1881

HASHA v. RAGHO AMBO GONDHALI.

Both parties being innocent purchasers and Hindus, we cannot deprive the defendant Ragho of the benefit of his possession. The case, we still think, comes within the principle on which *Lalubhai Surchand* v. *Bai Amrit*[1] was decided, and we must, therefore, decline to make an order *nisi* for review.

(1) I. L. R. 2 Bom. 299.

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, and Mr. Justice Kemball.

1880
August 30.

LAKSHMANDAS SARUPCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* DASRAT (ORIGINAL DEFENDANT), RESPONDENT.*

Registration—Priority—Possession—Notice—How far registration equivalent to possession—Priority between registered and unregistered documents—Optional and compulsory registration—Mortgage—Indian Registration Acts—Bombay Regulation IX of 1827—*Acts I of* 1843, *XIX of* 1843, *XVI of* 1864—*XX of* 1866—*VIII of* 1871—*III of* 1877—*Lis pendens.*

It is a general, but not an invariable, rule that possession in the grantee or assignee is deemed essential amongst Hindus and Mahomedans to the complete transfer of immoveable property, either by gift, sale, or mortgage.

Exceptions to the above rule pointed out.

Neither in England nor in Ireland has *mere* registration been held to amount to notice to subsequent mortgagees or purchasers. In Bombay the Courts have adopted the rule which prevails in America, and have held that registration does amount to notice to all subsequent purchasers of the same property.

Possession has been deemed by Hindu and Mahomedan law, as interpreted in the Presidency of Bombay, to amount to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon immoveable property without ascertaining the nature of the claim of him who is in possession, does so at his own risk. This is the rule in England also.

The Indian Registration Acts prior to the year 1864, like the Middlesex Registry Act (Stat. 7 Anne, c. 20, sec. 1); the Yorkshire Registry Acts (Stat. 2 and 3 Anne, c. 4, sec. 1; 6 Anne, c. 35, sec. 1: 8 Geo. II, c. 6, sec. 1), and the Irish Registry Act (Stat. 6 Anne, c. 2, sec. 4, Ir.,) gave priority of rank to priority of registration. The later Indian Registration Acts—viz., Act XVI of 1864, XX of 1866, VIII of 1871, and III of 1877—proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to

* Second Appeal, No. 172 of 1880.

operate if no registration had been required or made, and not from the time of its registration, which rule applies both to compulsory and optionally registrable instruments.

The earlier decisions, by which registration has in India been permitted to supply the want of possession, may be attributed to this absolute preference so accorded by the earlier Registration Acts to priority of registration.

In the reported cases under the Indian Registration Acts passed in and subsequently to 1864, which have not (like the previous enactments) given priority of rank to priority of registration, the Courts have also regarded registration as an equivalent for possession where the instrument *earlier in date* has been registered, but unaccompanied by possession. The Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and, therefore, to atone for the absence of, and to be a sufficient substitute for possession in the validation of title.

The rule, however, that registration is equivalent to possession, cannot be applied to cases where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it.

On the 10th December, 1866, M. mortgaged certain immoveable property to the defendant for Rs. 95. The mortgage was neither registered nor accompanied with possession. On the 12th September, 1869, M. executed a mortgage of the same property to K. for Rs. 200. That mortgage was registered, but not accompanied with possession. In 1876, K. sued M. on his mortgage of 1869. The defendant was not a party to that suit. While the suit was pending, M., on the 23rd February, 1876, executed another mortgage of the property to the defendant for Rs. 200, including the amount then due to him (defendant) on his mortgage of 1866. That mortgage was registered and accompanied with possession. On the 3rd March, 1876, K. obtained a decree against M., directing satisfaction of the mortgage-debt out of the mortgaged property. The property was sold under that decree, and purchased by K. himself for Rs. 50. He obtained a certificate of sale dated the 8th March, 1877, which was not registered. On the 25th July, 1877, K. sold the property to the plaintiff for Rs. 75-4-0. The deed of sale was not registered. In 1878 the plaintiff sued for possession of the property. The defendant relied upon his mortgages of 1866 and 1876.

Held that the defendant's unregistered mortgage of 1866, which was optionally registrable, was not over-ridden by K.'s mortgage of 1869, which was compulsorily registrable, and that, therefore, the plaintiff, whose title was derived from K., was not entitled to recover the property from the defendant without redeeming the mortgage of 1866, on which he (defendant) was entitled to rely. The registration of K.'s mortgage in 1869 could not have operated as notice to the defendant when he was taking his mortgage in 1866, and, therefore, was not such a registration in relation to the defendant's earlier mortgage as to fall within the scope of the rule that registration is equivalent to possession.

The operation of K.'s *lis pendens* was sufficient to bind the defendant so far as his mortgage of 1876 was concerned. The doctrine of *lis pendens* is in force in

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

British India. That doctrine rests, as stated by Turner, L.J., in *Bellamy* v. *Sabine* (1), not upon the principle of constructive notice, but upon the fact that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. This reason for refusing recognition to alienations *pendente lite* made by a party to a suit is as fully applicable in the case of a registered as of an unregistered conveyance.

Bhakun v. *Bhaiji* (1 Bom. H. C. Rep. 19) and *Goverdhun* v. *Sakharam* (8 Harr. S. D. A. Rep. 189) commented upon.

THIS was a second appeal from the decision of Rao Bahadur M. G. Ranade, First Class Subordinate Judge of Dhulia, with appellate powers, varying the decree of the Second Class Subordinate Judge of Yaval, in the district of Khandesh.

The facts of the case are briefly mentioned in the head-note above, and will be found fully stated at the commencement of the judgment of the High Court.

The case first came before Westropp, C.J., and F. D. Melvill, J., who referred it to a Full Bench on the 28th July, 1880.

The principal question argued before the Full Bench was, which of the rival mortgages was entitled to priority.

The arguments of the pleaders on both sides and the authorities cited in support of their respective contentions are mentioned in the judgment of the Court.

Shantaram Narayan for the appellant.

Manekshah Jehangirshah for the respondent.

The following is the judgment of the Full Court delivered by

WESTROPP, C. J.—Motiram Khubchand, owner of a house and site (situate in the district of Khandesh), the subject of dispute in this suit, mortgaged those premises, on the 10th December, 1866, to the defendant, Dasrat Khubchand, for Rs. 95. That mortgage (exhibit 33) is unregistered and was without possession. The consideration being less than Rs. 100, the registration of the mortgage was optional under section 18 of Act XX of 1866, which Act came into force on the 1st May, 1866, and was, accordingly, applicable to this mortgage.

On the 12th September, 1869, Motiram Khubchand executed a mortgage (exhibit 36) of the same premises to Kachru for

(1) 1 De G. & Jo. 566.

Rs. 200. That mortgage was registered on the 22nd September, 1869, but was unaccompanied by possession.

Early in 1876, a suit (No. 186 of that year) was instituted by Kachru against Motiram Khubchand on the mortgage of 1869. Dasrat was not a party to that suit. During its pendency—that is to say, on the 23rd February, 1876—Motiram Khubchand executed another mortgage (exhibit 34) of the same premises to the defendant, Dasrat, for Rs. 200. including therein the amount then due on the former mortgage of 1866 (exhibit 33) to Dasrat. This mortgage (exhibit 34) was registered, and purported to be a mortgage with possession. Dasrat did obtain possession under it; but, apparently, not until the 7th August, 1874, which is the date of a rent note (exhibit 35), whereby Motiram Khubchand (the mortgagor) attorned as tenant to Dasrat.

