

[APPELLATE CIVIL JURISDICTION.]

1872.
May 23.*Special Appeal No. 313 of 8169.*

BA'LA'RA'M NEMCHAND *Appellant.*
 APPA' valad DULU, HANMANTA' bin BA'PU,
 and MAHA'DU bin VITHU *Respondents.*

Registration—Reg. IX. of 1827, Sec. VI., Cl. I.—Prior unregistered sale with possession—Subsequent registered mortgage without possession—Acts XVI. of 1864, XX. of 1866, and VIII. of 1871.

On the 15th of December 1863, H. purchased from D. for valuable consideration two fields in the Sátára District (to which the provisions of Reg. IX. of 1827 and of Act XIX. of 1843, as to registration, were then applicable) and was duly put into possession of the fields. The deed of sale was not registered.

On the 14th of February 1864 D. mortgaged by a registered mortgage the same two fields to B. who then knew that H. was in possession of the fields as purchaser.

Held that, according to the true construction of Reg. IX. of 1827, Sec. VI., cl. I., the title of H. having been completed by possession, there was no property in the fields left in D. to mortgage to B., and that, therefore, H. (the purchaser) had a better title to the fields than B. the mortgagee.

Semble. The effect would have been the same under the provisions of Act XVI. of 1864 or of Act XX. of 1866.

History of Registration given, and the provisions of different enactments relating to registration compared and discussed.

THIS was a special appeal from the decision of A.C. Watt, Assistant Judge at Sátára, in appeal No. 351 of 1867, confirming the decree of Pándurang Parshráam, Munsif of Nateputay, in the district of Sátára.

The facts are set out fully in the judgment of the High Court.

The appeal was argued before WESTROPP, C.J., LLOYD and MELVILL, JJ., on the 8th June 1870, and again on the 11th January 1871.

Bhairavnáth Mangesh, for the appellant.

Pándurang Balibhadra for the respondent.

Civ. adv. vult.

WESTROPP C.J. :—We think that from the judgment of the Court below we may take the following facts as proved.

1872.
 BA'LÁRAM
 NEMCHAND
 v.
 APPA'
 valad
 DULU
 H. BA'PU,
 M. VITHU.

On the 15th December 1863, Dulu, the father of the first named defendant, Appá, sold to the second defendant, Hanmantá, for valuable consideration, two fields (Nos. 185 and 186) in the Collectorate of Sátára, and executed a deed (Exhibit No. 11) of that date, whereby he conveyed those fields to Hanmantá who was then duly put into possession of the same. That deed was unregistered.

On the 18th December 1863, Bálárám Nemchand, the present plaintiff, under a decree for money which he held against Dulu, caused four fields, including the two already mentioned, to be attached. Those two were then in the possession of Hanmantá.

In exhibit No. 35, which is the attaching Kárkun's memorandum of attachment, misdated 11th December 1863, and should have been dated 21st December 1863, that officer notes that he had attached four lots, viz., 185, 186, 187, and 188, and that "at the time of attaching the aforesaid lands Hanmantá bin Bápu stated that Nos. 185 and 186 had been sold to him and were in his possession, therefore, they are written as deducted" (or "excepted").

The attachment seems to have been withdrawn or abandoned by Bálárám Nemchand, and thereupon Dulu, in pursuance of an arrangement with him, executed to him a mortgage bond (Exhibit No. 3) dated 14th February 1864, for Rs. 300, whereby he purported to secure to Bálárám Nemchand Rs. 200, part of the amount, by a mortgage in possession of the four fields Nos. 185, 186, 187 and 188 for ten years, with a clause that if the Rs. 200 were not repaid within those ten years, the mortgage should be converted into a sale.

The present suit was brought by Bálárám against Appá, the son of Dulu who had died, and also against Hanmantá (in respect of Nos. 185 and 186) and against Mahádu (in respect of No. 187) to obtain possession of the fields 185, 186 and 187, the plaint stating that No. 188 had been given into possession of the plaintiff.

Hanmantá defended the suit by alleging his prior purchase, on the 15th December 1863, of the fields 185 and 186

under exhibit No. 11, and his uninterrupted possession; and alleged that the plaintiff's mortgage was obtained from Dulu by collusion.

Mahádu also defended the suit, so far as it affected No. 187.

The Munsif, although admitting that a registered deed is, under Act XIX. of 1843, entitled to priority over an unregistered deed, being of opinion that Dulu had, previously to the execution of the registered instrument (No. 3), not only by No. 11 but also by giving over possession of the fields 185 and 186 to Hanmantá, parted with the whole of his (Dulu's) interest in those fields, and, therefore, had nothing to convey, made a decree in favour of Hanmantá as to those numbers.

He decreed that the plaintiff should recover field No. 187 from Mahádu.

The plaintiff appealed against the decree so far as it related to fields Nos. 185 and 186, alleging (contrary to the fact) that those fields were in Dulu's possession at the date of the mortgage (No. 3) to the plaintiff, and relying on its registration. He also impeached Exhibit No. 11 as fraudulent and denied that Hanmantá ever had possession under it.

At first, the Assistant Judge, being under a mistake as to dates, held the sale to Hanmantá to be fraudulent; and, reversing the Munsif's decree as to him, decided in favour of the plaintiff, but afterwards, on review, restored the Munsif's decree. The Assistant Judge gave no opinion as to the effect of the registration of the mortgage (No. 3).

The plaintiff has specially appealed to this Court. A point, at first made by his pleader as to the review having been granted after the expiration of the 90 days allowed by law for the purpose, and without reasonable cause being shown for the delay, has been abandoned. As to the 5th point of appeal it must fail, as it is manifest that the Judge was not asked to raise the issues mentioned in it. He has, however, as we think, substantially found both of the facts mentioned in it in the affirmative. The only other point

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

argued before us was that the registration of the mortgage bond, Exhibit No. 3, dated 14th February 1864, gave it priority over the deed of sale (Exhibit No. 11) dated 15th December 1863, notwithstanding the possession under it, relied on by Hanmantá. It was contended for the plaintiff that this was so because Bombay Act III. of 1863 (which received the assent of the Governor-General in Council on the 15th April 1863, and purported to subject the Collectorate of Sátára, from the 1st January 1863, to the Regulations and Acts which are or shall at any time hereafter be in force within the territories subject to the Presidency of Bombay) had rendered (amongst others) Regulation IX. of 1827 and Act XIX. of 1843 applicable to that Collectorate, and, therefore, to the lands in question in this suit.

