
(1956) 02 OHC CK 0003

In the Orissa High Court

Case No : First Appeal No. 44 of 1951 and Civil Revision No. 260 of 1949

Bhuyan Shyam Sunder Mohapatra and Another

APPELLANT

Vs

Ch. Nilakantha Das and Others

RESPONDENT

Date of Decision : 17-02-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1, 151, 152, 153

Limitation Act, 1908 — Article 181, 6

Transfer of Property Act, 1882 — Section 52 , 73

Citation : AIR 1956 Ori 165 : (1956) 22 CLT 337

Hon'ble Judges : P.V.B. Rao, J; Narasimham, J

Bench : Division Bench

Advocate : S.C. Das, for D. Mohanty, in No. 44 of 1951 and U.N. Rath and G.C. Das, in No. 260 of 1949, for the Appellant; N. Mukherji, U.N. Rath and A. Das, in No. 44 of 1951 and S.C. Das, for D. Mohanty in No. 260 of 1949, for the Respondent

Final Decision : Dismissed

Judgement

P.V.B. Rao, J.—Civil Revision No. 260 of 1949 and First Appeal No. 44 of 1951, involve common questions of fact and law and are heard together. They are disposed of by this common judgment.

2. Civil Revision No. 260 of 1949 arises out of an order passed by the learned Subordinate Judge of Cuttak in Misc. Case No. 1 of 1949 on an application filed by the petitioners, who will be referred to hereafter as mortgagees, under Sections 151, 152 and 153, Civil P. C. for amendment of the decree and judgment passed in a suit for foreclosure.

3. First Appeal No. 44/51 is against the decree and judgment of the Additional Subordinate Judge of Cuttack, in Original Suit No. 9/49. The suit was filed by the plaintiffs (mortgagees) for a declaration of their title to the properties described in Schedule B and for delivery of possession of the same, or in the alternative for a claim of a sum of Rs. 5922-12-0 being the value of the suit property from

defendant 1.

The petitioners in Misc. Case No. 1 of 1949 and the plaintiffs in Original Suit No. 9 of 1949 are the same. Defendant 40 in the original suit is the mother of these plaintiffs who are the sons of one Bhuyan Bhaskar Chandra Mohapatra, who died in 1938, & is the original mortgagee. Defendants 4 to 39 are the co-sharers of defendant 1 who are pro forma defendants.

Defendant 1 borrowed Rs. 30,000/- from the plaintiffs' father on 13-4-32 on a registered mortgage by conditional sale, the properties mortgaged being situated in the districts of Cuttack and Puri and described in Schedule A. The conditions of the mortgage are that if defendant 1 fails to pay the aforesaid amount of Rs. 30,000/- within one year, the mortgagee will be the owner of the said property.

The defendant defaulted to pay the amount within the period fixed and the plaintiffs' father filed a suit for foreclosure of the mortgage in Original Suit No. 38 of 1935, in the Court of the Subordinate Judge of Cuttack against defendant 1 and two others, one Babu Nalinikanta Mookherjee, Common Manager, Kothdesh Estate and Babu Jyotish Chandra Chakravarty, Pleader Receiver of Bhingarpur Estate. The preliminary decree for foreclosure was passed on 30-5-1936 and it was made final on 13-2-37.

In execution of the said decree in Ex. Case No. 64/37, the mortgagee got possession of all the properties under decree except lot No. 6 of the mortgaged property in Schedule A. Even before the execution of the mortgage by defendant 1 there were two suits for partition, O. S. 69 of 1924 and O. S. 144 of 1927, pending in the Courts of the Subordinate Judge of Cuttack, between defendant 1 and his cosharers pro forma defendants 4 to 39.