In the above-mentioned suit of Kachru, a decree (exhibit 15) was pronounced in his favour on the 3rd of March, 1876, for Rs. 190, then remaining due to him on the mortgage of 1869, which decree authorized him to recover that amount as against the mortgaged premises. Those premises were sold by public auction under that decree to Kachru himself for Rs. 50, and a certificate of sale (exhibit 4) was given to him under date the 8th of March, 1877. That certificate has not been registered; but, the purchase-money being under Rs. 100, the registration was optional (Act XX of 1866, sec. 18). Upon the 25th of July, 1877, Kachru sold the same premises to the plaintiff Lakshmandas Sarupchand for Rs. 75-4, as appears by an unregistered conveyance of that date (exhibit 32). The purchase-money being less than Rs. 100, the registration was optional (Act III of 1877, sec. 18).

In 1878 the plaintiff brought this suit to recover possession of the premises from the defendant Dasrat, who was then in possession. The latter, in his written statement in defence, relied on his mortgages of 1866 and 1876.

The Subordinate Judge of Yaval decreed immediate possession to the plaintiff. On appeal by the defendant, that decree was varied by the First Class Subordinate Judge of Dhulia, Mr. Ranade, who decreed that the plaintiff, on paying to the defendant Rs. 190, being the sum then due to him on the mortgage of

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

1866, might redeem that mortgage, and not until then recover possession of the premises.

The present (second) appeal, (which has been heard by a Full Bench,) has been made by the plaintiff against that decree of Mr. Ranade.

The reasoning of the Courts below seems to have been this:—The Subordinate Judge of Yaval ruled that Dasrat's mortgage of 1876 for Rs. 200, notwithstanding its registration and the possession subsequently obtained under it by him, could not prevail against Kachru's registered mortgage of 1869 for Rs. 200; inasmuch as Dasrat's mortgage of 1876 was executed during the pendency of Kachru's suit upon his mortgage of 1869, and that Dasrat could not be permitted to rely upon his mortgage of 1866, because it was merged in, and superseded by his mortgage of 1876. While Mr. Ranade (the First Class Subordinate Judge with appellate powers) held that the mortgage to Dasrat of 1876 failing as against the mortgage to Kachru of 1869, Dasrat was entitled to fall back upon his mortgage of 1866.

As to the ruling of the Judge of first instance, that Dasrat's mortgage of 1876, having been executed during the pendency of the suit of Kachru on his mortgage of 1869, could not prevail against that mortgage and the decree and sale founded upon it, we would observe that, as decided in *Balaji* v. *Khushalji* [1] and other cases there cited, the doctrine of *lis pendens* is in force in British India; but in *Balaji* v. *Khushalji* neither of the competing mortgages was registered. In *Gulabchand* v. *Dhondi* [2], to the decision in which the Chief Justice was a party, the earlier deed, on which the *lis pendens* had been brought and to which priority was given, was unregistered and the later deed was registered. That case was decided on the principle of *lis pendens*. The Chief Justice has examined his note of the argument in that case, and finds that the remark of Sir William

(1) 11 Bom. H. C. Rep., 24; and see *Tukaram* v. *Gopala*, Sp. App. 22 of 1872, Printed Judgments of 1872, 11th April. *Ganeshbhat* v. *Chimnajirav* (Printed Judgments of 1874, p. 189). *Manual* v. *Sanacapalli*, 7 Mad. H. C. Rep., 104; and see Hyde 160; and see Sec. App. 130 of 1879 (Printed Judgments of 1879, p. 362).

(2) 11 Bom, H. C. Rep., 64.

Grant, M. R., in *Wyatt* v. *Barwell*[1] —that "even a *lis pendens* is not deemed notice" for the purpose of postponing a registered to an unregistered conveyance—was not mentioned by counsel, nor was it noticed by the Court in its judgment. The contest in *Wyatt* v. *Barwell* was between an unregistered deed of 1806 and two subsequent registered deeds of 1808 and 1812 respectively. There was not any *lis pendens* in the case: so Sir William Grant's remark was simply *obiter dictum*. Moreover, it proceeded upon the theory that *lis pendens*, when it operates, does so by way of notice. That theory has since been wholly exploded by the case of *Bellamy* v. *Sabine*[2] —now the leading authority on the subject of *lis pendens*. Lord Justice Turner there said: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied constructive notice. It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation, that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding." And the Lord Chancellor (Cranworth) said that it is immaterial whether the "alienees had or had not notice of the pending proceedings. If this were not so, there would be no certainty that the litigation would ever come to an end." The reason given for refusing recognition to an alienation *pendente lite* made by a party to a suit, seems to be as fully applicable and as true in the case of a registered as of an unregistered conveyance.

In *Raj Kishen Mookerjee* v. *Radha Madhub Holdar*[3] —before Couch, C. J., and Glover, J.—it appeared that an attachment against M. D. was, on 7th November, 1871, laid upon his immoveable property under a common money decree against him. That property was then and previously had been subject to a mortgage by M. D. to D. In December, 1871, D. instituted a

(1) 19 Ves., 435, 439; see *Jennings* v. *Bond*, 2 Jo. & Lat., 720—744; *Buckley* v. *Lanauze*, Lloyd & Goold's Rep. *temp.* Plunket, 327, for a limitation of the decision in *Wyatt* v. *Barwell*.

(2) 1 De G. & Jo., 565.

(3) 21 Calc. W. R., 349, Civ. Rul.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

suit against M. D. on that mortgage, and obtained a decree by consent upon it against him in February, 1872, directing the realization of what was due on the mortgage by a sale of the mortgaged property. On the 18th of April, 1872, the property was sold to P. under the attachment of the 7th November, 1871, on the common money decree; but, a few days previously, D. had, under the decree of February, 1872, in his mortgage suit caused the same property to be attached. Subsequently, that property was, under the execution upon D.'s mortgage decree, sold to D. The certificate of sale, on the 18th April, 1872, to P. was registered. The certificate of sale to D. was not registered, and, therefore, could not be used in evidence, but there was an order confirming the sale to D. in evidence. The Court held that, notwithstanding that P.'s certificate of sale was registered, and that D.'s certificate of sale was not registered, yet P. was bound by D.'s *lis pendens* on his mortgage, which *lis* had been commenced before the sale to P. Whether or not the High Court were right in deciding *Gulabchand* v. *Dhondi*[1] on the principle of *lis pendens* (as we think it was), the decree made in that case was, independently of that principle, sustainable on the last point glanced at in the judgment, but not decided[2], viz., that the unregistered mortgage of 1866 to Gulabchand, being for Rs. 15 only, was optionally registrable under Act XX of 1866, whereas the mortgage of 1869 to Dhondi, being for Rs. 251, was compulsorily registrable under the same Act, and, therefore, there was not any competition between them. The same point recurs in this case, and we shall presently mention the authorities for that position. In the present case, if the *lis pendens* of Kachru be not (as we think it is) sufficient to bind Dasrat so far as his mortgage of 1876 is concerned, yet, although Kachru had not possession, his mortgage of 1869, being both prior in execution and registration to Dasrat's mortgage of 1876, has precedence over it. For that position we shall presently mention the authorities, as the same point recurs in another part of this case. Eventually, in the argument before this Court, it was admitted that Kachru's mortgage of 1869 must be preferred to Dasrat's mortgage of 1876. The question which remains is, whether

(1) 11 Bom. H. C. Rep., 64. (2) *Ibid.*, p. 68.