What occurred when the plaintiff caused the fields 185 and 186 to be attached, must have given him notice, that Hanmantá was then in possession of those fields, and alleged that they had been sold to him. The mortgage to the plaintiff was not executed until more than two months after the attachment. The question is whether the notice which the plaintiff thus had of Hanmantá's possession and the sale to him, in evidence of which Hunmuntá produces his unregistered deed of purchase (No. 11) of the 15th December 1863, prevents the plaintiff's registered mortgage of the 14th February 1864 from taking precedence of Hanmantá's unregistered deed of purchase.

We shall advert, as briefly as may be, to the history of the law of Registration in this Presidency.

Bombay Regulation III. of 1793, Sec. 14, relating to the Court for Salsette, &c., and Bombay Regulation I. of 1800 relating to the Court at Súrat, respectively required the registration of mortgage bonds at the time of passing the same.

Those Regulations were repealed by Reg. I. of 1827. Bombay Regulation IV. of 1802 (for establishing a Registry for Wills and Deeds for the transfer or mortgage of real property as regarded *Súrat and its dependencies*) is, except

in some trivial points, identical with Bengal Regulation XXXVI. of 1793 and Madras Regulation XVII. of 1802. The following sections were common to all three Regulations.

“ III. *First.* The Register is authorized and required to register memorials of the following deeds.

“ *Second.* Deeds of sale or gift of lands, houses, and other real property.

“ *Third.* Deeds of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances.

“ *Fourth.* Leases and limited assignments of land, houses, and other real property, including generally all conveyances used for the temporary transfer of real property.

“ *Fifth.* Wusscatnamahs or wills.

“ *Sixth.* Written authorities from husbands to their wives to adopt sons after their (the husbands’) demise.

“ IV. It shall be left to the option of all persons to register or not, as they may think proper, any of the descriptions of deeds specified in the preceding section (mortgage bonds excepted) that have been executed, or which may be executed, prior to” (in Bombay the 1st September 1802, in Bengal the 1st January 1796, and in Madras the 1st January 1805). “The not registering such deeds shall in no wise operate to the prejudice of the rights of the parties thereto, which shall remain the same as if this Regulation had never been enacted.

“ V. It shall also be left to the option of all persons to register or not, as they may think proper, the several descriptions of deeds specified in clauses 4th, 5th and 6th of Section III. whether executed previous or subsequent to the” (dates given for the respective Presidencies in Sec. IV). “The not registering of the deeds specified in those three clauses shall in no wise operate to the prejudice of the rights of the parties thereto, which shall remain the same as if this Regulation had never been enacted.” (That must mean as between those parties themselves, for clauses 1 and 2 of Sec. VI. seriously affect their rights as regarding third persons.)

1872

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

1872.

BA'LA'RĀ'M
NEMCHAND
v.
APPA
valad
DULU
H. BA'PU,
M. VITHU.

“VI. *First.* Every deed of sale or gift, of the description specified in Clause 2nd, Section III., that may be executed on or after the” (dates given in Section IV. for the respective Presidencies) “and a memorial of which shall be duly registered according to this Regulation, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property, executed subsequent to the said date, which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed.

“*Second.* Every deed of mortgage, of the description specified in Clause 3rd Section III., that shall have been or shall be registered in pursuance of the requisition in Section XIV. (Bombay) Regulation I. 1800” (in Bengal according to Bengal Regulation XXXVI. of 1793, Section III. and executed on or after the 1st January 1796; in Madras after the 1st January 1805), “and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property, executed subsequent to the said date, which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage.

“*Third.* It being the object, however, of the rules in the two preceding clauses, to prevent persons from being defrauded by purchasing or receiving in gift, or taking in mortgage, real property which may have been before sold, given, or mortgaged; and as persons can never suffer such imposition, when they are apprised of the previous transfer or mortgage of the property, it is to be understood that if any person shall purchase, receive in gift, or take in mortgage, any real property, knowing such property to have been previously sold, given, or mortgaged to any other person, and that the deed of sale, gift, or mortgage, has not been registered, and shall register his own deed, in such case the deed of sale, gift, or mortgage of such subsequent purchaser, donee, or mortgagee, which may have been

registered, shall not, from the registry of it, invalidate, or be discharged in preference to the unregistered deed of sale, gift, or mortgage, first executed, provided the authenticity of the latter be established to the satisfaction of the Court."

So far as these provisions affected Bengal and Madras, they continued unaltered until 1843.

It will be observed that the rivalry for priority, created by them, is between one deed of sale or gift and another such deed, and between one mortgage and another mortgage, and not as between a deed of sale or gift on the one hand, and a mortgage on the other. (See Section VI., Clause 1 and Clause 2). The cases decided upon Act XIX. of 1843, which, in this respect, was framed upon the same principle, illustrate and establish this view. See *Moharajah Moheshur v Bhikha Chowdry (a)* and the cases there cited by Peacock, C.J. (p. 62), and approved of by him and a majority of the judges, and *Golla Chinna v Kali Appiah (b)*.

The whole of the Bombay Regulation IV. of 1802 (containing these provisions) was repealed by Bombay Regulation I. of 1827. Bombay Regulation IX. of 1827 (applying to all of the Regulation Provinces of this Presidency at that time) was substituted for it. The preamble of Regulation IX. of 1827 recited thus: "Whereas it would be conducive to the security of titles to immoveable property, and greatly facilitate the transfer of such property by sale, gift, mortgage, or otherwise, that a register of title deeds should be established in each zilla, and that deeds entered therein should be allowed such a preference as to give the holder an obvious interest in presenting them for registration: And whereas by establishing also a general register in each zilla for all other deeds, obligations, and writings, of whatever nature, effectual means would be provided for the preservation of copies of writings, and great facility afforded in proving their contents, in the event of the originals being lost or destroyed; the following rules are, therefore, enacted, to take effect from such date as shall be prescribed in a Regulation

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

(a) 5 Calc. W. Rep. Civ. R. 61. (b) 4 Mad. H. C. Rep. 434, 441.

