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MA SAW KIN AND OTHERS v. MAUNG TUN AUNG GYAW

In these circumstances their Lordships agree with the learned Judges of the High Court that the effect of the evidence is that there was only a living apart by mutual consent, or, if there was desertion at all, it was desertion by Ma Thet Shay. That is not the case set up here.

For these reasons their Lordships agree with the learned Judges of the High Court that the defendants have failed to prove that the plaintiff was divorced from Ma Thet Shay, and are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants :—*Sanderson, Lee & Co.*

Solicitors for respondent : —*Holmes, Sen & Pott.*

ORIGINAL CIVIL.

Before Mr. Justice Otter.

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Dec. 1.

N.P.A. CHETTIAR FIRM.

v.

H. C. SHARMA.*

Lien—An unpaid builder whether entitled to a lien on the building—The maxim quicquid plantatur solo, solo cedit *how far applicable in India.*

Held, that the maxim, *quicquid plantatur solo, solo cedit*, (whatever is affixed to the soil belongs thereto) applies to chattels affixed to the land in India unless by customary or local law such application is prohibited. As a matter of equity, the maxim would not apply in India to tenants who make improvements or to *bonâ fide* transferees where improvements were made under circumstances that the owner of the land ought not to benefit thereby.

Held, that an unpaid builder *as such* has no lien upon the building in his possession for the balance due to him under the contract for construction.

Beni Ram v. *Kundan Lal*, 21 All. 496 ; *Dunia Lall Seal* v. *Gopi Nath Khetry and others*, 22 Cal. 820; *Ismail Khan Mahomed* v. *Jaigun Bibi*, 27 Cal. 570 ; *Juggat Mohinee Dossee* v. *Dwarka Nath Bysack*, 8 Cal. 582, *Parbutty Bewan* v. *Woomatara Debee*, 14 Beng. L.R. 201 ; *Russickloll Mudduck* v. *Lokenath Kurmokar*, 5 Cal. 688 ; *Shib Doss Banerjee* v. *Bamun Doss Mookerjee*, 15 W.R. 360.

* Civil Regular Suit No. 246 of 1926.

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Thakoor Chunder Promanick and others v. *Ramdhone Buttachaya*, 6 Suth. W.R. 228—*referred to.*

Narayan Das Khettry v. *Jatindra Nath Roy Chowdhury*, 54 I.A. 218—*distinguished.*

The plaintiffs, as transferees of an unfinished house and the land upon which it stands, claim possession of the same. The defendant claims to be entitled to retain possession of the suit property by virtue of a lien upon it in respect of a balance alleged to be due to him under the contract for the erection by him of the building. He claims that (1) there was a specific agreement creating a lien upon the building for any balance due to him and (2) irrespective of any specific agreement, he, as an unpaid builder, is at law entitled to a lien upon the building. The plaintiffs deny that there was a balance due as alleged by the defendant. Three preliminary issues were framed, (1) Whether there was an express agreement to give a lien (2) If not, is the defendent entitled to a lien in law? (3) Is the plaintiff entitled to possession of the building? If so, on what terms; it being assumed for the purposes of this hearing that the defendant has not been paid the full amount due under him, as, if there is a finding in his favour on the three issues, the question of amount due (if any) must be referred to the Official Referee for the taking of accounts. The case went to trial on these issues with,

Leach for the plaintiffs.
Hay and *Dadachanji* for the defendant.

The learned Judge held on the evidence that no specific agreement was come to for a lien on the house for any balance due on the contract for erection. He then proceeds to deal with the questions of law involved in the second and third issues.

