
(1936) 07 BOM CK 0036
In the Bombay High Court
Case No : First Appeal No. 93 of 1930

Achut Sitaram Patwardhan	Vs	APPELLANT
Shivajirao Krishnarao Gaikwad		RESPONDENT

Date of Decision : 24-07-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Transfer of Property Act, 1882 — Section 52

Citation : AIR 1937 Bom 244 : (1937) 39 BOMLR 224

Hon'ble Judges : S.S. Rangnekar, Acting C.J.; Tyabji, J

Bench : Division Bench

Judgement

S.S. Rangnekar, Acting C.J.

1. This suit is concerned with the estate of a wealthy family in Poona called Gaikwad family. The common ancestor of the family was one Limbaji. He settled at Indore and enjoyed the favour of the ruler. He as well as other members of the family were employed in the State in various capacities and received from the ruler large gifts in the shape of jewels, cash and other property as a mark of their personal favour. The family thus amassed a large fortune, which they invested in the purchase of immovable property at Poona and Satara Districts. Limbaji died in 1892. About 1897 or 1898, the family seems to have incurred the displeasure of the ruler, in consequence of which their property at Indore was confiscated, and they had to leave the State. The family then came and settled in Poona. Limbaji had three sons, Gangaram, Gopal and Balwant. Of these, Gopal was the manager of the family. Gopal died in 1906, leaving a widow Laxmibai and a minor son Krishnarao. Gangaram had a son called Yadav; and Balwant, who died in 1893, left him surviving a son named Baburao. After the death of Gopal, his widow obtained a certificate of guardianship under Act VIII Ag. of 1890. No notices were issued to the other members of the family, nor was the whole of the family property disclosed in those proceedings. Thereafter, in 1907, she purchased in the name of her minor son Krishnarao an eight-anna share from one Rajguru family in two inam villages of the name of Chandori and Atit situate

in the districts of Poona and Satara respectively. She died in 1910. On her death Krishnarao, who had just attained majority, took charge of the entire property and began to manage it. This led to disputes between the members of the family, as a result of which in 1911, Baburao filed a suit for partition, being suit No. 733 of 1911, against Krishnarao in the Bombay High Court. Neither Gangaram nor Yadav were joined in this suit on the allegation that in 1908 Gangaram had passed a release in favour of the other coparceners and had gone out of the family, and that in the family property Baburao and Krishnarao had an equal half share. In September, 1911, the High Court returned the plaint for want of jurisdiction. On October 11, 1911, Baburao instituted another suit for partition, being suit No. 410 of 1911, against Krishnarao in the District Court, Poona. On or about October 7, 1911, Baburao mortgaged his share in the joint family estate to one Bolton for Rs. 40,000. Krishnarao, who by that time had commenced to squander the moveable property, began to alienate Immovable property in his possession, and on August 26, 1912, he sold the two villages, or his right, title and interest in them, for one Patwardhan, the father of the defendant-appellant. On September 24, 1912, Gangaram and Yadav brought a suit for partition, being suit No. 359 of 1912, against Krishnarao and Baburao in the District Court at Poona. On March 14, 1913, Baburao sold a fraction of his share in the joint family estate to one Gazdar, and sold another fraction of his share to one Bahadurji on May 1, 1913. There was an order for further particulars as to the property in suit No. 359, and the plaint was accordingly amended. It is not necessary to refer to this order. In 1914 Bolton brought a suit on his mortgage against Baburao; and, on February 24, 1915, he as well as Gazdar and Bahadurji were added on their application as party-defendants to suit No. 359 as defendants Nos. 3, 4 and 5 respectively. Gangaram compromised his claim with Krishnarao in suit No. 359, as the result of which he obtained an inam village and informed the Court that he did not wish to proceed with the suit. Thereupon, the Court held that that suit had abated in spite of the opposition of defendants Nos. 2 to 5 and struck it out of the file in 1916. Defendants Nos. 2 to 5 appealed against that order successfully; and in 1919, the order of abatement was set aside, and it was held by this Court that the suit must proceed as regards the rights and claims of defendants Nos. 2 to 5 for partition. Thereafter the suit was restored to the file in the Poona Court. It appears that Baburao died in June, 1913, and his widow Sonubai was brought on record in his place. Krishnarao also died pending suit No. 359, and his minor son Shivajirao was made a party in his place represented by his mother as guardian in the first instance, and after her death by his maternal uncle Umedsing. It appears that after the institution of suit No. 359 Gangaram had applied for the appointment of a receiver for the entire joint family property. The application was opposed by Krishnarao and was rejected by the Court. When Bolton was joined as a party defendant, he renewed the application which met with the same fate, but in appeal from that order Bolton himself was appointed receiver of the entire joint family property on proper security being taken from him. In 1917 Bolton obtained a decree on his mortgage in his suit. Suit No. 359 was then brought to a trial. Apparently nobody

seems to have thought of the earlier suit, No. 410, at the time. It is possible, as the learned Judge points out, that as all the persons who were interested in the family property were parties to the second suit, No. 359 of 1912, it was not considered necessary to proceed with the earlier suit, No. 410 of 1911. The fact remains, however, that no order consolidating the two suits was at any time made. Suit No. 359 was decided on April 19, 1920, and a decree made. It was held that all the properties in the suit including properties now in dispute were joint, that the members of the family who were parties to the suit were members of a joint Hindu family, and each branch had a one-third share in it, and it was directed that defendants Nos. 3, 4 and 5 should be at liberty to realize their claims in respect of the alienations made in their favour by Baburao out of the one-third share allotted to Baburao or his branch. Krishnarao's son Shivajirao was declared to be the owner of one-third share. There was an appeal from this decree to this Court, and the decree of the lower Court was confirmed in January, 1923. It appears that all this time Yadav, the son of Gangaram, had remained idle, and in 1923 he brought another suit, being suit No. 734 of 1923, for a declaration that he was not bound by the compromise made by his father and for the ascertainment of his share in the joint family estate and recovery thereof by partition. He succeeded in getting a decree, which declared that he was entitled to one-twelfth share. After the decree in suit No. 359 was confirmed by the High Court, on the application of Sonubai, the widow of Baburao, suit No. 410 was taken up; and it appears that the Judge mainly relied on the decree made in suit No. 359 and awarded one-third share in the joint family estate on April 18, 1923, in her favour. In 1924, Bolton brought the present suit against Patwardhan, and it is from the decree in that suit that the present appeal is made. The object of the suit was to set aside the sale by Krishnarao in favour of the defendant's father and to recover possession of the property sold to him.

2. It would be convenient to refer to the pleadings here in view of the contentions taken in the appeal.

3. The title of the suit is as follows :?

Mr. C.D. Bolton, Receiver appointed in the matter of Suit No. 359 of 1912 of the Court of the First Class Subordinate Judge, Poona.... Plaintiff.

Versus

Atchut Sitaram Patwardhan.... Defendant.

