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Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley and Mr. Justice Candy.

KESHAV PANDURANG (*Original Defendant*), *Appellant v.* VINAYAK HARI (*Original Plaintiff*), *Respondent.** [22nd June, 1893.]

Registration—Registration Act (III of 1877), s. 50—Priority—Purchaser under an unregistered deed—Lease of the land by purchaser to the vendor—Decree for rent obtained by the purchaser against the vendor—Effect of such decree on purchaser's title in competition with the title of subsequent purchaser under a registered deed.

On the 7th August, 1876, the defendant purchased the property in dispute under an unregistered sale-deed. On the same day he leased it to his vendor. In 1878 he obtained a decree for rent against his vendor. On the 23rd May, 1881, the plaintiff [356] purchased the same property from the same vendor under a registered deed of sale. In 1888 the plaintiff sued the defendant to establish his right to the property and to recover possession.

Held, that the plaintiff was entitled to a decree, his registered deed taking priority to the prior unregistered deed of the defendant.

Section 50 (1) of the Registration Act (III of 1877) did not give the defendant priority in virtue of the decree which he obtained in the rent suit, for in that suit the defendant's ownership was not in dispute, and the decree merely adjudicated as to the relationship between the defendant and his vendors created subsequently to the sale. The defendant's title as owner was not merged in the decree, but still rested exclusively on his deed of sale.

Kolluri Nagabhashanum v. *Ammanna* (2) and *Madar Saheb* v. *Subbarayalu* (3) distinguished.

[F., 28 C. 139 (141); R., 27 B. 452 (482).]

SECOND appeal from the decision of M. P. Khareghat, Assistant Judge of Thana.

The property in dispute originally belonged to Ladkoba Balaji, Narayan Pandurang and Nathu Pandurang as members of an undivided Hindu family. It was sold by Ladkoba Balaji and Narayan Pandurang on the 7th August, 1876, under an unregistered deed of sale to defendant Keshav Pandurang, who, on the same day, leased it to them as his tenants. In 1878, he sued them for rent and got a decree. He again sued them for rent and possession in 1885, got a decree, and obtained possession on the 26th January, 1887.

In the meanwhile, Narayan Pandurang and Nathu Pandurang sold the property to the plaintiff Vinayak Hari Sinkar with [357] possession

* Appeal No. 20 of 1892 under s. 15 of the amended Letters Patent of the High Court.

(1) Section 50 of the Registration Act (III of 1877):—Every document of the kinds mentioned in cls. (*a*), (*b*), (*c*) and (*d*) of s. 17, and cls. (*a*) and (*b*) of s. 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Nothing in the former part of this section applies to leases exempted under the proviso in s. 17, or to the documents mentioned in cls. (*e*), (*f*), (*ff*), (*g*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*n*), and (*o*) of the same section.

Explanation.—In cases where Act No. XVI of 1864 or Act No. XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act; and where the document is executed after the first day of July, 1871, not registered under Act No. VIII of 1871, or this Act.

(2) 3 M. 71.

(3) 6 M. 88.

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under a registered deed of sale dated the 23rd May, 1881. The plaintiff now sued the defendant to establish his right to the land and for possession.

The Subordinate Judge allowed the plaintiff's claim on the following grounds:—

"The chief question for decision is, then, which of the parties is entitled to the field Hirashet * * *.

"The question must be answered in favour of the plaintiff. For his deed of sale (Ex. 37) has been registered under the provisions of Act III of 1877. He is, therefore, entitled to priority over the defendant, whose deed of sale (Ex. 9) is an unregistered document under s. 50 of Act III of 1877. But it was contended for the defendant that the possession of the vendors as tenants of the defendant operated as constructive notice of the defendant's title to the plaintiff. But this contention cannot be allowed. For the plaintiff has no reason to suppose that the possession of his vendors was otherwise than as owners. It is not shown that the plaintiff had any knowledge of the defendant's decree (Ex. 10) obtained by him against his vendors for rent in 1878. Under these circumstances the plaintiff is entitled to priority. (I.L.R. 12 Bom. p. 569)."

On appeal by the defendant the decree was confirmed.

The defendant filed a second appeal.

Mahadeo Chimnaji Apte, for the appellant (defendant).

Manekshah J. Taleyarkhan, for the respondent (plaintiff).

