Privy Council Appeal No. 72 *of* 1919.
Bengal Appeals Nos. 62 *and* 63 *of* 1915.

Tilakdhari Lal and another - - - - - - *Appellants*

v.

Khedan Lal and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1920.

Present at the Hearing:
LORD BUCKMASTER.
LORD DUNEDIN.
SIR JOHN EDGE.

[*Delivered by* LORD BUCKMASTER.]

The main question raised upon this appeal is a pure question of law, and depends upon the true construction to be placed on certain Indian statutes. In the earlier stages of the dispute this question was associated with the history of a series of transactions to which detailed reference is now unnecessary, since the chief point that arises for determination is whether the effect of the Registration Act, 1877, and the Transfer of Property Act, 1882, is to provide that the registration of a deed shall by the mere fact of registration become, in the words of Lord Camden (*Morecock* v. *Dickens—Amb. Reports,* 680), "presumptive notice to all mankind." Opinion in India has differed upon the point. Certain decisions in the High Court of Bombay appear to be based upon the view that it is, while in Calcutta the decisions have been so uniformly in the opposite direction that in the present case counsel for the appellants, who contend in favour of the doctrine that registration is notice, found himself unable in the High Court to breast the tide of

authority, while reserving the right to renew the struggle if the case should further proceed.

Although this point is the chief one that now needs determination, eighteen issues were framed by the Subordinate Judge. These were all carefully examined and dealt with in his judgment, which was in favour of the respondents and was affirmed by the High Court at Fort William in Bengal. These issues are either now finally disposed of or they are subordinate to the question of notice. It is unnecessary, therefore, minutely to examine the history of this case or to analyse the transactions out of which the dispute proceeded or the form of the two suits which are now consolidated in this appeal. It is sufficient to say that the controversy arises between two sets of mortgagees claiming through six mortgages granted by the same mortgagor. The holders of the first and second mortgages are the contesting respondents, the third and fourth were in favour of the appellants, and the fifth and sixth were again in favour of the respondents.

The second mortgage included two decrees obtained by the mortgagor against third parties, namely, No. 509 of 1895 and No. 4 of 1897, and these were also made subject to the subsequent charges. The fourth mortgage also included a one-half share in an estate known as Khagra, and this again was included in the fifth mortgage without any reference being made to the preceding dealing with the estate. At the date of the execution of the fourth mortgage, although the mortgagor had purchased the estate under an execution decree, the sale had not been confirmed and he had obtained no certificate of sale. This he subsequently acquired before the execution of the fifth mortgage. All the transactions were duly registered. The decrees subject to the second mortgage in favour of the respondents were realised by the mortgagor and the respondents and were dealt with by them without reference to the rights possessed by the appellants under the third and fourth mortgages.

If the respondents can be held to have had notice of the third and fourth mortgages, the case will have to be remitted for adjustment of the accounts; but if, as found both by the Additional Subordinate Judge and by the High Court, such notice cannot be imputed, upon this point the judgment appealed from will stand.

Now actual notice is not suggested, nor are any circumstances established in evidence affecting the duty of the respondents to make enquiry, except the bare fact that they did not search the register on taking the fifth and sixth mortgages or before dealing with the moneys arising on the decrees.

Section 59 of the Transfer of Property Act (No. 4 of 1882) provides in express terms that a mortgage for a sum exceeding Rs. 100 can be effected only by a registered instrument, and as all the mortgages are subsequent to the date of this statute, and exceed the amount named, they are all bound by its terms. Section 17 of the Registration Act, 1877, which establishes the

necessity for registration with regard to certain classes of documents defined in that section, which include a mortgage, is made effective by Section 49, which provides that any document so required to be registered shall not, unless it has been so registered, affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property; while Section 50 secures that registered documents shall, as regards the property they comprise, take effect against every unregistered document relating to the same property. It will be observed from these provisions how wide and general is the scope of the statute.

