

(1912) 12 CAL CK 0028
In the Calcutta High Court

Tinoodhan Chatterjee by his Guardian, Khetra N. Chatterjee	APPELLANT
Vs	
Trilokya Saran Sanyal	RESPONDENT

Date of Decision : 13-12-1912

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : 18 Ind. Cas. 177

Hon'ble Judges : Richardson, J;N. Chatterjea, J

Bench : Division Bench

Judgement

1. The facts of the case out of which this appeal arises are as follows: The property in suit belonged to two brothers, Rajendra and Kedar. The latter, without any authority from Rajendra, mortgaged the entire property to the defendant. A suit was brought by the defendant on the mortgage on the 11th January 1904 against the heirs of Kedar (Kedar having died in the meantime), which was decreed on compromise. In execution of the decree, the property mortgaged was sold on the 6th October 1904 and the sale was confirmed on the 11th November 1904. In the meantime, the rights of Kedar and his brother Rajendra in the property were sold in execution of a decree which was in effect a money decree on the 16th June 1904 and were purchased by the pro forma defendant, Upendra Ganguly, who sold the same to the plaintiff in December 1907. The plaintiff brought this suit for declaration of his right to, and recovery of, possession of the 8-annas share which belonged to Rajendra, and for redemption of the other half which belonged to Kedar if the mortgage was found to be genuine and bona fide.

2. The defendant pleaded that the property belonged to Kedar alone and that the plaintiff having purchased pendente lite was bound by the mortgage decree and the sale held thereunder.

3. The Court of the first instance found that the property belonged to the two brothers Rajendra and Kedar and that the plaintiff, therefore, was entitled to possession of the half share which belonged to Rajendra, and was entitled to redeem the other half share which belonged to Kedar as the decree was collusive

and the doctrine of lis pendens did not apply. On appeal, the lower Appellate Court confirmed the decree so far as Rajendra's share was concerned and allowed mesne profits which had not been allowed by the first Court. So far as the share of Kedar was concerned, it held that the mortgage decree was brought about by Kedar's heirs by practising imposition upon the Court to which, however, the defendant was no party, and that the doctrine of lis pendens did not apply to the case, and accordingly directed redemption of the 8 annas share on certain terms agreed upon by the Pleader on both sides. The defendant No. 1 has appealed to this Court and the following contentions have been raised on his behalf:

- (i) that the doctrine of lis pendens applied to the plaintiff's purchase and he was debarred from redeeming the share which belonged to Kedar.
- (ii) That the facts found in this case do not justify the finding that the decree was obtained by fraud,
- (iii) That no decree for mesne profits ought to have been given with respect to Rajendra's share, at any rate, for any period beyond three years before the suit.

4. This last contention may be disposed of at once. The plaintiff is not entitled to any mesne profits for any period beyond three years before the suit and this is not disputed by the respondent. There is no reason, however, why the plaintiff should not get mesne profits in respect to Rajendra's share to which the defendant has acquired no title by his purchase and which had been unjustly withheld from the plaintiff by the defendant.

5. The principal contention on behalf of the defendant-appellant is whether the doctrine of lis pendens applies to the plaintiff's purchase. The suit upon the mortgage was instituted on the 11th January 1901 and was decreed on the 14th July. Plaintiff's predecessor-in-title purchased the property on the 16th June 1904. There is no doubt, therefore, that plaintiff purchased the property at a time when a suit on the mortgage was pending. It was a suit upon a simple mortgage for sale of the mortgaged property and it was contended on behalf of the respondent that such a suit is not one in which any right to Immovable property was directly and specifically in question within the meaning of Section 52 of the Transfer of Property Act. But a mortgage is the transfer of an interest in Immovable property and a suit upon a mortgage for sale of the mortgaged property necessarily involves a question of right to Immovable property. In the case of *Bazayet Hossein v. Dooli Chund* 5 I.A. 211; 4 C. 402 it was held by the Privy Council that a purchaser during the pendency of a suit in which the creditor obtains a decree for payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, is affected by the doctrine of lis pendens. No doubt, in the case relied upon by the respondent, *Upendra Chandra Singh v. Mohri Lal Marwari* 31 C. 745 there are observations which indicate that in the opinion of the learned Judges, a suit for recovery of money due upon a mortgage bond by sale of the Immovable property mortgaged therein is not a