After setting out the description of the property sold to the defendant in paragraph 1 of the plaint, the plaint referred to the purchase of the property by the mother of Krishnarao as his guardian in 1907 in the name of Krishnarao who was then a minor, and alleged that the property was purchased out of the moneys belonging to the joint family. It then went on to state as follows :?

Although the said property was in the vahivat (management) of the said Krishnarao since then, his cousin Baburao Balwantrao Gaikwad filed a partition

suit being suit No. 410 of 1911 in the Court of the First Class Subordinate Judge, Poona. In that suit the plaintiff (Baburao) has sought the relief for recovering his share in the aforesaid property stating that the said property belonged to the joint Hindu family of the plaintiff and the defendant in that suit; and the said property has been included in that suit. The present plaintiff has been appointed receiver of the property in suit in August, 1915, during the pendency of the suit. During the pendency of the suit the deceased Krishnarao sold the property in suit to the father of the defendant by a sale-deed dated 26th of August 1912 and gave him possession of it.

After referring to the fact that suit No. 410 of 1911 was a contentious suit and pending in the Court at that time, the plaint alleged as follows :

The suit was a contentious suit involving the property herein, and the issue of partition in respect of that property was decided in that matter and as the deceased Krishnarao had entered into the said transaction, by making a false representation that the property was of his exclusive ownership with the intention of defrauding his other kinsmen and right holders having right, title and interest in the said property, and with the object of causing loss to them, it is null and void and under that transaction neither the defendant's father nor the defendant himself acquires any kind of right whatever with respect to the suit property.

Then the plaint states that under those circumstances the plaintiff was obliged to file the present suit for having a declaration that the transaction of August 26, 1912, entered into by the deceased Krishnarao with the defendant's father in respect of the property in suit was illegal and null and void, and for getting possession of the property. The main prayer is as follows :

(a) The transaction entered into by the "deceased Krishnarao with Rao Bahadur Sitaram Vishwanath Patwardhan in respect of the suit property as mentioned in Clause 2, may be declared to be illegal and null and void; and the suit property may be taken out of the possession of the defendant and given in the possession of the plaintiff.

The plaint was filed on August 25, 1924. To this plaint the defendant filed a written statement in October, 1925. His answers were :

(1) That the suit was not maintainable as it was brought by the plaintiff as Receiver in suit No. 359, that the plaintiff had not stated in the plaint under what right he had brought the suit, and that he could not rely upon suit No. 410;

(2) That the property belonged to Krishnarao alone, for whom it had been purchased by his mother as his guardian;

(3) That the property was not in dispute in suit No. 410;

(4) That although it was purchased during the pendency of suit No. 410, it was not null and void; and

(5) That the plaint discloses no cause of action.

4. On January 22, 1926, the plaintiff applied for amendment of the plaint. The object of the amendment was to make it clear in the body of the plaint that, although the plaintiff was appointed receiver in suit No. 359, he was so appointed during the pendency of suit No. 410; and, secondly, that suit No. 410 was decided on the strength of the decision in suit No. 359. The actual amendment made in paragraph 2 is as follows : The words "The present plaintiff has been appointed receiver of the property in suit in August, 1915, during the pendency of the suit" were struck off, and instead it was stated as follows :?

During the pendency of the suit No. 359 of 1912 in the Court of the First Class Subordinate Judge, Poona, the Honourable the High Court has, in August, 1915, appointed the present plaintiff to be the Receiver of the joint property of the Gaikwad family (in which is included the property in the present suit) while the said suit No. 410 of 1911 was pending in the Court of the First Class Subordinate Judge, Poona.

Then a separate paragraph No. 2A was added, which is as follows :?

Suit No. 410 of 1911, in the First Class Subordinate Judge Court, Poona, has been decided on the strength of the decision of the suit No. 359 of 1912 on the date the 18th April 1923 following the decision in suit No. 359 of 1912 and in that matter the Court has "declared that the whole of the estate in dispute is of the ownership of the joint family of Gaikwad.

Then the prayer was amended by adding after the words "null and void" the following words :

on the strength of the decrees in suits Nos. 410 of 1911 and 359 of 1912 in the Court of the First Class Subordinate Judge, Poona, u/s 52 of the Transfer of Property Act.

5. To the application for amendment the defendant put in a reply, in which he denied the facts alleged in the application and contended that the plaintiff was not entitled to bring the present suit u/s 52, and there was no *Its pendens*. He denied that the plaintiff was appointed receiver in suit No. 359 and pleaded that the decree in suit No. 410 was contrary to Section 11 of the Civil Procedure Code. He further pleaded that the plaintiff was not a party to suit No. 410. The fact remains, however, that the defendant did not specifically object to the proposed amendment but only pleaded to the facts mentioned therein, and, when the application was heard, the defendant, as the order made on the plaintiff's application shows, did not object to the amendment, which was allowed by the learned Judge in March, 1926.

6. I may here briefly dispose of one of the points raised on behalf of the appellant, and that is that the amendment was wrongly allowed. To start with, the defendant did not object to the amendment, but he pleaded to the facts; and although he was allowed to put in a supplementary written statement, he did not

do so, but relied on what he had stated in his reply to the application for amendment. It is said that the amendment should not have been allowed as it has deprived the appellant of a vested right, that is a right to plead limitation. In my opinion there is no substance in that argument. The amendment did not in any way introduce a new cause of action. The plaint, as originally drafted, referred to *Us pendens*, though somewhat vaguely, and by the amendment that position was made clear.

7. On these pleadings the learned Judge raised certain issues, of which the following are material :

1. Whether the present plaintiff, appointed Receiver in suit No. 359 of 1912, cannot as such file this suit?

2. Whether the sale by one co-sharer Krishnarao Gaikwad to the deceased father of the present defendant was affected by the pendency of suit No. 410 of 1911?

3. If the sale was affected also by the pendency of suit No. 359 of 1912.

4. Is the suit for possession as framed not maintainable even if *us pendens* principle applies as is urged by the defendant's pleader now?

6. If the defendants were bona fide purchasers for valuable consideration and whether the purchase would not thus be affected by the principle of *Us pendens*.

8. The learned Judge's findings on the issues were as follows :

1. He can.

2. Yes.

3. Yes.

4. No.

6. It would be affected.

In the result he made the following decree :

I declare that the property in suit is liable to be proceeded against in execution of the partition decree in suit No. 359 of 1912, i.e., to be divided or sold in that execution, and in case the property in suit has to be sold in execution of that decree, defendant will hand over possession to the purchaser thereof subject to such equities as may be in defendant's favour. I order defendant to pay half the costs of plaintiff and bear his own. The remaining half costs of plaintiff will come out of the estate.

9. With all respect to the learned Judge, it is difficult to understand the ratio decidendi of the decision. The learned Judge in more than one place has observed that the question of *Ms pendens* did not arise in the suit and was not material. His reasoning in this respect, which is supported here, is that as Krishnarao was a member of a joint family and as the two villages were part of

the joint family property, he had no authority to sell them, and that,. at any rate, it was for the defendant to justify the sale on any recognised, grounds under the Hindu law. This they had not done, and that being so, the plaintiff, who represented the joint family and who himself was a transferee from Baburao, was entitled to set aside the sale, and, if necessary, a slight amendment would cure the defect in the plaint. It may be stated here that as a matter of fact, no amendment, however, was asked for or made in. the lower Court. Then the learned Judge's findings are, that the sale was affected by the pendency of suit No. 410 as well as by the pendency of suit No. 359, and that being so, the whole sale was null and void and should be set aside. Then, at page 8 of his judgment, he observes as follows :?

