

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Varden Seth Sam v. Luckpathy Royjee Lallah, from the Sudder Dewanny Adawlut at Madras; delivered 19th July, 1862.*

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Present :

LORD KINGSDOWN.

JUDGE OF THE ADMIRALTY COURT.

SIR EDWARD RYAN.

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SIR LAWRENCE PEEL.

SIR JAMES W. COLVILLE.

THIS is an appeal from a Decree of the Sudder Dewanny Adawlut, at Madras, reversing a decision in favour of the Plaintiff so far as it established a lien on certain landed property called the muttah of Tirupassur. This muttah, which was the property of the first Defendant on the Record, had been, as the Plaintiff alleged, duly charged in his favour by the first Defendant as a security in respect of the non-delivery of the title deeds of another estate called the muttah of Ekattur, purchased by the Plaintiff from him. After the creation of such charge the property was transferred, first to the third Defendant, and by him, pending the present litigation, to the last Defendant on the Record, Mr. Ouchterlony.

The Plaintiff alleged the existence, continuance, and validity of his security as against the third and the last Defendant.

In the Court of original jurisdiction, and in the first Appellate Court, the Plaintiff succeeded in establishing his charge, but on Appeal to the Sudder Dewanny Adawlut at Madras the Decree was reversed.

The Plaintiff is a Christian, and, from his name, appears to be an Armenian; the first Defendant is

the son of the second Defendant, and both are Mahometans ; the third Defendant is a Hindoo ; and the last on the Record is a Christian, and a British subject.

Though both the third and the last Defendants pleaded, in effect, that they were *bonâ fide* purchasers for value without notice, yet they did not prove that defence, though the Plaintiff charged notice and collusion with the first Defendant.

It appeared in evidence that, on the non-production of the title deeds of the estate Ekattur, it was promised on the part of the seller that they would be produced in a few days, but this promise was not fulfilled, as they proved to be in the possession of a prior incumbrancer. The Plaintiff was obliged, in order to procure them, to pay off this incumbrance; and, having previously paid a large part of the purchase-money, his whole payments exceeded the purchase-money by a considerable sum (3,810 rupees), for which, with interest, he claimed to be indemnified by his alleged security on the pledged estate. The contract of pledge contained, also, a further stipulation of purchase.

The decision of the Sudder Dewanny Adawlut, so far as it respects the enforcement of the lien against the third and last Defendants, appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law on the Company's Courts were insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity, and good conscience. The question then is whether the decision appealed against violates that direction or not. The Court of Appeal, reversing the prior decisions, has decided that the contract was not operative as a hypothecation, or pledge, even between the parties to it. Yet the evidence shows that the Plaintiff looked, not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If

the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahometan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one, not of pawn, but of trust (4 Hedaya, p. 208, tit. pawns). It is not declared that any writing or actual delivery is essential to the creation of such trust by that law; but as the contracting parties are not both Mahometans, that law would not have governed the question of the validity and force of their contract, even in the Supreme Court. The Plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitæ*, exists forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made, that is, the English law, the deposit of title-deeds as a security would create a lien on lands; though, as between parties who can convey by deed only, or conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves. The circumstance that the Plaintiff had not sued for a specific performance of the contract, to sell the land to him (on which the Sudder Court laid some stress), does not in the least affect his claim for a lien. By the contract this latter interest is immediately created, and expressed to be immediate. The sale is contemplated as future. The first Defendant's own acts, in dealing with his land as he did, would effectually bar him, and those taking derivative titles from him, from insisting on this objection, if it had had any original foundation of justice and equity to support it; but, in truth, they are distinct and independent parts of the same contract.

The contract, then, created between the parties a lien on the land. It is immaterial for the decision

of this suit to consider or decide whether that lien between these parties, looking to the power in the first Defendant to convey without writing, is legal or equitable (Doe, on the demise of Seebkristo, v. East India Company, 6 Moore's Indian Appeals, 267).

The question to be considered is, whether the third and sixth Defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value, *bond fide*, and without notice of this charge, whether legal or equitable, would have had in these Courts an equity superior to that of the Plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this case furnishes no such proof.

To give effect to the legal estate as against a prior equitable title, would be an adoption of the English law; and to adopt it, and yet reject its qualifications and restrictions, would be scarcely consistent with justice. The law in India has not enabled a purchaser of land to look only to the apparent title on the Collector's books, or the presumed title of the owner in possession. It is beyond the province of a Court of Justice to effect, by decision, a change so important as that which is involved in the principle of this decision.

Their Lordships must, therefore, humbly advise Her Majesty to reverse the Order appealed against, and to give to the Appellant the costs of the proceedings in the Court below, and of the present Appeal. Any costs paid by the Appellant under the Order reversed must, of course, be refunded.

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