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MUNICIPAL
BOARD OF
MUSSOORIE
v.
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present is that of *Smith v. Birmingham and Staffordshire Gas Light Company* (1). In that case a person of the name of Lumley on behalf of the defendant company seized and sold some articles belonging to one Smith for money due to the company for gas. Lumley had no authority under seal to carry out the distraint. It was held notwithstanding that the corporation was liable in tort for his tortious act, even though he had not been appointed by seal, the distress being professedly committed under a Statute for a debt due to the corporation. It was also held in that case that the jury might infer the agency from an adoption of the act of Lumley by the corporation as from their having received the proceeds of the seizure. If authority were necessary, this authority appears to support the view which we entertained throughout the hearing of the arguments of this appeal. For these reasons we hold that the appeal must fail. We therefore dismiss it with costs.

Appeal dismissed.

1904
March 10.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Turcott.

KHWAJA MUHAMMAD KHAN (PLAINTIFF) v. MUHAMMAD
IBRAHIM AND ANOTHER (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 41—Mortgage by ostensible owner.

Where certain mortgagees took a mortgage from a person who was in possession of the property mortgaged, was recorded as owner, and held the title deeds of the property, it was held that there was nothing in the transaction to put the mortgagees on inquiry as to the real title to the property, but the principle of section 41 of the Transfer of Property Act, 1882, applied, and a suit to restrain the mortgagees from selling the property in execution of a decree on their mortgage was rightly dismissed. *Ram Coomar Koondoo v. John and Maria McQueen* (2) followed.

THE facts of this case are as follows:—

On the 30th of July, 1892, one Khwaja Muhammad Khan purchased in the name of his son, Rustam Ali, a plot of land measuring 2 bighas 12 biswas for the sum of Rs. 600. Rustam Ali was at that time of full age. Subsequently a house was

* Second Appeal No. 155 of 1902, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 19th of December 1901, reversing a decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra, dated the 10th of September, 1901.

(1) (1834) 1 Ad. and El. 526. (2) (1872) 11 B. L. R., 52.

built upon that piece of land, which was occupied from time to time by Rustam Ali, and Rustam Ali was recorded as the owner of the house. On the 11th of February, 1897, Rustam Ali borrowed Rs. 8,000 upon the security of the house and its site, and executed a deed of mortgage in favour of Muhammad Ibrahim and Muhammad Yusuf. In 1899 the mortgagees instituted a suit for sale on their mortgage and obtained a decree for sale on the 31st of August, 1899. Thereupon Khwaja Muhammad Khan filed the present suit against the mortgagees, in which he asked for a decree declaring that the mortgaged property was not the property of Rustam Ali, the judgment-debtor, and could not be sold in execution of the defendants' mortgage decree. The Court of first instance (Subordinate Judge of Agra) decreed the plaintiff's claim; but on appeal by the defendants the lower appellate Court (District Judge of Agra), applying the principle of section 41 of the Transfer of Property Act, reversed the decision of the Subordinate Judge and dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The suit out of which this second appeal has arisen was brought by the plaintiff to have it declared that certain house property situate in Agra was not liable to be sold in execution of a decree obtained upon a mortgage executed by the plaintiff's son in favour of the defendants. The Court of first instance decreed the claim of the plaintiff, but on appeal this decree was reversed and the suit of the plaintiff dismissed on the ground that the plaintiff's son was the ostensible owner of the property within the meaning of section 41 of the Transfer of Property Act, and that before the mortgage was executed the defendants had taken reasonable care to ascertain that the mortgagor had power to execute the mortgage and had acted in good faith. It is found that the plaintiff purchased the site of the house with its appurtenances on the 30th of July, 1892, in the name of his son Rustam Ali. The area so purchased was 2 bighas 12 biswas

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and the price paid was Rs. 600. There was then no house upon the property. Rustam Ali was at this time of full age. Subsequently a house was built upon the property, and this house appears to have been occupied by Rustam Ali on at least some occasions. His name was recorded as owner, and in 1897 when the defendants made the advance to him on the security of the mortgage, he appears to have been in occupation of the house, for we find that the deed of mortgage was registered at it. The plaintiff, it is to be observed, resides elsewhere, namely at Dholpur. Rustam Ali borrowed from the defendants Rs. 8,000 on the security of the property. The mortgagees instituted a suit on foot of their mortgage for sale of the mortgaged property, and obtained a decree for sale on the 31st of August, 1899. In consequence of that decree the present suit was instituted in order to restrain the defendants from selling the property. The answer of the defendants to the suit is that they obtained the mortgage of the property from the ostensible owner *bonâ fide* after taking reasonable care to ascertain that Rustam Ali was the owner of it. Now, as the learned District Judge has pointed out, Rustam Ali was not merely the nominal owner recorded as such, but also occupied the house and had in his custody the deed of sale of the 30th of July, 1892. There was nothing whatever, as he says, to suggest to an intending lender that Rustam Ali was only a *benamidar* and not the real owner. Under such circumstances it cannot, we think, be successfully contended that the defendants did not take reasonable care to ascertain that Rustam Ali had power to execute the mortgage. The Privy Council has laid down the principle upon which section 41 of the Transfer of Property Act is founded in the case of *Ram Coomar Koondoo v. John and Maria McQueen* (1). Their lordships say as follows:—
“It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he

(1) (1872) 11 B. L. R., 52.

can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it." On the findings of the lower appellate Court it is impossible, we think, to say that the defendants in this suit either had constructive notice of the real title, or that there existed any circumstances which ought to have put them upon an inquiry which, if prosecuted, would have led them to a discovery of it. On the contrary, we think that where a person is found in possession of property, is recorded as owner, and holds the title deeds of the property and deals with a third party in respect of it, there is nothing to suggest a want of good faith in such third party in dealing with him in respect of the property. We do not think that the defendants respondents were called upon under the circumstances to communicate with the father of the mortgagor and inquire from him as to the title. For these reasons we do not see our way to differ from the learned District Judge. We think that the case is one coming within the provisions of section 41 of the Transfer of Property Act, and that the defendants are protected by that section. We therefore dismiss the appeal with costs. The objections filed by the defendants respondents are not pressed. They are also dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

LALLA MAL AND OTHERS (PLAINTIFFS) v. KESHO DAS AND OTHERS
(DEFENDANTS).*

Act No. XXVI of 1881 (Negotiable Instruments Act), section 10—Payment in due course—Shahjog hundi.

A hundi was drawn by a firm at Agra on their branch in Bombay. The payees endorsed the hundi over to one L. M., who sent it to his agent at Bombay for collection. The agent died suddenly, and thereupon the drawers at the request of the payees telegraphed to their branch in Bombay to stop payment. Notwithstanding this, on the hundi, which was a *shahjog hundi*, being presented to the drawers' Bombay branch by one Channu Mal, who had

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* Second Appeal No. 317 of 1900, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 19th of February 1900, modifying a decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra, dated the 13th of May 1899.