Chimabai Vs Dhula Kuppa

Court: Bombay High Court

Date of Decision: Sept. 23, 1918

Acts Referred: Bombay High Court Rules â€" Rule 446, 457

Citation: AIR 1918 Bom 59 : (1919) 21 BOMLR 281

Hon'ble Judges: Marten, J

Bench: Single Bench

Judgement

Mariten, J.
This is an adjourned summons under Rule 451 of the Bombay High Court. Rules to compel a purchaser at a Court-sale of

Immovable property to pay the balance of his purchase money. The principal questions that arise are: (1) whether the particulars and conditions of

sale are misleading and did in fact mislead the purchaser; and (2) whether the parties were ever ad idem inasmuch as the purchaser says he thought

he was buying property free from all encumbrances, and the applicant says that all he of the Commissioner intended to sell were the interests of the

first mortgagee and the mortgagor in the property subject to the rights of the second and fourth mortgagees.

2. The summons is taken out in Suit 360 of 1911, which was originally a redemption suit brought on the 5th May 1911 by one Chimabai a widow

to redeem the 1st mortgagees defendants 1 and 2 and their transferee defendant 3. Subsequently defendants 4 and 5 were added as parties in

respect of a subsequent mortgage of Sth February 1912, but it is common ground that their claims have been disposed of in pursuance of a

consent decree of 3rd December 1915 and accordingly they and their mortgage may, 1 think, be eliminated for the purpose of the present

application.

3. Therefore so far as appears from the record of the suit and the parties to it, the only persons now interested in the property are the plaintiff as

mortgagor and defendant 3 as first mortgagee, he holding under a mortgage of 16th December 1909 and a transfer thereof to himself of 17th

October 1910. In fact there are two other mortgages the holders of which are not parties to the suit, viz., (I) a second mortgage of 13th April

1911 for Rs. 2000 to Damodar Shri Krishna (since deceased) and his wife Rakhmabai, and (2) a fourth mortgage of 13th April 1916 for Rs.

3000 to Rakhmabai (then a widow) and Govindnath Ramnath Mahimkar. It will be observed that the above second mortgage was prior to the suit

and that the above fourth mortgage was after it. As I have already pointed out I eliminate the 3rd mortgage of 8th February 1912.

4. The proceedings in the suit are voluminous and curious but for present purposes I think it is sufficient to say that the Commissioner"s report of

14th April 1917 found Rs. 22750 and interest due to the third defendant, and that by a decree of Kajiji J. dated 23rd July 1917, the

Commissioner"s report was confirmed and a decree passed for payment by the plaintiff to defendant 3 of the above amount and for the sale of the

Immovable property in question, the proceeds to be applied in or towards satisfaction of the decree debt.

5. I lay stress upon the fact that what the Court ordered to be sold was the property itself, and that the Court never directed the sale to ho subject

to any encumbrances or limited the sale to such interests, if any, as the plaintiff and defendant 3 had in the property. In fact the Court would never

have made the decree it did if it had been informed of the true facts, for under Order XXXIV, Rule 1, the suit was defective for non-joinder of the

second mortgagee if not of the 3rd mort- gagee as well (see Khairajmal v. Daim (1904) L.R. 32 IndAp 23; 7 Bom. L.R. 1. Mr. Rustamji, the

solicitor for defendant 3, says he did not know of these mortgages until after the decree of 23rd July 1917 when he made the usual searches

preparatory to a sale. I do not accept this statement as regards the 2nd mortgage, for on looking through the file of this suit I find that Mr. Rustamji

appeared for defendant 3 when the order of 27th November 1913 was made adding defendant 4 as a party, and that an affidavit which was read

in that order clearly refers to the second mortgage. I refer to para 2 of the affidavit of defendant 4 affirmed 20th November 1913 in which ho

refers to a sale by auction at which he bought ""subject to the second mortgage dated 13th April 1911 in the said conditions mentioned."" The letter

of the 18th November 1913, Exh. B to that affidavit, also speaks of the sale being ""subject to the mortgage in the above suit and another mortgage

also in the particulars and conditions referred to."" Similarly, the order of 21st August 1914 gave liberty to the plaintiff if so advised ""to make the

third mortgagee party to the suit."" In fact defendant 5 was afterwards added. He was in fact the third mortgagee, but only so if the second

mortgage of 13th April 1911 was borne in mind.