In England two systems of registration of deeds exist, one in the county of Middlesex and the other in the county of York. With regard to the former, non-registration avoids the unregistered deed as against a subsequent holder of a registered document, but leaves the deed good as between grantor and grantee and as between the grantor and his creditors. The Yorkshire system, though in form compulsory, also effects its purpose by giving priority to deeds according to the date of entry on the register. Neither of these systems affects the liability of the grantor upon the deed. In Ireland the system is slightly different, for by the statute 6 *Anne, c.* 2, *Ir.*, non-registration in that country not only makes the deed void as against subsequent registered holders, but also as against creditors. There is no provision in any of these Acts corresponding to that to be found in the Indian Act of 1877, which destroys the whole effect of the transaction as against immoveable property and renders the document incapable of use in any proceedings by which such property is affected, or in the Transfer of Property Act, which wholly avoids an unregistered mortgage for a sum exceeding Rs. 100. It is important to bear these differences in mind in considering whether, for the purpose of creating notice to the world, the Indian statute differs in effect from those operative in England and Ireland, for in England and Ireland no person is affected with notice of any registered deed unless an actual search has been made. This is well-established and indisputable law. In England, so far as Middlesex is concerned, it was first enunciated by Lord King in *Bedford* v. *Backhouse* (2 *Eq. Ca. Abr.* 615), a case identical in substance with the present dispute. In *Hine* v. *Dodd* (2 *Atk., p.* 275) there are reported statements of Lord Hardwicke to the contrary effect, but when regarded in relation to the facts of the case then under decision it will at once be seen that they cannot be accepted as any authority upon the point. The question then raised was as to the priority of a registered mortgage over a judgment obtained and entered before execution of the mortgage, but subsequently registered. Lord Hardwicke gave priority according to date of registration and, refusing to accept the view that there was notice of the judgment, decided that to postpone a registered document there must be "clear and undoubted notice." It was as introduction to this decision that he said, "The Registration Act (7 *Anne, c.* 20) is notice to the parties and notice to everybody, and the meaning of this statute

is to prevent parol proofs of notice or not notice" ; and it is plain that the question of registration as notice in itself was never argued and was wholly irrelevant. Lord Camden, in *Morecock* v. *Dickens* (*supra*) followed, though perhaps with hesitation, the decision in *Bedford* v. *Backhouse* (*supra*), and this has been accepted without qualification down to the present time, see Moulton, L.J., in *Monks* v. *Whiteley* (1912, 1 Ch., p. 735, at p. 757), a case where, although there was much difference of judicial opinion upon the legal merits of the dispute—the judgment of the Court of Appeal reversing that of Parker, J., being itself reversed in the House of Lords 1914 A.C., 132—yet there was no dispute as to this proposition.

In Yorkshire the statute of 1884 expressly provided that registration should effect notice, but this provision has been subsequently repealed (48 & 49 Vict., c. 26) and in the Yorkshire registry also registration does not by itself constitute notice (*Monks* v. *Whiteley*—per Parker, J., 1911, 2 Ch. at p. 457—per Moulton, L. J., 1912, 1 Ch. at p. 758).

In Ireland again registration has been held not to create notice (see *Bushell* v. *Bushell*, 1 Sch. & Lef., p. 90), and the reason given is that "if it is to be taken as constructive notice it must be taken as notice of everything that is contained in the memorial."

Unless, therefore, the differences between the operation of the statutes in India and the statutes to which reference has been made affect the principle upon which those cases rest, the appellants must fail.

On behalf the appellants it is urged that such differences exist, and further that this is emphasized by the statutory definition of notice contained in Section 3 of the Transfer of Property Act, 1882. That section provides that a person has notice of a fact when he actually knows the fact or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. Their Lordships do not think that this definition affords much assistance in the determination of the point, for the question still remains, what was the enquiry which ought to have been made? Now it is important to observe that the effect of the argument must extend to notice of subsequent as well as prior transactions. Apart from registration, a subsequent encumbrancer, having knowledge of prior charges, would give notice of his charge to all having a prior claim ; in a country where registration is rendered compulsory, he could secure himself against all possibility of fraud by searching the register in order to ascertain what were the prior claims upon the property and then giving notice of his mortgage to the prior mortgagees, this is doubtless one of the essential reasons for registration. If the appellants' view be correct, it is not encumbent upon the subsequent mortgagee to give any notice ; he may rely upon the fact that when he registers his security it *ipso facto* gives notice to the prior encumbrancer. In support of his argument he points to the cases decided in Bombay, beginning with the case of *Lakshmandas Sarupchand*

v. *Dasrat*, I.L.R., 6 *Bombay*, p. 168. This decision depended in part upon the consideration of whether registration was equivalent to possession, every subsequent purchaser being deemed to have notice of such title as a person in possession may possess, but in the main it followed a statement of Mr. Justice Storey as to the law in America that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate legal or equitable in the same property. It is important to observe that in that case the real question as to notice did not necessarily arise for determination, since the point that was there determined was whether an unregistered mortgage that was optionally registerable was overridden by a mortgage subsequent in date which was compulsorily registerable and was in fact registered. It was decided that it was not, since the registration of the subsequent deed could not operate as notice to the earlier mortgagee at the date when he took his mortgage. None the less, the very careful and exhaustive judgments of the learned Judges upon the point demand close attention.

