

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

NARASIAH (PLAINTIFF), APPELLANT,

v.

VENKATARAMIAH (DEPENDANT No. 3), RESPONDENT.

1918,
August
13 and 14.

Hypothecation of movables—Bona fide purchaser without notice, from hypothecator, whether affected by hypothecation—Indian Contract Act (IX of 1872), sec. 108.

A *bona fide* purchaser without notice of the encumbrance, of goods hypothecated but left with the hypothecator, is not affected by the encumbrance and takes them free of it.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Cuddapah, in Appeal No. 71 of 1916, preferred against the decree of A. S. VIRASWAMI AYYAR, the District Munsif of Nandalur, in Original Suit No. 153 of 1915.

This was a suit to recover Rs. 126 due on a mortgage of certain immovable property and two bulls, executed by the deceased brothers of the first defendant, a minor. First defendant's guardian did not contest the suit and the third defendant contended that he was a *bona fide* purchaser of one of the bulls for value from a person to whom the first defendant's guardian had sold them, that he was not aware of the mortgage and that therefore no mortgage decree should be passed regarding the bull. Though the District Munsif found that the third defendant was a *bona fide* purchaser without notice, he gave a decree for the sale of the bull also. On appeal by the third defendant, the District Judge, upholding the contentions of the third defendant, dismissed the suit so far as the third defendant and his bull were concerned. The plaintiff preferred this second appeal.

E. Duraiswami Ayyar and C. Bakthavatsalu Nayudu for the appellant.

K. Koti Reddi for the respondent.

NARASIAH
 v.
 VENKATA-
 RAMIAH.
 PHILLIPS, J.

The JUDGMENT of the Court was delivered by—

PHILLIPS, J.—Plaintiff obtained a mortgage of certain properties including a bull, with which alone we are concerned here. The bull was left in the mortgagor's possession and was eventually purchased by third defendant from the mortgagor's vendee. The hypothecation of movables has been recognized in Indian Courts—vide *Shyam Soonder v. Theita and another* (1) and *Shrish Chandra Roy v. Mungrri Bema* (2) but that is not the question for consideration now. We have to determine whether a *bona fide* purchaser for value of hypothecated goods without notice of the hypothecation is bound by it. There is no direct authority on the point, nor is hypothecation of movables recognized by any statute. We are therefore thrown back upon principles of equity and justice. Under section 108 of the Indian Contract Act a person in possession of movables, although not the owner, can pass the property in the goods to an innocent purchaser. Much more then would it appear that the real owner could pass the property, which was only subject to an undisclosed hypothecation. Even if we are to apply principles of English law on this question, which is perhaps doubtful, we find that it has been held that goods included in a bill of sale and left with the original owner can be purchased in the ordinary course of business by a *bona fide* purchaser. *National Mercantile Bank v. Hampson*(3). When goods are left in the possession of the mortgagor, a wide door is opened for fraud, and when the equities between the innocent purchaser and the mortgagee have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has by his omission to secure possession of the goods facilitated the commission of the fraud. In this view we think that a *bona fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of it.

The second appeal is dismissed with costs.

N.R.

(1) (1871) 3 N.W.P., H.C.R., 71.

(2) (1904) 9 C.W.N., 14.

(3) (1880) 5 Q.B.D., 177.