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June 22.

Special Appeal No. 456 of 1863.

HARNAMGI'R GURU' DHANPATGI'R.....*Appellant.*
WILLIAM SPIERS*Plaintiff and Respondent.*

Mortgage—Miráspatra—Registration—Redemption—Account.

Held that a registered miráspatra was entitled, under Act XIX. of 1843, to preference over an unregistered miráspatra of a prior date accompanied with possession.

THIS was a special appeal from the decision of the Puna District Court, in Appeal Suit No. 515 of 1862.

The following judgment was recorded by the Acting Judge, Baron A. J. De H. Larpent:—

“The particulars of this case are as follows:—The appellant, between the years 1837 and 1840, advanced certain sums of money, amounting to Rs. 420, on mortgage on certain land, to Shekh Háfizuddin and Shekh Ahmad. Appellant entered into possession; and the land so mortgaged is the land now in dispute.

“Both the mortgagors died; and in 1855, Shekh Sáduddin, a son of Shekh Háfizuddin, executed the deed No. 12 to the appellant. The deed No. 12 is a miráspatra; the land by it becomes the appellant's property, subject to the fulfilment on his part of certain conditions. On the 25th of June 1859, another miráspatra, No. 3, was executed between Shekh Sáduddin and his wife, Nurunnisá, a daughter of Shekh Ahmad, one of the original mortgagors, and Shekh Muhammad Latíf, a younger brother of Shekh Sáduddin on one side, and Mr. Spiers, the respondent, on the other.

“The respondent called upon the appellant to give up possession of the land, and tendered payment of the mortgage money advanced to Shekh Ahmad and Shekh Háfizuddin. The appellant refused to give up the land, and the respondent then commenced this action. * * *

“The questions which arise in the suit are:—(1) Whether the miráspatra, No. 12, upon which the appellant grounds his claim to the land, is a valid document, or not; and (2) if so, whether the miráspatra, No. 3, on which the respondent

grounds his title, should be allowed precedence over the deed No. 12, or not.

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“The respondent urges that the miráspatra No. 12 is not a valid document: (1) because it was executed by Shekh Sáduddin for himself and for his brother Shekh Muhammad, who is stated to have been a minor in the deed, whereas he was not a minor; and (2) because a division of the property having been made between Shekh Ahmad and Shekh Háfizuddin, Shekh Sáduddin could not legally dispose of Nurunnisá's share, inherited by her as heiress of her father, Shekh Ahmad.

“In regard to the first ground of objection to the validity of the deed No. 12, the question is, whether Shekh Sáduddin, being himself of age, and the natural guardian of his brother Shekh Muhammad Latíf, a minor, could legally dispose of his brother's interest in the land. The Moulví has declared that, by Muhammadan law, Shekh Sáduddin had no power to dispose of his brother's share during his minority. This being the law, the question as to whether Shekh Muhammad was a minor or of age does not bear on the case: for his consent is certainly not given to the deed; and he is no party to it. The Court finds that Shekh Sáduddin had no power to dispose of his brother Shekh Muhammad's interest in the land, he (Muhammad) being a minor; and that the disposal of Muhammad's interest to the appellant was not legal.

“In regard to the second ground of objection: Could Sáduddin dispose of Nurunnisá's share? The first point for decision on this question is, whether Nurunnisá had a separate share to dispose of. It is alleged that she had, on the ground that a division of the family property was made between Shekh Háfizuddin and Shekh Ahmad, her father. To prove this, a deed, No. 50, is produced. The date of this deed is 1828, or previous to the original mortgage bonds. The Court holds that it is in the highest degree improbable that the mortgage bonds should have been passed by the two brothers, Shekh Háfizuddin and Shekh Ahmad, jointly, if, at the time they were passed, the brothers

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had divided the property. * * * *

It appears that the deed, No. 50, was first produced in evidence in 1854, by Nurunnisá, in a suit brought by her, in the Agent's Court, against Dinkar Ganesh Ok, to remove an attachment made in satisfaction of a decree obtained against her husband, Shekh Sáduddin. The deed was not proved in that case. It also appears, from the deed itself, that, in accordance with the usual manner in which such deeds are drawn up, a counterpart was made and given to Shekh Háfizuddin; and this counterpart, therefore, should be in Shekh Sáduddin's custody; but its counterpart has never been produced, or accounted for. The Court considers the deed, No. 50, not proved; and that there is strong reason to suspect it to have been drawn up by Nurunnisá, in collusion with her husband, Shekh Sáduddin, in order to obtain a release of his wife's interest in the property.

“Putting this deed aside, the Court next considers what Nurunnisá's interest is; and whether her husband, Shekh Sáduddin, had a right to dispose of it, or not. The Moulyí (exhibit No. 64) has declared that Nurunnisá has a right to her father's interest in the property, and that this amounts to one-half of the whole. The Moulyí has also stated that Shekh Sáduddin might dispose of his wife's share, with her consent, and that this consent need only be a verbal consent on her part. The Court considers that this consent must be presumed from the fact of the sale; and that any objection should have been made at that time. Exhibit No. 50 shows that Nurunnisá, in 1855, sued her husband, his brother, and a third party, to recover a share in the inám; and that her claim was thrown out. It may be said that Nurunnisá by this action did *bonâ fide* object to the sale; but the Court considers that that presumption does not follow from the fact, because the whole of this case discloses *mala fides* on the part of Sáduddin and his wife. The Court finds that the sale by Shekh Sáduddin of the interest of his wife in the property to the appellant was a legal sale.

