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**SONI LALJI JETHA & ORS.**

v.

**SONI KALIDAS DEVCHAND & ORS.**

October 14, 1966

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[K. SUBBA RAO, C. J., R. S. BACHAWAT AND  
J. M. SHELAT, JJ.]

*Adverse possession—Agreement to sell mortgaged properties—Subsequent sale to mortgagee in possession—Possession of mortgagee, if adverse—Trusts Act (2 of 1882), s. 91—Transfer of Property Act (4 of 1882), s. 40, para 2.*

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The karta of a joint Hindu family executed in 1907 a deed of mortgage with possession in respect of certain family properties. After the death of the karta, the coparceners, by an agreement of sale in 1930 agreed to sell, subject to the mortgage, the properties to respondents 1 and 2. Later, the coparceners, by a registered sale deed, sold the properties to L and K, sons of the original mortgagee. Respondents 1 and 2 filed a suit for specific performance of the earlier agreement. The suit was decreed. In the sale deed obtained from the Court, in pursuance of the decree, K was not made one of the conveying parties, but was made an attesting witness. In 1947, respondents 1 and 2 filed a suit for redemption and possession against L and K. L contended, *inter alia*, that as a result of the later sale deed, he and K became absolute owners and the right of redemption by the mortgagors and those claiming through them became extinguished; that his possession, being to the knowledge of respondents 1 and 2, was adverse against them and therefore the suit was barred by limitation; and that the decree for specific performance could not affect the adverse nature of the possession of K and L as K was not one of the conveying parties but only an attesting witness. In appeal by L, this Court,

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HELD : In spite of the existence of a previous contract of sale, a sale to a subsequent purchaser even with notice is not void, but voidable at the instance of the party agreeing to purchase under a previous contract and except for the obligation arising from s. 91 of the Trust Act and paragraph 2 of s. 40 of the Transfer of Property Act, the title to the property would pass from the vendor to the subsequent transferee. [879 G-H]

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The sale in favour of K and L was not void but voidable at the instance of respondents 1 and 2 by reason of their earlier contract and though as between the mortgagors and K and L the sale was valid and binding, it was subject to the right of specific performance which respondents 1 and 2 had acquired and K and L being in a fiduciary position, their possession was not adverse as against respondents 1 and 2. Therefore the suit for redemption was not barred even though the statutory period had expired. [880 E-F]

Further, being an attesting witness, K, both for himself and on behalf of L, was made fully aware that the sale deed conveying the title of the property was being passed in favour of respondents 1 and 2 and that the only right in them was to receive the mortgage amount and no more. [881 B-C]

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*Lala Durga Prasad v. Lala Deep Chand*, [1954] S.C.R. 360, relied on.

*Gafur v. Bhukajir Govind*, I.L.R. 26 Bom. 159, *Sathiraju v. Venkenna* A.I.R. 1935 Mad. 333 and *Appa Rao v. Keerana*, A.I.R. 1953 Mad. 409, approved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 727 of 1964. A

Appeal by special leave from the judgment and decree dated December 9, 1957, of the Bombay High Court in Civil Appeal No. 2 of 1956.

*Sarjoo Prasad* and *D. N. Mukherjee*, for the appellants. B

*J. A. Baxi*, *A. Rehman* and *K. L. Hathi*, for respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

**Shelat, J.** One *Soni Virji Sundarji* for himself and on behalf of the Hindu joint family of which he was the *Karta* executed a deed of mortgage dated December 11, 1907 in respect of two shops in *Jamnagar* in favour of *Jetha Roopchand*, to secure repayment of Rs. 800 advanced to the said family. The said mortgage was with possession and was redeemable in 8 years. On August 25, 1930 the coparceners of *Virji*, who had died in the meantime, by an agreement of sale agreed to sell and respondents 1 and 2 agreed to purchase the said two shops together with certain other properties for Rs. 3,200, subject of course to the said mortgage. In spite of the said agreement of sale the coparceners of *Virji* by a registered deed of sale dated September 10, 1930 sold the said shops and the said properties to *Lalji Jetha* and *Kanji Jetha*, the sons of said *Jetha Roopchand*, for Rs. 3,400. The said *Lalji* and *Kanji* both died and the appellants and respondents 3(1) to 3(9) are the heirs and legal representatives of the said *Lalji* and *Kanji* respectively. C

