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ment except as against himself." The same view was taken under the Limitation Act of 1877, section 19, by a Full Bench at Madras in *Chinnaya v. Gurunatham*⁽¹⁾, which followed the decision in *Kumara Sâmi v. Pâla*⁽²⁾, on the words "generally or specially authorized" in section 20 of the Limitation Act (IX of 1871). See also *Nâranji v. Dhagvândâs*⁽³⁾ and *Wajibun v. Kâdir*⁽⁴⁾, as regards acknowledgments. Following these authorities we must disallow the claim against defendants Nos. 4 and 5 altogether; they are not liable either personally or as regards their shares in the mortgaged property.

The lower Court of appeal allowed Rs. 1,103-15-6 to the defendants on the sixth issue, being seven years' rent at Rs. 99 per annum, plus Rs. 410-15-6 interest. But *per incuriam* it assumed that the plaintiff had not filed his books of account, whereas it appears that they were brought to Court, and the defendants filed extracts therefrom. It is contended for the respondent that the questions about the amount of rent and the plaintiff's possession of the land have thus been dealt with by the lower Court of appeal on a misconception of the case. Taking that view, we refer the sixth issue to the District Court for a fresh finding on the evidence on the record, to be certified within two months.

This Court will pass directions about interest and costs when it makes the final decree.

Order accordingly.

(1) I. L. R., 5 Mad., 169.

(3) P. J., 1881, 238.

(2) I. L. R., 5 Mad., 385.

(4) I. L. R., 18 Cal., 292.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Rânade.

JETHA'BHAI DAYALJI (ORIGINAL DEFENDANT), APPELLANT,
v. GIRDHAR (ORIGINAL PLAINTIFF), RESPONDENT.*

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December 10.

Registration Act (III of 1877), Sec. 50—Priority—San-mortgage optionally registrable, but not registered—Subsequent mortgage registered—Decree passed on san-mortgage—Execution—Purchaser at execution sale—Priority of mortgagee under registered mortgage to such purchaser—Notice.

In 1875 the land in dispute was mortgaged to defendant No. 2 under two *san-mortgage* bonds, which were optionally registrable, but were not registered. In

* Second Appeal, No. 301 of 1893.

1885 the land was mortgaged to plaintiff by a registered mortgage accompanied with possession. In 1886 the defendant No. 2 obtained a decree upon his *san*-mortgage bond, in execution of which the mortgaged property was brought to sale and purchased by defendant No. 3.

Defendant No. 3 was afterwards put in possession by the Court. Thereupon the plaintiff sued to enforce his mortgage lien against the property in the hands of defendant No. 3, who pleaded that the *san*-mortgages of 1875 were entitled to priority over the plaintiff's mortgage of 1885, and that he as purchaser at a sale under a decree obtained upon the *san*-mortgages held the property free from the plaintiff's claim.

Held, that the plaintiff's mortgage, having been executed and registered after Act III of 1877 had come into force, was entitled under section 50 of the Act to priority over the unregistered *san*-mortgage bonds.

A *san*-mortgage is not within the exceptions mentioned in section 50 of the Act.

Held, also, that under section 47 of the Registration Act (III of 1877) the plaintiff's registered mortgage began to operate from the date of its execution, and was not affected by the decree subsequently obtained upon the earlier mortgages.

By the custom of Gujarát, transfer of possession, which is necessary under general Hindu law, is not essential to validate *san*-mortgages, and such mortgages have always been held valid charges as between mortgagor and mortgagee, but they are liable to be defeated in case of the transfer of interest to third parties under registered instruments.

Apart from the doctrine of equitable notice, registration under Act XVI of 1864 and Act VIII of 1871 conferred no priority on a registered document as against a document the registration of which was optional. Since Act III of 1877, however, the competition obtains in a more general form, and confers priority on all documents required to be registered, and registered since Act III of 1877 was passed, over all prior unregistered deeds of an antagonistic character.

SECOND appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad, in Appeal No. 399 of 1891.

The property in dispute was mortgaged by one Báva Jagpál to defendant No. 2 by two *san*-mortgage deeds, dated 23rd March, 1875—one for Rs. 99 and the other for Rs. 98, respectively. The deeds were optionally registrable (see section 18 of Act VIII of 1871), but neither of them was registered.