1872.
 BA'LA'RA'M
 NEMCHAND
 v.
 APPA'
 valad
 DULU
 H. BA'PU,
 M. VITHU.

to be hereafter passed for that purpose." In reading that preamble we must recollect that by the law of Hindus, who constitute the great majority of the population and landholders of this country, a deed or writing is not necessary to effect the transfer of land. That transfer may be fully effected by verbal contract or gift, if accompanied by possession (c). With that rule of Hindu law neither the previously mentioned Regulations, nor this Regulation (IX. of 1827) purported to interfere; and had they so interfered, the result would probably have been frequent injustice to honest vendees and transferees of immoveable property. No doubt it is far more usual that there should be a writing when a sale or transfer takes place than that there should not, but the instances to the contrary were sufficiently numerous to prevent the Legislature from desiring to meddle with the rule of Hindu law that a writing is not indispensable. Reverting to Regulation IX. of 1827, we find that Section III., Clause 1, is as follows: "The register of title deeds shall be appropriated to the registry of sunnuds, deeds of sale, gift, *devise*, or mortgage of lands, houses, offices, or other immoveable property, situated within the Zilla; of awards of arbitrators determining the right to such property so situated, and of deeds of release or discharge of mortgages, or other incumbrances affecting the same, and generally of all documents relating to the right and title to immoveable property within the Zilla." Most probably the word "devise," which occurs in that clause, is a misprint for "demise," the word "devise" being wholly inapplicable to a deed, and applicable only to testamentary writings (wills or codicils). The argument, in favour of the supposition that this is a misprint, seems to be rendered conclusive by the fact that the registration of wills (a term sufficiently large to include codicils) is expressly provided for by Section IV. and directed to be made in "the general register," as distinguished from "the register of title deeds," (d) to which alone Section

(c) 6 Moo. Ind. App. 267; 1 Mad. H. C. Rep. 100; 2 *Ibid.* 37 39;
 1 Stra. H. L., 277.

(d) See Section I, Clause 1, and Section IX, Cl. 1.

III. clause 1 has reference. And if the word printed as "devise" in Section III., clause 1, were not intended to have been "demise," the important case of leases, which we might expect to find specially provided for, (as distinguished from deeds of gift, sale, or mortgage which are specified,) would have been left to fall within the concluding general words "all documents relating to the right and title to immoveable property," whereas leases were *eo nomine* provided for in the previous Regulation IV. of 1802, Section III. clause 4. Section VI., clause 1, is: "Every deed or other writing transferring or mortgaging immoveable property situated within the Zilla, if registered in the register of title deeds, shall, without regard to the date of execution, if proved to be valid, be preferred to and satisfied before any deed of the nature of those specified in Section III., clause 1, either subsequently registered or not registered at all; but this preference shall extend only to the immoveable property thereby transferred or mortgaged; provided, however, that if any person shall purchase, receive in gift, or take in mortgage immoveable property, knowing such property to have been previously sold, given, or mortgaged, to any other person, and that the deed of sale, gift, or mortgage, has not been registered, and shall register his own deed, in such case the registered deed shall not, from the registry of it, be entitled to preference over the unregistered deed, if proved to be authentic.

"Second.—Deeds, or other writings, transferring or mortgaging immoveable property, if not registered in the register of title deeds, shall not on that account be invalidated or null; but shall stand in regard to each other unaffected by the rules relating to registration."

That Section (VI.) did not limit the competition for priority to documents *ejusdem generis* only, but, as we think, most reasonably rendered it general amongst all deeds, mortgages, or other documents (except, as already suggested, testamentary documents) relating to the right and title to immoveable property.

1872.

BA'LA'BA'M
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

1872.
 BA'LA'RA'M
 NEMCHAND
 v.
 APPA'
 valad
 DULU
 H. BA PU,
 M. VITHU.

The concluding proviso in Section VI., clause I., of that Regulation (IX. of 1827) as to the effect of knowledge or notice of unregistered documents, as well as the similar provisions contained in Bengal Regulation XXXVI. of 1793, Section VI., cl. 3, and Madras Regulation XVII. of 1802, Section VI., clause 3, were repealed by Act I. of 1843, the preamble of which is "Whereas the Registry Laws now in force in the respective Mofussils of Bengal, Madras and Bombay, provide that registered conveyances and other instruments affecting titles to land and other interests therein shall not take precedence of unregistered conveyances and instruments in cases where the party registering shall have known of the existence of such unregistered conveyances or other instruments; and whereas a complicated system of law has arisen out of the construction which is to be given to the provisions regarding the knowledge of parties, or notice had by them in such cases; and whereas much perjury has been committed in investigations touching the fact of such notice or knowledge, and much of the time of the Courts has been occupied with such investigations; and whereas in consequence of forgeries, perjuries, fraudulent concealments, and other practices, no person purchasing or advancing money on the security of land can safely rely on the conveyances or other instruments affecting the title to such land or other interest therein affording, by means of their being registered, a security against conveyances or instruments being set up, as of previous date, by unregistered claimants."

The first remark which that preamble suggests is that the notice or knowledge spoken of there is notice or knowledge of unregistered conveyances, and the same remark may substantially be made of the concluding proviso in cl. 1 of Section VI. of Regulation IX. of 1827, for the words there, "knowing such property to have been previously sold, given, or mortgaged, to any other person," are immediately connected with "and that the deed of sale gift, or mortgage, has not been registered." Neither the preamble to Act I. of 1843, nor the concluding proviso in clause 1. of Section VI., Regulation IX. of 1827, which latter, together with the pro-

visions as to notice in the Bengal and Madras Regulations, that Act's preamble proposes for repeal, had any reference to notice or knowledge of *verbal contracts* as to immoveable estate, or notice, or knowledge of *possession* under any contract either in writing or oral.

