

1880

BISHAM
MAHTON
v.
SAHIB-UN-
NISSA.

The *Senior Government Pleader (Lala Juala Prasad)*, for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.,) was delivered by

SPANKIE, J.—We are not prepared to say that the sale of property by an amín of the Court on a close holiday is illegal. We cannot find that such a sale has ever been forbidden by the late *Sudder Dewanny Adawlut* or by this Court. Sales of land and of rights and interests in land paying revenue to Government during the *Dasehra* and *Muharram* vacations were prohibited by a notification of the *Sudder Dewanny Adawlut*, No. 1649 of 1851, but this prohibition has not been extended to sales by amíns. No rules by this Court for the guidance of the Courts in the exercise of their duties in respect to sales have hitherto been published. There is nothing in Act X of 1877 which forbids sales on a close holiday. Such a sale does not appear to be illegal. Even if it could be contended that the sale of moveable property by an amín on a close holiday was irregular, the irregularity would not vitiate the sale, but the person sustaining the injury may proceed as directed in s. 298 of the *Civil Procedure Code*. In sales of immoveable property the sale can only be set aside when substantial injury has been caused by reason of material irregularity, as provided in s. 311 of the Code. No material irregularity in publishing or conducting the sale has been shown in the case before us. Still less does it appear to be established that any material injury has been suffered. Consequently we should dismiss the appeal and affirm the order with costs.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1880
November 25.

ISHRI DAT (PLAINTIFF) v. HAR NARAIN LAL AND OTHERS (DEFENDANTS).*

Res judicata—Act X of 1877 (Civil Procedure Code), s. 13.

I, to whom the obligee of a bond for the payment of money in which immoveable property was hypothecated, had assigned by sale her right thereunder, sued by virtue of the deed of sale on such bond for the money due thereunder,

* Second Appeal, No. 1002 of 1879, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 9th July, 1879, affirming a decree of Muushi Madho Lal, Munsif of Mirzapur, dated the 27th March, 1879.

claiming to recover by the sale of the hypothecated property. This suit was dismissed on the ground that the deed of sale, not being registered, could not be received in evidence, and consequently *I's* right to sue on such bond failed. *I*, having procured the execution of a fresh deed of sale and caused it to be registered, brought a second suit on such bond by virtue of such deed of sale, claiming as before. *Held* that the second suit was not barred by the provisions of s. 13 of Act X of 1877.

1880

 ISHRI DAT
 v.
 HAR NARAI
 LAL.

THE plaintiff in this suit sued for Rs. 153-12-0, principal and interest, on a mortgage-bond (*disht-bandhak*), bearing date the 25th May, 1874, claiming to recover such money by the sale of the land and other property hypothecated in such bond. This mortgage-bond had been executed by the defendants in favour of one Ram Charan. After the death of Ram Charan his heirs, his widow Parbati and his nephew, conveyed their rights and interests under this mortgage and under other mortgages to the plaintiff, for Rs. 150, the deed of sale being dated the 13th March, 1878. This deed was not registered. The plaintiff, by virtue thereof, sued the defendants upon the mortgage-bond of the 25th May, 1874, claiming to recover Rs. 146 thereunder by the sale of the hypothecated property. This suit was dismissed on the 20th May, 1878, on the ground that the deed of sale, not being registered, could not be received in evidence, and the suit was consequently not maintainable. On the 8th November, 1878, the heirs of Ram Charan executed a second deed of sale in favour of the plaintiff in which they again transferred to him their rights and interests under the mortgage-bond of the 25th May, 1874, and the other mortgages, the consideration-money purporting to be Rs. 150. This deed of sale was duly registered. The plaintiff brought the present suit on the mortgage-bond of the 25th May, 1874, by virtue of this second deed of sale. The Court of first instance held that the present suit was barred by the provisions of s. 13, Act X of 1877, its reasons for so holding being as follows:—

“In my opinion, the case is liable to be dismissed on the ground that, when the plaintiff’s claim for the very debt has once been dismissed, he cannot sue again for that very debt, no matter on what grounds that case was dismissed: in other words, the plaintiff’s claim is, in my opinion, barred by s. 13, Act X of 1877: in the former case the plaintiff had claimed this very debt, basing his right on a sale-deed executed by the same persons by whom the present sale-deed has been executed: the present debt and the plaintiff’s right on the

1880

ISHRI DAT
v.
SAR NARAIN
LAL.

