

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melwill.

1877.
February 1.

KHANDU DUBLADA'S (PLAINTIFF AND APPELLANT) v. TA'RA'CHAND AMARCHAND (DEFENDANT AND RESPONDENT).*

Act XIX. of 1843—Act XX. of 1866, Section 50—Registration—Priority—Mortgage—Account—Res judicata—Notice.

A mortgage deed registered under Act XX. of 1866 is not thereby entitled to priority over a mortgage deed which might have been, but was not, registered under Act XIX. of 1843, in cases where the consideration for the rival deeds exceeds Rs. 100. *Maleshappa v. Bassappa* (1 Bom. H. C. Rep. 10), *Harnamgir v. Spiers* (2 Bom. H. C. Rep. 204), and *Parabhudas v. Dhondu* (2 Bom. H. C. Rep. 222) distinguished.

Quare.—Whether in the case of instruments executed for a consideration less than Rs. 100, Sec. 50 of Act XX. of 1866 would operate to give priority to the deed registered under that Act over the deed which might have been, but was not, registered under Act XIX. of 1843.

THIS was a special appeal from the decision of H. Batty, Extra Assistant Judge at Dhulia, reversing the decree of the 2nd Class Subordinate Judge at Yawal.

The plaintiff, Khandu, sued to recover possession of a house and site, alleging that these premises had been mortgaged to him by one Rághu Rámji for Rs. 312-8-0 on 26th July 1860, that he had obtained a decree against Rághu on this mortgage, and at a sale in execution of that decree had purchased the property himself on 26th March 1873. The defendant pleaded, among other things, that the property claimed had been mortgaged to him by the same Rághu Rámji on 20th October 1869; that his mortgage had been duly registered, and, therefore, was entitled to prevail over the unregistered mortgage of the plaintiff. He also alleged that he had purchased the property on 7th June 1872 in execution of a decree obtained by him against Rághu on the mortgage of 20th October 1869. The Subordinate Judge, after having taken evidence on the issues framed, found both the mortgages to be *bonâ fide* and for good consideration, held the mortgage of the plaintiff to be entitled to preference, and made a decree in the plaintiff's favour. In appeal the Assistant Judge reversed that decree, and held the defendant's mortgage entitled

* Special Appeal No. 188 of 1876.

to priority on the authority of *Maleshappa v. Bassappa*,⁽¹⁾ *Harnamgir v. Spiers*,⁽²⁾ and *Parabhudás v. Dhondú*.⁽³⁾

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Gokuldás Kahandás for the appellant:—The plaintiff's mortgage was executed when Act XIX. of 1843 was in force, while the defendant's mortgage was executed under Act XX. of 1866. The question of priority, therefore, did not arise in the case.

Shántarám Naráyan for the respondent.

WESTROPP, C.J. :—The plaintiff's and defendant's mortgages were both for sums exceeding Rs. 100. Act XX. of 1866, under which the defendant's mortgage was registered, makes no provision in such cases for priority of deeds of sale or mortgages registered under that Act over deeds of sale or mortgages which might have been, but were not, registered under Act XIX. of 1843. We cannot, therefore, adopt the view taken by the Assistant Judge of the consequence of the non-registration of the plaintiff's mortgage which was executed on the 26th July 1860, and was, therefore, registrable under Act XIX. of 1843, the defendant's mortgage having been executed on the 20th October 1869, and registered under Act XX. of 1866.

The authorities relied upon by the Assistant Judge were cases in which *all* of the conflicting documents were registrable under Act XIX. of 1843, and, therefore, are inapplicable to the present case, in which one of the mortgages only was registrable under that Act, and the other was registrable under Act XX. of 1866. The two latter of those cases—*Harnamgir v. Spiers* and *Parabhudás v. Dhondú*—are (on the question as to the effect of possession) the subject of comment in *Balarám Nemchand v. Appa Dulu*.⁽⁴⁾

Whether, in the case of instruments executed for a consideration under Rs. 100, where the earlier document was registrable under Act XIX. of 1843 and the later document was so under Act XX. of 1866, the 50th Section of that Act would give to the later document, if registered, priority over the earlier document, if unregistered, is a question which does not present itself here, and on which we offer no opinion.

(1) 1 Bom. H. C. Rep. 10.

(2) 2 Bom. H. C. Rep., 1st Ed. 213, 2nd Ed. 204.

(3) 2 Bom. H. C. Rep., 2nd Ed. 222.

(4) 9 Bom. H. C. Rep. 121. See pp. 138, 139, and 141.

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The plaintiff, the first mortgagee, is now entitled to recover possession of the house and site, the subject of this suit, and to hold the same as against the defendant, the second mortgagee, and we decree that such possession be forthwith given to the plaintiff; but we will give liberty to the defendant to redeem the same on payment of the sum which may be found now due to the plaintiff upon an account duly taken in respect of the mortgage to him by Rághu, of the 26th July 1860. The decree in the plaintiff's suit (No. 1198 of 1872) against Rághu is not binding upon the defendant, who, though he became a purchaser on the 7th June 1872, was not made a party to that suit, which seems to have been instituted on or about the 17th July in the same year. Therefore the account taken in that suit is not conclusive upon the defendant.

The defendant must, within one calendar month after this decree has been notified to him, inform the subordinate Court whether or not he intends to redeem, and, if so, whether he demands that an account should be taken of what is due to the plaintiff. If he do within that time demand that such account should be taken, the subordinate Court should, within the period of three calendar months from such demand, take and complete such account; and if the defendant do, within three calendar months (from the time the amount found due on such account to the plaintiff is notified by the subordinate Court to the defendant,) pay to the plaintiff that amount and the costs of the suit, and of the regular appeal, the defendant shall be at liberty to redeem and recover the house and site (the subject of this suit) from the plaintiff; but if the defendant do not pay such amount and such costs to the plaintiff within the last-mentioned period of three calendar months, the defendant is to be for ever barred and foreclosed from redeeming the said house and site from the plaintiff. The parties respectively are to bear their own costs of this special appeal.

Decree reversed.