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OTTER, J.—The remaining question therefore is whether the defendant is entitled as a matter of law to remain in possession of the building by reason of a lien operating in his favour as against the plaintiffs. It is necessary to see first of all whether such a lien can operate at all in favour of an unpaid builder in this country. It is perfectly clear so far as materials incorporated into the structure are concerned that under the law of England it cannot. The principle expressed by the maxim "*quicquid plantatur solo, solo cedit*" prevents it. See Hudson's Law of Building Contracts, 4th edition, at page 566 *et seq* ; and also Halsbury's Laws of England, Vol. III, pages 164, 260 and 264 (Articles 323, 542 and 552 respectively). It is said, however, that this principle does not apply in India, and that therefore a lien over such materials can be created. Two authorities were cited to me by Mr. Hay in support of this contention. *Narayan Dass Khettry* v. *Jatindra Nath Roy Chowdhury* (1), (a decision of the Judicial Committee), was the first of these. The questions in that case arose under the Land Acquisition Act of 1894. The facts shortly were that the original proprietor of a piece of land had built a house upon it, and subsequently the land was sold for arrears of revenue. After this sale, proceedings were taken to acquire the land under the Act of 1894, and the sum awarded included Rs. 12,388 in respect of "structures." The auction-purchaser claimed the whole of this sum. The first question was whether the house passed to the auction-purchaser by reason of the revenue sale. The answer to this question depended to some extent upon the construction of the relevant provisions of the Revenue Act, and in particular upon whether a house was covered by the word "estate". The Committee held

(1) (1927) 54 I. A. 218.

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that the building did not pass, and in so holding they considered that the word "estate" must be taken to have a more restricted meaning than in English law, and that the Government's power of sale for arrears of revenue *primâ facie* is limited to the land which is subject to the payment of the revenue. The Committee also had regard to "the view held in India respecting the separation of the ownership of buildings from the ownership of the land and to the recognition . . . . . that there is no rule of law that whatever is affixed or built on the soil becomes a part of it and is subject to the same rights of property as the soil itself." It was for these reasons that the Committee were of opinion that special words in the Act would be necessary to make a building subject to sale. Their Lordships apparently approved what was stated by a Full Bench in the case of *Thakoor Chunder Poramanick and others* v. *Ramdhone Buttachaya* (1) and the following passage in the judgment in that case was quoted by them: "We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself." That the law is different in this country from that in force in England is clear from these cases and also from the case of *Shib Doss Banerjee* v. *Bamun Doss Mookerjee* (2), which was the second case relied upon by Mr. Hay. In *Thakoor Chunder's* case improvements were made by a *bonâ fide* holder under a defective title, and it was held that he could either remove the building or obtain compensation. This principle is now recognised in the provisions of section 51 of the Transfer of Property Act, 1882. In the case of *Shib Doss Banerjee*, a

(1) (1866) 6 Suth. W.R. 228 (2) 15 W.R. 360.

similar principle was laid down, where a landlord had allowed his tenant to build a house upon the demised land. The houses in that case were brick houses, but apparently the land was in a country district.

This principle also finds a place in the Transfer of Property Act [see section 108, sub-section (*h*) and (*p*)] where it is provided that a lessee may remove at any time during the continuance of the lease all things which he has attached to the earth provided he leaves the property in the same state as he received it. He cannot however without the lessor's consent erect any permanent structure on the property except for agricultural purposes.

There are a number of cases where similar questions arose. See (among others) *Parbutty Bewan* v. *Woomatara Dabee* (1). (But this actual decision turned upon the existence of custom). *Russickloll Mudduck* v. *Lokenath Kurmokar* (2); *Yeshwadabai and one* v. *Ramchandra Tukaram* (3); *Dunia Lall Seal* v. *Gopi Nath Khetry and others* (4); *Ismail Khan Mahomed* v. *Jaigun Bibi* (5).

I was referred by Mr. Leach to the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (6) where the cases of *Thakoor Chunder Paramanick* (7) and *Russickloll Mudduck* (2) were referred to, and where it was held that as against a reversioner, a defendant who had bought an interest in land after a house had been built upon it was not entitled to a fair price for the building or to remove the materials. In that case, the Court distinguished between a rule to be observed in the mofussil (where houses are easily pulled down) and in a large modern town like

(1) 14 Bengal L.R. 201
(2) (1880) 5 Cal. 688.
(3) (1893) 18 Bom. 66.
(4) (1895) 22 Cal. 820.
(5) (1900) 27 Cal. 570.
(6) (1882) 8 Cal. 582.
(7) (1866) 6 Suth. W. R. 228.

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Calcutta. But as was pointed out in *Dunia Lal Seal* v. *Gopi Nath Khetry* (1) above referred to that was a case where the land had fallen into the possession of a reversioner, and it was said (and I think rightly) that the learned Judges who decided it did not go so far as to hold that the buildings might not have been removed by the tenants of the limited estate while they were in possession.

