

(1930) 11 BOM CK 0026
In the Bombay High Court
Case No : Second Appeal No. 569 of 1928

Zaverchand Khimchand

APPELLANT

Vs

Jesang Naran

RESPONDENT

Date of Decision : 20-11-1930

Acts Referred:

Contract Act, 1872 — Section 65
Transfer of Property Act, 1882 — Section 3

Citation : (1931) 33 BOMLR 499

Hon'ble Judges : Madgavkar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Madgavkar, J.—The question in this appeal is whether the defendant-respondent is entitled to payment from the plaintiffs-appellants. The defendant-respondent was the prior purchaser of an unrecognized portion of a bhag from the bhagdar, the consideration being a part of previous debts due on promissory notes. The appellants are subsequent purchasers of the entire bhag and sued for possession from the respondent. The trial Court held that the appellants had no notice of the sale in favour of the respondent and decreed the claim. In appeal by the defendant the lower appellate Court held that the plaintiffs had constructive notice and were not entitled to recover possession unless they paid into Court the amount of the consideration recited in the respondent's deed. The plaintiffs appeal.

2. It is argued for the appellants that the alienation in favour of the respondent being not merely voidable but forbidden by the Bhagdari Act and void there was, strictly speaking, no equitable right to repayment in favour of the respondent even as against the vendor, much less against the appellants, and therefore the question of constructive notice did not really arise. In any case the view of the trial Court was right and the lower appellate Court wrong that the appellants made inquiries and purchased bona fide without notice, and were entitled to

possession without payment. It is contended for the respondent, firstly, that the appellants had notice, secondly, the Courts had power to award compensation even from the subsequent purchasers, the appellants, and not merely from the original vendor, and, thirdly, the discretion was properly exercised and the order of compensation was correct.

3. It is undoubted that the deed in favour of the respondent was not merely voidable but was opposed to the express law and void. On the question of notice the facts as found by both the Courts are that the appellants inquired of the vendor Bhagvan and of the talati who assured them and correctly that the respondent was entered in the record of rights as a tenant. The appellants, however, failed to inquire of the respondent, and u/s 3 of the Transfer of Property Act the question before the Courts was whether this abstention from inquiry from the respondent was willful or was gross negligence sufficient to constitute constructive notice. It is argued for the respondent that in England from the case of *Daniels v. Davison* (1809) 16 V. J. 249, which has been followed in India, possession has been held to be cogent evidence of notice: *Sharfudin v. Govind* ILR (1902) 27 Bom. 452, 5 Bom. L.R. 144. Inquiry from the vendor and not from the person in possession is not sufficient: *Magoo Brahma v. Balkrishna Das* (1913) 18 C.W.N. 657. It is contended for the appellants that the onus is on the respondent, *Peerkha Lalkha Vs. Bapu Kashiba Mali*, , distinguishing *Himatlal Motilal v. Vasudev Ganesh* ILR (1912) 36 Bom. 446, 14 Bom. L.R. 634.

4. The question of onus does not, however, really arise in this case. Neither side called the owner Bhagvan. The judgment of the trial Court is in favour of the bona fides of the appellants and the mala fides, if any, rather of the respondent, who apparently set up a false case of a subsequent agreement by the bhagdar to sell jointly to himself and the appellants. It was held in *Fahi Ibrahim v. Faki Gulam* ILR (1920) 45 Bom. 910, 23 Bom L.R. 335 that the subsequent purchaser the "2nd defendant having knowledge of the plaintiff being in possession, and having made no inquiry why the plaintiff was in possession, must be taken to have had constructive notice of all the equities in favour of the plaintiff." *Fawcett J.*, however, expressly referred to ill. (c) to Clause (6) of Section 27 of the Specific Relief Act with regard to the absence of inquiry from the person in possession. The question of constructive notice must be a question of mixed law and fact rather than of pure law, and in the absence of a finding by the lower Courts that the appellants deliberately refrained from going to the respondent because they doubted the information of the vendor and of the talati as to the record of rights, I agree with the trial Court and not with the lower appellate Court and hold that abstention from the inquiry from the respondent is not willful or gross negligence amounting to a constructive notice on the facts of this particular case.

5. In this view the question of compensation to the respondent hardly admits of doubt. In cases under the Bhagdari. Act and even in suits by the vendor, the first case in which such compensation was awarded was *Gulabchand v. Fulbai* ILR

(1909) 33 Bom. 411, 11 Bom. L.R. 649. And in the subsequent case, Haribhai Hansji v. Nathvibhai Ratnaji ILR (1913) 38 Bom. 249, 16 Bom. L.R. 62, Shah J. points out 16 Bom. L.R. 62 --

that neither u/s 65 of the Indian Contract Act, nor under the ruling in Jijibhai v. Nagji (1909) 11 Bom. L.R. 693, the Court is bound to award compensation in all cases as a matter of course where the document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case as to whether the agreement is discovered to be void and whether any person has received any advantage.

6. In that case it was held that there was nothing to show that the defendant was aware of the fact that the agreement to the bhagdar was void at the date of the agreement. In the present case, the trial Court has found that the respondents knew on the date of the agreement that it was void and took the risk of possession, knowing that the sale-deed in his favour was illegal. It is perfectly true, as pointed out for the respondent, that at least in the case of documents which are voidable, such as for instance a sale by a minor without the sanction of the Court, compensation may be awarded even from a subsequent purchaser and without such an offer such a purchaser may even be refused possession : Dwijendra Mohan Sarma v. Manorama Dasi ILR (1922) Cal. 911. On the facts of the present case, without expressing any opinion as to how far the respondent might have been awarded compensation from the original vendor Bhagvan, it suffices to say that on the date of the deed the respondent took the sale-deed knowing it to be void, that the appellant bona fide took a valid sale-deed without notice of the respondent's deed and on the assurance not merely of the vendor but also of the talati that he was a tenant, and that the respondent is not, in my opinion, entitled to compensation from the appellants.

7. It is not, therefore, necessary to observe that even in regard to the amount of compensation, if the appellants had been held liable, the amount recited in the respondent's sale-deed was not necessarily a proper measure. In a suit as between the vendor and the respondent, it might have been open to the vendor to ask for accounts under the Dekkhan Agriculturists' Relief Act in fixing the amount of compensation.

8. For these reasons, the appeal is allowed, the decree of the lower appellate Court is set aside, and the decree of the trial Court restored, with costs throughout on the respondent.