On the 22nd June, 1885, Báva Jagpál mortgaged the same property to the plaintiff for Rs. 651. The mortgage-deed was registered, and the mortgagee got possession.

Subsequently, defendant No. 2 sued Báva Jagpál, the mortgagor, on the *san*-mortgage bonds of 1875, and obtained a decree, in execution of which the mortgaged property was put up

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for sale and was purchased by defendant No. 3, who was afterwards put into possession by the Court.

In 1891 the plaintiffs filed the present suit upon the registered mortgage of the 21st June, 1825, for possession of the property, and in the alternative to enforce their mortgage lien by a sale.

Defendant No. 1, the son and heir of Báva Jagpál, the mortgagor, did not admit the plaintiff's mortgage.

Defendants Nos. 2 and 3 pleaded (*inter alia*) that the *san*-mortgage-deeds of 1875 were entitled to priority over plaintiff's mortgage of 1885, and that a decree having been obtained on the *san*-mortgages, defendant No. 3 had purchased the property at the Court sale free from the plaintiff's mortgage lien.

The Court of first instance awarded the plaintiff's claim, holding that the *san*-mortgages relied upon by defendants Nos. 2 and 3 were not proved, and that the decree based upon the said mortgages was fraudulent and collusive.

On appeal the Acting Joint Judge held that the *san*-mortgages were genuine, but that though they were earlier in point of time, and optionally registrable, the plaintiff's mortgage being registered was entitled to priority under section 50 of the Registration Act (III of 1877).

He, therefore, varied the decree of the first Court, and ordered defendant No. 3 to pay to plaintiffs, within six months, Rs. 675 with interest at six per cent, or in default to restore possession of the land in suit to plaintiff.

The defendants Nos. 2 and 3 appealed to the High Court.

Ganpat Sadashiv Rao for the appellant (defendant No. 3):— The defendant No. 2 obtained a decree upon the *san*-mortgage of 1875. In execution of that decree, the right, title, and interest of the mortgagor was sold as it existed at the date of the *san*-mortgage. That was what defendant No. 3 bought at the sale. The property in his hands as purchaser is, therefore, free from all incumbrances subsequently created by the mortgagor—*Karsandás Laladás v. Pránjivan A'shárám*⁽¹⁾. The plaintiff's mortgage was subsequent, and defendant No. 3 is not liable to satisfy it. A

(1) 7 Bom. H. C. Rep., A. C. J., 146.

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san-mortgage is valid without possession according to the custom of Gujarát and is binding on all subsequent incumbrances—*Sobhagchand v. Bháichand*⁽¹⁾.

Chimanlál Harilál for appellant (defendant No. 2).

Nagindás Tulsidás for respondent (plaintiff):—Under section 50 of the Registration Act III of 1877 the plaintiff's mortgage being registered, is entitled to priority over the earlier *san*-mortgages, which are unregistered—*Shivram v. Sayq*⁽²⁾. A *san*-mortgage is not within any of the exceptions mentioned in section 50 of the Act.

Ganpat Sadáshiv Ráo in reply:—The *san*-khats are merged in the decree. And a decree is within the exceptions to section 50 of Act III of 1877.

JARDINE, J.:—The appellant (defendant No. 2) relied upon two unregistered documents of 1875 of which the registration was optional, *viz.*, two *san*-mortgage-deeds passed to him, on which in 1886, he obtained a decree, in execution whereof the mortgaged property was put up for sale by the Court, and purchased by defendant No. 3, who obtained possession. The plaintiffs-respondents relied upon a registered mortgage, dated the 25th June 1885.

In this case no question of notice requiring us to consider whether the equitable rule applies, arises as in *Vináyak v. Vásudev*⁽³⁾. In that case the change effected in the law by section 50 of Act III of 1877 was pointed out. That section makes a rule under which the plaintiffs' registered mortgage would have priority over every unregistered document of earlier date, unless the latter be held to come within an exception. Mr. Ganpatráv urged that the contrary view had been taken in *Vináyak v. Sitáram*⁽⁴⁾, where *Sobhagchand v. Bháichand*⁽⁵⁾ is referred to, but, as we have ascertained from the record, only for the equitable rule about notice. In Appeal No. 453 of 1893 decided on the 29th November, 1894, by Sargent, C. J., and Candy, J., where, as in the present case, the competition was between a *san*-mortgage-deed executed in Gujarát in 1876, optionally registrable and unregistered, and a sale-

(1) I. L. R., 6 Bom., 193.

