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that the intention of the Legislature was merely to give more definite expression to that rule, and that the words "Court of jurisdiction competent to try such subsequent suit" mean a "Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the pecuniary limit of its jurisdiction or the subject-matter of the suit, to try it with conclusive effect." This is the construction we are led to place on these words on a consideration of the decision of the Privy Council just referred to and of the judgment of this Court (West and Nanabbai, JJ.), in *Bholabhai v. Adesang* (1). As the judgment of the Kurundvad Huzur Divani Court was one on the merits and conclusive in the Kurundvad territory, as between the plaintiff and the defendant No. 2, on the question of the plaintiff's adoption, and was not appealed against to the Governor in Council, the question as to the plaintiff's adoption decided by that judgment cannot now be litigated between the same parties in the present suit. We, therefore, reverse so much of the decrees of the Courts below as rejects the claim against the defendant No. 2, and award the claim as against him. We confirm the rest of the decree. We order the plaintiff to pay the costs of defendants Nos. 1 and 3 throughout, and the defendant No. 2 to pay his own and plaintiff's costs throughout.

Decree varied.

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[229] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

SHIVRAM (*Original Plaintiff*), *Appellant v. SAYA* (*Original Defendant*)
*Respondent.** [24th April, 1888.]

Registration—Priority—Registration Act (III of 1877), s. 50, not retrospective in its operation—Meaning of the words "duly registered" in the section—Act VIII of 1871 s. 50—Contest between instruments executed before Act III of 1877 which are not both optionally registrable—Vendor and purchaser—Purchaser omitting to take possession—Fraud—Estoppel.

Section 50 of the Registration Act (III of 1877) has no retrospective effect. The words "duly registered" in that section mean duly registered under that Act, and not under any prior Act.

The section has no application to cases where the contest is between an unregistered instrument whenever executed and a registered instrument executed before the Act came into force. It applies only to cases where the registered instrument is subsequent to the Act.

A. sold certain land to B, by a sale-deed 15th July, 1871. The deed was optionally registrable, and was not registered. A. continued in possession after the date of the sale.

A. sold the same land to the plaintiff by a deed of sale dated 1st February, 1872. The deed was registered, its registration being compulsory. It was unaccompanied with possession.

In 1882, B. obtained possession of the land from A.'s sons and sold it to the defendant by a sale-deed dated 14th October, 1882. This deed was registered and accompanied with possession.

In 1883, the plaintiff sued for possession of the land in dispute, relying on his registered deed of sale of 1st February, 1872. The defendant relied on his vendor's sale-deed of the 15th July, 1871.

* Second Appeal No. 251 of 1886.

Held, that under Act VIII of 1871, which governed the present case, there could be no competition between the sale-deeds of 1871 and 1872, the registration of the one being optional, whilst that of the other was compulsory. The registration of the plaintiff's deed, therefore, did not give it priority over the earlier deed under which the defendant claimed.

Held, also, that the defendant's vendor by merely omitting to take possession of the land on his purchase was not guilty of any positive fraud or of any concealment or negligence so gross as to amount to fraud that would entitle the plaintiff to relief against him.

[R., 20 B. 158 (161, 164); 3 Bom.L.R. 679 (680).]

SECOND appeal from the decision of E. T. Candy, District Judge of Poona, in appeal, No. 297 of the District File.

[230] One Piraji Kute sold certain fields to Piraji Nhavi by a deed of sale dated 15th July, 1871. The deed was not registered, its registration being optional.

On the 1st February, 1872, Piraji Kute sold the same fields to the plaintiff under a registered deed of sale, the registration of which was compulsory. It was unaccompanied with possession.

In 1882, Piraji Nhavi obtained possession of the fields in question from the sons of Piraji Kute, and on the 14th September, 1882, sold them to the defendant Saya. The defendant's sale-deed was registered and accompanied with possession.

On the 27th August, 1883, the plaintiff filed the present suit to recover possession of the fields in question, relying on his sale deed of the 1st February, 1872.

The Subordinate Judge held that plaintiff was a *bona fide* purchaser for value without notice of the prior purchase by Piraji Nhavi, and, as such, his title was superior to that of the defendant Saya, who purchased from Piraji Nhavi. The plaintiff's claim was, therefore, awarded with costs.

