

The first Court held that the mortgaged-bond relied upon by the plaintiff was a forgery, and dismissed the suit on that ground solely. On appeal the Judge held that the mortgage-bond and deed of sale were both genuine; that Soodharam Buttacharjee must be taken to have bought the tank subject to the plaintiff's mortgage; and that the registered deed of sale could not have priority over the unregistered mortgage-bond; and he reversed the order of the lower Court, and passed a decree in favor of the plaintiff. From that decree Soodharam Buttacharjee appealed to the High Court.

Baboo Umbica Churn Bannerjee for the appellant.—The registered deed of sale must prevail over the unregistered mortgage-bond, Act XX of 1866, s. 50 (1). The mortgage-bond was no doubt executed before Act XX of 1866 came into force, but s. 100 of the Act will meet any objection raised on that ground.

Baboo Nilmadub Sen for the respondent,—Act XX of 1866 is not applicable, as the mortgage-bond was executed before that Act became law—*Girija Sing v. Giridhari Sing* (2). [MARKBY J.—But see *Mofuzel Hossein v. Golam Ambiah* (3).] It does not

(1) See Act VIII of 1871, s. 48.

(2) 1 B. L. R., A. C., 14.

(3) Before Mr. Justice Phear and Justice Sir C. P. Hobhouse, Bart.

MOFUZEL HOSSEIN (ONE OF THE DEFENDANTS) v. GOLAM AMBLIAH (PLAINTIFF).*

The 23rd July 1868.

Act XX of 1866, ss. 49, 50—Registration—Priority.

Baboo *Poorno Chunder Shome* for the appellant.

Baboo *Debendur Chunder Ghose* and *Ashootosh Dhur* for the respondent.

The judgment of the Court was delivered by.

PHEAR, J.—In this case it appears that one *Abdool Wahid*, the first defend-

ant, being owner of certain property after entering into a contract of sale of the property with the plaintiff, sold it again to the other defendant. The contract of sale, whatever it was between the plaintiff and the vendor (defendant), was not registered, and it seems that it was not of such a character as absolutely to require registration according to the provisions of s. 49. Act XX of 1866, in order that it should be admissible in evidence, but the kabala under which the special appellant purchased was duly registered, and after the registration, the special appellant obtained possession of the property from the vendor. Upon this having occurred, the plaintiff brought the present suit against the vendor (defendant), seeking specific performance of his contract. The present special appellant then intervened and

* Special Appeal, No.—, from a decree of the Judge of the 24-Pergunnas, dated the 2nd November 1867, reversing a decree passed by the Munsif of that district, dated the 14th February 1867.

1873
SOODHARAM
BHUTTA-
CHARJEE
v.
ODHOY
CHUNDER
BUNDOPA-
DRYA.

1873.

SOODHARAM
BHUTTA-
CHARJEE
v.
ODHOY
CHUNDER
BUNDOPA-
DHYA.

appear in that case when the deeds were executed. [MARKBY J.—You have never been in possession under the mortgage-bond if you had been, then the case of *Girija Sing v. Giridhari Sing* (1) would be applicable.] In *Girija Sing v. Giridhari Sing* (1), the Court does not rely on the mere fact of possession. S. 50 of Act XX of 1866 has not a retrospective effect. Registration in this case was only optional, Act XX of 1866, s. 18.

Baboo *Usnbica Churn Bannerjee* in reply.

Cur. adv. vult.

was made a defendant by the Court under the provisions on that behalf of s. 73 of Civil Procedure Code. The lower Appellate Court has given the plaintiff a decree against both the defendants. The vendor (defendant) makes no remonstrance against this, but the second purchaser (defendant) now appeals specially to this Court.

It appears to me that the addition of the special appellant as a party to the case was not called for, but I cannot go to the length of saying that it was an improper exercise of discretion on the part of the first Court. As, however, the intervenor has thus become a defendant on the record, the question between him and the plaintiff in the suit is simply this, namely, whether or not the plaintiff makes out as against him such a title to the property as gives him (the plaintiff) a right to a decree for possession. The special defendant says that the plaintiff's alleged purchase is not established by the evidence, and it would seem from the finding of fact stated by the first Court in its judgment to be very doubtful, indeed, whether the transaction between the plaintiff and the vendor (defendant), upon which the plaintiff relies, really did amount to a sale of the property: whether, in short, it passed any proprietary rights to the property

or not. But assuming that it was sufficiently complete to pass from the vendor (defendant) to the plaintiff rights of property as between those two persons, still inasmuch as it was not registered, it seems to us that, by the operation of s. 50, Act XX of 1866, it cannot have any priority as regards the property comprised in it against any other authentic instrument of conveyance executed afterwards by the vendor (defendant), and duly registered. It follows then, that the plaintiff's title from the vendor (defendant), traced as it is through an unregistered instrument, cannot prevail against the defendant's title, which is deduced from the same owner under a duly registered kabala. Treating therefore, as we have already said we must, the question between the plaintiff and the special appellant as if it arose in a suit brought by the plaintiff against the special appellant to recover the property in suit, the plaintiff has not made out that he is entitled to succeed.