Dasrat's mortgage of 1866 is overridden by Kachru's mortgage of 1869.

Before this Court the value, according to the Hindu law as enforced in this Presidency, of possession under one of two competing conveyances of land or other immoveable property, has been dwelt upon on behalf of the plaintiff, and it has been argued for him that registration is here regarded as equivalent to possession, and, therefore, that Kachru's mortgage of 1869, which was registered, though without possession, must have precedence over Dasrat's mortgage of 1866, which was both unregistered and unaccompanied by possession. On these points cases have been cited. Those and others we shall now mention.

It is true that our Bombay Reports, from their commencement, contain cases from which, taken in the aggregate, it may safely be laid down as a general, but not an invariable, rule, that possession in the grantee or assignee is deemed essential amongst Hindus and Mahomedans to the complete transfer of immoveable property either by gift, sale, or mortgage. Amongst those cases are *Tuljaram* v. *Meean Mahomed*[1]; *Mahomed Khan* v. *Keerajee*[2]; *Kundoojee* v. *Ballajee*[3]; *Gopal* v. *Dinkar*[4]; *Dondee* v. *Suntram*[5]; *Hurry* v. *Pandoo*[6]; *Dhondee* v. *Sukaram*[7]; *Rutunbhartee* v. *Kisunbhartee*[8]; *Antaji* v. *Kesho*[9]; *Durga* v. *Hurta*[10]; *Chuttrajee* v. *Krishna*[11]; *Mulapa* v. *Rungapa*[12]; *Raychund* v. *Ganesh*[13]; *Kullo* v. *Ramji*[14]; *Bank of Hindustan* v. *Premchand*

(1) 2 Borr, 147 (2nd ed.)
(2) Sel. Ca., S. D. A., Bom., 187 (reprint).
(3) Bellasis R., 5.
(4) Bellasis R., 58.
(5) Morris, Part I, 56.
(6) Morris, Part I, 105.
(7) 2 Morris Rep., 247.
(8) 4 Morris Rep., 44.
(9) 4 Morris Rep., 165.
(10) 7 Harr. (S. D. A., Bom.), 342.
(11) 8 Harr., 193.
(12) 9 Harr., 499.

(13) 8 Harr., 246 (Sp. Ap. 75 of 1861). An examination, however, of the record in that case shows that it was unnecessary to rest the decision there made, in favour of the deed of sale of the 7th January, 1855, to Ganesh, on his possession under it and on the want of possession by Raychund under his mortgage of Chaitur Sud 3rd, Shakh 1773 (A. D. 1851), inasmuch as the mortgage was unregistered, and the deed of sale was registered; and, consequently, the latter was, by virtue of Reg. IX of 1827, sec. 6, cl. 1, entitled to preference.

(14) Sp. Ap. 73 of 1872, Printed Judgments of 1872, September 9, so far as it relates to possession only.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

Raichand[1]; *Balaram Nemchand* v. *Appa Dulu*[2] as explained in *Sambhubhai* v. *Shivlaldas*[3]; *Kanu* v. *Krishna*[4]; *Kachu* v. *Kachoba*[5]; *Govinda* v. *Ravji*[6] and the comment thereon of West, J., in *Lalubhai* v. *Bai Amrit*[7]; *Parmaya* v. *Sonde*[8]; *Anant* v. *Arjun*[9], and especially *Lalubhai* v. *Bai Amrit* [10] where the Hindu law as to possession in the grantee or assignee is elaborately discussed by West, J., and *Hasha* v. *Ragho* [11], in which his decision was followed.

To that general rule, as to the necessity for possession, exceptions, which may be classified as follows, have, in many instances, been permitted, viz :—

1*stly*. Cases of *san*-mortgages in Gujarat : *Jiwa* v. *Mobhut*[12]; *Bhugwan* v. *Veerchund* [13]; *Dulputram* v. *Umrutlal* [14]; *Dulputram* v. *Kishore* [15]; *Mathuradas* v. *Kalia* [16]; *Itcharam* v. *Raiji* [17]; *Ranchodas* v. *Ranchodas* [18]; Special Appeal 618 of 1870 [19].

2*ndly*. Cases in which the only contending parties are : (*a*) the mortgagor (or volunteers claiming under him) and the mortgagee (or persons claiming under him) ; (*b*) or the vendor (or volunteers claiming under him) and the vendee (or person claiming under him) : *Chintaman* v. *Shivram* [20]; *Shaik Adam* v.

(1) 5 Bom. H. C. Rep., 83, 84, A. C. J. The case of *Hurjivan* v. *Naran* (4 Bom. H. C. Rep., 31, A. C. J., and see the remarks *per* West, J., I. L. R., 2 Bom., 325) referred to in *The Bank of Hindustan* v. *Premchand Raichand* can scarcely be regarded as a proper instance of the application of the general rule ; the defendant being only a tenant, his possession was that of the landlord, his donor. *Harjivan* v. *Naran* seems to be inconsistent with *Sakalchand* v. *Dayabhai* (4 Bom. H. C. Rep., 70, A. C. J.) decided the same Judges. The Court there directed an inquiry whether the defendant obtained possession by permission of the donors. If he did, his possession was merely that of his landlords, the donors, and could not prevent their right of gift or sale.

(2) 9 Bom. H. C. Rep., 121.
(3) I. L. R., 4 Bom., 89, 92.
(4) 5 Bom. H. C. Rep., 147, A. C. J.
(5) 10 Bom. H. C. Rep. 491.
(6) Printed Judgments of 1876, p. 274.
(7) Printed Judgments of 1880, p. 57.
(8) I. L. R., 2 Bom., at pp. 323-324.
(9) Printed Judgments of 1880, p. 293.
(10) I. L. R., 2 Bom. 299.
(11) *Vide supra*, p. 165.
(12) Morris, Pt. II, 117.
(13) 8 Harr., 177.
(14) *Ibid.*, 179.
(15) *Ibid.*, 181.
(16) 7 Bom. H. C. Rep. 24, A. C. J.
(17) 11 Bom. H. C. Rep., 41.
(18) I. L. R., 1 Bom., 581.
(19) Printed Judgments of 1871, April 24th.
(20) 9 Bom. H. C. Rep. 304.

Baba[1]. And see the observations of West, J., in *Lalubhai* v. *Bai Amrit*[2] upon the dicta in *Girdhur* v. *Daji*[3].

3*rdly*. Cases in which the subsequent mortgagee or purchaser became such with actual notice of the earlier mortgage or sale without possession—*Gopal* v. *Krishnappa*[4]; *Waman Ramchandra* v. *Dhondiba*[5]; Special Appeal No. 205 of 1870[6]; *Shaik Adam* v. *Baba*[7]; *Balaram Nemchand* v. *Appa Dula*[8]. These were all cases subsequent to the repeal of Acts I and XIX of 1843 by Act XVI of 1864. In *Gopal* v. *Krishnappa* the earlier unregistered mortgage was executed in 1864 before Act XVI of 1864 came into force, but the registered deed of sale was executed in 1867; consequently, there was not any competition between those documents in respect of registration. See Indian Law Reports, 1 Bombay, 574; Indian Law Reports, 4 Bombay, 459; Indian Law Reports, 2 Madras, 108; 10 Calcutta Weekly Reporter, 65; 11 Calcutta Weekly Reporter, 559; 13 Calcutta Weekly Reporter, 446; 22 Calcutta Weekly Reporter, 3; *Vishnu* v. *Pandharav*, Printed Judgments of 1881, page 146; *Virchand* v. *Purshotum*, Printed Judgments of 1881, page 86; Indian Law Reports, 3 Allahabad, 488, 505; 6 Madras High Court Reports, 391.

