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GANPAT BAJA'SHET v. KHANDU CHA'UGSHET et al.

On appeal, the Acting Assistant Judge reversed the Munsif's decree, on the ground that a mortgage without possession was invalid against a purchaser with possession: S. A. Nos. 23 and 75 of 1861. (a)

Dhirajlál Mathurádás, for the appellant, contended that the old Registration Law simply gave priority to registered documents; but left it entirely to the option of the parties to register their documents. The plaintiff, in consequence of his not having registered the mortgaged deed, could not be prevented from charging the property in question with his lien.

Bhairavanáth Mangesh, for the respondent, besides the cases referred to by the Assistant Judge, cited S. A. No. 970 of 1864, and S. A. No. 85 of 1865.

COUCH, C.J.:—The Acting Assistant Judge was right in holding that an unregistered mortgage without possession was not valid against a purchaser with possession.

We therefore affirm his decree with costs.

WARDEN, J., concurred.

April 10.

Special Appeal No. 528 *of* 1866.

SA'KALCHAND SAVA'ICHAND.....*Appellant.*

DAYA'BHA'I ICHHA'CHAND .....*Respondent.*

Gift of land—Permissive occupancy—Title.

A donee, under a deed of gift, brought a suit to recover a piece of land which, he alleged, his donors had given for a temporary purpose to the defendant in possession six years before; and the Munsif found that it was so, and allowed the claim. But the District Judge, in appeal, considering that the plaintiff had failed to prove his donors' title to the land, reversed the Munsif's decree.

Held that the Judge was in error in requiring the plaintiff to establish the title of the donors, without inquiring whether the defendant had obtained possession merely by their permission; and that the suit must be remanded for a finding by the District Judge on that point.

THIS was a Special Appeal from the decision of C. G. Kemball, Acting Judge of the Súrat District, in Appeal Suit No. 80 of 1866, reversing the decree of the Munsif of Súrat in Original Suit No. 1433 of 1865.

(a) 8 Bom. S. D. A. Dec., pp. 189 and 246.

The following judgment was recorded in the District Court :—

"This action was against the present appellant (Dáyábhái) and two brothers, Nemchand and Khemchand, to recover possession of a piece of land alleged to have been given by the two latter to the plaintiff; and plaintiff's case was that the land was originally bought by one Joti, the mother of the abovenamed brothers, in A. D. 1835, and that it was conveyed in gift to him by the latter in 1865. In proof of the purchase by Joti, a kabálá in the Persian character is produced in court, the seal on which is torn, but which, the Maúlavi, witness No. 31, says, may be the seal of a former Kázi, Hussan Alí.

"Defendant Dayábhái Ichháchand pleaded, and also subsequently maintained on solemn affirmation, that the land in question had been in his possession for the last twenty years, and was his property. I have read over the evidence, and must express my surprise at the conclusion arrived at by the Munsif.

"It is admitted that the defendant has been in undisturbed possession for the last six years; and therefore he is in law to be considered as the owner of the land, until the contrary be proved: but the Munsif appears to have lost sight of this fact, and the rule that necessarily follows therefrom, that the plaintiff must recover possession, if at all, by the strength of his own, and not by the weakness of the defendant's, title.

"Instead, however, of deciding on the merits of the case deducible from the evidence, the Munsif, apparently thinking it necessary to supply a deficiency observable in the plaintiff's case, issued a commission, with what legitimate object it is difficult to understand, for the dispute was not one in which personal inspection could possibly affect the question at issue. I think it unnecessary to consider here in detail the evidence offered by the plaintiff and that taken by the Commission. It is sufficient for me to remark that, as regards the kabálá, it is no proof at all of the title of the

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persons through whom the plaintiff claims, for, the land specified may be any land, as the document is not proved; and as regards the oral testimony, it is quite as strong in favour of the defendant as in that of the plaintiff. What object the plaintiff could have in joining the persons through whom he claims as defendants with the appellant, it is not easy to see, unless it was with a view to establish by a side-wind, *i. e.*, with their admission, that which otherwise he felt was hopeless. Khemchand's statement I look upon as most unsatisfactory.

"I consider that the Munsif, on improper and insufficient evidence, admitted the plaintiff's right to eject the defendant. The decree of the lower court is, therefore, reversed with costs on the respondent."

The case was heard before COUCH, C.J., NEWTON and WARDEN, JJ.

Pigot, Reid, and *Dhirajlál Mathurádás* for the appellant.

Nánábhái Haridás for the respondent.

COUCH, C.J. :—The case put forward by the plaintiff was, that the land in dispute belonged to Khémchand and Nemchand; that they, or one of them acting for both, had permitted the defendant to use it for a temporary purpose some six years ago; and that they subsequently made over the land to the plaintiff by a deed of gift. There appears to have been sufficient evidence in support of this case: and the Munsif appears to have been satisfied with the evidence as to the defendant's holding the land by permission of Khemchand; nor does the defendant seem to have denied that fact.

The District Judge, however, instead of raising and trying this, which was the real and most material issue between the parties, viz., the right by which the defendant held the land in dispute, considered that the plaintiff was bound to prove his donors' title, without regard to the circumstances under which the defendant had obtained possession, and whether it was adverse or not.

If, as was alleged by the plaintiff and found by the Munsif, the defendant took possession by the permission of Khem-

chand about six years ago, he was not at liberty to impeach the plaintiff's title, which was derived from Khemchand. As the District Judge in appeal has not inquired into the truth of this allegation, the case must be remanded for his finding upon it; and if he finds it in the affirmative, he should affirm the Munsif's decree.

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We order the costs to follow the final decision.

Decree reversed and suit remanded.

Special Appeal No. 61 *of* 1867.

March 12.

RA'MCHANDRA DI'KSHI'T.....*Appellant.*
SA'VITRIBA'I .....*Respondent.*

Hindú Widow—Maintenance—Contribution—Small Cause Court.

A Hindú widow, who had been supported by her father-in-law, after his death sued his eldest son for maintenance, and obtained a decree for Rs. 150, notwithstanding the defendant's objection that, being one of three brothers who inherited their father's estate, he was not solely liable for the maintenance claimed :—

Held that, as this was a Small Cause Court suit, an appeal did not lie.

The maintenance of a widow is, by Hindú law, a charge upon the whole estate, and, therefore, upon every part thereof.

The defendant might have the question raised by him decided, by suing his brothers for contribution.

THIS was a Special Appeal from the decision of F. Lloyd, Agent for Sardárs in the Dakhan, affirming, in appeal the decree of A. Daniel, Assistant Agent.

The original suit was brought by Sávitribái, the widow of Mahádev Díkshít, for arrears of maintenance for three years, from the 6th of December 1862 to the 6th of December 1865, at the rate of Rs. 100 a year: alleging that Moreshvar Díkshít, her husband's father, had supported her up to the date of his death, the 6th of December 1862; that the defendant, as eldest son, inherited Moreshvar's estate; and that she had no means of subsistence.

The defendant (amongst other things) contended that, as he was one of three brothers, the suit did not lie against him alone.