

was not one for personal property, or founded upon contract. It appears to us that a suit for *balute* is a claim in respect of a *hak* belonging to, and forming the emoluments of, an hereditary office amongst Hindus, and, therefore, one in respect of immovable, (*nibandha*), and not moveable or personal property.

For this reason we think that the question—"whether a Small Cause Court had jurisdiction in respect to the claim made in this suit"—referred to this Full Bench should be answered in the negative.

APPELLATE CIVIL.

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

SHIVRAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* GENU AND HAN-MANTRAV SADASHIV (ORIGINAL DEFENDANTS), RESPONDENTS.*

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March 6.

Registration—Act XX of 1866, Section 50—Priority—Notice of prior unregistered mortgage—Possession—Right to redeem—Parties.

On the 24th September, 1869, G. mortgaged certain land to H. Subsequently, on the 14th June, 1870, he mortgaged the same land to P. Both the mortgages were for sums less than Rs. 100. The mortgage to H. was unregistered, but the subsequent mortgage to P. was registered. On the 21st June, 1873, in a suit to which P. was not a party, H. obtained a decree on his mortgage, and at the execution sale he himself became the purchaser, and was put into possession of the land under his certificate of sale. On the 21st September, 1874, P. assigned his mortgage to the plaintiff. The deed of assignment was not registered; neither P. nor his assignee, the plaintiff, ever had possession under the mortgage of 1870. The plaintiff brought this suit to obtain possession of the land. Both the lower Courts dismissed the plaintiff's claim. On special appeal to the High Court.

Held that if P., at the time of taking his registered mortgage in 1870, had notice of the prior unregistered mortgage to H., he had that which it is the object of the registration law to give, and, consequently, the non-registration of H.'s mortgage could not, under Act XX of 1866, avail either P. or the plaintiff, who claimed under him by an assignment executed subsequently to the decree in H.'s mortgage suit.

A subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he had notice.

* Special Appeal, No. 400 of 1876.

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The High Court reversed the decrees of the Courts below, and remanded the case to the District Judge, to ascertain whether P., at or before the time of the execution of his registered mortgage, had notice of the prior unregistered mortgage to H.

Held, also, that, in order to bind P. by the decree passed in 1873 and thus make a good title to the purchaser under that decree, H. should have made P. a party to his suit, thereby giving P. an opportunity of redeeming H.'s mortgage. H., having neglected to do this, the plaintiff in the present suit, as the assignee of the rights and equities of P., was entitled to redeem the mortgage of H. in case it was proved that P. had notice of that mortgage.

This was a special appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, affirming the decree of the Second Class Subordinate Judge of Vita.

The plaintiff, Shivram, brought this suit for possession of certain land. Both the lower Courts dismissed his claim. The facts are fully stated in the judgment of the High Court.

Bhairavnath Mangesh appeared for the appellant.

Shantaram Narayan appeared for the respondents.

The following is the judgment of the High Court delivered by

WESTROPP, C.J.—On the 24th September, 1869, Genu (the first defendant) mortgaged a piece of land to the second defendant, Hanmantrav, for a sum less than Rs. 100. That mortgage was unregistered.

On the 14th June, 1870, Genu mortgaged the same land to Pandu for a sum less than Rs. 100. That mortgage was registered.

On the 21st June, 1873, Hanmantrav obtained a decree upon his mortgage of 1869, and, having caused the land to be put up for sale by the Civil Court, became its purchaser. The certificate of sale to him under that purchase was not registered. He did not make Pandu a party to the suit on the mortgage. Hanmantrav was put into possession (under section 269 of Act VIII of 1859) in virtue of his certificate of sale. About eighteen months afterwards, the plaintiff, Shivram, brought the present suit to enforce the mortgage of 1870 to Pandu, which mortgage had been assigned by Pandu to the Plaintiff Shivram. The deed of assignment (which was dated 21st September, 1874,) was not

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registered. Neither Shivram nor Pandu ever had possession under the mortgage of 1870. The Subordinate Judge held that Pandu had notice of the mortgage of 1869 to Hanmantrav. The District Judge has omitted to make any finding on the question of notice. If Pandu had notice, at the time of taking his registered mortgage in 1870, of Hanmantrav's unregistered mortgage of 1869, Pandu had that which it is the object of the registration law to give him, and, therefore, the non-registration of Hanmantrav's mortgage cannot avail Pandu, or the plaintiff, who claims under him by an assignment executed subsequently to the decree in Hanmantrav's suit. The language of section 50 of Act XX of 1866, which is the enactment applicable to these mortgagees (both of which are for sums under Rs. 100), is not more stringent than that of the fourth section of the Irish Registry Act, 6 Anne, c. II (1), and yet, under that Act, a subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase or mortgage of which he has notice. The reason for the decisions to that effect on the Irish Act, as well as on the Middlesex and Yorkshire Registration Acts, is concisely given by Lord Cairns in the *Agra Bank v. Barry*(2). He says: "I take the explanation to be this, 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 way the notoriety, which it was the object of the Statute to secure, is effected—effected in a different way, 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." In *Bushell v. Bushell*(3) Lord Redesdale, after describing the case of *Lord Forbes v. Deniston*(4), which was an appeal from Ireland, said: "The House of Lords determined that the words of the Act, which made

(1) For that enactment see *Waman Ranchandra v. Dhondiba Krishnaji*, I. L. R. 4 Bom., p. 145, note 1. (2) L. R. 7 Eng. & Ir. App., 135, 1147, 48. (3) 1 Sch. & Lef., 90—100. (4) 4 Bro. P. C., 189 (2nd ed.)