4*thly*. If the mortgagee be in possession, the mortgagor, though out of possession, may charge or sell his equity of redemption[9].

5*thly*. Where the mortgagor had not put the mortgagee in possession, and, subsequently to the mortgage, had been wrong-

(1) Sp. Ap. 286 of 1872, Printed Judgments of 1872, December 9th.

(2) I. L. R., 2 Bom. at p. 323. (3) 4 Bom. H. C. Rep. 7, A. C. J.

(4) 7 Bom. H. C. Rep. 60, A. C. J.

(5) I. L. R., 4 Bom., 126; and see *Nemai* v. *Kokil*, I. L. R., 6 Calc. 534.

(6) Printed Judgments of 1871, January 19th.

(7) Printed Judgments of 1872, Dec. 9th, Sp. Ap. 286 of 1872.

(8) 9 Bom. H. C. Rep. 121, 146, *et vide per* Pontifex, J., I. L. R., 5 Calc., 336, 349, 359.

(9) *Per* West, J., 10 Bom. H. C. Rep., 494, and in I. L. R., 2 Bom. 326, Notwithstanding *Venku* v. *Jivu*. (Sp. Ap. 509 of 1871), Printed Judgments of 1872, 11th March. And see 2 Macn. H. L., 303 N.; S. D. A, Dec. Beng. of 1848, 305. Macpherson on Mortgages, 92 (5th ed.); 9 Calc. W. R., 150—243; 10 Calc. W. R., 126; 22 Calc. W. R. 389, and numerous other cases. See, too, *Reg.* v. *Anaji*, 1 Bom. H. C. Rep., 93.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

fully dispossessed, it was held that the mortgagee might, within twelve years after the ouster of the mortgagor, bring a suit against the wrong-doers for possession of the mortgaged land—*Krishnaji* v. *Govind*[1]. That case was followed in *Balkrishna* v. *Vyankatrav*[2], where, however, it is not quite clear in the judgment whether the mortgagor, Gajabai, had been in possession at the creation of the mortgage[3]. See the comment on the former case in Indian Law Reports, 2 Bombay, 323.

6*thly*. It has been held that possession by a judgment-debtor having a good title, is not necessary to validate a judicial sale of his lands—Special Appeal 519 of 1870[4].

7*thly*. It appears to have been held that possession by the vendee, who became such at a judicial sale, is not necessary to validate the sale to him as against subsequent attaching creditors under money decrees or as against purchasers at the sales under such decrees—*Raghoo* v. *Vittoo*[5], [which case, however, might have been decided on the ground that the original vendee's (Vittoo's) deed was registered on the 12th November, 1858, and that such registration was equivalent to possession]; *Sunbussapa* v. *Moodkapa*[6], *Naroo* v. *Konheir*[7], [in which case the conditional sale deeds appear to have been unregistered]; *Bhakun* v. *Bhaiji*[8]. An examination of the record in the last-mentioned case shows that the report omits some of the principal facts in that case. The mortgage, to which preference over the judicial sale was given, was for Rs. 40, dated 21st May, 1860, and *registered* on the 16th January, 1861. The judicial sale (for Rs. 43) took place on the 19th February in the same year. The certificate of sale to the purchaser was dated the 1st March, 1861, and was *not registered*. Even if it had been registered, the priority of registration of the mortgage would, by virtue of Regulation IX of 1827, sec. 6, cl. 1, which was in force at that time, have given it precedence over the sale, and rendered

(1) 9 Bom. H. C. Rep., 275.
(2) Sp. Ap. 254 of 1874, Printed Judgments of 1876, p. 13.
(3) See *Girdhur* v. *Daji*, 7 Bom. H. C. Rep., 4, A. C. J.
(4) Printed Judgments of 1871, March 13th.
(5) Sp. Ap. 52 of 1861, repd., 8 Harr., 229.
(6) Sp. Ap. 40 of 1861, repd., 8 Harr., 235.
(7) Sp. Ap. 27 of 1861, repd., 8 Harr., 289, 290. (8) 1 Bom. H. C. Rep. 19.

the mortgage independent of the rule as to possession. That case is also open to Mr. Justice West's remarks upon it in Indian Law Reports, 2 Bombay, 321. Those four cases overruled *Hormusjee* v. *Pandurung*[1], which, independently of the ground upon which it was overruled, seems to have been erroneous: inasmuch as Haroon, the mortgagor, having attorned as tenant to Hormusjee, the mortgagee, the possession of Haroon was the possession of Hormusjee, and, therefore, good as against an attaching creditor.

8*thly*. The purchaser at judicial sale may re-sell without previously taking possession: *Govind* v. *Govinda*[2]; *Nanabhai* v. *Tukaram*[3].

The effect of registration upon the general rule as to the necessity for the delivery of possession has next to be considered. For this purpose we must distinguish between the enactments as to registration previous to the year 1864 and the enactments in and subsequently to that year. The earlier decisions, by which registration has, in India, been permitted to supply the want of possession, may be attributed to the absolute preference accorded to priority of registration by the enactments in force previously to 1864. Bombay Regulation IX of 1827, sec. 6, cl. I, enacted that "every deed or other writing transferring or mortgaging immoveable property situated within the zilla, if registered in the register of title-deeds, shall, without regard to the date of execution, if proved to be valid, be preferred to, and satisfied before, any deed of the nature specified in sec. 3, cl. 1, either subsequently registered or not registered at all." That enactment, however, contained a proviso, depriving a person, taking with notice of the unregistered deed, of the preference which otherwise would have been given to his registered deed. That proviso was repealed by Act I of 1843[4]. Act XIX of 1843, sec. 2, gave to registered deeds of sale or gift of such property absolute preference over unregistered deeds of sale or gift of the same, whether the latter be executed prior or subsequent to the registered deed, and

(1) 3 Morris Rep., 27. (2) I. L. R., 1 Bom., 500.

(3) Printed Judgments of 1873, p. 186.

(4) Acts I and XIX of 1843 have been repealed by Act XVI of 1864 without re-enacting their provisions as to the inefficiency of notice.

1880

LAKSHMANDA'S SARUPCHAND v. DASRAT.

preference to registered deeds of mortgage of like property over unregistered deeds of mortgage of the same, whether the latter be executed prior or subsequent to the registered deed of mortgage, and excluded the operation of notice. It has been held by the Privy Council that a deed, registered under Act XIX of 1843 cannot be deprived of the priority given by it, except there be fraud on the part of the grantee[1]. That Act created no competition between deeds of sale or gift on the one hand and deeds of mortgage on the other, but left the first part of Bombay Regulation IX of 1827 unrepealed which had that effect[2]. The Middlesex Registry Act[3] and the Yorkshire Registry Acts[4], and still more distinctly and effectually the Irish Registry Act [5], like Bombay Regulation IX of 1827 and Act XIX of 1843, give the preference to priority of registration. The subsequent Indian Acts [6] proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to operate if no registration had been required or made, and not from the time of its registration—a rule which applies both to compulsorily and optionally registrable instruments. Compulsorily registrable instruments under Act XVI of 1864, if not registered, cannot be received in evidence in any civil proceeding in any Court or acted on by any public officer[7]. Under Act XX of 1866 such instruments, if unregistered, are inadmissible in evidence in any civil proceeding in any Court, cannot be acted on by any public servant, and cannot affect any property comprised therein[8]. Under Acts IX of 1871[9] and III of 1877[10] such instruments, if unregistered, cannot affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property. Under Act XVI of 1864[11], Act XX of 1866[12], and Act VIII of 1871[13], an optionally

(1) 10 Moore's Ind. App., 220.