The enacting part of Act I. of 1843 is as follows : " It is hereby enacted that all provisions contained in any Regulation or Regulations of the Bengal, Madras or Bombay Codes, touching such knowledge or notice as aforesaid of previous unregistered conveyances or instruments affecting titles to land or other interests therein, shall be repealed from the first day of May next ; and every conveyance or other instrument affecting title to land, or any interest in the same, authorized by those Codes respectively to be registered, shall, so far as regards any lands to which the same relate, be void as against any person claiming under any subsequent conveyance or other instrument duly registered, unless the prior conveyance or instrument shall have been duly registered before the registration of the subsequent conveyance or instrument ; any alleged notice or knowledge of such prior conveyance or instrument notwithstanding : Provided always that this Act shall not be construed to extend to any conveyance or other instrument made before the first day of May next."

That Act, except so far as it repealed the provisions in previous Acts as to notice or knowledge of unregistered documents, was itself repealed by Act XIX. of 1843, Section I. The 2nd section of the last-named Act enacted that " from the 1st day of May last past, every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed ; and that from the said day every deed of mortgage on land, houses and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has

1872.

BA'LA'RA'M
NEMCHAND

v.

APPA'
valad

DULU

H. BA'PU,
M. VITHU.

1872.
 BA'LA'RAM
 NEMCHAND
 v.
 APPA
 valad
 DULU
 H. BA'PU,
 M. VITHU.

been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge, or notice, of any such unregistered deed or certificate alleged to be had by any party, to such registered deed or certificate notwithstanding: Provided always that nothing in this section contained shall be construed to extend to any deed or certificate made before the said 1st day of May last past."

"Section 3. And it is hereby declared and enacted that no conveyance or other instrument affecting title to land, or any interest in the same, whether made before or after the said 1st day of May last past, other than such deeds or certificates as aforesaid, are or shall be in any respect void for want of registration, any act, regulation or law to the contrary notwithstanding."

The above quoted 2nd section of Act XIX. of 1843 is drawn rather upon the model of Bengal Regulation XXXVI. of 1793 Section VI. clauses 1 and 2; Madras Regulation XVII. of 1802 Section VI. cl. 1 and 2; and the previously repealed Bombay Regulation IV. of 1802, Section VI. clauses 1 and 2, than of Bombay Regulation I. of 1827, Section VI. clause 1, which gave the preference to the prior registered instrument, whether it might be a mortgage, or a deed of sale, or gift, and did not limit the competition for priority to instruments *ejusdem generis* as did the Madras, Bengal and previous Bombay Regulations (*e*). It has, however, been held, in *Parshotum Ranchod v Jagjivan Mayaram* (*f*) that the first part of clause 1, Section VI. of Bombay Regulation IX. of 1827 was then (September 1863) in full force, (the latter part as to the effect of knowledge or notice having been expressly

(*e*) See per Peacock, C.J., in 5 Calc. W. Rep. Civ. R. 61, 62, and in 1 Beng. L. R. 200, and see the cases referred to by him in both of these places.

(*f*) 1 Bom. H. C. Rep. 60.

repealed by Act I. of 1843). The Court said: "Whatever may be the effect of Act XIX. of 1843, we think that it has not deprived the appellant of the right to rely on Regulation IX. of 1827, Section VI. The latter portion of the first clause of that section, relating to notice of unregistered documents, has been repealed by Act I. of 1843, but the first part of that section which, taken together with Section III. of the same Regulation, clearly provides that a deed of sale duly registered shall be preferred to and satisfied before a deed of mortgage unregistered, or registered at a subsequent date, has not been repealed by Act I. of 1843, Act XIX. of 1843, or any other enactment of which we are aware." That decision has, upon that point namely that the first part of cl. 1, Sec. VI. of Regulation IX. of 1827 was not repealed by Act I. or Act XIX. of 1843, been frequently and uniformly, as we believe, followed here; *ex. gr. Ganpat v. Khandu (g)* where a purchaser with possession, whose deed was registered, was preferred to a previous mortgagee of 1863, unregistered and without possession. Since that decision in 1 Bom. H. C. Rep. 60 was made, Acts XVI. of 1864, XX. of 1866 and VIII. of 1871, relating to Registration, have been passed; the first of which repealed Regulation IX. of 1827 and Act XIX. of 1843, but *the law* applicable to the present case (introduced into Sâtára by Bombay Act III. of 1863 from the 1st January 1863), is the law as it stood in the Bombay Mofussil Regulation Provinces before Act XVI. of 1864.

1872.

BA'LA'RA'M
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

In a note to Section 2 of Act XIX. of 1843 in Volume I. of Mr. West's Acts p. 269, there is a reference to Special Appeal No. 711 of 1864, as showing that Act XIX. of 1843 "does not affect the validity of a mortgage as against a sale, or *vice versa*," but on examination of the record in that case and of my own note book, I find that Special Appeal No. 711 of 1864 was an action to recover damages for a libel, and that no question of registration arose in it. There must be an error in the reference.*

(g) 4 Bom. H. C. Rep. A. C. J. 69.

* It would appear that 711 in Mr. West's note is a misprint for 751 which is the real number of the Special Appeal referred to.—Ed.

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

It is evident that the mere circumstance, that the plaintiff had notice of Hanmantá's *unregistered deed* (No. 11), would not alone be sufficient to defeat the registered mortgage to the plaintiff. The repeal of the latter part of clause 1 Section VI. of Regulation IX. of 1827, and of the provisions as to notice of unregistered conveyances in the previous Bengal and Madras Regulations, settles that point. To hold otherwise would be to frustrate the intention of the Legislature: *Krishnasami v. Venkatáchella* (h).

But the plaintiff here had, before taking his mortgage, notice of what was far more important than the unregistered conveyance. He knew that Hanmantá was in possession of fields 185 and 186, and that he (the plaintiff) had been foiled in his attempt to obtain against them execution of his decree.

We are aware of the dictum of Sir B. Peacock, C.J., in *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi* (i) where he said: "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. I agree with the remark of the Division Bench in *Manmohini Dasi v. Bishenmayi* (j) where "a party comes into Court resting his claim on a written title *which the law requires to be registered*, he cannot, when he has failed to register, and is, in consequence, unable to use his title deed, turn round and say I can prove my title by secondary evidence." Sir B. Peacock's observations had reference to Act XX. of 1866, and those of the Division Court, which he quoted from 7 Calc. W. Rep. 112, referred to Act XVI. of 1864, both of which enactments are imperative as to the registration of

(h) 3 Mad. H. C. Rep. 89.