Plaintiff in the present suit does not seek to have the defendant's transfer declared absolutely void altogether. He simply seeks for a declaration that the transfer is ineffectual against the rights arising under the partition decree. That cannot be resisted by defendant unless he sets up a title paramount to the rights under the decree which, as I said, he does not prove. So, in my opinion, the question of *Us pendens* is not really essential to the decision of this case.

It is difficult to understand these observations when the prayer, as I have: pointed out above, actually asked for a declaration that the whole sale was null and void and ought to be set aside; and then finally he makes the order which I have set out. In my opinion, these observations and the order made are not at all supported by the plaint and the prayers in it; and, with all respect to the learned Judge, I am unable to appreciate and accept his reasoning as well as the decree which he has made.

10. Mr. Coyajee tried to support the decision of the learned Judge on the ground that the sale by Krishnarao was an unauthorised alienation by a member of a joint family, and that being so it would only bind the share of the alienating member as the property was joint, and it was held to be joint by the decrees made in suits Nos. 359 and 410. As to the right of the plaintiff to sue, he says, it was open to the coparceners other than Krishnarao to bring a suit to have the sale set aside except as to Krishnarao's share in the property, and the plaintiff as a transferee from Baburao has the same right. He concedes that the plaintiff is not suing as transferee but, like the Judge, says a slight amendment would do, and applies for it. He further says that the decrees in the two suits are relevant for the purpose of showing that these two villages formed part of the joint family property of the Gaikwads. I am unable to accept the argument. In the first place, apart from the decrees, there is nothing to show that these two villages formed part of the joint family property of the Gaikwads. It is true that it was alleged in the plaint that the properties were purchased out of the joint moneys, but there is no allegation that the alienation of the property by Krishnarao was unauthorized and, therefore, not binding on the family, except a vague allegation that Krishnarao alienated the property to defraud the other coparceners.

11. Now, the position in law in Bombay, at any rate, is, that if the purchaser of a

part of the joint family property has obtained possession, the non-alienating coparceners would be entitled to joint possession of the property with him, and if they sue for it, a decree for joint possession can be made. They may also sue in such a case for recovery of possession of the whole of the property sold to the purchaser; but the Court is not bound to make a decree in ejectment and generally declares that the purchaser is entitled to hold the property until partition as a tenant-in-common with the other coparceners. If the non-alienating coparceners do not wish to be in joint possession of the property, their remedy lies in suing for a partition. Therefore, the plaintiff as a transferee of one of the coparceners is not entitled by himself to challenge the alienation and to sue to recover possession of the property. Assuming, however, that he represents the non-alienating members, it is obvious that if he had done so, different considerations would arise, and it would be open to the defendant to set up various answers. The defendant in that case might contend that Krishnarao was the manager of the family and the sale was made for necessity.

12. The plaintiff had two courses open to him. The first was to challenge the alienation on the ground of the villages forming part of the joint family property and that Krishnarao had no authority to alienate them so as to bind the family. But this contention can only be given effect to if a general account is taken and the sale is not void in toto. If it was found that Krishnarao's share was withdrawn, then, of course, the defendant as purchaser would get nothing. Whether the sale should be set aside in its entirety or partially set aside can only be determined if a general account is taken, that is to say, in a suit for partition. The other course open to the plaintiff which he seems to have preferred was to challenge the alienation on the ground of *Us pendens*; and when that is the case, any question as to whether the property alienated was joint or not is immaterial.

13. Whatever doubt there may have been as regards the nature of the suit before the amendment, there can be no doubt that after the amendment the claim was rested solely on the doctrine of *lis pendens*. It is said that it was alleged by the plaintiff in the plaint that the property was held to be joint family property by the two decrees, and that this fact was not denied specifically by the defendant in his written statement, and that, therefore, the burden would lie on the defendant to show that this was not the joint family property. It must, however, be remembered that by his written statement the defendant contended that the property was of the separate ownership of Krishnarao having been purchased by his guardian appointed by the Court. Now, when a guardian of the property of a Hindu minor is appointed in proceedings taken for that purpose, then it would be inconsistent with the case that the minor was a member of a joint family, for, in a joint family ordinarily no guardian of the property of a minor coparcener can be appointed. So that the presumption on which Mr. Coyajee relies loses its force as there is equally a presumption in favour of the defendant. The plaintiff, therefore, had strictly to prove that the property formed part of the joint family property. The plaintiff himself went into the box but said nothing as regards the nature of the property or whether it was joint family property or not.

There was no other evidence in the case on the point except the two decrees on which the plaintiff relied. The defendant admittedly was not a party to the two suits. The decrees, therefore, were not inter partes. Now, it is true that decrees not inter partes may be relevant in certain cases, but they clearly are not conclusive of the rights of the parties, and it is difficult to see how the defendant would be bound by these decrees. Apart from that, I am clear in my mind that the suit was not on the ground of an unauthorized alienation, but was based upon Section 52 of the Transfer of Property Act. This conclusion derives support from the application put in on behalf of the defendant suggesting certain issues. The issues actually raised by the learned Judge also support this position. To entertain the application for amendment now, therefore, might give rise to questions of limitation, which I do not think it necessary to allow under the circumstances of this case.

14. If I am right in holding that the cause of action was u/s 52 of the Transfer of Property Act, then any consideration as to the character of the property, and whether it was joint or not, would be irrelevant. Under the circumstances, although pleadings may not be construed strictly in this country, in my opinion, it would be changing the whole nature of the suit and manifestly unfair and unjust to the defendant to allow the amendment applied for at this stage. I must, therefore, reject the application for amendment.

15. The next question is, whether the plaintiff as receiver can bring this suit to set aside the sale u/s 52 of the Transfer of Property Act. Mr. Thakor raises two contentions in this respect. The first is, that as Bolton was appointed receiver in suit No. 359, he could not sue as receiver to attack the alienation by reason of the pendency of suit No. 410. The second is, that a receiver as such cannot bring a suit of this nature at all. As to the first contention, it is sufficient to state that if the property was joint, and if the non-alienating members, who were owners of the property along with the alienating member, could sue the latter or his transferee, it is difficult to see why the receiver though appointed in suit No. 359 could not sue the latter. The plaintiff was appointed receiver of the whole of the joint family property by the High Court in suit No. 359. The order made by the High Court is as follows.?

For the reasons given in the accompanying judgment, the Court allows the appeal and appoints the appellant Receiver on his giving security for the rents and profits of the Immovable property which may come into his hands. He will be Receiver of the whole estate now in litigation with power to take immediate possession of the moveables. That will not include stridhan ornaments or clothes or other personal property now in actual use or wearing.

