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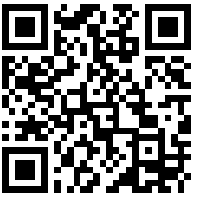

VARDEN SETH SAM - - - - *Appellant.*

AND

LUCKPATHY ROYJEE LALLAH, BUNHAH LALL, SADASEVA TANKER, and JAMES OUCHTERLONY - } *Respondents.**

*On appeal from the Sudder Dewanny Adawlut at Madras.*

3rd July, 1862.

THE question in this case related to the validity of a lien, created by deposit of the title deeds of an estate called the *Muttah* of *Tirupassur*, in the Presidency of *Madras*, in consideration of pecuniary advances made by the Appellant for the benefit of that estate.

The facts were these:—

In the year 1851, *Gulam Asen Khan Bahadoor*,

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

*Assessors*,—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

*Mad.* Reg. II., of 1802, sec. XVII., enacts, that in the absence of any positive law to the contrary, in force in the Presidency of *Madras*, that the decision of the Court is to be according to justice, equity, and good faith.

The Plaintiff was an Armenian and the Defendants, Hindoos, Mahomedans, and Christians. The Plaintiff sought by the plaint to establish a lien on land, created by an equitable mortgage by deposit of title deeds. Held (in the absence of any agreement that the transaction was to be governed by any particular local law), that, under *Mad.* Reg. II., of 1802, sec. XVII., the principles of English law respecting equitable mortgages applied.

*S.* purchased the *Muttah* of *E.*, and paid part of the consideration money. When the parties came to complete, the vendors had not the title deeds, but they promised to deliver them in a few days, and arranged that the remaining part of the purchase-money should be retained by the purchaser, and they handed over to him the title deeds

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and his father, *Sharpul Umra Sahib*, were in possession of three *Muttahs*, or Districts of villages, called respectively the *Muttah* of *Tirupassur* (otherwise called *Tripassur*), and the *Muttah* of *Ekattur* (otherwise called *Yagatoor*), situate in Districts of *Periyapalam*, and the *Muttah* of *Madhuravayal*, in the *Talook* of *Sydapetta*, all in the Presidency of *Madras*.

In the month of *September* of that year, the three *Muttahs* of *Tirupassur*, *Ekattur*, and *Madhuravayal* were attached by the Collector for *kist* due to Government, amounting to Rs. 8,049. 4a.; and the Collector advertised the *Muttahs* for sale in *October* following, for the arrears.

In this state of things, *Gulam Asen Khan* and his father, applied to the Appellant for assistance to prevent the sale, and offered to sell to him the *Muttah* of *Tirupassur* for Rs. 4,000, and the *Muttah* of *Ekattur* for Rs. 11,000, and stated that, except the claim of the Collector for arrears of revenue, there were no incumbrances affecting the properties; and it was, ultimately, on the 15th of *September*, 1851, agreed between them that the Appellant should purchase the *Muttah* of *Ekattur* for Rs. 11,000, and have the option of purchasing that

of another *Muttah*, called *T.*, to be held as security for their delivering to the purchaser the title deeds of *Muttah E.*, in order to perfect his title. The purchaser, on the faith of this advanced large sums, and paid off a mortgage on *Muttah T.* This latter *Muttah* having been sold, *S.* brought a suit to recover the amount advanced by him on account of that *Muttah*, claiming to be equitable mortgagee, and to have a charge on that estate for the advances made by him in respect thereof. Held, that the transaction created a lien, and bound the *Muttah T.* for the advances made by *S.*

*Semble.*—By the Mohamedan law such a deposit for a security in respect of a contingent loss would be in the nature of a trust, not a pawn.

The registration of the name of a party in possession of land, on the Collector's books, as owner, is not conclusive evidence of his title, as the land may be affected by prior equitable charges, and it is the duty of a purchaser to investigate the prior title.

