

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K C., Chief Justice, and Mr. Justice Mya Bu.

BACKER KHORASANEE

v.

AHMED ESMAIL JAMAL.*

1927

April 25

Mortgage without possession of movables—Sale by mortgagor in possession—Title of purchaser taking in good faith.

Held, that the purchaser from the mortgagor in good faith of movables mortgaged without possession takes the same free from the mortgagee's lien.

Dearle v. Hall, 38 Eng. Rep. 475; *Manackjee Pallanjee v. S. A. Meyappa Chetty*, 7 L.B.R. 336; *Narasiah v. Venkataramiah*, 42 Mad. 59; *Oo Tha Way and two v. Ko Aung Doon and one*, 1 B.L.R. 18—referred to.

Ko Kywet Nee v. Ko Koung Bone, 5 W. R. 189; *Tatham v. Andree*, 1 Moo. P.C. 386; *The Orient Bank of India, Ltd. (in liquidation) v. Mussamat Ghulam Fatima and one*, 1 Lah. 422—distinguished.

M. M. Jawad—for Appellant.

Young—for Respondent.

RUTLEDGE, C.J., AND MYA BU, J.—This is an appeal from the Original Side of this Court giving the respondent a decree, declaring that he has a lien on the stock-in-trade in shop No. 283, Dalhousie Street, Rangoon, for Rs. 2,200 being the balance due on a mortgage, Exhibit A, dated the 22nd of March 1926.

The sole question in the case is whether the appellant, when he purchased, on the 9th of July 1926, the stock-in-trade of the first defendant Parekh, purchased it subject to the respondent's mortgage. It is admitted that the respondent was, never in possession of the stock-in-trade and it is also admitted that the appellant was not aware of the respondent's mortgage when he purchased the stock-in-trade.

* Civil First Appeal No. 251 of 1926 from the judgment of the Original Side in Civil Regular No. 351 of 1926.

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Section 108 of the Indian Contract Act states :—

“No seller can give to the buyer of goods a better title to these goods than he has himself, except in the following cases :—

Exception.—When any person is by the consent of the owner in possession of any goods he may transfer the ownership of the goods of which he is so in possession to any other person, and give such person a good title thereto, notwithstanding any instruction of the owner to the contrary : Provided that the buyer acts in good faith and under such circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.”

Admittedly, the buyer in this case acted in good faith, and, though the respondent's mortgage was registered, as mortgages of movables are not required to be registered, there was no duty cast on the buyer to make a search in the Registration Office to see if there was any encumbrance. The respondent, however, urges that the exception only applies where a person is in possession of goods by the consent of the owner and that in this case the mortgagor was owner in his rights ; and that the exception would not cover him.

On this point we are in agreement with the Madras High Court in *Narasiah v. Venkataramiah* (1), where it was held that—

“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 When goods were left in the possession of the mortgagor, a wide door is opened for fraud ; 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 *bonâ fide* purchaser of hypothecated goods without notice of the encumbrance takes the goods free of it.

There is a decision to the same effect by the Recorder of Rangoon, Sir William Agnew, in *Oo Tha Way and two v. Ko Aung Doon and one* (1). In that case the learned Recorder followed the principle of the English case of *Dearle v. Hall* (2).

The learned trial Judge has relied upon a decision of the Lahore High Court in *The Orient Bank of India, Ltd., (in liquidation) v. Mussamat Ghulam Fatima and one* (3). That case, however, is clearly distinguishable from the present case, in that the purchaser had knowledge of the prior encumbrance. With regard to two of the cases cited by the Lahore High Court, *viz.*, in *Ko Kywet Nee v. Ko Koung Bone* (4), the purchaser had notice of the prior lien and in the Privy Council case from Ceylon, *Tatham v. Andree* (5), the case was decided under Roman Dutch Law, which has no application in British India.

We may note that a Bench of the late Chief Court held in *Manackjee Pallanjee v. S. A. Meyappa Chetty* (6) that : " It is settled law that a *bonâ fide* incumbrancer without notice who is in possession of movable property is to be preferred to an incumbrancer whose security is of prior date, and in this case it is not disputed that the appellant obtained possession of the launch through the Court and is now through the Court in possession of the sale proceeds. If Manackjee had notice of the S. A. Firm's earlier incumbrance, the latter is entitled to priority and not otherwise."

The principle stated in section 108, Exception 1, of the Indian Contract Act, in our opinion, applies *â fortiori* to the present transaction.

The appeal must accordingly be allowed, and the plaintiff-respondent's suit dismissed with costs in both Courts.

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(1) (1895) 1 B.L.R. 18. (3) (1920) 1 Lah. 422. (5) 1 Moore (P.C.) 386.
(2) 38 English Reports 475. (4) (1866) 5 W.R. 189. (6) 7 L.B.R. 336.