

Umesh Chandra Halдар Vs. Umesh Chandra Bag and ors.

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Court : Kolkata

Decided On : Dec-12-1912

Reported in : 18Ind.Cas.46

Judge : Holm wood and ;Chapman, JJ.

Appellant : Umesh Chandra Halдар

Respondent : Umesh Chandra Bag and ors.

Judgement :

1. This appeal arises out of a suit brought by the plaintiff for redemption of a usufructuary mortgage, dated the 20th Ashar 1266, by one Nobin Bag, the predecessor of defendants Nos. 5 and 6 in favour of defendant No. 1 for Rs. 75. The plaintiff is the purchaser of the same land from the heirs of Nobin Bag and his purchase was a registered purchase, dated 14th Ashar 1316, corresponding to 20th June 1909, for Rs. 600, keeping Rs. 75 in hand for payment of the mortgage. The defence was that on the 7 th Chaitra 1283 corresponding to the 19th March 1877, Nobin Bag had sold the equity of redemption to defendant No. 1 for Rs. 130 and, therefore, there was nothing to redeem.

2. The first Court held that the alleged sale to defendant No. 1 was not proved. The lower Appellate Court held that the sale is genuine though it was made by an unregistered document and that being before the Transfer of Property Act was enacted, it would not be compulsorily registrable. He also disagrees with the

Munsif who held that the redemption by defendant No. 1 was purely gratuitous and the act of a stranger, and he, therefore, obviously held that the defendant had the right to subrogate. He did not go into the question of notice. But on the view we take of the case, it will not be necessary to remand the case for inquiry upon this point as the facts which govern the law are admitted.

3. The first point taken in appeal by the plaintiff was that the deed was compulsorily registrable because the defendant admits that he paid Rs. 130. Had the Transfer of Property Act been in force at the time, there can be no doubt that it would have been compulsorily registrable because no transfer of property worth over Rs. 100 could be made except by a registered document. But the Registration Act of 1871, by which this case is governed, merely enacts that a document which purports to convey property of the value of over Rs. 103 must be registered and the parties in this case set out the value of the property in the document as Rs. 99. The document, therefore, on the face of it was not compulsorily registrable and there is, therefore, nothing in the first point.

4. The second point was that the registered deed has priority over the unregistered deed; The leading case of *Shivram v. Saya* 13 B. 229 and many other authorities having decided that point. As regards this point, it appears to depend on the question of notice Registration in itself is not notice and mere possession is not notice, and the Full Bench, in the case of *Narain Chunder Chuckerbutty v. Dataram Roy* 8 C. 597: 10 C.L.R. 241 held that this question of notice was necessary when the first purchaser had obtained possession under an unregistered conveyance, even if such possession continued at the date of the second registered conveyance, and they remanded the case to the lower Court for decision on the issue, if the appellant was a bona fide purchaser for value, was he affected by notice of the plaintiff's title? In a subsequent case, *Nani Bibee v. Hufizullah* 10 C. 1073 Garth, C.J., and Beverley, J., held that, although the mere fact of possession having been taken by a purchaser under an unregistered conveyance is insufficient of itself to establish a good title to a property as against a subsequent registered purchaser and is not conclusive evidence of notice as against him, yet in the majority of cases such possession is very cogent evidence of notice. Now that, on the admitted facts of this case, possession ia notice is

perfectly clear from the judgment of the Bombay Court in *Konaiba v. Nana Shidrao* 27 B. 408; 5 Bom. L.R. 269 where the learned Judges cited English authorities from 1794 down to 19(sic)2 and we may mention the first of these authorities *Taylor v. Stibbert* 2 Ves. Jr. 437 : 2 R.R. 278 and the latest authority *Hunt v. Luck* (1902) 1 Ch. 428 p 433; 71 L.J. Ch. 239 : 50 W.R. 291 : 86 L.T. 68 : 18 T.L.R. 265 where three of the Lords Justices laid down as follows: 'if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession (of the tenant who is in possession) and find out from him what his rights are, and if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession;' And the Bombay Court says: 'It follows, then, both on principle and authority, that the plaintiff having had notice of the defendant's actual possession at the date of the plaintiff's purchase, was bound to inquire of him as to the nature of his possession, instead of assuming that because that possession had originally commenced under a tenancy, it must have continued under that title on the day when the plaintiff purchased the land;' and it so happens that the facts of that case are precisely similar to the facts of the case before us. That was also a case where the first purchaser under an unregistered deed had been in possession of the land before as a tenant. This case is rather stronger because it was known to the plaintiff that the first purchaser had been in possession of this land as a usufructuary mortgage, and his case is that he has continued for 50 years to be such usufructuary mortgagee and he claims to redeem him on that footing. Now, knowing that defendant No. 1 was in possession as usufructuary mortgagee, the English authorities, which are cited and followed in the case of *Kondiba v. Nana Shidrao* 27 B. 408 : 5 Bom. L.R. 269 we have just noticed, make it clear that this was itself sufficient to put him on notice of the defendant's possession, and to make it incumbent upon him to inquire as to the nature of his possession, instead of assuming that the usufructuary mortgage continued. Under those circumstances, on all the authorities, the subsequent registered sale of the property to the plaintiff can give him no priority over the unregistered purchase made by the defendant No. 1 so long ago as 1877.

5. As regards the third point which raised the question of subrogation after a considerable amount of argument, the Court having expressed its inclination to follow the dictum of Mr. Justice Mookerjee in *Bisheswar Prosad v. Lala Sarnam Singh* 6 C.L.J. 134 the point as regards the right of subrogation was waived so that we need not decide that question.

6. The result is that the appeal fails on all the grounds upon which it was brought and must be dismissed with costs.

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