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of *Tirupassur* for Rs. 4,000; and that out of the Rs. 11,000, the purchase-money for the *Muttah* of *Ekattur*, he should pay to the Collector of the District Rs. 8,049. 4a. in discharge of what was due for arrears of revenue.

Under this arrangement, the Appellant, on the 15th of *September*, paid Rs. 200 to *Sharpul Umra Sahib*, in part performance of the agreement for purchase of the *Muttah* of *Ekattur*. The Appellant also, in order to prevent the sale of the three *Muttahs*, paid to the Collector the sum of Rs. 8,049. 4a. in discharge of the arrears.

The Appellant having thus paid the sums of Rs. 200 and Rs. 8,049. 4a., in respect of his purchase of the *Muttah* of *Ekattur*, attended on the 14th of *October* following, at the house of the vendors, to complete his purchase, when *Gulam Asen Khan*, by the desire of *Sharpul Umra Sahib*, his father, executed to the Appellant a Bill of Sale of the *Muttah* of *Ekattur*, and upon the Appellant calling for the title deeds of that to be delivered up to him, the vendors alleged that they were with some of their relatives, and said that they would send for them soon and deliver them to the Appellant. The Appellant, however, insisting that the title deeds ought to have been ready to be given up to him, they proposed and offered that, in the meantime, he should retain the residue of the purchase-money, and that they would deposit with him the title deeds of the *Muttah* of *Tirupassur*, to be held by way of equitable mortgage as a security for their delivering up to the Appellant the title deeds of the *Muttah* of *Ekattur*, in order to make his title thereto perfect; and, accordingly, *Gulam Asen Khan* delivered to the Appellant a Bill of Sale of the *Muttah* of *Tirupassur*, dated the 29th of *December*, 1834,

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from one *Tatipatri Bapu Rayar* to *Arcot Jivana Rayar*, and another Bill of Sale of the same *Muttah*, dated the 30th of *June*, 1840, from *Arcot Jivana Rayar*, to *Gulam Asen Khan*, being the title deeds under which *Gulam Asen Khan* held the *Muttah*, and he also delivered to the Appellant a certificate of registration, granted by the Collector of the District to *Gulam Asen Khan*, dated the 8th of *July*, 1840.

On the 22nd of *November*, 1851, the Appellant, by the direction of *Gulam Asen Khan*, paid to one *Rajah Jankeeran*, by whom the sale had been conducted, on behalf of the vendors, a further sum of Rs. 300, on account of the purchase-money.

The *Muttah* of *Ekattur* consisted of five villages, one of which was the village of *Kunnattur*, and upon the Appellant proceeding to take possession of it under the sale to him, he discovered that the village of *Kunnattur* had been already sold by *Gulam Asen Khan* and *Sharpul Umra Sahib* to *Kakaji Rai* and others for Rs. 500. This fact was admitted by the vendors, and it was thereupon agreed between them and the Appellant that the sum of Rs. 500, should be deducted from the purchase-money of Rs. 11,000, by which the purchase-money for the *Muttah* of *Ekattur* became reduced to Rs. 10,500, of which sum the Appellant had paid the several sums of Rs. 200; Rs. 8049. 4 a., and Rs. 300. In the year 1853, the Appellant further discovered that the vendors had, before the sale to him in *September*, 1851, actually mortgaged the *Muttah* of *Ekattur* to one *Mahomed Usen Sahib*, who had possession of the title deeds thereof, and who had, in the year 1851, commenced proceedings in the *Zillah* Court of the Principal *Sudder Ameen* of *Chingleput*, to recover what was due to him on such mortgage; and that the Defendants, the vendors,

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had filed a *Razinamah*, or judgment by confession, in such suit, in which *Mahomed Usen's* mortgage claim on the *Muttah* was admitted; and it was agreed that in default of payment of the sum therein mentioned, the same should be recovered from the *Muttah*. In the month of *November*, 1853, *Mahomed Usen* proceeded to attach the *Muttah* for the sum of Rs. 5,761, then due to him on the mortgage and the *Razinamah*; and, in order to prevent the sale of the *Muttah* then under attachment, and to redeem the *Muttah*, and obtain possession of the title deeds, the Appellant, on the 12th of *December*, 1853, paid to *Mahomed Usen* the sum of Rs. 5,761, in satisfaction of the *Razinamah*, and received from him the title deeds of the *Muttah*.