Mr. Leach also pointed out that buildings must be considered as immoveable property. See the definition in section 3 of the General Clauses, Act, 1897, read with the definition of "Attached to the earth" in section 3 of the Transfer of Property Act. There is no doubt that is so ; but there is also no doubt, I think, that although walls and buildings embedded in the earth may be immoveable property, such walls and buildings do not, at least not in all cases, become the property of the owner of the soil merely by reason of their being so embedded or attached.

It seems to me that the real question is whether, as it has been held that the maxim "*quicquid plantatur solo, solo cedit*" does not apply where a *bonâ fide* transferee of land, or in certain cases where a tenant, has made improvements to his holding, I must therefore hold that the maxim does not apply to a case like the present. There is no doubt of course that if the passage on page 224 of the report of the case of *Narayan Das Khetry* (which I have quoted above) was intended to apply to every case where a building is erected, then it may well be that what is apparently the only obstacle to the creation of a lien in favour of an unpaid builder is removed. The facts in that case however were very different. The substantial question was the meaning of the word "estate" in the Act under review, and

(1) (1895) 22 Cal. 820

it seems to me that the real object of the Committee's decision was to allow the man who had erected the building to receive some compensation when it was taken away from him, and to prevent a transferee of the land only from taking all the compensation money. It is a somewhat parallel case to that of the tenant and the *bonâ fide* transferee who has a bad title. The question is a difficult one, and it must be borne in mind that this is not a case where a person having an interest in the land erects a building on land of which the owner is another. In this connection, I would lay stress on what was said by the Full Bench in case of *Thakoor Chunder Poramanick* (1), which has frequently been followed and was apparently approved by their Lordships in *Narayan Das Khettry's* case. Two passages are of importance, *viz.*, that already quoted, when I dealt with the Privy Council decision in *Narayan Das Khettry's* case, and a second at page 229 of the report where a distinction is drawn between a mere trespasser and a person who is in possession under a *bonâ fide* claim of title. Now a builder is neither of these things. He is, I suppose, in the position of a licensee with permission to go upon and remain upon the land for a certain purpose. But apart from any question of lien, he has no other interest in the land. Nor would he seem to be (like a tenant or *bonâ fide* transferee who has built for himself) a person whom equity would be anxious to assist, upon the ground that he should not lose the benefit of what he has erected. Furthermore, the expression "No absolute rule" in the first of the two passages would seem to justify the supposition that there is a general rule to the effect referred to but it is subject to exceptions. This passage is of course less strong than the passage in

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Narayan's case, but the dictum of Sir Barnes Peacock seems to have been approved, and indeed forms part of the headnote to *Narayan's* case. Furthermore, I am not clear that their Lordships of the Privy Council intended to say more than was said by the Full Bench in the earlier case.

The application of the maxim under review is discussed by the learned author of Gour's Law of Transfer of Property (5th edition) in his notes to sections 3, 51 and 108 of the Transfer of Property Act at pages 61, 560 and 2055 *et seq.* respectively; and especially in view of paragraph 85 which appears on page 61, I doubt whether the view of the learned author is that the maxim in question does not apply at all in India.

It was of course argued that a builder should at least be in no worse position than either a tenant or a *bonâ fide* transferee who has no title and who has made improvements. It is true that in the one case (speaking generally) he may remove the materials if he does not damage the property; in the other, if he is turned out, he is entitled to be compensated. But otherwise neither has any remedy. It must be remembered that a tenant cannot resist ejectment unless he can prove that the tenancy was a permanent one for building purposes or that the landlord allowed him to believe it was; nor can he, unless he can prove the foregoing circumstances, obtain compensation. [See *Yeshwadabai and one* v. *Ramchandra Tukaram* (1) and *Ismail Khan Mahomed* v. *Jaigun Bibi* (2).] His right is strictly limited by the circumstances of the case. In this connection, I would refer to *Beni Ram* v. *Kundan Lal* (3), a Privy Council case. From the judgment in that

(1) (1893) 18 Bom. 66. (2) (1900) 27 Cal. 570.
(3) (1899) 21 All. 496.

case) at page 503, it would appear that the Committee were careful to say that the maxim had no application to the "present case," *viz.*, a case under section 108 of the Transfer of Property Act. It was pointed out that in such a case in England a landlord is estopped in equity from bringing ejectment against his tenants because they were permitted to build with the knowledge of the landlord.