6. But assuming that Mr. Rustamji had forgotten about this second mortgage and that he did know of the fourth mortgage, I think that when his

searches disclosed their existence, his proper course was to have taken the further directions of the Judge. I regret that the Commissioner did not

insist on this being done, for it was then obvious that the decree of 23rd July 1917 had been obtained from the Court by a misstatement of the true

facts, and that if the defect in the suit could be cured at all, some further order under Rule 407 or otherwise was necessary to deal with the new

situation caused by the disclosure of the second and fourth mortgages.

7. The course actually decided on was to proceed with the sale, and according to Mr. Rustamji (whose firm of Jamshetji, Rustamji & Devidas had

the conduct of the sale), the sale was to be subject to the second and fourth mortgages. It is, however, common ground that the conditions contain

no express statement to that effect. Further, Mr. Rustamji in para 1 of his affidavit of 22nd August 1918 admits that he stated at the auction that the

purchaser would not have to pay the moneys due under the second and fourth mortgages. Mr. Rustamji, however, says that by the particulars the

sale was limited to the right, title and interest of the plaintiff and defendant 3 in the property and that statement cures all defects.

8. Now, if Mr. Rustamji is correct as to what was intended to be put up for sale, it is plain that it was a sale of a special nature, and that it was

necessary to bring homo clearly to the mind of the purchaser what exactly ho was buying. The eventual purchaser at the auction was a Gujarati

buffalo-keeper who cannot read and who can only write sufficiently to sign his name. He heard of the sale from a milk-man of his and got a brother

to procure a print of the particulars and conditions of sale from the High Court. These he took to his solicitor, Mr. H.N. Vakil of Messrs. Payne &

Co., who advised him that there was nothing in them which should deter him from bidding for the property. Accordingly, the next day, viz., the 5th

March 1918, the purchaser and his solicitor attended the auction sale. The latter was authorised to bid up to Rs 30000 and the property was

eventually knocked down to him for Rs. 29000.

9. Now both the purchaser and his solicitor swear that they thought the purchase was free from any encumbrances. The solicitor says that if he had

had the slightest doubt on the point he would have told his client and obtained his instructions whether he still wanted to bid up to Rs. 30000. The

purchaser says that if he had known he would have to satisfy the second and fourth mortgages, or that the second and fourth mortgagees would

have the right to redeem the first mortgage, he would never have instructed his solicitor to bid as much as Rs. 30000 for the property, if indeed

under those circumstances he should have been minded to purchase the property at all. Both the purchaser and his solicitor have been cross-

examined on these and other statements in their affidavits. Having thus had the advantage of seeing them in the witnes3-box, I am satisfied that

what they say is correct and that if the sale is what Mr. Rustamji says it was, they have bought under a misapprehension of what was uttered for

sale. In saying this, I have not overlooked the fact that the purchaser''s solicitor read the conditions but did not read the particulars.

10. That brings me to the conditions of sale and to the argument oil Mr. Captain for defendant 3 that no reasonable man would be misled by them.

11. The purchaser''s solicitor is a solicitor of much experience. His practice is apparently to read conditions carefully but to pay little attention to

the particulars. I don''t commend that practice but let us see what effect the particulars and conditions would have on the mind of the hypothetical

reasonable man if read through from beginning to end. Turning to the front page I find the following prominent description: ""Suit 360 of 1911.

Chimabai v. Dhulla Kuppa & Co. Particulars and conditions of sale relating to the Immovable property situate on the Haines Road...to be put up

for sale by public auction before the Commissioner of the High Court on the premises in pursuance of the directions made in the above suit ...dated

the 23rd July 1917."" This description is repeated on the inner pages 2 and 3, and it will be observed there is nothing there to show that anything

except the absolute ownership was being sold. It will be observed however that the parties to the suit are set out on p. 2, and that the particulars

on p. 3 open with the words, ""All the right, title and interest of the plaintiff and defendant 3"". But it will also be observed that no explanation is

given as to what has happened to defendants 1, 2, 4 and 5 and their interests. I think, therefore, a purchaser might fairly assume that the only

interests which would remain outstanding on completion would be those of the plaintiff and defendant 3.