In this manner, the Appellant had paid the various sums of Rs. 200, Rs. 8,049. 4 a., Rs. 300, and Rs. 5,761, for the purchase of the *Muttah* of *Ekattur*, and upon the security of the title deeds of the *Muttah* of *Tirupassur*, so deposited with him as aforesaid, making in the whole Rs. 14,310. 4 a., being the sum of Rs. 3,810. 4 a. over and above the amount of Rs. 10,500, the purchase-money of the *Muttah* of *Ekattur*, and for the repayment thereof held the equitable mortgage on the *Muttah* of *Tirupassur*, by the deposit of the title deeds of that *Muttah*.

In the month of *October*, 1855, the Appellant, having discovered that, during his absence from the neighbourhood, *Gulam Asen Khan* had caused the *Muttah* of *Tirupassur* to be transferred in the books of the Collector from his own name to the name of the Respondent, *Luckpathy Royjee Lallah*, and that they were then endeavouring to sell the same to the Respondent, *Ouchterlony*; filed a plaint in the Court of



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the Principal *Sudder Ameen* of *Chingleput*, the District in which the *Muttah* of *Tirupassur* was situate, against *Gulam Asen Khan*, *Sharpul Umra Sahib*, and the Respondent, *Luckpathy Royjee Lallah*, in the plaint called *Set Rakpati Roy Lala Sankar* to recover from them, and, as against the *Muttah* of *Tirupassur*, the sum of Rs. 3,810. 4 a., with interest, amounting to Rs. 803. 15 a. 5 p., in all Rs. 4,614. 3 a. 5 p., and subsequent interest.

The Defendant, *Gulam Asen Khan*, by his answer, alleged that the Appellant was indebted to him. He admitted the sale by him to the Appellant of the *Muttah* of *Ekattur*, and the payment by the Appellant of the two sums of Rs. 8,049. 4 a, and Rs. 300, but alleged, that he had not authorized the payment of the sums of Rs. 200, Rs. 500 and Rs. 5,761, before mentioned. The answer also alleged, that the Plaintiff borrowed from the Defendant the title deeds of the *Muttah* of *Tirupassur*, under the pretence that he wished to see the form of title deeds relating to *Muttahs*, and had not returned them; he admitted that the third Defendant had purchased the *Muttah* of *Tirupassur* from him, and enjoyed it for three years, and afterwards publicly sold it to the Defendant, *Ouchterlony*, who was then in possession of it. The answer further alleged, that the first and second Defendants had not mortgaged the title deeds of *Ekattur* to *Mahomed Usen* for Rs. 5,761, and insisted that the Defendant had not authorized the Appellant to pay that sum.

The second Defendant, *Sharpul Umra Sahib*, made default, and it was ordered that, as against him, the suit should be heard *ex parte*.

On the 21st of *December*, 1855, *Ponna Lala*, and

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*Sadasiva Takar*, as *Vakeels* for the third Defendant, applied to the Court, praying, under the circumstances therein stated, that they might be permitted to put in an answer and defend the suit generally on his behalf; and on the hearing of such petition, it was ordered that the Plaintiff's *Vakeel* should include the Petitioners as Defendants in the suit, instead of the third Defendant.

