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clearly seems to have the effect of rendering unnecessary the delivery of possession, substituting, as it does, for delivery of possession registration. On turning to section 54 this becomes more apparent. In that section, in dealing with the sale of immovable property of a value less than Rs. 100, it is provided that the transfer may be made either by a registered instrument or by delivery of the property, while in the case of a transfer of immovable property of greater value than Rs. 100 the transfer can be made only by a registered instrument. This shows that, though delivery of possession of property is necessary in the one case, it is not necessary in the other. That the Hindu law upon the question of gift does not now affect the provisions of the Transfer of Property Act, is apparent from the terms of section 129. This question was discussed in the case of *Dharmodas Das v. Nistarini Dasi* (1). It was there held that, assuming that delivery of possession was essential under the Hindu law to complete a gift of immovable property, that law has been abrogated by section 123 of the Transfer of Property Act. The judgment of Mr. Justice Mitter is well deserving of attention, and commends itself to us as a true exposition of the present state of the law.

For these reasons we are of opinion that this appeal must be allowed. We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge, and dismiss the plaintiff's suit with costs in both Courts.

*Appeal decreed.*

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February 17.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

BHIKHI RAI AND ANOTHER (DEFENDANTS) v. UDIT NARAIN SINGH

(PLAINTIFF) AND HANWANT RAI AND ANOTHER (DEFENDANTS)\*

*Act No. III of 1877 (Indian Registration Act), section 50—Prior and subsequent incumbrancers—Notice—Prior incumbrance not compulsorily registrable, but incumbrancer in possession.*

*Held* that if a person about to take a mortgage which must be made by registered deed, finds some person other than the intending mortgagor in possession, the fact of such possession is sufficient to put the would-be mortgagor on inquiry as to the title of such person; and if such person's title is that of

\* Appeal No. 2 of 1902, under section 10 of the Letters Patent.

(1) (1887) I, L. R., 14 Calc., 446.

a prior mortgagee under a document not compulsorily registrable, the second mortgagee cannot, by getting his mortgage registered, obtain priority over the first mortgagee. *Barnhart v. Greenshields* (1), *Gunamoni Nath v. Bussunt Kumari Dasi* (2), *Krishnamma v. Suranna* (3), and *Diwan Singh v. Jadhoo Singh* (4), referred to.

THE suit out of which this appeal arose was brought by one Udit Narain Singh on foot of a mortgage, dated the 5th of January 1900, to recover the amount due to him. Amongst other defendants one Bhikhi Rai was impleaded in the suit, he being regarded as a trespasser upon the property in dispute. It appeared, however, at the hearing that Bhikhi Rai was in possession under a usufructuary mortgage of the property, dated the 19th of November 1896, which had not been registered. The Court of first instance, finding that Bhikhi Rai was in possession of the mortgaged property under a prior usufructuary mortgage, held that the suit could not be maintained, and accordingly dismissed it. On appeal the lower appellate Court held that, having regard to the provisions of section 50 of the Registration Act, the puisne mortgagee, whose incumbrance was registered under that Act, took priority over the holder of the prior unregistered document. An appeal was preferred to the High Court, which was dismissed. From the judgment dismissing this appeal the present appeal was preferred by the defendants under section 10 of the Letters Patent.

Maulvi *Muhammad Ishaq* (for whom Mr. *Ishaq Khan*), for the appellants.

Babu *Devendra Nath Sen* (for whom Babu *Beni Madho Ghosh*), for the respondent.

STANLEY, C. J., and BURKITT, J.—The facts of this case are very simple. The suit was brought by the plaintiff on foot of a mortgage, dated the 5th January 1900, to recover the amount due to him. Amongst other defendants the present appellant Bhikhi Rai was impleaded in the suit, he being regarded as a trespasser upon the property in dispute. It appeared, however, in the course of the hearing, that Bhikhi Rai was in possession under a usufructuary mortgage of the property, dated the 19th of November 1896, which had not been registered. The Court

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(1) (1853) 9 Moo., P. C., 18.

(3) (1892) I. L. R., 16 Mad., 148.

(2) (1889) I. L. R., 16 Cal., 414.

(4) (1898) I. L. R., 20 All., 252.

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of first instance, finding that Bhikhi Rai was in possession of the mortgaged property under a prior usufructuary mortgage, held that the suit could not be maintained, and accordingly it was dismissed. On appeal the lower appellate Court, without apparently attaching weight to the fact of possession of the property by the first incumbrancer, held that, having regard to the provisions of section 50 of the Registration Act, the puisne mortgagee, whose incumbrance was registered under that Act, took priority over the prior unregistered document. An appeal was preferred to this High Court, which was dismissed. This appeal comes before us under section 10 of the Letters Patent.