The final decree in the said partition suit was passed on 22-12-36. Lot No. 6 of plaintiff A schedule fell to the shares of the pro forma defendants 4 to 19 & 21 to 39 and defendant 1 under the final decree in the partition suit got the property described in Schedule B of the plaint in view of his undivided share in lot No. 6 of the mortgaged property. Exhibit 3 dated 24-8-38 is an extract from the order sheet in Act VIII Case No. 142 of 1938 in which Srimati Suniti Kumari Devi as guardian of the minor sons of Bhuyan Bhaskar Chandra Mohapatra, the mortgagee, was the applicant.

According to this exhibit, she was appointed guardian of the person and property of the minors, and it was also stated therein that the minors would attain their majority on 25-1-42 and 31-7-44. The father of the plaintiffs during his lifetime applied for delivery of possession under the foreclosure decree and failed to get possession, and it is alleged in the plaint that he came to know that the mortgaged property in lot No. 6 was allotted to the other cosharers of defendant 1.

Defendants 2 and 3 are subsequent allenees from defendant 1 mortgagor of the properties allotted to him in the partition suit in lieu of item No. 6 of the

mortgage by registered sale deeds, Exts. O and D dated 24-7-42 and 1-2-37 respectively. Defendants 2 and 3 contended that they were bona fide , purchasers for value without notice of the mortgage, and that the suit is not maintainable and is barred by time and res judicata.

4. The petitioners in the Civil Revision applied for amendment of the final decree on 3-1-49 and also filed the suit on 31-1-49. The only opposite party in the petition for amendment is Chaudhury Nilakantha Das, the mortgagor. The learned Subordinate Judge allowed the application for amendment for substituting the properties allotted to the mortgagor in partition suit in lieu of lot No. 6 of the mortgaged property which was an undivided share and the original suit was decided after the amendment was ordered.

5. The learned Subordinate Judge dismissed the original suit filed by the mortgagees for a declaration of their title to Schedule B properties on the ground that the suit was not maintainable and that the suit in effect was (1) to declare that the substituted properties are subject to the mortgage, and (2) as the final decree in the mortgage suit was already amended by substituting the said properties the suit was barred by time and res Judicata.

In view of the said finding, the learned Subordinate Judge did not deal with the other issues of the case as to the validity or otherwise of the alienations made in favour of defendants 2 and 3.

6. In the Civil Revision, the learned counsel, for the petitioner mortgagor contended that the learned Subordinate Judge acted with material irregularity in exercise of his jurisdiction in ordering substitution of the sons of the original mortgagee in the suit, and that the learned Subordinate Judge exercised his jurisdiction with material illegality in ordering amendment of the decree by substituting the properties allotted to the mortgagor in the partition decree and of which he was in possession since 1936.

7. The learned counsel contended that the mortgagee was aware of the pendency of the partition suits of 1924 and 1927 and took a mortgage in 1932 of an undivided share in lot No. 6 and was also aware at the time he filed the mortgage suit of the pendency of the said partition suits inasmuch as he impleaded the common manager and receiver appointed in the partition suits as parties to his mortgage suit.

The learned counsel further contended that he ought to have made the application for amendment before the final decree in the mortgage suit was passed or immediately afterwards. The mortgagee failed to get delivery of lot No. 6 & came to know that it was allotted to other cosharers in 1938 itself. Consequently, the amendment application, filed by the petitioners more than ten years after that, under the circumstances present in this case, ought not to have been allowed by the learned Subordinate Judge.

8. Mr. s.C. Das, learned counsel for the mortgagee contended that the

amendment can be allowed u/s 151, 152 and 153, Civil P. C. u/s 152, it is only the clerical and arithmetical mistakes in the judgments and decrees or orders or errors arising therein from any accidental slip or omission, may, at any time be corrected by the Court either of its own motion or on the application of any of the parties. In this case there is no mistake of any sort. In the judgment or decree there was no accidental slip or omission. In my opinion, therefore, Section 152 does not help the mortgagee.

