Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dhonender Chunder Mookerjee and others v. *Mutty Lall Mookerjee and others, from the High Court of Judicature at Fort William, in Bengal; delivered 5th November* 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS was a suit instituted by the sons of Hurrish Chunder against Juggut Chunder and Sreeman Chunder Mookerjee, praying, amongst other things, that a certain deed of assignment, dated the 23rd of June 1854, of the Plaintiffs' shares and interest in a certain decree, which had been sold by Mohes Chunder Mookerjee to Juggut Chunder Mookerjee, might be declared as against them invalid and void as an absolute conveyance, "and that the said assignment "might be decreed to stand as a security only "for the sum of Rupees 5,000, and for anything "further which might be found justly due from "the Plaintiffs to the Defendants." Mohes Chunder Mookerjee was made a party to the suit, but no relief was prayed against him. The ground upon which the bill was framed was, that Juggut Chunder, who purchased the decree, stood in a fiduciary relation to the Plaintiffs, and that he had purchased the decree for an inadequate consideration. It appears that Doorga Churn Mookerjee was the father of Sib Chunder,

Sumboo Chunder, and Ramnarain; that Doorga Churn Mookerjee was possessed of considerable property, and having died, his three sons divided the estate. Sumboo Chunder took a portion of the estate, and Sib Chunder covenanted with Sumboo Chunder to discharge all claims against the estate of Doorga Churn. A claim was made againt Sumboo Chunder and others, as representatives of Doorga Churn, and a decree was obtained against them for about two lacs of rupees. Sumboo having died, Juggut as one of his executors compromised the suit for 80,000 rupees, and, as such executor, brought a suit against the representatives of Sib Chunder to recover that amount and other monies from his estate; and in that suit he obtained a decree for one lac and 70,000 rupees. That suit was brought by Juggut Chunder as the executor of Sumboo Chunder. The question is, whether, in that position, and in that character, he did not hold a fiduciary relation to the Plaintiffs in the suit. Sumboo Chunder died, leaving six sons, Juggut Chunder, who is the Defendant in this suit, Mohes Chunder, who is also made a party to this suit, Hurrish Chunder, Prawn Chunder, Cally Chunder, and Sreeman Chunder; but Sumboo Chunder before he died made a will, by which he left his property to his five sons. Sreeman Chunder was not then born.

Hurrish Chunder died, leaving the Plaintiffs in the suit his heirs, and consequently Juggut Chunder held the decree which he recovered against the representatives of Sib Chunder in trust for the benefit of himself and his brothers, and as to the share of his brother Hurrish Chunder for the benefit of the Plaintiffs. Hurrish Chunder appointed Juggut Chunder and Mohes Chunder his executors; and Mohes Chunder, as one of the executors of Hurrish Chunder, sold the interest of Hurrish Chunder's

sons to Juggut Chunder for the sum of 5,000 rupees; in other words he sold a fifth share of a decree for 1.70,000 rupees for 5,000 rupees. The Courts found that that was under value, and that an inadequate consideration was given by Juggut Chunder to Mohes Chunder for the purchase. It is said that Juggut Chunder, as one of the representatives of Hurrish Chunder, renounced. Whether he did so renounce, or could renounce, appears to be immaterial, provided he held in a fiduciary character, as executor of Sumboo Chunder, the share which belonged to the Plaintiffs as the sons of Hurrish Chunder. It is clear that he held the decree which he recovered as executor of Sumbo in trust as to a share for the benefit of the Plaintiffs who were the sons of his brother Hurrish.

Now both Courts have found that no adequate consideration was given for the purchase. It therefore appears that there was a sale of the interest of the Plaintiffs for an insufficient consideration to Juggut Chunder, who held in a fiduciary character for them. According to the rules of equity, that sale cannot stand as an absolute sale, but Juggut Chunder is bound to return the share of the Plaintiffs in that estate upon receiving back the purchase money which he gave for it.

The youngest son of Sumboo, Sreeman Chunder, was also made a Defendant in the suit. Sreeman Chunder is said to have been a party to the purchase by Juggut Chunder. He says that Juggut Chunder purchased the decree for the benefit of himself and Sreeman Chunder jointly. But if Juggut Chunder, holding the decree in a fiduciary position, could not purchase it for himself, could Sreeman Chunder employ Juggut Chunder, who held the decree in a fiduciary position, to purchase that decree for the benefit of himself and Sreeman Chunder

jointly? It appears to their Lordships that the same objection would apply to Juggut Chunder's purchasing for himself and Sreeman jointly as there would be to his purchasing for himself alone. One of the reasons for setting aside transactions such as this, is, that the purchaser is presumed from his position to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person, knowing that another holds a fiduciary position, and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself; therefore it was not necessary in this suit to file a bill to set aside the sale merely as to half the estate as against Juggut Chunder, and to allow it to stand as to the other half for the benefit of Sreeman Chunder. If it became necessary to investigate the evidence, there does not seem to be sufficient to shew that Sreeman Chunder actually advanced any part of the purchase money, or was really interested in the purchase.