(i) 1 Beng. L. R. 58, 79, F. B. R.

(j) 7 Calc. W. Rep. 112.

documents transferring any estate, or interest, in immoveable property, exceeding Rs. 100 in value, and render such documents, if unregistered, inadmissible in evidence. But neither Regulation IX. of 1827, nor Act XIX. of 1843, rendered registration compulsory, nor unregistered documents inadmissible in evidence. Sir B. Peacock said nothing in that dictum as to what would, in his opinion, have been the effect of possession by the first vendee. In *Bhāndu Rājārām v. Dāmāji Jivāji* (k) Couch, C.J., and Gibbs, J., adopted and acted upon the same views as those enunciated *obiter* by Peacock, C.J., in *Sheikh Rahmatulla v. Sheikh Sarīntulla Kagchi*, and held that a deed of sale of immoveable property, registered under Act XX. 1866, was entitled to precedence over a previous 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, and further expressed their opinion that having regard to Sec. 48 of the Act, the rule would be the same even if the parties had no such intention. The authority of that case has been shaken by the decisions in which possession by the first purchaser has prevailed against registration by the second purchaser, to which we shall refer.

Kylash Chunder v. Gopal Chunder (l) was a case under Act XIX. of 1843, where the plaintiff sued for specific performance of a verbal contract of sale accompanied by part payment of the purchase money. Some of the defendants, relying on a subsequent deed of sale which was registered, resisted the suit. The report is meagre. It is, however, plain that the plaintiff, who claimed under an oral contract, was not in possession, and there is nothing to show that the defendants, who relied on the registered deed of sale, had any notice of the oral contract. If that be so, it was unnecessary for the Court to resort to the law of registration. They (Trevor and G. Campbell JJ.) said:—"It seems unnecessary to go into the question whether, according to the custom of this country, a verbal contract for the sale of land would be binding, for it seems quite clear to us that the case

1872.

BA'LA RA'M
NEMCHAND
v.
APPA
valad
DULU
H. BA'PU,
M. VITHU.

(k) 6 Bom. H. C. Rep. A.C.J. 59.

(l) 1 Calc. W. Rep. Civ. R. 78.

1872.
 BA'LA'RA'M
 NEMCHAND
 v.
 APPA'
 valad
 DULU
 H. BA'PU,
 M. VITHU.

is governed by Act XIX. of 1843, which gives to registered deeds of sale an absolute preference over all other deeds which have not been so registered. Even if there be question as to whether a verbal contract is a deed, we have no doubt that, on the principle of *a fortiori*, a verbal contract must also be invalidated. Since then the plaintiff has not obtained, prior to the registered sale, so complete a transfer in respect of possession and title as to render the subsequent deed altogether inoperative against him, he cannot claim under any unregistered prior contract to the detriment of a party holding *bond fide* under a subsequent registered deed. We, therefore, dismiss the appeal with costs." How a verbal contract could possibly be regarded as a deed, it is difficult to perceive; and the argument that, inasmuch as a registered deed must invalidate an unregistered deed, which is mentioned in the Act, a registered deed must also invalidate a verbal contract (which is not referred to either directly or by way of implication in the Act), is to our minds a clear *non sequitur*. The Act is conversant of conveyances only, and it would be a strong measure, and contrary to the ordinary canons of interpretation, to hold that the legislature intended to infringe upon the common law of Hindus or others further than it has distinctly signified. That common law did not require registration of documents relating to immoveable property, the legislature has required it; but it has not, in the Regulations or in Act XIX. of 1843, given utterance to any intention whatever to diminish the effect of a verbal contract accompanied with possession.

Gooroo Dass Dan v. Kooshoom Koomaree Dossee (m) arose under Act XVI. of 1864, and the property being less than Rs. 100 in value, the registration of a conveyance relating to it was optional (*n*). The defendant's deed of sale was registered, the plaintiff's, which was of earlier date, was unregistered. The Lower Appellate Court did not find that the plaintiff ever had possession under his deed, and his possession was not an admitted fact. Kemp J., after referring to those

(*m*) 9 Calc. W. Rep. Civ. R. 547.

(*n*) See 9 Calc. W. Rep. Civ. R. 282, as to optional registration.

circumstances, said: "But be that as it may, the deed of the special respondent (defendant) being registered and that of the special appellant (plaintiff) not being so, the former must prevail." The fact of possession by the plaintiff not having been either found or admitted, the remark as to the possible effect of possession was extra-judicial. E. Jackson, J., said that no fraud had been found against the respondent, and it could hardly be said that any had been alleged; and he admitted that the defendant's deed, though registered, ought not to be enforced, if the defendant had been a party to the fraud of the vendor. He said "A long undisturbed possession by the appellant (plaintiff) and knowledge of that fact by the subsequent purchaser would be proof of his having acted fraudulently. But the possession in this case was, as stated by the plaintiff, only recent; and there is no attempt at proof that the defendant was aware of that possession." The length of the possession, if the possession were *bonâ fide* that of a purchaser for valuable consideration, does not seem material, except in so far as it increases the probability of its being known to the second purchaser. Where, as here, it certainly was known to the subsequent claimant (the mortgagee), the length of possession by the first purchaser (being *bonâ fide* and for valuable consideration) is immaterial. As an illustration, however, of the possible injustice of holding that Regulation IX. of 1827, or Act XIX. of 1843, or, indeed, Acts XVI. of 1864 and XX. of 1866, invalidate a fair verbal contract accompanied by possession in favour of a subsequent registered deed, we may take the case of a man who has held land in his possession for 11 years and 11 months under a verbal contract of sale for valuable consideration before the execution by his vendor of a registered conveyance by way of sale, also for valuable consideration, to another person, who never inquires as to the possession before he purchases. He would not be guilty of fraud, but would of negligence, yet if the Regulation and Acts in question affect verbal contracts accompanied by possession, the first purchaser would be liable to be turned out of possession in a suit brought by the second purchaser before the 12th month of the 12th year had expired. Before determining that such was the

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

effect of those enactments, we should make certain that the Legislature, by expression or unmistakeable implication, laid down such a rule, but, in fact, we wholly fail to find it either in Regulation IX. of 1827 (the enactment applicable to this case) or Act XIX. of 1843 (which is not applicable, the competing parties here being a vendee with possession whose deed is unregistered, and a subsequent mortgagee with notice, and without possession, but whose mortgage is registered). It has been held in Calcutta by two able judges that even Act XX. of 1866, which presented much greater difficulty than Regulation IX. of 1827, has not affected contracts completed by possession. However, before referring more fully to their decisions, I shall mention some others of a different tendency. The authorities as to the effect of possession are conflicting. Under such circumstances we think that we are at liberty, on a reconsideration of the enactments themselves, to give to them the construction which seems to be most reasonable and most consistent with the intention of the Legislature, and to depart no further than is necessary from the usage of the country.

