**(1866) 02 CAL CK 0001**

**Calcutta High Court**

**Case No:** Special Appeal No. 645 of 1865

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| Bhikha Chowdhry | | APPELLANT |
| | Vs | |
| Maharaja Maheswar Bax Sing Bahadur | | RESPONDENT |

**Date of Decision:** Feb. 5, 1866

**Judgement**

Sir Barnes Peacock, Kt., C.J.
It has been held in several cases that a deed of sale registered did not invalidate a prior unregistered mortgage under the provisions of Act XIX of 1843. There was a case of Dooleychand v. Hurdeo Suhai 7 Agra S.D.A., 124. There was also a case of Heraloll v. Rutchfall, which is referred to in the decision of in Dooleychand v. Hurdeo Suhai, and the last mentioned decision was followed by a decision of the Sudder Court in Bengal to the same effect, dated 23rd December 1852. I am of opinion that those decisions were correct. But even if I had doubt as to the proper construction to be put upon the Act, if this had been a new case and there had been no authorities on the subject, I should not feel that I was right in overturning decisions upon the faith of which many persons may have acted, unless I saw that the decisions were clearly wrong. We can look only to the words of the Act, and must collect the intention of the Legislature by the words which they have used. It appears to me that the bond in question did not amount to a deed of sale either absolute or conditional, but merely to a charge binding upon the land, either in the bauds of the Raja or in the hands of any other person to whom it might be transferred. The Legislature probably intended merely to get rid of the effect of notice to the holder of a subsequent deed, when registered, of a prior unregistered deed, and investigations as to which had given rise to fraud and perjury. See the recital in Act I of 1843. That Act recites:-- "Whereas the Registry Laws now in force in the respective Mofussils of Bengal, Madras and Bombay, provide that registered conveyances and other instruments affecting title to laud and other interests therein, shall not take precedence of unregistered conveyances and instruments in cases where the party registering shall have known of the existence of such

unregistered conveyances or other instruments: And whereas a complicated system of laws has arisen out of the construction which is to be given to the provision regarding the knowledge of parties or notice had by them in such cases: And whereas much perjury has been committed in investigations touching the fact of such notice or knowledge, and much of the time of the Courts has been occupied with such investigations: And whereas, in consequence of forgeries, perjuries, fraudulent concealments, and other practices, no person purchasing or advancing money on the security of land can safely rely on the conveyances or other instruments affecting the title to such land or other interest therein affording, by means of their being registered, a security against conveyances or instruments being set up, as of previous date, by unregistered claimants: It is hereby enacted that all provisions contained in any Regulation or Regulations of the Bengal, Madras or Bombay Codes touching such knowledge or notice as aforesaid, of previous unregistered conveyances, or instruments affecting titles to land or other interest therein, shall be repealed from the first day of May next." The effect of the Act, therefore, was to repeal that part of the former Regulations which allowed proof of notice of a prior deed in order to prevent priority being given to a subsequent registered deed.

2. Act I of 1843 was repealed by Act XIX of 1843 which is the Act now under consideration. That Act states that:-- "Whereas doubts have risen as to the true meaning and construction of Act I of 1843," (the Act does not state what those doubts were): "It is hereby enacted that the said Act is repealed, except in so far as it repeals all provisions contained in any Regulation or Regulations of the Bengal, Madras or Bombay Codes, touching the knowledge or notice had by parties to registered conveyances and other instruments affecting titles to land and other interests therein, of the existence of unregistered conveyances or other instruments affecting such titles or other interests therein." The words of Act I of 1843 were:-- "And every conveyance or other instrument affecting title to land, or any interest in the same authorized by those Codes respectively, to be registered, shall, so far as regards any lauds to which the same relate, be void as against any person claiming under any subsequent conveyance or other instrument duly registered, unless the prior conveyance or instrument shall have been duly registered before the registration of the subsequent conveyance or instrument; any alleged notice or knowledge of such prior conveyance or instrument notwithstanding." These words were in my opinion sufficient to give a preference to a registered deed of sale over a prior unregistered deed of mortgage, and vice versa: but when we find the Legislature repealing that Act upon the ground that doubts had arisen as to the meaning and construction of it, and returning to the words of Regulation XXXVI of 1793, instead of using those of Act I of 1843 which they had before them, we cannot say that their intention was different from that which the words used by them import.

