

In the case of *Joydeo Singh v. Harihar Pershad Singh* (1) the period of six months had been allowed to expire without any prosecution being instituted, and a fresh sanction was applied for and obtained. But this Court held that, even assuming that a fresh sanction could be granted, a point which the learned Judges did not decide, it should not have been granted unless some explanation was given for the omission to commence the proceeding within six months, and the order for sanction was set aside. In the present case we think that the proceeding, not having been instituted within six months from the date of the sanction, the Magistrate had no power to take cognisance of the offence, and his proceedings therefore are void. Mr. Leith has drawn our attention to the provisions of section 537 of the Code, but that section is expressly made subject to the provisions before contained, and we cannot therefore suppose that it was intended to override the provisions of section 195. Nor can it refer to a case in which the want of sanction was directly brought to the notice of the Magistrate at the commencement of the proceedings before him. Nor can we say that there has not been a failure of justice in the prosecution of the petitioner after the period, for which the sanction was in force, had expired. We accordingly make the rule absolute and quash the commitment of the petitioner. The petitioner will be discharged.

H. T. H.

Rule made absolute and commitment quashed.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Hill.

GUNGA NARAIN GOPE (PLAINTIFF) v. KALI CHURN GOALA
AND OTHERS (DEFENDANTS.) *

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August 28.

Transfer of Property Act (IV of 1882), section 54—Delivery of possession under deed of sale unregistered where registration is optional—Delivery of property—Share in a tank—Tangible immoveable property—Question of fact—Second appeal.

The defendants purchased a share in a tank in 1884, and the consideration being of a less amount than Rs. 100 and registration therefore optional,

* Appeal under section 15 of the Letters Patent No. 39 of 1894 against the decree of the Hon'ble Henry Beverley, one of the Judges of this Court, dated the 17th of May 1894 in appeal from Appellate Decree No. 1132 of 1893.

(1) I. L. R., 11 Calc., 577.

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the deed of sale was unregistered. In 1886 the plaintiff purchased the same share from the same vendor under a registered deed of sale. It was found on the facts that the plaintiff purchased with notice of the defendants' previous purchase, and that the defendants had possession of the purchased share from the date of their purchase. *Held*, on appeal under the Letters Patent of the High Court, by TREVELYAN, J., upholding the decision of BEVERLEY, J., (HILL, J., dissenting), that the possession obtained by the defendants was a sufficient "delivery of the property" within the meaning of section 54 of the Transfer of Property Act. *Mukhan Lall Pal v. Bunku Behari Ghose* (1) referred to.

Per TREVELYAN, J.—It is not necessary that there should be any formal making over of possession.

Per HILL, J.—When the owner of immoveable property of a value less than Rs. 100 has executed to the intending buyer an instrument purporting to transfer the ownership of the property, and the instrument has not been registered, but the intending buyer has been placed in possession, the effect to be attributed to the delivery of possession depends on the intention of the parties, which is a question of fact that cannot be determined on second appeal.

THIS was a suit for declaration of title to, and recovery of possession of, a two annas share of a tank.

The plaintiff was the owner by inheritance of a two annas share in the tank, and the defendants 1, 2, and 3 each also owned a two annas share. The remaining eight annas share was owned by two widows Felumoni Goalini and Nayanmoni Goalini.

The plaintiff alleged that he purchased the eight annas share of the tank under a registered deed of sale executed in his favour by Felumoni and Nayanmoni in Assin 1293 (September 1886); that in 1295 (1888) he sold his ancestral two annas share and also six annas of the share he had purchased to other persons who were made *pro formâ* defendants in the suit; and that in 1298 (1891) the defendants 1, 2, and 3 refused him any share in the produce of the tank, and so dispossessed him of his remaining two annas share, for possession of which he sued.

The defendants 1, 2 and 3 alleged that they had purchased the eight annas share owned by the widows by a deed of sale dated Bhadro 1291 (August 1884), and the consideration being less than Rs. 100 the deed was unregistered, and that they had been in possession of a fourteen annas share of the tank ever since that

date; they also alleged that the plaintiff, when he purchased the eight annas share, was aware of the defendants' previous purchase.

The only issue raised material to this report was whether the defendants had previously purchased the eight annas share as they alleged, and, if so, whose purchase, the plaintiff's or the defendants', was entitled to preference.

The Munsif on the evidence upheld the defendants' purchase and found "that the plaintiff purchased with notice of the defendants' previous purchase, and that the defendants had possession of the purchased share from the date of their purchase." He therefore dismissed the suit.