9. Section 153 gives a general power to amend and the Court may, at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question at issue raised by pr depending on such proceeding. In terms, this section, in my opinion, refers to proceedings in a suit before the final disposal of the same. Order 6, Rule 17 deals with amendment of judgment and decree for the reasons stated therein and Section 153 deals with other proceedings in the suit.

10. The learned counsel for the mortgagee relied upon a decision of the Allahabad High Court in -- "Aziz Ullah v. Court of Wards, Shahjehanpur", 1932 All 587 (AIR V 19) (A), in support of his contention that? the amendment could be made under s. 153, Civil P. C. That was a case in which by an accidental slip the mortgaged property was described in the mortgage deed as being situated in Mouza Nagla Zaminia Nawadiya, the correct name of the village being Nawadiya Zaminia Nagla and that mistake was repeated in the plaint, preliminary decree and final decree, execution application and the sale certificate and was not noticed until the Revenue Court rejected the application of the decree-holder for mutation.

The Court held that u/s 152, Civil P. C., this being an accidental slip, the decree and the judgment could be amended though it was a slip committed by the parties, and that extensive powers might be" exercised by the Court under Sections 151 and 153 to amend the plaint, the sale certificate and the Dakhlanama. This, in my opinion, is not an authority for the position that the (amendment sought for by the mortgagees can be made u/s 153, Civil P. C.

11. Next Mr. Das contended that u/s 151 the Court has inherent power to amend if the ends of justice required it, or to prevent an abuse of process or to see that justice shall not fail in proper cases. There is no doubt that the Court should act u/s 151, Civil P. C., if there is a failure of justice on account of any accidental slip or omission. But it has to be seen whether in this particular case the mortgagees are entitled to invoke the powers of the Court u/s 151.

12. Mr. Das relied upon the following decisions, viz., -- "MO. Sebati Gartiani v. Pratap Gountia", 2 Cut LT 76 (B); -- "Khudu Mahto v. Bhim Mahto", 1950 Pat 183 (AIR V 37) (C); --"Mohabir Pershad v. Chandra Shekar", 1915 Cal 586 (1) (AIR V 2) (D); -- "Jagannath Prasad v. Jamuna Prasad", 1934 Pat 493 (AIR V 21) (E) and "Shyamakantlal v. Ramlal", 1941 Pat 399 (AIR V 28) (F), in support of

his contention that the amendment sought for by the mortgagees can be made u/s 151. In 2 Cut LT 76 (B), it was held that :

"Where a suit was brought to enforce a mortgage by the sale of the mortgaged property within the statutory period of limitation and by some accident and through the mistake of the scribe some lands though specifically mortgaged were not mentioned in the plaint and there was no schedule to that effect and a decree was granted for sale of mortgaged property and decree was drawn up with the description of the property as given in the plaint, a prayer for amendment of the plaint and the decree would be granted even though the suit had then passed the period of limitation as the suit was brought for the enforcement of such rights as were given by the mortgage deed and the question of the specific property to which the remedy claimed applied was a mere matter of description and the omission was accidental."

This decision, in my opinion, does not help Mr. Das as it was purely an accidental mistake committed by the scribe. In Khudu Mahto Vs. Bhim Mahto and Others, , it was held that :

"Where the Pleader-Commissioner whose report has been accepted by the Court and on the basis of whose report the final decree in a suit for partition has been passed, has committed a mistake in totalling the areas of the lands, it is the duty of the Court to check the arithmetical calculation made by the Commissioner before passing the final decree on the basis of the Commissioner's report, and if the Court passes a decree without noticing the mistake that has been committed by the Commissioner, then the Court would ultimately be deemed to be responsible for the mistake which has cropped up in the decree, and u/s 151, it must correct the mistake committed by it for the ends of justice or to prevent the abuse of the process of the Court.

If the Court is not able to detect the mistake itself, it should correct the mistake when the plaintiff points it out and applies for its correction, even after the decree has been executed under the provisions of Sections 151, 152, Civil P. C."