(2) 1 Bom. H. C. Rep., 60; 4 Bom. H. C. Rep., 68, 69, 143, A. C. J.

(3) 7 Anne, c. 20, s. 1.

(4) 2 & 3 Anne, c. 4, s. 1; 6 Anne, c. 35, s. 1; 8 Geo. II. c. 6, s. 1.

(5) 6 Anne, c. 2, s. 4, Ir.; Ind. L. Rep., 4 Bom., 145, *note*.

(6) Act XIX of 1864, s. 67; Act XX of 1866, s. 47; Act VIII of 1871, s. 47; Act III of 1877, s. 47.

(7) Act XVI of 1864, s. 13.

(8) S. 49; and see 8 Bom. H. C. Rep. 163, A. C. J.; I. L. R., 4 Bom., 89.

(9) S. 49. (10) S. 49. (11) S. 68. (12) S. 50. (13) S. 50.

registrable instrument, if duly registered, is preferred to another optionally registered instrument if unregistered and relating to the same property, whether such other instrument be of the same nature as the registered instrument or not[1].

We shall now mention some of the reported cases in which, under Regulation IX of 1827, sec. 6, cl. 1, or Act XIX of 1843, registration has been held to supply the place of possession.

Rambuggut v. *Sadanandrao*[2], decided in 1841—a Poona case—was a struggle between two mortgagees of a house. One mortgage (dated in 1832) was registered, but without possession. The other mortgage (dated in 1835) was unregistered, but was with possession. The Sadar Divani Adalat of Bombay on the ground of its registration gave priority to the mortgage of 1832. That case turned upon Regulation IX of 1827, sec. 6, and was between Hindus.

Govind v. *Ganeshram*[3] is a case in which a registered mortgage of land in the zilla of Ratnagiri was in 1853 preferred, by the Sadar Divani Adalat, under Act XIX of 1843, to an earlier, but unregistered, mortgage of the same land with possession which had been obtained under a decree upon that mortgage. The notice to the registered mortgagee, arising from the possession of the earlier, but unregistered, mortgagee, was rendered of no effect by the then existing enactments as to notice, viz., Act I of 1843, sec. 1, and Act XIX of 1843, sec. 1—both since repealed.

Umaji v. *Hari*[4], decided in 1867 by the High Court—an Ahmednagar case—was a competition between rival mortgagees of a field. One mortgage was executed upon the 10th and registered on the 14th December, 1860, but was unaccompanied by possession. The other mortgage, dated 19th October, 1861, was unregistered, but the mortgagee obtained possession under a decree recovered upon it in 1863. The High Court (Tucker and Gibbs, JJ.) held that "registration made the defendant's mort-

(1) 9 Calc. W. R., 547; *Panha* v. *Zulla*, Printed Judgments of 1875, p. 125; *Hari* v. *Ramji*, Printed Judgments of 1878, p. 122; see also *Fuzludeen* v. *Fakir Mahomed*, I. L. R., 5 Calc., 336.

(2) Bellasis Rep., 9; and see p. 70. (3) Morris Rep., Pt. III, p. 13.

(4) 4 Bom. H. C. Rep., 143, A. C. J.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

gage (*i. e.*, the mortgage of 1860) complete, though he did not obtain possession of the property mortgaged at the time the deed to him was executed, and any subsequent disposition of the equity of redemption by the mortgagor would be subject to the first mortgagee's lien." The mortgage of 1860 was, accordingly, preferred to that of 1861, notwithstanding the possession obtained under the latter. That case (as appears from the dates) turned upon Act XIX of 1843.

Sundar v. *Gopal*[1], decided by the High Court (Couch, C.J., and Warden, J.) in 1867, was a case from the Konkan. It was a struggle between a registered mortgagee *without possession* against a subsequent purchaser *with possession*. The dates show that it must have turned wholly upon the force of Regulation IX of 1827, sec. 6[2], and not upon any theory as to registration being notice. The mortgage was dated 22nd March, 1851. The deed of purchase was dated 12th March, 1855. The mortgage was registered on the 19th October, 1859, and the deed of purchase (as an examination of the records shows) was registered on the 24th December, 1860[3]. The registration of the mortgage, being subsequent to the execution of the deed of purchase, could neither have afforded notice nor the means of obtaining notice of the mortgage to the purchaser before he made his purchase and obtained possession of the mortgaged premises; but the registration of the mortgage, being anterior to the registration of the deed of purchase, gave, by virtue of Regulation IX of 1827, sec. 6, to the mortgagee priority over the purchaser notwithstanding his possession. The parties were Hindus.

But in *Goverdhun* v. *Sukharam*[4] a Mahomedan mortgaged land in the Konkan to a Hindu, and his (the Mahomedan's) son subsequently sold it to two other Hindus with his father's consent. Possession was given to the purchasers, and not to the mortgagee. The report being defective, we have examined the record, which shows that the mortgage (exhibit 27) was dated 21st November, 1852, and registered 17th December, 1852; and that the deed of

(1) 4 Bom. H. C. Rep., 68, A. C. J.

(2) See 1 Bom. H. C. Rep., 60; 4 Bom. H. C. Rep. 69.

(3) The latter important fact is omitted in the report.

(4) 8 Harr., S. D. A. Rep., 189.

sale (exhibit 3) was dated the 10th November, 1854, and registered on the 3rd January, 1855. That deed is erroneously stated in the report of the judgment of the Court to be unregistered. The Mahomedan law officer gave it as his opinion in the Assistant Judge's Court that a mortgage without possession is, according to Mahomedan law, incomplete, and that as against a subsequent purchaser with possession the mortgagee would have no lien on the property[1], and so the Assistant Judge decided. The Sadar Divani Adalat, however, held that the defendant (the purchaser) being a Hindu, the Hindu and not the Mahomedan law was, by Bombay Regulation IV of 1827, sec. 26, applicable; and that by "Hindu law, as it prevails in the Deccan" (and we presume in the Konkan also) "not in Gujarat, a mortgage without possession is invalid as against a purchaser with possession," and, therefore, and because Act XIX of 1843 created no competition between a mortgage and a deed of sale, the purchaser should be preferred to the mortgagee, although his mortgage was registered. The Sadar Divani Adalat, however, forgot that Bombay Regulation IX of 1827 was then unrepealed, and that it did create such a competition, and, independently of and above Hindu or Mahomedan law, gave priority to the document first registered, whether or not it was accompanied by possession. One of the Judges of the Sadar Divani Adalat who decided that case was, as a Judge of the High Court, a party to a subsequent decision in *Purshotam* v. *Jagjivan*[2], in which it was held that, with the exception of so much of Regulation IX of 1827 as recognizes the effect of notice of a prior sale or incumbrance, that Regulation is unrepealed by Acts I and XIX of 1843. With that case *Goverdhun* v. *Sukharam*[3] is inconsistent, and not only is unsustainable on the question as to the effect of registration under Regulation IX of 1827, but also seems to be open to doubt in respect of the view there entertained that the validity of a mortgage by a Mahomedan to a Hindu, if the latter be the defendant in a suit, should be tested by Hindu law—a proposition which seems to involve a serious misapprehension and misapplication of Bombay

(1) See Macn. M. L., ch. xi, pl. 15, pp. 74, 354. Hedaya, Vol. IV, Bk. XLVIII, ch. i, pp. 189, 190. *Mahomed Khan* v. *Keerojee*, Sel. Ca., S. D. A., Bom., 187.

