

1902.

EMPEROR  
v.  
TEBHOVAN-  
DAS.

conduct the prosecution he was contravening the provisions of clause (4) of section 495. The definition of the term "investigation" in section 4 is not exhaustive. It would, I think, be placing an undue limitation on the simple meaning of words to hold that a Police Inspector who had got information that persons were carrying on wagering business, and having satisfied himself had obtained a warrant under section 6 of the Gambling Act and effected the arrest of the accused and the seizure of their books, had not taken any part in the investigation into the offence in respect of which the accused was being prosecuted. Having regard to these facts, it is clear to my mind that before the institution of the prosecution there was an investigation into the circumstances of the offence, and that the Police Inspector who took part in it was not qualified to conduct the prosecution.

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## APPELLATE CIVIL.

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*Before Mr. Justice Candy and Mr. Justice Fullon.*

DINA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v.  
NATHU (ORIGINAL PLAINTIFF), RESPONDENT.\*

1902.

March 26.

*Registration—Notice of prior incumbrance—Transfer of Property Act (IV of 1882), section 81—Marshalling of securities.*

Registration of a sale or mortgage is in itself notice to subsequent purchasers or mortgagees. This doctrine is as applicable since the introduction of the Transfer of Property Act (IV of 1882) as it was before.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, First Class Subordinate Judge, Appellate Powers, at Dhulia, reversing the decree passed by Ráo Sáheb K. R. Natu, Subordinate Judge of Yával.

The plaintiff, as mortgagee under a mortgage deed dated 26th December, 1879, sued to recover the amount due to him by sale of the mortgaged property.

The first five defendants pleaded that the mortgage had been satisfied.

\* Second Appeal No. 237 of 1901.

Defendant 6 (Nathu) pleaded that part of the property (survey No. 89) mortgaged in December, 1879, was subsequently mortgaged to him on the 4th December, 1894, and he prayed that the plaintiff should be required to seek satisfaction of his claim first out of the other property.

The Subordinate Judge dismissed the suit, holding that the plaintiff's mortgage had been satisfied, but on appeal the decree was reversed and judgment was given for the plaintiff, the Judge being of opinion that the mortgage debt had not been satisfied.

The defendants filed a second appeal in the High Court. That Court affirmed the decision of the lower Appellate Court with regard to the non-satisfaction of the mortgage debt, but remanded the case to the lower Appellate Court for a finding on the following issue :

Is defendant Nathu (No. 6) entitled to a direction that plaintiff should first seek satisfaction of his mortgage debt from the property not mortgaged to the said Nathu?

The First Class Subordinate Judge with Appellate Powers found this issue in the negative, holding that the registration of the first mortgage was notice to a subsequent mortgagee.

In his judgment he said :

This case is governed by the Transfer of Property Act ; for although plaintiff's mortgage being dated in 1879 is not governed by it, defendant Nathu's (which is dated January 4th, 1894) is, that Act having been made applicable to this Presidency from January 1st, 1893. We have to determine the title of Nathu from and upon this mortgage, a title which is the subject of the question sent down.

Now under section 81 of the Act, defendant Nathu can only have title to marshalling, if he had no notice of plaintiff's mortgage. There is absolutely no evidence from plaintiff that defendant Nathu had such actual notice, none having been given in the Court below and none after remand. But plaintiff's mortgage is registered, and, under numerous rulings of the Bombay High Court, registration is notice.

But Mr. Apte relies upon *Inderdawan v. Gobind* (I. L. R. 23 Cal. 780), followed in *Preonath v. Ashutosh* (I. L. R. 27 Cal. 358). He also refers to I. L. R. 16 All. 478. All that I can say is I am bound to follow the Bombay rulings in preference to those of other High Courts.

The appellants objected to this finding and contended that the lower Court erred in holding that the registration of the plaintiff's

1902.

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 DINA  
 v.  
 NATHU.

1902.

