

it was equally adverse when after a temporary displacement by Govind, whom the plaintiff now represents, Timaná recovered it in 1850. Between that time and the institution of the present suit, there was an interval of more than twelve years, and the possession of the office obtained by Timaná's representative could no longer then be disturbed. If the plaintiff, Giriápá, being united in interest with Timaná, had been necessarily represented, in the absence of a special agreement by Timaná, while Timaná was *pátil*, his right would not of course have become practically extinguished by limitation, and thus it is that the plaintiff, Venkaná, in the other suit has been enabled to succeed, but here no union of interests has been averred as the foundation of the plaintiff's right. He has claimed merely as representative of a separated branch against which Timaná's tenure of the office was always adverse.

We must therefore confirm the decree of the District Court with costs.

NOTE.—A review was applied for in this case, but the Court (WEST and NA'NA'BRA'I HARIDA'S, JJ.,) on the 23rd September 1875, rejected the petition, on the ground that no sufficient reason was shown for the review sought.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 229 of 1874.

March 9.

JUSAB HA'JI JA'FAR..... *Plaintiff.*
 HA'JI GUL MUHAMMAD *Defendant.*

Registration Act VIII. of 1871, Section 17, Clauses 2 and 3, Sections 18 and 49—Agreement for purchase of immoveable property contemplating a future conveyance—Payment of earnest-money.

A "bargain paper" for the purchase of immoveable property above the value of Rs. 100, which contemplates the execution of a future conveyance does not require registration.

THIS was a suit, tried by Sir C. SARGENT, J., in a Division Court on the 15th January 1875, for specific performance of an agreement to purchase two houses. The agree-

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1875. ment, which was in writing, was dated the 25th June 1873, and the material portions of it were as follows:—"To Jusab HAJI JA'FAR v. HAJI GUL MUHAMMAD. and the material portions of it were as follows:—"To Jusab HAJI JA'FAR on behalf of Memon HAJI JA'FAR Waycdana, written by Memon HAJI Gul Muhammad HAJI Abda Rehamond. To wit. I give to you this bargain paper as follows:—"There is your property consisting of houses two in numbers." Here followed a description of the houses, after which the agreement continued: "I have made this bargain paper to purchase the same from you for the value of Rs. 8,250. As earnest for the same I have paid to you in ready cash Rs. 1,000. As to the balance of Rs. 7,250, I am duly to pay the same to you on your signing a new deed of sale in respect of these two houses. * * * You are duly to deliver the new deed of sale in respect of these houses prepared through an Attorney. * * * The time for the performance of this bargain is fixed to be one month."

The agreement was not registered.

Latham, for the plaintiff (*Scoble*, A. G., with him,) at the hearing tendered the agreement in evidence.

Starling, for the defendant (*Purcell* with him), objected:—This, being an agreement to purchase, creates an equitable interest in immovable property in the purchaser, and extinguishes one in the vendor. Therefore, the document is one which must be registered under Act VIII. of 1871, Section 17, clause 2.

Further, the document itself states the payment of Rs. 1,000, and, therefore, under clause 3 of the same section the document is one which must be registered. Under Section 49 of Act VIII. of 1871, the document cannot be received in evidence.

Latham:—The document is an agreement, and, therefore, the registration of it is optional under Section 18 of Act VIII. of 1871.

It creates no interest in immovable property, for it is a contract, which affects only the person, not a conveyance,

which affects the property—Maine's Lectures on Ancient Law (a).

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He also cited on the question of the necessity for registration: *Ramtonoo Surmah Sircar v. Gour Chunder Surmah Sircar* (b); *Bunwaree Lal v. Sungum Lal* (c); *Mark Riddedd Currie v. S. V. Mutu Ramen Chetty* (d); *Bhairabnath Khettri v. Kishori Mohan Shaw* (e); *Haji Abdul Vidona Jonas v. Haji Harone Esmile* (f); and *Port Canning Land, Investment, Reclamations, and Dock Company (Limited) v. Smith* (g).

Fati Chand Sahu v. Lilamber Sing Das (h), as being a sale *in presenti*, is distinguishable from the present case.

The words in clause 3 of Section 17 of Act VIII. of 1871 refer to the whole sum which is to be paid as the entire consideration, not to a small sum intended only to bind the bargain.

