

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

HA THISING SOBHA'I, (ORIGINAL PLAINTIFF), APPELLANT, v. KUVARJI JAVHER, (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

1885.
August 31.

Registration—Notice of prior unregistered deed—Priority—Sale—Mortgage—Act III of 1877, Sec. 50.

A subsequent registered purchaser or mortgagee is not to be preferred as against the holder of a prior unregistered instrument of purchase or mortgage of which he had notice.

Dundaya v. Chenbasapa⁽¹⁾ followed.

THIS was a second appeal from the decision of F. Beaman, Assistant Judge of Ahmedábád, reversing the decree of Ráy Sáheb Lallubháí Pránvallabhdás Párekhi, Joint Subordinate Judge of Ahmedábád.

The plaintiff sued one Jasá Valá and Kuvàrji Javher, (the respondent), to recover from them possession of a house, alleging that he had purchased it from Jasá Valá for Rs. 82 under an unregistered deed of sale dated 21st September, 1880; that he obtained possession of it immediately after his purchase, and had let it to one Jivan Mangal; that Jasá Valá at the instigation of Kuvàrji Javher ousted the plaintiff's tenant, and unlawfully obtained possession of the house; that the plaintiff brought a possessory suit in the Mámlatdár's Court against Jasá Valá, but was unsuccessful in that suit; and that Kuvàrji Javher subsequently obtained possession of the house.

Jasá Valá admitted the sale of the house to the plaintiff, but asserted that it was for Rs. 150, and that he had never given possession to the plaintiff, as the whole of the consideration money had not been paid.

Kuvàrji Javher answered that the suit was a collusive one between the plaintiff and Jasá Valá; that he had purchased the house from Jasá Valá for Rs. 140 under a registered deed of sale dated 7th January, 1881, and that he had ever since been in possession.

* Second Appeal, No. 47 of 1884.

¹⁾ Printed Judgments for 1883, p. 83.

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The Subordinate Judge awarded the claim; the Assistant Judge, relying on *Madar Sáheb v. Subbaráyalu Nayudu*⁽¹⁾, rejected it.

The plaintiff appealed to the High Court.

Gokaldás Kahándás for the appellant.—The defendant, a subsequent registered purchaser, had notice of the plaintiff's unregistered mortgage, and cannot claim preference. It is settled law in the Bombay Presidency that a subsequent registered purchaser or mortgagee is not to have priority as against a prior unregistered purchase or mortgage of which he had notice, and that possession by a purchaser or mortgagee prior in point of time is notice of his title to subsequent purchasers and mortgagees—*Dundaya v. Chenbasápá*⁽²⁾; *Shivrám v. Genu*⁽³⁾; *Lakshmandás Sarupchand v. Dasrat*⁽⁴⁾; and *Wáman Rámchandra v. Dhondiba Krishnáji*⁽⁵⁾. The Madras High Court regard notice as immaterial, and, therefore, their decision cannot guide us in this Presidency.

Nagindás Tulsidás for the respondent.—The Bombay cases are under the old law of registration. Notice is immaterial—*Nallappa Goundan v. Ibrám Sáhib*⁽⁶⁾, and, therefore, the defendant's deed is entitled to precedence.

SARGENT, C.J.—The Acting Assistant Judge has decided in favour of the defendant's registered sale-deed on the authority of the decision in the case of *Madar Sáheb v. Subbaráyalu Nayudu*⁽⁷⁾. But the decision in that case, owing to the view taken by the Madras High Court in *Nallappa Goundan v. Ibrám Sáhib*⁽⁸⁾, as to the immateriality of notice of the unregistered document by the holder of the subsequent registered document, proceeded entirely on the ground that the decree obtained by defendant did not revive the operation of his unregistered instrument. According, however, to the ruling of this Court in *Dundaya v. Chenbasápá*⁽⁹⁾, which does not seem to have been present to the mind of the Assistant Judge, the holder of the registered instrument may

(1) I. L. R., 6 Mad., 88.

(5) I. L. R., 4 Bom., 126.

(2) Printed Judgments for 1883, p. 83.

(6) I. L. R., 5 Mad., 73.

(3) I. L. R., 6 Bom., 515.

(7) I. L. R., 6 Mad., 88.

(4) I. L. R., 6 Bom., 168.

(8) I. L. R., 5 Mad., 73.

(9) Printed Judgments for 1883, p. 83.

lose his preference over the holder of the earlier, but unregistered, instrument by his having had notice of the latter at the time the instrument was executed in his favour; and we think that the Acting Assistant Judge, owing to his relying on the Madras cases, did not realize with sufficient distinctness the question he had to decide, which, upon the decision of this Court, was exclusively whether the defendant had or had not notice of the plaintiff's earlier sale-deed. It should be clearly understood that, in making these remarks, we are not expressing any opinion as to what the answer should be to that question. We must, therefore, send the case down for the District Judge to determine whether the second defendant had notice of the plaintiff's sale-deed when the first defendant executed in his favour the sale-deed of the 7th January, 1881. The finding to be transmitted to this Court within two months.

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APPELLATE CIVIL.

Before Mr. Justice Nanábhái Haridás and Sir W. Wedderburn, Bart., Justice.

IN RE THE PETITION OF RA'MDA'S BRIJ GOVANDA'S.*

Act XXVII of 1860—Certificate of heirship when necessary—Legal representative, suit by, to recover debt due to the deceased.

1885.

August 31.

The production of a certificate under Act XXVII of 1860 is not a condition precedent to the institution of a suit by a person claiming to be the legal representative of a deceased creditor. It is only where there is a reasonable doubt as to the person entitled to the property claimed in the suit that such a certificate can be required.

THE petitioner, as agent of Devkábái, sued one Amrit Nathu to recover a debt of Rs. 39-12 due to his principal, Devkábái, as the wife and alleged sole legal representative of her deceased husband, Devchand. When the suit came on for hearing before the Subordinate Judge of Bhusával, in the Khándesh District, Amrit Nathu raised an objection that Devkábái, not having previously obtained a certificate of heirship to her deceased husband, could not sue as his legal representative. The Subordinate Judge allowed the contention, and dismissed the suit.

*Extraordinary Application, No. 45 of 1885.