

directed by the first decree will not be barred by s. 244, Civil Procedure Code.

I concur in reversing the decree of the Courts below, and remanding the case to the Court of the District Judge for disposal on the other issues arising between the parties, and in directing that the costs of this appeal do abide the result.

Decree reversed.

1893
APRIL 20.
—
APPEL-
LATE
CIVIL.
—
18 B. 327.

18 B. 332.

[332] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

TRIKAM MADHAV SHET (*Original Plaintiff*), Appellant v. HIRJI HARJIVAN SHET (*Original Defendant*), Respondent.* [12th June, 1893.]

Registration—Mortgage—Priority—Unregistered mortgage with possession and without notice not entitled to priority as against a mortgage earlier in date, but subsequently registered—Bombay Regulation IX of 1827—Act XIX of 1843—Possession—Hindu law.

The plaintiff sued to enforce a mortgage dated 8th June, 1863, which was registered on 15th September, 1864, but was unaccompanied with possession. The defendant relied on a mortgage of the same property dated 9th May, 1864. This mortgage was unregistered, but was accompanied with possession.

Held, that, apart from any special peculiarities of Hindu law, the plaintiff's mortgage of the 8th June, 1863, which was registered on the 15th September, 1864, was entitled to priority over the unregistered mortgage of the 9th May, 1864, although the latter was without notice of the earlier mortgage and was accompanied with possession.

Held, also, that plaintiff's mortgage was not invalid under Hindu law owing to its not being accompanied with possession.

[R., 27 B. 452 (472) .]

SECOND appeal from the decision of C. E. G. Crawford, District Judge of Thana, in Appeal No. 225 of 1890.

The plaintiff sued to enforce his mortgage lien by sale of a portion of the property mortgaged.

He claimed under three following mortgage-deeds executed by the defendant Bhagu and his father Chimnia, each being a renewal of the one preceding it, *viz.*—

(1). 11th January, 1860, not registered or accompanied with possession.

(2). 8th June, 1863 registered on the 15th September, 1864, but not accompanied with possession.

(3). 4th August, 1867, registered, but not accompanied with possession.

The present suit was filed in 1889. Defendants Nos. 1 to 4 did not contest the claim.

Defendant No. 5 pleaded that he was in possession, and he relied upon a mortgage executed by Bhagu and Chimnia to one Mahadaji Ravji, dated 9th May, 1864, which was not registered [333] but which was accompanied with possession. He contended that he was entitled to the benefit of this mortgage, he having, in 1878, advanced

* Second Appeal No. 955 of 1891.

1893
 JUNE 12.
 —
 APPEL-
 LATE
 CIVIL.
 —
 18 B. 332.

money to Bhagu and Chimnia to pay it off, and having then obtained a fresh mortgage to himself, which was duly registered and under which he had ever since been in possession.

The Subordinate Judge passed a decree for the plaintiff, holding that though the defendant was entitled to the benefit of Mahadaji's mortgage, Mahadaji had notice of the plaintiff's prior mortgages, and that plaintiff, therefore, had a preferential right over the defendant, who stood in Mahadaji's place.

On appeal, the District Judge reversed the lower Court's decree, holding that there had been no sufficient notice to Mahadaji of the plaintiff's prior mortgage.

The plaintiff filed a second appeal to the High Court.

The question argued was whether the plaintiff's mortgage of 8th June, 1863, was preferable to Mahadaji's later mortgage of 9th May, 1864, which, though unregistered, was accompanied with possession; the plaintiffs' mortgage not having been registered until the 15th September 1864.

Vasudev Gopal Bhandarkar, for appellant.

Mahadeo Chimnaji Apte, for respondent.

The following authorities were referred to in argument:—*Hari Ramchandra v. Mahadaji Vishnu* (1); *Balaram Nemchand v. Appa* (2); *Lallubhai v. Bai Amrit* (3).

JUDGMENT.

CANDY, J.—The mortgage of 8th June, 1863, which the plaintiff seeks to enforce, was registered on the 15th September, 1864, but was unaccompanied with possession.

The mortgage to Mahadaji relied on by the fifth defendant was dated the 9th May, 1864, and was accompanied with possession, but was unregistered.

The portions of the Registration Law in force when these transactions took place, which govern this case, are contained in s. 6 of Reg. IX of 1827 and s. 2 of Act XIX of 1843, and are as follows:—

[334] Section 6 of Reg. IX of 1827:—"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 of those * specified in s. 3, cl. 1, either subsequently registered or not registered at all; but this preference shall extend only to the immoveable property thereby transferred or mortgaged."

Section 2 of Act XIX of 1843:—"And it is hereby enacted that from the first day of May last past every deed of sale, or gift of lands, houses or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed; and that from the said day every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity

* Sanads, deeds of sale, gift, devise, or mortgage of lands, houses, offices or other immoveable property situated within the zilla, &c.

(1) 8 B.H.C.R.A.C.J. 50.

