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[126] FULL BENCH—APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill and Mr. Justice Kemball.

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WAMAN RAMCHANDRA AND OTHERS (*Original Defendants*
Nos. 2, 3 and 4), *Appellants* v. DHONDIBA KRISHNAJI,
(*Original Plaintiff*), *Respondent*.* [10th October, 1879.]

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Registration Act (No. VIII of 1871), s. 17, cls. 2 and 3 and s. 48—Registration of letters containing a contract—Notice of prior equitable title—Instrument, meaning of the word, in Registration Act—Acknowledgment of receipt of consideration—Evidence Act (I of 1872), s. 91, Illustration (e)—Rules of English Courts of Equity applied in Mofussil, instances of.

An advertisement appeared in the *Bombay Gazette* newspaper of the 9th March 1874, advertising for sale certain moveable and immoveable property situated in the village of Angur, near Junnar, in the District of Poona. On reading that advertisement plaintiff entered into a negotiation with the solicitors of the widow and administratrix of the owner of the said property for the purchase of a certain portion of it. On the 26th May 1874 the plaintiff wrote a letter to the solicitors, offering to purchase the said property for Rs. 14,000 on certain conditions, and proposing to pay a deposit of Rs. 1,000 as earnest-money if the offer was accepted. On the following day the solicitors informed plaintiff, in writing that the widow accepted his offer, and requested him to deposit the earnest-money offered by him in his letter. Plaintiff, accordingly, deposited the earnest-money (Rs. 1,000) with the solicitors on the same day, and obtained from them a receipt, bearing a one-anna receipt stamp. The receipt mentioned the money as being in part payment of the sum of Rs. 14,000, the amount for which the plaintiff had agreed to purchase the property. Instead of completing the contract of sale with the plaintiff, and putting him in possession of the property, the widow sold it to other persons. [The advertisement of the 9th March, the plaintiff's letter of the 26th May (Ex. No. 3) the solicitors' reply (Ex. No. 4), and their receipt of the 27th May 1874 (Ex. No. 5)—are fully set out in the judgment of the Full Bench.] In a suit of the nature of a suit for specific performance brought by the plaintiff, as first purchaser, against the widow and the other purchasers to set aside the subsequent sale of the property, and to compel the widow to execute a conveyance thereof to the plaintiff, it was contended that three of the four documents, *viz.*, Exs. Nos. 3, 4 and 5, required registration under the Indian Registration Act (VIII of 1871); s. 17.

Held—(1) That plaintiff's letter (Ex. 3) offering to purchase the property in question and the letter of acceptance (Ex. 4) written on behalf of the vendor (defendant No. 1) by her attorneys, did not fall within cl. 2 of the 17th section of the Indian Registration Act (VIII of 1871), and were admissible in evidence towards proof of the contract of sale, although not registered. The acceptance of [127] the plaintiff's offer was conditional on his payment of the Rs. 1,000 as earnest-money, and therefore, until that sum was paid, no estate, legal or equitable, in the property passed to the plaintiff.

(2) That the receipt for Rs. 1,000 earnest-money (Ex. No. 5) fell within cl. (3) of s. 17 of the Indian Registration Act (VIII of 1871), as being an acknowledgment of the receipt or payment of consideration on account of the creation of a right, title or interest in immoveable property of the value of upwards of Rs. 100, and was, therefore, inadmissible in evidence not having been registered; but that that under s. 91 of the Indian Evidence Act (I of 1872) oral evidence was admissible to prove the payment, notwithstanding the existence of the written receipt.

(3) The third clause of s. 17 of the Registration Act VIII of 1871 includes within its scope a payment of a part of the consideration as well as a payment of the whole of it.

(4) *Quere*—Whether the letters between the parties (Exs. Nos. 3 and 4), even if they did constitute a complete contract for sale, unincumbered by the necessity

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for the payment of the deposit by way of earnest, could be regarded as 'instruments' within the meaning of s. 17 of the Registration Act (VIII of 1871).

(5) Persons claiming under a registered document which has been given, accepted and registered in fraud of a third party, and in collusion with the grantor, are not entitled to the benefit of s. 48 of the Indian Registration Act (VIII of 1871), and, therefore, the registration of a document of title which has been procured in fraud of a party possessing a prior equitable title and with actual notice of his prior equitable title, does not deprive such party of his priority.

(6) Registration cannot confer validity upon an instrument which is *ultra vires*, or illegal, or fraudulent.

(7) The reason for the exception made by s. 48 of the Registration Act (VIII of 1871) in favour of an oral agreement accompanied by possession, is, that, by such possession, the parties who rely on a subsequent registered deed, had, or might, if they had been reasonably vigilant, have had, previously to their entering into their contract with the vendor and to their taking a conveyance, notice, by the fact of such possession, that there was some prior claim to the property. Therefore, where there is actual notice of a prior oral agreement although unaccompanied by possession, the object of the Legislature is fully attained.

Hicks v. Powell (1), *Futtechand Sahoo v. Leelumber Singh Doss* (2), and *Valaji Isaji v. Thomas* (3) distinguished.

Instances, in which the rules of English Courts of Equity have been applied in the *Mofussil*, referred to.

[F., 35 B. 438 (441) = 13 Bom. L.R. 867 = 12 Ind. Cas. 362; 6 C. 534; 13 M. 324; 11 A.L.J. 137 = 18 Ind. Cas. 533; Appr., 13 C. 70 (72); 4 L.P.R. 26; R., 6 B. 168 (177) (F.B.); 6 B. 515 (517); 9 B. 427; 17 B. 235 (240); 27 B. 452; 7 C. 753 (766); 35 C. 34 (F.B.) = 6 C.L.J. 272 = 11 C.W.N. 983; 9 M. 119; 16 M. 148 (F.B.); L.B.R. (1872-1892) 151; 142 P.R. 1908 (F.B.) = 48 P.L.R., 1908; D., 9 A. 108 (F.B.); 71 P.R. 1906 = 111 P.L.R. 1907; 17 B. 375 (381).]

THIS case was referred for the opinion of a Full Bench by Westropp, C.J., and NANABHAI HARIDAS, J. The question of registration [128] referred to the Full Bench arose in a regular appeal preferred to the High Court against the decision of Rao Bahadur Mahadev Govind Ranade, Subordinate Judge (First Class) at Poona, in the original suit.

The plaintiff Dhondiba Krishnaji brought this suit against (1) Mrs. H. C. Dickinson, (2) Waman Ramachandra, (3) Virchand Lalchand, and (4) Vithu Mumbaji, in the Court of the First Class Subordinate Judge at Poona, and sought to establish his right, as first purchaser, of certain moveable and immoveable property belonging to defendant No. 1, who, subsequently to plaintiff's agreement to purchase, sold it to the other defendants. He also sought to compel defendant No. 1 to execute a deed of sale of the said property in his name. The plaint stated that defendant No. 1, had through her attorneys, Messrs. Hearn, Cleveland and Peile, advertised for sale, in the *Bombay Gazette* of the 9th March 1874, certain moveable and immoveable property belonging to her, and situated in the village of Angur, near Junnar; that on the 26th May 1874 he (plaintiff) wrote a letter (Ex. No. 3) to the attorneys, offering to purchase the property for Rs. 14,000 on certain conditions and to deposit Rs. 1,000 as earnest-money, in case his offer was accepted; that on the 27th May 1874 the attorneys informed him, in reply (Ex. No. 4), that defendant No. 1 agreed to sell the property to him, and they required him to pay Rs. 1,000 as earnest-money according to his own offer; that thereupon he paid the amount of the deposit to the attorneys on the same day, and obtained a receipt (Ex. No. 5) from them for the payment; that subsequently he, through his attorneys, sent two letters, dated the 8th and 16th June 1874, to the attorneys of defendant No. 1, and requested them to send the necessary title-deeds to enable his solicitors to prepare

(1) L.R. 4 Ch. 741. (2) 14 M. I. A. 129 = 9 B.L.R. 433. (3) 1 B. 194.

a deed of conveyance; that some further correspondence passed between the plaintiff and defendant No. 1 on the 19th June 1874, in which the latter agreed to furnish the necessary title-deeds and to sell the property to the plaintiff; that, notwithstanding all this, defendant No. 1 sold the property to the other defendants, and executed a deed of sale to them on the 20th June 1874. The plaint submitted, that defendant No. 1 had, by reason of her agreement with the plaintiff, no right to sell the property in dispute to the other defendants, and that they had full knowledge of [129] the prior agreement entered into by defendant No. 1 with the plaintiff, for the sale, to him, of the property which they had, notwithstanding such knowledge, in fraudulent collusion with defendant No. 1 and with a view to cause loss to the plaintiff, purchased from defendant No. 1.