12. The conditions on p. 4 are described as being ""conditions of sale of the property described in the notification of sale in Suit 360 of 1911."" This

notification is Exh. 2 and is a notification of the intended sale of ""the Immovable property situate at Haines Road...and particularly described in the

particulars and conditions of sale hereunto annexed.... The expression ""the property"" is used in conditions 1, 6, 8, 15 and 1(3. There is nothing in

conditions 1, 6 and 16 to show expressly that the expression is limited to the interests of plaintiff and defendant 3 in the land. As regards conditions

8 and 15 the expression seems to me to refer to the land itself. It is at any rate clear in condition 15 that it cannot refer to the interest of defendant

3, for the plaintiff could not mortgage that interest nor is the second mortgage ""on"" that interest. Accordingly, stopping there, I see nothing

unreasonable in a purchaser assuming that the word ""property"" was used in the same sense throughout, and that it meant the ""immovable property

situate on the Haines Road"" described on the front page.

13. Condition 6 gives the purchaser the right to an abstract of title and deals with requisitions. Condition 8 entitles him to a proper conveyance

wherein all proper parties shall join. Condition 13 begins with the extraordinary provision ""the purchaser shall accept such title as is made out from

the document (sic) set out in Schedule A hereto."" This cannot be taken literally as the seven documents in Schedule A do not include the orders in

the suit on which alone the right to sell is based. On the other hand it will be observed that Schedule A does not include the second and fourth

mortgages. The inference would, therefore, I think, be that by completion at latest, the 2nd and 4th mortgages would no longer affect the title. No

reasonable man would, I think, guess from this that he was to purchase subject to the 2nd and 4th mortgages of which he was not to be given even

an abstract. I will deal later on with the omission of the 2nd and 4th mortgages from the abstract of title, and will now turn to condition 15 which I

will read verbatim as it is particularly important.

15. There is a second mortgage on the property, dated 13th April 1911 from the plaintiff to Dainodar Shrikrishnadas and his wife Rakhmabai for

Rs. 2000, and a third dated 13th April 1910 from the plaintiff in favour of Rakhmabai widow of Dainodar Shrikriahna and Govindnath Ramnath

Mahimkar for Rs. 3000.

14. Now that condition merely states that there ""is"" a second mortgage and a third mortgage (which in this judgment I have called the 4th mortgage

). It does not state that the property is sold subject to these two mortgages, nor that it will be conveyed subject to these mortgages, nor that the

purchaser will have to covenant to indemnify the mortgagor against them. This is no subtle distinction. In Torrance v. Bolton (1872) L.R. 8 Ch. A.

118the conditions of sale (see p. 120) stated clearly that ""the purchaser shall take a conveyance subject to the three said several mortgages, and

shall pay interest to the mortgagees...from the 25th March next."" This, unlike condition 15, was a clear condition, and yet the sale was rescinded

because the particulars did not show that what was sold was an equity of redemption, and the conditions were only read out at the auction and not

issued, and the purchaser alleged he was deaf and failed to understand what was read out at the auction. The Court of Appeal there held that

having regard to the particulars, the burden of proof was throwu upon the vendor to show that the purchaser had not been misled, and that the

vendor had failed to discharge that onus. At p. 123 James L.J. said as follows:Ã¯Â¿Â½

I agree with the Vice-Chancellor that the description of the property in the particulars of sale was an improper, insufficient, and not very fair

description, It was not right to describe as an absolute reversion, or as an immediate reversion, expectant on the death of the tenant for life, that

which was intended to be offered for sale, which was in truth an equity of redemption in a reversionary interest, which was itself a reversionary

interest in an equity of redemption. Such a description, in my judgment, was calculated, if not intended to entrapÃ¯Â¿Â½was calculated if not intended

to mislead persons who would thereby be entrapped into the auction-room. A person reading such a description as this, who would be disposed

to invest in such a property, would naturally first of all go and inquire what the value of the property was, and would naturally then apply to an

actuary, or some other person whom he thought competent to give him advice upon such a subject, what was the proper deduction to he made in

respect of the outstanding life interest. If he had at the same time been informed that what he was buying was an equity of redemption a prudent

man would consult with his solicitor, or some other person capable of advising him in such a matter, as to what were the exact rights and the exact

liabilities which he was acquiring and taking upon himself as purchaser of an equity of redemption.

