

**(1879) 03 CAL CK 0001****Calcutta High Court****Case No:** None

Fuzludeen Khan

APPELLANT

Vs

Fakir Mahomed Khan

RESPONDENT

**Date of Decision:** March 18, 1879**Acts Referred:**

- Registration Act, 1877 - Section 48, 50

**Citation:** (1880) ILR (Cal) 336**Hon'ble Judges:** Richard Garth, C.J; Pontifex, J**Bench:** Division Bench**Judgement**

Richard Garth, C.J.

In this case we are unable to agree with the learned Judge of this Court. The suit was brought by the plaintiff to recover the rent of a jote from the ryot-defendant, upon the ground, that he had purchased the estate of the defendant's landlord. The plaintiff's purchase, as to which there was no dispute, was effected by a deed of sale dated in Cheit 1282 (March 1876), which was duly registered. It is found as a fact by the lower Court, that for sometime previous to the execution of this deed, the defendant had been the tenant of the property under a kabuliat, which he had given to the father of the plaintiff's vendor, and had since paid rent to the latter in accordance with the kabuliat. The defendant's case was, that, by another deed of sale, dated in Pous 1282 (December 1875), two months prior to the plaintiff's deed, the landlord had conveyed the same estate to him, the defendant; but this bill of sale was not registered.

2. Upon these facts the District Judge held, that the plaintiff's registered deed must prevail against the defendant's deed which was not registered, and he made a decree in the plaintiff's favour for the rent claimed.

3. The learned Judge of this Court considered, that the District Judge was wrong. He says, that Section 50 of Act VIII of 1871 ought not to be construed literally, and that,

if the defendant's bill of sale in this case was really executed before the plaintiffs bill of sale, the vendor's right to make a conveyance of the same property to the plaintiff or to any one else, was at an end, and that in that case nothing passed to the plaintiff by his deed, whether it was registered or not.

4. The learned Judge, therefore, remanded the case to the District Judge to determine the question, whether the defendant's deed was genuine, with an intimation that if it was so, the defendant ought to succeed.

5. I cannot agree with the learned Judge in the construction which he has thus put upon Section 50 of Act VIII of 1871, and it appears to me that if that were the right construction, the section would be virtually inoperative.

6. It is perfectly true, that Section 18 of the Act leaves it optional with purchasers, when the value of the property purchased is under Rs. 100, to register their deeds or not; but if they elect not to register, I think that the Act intends, that they shall be subject to the risk (under Section 50) of having their title displaced by a subsequent innocent purchaser without notice, whose conveyance is duly registered.

7. It seems to me that the only reasonable construction of Section 50 is, that where property under the value of Rs. 100 is purchased by two innocent purchasers, the one by a registered, and the other by an unregistered deed, and there is no fraud shown, or other circumstances which in equity would protect the unregistered purchaser against the registered, the title of the latter shall prevail.

8. This appears to have been decided by several cases in this Court, to which our attention has been directed.

9. The first was the case of Gooroo Dass Dan v. Kooshoom Koomaree Dossee (9 W.R. 547), decided u/s 68 of Act XVI of 1864, which contains a similar provision to Section 50 of Act VIII of 1871. In that case it was held, that the defendant's registered deed, though subsequent in date to the unregistered deed of the plaintiff, must have the priority.

10. This ruling was followed in the case of Gobind Chunder Roy v. Poorno Chunder Sein (10 W.R. 36), which is a decision to the same effect under the same Act, and by the case of Soodharam Bhuttacharjee v. Odhoy Chunder Bundopadhy (10 B.L.R. 380), decided u/s 50 of Act XX of 1866, which is similar in terms to Section 50 of the Act of 1871, and the reasoning of the Judges in the case of Shaikh Ryasatulla v. Doorga Churn Pal (15 B.L.R. 296) is also to the same effect.

11. The same point has been decided in the same way under the Act of 1871 by the High Court of Bombay in the case of Panha Khumaji v. Fatta Upaji (12 Bom. H.C.R. A.C. 179).