August 1st, 1892. JARDINE, J.—The only point argued relates to the construction to be placed on the words "not being a decree or order" in the first part of s. 50 of the Registration Acts of 1871 and 1877. The question is, whether the Court below was right in giving priority to the plaintiff's registered deed of sale, dated the 23rd May, 1881, over the defendant's unregistered deed of sale, dated the 7th August, 1876.

It appears that in 1878 the defendant obtained a decree against his vendors for rent and another in 1887 against them for rent and possession. To these suits the plaintiff was not a party: and it is not part of the defendant's case that his deed of sale was merged in the decrees, nor that the plaintiff had any [358] sort of notice, or knew that the property was in the possession of any person other than the vendor. At the defendant's appeal here it was contended on his behalf that the effect of the excepting words quoted above from s. 50 was to affect the plaintiff with notice, and that the defendant's deed was entitled to priority. No authority was cited for this contention.

The case of *Kolluri Nagabhashanum* v. *Ammanna* (1) is not on the same footing. In that case the unregistered document became merged in, and superseded by, a decree, as is pointed out in *Madar Saheb* v. *Subbarayalu* (2), in which case also the learned Judges point out that the effect of the contention of the present appellant that his unregistered document is to have priority, because of decrees to which the plaintiff was not a party, would have this result, that it would be only necessary to put such a document in suit to be able successfully to defeat the Registration Act. The intention of the Act is to prevent fraud by giving notoriety to the document, and it may be admitted that some notoriety is given by the passing of a decree, but I think not enough to prevent fraud. In *Baijnath* v. *Lachman Das* (3) the effect of the words "not being a decree or order" is confined to the case of the unregistered document being merged in a decree. The case of *The Himalaya Bank* v. *The Simla Bank* (4) seems to

(1) 3 M. 71 (2) 6 M. 88. (3) 7 A. 888. (4) 8 A. 23.

have been decided on a point different from that now before us. The registry of an assignment of a deed which required registration was held in England to be no notice to the subsequent purchaser—*Honeycomb* v. *Waldron* (1). An assignment of a decree was held to require registration —*Gopal* v. *Trimbak* (2).

There is nothing unreasonable in the limited construction which two High Courts have placed on the excepting words. I concur in that interpretation, and would confirm the decree with costs.

We have, however, the misfortune to differ in opinion; and as the case is of general importance, we think we should affirm the decree with costs, leaving the appellant, if so advised, to appeal when the question will come before a Court of three Judges.

[359] TELANG, J.—The plaintiff sued to be declared owner, and to be put in possession of the land, the subject-matter of the suit, claiming under a deed of sale executed in his favour in 1881 by Narayan and Nathu Pandurang. The defendant claims under a prior deed executed by Narayan Pandurang and one Ladkoji, who was alleged to be an uncle of Narayan and Nathu Pandurang. The Assistant Judge held that the plaintiff's deed was proved; that Ladkoji was not, as alleged, the uncle of Narayan and Nathu; and that under s. 50 of the Registration Act the plaintiff's deed, though later in date than the defendant's, was entitled to priority. This point of priority was the only one argued before us.

The defendant's deed is admittedly one the registration of which is not compulsory, and it has been alleged, and not denied, that some years before 1881, when the plaintiff's purchase took place, the defendant had let the land to Narayan Pandurang and obtained a decree against him for the rent due. And the question is, whether an unregistered deed of sale coupled with a decree for rent against the vendor, must, under s. 50 of the Registration Act, be postponed to a later deed of sale by the same vendor which is registered.

Now, it has not been denied that, if the decree had been one containing an express declaration of title as well as an award of rent, the subsequent purchaser with a registered conveyance, even though without notice of the prior title, would have been bound by such decree. It is argued, however, that a decree which does not contain such a declaration, has not the same legal operation. I cannot concur in this view. Section 50 contains an enactment, which admittedly invalidates a transaction perfectly valid at the time it is entered into, as against a subsequent transaction to which the party claiming a benefit under the first is in no way party or privy. To the extent that the intention of the Legislature to do this is clear from the language employed by it, we are, of course, bound to give effect to that intention, without reference to what might be called its apparent hardship—see *Body* v. *Halse*, *Hunt* v. *Halse* and *Fenning* v. *Halse* (3). But [360] we are not, I think, bound to go further. We ought not, in the case of such an enactment, to give effect to anything but clear language directing such an invalidation *ex post facto*, and we ought not, I think, by construction, to limit the words of exception or restriction in such an enactment which the Legislature has itself thought fit to employ. In spite of the large words of the enacting part, this Court has consistently limited them to the cases where the subsequent purchaser has no notice of the prior unregistered conveyance. In doing so, it has followed that series of authorities in England which is referred to by

(1) 2 Strange 1064. (2) 1 B. 267. (3) L. R. 1 Q. B. (1892) 203.

