

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice
Batchelor.

SAHADEV RAVJI BAGADE (ORIGINAL PLAINTIFF), APPELLANT, v.
SHEKH PAPA MIYA (ORIGINAL DEFENDANT), RESPONDENT.*

1904.

August 23.

*Mortgage—Registered sub-mortgage—Notice—Absence of knowledge of the
sub-mortgage by the mortgagor—Payment made in good faith by mortgagor to
mortgagee.*

When a mortgagor makes a payment to the mortgagee in good faith without knowledge of a registered sub-mortgage, the payment is not vitiated on the ground that it was made subsequent to the registration of the sub-mortgage. Registration is notice for some purposes but it cannot be treated as notice for the purpose of vitiating such payment.

Williams v. Sorrell (1) referred to.

SECOND APPEAL from the decision of M. B. Tyabji, District Judge of Ahmednagar, confirming the decree of V. K. Sovani, Joint Subordinate Judge.

One Jamanbhai had two sons, Shekh Ahmad and Amirbhai. Shekh Ahmad pre-deceased his father leaving a son Shekh Papa Miya. Jamanbhai was the owner of a house which he mortgaged to one Hambirmal Himatram on the 28th September 1869 for Rs. 801. The mortgage was registered and was with possession. Jamanbhai paid Rs. 400 and Rs. 201 to the mortgagee and obtained receipts for the payments dated the 23rd April 1872 and 25th June 1882 respectively. Jamanbhai died in July 1885. In the year 1896 the mortgagee's son Davlatram (the mortgagee having died in the meanwhile) sub-mortgaged the house to plaintiff Sahadev Ravji Bagade. The sub-mortgage was registered. On the 5th February 1897, one Mohanlal Hiralal obtained a decree (No. 54 of 1897) against the mortgagee and in execution attached the house and got a prohibitory order under section 274 of the Civil Procedure Code (Act XIV of 1882). The order, which was dated the 5th September 1898, directed that the attached house should be sold subject to the sub-mortgage of the plaintiff.

* Second appeal No. 275 of 1904.

(1) (1799) 4 Vesey, 389.

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Apparently the house was not sold and on the 27th September 1900 Amirbhai and Papa Miya, the son and grandson, respectively of the mortgagor Jamanbhai, paid the balance of the mortgage debt, namely Rs. 200, to the mortgagee's son Davlatram, obtained a receipt for the same and recovered possession of the house. Subsequently the plaintiff having obtained a decree (No. 465 of 1901) on the sub-mortgage for possession of the house against Davlatram and having applied for execution, Amirbhai objected to the delivery of possession on the ground that the mortgage debt due to the mortgagee was paid off by three instalments. The Court after inquiry disallowed Amirbhai's objection. Shekh Papa Miya thereupon came forward and resisted the delivery of possession. The plaintiff's application was therefore registered as a suit under section 331 of the Civil Procedure Code (Act XIV of 1882).

The defendant pleaded that the property belonged to him from the time of his forefathers and that the mortgage by Jamanbhai to Hambirmal was redeemed.

The Subordinate Judge found that the house was free from Hambirmal's mortgage and that the defendant's resistance was lawful and should not be removed. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree. The plaintiff preferred a second appeal.

Ganpatrao G. Nadkarni (with *Rao Bahadur G. N. Nadkarni*) for the appellant (plaintiff):—In our suit for possession of the property we had not joined the present defendant as a party, still our sub-mortgage being registered, the defendant had notice of our claim. Section 85 of the Transfer of Property Act supports our contention. Registration is held to be constructive notice by a current of decisions of all the High Courts in this country, *Lakshmandas v. Dasrat*⁽¹⁾, *Shivram v. Genw*⁽²⁾, *Dundaya v. Chenbasappa*⁽³⁾, *Ohintaman v. Dareppa*⁽⁴⁾, *Narayan v. Bapu*⁽⁵⁾, *Dina v. Nathu*⁽⁶⁾, *Janki Prasad v. Kishen Dat*⁽⁷⁾, *Jugul Kissors*

(1) (1880) 6 Bom. 168.

(2) (1882) 6 Bom. 515.

(3) (1883) 9 Bom. 427.

(4) (1890) 14 Bom. 506.

(5) (1892) 17 Bom. 741.

(6) (1902) 26 Bom. 538.

(7) (1894) 16 All. 478.

