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**(1869) 06 CAL CK 0037**

**Calcutta High Court**

**Case No: None**

Kenny

APPELLANT

Vs

The  
Administrator-General  
of Bengal

RESPONDENT

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**Date of Decision:** June 17, 1869

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**Judgement**

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. Kenny'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. Kenny'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 contraction 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.