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Lord Chancellor (Lord Cairns) in *Agra Bank* v. *Barry* (1). In the present case we have to deal not with the enacting part, but with the exception grafted upon it by the Legislature itself. And as the words except "a decree or order" generally from the operation of the enacting part, we ought, I think, to interpret them largely, and to hold that all decrees and orders whatsoever come within the purview of the exception.

If this view is correct, its application to the present case is obvious. Long before the purchase made by the plaintiff, the defendant had obtained not merely a conveyance from the plaintiff's vendor, but also a decree against that vendor for rent of these very premises under a contract of tenancy averred and proved. The effect of that decree I take to be this, that the plaintiff's vendor at the date of that decree incontestably became the defendant's tenant, and could not claim to be owner of the property. It is not pretended, in the present case, that anything occurred between the date of that decree and the sale to the plaintiff to alter the character of his legal relation to the property. The plaintiff, then, could only take such a title as his vendor had, and the decree being not invalid as against his conveyance, he must be deemed to have taken merely his vendor's title as tenant of the property, whatever such title may be. I see nothing in s. 50 of the Registration Act to prevent our giving this effect to the decree as against one who claims under the defendant in the suit in which the decree was passed.

The cases, which have been referred to, do not appear to me to militate against this view. In *Kolluri Nagabhashanum* v. [361] *Ammanna* (2), indeed, the Court said that "the decree was binding on the judgment-debtor, and on all persons who might thereafter acquire title from him." That remark is sufficient to govern this case. *Kolluri Nagabhashanum* v. *Ammanna* is referred to and distinguished in a subsequent case in Madras —*Madar Saheb* v. *Subbarayalu* (3), where the decree was held not to affect the title of the subsequent purchaser. But the sequence of events there rendered that conclusion almost inevitable. There was first the unregistered conveyance, and then the registered conveyance which took effect as against the former under s. 50. And *after* this second conveyance came the decree made upon the basis of the first conveyance. There being nothing in the Registration Act to justify the fiction of relation being resorted to, the decree as a document subsequent in date to the second conveyance could obviously not have any effect against the title created by such second conveyance. And the Court so decided. The gist of the decision is not, I venture to think, contained in the phrase that the prior document was "merged in, and superseded by, a decree," but in the phrase which the Court distinctly emphasizes, *viz.*, "*prior* to the execution of the registered conveyance." It is that priority on which the decision rests. The case of *Baijnath* v. *Lachman Das* (4) was also cited to us. But I do not understand that case, any more than the Madras case, as limiting the meaning of the words "a decree or order." The Allahabad Court, indeed, goes somewhat further in favour of the decree-holder than the Madras case, whether rightly or wrongly it is not now necessary to consider. The Judges there apparently hold that a decree obtained even after the registered conveyance is good as against the registered conveyance, if only it is obtained *before* a suit is instituted on the strength of the registered conveyance. But, however that may be, I confess I see nothing

(1) L. R. 7 E. & I. Ap. 135.
(2) 3 M. 71.
(3) 6 M. 88.
(4) 7 A. 888.

in this case or in the Madras cases to warrant the argument for the respondent from which, on other grounds, I have already expressed my dissent, that the words "decree or order" in s. 50 of the Registration Act must be limited to a "decree or order" in which the unregistered instrument is "merged."

[362] It is true that the result of this view is that the subsequent purchaser will be, in effect, bound by a transaction of which he has no notice. He cannot find the conveyance in the registry, and he would not necessarily have any notice of the suit. But this argument applies equally whether the decree is one which supersedes the unregistered conveyance or not. And it cannot, therefore, be allowed any weight against the construction above put forward. And, apart from any special equities, I do not see why the above suggested result should be looked upon as any thing in the nature of a *reductio ad absurdum*. It is entirely in harmony with the established rules *qui prior est tempore potior est jure* and *caveat emptor*. The later purchaser who is defrauded must trust to his remedy against his own vendor.

