

## [APPELLATE CIVIL JURISDICTION.]

*Special Appal No. 255 of 1873.*1873.  
September 8.

PADU MALHA'RI and another. *Defendants and Appellants.*  
 RAKHMA'I, heir of KRISHNA'JI  
 deceased, by her manager  
 VA'SUDEV PA'NDURANG ... *Plaintiff & Respondent.*

*Code of Civil Procedure, Sec. 259—Registration—Certificate of Sale—Act XX. of 1866, Secs. 17, 42, and 49—Value of unregistered certificate of Sale.*

A certificate of sale, issued under Sec. 259 of the Code of Civil Procedure, is an 'instrument' requiring registration within the meaning of Act XX. of 1866, Sec. 17.

Where such a certificate is not registered, other evidence is not admissible to prove the sale.

*Per NA'NA'BHA'I HARIDA's, J:—*An unregistered certificate of sale is not only inadmissible in evidence but invalid.

THIS was a special appeal from the decision of W. M. P. Coghlan, Judge of the District of Thana, reversing the decree of Kharsedji Rustamji, Subordinate Judge of Kallián.

The facts of the case are briefly these :—

Rámchandra, in 1860, mortgaged, without possession, a piece of land, belonging to him, to Pándurang, who obtained a decree against him and in execution thereof sold the land through the Civil Court on the 20th January 1870. The plaintiff's husband became the purchaser and gave a receipt in acknowledgment of having received possession of the property, but omitted to get his certificate of sale registered. The original proprietor, Rámchandra, had another creditor Masáji, who had previously obtained a decree against him in 1862, and in execution of it got the same property sold in September 1866. The defendants became purchasers at this sale, and got their certificate registered. They are now in possession. How they came into possession did not appear. Under these circumstances the plaintiff and the defendants were at issue on the question of ownership and possession of the land.

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*Note.*—The whole of this Act is repealed by Act VIII. of 1871.

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The Subordinate Judge was of opinion that but for the circumstance that the plaintiff's certificate of sale was not registered he was entitled to succeed; but, on the authority of *Mulji v., Anuprám (a)*, held the certificate to be invalid, and so rejected the claim. The District Judge, on appeal, reversed this decree on the ground that the plaintiff's husband was in legal possession of the land, as shown by the receipt passed by him to the Civil Court, and that this rendered the registration of his certificate unnecessary.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

*Ganpatráv Bháskar* for the special appellants :—The plaintiff's title rests entirely on the certificate of sale, as the defendants are admittedly in actual possession. This certificate, though it requires registration under Section 17 of Act XX. of 1866, has not been registered, and is, therefore, inadmissible in evidence and invalid : *Mulji v. Anuprám (supra)*; Sec. 49 of Act XX. of 1866. The plaintiff's receipt does not show actual possession.

*Dhirájlál Mathurádás*, Government Pleader, for the respondent :—In the case, cited by the other side, the question, whether a certificate of sale requires registration or not, does not appear to have been distinctly raised. The Court seems to have assumed that registration was necessary. In *Fakírchand v. Kahándás (b)*, the Court held that a certificate of sale was a *judicial process* which might be registered at the option of the holder, but the force and effect of which was in no wise to depend on its being registered.

[WEST, J. :—There the certificate was under Regulation IX. of 1827.]

Sec. 42 of the Registration Act requires the Court itself to send a memorandum of its order to the registration officer. Its omission to do so in the case should not be allowed to prejudice the plaintiff. The order of the Court is what transfers

(a) 7 Bom. H. C. Rep. A. C. J. 136.

(b) 3 Bom. H. C. Rep. A.C.J. 167.

property and the certificate evidences transfer but is not the only evidence of it. The sale was completed by delivery of possession: *Bálárám v. Appá* (c).

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The sale with possession gave to the plaintiff a complete title: *Tinamkhán v. Khojábhái*, R. A. No. 64 of 1871 (d).

He also referred to the following authorities:—*Mathurádás v. Káliá* (e); *Kishorbháí v. Jorábhái* (f); *Gopál v. Krishnáppá* (g); *Chintáman v. Shivrám* (h).

*Garpatráv* in reply:—The certificate of sale under Sec. 259 of the Code is the only evidence of title, none other being admissible. Under Sec. 17 of Act XX. of 1866 it requires registration, as it undoubtedly operates to create or assign an interest in immovable property of greater value than Rs. 100: *Sheikh Rahmatullá v. Sheikh Sariutullá* (i); *Somu Gurukkal v. Rangammál* (j); *Mahádu v. Báláji*, S.A. 1 of 1870 (k). In this case no evidence has been produced to prove the sale on the plaintiff's behalf, except the certificate of sale; but even if it were, none would be admissible: *Sheik Ibráhim v. Parvátá* (l).

WEST, J.:—The first point that arises in this case is whether a certificate of sale, issued under Sec. 259 of the Code of Civil Procedure, is an instrument that requires registration. Sec. 256 provides for a sale's becoming absolute when confirmed

(c) 9 Bom. H.C. Rep. 121.

(d) Decided by SARGENT and MELVILL, JJ., on the 14th June 1872.

(e) 7 Bom. H. C. Rep. A. C. J. 24. (f) Idem 56.

(g) Idem 60. (h) 9 Idem 306.

(i) 1 Beng. L. Rep. F.B. 58. (j) 7 Mad. H.C. Rep. 13.