On October 1, 1930, respondents 1 and 2 filed a suit being suit No. 263 of *Samwat* Year 1987 (1931 A.D.) for specific performance of the said agreement dated August 25, 1930 against the said mortgagors and the said *Kanji*, being defendant No. 5 therein. *Lalji*, however, was not made a party defendant. Respondents 1 and 2 alleged in the suit *inter alia* that as *Kanji* was anxious to purchase the said shops, he, in collusion with the said mortgagors and with *mala fide* intention, sought to purchase the said properties for a sum higher than the one agreed to by them and got the mortgagors to commit breach of the said agreement in order to deprive them of the benefit of the said agreement. The plaint contained a prayer for specific performance against the mortgagees being defendants 1 to 4 and for a decree against *Kanji* to hand over possession of the said shops on respondents 1 and 2 paying off the amount due under the said mortgage. The basis of the suit thus was that *Kanji* had not acquired any ownership in the said shops and only possessed the mortgagees' rights therein. The Trial Court declined to grant specific performance and awarded damages. On appeal by respondents 1 and 2 the Joint Civil Judge by his D  
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A judgment and decree dated August 16, 1943 reversed the judgment and decree of the Trial Court dismissing the suit and allowing the appeal passed a decree for specific performance against the said mortgagors. The defence of Kanji that he was a *bona fide* purchaser without notice was rejected. The Joint Civil Judge observed in his judgment as follows:—

B “All the equities in the case are in favour of the plaintiffs and I therefore pass a decree for specific performance of the contract as prayed for by them in their  
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plaint subject of course to the modification mentioned above *re*, their deferred right to secure possession of the shops later on after redeeming the same from the 5th defendant.”

He directed Kanji on payment of Rs. 2,065 to him by respondents 1 and 2 to hand over possession of the said shops and also directed that : “all the defendants respondents should execute the necessary registered formal sale deeds about all the five properties in favour  
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of the plaintiffs subject of course to Kanji Jetha’s right to continue in possession of the two shops till the plaintiffs redeem the mortgage of 1907 Ex. 21.” Neither Kanji nor the mortgagors filed any appeal against the said judgment and decree and therefore that decree became final and binding as between the parties.

E On October 8, 1947 respondents 1 and 2 filed Suit No. 283 of 1949 for redemption and possession against Kanji and Lalji. In his written statement Lalji alleged that since he was not a party to the earlier suit the said decree was not binding upon him, that as a result of the said deed of sale dated September 10, 1930 he and Kanji became absolute owners and the right of redemption by the  
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mortgagors and those claiming through them became extinguished, that Kanji had by an oral sale transferred his right, title and interest to him and therefore he was the absolute owner, and lastly that as a result of the sale deed he acquired ownership, that his possession was to the knowledge of the plaintiffs and was adverse against them and therefore the suit was barred by limitation. Kanji also filed a written statement supporting Lalji in regard to his having transferred to him his right, title and interest in the said shops.