(3) P. J. 1894, 133.

(2) I. L. R., 13 Bom., 229.

(4) P. J., 1883, 112.

(5) I. L. R., 6 Bom., 193 at p. 200.

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deed executed and registered after Act III of 1877 had come into force, the later document was awarded priority. The judgment of the District Court in that case shows that it took that view after consideration of *Sobhágchand v. Bháichand* (*supra*), *Hásha v. Rágho* ⁽¹⁾ and *Shivrám v. Saya* ⁽²⁾. We are of opinion, then, that we would exceed the province of interpretation if we imported into section 50 of Act III of 1877 an exception in favour of *san-mortgage-deeds*. On this point we consider the law has been correctly applied by the Court below.

Mr. Ganpatráv then urged that as defendant No. 2 had on some date later than that of the registration of the plaintiffs' mortgage obtained decrees on his *san-khats* against the person now represented by defendant No. 1, section 50 of Act III of 1877 gave those unregistered mortgages priority. This point seems not to have been raised in the two Courts below, and no authority was cited here. Under section 47, the plaintiffs' registered mortgage began to operate from the date of execution—*Santáya v. Náráyan* ⁽³⁾ and is not affected by the decrees obtained by defendant No. 2—*Madar v. Subbarayalu* ⁽⁴⁾ followed in *The Himalaya Bank, Limited, v. The Simla Bank, Limited* ⁽⁵⁾.

For the above reasons the Court confirms the decree with costs.

RA'NADE, J.:—I concur in the view taken by Mr. Justice Jardine in disposing of this appeal. The question at issue in this case is solely whether appellant Bechardás, who is the auction-purchaser in execution of the decree passed on the unregistered *san-mortgages* of 1875, was properly required by the lower Court to pay to the respondents, original plaintiffs, the sum due in respect of the registered mortgage of 1885 executed in their favour by the common mortgagor Báva Jagpál.

The appellant's pleader chiefly rested his case on the authority of the Full Bench decision in *Sobhágchand v. Bháichand* ⁽⁶⁾, affirmed in *Sankana v. Virupakshápa* ⁽⁷⁾ and *Mohan v. Toga* ⁽⁸⁾. In the first of these decisions, it was held that in the case of *san-*

(1) I. L. R., 6 Bom., 165.

(2) I. L. R., 13 Bom., 229.

(3) I. L. R., 8 Bom., 182.

(4) I. L. R., 6 Mad., 88.

(5) I. L. R., 3 All., 23.

(6) I. L. R., 6 Bom., 193 at p. 200.

(7) I. L. R., 7 Bom., 146.

(8) I. L. R., 10 Bom., 224.

mortgages, the transfer of possession, necessary under the general Hindu law, was not essential, and that such mortgages were valid under the custom of Gujarát. The case of *Sankana v. Virupakshdapa* came from Dhárwár side, while *Moñan v. Togu*, though it related to a *san*-mortgage, and the facts were somewhat similar to those of the present case, was not decided on the ground of any peculiar custom in regard to *san*-mortgages in Gujarát. In that case the auction-purchaser in execution of the decree on the unregistered, though prior, *san*-mortgage, was put in possession, but the subsequent registered mortgagee was permitted to redeem the *san*-mortgage charge. None of these cases thus supports the appellant's contention about the privileged character of *san*-mortgages in the way of dispensing with the priority conferred by the Registration Act of 1877 on registered mortgages. The only privilege recognized is in regard to the objection about possession. *San*-mortgages have always been held to be valid charges, as between mortgagor and mortgagee, even when not accompanied by transfer of possession—*Lakhmichand v. Kastur*⁽¹⁾; *Dwárákádás v. Gálábhái*⁽²⁾. Even these early decisions, however, recognized the fact that this privilege was liable to be defeated in case of the transfer of interests to third parties under registered instruments—*Lakhmichand v. Kastur*. This view was also given effect to in *Kasundás v. Pránjivan*⁽³⁾, in which the contest was between a registered mortgage of 1864, and an unregistered mortgage of 1862, and the *superior* claim of the former was upheld.