This is a clear case of arithmetical error in drawing up the decree and clearly falls within the provisions of Sections 151, 152. But this does not help Mr. Das as far as the facts of this case are concerned. In Jagarnath Prasad Bhagat and Others Vs. Jamuna Prasad Singh and Others, , it was held that :

"Where the property has been accidentally misdescribed in the mortgage bond and the mistake has been repeated throughout the proceedings to enforce the mortgage, but where there is no doubt as to the identity of the property mortgaged and the property is sold at auction, the Court has ample power to deal with such mistake and to amend the decree."

This case also does not help Mr. Das. In the case of Shyama Kant Lal Vs. Ram Lal and Another, , it was held :

"No doubt where a partition follows a mortgage and other properties are allotted

to the mortgagor in lieu of the mortgaged property the mortgagee can proceed against the substituted security. But where the mortgagee Ignores the fact of partition and proceeds not against the substituted security but against the originally mortgaged property which is sold in execution of his decree, the mortgagee can be allowed an amendment by substituting the substituted security in place of the originally mortgaged property only in the case of the plaintiff and the preliminary and the final decree.

But no further amendment of the consequential papers of the execution proceedings, that is, of the execution petition, sale proclamation and sale certificate can be allowed inasmuch as it would involve the result that property will have been bought and sold which has never been even put up for sale".

In this case, as in the present case before us, the partition was before the filing of the suit on the mortgage. The mortgage was at a time when the partition proceedings were proceedings, but the judgment does not show that in the Case before the Patna" High Court if the mortgagee was aware of the partition proceedings; whereas the mortgagee in the case before us, was admittedly aware of the partition proceedings inasmuch as the Common Manager and the Receiver appointed in the partition suit were made parties to the mortgage "suit. In the case in Maharaj Bahadur Singh and Others Vs. Surendra Narain Singh and Others, Chatrapat Singh and Others and Mr. A.H. Forbes and Others, , it was held : .

"A decree for the sale of a mortgaged property which was originally an undivided share in a mahal and was so described in the mortgage deed, but which was before the institution of the suit, formed into a separate Mahal, was passed describing the property as in the deed. On an application being made for amending the decree so as to give the new description of the mortgaged property, it was held that the Court had jurisdiction u/s 151, C. P. C., to amend the decree to prevent mockery and travesty of justice."

The learned Judges observed in the above case that it is correct that Section 152, Civil P. C. does not apply; but they had ample power u/s 151. From the judgment it is not clear whether in that case the application for amendment was made within 12 years of the date of the mortgage or whether the mortgagee had knowledge that the mortgage security formed into a separate mahal bearing a different Touzi number.

12a. These decisions, in my opinion, cannot be taken as authority for the position that where a mortgagee is aware of the pendency of the partition proceedings, and takes a mortgage after the partition suits are instituted, and the mortgage decree for foreclosure is made after the final decree in the partition suit and the Common Manager and Receiver are parties to the mortgage-suit, the mortgagee can subsequently apply for amendment of the foreclosure decree by substituting" the properties allotted to the share of the mortgagor.

13. Mr. G. C. Das, the learned counsel for the opposite party, contends that the

application for amendment is barred by time, under Article 181, Limitation Act. Article 181, Limitation Act prescribes that an application for which no period of limitation is provided elsewhere in the schedule or by Section 48, Civil P. C., should be filed within three years from the date when the right to apply accrues. Mr. G. C. Das contends that the right to apply accrued to the mortgagor admittedly at least when he could not take delivery of possession of the properties in lob No. 3 in the year 1938, and the application for amendment being an application for which no period of limitation is provided elsewhere, it falls under Article 181 and consequently it is barred by time.

Mr. S. C. Das relied upon a decision in -- Annada Prasad Mitra Vs. Sushil Kumar Mandal, , and contended that for these applications -there is no period of time fixed, and they do not come under Article 181. In Chat case the application for substitution was made in an execution proceeding, and the Calcutta High Court held that under those circumstances the application for substitution could not be treated as an application under Article 181, as the CPC does not provide for an application for substitution of a decree-holder, and" that Order 22, Civil P. C. does not apply to execution proceedings.

