Before Mr. Justice Kemp and Mr. Justice E. Jackson.

1868
June 26.

SHEIKH PARABDI SAHANI *v.* SHEIKH MOHAMED HOSSEIN.*

Evidence—Registration—Act (XVI. of 1864), s. 13.

A. sued B. for recovery of possession of land which he alleged had been sold to him by B., under a bill of sale. The bill of sale had been duly registered, and was not disputed by B., but B. produced an unregistered ikrarnama, executed by A., to prove that the sale was not absolute, but only by way of mortgage. B alleged that the terms of the bill of sale were qualified and explained by the ikrarnama.—*Held*, that the ikrarnama was inadmissible in evidence, as it had not been registered under section 13 of Act XVI. of 1864, but that the Court might look at other and independent evidence, *viz.*, the acts and conduct of the parties, to throw a light upon their intention.

See also Ante p. 1.

It has always been the policy of the Courts of this country not to apply the strict rules of English Law to natives of this country.

SUIT for possession of a putnee talook called Khaspore, on the ground that, on the 25th Bysak 1272 (May 1865), defendant mortgaged the same to the plaintiff; and that afterwards, that is to say on the 26th Kartic 1272 (10th November 1865) the defendent sold the same, for the sum of Rs. 1,150, under a registered deed of sale. The plaintiff alleged that he obtained possession of the property, but that the defendent, with a view to deprive him, had instituted a proceeding, under section 318 of the Criminal Procedure Code, in which the Joint Magistrate decided that the plaintiff was in possession of the Hat at Khaspore; but this order was quashed by the High Court on appeal; that the plaintiff again applied for a re-hearing of the case but his application was rejected on the 12th of July 1866; that two rent suits had been decreed in favor of defendant; and, therefore, he (the plaintiff) had brought this suit to set aside the criminal and collectorate orders, and to obtain possession of the talook, and for mesne profits.

The order of the Joint Magistrate, dated 12th July 1866, was to the following effect:

That the order passed by him had been quashed by the High Court, on the ground that proper enquiry had not been made as to the fact of actual possession; that Parabdi Sahani

* Special Appeal, No. 87 of 1867, from a decree of the Judge of Hooghly, affirming a decree of the Principal Sudder Ameen of that district.

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has again applied, on the ground that as a consequence of the High Court's order, the Joint Magistrate ought to take evidence, and proceed to decide the question of actual possession. The Joint Magistrate was of opinion that he was not bound, and thought that the time for holding such an enquiry had passed. The applicant was in a very different position from his former one. There was a collectorate award, which virtually declared that Mohamed Hossein was in possession of part of the talook. A competent Court had found that a part, however small, of the talook was not in his possession. He further said, that he had reason to think that the former proceedings were scarcely necessary.

The defendent set up that the sale was not an absolute, but a conditional one, by Bybilwufa; that an ikrarnama qualifying and explaining the terms of the deed had been executed by the plaintiff.

The Principal Sudder Ameen held, that the registration of the ikrarnama was not necessary but optional, as it fell under clause 7, section 16 of Act XVI. of 1864, and not under section 13 and that it was admissible in evidence. He found on the facts that the ikrarnama had been executed by the plaintiff; that possession was not delivered to the defendant, nor had there been a mutation of names in the zemindar's sherista. He found that the bill of sale was to take effect as a mortgage, and, accordingly, dismissed the plaintiff's suit.

On appeal the Judge held, that the ikrar came under the instruments mentioned in section 13, Act XVI. of 1864; and was, therefore, inadmissible in evidence. But he considered that the circumstances of the case required that the question should be decided as to whether the absolute deed of sale was to operate as a mortgage, and whether there were matters sufficient to contradict the writing, and give it the meaning alleged by the defendant. He found from the evidence that the plaintiff had entirely failed to prove that possession followed the execution of the deed; that certain kubooliats had been filed, of which only one had been spoken to by the party alleged to have given it, and these deeds not having been attested, were worthless as evidence; that there were no proceedings taken

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to compel payment; that the proceedings under Act X. of 1859, against defaulting ryots, filed by defendant, showed that the plaintiff intervened unsuccessfully; that in the proceedings before the Magistrate, under section 318 of the Criminal Procedure Code, possession had not been held to be with the plaintiff, and, therefore, he had not been recognized as the party in possession; that the plaintiff had been unable to show, by positive testimony and proof, that he had enjoyed the principal interest in the land; that the plaintiff had filed certain receipts for the putnee rent, from the zemindar, but that payment partook more of the nature of a deposit, as there was nothing to show that the zemindar recognized him as his putneedar, either by the registration of his name or by other acts; that since plaintiff had failed to prove his possession, he had consequently failed to prove dispossession; that the decisions under Act X. of 1859 fully supported the defendant's pleas, and showed that the land remained with him after execution of the deed of sale; that with reference to the alleged purchase-money advanced and to the value of the interest sold, the inference was that an actual sale could not have been contemplated—the amount paid was an inadequate price for the property, it having been less than one year's purchase; that the defendant paid the arrears of rent out of the purchase-money; that the title deeds also remained in the possession of the defendant. He found that he could not reconcile the acts and conduct of the parties subsequent to the deed, with the acts of persons who intended to act upon the deed as an absolute sale, but that such acts induced the belief that the money was a loan, and the transaction a mortgage. He considered that there was sufficient evidence in the case to show that the intention of the parties, when executing the deed, was, not that it should constitute an absolute sale, but that the transaction should be treated as a mortgage. He dismissed the appeal.