Defendant No. 1 (Mrs. Dickinson) did not appear to answer the claim, nor did she file any written statement. She, however, appeared by her attorney at a subsequent stage of the hearing. The allegations in the written statements of defendants 2, 3 and 4 were, that the sale of the property in dispute by defendant No. 1 to them was prior to the plaintiff's purchase of it; that they had no knowledge whatever of the plaintiff's purchase till the completion of their own; that they held a duly-registered conveyance from defendant No. 1, and were in possession of the property, which was duly transferred to their names in the Government books; that the plaintiff's purchase was subsequent to their own, and, therefore, null and void; and that Messrs. Hearn, Cleveland and Peile had no authority to sell the property. The Subordinate Judge framed issues and recorded the evidence offered by the parties. He found that the agreement by defendant No. 1 with the plaintiff for the sale of the property, was completed prior to her agreement with the defendants 2, 3 and 4, and that they had notice of the plaintiff's prior agreement before their deed of sale was executed to them by defendant No. 1 on the 20th June 1874. He accordingly, made a decree in the plaintiff's favour for specific performance by Mrs. Dickinson, the first defendant, and declared the plaintiff entitled to all the rights of a prior purchaser against the defendants 2, 3 and 4. The Subordinate Judge thus disposed of the objection taken by the defendants to Ex. 4 and 5 (Messrs. Hearn, Cleveland and Peile's letter of the 26th May to the plaintiff and their receipt dated 27th May for the earnest-money, both of the 27th May 1874) on the question of registration:—

"A fourth objection was raised on the point of registration. This point was much discussed in the course of the argument. It was contended that the Exs. Nos. 4 and 5 (i.e. the solicitor's letter accepting the plaintiff's offer and the receipt for Rs. 1,000 [130] earnest money) not being registered, could not be received as evidence of contract, and that no oral evidence could be received in the place of these exhibits. It was argued, moreover, that if these exhibits were put aside, the plaintiff had no cause of action. I overruled this objection, because it is plain that the contract in this case was an oral contract, and was never reduced to writing. The case in the Privy Council, which has overruled the previous judgment of both the Calcutta and Bombay High Courts (*vide Futtechand Sahoo v. Leelumbar Singh Doss* (1)), relates to preliminary written agreements of the nature provided for in cls. 2 and 3, s. 17 of the Registration Act. It does not apply to oral contracts like the one in dispute in this case. Giving the utmost efficacy

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to the ruling of the Privy Council, which by the bye, has not been followed by the Bombay High Court (2), it can only shut out Ex. No. 5 (the receipt) from being received as evidence of the contract. It in no way affects Ex. 4, which is only an attorney's letter communicating to the plaintiff the acceptance of defendant No. 1 contained in her letter to her attorneys. Neither Ex. 4 nor 5 constitute the agreement which was formed by the letter of the 26th May, communicating plaintiff's verbal offer and the reply sent to it by defendant No. 1 accepting that offer. The question of registration, therefore, does not arise in this case. There is nothing in the registration law to prevent oral agreements from being negotiated by means of letters sent through post. Exhibits 4 and 5 are both dated 27th May, one day after the agreement was completed by means of the written communication through the attorneys."

The defendants 2, 3 and 4 filed an appeal in the High Court against the decision of the Subordinate Judge. Mrs. Dickinson (defendant No. 1) did not join in it.

The appeal was first argued for three days before a Division Bench (Westropp, C.J., and Nanabhai Haridas, J.) which then referred for the consideration of a Full Court the question of [131] registration fully hereinafter stated in the judgment of that Court, the argument before which occupied three further days.

Inverarity and Telang (with them *Bhairavnath Mengesh and M. C. Apte*), for the appellants.—The four documents, *viz.*, the advertisement, the plaintiff's letter offering to purchase, the attorneys' letter of acceptance, and the receipt, but especially the three latter (Exs. 3, 4 and 5) contain a contract for the sale of immoveable property. The plaintiff claims the property in dispute by virtue of these writings, and has based his suit on them. They are, therefore, "instruments" within the meaning of the Registration Act (No. VIII of 1871), s. 17, cl. 2, as they purport or operate to create an interest in immoveable property of the value of more than Rs. 100. The fact that they contemplate a future conveyance, does not dispense with the necessity for their registration. The payment of the deposit money, Rs. 1,000, referred to in the receipt (Ex. No. 5), is a distinct acknowledgment of a part of the consideration money agreed to between the parties. Such acknowledgments are expressly required to be registered by cl. 3, as decided in *Valaji Isaji v. Thomas* (2). But an acknowledgment of this kind is only made or required when an "interest" in land has been created. The word "instrument" includes writings like the documents in question: Wharton's Law Lexicon, Title, Instrument, p. 490 (4th ed.), p. 467 (3rd ed.). The stamp laws, for instance, Act No. VIII of 1869, impose stamp duties on certain instruments'. In both the schedules there are many informal documents under the head of "instruments," such as an appraisement of valuation of property, &c.: sch. I, art. 21. An 'instrument' does not necessarily mean a formal document. The term includes any writing which is evidence of a contract or which creates an obligation. Letters of several descriptions are charged with fixed stamp duty under the head of "instruments" sch. II, arts. 2, 11, 29, 31. [MELVILL, J.—There does not appear to be in the Registration Act any machinery for registering or compelling the registration of letters.] It is no answer, for a person who enters into a contract for the purchase of land, to say: "I have entered

(1) *Vide Jusub Haji Jafar v. Haji Gul Mahomed*, 12 B.H.O.R. 175; *sed vide etiam Valaji Isaji v. Thomas*, 1 B. 194.

(2) 1 B. 190.

into the contract in such a manner that the Registrar would not be [132] bound to register it." The intention of the Registration Act is, that no interest is created in immoveable property by a writing, unless such writing is registered. The letters of the 26th and 27th May (Exs. Nos. 3 and 4), containing the plaintiff's offer and the acceptance, operate to create an interest in immoveable property. They ought, therefore, to be registered. In *Dwarkanath Mitter v. Sarat Kumari Dasi* (1), the High Court of Calcutta held a similar letter to create an interest in land, and to be inadmissible in evidence, because it was unregistered. In *Futtechand Sahoo v. Leelumber Singh Doss* (2), the Privy Council held an agreement, though it contemplated a future conveyance, to be an instrument of which the registration was compulsory. The receipt (Ex. No. 5) must also be registered, at least for the purpose of passing the land. The parties were aware that they were entering into a formal contract by these documents for the sale and purchase of land. All, or so many of them, therefore, as the plaintiff requires in support of his claim to the property, ought to be registered. The object of the Registration Act is to avoid clandestine alienations by means of writings. The Court will interpret the Act in such a manner as to promote that object, and advance the remedy. The learned counsel referred to the following English cases in which letters were called "instruments" by the Judges:—*Butts v. Swan* (3), *Jones v. Simpson* (4), *Knight v. Barber* (5), *Horsfall v. Key* (6), *Diplock v. Hammond* (7).