One of the main questions argued on appeal is, that the plaintiff by his registered mortgage bond obtained no priority over the defendants' unregistered mortgage, inasmuch as the plaintiff had notice of the unregistered document. The learned Judge who heard the appeal was of opinion that there was no substance in that ground of appeal. He observes:—"I have said that that point was not raised in the Court below, where the fact of notice or no notice would have been categorically found; but though not so raised, the Court below has by a very unequivocal sentence found that the plaintiffs were (sic.) deceived into accepting a mortgage of property already incumbered. That disposes of this appeal." We understand from this that the learned Judge considered the finding that the plaintiff had been deceived into accepting a mortgage of property as equivalent to a finding that he had no notice of the earlier unregistered document. This does not, however, appear to us to be the meaning of the lower appellate Court's finding. The meaning of the passage we take to be, that the plaintiff, believing that he was getting a first mortgage upon property, accepted the word of the mortgagors and advanced his money, and so was deceived, the property having already been mortgaged. There was no finding by the lower appellate Court that the plaintiff had not notice, or at least constructive notice, of the prior incumbrance. Now it is clear on the findings of both the Court of first instance and the lower appellate Court that the prior mortgagee was, as a matter of fact, in possession of the mortgaged property from the date of his mortgage.

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This being so, it seems to us to follow, according to the decisions of the Courts, that the plaintiff had notice, or must be taken to have had notice, of such possession, and therefore is affected by any equities which the mortgagee in possession could enforce against his mortgagor. In the case of *Barnhart v. Green-shields* (1) it was held by their Lordships of the Privy Council that where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that this equity extends not only to interests connected with his tenancy, but also to interests under collateral agreement; they held that the possession of the tenant was notice that he had some interest in the land, and the purchaser having notice of the fact of possession, was bound to enquire what that interest was. That case is referred to and cited in a number of decisions in the High Courts in this country, and amongst others in the Calcutta High Court in the case of *Gunamoni Nath v. Bussunt Kumari Dasi* (2). In that case it was held that notice of possession of the rents of property is notice of a tenancy, though it would not affect a purchaser with notice of the lessor's title. In a Full Bench case in the Madras High Court, namely, the case of *Krishnamma v. Suranna* (3) this question was fully discussed. There the defendants 1 and 2 in 1877 placed the plaintiffs' father (since deceased) in possession of certain rents under an unregistered mortgage deed for a sum of Rs. 99, and in 1883 mortgaged the same property to defendant No. 3 by a mortgage deed which was registered. Defendant No. 3 obtained a decree on his mortgage in 1886, and applied for sale of the mortgaged property. The plaintiffs opposed his application for an order for sale without success, and in consequence instituted a suit for a declaration of their title as mortgagees. It was found that the defendant No. 3 took his mortgage with notice of the mortgage of 1877, but had not otherwise acted fraudulently. It was held that the plaintiffs were entitled to priority in respect of the mortgage of 1877; that when it is proved that a subsequent incumbrancer under a registered conveyance had notice of a valid prior unregistered incumbrancer, and of possession by such incumbrancer, or

(1) (1889) 9 Moo., P. C., 18. (2) (1889) I. L. R., 16 Calc., 414.

(3) (1892) I. L. R., 16 Mad., 148.

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of such conveyance without possession, the Courts are not bound to interpret the Registration Act of 1877, section 50, so as to defeat the title of the prior incumbrancer. In that case the leading case of *Agra Bank, Ltd., v. Barry*, which has a close bearing upon this question, was referred to, as also some decisions of the several High Courts as supporting the view that if a party is in possession of property under an instrument not compulsorily registrable, and a subsequent mortgage is executed in favour of a third party, the subsequent mortgagee can derive no advantage from the registration of his mortgage. In a somewhat recent case in this High Court the question came up before a bench consisting of Edge, C. J., and one of us, in which the decision of our Brother Aikman was upheld (see *Diwan Singh v. Jodha Singh*) (1). It was held in that case that section 50 of the Indian Registration Act will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed not being a compulsorily registrable deed, if in fact the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed. Now in this case the first mortgagee was undoubtedly in possession. This fact was notice to the subsequent mortgagee that he had some interest in the land, and was sufficient to put him upon inquiry as to the nature of that interest. He was a resident of the same village, and undoubtedly had easy means of ascertaining under what circumstances possession had been handed over to the defendant. In England possession is *prima facie* evidence of a seisin in fee; in India it is ordinarily presumptive proof of title (see section 110 of the Indian Evidence Act). In our opinion therefore the plaintiff was not entitled to maintain his suit for sale. This being our view on the main question, it is unnecessary to consider the other matters which have been discussed before us. The decision of the Court of first instance was, in our opinion, correct under the circumstances. Accordingly we allow this appeal, set aside the decree of this Court, and dismiss the suit with costs in all Courts.

*Appeal decreed.*

(1) (1898) I. L. R., 19 All., 145 and I. L. R., 20 All., 252.