12. Against this current of authorities the only case in point to which we have been referred, is a decision of Glover, J., in Narain Doss v. Gunga Ram Dharah (20 W.R.,

287), which, though, no doubt, directly contrary to the rulings above referred to, appears to have proceeded upon a misapprehension of the true meaning of the judgment in the case of *Nursingh Poorkait v. Bikrum Majee* (14 W.R. 250).

13. This latter case, which was decided by Jackson and Dwarkanath Mitter, JJ., proceeded, not upon Section 50, but upon Section 48, of the Act of 1866; that section is similar in terms to Section 48 of the Act of 1871, and it does not apply to the case of two deeds conveying the same property, one registered and other not, but to the case of an oral agreement for purchase coupled with possession of the property on the one hand, and a subsequent registered deed relating to the same property on the other.

14. An oral agreement for the sale or letting of land, coupled with possession, is protected by Section 48 as against a subsequent registered deed; and there is good reason in this, because an oral agreement is, of course, not capable of registration, whereas the purchaser under a written conveyance can always register it, if he pleases, and so give the public notice that he has become the purchaser. The law does not oblige him to register, but if he omits to do so, he runs the risk of having his title displaced by a subsequent registered purchaser without notice.

15. Another case, *Salim Shaikh v. Boidonath Ghuttuck* (12 W.R., 217; S.C. 3 B.L.R. 312), decided by Jackson and Markby, JJ., arose also u/s 48 of Act XX of 1866, and is, therefore, inapplicable to the present.

16. It certainly seems to have been the opinion of Mr. Justice Markby, in more than one of the authorities to which we have referred, that a purchaser under an unregistered deed, who has obtained possession, would have priority as against a subsequent purchaser under a registered deed; and this point appears to have been directly decided by the same learned Judge and Mr. Justice Prinsep in an unreported case, Special Appeal No. 1122 of 1876, but I doubt whether this doctrine (stated broadly) is in accordance with the provisions of Section 50 of the Registration Act. That section certainly contains no qualification of the kind, and I consider that the Court is not at liberty to import one.

17. 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; and 2 White and Tudor's L.C. 34), might prevent the registered purchaser from asserting his rights against the unregistered u/s 50.

18. But in this case no question of equity, nor of the defendant having been put into possession under his alleged deed, arises.

19. No suggestion of the kind was made by the defendant in either of the lower Courts, and the possession which he held, after the deed was executed, was

perfectly consistent with his previous position as tenant to the plaintiff's vendor under his own kabuliat.

20. That kabuliat was produced at the trial by the plaintiff's vendor himself, and this fact is directly opposed to the defendant's contention, because, if he had purchased the property honestly by a bill of sale, the kabuliat, which he had previously given, ought in regular course to have been returned to him.

21. We must take it, therefore, that the case with which we have to deal now, is one between two innocent purchasers, one of whom has, and the other has not, registered his deed of conveyance, and I think that the only reasonable way in which we can give any effect to the provisions of Section 50 is by allowing the plaintiff's registered deed a priority over that of the defendant. As my learned brother is also of this opinion, the judgment of this Court will be reversed, the judgment of the lower Court will be restored, and the plaintiff's suit will be decreed with costs in all the Courts.

Pontifex, J.

22. This Letters Patent appeal raises an important question u/s 50 of the late Registration Act, upon which there has been a conflict of decisions, and as that section has been re-enacted in the same terms by Section 50 of the present Registration Act, III of 1877, it is advisable to consider its scope and operation carefully.

23. In the present appeal, the defendant (respondent) was originally the tenant of a certain jotedar, but he alleges that he purchased the jote-right from the jotedar by a deed of sale, dated Pous 1282 (December 1875), for less than Rs. 100, which deed--registration being optional--was not registered.

24. The plaintiff (appellant) satisfactorily proved a deed of sale to himself from the jotedar, dated Cheit 1282 (March 1876), or two months subsequent to the defendant's alleged purchase. The plaintiff's deed was registered, although below the value of Rs. 100.