On these grounds, I am of opinion that, on the only ground which has been argued before us, the plaintiff's case fails. And I would reverse the decrees of the Courts below and dismiss the plaintiff's suit with all costs.

The Judges thus differing in opinion, the decree was confirmed under s. 575 of the Civil Procedure Code (Act XIV of 1882).

The defendant appealed under cl. 15 of the amended Letters Patent of the High Court, 1865.

The appeal came on for argument before a Full Bench consisting of Sargent, C. J., and Bayley and Candy, JJ.

Ganesh Krishna Deshmukh, for the appellant (defendant).—The defendant has got a decree for rent, and, therefore, under s. 50 of the Registration Act, the plaintiff's deed does not take priority. The defendant's decree for rent is a decree relating to the same property to which the respondent's registered sale-deed relates, as the rent sued for was admittedly in respect of the same property. Therefore, the condition required by s. 50 is fulfilled. There is no other condition required by the section.

Even supposing that what is required is the merger of the title in the decree, we submit that as the decree for rent must have expressly or impliedly put the question of our title under the unregistered sale in issue in the rent suit, and thus our [363] title under the deed is merged in this decree, as the very relation of landlord and tenant between the defendant and his vendor depended on our previous purchase in 1876. Thus, in any view of the case, our purchase as of 1876 must prevail against the plaintiff's subsequent purchase in 1881 by reason of our decree for rent in the year 1878.

Manekshah J. Taleyarkhan (with *Vasudev Gopal Bhandarkar*), for the respondent (plaintiff).

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C. J.—The question for determination is whether the the lower appeal Court was right in giving priority to the plaintiff's registered deed of sale of 23rd May, 1881, over the defendant's unregistered deed of sale of 7th August, 1876, having regard to the decree for rent, subsequently obtained by him in 1878 against their common vendor. The exception in cl. 50 of the Registration Act operates, doubtless, to give

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the above decree its full legal effect in competing with the plaintiff's deed of sale, and the important question, therefore, is, what is the legal effect it has for such purpose.

Assuming that the defendant's ownership was not in dispute in the suit in which that decree was passed, as would appear to have been the case from there being no declaration of his title as owner, the decree merely adjudicated as to the relationship of landlord and tenant between defendant and his vendor created subsequently to the sale. The defendant's title as owner was not merged in the decree, but still rested exclusively on his deed of sale, although his vendor might not, whilst he was his tenant, be able to dispute it. In this respect the case differs from *Kolluri Nagabhashanum* v. *Ammanna* (1) as explained in *Madar Saheb* v. *Subbarayalu* (2) where the registered document became superseded by a decree under which the plaintiff derived his title as the purchaser at the auction sale, and the competition was, therefore, between the decree and a registered document, which came within the exception. We think, therefore, that the decree of Mr. Justice Jardine should be confirmed with costs.

Decree confirmed.

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[364] ORIGINAL CRIMINAL.

Before Mr. Justice Parsons.

QUEEN-EMPRESS *v.* SADANAND NARAYAN AND OTHERS.

[3rd February, 1894.]

Practice—Procedure—Several persons tried jointly—Right of reply where one of several accused calls witnesses and the others do not—Criminal Procedure Code (X of 1882), ss. 289, 292.

Where one of several accused persons tried jointly calls witnesses at the trial, but the other accused call no witnesses, they must all follow in their defence, and the prosecution has the right of reply on the whole case.

SADANAND Narayan, Harichand Bhikoba, Bajirao Tatia Raoji and Sayad Husain were charged, under ss. 109, 467 and 471 of the Penal Code (XLV of 1860), as follows:—No. 1 with the offence of using as genuine a forged document; No. 2 with forgery, and all of the Nos. 1, 2, 3 and 4 with abetment of forgery. The case came for trial at the Criminal Sessions of the High Court, and the prisoners pleaded not guilty, and claimed to be tried.

Anderson appeared for the prosecution.

Accused No. 1 was not defended by counsel.

Lowndes appeared for accused No. 2.

Jardine for accused Nos. 3 and 4.

At the conclusion of the case for the prosecution, accused No. 1 in answer to a question put by the Court said he desired to call witnesses. Accused Nos. 2, 3 and 4 in answer to the Court stated that they did not intend to call witnesses.

Accused No. 1 then called and examined his witnesses.

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(1) 3 M. 71. (2) 6 M. 88.