Marriott (Advocate-General) and *Pigot* (with them *Lynch* and *Tobin*, and *Bamanji Phirozeshah*), for the respondent.—The present case is on all fours with the decision of Sargent, J., in *Jusab Haji Jafar v. Haji Gul Muhamad* (8). The letters in question are not "instruments" within the meaning of Act No. VIII of 1871, s. 17. An "instrument" is a formal document which contains all the terms, and is a complete contract by itself. These letters evidently contemplate a future conveyance, and form only a preliminary [133] agreement to such a conveyance. They pass no estate by themselves, although they constitute a contract preliminary to the passing of the estate. The Privy Council held in the *Port Canning Company v. Smith* (9) that letters similar to those in the present case did not require registration. The learned counsel also referred to *Bunwari Lal and others v. Sungum Lal and others* (10), *Asgur Ali Shikdar v. Mothuranath Ghose* (11), *Currie v. Muthu Ramen Chetty* (12), *Haji Abdul Vidona Jonas v. Haji Harone Esmile* (13), where documents were held not to require registration. Counsel also referred to *Wall v. Bright* (14), *Wigg v. Wigg* (15) and *Frere v. Moore* (16).

Inverarity in reply cited *Seton v. Slade* (17), *Attorney General v. Brunning* (18), *Crockford v. Alexander* (19), *Hull v. Vaughan* (20), *Wright v. Stansfield* (21), *Neve v. Pennell* (22), *Moore v. Culverhouse* (23), *Toolseeram v. Mannoall* (24) *Shankar Ramachandra v. Vishnu Anant* (25).

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| (1) 7 B.L.R. 55. | (2) 14 M.I.A. 129=9 B.L.R. 433=16 W.R.P.C. 26. |
| (3) 4 Moore 484=2 Brod. & B. 78. | |
| (4) 3 Dow. & Ry. 545=2 B. & Cr. 319. | |
| (5) 16 M. & W. 66=16 Law. J. Ex. 18. | |
| (6) 2 Exch. 778=17 Law. J. Ex. 266. | |
| (7) 23 Law. J. Ch. 550. | (8) 12 B.H.C.R. 175. |
| (9) 1 I. A. 124. | (10) 7 W. R. 280. |
| (11) 15 W. R. 355. | |
| (12) 3 B.L.R. A.C. 126. | (13) 7 B.L.R. App. 21. |
| (14) 1 Jac. & W. 494. | (15) 1 Atk. 382. |
| (16) 8 Price 475. | |
| (17) Wh. & Th. L. C. 468 (3rd ed.). | (18) 8 H. L. 243 (254.) |
| (19) 15 Ves. 138. | (20) 6 Price 157. |
| (21) 28 Law. J. Ch. 189=27 Bea. 8. | (22) 2 H. & M. 170. |
| (23) 27 Bea. 639. | (24) 1 W.R. 353. |
| | (25) 1 B. 67. |

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The Court referred to *Somu Gurrukul v. Rangummal* (1).

JUDGMENT.

The following is the judgment of the Full Bench delivered by WESTROPP, C.J.—The facts for the purposes of obtaining the decision of this Bench are stated as follows in the reference made by the Division Court:—

“In the *Bombay Gazette* of the 9th March 1874 the following advertisement appeared;—

“For Sale—sale of valuable landed property

“The well-known estate, called Hafiz Bagh, situated near the town of Junnar, Poona Collectorate, the property of the late J. C. Dickinson, Esquire, containing 64 acres 4 guntas. There is not [134] in the Poona zilla a more compact farm. It has a fine running stream of water for irrigation, is well stocked with fruit and other trees, the whole enclosed in a good live fence, and the soil is equal to any in the taluka. There is also a good substantial residence, with out-houses and stables. Also a good copper still house and all necessary requirements for immediate use, a good sugar house, sugar-pans, and sugar-mills in good working order, and a growing crop of sugarcane. Farming implements, cart, buggy, shigram, working bullocks, cow, calves, buffalo, &c. For a native gentleman it is admirably adapted for a residence. The garden is well stocked with fruit trees, consisting of guava, mango, fig, grapes, orange, lime, pumallo, pomegranates, tamarinds, jack, custardapples and others. Also in the village of Belsar, 5 acres of land at a yearly rent of rupees thirty (30) per acre. For particulars apply to Messrs. Hearn, Cleveland and Peile, Solicitors, Parsi Bazar Street, Bombay, or Messrs. Morgan and Balkrishna, Auctioneers, Poona.”

The plaintiff having read that advertisement, entered into a negotiation with Messrs. Hearn, Cleveland and Peile, as solicitors for the first defendant, who was then the widow and administratrix of the late Mr. Dickinson, whose name occurs in that advertisement for the purchase of so much of the property therein mentioned as is referred to by the plaintiff in the following letter (Ex. No. 3) in which the negotiation resulted:—

“26th May 1874.

“Messrs. HEARN, CLEVELAND AND PEILE.

“Gentlemen,

“With reference to the interview which I have to-day had at your office, I hereby offer to purchase, for the sum of Rs. 14,000, all the right, title and interest of the administratrix of the late Mr. John Chorrington Dickinson in the under-mentioned lease-hold properties:

“1. The estate, known as Hafiz Bagh, containing 64 acres and 4 guntas or thereabouts, situate at Junnar in the village of Angur, tarat Haveli, taluka Sewari, zilla Poona, including the bungalows and out-houses standing thereon, and including also copper still and machinery and implements for the manufacture of [135] rum and sugar, and the farming implements and live stock belonging to the said estate.

“2. The Mori Guteurri, or sufferance pasture lands, situate at Junnar, aforesaid Nos. 58, 59 and 62, containing, respectively, 29 acres and 6 guntas, 28 acres and 13 guntas and 13 guntas.

"It is understood that I am to purchase the interest of the administratrix in the said properties, subject to all rents, taxes, &c., payable in respect thereof to Government.

"I agree to pay all costs of and incidental to conveying the interest of the said administratrix in the said premises to me; but all broker's commission must be paid by Mrs. Dickinson. In the event of this offer being accepted, I am prepared to pay a deposit of Rs. 1,000 as earnest money.

"I also agree to pay the balance of the purchase money within a month from this date on execution of the conveyance by the administratrix.

"Yours obediently,
DHONDIBA CRUSTNAJI PATEL."

On the following day, Messrs. Hearn, Cleveland and Peile, with the authority of Mrs. Dickinson, addressed to the plaintiff the following reply (Ex. No. 4) to his letter of the 26th May 1874:—

"Bombay, 27th May 1874.

"Mr. DHONDIBA CRUSTNAJI PATEL.

"Sir,

"We are instructed by Mrs. Dickinson to state that she accepts the offer contained in your letter of the 26th instant.

We shall be obliged by your at once depositing with us Rupees one thousand, the earnest-money therein mentioned.

"Yours truly,
HEARN, CLEVELAND AND PEILE."

Subsequently, on the same 27th of May 1874, the plaintiff, pursuant to the stipulation contained in the letter of the 26th May 1874, paid to Messrs. Hearn, Cleveland and Peile for Mrs. Dickinson, in respect of the purchase, Rupees 1,000 earnest-money, [136] and obtained from them the following receipt (Ex. No. 5) bearing a one-anna receipt stamp:—

"Bombay, 27th May 1874.

