

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 469 of 1872.

MAKANDA'S KA'LIDA'S and SHANKARDA'S
 DA'DA'BHA'I (*Original Defendants*) ... *Appellants.*
 SHANKARDA'S HARIBHA'I (*Original Plain-
 tiff*) *Respondent.*

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'*Sán*' mortgage (*mortgage without possession in Guzerát*)—Registration Act XX. of 1866, Section 50.

Under Section 50 of the Registration Act XX. of 1866, a registered instrument takes effect as regards the property comprised therein against every unregistered instrument relating to it, whether or not the grantor of those instruments be the same.

As between himself and his mortgagor and also as against any subsequent unregistered assignee of the latter, an unregistered *sán* mortgagee in Guzerát has a perfectly valid charge upon the property mortgaged; but his right against such property is liable to be defeated by the mortgagor or his heir or such assignee conveying it to another by a registered instrument while his own title remains unregistered.

Lakhmichand v. Kastur (9 Bom. H. C. Rep. 60) dissented from.

Quære—Whether notice, to the purchaser, of the existence of a prior unregistered mortgage would in any way affect the provisions of the Registration Act.

THIS was a special appeal from the decision of J. W. Walker, Acting Assistant Judge at Ahmedabad, reversing the decree of the Ahmedabad Subordinate Judge.

The appeal was heard by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J.

Nagindás Tulsiddás for appellants.

Dhirájlál Mathurádás (Government Pleader) for respondent.

The facts and arguments fully appear from the following judgment of the Court delivered by

NA'NA'BHA'I HARIDA'S, J. :—This suit was instituted by the plaintiff, Shankardás Haribháí, to have his right declared to sell, (in execution of a decree obtained by him against Lálá Valá,) a house situated in the village of Asláli, in the Ahmedabad District—the Subordinate Judge having ordered the

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The facts of the case, either found by the lower Court or not disputed, are as follows:—On the 7th of February 1867 the first defendant, Makandás Kálidás, obtained a money decree in a suit against Lálá Valá and his wife, but did not proceed to execute it until 1870. In the meantime, on the 26th April 1868, Lálá Valá, the owner, mortgaged the house in dispute to Jorá Ranchhod, who obtained possession of it under his deed of mortgage; and subsequently, on the 11th May 1869, Lálá Valá also *sán*-mortgaged the same house to Shankardás Haribhái, by Exhibit No. 27, in consideration of a sum less than Rs. 100. Subsequently, Makandás Kálidás, in execution of his above-mentioned decree of the 7th February 1867, attached the house as belonging to his judgment debtor, Lálá Valá, whose interest in it was accordingly sold by public auction to Kálidás, the father of Makandás, the first defendant, on the 3rd February 1870. On the 16th June 1870, Shankardás Haribhái, the present plaintiff, filed a suit upon his *sán* mortgage against Lálá Valá, whose interest in the house, as above stated, had already passed to Kálidás, and obtained an *ex parte* decree on the 5th July 1870. In the meantime, Kálidás by Exhibit No. 10 sold the house for Rs. 95 to the second defendant, Shankardás Dádábhái, on the 22nd June 1870, after having redeemed and recovered possession of it from Jorá Ranchhod. While in Shankardás Dádábhái's possession, as such purchaser, the house was attached by the plaintiff, Shankardás Haribhái, in execution of his *ex parte* decree against Lálá Valá, and that attachment was raised by the Subordinate Judge, as stated above, upon Shankardás Dádábhái's application under Section 246 of the Code of Civil Procedure. Hence this suit by Shankardás Haribhái to establish his right to sell the house in dispute in execution of his decree.

It is difficult to understand why Makandás Kálidás was made a party. The contest is really one between Shankar-

dás Haribhái and Shankardás Dádábhái, and the question we have to determine is, what are their respective rights?

