

## APPELLATE CIVIL.

*Before Bhide J.*

ILAH I BAKHS H (PLAINTIFF) Appellant,

*versus*

KALU MAL AND OTHERS (DEFENDANTS) Respondents.

1938

Sept. 29.

Regular Second Appeal No. 426 of 1938.

*Indian Registration Act (XVI of 1908), S. 50 — Vacant site in village — sale by unregistered deed — alleged delivery of possession — Subsequent mortgage by registered deed — Whether “ taking effect ” against sale — Possession under the circumstances whether notice of the previous transaction.*

Two persons sold the vacant site in dispute to plaintiff by an unregistered deed in 1922 for a sum of Rs.99. They mortgaged the same site (without possession) to K. by means of a registered deed in 1923 for a sum of Rs.250. It was alleged that the possession of the site was delivered to plaintiff after the execution of the deed in his favour and that he began to stack his fodder and tie his cattle there. In plaintiff's suit against K. claiming preference for his sale-deed it was contended on his behalf that the transaction of sale having been completed by delivery of possession there was no question of the subsequent mortgage “ taking effect ” against the sale and hence s. 50 of the Indian Registration Act did not apply and that the possession obtained by him should be presumed to be evidence of his title under the deed.

*Held*, that a person who takes the same property by a registered deed, with full knowledge of the previous transaction is obviously a party to the vendor's fraud and in such a case he cannot succeed merely on the strength of his registered deed.

*Krishnamma v. Suranna* (1), *Shankar Das v. Sher Zaman* (2), and *Narain Chunder Chuckerbutty v. Dataram Roy* (3), relied upon.

*Held however*, that the plaintiff's suit must fail as in the present case there was no evidence to show that the subsequent

(1) I. L. R. (1893) 16 Mad. 148 (F. B.).

(2) 56 P. R. 1900 (F. B.).

(3) I. L. R. (1882) 8 Cal. 597 (F. B.).

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mortgagee had obtained notice of the previous sale in favour of the plaintiff because the alleged possession of the vacant site, in the circumstances, could not be held to be sufficient notice of the previous transaction as to put him on enquiry as regards plaintiff's title under the sale-deed.

Case-law discussed.

*Second appeal from the decree of Diwan Siri Ram Puri, Senior Subordinate Judge, Hoshiarpur, dated 18th January, 1938, reversing that of Lala Chetan Dass Jain, Subordinate Judge, 4th Class, Garh-shaakar, District Hoshiarpur, dated 12th November, 1937, and dismissing the plaintiff's suit.*

MOHAMMAD MONIR, for Appellant.

D. N. AGGARWAL, for Respondent (No.1).

BHIDE J.—The material facts of the case giving rise to this appeal are as follows :—

Defendants Nos.2 and 3 sold the vacant site in dispute to plaintiff Ilahi Bakhsh by an unregistered deed on the 30th September, 1922, for a sum of Rs.99. Thereafter they mortgaged the same site (without possession) in favour of Kalu Mal defendant No.1 by a registered deed dated 29th October, 1923, for a sum of Rs.250. It is alleged that possession was delivered to Ilahi Bakhsh after the execution of the deed in his favour and that he began to stack his fodder and tie his cattle there. In 1936, Kalu Mal sued on the basis of his mortgage and got a decree. When he tried to sell the property in execution, Ilahi Bakhsh objected on the basis of the sale in his favour. The objection was dismissed whereupon he instituted the present suit for a declaration as to his title.

Kalu Mal claimed preference for his registered mortgage-deed over the prior unregistered sale-deed in favour of the plaintiff on the strength of the provisions of section 50 of the Indian Registration Act.

The trial Court decreed the suit. On appeal, the learned Senior Subordinate Judge dismissed it, holding that the alleged possession of the vacant site obtained by Ilahi Bakhsh was not of such a nature, as could be held to be tantamount to 'notice' of the present plaintiff's rights under the sale-deed. In support of this decision, he relied upon a Full Bench ruling of the Punjab Chief Court reported as *Shankar Das v. Sher Zaman* (1).

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Plaintiff has come up in second appeal and the learned counsel, who appeared for him, has taken up a two-fold position. It was urged by him, that the transaction of sale having been completed by delivery of possession, there was no question of the subsequent mortgage 'taking effect' against it and hence section 50 of the Indian Registration Act did not apply. In support of this contention reliance was placed particularly on *Kuppuswami Goundan v. Chinna-swami Goundan* (2) and *Asgar Ali v. Dost Mohammad* (3). Secondly, it was contended that the possession obtained by Ilahi Bakhsh should be presumed to be evidence of his title under the deed.

The point is not free from difficulty: So far as the wording of section 50 of the Indian Registration Act is concerned, it provides in unqualified terms that a subsequent registered deed shall 'take effect,' as against a previous unregistered deed. No exception is made even in the case of a vendee, who takes the property with actual knowledge of the previous transaction. But almost all the Courts in India have now superimposed this exception on the section, as the contrary view would obviously promote fraud and would be opposed to equity and good conscience. A person

(1) 56 P. R. 1900 (F. B.).

