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[444] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BALMAKUNDAS ATMARAM (*Original Defendant No. 2*), *Appellant v.*
 MOTI NARAYAN AND OTHERS (*Original Plaintiffs*), *Respondents.**
 [17th August, 1893.]

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Mortgage—Priority—Registration—Notice—Possession of title deeds—Mortgagor allowed by first mortgagee to retain title-deeds—Subsequent mortgagee to second mortgagee and title-deeds transferred—Plea by second mortgagee of no notice of first mortgage—Registration of first mortgage equivalent to notice.

A. mortgaged land to B. by a mortgage duly registered. A. subsequently got back the title-deeds, and handed them to C., to whom he mortgaged the same property. B. sued C. (the second mortgagee) for a declaration of priority. The lower Court found that B. had not been guilty of fraud or negligence in parting with the title-deeds.

Held that B., as first mortgagee, was entitled to priority. The registration of his mortgage was notice to C., and there was no misrepresentation by B. which would relieve C., as subsequent mortgagee, of the duty of inquiry, or destroy the effect of such constructive notice.

[F., 6 Bom. L.R. 1043 (1050); R., 31 M. 7=17 M.L.J. 499 (502)=3 M.L.T. 87.]

APPEAL under s. 15 of the Amended Letters Patent, 1865, against the decree of Telang, J., dismissing, under s. 551 (cl. 1) of the Code of Civil Procedure (Act XIV of 1882), a second appeal from the decision of J. B. Alcock, District Judge of Surat.

One Ghelabhai Nandram mortgaged certain property to the plaintiff for Rs. 499 by a registered mortgage-bond dated 11th November, 1884. Subsequently to the mortgage the title-deeds got back into the hands of the mortgagor, but the record did not show the circumstances under which they did so.

On the 9th July, 1886, Ghelabhai mortgaged the same property to defendant No. 2 and gave him the title-deeds.

On the 6th August, 1890, defendant No. 2 obtained a decree upon his mortgage for sale of the property mortgaged. In the execution proceedings plaintiff applied to the Court that the property should be sold subject to his mortgage lien. The Court refused this application.

Thereupon the plaintiff filed the present suit to enforce his mortgage lien against the property in dispute, and also for a declaration that his mortgage was entitled to priority over the mortgage to defendant No. 2.

[445] Defendant No. 1 (the mortgagor) did not contest the plaintiff's claim.

Defendant No. 2 (the second mortgagee) pleaded that he had no notice of the plaintiff's mortgage; that plaintiff had fraudulently restored the title-deeds of the property to the mortgagor, and thereby led him (defendant No. 2) to believe that the property was unincumbered, and that acting on such belief he (the defendant No. 2) had made advances to the mortgagor on the security of the same property under a mortgage-bond dated 9th July, 1886. Defendant No. 2, therefore, contended that his mortgage was entitled to priority over plaintiff's.

* Appeal No. 12 of 1893 under cl. 15 of the Letters Patent, 1865.

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The Court of first instance held, on the authority of *The Madras Hindu Union Bank v. C. Venkatrangiah* (1) and *Madras Building Company v. Rowlandson* (2), that as the plaintiff had parted with the title-deeds, and as they were now in the possession of defendant No. 2, he (defendant No. 2) had priority. The Court, therefore, passed a decree directing the plaintiff to recover his mortgage-debt from the mortgagor (defendant No. 1) personally, and dismissed the suit as against defendant No. 2.

On appeal the District Judge was of opinion that the registration of the plaintiff's mortgage was a sufficient notice of it to defendant No. 2, and that his possession of title-deeds did not give defendant No. 2 a claim to priority. He further held that there was nothing to show that plaintiff (the first mortgagee) was guilty of negligence or fraud with respect to the title-deeds. He, therefore, reversed the decree of the first Court and awarded the plaintiff's claim.