"Received from Dhondiba Crustnaji Patel the sum of Rupees one thousand only, being in part payment of the sum of Rupees fourteen thousand, the amount for which the said Dhondiba Crustnaji Patel has agreed to purchase the Hafiz Bagh Estate at Junnar of the widow and administratrix of the late Mr. J. C. Dickinson, deceased.

"HEARN, CLEVELAND AND PEILE."

one anna
receipt
stamp.

The plaintiff has never had possession of the property mentioned in the letter of the 26th May 1874 agreed by him to be purchased and by Mrs. Dickinson to be sold.

The Division Court referred to a Full Bench the question, whether the foregoing documents, or any of them, required registration under Act

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VIII of 1871, and in relation to that question mentioned for consideration the case of the *Port Canning Company v. Smith* (1).

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It was not contended that the advertisement of the property for sale needed registration.

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The next document (Ex. No. 3), namely the plaintiff's letter of the 26th May 1874, containing his offer to purchase a portion of the property specified in the advertisement, it was at first argued, needed registration, but eventually this was not persisted in. That document clearly is not comprised within the only portion of Act VIII of 1871, namely, the second clause of s. 17 mentioned with respect to it. Being a mere offer to purchase on certain conditions, it was not an instrument which purported or operated to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, &c., of the value of Rs. 100 and upwards to or in immoveable property.

[137] It was strongly insisted upon for the appellants that the next document needed registration. It is Messrs. Hearn, Cleveland and Peile's letter of the 27th May 1874 (Ex. No. 4), in which they say that they are instructed by Mrs. Dickinson to accept the offer contained in the plaintiff's letter of the 26th instant; and they add a request that the plaintiff should immediately deposit with them (the writers) the Rs. 1,000 earnest-money mentioned in the plaintiff's letter of the 26th May 1874. Looking to that letter we find that what the plaintiff had said as to the Rs. 1,000 was this—"In the event of this offer being accepted, I am prepared to pay a deposit of Rs. 1,000 as earnest-money; I also agree to pay the balance of the purchase money within a month from this date on execution of the conveyance by the administratrix." The effect of this passage, connected with what Messrs. Hearn, Cleveland and Peile have said as to the Rs. 1,000 in their letter of the 27th May, is, in our opinion, that the acceptance of the plaintiff's offer was conditional on his payment of the Rs. 1,000 as earnest-money, the name given to that payment by both parties, and therefore that, until that sum was paid, no estate, legal or equitable, in the property passed from Mrs. Dickinson to the plaintiff. Hence, this letter of Messrs. Hearn, Cleveland and Peile, no more than the previous letter of the plaintiff, fell within the second clause of s. 17 of Act VIII of 1871, as purporting or operating to create, &c., any right, &c., in immoveable property.

The subsequent payment (on the same day) of the sum of Rs. 1,000, by the plaintiff, to Messrs. Hearn, Cleveland and Peile, in our opinion, did complete the contract for sale. And this is so, independently of the written receipt of the 27th May given for it after the payment. It was the payment of the Rs. 1,000, and not the giving of the written receipt for it, which perfected the contract. And oral evidence was admissible to prove that payment notwithstanding the existence of the written receipt—(Indian Evidence Act (I of 1872), Illustration (e) to s. 91).

We have made this last remark as to oral evidence, because we think that the fourth document mentioned in the reference, namely the written receipt, does fall within the third clause of s. 17 [138] of Act VIII of 1871, it appearing to us to be distinctly an acknowledgment of the receipt or payment of consideration on account of the creation of a right, title or interest in immoveable property of the value of upwards of Rs. 100. We think that clause includes, within its scope, a payment of a part of the consideration as well as a payment of the whole of it. The words "on

(1) 1 I. A. 124.

account of " the creation, &c., aid us in arriving at this conclusion. The letter of the plaintiff, of the 26th May, as well as the receipt itself, shows that the payment of the Rs. 1,000 deposit was made " in part payment of the sum of Rs. 14,000, the amount for which" the plaintiff had agreed to purchase the property from Mrs. Dickinson. In *Valaji Isaji v. Thomas*(1), one of the grounds on which the document, there in question, was held to be compulsorily registrable, was that it acknowledged the payment of Rs. 100 as earnest-money for a purchase of immoveable property for Rs. 4,300; the Division Bench, which decided that case, being of opinion that the Rs. 100 was a part payment on account of the consideration money. A payment of five shillings as earnest-money, in relation to a purchase, in England, of real estate for £775, was, on demurrer, held in *Portage v. Cole* (2) to be a part payment of the £775. The observations of Lord Eldon in *Main v. Melbourne* (3), as to payment of a small sum to bind the bargain, have relation only to the fourth section of the statute of frauds, and have no bearing upon the present question. If the statute of frauds ever were in force in the Mofussil of this Presidency as regards Europeans, Parsis or Eurasians (for it certainly was not in force there in respect to Hindus or Mahomedans), it ceased to be so on the coming into effect of the Indian Contract Act by which it was repealed. However, there cannot be any doubt here that the payment of Rs. 1,000, as a deposit, was a part payment of the Rs. 14,000, as well as an earnest to bind the bargain. As a matter of fact, I have never in this country met [139] with an instance in which the payment of earnest-money was not intended to be a part payment of the consideration.

Further, as to the letters of the 26th and 27th May (Ex. Nos. 3 and 4), and independently of the circumstance that neither of them appears nor indeed do both collectively appear, to us to create any right or interest in immoveable property, we have strong doubts that, even if they did constitute a complete contract for sale,—unincumbered by the necessity for the payment of the deposit by way of earnest, they could be regarded as 'instruments' within the meaning of s. 17 of Act VIII of 1871. No provision appears to have been made for registering a contract lying in letters, similar to the provision in the Stamp Acts with respect to an agreement lying in letters (see, for example, Act XVIII of 1869, sch. II, art. 11), or to the provision in s. 15 of the Irish Registration Act (6 Anne, c. II) and in s. 7 of the Middlesex Registration Act (7 Anne, c. XX), where "the conveyance or security" is contained in more writings than one. The term "instrument" itself (although no doubt of considerable capacity) does not, as defined by Mr. Wharton in his Law Dictionary (4), much aid in the supposition that ordinary letters in a negotiation for a purchase of immoveable property were intended to be comprised within the scope of that term. He says: "Instrument, [*instrumentum*, Lat. fr. *instruo*, to prepare or provide], a formal legal writing, e.g., a record, charter, deed, or written agreement."

The view which we have taken of the letters of the 26th and 27th May 1874, namely, that neither separately nor collectively did they constitute a complete sale, renders it unnecessary for this Full Bench to consider here the other ground on which *Valaji Isaji v. Thomas* (1) was

(1) B. 190.

(2) 1 Wms. Saunders 319 l, 320 (5th ed.) by Patteson and Williams. And see *Bach v. Owen*, 5 T. R. 409. See also Sugden's Vendors, p. 48, 11th ed.), ch. 1 sec. iv. pl. 16.

(3) 4 Vesey Junior, 722.

(4) P. 490, 4th ed.

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decided, *viz.*, that under a written agreement for sale, such as existed there, such an equitable interest, in the property sold, passed to the vendee (although a further conveyance was contemplated, as to bring the written agreement within cl. 2 of s. 17 of Act VIII of 1871, or to consider whether the subsequent legislation in Act III of 1877, s. 17, cl. (h)), has shed any light upon the law as it stood in this country previously to the latter enactment.

