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and sufficient security is not objected to, and it is conceded that the refusal to entertain the plaintiffs' application because of their breach of a former agreement was not sanctioned by any authoritative rule or custom. We are of opinion that it is not open to the appellants now to set up that the mirassidars have no right whatever to claim the occupancy of waste lands. Their preferential right subject to the conditions already stated has been deliberately and distinctly admitted, and on that admission the suit was heard and determined by the Civil Court. If on the part of the Government a Judicial decision as to the right of pre-occupancy is desired, the question may be properly raised in another suit when the mirassidars will have the opportunity, to which they are entitled, of adducing evidence of custom in support of their claim.

For these reasons the decree of the Civil Court must be affirmed with costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 40 *of* 1869.

GOLLA CHINNA GURUVUPPA NAIDU..... *Appellant.*

KALI APPIAH NAIDU and another..... *Respondents.*

The plaintiff brought a suit on an instrument, dated 1861, described as a mortgage bond, to recover the amount due by a decree against the first defendant personally and against the mortgaged property which was in the possession of the 2nd defendant under a registered deed of sale by 1st defendant to him in 1866. The Civil Judge gave a decree against the 1st defendant, but refused the prayer against the 2nd defendant on the ground that he was a *bona fide* purchaser for valuable consideration without notice.

Held, by the High Court, that the plaintiff was entitled to a decree against the property in the possession of the 2nd defendant for satisfaction of the debt, whether the instrument sued on was a mortgage, or whether its effect was merely to create a lien.

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THIS was a Regular Appeal against a decision of E. F. Eliott, the Acting Civil Judge of Chittoor, in Original Suit No. 33 of 1866.

The suit was brought to recover rupees 3,000 under certain mortgage bonds.

(a) Present. Bittleston and Innes, J. J.

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The plaint set forth that 1st defendant owed plaintiff a sum under a mortgage bond, which, with ready money received, amounted to rupees 3,000, for which on the 27th November 1861, 1st defendant executed on stamp paper a mortgage bond promising to pay the same at 1,000 rupees a year, with interest on the principal at 1 per cent. per mensem, and mortgaging what was mortgaged in the former mortgage bond, viz., 1st defendant's 10 and odd cawnies of tope land in Ayalam village, and nunjah lands and wells pertaining thereto; that 1st defendant had paid nothing but was making dilatory promises, and that as he had made over the mortgaged property to 2nd defendant, this suit had been brought against 2nd defendant also to recover the debt by means of the property mortgaged; that out of the amount of the aforesaid bond for 3,000 rupees, 1,000 rupees due on the 1st instalment was relinquished as affected by lapse of time, and the balance remaining is 2,000 rupees, and the interest thereon from date of bond was rupees 1,016-9-0. Relinquishing therefore rupees 16-9-0, the balance left is 1,000 rupees, and the total 3,000 rupees, which sum, together with further interest and costs, the plaintiff sued to be recovered to him by means of the mortgaged property and from 1st defendant, and that 2nd defendant's interference might be prevented in rendering this mortgaged property liable.

The 1st defendant allowed the case to be tried *ex-parte.*

The 2nd defendant contended that he did not know 1st defendant executed a document to plaintiff mortgaging his lands, fruit trees, &c., or if he owed any debt, neither was his knowledge of the same alleged in the plaint; that 1st defendant sold to 2nd defendant for rupees 2,000 (1,200 rupees being formerly due and 800 then received) his punjah lands measuring cawnies $10\frac{3}{4}$ with two wells thereon and fruit trees situated in the village of Ayalam, which had been in 1st defendant's possession and enjoyment; that on the 23rd May 1866, 1st defendant executed a sale-bond to 2nd defendant and had it duly registered, and that he also presented a razinamah to the circar

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for the transfer of puttah to 2nd defendant's name; that 2nd defendant purchased this tope and lands for their proper value and was in possession and enjoyment of the same ever since; and that plaintiff's demand to make them liable to his claim was illegal and invalid.

The following issues were settled by the then Judge Mr. C. A. Roberts :—

Whether the plaintiff's document of 1861 is genuine ?

Whether 2nd defendant is liable to plaintiff's claim under the document aforesaid ?

The following is extracted from the Judgment of the Civil Judge :—

The vakils of both parties stated that as the documents on either side are not disputed by the other side nor by 1st defendant, and as either party only pleads ignorance of the execution of the document of the other party, there was no apparent necessity to examine evidence on the 1st issue, and accordingly they dispensed with the same.