(k) Decided by WARDEN and MELVILL, JJ., on the 10th of  
 March 1870.

(l) 8 Bom. H. C. Rep. A. C. J. 163.

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by the Court, and Sec. 259 prescribes that the certificate shall be issued after the sale has thus become absolute. Sale, however, according to the definition given in Sec. 77 of the Indian Contract Act, "involves the transfer of the ownership of the thing sold from the seller to the buyer." When, therefore, the sale has become absolute, no further property in the thing sold can remain in the former owner capable of transfer to the purchaser. Yet Sec. 259 says that "the certificate shall be taken and deemed to be a valid transfer of such right, title, and interest" as has passed from the judgment-debtor to the vendee. It has been contended for the respondent that the document is, and can be, no 'transfer' in the strict sense, there being nothing left at the moment of its issue that it can operate upon; that it is no more than a particular piece of evidence conclusive in its effect as such, but not in itself a conveyance, or operating as such, and, therefore, requiring registration under Sec. 17 of the Registration Act XX. of 1866. In confirmation of this view, Sec. 42 of the same Act has been referred to, which requires that whenever a Court 'shall by a decree or order...transfer.....any right.....in immoveable property,' it shall itself cause a memorandum thereof to be sent for registration. The order under Sec. 256 must thus be registered, it is urged, and it cannot have been contemplated that the same transaction should be registered again in the form of the certificate under Sec. 259.

It would seem *a priori* unlikely that such a double registration should be required; but, undoubtedly, Sec. 259 does declare that the certificate shall be deemed to be a valid transfer of the property to which it relates. If it is a valid transfer, then the transaction must be necessarily incomplete, notwithstanding the language of Sec. 256, until it is issued. A similar suspensive effect arising from the necessity for a written instrument, as the prescribed evidence of a transfer or exchange, is provided for in the Roman Law (Cod. Lib. IV., T. XXI. L. 17) "*ut nulli liceat prius quam hæc ita præcesserint.....aliquod jus sibi ex eodem contractu vel transactione vindicare.*" The certificate being

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thus essential to the completeness of the transaction, it is *the* transfer, as there cannot be two, at the same time, of the same property, between the same parties; and yet it cannot affect the property without registration (Act XX. of 1866, Sec. 49). This is the view which, in the apparent contradiction between the words of the two sections, has been taken by this Court in Special Appeal 1 of 1870 and in *Mulji v. Anupram (supra)*. The ruling at 6 Madras Reports, Appendix 39, is to the same effect, and no decision, resting on the contrary view, has been cited to us. In such a case, where a perfectly satisfactory conclusion is not to be arrived at, we think it right to adhere to the received construction.

The next point taken was, whether, as the registration is compulsory, other evidence of the sale could be received. *Mulji v. Anupram (supra)*, and the previous case already cited, seem conclusive that it could not. But it is not in fact alleged before us in the present case that any other evidence than the certificate was tendered. If that could not be received, the sale to the plaintiff was wholly unproved.

The sale, however, being unproved, no special importance can be attached to the document showing a receipt for delivery of the land passed by the plaintiff to the Court. How this delivery was effected does not appear. Perhaps it was one of those deliveries under Sec. 264 of the Code of Civil Procedure, which bind the judgment-debtor, but do not bind third parties: *Joogal Kishore v. Mussamut Edun (m)*. But even supposing it was an actual and effective transfer of possession, the possession thus acquired by the plaintiff must have been immediately afterwards lost. At the time of the institution of the suit, the defendants were in possession, as they averred, under the sale made to them in 1866. The possession taken and lost by the plaintiff is an insignificant circumstance as against the present possessors, unless it can be referred to some right to which the possession could attach itself. Such a right would probably have been established,

(m) S. D. A. (N. W. P.) 1864, 296.

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had the certificate of sale been admissible in evidence ; but, as this document is not admissible, the plaintiff can derive no advantage from a transient occupation (supposing he really occupied) resting, so far as the evidence can be looked at, on no title at all.

I must, for these reasons, reverse the decree of the District Judge and restore that of the Subordinate Judge. Costs throughout on respondent.

NA'NA'BHA'I HARIDA'S, J. :—I entirely concur in the judgment just delivered. Upon the authorities cited by Mr. Ganpatráv, it is clear that a certificate of sale under Sec. 259 of the Code of Civil Procedure is an “instrument” within the meaning of Secs. 17 and 18 of the Registration Act, No. XX. of 1866. The plaintiff's certificate of sale in this case is one that falls under Sec. 17, and, being unregistered, is not only inadmissible in evidence, but invalid under Sec. 49 of that Act : *Hicks v. Powell* (n). Such being the case, it does not affect the property comprised in it, which is the one in dispute here ; nor can the sale of it to the plaintiff be proved by any other evidence : see the cases cited above and *Raja Ram Chowdky v. Seetula Buksh* (o).

As to the receipt given by the plaintiff to the Court, acknowledging that he had obtained possession of the said property, it cannot be regarded as any evidence of his possession against the defendants, who are now in possession, and who deny having ever lost it since their purchase at a Court sale in 1866. It does not in any way improve the plaintiff's case.

The decree of the District Judge must, therefore, be reversed, and that of the Subordinate Judge restored. The plaintiff to pay the costs of this appeal and also of the appeal to the Court below.

(n) L. R. 4 Ch. 741.

(o) 7 Calc. W. R. Civ. Rul. 113.