In this view, the decision of the Principal Sudder Ameen is erroneous in law, and must be set aside as between these two parties only. As regards the plaintiff and the vendor (defendant), it will remain undisturbed. The special appellant must have his costs in this Court and in the lower Appellate Court.

(1) 1 B. L. R., A. C., 14

The judgment of the Court was delivered by

1873

BIRCH, J. (who, after briefly stating the facts, continued.)—
The first Court found that the plaintiff's bond was a forged document, and for that reason dismissed the suit without going into the question of the validity of the deed of sale propounded by Soodharam.

SOODHARAM
BRUTTA-
CHARJEE
v.
ODHOY
CHUNDER
BUNDOPA-
DHYA.

On appeal the Judge held that the bond was genuine ; he also held that the deed of sale was a well-attested deed, and that the bond did not interfere with it. He was of opinion that Soodharam must be considered to have bought the tank encumbered with the mortgage ; and that the registered deed of sale could not prevail over the unregistered mortgage-bond. His order is not clear, but the only interpretation to be put upon it is that he gave the plaintiff a decree for the sum due, confirming his right as mortgagee of the tank.

Soodharam appeals, and it is urged on his behalf that the Judge is wrong in holding that the registered deed of sale does not prevail over the unregistered deed of mortgage.

There can be no doubt that, immediately after his purchase Soodharam obtained possession of the tank. The plaintiff raised no objection to the change of possession. He comes into Court upon an unregistered bond nearly twelve years after its execution. He is met by an allegation of possession under a registered deed of sale by his mortgagor to Soodharam. We think that there can be no doubt that the registered deed of sale must prevail over the unregistered mortgage-deed. The question is governed by s. 50 of Act XX of 1866. That section provides that "every instrument of the kinds mentioned in cls. 1, 2, and 3 of s. 18 shall, if duly registered, take effect as regards property comprised therein against every unregistered instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not;" and if it applies; then the plaintiff's mortgage-bond being unregistered cannot prevail against the defendant Soodharam's purchase-deed, which, though of later date, was duly registered. It seems to us to be a reasonable construction of the Act that it does apply to such a case. It is contended that it

1872

SOODHARAM
BHUTTA-
CHARJEE
v.
ODHOY
CHUNDER
BUNDOFA-
DHYA.

does not, because the mortgage-bond was executed before the Act came into operation. But the provisions of this section are not new. The principles of them is contained in the previous Acts XIX of 1843, s. 2, and XVI of 1864, s. 68.

If these provisions of the Registration Act did not apply to instruments previously executed, the law of registration would be full of anomalies, and titles which were once secure would become insecure when a new Registration Act was passed. Had it been intended that these provisions should not be so far retrospective, the successive Acts, when repealed, would have been kept in force in this respect as to documents already executed. When Act XIX of 1843 was passed, express provision was made that these provisions should not apply to documents executed before a certain date. No such provision is contained in the subsequent Acts. But the explanation of s. 50 in the present Act (VIII of 1871) clearly assumes that the Act applies to deeds already in existence.

The respondent has relied on the decision in the case of *Girija Singh v. Giridhari Singh* (1), but that case is we think distinguishable. Macpherson, J., there says distinctly that, "if it were a mere question, as to which deed was to be given effect to, the plaintiff (who had purchased under a prior unregistered bill of sale) is not entitled to recover," *i. e.*, to recover as against the defendant who had purchased under a subsequent bill of sale which had been duly registered. But the learned Judge goes on to show that the first purchaser had been eleven years in possession, and that therefore his position was "far stronger than if he were seeking possession for the first time under his deed of sale: and the question is not merely one as to the effect to be given to the deed as against a deed of later date;" and Bayley, J., also relies on the fact that the unregistered purchaser had obtained possession. The principle that runs through this and a number of other similar cases seems to be this, that non-registration will not impair the validity of a deed executed in good faith under the old law in force at the time of execution under which registration was optional, if pos-

(1) 1 B. L. R., A. C., 14

session has actually been acquired and enjoyed before the execution of the second deed.

In the case before us, the mortgagee never had possession. The mortgagor sold the property to the defendant, and the deed of sale was duly registered, and possession was acquired by the defendant. Under such circumstances the registered deed of sale must prevail over the unregistered mortgage, and the plaintiff can only obtain a decree for money lent, against Kristodhone Bose.

We observe the Judge has said that the grounds of the Munsif's judgment are mere conjecture, and that his reasons are frivolous. We are wholly unable to concur in that observation. We think that they were worthy of the Judge's most careful consideration.

No decree has been drawn up by the Judge in this case except that the "appeal is decreed," a decree which it would have been impossible for the plaintiff to execute. As, however the judgment is wrong in point of law, we set aside the decree of the lower Appellate Court, and direct that the plaintiff do have a personal decree against the defendant Kristodhone for the sum of Rs. 99-1-8, with interest at 5 per cent, from this date until payment; and that the suit, so far as it seeks to render the property purchased by the defendant Soodharam liable under the mortgage-bond executed by Kristodhone in the year 1266 B. S. (1859) be dismissed; and that the plaintiff do pay to the defendant Soodharam his costs in this Court and the Courts below.

Appeal allowed.

1873.

SOODHARAM
BHUTTA-
CHARJEE
v.
ODHOY
CHUNDER
BUNDOPA-
DHYA.