(2) 1 Bom. H. C. Rep., 60. (3) 8 Harr., S. D. A. Rep, 189.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

Regulation IV of 1827, sec. 26[1]. It could not have been intended by the Legislature that the power of a Mahomedan to convey should be measured by the Hindu law.

The registration law applicable to *Kanu* v. *Krishna*[2] was Regulation IX of 1827, sec. 6, the mortgage bearing date in 1858 and the certificate of sale in 1862. Of these, the former was unregistered and without possession, but in 1859 a decree for possession was passed upon it. Possession, however, was not given, as the decree remained unexecuted until after the certificate of sale in 1862 had been granted, registered, and possession given under it to the vendee. The Court held the decree for possession not equivalent to possession, and, therefore, preferred the registered certificate of sale.

The dates of the mortgage and certificate of sale in competition in *Hari* v. *Mahadaji*[3] are omitted in the report. An examination of the record enables us to say that the mortgage, there relied upon by the defendant, was dated the 10th December, 1862, and registered on the 16th December, 1862. The certificate of sale was dated the 28th of June, 1864, and was not registered. The absence of possession by the mortgagee was relied upon by the plaintiff, who claimed under the certificate of sale. The Court, however, held that the registration of the mortgage dispensed with the necessity of possession. Inasmuch as Act XVI of 1864 did not come into force until the 1st of January, 1865, that case must be regarded as dependent upon Regulation IX of 1827, sec. 6.

Before noticing the cases falling under Act XVI of 1864 and subsequent Acts, we must admit that, neither in England nor in Ireland, is *mere* registration held to amount to notice to subsequent mortgagees or purchasers. The first reported case to that effect seems to be *Bedford* v. *Backhouse*[4], decided A.D. 1730 by Lord King, C., on the Middlesex Registry Act[5]. The reason which he gave was: "Though the Statute avoids deeds, not regis-

(1) *Vide Sarkies* v. *Prosonomoyee Dossee* (I. L. R., 6 Calc., 794, 805, 808) as to the somewhat similar enactment 21 Geo. III, c. 70, s. 17.

(2) 5 Bom. H. C. Rep., 147, A. C. J. (3) 8 Bom. H. C. Rep., 50, A. C. J.

(4) 2 Eq. Ca. Ab., 615, pl. 12; and see *Calor* v. *Cooley*, 1 Cox., 182 (A. D. 1785); *Wiseman* v. *Westland*, 1 Y. & Jer., 117; *Wyatt* v. *Barwell*, 19 Ves., 435.

(5) 7 Anne, c. 20.

tered, as against purchasers, yet it gives no greater efficacy to deeds that are registered than they had before." There A. lent money on a duly registered mortgage. Afterwards B. lent money on the same lands upon a duly registered mortgage. Then A. advanced a further sum on the same lands on a duly registered mortgage and without knowledge of B.'s mortgage. It was held that A. might tack his second advance to his first advance, and recover both amounts in priority to B., as the registration of B.'s mortgage was not constructive notice to A. of that mortgage. *Wrightson* v. *Hudson*[1], also a case of tacking, was decided in the same way by Sir Joseph Jekyll, M. R., in A. D. 1737, and on the same grounds[2]. It was said by him that though Wrightson might have searched the register, yet he was not bound to do so. This view, although now established law in England, has not become so with perfect unanimity. In *Hine* v. *Dodd*[3], decided in 1741, Lord Hardwicke, C., said that the Middlesex Registry Act, 17 Anne, c. 20, is a notice and a notice to everybody. In *Morecock* v. *Dickins*[4], registration in Middlesex of an equitable mortgage was, in A. D. 1768, held not to be constructive notice of itself to a subsequent legal mortgagee so as to take from him his legal advantage. Lord Camden so decided with apparent reluctance. He said that "it becomes a serious point whether a Court of Equity should not say that in all cases of registry, which is a public depository for deeds, and to which any person may resort, a subsequent purchaser ought not to search, or be bound by notice of the registry, as he would of a decree in equity or judgment at law." Speaking of *Bedford* v. *Backhouse*, he said: "A thousand neglects to search have been occasioned by that determination, and, therefore, I cannot take upon me to alter it. If it was a new case, I should have my doubts; but the point has been closed by that determination, which has been acquiesced in ever since." In cases in Ireland coming within the Registry Act (6 Anne, c. 2, Ir.), tacking is not permitted[5]. But Lord Redes-

(1) 2 Eq. Ca. Ab., 609, pl. 7.

(2) It is important to remember that tacking is not permitted in the Indian Mofussil. 2 Beng. L. R., Appx. 45; S. C. 11 Calc. W. R., 310; 5 Beng. L. R., 463.

(3) 2 Atkins, 275. (4) Ambler, 678.

(5) *Secus* in cases in Ireland not coming within the Registry Act.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

dale, while adopting that rule, said in *Bushell* v. *Bushell*[1] "that the fourth clause of the Irish Statute, 6 Anne, c. 2, which clause has not any equivalent in the English Acts, gives to all deeds, registered as thereby directed, efficacy in law and equity according to the priority of the time of registry, except in case of fraud, as where the party has had notice *aliunde*" [2]. He added: "It is true the registry is considered as notice to a certain extent; no person thinks of purchasing an estate without searching the registry, and, if he searches, he has notice [3]; but I think it cannot be considered as notice to all intents, on account of the mischief that would arise from such a decision. For, if it is to be taken as constructive notice, it must be taken as notice of everything that is contained in the memorial; if the memorial contains a recital of another instrument, it is notice of that instrument; if a fact, it is notice of that fact. It strikes me to be a better and safer way of considering it to let the words of the Act operate by their own force, and that the registry shall not be taken as notice more here than it is in England or in the Colonies, where it has been uniformly held that even inrolments are not considered as notice." He expressed himself nearly to the same effect in *Latouche* v. *Dunsany* [4] and in *Underwood* v. *Lord Courtown* [5].

The rule, however, is different in America. There the Courts hold that registration is, in itself, constructive notice to subsequent purchasers and mortgagees. Chancellor Kent [6], with reference to the observations of Lord Redesdale last quoted, says: "But Lord Camden was evidently of a different opinion, though he held himself bound by precedents to consider the registry not notice. In this country the registry of the deed is held to be constructive notice of it to subsequent purchasers and mortgagees, but we do not carry the rule to the extent apprehended by Lord

(1) 1 Sch. & Lef., 90.

(2) *Ibid.* 101, 102. For the Stat. 6 Anne, c. 2, Ir., see I. L. R., 4 Bom., 145, *note* (1).