3. As to the second ground which has been raised for our opinion, viz., that the purchaser under the bill of sale was a bona fide purchaser without notice, and therefore entitled to priority. If the bond was really and bona fide executed before the date of the defendant''s purchase, it would prima, facie be entitled to priority, and the defendant could not, according to the decision in the case of Varden Seth Sam v. Luckpathy Royjee Lallah 1 Mars., 461, succeed without proof that he was a bona fide purchaser for value without notice. But even if the defendant were to satisfy the Court on that point, he could not, in my opinion, be entitled to priority, unless the plaintiff was bound to give notice of his bond. If he was not bound to register it in order to retain priority over subsequent purchasers for value, I do not see what notice he could give or was bound to give.

4. The mere charge upon an estate does not give a right to the possession of the title deeds: and even if it would, the plaintiff in the present case had a charge, not upon the entire estate, but only on one or two villages, which would not give him a right to the possession of the title deeds to the whole estate. But if the defendant should prove that he was a bona fide purchaser for value, he would throw the onus on the plaintiff of proving that he actually advanced the money as alleged in the bond creating the charge, and that the bond was executed before the defendant''s purchase.

5. We think that the case ought to be remanded to the Judge to try--

1st.--Whether the defendant was a bona fide purchaser for value.

2ndly.--Whether the plaintiff''s bond or deed of charge was bona fide and for value, and whether the money secured thereby was advanced to the Raja as alleged in the bond, and whether the bond was executed, as alleged, before the date of the defendant''s purchase.

6. As both of these deeds were executed after the Penal Code came into operation, I think the case should be sent to the Magistrate in order that he may investigate it and consider whether there are any grounds for instituting criminal proceedings against Raja Ram Prokash. The vendor under s. 415 of the Penal Code, or under s. 423 or 464 of the same Code. If the deed of 30th of March 1862 (i.e., the bond or deed of charge) was bona fide executed on the day on which it bears date, it would amount to cheating to sell the property to the defendant without disclosing the prior charge. See s. 415 of the Penal Code. That section says:-- "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do any thing which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to ''cheat.''

7. "Explanation.--A dishonest concealment of facts is a deception within the meaning of this section." And then there is Illustration (I) which says:-- "A sells and conveys an estate to B. A knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage-money from Z, A cheats." That will be the case if the bond or deed of charge was a valid one, and bona fide executed for "valuable consideration, and the subsequent sale was effected without disclosing the prior mortgage. But if the bond was fraudulent and antedated for the purpose of giving it priority over the deed of sale and thereby defrauding the defendant, it would amount to an offence under s. 464 of the Penal Code. That section says:-- "A person is said to make a false document, who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed, &c." And then we have Illustration (h) which says:-- "A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed his estate to B before he conveyed it to Z. A has committed forgery." But if the bond was not antedated, but was executed on the date when it bears date, or prior to the deed of sale, and fraudulently recited a loan which did not exist, the case would fall under s. 423 of the Penal Code. That section says: "Whoever dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which purports to transfer or subject to any charge any properly, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persona for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. The deeds will be impounded by the Judge until after the investigation now ordered.
Bayley, J.

8. At the hearing I expressed my concurrence in the views expressed by the learned Chief Justice on the first and third points, viz., as to the construction of the Registration Law, Act XIX of 1843, and its application in this case, and as to the propriety of directing an enquiry by the criminal authorities in regard to the conduct of one of the parties, and the character of the deeds propounded in this case. I then also reserved my judgment on the second point, viz., as to the right of a bona fide purchaser for value, and duly registered, to hold his purchase unaffected by an unregistered mortgage alleged to be of prior date, and of which no notice had in any way been given.

9. Here the purchaser who is admitted to hold under a bona fide purchase for value, and to have done all he could by registration to give public notice of his purchase, and thus legally to protect himself and enable others to do likewise in their dealings with the property, is met by an unregistered mortgagee who, by the production of a document of which no one had notice, is to oust the purchaser of title and possession.

