

this view the appeal must be, and hereby is, dismissed with costs.

PETHERAM, C. J.—I concur in the order proposed by my brother Straight.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

THE HIMALAYA BANK, LIMITED, (PLAINTIFF) v. THE SIMLA BANK, LIMITED, AND ANOTHER (DEFENDANT). *

Registered and unregistered documents—Mortgage under registered deed competing with holder of decree on prior unregistered mortgage deed—Act III of 1877. (Registration Act), s. 50.

The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed.

Held that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhaiya Lal v. Bansidhar* (1), *Shahi Ram v. Shib Lal* (2), and *Madar v. Subbarayalu* (3), referred to.

THIS was a suit brought by the Himalaya Bank, Mussoorie, to recover a sum of Rs. 3,428-7-3, due on a bond, dated the 17th July, 1883, for Rs. 3,000, executed by the defendant No. 1, Mrs. E. McMullen. By this bond, certain land situate in Saharanpur and a dwelling-house thereon of value exceeding Rs. 100 were hypothecated to the plaintiffs. The bond was duly registered on the 10th August, 1883. The defendant No. 1 did not appear to answer the suit. The defendants No. 2 were the Simla Bank Corporation, Limited, who held a bond for Rs. 10,000, dated the 30th June, 1881, in which the defendant No. 1 had hypothecated to them, among other properties, the same dwelling-house as was subsequently mortgaged to the plaintiffs. This bond was executed by all the parties thereto. On the 25th July, 1881, Mrs. McMullen herself took the bond for registration to the office of the Registrar at Mussoorie,

* First Appeal No. 19 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 2nd December, 1884.

(1) Weekly Notes, 1884, p. 136. (2) Weekly Notes, 1885, p. 63.

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

1885

KRISHNA RAM
v.
GOBIND
PRASAD.

1885
November 16

1885

THE HIMA-
LAYA BANK
v.
THE SIMLA
BANK.

and in his presence admitted execution and acknowledged receipt of consideration. Two certificates to this effect were endorsed on the bond and signed by the Registrar, who affixed thereto the office seal. At this point it was discovered that no representative of the Simla Bank was present as required by s. 35 of the Registration Act (III of 1877), and the bond was therefore returned to Mrs. McMullen, without the said certificate required by s. 60 of the Act, and without record in the register-book required by s. 61. The bond was passed on to the Simla Bank, and no further steps towards its registration were ever taken. On the 19th December, 1883, the Simla Bank put their bond in suit against Mrs. McMullen and one Moran, who, in execution of a money decree, had attached some of the property hypothecated in the bond. The defendant Mrs. McMullen did not appear, but the claim of the Simla Bank was contested by Moran, who urged that the plaintiffs' bond, being unregistered, was not admissible in evidence. On the 3rd March, 1884, the District Judge of Saharanpur decreed the claim, holding that the bond of the 30th June, 1881 was duly registered in compliance with the Registration Act.

On the 31st July, 1884, the present suit was brought by the Himalaya Bank under their bond, alleging as against the defendant No. 1, Mrs. McMullen, non-payment of the debt secured by that instrument, and as against the Simla Bank that they had taken possession of the mortgaged premises in or about the month of May, 1884, and still retained possession; and praying that, in default of payment of the debt due to them, with interest and costs, the said premises might be sold and the proceeds of the sale applied to such payment. The defendants No. 2 appeared and contested the suit, on the ground that under their deed of the 30th June, 1881, and the decree thereon of the 3rd March, 1884, they held a lien on the property which was entitled to priority over that held by the plaintiffs. In reply to this contention, it was argued on behalf of the plaintiffs that the bond of the 30th June, 1881 was not duly registered, and was therefore not admissible in evidence.

The District Judge, re-affirming the grounds of his decision in the case of the Simla Bank v. McMullen and Moran, held that the bond of the Simla Bank was duly registered, and therefore admis-

sible in evidence. He was of opinion that the proceedings before the Registrar at Mussoorie on the 25th July, 1881, amounted to what he described as "inchoate, though not actually completed, registration," and, in reference to his former judgment, he observed:—"I held then, and I hold still, that the bond was, to all intents and purposes, registered; that publicity had been given to it by Mrs. McMullen, the party most interested, inasmuch as she would have to pay the money, herself coming forward to register it, and I may add here that although it was not finally entered in the register, yet any person coming to search the registers to see if there was any lien on this property, could at once have ascertained from the clerk what proceedings, short only of actual and final registration, had taken place in the matter." The learned Judge passed a decree in the following terms:—"I decree now for the plaintiff in full against Mrs. McMullen for a sum of Rs. 3,428-7-3 with costs and future interest at 6 per cent. per annum, *ex parte*, and against the house hypothecated, after the claim of the Simla Bank on its decree shall have been satisfied. The costs of the Simla Bank are payable by the plaintiff Bank to the extent of three-fourths. In all other respects the claim against the Simla Bank is dismissed."

