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subject to the legal right of plaintiff to possession—what meaning was to attach to these concluding words the plaintiff has failed to explain; further, by clause 3, the defendant is to be entitled to the whole of the profits from the dairy and lands; and lastly under clause 4 defendant is to pay to plaintiff all rents, rates and taxes due upon the lands. It does seem to me that the covenants contained in these clauses are divisible from the covenants which operate as a Bill of Sale, although closely connected it cannot be said that they are inseparable from and dependent upon one another. The plaintiff agrees to permit defendant to use the lands, and the defendant agrees to pay the rents, rates and taxes to plaintiff for the same when due. I do not find that this agreement is to stand or fall whether or no the defendant fulfills the terms of the payment under clause 2 of the agreement, nor do I find that the defendant by the agreement has in any way mortgaged or hypothecated the leases to the plaintiff, or in other words that the plaintiff has any lien or charge in respect thereof.

In the case of *Davies v. Rees*, 17 Q.B.D. 1886, p. 408, relied upon by the learned counsel the Court held that a covenant for the payment of principal and interest formed an integral part of a Bill of Sale and therefore if the Bill of Sale were void it would fail. The covenants referred to do not in my opinion form an integral part of a Bill of Sale; they are separate and independent.

I find therefore that so much of the plaintiff's claim as is founded on the Bill of Sale must fail and that the plaintiff is entitled to recover from the defendant the rent, rates and taxes, if any, in terms of the covenants contained in the agreement.

[CIVIL JURISDICTION.]

[ACTION No. 3, 1923.]

DIN MAHOMED KHAN v. ANNIE GASPARD.

Real Property Ordinance 1876—Judgment of Supreme Court—entry on Certificate of Title under provisions of Rule 286 of the Civil Procedure Rules 1875. Effect of section 91 of the Real Property Ordinance—Order for sale made under Rules 321 and 322—as to practice and procedure thereon—jurisdiction of Court to rehear. Defendant registered a mortgage prior to the Order for sale and filed a caveat subsequent to such order being made—submitted the Certificate of Purchase issued by the Court consequent on the sale is not final and binding against defendant.

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Held, (1) Certificate final and binding against all parties
(2) Court no jurisdiction to rehear or alter the Order for sale.

Sir ALFRED YOUNG, C.J. This matter came before me by way of a Special Case. The facts leading up to the case are fully set out in the Statement of the Special Case, and therefore there is no need for me to repeat them seriatim.

Mr. Grahame of counsel, who appeared on behalf of Annie Gaspard, submits that the Certificate of Purchase, bearing date the 9th January, 1923, issued under the hand of the Acting Chief Justice and the Seal of the Court to Din Mahomed Khan and referred to in paragraph 17 of the Special Case is not final and binding against the defendant.

This certificate was issued as the result of the proceedings taken pursuant to the Order of the Court dated the 3rd November, 1922, for the sale by public auction of the interest of one Dwarka in a piece of land of about $17\frac{4}{10}$ th perches situated at Davuilevu, Rewa, in Fiji, and being the whole of the land comprised in the Certificate of Title registered under the provisions of the Real Property Ordinance 1876, in the Register of Titles Volume 45, Folio 4432. Mr. Grahame proceeded to argue that the procedure under which this order was obtained is contrary to law and altogether irregular. At this stage of the argument I indicated that it seemed to me that the effect of the application was in truth in the nature of a rehearing and for a revision of the order of the 3rd November, and in the light of authority I was of the opinion that this Court had no such jurisdiction. Mr. Grahame replied that owing to the facts of the case, the difficulty of appeal, and also to the fact that the order complained of was made by another Judge, the Court should entertain the present application. He then continued to argue, *inter alia*, that the Certificate of Title was conclusive evidence of title (section 14 of the Real Property Ordinance 1876) and that under section 39 of the Ordinance unregistered instruments were invalid. This proposition would no doubt be correctly put, provided that there had been no registration in the register of any charge or encumbrance binding and affecting the land. In the present case has there been any such registration so as to bind, charge or affect the land?