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The lower Appellate Court held that Kálidás having, at the Court sale, purchased only the right, title, and interest of Lálá Valá, Shankardás Dádábhái, the assignee of Kálidás, cannot be considered to have acquired anything more; and that as Shankardás Haribhái was entitled, as against Lálá Valá, to realize his *sán* lien by the sale of the house, he was equally entitled to do the same as against Shankardás Dádábhái who stood in Lálá's place. It is true that in Guzerát a *sán* mortgage—*i.e.*, a mortgage not intended to be accompanied by possession—is perfectly valid even as against a subsequent purchaser. But there are important circumstances which do not appear to have been brought to the notice of the Assistant Judge, and which have a very important bearing upon this case. Both the *sán* mortgage, Exhibit No. 27, (which the plaintiff relies upon,) and the deed of sale, Exhibit No. 10, (which the defendant Shankardás Dádábhái relies upon,) are documents whose registration was optional under Clause 1, Section 18, of Act XX. of 1866, and relate to the same property, the house in dispute. One of them—the *sán* mortgage, though prior in date, is unregistered; while the other, the deed of sale, is registered in accordance with the provisions of that Act. Such being the case, the question is, what is the effect of Section 50 of the Act upon them? They were both executed after that Act came into force. The section runs thus:—“Every instrument of the kinds mentioned in Clauses 1, 2 and 3 of Section 18 shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not.”

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These words are very clear, and admit of only one construction. Unless, therefore, it is satisfactorily made out that Section 50 does not apply to the documents before us, we are bound to hold that the deed of sale, Exhibit No. 10, which has been “duly registered”, shall “take effect, as

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regards the property comprised therein", against the plaintiff's "unregistered" *sán* mortgage, Exhibit No. 27, "relating to the same property".

It was, indeed, argued by Mr. Dhirájlál Mathurádás for the respondent that Section 50 does not apply to these documents, inasmuch as they were not by the same grantor. But we do not find in the Act any indication that the Legislature intended to provide only for documents by the same grantor. The words of the section are wide enough to include documents executed by different grantors as well as those by the same grantor. Besides, it cannot, we think, be denied that *bond-fide* purchasers from the original owner's heirs or assigns require protection against secret or concealed conveyances and charges no less than those from the original owner himself, and that, therefore, their case is as much within the mischief the Act was intended to remedy. We must, accordingly, hold that it is not, by any means, necessary, under Section 50 of Act XX. of 1866, that the two rival deeds must have been executed by the same grantor; and in this view we are fortified by the decision of the House of Lords in *Warburton v. Loveland* (a), where the same question arose upon the construction of a somewhat similar Irish Registration Act, 6 Anne, C. 2.

In that case the facts were as follow:—A term for years in land being vested in B for life, with remainder to E his daughter absolutely, B and E, on the marriage of the latter, conveyed, by a deed not registered, to trustees to the use of B for life, with remainder to W the intended husband for life, with remainder over. After the death of B, W being in possession conveyed by a deed which was registered; it was held by the House of Lords, in affirmance of the decision of the Court of Exchequer Chamber in Ireland, which had affirmed that of the Court of Exchequer, that the latter conveyance (a lease) was valid against E, who, after the death of W, claimed the term under the unregistered settlement. The Court of Exchequer Chamber had been equally divided on the question. The decision of the House of Lords was given in conformity with the unanimous opinion of the

(a) 6 Bligh, N. R. 1; S. C. 2 Dow and Clark 480, 1 Hudson and Brooke 623,

English Judges. It was in that case contended, on behalf of E, that the Irish Registry Act, 6 Anne, C. 2, applied only to cases of conveyance from the same person, and that, if this were not so, the registered conveyance of a mere stranger to the title might prevail against the unregistered conveyance of the true owner; and it was argued that W was a stranger to the title, if the unregistered settlement were laid aside. But this was denied by Tindal, C.J., who gave to the House the unanimous opinion of the English Judges. He said that, putting aside the unregistered settlement, the term for years would, on the death of B, have vested *jure mariti* in W, inasmuch as, independently of the unregistered settlement, his wife E was entitled to the term in remainder after the death of her father B, and that in right of E it would have vested in her husband W with full power in him alone to dispose of it, so he was no stranger to the title. Tindal, C.J., was careful to guard against any supposition that a mere stranger to the title could, by the operation of the Irish Registry Act, make a valid conveyance, and so also was Burton, J., in his judgment in the Court of Exchequer Chamber in Ireland. Referring also to the English Registry Act, 2 and 3 Anne, C. 4, the latter said: "It has never been supposed that, under that statute, a purchaser, by a registered conveyance from a mere stranger, could acquire a title by such a conveyance merely because another person, having a title, had theretofore conveyed it by an unregistered deed" (1 Hud. and Br. 637).