G The Trial Court held that as Lalji was not a party to the former suit the said decree was not binding on him, that on the passing of the said sale deed Kanji and Lalji claimed their possession as owners, that their possession was adverse, that the said decree did not affect Lalji’s title, ripened as a result of adverse possession, that the present suit ought to have been filed before 1942 and therefore a preliminary decree for redemption could only be passed  
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against Kanji. On this footing, the Trial Court dismissed the

suit against Lalji. This decree meant that the Trial Court did not accept the contention of Kanji and Lalji that the former had parted with his right, title and interest in favour of Lalji as alleged by them. Respondents 1 and 2 filed Appeal No. 104 of 1951 in the District Court, Jamnagar. Lalji also filed cross-objections on the ground that he had purchased Kanji's right, title and interest in the said properties before the decree was passed in the former suit and therefore the decree being only against Kanji it was not binding upon him. By his judgment and decree dated November 18, 1952 the District Judge allowed the appeal of respondents 1 and 2 holding that Kanji being the elder brother, became the Karta and manager of the said joint family on the death of the said Jetha, that Kanji represented the joint family and therefore it was not necessary to join Lalji as a party in the said suit and the decree was valid and binding on both the brothers. The District Judge also rejected Lalji's plea of his having acquired Kanji's interest in the said shops and dismissed his cross-objections. The District Judge held that the sale deed in favour of Lalji and Kanji conferred no right on them as against respondents 1 and 2 and since their agreement was in point of time earlier than the said sale deed they were entitled to a decree for specific performance. He also held that though 12 years had passed since the execution of the said deed Lalji could not become the owner of those properties by adverse possession as a mortgagee-in-possession cannot by merely asserting possession as an owner under an invalid sale convert his possession into adverse possession.

Lalji filed a second appeal, being Second Appeal No. 20 of 1953. By that time various States in Saurashtra had formed themselves into the United States of Saurashtra. The appeal was filed in the then High Court of Saurashtra and was heard and disposed of by a single Judge of that High Court. By his judgment and decree dated September 3, 1955 the learned Single Judge allowed the appeal and dismissed the suit holding that though Lalji and Kanji as mortgagees in possession could not convert their possession during the subsistence of the said mortgage into adverse possession by assertion of ownership in the property or otherwise by an unilateral act, if by common consent the mortgagors and the mortgagees agree to put an end to the mortgagees' estate by the mortgagors executing a deed of sale and the mortgagees assert their right by ownership under such a sale, even if such sale were to be declared to be invalid their possession becomes adverse and such adverse possession ripens into a title if it continues for the statutory period. He also held that the said decree for specific performance declaring the said sale as invalid had not the effect of disturbing the adverse quality of such possession and that its effect on the contrary was to accentuate the adverse character of such possession.

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**A** Aggrieved by the said judgment and decree respondents 1 and 2 filed a Letters Patent Appeal. By the time the said appeal came up for hearing the State of Saurashtra had merged in the State of Bombay under the States Reorganisation Act and the appeal was heard by a Division Bench of the High Court of Bombay at Rajkot. The Division Bench allowed the appeal, reversed the judgment and decree passed by the learned Single Judge and restored the judgment and decree passed by the District Judge. The Division Bench took into account the fact of a deed of conveyance dated April 29, 1947 having been executed through the court in pursuance of the said decree for specific performance by the mortgagors and signed by Kanji as an attesting witness. On the strength of this deed the Division Bench held that Kanji and Lalji held the said shops in their capacity as mortgagees only, as the said shops were now conveyed to respondents 1 and 2. But the Division Bench also held that even before the execution of the said deed dated April 29, 1947 Kanji and Lalji were not in adverse possession since their possession could never amount to adverse possession in law and therefore Kanji and Lalji were at no point of time in adverse possession of the said shops.

The appellants then applied for a certificate in the High Court and on its refusal obtained special leave from this Court and that is how this appeal has come up before us for hearing and final disposal.