There will be liberty to the parties to apply for further orders from the lower Court,

The lower Court to define the further powers of the Receiver and! to fix any limitations within which those powers should be exercised, and to pass

appropriate orders providing for the residence and maintenance of the 1st defendant and his family.

Accordingly the District Court conferred the following powers on the plaintiff as receiver :?

Whereas you have been appointed Receiver as per order passed by the Honourable the High Court on the date the 29th July 1915, in the above suit, you are conferred upon with such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of documents as the owner himself has, and to making an inventory of the moveable property which the wife of the defendant No. 1 might claim as her own stridhan property and to let out Immovable property and to evict tenants whenever it may become necessary. The house in which the defendant No. 1 and his family are now residing is allowed to be kept in their possession for the present.

16. The present suit was instituted with leave of the Court. Mr. Thakor says that the power of a receiver to sue would not include a power to sue to set aside a transaction or to recover property alleged to be belonging to the parties to a suit in which a person is appointed receiver on the ground of fraud or *Us pendens*, and he relies on certain observations of the Madras High Court in the case of *Mahamed Kasim Sahib v. Panchapakesa Chetti* ILR (1911) Mad. 578. to show that where a right to sue depends upon the election to be made by parties to a transaction or any volition is to be exercised as a condition precedent to bring the suit, then the receiver on behalf of such parties cannot sue. Apart from the fact that the decision relied upon goes upon its own facts and the terras of the order made by which the receiver in that case was appointed, in my opinion, there is no substance in this contention; and the answer to it is the law contained in Order XL, Rule 1, Civil Procedure Code, which is in these terms?

(1) Where it appears to the Court to be just and convenient, the Court may by order?

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents arid profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession

or custody of property any person whom any party to the suit has not a present right so to remove.

17. These words, in my opinion, are wide enough to empower the Court to authorise a receiver to bring any suit in his own name, the object of which is to preserve, collect or realize the property in suit, and where the receiver is authorised in this behalf, he may sue in his own name. The grounds upon which the suit is based seem to me to be immaterial. If the owner can bring a suit to recover his own property and has a cause of action to do so, it is difficult to see why the receiver, who has the same powers as the owner has to bring a suit and who is authorised by the Court in that behalf, cannot. bring such a suit. The receiver appointed, in my opinion, when properly authorized, would have the same powers as the owner as regards the property; and if the owner could not have sued for possession of the property, the receiver could not. But if the owner could bring a suit and has a cause of action, then I think the receiver would be entitled to sue on that cause of action, subject of course to his being authorized by the Court in that behalf. The objects for which a receiver is appointed are the preservation and realization of the subject-matter of the litigation pending the determination of the rights of the parties. He is appointed for the benefit of all the parties concerned in the litigation and is the representative of the Court and the parties interested in the litigation. If the joint family can sue to recover possession of the family property, there is no reason why the receiver cannot.

18. This brings me to the important question of *Its pendens* on which, as I have said, the suit is based. The old Section 52 of the Transfer of Property Act, which applies to this case, is in these terms :?

During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to Immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

It is clear from the terms of this section, that the doctrine of *Its pendens* is not based upon notice, but it rests upon the ground that neither party to a suit can alienate the property in the suit pending the suit so as to defeat the rights of the other party. As the decisions show, it is based upon expediency, and it is immaterial whether the alienee *pendente lite* had or had not notice of the suit. (See *Bellamy v. Sabine*. (1857) 1 De G. & J. 566.). The mere pendency of a suit will not prevent one of the parties from selling the property, the subject-matter of the suit, but the purchase will in no manner affect the right of the other party under any decree which may be made in the suit, unless the property was sold with the permission of the Court. The section lays down the principle, which is in conformity with what Story in his "Equity Jurisprudence" observes that the effect

of the maxim "But lite pendente nihil innovetur" is not to annul the conveyance, but only to render it subservient to the rights of the parties to the litigation. The right, then, being created by a statute and being restrictive of the ordinary rights of parties, the section, it is clear, must be construed strictly. The point to note is, that this statutory right is given to the party to the suit other than an alienating party to have an alienation set aside so far as it is necessary for the protection of his own rights. It has been held that if the plaint is insufficiently stamped and is rejected and is then re-presented after making good the deficiency, an alienation between the two dates of presentation would not be subject to *Us pendens*. In a suit to cancel a deed of gift, where the plaint omitted reference to a particular property which the defendant sold before it was included in the suit by an amendment of the plaint, it was held that the sale was not affected by the doctrine of *lis pendens*. (See *Ashutosh Roy v. Ananta Ram Bhattacharjee* 50 IND.CAS. 727. *Wall Bandi Bibi v. Tabeya Bibi* ILR (1919) All. 534. and *Ramchandra v. Bhagwan* (1920) 57 I.C. 652., I refer to these cases to show how strictly the section is interpreted. Although the learned Judge finds that the sale to the defendant's father is subject to the doctrine of *Us pendens* by reason of the pendency of suit No. 359, it is fairly conceded before us by Mr. Coyajee that that finding cannot be accepted and is not correct. That suit was instituted on September 24, 1912. The sale in favour of the defendant's father was completed on August 26, 1912. There can be no *Us pendens* where an alienation has been effected before the institution of the suit; but it is argued, and the learned Judge was inclined to accept the argument, that suit No. 359 was so connected with suit No. 410, or, as the learned Judge puts it, was a mere continuation of suit No. 410, that both these suits practically are one and the same. The learned Judge himself has observed in more than one place that there was no order consolidating the two suits. The fact remains that all the parties to the later suit were not parties to suit No. 410. In that suit there were only two parties, Baburao as the plaintiff and Krishnarao as the defendant. In the other suit the plaintiff represented the third branch, and Krishnarao and Baburao, and Baburao's transferees were party-defendants. The rights of Sonubai, widow of Baburao, were not determined in suit No. 359, but they were determined in suit No. 410. There were two separate decrees made in the suits. There was no decree in suit No. 410 in favour of Gangaram or his branch, and the transferees were not parties to suit No. 410. There is no provision of law under which suit No. 359 could be considered to be a continuation of suit No. 410. The subsequent act of the Court in delivering a judgment in suit No. 410, even if it be admitted that it was done on the strength of the decree in suit No. 359, cannot alter the position in law or make suit No. 359 a continuation of suit No. 410. In these circumstances, the rights of the parties must be determined with reference to suit No. 410 and that suit alone.

19. Now, suit No. 410 was brought by Baburao for partition of the family property originally against Krishnarao. In the list of the property there is an item of Rs. 75,000, which refers to three inam villages in the Satara District,?(1)

Chandoli (2) Bamboli, and (3) Atit?, as an approximate value of these villages. The plaintiff asked for a half share in the property partition and for accounts. As stated above, after the decision in suit No. 359, suit No. 410 was taken up. Baburao in the meantime had died, and Sonubai as his widow had been brought on record. It appears that one Shankerrao claimed to be the adopted son of Baburao, and in 1921 he was also brought on record of this suit; but it is common ground that it is not necessary to consider the rights of Shankerrao in this litigation and on the points which arise in this appeal. The decree, which is made in suit No. 410, is at page 64, and is as follows :?

