APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Krishnan.

VENKATACHARYULU AND OTHERS (PLAINTIFFS), APPELLANTS, 1925, January 21.

v.

VENKATASUBBA RAO AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 54, 55 and 105—Owner of both varams—Grant of kudivaram—Lease in perpetuity—Lease in consideration of a rent and premium—Promissory note, executed for the premium—Lessor, whether entitled to a charge on leasehold interest for the premium—Grant, whether a sale or lease—Charge, whether created under the Transfer of Property Act or under the general common law of India—Rule of English Common Law, whether applicable to India.

Where the owner of both the varams in certain lands, granted the kudivaram therein to a certain person on a perpetual lease in consideration of rent as well as a premium, and in respect of the premium the lessee executed a promissory note to the lessor, and the latter sued on the note and claimed to recover the amount as a charge on the leasehold interest in the hands of transferees from the lessee,

Held, that the grant was only a lease falling under section 105, and not a sale under section 54, of the Transfer of Property Act;

that the lessor was not entitled to a charge for the premium payable under the lease, either under the Transfer of Property Act or under the Common Law of India;

that the rule of the English Common Law, laid down in *Shepheard* v. *Beetham*, (1877) 6 Ch D., 597, should not be followed in India, as the matter is entirely regulated by the Transfer of Property Act, which provides under section 55 for a charge only in the case of sales under section 54;

* Appeal No. 168 of 1922.

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that, consequently, the plaintiff was entitled only to a personal decree against the lessee.

APPEAL against the decree of P. RAMA RAO PANTULU, Subordinate Judge of Masulipatam, in Original Suit No. 26 of 1918.

The plaintiffs were the Agraharamdars of a village, of which the six items appended to the plaint formed art. They were the owners of both the varams and granted the kudivaram in those items to the father of the first defendant, which was a lease in perpetuity in consideration of a rent to be paid as well as a nazarana or premium in respect of the grant. The grantee executed a promissory note to the plaintiffs in respect of the premium. The plaintiffs instituted this suit to recover the premium on the pro-note and claimed a charge in respect thereof on the leasehold property. The first defendant had transferred his interest in the property to defendants 3 to 17; the plaintiffs alleged that they were transferees with notice of his charge, and claimed to enforce his charge as against them. The Subordinate Judge, who originally tried the suit, held on a preliminary issue of law, that the plaintiffs were in law entitled to a charge for the unpaid premium, but when the case came on for trial on the other issues, his successor held that the defendants 3 to 17 were bona fide transferees for value without notice of the charge in favour of the plaintiffs, and that consequently the plaintiffs were not entitled to enforce the charge as against them, and passed a decree against the first defendant and his son (the second defendant) for the suit amount to be paid out of their family property. The plaintiffs preferred this appeal.

K. Bhashyam Ayyangar for appellants.

K. V. Krishnamohan for respondents.

JUDGMENT.

COUTTS TROTTER, C.J.—In this case the plaintiffs are the owners of an Agraharam village in the sense that they own both the *melvaram* and the *kudivaram* rights. In the year 1909 there was a grant of the kudivaram right to the 1st and 2nd defendants and in consideration for that they promised to pay a rent and they also promised to pay what is described as nazarana to the landlords and that may be roughly described as a premium for the granting of the kudivaram which no doubt was in perpetuity. They gave a promissory note for the amount and the question is whether the debt—because it undoubtedly was a debt—was a mere personal debt affecting the makers of the promissory note or whether it is a charge on the land. In the view that we take of this case the further question, which arose at the trial, viz., whether the 3rd and 4th defendants were bona fide purchasers for value without notice, does not arise. It is no doubt true that there is a direct decision in England, *Shepheard* v. *Beetham*(1), a decision of MALINS, V.C., which treats a premium as creating a lien upon the leasehold premises. Whether that decision is correct or not, we are not concerned to enquire, although it does seem certainly an astounding result. But, in our opinion, in India the matter is entirely regulated by statute. There is a fundamental distinction under the Transfer of Property Act between a transfer of immovable property and a transfer of the right to the enjoyment of immovable property; and a lease is defined by section 105 of the Transfer of Property Act as a transfer of a right to enjoy immovable property made for a certain time, express or implied, or in perpetuity, in consideration of the price paid or promised

(1) (1877) 6 Ch.D., 597.