A supplemental plaint was then filed, making *Ponna Lala* and *Sadasiva Takar*, Defendants to the suit; and by their answer they alleged that the third Defendant left in *September*, 1855, for *Biganir*, in the *Raj* of *Satadar*, which was 2,000 miles distant; and that the Plaintiff ought not to have brought the suit in the *Chingleput* Court, the parties being resident elsewhere; that the third Defendant was under no obligation to the Plaintiff, and that the Plaintiff had obtained no documents in connection with the *Muttah* of *Tirupassur*; and further, that the *Muttah* of *Tirupassur* had been registered by the *Circar* in the name of the third Defendant, and the certificate and *Sunnud*, &c., issued in his favour, and who had remained in unmolested and public enjoyment thereof up to four years previously; and that a short time previously to the institution of the suit, the *Muttah* had been sold to the Respondent, *Ouchterlony*, and was registered by the *Circar* in his name, and remained in his enjoyment; the answer then suggested that no benefit could be derived from the simple possession of the certificates, &c., of earlier date, by a party who had no interest whatever in them; and denied that any of the facts stated in the plaint in connection with the *Muttah* of *Tirupassur* had taken place.

The Appellant afterwards filed a supplemental plaint against *Ouchterlony*, making him a Defendant to



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the suit. *Ouchterlony* by his answer alleged, that he was utterly ignorant of the transactions between the Plaintiff, and the first and second Defendants, and that whatever claims the Plaintiff might have against those Defendants, yet that he had no legal claim whatever upon the *Muttah* of *Tirupassur*; he denied having had any conference with the first or second Defendants at any time on any subject; and insisted that the transaction between the third Defendant and him was valid and conclusive; that the third Defendant, alleging that the *Muttah* of *Tirupassur* was his own property, asked him to purchase it, and showed a Bill of Sale, which he was then unable to produce, but which was executed a long time ago, either by the first and second Defendants, or one of them, and that the *Muttah* had been registered in his name by the Collector, and that, as the third Defendant had in himself the title and enjoyment thereof, he, *Ouchterlony*, purchased it from him just as he had it.

The Appellant entered into evidence, and proved the several matters hereinbefore stated. The first Defendant and the sixth Defendant, also adduced evidence. The cause was heard by *T. Alaghiah*, the Principal *Sudder Ameen*, on the 14th of *April*, 1857, when that Judge pronounced judgment, declaring that the absence of a written agreement in favour of the Plaintiff could not vitiate his claim; for that it was quite clear the Plaintiff had a lien upon the first and second Defendants' estates long before the claim of the other Defendant began to exist; and that although those Defendants would not bring to notice in their pleadings the date of the deeds in their favour, it was certain by the depositions of their *Vakeels* taken at the hearing

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of the cause, and by the other circumstances connected with it, that they did not acquire their right before the Plaintiff's claim to recover a surplus of Rs. 3,810. 4 a. 1 p. on the security of the estates, came into existence, and the Court decreed that the first and second Defendants should pay to the Plaintiff the amount claimed, with interest up to the date of the decree, and that the *Tirupassur Muttah* be held responsible for the same, and that the costs should be paid by the first and second Defendants to the Plaintiff, and the other Defendant.

From this decree the Respondents, *Ouchterlony* and *Luckpathy Royjee Lallah*, by his attorneys, the fourth and fifth Defendants, appealed to the Civil Court of *Chingleput*, and the Judge of that Court (Mr. *W. Dowdeswell*), on the 31st of *March*, 1858, pronounced the following judgment :—" It appears, from the evidence in this case, that the first Defendant sold the *Muttah* of *Ekattur* to the Plaintiff on the 14th of *October*, 1851, and deposited the title deeds of the *Tirupassur Muttah* with the Plaintiff as security, until he should deliver up the title deeds of the *Ekattur Muttah*. The first Defendant has in his answer, admitted the sale, and the delivery of the title deeds of *Tirupassur Muttah*. It must be here remarked, that the first Defendant had filed a *Razinamah*, in the suit No. 37, of 1851, on the file of the Principal *Sudder Ameen's* Court, in which he had admitted *Mahomed Usen's* mortgage claim over the *Ekattur Muttah*, and had agreed that, in default of payment of the sum stipulated in the *Razinamah*, the same should be recovered from the *Ekattur Muttah*. Notwithstanding this agreement, filed in the Court of the Principal *Sudder Ameen*, the first Defendant assured the Plaintiff (as stated in the Bill of Sale) that there