1885
 THE HIMA-
 LAYA BANK
 v.
 THE SIMLA
 BANK.

The plaintiffs appealed to the High Court.

Mr. C. H. Hill, for the appellants, contended that the District Judge was wrong in holding that the bond held by the respondents had been duly registered in conformity with the provisions of the Registration Act. It was obvious that a document must be either registered or unregistered, and there could be no intermediate position, such as the Judge termed "inchoate" or "imperfect" registration. Under the Registration Act, what constituted registration was the entry in the register-book required by s. 60, and, as no such entry had been made in respect of the defendants' bond, it must be taken to be unregistered, and therefore, under s. 49, to be inadmissible in evidence. Under s. 50, the plaintiffs' bond of the 17th July, 1883, having been duly registered, was entitled to priority over every unregistered document relating to the same property.

Mr. A. Strachey, for the respondents, admitted that the finding of the District Judge as to the registration of the bond of the 30th

1885

THE HIMA-
LAYA BANK
v.
THE SIMLA
BANK.

June, 1881, could not be sustained. The respondents' title must now, however, be regarded as derived from the decree of the 3rd March, 1884, into which their bond had merged, and not from the bond itself. The terms of s. 50 expressly excluded from its scope questions of priority between registered documents and decrees or orders. The decree required no registration, and, not having been set aside by appeal or otherwise, must, so long as it existed, have all the incidents and effects which the law attached to decrees. *Parshadi Lal v. Khushal Rai* (1) was a direct authority; also *Bajinath v. Lachman Das* (2), *Kanhaiya Lal v. Bansidhar* (3), and *Shahi Ram v. Shib Lal* (4) were distinguishable, being cases of competing decrees, and not affecting a question of priority between registered documents and decrees obtained upon unregistered documents.

Mr. C. H. Hill was not called on to reply.

PETHERAM, C.—I am of opinion that this appeal must be allowed, and that judgment must be given in favour of the plaintiff. The real question in the case is, whether the title of the Himalaya Bank or that of the Simla Bank should prevail with respect to the mortgages executed by the defendant, Mrs. E. McMullen. The facts of the case are, that on the 30th June 1881, the defendant, Mrs. McMullen, mortgaged a house in Saharanpur to the Simla Bank, to secure a sum of money. The mortgage deed was never registered, and the amount due upon it was never paid off. On the 17th July, 1883, the same mortgagor executed a mortgage-deed in respect of the same house in Saharanpur in favour of the Himalaya Bank, to secure a sum of money, and this deed was duly registered on the 10th August, 1883. There is no finding on the subject, but it must be assumed for the purposes of this case that the Himalaya Bank had no knowledge of the mortgage-deed of the 30th June 1881, which, at the time of their own deed, was not registered.

The first question is, what was the condition of the titles to the property in suit at the time of the registration of the second mortgage-deed? The titles here in question are titles created by two mortgage-deeds. The matter is governed by s. 50 of the Regis-

(1) Weekly Notes, 1882 p. 15.

(2) Weekly Notes, 1884, p. 136.

(3) I. L. R., 7 All. 388.

(4) Weekly Notes, 1885, p. 63.

1885

 THE HIMALAYA BANK
 v.
 THE SIMLA BANK.

tration Act, which is in the following terms :—“ Every document of the kinds mentioned in clauses (a), (b), (c), and (d) of s. 17, and clauses (a) and (b) of s. 18”—which includes the mortgage deeds before us —“ shall, if duly registered, take effect, as against the property comprised therein, against every unregistered document relating to the same property.” It is only necessary to read the section to see what was the condition of the titles possessed by the two Banks at the time when the second mortgage-deed was registered. The registered deed of the Himalaya Bank was, by s. 50, given priority over the unregistered deed of the Simla Bank; so that at that time the Himalaya Bank, by virtue of their registered deed and the terms of the statute, was in the position of a first mortgagee, and the Simla Bank was in the position of a second mortgagee. The only interest, therefore, which Mrs. McMullen or the Simla Bank had in the property was what would remain after the debt of the Himalaya Bank had been satisfied. That was the condition of the titles in August, 1883. Upon this state of things, the Simla Bank took proceedings against Mrs. McMullen—to which the Himalaya Bank was not made party—to realise their security, and obtained a decree. Now, at the time when that decree was passed, the interest which Mrs. McMullen had was subject to the Himalaya Bank's mortgage. So that the Himalaya Bank held a first charge on the property, and the Simla Bank held a decree for money against Mrs. McMullen, and against any interest which remained in her after the first charge had been paid off. That was the effect of the decree. Then the present suit was brought by the Himalaya Bank, and the question raised by it is, whether the plaintiffs are entitled to have the property sold to satisfy their mortgage, or whether their mortgage is subject to the decree held by the Simla Bank.

