

APPELLATE CIVIL.

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

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ICHHARAM KALIDAS, DECEASED, HIS HEIRS, HIS WIDOWS NATHBAI
AND OTHERS (*Original Defendants*), Appellants v. GOVINDRAM
BHOWANISHANKAR (*Original Plaintiffs*), Respondent.*
[12th September, 1881.]

Registration Act III of 1877, s. 50—Priority between registered and unregistered documents—Optional and compulsory registration—Acts XVI of 1864, XX of 1866, and VIII of 1871—Interpretation of statutes.

The registration of documents under Acts XVI of 1864, XX of 1866, or VIII of 1871, does not give them effect as against documents which might have been, but were not, registered under one of those Acts. Section 50 of Act III of 1877 has no retrospective operation upon such documents: the preference which it gives to registered over unregistered documents is confined to documents registered under Act III of 1877.

According to the registration law, as it stood before Act III of 1877 came into force, there was no competition grounded upon registration between documents, optionally and documents compulsorily registrable.

The Legislature, while possessing the power to divest existing rights, is not (in construing statutes) to be understood as intending to exercise that power retrospectively to any greater extent than the express terms of, or necessary implication from, its language requires.

A and B (two brothers) purchased a house on the 19th July 1871, and mortgaged it to the plaintiff for Rs. 585, by a *san* mortgage, dated the 21st July 1875, and duly registered. In 1874, the plaintiff sued upon his mortgage, and obtained a decree, directing satisfaction of his claim by the sale of the house. The house was accordingly sold by the Court and purchased by the plaintiff for Rs. 325. He obtained a certificate of sale, dated the 15th October 1875. The certificate was duly registered. On applying to [654] the Court for possession of the house, the plaintiff was resisted by the defendant on the ground that he was in possession under two mortgages dated the 20th July, 1871, and executed, the one by A and the other by B. These mortgages were not registered, both of them being for sums less than Rs. 100. The plaintiff's application, having been rejected by the Court, he brought a suit for possession of the house. Both the lower Courts allowed his claim, holding that his mortgage and certificate of sale, being registered, were entitled to priority over the unregistered mortgages of the defendant under s. 50 of Act III of 1877. On appeal to the High Court.

Held—that the case was governed by the law of registration as it stood before Act III of 1877 came into force, and that the registration of the plaintiff's mortgage and certificate of sale, both of which were compulsorily registrable, did not confer upon them any priority over the defendant's unregistered mortgages, which were optionally registrable.

Kanitkar v. Joshi (1) referred to and approved.

[R., 6 B. 168 (192); 13 B. 229; 20 B. 158 (164).]

THIS was a second appeal from the decision of S. H. Phillpotts, District Judge of Ahmedabad, affirming the decree of Harderam Anupram, Second Class Subordinate Judge of Umreth.

The plaintiff sued for possession of a house under the following circumstances:—Ambaram and Shrikrishna, the sons of one Gaurishankar, purchased a house on the 19th July, 1871, and mortgaged it to the plaintiff's son, Bhalashankar, for Rs. 585 by a *san* mortgage (Ex. 27), dated the 21st July, 1871. The mortgage was duly registered. In 1874, the plaintiff Govindram, as guardian of his grandson Harikrishna (the son of

* Second Appeal, No. 438 of 1880.

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Bhalashankar, deceased) brought a suit on the mortgage, and obtained a decree, directing payment of the mortgage debt by the sale of the house. It was accordingly sold by the Court and purchased by the plaintiff himself for Rs. 325 on the 13th September, 1875. He obtained a certificate of sale (Ex. 18), dated the 15th October, 1875. It was duly registered. On the plaintiff's applying to the Court for delivery of the house to him, the defendant Ichharam opposed the application on the ground that he was in possession under two mortgages (Exs. 7 and 8), dated the 20th July, 1871, and executed to his brother Haribhai on behalf of their firm, the one by Ambaram and the other by Shrikrishna. (These mortgages, Exs. 7 and 8, were not registered, being each for less than Rs. 100). The Court having rejected the plaintiff's application, he brought the present suit for possession of the house.

[655] The defendant Ichharam answered, *inter alia*, that he was in possession of the house by virtue of the two mortgage deeds (Exs. 7 and 8).

Both the lower Courts allowed the plaintiff's claim. The Subordinate Judge held that the plaintiff's certificate of sale (Ex. 18) being registered, was entitled to priority over the unregistered mortgages (Exs. 7 and 8) set up by the defendant. The District Judge held that the plaintiff's mortgage (Ex. 27), if not his certificate of sale (Ex. 18), prevailed against the defendant's unregistered mortgages. Both the Courts were of opinion that s. 50 of Act III of 1877 applied to the case. They did not think it necessary to find on the genuineness or otherwise of the two mortgages (Exs. 7 and 8).

The defendant appealed to the High Court.

