

1877, together with the explanation appended to it respecting the three preceding Registration Acts, is too clear, and as that section provides the law to be applied to the present case, we cannot do otherwise than hold that the sale-deed of the 27th September, 1877, has preference over the previous mortgage-bond of the 20th August, 1875. We must, therefore, reverse the judgment of the Subordinate Judge on this point, and, with this decision, send back the case to him for disposal on the merits, costs to abide the result.

SPANKIE, J.—The ruling of the Subordinate Judge appears to be wrong. Under the provisions of s. 50, Act III of 1877, the defendant's instrument, which is registered, would take effect as against the plaintiffs', which might have been, but was not registered under Act VIII of 1871. The defendant's instrument was executed after Act III of 1877 came into operation. The plaintiffs' deed was executed after the 1st day of July, 1871, and was not registered under Act VIII of 1871. It is therefore "unregistered" within the meaning of the explanation appended to s. 50 of the new Act III of 1877. The appeal on the part of the defendant was not decided by the lower appellate Court on the merits. I feel, therefore, the necessity of reversing the decision of the Subordinate Judge on the point of law and would remand the case to him for trial on the points regarding which the parties are at issue. Costs to abide the result of a new trial.

Cause remanded.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

LACHMI NARAIN (PLAINTIFF) v. WILAYTI BEGAM AND OTHERS (DEPENDANTS).*

1879
August

Gift—Illegal consideration—Immoral consideration.

In the year 1870 *H* made a gift of certain immoveable property to *W*, who was his mistress but lived with him as his wife, "on condition of her continuing to be his wife and remaining obedient to him, her husband." *W* acquired possession of the property in virtue of the gift, and had held it for eight years, when a creditor of *H*, under a decree enforcing a debt created by *H* subsequently to the gift, sued, amongst other things, for a declaration that the gift was invalid, as it had been made for an illegal consideration, viz, the future immoral co-habitation of *W* with *H*. *Held* that, assuming that the consideration for the gift was illegal, in the absence of fraud, the gift could not be set aside so many years after *W* had acquired possession thereunder. *Ayerst v. Jenkins* (1) followed.

* First Appeal, No. 9 of 1879, from a decree of Maulvi Maqsood Ali Khan, Subordinate Judge of Bareilly, dated the 13th September, 1879.

(1) L. R., 16 Eq. 275.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff appealed from the decree of the Court of first instance dismissing his suit.

Mr. *Conlan*, the *Junior Government Pleader* (Babu *Dwarika Nath Banarji*), Pandit *Bishambhar Nath*, and Mir *Zahur Husain*, for the appellant.

Messrs. *Colvin, Ross, and Vansittart*, Pandit *Ajudhia Nath*, and Shah *Asad Ali*, for the respondents.

The High Court (SPANKIE, J. and OLDFIELD, J.) delivered the following

JUDGMENT.—The plaintiff, Lachmi Narain, alleges that the defendant Captain W. Hearsey borrowed money from him on a bond dated 3rd February, 1873, and again other sums from 7th September, 1873, to 27th October, 1876, and a further sum on a bond dated 21st March, 1874. The plaintiff obtained decrees against him, and before judgment had attached certain properties, *i.e.*, mauza Kareli, mauza Bokhara, mauza Pahaganj, mauza Lissia Ghulam, and a share in mauza Kargina. The defendant Wilayti Begam, who is the mother of the other minor defendants, claimed these properties in her own right and that of her children, on the ground that they had been conferred on them by Captain Hearsey, and the properties were released. The relief sought by plaintiff is substantially to have declared the nature of the right of Captain Hearsey in the properties, that Wilayti Begam has no right in them, and that the other minor defendants have only a life-interest in them, and that the right and interest of Captain Hearsey in the property may be declared liable to sale in execution of the plaintiff's decrees. Wilayti Begam replied that these properties had been given to her and her children absolutely by Captain Hearsey, three years before the plaintiff became a creditor of Captain Hearsey, and that Captain Hearsey ceased to have any interest in them; and Captain Hearsey replied to the same effect. The Subordinate Judge has decided that there was a gift of the properties made by Captain Hearsey in consideration of love and affection for Wilayti Begam and his children, and that it was fully carried out by transfer of possession to them. There was no fraud on the plaintiff in the matter, for at the