(3) If a purchaser searches the registry he will, in England, be presumed to have notice, unless he rebuts the presumption by showing that the search was made for a period only in which the registered deeds are not included. *Hodgson* v. *Dean*, 2 Sim. & St., 221.

(4) 1 Sch. & Lef., 137, 157. (5) 2 Sch. & Lef., 41, 64.

(6) 4 Comm., Part VI, sec. 58, p. 203 (10th ed.)

Redesdale." And Mr. Justice Story[1], after referring to the English doctrine—which, as we have seen, was not the result of unanimous opinion amongst the judges who have dealt with the subject—says (para. 403): "In America, however, the doctrine has been differently settled; and it is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property[2]. The reasoning, upon which that doctrine is founded, is the obvious policy of the Registry Acts, the duty of the party purchasing under such circumstances to search for prior incumbrances, the means of which search are within his power, and the danger (so forcibly alluded to by Lord Hardwicke[3]) of letting in parol proof of notice or want of notice of the actual existence of the conveyance. The American doctrine certainly has the advantage of certainty and universality of application; and it imposes upon subsequent purchasers a reasonable degree of diligence only in examining the titles to estates."

In *Wyatt* v. *Barwell*[4] Sir William Grant, M. R., in 1815, while following the English precedents, admitted that their policy had been much doubted.

It will presently appear that what Mr. Justice Story says has in America been deemed to be "the obvious policy of the Registry Acts" has, in this Court, been preferred to the less logical and more artificial doctrine which has been permitted to prevail in England.

Turning now to cases in which the conflict has been between instruments registrable under the modern Indian Acts relating to registration—viz., Act XVI of 1864, Act XX of 1866, Act VIII of 1871 and Act III of 1877—which did not (as did the previous enactments) give priority of rank to priority of registration, we still find that registration has been treated as an equivalent for possession where the instrument *earlier in date* has been registered prior to the execution of the second instrument, but unaccompanied by possession. Possession has been deemed by Hindu and Mahomedan law, as interpreted in this Presidency, to amount

(1) 1 Comm. Eq. Jur. (11th ed.), p. 420.

(2) *Parkhurst* v. *Alexander*, 1 Johns, Chanc. 394; *Schutt* v. *Large*, 6 Barb., 373.

(3) *Hine* v. *Dodd*, 2 Atk., 275.

(4) 19 Ves., 435.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases immoveable property without ascertaining the nature of the claim of him in possession, does so at his own risk. This is so in England also. See *Daniels* v. *Davison*[1] and the other cases, in which its authority has been recognised, collected in Sugden's Vendors and Purchaser[2] and 2 White and Tudor, 61, *et seq.* But here the Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and, therefore, to atone for the absence of and to be a sufficient substitute for possession in the validation of, title. In *Motiram Hiraji* v. *Hari Raghunath*[3] the Court (Melvill and Kemball, JJ.), after observing that the mortgage held by the judgment-creditor (who put up the property for sale in the Civil Court in virtue of such mortgage) was registered, said: "We think that the registration must be considered to be a legal notice to intending purchasers of the existence of the mortgage." An examination, which we have made of the record in that case, shows that the mortgage in question was dated 24th January, 1868, and registered on the 27th January, 1868. It was from Kachari Bhikari to Vasudev Ganesh for Rs. 125 advanced by the latter to the former, and was subsequently assigned by Vasudev Ganesh to the plaintiff Hari Raghunath on the 6th February, 1872. In 1869 a house, part of the mortgaged property, was brought to judicial sale by Vasudev Ganesh in execution of a money decree, and he said nothing of his mortgage. An attempt was made to bring the case within the authority of *Tukaram* v. *Ramchandra*[4], where the concealed mortgage was unregistered; but the Court held that the registration of the mortgage of the 24th January, 1868, was sufficient notice.

In *Narsiv* v. *Kriparam*[5] it appears from the record that a house belonging to Mango Lohar was mortgaged by him on the 3rd September, 1867, (registered 10th September, 1867,) for

(1) 17 Vesey, 433.

(2) 11th ed., p. 1052, Ch. XXIII, sec. 1, pl. 50. V. C. Wigram, V.C., in Hare, 60, says: "Possession is *prima facie* evidence of a seisin in fee."

(3) Printed Judgments for 1877, p. 4. (4) I. L. R. 1 Bom. 314.

(5) Sp. App. 119 of 1876, Printed Judgments for 1877, p. 26.

Rs. 300 to Mansuram Devaji (first defendant), who on the 23rd January, 1872, made a sub-mortgage of it to the plaintiff Kriparam for Rs. 250. That sub-mortgage was registered on the 24th January, 1872, but was without possession. Mansuram Devaji on the 1st April, 1873, again sub-mortgaged the same house for Rs. 325 to Narsiv, the second defendant. That sub-mortgage was registered on the 2nd April, 1873. Narsiv, subsequently having sued Mansuram Devaji on the second sub-mortgage, obtained possession of the house through the Civil Court. Plaintiff Kriparam the first sub-mortgagee, then sued Mansuram Devaji and Narsiv for possession of the house. It was held by the High Court that Kriparam's sub-mortgage having been both executed and registered before the execution or registration of the sub-mortgage to Narsiv, albeit that Kriparam's mortgage was not accompanied by possession, had priority over the latter under which Narsiv obtained possession, "inasmuch as the doctrine of this Court is, notwithstanding what was said in *Bushell* v. *Bushell* (1 Schoales and Lefroy, 103) by Lord Redesdale that registration operates as notice, the object of a Registration Act being to give intending purchasers and mortgagees notice of prior transactions affecting immoveable property." The observations of Melvill, J., to the same effect in *Icharam* v. *Raiji*[1] were there referred to, where he said that registration secures the same object which the Hindu law wished to secure by requiring possession, viz., notice to subsequent incumbrancers of the existence of a prior incumbrance. He also cited Story's Eq. Jur. (9th ed.), sec. 395. In *Nanabhat* v. *Lakshman*[2] the mortgage was dated the 3rd January, 1868, and registered on the 25th January, 1868. The Court (Melvill and Kemball, JJ.) held that the registration of that mortgage was sufficient notice of it to a subsequent purchaser. So in *Balaji* v. *Ramachandra Ganesh Kelkar*[3] a mortgage of the 5th August, 1866, registered under Act XX of 1866, (which came into force on the 1st May, 1866), but unaccompanied by possession, was preferred to a subsequent purchase at a Court sale apparently followed by possession; the Court observing that the plaintiff's mortgage being registered was valid

(1) 11 Bom. H. C. Rep., 41, 42. (2) Printed Judgments for 1877, p. 83.

(3) 11 Bom. H. C. Rep., 37.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

without possession. A similar decision was made in *Radhabai* v. *Shamrav Vinayak*[1], where it was said "that the mortgage of Sitabai, being prior in date to that of Radhabai and being registered, is, under the rulings of this Court, equivalent to possession, as amounting to notice to subsequent incumbrancers or purchasers, Sitabai's claim against the land is prior to that of Radhabai."

Under Acts XVI of 1864, XX of 1866, and VIII of 1871 there is not any competition in respect of registration between a document compulsorily registrable and a document optionally registrable. This has been often so decided: *Cheniram* v. *Bunsiram*[2]; *Hamed Bux* v. *Bundra Bux*[3]; *Vithu* v. *Ramji*[4]; *Oghra Singh* v. *Ablaki Kooer* [5]. The unregistered bill of sale in the last mentioned case was dated the 27th January, 1876, and was in consideration of Rs. 95. The registered bill of sale was dated the 28th February, 1876, and was in consideration of Rs. 200. The former being optionally and the latter being compulsorily registrable, the Court gave priority to the former, being of opinion that there was not any competition between them under section 50 of Act VIII of 1871.