DINA  
v.  
NATHU.

mortgage was notice to the appellant within the meaning of section 81 of the Transfer of Property Act, and that the lower Court, having found that there was no actual notice to the appellant of plaintiff's mortgage, erred in holding that the appellant was not entitled to have the securities marshalled.

*Branson* (with him *S. V. Bhandarkar*) for the appellants.

*Ghanasham N. Nadkarni* for the respondent.

FULTON, J. :—The plaintiff is the mortgagee of two fields under a deed dated the 26th December, 1879, and has sued to recover the amount due to him by the sale of the mortgaged property. The sixth defendant holds a mortgage of one of the fields under a bond dated the 4th January, 1894, executed after the introduction of the Transfer of Property Act.

The Subordinate Judge rejected the claim on the ground that the plaintiff's mortgage had been satisfied. The lower Appellate Court reversed this decree and awarded the claim, holding that satisfaction of the plaintiff's mortgage debt was not proved.

On second appeal made by the sixth defendant along with the other defendants we sent down the issue :

Whether the defendant Nathu (the sixth defendant) was entitled to a direction that the plaintiff should first seek satisfaction of his mortgage debt from the property not mortgaged to the said Nathu ?

In the Court of first instance Nathu had in his written statement claimed the benefit of marshalling, and when we sent down the issue we were under the impression that in argument before the lower Appellate Court his pleader had repeated the claim. It appears now that this was a mistake arising from the omission of the word "not" in the printed copy of the judgment of the lower Court that came before us. The error originated in the certified copy of the judgment, and has formed the subject of correspondence with the District Judge. We have now to consider whether in these circumstances Nathu can in second appeal claim the right of marshalling which his pleader did not claim in his argument in the lower Court. We think, however, that as the question is purely one of law, and as the omission of the pleader in the lower Appellate Court to raise the

1902.

DINA  
v.  
NATHU.

issue must have been due to oversight, there is no objection to our proceeding now to consider the point, which is one of great importance.

The lower Appellate Court has found that there is no proof that Nathu, when he accepted his mortgage in 1894, had any actual notice of the prior mortgage, but infers that he had notice from the fact that the prior mortgage was registered.

The issue, then, which we have to determine is whether registration of a prior incumbrance is in itself notice to a subsequent mortgagee.

Prior to the introduction of the Transfer of Property Act this point was considered to be settled in this Presidency by the Full Bench decision in *Lakshmandas v. Dasrat* <sup>(1)</sup> in which Sir Michael Westropp, C.J.—delivering the judgment of the Court after observing (at page 184) that neither in England nor in Ireland was *mere* registration held to amount to notice to subsequent mortgagees or purchasers, while in America the Courts held that registration was in itself constructive notice—proceeded to point out (at page 187) “that what Mr. Justice Story says has in America been deemed to be ‘the obvious policy of the Registry Acts’ has in this Court been preferred to the less logical and more artificial doctrine which has been permitted to prevail in England.”

In *Dundaya v. Chenbasapa* <sup>(2)</sup> this decision was followed by Sir Charles Sargent, C.J., and Melvill, J., in which their Lordships said that it must be taken as settled law in this Presidency that possession by, or a registration of the title of, a purchaser or mortgagee, prior in point of time, is notice of that title to subsequent purchasers and mortgagees. Reference may also be made to *Narayan v. Bapu*. <sup>(3)</sup>

For the appellant it was argued that, although the foregoing decisions may have been conclusive prior to the introduction of the Transfer of Property Act, they cannot now be looked upon as binding interpretations of the definition of ‘notice’ in the Act, in regard to which we were referred to *Inderdawan v. Govind Ial*, <sup>(4)</sup> *Preonath v. Ashutosh*, <sup>(5)</sup> *Shan Moun Mull v. Madras Building*

(1) (1880) 6 Bom. 168.

(3) (1892) 17 Bom. 741.

(2) (1883) 9 Bom. 427.

(4) (1896) 23 Cal. 790.

(5) (1899) 27 Cal. 358.

1902.

DINA  
v.  
NATHU.