25. The plaintiff sued for possession, basing his title on the words of Section 50 of the Registration Act of 1871, which in effect enacts, that any document, which "may be registered," although it is not compulsory to register it under the Act, "shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property" and under that section, it was contended broadly on behalf of the plaintiff, that, under no circumstances whatever, can a prior deed, unregistered, prevail against a subsequent deed duly registered, although registration may be merely optional, the property being of less value than Rs. 100.

26. The District Judge decided the case in favour of the plaintiff on this broad ground, but on appeal to this Court, Mr. Justice Tottenham held, that Section 50 was

not in all cases to be construed strictly, and that it could not apply to the present case, because, if the defendant could prove his conveyance, the common vendor would have nothing left in him to convey to, the plaintiff under the subsequent deed, which, therefore, although registered, could not operate upon the property. But inasmuch as the defendant's alleged conveyance had not been proved in the lower Court, Mr. Justice Tottenham remanded the case to the first Court, to try the issue whether the defendant's kobala was a genuine instrument, in which case the suit was to be dismissed.

27. Against that decision the plaintiff now appeals, and, in the argument of his appeal, several decisions have been cited to support his contention, that, under all circumstances, a registered deed must prevail over a prior deed which has not been registered. The decisions so cited are the following:Gooroo Dass Dan v. Kooshoom Koomaree Dossee (9 W.R. 547), Gobind Chunder Roy v. Poorno Chunder Sein (10 W.R. 36), Mofuzel Hossein v. Golam Ambiah (10 W.R. 196; S.C., 10 B.L.R. 381), Shaikh Ryasatulla v. Doorga Churn Pal (15 B.L.R. 295), Panha Khumaji v. Eatta Upaji (12 Bom. H.C.R. 179), Soodharam Bhuttacharjee v. Odhoy Chunder Bundopadhy (10 B.L.R. 380).

28. On the other hand, several cases have been cited on behalf of the respondent as authorities to show that, with respect to properties of less value than Rs. 100, a prior deed, coupled with or followed by possession, will, although unregistered, prevail against a subsequent deed duly registered. The following cases were cited in support of this contention:Salim Shaikh v. Boidonath Ghuttuck (12 W.R. 217; S.C., 3 B.L.R. 312), Gourree Kant Roy v. Gridhur Roy (12 W.R. 456), Nursingh Poorkeat v. Bikrum Majee (14 W.R. 250), Narain Doss v. Gunga Ram Dhara (20 W.R. 287).

29. And, in addition, we were furnished with the judgments of Markby and Prinsep, JJ., in an unreported case (Special Appeal No. 1122 of 1876), which do in fact lay down, that, where the property is under the value of Rs. 100, a prior deed with possession, although unregistered, prevails against a subsequent deed duly registered. Mr. Justice Markby appears to have founded his judgment on the case of Salim Sheikh v. Boidonath Ghuttuck (12 W.R. 217; S.C., 3 B.L.R. 312), and the cases there referred to. But that was a case in which there was a conflict between a verbal or oral grant, which from the nature of the case could not be registered, and a subsequently registered document, and it was decided u/s 48 of Act XX of 1866, which was in the same terms as Section 48 of the Act of 1871, but with this difference, that in the latter Act the following words are added "unless where the agreement or declaration has been accompanied or followed by delivery of possession".

30. Mr. Justice Prinsep, in his judgment, also relies on the case of Salim Shaikh v. Boidonath Ghuttuck (12 W.R., 217; S.C. 3 B.L.R. 312), and adds--"Comparing Section 48 with Section 50, I am unable to learn any valid reason for any difference between an unregistered and an oral agreement both followed by delivery of possession, or

why, when registration is optional, such a deed should be placed at a disadvantage. In other words, why, because such an agreement has been reduced to writing, it should not be at least as good as the previous state of the same transaction before the terms agreed on were fixed and made certain by a permanent record."