Against this decision the second defendant preferred a second appeal to the High Court. The appeal was dismissed by Telang, J., under s. 551, cl. 1 of the Code of Civil Procedure (Act XIV of 1882).

Against this decree the present appeal was made under the Letters Patent. The appeal came on for hearing before a Division Bench (Candy and Fulton, JJ.).

Kalabhāi Lallubhai, for appellant (defendant No. 2):—The plaintiff is a prior mortgagee. He has negligently allowed the [446] title-deeds of the property in dispute to remain with the mortgagor. He has thereby put it in the power of the mortgagor to raise fresh loans from others on the security of the same property, as if it was unincumbered. He has thus assisted in or connived at the fraud practised by the mortgagor. He cannot take advantage of his own wrong. Equity will postpone his rights to those of a puisne mortgagee. Refers to *Northern Counties of England Fire Insurance Company v. Whipp* (3). The plaintiff's mortgage is no doubt registered. But registration is not equivalent to a notice in a case of fraud—*Agarchand v. Rakhma* (4)

There was no appearance for the respondent.

JUDGMENT.

FULTON, J.—I think this appeal should be rejected. Even assuming that the conduct of the prior mortgagee in allowing the *sanad* to pass into the hands of a mortgagee after he had once been given possession of it would, in the absence of notice to the puisne mortgagee, have amounted to gross negligence such as would have justified the Court in concluding that he was "an accomplice" in the mortgagor's fraud (5), no question of assistance in fraud here arises, inasmuch as in this Presidency registration is held to be equivalent to notice. It is not alleged that there was any actual misrepresentation on the part of the prior mortgagee. If there had been such misrepresentation, doubtless the doctrine of constructive notice would not have applied. "If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering the falsity and did not choose to avail yourself of them'" (per Jessel, M. R., in *Redgrave v. Hurd* (6)). But in a case like the present, in which it is not

(1) 12 M. 424.

(2) 26 Ch. D. 482.

(5) *Vide* Kerr on Fraud, 2nd Ed., p. 113.

(3) 13 M. 383.

(4) 12 B. 678.

(6) 20 Ch. D. 1 (13.)

suggested that there was any misrepresentation by the prior mortgagee of a kind to relieve the subsequent mortgagee of the duty of inquiry, we cannot hold, consistently with the doctrine recognized in this Presidency that registration gives notice, that the latter was misled by the conduct of the prior mortgagee and induced thereby to lend money on the property. In the case [447] of the *Northern Counties of England Fire Insurance Company v. Whipp* (1) relied on by Mr. Kalabhai, the authorities summarised were held to lead to the conclusion that the Court would postpone the prior legal estate to the subsequent equitable estate where the owner of the legal estate had assisted in or connived at the fraud which had led to the creation of a subsequent equitable estate, *without notice of the prior legal estate*. But no decision was shown to us in which it had been held that the surrender of a title-deed by the holder of a prior estate could postpone his rights to those of a subsequent encumbrancer who had notice of the prior mortgage when he accepted the later one.

Mr. Kalabhai referred us to the case of *Agarchand v. Bakhma* (2) as throwing doubt on the doctrine that registration is equivalent to notice. I do not think, however, that it has that effect. I understand it simply to mean that a mortgagee who puts up property to sale in execution of a money decree, and makes no mention of his prior mortgage, necessarily leads the purchaser to believe that no such prior mortgage exists and thereby relieves him of the duty of inquiry, and that he is, therefore, subsequently estopped from alleging such mortgage. The principle is more fully explained in *Hari v. Lakshman* (3) and is no way in conflict with the decision in *Lakshmandas v. Dasrat* (4).

We have referred to the decision in *Shan Maun Mull v. Madras Building Company* (5); but as the Courts in the Madras Presidency do not recognize the principle that registration is equivalent to notice, it cannot be treated as an authority to govern the case now under consideration.

