

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Brandt.*

RÁMACHANDRA AND ANOTHER (PLAINTIFFS), APPELLANTS,
and

KRISHNA (DEFENDANT), RESPONDENT.*

1886.
July 28.
August 3.

Registration Act (Act III of 1877), s. 50.—Conflict between an unregistered hypothecation bond and a subsequently registered conveyance—Notice—Decree on hypothecation bond.

Land was hypothecated to plaintiff by an unregistered bond, dated 29th May 1878, and afterwards sold to the defendant by a registered conveyance, dated 29th June 1879, which recited the previous hypothecation. In a suit brought by the plaintiff to enforce his charge:

Held, that there was no conflict between the instruments, and the hypothecation bond was enforceable though unregistered.

THIS was an appeal against the decree of J. A. Davies, Acting District Judge of Tanjore, confirming the decree of V. Srinivásacháru, District Múnissiff of Valangimán, in suit No. 164 of 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Brandt, J.).

Bhashyam Ayyangár for appellants.—The provisions of s. 50 of Act III of 1877 are not applicable. The conveyance to respondent conveying only the equity of redemption, no conflict arises between it and the unregistered hypothecation bond to appellants.

Ráma Ráu for respondent.

JUDGMENT.—The appellants sued upon an unregistered instrument of hypothecation securing Rs. 75 principal executed in favor of their father by one Kamakshi Ammál in May 1878. In June 1879 Kamakshi Ammál executed a deed of conveyance, dealing with the land hypothecated, to the father of the appellants among other lands and conveying them to the respondent: this deed of conveyance was registered.

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The plaint contained a prayer for the principal and interest in accordance with the terms of the bond, "holding the plaint property liable," and asking that, if necessary, it be sold to realize the amount decreed.

The Court of First Instance found in favor of the appellants on the merits, and no appeal was preferred against that finding; but both Courts allowed the plea of the respondent, viz., that the sale-deed passed to him by Kamakshi Ammal, being a registered instrument, must prevail against the appellants' unregistered instrument, and, for the purposes of this appeal, it may be taken that this was so decided on the authority of *Madar v. Subbaráyalu*.(1)

It is contended in appeal that that case and the present are not on all fours: that the provisions of s. 50 of the Registration Act apply only in cases in which a registered and unregistered document are antagonistic, not where legal effect can be given to one without infringement of the other *Sobhághand Gulábehand v. Bháichand*,(2) which is the case here, it is said. And our attention is also called to *Rámárájá v. Arunáchala*,(3) in which the principle of the decision in the Bombay case just above referred to was approved, and in which it is said that "an unregistered mortgage is not in itself unlawful, and a person who has bought subject to it cannot afterwards take advantage of the Registration Act to avoid it."

Madar's case is on all fours with the present case in the following respects: there, an unregistered instrument creating an incumbrance of prior date was set up in competition with a registered sale-deed of subsequent date, and it was found by the Lower Appellate Court that the purchaser and his vendors were well aware of the prior charge, and that the purchaser had retained a sum of Rs. 60 to pay it off.

The prior encumbrancer had obtained a decree upon his bond, but this fact is not material to our present decision, and on the question of notice, we are not prepared to reconsider the view of that doctrine taken by this Court in connexion with the Registration Act. But it does not appear that there was any reference to or acknowledgment of liability in respect of the prior encumbrance contained in the registered conveyance. In the present case, in the registered sale-deed, after recital of the sale the consider-

(1) I.L.R., 6 Mad., 88. (2) I.L.R., 6 Bom., 193. (3) I.L.R., 7 Mad., 248.

ation is set forth, and as part of this the sum of Rs. 90 then due on account of the appellants' hypothecation claim is set out: this sum being described as reserved with or retained by the purchaser to be paid by him to the appellant, and it is contended in the present case that the equity of redemption alone was sold, or in other words that the estate was sold subject to the charge. On the other side it is urged that the sale was absolute, not conditional, and that the mere recital of the manner in which the consideration was made up cannot avoid the consequence of non-registration of the appellants' instrument as regards the claim against the land; that though it is possible the purchaser might be held to stand in the position of a trustee of the money, and an action for money had and received for the appellants' use might be maintainable, the recital of the existence of a prior charge does not debar the respondent from relying on the exception arising out of s. 50 of the Registration Act, does not amount to a covenant on the part of the purchaser to pay the charge, and cannot be held to create a liability in respect of the charge as affecting the land conveyed.

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We concur in the proposition stated by the learned Judges in *Sobhágchand Gulábchand v. Bháichand*, (1) and in *Rámáráj v. Arunáchala* (2) that the respondent's vendor could honestly sell subject to any equities arising out of prior charges created on the property sold, and that an unregistered mortgage is not itself invalid, and that a person who has bought subject to it cannot afterwards take advantage of the Registration Act to avoid it; and we do not see that there is any conflict between the decision in the latter case and that in *Madar's case*.

In the last-mentioned case the facts that the purchaser was aware of the prior incumbrance, and had retained a sum of money to pay off a prior charge were held to be of no avail to the incumbrancer holding an unregistered instrument, as against an absolute deed of sale registered, in which no mention was made of such incumbrance; but the retention of money by the purchaser to pay off the prior charge may have been treated by the Subordinate Judge and appears to have been referred to in argument only as evidence of notice. The question whether such retention had the effect of passing the estate to the purchaser subject to

(1) I.L.B., 6 Bom., 193.

(2) M.L.R., 7 Mad., 248.

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the prior charge does not appear to have been raised. We have to deal with a different case, viz., one in which in the registered instrument of sale itself the estate is sold with notice to the purchaser of the charge, and the sum then due to the incumbrancer is left with the purchaser under an express or implied agreement on his part to pay it over to the incumbrancer.

The question then is, whether having regard to the recital of the prior charge, and of the retention of the money due, the purchaser should be held to have purchased the land subject to the prior charge. If he did, we should hold that the fact of appellants' instrument of mortgage being unregistered does not debar the appellants from relying on the recital in the respondent's registered sale-deed, or from availing themselves of the legal consequences of that recital, and does not enable the purchaser, who bought subject to that charge, to avail himself of the Registration Act to avoid it.

There is, it is true, in the defendant's conveyance no covenant expressed on the respondent's part to pay the mortgage debt, but having regard to the ordinary manner in which conveyances are drawn in this country, we have no doubt that the vendor sold and the vendee purchased subject to the appellants' hypothecation lien. The vendor did not profess to sell, nor contract to convey more than the estate which remained to him subject to that charge.

Nor can the purchaser succeed unless he puts in proof an instrument which itself discloses these facts.

There is then no conflict between the two documents, and we consider that the appellants are entitled to decree for the sum claimed with interest and costs throughout and interest from date of institution of the suit at 8 per cent. per annum till date of payment, to be realized by sale, if necessary, of the property, if the amount due be not paid within six months from the date of the decree of this Court.