In *Dundaya* v. *Chenbasapa*, I.L.R., 9 *Bombay*, at p. 427, Sir Charles Sargent accepts the same view, stating that it must be taken as settled law in the Presidency that possession by or a registration of the title of a purchaser or a mortgagee prior in point of time is notice of that title to subsequent purchasers and mortgagees. He again appears to have based his decision upon the doctrine of possession, and in a later case, *Chintaman Ramchandra* v. *Dareppa*, I.L.R., 14 *Bombay*, p. 506, he says, at p. 510: "If the mortgagor had been in actual possession, the registration of the mortgage would have been notice to the purchaser of the mortgagee's title"; and the same learned Judge decided to the same effect in *Narayan Laksman* v. *Haibatrav* I.L.R., 17 *Bombay*, p. 741.

It does not appear to their Lordships that the fact that these decisions are associated with the consideration of the doctrine of possession has a material bearing upon the point decided, for the decisions really rest upon following the statement of Mr. Justice Storey rather than the authorities of the English Courts.

In Storey's *Equity Jurisprudence*, Third Edition, paras. 401 & 402, this doctrine, however, receives some modification, and in par. 402 he states: "The doctrine seems at length to be settled that the mere registration of a conveyance shall not be deemed constructive notice to subsequent purchasers." Acting upon this statement, which also appeared in the Second Edition, Mr. Justice Brett and Mr. Justice Mittra, in *Bunwari Jha* v. *Ramjee Thakur*, 7 *Calcutta Weekly Notes* 11, declined to accept the contention that registration was notice *per se*, while at the same time they refused to accede to the view that in no case can registration be notice in itself. At page 18 the learned Judges say:—

> "Whether registration is or is not notice in itself depends, we think, upon the facts and circumstances of each case, upon the degree of care and caution which an ordinarily prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act."

In *Shan Maun Mull* v. *Madras Building Company*. I.L.R.,

15 *Madras*, 268, Sir Arthur Collins and Mr. Justice Handley reach the same conclusion. They point out that if the Legislature desire to make registration notice it is expedient to enact it in express words, as had been done in the Yorkshire Registration Acts then on foot ; and they continue :—

> "The Indian Legislature must have been aware of the conflict between the English and Irish decisions and those of the Bombay High Court upon the subject, and yet in laying down what shall be the effect of registration and non-registration they have abstained from declaring that notice to subsequent purchasers and mortgagees shall be one of the effects of registration. We think it is not the province of the Courts to do that which the Legislature has abstained from doing."

Their Lordships think it is unnecessary to pursue the examination of each one of the numerous cases quoted where the same principle has been stated and acted upon in the Calcutta High Court. They think it sufficient to refer in conclusion to the case reported in 2 *Calcutta Weekly Notes*, p. 750, *Monindra Chandra Nandy* v. *Troyluckko Nath Burat* in which Sir Lawrence Jenkins examined the position. It is true that in that case the question of notice was not, in the view that he took of the case, necessary for decision, but it was argued and he made some comments upon it that are deserving of attention. He says :—

> "Apart from authority, I should have thought, having regard to the statutes applicable in this country, that the proposition involved is not one of law but of fact, and that as each case arises it should be determined whether in that individual case the omission to search the register, taken together with the other facts, amounts to such gross negligence as to attract the consequence which results from notice ; and it well may be that this test will serve to reconcile the apparent conflict of view that at first sight the cases suggest."

There are only two further cases to which reference need be made. They are decisions of this Board, the one in 39 I.A. 68, *Syed Mahomed Ibrahim Hossein Khan* v. *Ambika Pursad Singh*, and the other in 45 I.A. at p. 130, *Het Ram* v. *Shadi Lal*.

It is obvious upon examination that neither of these cases afford any real assistance in the present case. The point that arose in both these cases was as to the proper constitution of a suit by a mortgagee. By section 85 of the "Transfer of Property Act, 1882," a duty is imposed upon a plaintiff in a suit for foreclosure, sale or redemption under that Act to make a party to the suit every person having an interest in the property comprised in the mortgage, provided that the plaintiff had notice of such interest—the object being to secure that all proper parties were before the Court.

In order to discharge that duty the plaintiff was bound to search the register, and his omission to do so would be presumed to have been a wilful abstention from the search or gross negligence; and in either case he would be deemed to have had notice of the fact that he would have discovered if the search had been made.

It was this and nothing further that was decided in the two authorities quoted, and it is not surprising that, in these circumstances, it was stated in the judgment in the first case at page 82 that it is not alleged that when the suit was brought the plaintiff had no notice that a third party was appearing having an interest

in the property comprised in the mortgage of the suit. In the latter case there is a further statement at page 133 to the following effect :—

> The only other observation which it is necessary to make before considering the question of law that arises under the Transfer of Property Act, 1882, is that on the admissions of the parties it is to be taken that the second mortgage was duly registered and that the first mortgagee must be taken to have had notice of it when he brought his suit and obtained a decree for sale."

But this statement again related merely to the question of notice of the interests that it was the duty of the plaintiff to bring before the Court in obtaining a decree for sale.

