

person can be held to be a European British subject, he must prove that he comes within the terms of that definition, and to do this, it is necessary that he both make the claim and establish it. There can be no such *status* without a claim and a decision that it exists. In the present case no such claim has been made and no such decision has been passed. There is nothing, therefore, to show that the *status* of a European [569] British subject exists, and that the accused comes within the terms of the definition of such a subject as is given in s. 4 of the Code. The proceedings, therefore, not being proceedings against a European British subject, have been wrongly entered as such in the returns sent to this Court by the Courts in Sind, and must be returned to the Magistrate (who for the purposes of this trial had needlessly styled himself a Justice of the Peace). They are subject to revision, not by this High Court, but by the Sadar Court in Sind, which is the High Court in reference to them.

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13 Ind. Jur.
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12 B. 569.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

MORESHWAR BALKRISHNA (*Original Plaintiff*), *Appellant v.*
DATTU AND ANOTHER (*Original Defendants*), *Respondents.**
[26th April, 1888.]

Registration Act III of 1877, s. 50—Priority—Possession of mortgagor as tenant to mortgagee—No notice to bona fide purchaser—Notice.

By an unregistered deed of sale dated the 1st June, 1881, the first defendant sold to the plaintiff, for Rs. 90, certain land which had been previously mortgaged with possession by him to the plaintiff. The first defendant had remained in possession subsequently to the mortgage as the tenant of the plaintiff under a lease which was not registered. On the 16th April, 1883, the first defendant sold the property to defendant No. 2, who registered his deed, took actual possession of the land, and got it transferred to his name in the revenue books. The plaintiff now sued to recover possession from defendant No. 2, who contended (*inter alia*) that his deed being registered was preferable to the plaintiff's prior, but unregistered, deed of sale. The Court of first instance awarded the plaintiff's claim. The defendants appealed to the District Judge, who reversed the lower Court's decree. On appeal by the plaintiff to the High Court.

Held, confirming the decree of the lower appellate Court, that defendant No. 2 having registered his deed of the 16th April, 1883, was entitled, under s. 50 of Act III of 1877, in priority to the plaintiff, whose deeds were not registered, although earlier in date.

It was contended for the plaintiff that the possession of defendant No. 1 as tenant to the plaintiff subsequently to the mortgage and sale of the land to the plaintiff was the possession of the plaintiff, and that such possession operated as constructive notice of the plaintiff's title to defendant No. 2.

Held, that the possession by defendant No. 1 as mortgagor was not notice to defendant No. 2 of the plaintiff's title. Defendant No. 1 being the vendor of the land to defendant No. 2, the latter could have no reason to suppose that he was in possession otherwise than as owner.

[R., 22 B. 213 (216); 27 B. 452 (470); U.B.R. (1897—1901), 574.]

[570] THIS was a second appeal from a decision of H. J. Parsons, District Judge of Thana, reversing the decree of Khan Sahab Ruttonji Mancherji, Subordinate Judge of Murbad.

* Second Appeal, No. 275 of 1886.

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In 1879 the defendant Dattu mortgaged with possession the land in dispute to the plaintiff for the consideration of Rs. 50, but remained in possession as plaintiff's tenant. On the 1st June, 1881, Dattu sold the land to the plaintiff for Rs. 90, and executed a deed of conveyance, which was not registered. He still remained in possession, as a tenant of the plaintiff, under a lease which was not registered.

On the 16th April, 1883, Dattu sold the land to Devu Patel, (defendant No. 2), for Rs. 199, as alleged by Dattu. Devu got his deed registered, and was put into actual possession of the land by Dattu, who also transferred the land to the name of Devu in the revenue books.

The plaintiff sued the defendants to establish his title to, and recover possession of, the land. Defendant No. 2 (*inter alia*) contended that his sale-deed being registered was entitled to priority.

The Court of first instance awarded the plaintiff's claim.

The defendants appealed to the District Judge, who reversed the lower Court's decree with the following remarks :—

"* * The Subordinate Judge has awarded the claim of the plaintiff, holding that the act of defendant No. 1 in selling his land to defendant No. 2 after he had sold it to the plaintiff was a fraud. He finds, however, expressly that defendant No. 2 was not a party to this fraud, and that he was not cognizant and had no notice of the former sale or mortgage or leases. This finding is not objected to. On it, it is clear that the plaintiff is not entitled to possession as against defendant No. 2. * * * The question is, which purchaser has priority. The law (s. 50 of Act III of 1877) gives it to the one who holds a registered document,—that is, to defendant No. 2 in this case. The plaintiff when he took his deeds of mortgage and sale and his leases, and failed to register them or take actual possession of the land, knew the risk he was running, and accepted it, and, therefore, he cannot now complain * * * *"

[571] The plaintiff preferred a second appeal to the High Court.