On appeal, the District Judge was of opinion that a subsequent purchaser could not take precedence by the mere fact of his deed being registered when the prior purchaser had obtained possession. In the present case the plaintiff was undoubtedly a purchaser for valuable consideration without notice; but equally so was Piraji Nhavi, the prior purchaser, and as the latter had eventually obtained possession, neither he nor the defendant, who claimed under him, could now be ejected. On these grounds he reversed the decree of the Subordinate Judge and rejected the plaintiff's claim.

Against this decision the plaintiff preferred a second appeal to the High Court.

Vishnu K. Bhatavadekar, for the appellant.—Section 50 of Act III of 1877 applies to the present case. The explanation to the section clearly gives a priority to the plaintiff's registered deed over the earlier unregistered deed. The plaintiff is a purchaser for value without notice of the prior sale. Defendant had, on the other hand, notice of our title, our deed being registered. Refers [231] to *Raju Balu v. Krishnarav Ramchandra* (1) and *Shib Chandra Chakravarti v. Johobux* (2).

Ganpat Sadashiv Rav, for the respondent.—Section 50 of Act III of 1877 is not retrospective. It applies only to cases where the registered document is executed after the Act came into force—*Kanitkhar v. Joshi* (3); *Ichharam Kalidas v. Govindram Bhowanishankar* (4); *Rupchand Dagdusa v. Davlatrav Vithalrav* (5). The rulings of the other High Courts are, no doubt,

(1) 2 B. 273 (280). (2) 7 C. 570. (3) 5 B. 442. (4) 5 B. 653. (5) 6 B. 495.

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opposed to this contention. We rely on the uniform course of decisions of this Court. The present case is, therefore, governed by Act VIII of 1871. Under that Act the competition lies only between two optionally registrable deeds. Our prior deed of sale, therefore, prevails. It is, moreover, perfected by subsequent possession. The plaintiff cannot eject us.

Vishnu K. Bhatavadekar, in reply.—Apart from the question of registration, the prior purchaser stood by, and allowed the vendor to deal with the property as if it was his own. He is, therefore, estopped from disputing our title.

Ganpat Sadashiv Rav.—This is a new point, which cannot be raised for the first time in second appeal.

JUDGMENT.

BIRDWOOD, J.—The plaintiff claims certain land under a registered deed of sale dated the 1st February, 1872. The defendant is the vendee of the same land from one Piraji Nhavi, who purchased from the plaintiff's vendor on the 15th July, 1871. Piraji Nhavi did not register his deed of sale, but obtained possession of the land in 1882. The defendant's deed of sale is registered. The contest is between Piraji Nhavi's unregistered deed of 1871 and the plaintiff's registered deed of 1872. If we can hold that s. 50 of Act III of 1877 is applicable to the case, then the plaintiff must succeed, even though Piraji Nhavi took possession of the land. The High Courts of Calcutta, Madras and Allahabad have concurred in giving a retrospective effect to the provisions of that section so far as it refers to registered instruments. See *Shib [232] Chandra Chakravarti v. Johobux* (1); *Kondayya v. Guruwappa* (2); and *Abdul Rahim v. Ziban Bibi* (3). But the course of decisions in this Court prevents our adopting such a construction. See *Kanithkar v. Joshi* (4); *Ichharam Kalidas v. Govindram Bhowanishankar* (5); *Lakshmandas Sarupchand v. Dasrat* (6); *Rupchand Dagdusa v. Davlatrav Vithalrav* (7). The "Explanation" of the section shows that it is applicable to unregistered instruments executed before the Act came into force; but the decision in *Ichharam Kalidas v. Govindram Bhowanishankar* (5) shows that, though that is so, the section has no application to cases where the contest is between an unregistered instrument, when ever executed, and a registered instrument executed, as in the present case, before the Act came into force. It applies only to cases, where the registered instrument is subsequent to the Act. That being so, we cannot apply s. 50 of Act III of 1877 to the present case. Under s. 50 of Act VIII of 1871, which was in force when the instruments in question were executed, the contest can only be between instruments both of which are optionally registrable. See *Parmaya v. Sonde Shrinivasapa* (8); *Oghra Singh v. Ablakh Kooer* (9); and *Bholanath v. Baldev* (10). Here, however, the deed of sale of 1871 was optionally registrable, whereas the registration of the later deed of 1872 was compulsory. There is, therefore, no competition between them; and the earlier, under which the defendant claims, must prevail.

