

points arising in the appeal before it. Costs will be costs in the cause. Stamp on appeal to this Court to be refunded.

Appeal accepted.

A. N. C.

LETTERS PATENT APPEAL.

Before Mr. Justice Chevis, Acting Chief Justice, and Mr. Justice Dundas.

THE ORIENT BANK OF INDIA, LTD. (IN
LIQUIDATION)—*Appellant,*

versus

Mussammat GHULAM FATIMA AND NUR ILAHI—
Respondents.

Letters Patent Appeal No. 33 of 1920.

Mortgage—Hypothecation of stock in trade left in possession of the debtor—subsequently sold to a purchaser with notice of the creditor's lien—whether the creditor can follow the property into the hands of the purchaser.

Held, that in India there is no rule of law by which a person having a mortgage on immovable property is debarred from following that property into the hands of a purchaser with notice of the mortgage.

Deans v. Richardson (1), *Ko Kyw-tnee v. Ko Koung Bane* (2), and *Tatham v. Andree* (3), cited in Ghose's Law of Mortgage, 4th Edition, Volume 1, page 108, followed.

Addison's Law of Contract, 10th Edition, page 766, referred to and discussed.

The facts of this dispute, which arose in execution proceedings are as follows :—

On the 11th March 1913, one Sardar Khan executed a promissory note for Rs. 2,000 in favour of the Orient Bank, and by way of collateral security hypothecated his whole stock-in-trade to the Bank. Thereafter from time to time he borrowed various sums of money, and after his death the Bank got a decree for Rs. 1,863-9-1 against his estate in the possession of *Mussammat Ghulam Fatima*, the mother, and *Nur Ilahi*, a cousin of deceased. Sardar Khan died on the 24th

(1) (1871) 3 N. W. P. H. C. R. 54.

(2) (1866) 5 W. R. 189.

(3) 1 Moo. P. C. 386.

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September 1913, and on the 29th September 1913 his mother, *Mussammât Ghulam Fatima*, transferred the whole of the stock-in-trade to Nur Ilahi for the consideration set forth in the deed. Nur Ilahi presented an application to the District Judge under Act XIX of 1841, and in the course of those proceedings the stock-in-trade was sold for Rs. 868-11-6, which sum was placed in deposit in the District Judge's Court. The Bank in execution of its decree attached this sum, and the dispute between the parties was whether the judgment creditors were entitled to it as against Nur Ilahi who claimed it on account of the transfer to him by *Mussammât Ghulam Fatima* on the 29th September 1913. The District Judge, as the Lower Appellate Court, held that, though by virtue of the hypothecation the Bank could have seized that stock-in-trade at any time, while it was still in the possession of Sardar Khan or his representatives, it could not pursue the property in the hands of a third person, although Nur Ilahi had notice of the hypothecation to the Bank, and also held that there was no consideration for the transfer to him. The Bank appealed to the High Court, where the case came on for hearing before Mr. Justice Scott-Smith. The learned Judge found that there was some consideration for the sale to Nur Ilahi, and that there was no good ground for holding that the transfer was made with intent to defraud or delay creditors. But that the hypothecation by Sardar Khan gave the Bank no right to follow the goods into the hands of third parties and dismissed the appeal.

The Bank then preferred an appeal under section 10 of the Letters Patent against the order of Mr. Justice Scott-Smith.

S. K. Mukerji, for the Appellant, contended that no consideration passed as regards the transfer in favour of Nur Ilahi inasmuch as he only undertook to pay certain debts for which he was jointly and severally liable with Sardar Khan. The transfer was intended to defeat the claim of the Bank. The principles of section 53 of the Transfer of Property Act were applicable to transfers of moveable property, as there could not be one set of justice, equity and good conscience for transfers of immoveable property and another for transfers of moveable property, *Chidam-*

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baram Chettiar v. Sami Aiyar (1). If the sale were a public one and the purchaser had no notice, then the observations in Addison's Law of Contract (10th Edition), page 766, cited by Mr. Justice Scott-Smith, might apply and the Bank might have no remedy, the observation should be read with the context. Here the sale was a private one and the purchaser had full notice of the Bank's hypothecation. Such transactions can be enforced even against *bonâ fide* purchasers without notice, Ghose's Law of Mortgage (4th Edition), Volume 1, page 109, and the cases cited in the footnote therein, *Deans v. Richardson* (2), *Tatham v. Andree* (3), and *Ko Kywetnee v. Ko Koung Bane* (4).

Niaz Muhammad, for Respondents, urged that *Dearle v. Hale* (5) was on all fours with the present case, and that the cases cited by the other side were distinguishable. Nur Ilahi had paid full consideration for the transfer in his favour and the purchase was *bonâ fide*.