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were no liabilities whatsoever on the property; and it was entered in the Bill of Sale that 'in the event of there being any claim against the *Ekattur Muttah*, the first Defendant would hold himself responsible for clearing it off.' Subsequently to this sale having been effected, the *Ekattur Muttah* was attached in *November*, 1853, in satisfaction of the *Razinamah*, filed by first Defendant himself in the suit, No. 37, of 1851; and as the Defendant did not clear off the demand, the Plaintiff was forced to pay the mortage claim of *Mahomed Usen*, amounting to Rs. 5,761, in order to get the *Muttah* released from attachment. The evidence shows that this sum of Rs. 5,761, was paid by Mr. *Lazar*, the Plaintiff's agent, and the receipt of it was acknowledged by *Mahomed Usen* in his petition, No. 705, of 1853. It is clear, then, that the Plaintiff could not have received the title deeds of the *Ekattur Muttah* till the year 1853, as they were not delivered back to *Mahomed Usen* by the Court till 1853; and he was clearly entitled to recover all sums paid by him over and above the price of the property which it was necessary should be paid, before the title deeds could be delivered to him, from the estate of *Tirupassur Muttah*, of which he held the title deeds as security. The Appellants set forth that the Court had no jurisdiction, the parties being residents in *Madras;* moreover, that the Plaintiff had no lien on the *Tirupassur Muttah*. With regard to the first objection, it is clear the property from which the Plaintiff sought to recover the money due to him, is situate within this *Zillah*, and, therefore, was cognizable by the Civil Courts. With regard to the second, the Plaintiff has shown he has a lien upon the property, by producing the title deeds of it, and

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showing he held them as security, previous to the period at which the sale to the third Defendant, whose agents have appealed, was made. The third Defendant, it appears, is abroad somewhere, and his agents; the fourth and fifth Defendants, were allowed to defend the suit on his behalf, and, as they were dissatisfied with the decision of the lower Court, they were allowed to make this appeal on his behalf. In the oral pleadings, the *Vakeel* on behalf of the third Defendant, stated that the *Tirupassur Muttah* was purchased by his client in 1852, from the first Defendant, and that a Bill of Sale was executed in his (the third Defendant's) favour, and the transfer of the *Muttah* to his name, and his possession and enjoyment of the property, conferred on him every title, and that the absence of the title deeds of the property was immaterial. The Civil Judge, however, considers that the third Defendant, by his own showing, neglected to observe even the common precautions which are used when property is purchased and sold, for he admits he did not see the title deeds, and it does not appear that he made any regular inquiry as to whether there were, or were not, claims on the property. The Plaintiff, it has been proved, received from the first Defendant, the title deeds of the *Tirupassur Muttah*, in 1851, as security for the delivery of the title deeds of the *Ekattur Muttah;* and, as these title deeds had been so pledged, the first Defendant had no power to effect the sale of the *Tirupassur Muttah*, until he had delivered the title deeds of the *Ekattur Muttah*, and the sale thereof to the third Defendant cannot prevent the Plaintiff from recovering the amount he was forced to pay, to enable him to obtain possession of the title deeds of *Ekattur Muttah*,

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from the property of the *Tirupassur Muttah*, the title deeds of which Plaintiff held as security. The appeal is, therefore, dismissed with costs."

From this decree the third, fourth, fifth, and sixth Defendants to the original and supplemental suit, presented a special appeal to the *Sudder Dewanny Adawlut* at *Madras*, upon the following grounds:—Under cl. 1, sec. 4, Act, No. XVI. of 1853; first that the Plaintiff had no lien on the *Tirupassur Muttah;* secondly, that the third and sixth Defendants were respectively purchasers for valuable consideration, without notice, and with registry of the conveyances to them; thirdly, that neither the Principal *Sudder Ameen*, nor the Civil Judge, had any jurisdiction as against the third, fourth, fifth, and sixth Defendants. And, under cl. 4, of the same Act, first, that the third Defendant was never served with notice to appear or answer, and that the prosecution of the suit in his absence was wholly illegal; and secondly, that making the fourth and fifth parties was also illegal; lastly, that no points were recorded for the third, fourth, fifth, and sixth Defendants, or any of them.

The *Sudder* Court admitted the special appeal, in order to decide whether the sixth Defendant was to be considered a *bonâ fide* purchaser without notice, and if so, whether the property purchased by him was affected by the Plaintiff's asserted lien thereon.

The special appeal was heard before Messrs. *Hooper*, *Strange*, and *Phillips*, the Judges of the *Sudder Dewanny* Court, and, on the 23rd of *July*, 1859, the following decree was made:—"The Courts below have held, that the circumstances of the case give the Plaintiff a lien on the *Tirupassur Muttah* for the money overpaid by him on account of the *Ekattur Muttah*, and that the

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omission of the third Defendant to inquire, as he was in duty bound, for the title deeds of the *Tirupassur Muttah*, when making purchase of that *Muttah*, serves to charge him constructively with notice of the Plaintiff's claim. In these opinions we cannot coincide. We consider the above doctrine of constructive notice inapplicable to the circumstances of the country, where, very commonly, old deeds connected with land do not exist, and inquiry for them ordinarily is not made. In the present instance, the third Defendant found the parties with whom he dealt in possession with their names on the registry, and it appears to the Court reasonable that he should have looked for no further proof of title in them, to sell the property to him. In like manner the sixth Defendant found the third Defendant in possession with his name on the registry, and was justified in concluding that he might safely make the purchase from him. The Court hold, therefore, that neither the third nor the sixth Defendant is chargeable with notice, and that the *Tirupassur Muttah*, after passing to their hands, cannot be liable for any lien thereon which Plaintiff may have possessed. The Court is further of opinion, that the Plaintiff possessed no such lien. On the premises stated by him, he might have insisted on specific performance of the engagement of the first and second Defendants to sell him the *Muttah*, but this he has not done. On the contrary, he shows that he has receded from that arrangement by demanding back money which might have been taken as advanced towards completion of the purchase, and represents this money as an over payment made on account of the *Ekattur Muttah*. Now, it is clear, that the deposit with him of the

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title deeds of the *Tirupassur Muttah* was not made with the end of holding that *Muttah* liable in hypothecation for payments made in connection with the *Ekattur Muttah:* it was a deposit without contemplation of a mortgage, and the Court hold, therefore, that no lien was created. The Court, for the above reasons, resolve to amend the decrees of the Courts below, so far as to declare that the *Muttah* of *Tirupassur* is not liable for the Plaintiff's demand upon the first and second Defendants. The costs of the Defendants, from three to six, are to be paid by the Plaintiff."

After an unsuccessful application to the *Sudder* Court for review of judgment, the Appellant, as the amount at issue was under the appealable value, applied by petition to the Privy Council, and was allowed, in the circumstances, special leave to appeal.

As the Respondents did not appear, the appeal was heard *ex parte.*

Mr. *Teed*, Q.C., and Mr. *Cracknell*, for the Appellant,

Submitted, that the decree of the *Sudder* Court could not be sustained, and in support of the appeal relied upon these grounds:—

First, that as the only point open to the Respondents, under the order of the *Sudder* Court of the 20th of *January*, 1859, admitting the special appeal, was, whether the Respondent, the sixth Defendant in the original suit, was to be considered a *bonâ fide* purchaser, without notice, of the *Muttah* of *Tirupassur*, and if so, whether that *Muttah*, as having been purchased by him, was thereby freed from the Appellant's claim upon it; it was, therefore, not

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competent to the Court to entertain or determine the question, whether the Appellant had or not the lien claimed by him on that *Muttah*, under the circumstances of the case.