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or of money, etc. It is perfectly clear, therefore, that the Transfer of Property Act regards a lease in perpetuity as merely a transfer of the right to enjoy property. Does it or does it not create a charge upon the land? The answer is that the only charge, valid in Indian Law, on landed property, is to be found in the section of the Act which creates such a charge and section 55 is obviously confined to cases which deal not merely with the transfer of the mere right of enjoyment but with the transfer of the property itself, for, for any other lien or charge, the Act makes no provision at all. In our opinion we are bound to hold that we cannot but regard the Act as intended to be exhaustive and that we are not at liberty to follow English Common Law rules. On this ground we think the appeal fails and must be dismissed with costs.

KRISHNAN, J.

KRISHNAN, J.—The question, that arises for our decision, in this case, is, whether, when the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as a premium, he has got a charge on the leasehold right he has so created for the premium so payable.

The promissory note in this case was executed for such a premium and it is now sought in appeal before us to be enforced not against the makers of the note nor against the persons who took the lease but against certain third parties who have now become transferees or assignees of the lease right. Against them the amount of the note could be claimed if at all, only if there is a charge created in favour of the landlord on the property in their hands.

The English Law is apparently that such a lien does exist; but it is not necessary to consider that position here, for, we are concerned only with the Indian Law on the point. The appellant has to show us how he

gets the charge. The document by which the lease was created gives him no charge whatever for the amount. Therefore the charge must be rested by him upon the general law of this country. Now so far as appears, the only lien that is recognized in the Transfer of Property Act in this country is a lien in favour of the vendor. That being so, a strenous effort was made by the appellant's vakil to persuade us that the grant of a lease like this really amounted to a sale or transfer of a fractional right in the property for a price, namely, the premium payable for the grant and he argued that as vendors of that right the plaintiffs have a charge on the leasehold estate which has been given to defendants 1 and 2. It is impossible to accept this view for the Transfer of Property Act makes a very clear distinction between a sale and a lease. This is a transaction that falls clearly within the definition of a lease in the Transfer of Property Act, section 105. I do not see how then it could be brought under the definition of a sale. The payment of premium is only one of the incidents of the lease, just as payment of rent is. It is certainly not a price paid for the transfer of immovable property as defined in section 54 of the Transfer of Property Act. It is impossible, it seems to me, to hold that the relationship between the plaintiffs and defendants 1 and 2 was anything but that of a lessor and a lessee. Apart from the Transfer of Property Act, it has not been shown that there is any common law in India on which the right of lien claimed could be founded. It is true that in one of the decisions brought to our notice, viz., *Kandasami Pillai* v. *Ramasami Mannadi*(1), there is an observation by the then learned CHIEF JUSTICE that a lien like that which exists in England

(1) (1913) I.L.R., 42 Mad., 203.

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may be claimed here. But that observation cannot be treated as authority as it is only an *obiter dictum*, of the learned Judge. When that case came on appeal before three other learned Judges of this Court, those learned Judges held that the principles of equity in England could not be introduced into India for purposes of creating rights of parties like the one in question. The view of the CHIEF JUSTICE cannot be treated as of weight after the expression of opinion by the appellate Judges. There is no other decision which has been brought to our notice where such a lien has been recognized in India.

I am therefore entirely in agreement with the learned CHIEF JUSTICE in holding that whatever the position may be in England, we are not justified in introducing new conceptions of charges in India which are not supported by our Statute Law. When the Estates Land Act was passed, the legislature had to consider what kind of charges should be given to the landholder on a leasehold estate. That was the only instance in which the legislature dealt with a lien of the kind claimed and there we find that the lien was not allowed—see section 25 of the Estates Land Act. It seems quite clear that such a lien as is now set up cannot be supported. In the result, the appeal and all the second appeals must be dismissed with costs.

K.R.