sale-deed formed the subject of the former suit, and the same things form the subject of the present suit also: hence, under s. 13, Act X of 1877, the present claim will not lie: it is true that the plaintiff's first claim was dismissed because the plaintiff's sale-deed was not registered; still his claim to recover the money was dismissed along with it, and he has now no right to bring a claim on the basis of a second sale-deed." On appeal by the plaintiff the lower appellate Court was also of opinion that the suit was not maintainable, holding that nothing passed to the plaintiff under the second sale, and that, if any thing passed, the suit was barred by the provisions of s. 13 of Act X of 1877. The reasons of the lower appellate Court for so holding were as follows:—"The mortgage-rights were sold to the plaintiff on the 13th March, 1878, and the purchase-money was paid to Parbati: from and after that date she ceased to have any interest in the mortgage: she had sold her rights and been paid for them: after the sale she could not have sued the mortgagors for the mortgage-money as she had no mortgage rights, and for the same reason she had no right to sell in November, 1878: the deed of sale she executed was so much waste paper, purporting as it did to transfer rights which Parbati had not to transfer, as she had parted with them in March of the same year: if the second sale-deed was to remedy the defect of the first one, then the suit is barred under s. 13: if the second sale-deed is an entirely separate transaction, then the defendants' contention that no suit will lie on it is right, for the rights the subject of the sale were not Parbati's to transfer: the appellant urges that the sale-deed shows that, after the first suit was dismissed, the plaintiff demanded back his money from Parbati, and that the second sale-deed was executed in lieu of retaining the money: on this the Court has simply to observe that the first sale was a *bona fide* one: the effect of the Subordinate Judge's decision dismissing the suit based on it was not to cancel the deed of sale or invalidate it, the sale having taken place, but that the deed could not be produced in Court as it had not been registered: it was the plaintiff's business to see that the deed was registered: he could not enforce his demand for a refund of his money by Parbati by suit, for he could not say that the sale had not been carried out, and it was his fault that he did not register the deed or cause its registra-

tration, without which he could not make it the basis of suit in a Civil Court: the respondents' (defendants') objection, therefore, that the suit will not lie on the present sale-deed is good."

1880

ISHRI DAT
v.
HAR. NARAY
LAL.

The plaintiff appealed to the High Court, contending in the memorandum of appeal that the present suit was not barred by the provisions of s. 13, Act X of 1877, as the matters in issue in the former suit had not been determined, and the causes of action in the two suits were distinct; and that there was no reason in law or equity why the present suit instituted on the basis of a valid and registered deed should not be tried and determined.

The *Senior Government Pleader* (Lala Juala Prasad) and *Munshi Hanuman Prasad*, for the appellant.

Pandit Bishambhar Nath, *Pandit Ajudhia Nath*, and *Lala Lalta Prasad*, for the respondents.

The Court (STUART, C. J., and OLDFIELD, J.,) made the following

ORDER OF REMAND.—The defendant executed a deed of mortgage in favour of one Ram Charan on 25th November, 1874, and the latter's widow assigned the rights of the mortgagee to plaintiff by deed of sale dated 13th March, 1878. The plaintiff then brought a suit against defendant to recover on the bond. The suit was dismissed on the ground that the deed of sale in plaintiff's favour, being unregistered, was inadmissible in evidence, and in consequence his title to sue on the bond failed. Plaintiff then got his vendors to execute a fresh deed of sale in his favour, and he has brought the present suit against defendant to recover on the bond. The Judge has dismissed the suit on grounds which appear to us to be erroneous. He seems to hold that the present suit is barred by s. 13, Act X of 1877, and, if not, that the second deed of sale could convey no title, since all the interest which the vendor had had already been conveyed to plaintiff by the first deed. But s. 13, Act X of 1877, cannot apply, since the two suits have not been brought under the same title. The title of plaintiff is in this suit based on a deed of sale subsequent to the disposal of the former suit, and it cannot be held that the second deed conveyed no interest to the

1880

ISURI DAT
v.
HAR NARAYAN
LAL.

plaintiff by reason of the vendor having already parted with his interest by the previous sale-deed, since the latter deed, being unregistered, could not affect the property. In fact, the first suit came to nothing, the whole record disappearing and leaving nothing on which a plea of *res judicata* or any other plea could be based. We, therefore, reverse the decree of the lower appellate Court and remand the case to that Court to try the issue as to the amount due to plaintiff. On submission of the finding, ten days will be allowed for objections.

1880

November 27.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson.

EMPRESS OF INDIA v. BHAIRON SINGH AND OTHERS.

Confession—Act I of 1872 (Evidence Act), s. 24.—Act X of 1872 (Criminal Procedure Code), ss. 122, 346.

A confession does not become irrelevant merely because the memorandum required by law to be attached thereto by the Magistrate taking it has not been written in the exact form prescribed.

THIS was an appeal by six persons convicted on a trial held by Mr. J. H. Prinsep, Sessions Judge of Cawnpore. It appeared that four of the convicted persons had made confessions to Chohari Prasad, the Magistrate who had been deputed to make a preliminary inquiry into the case, which were recorded and attested by the Magistrate's signature. A certificate was appended to each of such confessions to the effect that the statement had been taken in the presence and hearing of the accused person, and, having been read to him, was verified by him, and such certificate was signed by the Magistrate. These confessions were forwarded by Chohari Prasad to Saan-ul-lah Khan, the Magistrate who inquired into and committed the case for trial. The same four persons also made confessions before the committing Magistrate. These confessions were recorded by him on the 19th May, 1880, under his own hand, and were signed by him. On the 10th June, 1880, such persons having been asked whether they wished any witnesses to be summoned to give evidence before the Court of Session, their answers were recorded after their confessions, and after their answers a certificate was appended signed by the Magistrate to the effect that their answers