(2) 1928 A. I. R. (Mad.), 546.

(3) (1918) 44 I. C. 354.

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who takes the same property by a registered deed, with full knowledge of the previous transaction, is obviously party to the vendor's fraud and consequently it has been held that in such a case, he cannot succeed merely on the strength of his registered deed (cf. *Krishnamma v. Suranna* (1), *Shankar Das v. Sher Zaman* (2), *Narain Chander Chuckerbutty v. Dataram Roy* (3), etc.). In the present case, there is no evidence to show that the subsequent mortgagee had actual notice of the previous sale in favour of the plaintiff Ilahi Bakhsh. The plaintiff merely relied upon the delivery of possession as equivalent to such notice; but the learned Senior Subordinate Judge has held that even if possession was delivered, the possession of the vacant site, in the circumstances of this case, cannot be held to be sufficient notice of the previous transaction; for open sites in villages are frequently used by neighbours who have no title, for tethering cattle or stacking hay, etc. The learned counsel for the plaintiff-appellant relied on the remarks in *Shankar Das v. Sher Zaman* (2) of Robertson J. who said that 'where it is shown that the original transferee was in possession under his transfer at the time of the second conveyance, it is to be presumed that the second grantee had notice of the prior title or conveyance.' But the learned Judge himself has made his position clear in the earlier part of his judgment by observing that it would be going too far to say that possession of the first transferee must always amount to notice. This was also the view taken in *Nani Bibee v. Hafizullah* (4). The nature and circumstances of the possession must, therefore, be considered. In the present instance, the property transferred was an open site. The plaintiff

(1) I. L. R. (1893) 16 Mad. 148 (F. B.). (3) I. L. R. (1882) 8 Cal. 597 (F. B.).

(2) 56 P. R. 1900 (F. B.).

(4) I. L. R. (1884) 10 Cal. 1073.

was admittedly a neighbour and it was not disputed that the village neighbours do use frequently open sites not belonging to them for tying cattle and stacking hay, etc. The mortgage in favour of Kalu Mal was effected only about a year afterwards. There is no clear evidence on the record that the plaintiff was actually tying his cattle or stacking his hay on the site during the days preceding the mortgage; but even if he was, this sort of possession cannot be considered to be sufficient to put Kalu Mal on enquiry as regards plaintiff's title. I am, therefore, of opinion that the view taken by the learned Senior Subordinate Judge was justifiable in the circumstances of the case and there is no ground for interfering with his finding in second appeal.

As regards the other contention of the learned counsel for the appellant, viz., that the unregistered sale having been followed by possession, the sale had already 'taken effect,' that in the circumstances there could be no question of the subsequent mortgage 'taking effect' in competition with it, and consequently the provisions of section 50 were inapplicable in terms, I must say with all respect, that I find some difficulty in following the reasoning adopted in *Kuppuswami Goundan v. Chinna-swami Goundan* (1) and *Asgar Ali v. Dost Mohammad* (2). Section 50 says that a registered document shall 'take effect' as regards the property comprised therein, against every unregistered document relating to the same property. The wording would seem, *prima facie*, to apply to previous unregistered deeds, whether they have taken effect by delivery of possession or not (*cf. Narain Chunder Chuckerbutty v. Dataram Roy* (3)). As at present

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advised, I think, that it would be unduly restricting the scope of the section to say that it does not apply at all, when the previous unregistered transaction has taken effect by delivery of possession. Of course, delivery of possession may amount to notice of the previous title and the subsequent alienee may fail owing to such notice as already pointed out; but that would depend upon the nature and circumstances of the possession under the prior title.

On the above findings, I dismiss the appeal, but in view of all circumstances I leave the parties to bear their costs.

A. K. C.

*Appeal dismissed.*

APPELLATE CIVIL.

*Before Bhide J.*

1938  
 Oct. 8.

RATI RAM AND OTHERS (DEFENDANTS) Appellants,  
*versus*

SHERA RAM AND OTHERS  
 (PLAINTIFFS)  
 SIRI RAM (DEFENDANT) } Respondents.

Regular Second Appeal No. 1346 of 1937.

*Custom — Alienation — Non-proprietor of village Chotala, Tahsil Sirsa, District Hissar — Whether entitled to alienate the houses occupied by them — Wajib-ul-arz — Value of.*

*Held*, that non-proprietors of the village Chotala, Tahsil Sirsa, District Hissar, are not entitled by custom to alienate the houses occupied by them.

*Held further*, that an entry in the *Wajib-ul-arz* even when it is not corroborated by instances is a strong piece of evidence and is sufficient to shift the *onus* to the other side and is of even greater authority than an entry in the *Riwaj-i-am* as a *Wajib-ul-arz* is a part of the revenue record and is drawn up with special reference to each village.