

place before suit did not amount to a denial of plaintiffs' title. In second appeal we are unable to look into the evidence to see whether there was or was not an express denial of the landlords' title in this case. Having regard, however, to the circumstances to which we have already adverted, we think this case must be sent back to the lower Appellate Court for the purpose of coming to a finding on the point of the express denial upon which alone the forfeiture can be based.

The appeal will remain on the file of this Court. The learned Judge will make the return of his finding within a month from the date of the receipt by him of the record.

Case remanded.

1900
JULY 30 &
AUG. 3.
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APPELLATE
CIVIL.
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28 C. 135.

28 C. 139.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Stevens.

ISHAN CHANDRA DEY (*Defendant*) v. GONESH CHANDRA PARSI
AND OTHERS (*Plaintiffs*).* [28th May 1900].

Registration Act (III of 1877), s. 50—Priority—Registered and unregistered documents—Purchaser under a registered deed whether entitled to priority over purchaser in execution of a subsequent decree obtained by a prior mortgagee under an unregistered deed.

A purchaser of immovable property under a registered deed of sale is entitled to priority over a purchaser of the same property in execution of a subsequent decree obtained by a mortgagee under a prior unregistered deed. *Baijnath v. Lachman Das* (1) dissented from.

This appeal arose out of an action brought by the plaintiffs to recover possession of a certain plot of land on declaration of their title thereto. The lands in dispute admittedly belonged to the defendant No. 2 and to the predecessors of defendants Nos. 3 to 5. On the 20th Pous 1297 B.S. (3rd January 1891) these defendants [140] by an unregistered deed mortgaged the said lands to defendant No. 1 Ishan Chandra Dey, and on the 26th Bhadro 1300 B.S. (10th September 1893) sold them to the plaintiffs by a registered conveyance. There was nothing to show that the plaintiffs had any notice of the mortgage. In 1894 Ishan Chandra brought a suit upon his unregistered mortgage deed without making the plaintiffs parties, and obtained a decree. In execution of that decree the mortgaged lands were sold and purchased by Ishan Chandra (defendant No. 1) on the 13th September 1895, and later on he obtained symbolical possession. The plaintiffs then brought the present suit. The Court of first instance having decided that the registered deed of sale set up by the plaintiffs had a priority over the unregistered deed of mortgage, decreed the suit. On appeal the decision of the Lower Court was affirmed by the Subordinate Judge of 24-Pergunnahs, Babu Rajendra Kumar Bose.

Against this decision the defendant No. 1 appealed to the High Court.

Dr. Ashutosh Mookerjee, and Babu Jnanendra Nath Bose, for the appellant.

* Appeal from Appellate Decree No. 2890 of 1898, against the decree of Babu Rajendra Coomar Bose, Subordinate Judge of 24-Pergunnahs, dated the 27th of July 1898, affirming the decree of Babu Chandi Charan Sen, Munsif of Alipur, dated the 21st of February 1898.

(1) (1885) I. L. R. 7 All. 888.

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Babu Joy Gopal Ghosha for the respondents.

Dr. Ashutosh Mookerjee—The unregistered mortgage-bond having merged in the decree was entitled to take effect against a registered conveyance relating to the same property which was executed subsequently to the unregistered bond but prior to the decree : see s. 50 of the Registration Act, and the case of *Baijnath v. Lachman Das* (1), and in the course of the argument the following cases were also referred to : *Keshav Pandurang v. Vinayak Hari* (2) ; *Jethabhai Dayalji v. Girdhar* (3) ; *Desai Lallubhai Jethabhai v. Mundas Kuberdas* (4) ; *Himalaya Bank v. The Simla Bank* (5) ; and *Jugrup Rai v. Radhey Singh* (6).

The respondents were not called upon.

[141] 1900, MAY 28. The following judgments were delivered by the High Court (MACLEAN, C. J., BANERJEE and STEVENS, J.J.)

MACLEAN, C. J.—I think it sufficient to say that I concur in the view expressed in the case of *Keshav Pandurang v. Vinayak Hari*, (2) and also in the two cases of *Jethabhai Dayalji v. Girdhar* (3) and *Desai Lallubhai Jethabhai v. Mundas Kuberdas* (4), a view which seems to be in consonance with that taken of *The Himalaya Bank v. The Simla Bank* (5) and the case of *Jugrup Rai v. Radhey Singh* (6). I am not disposed to follow the case of *Baijnath v. Lachman Das* (1), which is not consistent with that taken in the other cases to which I have referred. The appeal therefore fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The learned Vakil for the appellant contends that any view opposed to his contention would necessitate the reading of some qualifying words into s. 50 of the Registration Act after the words, "not being a decree or order," and that whenever an unregistered mortgage is merged in a decree, a transferee under a registered deed subsequent to the mortgage is precluded from claiming the priority under s. 50. The answer to this contention is shortly this, that the words "a decree or order" in s. 50 must mean a decree or order which can be evidence against the subsequent transferee under a registered deed ; and in order that a decree or order may be evidence against a subsequent transferee it must either be a decree or order to which the subsequent transferee was a party, or a decree or order obtained against his transferor before the transfer to him, in which case also the decree will be evidence against him. But where the decree or order is obtained upon an unregistered mortgage-deed against the mortgagor alone subsequent to the registered transfer on which the opposing claim is based, there s. 50 must in my opinion [142] give priority to the claimant under the registered transfer, because in such a case the only basis upon which the mortgagee can rest his claim must be, not the decree, which is not evidence against the subsequent transferee, but the prior unregistered mortgage, and that by s. 50 is entitled to no priority against the subsequent registered transfer.

STEVENS, J.—I concur.

Appeal dismissed.

(1) (1885) I. L. R. 7 All. 888.

(2) (1898) I. L. R. 18 Bom. 355.

(3) (1894) I. L. R. 20 Bom. 158.

(4) (1895) I. L. R. 20 Bom. 890.

(5) (1885) I. L. R. 8 All. 28.

(6) (1890) I. L. R. 13 All. 288.