

Privy Council Appeal No. 65 of 1928.

Khoo Sain Ban - - - - - *Appellant*

v.

Tan Guat Tean 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 11TH MARCH, 1929.**

Present at the Hearing :

LORD SHAW.

LORD TOMLIN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree of the High Court at Rangoon made in its Appellate Jurisdiction on the 20th April, 1926. It reversed a decree of the same Court made in its Original Civil Jurisdiction on the 8th May, 1925. In the case for the appellant the point to be decided is thus stated "The principal question in this appeal is whether the appellant is entitled to a charge upon certain property in Rangoon known as 'Mount Pleasant' as was found by the Trial Court or only to a money decree as held by the Court of Appeal."

It is unnecessary to repeat the facts of the case antecedent to the 2nd August, 1923. They are stated with sufficient particularity in the cases for the parties and in the judgments of the Courts below.

One Lim Chin Tsong, a Chinese resident in Burma, had acquired in 1909 a small plot of land of 1.871 acres in extent, part of "the Golden Valley Estate" in the district of Rangoon. In 1919 he also purchased two other properties, one of which was a

house and land known as "Mount Pleasant"—the subject-matter of the present suit. Lim Chin died on the 2nd November, 1923. There had been a variety of business transactions between him and the appellant Khoo Sain Ban.

Some months before his death in November, namely on the 2nd August, 1923, Lim Soo Hean & Company, being the firm of which Lim Chin was the sole partner, gave to the appellant the document :—

Rangoon, 2nd August, 1923.

DEAR SAIN BAN,

I confirm that we owe you nearly half a lakh of Rupees, I shall convey you my property known as "Mount Pleasant" as agreed by me to liquidate the amount as soon as I feel a little better.

(Sd.) LIM SOON HEAN & CO.

The argument before the Board had reference to the proper construction of that instrument.

In 1924 his widow, the respondent No. 1, obtained letters of administration, and she executed in April of that year a registered deed in favour of the appellant transferring to him the first small plot of land mentioned, and the appellant Sain Ban accepted the said transfer as "in part satisfaction of" his debt which was stated to be Rs. 52,734. The price of the plot was Rs. 15,000, leaving a balance of Rs. 37,734 still due. In June, 1924, the estate was placed for administration in insolvency and the respondent No. 2 was appointed official assignee.

In September the appellant filed a claim as a creditor on the estate as per an account which included two sums of Rs. 1,000 and Rs. 2,800 said to have been advanced to respondent No. 1 after her husband's death. In that account the Rs. 15,000—the value of the small property transferred—is clearly credited and the final balance of Rs. 43,533 is followed by this statement :—

"This amount is covered by property known as Mount Pleasant with 7.92 acres freehold in 'Golden Valley.'"

It is accordingly fairly plain that the appellant and his advisers viewed the transaction to be presently noted, as security, or cover for, or charge, upon "Mount Pleasant." The view, however, pressed upon the Board was of a more radical character, viz., that the document fell to be construed as a still existent agreement for sale of which specific performance may be demanded at law.

The second "reason" for the appellant is :—

"the appellant was entitled to specific performance or in any event to a charge as held by the Trial Court."

By specific performance can only be meant a performance of this obligation, "I shall convey you my property known as 'Mount Pleasant.'" As has been shown subsequent to the execution of that document the appellant had accepted a property valued at Rs. 15,000 in part satisfaction of the obligation of 2nd August and in part payment of the sum due to him, and had in fact

credited that part payment accordingly. To grant specific performance would accordingly be to vest the property fully in the appellant in respect of an obligation which had been in considerable part extinguished. According to one argument laid before the Board the appellant would have been permitted to realise the property and he would then stand in the position of a debtor to the estate of the vendor should more be obtained than was necessary to cover the remanent balance.

In the opinion of their Lordships, looking to the facts of the transaction, specific performance of the obligation cannot be given or worked out on any such principle. On the general point of construction of the document taken as a whole there are two views. It may be argued for as an obligation to grant an out and out transfer, liquidating the amount due in the sense that no debt remained between the parties, the property having been given and accepted in complete liquidation, that is to say in the sense of complete extinguishment of any existing debt. Difficulties might have arisen as to this construction and as to its possible application to a position of affairs in regard to a property in respect of which Rs. 15,000 had been accepted in part satisfaction for the debt for which the land had been (as alleged) agreed to be sold. Their Lordships are of opinion that in the circumstances a decree for specific performance of the contract by conveyance of the property cannot be granted, and that the judgment of both of the Courts below on that topic is right.

The other view, however, is that, granted the payment of Rs. 15,000 as stated, the document as it stands provides sufficient grounds for an equitable charge upon the property, to the effect of enabling the appellant to rank as a secured creditor (he is of course an ordinary creditor) upon the estate of the grantor, now in liquidation. The first Court thought that it did: the High Court thought that it did not, upon reference to sections 54 and 55 (6) of the Transfer of Property Act. Their conclusion was that "in the absence of a contract of sale we fail to see how any of the rights and liabilities of buyer and seller under section 55 can be enforced."

The Board agrees with the result reached by the High Court, but thinks that the case can and ought to be disposed of in accordance with certain statutory provisions of the Indian law, to which the attention of the Court below may not have been called.

It must be remembered that the title deeds of the property were not handed over and no question of security, charge or lien on that ground arose. The claim of the appellant arises solely upon the document, and is of the nature of an equitable charge. Such a charge can only found a claim in law if the provisions of section 17 of the Registration Act, 1908, are complied with. The provision is as follows:—

"17 (1) The following documents shall be registered (b) other non-testamentary instruments which purport or operate to create, declare assign, limit or extinguish, whether in present or in future, any

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right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property.”

It is plain that the document founded upon this record is one alleged to create a right, title or interest over immovable property. Such a document, it is declared “ shall be registered.”

Further by section 49 it is provided as follows :—

“ No document required by section 17 to be registered shall—

“ (a) affect any immoveable property comprised therein, or

“ (b) confer any power to adopt, or

“ (c) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered.”

These sections were applied in *Dayal Singh v. Indar Singh*, reported in 53 I.A. 214 with a reference to the antecedent legislation and the provisions of the Registration Act were, of course, given effect to.

In the result accordingly, their Lordships are of opinion that the document was compulsorily registrable, that it was not registered, and that no charge can accordingly be created by it. It is unnecessary to proceed to the further general ground referred to in the judgment of the High Court.

Their Lordships will humbly advise His Majesty that the appeal fails with costs against the appellant.

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DELIVERED BY LORD SHAW.

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