

Privy Council Appeal No. 156 of 1915.

Shrinivasdas Bavri - - - - - *Appellant,*
v.
Meherbai and Others - - - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER, 1916.

Present at the Hearing :

LORD PARKER OF WADDINGTON.

LORD SUMNER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

[*Delivered by* LORD PARKER OF WADDINGTON.]

This appeal arises in a vendor and purchaser summons on the original side of the Bombay High Court under Rule 210 of the High Court Rules. The vendors were bound by their contract of the 18th October, 1913, to deduce "a marketable title free from all reasonable doubts" to the property they contracted to sell. The question is whether they have discharged this obligation. Both the Judge of first instance and the High Court on appeal have answered this question in the affirmative. The purchaser is now appealing to His Majesty in Council.

The material facts may be stated as follows: On the 26th April, 1892, Ramdass Kessowji, the then owner of the property contracted to be sold, joined with Dwarkadass Shamji, the owner of an adjoining property, in mortgaging both properties to Damoderdass Sunderdass and Gordhandass Sunderdass to secure a lac of rupees, with interest at $7\frac{1}{2}$ per cent. per annum. The mortgage was effected by an agreement of charge duly registered. It appears from this agreement that the sum to secure which the mortgage was given was a debt due from the mortgagors to the mortgagees. The title-deeds relating to both properties are stated to have

been deposited with the mortgagees. The principal debt is made payable by two instalments of 50,000 rupees each on the 30th September, 1892, and the 20th April, 1893, but the mortgagors were entitled to pay each instalment before its due date with interest up to the date of actual payment. Both mortgagors join in charging the properties. The agreement contains a proviso that on payment of either instalment with interest the mortgagors, or either of them, shall be entitled to redeem the title-deeds of one of the properties, and that a memorandum of such payment and redemption shall be endorsed on the agreement.

In order to make a title to the property the vendors must show that this mortgage has been cleared off. Their case is that about the 9th August, 1892, Ramdass Kessowji paid to the mortgagees the first instalment of 50,000 rupees with interest, and redeemed the title-deeds of the property contracted to be sold. As evidence of this they produce a certified copy of a release, dated the 30th September, 1902 (less than eleven years before the date of the contract), and duly registered, whereby, after reciting such payment and redemption, and also the death of Damoderdass Sunderdass on the 4th July, 1902, leaving Gordhandass Sunderdass his only heir and legal representative, Gordhandass Sunderdass released the property contracted to be sold from the equitable charge created by the agreement of the 26th April, 1892. Obviously if it be the fact that when this release was executed Damoderdass Sunderdass was dead, and Gordhandass Sunderdass was his sole heir and legal representative, the equitable charge was effectually released. The purchaser therefore asked for evidence of these facts, but the vendors refused to supply such evidence on the ground that the recitals in the release itself were sufficient proof of the facts recited.

In their Lordships' opinion, it is quite clear that the recitals in a deed are, strictly speaking, evidence only as against the parties to the deed and those claiming through or under them. If, therefore, at the date of the release Damoderdass Sunderdass were living, or if, though dead, Gordhandass were not his heir or legal representative, there would be nothing to prevent either Damoderdass Sunderdass himself or those claiming through him from disputing the truth of the recitals contained in the release. The learned Judges in the Court below appear to have thought that the provisions of the Registration Act, 1877, had some bearing on this point, but if those provisions be referred to it is quite clear that they have no effect on the value as evidence of recitals contained in a registered instrument.

Although, however, recitals in a deed are only evidence as against the parties to the deed or those who claim through or under them, it has long been the custom of conveyancers, at any rate in this country, to provide in contracts of sale and purchase that recitals in deeds of a

certain age shall be sufficient to satisfy a purchaser of the truth of the fact recited. The existence of such a custom is material whenever a purchaser is bound to accept a marketable title, for the insertion of a usual condition in a contract of resale could not be depreciatory. In this country the usual condition (now recognised by statute) is confined to deeds dated not less than twenty years before the contract, and there is no evidence of any custom among Bombay conveyancers relating to more recent deeds. In their Lordships' opinion, a condition making the recitals in the release of 1902 evidence of the facts recited would have been depreciatory, especially having regard to the fact that the vendors cannot produce one of the title-deeds deposited for the purpose of the equitable charge or the equitable charge itself.

It was argued that Damoderdass Sunderdass, if living, or, if dead, his heirs or legal representative, must be barred by the Limitation Act. This point was not taken in either of the Courts below, and it is doubtful whether it be open to the respondents to take it before this Board. Their Lordships, however, do not consider the point to be a good one. It is perfectly possible that there have been payments on account of the principal or interest secured by the equitable charge which would preclude the operation of the statute.

Their Lordships conclude, therefore, that the purchaser was justified in requiring evidence that Gordhandass Sunderdass was sole heir and legal representative of Damoderdass Sunderdass, and that the vendors having refused to supply such evidence have not deduced the marketable title which they were bound to deduce.

Under these circumstances their Lordships will humbly advise His Majesty to reverse the orders appealed from with costs here and below, and to order the return to the purchaser of his deposit with interest at the usual rate allowed in such cases by the Courts in Bombay (or in case the parties differ, at a rate to be fixed by the High Court), and the cost of investigating the vendor's title.

In the Privy Council.

SHRINIVASDAS BAVRI

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MEHERRAI AND OTHERS.

DELIVERED BY LORD PARKER
OF WADDINGTON.

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