suit in which a right to Immovable property is directly and specifically in question, but as pointed out in a later case, *Durga Prasad v. Madho Prasad* 8 C.L.J. 153 the learned Judges in the case of *Upendra Chanara Singh v. Mohri Lal Marwari* 31 C. 745 placed more reliance on the word "contentious," than on the word "right to Immovable property," in Section 52 and it was held in *Durga Prasad v. Madho Prasad* 8 C.L.J. 153 that a suit on a mortgage was, undoubtedly, covered by Section 52 of the Transfer of Property Act. The Privy Council in the case of *Faiyaz Husain Khan v. Munshi Prag Narain* 34 I.A. 102; 11 C.W.N. 561; 4 A.L.J. 344; 5 C.L.J. 563; 17 M.L.J. 263; 9 Bom. L.R. 656; 2 M.L.T. 191; 29 A.C. 339 (P.C.); 10 C.G. 314 applied the doctrine of *lis pendens* to a purchase pending a suit upon a simple mortgage. This contention on the part of the respondent must, therefore, be overruled.

6. The purchase made by the plaintiff's predecessors-in-title was at a sale held in execution of a decree, but the Privy Council has repeatedly applied the doctrine of *lis pendens* to a purchase at an execution sale and the question may now be considered as set at rest. See *Radhamadhub Holdar v. Manohur Mukerjee* 15 I.A. 97; 15 C. 756, *Moti Lal v. Karrbuldin* 24 I.A. 170; 25 C. 179; 1 C.W.N. 639 and *Faiyaz Hussain Khan v. Munshi Prag Narain* 34 I.A. 102; 11 C.W.N. 561; 4 A.L.J. 344; 5 C.L.J. 563; 17 M.L.J. 263; 9 Bom. L.R. 656; 2 M.L.T. 191; 29 A.C. 339 (P.C.); 10 C.G. 314.

7. The main point, which was argued in this case, was whether the doctrine of *lis pendens* applies to a purchase made during the pendency of a suit where such suit is subsequently compromised and a decree is passed in pursuance of such compromise. Section 52 of the Transfer of Property Act provides that during the active prosecution 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 decree or order which may be made therein. The Privy Council, in the case already cited, *Faiyaz Hussain Khan v. Munshi Prag Narain* 34 I.A. 102; 11 C.W.N. 561; 4 A.L.J. 344; 5 C.L.J. 563; 17 M.L.J. 263; 9 Bom. L.R. 656; 2 M.L.T. 191; 29 A.C. 339 (P.C.); 10 C.G. 314 held that they were unable to agree in the view which seemed to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of Section 52 of the Transfer of Property Act until a summons is served on the opposite party. Though the case does not directly decide the question now before us, it decides that a suit contentious in its origin and nature is a contentious suit within the meaning of Section 52 of the Transfer of Property Act. Generally speaking, any suit, in which there is a question to be decided between two or more persons and which is not a collusive proceeding, is a contentious suit, and we agree with the view taken by Sir Lawrence Jenkins, C.J., as to the nature of a contentious suit in the case of *Krishnappa bin Venkareddi v. Shivappa bin Timareddi* 31 B. 393 at p. 398; 9 Bom. L.R. 530 where he observed as follows: "Speaking generally, I should be disposed to say that every real suit, to which the CPC applies, is *prima facie* contentious; for if we turn to the Code, we find as the essentials of a suit,

opposing parties, a subject in dispute, a cause of action, and a demand of relief. The degree or absence of resistance on the part of the defendant before the Court can make no difference in this respect." In that case, it was held that a suit was contentious although the decree passed therein was ex parte. A Full Bench of the Madras High Court, in the case of Annamali Chettiar v. Malayandi Appaya Naik 29 M. 426; 1 M.L.T. 145; 16 M.L.J. 372 held that a purchaser pendente lite is bound by a consent decree overruling the case of Vythinadayyan v. Subramanya 12 M. 439 in which a contrary view was taken. In our Court, the decisions in the case of Naduroonissa Bibee v. Aghur Ali Chowdhry 7 W.R. 103; Raj Kishen Mookerjee v. Radha Madhub Holdar 21 W.R. 349 and Mandhor Chowdhuri v. Haryhar Dutta 3 Shomea Report 23 support the view that a purchaser pendente lite is bound by a consent decree. The point, however, does not appear to have been argued in the first two cases.