*Company*<sup>(1)</sup>; while on behalf of the respondents, on the other hand, attention was called to *Janki Prasad v. Kishen Dutt*.<sup>(2)</sup>

After carefully considering this argument we are unable to assent to it. It is true that the decisions of this Court had no reference to the words of the definition now in force. But, as pointed out by the Calcutta High Court at page 361 in 27 Calcutta, the definition of 'notice' in the Transfer of Property Act is as comprehensive as any that has ever been given. We cannot, then, without departing from the series of decisions of this Court, hold that the doctrine that registration of a sale or mortgage in itself gives notice to subsequent purchasers or mortgagees is not as applicable since the introduction of the Transfer of Property Act as it was before. It may be contended that this ruling renders inoperative in nearly all cases section 61, which can only take effect in cases of a prior mortgage by deposit of title deeds where there was no mortgage deed to be registered. But though such mortgages cannot be effected in the mofussil, they nevertheless are common enough in the Presidency towns. Some effect is, therefore, left to section 81; but even were this effect less than it is, we should still think that we were bound by the previous decisions of this Court, and that it would be dangerous to interfere with the doctrine about notice which has long been accepted in this Presidency and is so firmly established that it must form the basis of transactions. Mortgages must have been entered into on the faith of those decisions which should not be altered without express legislation. The want of unanimity on this subject between the different High Courts is to be regretted, but if unanimity in the construction of the Act is thought desirable, it appears to us necessary for the Legislature to interfere with phraseology less open to argument than that of the definition of 'notice.' It is true that a mortgagee is not bound by any law to search for incumbrances, but in this Presidency it has so long been held incumbent on him, as a prudent man, to do so, that we think it may fairly be said that he is guilty of gross negligence if he omits this precaution.

Of course, we observe that a change in the law of marshalling has been effected by section 81, which only secures this right to

(1) (1891) 15 Mad. 268.

(2) (1894) 16 All. 478.

the second mortgagee when he has obtained his security without notice of the prior charge. Formerly it was held that a second mortgagee of part of a property included in a previous mortgage could claim the benefit of marshalling even though he had notice of the earlier incumbrance; *Chumilal v. Fulchand* <sup>(1)</sup> and *Lakshmidas v. Jannadas*.<sup>(2)</sup> But the new limitation on the rights of the second mortgagee furnishes no reason for putting a new meaning on the word 'notice.' The second mortgagee accepted his mortgage subject to this limitation, and subject also to the construction previously placed on the word 'notice,' and has no valid reason for complaint. The importance of upholding the effect of registration is the same now as when the decision was given in *Lakshmandas v. Dasrat*.<sup>(3)</sup>

For these reasons we confirm the decree of the lower Appellate Court with costs.

*Decree confirmed.*

(1) (1893) 15 Bom, 160.

(2) (1896) 22 Bom. 304.

(3) (1880) 6 Bom. 168.

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.*

CHITAMBAR SHRINIVASBHAT (ORIGINAL PLAINTIFF), APPELLANT, v.  
KRISHNAPPA (ORIGINAL DEFENDANT 2), RESPONDENT.\*

1902.

March 26.

*Execution—Sale in execution of decree fraudulently obtained—Fraud—Innocent purchaser—Purchase for valuable consideration—Inadequacy of price—Suit to set aside sale.*

An *ex-parte* decree was fraudulently obtained by the first defendant against the plaintiff, and in execution certain land of the plaintiff's, worth Rs. 2,000, was sold by auction and was purchased by the second defendant for Rs. 400. The plaintiff sued to set aside the sale and to recover possession of the land. The facts found by the lower Courts were (1) that the decree was obtained by fraud, (2) that the property was sold at a considerable undervalue. The purchaser had no knowledge of the fraud.

*Held*, dismissing the suit, that the plaintiff was not entitled, as against the purchaser (defendant 2), to have the sale set aside. When property is sold in execution of a decree fraudulently obtained, mere inadequacy of price apart from

\* Second Appeal No. 387 of 1901.