The District Judge on appeal agreed with the Munsif as to the defendants' purchase and their possession, and continued:—

"I should therefore have been prepared to uphold the lower Court's judgment but for the following objection. Allowing that the plaintiff had notice of the defendants' possession, it is necessary further to show that the defendants were in possession under a legal title; otherwise it cannot be held that the defendants' notice was of a nature to defeat his subsequent purchase. Now the position of the defendants was this. They had purchased, it is said, for a sum less than Rs. 100 and had obtained possession under that purchase. But inasmuch as they had purchased by means of a deed of sale, they can prove the terms only by reference thereto. Now the deed was unregistered. Under section 54 of the Transfer of Property Act, however, registration was compulsory; *Makhan Lall Pal v. Bunku Behari Ghose* (1). If there had been delivery of possession without a writing but for a consideration less than Rs. 100, that would be a good sale, but if there was a writing, then, without registration, there would be no sale, or at least no sale that can be proved; for, unless the writing be exhibited, we cannot know the amount of consideration, and, unless we do, we cannot find that the terms of the sale were such that it could be effected by delivery of possession; for under section 91 of the Evidence Act the terms cannot be proved excepting from the writing itself. The ruling quoted shows that if there is a writing registration is compulsory, and, that being so, sections 17 and 49 of the Registration Act will prevent the principal defendants' unregistered conveyance from being exhibited, and will thereby shut them out from proving that their purchase was a valid one under the Transfer of Property Act, section 54."

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For these reasons the Judge held that the defendants' deed of sale was not admissible in evidence, and that their case therefore failed. He therefore reversed the decision of the Munsif and gave the plaintiff a decree.

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The defendants appealed to the High Court.

The judgment was as follows :—

BEVERLEY, J.—It seems to me that there is a manifest error of law in the judgment of the lower Appellate Court in this case. In point of fact the learned pleader for the respondent has not attempted to support that judgment.

The District Judge has found that the plaintiff purchased with notice of the defendants' prior purchase and possession. But he has found that the purchase was invalid because the deed by which it was effected, although accompanied by possession, was not registered. He says : "Now the position of the defendants was this : They had purchased, it is said, for a sum less than Rs. 100, and had obtained possession under that purchase. But inasmuch as they had purchased by means of a deed of sale they can prove the terms only by reference thereto. Now the deed was unregistered. Under section 54 of the Transfer of Property Act, however, registration was compulsory ; *Makhan Lall Pal v. Bunku Behari Ghose* (1). If then there had been delivery of possession without a writing, but for a consideration less than Rs. 100, that would be a good sale ; but if there was a writing, then without registration there would be no sale, or at least no sale that could be proved ; for, unless the writing be exhibited, we cannot know the amount of consideration, and, unless we do so, we cannot find that the terms of the sale were such that it could be effected by delivery of possession ; for, under section 91 of the Evidence Act, the terms cannot be proved excepting from the writing itself."

Now it seems to me that the District Judge has altogether misapprehended the law, and the decision of the Full Bench to which he has referred. Section 54 of the Transfer of Property Act declares that in the case of tangible immoveable property of less than Rs. 100, the "transfer may be made either by a registered instrument or by delivery of the property." But the section does not say that, if the delivery of the property is accompanied by a deed, that deed must necessarily be registered. Nor is that the decision of the Full Bench. What the Full Bench says is that "a transfer of ownership by sale of tangible immoveable property of a value less than Rs. 100 can be made only by a registered instrument or

by delivery of the property, and that if made otherwise, as in the case now before us, by an unregistered instrument, *unaccompanied by possession*, the transfer of sale is inoperative, and so it confers no title in the vendee." In other words, if the transfer is made by a deed, and there is no delivery of possession at the time, then the transfer is only valid if the deed is registered.

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Now in this case the Judge has found as a fact that the defendants have obtained delivery of possession of their vendors' eight annas share, and that possession was sufficient to effect the legal transfer of the property. The possession, however, might be accompanied by the execution of an instrument, but it does not follow, either from section 54 of the Transfer of Property Act or from the decision in *Makhan Lall Pal v. Dinku Behari Ghose* (1), that if there is such an instrument it must be registered, and that it will be inoperative if not registered. That in fact would be to nullify the provision of the Registration Act which makes the registration of a conveyance of property of a value of less than Rs. 100 optional and not compulsory. What section 54 says, and what the Full Bench case says, is that where the transfer is effected by means of an instrument without delivery of possession, in that case the instrument must be registered or the transfer is invalid.