Leaving, therefore, the question of special custom aside, we must apply the general law to the case. It is true that in *Sobhágchand v. Bháichand*, Westropp, C. J., and the Judges who sat with him, held that the registered certificate of sale did not defeat the prior unregistered mortgage. Melvill, J., explained the reason clearly in his judgment by stating that under the Registration Act competition for priority can only exist between documents which are in their nature antagonistic. The decision by the Full Bench of the third point referred to it is thus not applicable here or, if it is applicable, it tells against appellant's contention.

(1) 9 Bom. H. C. Rep., 60.

(2) P. J. for 1882, p. 218.

(3) 7 Bom. H. C. Rep., A. C. J., 146.

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As regards the general law, the authorities are clear that, under Act XVI of 1864 and Act VIII of 1871, the competition about priority was only recognized in regard to documents of a like kind, either optional or compulsory. Apart from the doctrine of equitable notice, which question does not arise in the present case, registration under those Acts by itself conferred no priority on a registered document if its registration was compulsory as against a document whose registration was optional. Since Act III of 1877, however, the competition obtains in a more general form, and confers priority on documents required to be registered, and accordingly registered since Act III of 1877 was passed, over all prior unregistered documents of an antagonistic character.

The Allahabad High Court decided the point in *Kuar Gir Prasad v. Bansi*⁽¹⁾, *Lachaman Dás v. Dip Chand*⁽²⁾, and it was subsequently affirmed in *The Himalaya Bank v. The Simla Bank*⁽³⁾. The Bombay High Court recognized this same change in the law in *Kanitkar v. Joshi*⁽⁴⁾, *Ichhárám v. Govindrám*⁽⁵⁾, *Shivrám v. Saya*⁽⁶⁾. The Madras High Court affirmed it in *Nallappa v. Ibrám*⁽⁷⁾, and that Court went to the length of allowing section 50 of Act III of 1877 to override even the equitable doctrine of notice, in which last respect this Court has not been able to accept the Madras view—*Shivrám v. Genu*⁽⁸⁾ and *Dundaya v. Chenbasápa*⁽⁹⁾. The Calcutta High Court also recognized the change effected by Act III of 1877 in *Shib Chandra v. Johobux*⁽¹⁰⁾. The expression of opinion contained in *Dundaya v. Chenbasápa* (*supra*), that the principles of the former Acts are equally applicable to the recent Act, must be confined to the two points directly decided in that case, namely, about the equitable doctrine of notice, and the effect of possession, and cannot be extended to embrace the point now under consideration, in respect of which all the High Courts are in accord in holding that Act III of 1877 has effected an important change. On the whole, we feel satisfied that the *san-*

(1) I. L. R., 2 All., 431.

(2) I. L. R., 2 All., 851.

(3) I. L. R., 8 All., 23.

(4) I. L. R., 5 Bom., 442.

(5) I. L. R., 5 Bom., 653.

(6) I. L. R., 13 Bom., 229.

(7) I. L. R., 5 Mad., 73.

(8) I. L. R., 6 Bom., 515.

(9) P. J. for 1883, 83.

(10) I. L. R., 7 Cal., 570.

mortgages in this case were entitled to no particular privilege by force of custom, and that as the registered mortgage competing with them was executed since Act III of 1877 was passed, and the execution sale in which the appellant Bechardás bought the property took place subsequent to the registered mortgage, the appellant Bechardás was very properly ordered by the lower Court to pay off the encumbrance, subject to which the sale must be held to have taken place.

As regards the contention that the *san*-mortgages merged in the decree, and that section 50 exempts decrees from competition with registered mortgages, the authorities are clear that no such exemption can be claimed. In *The Hamalaya Bank, Limited, v. The Simla Bank, Limited*⁽¹⁾, it was expressly held that a mortgage registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered bond. The principle of that decision is that the decree and the sale only give effect to the rights under the bond, and cannot confer any higher right. See also *Dullabhdás v. Lakshmandás*⁽²⁾.

We accordingly reject the appeal, and confirm the decree with costs.

Decree confirmed.

(1) I. L. R., 8 All., 23.

(2) I. L. R., 10 Bom., 88.

ORIGINAL CRIMINAL.

Before Mr. Justice Jardine, Chief Justice (Acting).

EMPRESS v. LESTER.

Evidence—Evidence Act (I of 1872), Sec. 26—Statement of accused—Custody of police—Statement made in temporary absence of police.

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July 1.

A person under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to Godhra. A friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then in custody, and that section 26 of the Evidence Act (I of 1872) did not apply.