[140] It would perhaps be difficult, when we compare *Wall v. Bright* (1) with the observations of Wood, V. C., in *Benham v. Keane* (2) and with the more recent cases of *Lysaght v. Edwards* (3) and *Earl Egmont v. Smith* (4), to assert with much confidence that there has been complete harmony amongst the English authorities as to the effect of a contract for sale. On the question as to the effect of such a contract in India, the important case of *Futtechand Sahoo v. Leelumber Singh Doss* (5) should be considered, as well as that of the *Port Canning Company v. Smith* (6). I may take this opportunity of saying that my remark in *Valaji Isaji v. Thomas* (7), that the whole of the consideration for the sale in *Futtechand Sahoo v. Leelumber Singh Doss* (5) had been paid, seems to be an error caused by the assertion to that effect in the statement of that case at p. 434 in 9 Beng. L. R., and that on looking to the concluding portion of the judgment of Her Majesty's Privy Council in that case at p. 440 we find their Lordships saying: "It may be that the appellant" (the purchaser) "may be able partially to obtain relief, since part of the consideration money seems to be still in his hands;" and this is quite reconcilable with what is said as to the consideration money in the agreement which is set forth in 9 Beng. L. R., p. 434, though not in 14 Moore's Ind. Appeals, where the report is very meagre. The whole consideration money was Rs. 22 500: the receipt of Rs. 7,500, part thereof, by the vendors is expressly acknowledged by them in the agreement; but, as to the residue, they there say: "The balance Rs. 15,000 we made a transfer to Colonel Hamdil on account of the mortgage of the mauzas and kamats (the property sold) aforesaid," but there is not any statement that the plaintiff (the vendor) had paid over those Rs. 15,000 to Colonel Hamdil, and what is said as to the transfer means no more than that the vendors had authorized Colonel Hamdil to receive it. This circumstance, that only a part of the consideration had been paid or acknowledged in [141] that case, renders its resemblance to the case of *Valaji Isaji v. Thomas* more perfect than I had, when deciding the latter, supposed to be the fact. In a much earlier case, *Lala Chunilal Nagindas v. Savaichand Naredas* (8), which originated in the zilla of Kaira, the Privy Council in 1835, reversing a decree of the Sadr Adalat of Bombay, allowed a *satakhata*, being articles of agreement for the sale of three houses situate at Oomrut, and which contemplated the execution of a further and more formal conveyance, to prevail against an execution-creditor who had subsequently, upon a money decree against the vendor, obtained an attachment against the houses. Mr. Justice Vaughan, in giving the judgment of their Lordships, said: "As to the objection to the validity of the deed, founded on the fact of its not

(1) 1 Jac. & W. 494.

(2) 1 Johns & Hem, 685, 697; affirmed on appeal 3 De Gex, F. & J. 318.

(3) L. R. 2 Ch. Div. 499.

(4) L. R. 6 Ch. Div. 469, 475.

(5) 14 M. I. A. 129=9 B.L.R. 433.

(6) 1 I. A. 124.

(7) 1 B. 194.

(8) 5 W.R. 111. P. C = 1 Morley Dig. p. 106=3 P. C. Cases, Case 6.

being a complete and final deed of sale, inasmuch as the parties contemplated the execution of a more formal conveyance, the Lords of the Council are unanimously of opinion, that it was sufficient to bind the property, and to give to the appellant the right to demand a specific performance of the contract, and the execution of such further assurances as might be deemed necessary to invest him with a complete legal title to the houses which were the subject-matter of this appeal." The parties in that case were Hindus.

In reply to the reference, we state it to be our opinion that the advertisement of the 9th March 1874 and the letters of the 26th and 27th May 1874 did not, nor did any of them, require registration in order to render them admissible in evidence. The receipt, in writing, of the 27th May 1874 for Rs. 1,000 deposit, we think, is inadmissible in evidence, as we hold that it falls within cl. 3 of s. 17 of Act VIII of 1871, and, therefore, needed registration; but we think that oral evidence to prove the making of that payment was admissible.

After the above decision of the Full Court on the question referred to it, the Division Bench proceeded to dispose of the case on the other points as follows:—

WESTROPP, C. J.—Upon all of the questions argued in this case, and which were material in it, except the question as to the [142] necessity for the registration of the four documents mentioned in the reference to the Full Bench, Mr. Justice Nanabhai Haridas and I expressed our opinion immediately upon the termination of the argument, which lasted over several days, in the Division Court, and stated our reasons *viva voce* for the conclusions at which we arrived. It is unnecessary now to repeat those reasons, but it is desirable briefly to recapitulate the conclusions.

1st. We were of opinion that the first defendant, Mrs. Dickinson (since become Mrs. Bayley, and who has not joined her co-defendants in the present appeal), entered, through her duly authorized agents, Messrs. Hearn, Cleveland and Peile, on the 27th of May 1874 into a contract for the sale of the property, as to which specific performance is claimed by the plaintiff and decreed by the First Class Subordinate Judge of Poona in an elaborate judgment, which is a testimonial to his industry and ability.

2nd. We were of opinion that the said contract for sale was prior in date to the contract for sale relied upon on behalf of the second, third and fourth defendants, and that the receipt, purporting to be dated the 26th May 1874 (Ex. 26) for Rs. 100 signed by Mr. Smith, was not so signed upon the day on which it bears date, or until subsequently to the 1st of June 1874, and that it is a colourable and fraudulent receipt, and not the record of any *bona fide* transaction or payment of money, and that Mr. Smith had not any authority from the first defendant, Mrs. Dickinson, to give any such receipt.

3rd. That the plaintiff had not possession of any of the property, the subject of the contract of sale to him. This question is no longer material. Having established his contract and its priority to that of the defendants 2, 3 and 4, and knowledge of his contract by them, whether he was in possession or not, is a matter of indifference.

4th. That there is evidence *dehors* the written receipt of the 27th May 1874 of the payment of Rs. 1,000 deposit on that day by the plaintiff to Messrs. Hearn, Cleveland and Peile, on behalf [143] of, and for Mrs. Dickinson, after the giving by Messrs. Hearn, Cleveland and Peile,

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of the letter of the 27th May 1874 to the plaintiff. Such evidence is to be found in the deposition of the plaintiff, also in the deposition of Mr. Cleveland and in the bill of costs of Messrs. Hearn, Cleveland and Peile put in by Mr. Turner for the first defendant without objection, and used in the Subordinate Judge's Court by all of the defendants, as well as by the plaintiff, as stated at p. 3 of the printed judgment of the Subordinate Judge.

5th. That the objection, made at the hearing of the appeal, that the second, third and fourth defendants were not properly made parties to this suit against the first defendant for specific performance of her contract with the plaintiff, inasmuch as the second, third and fourth defendants were no parties to that contract (for which proposition Mr. Inverarity cited *Tasker v. Small*(1) and *De Hoghton v. Money*(2),) not having been taken at the hearing before the Subordinate Judge, and no issue having been sought from him on that point, and the second, third and fourth defendants, having been then satisfied to have the merits of their alleged contract for purchase of the lands inquired into and decided in this cause, they cannot on appeal be permitted to raise such an objection for the first time.

It having been determined by the Full Bench that the advertisement and the letters of the 26th and 27th May 1874 were admissible in evidence, although unregistered and it being proved *dehors*(3) the written receipt of the 27th May 1874, that the deposit of Rs. 1,000 was paid by the plaintiff to Mr. Cleveland on the 27th May 1874, the Subordinate Judge (First Class) was perfectly right in decreeing that the first defendant was bound specifically to perform her contract for sale to the plaintiff; and as the defendants Nos. 2, 3 and 4 had notice of such contract before they entered into their contract with the first defendant, and as Acts I and XIX of 1843 are repealed by Act XVI of 1864, the Subordinate Judge was right in decreeing that the plaintiff's [144] contract was entitled to preference over that of the second, third and fourth defendants with the first defendant, and, consequently the conveyance by the first defendant to the second, third and fourth defendants is void as against the plaintiff.