It was further argued that Lálá, after the *sán* mortgage to the plaintiff, had only the equity of redemption in him, and that, therefore, Shankardás Dádábháí could not be considered, by the simple act of registering his deed of sale, to have acquired any higher right; and the decision in *Lakhmichand v. Kastur (b)*, which was cited to us, may, no doubt, be regarded as supporting such contention. But we are not prepared to follow that decision. Argument, similar to that addressed to us, was resorted to unsuccessfully in

(b) 9 Bom. H. C. Rep. 60. See, as to the necessity for the registration of a certificate of sale, *Padu v. Rakhmái*, 10 Bom. H. C. Rep. 435. *Mulji v. Anuprám*, 7 Bom. H. C. Rep. 136 A. C. J.

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1875. *Warburton v. Loveland.* Besides, such argument would equally apply to every subsequent alienation by Lalá himself. Suppose he had sold the house after redeeming it from Jorá Ranchhod, and the purchaser had got his conveyance registered. It could not, we think, be contended that in that case the purchaser would not have got the house free from the unregistered *sán* charge. Suppose, again, that, having by a registered instrument let it for a term of years, he had only the reversion in him, which he sold, first to A for Rs. 50 by an unregistered deed, and then, before A took possession (c), to B for Rs. 99 by a registered deed. Here also the argument would equally apply. As between himself and A, the unregistered deed having conveyed the whole of his right to A, he would have nothing remaining in him to convey to B; and yet, as between A and B, the Registration Act distinctly provides that B's registered deed shall take effect as against A's prior unregistered one. To hold otherwise would be entirely to disregard and evade the clear provisions of Section 50 of that Act to the prejudice of registered purchasers whom the Legislature intended to protect. The position, then, of an unregistered *sán* mortgagee in Guzerát seems to us to be this.—If the mortgagee is one whose registration is optional, as between himself and his mortgagor, and also as against any subsequent unregistered assignee of the latter, he has a perfectly valid charge upon the property mortgaged; but his right against such property is liable to be defeated by the mortgagor, or his heir, or such assignee, conveying it to another by a registered instrument while his own title remains unregistered.

With reference to the case of *Lakhmichand v. Kastur*, already mentioned, it seems desirable to observe that the Privy Council in *Raja Enayet Hossain v. Giridhari Lall* (12 Moore's Indian Appeals 366, 378, 379, S. C. 2 Beng. L. R. 75 P. C. C.) held that there was no foundation, in principle or authority, for any distinction between the right of a person standing in the position of a claimant under an execution sale and a claimant under any other conveyance or assign-

(c). See 9 Bom. H. C. Rep. 121, 147.

ment. The struggle there was to obtain a preference for a claimant under an execution sale.

In this view of the matter we must reverse the decree of the Court below, and reject the claim with costs throughout.

We may observe that no question of notice or fraud arises in this case, as none such was ever suggested in the Courts below. We are not, therefore, called upon to consider whether notice on the purchaser's part of the existence of a prior unregistered charge would, in any way, affect the provisions of the Registration Act; nor, in the view we have taken of those provisions, is it necessary for us to express any opinion upon the point raised in the second ground of appeal to us, namely, whether Kálidás, having paid off Jorá's prior mortgage before the term of that mortgage had expired, did not thereby become an assignee of that mortgage, and, as such, entitled to resist the plaintiff's claim (*d*).

Decree reversed and claim rejected.

Note.—The ruling in this case was followed in S. A. No. 133 of 1873.

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Regular Appeal No. 12 of 1875.

LA'LBHAI LAKHMIDA'S (*Plaintiff*) *Appellant.* September 23.
 NAVA'L MIR KAMA'LUDIN HUSEN
 KHA'N (*Defendant*) *Respondent.*

Certificate of sale—Registration—Practice.

The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and tendered in evidence a sale certificate dated 20th September 1865. The first Court decided against the plaintiff on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875 the plaintiff filed an appeal in the High Court against that decree, and on the 26th July 1875 applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related.

Held by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence which had no existence when that Court made such decree.

(*d*) See *Itcharám v. Dayáram*, 11 Bom. H. C. Rep. 41.

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