The importance of possession is shown in a case in *Bellasis Rep. p. 5* (in which no question as to registration arose). There a mortgagee puisne in point of time, but with possession, was preferred to a mortgagee prior in time, but without possession.

In *Bellasis, p. 9*, a registered mortgage without possession was preferred to an unregistered mortgage of later date with possession. In such a case the first mortgage being registered, the puisne mortgagee, if he had taken the precaution of searching the registry, would have discovered the existence of the first mortgage, which had the double advantage of registration and of priority of date. Such was also the case in *Sundar Jagjivan v. Gopál Eshvant (o)*. The mortgage was registered, and, though without possession, was preferred to a subsequent deed of sale with possession.

Harnamgir v. Spiers (p) was decided by Mr. Justice
(o) 4 Bom. H. C. Rep. A. C. J. 68. (p) 2 Bom. H. C. Rep. 204.

Newton and myself in 1864. The facts, so far as they are material on the present question, were that the defendant H. being a mortgagee in possession from 1840, the equity of redemption was conveyed to him by Saduddin, an heir of the mortgagor, by a Miráspatra, in 1855, which was not registered. The defendant continued in possession until 1859, when Saduddin and his wife and brother, who claimed to be co-heirs with Saduddin, conveyed the same lands to Spiers by another Miráspatra which was registered. Spiers brought a suit as owner of the equity of redemption against H. to redeem the mortgages. H. relied upon the unregistered Miráspatra of 1855 and his possession, but the Court held that, under Act XIX. of 1843, the registered Miráspatra of 1859 invalidated the unregistered Miráspatra of 1855. On the assumption that Saduddin had power to convey the lands, I doubt that we were right, inasmuch as the transaction of 1855 had been completed by possession, and Spiers, when taking the Miráspatra of 1859, was aware of the Miráspatra of 1855, and, although it is not so stated in the report of the case, or in the judgment of the Acting Judge, must, I think, have been at the same time aware also of the fact, that H. had been for some time and then was in possession of the land under the unregistered Miráspatra. I now think that, assuming Saduddin's powers to convey, we should have treated the Miráspatra of 1859 as having been taken by Spiers in fraud of H. the defendant, and further that the sale to H. having been completed by possession, ought to have been upheld. The effect of possession does not appear to have been discussed by the Court although touched upon by the defendant's counsel. There was considerable doubt as to Saduddin's title to convey alone, so that, even if the Court had been of opinion that the point on the registration law was not fatal to the defendant H's case, the decision might, on the other ground, have been adverse to him.

In *Parabhudás v Dhondru (g)* decided by Newton and Warden, JJ., the prior purchaser, claiming in virtue of an

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

1872.
 BA'LA'RAM
 NEMCHAND
 v.
 APPA'
 valad
 DULU
 H. BA'PU,
 M. VITHU.

unregistered deed, under which he had possession, was by the Court ousted in favour of a subsequent purchaser whose purchase deed was registered. It does not appear that the subsequent purchaser had any knowledge of the previous sale, but, as it had been perfected by possession, we doubt that the decision of the High Court can be sustained. We are disposed to think that the decision of the Assistant Judge (Mr. Izon) in favour of the first purchaser, on the ground of the completion of his purchase by possession, and that the vendor, therefore, had no title left in him to convey to the second purchaser, was right. The High Court relied upon a precedent (*Bhasker Aba v. Ragoo, Babajee and others*) quoted from 7 Harr. S. D. A. Rep. 357, where A, a mortgagee of lands in Angrias Kulába, had, in consideration of a balance due to him, purchased the lands from B. the mortgagor in 1854. The deed of sale was neither stamped nor registered, but the lands were transferred in the Collector's book to A's name, and A paid the Land Revenue to Government. A allowed B to occupy them as his tenant. B voluntarily paid rent to A for one year and was, by decree of the Revenue Court, compelled to pay it to him for the following year. B fraudulently sold the lands to Babaji Tannaji for valuable consideration. Babaji Tannaji had not apparently any notice of the deed executed in favour of A by B, or that A was in possession through B as his tenant paying rent. The conveyance by B to Babaji Tannaji (dated in May 1856) was stamped and registered. B, taking advantage of his position as tenant to A, made over possession of the lands to Babaji Tannaji. A, having in August 1856 caused his conveyance to be stamped, brought his suit to recover the lands from Babaji Tannaji. The plaint stated the mortgage to A (which was executed before Angrias Kulába had, by Act VIII. of 1853, been brought under the Regulations and Acts relating to the Regulation Provinces of the Presidency of Bombay and, therefore, required neither stamp nor registration), and the sale to him in 1854, and the conveyance then executed. The Şadr Adálat held that the conveyance, executed in 1856 to Babaji Tannaji, being registered, invalidated, under Act XIX. of 1843, the unregist-

ed conveyance to A in 1854, and that A, having mainly relied on it in his plaint, could not, in that suit, be permitted to fall back on his prior mortgage. We, for the same reason given by us as to the decision in *Parabhuddis v. Dhondu*, doubt that on the question of registration, that case was rightly decided, the sale to A having been perfected by possession. Babaji Tannaji, however, might have rested, so far as regarded the conveyance of 1854, on his being a purchaser in 1856 for valuable consideration without notice. But we think that A, having stated the mortgage to him in his plaint, ought, in order to avoid circuity of action, to have been allowed to fall back upon the mortgage in that suit, instead of being compelled to bring another suit afterwards in which he succeeded in establishing his mortgage (r) against the second purchaser, Babaji Tannaji.