The decree of the lower Appellate Court must, therefore, be set aside, and that of the first Court restored. The appellant will have his costs in both the Appellate Courts.

From this decision the plaintiff appealed under section 15 of the Letters Patent, the only material ground being that the possession which the defendants obtained did not constitute "delivery of property" within the meaning of section 54 of the Transfer of Property Act, so as to make the sale a valid one.

Baba Nalini Ranjan Chatterjee for the appellant.

Babu Sarada Churn Mitter, and Babu Kali Churn Banerjee, for the respondents.

The following judgments were delivered by the Court (TREVELYAN and HILL, JJ.) :—

TREVELYAN, J.—The question in this case depends upon the

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construction to be placed upon section 54 of the Transfer of Property Act. On the findings of fact of the Court below, the property, which is an 8-anna share of a tank, was sold to the defendants for a sum less than Rs. 100 by an unregistered deed of sale; the defendants obtained possession under that purchase. They possessed the share after their purchase, to use the words of the Munsif, which, as appears later in his judgment, means from and after that purchase. Their vendors never had possession after the purchase. It is also found that the plaintiffs, who have obtained a registered conveyance from the same vendors, took with notice of the defendants' previous purchase and possession. Section 54 says this: "Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property." I do not think it is necessary that there should be any formal making over of possession. It can scarcely be supposed that the Legislature, while making provision for transactions which would mostly be between poor people, would insist upon very strict formalities. Where the vendee obtains possession on the date of the sale and remains in possession thereafter, I think it is reasonable to presume that the possession so obtained was a lawful one, and had been given by, or with the assent, express or implied, of the person previously in possession, namely, the vendor. As was pointed out in the argument, it is not easy to see what formality of delivery would be required in the case of an undivided share of a tank. I think it follows from the facts of this case that the buyer was placed in possession by the seller, and, if so, the law has been complied with. The difficulties in this case arise from the existence of the unregistered deed of sale. If there were no deed of sale, the case would be a clear one. As the law stands, the deed of sale has no operation to transfer the property, though it may show the payment or promise of a price, which, *plus* the transfer of ownership, constitutes a sale.

I am not prepared to say that Mr. Justice Beverley's decision is wrong. I would therefore dismiss this appeal with costs.

HILL, J.—I have given the question argued before us in this appeal a good deal of consideration, and I have also had the opportunity of considering the judgment which has just been

delivered by Mr. Justice Trevelyan. It is with regret that I find myself unable to agree in the view which he takes of the construction to be placed on section 54 of the Transfer of Property Act, and I regret this the more since his opinion is in accord with that of the learned Judge from whose decree this appeal has been preferred. But it seems to me that when the owner of immovable property of a value less than one hundred rupees has executed to the intending buyer an instrument purporting to transfer the ownership of the property, and the instrument has not been registered, but the intending buyer has been placed in possession, the effect to be attributed to the delivery of possession depends on the intention of the parties, which is a question of fact that cannot be determined in second appeal. For reasons, however, into which I do not now propose to enter, I agree that this appeal ought to be dismissed with costs.

J. V. W.

Appeal dismissed.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Norris and Mr. Justice O'Kineely.

R. JOSHUA AND OTHERS (DEFENDANTS) *v.* ALLIANCE BANK OF SIMLA
(PLAINTIFFS.)^a

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July 27.

Transfer of Property Act (IV of 1882), s. 53—Statutes 12 Eliz., c. 5 and 27 Eliz., c. 4—Voluntary transfers as against creditors or subsequent transferees for consideration—Notice—Registration—Duty of mortgagees in searching for prior incumbrances—Post-nuptial settlement with power of appointment to wife—Deed of appointment in favour of children—Secrecy as evidence of fraud—Subsequent mortgage by wife and trustee of settlement without mention of deed of appointment.

In 1870 the defendant *J* and her husband executed a post-nuptial settlement, by which they assigned certain Municipal debentures to the defendant *E* (the brother of *J*) and one *G* "upon trust for *J* during her life and after her death as she should by deed or will appoint," and subsequently the trustees, in pursuance of a power given them by the settlement, sold the debentures and invested the proceeds in house property in Calcutta, such house and premises thereafter representing the trust property, and being held by the trustees on the trusts of the settlement. On 17th December 1878, *E* retired from the trust and made over his interest to the remaining

^a Original Civil Appeal No. 9 of 1894 in suit No. 281 of 1892.