

**(1866) 02 CAL CK 0004**

**Calcutta High Court**

**Case No:** Special Appeal No. 1978 of 1865

Maluk Chand Surma

APPELLANT

Vs

Karlu Chandra Surma and  
Others

RESPONDENT

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

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### **Judgement**

Sir Barnes Peacock, Kt., C.J. and Bayley, J.

It appears to me that this case is governed by the ruling in Kashinath Chatterjee v. Chandi Charan Banerjee See Kashi Nath Chatterjee v. Chandi Charan Banerjee, ante, p. 383, that mere verbal evidence is not admissible to show that the parties did not intend that an absolute sale in writing should operate as an absolute sale, but intended it to operate merely as a conditional sale. This case is still stronger than the former one; for in this case the absolute deed of sale was registered, and the plaintiff is a third party who claims a right of pre-emption. If the sale was absolute as expressed in the registered deed, the plaintiff was entitled to pre-emption; but if it was merely conditional as attempted to be shown by the verbal evidence, he was not entitled to pre-emption. The plaintiff, acting upon the registered deed, as he found it published to the world upon the registry, asserts his right of pre-emption and endeavours to enforce it by suit, but he will be defeated, and the suit must be determined against him if the verbal evidence be admitted and acted upon. The acts of the original parties, or their statements, cannot be admitted as against a third party to prove that their intention was not that which their written deed expressed, and was intended by them to express. It is unnecessary, therefore, to send this case back to have an issue tried, whether the vendor took possession or not. The parties to the bill of sale can no more use verbal evidence to defeat the right of the plaintiff, than they could to defeat a purchaser from the vendor if the latter had sold for a valuable consideration. The Principal Sudder Ameen has not tried the question, whether the requisitions of the law of pre-emption were fulfilled by the plaintiff, This case must be remanded to him to try the fourth issue as laid down by the first Court which raises that question, and which the first Court has decided in favor of the

plaintiff, and the Principal Sudder Ameen is directed to return his finding upon that issue in this Court, together with his reasons in detail for such finding.

Norman, J.

2. It is objected before us that parol evidence was not admissible to contradict the deed of sale which is absolute in its terms. I have already stated my view on that subject in *Kashinath Chatterjee v. Chandi Charan Banerjee Ante*, p. 391.

3. I think that the Principal Sudder Ameen should have enquired into the truth of the allegation that possession was taken by the purchaser; that, if no possession was taken, the evidence that the deed was subject to a verbal condition for rendering it void on payment of the money within the time stipulated would be properly admitted.

4. But there is another consideration to which attention has not been given by the Principal Sudder Ameen, which would be deserving of the greater weight if possession followed the execution of the deed, viz., whether the plaintiff was not so far misled and injuriously affected by the acts of the defendants, in becoming parties to a deed purporting to be one of absolute sale, as to entitle him to say that they are not now at liberty to set up that the deed is not one of absolute sale as against their own admission. If he was misled, and in good faith brought this suit in the bond fide belief that the deed was one of absolute sale, I think that the defendants ought not now to be allowed to deny it. If they could do so, the plaintiff might lose his right to pre-emption altogether. If he delayed taking the necessary steps till the end of the year, when the sale is to become absolute, the defendants would have the answer:--

The sale was absolute and not conditional. You were warned by the registered deed, and are now out of time under s. 1, cl. 1, of Act XIV of 1859" <sup>(2)</sup>. To hold the parties so bound, appears to me the only mode in which the interests and rights of the pre-emptor can be effectually protected.

5. I would remand the case to the Principal Sudder Ameen for the trial of the issues to be raised with reference to these points. It is admitted that the case must go back to the lower Court for the trial of the fourth issue.

Pundit, J.

6. The judgment in *Kashinath Chatterjee v. Chandi Charan Banerjee Ante*, p. 383, decided today, affects this suit. The plaintiff in this case sued for pre-emption on the ground of a deed drawn as one of out-and-out sale. He may have been misled to suppose the contract to be a sale; but his mistake cannot give him a right to alter the real nature of the original transaction. The plaintiff cannot be considered to have incurred any such loss by his mistake that he can in return ask for a decree of the property. If he had purchased from the ostensible purchaser, he was clearly entitled to be protected from any demand made against him by the mortgagor. I

think, however, that, if not satisfied with the denial of the vendor and the vendee regarding the transaction being a sale, and relying upon the wording of the deed, he institutes a case under a belief that his opponents will fail in establishing before a Court of Justice that the transaction was merely a mortgage, he may, notwithstanding his calculations proving wrong, be entitled to be protected from the liability of paying any costs to his opponents.

7. Even if the English rule of evidence be considered as applicable to this case, as in this suit also, the question of possession is at issue, and as proof of it is likely to throw great light upon the nature of the transaction, and as this evidence is not parol evidence which is considered inadmissible, and as it is necessary to enquire whether the plaintiff knew the real nature of transaction, I agree in the order of remand proposed by Norman, J., on the points therein mentioned.

Campbell, J.

In this case, as distinguished from the last, *Kashinath Chatterjee v. Chandi Charan Banerjee* Ante, 383, I have had a good deal of doubt, first, as regards the point whether as between the original parties, or those standing in no higher position, it would be necessary to try the question of possession; and, secondly, as regarding the position of the plaintiff as a third party. In the last case, it was alleged that, during several years subsequent to the sale, possession was retained by the vendor, and that was so material an act and fact that parol evidence might well be admitted in support of it. In this case the cause of action arose so soon after the transaction, that the retention of possession (if it was retained) may hardly have attained the character of a positive act. Still, I think, I should be inclined to hold that till possession is delivered in terms of the deed of sale, the transaction is not a complete transaction: and that, if possession had not been given, it might be shown in a suit between the original parties that it never was intended to transfer possession, and that the transaction was a mere deposit of title as security. The plaintiff, though a third party, is not a purchaser for value; he is in the very peculiar position of a person claiming the right of preemption on the faith of the deed of sale, and the question to my mind is whether he is a third party in the sense that in his favour effect must be given to the deed without respect to the disputed question of possession. Upon the whole, I think, it must be important to maintain in all cases the right of third parties acting upon solemn instruments formally published and registered; and considering that the plaintiff, on the faith of the registered sale, may have raised money, made his arrangement for the purpose, and brought his suit, while the combined defence of the vendor and vendee, if admissible, could hardly be disproved, by him, I, on that ground, concur in the decision of the learned Chief Justice.

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(1) See *Kashi Nath Chatterjee v. Chandi Charan Banerjee*, ante, p. 383

(2) Act XIV of 1859, s. 1, cl. 1.--"To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract,--the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached."