SHANGARA v. KRISHNAN.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Ryru Nambiar for respondents.

JUDGMENT.—Original suit No. 610 of 1887 was instituted by the defendant No. 1, the plaintiff's brother, who is alleged by the plaintiff to have been his agent, the property which defendant No. 1 sought to recover in the above suit having been purchased in his name *benami* for the plaintiff. The question is whether the plaintiff is bound by the decision in that case. The presumption is that the *benamidar* instituted the suit with the authority and consent of the true owner *Gopi Nath Chobey* v. *Bhugwat Pershad*(1); and the lower Courts have found upon the evidence that the suit was instituted with the knowledge of the plaintiff. He is therefore as much bound by the decree as if he had himself instituted the suit, and the present suit is barred as being *res judicata*. The plaintiff stood by and permitted his undivided brother to sue for possession. There was nothing to put the person in possession upon inquiry as to who was the real owner, and it is too late now for plaintiff to be allowed to recover on his secret title. The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Handley.

1891. October 19, 20. November 24.

SHAN MAUN MULL AND ANOTHER (REPRESENTATIVES OF DEFENDANT No. 2), APPELLANTS,

v.

MADRAS BUILDING COMPANY (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, *ss.* 3, 78, 101—*Priority of mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of* 1877, *ss.* 17 (*d*), 48—*Notice by registration.*

In a suit for the declaration of the priorities of mortgages and for foreclosure, it appeared that the mortgage premises had been purchased by the mortgagor from the second defendant and others in 1878, under a conveyance containing a covenant that they were free from incumbrances, and the mortgagor then received *inter alia*

(1) I.L.R., 10 Cal., 697.

* Appeal No. 43 of 1890.

a collector's certificate, which was recited in another title-deed also handed over to her. The premises were mortgaged to defendant No. 2, who was an experienced sowcar in 1879 and to the plaintiff company in 1883 and again in 1884 and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff company on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff company and defendant No. 2 had no notice at the respective dates of their mortgages and conveyance of any previous incumbrance. The plaintiff company received the title-deeds of the estate from the mortgagor (but not the Collector's certificate) on the execution of the mortgage of 1883; the second defendant alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that before the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:

Held, (1) that the plaintiff company were not affected with constructive notice of the mortgage of the second defendant by reason of its registration or of their failure to search the registry or to inquire after the Collector's certificate.

(2) that the second defendant not having given a reasonable explanation of his conduct in leaving the title-deeds with the mortgagor four years after his mortgage, lost his priority by reason of his gross neglect under Transfer of Property Act, s. 78, apart from the circumstances raising a suspicion of fraud on his part.

Quære: whether the case might not have been decided against the second defendant on the ground that his mortgage was merged in the conveyance of 1886.

APPEAL against the judgment of Mr. Justice Shephard in *Madras Building Company* v. *Rowlandson* and another(1). That was a suit by the plaintiff company for a declaration of the priority of their two mortgages over a mortgage of December 1879, under which defendant No. 2 claimed to be interested in the same premises and for foreclosure. The mortgagor, Mrs. Anne Smith, was an insolvent, and defendant No. 1 was the Official Assignee of Madras and as such Assignee of her estate. The learned Judge passed a decree as prayed, and the executor of defendant No. 2 (deceased) preferred this appeal.

Mr. *E. Norton* and Mr. *R. F. Grant* for appellants.

As to registration we rely upon the Bombay authorities that registration is constructive notice to every one. If the Court adopts this view, there is no ground on which the plaintiffs can claim priority, see also *Gangadhara* v. *Sivarama*(2), *The Madras Hindu Union Bank* v. *C. Venkatrangiah*(3), *Damodara* v. *Somasundara*(4). As to "gross negligence," &c., in Transfer of Property Act, s. 78, see *The Madras Hindu Union Bank* v. *C. Venkatran-*

(1) I.L.R., 13 Mad., 383.
(2) I.L.R., 8 Mad., 246.
(3) I.L.R., 12 Mad., 424.
(4) I.L.R., 12 Mad., 429.

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giah(1), *Evans* v. *Bicknell*(2). The question is what was the intention with which the papers were handed over.

[*Collins*, C.J.—We ought to know what sort of person Mrs. Smith was.]

Yes, there was an oversight in that respect; neither side called her. Unless defendant No. 2 acted with a fraudulent intention to enable the mortgagor to act as she did, he should not lose his priority. *Northern Counties of England Fire Insurance Company* v. *Whipp*(3). His intention was not to defeat any one's right for none other has been created: it could not have been to enable Mrs. Smith to affect his title prejudicially.

[*Handley*, J.—There is no evidence where the documents were between 1878 and 1883.]

He said he never got them back after 1878. In *Damodara* v. *Somasundara*(4) again, the intention in parting with the deeds was to enable money to be raised on them. But mere finding of negligence would not disentitle defendant No. 2 to stand in his right as first incumbrancer; it is a question of his motive.

[*Collins*, C.J.—The deeds were only given back, he said, to remain in her possession to get the Collector's certificate.

Handley, J.—He was not to believe anything she said.]

Again, we claim that the plaintiffs were affected with notice, because the deeds handed to them referred to a Collector's certificate which was not handed to them and after which they should have inquired.

[*Handley*, J.—A stronger case is necessary to postpone a legal mortgage to an equitable, than an equitable to an equitable. As between holders of equal rights, it wants less than if the mortgage to be postponed is legal, and the other equitable.]

The Court will not impute fraud or dishonesty unless it is proved.

[*Handley*, J.—Fraud is not necessary under Transfer of Property Act, s. 78.]

A money lender would not leave documents with another for the purpose of invalidating his own title to weaken his own security, L.R., 26 Ch. D., 494-5. The explanation he got, as to procuring a certificate, in his view was reasonable and sufficient,

(1) I.L.R., 12 Mad., 424.
(2) 6 Ves. Jun., 173.
(3) L.R., 26 Ch. D., 482.
(4) I.L.R., 12 Mad., 429.

and it is the reasonableness of the explanation in his view that is to be considered. Also he said he never had had occasion to apply for a certificate before.

[*Handley*, J.—Does that matter? He was in the habit of taking mortgages.

Collins, C.J.—He produced no books. What came of the money got from the plaintiff?]

That does not appear. The directors were guilty of gross negligence, and at least contributed to the mortgagor's fraud. They held no consultation together, and had no conversation with Mrs. Smith.

Story, § 105, *Churaman* v. *Balli*(1), *Fry* v. *Tapson*(2), *Lloyd's Banking Company* v. *Jones*(3), *Manners* v. *Mew*(4), *Union Bank of London* v. *Kent*(5), *Farrand* v. *Yorkshire Banking Company*(6) were also referred to.

Mr. *Michell* and Mr. *K. Brown* for respondents.

The second defendant by his fraud and gross neglect lost his priority, Transfer of Property Act, section 78. He knew that, by allowing the first defendant to keep the title-deeds, he enabled her to raise money on them, her possession of them raising the presumption that there was no subsisting mortgage on the property, and thus probably to pay off some of her debt to him on his mortgage. This was fraud on his part. In *Northern Counties of England Fire Insurance Company* v. *Whipp*(7) there was only carelessness without any element of fraud on the part of the Company (the prior mortgagees). But even gross negligence, without fraud, postpones the prior mortgagee under the Transfer of Property Act. In *The Madras Hindu Union Bank* v. *C. Venkatrangiah*(8) it was held that an element of fraud is not necessary; gross negligence is sufficient. It was also in that case held that the first mortgagees retaining some of the title-deeds, while parting with the principal ones, makes no difference. In *Bamodara* v. *Somasundara*(9), Kernan, J. attached considerable weight to the fact that the mortgagor was in possession of the mortgaged property. The mortgagor was in possession in the present case. Kernan, J. also held, in that case, that the prior mortgagee was postponed through his gross negligence, notwithstanding the

(1) I.L.R., 9 All., 599. (2) L.R., 28 Ch. D., 268. (3) L.R., 29 Ch. D., 221.
(4) L.R., 29 Ch. D., 725. (5) L.R., 39 Ch. D., 238. (6) L.R., 40 Ch. D., 182.
(7) L.R., 26 Ch. D., 482. (8) I.L.R., 12 Mad., 424. (9) I.L.R., 12 Mad., 429

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subsequent mortgagee was guilty of some negligence. See also *Hewitt* v. *Loosemore*(1), *National Provincial Bank of England* v. *Jackson*(2), *Briggs* v. *Jones*(3), *Mumford* v. *Stohwasser*(4), *Union Bank of London* v. *Kent*(5).

The burden lay on the second defendant to explain his conduct, from which the presumption of fraud arises, but this he failed to do. He ought to have cited the first defendant and the Collector of Madras; he has only called his gumastah. The second defendant is estopped by his conduct from denying the plaintiff's claim: *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of Bank of England*(6), Evidence Act, section 119.

The view taken by the Bombay High Court in *Lakshmandas Sarupchand* v. *Dasrat*(7), and the cases referred to in the judgment in that case that registration amounts to notice, has not been adopted by the Madras High Court. In *Gangadhara* v. *Sivarama*(8), Turner, C.J. said: "It has not as yet been held in this Court that registration is notice." The observation in the judgment in the *Madras Hindu Union Bank* v. *C. Venkatarangiah*(9) that "registration would be notice" was *obiter dictum*. If the legislature had intended that registration should operate as notice, it would not have left such an important effect unexpressed in the Acts. In the Yorkshire Registration Act (47 & 48 Vic., c. 54) there is a section(10) expressly making registration under the Act to be notice. When there is fraud or gross negligence, non-registration will not avail against the effect of such fraud or gross negligence, *Kettlewell* v. *Watson*(11). Section 78 of the Transfer of Property Act contains no exception of the case of a prior mortgage which has been registered, although the legislature had before them the decision in *Lakshmandas Sarupchand* v. *Dasrat*(12) which was prior to the passing of that Act.

The second defendant's mortgage of 1879 was merged in the sale to him of 1886, and thereby extinguished. The question as to merger depends on the question what was the intention of the party paying off the prior charge? Did he intend to keep it alive or not? *Gangadhara* v. *Sivarama*(8), *Mohesh Lal* v. *Mohant Bawan Das*(13),

(1) 9 Hare, 449. (2) L.R., 33 Ch. D., 1. (3) L.R., 10 Eq., 92.
(4) L.R., 18 Eq., 556. (5) L.R., 39 Ch. D., 238. (6) L.R., 21 Q.B.D., 160.
(7) I.L.R., 6 Bom., 168. (8) I.L.R., 8 Mad., 246. (9) I.L.R., 12 Mad, 424.
(10) 5. (11) L.R., 26 Ch. D., 501. (12) I.L.R., 6 Bom., 168.
(13) I.L.R., 9 Cal., 961.

Gokaldas Gopaldas v. *Puranmal Premsukhdas*(1), in which it was held that the doctrine laid down by the Court of Chancery in *Toulmin* v. *Steere*(2) was not to be applied to cases in India, even apart from the provisions of the Transfer of Property Act. In *Gokul Das Gopal Das* v. *Rambux Senchand* (3), the first mortgage was held to have been kept alive, because the third mortgage had notice of the second mortgage, and therefore an intention to keep alive the first was presumed. In the present case, the second defendant has stated in his deposition that when he made the purchase in 1886, he did not know of the mortgage to the plaintiff. He cannot therefore be held to have intended to keep alive his mortgage.

Mr. *E. Norton* in reply.

