

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1906
April 10

HARGOVIND (DEFENDANT) v. KISHAN KUNWAR (PLAINTIFF).*

Act No. III of 1877 (Indian Registration Act), section 50—Act No. XIX of 1848, section 2—Act No. XVI of 1864, section 68—Registration—Registered and unregistered documents—Priority.

Held that section 50 of the Indian Registration Act, 1877 did not give to a registered mortgage executed in 1900, priority over an unregistered mortgage executed in 1861. *Tirumala v. Lakshmi* (1) and *Desai Lallubhai Jethabhai v. Mudas Kuberdas* (2), followed. *Hickson v. Darlow* (3), referred to.

THIS was a suit for foreclosure based upon a deed of mortgage by way of conditional sale, dated the 31st January, 1861. The mortgage was not registered. One of the defendants to the suit, Hargobind, was the holder of a registered mortgage, dated the 15th January, 1900, and he claimed that his mortgage took priority over the plaintiff's unregistered deed. The Court of first instance (Subordinate Judge of Mainpuri) held that this plea was not sustainable, and decreed the plaintiff's suit. The defendant appealed, but his appeal was dismissed by the lower appellate Court (District Judge of Mainpuri). The defendant thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Babdeo Ram Dave*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the respondent.

STANLEY, C.J. and BURKITT, J.—The competition in this case is between an unregistered mortgage by way of conditional sale of date the 21st January, 1861, and a registered mortgage of the 15th of January, 1900. In 1861 registration was not compulsory, but section 2 of Act XIX of 1848 gave priority to registered over unregistered instruments. The Act of 1848 was, however, repealed by Act XVI of 1864. Section 68 of this last-mentioned Act secured priority for registered instruments mentioned in clauses 1 and 2 of section 16, *i.e.* certain instruments of which the registration was optional. Between 1864 and the

* Second Appeal No. 671 of 1904, from a decree of B. J. Dalal, Esq., District Judge of Mainpuri, dated the 4th of May 1904, confirming a decree of Maulvi Aziz-ur-Rahman, Subordinate Judge of Mainpuri, dated the 7th of December 1903.

(1) (1880) I. L. R., 2 Mad., 147.

(2) (1896) I. L. R., 20 Bom., 390

(3) (1883) L. R., 23 Ch. D., 690.

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passing of Act No. III of 1877 registration did not give priority except in regard to such instruments. It is admitted before us that the mortgage of the 21st of January, 1861, would have had priority to a registered mortgage executed during the period from 1864 to 1877. But it is contended on behalf of the defendant appellant, who is the owner of the puisne incumbrance, that the effect of section 50 of the Registration Act of 1877 is to give his mortgage priority over the plaintiff's mortgage. This section provides that "every document of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17 (which would include the defendant's mortgage) and clauses (a) and (b) of section 18 shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. It is contended on behalf of the defendant appellant that this section has retrospective operation.

Now it is a well recognised principle of law on the construction of Statutes, specially when the rights and liabilities of parties are altered thereby, that they are not to have retrospective operation unless the language is such as plainly to require such a construction. The effect of giving a retrospective operation to section 50 of the Registration Act in this case would undoubtedly be prejudicial to the vested right which the plaintiff had at the date of the passing of that Act by virtue of her mortgage. At that time her mortgage was not liable to be postponed to any subsequent instrument. Therefore, unless the language of the Statute compels us to give a retrospective operation to it, the rule to which we have referred would preclude us from putting such a construction upon it. An illustration of the application of the rule is to be found in the case of *Hickson v. Darlow* (1). Section 8 of the Bills of Sale Amendment Act of 1882 provides that "every bill of sale shall be registered under the Principal Act within seven clear days after execution thereof, otherwise such bill of sale shall be void in respect of the personal chattels comprised therein," and the question in that case was whether a bill of sale, which was executed before the Act came into operation

and which was valid as between the grantor and the grantee under the law as it previously existed, was valid notwithstanding the provisions of the section to which we have referred. It was held that the section in question did not avoid the unregistered bill of sale. The language of the Bills of Sale Act, it will be observed, is quite as general and comprehensive as the language of section 50 of the Registration Act. We think that the general rule is applicable to this case and that the plaintiff's mortgage is entitled to priority over the defendant's mortgage. This view is supported by the decision in the case of *Tirumala v. Lakshmi* (1), in which it was held that section 50 of the Registration Act does not operate so as to postpone, on the ground of their non-registration, instruments executed before Act XVI of 1864 came into operation. The same point was decided in *Desai Lallubhai Sethabhai v. Mundas Kuberdas* (2). In that case the competition was between an unregistered mortgage deed of the year 1862 and a subsequent registered mortgage of the year 1883. Mr. *Sundar Lal*, on behalf of the appellant, attached weight in his argument to the fact that, when the plaintiff respondent's mortgage was executed, it was liable, by virtue of the provisions of section 2 of the Act of 1843 to be postponed to a subsequent registered mortgage, and he contended that the Act of 1877 only recreated the liability to postponement which had previously existed so long as the Act of 1843, was in force; but we do not think that we can yield to this argument, seeing that under the subsequent legislation whereby the Act of 1843 was repealed, the plaintiff secured a privilege (which no doubt she did not before possess), namely, priority for her mortgage over subsequent instruments whether registered or not registered. This right or privilege was vested in her when the Act of 1877 was passed, and it is to her rights as existing at that time that we must, we think, have regard and not to her rights as they existed when the mortgage was executed.

We therefore dismiss the appeal with costs.

We extend the time for payment of the plaintiff respondent's mortgage to six months from this date.

Appeal dismissed.

(1) (1830) L. L. R., 2 Mad., 147. (2) (1896) L. L. R., 20 Bom., 390.