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an unregistered deed fraudulent and void against a subsequent registered deed, had not that effect if there was notice of the prior deed. If a man has notice, he cannot say he is defrauded; it is fraudulent in him to take a conveyance to defeat the charge of another." And, again, speaking of the Irish Act, sec. 4, he says: "it has the effect of giving priority, except in case of fraud, (as where the party has had notice *aliunde*,) and that it is a priority which a Court of Equity or of Law cannot take away"(1). That view of the Act was adopted by Lord Manners in *Eyre v. Dolphin*(2), and in the Irish cases mentioned in note 4, page 149, I. L. R., 4 Bom. For cases on the Middlesex Act in which notice was held to excuse non-registration, see *Le Neve v. Le Neve*(3) and *Cheval v. Nichols*(4) in the Equity Exchequer and on the Yorkshire Act: *Blades v. Blades*(5). In a very recent Calcutta case, *Dinanath Ghose v. Auluck Mini Dabee*(6), the defendant claimed under optionally registrable but unregistered *kobalas*, respectively dated the 19th and 20th November 1871, and had possession of the immoveable property, the subject thereof. The plaintiff claimed the same property under an optionally registrable and registered conveyance of the 10th December, 1873, without possession. The Court (Prinsep and Field, JJ.) held the title of the defendant preferable to that of the plaintiff, inasmuch as the possession of the defendant was notice to the plaintiff of the defendant's unregistered title(7). Such, too, is the effect of possession in England—*Daniels v. Davison*(8).

The cause must, therefore, be remanded to the District Judge to ascertain whether or not Pandu, at or before the time of the execution of his registered mortgage of the 14th June, 1870, had notice of Hanmantrav's unregistered mortgage of the 24th September, 1869.

(1) 1 Sch. & Lef. 102.

(2) 2 Ball and Beatty, 290, 302.

(3) 7 Ambler, 436, 447; S. C., 2 Wh. & Tnd., 32, 41, 42 (5th ed.)

(4) 1 Stra. 664.

(5) 1 Eq. Ca. A. 358, pl. 12.

(6) 17 Vesey. 433; Sugden's Vendors and Purchasers (11th ed.), p. 1052, Ch. XXIII, sec. 1, pl. 50; 2 Wh. & Tnd. 61 *et seq.*(6) I. L. R. 7 Calc. 763, and see *per Pontifex, J.*, in *Fuzlodeen Khan v. Fakir Mahomed Khan*, I. L. R. 5 Calc. 326, 343 *et seq.*(7) See, also, *Nageshbat v. Balvani-rav*, 7 Bom. H. C. Rep. 151.

Assuming that the District Judge finds that question in the affirmative, viz., that Pandu had such notice, it becomes necessary to remember that, although it would have been quite practicable for Hanmantrav to have bound Pandu by the decree in Hanmantrav's suit if he had made Pandu a party thereto, and, consequently, to have made a good title to the purchaser under that decree, whosoever he might be (in the present case himself), yet Hanmantrav neglected to take the proper means for that purpose by making Pandu a party to that suit, whereby Pandu might have had an opportunity of redeeming the land from Hanmantrav's mortgage (1). To that opportunity, Shivram (the plaintiff), who has since become the assignee of the rights and equities of Pandu, will be entitled if it be established that Pandu had notice of Hanmantrav's mortgage. The burden of proving that Pandu had such notice will lie upon Hanmantrav.

Assuming, however, that Pandu had not, at or before the execution of his mortgage, notice of Hanmantrav's unregistered mortgage, and, therefore, that Pandu's mortgage by virtue of its registration is entitled to priority over that of Hanmantrav, the latter (Hanmantrav) will in that event be entitled, as owner of what was Genu's equity of redemption under the judicial sale to Hanmantrav, to redeem the mortgage of Pandu now vested in the plaintiff.

Whatever party may be subjected to the duty of redemption, should have a reasonable time, say, six calendar months, within which he may redeem. Such account as may be necessary to ascertain the amount due on such mortgage should be taken in the District Court.

This Court reverses the decrees of the Courts below, except so far as the same affect the defendant Genu, and remands the cause for a new trial on the merits, in accordance with the foregoing observations. The question of costs of the suit and of both appeals as between Hanmantrav and the plaintiff should, on such new trial, be disposed of in such manner as may be just.

Decrees reversed.

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