14. No doubt where the Court has power to act at any time either upon or within application, such power may be exercised even if an application is made by a party after the limited time. If the Court invokes its inherent jurisdiction u/s 151, Civil P C. in the ends of justice, then irrespective of the fact whether the Court acts suo motu or on an application, it is clear that limitation would not be taken into consideration.

Where the Court amends a decree which is not in conformity with the judgment, it can do so u/s 151 at any time, but no amendment ought to be allowed by the Court if it is inexpedient or inequitable to do so where third parties have acquired rights under the erroneous decree without knowledge of the circumstances which would tend to show that the decree was erroneous : See -- "Hatton v. Harris" 1892 AC 547: -- "Stewart v. Rhodes", 1900-1 Ch 386 (I); -- Pandurang Shridhar Pathak Vs. Narhar Pandurang Atre, ; -- "Narayana Aiyer v. Biyari Bivi" AIR 1923 Mad 57 (K) and -- "Langat Singh v. Janki Koer", 39 Cal 265 L..

In AIR1923 Mad 57 (K), it was held by the Madras High Court that :

"The exercise of the power to amend u/s 152, Civil P. C., is discretionary, and an application for amendment of the decree should be-rejected as too late, if the right of third parties acting in good faith is prejudiced, and a purchaser in sale held in execution of a decree which is subsequently sought to be amended is a necessary party to the application for amendment on the general principle that person whom it is desired to bind by proceeding can and must be impleaded in them and that the order allowing the amendment is not binding on him if he is not so impleaded."

In the course of the judgment it was observed:

"It is clear that if the amending Court, the District Court of Madura, had full facts before him, its duty should have been to refuse to use its power for plaintiff's benefit If the District Court had been aware of the real state of the case, it cannot be doubted that it would have refused to consider the application until at least defendant 3 had had notice of it."

In 39 Cal 265 L., it was observed that:

"The power to amend the decree so as to correct the clerical or arithmetical errors arising out of accidental slip or omission is inherent in Court; although a Court cannot exercise such power unless the error is of the description mentioned in Section 206 of the Code of 1882 (S. 152 of the present Code), and although the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired a right under an erroneous decree without the knowledge of the circumstances which would tend to show that the decree was erroneous".

15. In this case defendants 2 and 3 the subsequent alienees from defendant 1 of the properties allotted to him in lieu of item 6 of the mortgage were not parties to the amendment application. The amendment application was filed more than ten years after the final decree in the mortgage-suit. Defendants 2 and 3 whose alienations were made in 1937 and 1942, must have acted on the final decree as stood originally and therefore, their rights cannot be prejudiced by allowing this amendment specially when they are not parties to the amendment application.

As observed by the Madras High Court in AIR1923 Mad 57 (K), these facts were not before the learned Subordinate Judge and had he been aware of the subsequent alienations and the long lapse of time even after the attainment of the majority of the mortgagees, he would certainly have rejected the amendment application. In this view of the matter, I am of opinion that the application for amendment of the final decree is barred.

16. Defendant 1 also contended that) the application for substitution of the mortgagees in the place of their deceased father was made long after the death of the father. As already stated above, the two petitioners attained majority in 1942 and 1944, and the application was made in 1949. The application for substitution as plaintiffs in the final decree for foreclosure is an application under the CPC and as such it should be filed within three years after the death of their father or at least within three years after they "attained majority. In my opinion, therefore, the application for substitution is barred by time.

17. I would, therefore, set aside the order directing amendment of the final decree and allow the Civil Revision with costs. Hearing fee Rs. 50/-.

