

[73] APPELLATE CIVIL.

The 25th August, 1880.

PRESENT :

MR. JUSTICE KERNAN AND MR. JUSTICE KINDERSLEY.

Kallacolathuran and another.....(Defendants) Appellants.

versus

Subbaroya Reddi.....(Plaintiff) Respondent.*

Registration Act III of 1877—Priority of registered mortgage.

S sued K in 1879 upon an unregistered hypothecation deed dated 3rd January 1870, securing repayment of a loan of Rupees 85 with interest; V intervened, and being made second defendant, claimed to be mortgagee of the land hypothecated to S under registered deeds dated 11th September and 30th November 1875 executed by K:

Held, that under Section 50 of Act III of 1877, V had a priority over S.

THE question raised by this appeal was whether the plaintiff's unregistered deed of 1870, hypothecating land to secure payment of a sum less than 100 rupees, was entitled to priority over the second defendant's registered deeds of mortgage and hypothecation, executed in 1875.

Both the Lower Courts found for the plaintiff, and the Acting District Judge remarked as follows:—"As to the second defendant's superior claim under Section 50 of the *Registration Act*, I follow I. L. R., 2 *Allahabad*, 198; *Secus* 2 *Bombay*, 274. It seems to me that if the *Bombay* ruling is to prevail, every encouragement will be given to debtors to deprive prior unregistered bond-holders of their security by the simple process of giving and registering new bonds in favour of other persons. This may be justifiable where all the transactions took place during the currency of the present Act, but I cannot suppose it was the intention of the framers of the Act to take away what had already become a 'vested interest' (so to say) under a former Act."

Parthasaradi Ayyangar and *Kristnasami Chetti* for the Appellant.

R. Balaji Rau for the Respondent.

The Court (KERNAN and KINDERSLEY, JJ.) delivered the following

[74] Judgment :—Plaintiff claims on foot of a hypothecation-deed of 1870, for less than Rupees 100, unregistered.

The second defendant is mortgagee under a mortgage and under a hypothecation-deed, dated respectively the 11th September 1875 and 30th November 1875, both registered.

The Judge held that the plaintiff's unregistered deed is prior to the defendant's registered deeds.

This suit is filed after the *Registration Act* III of 1877. Under Section 50 of that Act the deeds of 1875, being registered, are prior to the deed of 1870 since the passing of that Act. In the case in 4 *Calcutta*, page 536, the suit was filed before Act III of 1877 came into force, and it was held that, under the *General Clauses Act* I of 1868, the Act in existence when the suit was filed applied, and not the subsequent Act III of 1877.

*Second Appeal, No. 432 of 1880, from the decree of J. C. Hughesdon, Acting District Judge of South Arcot, confirming the decree of the District Munsif of Villupuram, dated 18th February 1880.

The genuineness of plaintiff's document was disputed below and here; the fact was found, however, in plaintiff's favour.

We reverse the decrees of the Lower Courts and declare the plaintiff's deed of hypothecation of the 3rd January 1870 to be, by virtue of the *Registration Act III of 1877*, subsequent to the deeds to the second defendant of 11th September 1875 and 30th November 1875.

[3 Mad. 74.]

APPELLATE CIVIL.

The 2nd September, 1880.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND
MR. JUSTICE FORBES.

Kannoth Tuluvan Paramban Kunhali.....(First Defendant) Appellant.
versus
Vannathan Vittil Kinathe and another.....(Plaintiff and
Fourth Defendant) Respondents. *

Malabar Law, Otti holder—Right of pre-emption not forfeited by setting up further charges not proved, or by denying validity of assignment of jenm title in defeasance of right of pre-emption.

An Otti holder does not forfeit his right by endeavouring to set up further charges in answer to a suit for redemption and failing to prove them, or by denying that an assignment of his jenmi's title is valid because it was made without his consent in writing and, in defeasance of his right of pre-emption, without previous offer to him.

[75] THE plaintiff in this case as purchaser of the jenm title sued to recover possession of a paramba mortgaged to the first defendant in 1866 by the karnavan of defendants 4 and 5.

The plaintiff alleged that the first defendant held on kanom, but the first defendant claiming to hold on Otti, alleged that the sale to the plaintiff of the jenm right without his written consent was invalid, and set up "Porankadom" rights (further charges) created in 1869 and 1874 by fourth defendant and his karnavan in his favour.

The Munsif finding that the first defendant only held on kanom (the amount of mortgage being 175 rupees, whereas the plaintiff's purchase money was 350 rupees), and that the instrument creating the "Porankadom" right had been forged, held that the defendants 4 and 5 had, therefore, perfect right to sell to the plaintiff, and that first defendant had rendered himself liable to dispossession by attempting to defraud his jenmi, and decreed for the plaintiff.

On appeal the Subordinate Judge differed from the Munsif as to the nature of first defendant's tenure, because the demise was expressed to be on Otti, and the fact that the amount advanced ten years ago was not an equivalent to the present value of the paramba did not show that the demise was not Otti, but confirmed his decree on the ground that the first defendant by concocting

* Second Appeal, No. 512 of 1880, against the decree of the Subordinate Judge of North Malabar, confirming the decree of the District Munsif of Chavasheri, dated 15th April 1880