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RAMADHAR
v.
RAM DAYAL.

I dissented from the majority of the Full Bench in the ruling referred to, but I am bound to decide this case in accordance with it. A decision of a Division Bench of this Court has been cited to the effect that "that the proviso in s. 230 applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230"—[*Tufail Ahmad v. Sakhoo Saran Singh* (1)].

According to this ruling, the decree we are dealing with would not be saved by the proviso, which would not apply to it.

But I am unable to concur in the interpretation of the proviso taken by the learned Judges in that case.

I would set aside the orders and remand the case for execution. Appellant will have costs in all Courts.

Case remanded.

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Before Mr. Justice Straight, Offy. Chief Justice, and Mr. Justice Mahmood.

RAM AUFAR (PLAINTIFF) v. DHANAURI AND OTHERS (DEFENDANTS).*

Mortgage—First and second mortgages—Registered and unregistered documents—Act III of 1877 (Registration Act), s. 50—Fraudulent transfer—Act IV. of 1882 (Transfer of Property Act), s. 53.

Apart from any question of equitable estoppel, such as described by Lord Cairns in the *Agra Bank v. Barry* (2), where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV. of 1882) is applicable to such a transaction. In such a condition of circumstances, *quoad* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a

* Second Appeal No. 1629 of 1885, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 25th July, 1885, confirming a decree of Pandit Rajnath, Munsif of Benares, dated the 19th February, 1885.

transaction that, in its inception, being fraudulent, was a *nudum pactum*. Such document would not be a "document" in the sense of s. 50 of the Registration Act, which term as therein used means a document legally enforceable. *Rahmat-ulla v. Sarwat-ulla* (1) referred to.

In a suit for possession of immoveable property by virtue of a registered instrument of mortgage executed in 1883, against a defendant in possession of the same property under an unregistered mortgage-deed of 1881 (both deeds being instruments the registration of which was not compulsory), it was found as a fact that at the time of the execution and registration of his mortgage-deed the plaintiff was aware that the defendant was in possession under his mortgage.

Held that, under these circumstances, the fact that the plaintiff's deed was registered did not entitle him to dispossess the defendant by virtue of the provisions of s. 50 of the Registration Act (III of 1877).

THE plaintiff in this case claimed possession of certain land, by virtue of a registered instrument of mortgage dated the 20th June, 1883. Part of the land was in the possession of one of the defendants under an unregistered instrument of mortgage dated the 17th January, 1881. Both the instruments of mortgage were instruments the registration of which was not compulsory. It was found as a fact that at the time of the execution and registration of his mortgage-deed, the plaintiff was aware that the first mortgagee, defendant, was in possession under his mortgage. Both the lower Courts held that, under these circumstances, the fact that the plaintiff's deed was registered, did not entitle him to dispossess the first mortgagee.

In second appeal the plaintiff contended that his registered deed should have priority over the defendant's unregistered deed.

Mr. *Niblett*, for the appellant.

Lala Juala Prasad, for the respondents.

STRAIGHT, J.—It has been found as a fact by both the lower Courts, and the appellant's pleader admits it to have been so found, that the plaintiff took his mortgage of the 20th June, 1883, with notice of the defendant's possessory mortgage of the 17th January, 1881. Both these instruments were for sums of money below Rs. 100, and both were optionally registrable, that of the 20th June, 1883, being, in fact, registered, and that of the 17th January, 1881, being unregistered.

The question then arises whether the plaintiff, having taken his document of the later date with knowledge of the prior title

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of the defendant and of his possession, in virtue of it, of the land to which the suit relates, is entitled to enforce the provisions of s. 50 of the Registration Act, 1877? In support of the contention that he is, his pleader referred to *Nallappa Goundon v. Ibram Sahib* (1), *Madar Saheb v. Subbarayalu Nayudu* (2), and *Kota Muthanna Chetti v. Ali Beg Sahib* (3). On the other side our attention was called to *Fuzl-ud-deen Khan v. Fakir Mahomed Khan* (4), *Dimonath Ghose v. Auluck Moni Dabee* (5), *Narain Chunder Chuckerbutty v. Dataram Roy* (6), and *Nani Bibee v. Hafiz-ul-lah* (7), and *Bhalu Roy v. Jokhu Roy* (8). Putting aside any question of equitable estoppel, such as is so forcibly described by Lord Cairns in the *Agra Bank v. Barry* (9), it seems to me that where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith (see Story's Equity by Grigsby, s. 397, and 2 White and Tudor, pp. 45, 46), and that the principle enunciated in s. 53 of the Transfer of Property Act is applicable to such a transaction. In other words, in such a condition of circumstances, the condition of things is that *quâ* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law, to give preference to an instrument which records a transaction that in its inception, being fraudulent, was a *nudum pactum*. In this respect of the matter such document would not be a "document" in the sense of s. 50 of the Registration Act, which term, as therein used, I understand to mean a document legally enforceable, and I am confirmed in this opinion by the remarks of Sir Barnes Peacock, C. J., in *Rahmat-ulla v. Sariat-ulla* (10). This being the view I take of the question raised by the second

(1) I. L. R., 5 Mad. 73.

(6) I. L. R., 8 Calc. 597.

(2) I. L. R., 6 Mad. 88.

(7) I. L. R., 10 Calc 1073.

(3) I. L. R., 6 Mad. 174.

(8) I. L. R., 11 Calc 667.

(4) I. L. R., 5 Calc. 336.

(9) L. R., 7 H. L. 135.

(5) I. L. R., 7 Calc. 753.

(10) 1 B. L. R., F. B. 82.

plea in appeal, the Courts below were, in my opinion, right in giving effect to the defendant's deed, and I dismiss this appeal with costs.

MARMOOD, J.—I concur.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

BEJARI DAS (PLAINTIFF) v. KALIAN DAS (DEFENDANT). *

Arbitration—Making award after the time allowed by Court—Civil Procedure Code, s. 521.

Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless "made" within the period fixed by the Court, is equivalent to a rule that the award must be "delivered" within that period.

Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September, 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision.

Held that the award was not "made within the period fixed by the Court" within the meaning of s. 521 of the Civil Procedure Code.

THE facts of this case are stated in the judgment of the Court.

Babu *Ratan Chand*, for the appellant.

Pandit *Nand Lal*, for the respondent.

TYRRELL, J.—This case is one in which a reference to arbitration was made when the suit was in the Court of first instance.

The question at issue was referred to three arbitrators, namely, Nand Kishore, Jit Mal and Beni Ram, and the order of the Court was, that the award made by these arbitrators should be filed, that is to say, made and delivered, on or before the 19th September, 1885.* As a matter of fact the award of the three arbitrators was not filed on that date, but was signed by two of them on that date, and by Beni Ram, the third arbitrator, on the 20th September. Both parties objected to the propriety and correctness of the arbitrators' award, but their objections were overruled, and a decree based on the award was passed.

* First Appeal No. 97 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 10th May, 1886.

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DHANABAI.

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