Lal v. Kartic Chun ler⁽¹⁾. The rule to be deduced from the cases is that if a party sets up a plea of want of notice in spite of registration, the plea shall be held bad in law and his *bond fides* will not avail him. Further, the doctrine of notice, which is enforced only in cases of assignment of a money debt or a chose in action, is inapplicable to cases in which rights over immoveable property are transferred: see Shepherd and Brown's Commentary on Transfer of Property Act, 4th edition, page 425, last paragraph. There is another circumstance which shows that the defendant had notice of our sub-mortgage. When Mohanlal, another creditor of Davlatram, obtained a decree against him, the house in suit was attached subject to mortgage rights and a sale subject to those rights was ordered. The prohibitory order contained a specific recital of our rights, therefore, we did not take further steps to give actual notice to Amirkhan. The last payment of Rs. 200 to Davlatram was in disobedience of the prohibitory order.

G. B. Rele for the respondent (defendant):—The omission of the plaintiff to join us as a party to his suit for possession is fatal to his case. The mortgage by Jamanbhai to Hambirmal was also registered. Therefore, when the plaintiff took the sub-mortgage he had notice of our prior mortgage. We had no actual notice of the sub-mortgage in plaintiff's favour. The findings of the lower Courts on the issues of notice and payment in good faith are in our favour. Registration of a document may in some cases operate as constructive notice of the transaction but it cannot affect payments made in good faith. There is no clear authority to support the plaintiff's contention. The prohibitory order was issued at the instance of Mohanlal and not at the instance of the plaintiff, therefore, it cannot be said that the prohibitory order which was issued on the application of a third party in connection with a wholly different transaction operated as a notice of the plaintiff's rights. Such orders are general and are not commands to specific individuals.

Ganpatrao G. Nadkarni, in reply.

(1) (1892) 21 Cal. 116.

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JENKINS, C. J. (after stating the facts):—The defendant has proved to the satisfaction of both Courts in this suit that the whole of the mortgage amount of Rs. 801 secured by the original mortgage in September 1869 has in fact been paid off in good faith, and without any notice of the sub-mortgage to the plaintiff. With regard to the first two payments, no question can arise, because they were made as to Rs. 400 in April 1872 and as to Rs. 201 in June 1882; and the only question is as to the sum of Rs. 200, paid on the 27th September 1900.

Mr. Ganpatrao Ghanasham maintains that the mortgagor had no right to make that payment after the sub-mortgage. That would be so had the payment been made with knowledge of the sub-mortgage, but both the Courts have held that the last payment was made without knowledge of the sub-mortgage.

Then Mr. Ganpatrao has relied on the fact that the sub-mortgage was registered, and that, he claims, constituted a notice to the mortgagor, which vitiated the payments subsequent to the registration of sub-mortgage.

A precisely similar point was taken on an Act on much the same lines as our Registration Act in the case of *William v. Sorrell*⁽¹⁾, but it was there held that notwithstanding the fact that the sub-mortgage had been registered, and that registration was notice for some purposes, it could not be treated as notice for the purpose of vitiating payments made by a mortgagor to his mortgagee without actual notice of the sub-mortgage. The point there considered was so clear that the Solicitor General, who was concerned to argue that the payment was bad, conceded, that though the registration was a species of notice, he was afraid it would not be notice for the purpose then in hand. That view was accepted by the Lord Chancellor. This fortifies us in the conclusion at which we have independently arrived, that we ought to disallow the objection that registration constituted notice of the sub-mortgage. Then it has been argued that notice must be imputed because the prohibitory order under section 274 of the Civil Procedure Code was obtained at the suit of one Mohanlal, a creditor of Davlatram. But a prohibitory order cannot be treated as notice to the world, and the findings in this case exclude

(1) (1799) 4 Vesey, 389.

the idea that notice in fact of this prohibitory order came to the knowledge of the defendant.

For these reasons we hold that the decree of the lower Appellate Court must be upheld.

The decree will therefore be confirmed with costs.

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Decree confirmed.

G. B. R.

CIVIL REFERENCE.

*Before Mr. Justice Chandavarkar, Mr. Justice Batty,
and Mr. Justice Aston.*

IN RE NIRABAI IN RE LUXMAN AND GANPAT*.*

*Indian Stamp Act (II of 1899), sec. 24 †—Mortgage-deed—Exemption from duty—
Statute—Construction—Exemption.*

1904.
September 5.

The proviso to section 24 of the Stamp Act (II of 1899) contemplates that to entitle the mortgagor to a deduction thereunder, the property transferred should be identical with that mortgaged and should not merely form a portion thereof.

An enactment imposing a burden requires a strict construction in favour of the subject; but an exemption must be strictly construed in favour of the State.

CIVIL references made by A. D. Younghusband, Commissioner, Central Division, under section 59 of the Indian Stamp Act (II of 1899).

* Civil References Nos. 8 and 3A of 1904.

† Section 24 of the Indian Stamp Act (II of 1899) runs as follows:—

24. Where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject either, certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty

Explanation :—In the case of a sale of property subject to a mortgage or other incumbrance, any unpaid mortgage money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale.

Provided that, where property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.