being the assignee of the original bidder) became the purchaser for 19,000 rupees, which was actually paid.

That circumstance is not conclusive proof of a *bonâ fide* purchase; but it is a strong circumstance, in considering a case which consists of allegations, that there was a collusive agreement between the judgment debtor, that is, the original owner of the estate, and the Appellant, to buy in the estate for the benefit of the judgment debtor.

The transaction appears to have been this:—a person of the name of Petumber attended the sale as the agent of another person, who appears to be a man of property, of the name of Mohischunder. Petumber was declared best bidder, and consequently the purchaser. It seems from the evidence that Petumber exceeded the authority which had been given to him by Mohischunder, his principal. Mohischunder had limited the price to be given to a sum of money less than the amount which Petumber had bid; Mohischunder therefore either repudiated the contract or was desirous of getting rid of it. In that state of things Petumber applied to the Appellant to take a transfer of the contract, and the Appellant agreed so to do. The reason for the Appellant purchasing the property does not appear. It does not appear, nor is there any testimony that would warrant at all the inference that Mohischunder in sending Petumber to the auction was acting as the agent or on behalf of the judgment debtor. It is said that Mohischunder was a distant relation of the judgment debtor, but there is nothing like testimony to

warrant the conclusion that Mohischunder was acting on behalf of the judgment debtor.

No doubt that would not be material, if it were proved that the Appellant, the assignee of Petumber, was himself the agent or trustee of the judgment debtor. If he was so, of course the estate in the hands of the Appellant might be made available for the satisfaction of the judgment debts existing unsatisfied.

To prove this, the circumstances relied on by the Respondent, are, first, the fact which it is alleged appears on the judicial proceedings under which the sale was made, that two previous sales had been effected of this property, in both of which the real, though not the apparent, purchaser was the judgment debtor, and that those sales had consequently been set aside. The Courts below and the Respondent here appear to have considered that those facts justified the inference that the judgment debtor had formed the design in the present case, for the third time, to acquire the property through the instrumentality of a person, acting apparently on his own behalf.

Although the fact of these former sales may be referred to, as they appear on the proceedings in the cause in which the sale was made, yet no legal inference affecting the integrity of the present proceeding can with any propriety be drawn from them.

The next circumstance relied upon by the Respondent is this: that the Appellant and the judgment debtor appear to live still on good terms together; that they are not open and avowed enemies, which it is said would have been the necessary consequence if the Appellant had in reality been the purchaser of the judgment debtor's estate for his own benefit.

That is a circumstance, again, from which we are of opinion that no legal inference results.

The next thing relied upon by the Respondent, and which is one of the main grounds of his case is this: that the Appellant is unable to give a satisfactory account, nay, may be supposed perhaps to have given a false account in part, as to the manner in which he became possessed of the money in question.

Their Lordships have been much struck with

the unsatisfactory character of the account given by the Appellant of the manner in which he alleges he obtained the money, but we cannot help feeling that it is an inquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But, this circumstance, although it may excite doubt, is not a thing from which we can legitimately infer that the Appellant was a bare trustee of the purchase so made by him.

And if it inclined us to doubt the Appellant's ownership of the money, there is still a great interval between that doubt and the conclusion that it was the money of the judgment debtor, or that the Appellant acted in the matter on his behalf.

It is for the Plaintiff to prove that the money was the money of the judgment debtor, or that it was supplied or found by some third person for the benefit of the judgment debtor; but we find nothing which can be accepted either as direct proof of the fact, or as materials from which any such inference can be justly drawn. Two witnesses, called by the Respondent himself, state that as far as their knowledge extends, the circumstances and the condition of the judgment debtors were such, that they had not the means of supplying the money in question. The other evidence given by the Respondent, is, that a person of the name of Mohischunder, some time after the transfer of the contract to the Appellant, raised a sum of 19,000 Rupees, and that Mohischunder was a friend and second cousin of the judgment debtor, and therefore the Respondent would have us infer that the 19,000 Rupees so raised by Mohischunder, being about the amount of the purchase-money for the talook, was raised by him on behalf of the judgment debtor for the purpose of completing the purchase of the talook, or of repaying the money which it appears the Appellant obtained from certain bankers at Calcutta, in order to complete his purchase.

We are asked, therefore, to hold that the distant connection between Mohischunder and the judgment debtor, and the equality in amount of the sums are sufficient grounds for the conclusion that the purchase-money was in reality the money of

Mohischunder, and that he found and advanced it for the benefit of the judgment debtor. If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe.

It is material that this purchase is not really challenged by the judgment creditors. They have not originated this action, but it is the fruit of the angry feeling of a tenant on the estate, who has sought out a judgment creditor, and got a transfer of his interest for the purpose of bringing forward this claim; and therefore the origin of the action and the circumstances under which it is brought are to be taken into account, when we are considering the truth and reality of the purchase by the Appellant.

It is natural to suppose, that if this purchase had been generally felt not to be a *bona fide* purchase it would have been questioned by the judgment creditors themselves, and that they would not probably, for a small consideration, have parted with their judgments to another person, but would have instituted the suit themselves.

In the conduct of the suit, there is a circumstance which their Lordships think it right to advert to.

When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly; because, where it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new, original inquiry by the High Court may be in itself im-

perfect, and not sufficiently extensive to answer the purposes of justice.

The opinion of their Lordships is, that the evidence which has been given, (there having been the fullest opportunity of giving evidence against the Appellant,) is not sufficient to warrant the conclusion that the Appellant was acting as the agent of the judgment debtor.

It is easy to suppose a case in which the Appellant might not in reality be the *bonâ fide* purchaser on his own account, and yet in which there would be no ground for holding that the estate was the property of the judgment debtor. It is possible to suppose that some of the family of the judgment debtor might have been willing to find, either wholly or partly, the money for the purchase; but if it were established that the money was not the property of the Appellant, we could not derive from that the conclusion that the estate was therefore the property of the judgment debtor.

It was said by the counsel for the Respondent that no other owner was suggested by the Appellant. There was no obligation upon him to suggest any other owner. He was under no obligation to show whence the money was derived; but taking everything against the Appellant upon that point, there is still a great chasm between that inference and the conclusion which alone would support the action of the Respondent, viz. that the estate is the judgment debtor's property, both at law and in equity. That is neither established, nor can be legitimately inferred from any of the facts which have been proved.

We are, therefore, of opinion that the decree of the Court below must be reversed, and we shall humbly advise Her Majesty to order that it be reversed accordingly; and that the action of the Respondent in the Court below be dismissed with costs. It follows that the Appellant must have the costs of this Appeal.