This Court, therefore, affirms the decree of the Subordinate Judge (First Class), and directs the second, third and fourth defendants to the plaintiff his costs of this appeal.

Decree affirmed.

February 25, 1880. A petition of review having been presented in the above case on behalf of the appellants:—

Macpherson now, for them, moved (4) *ex parte* for an order *nisi* for review of judgment on the first ground only, mentioned in the petition, *viz.*, that the Division Bench "was in error in holding the respondent's claim superior to that of the appellants, whose deed of purchase is registered and accompanied by possession."

WESTROPPE, C. J. said that the Division Bench, while finding that the plaintiff (respondent) never had possession under his contract, held that fact to be immaterial in this particular case, saying that the plaintiff "having established his contract and its priority to that of the second, third and fourth defendants, and knowledge of his contract by them, whether he was in possession or not was a matter of indifference." The Division Bench was clearly of opinion, on the facts proved in the case, that the second, third and fourth defendants obtained possession under

(1) 3 Myl. & Cr. 63. (2) L. R. 2 Chan. App. 164. (3) "Independently of."

(4) This motion was made before the Chief Justice alone, as Nanabai Haridas, J., had retired from the Bench.

their contract (which was entered into subsequently to that of the plaintiff) by fraudulent collusion with Mrs. Dickinson (the first defendant), and thus prevented the plaintiff from obtaining possession under his contract. That point had not been dwelt upon at any length by the Division Bench, inasmuch as it had found that the second, third and fourth defendants had full personal knowledge, at the time they entered into their contract with Mrs. Dickinson, of her previous contract with the plaintiff, and it appeared in the judgment of the Subordinate Judge, that, before him, it was, on behalf of the defendants, "admitted that the equitable doctrine which relegates a purchaser [145] with notice to the position of the seller as against the prior purchaser, must govern this case," if the priority of the plaintiff's contract and notice of it by the defendants were established. It was not disputed that Mrs. Dickinson (who has been stated to be a Eurasian lady, *i.e.*, an Indo-British Christian) was in possession of the property at the time of her contract to sell it to the plaintiff, who is a Hindu; and her position was, that a suit by the plaintiff for specific performance of that contract would lie against her. Her three co-defendants, with whom she had colluded, were Hindus.

Macpherson said that, under such circumstances and after considering the authorities, he feared that he could not successfully maintain that the admission, made, on behalf of his clients, before the Subordinate Judge, was erroneous in point of law. The language of ss. 48 and 49 of the Registration Act (VIII of 1871) does not appear to be stronger than that of ss. 4 and 5 of the Irish Registration Statute, 6 Anne, c. II (1), [146] notwithstanding which, an unregistered mortgage or deed of sale of property would, in Ireland, be preferred to a subsequent but registered mortgage or deed of sale relating to the same property, if the party claiming under the registered instrument had, at the time of the execution thereof, actual notice of the previous unregistered instrument. Lord Cairns, C., and Lord Selborne, in their speeches in the House of Lords in

(1) The object of registration is, in the first section of the Irish Act (6 Anne, c. II) stated to be "for securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements and hereditaments"; and that section provided for the establishment of a Registry office. The third section enacted "that a memorial of all deeds and conveyances which, from and after the 25th day of March A.D. 1708, shall be made and executed, and of all wills and devises in writing, made or to be made and published, where the devisor or testatrix shall die after the said 25th March 1708, for or concerning and whereby any honours, manors, lands, tenements or hereditaments within this kingdom (Ireland) may be any ways affected may, at the election of the party or parties concerned be registered in such manner as is hereinafter directed." The 4th section enacted "that every such deed or conveyance, a memorial whereof shall be duly registered according to the rules and direction in this Act prescribed, shall, from and after the said 25th March 1708, be deemed and taken as good and effectual both in law and equity, according to the priority of time of registering such memorial for and concerning the honours, manors, lands, tenements and hereditaments in such a deed or conveyance mentioned, or contained, according to the right, title and interest of the person or persons so conveying such honours, manors, lands, tenements and hereditaments against all and every other deed, conveyance, or disposition of the honours, &c. &c., or any part thereof comprised or contained in any such memorial as aforesaid." The 5th section enacted "that every deed or conveyance not registered, which shall be made or executed from and after the 25th day of March 1708, of all or any of the honours, manors, lands, tenements or hereditaments comprised or contained in such a deed or conveyance, a memorial whereof shall be registered in pursuance of this Act, shall be deemed and adjudged as fraudulent and void; not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors by judgment, recognisance, statute merchant, or of the staple, consigned acknowledged or entered into from and after the 25th day of March aforesaid, as for and concerning all or any of the honours, manors, lands tenements or hereditaments, contained or expressed in such memorial registered as aforesaid."

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The Agra Bank v. Barry (1), admitted that, upon the authorities, this is the well-established doctrine of equity, but held that there was not in that particular case any actual notice or constructive notice accompanied by fraud, which would give scope for the application of that doctrine. The same doctrine is applicable to cases arising under the Middlesex Registry Act. In *Lee v. Clutton* (2), a case recently decided by Jessell, M.R., he, while holding that, there being only an imputation of *constructive* notice of an unregistered charge unaccompanied by any allegation of fraud on the part of the party who obtained the registered deed, the latter deed must prevail, yet admitted that the result would have been different if there had been actual notice of the unregistered charge, or constructive notice of it accompanied by fraud. Counsel also mentioned *Jivandas Keshavji v. Framji Nanabhai* (3).

WESTROPP, C. J.—The question as to the effect of actual notice to the second, third, and fourth defendants, of the contract by the first defendant, Mrs. Dickinson, to sell property, the subject of this suit, to the plaintiff, was not submitted by the Division Bench to the Full Bench, because, as already mentioned in the course of the hearing of the present petition of review, the defendants had, in the Court of the Subordinate Judge, admitted that the equitable doctrine which relegates a purchaser with notice to [147] the position of the seller, as against the prior purchaser, must govern this case, if the priority of the plaintiff's contract and notice of it by the defendants were established. And the investigation of the matter in dispute between the parties proceeded in that Court upon the basis of that admission. Under such circumstances there would be some difficulty in now permitting the defendants to withdraw it, even if it were erroneous in point of law. It does not, however, seem to have been so.

The contract for sale to the plaintiff was proved partly by two letters of the 26th and 27th May 1874 and partly by oral evidence of the payment of earnest-money to complete the bargain. The Full Bench held those letters not to be registrable documents within the meaning of the 17th section of the Indian Registration Act (VIII of 1871), and, therefore, not to be within s. 49 of the same Act, and consequently, not excluded by it from being received in evidence. That circumstance distinguishes this case from *Hicks v. Powell* (4), *Futtechand Sahoo v. Leelumber Singh Doss* (5), and *Valaji Isaji v. Thomas* (6).

In the first mentioned of those three cases, the successful party, who claimed under a registered mortgage of 1866, appears to have had notice (whether actual or constructive, is not stated in the report) of an unregistered but registrable deed of the 24th April 1865, executed by the same grantor (the mortgagor of 1866), declaring the trusts of the proceeds of the intended sale to be for the benefit of the creditors of a firm of which he was a member. The deed of the 24th April 1865 having been registrable, but not registered, it was inadmissible in evidence; and that circumstance *per se* was sufficient ground for the disposal of the suit; as the parties claiming under that deed were thus rendered unable to prove their case. The judgment seems, however, to have gone somewhat beyond that point, but, with all due deference to the high authority by whom it was given, I

(1) L.R. 7 Eng & Ir. App. 135.

