

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.

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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

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1866. In Appeal, the District Judge reversed the decree of the first Court on the 16th August 1870. His reasons will appear from the following extract from his judgment :—

“The issues framed by the Lower Court were :—(1) Which document is entitled to the preference, the certificate of sale, Exhibit No. 3, or the deed of sale, Exhibit No. 8? (2.) Was the deed of sale Exhibit No. 8 executed *bonâ fide* or not?

“My finding on the 1st Issue is that Exhibit No. 3 is entitled to preference over Exhibit No. 8, if they are conflicting documents. Exhibit No. 8 purports to be a deed of sale by Krishnáji, dated the 5th July 1867, while Exhibit No. 3 is a certificate of the plaintiff's purchase of Krishnáji's right in the land on a date subsequent to the 5th July 1867. I give full force to Exhibit No. 3, and the right which Krishnáji then had shall be awarded to the plaintiff. But Krishnáji then had no right in the land, for he had sold it and made it over to the purchaser, the defendant.

“My finding on the 2nd Issue is for the defendant. The execution of Exhibit No. 8 is proved by witnesses Nos. 21, 22, 23, 24 and 42; and the endorsement on the stamped paper of it shows that it was bought by Krishnáji on the date of its execution, viz., the 5th July 1867. The witnesses say that the purchase money of Rs. 50 was paid and that the land was then made over to the defendant, Dashrath.

“No doubt Krishnáji's motive in selling the land was that he knew that it was about to be attached by this plaintiff and it was attached on the 8th July 1867. But that does not invalidate the sale.”

The Appeal was argued before Westropp, C.J., and Melvill, J., on the 20th February 1871.

Ghanashám Nillkant, for the appellant :—The Lower Court held that the registered certificate of sale (No. 3) was not entitled to preference over the unregistered deed of sale (No. 8), whereas, under Act XX. of 1866, the certificate was entitled to such preference. Although the Lower Court had no doubt that Krishnáji's motive in selling the land was to

defeat Manmal's attachment, yet that Court did not hold the sale to be invalid. The Lower Court did not raise and determine the issue whether the alleged possession of Dashrath was obtained prior or subsequent to the attachment of the land in dispute by Manmal. The Lower Court held the deed of sale valid, although there was ample evidence on the record to show that it was not executed *bonâ fide*.

Shântâram Nârâyan for the respondent: The deed of sale (No. 8), though unregistered, was certainly good and valid as against Krishnâji, it being optional with the parties to register it or not, as the consideration was less than Rs. 100. There was, therefore, no right or title in Krishnâji to be conveyed by the subsequent certificate of sale.

Cur. adv. vult.

Westropp, C.J.:—Manmal, being the creditor of Krishnâji valad Anâji, sued him for the debt and recovered a decree in 1866, under which an attachment was laid upon a field on the 8th July 1867. The right, title and interest of Krishnâji in that field was sold under this attachment by public auction to Manmal for Rupees 25, and a certificate of sale (dated 9th September 1867) was given to him by the Munsif, which certificate was registered. A question as to the regularity of that registration has been raised on behalf of the defendant, but our opinion upon other points in the case renders it unnecessary that we should decide that point.

Krishnâji had, by private sale, sold the field and conveyed it to Dashrath, the defendant, on the 5th July 1867, that is to say, three days before the plaintiff's attachment was laid upon the field, and upwards of two months before the date of the certificate of sale to the plaintiff. The deed of sale (No. 8) to the defendant was not registered, but the finding of the District Judge amounts to this, that it was executed on the 5th of July 1867, and that the purchase money, Rupees 50, was then paid and the field made over to the defendant, Dashrath. By his memorandum of Special Appeal, clause (d), the plaintiff objects that the District Judge did not raise and determine the issue whether the

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possession of the respondent (defendant) was obtained prior or subsequent to the attachment. But the defendant had put forward in express terms in his written statement by way of defence that the sale to him was on the 5th July 1867, and that the land had, since that time, been in his possession. It was open to the plaintiff, if he disputed that distinct allegation as to the time of the defendant's possession, to have asked the District Judge to raise an issue upon the point. The plaintiff has not done so. It is, therefore, now too late to raise such a point, and the Judge has, we think, found the fact as to the time at which possession was given with sufficient clearness, and in conformity with the defendant's allegation in his written statement.