**E** Mr. Sarjooprasad for the appellants criticised the judgment of the Division Bench as erroneous and in our view his criticism has some justification. For, while observing that possession of Kanji and Lalji could at no point of time be adverse the Division Bench slipped into an error in failing to take into account the legal effect of the sale dated September 10, 1930. It is true that as mortgagees-in-possession Kanji and Lalji derived their title to possession through the mortgagors and by virtue of their rights under the said mortgage. They were entitled therefore to continue to be in possession under the said mortgage and so long as it subsisted. By merely asserting rights of ownership in the said shops they could not convert their possession as mortgagees and unilaterally alter their lawful possession as mortgagees into possession hostile to the mortgagors. But it is a well settled proposition that a mortgagor can sell the mortgaged property to his mortgagee and thus put the mortgagee's estate to an end and thereafter all the right, title and interest in the property would vest in the mortgagee. Such a sale would be valid and binding as between them and henceforth the character of possession as a mortgagee would be converted into possession as an absolute owner. Even if such a sale is held to be voidable and not binding on a subsequent purchaser the character of possession based on assertion of absolute ownership

by the mortgagee does not alter, and if that possession continues throughout the statutory period it ripens into a title to the property. In *Subbaiya Pandaram v. Mohamad Mustapha Maracayar*<sup>(1)</sup> a suit was brought by the appellant in 1913 against the respondents for possession of immovable property which had been dedicated to the endowment of a *chattaram* by deeds of trust executed in 1890 by the appellant's grandfather. In 1898 the first respondent purchased part of the property at a sale in execution of a decree against the appellant's father and the purchaser and the other respondents who claimed under him had since been in possession. In 1904, in a suit to which the first respondent had been joined as a party at his own request, a decree was passed declaring the validity of the said trust but no steps had been taken in consequence of that decree prior to the instant suit. The Privy Council observed that though the real argument in favour of the appellant was that in the presence of the purchaser it was declared that the said trust was valid and that the said property was trust property the contention that the said declaration operated as *res judicata* against the respondents and prevented them from asserting that the property was theirs was not tenable:

"At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been made subject to a trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession, it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late."

This decision was followed in *Dagadabhai v. Sakharam*<sup>(2)</sup> where the High Court of Bombay held that if a decree for possession in plaintiff's favour does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, it cannot be said that it had interrupted possession; nor can it in law affect the nature of the possession, unless it does so in fact. On this basis the High Court held that the possession of the defendant must be deemed to have been adverse throughout and could not be said to have been interrupted by the mortgage decree. (See also *Bogilal v. Ratnalal*).<sup>(3)</sup> The observation made by the High Court that possession of Kanji and Lalji was at no point of time adverse is clearly contrary to the decision of the Privy Council and the two decisions of the High Court of Bombay which were binding on them. The fact that a decree for specific performance was passed in Suit No. 263 of S.Y. 1987 would not affect the character of possession of Kanji and Lalji nor would the declaration therein made that the sale deed in their favour was not

(1) 50 L.A. 295 at 299.

(2) A.I.R. 1948 Bom. 149.

(3) A.I.R. 1939 Bom. 261.

- A valid and binding on respondents 1 and 2 have the effect of altering the character of their possession. Therefore, except for the rights and equities in favour of respondents 1 and 2 by virtue of the agreement of sale of August 1930, the sale in favour of Kanji and Lalji by the mortgagors was a valid sale and conveyed title in the shops in their favour. So far there would be no difficulty in the way of Mr. Sarjoooprasad.

- B But paragraph 2 of s. 40 of the Transfer of Property Act, 1882 in clear terms lays down that where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein, such right or obligation may be enforced against a transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands. It is a right no doubt arising from contract and the person agreeing to purchase the property thereunder does not acquire any interest in the property. Section 54 of the Transfer of Property Act in terms provides that such a contract of sale does not create as in English law any equitable estate in the immovable property which is the subject-matter of the contract. But as aforesaid, the contract creates an obligation which is recognised by section 3 of the Specific Relief Act, 1877 and section 91 of the Indian Trusts Act, 1882. Section 3 of the Specific Relief Act defines an "obligation" as including every duty enforceable by law and a "trustee" as including every person holding expressly, by implication or constructively a fiduciary character. Illustration (g) to that section reads as follows :

"A buys certain land from B, with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act for B, of the land so bought."