S. K. Mukerji, in reply, pointed out that the ruling *Dearle v. Hale* (5) cited for the Respondents was criticised and dissented from by such an eminent Judge as Lord Macnaughton—*vide* Ghose's Law of Mortgage, volume 1, pages 383 and 384. There might not be any fraud in the present case but there was certainly an intention to defeat the Bank's claim.

Appeal from the order of Mr. Justice Scott-Smith dated the 20th January 1920, dismissing the appeal.

The judgment of the Court was delivered by—

DUNDAS, J.—The facts in this case are as follows: One Sardar Khan borrowed Rs. 2,000 from the Orient Bank on a promissory note, dated the 11th March 1913, and he hypothecated his stock-in-trade as security for repayment of the loan. Sardar Khan died on the 24th September 1913, and on 29th September 1913, *i.e.*, five days afterwards, his mother, *Mussammât Ghulam Fatima*, sold his entire stock-in-trade to Nur Ilahi, a cousin of the deceased, by a sale deed showing Rs. 2,630-7-0 as the purchase price. On the 27th April

(1) (1906) I. L. R. 30 Mad. 6.

(3) 1 Moo. P. C. 386.

(2) (1871) 3 N. W. P. H. C. R. 54.

(4) (1866) 5 W. R. 139.

(5) (1823) 3 Russ. 1.

1915, the Orient Bank obtained a decree for Rs. 1,863-9-1 against *Mussammatt Ghulam Fatima* and sought to attach a sum of Rs. 868-11-6, which was the proceeds of a sale of Sardar Khan's stock-in-trade made by order of the Court. The question is whether *Mussammatt Ghulam Fatima's* sale of the stock-in-trade of Sardar Khan to Nur Ilahi transferred the stock-in-trade to Nur Ilahi, free of the Bank's incumbrance or whether the Bank can follow the property into the hands of Nur Ilahi. The District Judge held that the transfer to Nur Ilahi was not for any real consideration and he also held that Nur Ilahi had notice of the hypothecation to the Bank, but he was of opinion that the Bank could not enforce its lien against a third party and therefore Nur Ilahi was not affected by any hypothecation made by Sardar Khan to the Bank. The learned Judge of this Court considered that there was at all events some consideration for the transfer of stock-in-trade to Nur Ilahi, and that there was no good ground for holding that the transfer was made with intent to defraud or delay creditors. He held that the hypothecation by Sardar Khan gave the creditor Bank no right to follow the goods into the hands of third parties and he therefore dismissed the appeal.

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In this appeal it is first urged that Nur Ilahi paid no real consideration, but to this contention we are unable to agree. We find that Sardar Khan and Nur Ilahi jointly executed an earlier promissory note of the 30th of May 1912 for Rs. 2,000 in favour of the Orient Bank, and although Nur Ilahi signed this promissory note as principal the money was actually advanced to Sardar Khan for the purposes of his business. Now the Bank obtained a decree for Rs. 636-7-0 on the balance of this promissory note account and this decree has been satisfied as we are informed by Nur Ilahi. Nur Ilahi is also alleged to have paid off a promissory note of Rs. 1,000 by Sardar Khan, Mehr Ilahi, and himself in favour of Aziz Din and to have paid Rs. 500 and given a promissory note for Rs. 500 on the debt of Rs. 1,000 due by Sardar Khan, Nur Ilahi and Mehr Ilahi to the firm of Bansi Lal-Ram Ratan, thus making up the recorded sale price of Rs. 2,636-7-0. It is quite evident that the estate of Sardar Khan is liable for a considerable portion of these debts, and if Nur Ilahi has

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satisfied them, which we see no reason to doubt, he is a creditor of Sardar Khan's estate to the extent that he has paid debts due from the estate. But the effect of the transfer of Sardar Khan's stock to him is to divert that property of Sardar Khan, which was assigned for a debt for which he (Nur Ilahi) was not jointly liable, to the satisfaction of a debt for which he (Nur Ilahi) was jointly liable, and it cannot be denied that this transfer was at least calculated to defeat the just claims of the Bank, although in our opinion, it certainly does not amount to an act in fraud of the Bank, and Nur Ilahi certainly showed diligence in safeguarding his own interests at the expense of those of the Bank.