Mahadev Bhaskar Chaubal, for the appellant :—The plaintiff's purchase was prior to that of the defendant, and as it was accompanied by possession it has priority. Possession by a mortgagor is as good as possession by the mortgagee—*Shivlal v. Naro Balwant* (1). The registration of the defendant's purchase-deed does not give him priority. Possession by a tenant under a *kabulayat* is as effectual as actual possession by the landlord—*Wamanji Vishnu v. Amba* (2); *Anant Babu v. Arjun Gondji* (3).

The possession of the plaintiff, though constructive, was a notice to the defendant, who ought to have made inquiries as to the title of the vendor.

Vishnu Krishna Bhatvadekar, for the respondents :—This case is governed by the Registration Act III of 1897, s. 50, which gives priority to a registered document over an unregistered document. The defendant's purchase-deed is registered and accompanied by possession, and the land has been transferred to his name in the revenue books. The first defendant was in possession when he sold the property to the second defendant, who had no reason to suppose that it had already been sold. Possession by a tenant cannot amount to notice. The plaintiff ought to have got his deed of sale or the lease registered, in order to fix the defendant with

(1) Printed Judgments for 1882, p. 191. (2) Printed Judgments for 1881, p. 117.
(3) Printed Judgments for 1830, p. 293.

notice. Both the documents, viz., that of the plaintiff and that of the defendant, were executed after the Act of 1877 came into force.

JUDGMENT.

SARGENT, C.J.—Since the passing of the Registration Act III of 1877 the preference given to an unregistered document accompanied by possession (where registration was optional) as against a registered document by the decision in *Balaram Nemchand v. Appa* (1) (as explained by Melvill, J., in *Sambhubhai v. Shivalaldas* (2)), has been taken away by the altered language of s. 50 of that Act. That section provides that every document of the kind mentioned in cls. *a*, *b*, *c* and *d* of s. 17, if duly registered, shall take effect, as regards the property comprised [572] in it, against every unregistered document relating to the same property. The defendant's purchase, therefore, of the 16th April, 1883, is entitled to priority over the earlier, but unregistered, document on which the plaintiff's title is based, unless indeed the defendant had notice of it, in which case, under the ruling of this Court in *Shivram v. Genu* (3) and *Dundaya v. Chenbasapa* (4), he would lose his preference. The plaintiff was not in actual possession, but was constructively so for certain purposes through the mortgagor, who remained in possession as his tenant under a *kabulayat*, which, however, had not been registered. The mortgagor's possession, however, would afford no notice, either actual or constructive, to the defendant of the plaintiff's title. Finding his intended vendor in possession, the defendant would have no reason to suppose that he was there otherwise than as owner. The plaintiff might have protected himself by having the *kabulayat* registered; but not having done so, he cannot now contend that the defendant, in the absence of any special circumstances, had notice of the nature of the mortgagor's possession. As the plaintiff's pleader refused at the hearing to have an issue raised to try the genuineness of the defendant's mortgage, this Court in second appeal has no power to rectify his mistake. We must, therefore, confirm the decree, with costs on the appellants.

Decree confirmed.

12 B. 573 = Chitty's S.C.G.R. 187.

[573] ORIGINAL CIVIL.

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

KHURSEDJI RUSTOMJI COLAH, EXECUTOR OF DOSSIBAI, WIDOW,
(Plaintiff) v. PESTONJI COWASJI BUCHA (Defendant).
[10th August, 1888.]

Small Cause Court—Jurisdiction—Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Act XV of 1882, s. 18.

The plaintiff as executor of D. sued the defendant in the Small Cause Court of Bombay, to recover two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of D. The defendant, who had been D.'s servant, alleged that the notes had been given to him by D. as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D. to the defendant. It was then contended, on behalf of the plaintiff,

* Small Cause Court Suit No. 8832 or 1887.

(1) 9 B.H.C.R. 121.
(3) 6 B. 515.

(2) 4 B. 89 (92).
(4) 9 B. 427 (428).