- F This principle is embodied in section 91 of the Indian Trusts Act which lays down that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

- G In *Lala Durga Prasad & Anr., v. Lala Deep Chand & Ors.*(1)—this Court after considering these provisions observed that in spite of the existence of a previous contract of sale, a sale to a subsequent purchaser even with notice is not void but voidable at the instance of the party agreeing to purchase under a previous contract and except for the obligation arising from section 91 of the Trusts Act and paragraph 2 of section 40 of the Transfer of Property Act the title to the property would pass from the vendor to the subsequent transferee. In *Gafur v. Bhikaji Govind & Ors.*(2) the facts were almost

(1) [1954] S.C.R. 360.

(2) 26 I.L.R. Bom. 159.

similar to the facts in the present case. The first defendant there had entered into an agreement dated June 25, 1895 to sell certain land to the plaintiff. On December 19, 1895 he sold the land to the second defendant by a registered deed. The plaintiff then sued the first defendant for specific performance and got a decree dated March 8, 1897 in execution of which conveyance of the land was executed to him by the court. On his failing to obtain possession from the second defendant he filed a suit. It was found as a fact that the second defendant had purchased the said land in December 1895 with notice of the earlier agreement of June 1895 with the plaintiff. The High Court held that the plaintiff was entitled to possession and as the second defendant had purchased with notice of the plaintiff's contract he held the property for the benefit of the plaintiff to the extent necessary to give effect to that contract. In *Sathiraju v. Venkanna*<sup>(1)</sup> the High Court of Madras similarly observed that as a result of s. 91 of the Trusts Act the natural result of a person purchasing a property with notice of a prior contract in another person's favour is that the purchaser holds the property for the benefit of the latter to the extent necessary to give effect to the contract. But for all other purposes and as between the purchaser and the vendor, the purchaser is the owner and that is the reason why in such circumstances the decree in a suit for specific performance must direct the purchaser to join in execution of the conveyance. (See also *Appa Rao v. Veeranna*).<sup>(2)</sup>

It is thus clear that though the sale dated September 10, 1930 in favour of Kanji and Lalji was not void but voidable at the instance of respondents 1 and 2 by reason of their earlier contract and though as between the mortgagors and Kanji and Lalji the sale was valid and binding it was subject to the right of specific performance which respondents 1 and 2 had acquired and Kanji and Lalji being in a fiduciary position, their possession was not adverse as against respondents 1 and 2. Therefore their suit for redemption cannot be said to be barred even though the statutory period had expired. We thus arrive at the same result which the High Court reached though on different reasons.

The contention of Mr. Sarjooprasad, however, was that the said decree for specific performance cannot effect the adverse nature of possession of Kanji and Lalji as even when respondents 1 and 2 obtained the deed of sale from the court in April 1947 Kanji was not made one of the conveying parties but was made an attesting witness. As pointed out in *Lala Durga Prasad's*<sup>(3)</sup> case the logical course is to provide in such a decree that both the vendors and the subsequent purchaser should join in the deed of conveyance. The decree for specific performance did in fact provide that all the defendants in that suit that is, including Kanji should

(1) A.I.R. 1935 Mad. 333. (2) A.L.R. 1953 Mad. 409. (3) [1944] S.C.R. 360.

- A** sign the deed of conveyance. But it appears that through some misconception Kanji was not made to join in that conveyance and was only made to attest that document. But that would not, in our view, make any difference in the conclusion that as between Kanji and Lalji on the one hand and respondents 1 and 2 on the other the possession of the former could not be adverse and therefore there was no question of the suit of respondents 1 and 2 for redemption being barred by limitation. Further, being an attesting witness, Kanji both for himself and on behalf of Lalji was made fully aware that the sale deed conveying the title of the property was being passed in favour of respondents 1 and 2, and that the only right henceforth in them was to receive the mortgage amount and no more.
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For the reasons aforesaid, the appeal fails and is dismissed with costs.

Y.P.

*Appeal dismissed.*