Privy Council Appeal No. 130 *of* 1931.

Ram Raghubir Lal and others - - - - - *Appellants*

v.

The United Refineries (Burma), Limited, and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY, 1933.

Present at the Hearing:

LORD TOMLIN.
LORD THANKERTON.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

On the 15th December, 1924, the first respondents (hereinafter referred to as the Company) agreed to sell to the firm of Kashi Vishwanath & Co. or their nominees or assigns certain immoveable property in the Hanthawady District of Burma, comprising 330 acres of land and the buildings and plant of an oil refinery erected thereon. The members of the said firm were the first two appellants before the Board and a third partner now deceased and represented by the fourth appellant. The consideration for the sale was set out in the agreement and included the sum of Rs. 2,00,000, which was to be paid three months after the registration of the sale deed.

On the 15th January, 1925, the sale deed was executed by the company as vendors, the conveyance being made by the direction of the firm to the third appellant as their nominee. Neither the firm nor any member of it was a party to the deed, but the direction to convey to the third appellant was recited therein, and a declaration to that effect under the signature of the firm was appended thereto. It was also recited that in respect

of the Rs. 2,00,000 a joint and several promissory note had been executed by the firm and the third appellant to secure payment of that sum three months after registration.

The sale deed was registered on the 17th January, 1925, but the Rs. 2,00,000 was not paid, and on the 22nd September, 1927, the third appellant entered into an agreement for the re-sale of the property to the second respondent. This sale has fallen through, and for the purposes of the present appeal the second respondent, who has not appeared and against whom no relief is sought, may be disregarded.

On the 20th March, 1928, the company instituted a suit in the District Court of Hanthawady against the partners in the firm and the purchaser (the third appellant), praying a decree for Rs. 2,35,000, being the Rs. 2,00,000 above referred to with interest to date, and in default of payment for sale of the property, with a personal decree against the defendants for any deficiency. This was based originally on an alleged equitable mortgage of the property by deposit of title deeds, but by subsequent amendment it was supported by claiming a charge for unpaid purchase money.

Various defences were raised to the suit, but the only question of substance now material is as to the personal liability of members of the firm, *i.e.*, appellants 1, 2 and 4. The claim to an equitable mortgage was not established, but both Courts in Burma affirmed the charge for Rs. 2,35,000 in respect of unpaid purchase money, and the propriety of this decision has not been seriously disputed before the Board. The question of the promissory note has also gone out of the case, as it was found not to be properly stamped and therefore inadmissible in evidence. The only other question raised on the appeal was as to limitation and it will be dealt with later.

The District Judge thought it sufficient to pass a decree in favour of the company merely declaring that it had a vendor's lien over the property in suit and awarding costs against the defendants. From this decree an appeal was taken to the High Court by the present appellants, and the company filed cross-objections claiming *inter alia* sale of the property and a personal decree for any deficiency. After a remand and a further finding by the District Judge on a question not now material, the learned Judges of the High Court delivered their final judgment on the 10th September, 1930. They affirmed (as already stated) the finding of the District Judge that the company had a vendor's lien over the property for the Rs. 2,00,000 with interest, but they set aside his decree as insufficient, and substituted a decree in the company's favour for

> "(1) 2,35,000 (Rupees two lakhs and thirty-five thousand only) with further interest at 6 per cent. per annum from the date of suit to the date of realisation, charged on the property in suit.
>
> (2) For the sale of the said property should the amount of the decree not be paid;

(3) For a declaration that the respondent-plaintiff company's charge over the property takes priority over any interest of the 4th appellant —4th defendant— company in the said property ; and

(4) For a personal decree against the 1st, 2nd, 3rd and 5th appellants —1st, 2nd, 3rd and 5th defendants—for any portion of the decretal amount which may not be satisfied out of the sale proceeds of the property. "

They also gave the company their costs in both Courts against the same parties.

It has been brought to their Lordships' notice that under section 100 of the Transfer of Property Act, 1882, read with Order 34, Rule 15, of the Code of Civil Procedure, the Court should have passed a preliminary decree for sale as in a suit on a mortgage, but no objection has been taken to the decree on this score, and as their Lordships are informed that the property has already been brought to sale, they do not think it necessary to lay stress upon this apparent irregularity.

The only part of the decree to which serious objection is taken by the appellants is sub-head (4), whereby a personal liability for the anticipated deficiency is laid upon all the present appellants. It is contended that though this order may be justified (subject to the question of limitation) in the case of the third appellant, the nominee purchaser, there is no such right against the other appellants who represent the firm of Kashi Vishwanath & Co.

The determination of this question depends in their Lordships' opinion upon the construction of the sale deed. The members of the firm were not parties to it and merely directed the vendors, as they had a right to do under the original agreement, to convey to the third appellant. The learned Judges of the High Court seem to have affirmed the liability of appellants 1, 2 and 4 merely by reason of the statement appended to the deed declaring the third appellant to be the nominee of the firm as purchaser and consenting to the conveyance to him. Their Lordships are unable to give this effect to the statement in question. Under the original agreement the company had bound themselves to accept as purchaser either the firm or a person nominated as such by the firm, and there was no provision that in the case of a nominee the firm were to remain liable for the balance of the purchase money. The conveyance was made to the third appellant as purchaser, reciting that the agreed part of the consideration had been made good by him, and that he was ready and willing to pay the outstanding balance of Rs. 2,00,000. Their Lordships can read this only as a substitution of the third appellant for the firm, and as leaving no liability upon the other appellants. They are therefore of opinion that the decree of the High Court was wrong in declaring the personal liability of appellants 1, 2 and 4 for the anticipated deficiency.

The question of limitation may be shortly disposed of. Having regard to the conclusion at which their Lordships have arrived above, the only question is whether the claim for a

personal decree against appellant No. 3 was out of time. No issue as to limitation was raised in the District Court, but the matter was dealt with at length in the judgment of the High Court. The learned Judges held that the liability of the third appellant arose, in virtue of the conveyance, upon a contract in writing registered within the meaning of article 116 of the Limitation Act, and that the six years period allowed by that article applied, with the result that the suit was well within time. Their Lordships think that, having regard to the judgment of this Board in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*, 44 I.A. 65 this view was manifestly correct. It is therefore unnecessary for them to consider the applicability of article 111, by which a shorter period is prescribed, and upon which reliance is placed for the company in a case where (as here) no time was fixed for completing the sale and the purchase money in question was not payable until some date after conveyance of the property.

For the reasons appearing above, their Lordships think that a personal decree should only have been passed against the third appellant, and that the decree of the High Court should be varied by omitting from sub-head (4) thereof the reference to 1st, 2nd, and 5th appellants—1st, 2nd, and 5th defendants, the references to the 5th appellant and 5th defendant being taken to cover the present 4th appellant. The order for costs must, they think, be varied in the same way, the costs of the company in both Courts being ordered to be paid by the 3rd appellant only. There will be no order as to costs before this Board.

Their Lordships will humbly advise His Majesty to this effect.

In the Privy Council.

RAM RAGHUBIR LAL AND OTHERS

v.

THE UNITED REFINERIES (BURMA), LIMITED, AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES.

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