JUDGMENT.—It is an admitted fact that the three principal title-deeds relating to the property in question in this suit, which should have been in the possession of the late second defendant as mortgagee under a deed of mortgage from Mrs. Annie Smith of the 5th December 1879, were in September 1883 in the possession of the mortgagor, who was thereby enabled to obtain a loan of Rs. 10,000 from the plaintiff company on executing to them a mortgage of the property in question dated 15th October 1883, and subsequently to obtain a further sum of Rs. 500 by way of further charge on the same property. The explanation which the second defendant gave of the title-deeds being out of his possession was that he was in possession of them in 1878, having obtained them on the occasion of taking a prior mortgage from Mrs. A. Smith, but gave them up to her in that year to enable her to obtain a new Collector's certificate in her name, that such new Collector's certificate was issued in May 1878 and handed to him, but he did not receive back the title-deeds from Mrs. Smith, and on asking her for them was told that they were retained by the Collector, with which answer he was satisfied and took no further steps to obtain the title-deeds. We understand from the judgment that the learned Judge who tried the case did not believe this explanation and we see no reason whatever to differ from him. It is possible that the first part of the story is true and that the title-deeds were given up by the second defendant to Mrs. Smith to enable her to get the new Collector's certificate, but we agree with the learned Judge that it is incredible that the second defendant,

(1) I.L.R., 10 Cal., 1035. (2) 3 Mer., 210. (3) L.R., 11 I.A., 126.

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a sowcar of experience, who, on his own admission, had had a good deal to do with mortgages and who is well known in this Court as having been concerned in much litigation connected with mortgage transactions, could have believed that it was the practice for the Collector to retain possession of title-deeds handed to him on the occasion of a new certificate being applied for—not to retain them temporarily, but to keep them altogether—and that he should have believed this extraordinary statement merely on the word of Mrs. Smith and should never have made inquiries as to its truth at the Collector's office. This part of the second defendant's story rests only upon the evidence of himself and of his relative and agent Hunsraj, and we think the learned Judge was amply justified in rejecting it as incredible.

The case is therefore one of a first mortgagee, who allows the title-deeds, nearly 4 years after his mortgage, to be in the possession of the mortgagor and gives no reasonable explanation of their being so in her possession, and the question is whether he is on that account to be postponed to the second mortgagee, the plaintiff company. The law under which this question has to be decided is unquestionably section 78 of the Transfer of Property Act, for the inducing the plaintiff company to advance money on the security of the property in question took place after the Act came into force. That the allowing the title-deeds to be in the hands or at the disposal of the mortgagee nearly 4 years after the date of his mortgage was gross neglect on the part of the second defendant in the ordinary meaning of the words can hardly be doubted. We think it would be so even if his explanation were believed and *a fortiori* when it is not believed. But it is argued that the words "gross neglect" in section 78 of the Act must be understood in the limited sense in which they are used in the English decisions on the subject, viz., as meaning such gross neglect as is evidence of fraud or complicity in fraud. No doubt the tendency of the English decisions and especially since the case of the *Northern Counties of England Fire Insurance Company* v. *Whipp*(1), where the previous cases were the classified and summarized, has been to refuse to postpone the owner of the prior legal estate to a subsequent equitable incumbrancer merely on the ground of gross negligence unaccompanied by any element of fraud. We are

(1) L.R., 26 Ch. D., 482.

not prepared however to hold that the words "gross neglect" in section 78 of the Transfer of Property Act must necessarily be read by the light of the English decisions. On the contrary the language of the section "where through the fraud, misrepresentation or gross neglect, &c." seems to us to indicate an intention to make gross neglect of itself and apart from fraud a reason for postponement of the prior mortgagee and this view is strengthened by the use of the word "misrepresentation," which is not necessarily fraudulent misrepresentation. The framers of the Indian Act must have considered the English decisions prior to the *Northern Counties of England Fire Insurance Company* v. *Whipp*(1), and if they had wished to limit the application of the words "gross neglect" to cases where there was an element of fraud could have done so by appropriate words. And it is in our opinion strictly in accordance with the principles of equity that a person who, by his gross neglect, enables another to commit a fraud shall suffer for that fraud. We should therefore hold that, under section 78 of the Transfer of Property Act, apart from the question of fraud, the second defendant having been guilty of gross neglect in allowing the title-deeds to be out of his possession and thereby allowing the plaintiff company to be induced to advance money on the security of the mortgaged property should be postponed to the plaintiff's mortgage.

It may be noted that such was the view of the law taken by the Madras High Court before the passing of the Transfer of Property Act in *Somasundra Tambiran* v. *Sakkarai Pattan*(2). In that case, after quoting some Sudder Court decisions on the subject and commenting on the English cases and in particular the then recent case of *Thorpe* v. *Holdsworth*(3), the learned Judges quoting the words from that case—"The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default on the part of the first mortgagee to have this effect," observe:—"We consider this to be a just and reasonable rule to be applied to this country. The non-possession of the title-deeds by the first mortgagee is a circumstance which certainly calls for explanation on his part, but it may be explained; and if he can satisfy the Court that the absence of the title-deeds was reasonably

(1) L.R., 26 Ch. D., 482. (2) 4 M.H.C.R., 369. (3) 38 L. J. Ch., 194.

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accounted for to him, at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he ought not to lose his priority, because the mortgagor may afterwards have dishonestly handed over the title-deeds to a second mortgagee." The decisions upon section 78 of the Transfer of Property Act in *The Madras Hindu Union Bank* v. *C. Venkatrangiah*(1), *Damodara* v. *Somasundara*(2) adopt the same principle though they are professedly based upon the English decisions.

But even on the principle of the English decisions we agree with the learned Judge that second defendant should be postponed. The case of *Hewitt* v. *Loosemore*(3) quoted in the judgment and which has not been dissented from in later cases is directly in point. There it was held that the Court will not impute fraud or gross and wilful negligence to the prior mortgagee if he has *bonâ fide* inquired for the title-deeds and a reasonable excuse has been given for their non-delivery, but otherwise will impute fraud or gross and wilful negligence. Here on the finding of the learned Judge in which we concur there was no *bonâ fide* inquiry for the title-deeds or reasonable excuse for their non-production, and the Court therefore will impute fraud, or gross and wilful negligence which is evidence of fraud, to the second defendant and will therefore postpone him to plaintiff. It is argued for appellant that the circumstances of the case negative fraud on the part of the second defendant, for it could not have been to his advantage that the title-deeds should be out of his possession. As to this it must be said that we have very little evidence as the exact nature of the pecuniary transactions between the second defendant and Mrs. Smith; and that little only the statements of himself and his agent. He admitted that he had other money dealings with her besides the mortgage in question. We know from the documents that he advanced money on mortgage of this very property to former owners of it and joined them in conveying it to Mrs. Smith in January 1878. According to his own story, he immediately obtained a mortgage of the property from Mrs. Smith in February 1878. Then he takes the mortgage in December 1879 and subsequently sues Mrs. Smith

(1) I.L.R., 12 Mad., 424. (2) I.L.R., 12 Mad., 429. (3) 9 Hare, 449.

on this mortgage and withdraws the suit on her selling the property to him and she conveys it to him by deed of 19th August 1886. Even then he does not profess to have made any inquiry about the title-deeds, for he says he first knew of the mortgage to the plaintiff company at the end of 1887. And this, although the conveyance to him by Mrs. Smith, contains the very unusual covenant on her part that she had delivered to him "all the title-deeds and other muniments of title in anywise relating or appertaining to the said premises." Mrs. Smith filed her petition and schedule in the Insolvent Court in February 1888. All these circumstances combined with the unexplained absence of the title-deeds from the second defendant's hands do in our opinion raise a strong suspicion of fraud or complicity with fraud on the part of the second defendant such as would be sufficient to justify his being postponed to the plaintiff's mortgage even on the principle of the latest English cases.

