

(1868) 06 CAL CK 0006

Calcutta High Court

Case No: Special Appeal No. 87 of 1867

Sheikh Parabdi Sahani

APPELLANT

Vs

Sheikh Mohamed Hossein

RESPONDENT

Date of Decision: June 26, 1868

Final Decision: Dismissed

Judgement

Kemp, J.

The plaintiff, appellant, sues the defendant for possession of certain property, under a bill of sale, dated the 25th Bysack 1272 (6th May 1865). This deed conveys the property absolutely for a consideration of 1,100 rupees; the instrument is registered, and is not disputed. The defendant, respondent, pleads an ikrarnama of the same date, in which it was stipulated, that if the consideration was repaid within a period of six months, or before Aghran 1272 (November or December 1865), and Bysack 1273 (April or May 1866), the plaintiff was to return the deed of sale to the defendant, the vendor. This ikrarnama is not registered, u/s 13 of Act XVI of 1864, therefore, this instrument, being an instrument which purports to operate to create a title in immoveable property of the value of upwards of 100 rupees, is inadmissible in evidence in any civil proceeding in any Court. The Judge has treated this piece of evidence as inadmissible, but he has decided the case on independent evidence,--evidence as to the acts and conduct of the parties,--and has come to the conclusion, that it was the intention of the parties that the vendor should have the power of repaying the consideration-money within the period fixed by the ikrar; and having done so, the sale was not absolute. The acts and the conduct of the parties, on which the Judge relies, are: 1st, that the vendor remained in possession; 2ndly, that the consideration paid was an inadequate one; and, 3rdly, that the title-deeds were in the possession of the vendor. The learned counsel for the appellant contends, that the deed of absolute sale being registered, and the ikrarnama unregistered, the former cannot be controlled by the latter; and that the Judge was wrong in law in looking at the evidence bearing upon the acts of the parties, and were he right in law, the possession not being a peaceable possession, but a

contested one, the case does not come within the view taken by the majority of the Full Bench, in *Kashinath Chatterjee v. Chandi Charan Banerjee* Case No. 870 of 1865, 5th February 1866 inasmuch as in that case a peaceable possession was not only contemplated, but found to exist. As to the inadequacy of the consideration, the learned counsel contends that the plaintiff, being called upon by the Court of First Instance to explain an apparent overvaluation of his claim, put in an explanation, which showed that the net profits, after paying rents, collection expenses, &c., were only 53 rupees, odd annas; and, therefore, that 1,100 rupees being more than 20 years' purchase, the consideration-money was not inadequate. With reference to the question of the title-deeds being in the possession of the vendor, the learned counsel remarked, that it was the custom of this country to hand over the title-deeds to the mortgagee or vendee; and if the vendor had not done so, his conduct is not such as to give rise to a presumption in his favour, but rather against him. "We are of opinion that the Judge was right in refusing to look at the *ikrarnama*, that document being an instrument relating to lands within the meaning of Section 13 of Act XVI of 1864, and, as observed by the learned Chief Justice, in his opinion in the case quoted above, the whole effect of the new Registration Act would be frustrated, if such evidence were admitted. The question then comes, whether, taking away the *ikrarnama*, the defendant is entitled to ask the Court to look at other and independent evidence, as throwing a light upon the intentions of the parties. We think that it has always been the policy of our Courts not to apply the strict rules of English law to natives of this country. Their Lordships of the Privy Council, in *Chowdhry Deviprasad v. Chowdhry Dowlut Singh* 3 Moore, I. A., 847 held, that although the recital of the receipt of consideration was *prima facie* evidence that it was paid at the time of execution of the deed, that inference might be rebutted by evidence as to the conduct and acts of the parties. In this case the Judge has found, as a fact, that the vendor is still in possession. It is not very clear whether that possession has been altogether uncontested, and it may be that the Judge has somewhat misconstrued the decision of the Magistrate, u/s 318 of the Code of Criminal Procedure, but the broad fact of possession has been found to be against the plaintiff. There is some difficulty in coming to a conclusion as to whether the consideration was an adequate one or not, and the Judge has not come to a very clear finding on that point. The fact of the title-deeds being in the hands of the vendor is not conclusive evidence, but, taken with the fact that he is in possession, it is not without weight, for, so far as our experience serves us, we have found that mortgagees in this country do insist on taking the title-deeds before they part with their money, when lending on the security of landed property. On the whole we think that justice has been done in this case, that the Judge was right to look beyond the mere fact of the absence of registration, and to consider, as he has done, the acts and the conduct of the parties. We have no doubt that the *ikrarnama* was executed, and that the intentions of the parties were represented in that instrument. This special appeal will be dismissed with costs.

¹[Sec. 13:--No instrument being a deed of gift of immoveable property, no lease of immoveable property for any period exceeding one year, no instrument (other than a deed or gift or lease as aforesaid) which purports or operates to create, declare, transfer or extinguish any right, title or interest of the value of one hundred Rupees or upwards in any immoveable property, and no instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration transfer, or extinction of any right, title, or interest as above of such value as aforesaid, in any immoveable property, shall be received in evidence in any Civil proceeding in any Court, or shall be acted on by any Public Officer, if such instrument shall have been executed on or after the date on which this Act shall come into operation, and if the property to which such instrument relates shall be situate in any part of British India in which this Act is in force, unless the same shall have been registered in the manner and within the time prescribed by this Act. Provided that the provisions of this section shall not apply to any lease executed between landlord and tenant relative to land in the Presidency of Madras liable to the payment of Revenue to Government but any such lease may be registered u/s XVI subject to the provisions of Sections XVII and XIX. (Amended by Act IX, 1865, s. 2).]

Certain instruments not to be received in evidence in any Civil proceeding unless registered according to provisions of this Act- proviso.

²Instruments whereof the registration is optional.

[Cl. 7, Sec. 16:--On and after the date on which this Act shall come into operation, any of the following instruments executed on or after the said date may be registered Under this Act. Any Deed, Bond, Contract, or other Obligation]