18. With regard to the First Appeal, it may be observed that the trial Judge dismissed the suit holding that it was not maintainable, and based his finding mostly on the fact that the amendment of the decree was allowed and it was pending in the Civil Revision in the High Court.

19. The main contention advanced by the learned counsel for the appellants is that the alienations in favour of delendants 2 and 3 are affected by the doctrine of lis pendens, and the suit being a suit for declaration of title and recovery of possession, they are entitled to a decree as far as defendants 2 and 3 are concerned.

He contends that the decree in a mortgage suit for foreclosure is not satisfied until the mortgagee obtains possession of all the properties. In this case, the decree is not satisfied as the mortgagees have not obtained delivery of possession of lot No. 6, and as they are entitled to proceed against the substituted property the decree remains unsatisfied as far as the substituted properties are concerned.

20. In this contention, two questions arise for determination: (1) whether the 11s continues till the date of alienations in favour of defendants 2 and 3, and (2) whether the suit for declaration of title is maintainable in view of the final decree for foreclosure having "already been passed in the year 1937, and whether the suit is in time.

21. It is settled law that the mortgagee is entitled to proceed against the substituted property land it is his only remedy. In the case of *Byjnath Lall v. Ramoodeen Chowdhry*, 1 Ind App 106 (PC) (M), their Lordships of the Judicial Committee of the Privy Council considered in detail the law as to the mortgagee's right to proceed against the substituted security. The facts of that case related to a mortgage of an undivided share by one of the cosharers and subsequent partition. Sir Montague E. Smith, delivering the judgment of the Judicial "Committee observed at p. 119 as follows:

"Now what was the subject of this mortgage?

It was an undivided moiety in two out of three villages forming a joint and undivided estate It is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages, but it is also clear that he could not by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of these shares to enforce a partition, and thereby to convert what was an undivided share of the whole into defined portion held in severally."

At p. 120 it is observed:

"Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer, who has no privity of contract with the other cosharers, would have no recourse against the lands allotted to such cosharers; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed."

And it was decided by the Judicial Committee that not only that he had a right to do so, but that this in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge and other parcel of the estate in the hands of any of the former cosharers. It follows, therefore, that the moment there is bona fide and final partition, the mortgagee of an undivided share prior to partition gets as his security under his mortgage only the properties which were allotted to the share of the mortgagor on partition. The mortgagee in this case being aware of the suit for partition and the final decree for partition ought" to have in the earliest moment proceeded against the substituted security, that is the suit property in the First Appeal. There can., therefore, be no doubt that the appellant is in law entitled to proceed against the suit property in exercise of his right as a mortgagee of an undivided share.

22. But what is exactly his remedy in the circumstances present in this case, is the bone of contention between the parties. The contention of defendants 2 and 3 is that after the alienations in their favour by defendant 1 of the suit property in 1937 and 1942, they became interested in the mortgage security, and therefore, they ought to have been added as parties in the mortgage suit for foreclosure or in execution of the decree.

Mr. Mukherji contends that they being not parties to the mortgage decree, the mortgage decree is invalid. The contention that the mortgage decree is invalid cannot be accepted. No doubt, a subsequent alienee is a necessary party under Order 34, Rule 1, Civil P. C. to a suit on the mortgage, but the alienations were subsequent to the final decree in the foreclosure suit.

The defence open to the subsequent alienee of the mortgaged property cannot be that the mortgage decree is invalid, but the defence can be that he is entitled to redeem the mortgage, and that a suit for possession is not maintainable against him, and that in that suit he cannot be asked to redeem as defendant.

A number of decisions were cited by both the parties on this question but the law on the subject is clearly laid down in the Pull Bench case of Ram Sanahi Lal T. Janki Prasad AIR1931 All 465 (N) and Ganga Prasad Singh Vs. Mt. Ganeshi Kuer and Others, . It is laid down in this case that:

"Although Order 34, Rule 1 lays down that all persons interested in the equity of redemption are necessary parties, that rule is a mere rule of procedure, and not of substantive law and is subject to the provisions of Order 1, Rule 9 which lays down that as far as possible no suit is to fail on account of non-joinder of party, and that the omission, therefore, to implead a person interested in the mortgaged property does not make the whole suit defective and proceedings null and void."

In the Patna case after a full discussion of the law on the subject, it) was held that if the person who has been left out in the mortgage action was in possession or is entitled to possession on that date as the representative of the equity of redemption or the person in whom the equity of redemption lay in full, then the

sale in his absence cannot be binding on him and he cannot be forced to redeem." In the case before, us, defendants 2 and 3 are not One representatives in full of the equity of redemption at the time when mortgage suit was filed. But if the suit is otherwise maintainable. Mr. Mukherji's contention that & separate suit on she mortgage has to be filed against his clients is correct.

23. Mr. S. C. pass contention is that the alienation was made during the pendency of the suit on his mortgage, and that the alienations were affected by the doctrine of lis pendens. He accordingly contends that as he could not obtain delivery of possession of the mortgaged property, as far as item No. 6 is concerned, the decree for foreclosure still remains unsatisfied and the lis continues in a mortgage suit till the satisfaction of the mortgage decree.

Both parties cited a number of decisions bearing on the subject as to the period during which the lis continues, but it is not necessary to consider all the decisions in view of the amendment of Section 52, Transfer of Property Act in 1929. According to that amendment, it is enough for, the attraction of the doctrine of lis pendens that the alienation is made during the pendency in any Court having authority in British India or established beyond the limits of British India by the Governor General in Council of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question; and the explanation which was newly added in 1929 to Section 52 specifically says that:

"For purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

Under the amended section, therefore, there is no doubt that the mortgage suit for foreclosure was pending till the date of the alienations in favour of defendants 2 and 3 Inasmuch as a portion of the decree for possession remained unsatisfied. But the latter clause of the explanation has to be taken into consideration in determining the maintainability of the suit. Can it be said that the satisfaction of the decree for foreclosure has be-come unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

24. The last execution application was closed in the year 1938 when the decree-holder could not obtain possession of item No. 6 of the properties mortgaged. He ought to have filed an execution application within three years of that date against the substituted properties.

Mr. Das contends that he could not have proceeded in execution against the substituted properties as defendants 2 and 3 were not parties to the suit for

foreclosure, and consequently, his only remedy was by filing a suit for declaration of his title to the substituted properties and for recovery of possession as he has entitled to proceed against those properties by virtue of his mortgage decree and that as the alienations were affected by *lis pendens*.

25. No doubt, there is a decision of the Bombay High Court in the case of Basappa Budappa Halavalad Vs. Bhimangowda Shiddangowda Patil, in which it was held that:

"A transferee during the pendency of a suit of the property in suit is bound by the decree of the suit, and that the transferee *pendente lite* cannot be representative of the transferor within the meaning of Section 47, Civil P. C. for the purpose of attacking the decree-holder's right to sue."

In that case it was held that:

"A suit can be filed by the decree-holder for recovery of the property which was the subject-matter of the decree in the hands of the transferee *pendente lite* by filing a separate suit, and such a suit was not barred by virtue of Section 47, Civil P. C."

The Bombay decision was based upon the decision of the Judicial Committee in *Piayaz Hussain Khan v. Prag Narain* 29 All 339 (PC) (Q). It was a suit by a decree-holder to recover possession of certain properties which were the subject-matter of alienation *pendente lite*. The defendant was the appellant before the Judicial Committee, and the appeal was dismissed by their Lordships. But the question for consideration in that case was whether the alienation was affected by *lis pendens*, and that as the defendant knew all about the mortgage before he became a purchaser, his appeal could not succeed. The question whether the suit was barred by virtue of Section 47, Civil P. C. was not raised in that case, and was not the subject-matter of that decision. In the case of AIR 1937 260 (Privy Council) , it was held by the Judicial Committee that:

"Where the mortgagor transfers the mortgaged property pending the suit for foreclosure on the mortgage and the transferee takes actual possession of the same, the mortgagee-decree-holder on the making of the final decree can proceed to execute the decree against the transferee for recovery of possession of the property transferred to him, inasmuch as the transferee is on account of the transfer *pendente lite* a representative-in-interest of the mortgagor-judgment debtor and is bound by the decree passed against him."

