

the purpose of bolstering up the case of the defendants; and I shall not allow the persons who rely on such a defence as this to have their costs, considering that the plaint is dismissed not on the merits, but on the peculiar ground which has been fatal to the plaintiff's case. The suit is therefore dismissed, each party paying their own costs.

Attorney for the plaintiff: Mr. *Paliologus*.

Attorneys for the defendants: Messrs, *Swinhoe & Co.*

Before Mr. Justice Phear.

KENNY v. THE ADMINISTRATOR-GENERAL OF BENGAL.

*Equity of Redemption—Claimant—Agreement to Purchase.*

The claimant entered into an agreement for the purchase of certain property; and on the execution of the agreement, deposited rupees 15,000 as earnest-money of the contract, and in part payment of the purchase money. The claimant was not satisfied at that time with the title deeds supplied by the vendor, but afterwards entered into fresh negotiations for the purchase upon different terms. The vendor died, and the present claim was filed in a suit to administer his estate. *Held*, that the claimant was entitled to be paid in full the rupees 15,000 in priority to all other creditors; and that his lien was not lost by the failure either of the original contract or the subsequent negotiations.

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In this administration suit a claim was made on behalf of Janokinath Mookerjee, the son of Rakhaldas Mookerjee of Burdwan, and S. M. Barada Sundari Debi, the mother and guardian of Bir Chand Mookerjee, the only other son of Rakhaldas Mookerjee. The claimants were representatives of Rakhaldas Mookerjee, who died in November 1868; and sought to recover 15,000 rupees, the amount of earnest-money paid by the deceased in respect of lands which he had contracted to buy.

About March 1868, negotiations were entered into between Thomas Kenny (since deceased) and Rakhaldas Mookerjee for the sale to the latter of property in Nuddea belonging to the former, and an agreement to that effect was come to between them.

At the time of the execution of the agreement, the sum of rupees 15,000 was paid by Rakhaldas Mookerjee to Thomas Kenny, as earnest-money and in part payment of the purchase-

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money ; the stipulation being that the balance should be paid in a month. Rakhaldas Mookerjee after the execution of the agreement gave his attorneys instructions to inspect the title deeds and papers relating to the property, with a view to completing the purchase ; and after some delay on the part of the vendor in producing all the necessary documents, the title was gone into and found unsatisfactory. The vendor died leaving a will, and fresh negotiations for purchase were entered into between Rakhaldas and the Administrator-General, who as executor represented the estate of the deceased, but the purchase was not completed. In June 1868, the following letter was sent to the liquidator of the Agra Bank by the attorneys of Rakhaldas Mookerjee :—

*9 Hastings' Street, 18h June 1868.*

TO THE LIQUIDATORS OF THE AGRA BANK.

SIR,—In pursuance of the terms of an agreement entered into by the late Mr. Kenny, of Salgarmudia, with our client, Baboo Rakhaldas Mookerjee, on the 7th of March 1867, which was registered on the same date ; and by which, in consideration of having received rupees 15,000 as earnest-money, he, the late Mr. Kenny, agreed to sell the whole of his estate, mortgaged, or not mortgaged, to our client, the said Baboo Rakhaldas Mookerjee, for a sum of rupees 1,75,000, and then again to take a sub-lease of the estate at an annual rental of rupees 19,000, exclusive of revenue or rent payable to Government or other superior holders, we are instructed to offer you, on behalf of our client, the said Baboo Rakhaldas Mookerjee, to pay the whole debt which is due by the said Mr. Kenny to your Bank ; the terms of the agreement run to the effect, that if Mr Kenny failed to execute the Bill of Sale, our client, the said Baboo Rakhaldas Mookerjee, would be competent to pay off the whole debt amounting to rupees 1,60,000 due to the Bank, and then to have a conveyance executed by Mr. Kenny. We request the favor of your sending us a copy of the account current subsisting between the Bank and the said Mr. Kenny for which the Bank holds a mortgage of the estate.

(Sd.) BANNERJEE AND BOSE.

No reply was received to this letter, and in September 1868, negotiations for purchase were again opened with the Adminis-

trator-General, and the following letter was sent to him on behalf of Rakhaldas Mookerjee by his attorneys:—

“ Baboo Rakhaldas Mookerjee, having been laid up for some time, I have not been able to communicate with you on the subject of the sale of the property of the estate of Mr. Kenny to my client. I have now been instructed by my client (without prejudice to his rights) to accept the offer of rupees 240,000 made by you for the purchase of the property by my client, should you allow a deduction of the earnest money, viz., rupees 15,000, with interest thereon at the rate of 12 per cent. per annum, from the date of payment of the earnest-money to the close of the bargain being made in the aforesaid purchase-money to be paid by my client.”