Their Lordships do not think that in these circumstances these authorities can be relied upon for guidance in the present case.

After giving all the authorities quoted the fullest consideration, in their Lordships' opinion the true position was best stated in the quotation made from the judgments of Mr. Justice Brett, Mr. Justice Mittra, and Sir Lawrence Jenkins. The real purpose of registration is to secure that every person dealing with property, where such dealings require registration, may rely with confidence upon the statements contained in the register as a full and complete account of all transactions by which his title may be affected, unless indeed he has actual notice of some unregistered transaction which may be valid apart from registration. In England such notice would prevent the registered document having priority over that which was unregistered. In India this would not be the result if it were a mortgage for over Rs. 100 or if the unregistered document was one brought within the provisions of Section 49 of the Registration Act. In either case the object of registration is to protect against prior transactions. If, however, the view contended for by the appellants be correct, it has a more extended effect. If after a first mortgage has been obtained a second mortgage were registered and the mere fact of registration constituted notice, the first mortgagee would be bound to search the register before he dealt with the proceeds of the mortgage. Such an extension would go beyond even the dictum of Chief Justice Storey, who expressly limited the doctrine of notice to notice of previous transactions. It is true that this is not the position in the present case, since the respondent mortgagees are both prior and subsequent to the appellants, and therefore on searching when they took their subsequent charges they would have been aware of the intervening transactions ; but none the less it shows that it would not be reasonable to hold that registration was notice to the world of every deed which the register contained. The doctrine must be subject to some modification. There may be circumstances in which omission to search the register would, even under the definition already given, result in notice being obtained and the circumstances necessary for this purpose may be very slight, but in the present case no such circumstances are found excepting those to be drawn from the fact that the mortgagor was executing several mortgages on the property.

Further, their Lordships are impressed with the view that since registration has for nearly two centuries been held not to operate as constructive notice in this country, and the knowledge of this law, which was then old, must have been present to the Indian Legislature when they framed the different Indian Registration Acts and the definition of notice in the Transfer of Property Act, yet none the less they have omitted to state the principle for which, according to the appellants' contention, it is essential that the register should provide.

The appellants contend that the omission is due to the fact that the difference in the system of registration renders such a provision unnecessary.

The main differences are these : that in India non-registration in certain cases has the effect of rendering the registered document ineffectual even as between grantor and grantee and excludes it from evidence. Both in England and in Ireland it has no such effect. This is sometimes stated by saying that in India registration is compulsory and here permissive ; but the true difference is better expressed as it has already been stated.

Their Lordships find it difficult to understand how such a difference can cause the register to be notice in the one case and not in the other. In either instance the doctrine of notice must necessarily depend upon the fact that there is a public register open for inspection to which all persons having dealings with the property can have access ; in each case they have before them the means of acquiring knowledge. In India that knowledge may afford complete protection even if notice be otherwise obtained of an unregistered deed. In England and Ireland that is not the case. But the completion of the register and the penal effect of non-registration do not appear to their Lordships to be any reason for causing the register to be notice in the one case and not in the other.

For these reasons their Lordships think that notice cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian register of deeds.

This disposes of the whole appeal excepting for a question that arises with regard to the one-half share of Mouza Khagra. In the High Court and in the Court of the Subordinate Judge this question appears to have been dealt with by the mere consideration of whether the former registered deed did give notice. But their Lordships think that this is not a complete and adequate answer to the appellants' case.

It is true that no estate, title or interest in the property was originally conveyed by the first deed ; but directly the certificate of sale was obtained, according to the English law, this passed the estate to the first grantee and, his conveyance being duly registered, the second grant could only operate subject to the first.

This principle of law, which is sometimes referred to as feeding the grant by estoppel, is well established in this country. If a man who has no title whatever to property grants it by a

conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first *Christmas* v. *Oliver*, 5 Man. & Ry. 202, and discussed in *Smith's Leading Cases*, Vol. 2, p. 724).

It is unfortunate that this view of the case does not seem to have been presented either before the Subordinate Judge or to the High Court; but it appears to their Lordships that it could have been raised under Issue 15 and that it is raised in the appellants' case. In these circumstances it is not in accordance with their Lordships' practice to determine a point of law of such importance. There may be statutory provisions or provisions of native law which would prevent the operation of the doctrine; for the law of conveyance in England depends on special and complicated considerations. They think, therefore, that the case ought to be remitted to the Subordinate Judge to be tried on this point alone; but as the appeal has failed on the substantial question and the inability of their Lordships to deal with the other point is due to the omission of the appellants, their Lordships think that the right order would be to remit that part of the case, and that part only, for further consideration and, subject to that order, to dismiss the appeal with costs, and they will humbly advise His Majesty to this effect.

In the Privy Council.

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DELIVERED BY LORD BUCKMASTER.

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