(2) 9 B.H.C.R. 121.

(3) 2 B. 299.

1893
JUNE 12.
—
APPEL-
LATE
CIVIL.

18 B. 332.

be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."

The District Judge has found, on the evidence, that it is not proved that when Mahadaji obtained his mortgage of the 9th May, 1864, he had any notice of the prior mortgage of 8th June, 1863, and no grounds have been shown to us for questioning the correctness of this finding.

[335] On these facts it seems clear that, apart from any special peculiarities of Hindu law, the mortgage of 8th June, 1863, registered on 15th September, 1864, must prevail over the unregistered mortgage of 9th May 1864. The language of s. 2 of Act XIX of 1843 is so clear as to admit of no dispute on this point. But it was urged that, as the parties were Hindus, the mortgage of the 9th May, 1864, must get preference, as it was accompanied with possession. The case of *Balaram Nemchand v. Appa* (1) and of *Lallubhai v. Bai Amrit* (2) were relied on to support this theory. But in the former of these cases the unregistered deed of sale accompanied with possession was anterior in date to the registered mortgage; and in the latter both documents were registered and the latter was preferred to the earlier, on the ground that it was accompanied with delivery of possession, which under Hindu law was held essential to complete the title of the vendee. On the other hand, there is the decision of Couch, C. J., and Warden, J., in the case of *Sunder v. Gopal* (3) (which does not seem to have been alluded to in *Lallubhai v. Bai Amrit*), of which the facts are fully explained on p. 182 of I.L.R., 6 Bom., in the judgment in *Lakshmandass Sarupchand v. Dasrat*. The remarks made in that judgment on this case are as follows:—

"*Sundar v. Gopal* (3) 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 Reg. IX of 1827, s. 6, 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. 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 [336] 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 Reg. IX of 1827, s. 6, to the mortgagee priority over the purchaser notwithstanding his possession. The parties were Hindus."

The facts of this case are, it will be noticed, very similar to those of the present case. In both the earlier cases, the mortgage unaccompanied with possession was not registered till after the delivery of possession to the subsequent alienee. The only difference is that in *Sundar v. Gopal* the later conveyance was a deed of sale, while here it was mortgage.

(1) 9 B. H. C. R. 121.

(2) 2 B. 299.

(3) 4 B. H. C. R. A. C. J. 68.

1893
 JUNE 12.
 —
 APPEL-
 LATE
 CIVIL.
 —
 18 B. 332.

This distinction, however, does not seem to affect the decision. In the earlier case the judgment was based on Reg. IX of 1827. In the present instance, as both documents were of the same class and notice of the earlier was not proved, we may rely both on the Regulation and on Act XIX of 1843, by either of which the registered mortgage is to be preferred to the unregistered document. It is true that in *Lallubhai v. Bai Amrit* (1) the Court laid stress on the necessity of a transfer of possession as the complement of a contract of sale in order to effect an absolute change of ownership; but this judgment is qualified by the decision of the Privy Council in *Kali Das Mullick v. Kanhya Lal Pundit* (2), which has been followed by this Court in *Ugarchand v. Madappa* (3), *Lullubhai v. Keso* (4), *Shankar v. Visaji* (5), and *Ramchandra v. Mhasu* (6). Moreover, in *Lallubhai v. Bai Amrit* it was pointed out that the transfer of possession might be replaced by registration.

We are, therefore, unable to hold that the registered mortgage, on which the plaintiff relies, was invalid by Hindu law owing to its not being accompanied with possession; and as it was anterior in date to Mahadaji's mortgage (though subsequently registered), it is impossible to apply the reasoning followed in *Balaram Nemchand v. Appa* (7), in which it was held that a vendor having by an unregistered deed sold an estate, and having completed the [337] transaction by delivery of possession, retained no interest therein on which a subsequently executed and registered deed of sale could operate. This judgment was explained in *Sambhubhai v. Shivaldas* (8) as follows:—"What we decided in that case was that the priority given by Reg. IX of 1827 and Act XIX of 1843 to registered over unregistered instruments did not operate to defeat the title of a person who had obtained possession under an unregistered conveyance previously to the execution of a registered conveyance to another person."

Under these circumstances, then, we think that we must follow the decision in *Sunder v. Gopal* (9), which is strictly in accordance with the provisions of the registration law in force when the transactions took place, and has never been overruled. We, accordingly, reverse the decision of the District Judge and restore that of the Subordinate Judge, with costs on the respondent (defendant No. 5) in this Court and the lower appellate Court.

Decree reversed.

(1) 2 B. 299.

(4) P. J. (1886), p. 33.

(7) 9 B.H.C. R. 121.

(2) 11 I. A. 218.

(5) P.J. (1886), p. 35.

(8) 4 B. 89 (92).

(3) 9 B. 324.

(6) P.J. (1888), p. 14.

(9) 4 B.H. R. A.C. J. 65.