31. I am unable to follow this reasoning to its full extent, for it seems to me to be founded on the assumption that the words relating to possession, which are found in Section 48 of the Act of 1871 and the present Act, were inserted for the protection of oral alienees, whereas, in my opinion, they were inserted for the purpose of limiting the operation of oral alienations, and of declaring the law with respect to them. Section 48 of Act XX of 1866 had provided that all instruments duly registered should take effect against any oral agreement or declaration. Yet that Act did not declare oral alienations to be invalid to all intents and purposes, nor was it the object of the Registration Acts to repeal the existing law which authorized oral alienations of both moveable and Immovable property of any value, and whether voluntary or for valuable consideration. It, therefore, became necessary to qualify the too general language of Section 48 of Act XX of 1866, and, at the same time, to declare the law as to oral alienations, which were not intended to be affected, which object was accomplished by patching on a proviso to the section. Section 48 of the Act of 1871 is applicable to all oral transactions, whether voluntary or for valuable consideration, and whether the property is moveable or immovable, and whether its value is over or under Rs. 100.

32. With respect to moveable property, and alienations by way of gift of Immovable property, possession had always been requisite to complete the alienation, and as between a purchaser for value by deed, and a prior purchaser for value by oral alienation, even if possession was not theoretically essential (which may be doubtful), the fact of possession must always have been a very material consideration. The insertion of the words relating to possession in Section 48 appears to me, therefore, to have been merely intended as a declaration of the law limiting the operation of oral alienations. It was in effect equivalent to saying that, although, the Registration Acts are not intended to interfere with oral alienations, which, from the nature of the case, cannot be registered, yet the only oral alienations of which the law can take notice, in competition with registered instruments, are those which are properly established by evidence of possession.

33. The insertion in Section 48 of the words relating to possession, in fact rather detracts from, than adds to, the security of oral alienations, because, unless the oral alienee was in possession, the Courts would now be excluded from considering any equity which he might have against a subsequent alienee by registered deed.

34. As alienations by deed for value, of Immovable property below the value of Rs. 100, although unregistered, continued to be perfectly valid and effectual against the vendor or mortgagor, I think that, though it may have been intended to encourage registration of deeds, even where the property was below the value of Rs. 100, it

was not intended to deprive a perfectly lawful and honest alienee of Immovable property of any equities he might be able to establish against a subsequent alienee by deed duly registered. In my opinion, therefore, words relating to possession, corresponding with those in Section 48, were advisedly omitted from Section 50; for the insertion of such words might have deprived an unregistered alienee for value, but without possession, of all such equities, even though the absence of possession might be satisfactorily accounted for. I cannot suppose that it could have been the intention of the legislature, where registration was not made compulsory, to protect cases of fraud, or to effect by a side wind (Section 50) what they had carefully refrained from effecting directly, namely, notwithstanding Section 18, to make the registration of all alienations by deed practically compulsory. It seems to me, that precisely the same considerations apply to the interpretation of Section 50 as Courts of Equity have applied to the English Registration Acts of Middlesex and Yorkshire. By the English Acts, every conveyance is to be deemed fraudulent and void against any subsequent purchaser or mortgagor for valuable consideration, unless registered as required by the Acts". But an unregistered deed, as against the vendor or mortgagor, is perfectly valid and effectual, in the same way as an unregistered deed for value, of property below the value of Rs. 100, is in India valid against the vendor or mortgagor; or, in other words, registration is in both cases optional, although the alienee, if his deed is unregistered, is subject to a possible penalty, which in England only applies when there is a subsequent innocent purchaser by registered deed in which case preference is given to him. The words used in the English Acts are at least as strong as the language used in Sections 18 and 50. Yet, under the English Acts, Courts of Equity held, that if they allowed a purchaser for value, who had actual notice of a prior unregistered conveyance, to prevail against it by registering his own subsequent deed, fraud, instead of being prevented, would be protected. For a subsequent purchaser would, by registration, be enabled to defraud a prior purchaser of that title which the subsequent purchaser, at the time of his own purchase, knew, was lawfully in the prior purchaser--Jolland v. Stainbridge (3 Ves. 485). Lord Eldon, in Davis v. Earl of Strathmore (16 Ves. 428) has pointed out the distinction between an Act of Parliament denying legal effect to certain instruments, and declaring them void to all intents and purposes; and a Court of Equity collecting from the more extensive words the inference that the equitable as well as the legal jurisdiction was intended to be prohibited. This distinction, I think, exists in the construction which ought to be placed on the Registration Acts with respect to instruments affecting property of less value than Rs. 100, and instruments purporting to affect property of the value of Rs. 100 and upwards. In the latter case, the instrument, if unregistered, is void to all intents and purposes, and the equitable jurisdiction of the Court is ousted. In the former case, the instrument, although unregistered, is not void to all intents and purposes, and the equitable jurisdiction of the Court, in my opinion, remains unaffected.