“The respondent has urged that, even if it be held that the sale to the appellant be a legal sale, the deed No. 3 has a

precedence over the deed No. 12, on the ground that the deed No. 3 is registered. * * * *

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In the present action every requisite to render the sale complete was performed: the deed was executed; the purchase-money paid; and the land transferred. The deed in this case had performed every purpose for which it was executed: and the law does not say that registration is necessary for the validity of a deed.

“The respondent admits that, when he executed the deed No. 3, he knew that the deed No. 12 existed, and that the appellant stood in the position of the purchaser of the land; but, notwithstanding this foreknowledge, the respondent executed the deed, and took it to the Registry Office; and relies now on that act to deprive the appellant of the property. The Court cannot admit the precedence of the deed No. 3 over the deed No. 12; and finds that the deed No. 12, so far as the sale of Shekh Sáduddin and his wife’s interest in the property is concerned, has precedence over the deed No. 3. Moreover, the Court considers the sale of this property to the respondent is an attempt on the part of Shekh Sáduddin to dispose of the property twice over.

“To resume, the Court has found the disposal of the interest of Shekh Muhammad, the minor, by his brother, Shekh Sáduddin, to be contrary to the Muhammadan law. The question, therefore, arises, what is Shekh Muhammad’s interest? The Moulví (in exhibit No. 64) has stated Shekh Muhammad’s interest, as inherited from his father, Shekh Háfizuddin, to be one-fourth. By the deed, No. 3, passed to the respondent, Shekh Sáduddin, his wife, and his brother, Shekh Muhammad, each make over their interest in the land to the respondent.

“The Court finds that the sale of the interest in the land, viz., the one-fourth belonging to Shekh Muhammad, to the appellant, has been illegal, and is, therefore, null; and the Court finds the sale by Shekh Muhammad of his interest as above, viz., one-fourth in the land, to the respondent, to be a valid sale.

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“ The Court finds that the sale of the interest in the land possessed by Shekh Sáduddin and his wife, Nurunnisá, by the deed No. 12, to the appellant, was a legal sale ; and that the deed, No. 12, conveying this land to the appellant, has precedence over the deed conveying the same property to the respondent : [and directs] one-fourth of the land to be given over to the respondent, on payment of the sum of Rs. 105 ; being a part of the mortgage-money proportionate to the interest in the property purchased by the respondent ; the respondent to pay all costs of the original suit and in appeal.”

The case was heard before NEWTON and WESTROPP, JJ.

White (with him *Dhiraajál Mathurádas*), for the appellant :—Muhammad, one of the parties to the miráspatra, exhibit No. 12, was a minor. The Munsif found him so ; and the Judge has erred in leaving this question in doubt. There has been a miscarriage on the points raised. They ought to have been : whether Muhammad was a minor, when exhibit No. 12 was executed ; whether the arrangement come to was for his benefit, or not ; and, if he was of age, whether he expressly or impliedly consented to the document made by his brother. These are important questions, when viewed in connection with the remark of the Judge that the whole of the case discloses *mala fides* on the part of Sáduddin and his wife. The Judge has erred, under this opinion of his, in finding the conveyance No. 3 good.

V. N. Mandlik (with him *Shántárám Náráyan*), for the respondent :—There is no mention of Nurunnisá, or her share, in miráspatra No. 12. The Munsif's finding, that Muhammad was of age, has not been disturbed by the Judge. Moreover, the respondent's miráspatra, No. 3, was registered ; and was, therefore, entitled to priority over No. 12 : Act XIX. of 1843.

White, in reply :—If the Court gave priority to exhibit No. 3, it would be sanctioning a fraud. A person ten or twelve years in possession of property, under a *boná fide* mortgage, might be at any time ejected from that property, by a subsequent fraudulent mortgagee having his deed registered.

PER CURIAM:—The Court is of opinion that the exhibit No. 3, bearing date the 25th of June 1859, having been duly registered, is, under the registration laws, entitled to preference over the exhibit No. 12, dated the 4th of July 1855, which is unregistered.

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The Court, therefore, reverses the decrees of both the courts below: and declares that the plaintiff, William Spiers, is entitled to redeem the lands which are the subject of the suit, on payment of the sums, if any, still remaining due to the defendant, as principal and interest, on mortgages Nos. 8, 9, 10, and 11 in this suit; and directs the court of first instance to proceed to take an account of what is still so due to the defendant, with respect to the said mortgages, having regard to the terms thereof; and, if the said sum, so found due, be not paid by the plaintiff to the defendant, within six calendar months after the said sum be so ascertained and duly notified to him, it is ordered that the plaintiff be foreclosed from any right of redemption of the said mortgages.

The Court orders the defendant to pay to the plaintiff the costs in both appellate courts; and each party to bear his own costs in the court of first instance.

Suit remanded.

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Special Appeal No. 550 of 1863.

July 4.

BHIKA'JI *et al.*, sons of R. G. Ok *Appellants.*
VALLABHDA'S *et al.*, sons of Krishṇa Keval *Respondents.*

Mortgage—Registration—Possession—Act VIII. of 1859, Sec. 230.

Held that a mortgagee whose bond was registered was entitled, under Sec. 230 of Act VIII. of 1859, to recover possession of the mortgaged land, of which he had been dispossessed, under a decree obtained against his mortgagor, by another mortgagee, whose mortgage bond had been subsequently registered, on condition that he satisfied the claim of the decree-holder: otherwise the defendant to be entitled to possession on his satisfying the plaintiff's mortgage claim.

THIS was a special appeal from the decision of C. Gonne, Joint Judge of the Konkan District, in Appeal Suit No. 126 of 1861, confirming the decree of the Munsif of Mahád, in Original Suit No. 971 of 1860.