This is of course assuming that the plaintiff company had no notice of the second defendant's mortgage. It is not alleged that they had actual notice, but it is argued that the second defendant's mortgage being registered and registration being legal notice, they must be taken to have had notice. In support of the contention that registration is legal notice, we are referred to the cases decided by the High Court of Bombay and particularly to the Full Bench decision in *Lakshmandas Sarupchand* v. *Dasrat*(1), where the question was fully considered and it was declared that in Bombay the Courts had adopted the rule which prevails in America, and had held that registration does amount to notice to all subsequent purchasers and mortgagees of the same property. In the English and Irish Courts, as admitted by the learned Judges of the Bombay High Court in the above case, the current of decisions has been the other way, though with an occasional expression of dissent from the principle by some of the Judges. As far as we know the High Courts of the other presidencies have not followed the High Court of Bombay in holding that registration is notice. In *Gangadhara* v. *Sivarama*(2), Turner, C. J. observed:—"It has not as yet been held in this Court that registration is notice." Under these circumstances we prefer to follow the English and Irish decisions and to hold that registra-

(1) I.L.R., 6 Bom., 168. (2) I.L.R., 8 Mad., 246.

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tion is not of itself notice to subsequent purchasers and mortgagees. To hold otherwise might have the effect of seriously disturbing titles created upon the understanding that the law here was the law of the English and Irish Courts. Upon the abstract question of the comparative expediency of the one rule or the other we say nothing. Much is to be said on both sides. It is for the legislature if it considers that it is expedient to make notice one of the effects of registration to so enact in express words, as is done in the latest Yorkshire Registration Act 47 and 48 Vict., Cap. 54. The Indian legislature must have been aware of the conflict between the English and Irish decisions and those of the Bombay High Court upon the subject, and yet in laying down what shall be the effect of registration and non-registration they have abstained from declaring that notice to subsequent purchasers and mortgagees shall be one of the effects of registration. We think it is not the province of the Courts to do that which the legislature has abstained from doing. In the judgment in *The Madras Hindu Union Bank* v. *C. Venkatrangiah*(1) the words occur "Registration would be notice to subsequent lenders, but without it how is a prior mortgage to be discovered?" We do not understand that it was intended by those words to lay down the rule that registration of itself would amount to notice. The first mortgage there was unregistered and it was pointed out that this was a reason for extra caution on the part of the first mortgagee in parting with the title-deeds, as a subsequent purchaser or mortgagee would not be able to discover the prior mortgage by searching the registry. The question whether registration amounted to notice or not was not raised in that case.

Upon this question we are referred by the learned Counsel for the appellant to the last clause of the definition of notice in the Transfer of Property Act, section 3—"A person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, &c." We shall show hereafter when dealing with another part of the argument for appellant that in our opinion the plaintiff company was not guilty of any wilful abstention from inquiry or of gross negligence. No doubt the persons acting on behalf of the company

(1) I.L.R., 12 Mad., 424.

did not make search in the Registration Office, and had they done so they would have discovered the second defendant's mortgage. It would have been more prudent had they done so, but we are not prepared to lay down as a general principle that non-search of the registry is such gross negligence as to disentitle a subsequent purchaser or mortgagee to relief, for to do so would be practically to make registration notice, which, for other reasons, we have declined to do. In *Damodara* v. *Somasundara*(1) the prior mortgage was registered and it was held by Kernan, J. that the subsequent mortgagees were not guilty of such negligence as to disentitle them to priority over the first mortgagee on the ground of his gross negligence in parting with the title-deeds. We do not think that the plaintiff company by reason of the non-search in the Registration Office for incumbrances can, under the circumstances, which we shall consider more fully hereafter, be said to have been guilty of wilful abstention from a search which they ought to have made within the meaning of section 3 of the Transfer of Property Act.