There being, then, this improper and misleading description in the particulars of sale, I am of opinion that the burden of proof is cast entirely on the

defendant to show that the plaintiff was not in fact misled by what he had read, and of that burden the defendant has not, in my judgment,

discharged himself. It was not sufficient to read, in the midst of a long paper of conditions, a condition, not even the first, following immediately the

particulars of sale, but the fourth conditionÃ¯Â¿Â½which merely told him that the property was subject to several mortgages, and which contained a

very long story as to what he was to do; as to which it might very well happen, as in this case it did happen, that it failed to convey to the

purchaser"s mind this information, which ought to have been conveyed to him, namely, that what he was buying was the right of instituting two or

three suits in Chancery, an immediate liability to a sum of Ã¯Â¿Â½ 500, which he might be called upon to pay at any moment, and an immediate liability

to one or two other Chancery suits, which the mortgagees of the property might at any time have instituted for the purpose of foreclosure. I am of

opinion, from all the circumstances of the case, and from the conduct of the purchaser, that he never did know what he was buying, and that he

never had his mind sufficiently clear of that misrepresentation which was infused into it by the particulars of sale, and in consequence of which ho

was led to bid as he did.

15. Turning to the Bombay Rules I think that Rule 422 contemplates that if property is sold subject to an incumbrance it shall be so stated, and the

nature and amount stated. In condition 15 nothing is said as to the rate of interest nor as to any arrears. This would be material information for a

purchaser to know who bought subject to those mortgages. The absence of such information would again tend to show that the mortgages would

be discharged before completion. Further u/s 55(1)(g) of the Transfer of Property Act the vendor is bound to discharge all incumbrances except

where the property is sold subject to incumbrances.

16. The above are the principal points on the particulars and conditions. In my judgment they entirely fail to bring home to any reasonable person

what Mr. Rustamji says was sold, vis;, (1) a transfer of a first mortgage subject to redemption by the second and fourth mortgagees, and (2) a

conveyance of the equity of redemption vested in the mortgagor subject to the second and fourth mortgages. To apply Lord Justice James words

in Torrance v. Bolt on at p, 124 the conditions failed to convey to a purchaser''s mind this information which ought to have been conveyed to him,

viz., that, what he was buying was the right of instituting one or more suits in equity, and an immediate liability to two sums of Rs. 2000 and Rs.

3000 and interest which he might be called upon to pay at any moment.

17. I think, therefore, that the conditions must be regarded as misleading and that in fact they did mislead the purchaser. This is quite apart from

what was said at the auction by Mr. Ruatamji, viz., that the purchaser would not have to pay the moneys duo under the second and fourth

mortgages. The pencil note which Mr. Vakil made at the time against condition 15 was ""vendors (sic) were told that that fact would not affect the

sale."" ''Vendors'' is of course a slip for ''purchasers.'' That was the effect on his mind of what Mr. Rustamji said. Mr. Rustamji explains his

statement to mean that the purchaser would only be liable to be redeemed, and would not be personally liable for the mortgage debts. In saying

this he entirely overlooks the position of a purchaser of an equity of redemption, viz., that though not personally liable as between himself and the

mortgagee (see In re Errington [1894] 1 Q. B. 11 he has to covenant with the mortgagor to keep the mortgagor indemnified against the mortgage

debt. This follows as a matter of course in English convincing practice (see Key and Elphinstone''s Precedents in Convincing, 8th Edn., Vol. I,

Form 24, p. 522 and notes and Mills v. United Counties Bank, Limited [1912] 1 Ch. 231So, too, u/s 55(5)(d) of the Transfer of Property Act the

purchaser is bound to ""pay...the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon

afterwards accruing due.

18. The misleading conditions of sale were therefore made a good deal worse by this erroneous and misleading statement of Mr. Rustamji at the

auction. Unfortunately the Commissioner was unable to be present at the auction sale, or else the misstatement would doubtless have been

corrected there and then.