The decree having been obtained by Juggut Chunder, the property of Sib Chunder's representatives was put up for sale by the sheriff in execution, and a portion of the property so put up was purchased under the decree, but Juggut Chunder did not actually pay money for the property which he so purchased. The price of that portion of the property which was sold in execution of the decree was credited to the decree, and only the balance remained due. Then Juggut Chunder held the balance of the decree, and also the property which he had purchased and paid for with the other portion of the decree,

in trust as to one fifth share for the benefit of the Plaintiffs. It was shown that Juggut Chunder re-sold portions of the property which he purchased at the sale under the decree for very much larger sums of money than those for which he purchased them. Both the Lower Courts found, as a fact, that the 5,000 rupees which Juggut Chunder paid as the purchase money of the share of the Plaintiffs was an inadequate consideration. Their Lordships would not disturb the finding on the question of value unless there was the clearest evidence to satisfy them that an adequate consideration was given for the property; but, so far from that appearing to be the case, their Lordships are satisfied that the Lower Courts came to a right conclusion in finding that there was an inadequate consideration.

Then it is contended that this suit cannot be maintained, inasmuch as a suit had been brought against Mohes Chunder, as one of the executors of Hurrish Chunder, for administration of the assets of his estate; and it is said that this suit is in the nature of a Bill of Review of the decree which was given in that suit, or that it is in the nature of a supplemental bill, or of a bill in aid of that decree. But it appears to their Lordships most clearly that that is not so, when they come to look at the nature of the two suits. The administration summons, which may be treated as a suit, was to compel Mohes Chunder to account for the monies which he had received as executor of Hurris Chunder. It is true that in the affidavit, and also in the petition which was filed in order to obtain that summons, it was alleged that Mohes Chunder, as the executor of the will of Hurrish Chunder, "had relinquished all claims to the decree for "Rupees 170,000, by executing the said deed of "assignment for the sum of Company's Rupees

" 5,000 only, and thereby had occasioned a " loss to the Plaintiffs of the balance of Com- " pany's Rupees 23,333." That was alleged in the petition; but it is clear that under a summons for an administration of the assets of an estate the executor could not be charged with negligence and wilful default. Accordingly the order which was made under that petition, referring the matter to the Master, did not direct the Master to inquire as to whether more could have been made by Mohes Chunder if he had not been guilty of wilful default, but merely to take an account of the assets which he had received; and that is all that the Master did. He found what Mohes Chunder had received, and stated that there was a small balance due from him to the estate; but he did not enter at all into the question of whether Mohes Chunder had committed waste; nor could he, under the order which was made by the Court, have entered into that question. When the matter was brought before the first Court, Mr. Justice Morgan says, " One point made by the Defendants is that " the same points have been raised by an " administration summons by the present Plain- " tiffs against the executor. The Master, how- " ever, properly declined to enter on an investi- " gation of this matter; " and the Master never did, nor did Mr. Justice Levinge, who made the order, direct the Master to enter into such an investigation. He could not, and did not, make such an order, and the matter never came before the Master at all.

Well, then, assuming that Mohes Chunder has been decreed to account for the 5,000 rupees which he had received from Juggut as the purchase money of the estate, that circumstance would be no reason why the heirs of Hurris Chunder should not have the purchase made by Juggut Chunder set aside upon returning the

amount to him. The two causes of action are quite different. The present suit is not in the nature of a review of the decree which has been made against Mohes Chunder. It is a suit against Juggut Chunder as a purchaser in his own right, and not as executor of Hurris Chunder. The other suit was against Mohes Chunder, to account for what he had received as executor of Hurris Chunder.

It appears, therefore, to their Lordships, that the Lower Court was right in declaring that the points raised by the administration summons, and the order and the reference to the Master, did not preclude the Plaintiffs from bringing this suit against Juggut Chunder. It is true that Mohes Chunder was made a party to the present suit, but whether it was necessary or not is immaterial. Possibly this decree might have been obtained against Juggut Chunder without making Mohes a party; but Mohes did not object to being made a party, and he does not appeal in this case. He is made a Respondent in this suit; he is not an Appellant.

Their Lordships do not repudiate the authority of any of the cases which were cited by Mr. Cochrane. Admitting them to their fullest extent they are not applicable to the present case.

Mr. Justice Norman says, "I see no reason why "an account should not be taken against one "executor on one principle and against another "in respect of a separate wrong committed by "him or separate relief sought against him." It appears to their Lordships that that remark is not applicable to the case. They have already pointed out that this is not a suit against Juggut Chunder as executor of Hurris Chunder, nor for a wrong committed by him in that capacity. The relief to which the Plaintiffs are entitled is upon the ground that the purchase which Juggut Chunder made was invalid, not because he was

executor of Hurrish Chunder, but because he was executor of Sumboo Chunder, and as such executor held, for the benefit of Hurrish Chunder's heirs, the share which he purchased from Mohes Chunder as executor of Hurrish Chunder.

Under these circumstances their Lordships think that the Lower Courts came to a right decision, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed. As there is no party appearing on the other side, it will be without costs.