Secondly, that the *Sudder* Court ought to have determined that the sixth Defendant was not a purchaser *bonâ fide*, without notice, as the evidence in the cause proved notice to him before the institution of the suit; and, that there was no proof in fact of any conveyance of the *Muttah* to the third Defendant from the first and second Defendants; as the registry in the Collector's books of the third Defendant, as owner of the *Muttah*, was not proof of his title to it, as shown by the Circular Order of the 17th of *September*, 1832; neither was there any proof of any payment of purchase-money, or of other valuable consideration, for the purchase of the *Muttah* having been given by either the third or sixth Defendants, prior to notice of the Appellant's claim, or in fact, prior to the institution of the suit; the purchase by the sixth Defendant, if in fact made, being after the institution of the suit, and, therefore, *pendente lite*, and could not affect the Appellant's right. That the non-production by the first or second Defendant of any conveyance of the *Muttah* to them on the purchase of the *Muttah* by the third and sixth Defendants respectively, ought to have induced suspicion in those Defendants, and led them to inquire for the conveyance and the earlier title deeds, which inquiry, if made, would have made them acquainted with the Appellant's rights, and that, therefore, the third and sixth Defendants ought to be deemed to have had notice of them; and that the defence of being a purchaser *bonâ fide*, for value, and without notice of the Appellant's

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rights, was not sufficiently pleaded by the third and sixth Defendants so as to entitle them to raise that defence.

Thirdly, that the evidence proved that the sale of the *Muttah* to the third and sixth Defendants respectively, was not made *bonâ fide*, but if so made, was made in fraud of the Appellant.

Fourthly, that if the *Sudder* Court was at liberty to entertain the question whether the Appellant was, or not, entitled to the lien or charge claimed by him upon the *Muttah* of *Tirupassur*, it ought to have found that he was entitled to that lien.

Fifthly, that the Judge of the Civil Court of *Chingleput* having found as a fact, that the first Defendant had sold the *Muttah* of *Ekattur* to the Appellant on the 14th of *October*, 1851, and deposited the title deeds of the *Muttah* of *Tirupassur* with the Appellant as security, until he should deliver up the title deeds of the *Ekattur Muttah*, that finding, being a finding of fact, could not be controverted in the *Sudder* Court, as it had established the right of the Appellant to the equitable mortgage or lien upon the *Muttah* of *Tirupassur*, claimed by him, and confirmed by that decree. Equitable mortgages of land, by the deposit of the title deeds, being a well-known and customary species of security in the *Madras* Presidency.

Lastly, they contended, that the *Sudder* Court was wrong in not applying the principles of English law relating to equitable mortgages in deciding the case, and that, as the Appellant was an Armenian Christian, and the other parties Hindoo, Mahomedans and Christian, the case fell to be determined according to justice, equity, and good conscience, as provided by

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*Mad.* Reg. II. of 1802, sec. XVII., as no particular local law was applicable to the transaction (*a*).

The case stood over for consideration, and their Lordships' judgment was now delivered by

The Right Hon. Lord KINGSDOWN.

19th July, 1862.

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 Mahomedans; 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

(*a*) See Abraham *v.* Abraham, *ante*, p. 197.

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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 (Rs. 3,810), 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

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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 Mahomedan 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 (*Hedèya*, vol. iv. 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 Mahomedans, 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

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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 dem. Seebkristo* v. *The East India Company*, 6 Moore's Ind. App. Cases, 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, *bonâ fide*, and without notice of this charge, whether legal or

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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 decree 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 decree reversed must, of course, be refunded.



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