19. Mr. Kanga, who appeared with Captain for the defendant 3, argued that the purchaser''s objection re. the second and fourth mortgages was

not taken in his requisitions on title of 13th March 1918, and was therefore barred by condition C. But in the first place condition 6 only bound the

purchaser to make his requisitions ""on the title as deduced by such abstract"". The title as deduced by the abstract actually furnished did not

however disclose either of the second and fourth mortgages. I do not think, therefore, that the purchaser infringed condition 6. Further in the

absence of express stipulation, the expression ""abstract"" implies a perfect abstract. Apart, therefore, from condition 13 the abstract was imperfect

for non-disclosure of these two mortgages, and accordingly time would only run at any rate as regards those mortgages from the date when they

were abstracted. What effect condition 13 had on condition 6, I think I need not decide. On the merits it is clear that requisition 5 asked by whom

it was proposed that the conveyance to the purchaser should be executed. On the receipt of the reply ""the plaintiff and the third defendant"", the

purchaser by his letter of 18th March asked why the second and fourth mortgagees had not been made parties to the suit, and subsequently by his

letter of 3rd April required specifically that they must join in the conveyance and convey the premises free from their mortgage claims. I think this

objection really arises out of requisition 5 and that this is an additional reason for holding that it is not barred by condition 6. Accordingly in this

respect I agree with the Commissioner''s opinion of 20th April 1918.

20. This opinion was obtained under Rule 446 which provides that any disputed question arising out of objections or requisitions by a purchaser

may be brought before the Commissioner who shall certify his opinion and shall also certify by whom the costs ought to be borne. The

Commissioner in fact certified that in his opinion the sale was not a nullity and that the third defendant and the plaintiff were not bound to get the

second and fourth mortgagees to join in the conveyance to the purchaser. I am not sure what is the proper course for a ''purchaser to take who

desires to get such an opinion of the Commissioner reversed by the Judge. In the Chancery Division there is no procedure exactly corresponding

to Rules 446 and 447, but the opinion of the convincing counsel to the Court can be challenged before the Judge under R.S.C.O. 51, Rule 8. In

the present case the purchaser''s solicitors in their letters of 1st May and 27th June took the view that as they adhered to their objections on the

title the next step was for defendant 3 to take out a summons under Rule 447 as to whether a good title had been shown. Eventually on the 22nd

July defendant 3 took out the present summons under Rule 451 for payment.

21. Under the above circumstances I do not think that the purchaser is barred from disputing the accuracy of the Commissioner''s opinion. If an

order for payment is made under Rule 451 it involves a proper conveyance being given to the purchaser under Rule 457. Substantially therefore

this summary procedure under Rule 451 amounts to trying a specific performance action on a summons. I need not decide whether the Court has a

discretion to require the matter to be determined in a separate suit in the ordinary way nor whether (1892) L.R. 19 I.A. 166 (Privy Council) would

apply here, for counsel for both the purchaser and defendant 3 asked me not to require a separate suit and consented to treat the summons as if it

was a suit for specific performance. The plaintiff who appeared in person agreed to nothing except that the sale should be set aside. Under these

circumstances I thought a separate suit was unnecessary, and that the principles of specific performance should be applied to Rule 451 despite the

plaintiff''s attitude as to the procedure. Under these circumstances I think I am exercising a wider jurisdiction than it was competent for the

Commissioner to exercise, for in effect I have to decide whether it is equitable to grant specific performance. Incidentally, therefore, I think it is

open to me to review the decision the Commissioner arrived at.

22. I do not think it necessary to deal in any detail with that decision, for the views which 1 have already expressed show that I disagree with its

conclusions and reasoning. The Commissioner was of opinion (a) that the purchaser could not object to the sale for he purchased the property

knowing full well what was offered for sale and (b) that condition 15 was notice to the purchaser that the sale did not affect the rights of the second

and fourth mortgagees. He appears, however, to have entirely overlooked what Lord Macnaghten described as a principle of supreme

importance, and which briefly stated is the principle of scrupulous fairness to High Court purchasers. I refer to Mahomed Kola Mea, v. Harperink

(1908) L.R. 36 IndAp 32; 11 Bom. L.R. 227, where both Courts in Burma had overruled a purchaser''s objections that he had been misled by the

officers of the Court into bidding Rs. 40000 for a valueless equity of redemption; whereas he thought he was buying free from all incumbrances.

