

Bamasundari Dassi Vs. Krishna Chandra Dhur and ors.

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Court : Kolkata

Decided On : Feb-19-1884

Reported in : (1884)ILR10Cal424

Judge : McDonell and ;Field, JJ.

Appellant : Bamasundari Dassi

Respondent : Krishna Chandra Dhur and ors.

Judgement :

Field, J.

1. In this case the plaintiff is purchaser under a registered conveyance from defendant No. 4. Defendants 1, 2 and 3 are purchasers under an unregistered conveyance from the same person. The Judge in the Court below has decided that the title of defendants 1, 2 and 3 ought to prevail against that of the plaintiff. The Judge says in his judgment: 'The Munsiff is wrong infinding, that now since the Act of 1877, registered documents of which the registration is compulsory, have no priority over unregistered documents executed before 1877, of which the registration was optional. Under the present Act no document executed after the passing of the Registration Act of 1864, if unregistered, and the registration was optional, can take effect against a later registered document. But the purchase under the later registered document cannot prevail against the former unregistered purchaser, if it is shown (1st) that the earlier bill of sale was a legal conveyance,

and (2nd) that it was accompanied by delivery of possession. Such delivery of possession divests the vendor of all title and retention of possession by a prior purchaser over a long period, and makes it proper to presume that the second purchaser had notice Sic. In Original.' This must be taken to be an incorrect statement of the law since the decision of the Full Bench in the case of *Narain Chunder Chuckerbutty v. Dataram Roy* I.L.R. 8 Cal. 597. The Judge then proceeds: 'In this case undoubtedly possession was in 1276 (1869) transferred to the first purchasers, defendants Nos. 1, 2, 3, who continued in peaceable and evident possession for nine years prior to the second sale, and, for eleven years prior to the bringing of this suit. The plaintiff is a relative of defendant No. 4, and lives in a bari adjoining his; she is a woman, but a married woman, and her husband is a clerk in this office, and a man of some degree of education and intelligence; clearly then it must be presumed that plaintiff had notice of the former sale.' The Judge accordingly bases his judgment on the ground that the registered purchaser had notice. This raises the question whether the case of a second registered purchaser having notice of a prior unregistered sale is an exception to the rule laid down in the Full Bench case *Narain Chunder Chuckerbutty v. Dataram Roy* I.L.R. 8 Cal. 597. This is a point which can scarcely be said to have been settled by the decisions of this Court. In the case of *Fuzluddin Khan v. Fakir Mahomed Khan* I.L.R. 5 Cal. 336 the Chief Justice says (p. 342): 'If, indeed, it could be shown that the subsequent purchaser under the registered instrument had notice of the conveyance by the prior unregistered deed, then the equitable doctrine which obtains in like cases in England, and which is explained in the case of *Le Neve v. Le Neve* 3 Atk. 646 : 2 Wh. & Tudor L.C. 34 might prevent the registered purchaser from asserting his rights against the unregistered under Section 50.' Clearly in this passage the learned Chief Justice does not decide the point. In the judgment of Mr. Justice Pontifex, at page 350, the question whether the plaintiff had sufficient notice was considered and decided in the negative. It may then be said that the question of notice was considered by one learned Judge to have arisen in that case. In the case of *Dino Nath Ghose v. Aluck Moni Dabee* I.L.R. 7 Cal. 753 Mr. Justice Prinsep bases his decision upon the fact that the second and registered purchaser presumably had notice of the title of the first purchaser. My judgment in that case proceeded upon other grounds. In the Full

Bench decision in *Narain Chunder Chuckerbutty v. Dataram Roy* I.L.R. 8 Cal. 597 Mr. Justice Pontifex adverts to the question of notice, but inasmuch as the question of notice or no notice did not directly arise in that case, any observation made upon this point must be regarded as an 'obiter dictum.' We observe that the Madras High Court in two cases *Nallappa Goundan v. Ibram Sahib* I.L.R. 5 Mad. 73 and *Kondayya v. Gurruvappa* I.L.R. 5 Mad. 139 have decided that the question of notice is immaterial, regard being had to the express provisions of the Registration Act. Now, if we had to decide the question whether the case of a second registered purchaser having notice is an exception to the law laid down in the Pull Bench case, we might, perhaps, think it right under the circumstances to refer this question to a Full Bench, but we think that in the present case the question does not really arise. The Judge says in his judgment, 'The plaintiff is a relative of defendant No. 4, and lives in a bari adjoining his; she is a woman, but a married woman, and her husband is a clerk in this office, and a man of some degree of education and intelligence. Clearly then it must be presumed that plaintiff had notice of the former sale.' We think that no such presumption arises upon the facts stated. There is some evidence that the plaintiff is related to defendant No. 4, although what degree of relationship does not appear; but admittedly there is no evidence on the record that the plaintiff lives in a bari adjoining that of defendant No. 4. In the case of *Fuzhiddin Khan v. Fakir Mahomed Khan* already referred to, Pontifex, J. says: 'According to the English decisions, the notice of fraud must be very clearly proved,' and then he refers to the case of *Wyalt v. Barivell* 19 Ves. 435 the judgment in which contains the following passage: We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.' Applying this principle to the present case, we think that the decision of the Judge, in the Court below, is erroneous--first, because there is no clear proof of notice, and second, because, he has raised a presumption upon facts which do not support the presumption raised. This being so, the question whether the case of a second registered purchaser having notice is an exception to the general rule laid down by the Pull Bench case, does not arise; and it is unnecessary to decide it on the present occasion. We must set

aside the decree of the lower Appellate Court and decree this appeal with costs of all Courts.'

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