Gokuldas Kahandas, for the appellant.—The lower Courts were wrong in applying s. 50 of Act III of 1877 to the case. The mortgage deeds (Exs. 7, 8 and 27), relied upon respectively by the appellant and respondent, were executed while Act VIII of 1871 was in force. The effect of s. 50 of Act III of 1877 is not retrospective, as held in *Kanitkar v. Joshi* (1). According to that case, the registration of documents compulsorily registrable did not give them preference over unregistered documents subject to optional registration, before Act III of 1877 came into force.

Nagindas Tulsidas, for the respondent.

JUDGMENT.

WESTROPP, C.J.—This is a suit to recover a house situated in Umreth in the district of Ahmedabad and province of Gujarat. That house was purchased by Ambaram Gaurishankar and Shrikrishna Gaurishankar from Haribhai Purshotam bin Kasidas on the 19th July, 1871, and was conveyed to those purchasers by that vendor by a registered deed of sale of that date (Ex. 17). The brothers Gaurishankar having thus become the owners of the house, mortgaged it for Rs. 585 by way of *san* mortgage (Ex. 27) on the 21st July, 1871 (which deed of *san* mortgage was registered) to Bhalashankar, the son of the present plaintiff Govindram. Govindram, his son Bhalashankar and grandson Harikrishna constituted an undivided family. A suit by Harikrishna, minor son [656] of Bhalashankar, deceased, through his grandfather and guardian Govindram Bhowanishankar, having been instituted against the brothers Gaurishankar on that mortgage, a decree was obtained on the 22nd January, 1875, for sale of the house in satisfaction of the amount found due on the mortgage. At the auction-sale on the 13th September, 1875, held pursuant to that decree,

Govindram Bhowanishankar purchased the house for Rs. 325, and having obtained a certificate of that sale, dated October 15th, 1875, (Ex. 18), which certificate has been registered, applied to the Court of Subordinate Judge for possession of the house. That purchase as well as the mortgage (Ex. 27) must be regarded as for the benefit of the undivided family of which Govindram, the plaintiff, is the head.

The defendants relying on two alleged mortgages from the Gaurishankar brothers, respectively, dated the 20th July, 1871, (Exs. 7 and 8), and asserting that they (the defendants) were in possession under those mortgages, resisted delivery of possession of the house to Govindram under the certificate of sale to him. The application of the plaintiff for possession having, in consequence of this resistance, been refused, the present action was brought by the plaintiff to recover possession.

The plaintiff denies, and apparently not without some reason, the *bona fides* of those mortgages relied upon for the defence. They purport to have been executed on the 20th July, 1871, by the Gaurishankar brothers to Haribhai Kalidas as representing the firm of his father, of which he and his brother Ichharam Kalidas were members. That day intervened between the day (the 19th July, 1871), on which the Gaurishankar brothers purchased the house and the day (21st July, 1871), on which they mortgaged it to Bhalashankar. The mortgages to Haribhai Kalidas (Exs. 7 and 8), of which Ex. 7 purports to have been executed by Ambashankar Gaurishankar and Ex. 8 by Shrikrishna Gaurishankar, were respectively for Rs. 95 and Rs. 99, *i.e.*, each for a sum not exceeding Rs. 100, and therefore, were optionally, not compulsorily, registrable. They were not registered. There seems, however, to have been no good reason for having two mortgages instead of one, except to evade the necessity for registration. Secondly, the indorsements of the stamp-vendor [657] on the stamped papers on which those mortgages were written show that those papers were sold to Haribhai Kalidas on the 12th September 1867, that is to say, nearly four years before the alleged execution of those mortgages; and, thirdly, the defendants, although claiming priority in time for their mortgages over the registered mortgage of the plaintiff, did not obtain or produce the title-deed of the Gaurishankar brothers, the same having been made over to Bhalashankar, on behalf of whose father, the plaintiff, it was produced in Court. These circumstances have been earnestly dwelt upon on behalf of the plaintiff as affording strong grounds for believing that the defendant's mortgages have been fabricated since the execution and registration of the plaintiff's mortgage (Ex. 27), and made to bear date on the only day intervening between the day of the Gaurishankar's purchase of the house and their mortgage of it to Bhalashankar in order to give an apparent priority to the defendant's mortgages.

The Subordinate Judge, holding that the plaintiff's certificate of sale as being registered had under the 50th section of the recent enactment as to registration (Act III of 1877) priority over the unregistered mortgages of the defendants, made a decree that the plaintiff do recover possession of the house. The District Judge affirmed that decree, he being of opinion that, although it may be a matter of doubt whether the registered certificate of sale gave to the plaintiff a right preferable to that of the defendants, yet the plaintiff's mortgage certainly did confer such priority under s. 50 of Act III of 1877. The learned Judges, holding those opinions as to the effect of that enactment, did not deem it necessary to try and determine the issue framed as to the *bona fides* and validity of the defendants' mortgages.

