

Heng Moh and Company - - - - - *Appellants*

*v.*

Lim Saw Yean and others - - - - - *Respondents*

FROM

THE CHIEF COURT OF LOWER BURMA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 27TH APRIL, 1923.

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*Present at the Hearing :*

VISCOUNT HALDANE.

LORD SHAW.

LORD PARMOOR.

MR. AMEER ALI.

[*Delivered by* VISCOUNT HALDANE.]

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Their Lordships are in a position to deal with this appeal at once.

The question is a short one. It is whether an equitable charge was created in favour of the appellant firm by deposit of certain title deeds to secure a sum of Rs. 25,000, with interest. The Court of first instance decided that such a charge was constituted. The Court of Appeal has reversed the decision.

The appellant was a money-lender and banker and he also carried on business, under another firm name, as a merchant. His merchant firm entered into partnership with one, Chwa Chwee Gee, who is now dead, but who is represented among the respondents. It was a business for the making and sale of oil. It is not necessary to go into the history of that business. It is enough to say that there was an existing mortgage on one of its mills for Rs. 25,000; the mortgagee was pressing for the money and Chwa Chwee Gee, who was the other active partner in the oil firm besides the appellant, went to the appellant and

asked him to raise the Rs. 25,000 which was necessary to meet the mortgagee's claim. Under Article 9 of the articles of partnership between the appellant and Chwa Chwee Gee and the other persons in the firm, it was provided that the mortgages to which the mills were subject should be paid off out of the share of profits of Chwa Chwee Gee. The reason for that was that Chwa Chwee Gee and another partner had brought the mills into the partnership subject to these mortgages, while the appellant, who had nothing to do with the mills, had brought in Rs. 60,000 of capital; and it was only right that the mills should be cleared so as to put the appellant on the same footing as Chwa Chwee Gee and the other partner. The articles of partnership provided, as has been said, that the profits of Chwa Chwee Gee were to go to pay off these mortgages. When Chwa Chwee Gee went to him the appellant sent his clerk to the office of the original mortgagee's lawyer, where the clerk paid off the mortgage and brought back the deeds and handed them over to the appellant. Now it is not suggested that on that occasion, when Chwa Chwee Gee was present, there was any verbal agreement come to about the mortgage. The clerk says that what was done was done the day before, and the question is whether this is true.

The Court of Appeal, differing from the learned Judge, has said this in its judgment, at page 68 of the record :—

“ Having regard therefore to the evidence, oral and documentary, and to the undoubted facts of the case and the conduct of the parties, I am of opinion that plaintiff has entirely failed to prove that defendants mortgaged the property in suit to him as alleged.”

The view taken was that this was a mere partnership transaction, an advance from one partner to another to be paid off, like other advances already existing, out of profits, and there was a very good prospect of profits; indeed, it is suggested that enough profits had come in to pay off everything. Whether that was so or not, it was a transaction which might very well have been entered into having regard to the state of the business and to Clause 9 of the articles of partnership.

The Court of Appeal negatives the alternative view that this was a transaction of mortgage independently between the appellant and Chwa Chwee Gee, and they proceed on various grounds. One of these is an important admission, which it has been contended was a mistake, but still stands, made by the appellant in cross-examination. He said he was manager of the firm in which he and Chwa Chwee Gee were partners, and that as such manager in chief he “ took charge of all books and papers as such,” that is as manager of the partnership firm, “ I took charge of title deeds from Ramen Chetty,” that is the original mortgagee, “ when the mill was redeemed. The title deeds came to me because I lent the money as Heng Moh's.” That may or may not be so, but he said it was in the capacity of manager in chief of the partnership firm that he took charge

of the deeds, and this is borne out by the documents, which show that the debt is one which is treated as a debit of Chwa Chwee Gee in the partnership accounts, both as regards the capital of Rs. 25,000 and also as regards the interest.

Then there is another very significant fact, and that is that in the appellant's own books, the books of his own business, which he, a shrewd man of business, as the Court of Appeal said, carried on as money-lender or banker, there is not any entry of a transaction by way of mortgage, equitable or otherwise. What is found there fully supports the view that their Lordships take of the transaction, in regard to which they are in agreement with the Court of Appeal.

Under these circumstances their Lordships conceive that the judgment of the Court of Appeal was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

There was a petition by the respondents to bring further proceedings on the record. Their Lordships have not found it necessary to refer to those proceedings and the petition will be formally dismissed and the respondents must pay their own costs of it.

In the Privy Council.

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DELIVERED BY VISCOUNT HALDANE.

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