10. It was clearly necessary by law (Act XIX of 1843) that that mortgage deed should have been registered if it were a question of priority between it and another deed of the same description, i.e., of mortgage. The same law enabled the mortgagee, by registering is mortgage deed to record its date and other particulars, so as to help to secure himself against allegations of antedating or other mala fides in the transaction. This same process was that which would, at the same time, have given others notice not to deal with the property as free from the lieu of this alleged mortgage, and this might have been a guide to all as to the real position and real value of the property.

11. It is not the policy of the law generally, and it is not equity and good conscience, that parties should be left in ignorance and without moans of knowledge of the real value and real position of property by absence of such notices as are practically, and are intended to be, the legal guides to them in these transactions with property; nor is it equitable that a bona fide purchaser for value should, having purchased without notice or means of knowledge of an alleged mortgage, find his purchase so encumbered. In this case, too, the purchaser''s possession under his sale was for some time unquestioned, i.e., till this mortgage deed was long after produced, and alleged to have been long before executed, though always unpublished and never heard of nor acted upon. If, under such circumstances, a bona fide purchaser for full value in possession is to lose title and possession by the production of a hitherto unheard of paper, capable of being easily falsely written, and, unfortunately, equally capable of being easily falsely altered by oral testimony in this country, an extremely wide door to most dangerous temptations to fraud, and too often to successful fraud, would be opened, seriously and extremely affecting existing and bona fide purchasers for value. On this ground I differ from the majority, and concur with Campbell, J., and I would, therefore, not rule that the bona fide and duly registered purchaser for full value in possession, as in this case, may lose his title and possession by the production of this on-registered mortgage of alleged prior date, of which no notice has been given to any one in any way whatever.
Norman, J.

12. I agree entirely with the learned Chief Justice, and I only wish to add a very few words. To construe the Registration Act, XIX of 1843, as giving no protection to a registered deed of sale against prior unregistered mortgages, and no protection to a registered mortgage against a prior unregistered deed of sale, is to make the Act a dead letter. If this matter had come before the Court for the first time, and I had

been considering Act XIX of 1843, or Regulation XXXVI of 1793, s. 6, cls. 1 and 2, of which that Act is a re-enactment, I should have had some doubt in coming to the conclusion at which the Chief Justice has arrived. The Regulation recites that one of its objects is to prevent individuals being defrauded by buying, or receiving in gift, or lending money on mortgage, or taking on lease any such property that may have been so previously disposed of or pledged.? That is the object of the Regulation, as stated in the Preamble. S. 6, cl. 1, says, "every deed of sale or gift of the description specified in cl. 2, s. 3" (that is to say, "deeds of sale or gifts of lauds, houses, and other real property") "that may be executed on or after the 1st January 1796, and a memorial of which shall be duly registered according to this Regulation, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property, executed subsequent to the said late which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed." If I were reading that Regulation for the first time, I should be strongly disposed to hold that "deeds of sale or gift of lands, houses, and other real property" included every deed of sale, whether absolute or conditional, and every gift, whether as a free gift, or a pledge, or otherwise, in the widest sense as intended to include every transfer of a charge on land. Then comes the second clause, which says:-- "Every deed of mortgage of the description specified in cl. 3, s. 3." (that is to say, "deeds of mortgage on land, houses and other real property, as well as certificates of the discharge of such encumbrances") "that may be executed on or after the 1st January 1796 and a memorial of which shall be duly registered according to this Regulation, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property executed subsequent to the said date, which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage." Now I think that these words "satisfied in preference to any other mortgage on the same property, executed subsequent to the said date which may not have been registered" might have had a sufficient meaning given to them by treating the first clause as relating to titles to land, and the second to the application of money in paying off charges on land. That construction would have given to the enactment a remedial operation as large and beneficial as the Legislature, in the preamble declared their intention to provide for. But I cannot say that that construction ought now to be given to the enactment: because, for the last sixteen or seventeen years, both in this Court and the Agra Court, a different construction has been put upon it; and if we were to overrule the cases, we should be imperiling the titles of a large number of persons who may have dealt with property in reliance upon the law as stated in those decisions. They are binding upon us, and if they are to be overruled at all it can only be by the Privy Council.