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In reply to this the following letter was sent:—

*Calcutta, 5th September 1868.*

To BABOO DINANATH BOSE.

DEAR SIR,—In reply to your letter, without date, just received, in which you say your client, Baboo Rakhaldas Mookerjee, is willing to become the purchaser of the Salgarmudia Concern, I beg to say, that as he did not reply to my letter, I concluded he was unwilling to do so and I therefore opened negotiations for the sale with other parties. These are very nearly settled, and I fear I cannot now entertain your client's offer.

I should like however to see you this afternoon before I finally arrange with the other parties.

C. J. WILKINSON,

*Offg. Admr.-General*

And, two others were afterwards sent, which are as follows:—

*7th September 1868.*

To BABOO DINANATH BOSE.

DEAR SIR,—It will be as well if Baboo Rakhaldas Mookerjee should, at the same time as he agrees to purchase on the terms proposed to-day, undertake to pay the purchase-money before the holidays, otherwise I shall close with the parties with whom I am negotiating the sale of this estate.

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Of course, my terms are only dependent on my being able to refuse the terms offered me by the above parties, for I think the matter has almost gone too far to justify me in breaking off with them.

C. J. WILKINSON,

*Offg. Admr.-General.*

12th September 1868.

To BABOO DINANATH BOSE:

DEAR SIR,—Your client, Baboo Rakhaldas Mookerjee, has sent me no reply, as was promised, saying whether he was willing to purchase the Salgarmudia Concern, at rupees 2,40,000 with the “dena-powna.”

As he has not done so, I shall conclude with those persons with whom I have been in treaty, without further reference to him, and shall entirely disregard the arrangement which he entered into with Mr. Kenny.

I send you a copy of the Advocate-General’s opinion respecting that arrangement; and in compliance with the suggestion therein, I hereby give you notice, as the Attorney for Baboo Rakhaldas, that that agreement for sale to him is at an end, and that I shall proceed to sell the right, title, and interest of the late Mr. Kenny in the property for the good of his estate.

Yours faithfully,

C. J. WILKINSON,

*Offg. Admr.-General.*

Mr. Kennedy (Mr. Bonnerjee with him) for the claimants, contended that they had a lien on the estate of the deceased Kenny, and cited *Parden v. Thorold* (1), *Rose v. Watson* (2), *Wythes v. Lee* (3), *Maclreth v. Symmons* (4), *Middleton v. Magnay* (5), and referred to Sugdens’ Vendors and Purchasers.

Mr. Broughton (Mr. Graham with him), for the Administrator-General, cited *Burges v. Wheate* (6), and *Dinn v. Grant* (7).

(1) 10 I. J., 959.

(2) 10 H. L. C., 672.

(3) 3 Drewry, 396.

(4) 1 Wh. & Tu., L. C., 2nd Ed., 235.

S. C., 15 Ves., 329.

(5) 2 H. & M., 233.

(6) 1 W. Bl., 123.

(7) 5 DeGex & Sm., 451.

Mr. *Kennedy* in reply.

PHEAR, J.—I think that Rakhaldas Mookerjee's contract with Mr. Kenny amounts to a sale by Mr. Kenny to Rakhaldas of Mr. Kenny's property in the lands and tenures specified, which was at that time an equity of redemption, for I believe the whole estate of Mr. Kenny was then under mortgage to the Agra Bank. I think the rupees 15,000 paid by Rakhaldas to Mr. Kenny was earnest-money, *i. e.*, a deposit of part of the purchase-money; and that, consequently from the moment it was paid down, the purchaser had a lien upon the property to the extent of rupees 15,000, which lien could only be lost to him by reason of his failing to carry out his side of the contract. It was not very easy from the materials before me to say exactly what position the parties took in relation to each other before and after Mr. Kenney's death, but this I think clear as between Rakhaldas and Mr. Kenny, namely, that the period of one month within which the purchase-money was to be paid was not of the essence of the contract between them. Even if it was originally so, I think they waived it by their mutual conduct. Enquiries were being made by Rakhaldas as to the amount of Mr. Kenney's property and as to title, and were being responded to after the lapse of the month. This being so, the non-payment within the month was not a breach of Rakhaldas' contract, indeed I do not think he could have been called upon to pay till a good title had been made out, and that certainly was not done within the month. I think, on the whole, Rakhaldas has not broken his original contract. The lien which he obtained at first was not lost merely by his entertaining proposals for a new contract on a new basis. It seems to me, therefore, that he is entitled to be paid in full his rupees 15,000 out of the proceeds of the equity of redemption, in priority to all other creditors.

Attorneys for the claimants : Messrs. *Judge and Gangooly*.

Attorneys for Mr. Kenny : Messrs. *Watkins, Trotman & Co.*

Attorneys for the Administrator-General : Messrs. *Stack & Co.*

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