It is declared that Sonubai or her husband, the deceased Baburao, has one-third share in the suit property. The said one-third share may be properly partitioned according to law and it should be separated and given. Accounts may be taken for determining as to how much moveable property there was belonging to the joint family on the date on which the suit (No. 733 of 1921) was first filed in the High Court. The property that may have been disposed of by Krishnarao since the filing of the aforesaid suit may be deducted from the property mentioned in the plaint which is in the possession of the Defendant.

The rest of the decree is immaterial. With all respect to the learned Judge, he seems to be under the impression that the suit was of the nature contemplated under Order XXI, Rule 63, that is a suit for a declaration that certain property in the possession of the defendant was liable to be taken in execution of the decree in favour of the plaintiff.

20. On these facts it is argued (1) that the property was not specifically described in the plaint; and (2) that the decree having directed that any property which may have been disposed of by Krishnarao since the filing of the suit should be deducted from the property mentioned in the plaint which is in the possession of the defendant, no *Us pendens* would arise as against the defendant in this litigation.

21. Section 52 of the Transfer of Property Act lays down the conditions which create a *Us pendens*. One of the conditions is that in a pending suit a right to Immovable property must be directly and specifically in question. Then it provides that the property in regard to which the right is directly and specifically in question in the suit cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto under any decree which may be made therein, except under authority of the Court and on such terms as it may impose. The rules of procedure require that when any Immovable property is in question in a suit, it must be as far as possible specifically described in the plaint, and, if possible, by its boundaries. Mr. Thakor, therefore, says that, to start with, the two villages are described as being in the Satara District, whereas one of them, namely the village Chandoli, is in Poona District; and, secondly, no boundaries are given, and that even the names of the villages are not accurately written. It is true that a misdescription of the land in the pleadings will prevent the operation of the doctrine of *Us pendens*; but if in

spite of the misdescription the land is sufficiently identified, then the doctrine will apply. It has been held by the Calcutta High Court that an alienee who is aware of the identity of the property will be affected by *Us pendens* in spite of the misdescription. The question to my mind is not so much the knowledge of the alienee as to the identity of the land which he is buying and as to whether it is included in the suit or not, but the question is what was the property which the parties knew and believed was transferred pending the suit by one of the parties thereto. If it is found that the parties to the suit from the description given in the plaint knew what the properties were, in which a right was specifically and directly asserted, and if, as a result of the decree made therein, either that property or a part of it is allotted to the other party, then it is difficult to see why that party will not be entitled to rely upon the rule of *Us pendens* as against the alienee from his opponent in the suit. It was not suggested in this case that the parties did not know what was the property to which the plaintiff Baburao asserted a right specifically and directly as being part of the joint family property. It was not suggested that the family was possessed of any Chandori inam village situate in the Satara District. It was common ground that Krishnarao's mother had purchased a half share in the inam village of Chandori in the Poona District and a similar half share in the inam village of Atit in the Satara District. It was this property which was valued at Rs. 75,000 by the plaintiff Baburao. It was not suggested on behalf of Krishnarao that he was not in possession of any Chandoli inam village in the Satara District. In this state of things, it is clear that the parties at any rate to suit No. 410 knew what was the property which was claimed to be the joint family property and as to which the defendant had denied the claim. If that is the position, and if Krishnarao alienated these two villages about which there was no mistake in the mind of Krishnarao and Baburao, a mere mistake in describing the situation of the property or a misspelling of the names of the properties would not affect the doctrine of *Us pendens* as against the present defendant. As a matter of fact I am not disposed to attach any importance to the alleged misspelling. It is said that even in the Poona District there was another village of Chandoli, but it was nobody's case, right from the time suit No. 410 was instituted up to the time of the decree in the present litigation, that the village now claimed in the receiver's suit was that other village of Chandoli. Nor was it suggested on behalf of the defendant in this case that there was a Chandoli village in the district of Satara. The principle, I think, which is deducible from the cases on which Mr. Thakor himself relies is, that if the property is capable of being sufficiently identified and is included in the decree made in the suit awarding the non-alienating parties rights therein, then if it happens that his opponent transfers it pending the litigation and before the decree, it would not affect his share. A purchase made of land actually in litigation *pendente lite* for a valuable consideration and without any express or implied notice affects the purchaser in the same manner as if he had notice, and he will accordingly be so far bound by the judgment or decree as not to be entitled to defeat the main object of the suit. Ordinarily the judgment of a Court binds only the parties and their privies in representation or estate. But he who

purchases during the pendency of an action is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired and such purchaser need not be made a party to the action.

22. If this is the doctrine, then the point made has no force. The decree was made on the strength of the decree in suit No. 359. The latter decree leaves no doubt upon the point. These villages were held to be part of the joint family property and are ordered to be partitioned. When the decree was made in suit No. 410, the parties understood what the villages were, as by that time decree in "suit No. 359 was made and suit No. 359 described the villages accurately. If these villages had not been alienated, then it is clear that Krishnarao would have had to bring them into hotchpot. It was never his case that the villages in suit No. 410 were different from those which his mother has purchased. If so, it is difficult to see how a transferee from him can put forward any contention now. Once it is remembered that a transferee pendente lite cannot rely on want of notice of the suit which is *Us pendens*, then I think the difficulties suggested would disappear. It seems to me to be clear from the record that everybody concerned understood what the properties were. The fact that the defendant raised no contention in this respect in his written statement or in the lower Court shows that he too was quite clear about the properties.

23. The second point made is that the doctrine of *Us pendens* would not apply as the decree itself directed that the property transferred by Krishnarao should be deducted from the property in the possession of the defendant. In the first place, reading the decree, it seems to me that this particular clause refers to moveable property which Krishnarao had alienated, and all that it says is that if it was found on taking accounts that he had alienated more than his share, then it should be debited against him. The evidence shows that until the termination of the two suits, suit No. 359 and suit No. 410, it was nobody's case that Krishnarao had alienated the Immovable property, and the case was that he had alienated a considerable part of the move-able property consisting of jewellery, cash and ornaments. It was after the decree in suit No. 359 was made, and after it was confirmed by the High Court, that the receiver started making inquiry and discovered that Krishnarao had made various alienations with regard to Immovable property. The meaning of the clause in question seems to me to be nothing more than that the property alienated, if any, should be accounted as a debit to the share allotted by the decree to Krishnarao. That seems to be in consonance with the rule on which the Court acts in adjusting the rights of coparceners, including those of the alienees from some of them, in effecting partition in a partition suit.