In the above remarks I have assumed that the prior mortgagee's conduct might, in the absence of notice, have amounted to connivance at fraud, but I am very doubtful whether, having regard to the usages in the mofussil of this Presidency, in which I do not think that there is any settled practice about the custody of title-deeds, it would, in the absence of clear proof of fraudulent intention, be safe to hold that the omission by a mortgagee to obtain or keep the title-deeds was *prima facie* evidence [448] of assistance in or connivance at fraud. Whether it would constitute gross neglect under s. 78 of the Transfer of Property Act, IV of 1882, is a point which need not be considered, as the transactions which gave rise to this suit occurred before that Act came into force.

CANDY, J.—I concur in holding that this appeal should be dismissed under s. 551 of the Civil Procedure Code.

The District Judge was mistaken in saying that no issue about negligence or fraud was raised in the lower Court. The second issue ran,—“Is the second defendant's mortgage, though subsequent to the plaintiff's, entitled or not to priority over the plaintiff's for the reasons given in his written statement?” The plea in the written statement was that plaintiff had parted with the title-deeds of the property and so his conduct was fraudulent, and he could not take advantage of his own fraud. Turning to the proceedings of the Court of first instance in this and in the companion case, which was tried with it, it is at once apparent that the only allegation

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(1) 26 Ch.-D. 482.
(4) 6 B. 168.

2) 12 B. 678.
(5) 15 M. 268.

(3) 5 B. 614.

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of fraud was that plaintiff had lost the title-deed (*sanad*), and so allowed the document to go into the possession of the mortgagor. This, on the very authority relied on by Mr. Kalabhai, *Northern Counties of England Fire Insurance Company v. Whipp* (1), would not postpone the plaintiff's prior title.

The Madras authorities quoted by the Subordinate Judge are clearly not applicable in this Presidency. In *Shan Maun Mull v. Madras Building Company* (2), where the authorities are all reviewed, the judgment of the Court proceeds (p. 277) on the assumption that the subsequent mortgagee had no notice of the prior mortgage, and then it is shown that in Madras Presidency it has not yet been held that registration is notice, while in Bombay the contrary is the rule. The Full Bench decision of this Court given so long ago as 1880 in *Lakshmandas v. Dasrat* (3) must of course govern the present case, and thus there is no reason for questioning the District Judge's decision. The present appeal should be dismissed.

Appeal dismissed.

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[449] APPELLATE CIVIL.

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

NATHEKHA VALAD BHEKHANKHA (*Applicant*) v. ABDUL ALLI,
*Opponent.** [19th August, 1893.]

Mamlatdars' Act Bombay Act (III of 1876), s. 15, cl. (a) sub-cl. (1) and sub-cl. (2)† ; s. 18‡—Possessory suit—Execution of decree—Actual possession—Execution of decree against a third party—Want of jurisdiction—Exercise of the extraordinary jurisdiction discretionary.

A third party cannot be ousted from possession of property in the execution of a decree for possession made by a Mamlatdar against a defendant under Bombay

* Application No. 175 of 1892 under extraordinary jurisdiction.

† Mamlatdars' Act, s. 15, cl. (a), sub-cl. (1), sub-cl. (2)—

15. On the day appointed, the Mamlatdar shall proceed to hear all the evidence that is then and there before him and try the following issues, viz. :—

(a) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use :—

(1) Whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed.

(2) Whether the defendant is in possession at the time of the suit and if so whether he obtained possession otherwise than by due course of law.

‡ Mamlatdar's Act, s. 18—

18. The party to whom the Mamlatdar shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a Civil Court :

Provided that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed from recovering by a suit in the Civil Court mesne profits for the time he may be kept out of possession of any property, or out of enjoyment of any use:

Provided further that in any subsequent suit or other proceeding in the ordinary Civil Courts between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

(1) L. R. 26 Ch. D. p. 482 ; see especially p. 494.

(2) 15 M. 268.

(3) 6 B. 168.