I am of opinion that the decree of the Simla Bank only affected what was left of the property after satisfaction of the mortgage of the Himalaya Bank, and that the Himalaya Bank is therefore entitled to have the property sold.

The authorities on the subject appear to be somewhat at variance with each other. The difficulty arises from the words in s. 50 of the Registration Act immediately following those I have

1885

THE HIMA-
LAYA BANK
v.
THE SIMLA
BANK.

already quoted,—“not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.” This, in my opinion, means that if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. I do not think that the section can in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed. Such an interpretation would lead to manifest injustice, and would defeat the very object with which the registration law was enacted—namely, that publicly registered documents should have effect as against documents not registered. To give priority to a decree obtained against a mortgagor behind the mortgagee’s back would be to defeat this object.

I should have thought it necessary to refer the determination of this case to the Full Bench were it not that my brother Tyrrell concurs in the opinion which I have just expressed. It appears from the judgment in *Kanhaiya Lal v. Bansidhar* (1) that my brother Straight is now of the same opinion. Again, in the case of *Shahi Ram v. Shib Lal* (2), Mr. Justice Oldfield and Mr. Justice Mahmood expressed the same view in the following words:—“There is no doubt in my mind that the registered bond of the plaintiff takes effect, as regards the property comprised in it, against the defendant’s unregistered bond under s. 50. This gives priority to the incumbrance created by it over the incumbrance created by the defendant’s bond; and this priority is not affected by the subsequent decrees obtained on the bonds, which only give effect to the respective rights under the bonds.” This precisely expresses the view which I take in the present case; and the same view has been taken by the Madras High Court in *Madan v. Subbarayalu* (3).

We therefore have the concurrent opinions of Mr. Justice Oldfield, Mr. Justice Mahmood, Mr. Justice Straight, Mr. Justice Tyrrell, the Madras High Court and myself, that this is the correct construction of the terms of s. 50 of the Registration Act; and under these circumstances I have thought it right to deliver judgment.

(1) Weekly Notes, 1884, p. 137. (2) Weekly Notes, 1885, p. 63.

(3) L. L. R., 6 Mad., 83.

ment in the case now. The appeal is allowed with costs, and the plaintiffs declared entitled to judgment, that this mortgage be realised as a first charge against the mortgaged property.

TYRRELL, J.—I am of the same opinion, and, having given careful consideration to the terms of s. 50 of the Registration Act of 1877, I accept the interpretation placed on the words “not being a decree or order” by the learned Chief Justice.

Appeal allowed.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.**

NIHAL SINGH AND OTHERS (PLAINTIFFS) v. KOKALE SINGH AND OTHERS
(DEFENDANTS) *

*Pre-emption—Wajib-ul-arz—Right of pre-emptor to stand in the position
of the purchaser.*

A co-sharer of a village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase-money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor.

Held, that it could not be said that the partners of the vendor had not only the right of pre-emption but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and the purchaser.

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village named Pachnan. The clause of the *wajib-ul-arz* relating to pre-emption was in the following terms:—“Up to this time, no case of pre-emption has ever occurred. The practice, however, in the neighbourhood has been that when any co-sharer desires to sell his property, he sells first to the nearest partner, after him to the partner in the *thoke*, then to the partner in the village; failing all these, to a stranger. We also accept this practice.” The plaintiffs, Nihal Singh and five other persons, alleged that they were co-sharers in the village with the defendant Girind Singh; that, on the 3rd February, 1883, Girind Singh sold a five annas share out of his ten annas share in the village to the defendants Kokale Singh and Muhabbat Singh, who were “total strangers and inhabitants of a different mauza,” for a sum of Rs. 10,000, of

* First Appeal No. 45 of 1885, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th September, 1884.

1885

THE HIMA-
LAYA BANK
v.
THE SIMLA
BANK.

1885

November 16.