24. One more point remains, and that is limitation. Mr. Thakor says that this was a suit for declaration and possession, and as the relief for possession was negatived, the suit must be treated as if it was one for declaration and, therefore, the suit which was filed in 1930 must be held to be barred under

Article 120 of the Indian Limitation Act. The right to sue, he says, accrued when the unauthorized alienation was made by Krishnarao, or in any case on April 19, 1923, when the decree declaring the rights of Baburao was made in suit No. 410. I have no difficulty in rejecting that contention. In order to decide which article applies, and whether the suit is barred or not, regard must be had to the nature of the suit and the relief claimed. It is the right of the plaintiff to frame his suit so as to bring it under any article of the Indian Limitation Act which is more favourable to him as giving a longer period than another. If he frames the suit wrongly, he takes the consequences. But so long as the frame of the suit is consistent with the cause of action as alleged, the mere fact that he had made a claim which on investigation is found to be unauthorised or which he was not entitled to make, cannot affect the question as to what article would apply. The question of limitation is to be decided with reference to the cause of action and to the frame of the suit when instituted and not with what is found at the end of the trial or the relief which is granted. I must, therefore, reject this contention.

25. The question then remains, what is the decree, which should be made in this Court? I have referred to the actual decree made by the lower Court. I have pointed out that the nature of the property has nothing to do with the question of *Us pendens*. The effect of *Us pendens*, if it applies, is that the alienation is bad and must be set aside either wholly or to the extent that it affects the rights conferred upon the non-alienating party by the decree in the suit.

26. I, therefore, think that we must, following the section, give a declaration to the plaintiff to the effect that the alienation by Krishnarao in favour of the defendant is bad and cannot affect the rights of Baburao, or rather of his wife, that is to say, that *Us pendens* would affect the defendant's rights to the extent of the one-third share allotted to Baburao or his wife Sonubai in both the villages. As to how this is to be worked out, whether the purchaser is to be allowed to remain in possession of the whole or any part of the property, is a matter which does not arise in this suit, and that must be left to be decided in execution of the decrees in suit No. 359 and suit No. 410. I would, therefore, set aside the decree and substitute a decree as indicated above.

27. I think a fair order to make under the circumstances of this case is, that the plaintiff must get one-third of his costs from the defendant throughout, and the defendant do get two-third costs throughout from the plaintiff. Costs to be set off.

28. Tyabji J. This appeal arises out of a suit brought by a receiver appointed in another suit to which I shall presently refer. The reliefs sought in the present suit are a declaration that the sale-deed relating to two villages dated August 26, 1932, and executed by one Krishnarao Gopalrao Gaikwad in favour of the adoptive father of the defendant was not binding on the plaintiff; possession and mesne profits, and other reliefs.

29. Limbaji Gaikwad was the common ancestor "Of the parties with whom the suit is primarily concerned, He died in 1892, leaving three sons Balvantrao,

Gopalrao and Gangaram. Limbaji's first son Balvantrao died in 1893 leaving a son named Baburao who died on June 12, 1913, leaving a widow Sonubai. The second son of Limbaji, Gopalrao, died in 1906 leaving a son Krishnarao who died leaving a son Shivajirao. The third son of Limbaji Gangaram is alive and has a son Yadavrao.

30. The following pedigree will show the relations between the parties :?

Limbaji, died 1892. _____ |
 _____ | | | Balvantrao, Gopalrao, died 1906
 Gangaram, died 1893 =Lakshmibai [February 25, 1908, re- | | leased his rights
 in fa- Baburao, died Krishnarao. your of Laxmibai. On June 12, 1913 |
 September 24, 1912, = Sobubai. Shivajirao. braought suit No. 359 of [On
 October 11, 1911, 1912: Gangaram and brought suit No. 410 of Yadav v.
 Krishnarao 1911: Baburao v. Krishnarao.] and Baburao.]

31. Several suits for obtaining partition of the family property and similar reliefs have been instituted between members of the family. It is necessary to refer to two of them. First, on October 11, 1911, suit No. 410 of 1911 was brought by Baburao (representing the first of the three of the family branches) against Krishnarao (representing the second branch) for partition. The third son Gangaram was not made a party to this suit on the allegation that he had released his rights in the family property. It was during the pendency of this suit that Krishnarao on August 26, 1912, entered into the sale-deed (exhibit 73) which is sought to be declared null and void in the present suit. Within a month of the sale-deed, viz., on September 24, 1912, the second suit to which I have referred, suit No. 359 of 1912, was brought by Gangaram and his son Yadavrao against Krishnarao and Baburao so that to this suit the representatives of all the three branches of the family were parties. The second suit was proceeded with, not suit No. 410 of 1911 though it was the earlier suit. The present plaintiff was appointed receiver in the second suit No. 359 of 1912 and has brought this, suit for obtaining the reliefs that I have stated. I will in future refer to the earlier suit as suit No. 410, and the second one as suit No. 359 omitting the years of institution.

32. The first question that arises in the present proceedings is, under what right if any can the plaintiff bring the present suit? He relies upon the orders of the Court appointing him receiver. The earlier of those orders was made by Mr. Justice Batchelor and Mr. Justice Hayward in Appeal No. 23 of 1915 which arose out of interlocutory proceedings in suit No. 359. The order, so far as relevant, is to the effect that the plaintiff was appointed receiver of the Immovable property which may come into his hands; and that he was to be receiver Of the whole estate then in litigation, with power to take immediate possession of the moveables. Liberty was given to the parties to apply for further orders, and the lower Court was directed (1) to define the further powers of the receiver; (2) to fix any limitation within which those powers should be exercised; and (3) to pass appropriate orders providing for matters not now relevant. In pursuance of the

directions of the High Court, the Subordinate Judge, in whose Court suit No. 359 was pending, made on July 31, 1915, an order conferring upon the receiver the powers referred to in the Civil Procedure Code, Order XL, Rule 1, Sub-rule (1), Clause (d) in terms of the clause itself. These powers include "all such powers as to bringing and defending suits as the owner himself has." The Subordinate Judge also gave some other directions to the receiver which are not now relevant.

33. It is argued on behalf of the appellant that the present suit is for the purpose of avoiding a sale on the principle contained in Section 53 of the Transfer of Property Act, and that a receiver cannot be empowered to bring such a suit. Reliance is placed on *Mahamed Kasim Sahib v. Panchapakesa Chetti* ILR (1911) 35 Mad. 578, in which after reference to several general considerations it is stated (p. 581) :-

No authority has been cited to us, nor are we aware of any in support of the position that a receiver appointed in the circumstances of this case has any right to recover property which has been already sold away by the judgment-debtor on the ground that the sale is voidable as against the creditors on the principle embodied in Section 53 of the Transfer of Property Act.

Thus the judgment expressly refers to a receiver appointed in the circumstances of the case before the Court. The order there was made on an application that the receiver should be appointed for collecting the property or the price thereof. And yet the order made on that application did not authorise the receiver to recover the price of the goods from the defendant, but appointed him receiver specifically of certain property mentioned under twenty-two items in a schedule. It is also pointed out in the judgment that the receiver had not obtained permission to bring the suit in question.