It appears to me that the point for decision is—which claim has the preference ? In point of priority of date there can be no doubt that the mortgage bond of the plaintiff is the prior document, but I am of opinion that this fact alone is not sufficient in itself to give it the preference especially considering that the defendant is in admitted possession and enjoyment of the property by his deed of sale. Either party to the suit pleads entire ignorance of the execution of the document of the other party, and the 1st defendant has tacitly admitted the claims of both parties by having not disputed either claim but allowed the case to be heard *ex-parte*. Further, the plaintiff has nowhere alleged that defendant was aware of the mortgage which is equivalent on his part to a tacit admission that he (2nd defendant) was not aware, and it is clear from his plea of ignorance of the deed of sale that he himself could not have made 2nd defendant aware or given him notice of the mortgage. The presumption therefore is in favor of 2nd defendant's plea that he was a *bonâ fide* pur-

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chaser for a valuable consideration without notice supported by the fact of his being in possession of this property claimed. Still it has been ruled by the Judgment of Privy Court in *Seth Sam* v *Luckpathy Royjee Lallah* in 9. *M. I. Ap.* that conceding that such "a purchaser would have an equity superior to that of plaintiff, still such innocent purchase must not be merely asserted but proved in the cause." Such being the case, it remains to look to the proof. On this point I am of opinion that the circumstantial evidence before me is sufficient to establish the innocence of this purchase. The facts, that the property was purchased for a proper value ; that the 2nd defendant is and has been ever since in possession ; that the deed of sale has been registered ; that the 1st defendant has not denied or disputed this document, nor has plaintiff discredited or impugned it ; that ignorance or " without notice" has been the plea pleaded by this defendant which has not been at any time denied or discredited by plaintiff, nor has the plaintiff at any time alleged to the contrary that this defendant was aware and had notice,—all these are in favor of the presumption of the innocence of his purchase, and, as far as I can see, no other evidence can be available in proof of a negative pleading such as absence of knowledge as well as of notice. I consider that it was either for the plaintiff or the 1st defendant to give notice. The former having pleaded ignorance of the execution of this document certainly could not have done so, and the 1st defendant by withdrawing from this suit and not denying or refuting either claim shows that he did not do so either, and clearly it was not his object to do so, and therefore this affords the strongest presumption of the innocence of the purchase which, if considered proved, establishes an equity superior to that of the plaintiff. The 1st defendant in this case, I consider, to be chiefly responsible for this fraudulent conveyance, inasmuch as he has obtained money from both parties on this land and has imposed on both—in the case of plaintiff by selling it without his knowledge when he had a mortgage lien upon it, and in the case of 2nd defendant by selling it to him without notice, and when in reality at the time he had no right, title, and interest in

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it to part with. The saving fact, however, in favor of 2nd defendant is that it was an innocent purchase and without notice which I find it to be, and as such it cannot be held liable in my opinion to plaintiff's claim notwithstanding the plea set up by the plaintiff of "*Caveat emptor.*"

For these reasons I find for the plaintiff in the amount sued for as against 1st defendant personally, but not as against this property, which together with 2nd defendant, I exonerate from all liability to this suit. All costs to be borne by the 1st defendant.

The plaintiff appealed to the High Court.

Rungaiya Naidu, for the appellant, the plaintiff.

Rama Row, for the 2nd respondent, the 2nd defendant.

The Court delivered the following

JUDGMENT:—This is a suit on an instrument dated 27th November 1861, described as a mortgage bond, to recover the amount due by a decree against the 1st defendant personally, and also against the mortgaged property which is in the possession of the 2nd defendant under a registered deed of sale by 1st defendant to him in 1866.

On the hearing before the Civil Judge, the plaintiff's mortgage and the defendant's deed of sale were admitted; and excepting those documents no evidence was given on either side, but on behalf of the 2nd defendant it was argued that he was a purchaser for valuable consideration without notice, and that the property which he had purchased could not be held subject to the plaintiff's mortgage. The Civil Judge was of that opinion and made a decree accordingly, directing that 1st defendant should pay the amount due, but that 2nd defendant and the property purchased by him should be exonerated from the plaintiff's claim.

In support of this decree, we were referred to the decision of this Court in Regular Appeal No. 32 of 1865, not reported,

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and if we take only the language of the Judgment in that case, it is difficult to distinguish it from the present; for the decree of the Civil Judge in that case dismissing the suit was upheld on the ground that the plaintiff was attempting to enforce a mere hypothecation against a purchaser for valuable consideration without notice—it being said that the English decisions on this subject should be followed as clearly tending to advance justice. We have no doubt that in that particular case the application of the rule was in furtherance of justice, but we are not prepared to say that it necessarily would be so in every case, and the facts of this present case are totally different from those found by the Civil Judge in Regular Appeal No. 32 of 1865. In that case the Civil Judge found that the 1st defendant, a *bonâ-fide* purchaser for value without notice, had been in sole and independent enjoyment of the lands in question for ten years prior to the document under which the plaintiff claimed a lien and 16 years before the suit; that the alleged lien was fraudulent, collusive, and illegal, and that the plaintiff had been guilty of laches. In the present case the Civil Judge finds in effect that both plaintiff and 2nd defendant are innocent parties both of whom have been imposed upon by the 1st defendant—"in the case of the plaintiff (as he expressly puts it) by selling it without his knowledge when he had a mortgage lien upon it, and in the case of the 2nd defendant, by selling it to him without notice, and when in reality at the time he had no right, title, and interest in it to part with." If this be a correct view of the facts of the case, we find it difficult indeed to understand why the plaintiff should be deprived of that security which the 1st defendant had given to him, and the 2nd defendant be confirmed in a right which the 1st defendant could not give him.