It was argued, however, that as Piraji Nhavi stood by while his vendor sold to the plaintiff, without disclosing his own title, he could not pass any title to the defendant. But there is no allegation and nothing in the case to show that Piraji acted in such a way as to be deprived

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| (1) 7 C. 570. | (2) 5 M. 189. | (3) 5 A. 593. | (4) 5 B. 442. |
| (5) 5 B. 653. | (6) 6 B. 168. | (7) 6 B. 495. | (8) 4 B. 459. |
| (9) 4 C. 536. | (10) 2 A. 198. | | |

of his legal rights under his purchase, or that he, in any way, encouraged or influenced the plaintiff's purchase. The plaintiff never acquired possession of the property, nor is there anything to show that Piraji even knew of [233] his purchase. The case is clearly not one to which the rule relied on by the appellant can be applied: See *Willmott v. Barber* (1). We, therefore, confirm the decision of the lower appellate Court with costs.

PARSONS, J.—The plaintiff claims certain land under a registered deed of sale dated the 1st February, 1872. The defendant, who is in possession, claims the same land by purchase from Piraji Nhavi, who bought from the plaintiff's vendor by an unregistered deed of sale dated the 15th July, 1871. The contest is as to the priority of these deeds, the one relied on by the plaintiff compulsorily registrable and registered under Act VIII of 1871, the other relied on by the defendant optionally registrable under the same Act and not registered. There is no doubt that if s. 50 of Act III of 1877 does not apply, registration gives no priority to the plaintiff's deed—*Parmaya v. Sonde Shrinivasapa* (2). In deciding the point, regard must be had to the consistent course of rulings of this Court—*Kanitkar v. Joshi* (3); *Ichharam Kalidas v. Govindram Bhowanishankar* (4); *Lakshmandas Sarupchand v. Dasrat* (5); *Rupchand Dagausa v. Davlatrav Vithalrav* (6) opposed though they be to the decisions of the other High Courts—*Shib Chandra Chakravarti v. Johobux* (7); *Kondayyav. Guruvappa* (8); *Abdul Rahim v. Ziban Bibi* (9); and, therefore, it must be held that s. 50 of Act III of 1877 has no retrospective effect, and that the words "duly registered" in that section mean duly registered under that Act and not under any prior Act. By virtue, therefore, of its being registered, the plaintiff's deed is entitled to no priority over the defendant's. It was further argued that as the defendant did not on his purchase take possession of the land, he cannot dispute the subsequent alienation made by his vendor whom he allowed to remain on in possession. No rule of law or equity, however, is shown that will support a proposition so broadly stated. If the defendant, knowing of the intended sale to the plaintiff, had [234] stood by and encouraged it or had not forbidden it, or if he even were shown to have in any way misled the plaintiff, he might be held bound by the sale; see *Willmott v. Barber* (1); but, in order that he be bound, it is necessary to show a suffering amounting to fraud—*Hanning v. Ferrers* (10). It cannot be held that by merely omitting to take possession of the land on his purchase the defendant was guilty of any positive fraud or of any concealment or negligence so gross as to amount to fraud, that will entitle the plaintiff to relief against him—*Evans v. Bicknell* (11). In this case indeed any such relief could hardly be asked for by the plaintiff, because he himself never took possession, and was, therefore, even more negligent than the immediate vendor of the defendant, for that vendor was in possession when he sold to the defendant by the registered deed of the 14th October, 1882, by virtue of which deed and of his possession thereunder the defendant claims to hold the land. The equities, therefore, are on the side of the defendant rather than of the plaintiff. For these reasons I concur in confirming the decree with costs.

Decree confirmed.

- (1) 15 Ch. Div. 96. (2) 4 B. 459. (3) 5 B. 442. (4) 5 B. 653.
 (5) 6 B. 168. (6) 6 B. 495. (7) 7 C. 570. (8) 5 M. 139.
 (9) 5 A. 593. (10) 1 Eq. Abrid. 356. (11) 6 Ves. Jun. 174 (191).

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