

*Regular Appeal No. 10 of 1868.*Bhandu valad Rajaram *Appellant.*Damaji valad Jivaji... .. *Respondent.**Registration—Priority—Verbal sale with possession—Registered deed—Act XX. of 1866, sec. 48.*

Held, that a deed of sale of immoveable property, duly registered under Act XX. of 1866, was to be preferred to a prior verbal sale of the same property accompanied by possession, where it appeared that it was the intention of the parties to the verbal sale to complete the transaction by a deed.

Semhle, that the effect would have been the same if there had been no such intention.

This was an Appeal from the decision of the Hon'ble G. A. Hobart, Judge of the District of Khandesh, in Original Suit No. 5 of 1867.

The plaintiff, Bhandu valad Rajaram, sued the defendant Damaji valad Jivaji, to recover possession of a house sold to the plaintiff by Bhau valad Naroba, under a deed of sale dated 9th of January 1867, which was duly registered under Act XX. of 1866.

The defence of Damaji was that Bhau valad Naroba had, on the 3rd of January 1867, sold the house to him; that he paid the purchase money and got possession of the house, and that a formal deed of sale was to be passed to him, and that, therefore, his oral transaction should prevail against the subsequent sale to the plaintiff of which he (Damaji) had no notice.

Narayan Malhar, a subordinate Magistrate, was made a defendant in the suit on the ground that a certain order issued by him in the matter of the possession of the house had caused damage to the plaintiff. The Judge, in consequence, himself tried the suit under Sec. 43 of Rs. II. of 1827, and on the 6th of February 1868, gave judgment for the defendant. The plaintiff then applied for a review of the judgment and, the application having been granted, the following judgment was given by the Judge under date the 2nd of July 1868;—

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"This suit being called on for hearing with a view to revision of judgment, the same having been ordered under date the 13th of April last, it is urged orally by the defendants that, the plaintiff never having had possession, sec. 48 of the Indian Registration Act (XX. of 1866) does not apply to the case.

"After full consideration of the Registration Act (XX. of 1866) under which Bhandu's deed of sale was registered, I am of opinion, following the precedent of the decision of the High Court of Judicature at Calcutta in S. A. No. 1338 of 1867, *Bheemul Mahatoon v. Mussamut Olimussa*, (a) that I was at liberty to receive evidence oral or of other sort to prove the sale to Damaji by Bhau Naroba of the property in dispute with the purpose of ascertaining whether, previous to Bhandu's registered deed of sale, Damaji and Bhau Naroba had not purchased and sold that property. It is ruled in the decision in Special Appeal above adverted to that, notwithstanding the subsequent sale to a third party and registration of such subsequent deed, there is nothing in the Registration Law (which governs this case) to prevent a person from enforcing his (previous) contract.

"The result of this revision is, therefore, to confirm the decree given in this case under date the 6th of February A.D. 1868. Costs of this revision on Bhandu."

The case was argued before COUCH, C.J., and GIBBS, J.

Vishvanath Narayan Mandlik, for the Appellant, cited *Ramkumar Mandal v. Brajahari Mridha* (b).

Govind Vithal Karkare and *Shantaram Narayan* for the Respondent:—Sec. 48 of the Registration Act (XX. of 1868) does not apply to this case, as the sale to the defendant was completed by possession, and, at the time of the second sale, Bhau had no interest in the house to convey. The defendant opposed the registration of Bhandu's deed, and he in this way had notice of the prior sale.

(a) 8 Calc. W. Rep. Civ. R. 423.

(b) 2 Bengal Law. Rep. App. J. Civ. 75.

Sec. 48 of the Registration Act ought to be construed in the same spirit as analogous words in the old law were construed; sec. 2 of Act XIX. of 1843 and sec. 6 of Reg. IX. of 1827 were construed in such a way as not to affect previous complete transactions: *Syud Furzund Ally v. Syud Abdool Kuhim* (c).

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Vishwanath in reply cited *Boikuntonath Sett v. Russick Loll* (d.)

COUCH, C.J.—Taking the evidence of the witness, No. 36, for the defendant Damaji to be entirely true, it shows that the sale to Damaji was intended to be by a deed of sale; since the witness says, “the Rs. 300 were then and there paid to Bhau Naroba, and Damaji told Bhau Naroba to speak to his (Damaji’s) Gumasta, who was a Bhalode, and he would put his (Damaji’s) lock on it (the house). Bhau had said he would take off his lock. Bhau said he would give a deed of sale on a stamp paper in a few days, on the 30th; and he got his Gumasta, Nathu, then to write a draft of a deed of sale, and he said he would next day go to Bhalod and have the house measured and then have a deed of sale made out. Nathu gave the draft to Bhau and Bhau gave it to Damaji.” To meet such a case we have a ruling of a full Bench of the High Court at Calcutta in the case of *Sheik Rahmatulla v. Sheik Sareutulla* (e) where Peacock, C. J. observed:—“Assuming, for the present purpose, that before the deed was executed there was a distinct verbal sale of the property, which between these parties, there being no Statute of Frauds, would have operated as a transfer of title if no deed had been executed, I am of opinion that when the transaction was completed by the execution of a deed, the parties must be considered to have intended that the verbal sale was not to be the operative one or the conclusion of the transaction between them” (p. 79); I entirely concur with the learned Chief Justice and though, in the present case, the deed was not executed, yet the transaction was to be concluded by a regular deed, and therefore I should come to the

(c) 4 Calc. W. Rep. Civ. R. 30.

(d) 10 Calc. W. Rep. Civ. R. 231.

(e) 1 Bengal Law Rep. Full B. R. 58.

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conclusion that the transaction could not be set up against a registered deed and that the Calcutta decision is equally applicable here. But we may decide this case upon a totally different ground ; viz upon the wording of sec. 48 of the Registration Act (XX. of 1866.) which runs thus :—" All instruments duly registered under this Act and relating to any moveable or immovable property shall take effect against *any* oral agreement or declaration relating to the same property," and here "any oral agreement" may mean an agreement made either previous or subsequent to the registered instrument. Now, there is in this case a registered instrument against which an oral agreement is set up. There is no possession under the registered instrument ; but the nature of the possession of the defendant Damaji cannot be shown without resorting to the oral agreement. Sec. 48 says that an oral agreement shall not prevail, and, if this were not so, the security intended to be afforded by the Registration Act would in most cases be lost. I am, therefore, very much inclined to hold that the oral agreement cannot be set up, and that the possession makes no difference.

GIBBS, J.--I fully concur.