13. The next point referred to us is whether, even independent of Act XIX of 1843, the defendant, as a bona fide purchaser for value without notice, and exercising due

diligence, is liable to the plaintiff in respect of the plaintiff''s lien over the laud. Now I take the position of the two parties to be this. The plaintiff is a prior purchaser, having equal rights and equal equities with the defendant, subject to what I shall presently say on that subject; and the general rule is that he who is prior in time has the better right. But it is suggested that the plaintiff has failed to do something which he was bound to do. It is said that he should have given notice of his charge. But, as the learned Chief Justice has said, to whom could he have given notice? There was a particular and specified mode of giving information, viz., by registering the mortgage. He failed to give information in that way, and the Legislature has distinctly and exactly pointed out what should be the consequences of that omission, and we cannot enlarge them. I do not mean to say that a case might not happen in which a mortgagee, who by his own act or default, whether fraudulently or not, has actually misled a subsequent purchaser, and induced him to believe that the estate was free from encumbrance at the time of his purchase, might be estopped from setting up his charge to the prejudice of the person so misled by him. But that does not appear to be the present case.

Pundit, J.

14. On all three points I agree with the Chief Justice and Norman, J.

Campbell, J.

15. It appears to me that Act XIX of 1843 is entirely adopted and imported from Regulation XXXVI of 1793, and as that Regulation, XXXVI of 1793, has not been repealed to this moment, I think I am justified in considering that the two enactments may be read together, and that the preamble of Regulation XXXVI of 1793 may be considered as if it had been repeated as the Preamble of Act XIX of 1843. Moreover, as it seems to me, the Preambles of those days were not mere statements of objects, but parts of the Regulations themselves. They do not in fact stand apart before we come to the body of the Regulations, but the preamble is numbered s. 1, and then we come to s. 2 and so on. That being so, great doubt arises in my mind on reading that part of the preamble which mentions one of the objects of the Regulation to be to prevent individuals being defrauded by buying or receiving in gift, or lending money on mortgage, or taking on lease any such property that may have been so previously disposed of or pledged. I think the object of the Legislature was to provide for just such a case as we have before us. If we had been deciding the case for the first time, then reading the preamble of Regulation XXXVI of 1793 as part of an un-repealed enactment, I should have felt disposed to give to the enactments as a whole the construction which the framers intended. But reading the provisions repeated in Act XIX of 1843 alone, I admit that they will bear, and, in fact, taken literally do bear, a different construction; and considering that several decisions may be said to have declared, and in some sort settled, the law according to that literal construction, I am not prepared on this point to dissent from the judgment of my learned colleagues, founded on the reasons so fully

expressed by the learned Chief Justice and Norman, J. On the second point, regarding the position of an innocent purchaser without notice, I am compelled in some degree to dissent from that judgment. I would go a good deal further than the Chief Justice proposes to go in favor of an innocent purchaser. The principle which I would adopt is that which has I believe been adopted in a long series of decisions of this Court and of the late Sudder Court, and which, if it has not been laid down authoritatively as a principle of law, has, I think, not been contradicted in the decision of the Privy Council--Varden Seth Sam v. Luckpathy Roy Lallah 9 Moo. I.A., 303; S.C., Mars., 461--which has been quoted to-day. The words I rely upon are these:-- "Let it be conceded that a purchaser for value bona fide, and without notice of this charge, whether legal or equitable, would have had in these Courts an equity prior to that of the plaintiff," If so much he conceded, (and the Privy Council do not negative the doctrine), it appears to me that, subject to the limitations and reservations mentioned in the judgments of the Privy Council, if the defendant can prove that he is a bona fide purchaser for full value, and that he has exercised due diligence and care, and made an apparently complete title, he would be entitled to a verdict. In this Court the only law we have to administer on such subjects is the law of equity and good conscience. The principle which protects an innocent purchaser is certainly not unknown to the law of England. There, no doubt, the working of the principle is complicated and embarrassed by the distinction between legal and equitable titles. That distinction is not known to the law. It is hard to say in this case whether the holder of a mere paper lien has acquired the legal estate, or only an equitable lien on the property, which the Court of Equity may or may not enforce. Our Courts are (except in regard to certain special classes of cases) Courts of equity, and of equity only, and it seems to me that the case comes before us to be judged on equitable principles only. If that be so, the equities are, in my opinion, by no means equal. The man who has done nothing to protect himself is not superior or equal in equity to the man who has done every thing. The maxim Qui prior est in tempore potior est in jure strictly applied is, I think, rather a Common Law than an equitable maxim; that is, in equity it may be, and constantly is, overridden by other rules. It is also said leges vigilantibus non dormientibus subveniunt. Here we have (supposing that the plaintiff and defendant make out their respective cases) the case of one man, the plaintiff, who obtains a paper creating a lien on certain property, which he neither acts on nor publishes. He leaves in the hands of the original owner both the possession of the property and all the ordinary evidences of title such as they are in this country, and keeps his lien as it were secret; and on the other side, we have the defendant, a man who deals with the apparent owner in possession both of the property and of the title, whom I suppose to make all due enquiries, to turn every stone that he could reasonably be expected to turn in order to test the title, and to exercise proper caution in every way: such a man, so dealing, buys the property, acquires possession and an apparently complete title, and pays his money. Subsequently, the secret lien-holder pulls his paper out of his pocket, and says, "True you have bought in good faith and paid your money; true you had