(2) 45 L.J. Ch. 43. affirmed on appeal: 46 L.J. Ch. 48.

(3) 7 B. H. C. R. O C J 5.

(4) L. R. 4 Chan. 741.

(5) 14 M. I. A. 129=9 B. L.R. 433.

(6) 1. B. 194.

would venture to say, not indispensably for the decision of the case. In the two other cases notice was not an ingredient.

The Irish Registration Act (6 Anne, c. II) and the Middlesex Registration Act (7 Anne, c. XX) differ from the Indian [148] Registration Acts of 1866, 1871 and 1877, in not prohibiting the reception of unregistered but registrable documents in evidence. That distinction is not, however, of importance in this case, so far as regards the letters of the 26th and 27th May 1874, inasmuch as the Full Bench held that those letters are not registrable documents. The circumstance, that those letters were not registrable and, therefore, not excluded from evidence, and the possibility of proving the payment of the earnest-money, tided the plaintiff over the main difficulty in his path. I may take this opportunity of saying that I agree in my brother Melvill's statement of the point actually decided in *Balaram Nemchand v. Appa Dula*(1) made by him in *Sambhubhai v. Shivalaldas* (2).

Those letters being in evidence, the next section to be considered is s. 48 of Act VIII of 1871, which enacts that "all documents not testamentary, duly registered under this Act, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession." In relation to this section, it should be remembered, that registration cannot confer validity upon an instrument which is *ultra vires*, or illegal, or fraudulent. The law of registration was intended to prevent and not to aid fraud. In *Underwood v. Lord Courtown* (3), Lord Redesdale (a high authority on the law of registration) held that the benefit of the Irish Registration Act could not be given to a deed which was not above exception. And in *Latouche v. Lord Dunsany* (4), speaking of the same Act (6 Anne, c. II, Ir.) he said: "The intention was to make priority of registration the criterion of title to all intents and purposes whatever. But this does not exclude anything which affects the conscience of the party himself who claims under the registered deed; it never was the intention of the Legislature to give a priority of right to commit a fraud; but its meaning was that, parties dealing fairly, priority should be given to him who had the [149] registered instrument, and that in equity as well as at law." The rule of equity in England and Ireland is that the person, who purchases an estate (although for valuable consideration) after notice of a prior equitable right, makes himself a *mala-fide* purchaser, and will not be enabled by getting in the legal estate to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat; and, as Lord Hardwicke in *Le Neve v. Le Neve* (5) and Lord King, before him, in *Blades v. Blades* (6) have said, 'fraud or *mala-fides* is the true ground on which the Court is governed in cases of notice.' *Le Neve v. Le Neve* arose in Middlesex, a register county. *Blades v. Blades* arose in Yorkshire, also a register county. In each of those cases, the purchaser with notice had registered his conveyance, and the equitable claimant had neglected to

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(1) 9 B. H.C.R. 121.

(2) *Supra*, 4 B. 89 (92).

(3) 2 Sch. & Lefroy 41 at p. 68; and see 1 C. W. R. 314, and 8 C. W. R. 300.

(4) 1 Sch & Lefroy 137 at p. 159.

(5) Ambler 436, 447; 2 Wh. & Tud. 32, 41, 42 (5th ed.).

(6) 1 Eq. Ca. Ab. 358 pl. 12, *et vide* as to this case the observations of Lord Hardwicke in Ambler, pp. 445, 446, and in 1 Ves. Sen. 68.

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register; and in each the conduct of the purchaser (who had notice of the prior claim) in taking, and of his vendor in giving, the registered conveyance, was deemed fraudulent and collusive. In the *Agra Bank v. Barry* (1), which has been mentioned by Mr. Macpherson, Lord Cairns, C., said: "Your Lordships have been referred to the Act of Anne, which established a registry of deeds in Ireland, and your Lordships have been referred to the authorities which have been decided with reference to the state of the law of registration since the passing of that Act. My Lords, any person reading over that Act of Parliament would, perhaps, in the first instance conclude, as has often been said, that it was an Act absolutely decisive of priority under all circumstances, and enacting that, under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, was not registered till afterwards. But by decisions (2) which have now, as it seems to me, well established the law, and which it would not, I think, [150] expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament, still, if a person in Ireland registers a deed, and if, at the time he registers the deed, either he himself, or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed. And, my Lords, I take the explanation of those decisions to be that, which was given by Lord King in the case of *Blades v. Blades* (3) upwards of 150 years ago, * * * that, inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished, if the person coming to register a deed has, *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case, the notoriety which it was the object of the statute to secure, is effected in a different manner, but effected as absolutely in respect of the person who thus comes to register as if he had found, upon the register, notice of the earlier deed. If that is so, your Lordships will observe that those cases depend, and depend entirely, upon the question of actual notice either to the principal, or to the agent whose knowledge is the knowledge of the principal." Lord Selborne in the same case said (4): "It would, I think, my Lords, be quite inconsistent with the policy of the Registry Act (6 Anne, c. II), which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a latter registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered interests when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent."

The Statute of Inrolment of Deeds of Bargain and Sale (27 Hen. VIII, c. XVI) enacted that "no manors, lands, tenements [151] or

(1) L.R. 7 Eng. & Ir. App. 135, 147.

(2) *Ex. gr.*: *Nixon v. Hamilton*, 2 Dru. & Walsh 364; *Lord Forbes v. Deniston*, 4 Bro. Parl. C. 189, as described by Lord Hardwicke in *Le Neve v. Le Neve*; *Ambler* 436, 444 (*nomine Lord Forbes v. Nelson*); and see 1 Ves. Sen. 64, 67; *Stuart v. Ferguson*, *Hayes* 452.

(3) 1 Eq. Ca. Ab. 358, pl. 12.

(4) L. R. 7 Eng. & Ir. App. 157.

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other hereditaments shall pass, alter or change from one to another; whereby any estate of inheritance or freehold shall be made to take effect in any person or persons or in any use thereof, except the same bargain and sale be made by writing, indented, sealed and inrolled in one of the King's Courts at Westminster, &c. &c., within six months next after the date of the same writings indented." Lord Hardwicke in *Le Neve v. Le Neve* (1), speaking of that statute, said: "What is the meaning of this? Before the making of the Act, any paper writing passed the use from the bargainer to the bargainee, whereby great mischief arose; for it entangled the purchasers, affected and injured the Crown, and was contrary to the rule of law, which required notoriety in purchases by feoffment and livery, &c. But, what has been the construction of this statute ever since? Why, if a subsequent bargainee has notice of a prior, he is equally affected with that notice as if the prior purchase had been a conveyance by feoffment and livery, &c. The operation of both Acts of Parliament (Middlesex Registry Act, 7 Anne, c. XX, and the Statute of Inrolments, 27 Hen VIII, c. XVI) and construction of them is the same; and it would be a most mischievous thing if a person taking advantage of the legal form appointed by an Act of Parliament might, under that, protect himself against a person who had a prior equity of which he had notice."