I find entered on the Certificate of Title (exhibit A), *inter alia*, a note or memorandum to the following effect:—

Order of the Supreme Court registered 2nd February, 1922, at 11 o'clock. Register of Caveats Book 45, Folio 2, J. P. Maharaj & Company for £170 10s. 4d. and £7 7s. costs against the interests of Amika (otherwise known as Maniram) in this land. (sgd.) Geo. S. Parker.

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Mr. Parker is the official attached to the Lands Titles Office whose duty it would be to make or note any entries in the Register of Titles. This entry was made pursuant to a request addressed to the Registrar of Titles by the solicitor of J. P. Maharaj & Co., in which they forwarded a sealed copy of a judgment for £170 10s. 4d. and £7 7s. costs obtained by J. P. Maharaj & Co. against two defendants, namely, Dwarka and Amika. As authority for this procedure Mr. Ellis of counsel who appeared for Din Mahomed Khan relies on the provisions of Rule 286 of the Civil Procedure Rules, 1875, which reads as follows:—

A judgment for the payment of money shall bind the lands, tenements, and hereditaments of the judgment debtor within the Colony to the extent of his beneficial interest therein, both at law and in equity, and the same shall be deemed to be attached by virtue of such judgment, in satisfaction thereof, from the date of the judgment, subject to Crown debts and to any prior *bona fide* mortgage, charge, or incumbrance thereon. Upon the filing of the judgment, as aforesaid, the Registrar shall forthwith record the same in the judgment book.

It is argued on the other side that these rules being of earlier date than the Real Property Ordinance 1876 cannot *per se* bind lands registered under the provisions of that Ordinance in that section 91 of the Ordinance provides a specific way in which land is affected under its provisions. However much there may be to be said in support of this argument, the provisions of section 91 have not been overlooked, inasmuch as the draftsman of Rule 286 has inserted a marginal note of reference to section 91 from which it might be inferred that the provisions of the rule and the section of the Ordinance were intended to be read together. The wording of the rule admits of no doubt that a judgment for the payment of money binds all the lands of the judgment debtor within the jurisdiction in that they are deemed to be attached by virtue of such judgment, subject to Crown debts and to any prior *bona fide* mortgage, charge or encumbrance. The legislature specifically took cognisance of the fact that lands registered under the Real Property Ordinance might be affected by the Civil Procedure Rules (rules approved by that body and subject to disallowance by His Majesty), inasmuch as section 109 of the Real Property Ordinance provides in certain circumstances for "an immediate Order of Sale of the lands notwithstanding the provisions contained in Rule 322 of the Civil Procedure Rules." The rule referred to and Rule 321 is the authority

under which the Court made the Order of the 3rd November, 1922, for the sale of the land.

The rules, however, do not prescribe any procedure for giving effect to the provisions of Rule 286, and on examination of the Register of Titles to land kept in accordance with the provisions of the Real Property Ordinance 1876, I find that as far back as 1881 it was the practice to lodge a caveat founded on a judgment, and that it was not until 1897 the first departure from this practice seems to have taken place, when a judgment creditor filed a notice of his judgment. He had, however, previously served the Registrar with a copy of a Writ of Seizure and Sale directed to the Sheriff to levy against the "goods and chattels" of the judgment debtor, a practice adopted at that date and previously; no doubt in an endeavour to comply with the provisions of section 91, but I am unable to follow how a writ of such a nature could affect a judgment debtor's lands. In 1910 I find the first introduction of the practice adopted in the present case where the judgment purported to be served pursuant to the provisions of section 91 of the Real Property Ordinance 1876. I must express my doubt whether such a judgment is a "Decree or Order" within the meaning of section 91. However, the practice referred to has continued generally to the present time.

The Order of the 3rd November, 1922, in effect treats the judgment creditor's registered charge on the land on the same footing as a "judgment mortgage" taking priority of other charges or mortgages of subsequent registration; an order no doubt based on the provisions of Rule 286 of the Rules of Civil Procedure, and following the interpretation which, apparently, has always been placed upon that rule and one with which I see no reason to disagree. Subsequent to the entry of the judgment debt Annie Gaspard, on the 26th August, 1922, registered her mortgage for £614 17s. 9d. in respect of the one undivided moiety of the land of which Dwarka was at that date the proprietor, Amika, otherwise known as Maniram, the judgment debtor, having transferred on the 21st August, 1922, his interest in the land to Dwarka. She was given notice as mortgagee by letter dated the 19th September, 1922, of the intention of the judgment creditor to apply to the Court for the sale of the land in satisfaction of the judgment debt registered against the land on the 2nd February, 1922. Annie Gaspard did not move in the matter, and on the 3rd November, 1922, the Court made the order for the sale of Dwarka's interest in the land, and ordered the balance of the