There Lord Macnaghten in delivering the judgment of their Lordships of the Privy Council said (at p. 35):Ã¯Â¿Â½

Their Lordships regret to say that in their opinion there haw been a lamentable miscarriage of justice in this case.

23. And at p. 37:Ã¯Â¿Â½

So the matter would have stood if the question had arisen between outsiders and the Court had had no concern in the matter beyond the duty of

exercising its judicial functions. But over and above all this there is involved in this case a principle of supreme importance which the learned judges

of the Chief Court entirely disregarded.

It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and

very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at

any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or

unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were

to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientiously as this.

24. I must not be understood to impute any intentional unfairness here. I do not do so; but neglect of elementary principles in settling conditions of

sale may easily mislead a purchaser. It must be remembered that the vendor knows his title and the purchaser does not, and that accordingly

conditions guarding against a known defect must clearly show to a purchaser what that defect is. And condition 15 does not stand alone. I have

already commented on the first sentence in condition 13. Apart from its inaccuracy, it is to my mind a typical example of a condition which should

never have been inserted in any Court-sale. If that sort of condition was to be prevalent, no purchaser would be safe in even bidding without first

employing a solicitor to abstract, inspect and advise on the documents specified in the schedule.

25. So, too, I think it was quite wrong not to abstract the second and fourth mortgages. The excuse given by Mr. Rustamji is that these documents

were not in his possession and that he acted under the Commissioner''s directions. He some to have entirely overlooked the fact that an abstract is

an abstract of title and not merely of documents in the vendor''s possession, and that the intentional omission of material documents in an abstract is

a serious offence. Mr. Rustamji, however, frankly admitted that he had little experience of mortgage actions. This was unfortunate both for the

purchaser and the Commissioner as they had largely to rely on his work; and I think under the circumstances it would have been legitimate for the

Commissioner to require counsel''s opinion to be taken.

26. Mr. Kanga argued that the point as to the conditions being misleading was not taken before the Commissioner, and that consequently I should

disregard the purchaser''s present complaint. He also argued that this complaint was an afterthought by the purchaser in order to get out of a

bargain which had become unprofitable by reason of some recent municipal orders limiting the number of buffaloes that can be kept in a certain

space. The latter suggestion is, in my opinion, quite unfounded. The purchaser offered before me, as he had offered previously, that he would

complete the sale if the second and fourth mortgagees would join or recovery. That offer was refused by the defendant 3 who insisted that the sale

was subject to the second and fourth mortgages.

27. As regards the former argument, the purchaser did take the main point before the Commissioner, viz., as to the two mortgages. His attitude

was to get what ho thought he had bought, viz,, the property free from incumbrances. It was not till that point was decided against him that the

question as to being misled would really arise. Further it is just possible that his solicitors felt some hesitation in arguing before the Commissioner

that conditions approved by the Commissioner were misleading.

28. I do not think, therefore, there is any substance in this argument of Mr. Kanga, nor that there has been any such delay on the part of the

purchaser as might disentitle him from taking the points he has. The more the purchaser was misled by the conditions the more likely it would be

that he would require time to realise that first the vendor and secondly the Commissioner were of opinion that he had bought something quite

different from what ho thought he had bought.

29. Mr. Kanga laid stress on the words ""all the right, title and interest...in the particulars. But the conditions must be read as a whole, and I have

given my opinion of them as a whole. It is said that it has been the practice for the last fifty years or more to insert these words in the auction

particulars in Court-sales in mortgage suits. If that be so, I think it is high time to make a change and to drop those words in the particulars. That

they are depreciatory is obvious. It is also an objection that they afford a refuge for the lazy or incompetent practitioner for he can deliver a short

or defective abstract without taking the trouble to get his title into order, and can answer requisitions by saying that the purchaser only bought

whatever interest, if any, the vendor had. On the other hand I have not yet heard any reason for their insertion, and I cannot help thinking that the

practice, if it really exists at all, arises from a confusion between decrees for sale in a mortgage suit on the one hand and executions of a money

decree against a judgment-debtor on the other hand, in which latter case all that can be sold is of course the right, title and interest of the judgment-

debtor.