If, however, the distinction between a mortgage and a hypothecation of land is to be adverted to, we are not prepared to say that the document on which the plaintiff sues, or the earlier document referred to therein, is more than an instrument of hypothecation; and the case therefore falls within the very terms of the judgment in

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Regular Appeal No. 32 of 1865, but we have no doubt at the same time that the parties to those documents intended that they should give to the plaintiff a perfect and complete right to have the lands in question made available for satisfaction of his debt in case of need; and we cannot but think that equity and good conscience (which is our rule of decision) require that he should not be deprived of that right unless he can be shown to have been guilty of some negligence whereby the 2nd defendant may have been more easily imposed upon in the matter of his purchase from the 1st defendant.

Further, one of the Judges (Mr. Justice Innes,) who took part in that decision has for some time been of opinion that the proposition was stated too broadly, and the other Judge (Mr. Justice Holloway) in a previous reported case in which he was considering the nature of the contract of hypothecation as applied to land, held that it gave an interest in immoveable property, for (he said) it is clear that any subsequent sale must be made subject to it (2, *Madras High Court Reports, p.* 54).

There is still another reason why we do not feel ourselves bound to apply to this case the rule mentioned in Regular Appeal No. 32 of 1865, which is this-that a full Bench of the High Court of Calcutta have come to a directly opposite decision, not unanimously, but by a majority of Judges of whom the Chief Justice was one (*Vol.* 5 *Calcutta W. R. for* 1866, *Civil Rulings, page* 61).

The facts of that case very closely resembled the present, and the plaintiff was held entitled to enforce an unregistered instrument creating a lien upon land against a subsequent purchaser for value without notice whose deed of sale was registered. In his case, too, the non-registration of the plaintiff's mortgage is the only fact tending to show any negligence on his part, but the Calcutta High Court considered that the document creating the lien was not a deed of mortgage which he was bound to register under Act XIX of 1843, Section 2, and though in this respect there is an apparent conflict between that decision and the decision of this Court in Referred Case No. 80 of

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1864 (2. *M. H. C. Rep. page.* 108), for this Court treats the instrument of hypothecation as a mortgage deed, it is to be observed that this Court only held that the instrument of hypothecation was one which could be registered under Section 3 of Regulation XVII of 1802 ; and that Section includes amongst the instruments of which the registration is optional " all limited assignments and generally all con- " veyances used for the temporary transfer of real property."

It is clear from Section 3 of the Act XIX of 1843 that there are instruments affecting title to land or some interest in the same other than the deeds of sale or gift or mortgage mentioned in Section 2, as to which the Legislature has declared that they are not to be in any respect void for want of registration ; and those no doubt include the instruments of which registration is declared to be optional by the Regulation XVII of 1802, Section 5, and as to which it is by that Section enacted that the not registering them shall in no wise operate to the prejudice of the rights of the parties thereto. Practically, it seems to us, that the question is reduced to this. Either the instrument on which the plaintiff relies is a mortgage, meaning thereby an instrument whereby the interest of the mortgagor in the land mortgaged to the full extent of the debt intended to be secured thereby is transferred to the mortgagee whether actual possession of the land mortgaged be or be not given to the mortgagee, in which case non-registration would render the mortgage void as against a subsequent registered mortgagee, though not as against a subsequent registered sale, and the defence of purchase for valuable consideration without notice would be inapplicable because the plaintiff would be pursuing a legal remedy upon a legal title. Or if the instrument can only be properly construed as one not transferring any estate or interest in the land but creating simply a lien or charge, unaccompanied with any right of possession, the registration would at most only be optional, and if so, the non-registration is not to prejudice the rights of the parties, and the plaintiff cannot be charged with neglect and deprived of his lien on account of his omission to register. We would add only, as to the obser-

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vation in the Judgment of the Privy Council to which the Civil Judge in the present case refers, that it does not purport to be even an expression of opinion on this subject.

Under the circumstances of this case therefore, and in the existing state of the authorities, we do not feel ourselves prevented from doing what justice seems to us in the present case to require, viz, giving to the plaintiff the benefit of his security upon the land of which the 2nd defendant has possession. That the plaintiff's documents are genuine and *bona fide* and given for valuable consideration, is not in the slightest degree disputed in this case, and it is unnecessary therefore to remand the case to the Civil Judge for any investigation on those points. The decree already directs payment of the amount due by the 1st defendant, and so far it is not objected to and must stand; but so much of it as exonerates the mortgaged property from liability must be reversed, and the decree must direct that the said property be made available for satisfaction of the said debt. The costs of the appellant in the Lower Court were ordered to be paid by the 1st defendant, and we do not interfere with that part of the decree. As to the costs in this Court, we think it reasonable that each party should bear his own.