Section 48 of the Indian Registration Act (VIII of 1871) provides that a document, duly registered under that Act, shall "take effect" against an oral agreement unaccompanied by possession, but that provision cannot be properly applied to a registered document which has been given, accepted and registered in fraud of a third party, as is the case with the registered deed of sale which has been given by the first defendant, and accepted by the other defendants, with full notice of the prior contract of sale to the plaintiff by the first defendant, and, therefore, most clearly and deliberately in fraud of the plaintiff whom by their collusive conduct, all of the defendants have prevented from obtaining from the first defendant a regular conveyance of the property, registration [152] of it, and possession of the property. The second, third and fourth defendants, almost immediately after the first defendant had contracted to sell that property to the plaintiff and after the latter had paid to Mr. Cleveland the earnest-money upon that contract, induced the first defendant, who seems to have been a most vacillating and easily misled person, to depart from her engagement to the plaintiff and to resell to themselves at a higher price; and have, with full knowledge of the plaintiff's prior and equitable claim, successfully struggled to obtain from her, and to register, the conveyance, to which they ask this Court to apply s. 48 in their favour. The object of that section was to prevent fraud; the application of it in favour of the second, third and fourth defendants would be to render fraud triumphant (2). There is this further ground for refusing to those defendants the benefit of that section; that the reason for the exception made by it in favour of an oral agreement accompanied by possession is that, by such possession, the parties who rely on a subsequent registered deed, had, or might, if they had been reasonably vigilant, have had previously to entering into their contract with the vendor and to their taking

(1) Ambler 436 = 3 Atk. 646; 1 Ves. Sen. 64; 2 Wh. & Tu. 32, 38, 39 (5th ed.)

(2) For similar reasoning as to the Statute of Frauds—see *Lincoln v. Wright* by Turner, L.J. (4 DeG. and J. 16, 22), and by Selborne, C., in the *Jervis v. Berridge* (L. R. 8 Ch. 351, 360); and as to Act XIX of 1843 see *per* Turner, L.J., 10 Moore's Ind. App. 228.

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a conveyance, notice, by the fact of such possession, that there was some prior claim to the property. That notice they have had in this case even more fully than mere possession of the property by the plaintiff would have furnished to them. It was proved, to the satisfaction of the Subordinate Judge and of the Division Court, that the second, third and fourth defendants were, when entering into their contract with the first defendant, fully aware of her prior contract with the plaintiff, and that, knowing the price he agreed to pay, they deliberately outbid him, and did every thing in their power to thwart him in obtaining a performance of the first defendant's part of the contract, and have not hesitated to support the alleged priority of the contract of the first defendant with themselves by false and fabricated evidence (1).

The plaintiff being a Hindu, the first defendant being a Christian, and the second, third and fourth defendants being Hindus, [153] this case bears some similarity, in respect of the complication of parties defendants, to *Varden v. Luckpathy* (2), where the plaintiff was an Armeenian and the defendants were Hindus, Mahomedans and Christians. The Privy Council there, relying upon the Madras Reg. II of 1802, s. 17, which, "in the absence of any specific rule," prescribes, for the guidance of the Madras Court, "justice, equity and good conscience," enforced an equitable mortgage in accordance with the rules which prevail in an English Court of Equity. Regulation IV of 1827, s. 26 of the Bombay Code, enacts that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, equity and good conscience alone." Act VIII of 1871 (ss. 17, 48 and 49) is the only legislation which has been mentioned in connexion with this case, and does not, as has been already said, appear to avail the defendants. Acts I and XIX of 1843 were repealed by Act XVI of 1864, and their provisions as to notice were not re-enacted. No specific usage of the Dekkan, whence the case comes, has been alleged or proved in relation to it; the defendants are diverse, being a Christian and three Hindus. There is no law binding Christians in this Presidency which would exonerate the Christian defendant from the performance of her contract with the plaintiff, or tolerate the collusion between her and her co-defendants; and, if we look to the Hindu law, the three Hindu defendants, so far from being aided, are concluded by it. In Manu, ch. viii, pl. 165, it is laid down thus: "When the Judge discovers a fraudulent pledge or sale, a fraudulent gift or acceptance, or in whatever other case he detects fraud, let him annul the whole transaction." Brihaspati declares that "a fraudulent purchaser is a thief (3)." The observations of Mr. Justice West in his very able judgment in *Lalubhai v. Bai Amrit*, at page 333 of the Report (4), show that, according to Hindu law, in his opinion, the purchaser, with notice of a prior contract of sale, takes subject to it, and is a party to a fraud in accepting a conveyance from the same vendor. To the same effect is the remark at page [154] 146 of the Report in *Balaram v. Appa* (5). In *Bayabai v. Bala* (6)

(1) *Vide* 1 Kent. Com., p. 525, 10th ed., pl. 465.

(2) 9 M.I.A. 308.

(3) Coleb. Dig. Bk. 1, ch. ii, pl. 57; and see the texts quoted in 2 B. 306 by West, J.

(4) 2 B. 299 (333).

(5) 9 B.H.C.R. 121 (146, 147.)

(6) 7 B.H.C.R., App. i, xxii, xxiii.

a transaction, even so sacred as an adoption amongst Hindus, was held to be avoided by fraud.

Instances are not wanting in the reports of Indian cases in which the doctrine of English Courts of Equity as to notice has been applied in the Mofussil. Amongst them may be mentioned *Gopal v. Krishnappa* (1), where a mortgage of the 1st August 1864, unregistered and without possession, was (even in the Dekkan, where the rule of Hindu law is that a mortgage of land must, to have validity against third persons, be accompanied by possession) held valid against a subsequent purchaser, under a registered deed of 1867, with possession, who had notice of the mortgage. That he had such notice through an order of Court, which may have been irregular, was deemed not to affect the equitable value of the notice. The mortgage might have been registered under Bombay Reg. IX of 1827 and Act XIX of 1843. The purchase deed was registered under Act XVI of 1864. In *Shib Kishen v. Sheikh Abdul* (2) an agreement for sale was enforced against a subsequent purchaser with notice. The same principle was acted on in *Ramtonoo v. Gour Chunder* (3), where an inquiry was directed as to whether a purchaser had notice of a previous agreement for sale. In *Gowree Kant v. Girdhar* (4), with reference to s. 68 of Act XVI of 1864, the Court said that a registered deed could not prevail against a prior unregistered deed, whereof the grantee of the registered deed had notice. *Jivandas v. Framji* (5) arose within the original jurisdiction of the High Court, not in the Mofussil.

The Specific Relief Act (I of 1877) having come into force since the present litigation commenced, is not applicable to this case. It is, therefore, unnecessary now to consider s. 4, cl. c; s. 24, cl. d; s. 27, cl. b, and the illustrations of it.

The petition of review is dismissed.

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[155] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Officiating Chief Justice, and
Mr. Justice M. Melvill.

HARKISANDAS NARANDAS, DECEASED; HIS HEIR, HIS WIDOW

BAI JAMNA (Original Plaintiff), Appellant v. BAI ICHHA

(Original Defendant), Respondent.* [17th November, 1879.]

Certificate of sale—Right of action—Registration Act (No. VIII of 1871), s. 49.

The plaintiff sued to recover possession of a house purchased by him at a Court sale for Rs. 350. The plaint was filed on the 31st March 1873. No certificate of sale was filed with it; but plaintiff subsequently produced one, dated the 8th July 1873, and the Court admitted it in evidence. Defendant submitted that the suit should be dismissed, as no certificate was produced by the plaintiff with the plaint. The first Court made a decree in the plaintiff's favour. The Court of appeal reversed that decree, and dismissed the suit, holding that the certificate ought not to have been received in evidence by the lower Court.

* Second Appeal, No. 311 of 1879.

(1) 7 B. H. C. R. A. C. J. 60 and see *Suraj Bansi v. Sheo Prashad*, 6 I.A. 88.

(2) 13 W. R. 604.

(3) 3 W. R. 64.

(4) 4 B.L.R.A. C. 8=12 W.R. 456.

(5) 7 B.H.C.R. O.C.J. 45.

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