time Hearsey was in affluent circumstances, and the debt which he incurred to plaintiff was incurred after the gift had been made, and he finds that these properties were not hypothecated in the plaintiff's bonds, a fact the Subordinate Judge thinks affords an argument in favour of the fact that they had been already transferred to defendants, and that the transfer was known to the plaintiff, who otherwise, being well acquainted with Hearsey's affairs, would have insisted on their being pledged as security for the money he was lending. The Subordinate Judge finds that the gift was made to Wilayti Begam by Captain Hearsey, who regarded her as his wife, on condition of her continuing his wife, and to the children, on the condition of their adhering to the Christian religion, and he disallows the plea that since it is admitted Wilayti Begam was not his married wife, but only his mistress, the condition was really one for continuance of concubinage, and immoral, and the transfer null and void in consequence. On this point the Subordinate Judge remarks that: "Wilayti Begam is at least the mother of Mr. Hearsey's children, and lives with him as his wife: under these circumstances he made the gift of the property, having considered it his duty to support and provide for them, but as Wilayti Begam was of different religion and the children were minors, he introduced conditions calculated to invalidate the title of the transferees in case of their deviation;" and further on in his judgment he seems to consider that the gift having taken effect cannot be set aside at the instance of the plaintiff, and he dismissed the suit. The questions which we have to determine in appeal are (i) whether there was an actual gift which took effect and became operative by transfer of possession; (ii) its nature, what interest the transferees took under it, and whether anything remained to Captain Hearsey which can be taken in execution of plaintiff's decrees; (iii) whether the gift to Wilayti Begam can be set aside in this suit as illegal and immoral. (After determining that there was an actual gift which took effect and became operative by transfer of possession, and that in virtue of the gift the property vested absolutely in the donees, and no interest in the property remained to Hearsey, which could be sold in execution of a decree, the judgment continued :) Nor are we of opinion that the bequest to Wilayti Begam can be set aside by the plaintiff, and the property be taken in execution of his decrees, on the ground of ille-

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gality. It is quite true that she is not the married wife of Hearsey, and that their connection is open to the charge of immorality, but it is clear, in making this bequest to her, he regarded her in the light of a wife and the mother of his children, and it appears to us that the consideration he had in mind in making the gift may be held to have been rather her continuing to remain and discharge her duties to the children she had by him, than the continuance of their illicit intercourse, for it must be remembered he considered his state of health at the time to be precarious, and a personal object does not appear to have actuated him. The imputation of an immoral object is based solely on some words which appear in Hearsey's applications for mutation of names, *viz.*, the words, "on condition of her continuing to be my wife and remaining obedient to me, her husband," but there is nothing in these words by themselves to support the imputation, but it is sought to attach an immoral object to them on the ground, though she is referred to as his wife, she was his mistress, but when explained by all the circumstances the object implied in the words does not necessarily appear to have been such as is imputed. Nor should we be disposed to allow this plea, so as to rescind the bequest, and make the property available as Captain Hearsey's to satisfy plaintiff's claim, so many years after the donees had taken possession under the bequest. On this point we may refer to *Ayerst v. Jenkins* (1), as the principle on which that case was decided seems applicable here. It is not pretended, nor can it be shown, that the bequests were made in fraud of plaintiff. On the contrary there is evidence to show that at the time Captain Hearsey had a balance in plaintiff's hands of over a lakh of rupees, and the loans, the subject of this suit, were taken some years after the bequests had been made, and, as remarked by the Subordinate Judge, it is a significant fact that while other property was pledged for the loans, these properties were not, and as plaintiff was well aware of Captain Hearsey's affairs, the reason why the plaintiff did not insist on their being pledged may well be that he knew they had passed out of Captain Hearsey's hands. We have now disposed of all the material pleas in appeal, and there is no force in the last objection as to costs. We dismiss the appeal with costs.

(1) L. R., 16 Eq. 275.