Now the principle on which this case has been decided by the Courts so far is that an imperfect hypothecation of goods although giving "a right to seize and sell in case of non-payment of a debt at an appointed period, gives the creditor no right to follow the goods into the hands of third parties, but only so long as the property remains in the possession of the debtor himself and continues his property, the creditor may seize it in the same way that a landlord distrains and sells the goods and chattels of his tenant on demised premises for rent in arrear." It appears to have been assumed that this is a correct statement of law as regards any such hypothecation in India, and further the reservations limiting this rule appear to have been somewhat lost sight of. The reason of the rule is stated to be that "if parties who had bought goods in a public market, or in the ordinary way of trade, of persons who had the possession and visible ownership of them, were liable, after they had paid the purchase money, to be called upon by third parties who had secret charges or liens upon such goods for further payment, all public confidence would be destroyed, and trade and commerce annihilated" (Addison's Law of Contracts, 10th edition, page 766). It is obvious that this reason has no application to the present case where the purchase was not made in public market and was made with full notice of the Bank's incumbrance, so that no question of a secret charge arises. Now, in Ghose's Law of Mortgage, 4th edition, volume I, page 108, it is remarked that although "it is a matter for regret that the Contract Act is silent on the subject

of hypothecation of moveables, we must not infer from the silence of the Legislature that such transactions may not be enforced even against *bond fide* purchasers without notice." In the case of *Deans v. Richardson* (1) one Mr. Pogose obtained a loan of Rs. 15,000 from the Allahabad Bank on the 14th September 1869 and hypothecated as security two ice-machines which constituted his stock-in-trade. In August 1870 Mr. Richardson sued Mr. Pogose upon a promissory note and on the 22nd August 1870 he obtained a decree for Rs. 2,424-4-0 against Mr. Pogose and on the 24th of the same month he attached the said ice-machines in execution of his decree. Early in September the Bank gave Mr. Richardson a notice of its lien, but Mr. Richardson nevertheless purchased the machines at an execution sale on his decree on the 22nd of November 1870. The Bank had meanwhile obtained a decree against Mr. Pogose on the 15th November 1870, and the question then arose as to whether the mortgage of the 14th September 1869 unaccompanied by possession gave the Bank priority against the execution creditor who attached on the 24th August 1870 and bought the stock subsequently with notice of the Bank's lien. The Court held that by the Common Law of England when goods are mortgaged and left in the possession of the original owner the circumstance that they are so left is not to be held as a fraud *per se* rendering the mortgage liable to be defeated as between the mortgagee and third parties, such as *bond fide* purchasers or judgment creditors; but when possession is left with the mortgagor, this is a circumstance which warrants the Court in leaving it to the jury to determine whether or not the mortgage was fraudulent and colourable or otherwise. The Court held that the circumstances of each case should be closely scanned and where it is shown that the original dealing is *bond fide*, it should be supported, notwithstanding there has been no delivery. In that case as in the present case it was not denied that the advance was made and the security bargained for; but it was only urged that the Bank should have taken possession at least when failure occurred in payment of the loan. The Court however, held that

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the Bank was not bound to take possession immediately default was made. The stock was the means whereby the debtor earned money and might have enabled him to discharge his debts if indulgence were shown him and it therefore held that the property only passed to the auction purchaser, *i.e.*, the subsequent creditor subject to the lien created in favour of the Bank. This decision is a definite exposition of the law prevailing in India and so far as we are aware it has never been overruled. In a case from Burma *Ko Kywetnee v. Ko Koung Bane* (1) it was held that a purchaser who buys property with notice of lien thereon is liable to be burdened with it when he had actual notice of the existence of the lien, and risked the ulterior consequences of his purchase in his anxiety to make a present profit. In a Privy Council case from Ceylon *Tatham v. Andree* (2) it was held that under the Roman Dutch Law possession of moveables is not necessary to the validity of a lien whether created by contract or act of law and that such lien will attach upon moveable property even in the hands of a *bonâ fide* purchaser without notice.

These, therefore, are sufficient authorities for the view that in India, at all events, there is no rule of law by which a person having a mortgage on moveable property is debarred from following that property into the hands of a purchaser with notice of the mortgage, and seeing that this is the case we find that the Bank is in the position of a secured creditor and Nur Ilahi is at best in the position of an unsecured creditor. We doubt if any question of superior diligence arises in the case and in our opinion the Bank has in this case the prior claim against the proceeds of the stock-in-trade of the deceased Sardar Khan and can enforce it against the purchaser.

We therefore accept the appeal, and disallowing the objection of the judgment-debtor restore the decree holder's attachment of the proceeds of the sale of the stock-in-trade.

The decree-holders, appellants, will be paid their costs throughout by Nur Ilahi, objector.

Appeal accepted.

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(1) (1866) 5 W. R. 189.

(2) 1 Moo. P. C. 366.