In *Prahlad Misser v. Udit Narayan* (s) a mortgagee of a village, having sued on his mortgage (dated in 1863 and registered), obtained a decree in March 1864, under which the village was sold in April 1864 to the plaintiff. Another mortgagee (the defendant) of the same village, having sued on his mortgage (dated in 1859 but unregistered), obtained a decree in July 1864, under which the village was sold to himself in March 1865. Under Act XIX. of 1843, the plaintiff was declared entitled to priority, the mortgage upon which the decree, under which he purchased, was founded, having been registered. *It does not appear that either mortgagee had ever been in possession of the village*, nor was it alleged that the registered mortgagee had notice of the earlier mortgage. The case therefore was plain.

We now proceed to refer to the decisions in which possession by the first purchaser has prevailed against registration by the second purchaser.

In *Bhyrub Chunder Misser v. Ramchunder Bhattacharjee* (t) it was held that where an unregistered sale had been fully proved, as well as possession under it, and a subsequent registered deed of sale was set up, the mere fact of the

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'RU,
M. VITHU.

(r) 2 Bom. H. C. Rep. 198.

(s) 1 Beng. L. Rep. A.C. 197.

(t) 1 Hay 261.

1872. registration of the latter deed could not defeat the preceding sale completed by possession.

BA'LA'RA'M
NEMCHAND

v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

In *Syud Fursund Ally v. Syud Abdool Ruhim (u)*, a special appeal heard by Steer and Phear, JJ., in 1865, the facts were that A in 1862 executed, for valuable consideration, a deed purporting to be a conditional sale by way of mortgage of land to the defendant who was then put into possession. In 1863 A sold the same land to the plaintiff by a kabálá or deed of sale which was registered. The decree of the Lower Appellate Court for the defendant was questioned on two grounds: 1st.—That the Lower Appellate Court had assigned insufficient reasons for holding the mortgage to be genuine and valid—which objection was overruled, and 2nd.—That the mortgage being unregistered and the kabálá being registered, the latter was entitled to priority, but the Court said: “We are of opinion that Act XIX. of 1843 does not apply to a case where enjoyment has actually taken place under the first deed.”

Imrit Singh v Koylashoo Koer (v) heard by Kemp and Glover JJ., was a case in which the plaintiff, claiming under a registered deed of sale dated in 1867, sued to obtain possession of a mango garden, which had been purchased by the defendant in 1862, under a kabálá which was unregistered; the Court, relying on the last-mentioned case, sent the cause back for retrial with an expression of its opinion to the Judge that if, after weighing the evidence on both sides, he should find the defendant in possession from the time of his purchase, under a *bonâ fide* executed deed of sale, his judgment should be in the defendant's favour.

The most important case on this question is *Selam Sheikh v. Baidonath Ghatak (w)* decided by L. S. Jackson and Markby JJ., in which the legal value of possession is considered, and where it was held that if a verbal grant of land, alleged to have been made in 1867, were so made, and possession under it then delivered to the grantee, his title ought to prevail

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

(v) 11 Calc. W. Rep. Civ. R. 559 A. C. J.

(w) 3 Beng. L. R. 312 A. J.; S. C. 12 Calc. W. Rep. Civ. R. 217.

against a subsequent purchaser claiming under a registered deed of sale executed in 1868. The subsequent purchaser relied on Sec. 48 of Act XX. of 1866, which provided "that all instruments duly registered under this Act, and relating to any moveable or immoveable property, shall take effect against any oral agreement or declaration relating to the same property." Mr. Justice Markby, who delivered the judgment of the Court, said: "It would certainly appear, applying ordinary principles of construction to these words, that as against the holder under a registered title, the holder under a title derived from a parol agreement would be in all cases defenceless. If the case falls within Sections 17 and 48, the parol agreement cannot be given in evidence. If the case falls within Sections 18 and 48, the parol agreement is of no avail. And unless some distinction can be discovered, which is not at first sight apparent, the purchaser—no matter whether of an article of food at a shop over the counter, or of a piece of land worth Rs. 10,000—under a parol agreement, has, against a subsequent registered purchaser, a defective title. The consequences of such a construction need hardly be pointed out. Probably no one, who has purchased any of the ordinary articles of daily use or consumption since 1866, would be able to make out a safe title to them, nor would it be possible to acquire a safe title to the most trivial thing imaginable without the expensive and troublesome formality of a registered instrument. I think it quite impossible that the Legislature intended the Act to apply to such cases as these, and it is, therefore, necessary to search for some distinction which will enable us to escape from this conclusion. The choice seems to me to lie between these three courses; either (1st) to hold that when possession is delivered, the strict rules laid down in the Registration Act do not apply; or (2nd) to put some limit upon the words "declaration or agreement" in Section 48; or (3rd) to make some distinction between moveable and immoveable property." After showing that it is impossible to adopt the 2nd or 3rd course, he proceeds: "There yet remains the first of the three alternatives which I mentioned above, namely, to hold that the strict provisions as to registration do not apply where possession of the thing

1872.

BA'LA RA'M
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

1872.

BA'LA RA'M
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

to be transferred is given by the owner to the transferee. It is true that there is nothing in the words of the Act, which expressly authorises such a distinction; but, on the whole, I cannot help thinking that it must have been intended. It would be very strange, if just when the Law Commissioners were reporting that the provisions of the English Statute of Frauds, which require contracts to be in writing, were 'not suited to the habits and present condition of the people in India,' the Legislature here should pass a Registration Act, which makes not only a writing but a registered writing necessary for every transaction relating to an interest in land or goods of whatever value, which would be a Statute of Frauds for India going far beyond the Statute of Frauds in England in its requirements, and extending over all the ordinary transactions of daily life. I think the Legislature cannot have intended the provisions of Sections 17, 18, and 48, to apply to cases of transfer of an interest in moveable property, where the transfer is followed by putting the transferee in possession; and if they do not apply to this case, where the subject of transfer is moveable property, neither do they apply to a similar case where the subject of the transfer is immoveable." He then refers to a case in 10 Calc. W. Rep. 231, decided by Phear and Hobhouse, JJ., as inconsistent with the views expressed by Steer and Phear, JJ., in the case above cited from 4 Calc. W. Rep. 30, and gives the preference to that in 4 Calc. W. Rep. 30. After quoting the following passage from the Mitákshará Chap. III. Sec. 6 pl. 1, in Macnaghten*: "It has been shown that possession, when accompanied by a title, affords evidence of right; but lest it should be supposed that a title without possession affords equal proof, it is declared: 'Where there is not the least possession, there a title is not weighty.' Such is the intent. With whatsoever title there is not the least occupancy, in that title there is no sufficient weight," he referred to the cases above mentioned by us as those decided on Act XIX. of 1843, and in which possession of an unregistered grantee prevailed against registration by a subsequent grantee without possession.