The point is so far as I know a new point, and there is no direct authority upon it. So far as I know there is no decided case where such a right of lien has been held to exist in India, nor any provision of any enactment dealing directly with the matter. An unpaid builder is not mentioned in the Indian Contract Act of 1872 though numerous other classes of persons are mentioned. It might however be argued in the case of certain building contracts that the unpaid builder should be held to be an "unpaid seller" within the provisions of section 95 of that Act. There is no case, however, so far as I know where this has been held or even suggested, and it may be that the reason for this is that a building in course of erection by a builder acting for the owner of the land does by being attached to the soil become part of it and thus vests in the owner of that soil. That this is so seems to me to be not unlikely. It is clear to my mind from a consideration of the cases where it has been held that buildings do not become part of it but are severable from the soil, that it was thought that as a matter of equity the tenant or *bonâ fide* transferee ought not to suffer, nor ought the owner of the land to benefit from improvements made in these circumstances. That being so, a remedy has been supplied.

Now in the present case, the builder has his ordinary civil remedy by way of action. It is perfectly

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true that an ordinary unpaid seller, or bailee has his remedy by way of action in addition to his lien; and in principle it is difficult to see the distinction. That it exists in England however there is no doubt whatever, and it seems (apart from authority) not unreasonable to hold that in the case of any ordinary building contract where materials are attached to the soil of the building owner, they become part of his soil. There can be no doubt they are immoveable property, and that being so it may well be that as such they become the immoveable property of the owner of the soil to which they are attached. Unless the maxim "*quicquid plantatur (or aedificatur) solo, solo cedit*" has no application at all in India, the effect of holding in a case like the present that such materials do not attach to the soil would be to create another exception to that maxim. No custom of Hindu (or other) law has been proved or referred to in support of the view that this maxim does hot apply in such a case as this, and upon the authorities as a whole I have come to the conclusion, though the matter is by no means free from doubt, that it does. The English law would apply unless it is clear that by local, customary or other law applicable in this countary, it does not. I am not clear that the Courts of India have excluded the application of the maxim altogether, though they have held and the legislature has said in effect that there are substantial exceptions to the application of the maxim.

If I am right, I must hold therefore that no lien in the defendant's favour has been created in law. I have already stated that I am not satisfied that a verbal agreement for a lien was arrived at, and I must therefore answer the first two issues in the affirmative.

It follows therefore that the plaintiffs are entitled to possession of the land and building as claimed,

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and I see no reason to impose any terms upon them. The third issue is thus also answered. There will be judgment for the plaintiffs in the terms of the foregoing with costs. In view of the difficulty of the case, I allow the plaintiffs a special allowance of seven gold mohurs a day for every day after the first day.

I am asked by both advocates to deal with the question of the costs relating to the appointment of the Receiver. I am told that I reserved them—and I think this is so—though no note appears in the diary. It is true the defendant consented to the appointment, but not until a considerable time had passed, and after he had filed substantial objections. In view of this and also in view of his attitude in persisting in remaining in the building, thus preventing its completion, I order that he should pay to the plaintiff's these costs.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

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Dec. 5.

U BA PE AND ONE

v.

U PO SEIN AND OTHERS.*

Order of Court confirming elections under scheme framed by it under the Civil Procedure Code, whether appealable—Civil Procedure Code (Act V of 1908), s. 92.

Held, that where a Court reserves to itself the right to confirm elections held under a scheme framed by it under the provisions of s. 92 of the Civil Procedure Code and where application for confirmation is made by parties on one side in the suit and is opposed by parties on the other side, the order is a decree in the suit itself and is therefore appealable as a decree under the Code

Abdul Shaker v. *Abdul Rahiman*, 46 Mad. 148—*referred to. Balakrishna* v. *Vasudeva*, 40 Mad. 793 ; *Chunilal* v. *Ahmedabad Municipality*, 36 Bom. 47 ;

* Civil First Appeal No. 301 of 1926.