34. In my opinion the order in the present case must be construed on its own terms?just as the order in the decision to which I have referred was construed,? and it must be determined whether the Court had?acting within its jurisdiction? authorised the institution of such a suit as the receiver has instituted. The order must of course be controlled by the limits of the jurisdiction conferred upon the Court to appoint receivers under Order XL, Rule 1. The present order was couched in the very terms of Clause (d) of that rule, its terms were not even made to conform to the special needs and circumstances with which the receiver had to deal. As to the limits upon the jurisdiction of the Court, its authority to remove any person from the possession or custody of property is restricted to cases where any party to the suit has a present right to remove the person in possession. It is not alleged that the order contravenes this provision. It is not pointed out what other obstacle hinders the Court from appointing a receiver for bringing such a suit as the present, nor is the peculiarity in the present suit specified, by reason of which this suit must be put out of the class of suits that the owner himself could have brought.

35. Whether the present plaintiff as receiver became entitled after the Court's

order to bring the present suit cannot however be determined without attending to other considerations. The receiver was appointed receiver of the whole of the property then in litigation in a suit to which not only Krishnarao, whose act is sought to be impeached, but Baburao whose rights are affected, was party. The object of appointing the receiver was that the interests of all "the parties to the suit (and particularly of Baburao) in all the estate should be safeguarded. The power to bring all such suits as the owner himself had, must therefore have reference to all such suits as any of the parties to the suit could have brought for safeguarding their interests. Consequently the receiver was authorised to bring any such suit as Baburao could have brought : and the question whether the receiver could bring this suit must depend upon whether Baburao could himself have brought it.

36. For dealing with this question?whether Baburao could have brought a suit for a declaration that the sale-deed by Krishnarao dated August 26, 1912, was not binding on him?I must turn to suit No. 410. In that suit Baburao was the plaintiff and Krishnarao the defendant. The reliefs sought were that the property mentioned in the schedules A and B may be equitably partitioned between the plaintiff and the defendant, that accounts be taken and other reliefs. One of the items in the schedule of which partition was sought was as follows : "Rs. 75,000? Inam villages in the Satara District?1. Chandore, 2. Bomboli, 3. Hatid, the value of all these is about Rs.

37. In order that Section 52 of the Transfer of Property Act may be brought into operation, it has to be made out?I follow the language of the section as far as possible?that some right to the Immovable property (consisting of the two villages which are the subject-matter of the present suit) was directly and specifically in question in suit No. 410. If that is made out, then u/s 52 the property could not be transferred by any party to suit No. 410 so as to affect the rights of any other party thereto under any decree therein.

38. It was argued that the answer to the initial question must be in the negative, viz., that no right to the said villages was directly and specifically in question in suit No. 410 as the description of the villages in the plaint in that suit is not accurate. There is no doubt about the inaccuracy of the description. But for determining whether any right to a property is directly and specifically in question in any suit, an error in the description cannot be of any materiality so long as the Court and the parties understand which property is in question. Fraud or collusion might alter the situation, but subject to such considerations the description of the property is for the Court and for the parties concerned. If they are able to understand what property is meant and proceed with the suit, their understanding of the situation will determine which is the property the right to which is directly and specifically in question in the suit. In *Wall Bandi Bibi v. Tabeya Bibi* ILR (1919) All. 534, reliance is placed on Bennet in his work on *lis pendens* :

It may be said in general that a *lis pendens* will be created whether the property

involved in suit is described, either by such "definite and technically legal description that its identity can be made out by the description alone, or where there is such a general description of its character or status, and by such reference that upon inquiry identity of the property involved in litigation can be ascertained.

There is no doubt that the villages referred to in the schedule in suit No. 410 were the villages that are referred to in the present proceedings, nor is there any doubt that in the previous suit Baburao's right to have these villages partitioned was directly and specifically in question. The property, therefore, could not u/s 52 be transferred or otherwise dealt with by any party, (and Krishnarao was one of the parties) so as to affect the rights of any other party to the suit, (viz., Baburao), under the decree or order which may be made in the suit except under the authority of the Court, and on such terms as it may impose. It is not suggested that the transfer was made under the authority of the Court. Baburao's rights under the decree in suit No. 410 will not therefore be affected by the transfer made by Krishnarao.

39. Under the decree made in suit No. 410, it was declared that "Sonubai or her husband the deceased Baburao, has one-third share in the suit property. The said one-third share may be properly partitioned according to law and it should be separated and given." The decree is dated April 19, 1923. At the date of the decree Baburao had died and his representative Sonubai had been brought on the record, but for convenience and brevity I will hereafter speak of the decree being in favour of Baburao omitting reference to his representative Sonubai and substituting Baburao's name for that of Sonubai where her name is mentioned as his representative. The plaint in suit No. 410 had been filed on October 11, 1911, and the decree was made on April 23, 1923. In the interval Krishnarao had, on August 26, 1912, executed the sale-deed now in question (exhibit 73) alienating the two villages. It seems to me, therefore, that u/s 52 of the Transfer of Property Act the sale by Krishnarao in favour of the present defendant cannot affect the rights of Baburao under the decree made in suit No. 410, viz., the sale cannot affect the declaration that Baburao had a one-third share in it, nor the order that the one-third share of the property should be partitioned according to law and separately given to him.

40. It was argued however that Section 52 of the Transfer of Property Act expressly restricts its own operation to rights under any decree or order that may be made in the pending suit : that the property can be transferred or otherwise dealt with so long as it does not affect the rights of any party under the decree in the pending suit, and that a transfer affecting such rights of the parties as do not arise under the decree is not rendered nugatory by Section 52. In connection with this argument our attention was drawn to the provisions in the decree in suit No. 410, that

Accounts may be taken for determining as to how much moveable property there was belonging to the joint family on the date on which the suit (No. 733 of 1911)

was first filed in the Honourable High Court. The property that may have been disposed of by Krishnarao since the filing of the aforesaid suit may be deducted from the property mentioned in the plaint which is in the possession of the defendant.

It is argued that these provisions of the decree preclude a disturbance of the dispositions by Krishnarao after the date referred to; that his dispositions were protected, and were to have full effect; and that the result was that Krishnarao's share was made responsible for his acts, but his alienations were ratified. I cannot agree. The intention of the decree was to make Krishnarao responsible for all the property in his possession : if he had unlawfully disposed of any such property, it could not have been intended to perfect the deficient title of persons who could be traced to be in possession of Immovable property unauthorizedly transferred to them. In any case there is nothing to show that it was intended, after the institution of the suit for partition, that a single coparcener should be chartered to act so as to render the partition sought in the suit nugatory and meaningless, and to deprive the parties of the protection vouchsafed by Section 52 of the Transfer of Property Act.

41. If I am right in coming to the conclusion that Baburao was entitled to the benefit of Section 52 of the Transfer of Property Act, and his rights under the decree in suit No. 410 were protected against the transfer by Krishnarao in favour of the defendant's father, then in my opinion the plaintiff as the receiver in suit No. 359 was authorised to represent the interest of Baburao and to bring a suit for a declaration that the right of Baburao was not affected by Krishnarao's unauthorized transfer. The argument that the receiver was appointed receiver in suit No. 359 and not in suit No. 410 has no materiality. As receiver he was entitled (provided the Court authorised him) to step into the shoes of the parties to the suit in which he was appointed?viz., suit No. 359. One of such parties was Baburao, whose rights included the right to have it declared that the sale-deed dated August 26, 1912, made during the pendency of suit No. 410 did not affect his rights under the decree in suit No. 410 : and that is the declaration that I would make.