In Special Appeal it was contended, that since the defendant admitted the execution of the deed of sale, but set up a contemporaneous written ikrarnama, as qualifying or explaining its terms, which had been held inadmissible under the provisions of

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section 13, Act XVI. of 1864, parol evidence should not have been received to explain a written document.

Mr. Paul (with him Baboo *Atul Chandra Mookerjee* and Baboo *Lakhicharan Bose*) for appellant.

Baboo *Krishna Kishore Ghose* and Baboo *Annadaprasad Banerjee* for respondent.

The judgment of the Court was delivered by

KEMP, J.—The plaintiff, appellant, sues the defendant for possession of certain property, under a bill of sale, dated the 25th Bysack 1272 (6th May 1865.) This deed conveys the property absolutely for a consideration of 1,100 rupees; the instrument is registered, and is not disputed. The defendant, respondent, pleads an ikrarnama of the same date, in which it was stipulated, that if the consideration was repaid within a period of six months, or before Aghran 1272 (November or December 1865), and Bysack 1273 (April or May 1866), the plaintiff was to return the deed of sale to the defendant, the vendor. This ikrarnama is not registered, under section 13 of Act XVI. of 1864, therefore, this instrument, being an instrument which purports to operate to create a title in immovable property of the value of upwards of 100 rupees, is inadmissible in evidence in any civil proceedings in any Court. The Judge has treated this piece of evidence as inadmissible, but he has decided the case on independent evidence,—evidence as to the acts and conduct of the parties,—and has come to the conclusion, that it was the intention of the parties that the vendor should have the power of repaying the consideration-money within the period fixed by the ikrar; and having done so, the sale was not absolute. The acts and the conduct of the parties, on which the Judge relies, are *1st*, that the vendor remained in possession; *2ndly*, that the consideration paid was an inadequate one; and, *3rdly*, that the title-deeds were in the possession of the vendor The learned counsel for the appellant contends, that the deed of absolute sale being registered, and the ikrarnama unregistered, the former cannot be controlled by the latter; and that the Judge was wrong in law in looking at the evidence bear-

ing upon the acts of the parties, and were he right in law, the possession not being a peaceable possession, but a contested one, the case does not come within the view taken by the majority of the Full Bench, in *Kashinath Chatterjee* v. *Chandi Charan Banerjee* (1), inasmuch as in that case a peaceable possession was not only contemplated, but found to exist. As to the inadequacy of the consideration, the learned counsel contends that the plaintiff, being called upon by the Court of first instance to explain an apparent over-valuation of his claim, put in an explanation, which showed that the nett profits, after paying rents, collection, expenses, &c., were only 53 rupees, odd annas; and, therefore, that 1,100 rupees being more than 20 years' purchase, the consideration-money was not inadequate. With reference to the question of the title-deeds being in the possession of the vendor, the learned counsel remarked, that it was the custom of this country to hand over the title-deeds to the mortgagee or vendee; and if the vendor had not done so, his conduct is not such as to give rise to a presumption in his favour, but rather against him. We are of opinion that the Judge was right in refusing to look at the ikrarnama, that document being an instrument relating to lands within the meaning of section 13 of Act XVI. of 1864, and, as observed by the learned Chief Justice, in his opinion in the case quoted above, the whole effect of the new Registration Act would be frustrated, if such evidence were admitted. The question then comes, whether, taking away the ikrarnama, the defendant is entitled to ask the Court to look at other and independent evidence, as throwing a light upon the intentions of the parties. We think that it has always been the policy of our Courts not to apply the strict rules of English law to natives of this country. Their Lordships of the Privy Council in *Chowdhry Deviprasad* v *Chowdhry Dowlut Singh* (2) held, that although the recital of the receipt of consideration was *prima facie* evidence that it was paid at the time of execution of the deed, that inference might be rebutted by evidence as to the conduct and acts of the parties. In

(1) Case No. 870 of 1865, 5th February 1866. (2) 3 Moore, I. A., 317.

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this case the Judge has found, as a fact, that the vendor is still in possession. It is not very clear whether that possession has been altogether uncontested, and it may be that the Judge has somewhat misconstrued the decision of the Magistrate, under section 318 of the Code of Criminal Procedure, but the broad fact of possession has been found to be against the plaintiff. There is some difficulty in coming to a conclusion as to whether the consideration was an adequate one or not, and the Judge has not come to a very clear finding on that point. The fact of the title deeds being in the hands of the vendor is not conclusive evidence, but, taken with the fact that he is in possession, it is not without weight, for, so far as our experience serves us, we have found that mortgagees in this country do insist on taking the title-deeds before they part with their money, when lending on the security of landed property. On the whole we think that justice has been done in this case, that the Judge was right to look beyond the mere fact of the absence of registration, and to consider, as he has done, the acts and the conduct of the parties. We have no doubt that the ikrarnama was executed, and that the intentions of the parties were represented in that instrument.

This special appeal will be dismissed with costs.

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June 27.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

GAUR MOHAN DAS *v.* RAMRUP MAZOOMDAR.*

Assignee of a Bond—Summary Application—Registration Act (XX. of 1866), s. 53.

A summary application, under section 53 of Act XX of 1866 by he assignee of a bond, cannot be entertained.

See also 14 B. L. R. 420

THE following case was submitted by the Judge of the Small Cause Court of Jessore, for the opinion of the High Court.

"This is an application to this Court under section 53 of Act XX. of 1866, by the Assignee of the bond or obligation filed with the application, to enforce the agreement recorded therein by the Registering Officer, under section 52, and the question

Reference from the Court of Small Causes at Jessore.