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judgment obtained by the judgment creditor on the 24th January, 1922, together with eight per cent. interest from the date of the judgment and the costs of the proceedings to be paid out of the proceeds of the sale, and the balance of the proceeds of the sale, after payment of all encumbrances registered against the interest of Dwarka in the land to be paid into Court for his benefit.

On obtaining this Order for sale the interest in the land was advertised for sale by public auction on the 6th January, 1923, subject to the settled conditions of sale.

Ten minutes before the sale Annie Gaspard through her solicitor filed a caveat forbidding the registration of any dealing with the land unless subject to her interest as a duly registered mortgagee. Notwithstanding the caveat the Acting Registrar of the Supreme Court, under whose direction the sale took place, allowed the sale to proceed in accordance with the terms of the order, and with the result that Din Mahomed Khan was declared the highest bidder, and on the 9th January a certificate of purchase of the interest of Dwarka in the land was issued to Din Mahomed Khan; the certificate is under the seal of the Court and signed by the Acting Chief Justice. Although the words "(subject to the mortgages and encumbrances notified hereunder)" occur in the certificate, none are noted thereon, and these words must therefore be treated as *non scripta*, inasmuch as under the terms of the order itself no such reservation is made unless therefore the order of the 3rd November, 1922, is set aside; the certificate is in my opinion final and binding against all parties. I have examined the question of the procedure adopted in obtaining the order for sale so as to enable me to form an opinion as to whether *ex debito justitiæ* I should venture to assume jurisdiction to review the order as requested by counsel, and, although the procedure followed to bind the land may not strictly comply with the requirements of the Real Property Ordinance 1876, it occasions, in my opinion, no substantial wrong. Whether Annie Gaspard was well advised in being allowed to accept as collateral security for the sum of £614 17s. 9d., Dwarka's interest in land, which at the sale only realised £230, is another matter, and to my mind affects the position of the solicitors upon whose advice she acted, the same firm of solicitors, it may be noted, who had registered J. P. Maharaj & Company's judgment on the 2nd February, 1922, and who obtained the order for the sale of the land, and are now the solicitors for Din Mahomed Khan.

I have above given my reasons for hearing lengthy argument on the case in which it has been approached from every point of view, and I have expressed an opinion on the fundamental points raised. However, on the authority of *Preston Banking v. Allsop & Sons*, 1 C.D., 1895, p. 141, I find this Court has no jurisdiction to rehear or alter the order of the 3rd November, 1922, and admitting that there was power, I doubt whether after this lapse of time since the date of the order complained of the Court would exercise such power without some very good reason being given accounting for the delay. In answer to question A of the Special Case I have already found that the Certificate of Purchase issued by the Court to Din Mahomed Khan is final and binding. As to question B, I have gone into the facts for the reasons given and so far find they are relevant. As to C, I have already indicated that as to the question whether Annie Gaspard had notice or not of the fact that the judgment of J. P. Maharaj & Company was registered prior to her execution of the mortgage is not material to the issue, but affects rather the position of the solicitors who were then acting for her. As to E, I find that Din Mahomed Khan is entitled to be registered as the proprietor of one undivided moiety (formerly the interest of Amika) in the land described in the Certificate of Purchase issued to him by the Court on the 9th January, 1923, and I accordingly order that the caveat registered in Register of Caveats Book 46, Folio 1, be withdrawn. Plaintiff to be allowed his costs.

Memo.—With reference to the observations in this judgment relating to the advice given to Annie Gaspard by Messrs. Garrick, Caldwell & Ellis, the firm of solicitors who drew the Mortgage Deed of the 25th August, 1922, Mr. Ellis of counsel stated at the Bar that he strongly advised Annie Gaspard against accepting as collateral security Dwarka's interest in the land dealt with, and pointed out to her that the registered judgment of J. P. Maharaj & Company would take priority of her mortgage.

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