It is further argued for the appellant that even if the plaintiff company would be entitled to priority over the second defendant by reason of his gross negligence with regard to the title-deeds, they themselves have been guilty of such gross negligence as to disentitle them to priority. With the matter of negligence in not searching in the Registration Office we have already dealt. It is also charged against them that they omitted to inquire for the Collector's certificate and that their attention should have been particularly directed to the matter of the certificate by the recital in one of the title-deeds (exhibit B3) of the old Collector's certificate, which, if they had asked for, they might have got upon the track of the new certificate and of the second defendant's mortgage. As to this we observe that the same document (exhibit B3), which was a conveyance by the second defendant and some previous mortgagors to Mrs. A. Smith, contains a covenant that the property was then (January 1878) free from incumbrances. This of itself would divert persons, dealing with Mrs. Smith and having no reason to suspect her of dishonesty, from inquiry as to incumbrances. The documents which showed a legal title in Mrs. Smith being in her possession, the absence of the Collector's certificate

(1) I.L.R., 12 Mad., 429.

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would not of itself be sufficient to arouse suspicion. The company's agents ascertained that Mrs. Smith was in possession of the property and she put them into possession by executing a rent agreement in their favour. Although they might have been more careful, we do not think that they were guilty of such gross negligence as to disentitle them to relief.

We have dealt with the case on the assumption that the second defendant was entitled to rely on his mortgage of 1879. It is argued for respondent that that mortgage is merged in his purchase of 1886. In August 1886, Mrs. A. Smith conveyed the property to second defendant, the consideration stated in the deed (exhibit III) being Rs. 15,000 made up of Rs. 14,291-10-6 due on the mortgage of 1879 and Rs. 420-5-6 cash. The conveyance says nothing about keeping alive the mortgage, on the contrary it appears on the face of it to extinguish it, for it conveys the property free from incumbrances and the consideration includes the amount due on the mortgage. The appellant's Counsel relies on section 101 of the Transfer of Property Act as keeping the mortgage of 1879 alive for the benefit of the second defendant. That section enacts that "where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares by express words or necessary implication that it shall continue to subsist, *or such continuance would be for his benefit.*" Declaration express or implied there was none. The mortgage can only be saved from extinction by the latter words of the section on the ground that the continuance of the incumbrance would be for the second defendant's benefit. We are inclined to think that these words must have reference to the time when the conveyance was executed and it is not clear that it could be said that at that time it would have been for his benefit that the mortgage should not be extinguished. And it is doubtful whether the mortgage could be considered to be kept alive even if it were for his benefit to do so in the face of the deed of conveyance which seems to extinguish it. We are not sure that the case might not have been decided against the second defendant on this ground. But we have followed the Lower Court in giving him the benefit of the doubt on this point and deciding the question of priority between his mortgage and the plaintiff's.

We confirm the decree of the Lower Court and dismiss the appeal with costs.

D. Grant, Attorney for Appellants.

Branson & Branson, Attorneys for respondent.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

RARICHAN (PLAINTIFF), APPELLANT,

v.

PERACHI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891. November 16. 1892. March 7.

Malabar Law—Makkatayam rule of inheritance—Custom of Tiyars in South Malabar.

A community, following the Makkatayam rule, must not be taken to be necessarily governed by the Hindu law of inheritance with all its incidents.

Accordingly, when a member of the Tiyar community in Calicut following that rule, alleged and proved a custom that brothers succeeded to self-acquired property in preference to widows, it was held that the Court should give effect to it.

SECOND APPEAL against the decree of A. Thompson, Acting District Judge of South Malabar, in appeal suit No. 282 of 1890, reversing the decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in original suit No. 904 of 1888.

Suit for a declaration that the plaintiff was entitled to the self-acquired property left by his brother (deceased) whose widow was defendant No. 1. The parties were Tiyars, admittedly following the Makkatayam rule, and the plaintiff alleged that his claim was in accordance with the custom governing them. Upon the allegation, the fourth and fifth issues were framed as follows:—

"What is the law of succession which governs the parties.

"Whether, according to the law of succession which governs "the parties, the plaintiff, the undivided brother of the deceased "or his widow, the defendant, is his legal representative in respect "of his self-acquired properties."

The District Munsif recorded findings on these and the other issues in favour of the plaintiff and passed a decree accordingly.

* Second Appeal No. 1267 of 1890.