35. In *Benham v. Keane* (1 J. & H. 702), V.C. Wood very clearly stated the principles of equity which apply. He says: "The whole doctrine of notice proceeds on this--where a man has created a charge affecting his estate, he is not at liberty to enter into any new contract in derogation of the interest which he has created. This Court will not allow him to do the wrong himself, nor will it suffer any third person to help him to do it. No one will be permitted to enter knowingly into a contract with a person so situated, which would redound to his benefit at the expense of the prior incumbrance.

The conscience of a purchaser is affected through the conscience of the person through whom he buys; that person is precluded by his previous acts from honestly entering into a contract to sell, and, therefore, anyone who purchases with the knowledge that his vendor is precluded from selling, is subject to the same prohibition as the vendor himself.

36. In the present case, moreover, consideration cannot be withheld from the fact, that when the Act of 1871 was passed, the case of *Salim Shaikh v. Boidonath Ghuttuck* (12 W.R. 217; S.C., 3 B.L.R. 312) must have been within the knowledge of the Legislature, and was the probable cause of the amendment of Section 48. That case dealt with Section 48 of the Act of 1866, which was then almost identical in its terms with Section 50 of the Act of 1871, for it did not include the words relating to possession, yet it was held in that case, that the language of the section, as it then existed, did not render oral alienations wholly inoperative, when competing with subsequent deeds duly registered. Notwithstanding that decision, however, Section 50 was allowed to remain without alteration or addition, and we may, therefore, suppose intentionally liable to the same construction as was adopted in that decision. I think, therefore, that we ought to interpret Section 50 as intended to apply to the case of two innocent purchasers, giving the preference to the one who has taken the greater precaution to secure his title, but not as intended to apply to the case of a subsequent purchaser, who registers, but who, at the date of his purchase, had actual notice of a prior unregistered purchase. For otherwise, in this latter case, the subsequent purchaser with full notice would, by registration, be enabled wilfully to defraud a prior purchaser of the property, which he had honestly purchased, and which had been properly and legally conveyed to him. But according to the English decisions, the notice of fraud must be very clearly proved.

37. As said in *Wyatt v. Barwell* (19 Ves. 435): "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". So here, to affect a subsequent registered document, we ought to hold that notice of the prior unregistered alienation must be very clearly proved against the subsequent registered purchaser, in order to prevent his registered conveyance taking effect.

38. Now, in the present case, the defendant (respondent) sets up his possession as sufficient notice to the plaintiff of the defendant's alleged prior purchase. No other equity in his own favour, or fraud on the part of the plaintiff, is alleged or proved.

39. In many cases possession not properly accounted for may be a very material fact. But in the present case, the defendant had originally been a tenant of the jotedar, the common vendor of both parties, and his possession was equally consistent with the continuance of such tenancy, as with his alleged purchase. Moreover, it has been found as a fact by the Officiating Judge in the Court below, that the defendant left the kabuliat of his tenancy in the hands of the common vendor. He ought, if and when he made his alleged purchase, to have insisted upon the kabuliat being given up to him. By not having done so, he in fact helped the vendor to commit a fraud upon the plaintiff, for the production of this kabuliat to the plaintiff would be sufficient to satisfy him that the defendant's occupation was merely that of a tenant.

40. In the present case, to say the least, the defendant can put his claim no higher than that he and the plaintiff are both innocent purchasers, and if that is so, the fact that the plaintiff did register, while the defendant did not, is sufficient u/s 50 to compel us to hold that the plaintiff's registered deed must prevail against the defendant's unregistered deed, and, consequently, under the circumstances, the decree of the Judge of Rungpore will be upheld, and the decree of this Court reversed with costs.