In the present case, however, it has been contended that the registration, in 1869, of Kachru's mortgage (dated in the same year) for Rs. 200 was equivalent to possession, and, therefore, gave to it priority over Dasrat's unregistered mortgage for Rs. 95 of 1866. Inasmuch, however, as it was impossible that such registration in 1869 could have operated as notice to Dasrat when he was taking his mortgage in 1866, it is not such a registration, in relation to Dasrat's earlier mortgage, as to fall within the scope of the rule that registration is equivalent to possession. The High Court has more than once refused to extend that rule to cases where the second in time of two rival instruments is that which is registered. In *Radhabai* v. *Rama*[6] the plaintiff's mortgage, dated 7th August, 1872, for Rs. 82, and, therefore,

(1) Printed Judgments of 1881, p. 218.
(2) Printed Judgments of 1874, p. 49.
(3) 2 N. W. P. Rep., 37.
(4) Printed Judgments of 1875, p. 297.
(5) I. L. R., 4 Calc., 536.
(6) Sp. App. 320 of 1875, Printed Judgments of 1876, p. 83.

optionally registrable, was unregistered. The defendant Hari Prasad's mortgage, dated 21st March, 1873, for a sum exceeding Rs. 100, and, therefore, compulsorily registrable, was registered. Neither mortgagee was in possession. The Court (Melvill and Kemball, JJ.) refused to hold that registration by the second incumbrancer, Hari, was as against the earlier imcumbrancer, the plaintiff, equivalent to possession, and rested its refusal on the ground that such registration could not have operated as notice to the plaintiff. In *Lalubhai Surchand* v. *Bai Amrit*[1], already referred to, there were two deeds of sale of the same house (each for a consideration exceeding Rs. 100) executed on the same day (July 2nd, 1868). Upon the first executed on that day the consideration was then in part paid, but possession was not given. Upon the second the whole of the consideration was paid on that day, and possession was given to the vendee; he had not any actual notice of the first deed. Both deeds were registered—the second on the 7th July, 1868; the first (as appears from the record but not in the report) was presented for registration on the 9th December, 1868, but, owing to a long litigation as to the right to register it, was not actually registered until the 26th July, 1872. It was argued for the vendee under that deed that being registered it operated from the time of its execution, and that such registration was equivalent to possession. But the Court preferred the second deed, it being accompanied by actual possession; and it being impossible that the subsequent registration of the first deed should operate as notice to the vendee under the second. That decision was followed in *Hasha* v. *Ragho*[2], which was a contest between two deeds of sale—one being to the plaintiff Hasha and dated the 28th February, 1878, but, though lodged on that day for registration, not registered until the 29th April, 1878; the other deed of sale, dated 1st of April, 1878, was to the defendant Ragho, who lodged it for registration on the 2nd of April, 1878, but it was not registered until the 26th May, 1878. The delay in registration of both deeds was solely caused by the misconduct of the sub-registrar. The Court being of opinion that the registration of the plaintiff's deed, not having been effected until after the execution of the defendant Ragho's deed, could

(1) I. L. R., 2 Bom., 299. (2) *Supra*, p. 165.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

not possibly have operated as notice to Ragho of the plaintiff's deed, and, therefore, could not be equivalent to possession, and observing that Ragho was a purchaser for valuable consideration without notice (either actual or constructive) of the plaintiff's purchase, and had taken the precaution of obtaining possession, and that both purchasers were Hindus, held that it could not deprive Ragho of the benefit of his possession.

Lastly, it was contended that the new legislation, contained in section 50 of Act III of 1877, was retrospective so far as to apply in cases where the rival instruments were registrable under Acts XVI of 1864, XX of 1866 or VIII of 1871, and that it was not necessary, in order to render that section applicable, that one of the instruments should be registered under Act III of 1877. But we cannot yield to that argument, as in this respect also there have been two rulings of this Court hostile to such a contention—*Kanitkar* v. *Joshi*[1] and *Selat Icharam* v. *Deve Govindram*[2], in both of which the question was carefully considered. To the same effect is *Bhola Nath* v. *Baldeo*[3] decided by the High Court at Allahabad, which Court has held that it is otherwise where the second and compulsorily registrable instrument has been registered under Act III of 1877. And see *Gangaram* v. *Bansi*[4], *Lachmandas* v. *Dipchand*[5], as to which two last-mentioned decisions it would be extra-judicial for us now to give any opinion—the point there dealt with not arising in the present case.

For these reasons we hold that Dasrat's unregistered mortgage of 1866, which was optionally registrable, is not overridden by Kachru's mortgage of 1869, which was compulsorily registrable, and, therefore, that the plaintiff, whose title is derived from Kachru, is not entitled to recover the property from Dasrat without redeeming the mortgage of 1866, as he is entitled to fall back on that mortgage according to the well-established practice of this Court[6]. The decree of the First Class Sub-

(1) I. L. R., 5 Bom., 442.
(2) Printed Judgments of 1881, 263; I. L. R., 5 Bom., 653.
(3) I. L. R., 2 All., 198.
(4) I. L. R., 2 All., 431.
(5) I. L. R., 2 All., 851.
(6) *Hirachand* v. *Bhaskar*, 2 Bom. H. C. Rep., 198.

NOTE.—See *Dinanath* v. *Auluck*, I. L. R., 7 Calc., 753, 765.

1880

LAKSHMAN-DAS SARUPCHAND v. DASRAT.

ordinate Judge, Mr. Ranade, is, accordingly, affirmed with costs of this appeal.

This judgment runs to a very great length, caused, however, by the desire to collect and classify (for the use of the Courts subordinate to this Court), so far as may be, the authorities on the difficult subject of the relation in which the Hindu and Mahomedan rule as to possession stands to the Registration Acts which from time to time have been in force in this Presidency.

Decree affirmed.

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, and Mr. Justice Kemball.

SOBHAGCHAND GULABCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BHAICHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1882
February 14 *and March* 3.

Registration—Possession—Notice—San-mortgage in Gujarat—Priority—Priority as between a purchaser at execution sale and prior mortgagee by unregistered san-mortgage—Plea of purchase without notice—At an execution sale the Court sells only what the judgment-debtor could honestly sell—Acts XX of 1866 *and VIII of* 1871.

The general rule in the Presidency of Bombay is that, amongst Hindus, possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers. The main ground of this rule is that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession.

It is, however, the established and judicially recognized custom of Gujarat, that possession is not necessary in the case of a *san*-mortgage (1) to validate it as against subsequent mortgagees or purchasers. The necessity of possession being thus dispensed with, it seems to follow that a *san*-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the *san*-mortgage. To hold that a subsequent mortgagee or purchaser for valuable consideration, and without notice of a *san*-mortgage is entitled to priority over it, would be tantamount to depriving the *san*-mortgagee of the benefit of the custom that possession is unnecessary.

A buyer of property at an execution sale who registers his certificate of sale does not thereby acquire a title free from the obligation arising from a *san*-mortgage of

*Special Appeal, No. 540 of 1873.

(1) In Gujarát a *san*-mortgage or *sankhat* means a mortgage without possession.