Starling, in reply:—The cases cited against our contention can all be distinguished, and even if they were applicable to the present instance, they have all been over-ruled by the case reported at 9 Beng. L. R. 433. There being no difference in equity between the sale and the agreement to sell, the agreement in this case, in the words used at p. 438 in the case last cited, "presently operates in equity as a sale of the property," even if the words used in the agreement, "I have made this bargain paper for the sale to you," be not held to be equivalent to the words "I have bargained and sold to you." In the case reported at 9 Beng. L. R. 433 the document is described as an *ikranama*, which means agreement (i). In that case, as in this, a further document was to be executed.

The words "any consideration" in clause 3 of Section 17 of Act VIII. of 1871 cannot be held to apply only to the whole

(a) Pp. 318, 321, *et seq.*

(b) 3 Calc. W. R. 64 Civ. Rul.

(c) 7 Calc. W. R. 230 Civ. Rul., also reported at 3 Wym. 186.

(d) 3 Beng. L. R. 126 A.C.J.

(e) 3 Beng. L. R. App. 1.

(f) 7 Beng. L. R. App. 21

(g) L. R. 1 Ind. Ap. 124.

(h) 14 Moore I. A. 129; S. C. 9 Beng. L. R. 433.

(i) He referred to Forbes's Hindustani Dictionary and Johnson's Arabic and Persian Dictionary.

1875. consideration or it would be possible to save all documents from the necessity of registration by the payment of one pie less than the full consideration. Payment of a portion of the purchase money is a "transaction affecting the property," and therefore Section 49 of Act VIII. of 1871 applies.

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The case reported at L. R. 1 Ind. Ap. 124 does not in fact conflict with that reported at 9 Beng. L. R. 433, and is no authority for the plaintiff's contention, for the document in that case did not create or extinguish any interest in immoveable property, but was simply an agreement that when rent became due it should be set off against the debentures.

Cur. ad. vult.

SARGENT, J.:—This document is, on the face of it, termed a "bargain paper," and provides for the execution of "a deed of sale." It is, therefore, clear that the parties, at the time of the making of the agreement embodied in this document, contemplated the execution of a conveyance at some future date. I am, therefore, of opinion that this document does not need registration. That was the rule laid down in *Bunwaree Lal v. Sungum Lal* (j), where it was held that a deed merely preliminary to the main contract, such as this, need not be registered. In the case reported at 3 Beng. L. R. 127, the same argument was urged as in this case, viz., that equity treats as done what ought to be done, but Peacock, C.J., says (k): "It is not because a Court of Equity would treat a document as doing a thing which a party agrees to do, that the document comes within the meaning of an enactment which refers to a document by which a thing is done, and not to an agreement to do it." In this case, as in that, the document is merely an agreement to create such an interest as that contemplated by the Registration Act, but does not purport to create it. Nor does the document fall, I think, under Clause 3 of Section 17. The money paid in this case was earnest money for the performance of the agreement and not consideration money

(j) 7 Calc. W. R. 230 Civ. Rul.

(k) See p. 131.

for the creation of an interest in immoveable property. In the case reported at 14 Moore I.A. 179, the document was an instrument acknowledging the payment of the entire purchase-money. I must, therefore, rule that the document in this case is not one that needs registration, and is, therefore, admissible in evidence.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 278 of 1874.

June 9.

PANHA' KHUMAJI *Defendant and Appellant.*
FATTA' UPA'JI..... *Plaintiff and Respondent.*

Execution—Sale—Contest between two rival auction purchasers—Certificate of sale, Act VIII. of 1859, Section 259—Registration Act XX. of 1866, Sections 18 and 50.

Plaintiff and defendant were two auction purchasers. Plaintiff's purchase was prior, but his certificate of sale was not registered. Defendant's purchase was subsequent, but he was in possession, and his certificate was registered. Registration was optional in both cases. In a contest as to priority between plaintiff and defendant,

Held that under the provisions of Act XX. of 1866, Section 50, the defendant's title must prevail against that of the plaintiff.

THIS was a special appeal from the decision of W. H. Crowe, Assistant Judge at Thaná, reversing the decision of the Subordinate Judge of Penn.

The material facts in this suit, which was instituted by Futta Upaji against Panha Khumaji to recover certain immoveable property, are these :—The property in dispute originally belonged to one Posha Aba, and was, on the 11th November 1868, sold in execution of a decree against him and purchased by the plaintiff Futta Upaji. A certificate of sale was granted to him under Section 259 of the Civil Procedure Code, but was not registered by him. The property was again sold in execution of another decree against the said Posha, and was, on the 17th November 1869, purchased by the defendant Panha Khumaji, who took possession, and got his certificate of sale registered. Both the sales being for less than Rs. 100, registration was optional under Act XX.