42. The learned Judge in the decree under appeal has held that the deed of sale by Krishnarao was void except as against himself, because Krishnarao purported to deal with joint family property and because he could at the most deal with the joint family property to the extent to which one of several coparceners can deal with joint property. The learned Judge says :

It is not now contended before -me that the property in suit was not the joint family property of the transferor Krishnarao and his other co-sharers or that it was the separate and self-acquired property of the transferor Krishnarao.... Krishnarao did not contend particularly that this was his self-acquired property. Defendant, who derives title through him? a title acquired after the filing of these suits? could not therefore raise that contention. As a matter of fact this defendant does not raise that contention now. Even if he were not precluded from raising

that contention there is nothing in support of that contention. In the circumstances mentioned it was for the defendant to prove that the property in suit was the self-acquired property of Krishnarao and not the joint family property of himself and his uncle and cousins. And he does not attempt before me to prove this. In fact the theory of self-acquisition is not pressed or argued before me.

The objection to this view of the case, however, is that the present suit did not seek any relief on the ground of the property being joint and the transfer being void against the interests of the other coparceners. The plaint is very badly drawn. Much argument was addressed to us to the effect that plaints in the mufussal should be liberally construed. The plaint in this case was filed in the Court of the First Class Subordinate Judge, Poona. There could not have been any difficulty in getting the plaint more carefully drafted. Notwithstanding this I am prepared to make allowances. What is badly or carelessly expressed may be laboriously interpreted, and what has been unexpressed may be taken to have been implied, so long as this can be done without being unfair to the other side. But the suit cannot be allowed to be entirely altered in its nature. The only prayers in the plaint as originally filed were for a declaration that the sale-deed of August 26, 1912, was illegal and null and void and that the suit property may be taken out of the possession of the defendant and given into the possession of the plaintiffs. By an amendment it was added that the declaration was to be on the strength of the decree in suits Nos. 410 and 359 and Section 52 of the Transfer of Property Act. It was argued for the plaintiff that the reasons why the sale should be declared void should be considered as surplusage, and that if the plaintiff could make out other good grounds for the sale being declared void, he should not be precluded from doing so. Reliance was in this connection placed on two paragraphs of the plaint : paragraph 2, where it is stated that the villages had been purchased out of the moneys of the joint family; that in suit No. 410 Baburao sought to recover his share in the villages after stating that they belonged to the joint family and that the sale had been entered into by Krishnarao making false representations that the property was of his exclusive ownership. And in paragraph 2-A by an amendment it was suggested that "the Court would declare the whole of the Estate in dispute is of the ownership of the joint family of Gaikwad.

43. But the ultimate difficulty in the plaintiff's way is that there was neither an issue on the point whether the villages belonged to the joint family nor any materials on which such an issue might be answered in the plaintiff's favour. The issues are limited to the question of *Us pendens*. No evidence was adduced on the question whether the property was joint or separate. Hardly any facts seem to have been proved during the trial. The only oral evidence seems to have been that of the receiver who knew nothing personally and could depose to no facts of his own knowledge. He only produced documents mainly relating to proceedings in Court. The learned Judge has allowed his mind to be affected by the statements in the judgments in the previous suits. But judgments can be

deemed relevant under the Indian Evidence Act only for very limited purposes. It was argued that they may be relied upon under Sections 13 and 43 of the Indian Evidence Act. Under those sections judgments are admissible only as establishing particular transactions in which a right, the existence of which is in question, was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from. In particular the reasons upon which the judgment is founded are not part of the transaction and cannot be regarded as such, nor can any finding of fact come to in the previous judgments other than the transaction itself be deemed to be relevant in the present case : (1931) L.R. 58 I.A. 125 (Privy Council) . The previous judgments therefore cannot be evidence of the fact that these villages were joint property or that they were purchased out of joint property. If that fact had been made an issue in the present suit, it would have been necessary to give evidence to establish it. The previous judgments would only have been evidence for showing that in the transaction consisting of the suits and of the judgments it had been asserted that the property was joint. In my opinion, therefore, the learned Judge had no materials before him on which he could decide the case on the basis that the two villages were joint family property and liable to be partitioned in execution of the decree in suit No. 359, The decree should in my opinion have been restricted to the matters alleged and proved before him. The matters alleged and proved before him had reference only to the applicability of the doctrine of *Us pendent*. Accordingly the decree should merely have contained a declaration that the rights of Baburao under the decree in suit No. 410, viz., to have the property partitioned and to receive possession of a 1936 one-third share therein, were not affected by the sale-deed dated August 26, 1912.

44. The learned judge has decided the case primarily on the basis that the property was joint and that therefore the sale was not authorised. But he has also held that the doctrine of *lis pendens* must be taken to vitiate the sale not only as against Baburao but against all parties to suit No. 359. His reasons for holding to this effect are that the two suits Nos. 410 and 359-were practically the same and that the sale must be subject to the rights of all the parties to suit No. 359 also, that "though there was not a formal consolidation order, it was practically understood that the suit No. 359 was the same as, or a continuation of, the former suit, viz., suit No. 410, and the matters in dispute were decided in suit No. 359 of 1912." In my opinion this view is erroneous. The doctrine of *lis pendens* is enunciated in Section 52. It must be given effect to according to the terms of the section. The section refers only to transfers or dealings by parties to the pending suit so as to-affect the right of any other party to the pending suit under any decree or order that may be made therein. Suit No. 359 was not pending at the time of the sale on August 26, 1912, and the parties to that suit cannot be brought under the terms of Section 52. The learned Judge has referred to a formal consolidation order. I am not aware of the precise class of orders to which reference is made. No authority was cited to us on this point. So far as I have been able to discover, the expression "consolidation" is applied to suits in

the CPC only under Order XLV, Rule 4, which is restricted to pecuniary valuation in order to decide whether leave to appeal may or may not be granted. But I am unable to understand the process by which suits Nos. 359 and 410 could have been so consolidated as to bring; about the result that a person who was not a party to any suit until September 24, 1912, when suit No. 359 was instituted, should be deemed to have been a party to a suit instituted on October 11, 1911? viz., suit No. 410. Unless this process is requisitioned the sale of August 26, 1912, would be unaffected by the rights of the parties subsequently introduced into the litigation,?even if it is conceded that the litigation under the two suits must be considered to be one suit or proceeding for the purposes of Section 52 of the Transfer of Property Act, in the sense that every party to the one suit must be deemed to be a party to the other suit?a proposition which I need hardly say, a Court would pause before adopting.

45. I would, therefore, set aside the decree made by the lower Court and instead of it make a declaration in the terms of the decree in suit No. 410 in favour of the representative of Baburao. I agree in the order relating to costs proposed by the learned Officiating Chief Justice.