In those views of Markby, J., concurred in, as they were, by L. S. Jackson, J., we agree. The last mentioned learned Judge and Mitter, J., acted upon them in 1870 in *Narsing Por-kaet v. Mussamat Bewah* (x) and held that where possession of immoveable property has been given under an unregistered lease, a subsequent grantee of a registered lease cannot maintain a suit to evict the lessee in possession on the ground of the priority of his deed under Section 48 of Act XX. of 1866.

Selam Sheikh v. Baidonath Ghatak is mentioned apparently with approbation by Glover and Mitter, JJ., in *Gouree Kant Roy v. Gridhur Roy* (y). It may be useful to mention here that the new Registration Bill, when introduced in 1870, contained the two following clauses:—

“48. All documents, not testamentary, duly registered under this Act, and relating to any immoveable property, shall take effect against any oral agreement or declaration relating to such property, whether possession thereof has or has not been delivered.

“49. All documents, not testamentary, duly registered under this Act, and relating to any moveable property, shall take effect against any oral agreement or declaration relating to such property, unless when the agreement or declaration has been accompanied or followed by delivery of possession.”

The judgment of Markby, J., above quoted, is referred to in the statement of objects and reasons, as the reason for the introduction of those two sections. The distinction made between moveable and immoveable property, as to the effect of delivery of possession, was abandoned in Committee, Mr. Cockerell, the mover of the bill, saying: “The bill as introduced, in modification of the present law, was framed so as to give effect to a registered instrument relating to immoveable property against any oral agreement regarding the same property, irrespective of any circumstances attending such agreement. Such a provision, it has been rightly contended, would amount practically to the enforcement of written contracts for the conveyance of immoveable property

1872.

BA'LA'RAM
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

(x) 5 Beng. L. R. Appx. 86.

(y) 12 Calc. W. Rep. Civ. R. 456.

1872.
 BA'LA RA'M
 NEMCHAND
 v.
 APPA'
 valad
 DULU
 H. BA'PU,
 M. VITHU.

or any interest therein, and would seriously disturb the law of property in force in this country. Some alteration of Act XX. of 1866 on this subject was clearly necessary to qualify the absolute superiority which the wording of Section 48 of that Act *apparently* gave to the registered instrument over the oral contract. Oral agreements, therefore, when accompanied or immediately followed by the delivery of possession of the property to which they relate, have been saved from the preferential rule in the Bill as now amended." Accordingly Section 48 of Act VIII. of 1871 is as follows :—

“48. All documents, not testamentary, duly registered under this Act, and relating to any property whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement has been accompanied or followed by delivery of possession.”

In our opinion, Hanmantá's deed of purchase (No. 11), though unregistered, yet being accompanied by possession, must be preferred to the plaintiff's subsequent mortgage though registered; this, we think, being in accordance with the true construction of Regulation IX. of 1827, Section VI., clause 1, which governs this case. The same ruling would, we think, be proper, if the case were governed by Act XVI. of 1864, or Act XX. of 1866. As to whether it would be so under Act VIII. of 1871, we think it advisable to reserve our opinion until such time as the question may arise.

We further think that although, so far as regards the supposed tampering with the date of the *Jupti Pati* (the kárkun's memorandum), the plaintiff must stand exonerated by the finding of the District Judge from any charge of fraud, yet the indisputable facts, that the plaintiff knew of the defendant Hanmantá's purchase of the 15th December 1863, and that Hanmantá was in possession under it, and that consequently he (the plaintiff) was unable to render his attachment effective and to execute his decree against Hanmantá's fields 185 and 186, establish the existence of collusion between the plaintiff and Dulu, and that the taking a mortgage from Dulu, in February 1864, of those fields amounts

in law to fraud on the part of the plaintiff, and renders his mortgage void as against Hanmantá (z).

We, therefore, affirm the decree of the Assistant Judge with costs.

1872.

BA'LA'RA'M.
NEMCHAND
v.
APPA'
valad
DULU
H. BA'PU,
M. VITHU.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 547 of 1870.

May 23.

MANMAL valad SURATMAL *Appellant.*

DASHRATH valad NA'RA'YAN *Respondent.*

Registration—Priority—Certificate of Court's sale—Possession—Act XX. of 1866.

An unregistered deed of sale accompanied by immediate possession ought to be preferred to a subsequent registered certificate of a Court's sale or to a subsequent deed unaccompanied by possession.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmadnuggur, in Appeal No. 9 of 1870, reversing the decree of the Subordinate Judge of Newassa.

Manmal sued to obtain possession of a field (survey No. 200) from Dashrath, under a certificate of sale granted to him by a Civil Court upon the 9th September 1867, and stated that he had obtained a money decree against one Khrishnáji Anáji, and had attached and purchased at the Court's sale the field in question in satisfaction of that decree. The date of the attachment was the 8th of July 1867.

The defence of Dashrath mainly was that the field in dispute had been sold to him by Khrishnáji for Rs. 50, under a deed of sale dated the 5th July 1867, and that he had been in possession since that date.

The Subordinate Judge decreed in favour of the plaintiff on the ground that the certificate of sale having been registered was entitled to a preference over the defendant's unregistered deed of sale, under Section 50 of Act XX. of

(z) See 4 Beng. L. R. A.C., 8 S.C. 12 Calc. W. R. Civ. R. 456 and see 9 Calc. W. R. Civ. R. 547