In the course of the judgment his Lordship Sir Shadi Lal who delivered the judgment of the Judicial Committee observed:

"The dispute between the appellant and the decree-holders related to the execution of the decree and as he was the representative of the Judgment-debtor, the Court executing the decree had jurisdiction u/s 47, Civil P. C. to determine the dispute."

In the case of Nishi Kanta Shaha Mondal and Others Vs. Kumar Promotha Nath Roy and Others, , it was held by a Division Bench of the Calcutta High Court that a lessee inducted on the land by the Judgment-debtor pending litigation to a representative of his judgment-debtor within the meaning of Section 47, Civil P. C., and is bound by the decree passed against the judgment-debtor. In the case of Lakshminayana v. Hanumayya, 1937 Mad 580 (AIR V 24) (T) a single Judge of the Madras High Court held that:

"The question regarding "the delivery of the mortgaged property between mortgagee-decree-holder and purchaser of the mortgaged property pendente lite is one u/s 47, Civil P. C., and therefore, the mortgagee-decree-holder is barred from filing a suit against the purchaser of the mortgaged property pendente lite in possession especially when he was aware of the purchase even, during the pendency of the suit."

This is also consonant with the principle underlying the doctrine of lis pendens, the sole object of which is to put an end to the necessity of the successful decree-holder to sue against the alienee. Turner L. J. in the leading case of Bellamy v. Sabina, 1857-44 ER 842 (849) (U) observed:

"It is, as I think, a doctrine common to the Courts both of law and equity, and rests, as I apprehend upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant alienating before the judgment or decree and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."

Lord Cranworth in the same case observed in his judgment as follows:

"It is scarcely correct to speak of lis pendens as affecting a purchaser "through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation, it affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

These decisions are clear authority for the position that the transferee pendente lite is a representative of the judgment-debtor, and that the decree-holder can proceed and ought to proceed for recovery of possession by execution of his decree, if he is a representative of the judgment-debtor and the decree-holder can proceed against him in execution, it follows a fortiori that a separate suit for recovery of possession cannot lie.

The plaintiffs' suit, therefore, though the alienation in favour of defendants 2 and 3 was during the pendency of the mortgage suit, is not maintainable as his remedy lies in proceeding by way of execution to get possession of the suit property, and the satisfaction of the decree has become unobtainable under explanation to Section 52, Transfer of Property Act, and in this view of the

matter, the alienations in favour of defendants 2 and 3 cannot be said to be affected by the doctrine of lis pendens, though that explanation clearly says that the lis continues as long as the execution can be obtained.

26. Mr. Mukherjee then contends that if the mortgagee who obtained a final decree for foreclosure wants now in this suit to get possession of the substituted security, he must show that the suit is within 12 years from the date of the mortgage or, from the date fixed for payment of the mortgage money. According to that view of the matter, Mr. Mukherjee contends, the present suit is barred by time.

The necessity of considering this contention would arise only if it be held that the mortgage is entitled, after the final decree for foreclosure, to file a suit for declaration of his title over the substituted security in the hands of defendants 2 and 3. As my finding is that the suit is not maintainable this contention does not arise for decision. The other questions whether the alienations in favour of defendants 2 and 3 are supported by consideration and they are bona fide purchasers for value do not arise for consideration.

27. For the reasons stated above, I am of opinion that the suit is not maintainable and ought to be dismissed. The appeal is therefore dismissed with costs.

Narasimham, J.

28. I agree.