30. I asked Mr. Kanga what precise form he thought the conveyance would take and whether the mortgage-debt of defend-and 3 would be

transferred. The reply was that the conveyance would only be of all the right, etc. Now the right of a mortgagee is to hold the property as security

for the mortgage debt, and as at present advised I am not satisfied what the position of the purchaser would be if the mortgagee only transferred

his interest in the land and not in the debt. There is of course no question of the present being a sale by a mortgagee under the power of sale.

31. Moatyn v. Mostyn [1893] 3 Ch. 376 is an instance of a Court-sale where the purchaser was held entitled to an absolute conveyance

notwithstanding conditions under which it was argued the property was only sold subject to certain incumbrances. Accordingly there the first

mortgagees were held not entitled to insert in the conveyance the qualifying words ""according to their estate and interest in the premises...and not

further or otherwise."" I have not overlooked the recent decision of the Privy Council in Het Ram v. Shadi Lal (1918) L.R. 45 IndAp 130; 20 Bom,

L.R. 798 where it is said at p. 133 that ""on the making of the order absolute (for sale) the security as well as the defendant''s right to redeem are

both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

Assuming, without deciding the point, that that passage is applicable to the decree of 23rd July 1917, I think it does not assist defendant 3 for his

right would be to have the property itself sold and not the interest of himself and the mortgagor in it.

32. I do not propose to discuss the interesting question raised in Gee, v. Liddell [1913] 2 Ch. 62 as to how far a decree for foreclosure is binding

between the parties to a suit as contrasted with those who are not parties.

33. I think, however, in the present case, that the insertion of the words ""right, title and interest"" coupled with the other conditions does raise the

point whether the Commissioner had any jurisdiction to effect the sale contended for by defendant 3. An Official executing the Court''s decree has

no power to alter or amend that decree. That is for the Court alone to do. Hero the Court thinking all parties were before it, ordered the whole

property to be sold. The Commissioner, however, according to defendant 3, has sold something quite different. As at present advised I am inclined

to think ho had no jurisdiction to do so, but I do not propose actually to decide the point as it has not been argued before me, and I can arrive at

my conclusion quite apart from it.

34. Nor again do I propose to comment on the inaccurate recital in the Commissioner''s report of 14th April 1917 as to the enquiry he was

directed to make by the consent decree of 3rd December 1915; nor on the inaccurate finding that a certain sum was due to the third defendant

under the ""transfer of mortgage of 17th October 1910"". A perusal of the decrees or orders of 11th October 1911, 21st August 1914 and 3rd

December 1915 will show what I mean and that the present is an unusual case. The mortgagor was not a party to the transfer, and there is a

difference of some Rs. 10459 between what the mortgagor has to pay under the mortgage and transfer, and what can be claimed under the

transfer alone: and this difference of Rs. 10459 the transferors, defendants 1 and 2, and not the mortgagor have had to pay to defendant 3. The

report was however confirmed by the order of 23rd July 1917; so I doubt whether the purchaser could take any objection to it and in fact he has

not. There appears to be a clerical slip in the decree as to the future interest being at one and a half per cent, ""per annum"" instead of ""per month"" as

in the Commissioner''s report.

35. This brings me now to my conclusions on the summons. I have only to add that as the purchaser''s offer to complete an unencumbered sale has

been refused, he asks for the sale to be set aside. I do not understand him to ask the Court to enforce a sale free from incutnbrances. In this, I

think his counsel Mr. Vakil is right, for if he asked for specific performance of the contract as ho understood it. I should then have to consider

whether defendant 3 or the Commissioner ever intended to make such a contract, and if not, whether it would be equitable to grant specific

performance against them.

36. In my opinion this in not a case which can be decided merely on the true construction of the particulars and conditions of sale coupled with Mr.

Rustamji''s statement at the auction. In my judgment the true view is that the parties were never really ad idem, for the vendors honestly thought

that they were selling one thing and the purchaser honestly thought he was buying another thing. Further, even if the question of construction be

decided in the vendor''s favour, I am satisfied that he cannot hold the purchaser to the contract having regard to the misleading conditions of sale

and the /statement at the auction.

37. My conclusion, therefore, is that having regard to all the circumstances of the case this sale cannot be upheld in a Court of Equity and must be

set aside. But I think I need not put the parties to the expense of a separate summons for the return of the deposit and costs. As to this I think I

have power to act under Rule 449, and 1 accordingly direct that the purchaser be repaid his deposit and also his costs, charges and expenses

occasioned by his bidding for and being declared the purchaser of the property and of and incidental to the proceedings before the Commissioner.