The main question in this case, as argued before us, was whether the unregistered deed of sale to the defendant, accompanied by immediate possession, ought to be preferred to the subsequent registered certificate of sale to the plaintiff unaccompanied by possession. The Calcutta cases *Selam Sheikh v. Baidonath Ghatak (a)* and *Narsing Perkaet v. Mussamat Bewah (b)* are distinct authorities in favour of an affirmative answer to that question. We concur in those decisions; and in the Special Appeal No. 313 of 1869, (*Bálárám Nemchand v. Appa Dulu, Hanmantá and another*), heard by my brothers Lloyd and Melvill and myself, we have this day stated our reasons for that concurrence.

The conclusion at which we have arrived on that question in favour of the defendant, renders it unnecessary for us to say any thing upon another point raised by the defendant, namely, whether the plaintiff is not prevented by the terms of the certificate of sale, which conveys to him only the right, title and interest of Krishnáji, from recovering the field, inasmuch as it was argued that the unregistered conveyance to the defendant (which it was optional with him to register or not, the consideration being under Rupees 100) being certainly good against Krishnáji, there was not any estate, right, or title in him to be conveyed by the sub-

(a) 3 Beng. L. R. A. J. 312, S. C. 12 Calc. W. R. Civ. R. 217.

(b) 5 Beng. L. R. Appx: 86.

sequent certificate of sale. For that proposition, the decision of Warden and Melvill, JJ., in Special Appeal No. 68 of 1870 was cited.

A question was raised as to the right of Krishnáji to convey to the defendant, while the plaintiff's decree was pending against Krishnáji, and with a view to defeat it, but before attachment. *Wood v. Davie (c)* decides that question in the affirmative, it having been ruled there that a sale of property for good consideration is not fraudulent and void merely because it is made with the intention to defeat the expected execution of a judgment creditor. There is neither proof nor allegation in this case that the defendant was privy to any such intention on the part of Krishnáji.

We affirm the decree of the District Judge with costs.

TO the same effect was the case of *Nágesh Bhat v. Balvantráv*, Special Appeal No. 113 of 1871, in which the following judgment was delivered on the same day by

Westropp C.J. :—In this case, the Judge found that the defendant, Krishnáji, had a mortgage of the lands in dispute from the defendant, Balvantráv, and had, under a decree in respect of interest due upon the mortgage, obtained possession of the lands. On the 28th September 1869, Balvantráv resigned, by an unregistered *rázinámá*, the same lands to the Collector with a view to the substitution of the name of Krishnáji in the Government books in lieu of the name of Balvantráv as tenant of those lands under Government. That substitution was made, and Krishnáji remained in possession as owner up to the time of the commencement of this suit by Nágesh Bhat.

On the 3rd December 1869, the defendant, Balvantráv, executed a deed of sale of the same lands for valuable consideration to the plaintiff, Nágesh Bhat, which was duly registered under Act XX. of 1866. Nágesh Bhat then instituted this suit against Balvantráv and Krishnáji to obtain possession of the lands and to redeem the original

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mortgage to Krishnáji. The Subordinate Judge made a decree in favour of the plaintiff for redemption and possession. The defendant, Krishnáji, appealed to the District Judge, who held that the transaction of the sale by Balvantráv to Krishnáji having been perfected by possession and by substitution of Krishnáji's name for that of Balvantráv in the Government books as tenant, the title of Krishnáji must prevail against the subsequent registered conveyance to Nágesh Bhat, the plaintiff. Nágesh Bhat has specially appealed against that decree to this Court, and contends that the *rázinámá*, whereby the defendant Balvantráv surrendered his interest to the Collector, being unregistered, ought to give way to the plaintiff's subsequent registered conveyance.

It is unnecessary for the Court to say whether or not a *rázinámá* addressed by a Government tenant to a Collector needs registration, in order to protect the new tenant substituted with the assent of the late tenant for him by the Collector, from subsequent vendees of the original tenant.

The decisions of the High Court at Calcutta in the cases of *Selam Sheikh v. Baidonath Ghatak* (d) and *Narsing Porkaet v. Mussamat Bewah* (e) and those made here to-day in *Bálárám Nemchand v. Appá valad Dulu* and *Manmall v. Dashrath* contain the principle on which this case must be decided, namely, that the title of Krishnáji, having been completed by possession, before Balvantráv attempted to confer upon Nágesh Bhat any lien upon or title to the lands, must prevail against the subsequent registered conveyance by Balvantráv to Nágesh Bhat. At the time Balvantráv executed that conveyance, he had not any estate in, or title to, the lands which he could convey to Nágesh Bhat.

Nágesh Bhat accordingly is neither entitled to be permitted to redeem the mortgage nor to obtain possession of the lands.

This Court, therefore, affirms the decree of the District Judge with costs.

(d) 3 Beng. L. R. A. J. 312, S. C. 12 Calc. W. R. Civ. R. 217.

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