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That question, therefore, still remains to be decided, if this Court takes a different view of that enactment, which has indeed already in *Kanithkar v. Joshi* (1) been held not to be retrospective so as to give priority over optionally registrable but unregistered documents to a document of subsequent date registered under any Act prior to Act III of 1877. We think that case was rightly decided. The 50th section of Act III of 1877 is as follows:—

[658] "Every document of the kind mentioned in cls. (a), (b) and (d) of s. 17, and cls. (a) and (b) of s. 18, shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

"Nothing in the former part of this section applies to leases exempted under the proviso in s. 17 or to the documents mentioned in cls. (e), (f), (g), (h), (i), (j), (k) and (l) of the same section.

"Explanation.—In cases where Act No. XVI of 1864 or Act XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, 'unregistered' means not registered according to such Act, and, where the document is executed after the 1st day of July, 1871, not registered under Act VIII of 1871, or this Act."

This concluding explanation, that the term 'unregistered,' used in the commencement of that section, means, not only documents which might be, but are not registered under this Act (III of 1877), but also documents which might have been, but were not registered under Acts XVI of 1864, XX of 1866 and VIII of 1871, when contrasted with the marked omission to state that the term 'registered,' used in the same portion of that section, includes documents registered under the three last-mentioned Acts, points directly to the conclusion that the Legislature did not intend to bestow upon documents so registered any better position in relation to unregistered documents, which might have been registered under any one of those three Acts; than the former occupied previously to the coming into force of Act III of 1877; and that the new preference over *such* unregistered documents accorded to registered documents is confined to documents registered under that Act. This construction of s. 50 is in unison with what we believe to be one of the safest rules for the interpretation of statutes, *viz.*, that the Legislature, while possessing the power to divest existing rights, is not to be understood as intending to exercise that power retrospectively to any greater extent than [659] the express terms of, or necessary implication from, its language requires. Amongst many illustrations of that rule are *Moon v. Durden* (2); *Williams v. Smith* (3); *Batansi Kalianji's case* (4); and *Delhi and London Bank v. Orchard* (5).

So far, then, as this case is affected by the law of registration, it must be governed by the law as it stood before Act III of 1877 came into force. According to that law, there was not any competition grounded upon registration between documents optionally and documents compulsorily registrable. Hence the registration of the plaintiff's mortgage of the 21st July 1871, and of the certificate of sale to him (both of which were compulsorily registrable), did not confer priority on those documents over the two unregistered mortgages to the defendants, these latter having

(1) 5 B. 442.

(2) 2 Exch. Rep. 22.

(3) 4 H. & N. 559.

(4) 2 B. 148.

(5) 4 I.A. 127.

been respectively for sums under Rs. 100, and, therefore, optionally registrable. The decrees of the District and Subordinate Judges having been rested on the assumption that Act III of 1877, s. 50, is retrospective, must be reversed. The case must be remanded for new trial on the question whether the two mortgages (Exs. 7 and 8), relied upon by the defendants, are *bona fide* instruments, and were executed by the Gaurishankar brothers to Haribhai Kalidas, and more especially whether they were so executed on the 20th July, 1871, on which they purport to bear date. The extremely suspicious circumstances connected with those two alleged mortgages we have already noticed. Those circumstances will require the most careful attention of the trying Court, which may receive such further legally admissible evidence (if any) in connection with those mortgages as that Court may deem necessary in order to determine whether or not those two documents are trustworthy.

The costs of the suit and of both appeals should be disposed of on the re-trial in such manner as may be just.

Decree reversed.

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[660] APPELLATE CIVIL.

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

BABAJI BIN NARAYAN (*Original Plaintiff*), *Appellant v.*
BALAJI GANESH AND ANOTHER (*Original Defendants*), *Respondents.*
[20th July, 1881.]

Hindu law—Inheritance—Daughter's rights—Alienation by daughter.

According to the law of the Presidency of Bombay, the daughter of a Hindu dying without male issue takes absolutely, and may alienate lands by deed, or devise them by will.

Haribhat v. Damodarbhat (1) followed.

[R., 9 B. 301; 21 B. 739; 24 B. 192 (F.B.)=1 Bom. L.R. 574.]

THIS was a second appeal from the decision of R. F. Mactier, District Judge of Satara, affirming the decree of Meherjibhai Kovarji, Second Class Subordinate Judge of Tasgaon.

The plaintiff Babaji sued Balaji and Hanmanta to recover possession of certain lands. He alleged that the said lands had belonged to one Yesu, who at his death left a widow Uma and a daughter Saku, but no male issue; that on the death of Uma, he (plaintiff) succeeded to the lands as heir of Yesu; that subsequently Saku sued him and recovered possession of the lands from him; that Saku died on the 29th November, 1877, and that, thereupon, he was entitled to the property as heir of her father Yesu, deceased.

Defendant No. 1 (Balaji) denied that the plaintiff was heir to Yesu, and answered, *inter alia*, that he held a moiety of the lands in dispute under a deed of sale executed to him by Saku on the 14th July, 1874.

* Second Appeal, No. 470 of 1880.

(1) 3 B. 171, and the cases referred to *in notis*.