He must also, I think, ho paid his costs of this summons. All these costs will be paid to him by defendant 8 without prejudice as to how such costs

and defendant 3"s own costs of the sale and this summons should ultimately be borne as between defendant 3 and the person entitled to the equity

of redemption. Plaintiff must bear her. own costs if any.

38. The order will be prefaced by a statement that the Court being of opinion that the certified opinion of the Commissioner dated the 26th April

1918 ought not to be upheld and that the conditions of sale were misleading and that the parties were never ad idem as to what was being sold,

dismisses defendant S"s application for payment of the balance of the purchase money and directs that the auction sale purported to be effected in

this suit be set aside.

39. That finishes all I have to say on the summons. I should now briefly refer to a petition which the plaintiff Chimabai presented to me on

September 14, 1918, asking for a review of Kajiji J".s order of 23rd July 1917, or alternatively for an inquiry by the Government solicitor or

otherwise. This is the result of the adjournment which I granted her from the 6th to 17th September in order to obtain legal assistance and to urge

anything she might wish to urge on the above summons. Para 2 of the petition is inaccurate but it raises no objection to the sale being set aside. The

remaining 40 paras deal with the suit generally. Till I read them I had not been informed that this was the same suit as that in which serious chargos

of forgery were recently made, and in which it was alleged that the letter-books of the solicitors on both sides had been tampered with. The facts

will be found in Imp. v. Ramdin Binda (1918) Crim. Appeal No. 57 of 1918, decided by Heaton and Beamall JJ. on 19th June 1918.

(Unreported).

40. I accordingly thought it proper particularly as the petitioner was a litigant in person to call for the file of that criminal case, and also with the

assistance of my Registrar Mr. Bhojwani to go through the more material documents on the file of the civil case. In the result I see that this civil suit

is one which has been dealt with by Macleod J. or by Kajiji J. while acting for him. I think, therefore, that the plaintiff"s petition should be dealt

with by Macleod J. and I will accordingly direct it to be forwarded to him for disposal. I express no opinion on the merits nor whether having

regard to the lapse of time that petition can be entertained. But if I have grasped the figures correctly it is unpleasant to think that a mortgage for

Rs. 6000 on a property now worth Rs. 29000 can in some ten years swell to Rs. 22750, and that some means in those ten years were not taken

to stop compound interest mounting up at 15 per cent per annum with monthly rests, for that interest practically nullified the sub-stantial successes

which the plaintiff appears to have gained in fighting the claim of defendant 3 and his transferors defendants 1 and 2. As regards defendant 3 he

appears to have paid Rs. 18256 to defendants 1 and 2 on the transfer of 17th October 1910 and to have been repaid by them Rs. 10459 in

pursuance of the order of 21st August 1914 and to be still owed by the plaintiff the above Rs. 22750 and upwards. So he has got or is entitled to

over Rs. 33000 for his outlay of Rs. 18256, verily a case of an estate being eaten up by compound interest. It is therefore not surprising that the

petitioner lays stress on the alleged agreement contained in the two letters of 27th June 1914 between her former solicitors and the solicitors for

defendant 3 under which, according to her, defendant 3 agreed to forego interest in consideration of being allowed to give up possession. It is

these letters which her former solicitors Messrs. Jehangir, Mehta and Somji and the solicitors for defendant 3 Messrs. Jamshetji, Rustamji and

Devidas both say are forgeries. She retorts by saying they have conspired to injure her interests.

41. I regard this petition however as distinct from the summons and it does not now, I think, affect the purchaser. But I think the history of this

unfortunate suit with its charges of fraud and forgery makes it all the more essential that a purchaser should know precisely what he is buying and

that the Court should give him adequate protection and that he should not be asked lightly to step into the shoes of defendant 3.

42. But whether the plaintiff''s petition for a review be granted or not, it will presumably be necessary for the defendant 3 to take some further step

before his security can be realised, and when he does so and the plaintiff is heard on that application, I have no doubt but that this Court sitting as a

Court of Equity will see that equity is done to the plaintiff and defendant 3 alike.