no knowledge or means of knowledge of my lieu; but my paper is first in date; by that paper I am entitled to take from you the value for which you have paid. I claim the assistance of the Court to turn you out and sell the property in satisfaction of my claim." In my view the party thus claiming the assistance of a Court of Equity has an equity far inferior to that of him against whom he invokes the Court. He has taken none of the steps to secure himself, and prevent the alienation of the property in contravention of his claim, which a prudent and cautious man should take. It is true that, as the law has now been construed, he was not absolutely bound to register. But every facility for, and encouragement to, registration was given to him by the law. Regulation XXXVI of 1793, s. 5, by expressly making it optional to register or not to register the deeds specified in three clauses of s. 3, seems to infer that the registration of the deeds mentioned in the other two clauses was not optional: and, in fact, every prudent man would register or publish a mortgage openly for the very sufficient reason that, if he did not do so, every subsequent mortgagee without notice would, under the express terms of the law, be satisfied before him. There are also several other modes in which a transaction creating a right in real property may be, as I think, published. In my opinion, according to the law and practice of this country, any transfer of rights in real property should be accompanied with some sort of seisin, actual or formal and public. It is usual in case of landed property to proclaim either entry or pledge by public announcement on the estate and before the tenants: and the pledge of house property in security for public engagements is, I think, always notified in some formal way. I think the man who omits all public formality and publication, as well as registry, record of names, or deposit of title-deeds, fails in his duty, or at least takes the risk that the property may be subsequently made away with by the owner in possession. This case may not improbably go off on another point: but I think it right fully to express my opinion on account of the apprehension which I entertain of what I may call frightful consequences which may result, if it be established as law that not only a lien on real property need not have been registered, but that without either publication or possession or notice of any kind it will suffice to defeat the most cautious purchaser. I should fear that, in this country, the result would be an entire insecurity of title: that it would be impossible for any man, by any amount of caution, to buy real property with any confidence or any security that such lien-holders may not start up with documents (or possibly even asserting verbal engagements) proved as proof here goes, and which he cannot disprove, and may defeat or harass him. My remarks have special reference to the state of things prior to the new Registry law. But even that law only affects documents of date subsequent to its taking effect: and I apprehend that, for the next fifty years, no purchaser would be safe against secret lien-holders, or pretended lien-holders, of date prior to 1st January 1865. I think that the lower Court should be instructed that, if the defendant proves that he is a purchaser for value who has exercised due caution and diligence, who has made an apparently complete title, and who had no knowledge or means of knowledge of the plaintiff''s lien, the plaintiff''s suit should be dismissed. As regards the other

points, and especially the order that the defendant Ram Prokash Sing should be sent to the Magistrate for enquiring into his conduct, I entirely concur in the judgment of the learned Chief Justice.

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(1)See Prahlad Misser v. Udit Narayan Singh, 1 B.L.R., A.C., 197; Girija Singh Vs. Giridhari Singh ; Soodharam Bhattacharjee v. Odhoy Chunder Bundopadya, 10 B.L.R., p. 380; and Act VIII of 1871, S. 50.