8. The same view has also been taken in the recent decisions of this Court. See Durga Prasad v. Madho Prasad 8 C.L.J. 153; Motilal Pal v. Preo Nath Mara 9 C.L.J. 96 and Tangor Majhi v. Jaladhar Dowari 14 C.W.N. 322; 5 Ind. Cas. 691. In the first case, however, the decree was passed independently of the compromise by some of the defendants and in the second the purchase was made long after the compromise decree and the question, therefore, did not arise. In the third case, it was held that lis pendens would apply without any discussion on the point.

9. Reliance was placed on behalf of the respondent, mainly on the case of Kailas Chandra Ghose v. Fulchand Jahuri 8 B.L.R. 474; 2 W.R. Sup. 523. In that case, Couch, C.J., in considering the liability of a purchaser pendente lite, observed "Then the question is by what proceedings in the suit is he bound? Is he bound by the proceedings which arise from the nature of the suit, and from the case set up and the relief prayed for in the bill, or is he to be bound by any order which the Court may be induced by the parties to make in the course of the suit? I can find no authority which goes to the extent of saying that, because he does not think fit to become a party to the suit, he is to be bound by any order whatever that may be made. It seems to me that he ought only to be bound by the proceedings which, from the nature of the suit and the relief prayed, he might expect would take place." The consent order which had to be considered in that case was one made after decree in a suit for partition and accounts, for a sale of a portion of the property to provide for costs of the suit and all that was laid down was that a purchaser pendente lite is not bound by any order whatsoever which the Court may be induced to make in the course of the suit without reference to the nature of the suit, the case set up and the relief prayed for in the plaint. The case was decided on the ground that the person, who invoked the doctrine of lis pendens, had full notice of the claim of the purchaser pending the suit and Couch, C.J., said that if there had been no notice it might have been necessary to determine what was the precise effect of lis pendens. It does not lay down that in no case a purchaser pendente lite is bound by a consent order. In fact, in the case of Raj Kissen Mookherjee v. Radha Madhab Holdar 21 W.R. 349 Couch, C.J., himself applied the doctrine of lis pendens to a purchase pending a suit in which

a consent decree was passed.

10. Similar remarks apply to the case of *Kasimmunnissa Bibee v. Nilratna Bose* 8 AC. 79; 9 C.L.R. 173; 10 C.L.R. 113 in which the observations of Couch, C.J., were followed. There in a suit brought by the representative of a member of a Hindu, family against the manager for partition and accounts, a decree was passed directing accounts to be taken and by a subsequent order a part of the estate was directed to be sold. The plaintiff, claiming under a mortgage pending these proceedings but before the last mentioned order was made, was held not affected by the order for sale. The order for sale does not appear to have been made by consent and the doctrine of *lis pendens* was held inapplicable on the ground that the purchaser is bound only by proceedings which might be expected to take place in the suit.

11. These two cases do not decide the precise point now before us and they were decided before the Transfer of Property Act which formulates the doctrine of *lis pendens*.

12. In the case of *Kishory Mohan Roy v. Muhammad Mujaffar Hossein* 18 C. 188 the learned Judges abstained from pronouncing any decision upon the question whether a purchaser pendente lite is bound by a consent decree, and although they made as observation that if the matter had been untouched by authority, they would have felt inclined to answer the question in the negative, it was obiter. In that case, the observations of Couch, C.J., were applied, but the final order of the Court which had to be considered in that case was that the case be struck off.

13. These cases, therefore, do not support the broad contention raised on behalf of the respondent, viz., that a purchaser pendente lite cannot be bound by any consent order. The contention proceeds upon the assumption that a suit in order to be contentious must be contested in all its stages till its final determination. But the origin and nature of a suit determines its contentious or non-contentious character, and a contentious suit is obviously one in which a party having difference with another puts the law in motion as against the other. A suit does not cease to be contentious, for example, where the defendant abandons his defence, and if the argument of the respondent were well founded, there can be no *lis pendens* in a case terminating in a decree *ex parte*, or where the defendant abandons the defence originally set up; and the defendant, in an action after transferring the property in suit, has merely to abandon his defence or fail to appear or enter into a compromise and thus compel the plaintiff to bring a fresh action against the transferee--a result completely at variance with the principle on which the doctrine of *lis pendens* is founded. That principle, in the words of Lord Justice Turner in the case of *Bellamy v. Sabine* 1 De. G. & J. 563; 9 S.E.C. (o.s.) 71; 118 R.R. 228; 44 Eng. Rep. 842; 26 L.J. Ch. 797; 3 Jur. (N.S.) 913; 6 W.R. 1 rests upon the 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's 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."

14. There is no reason why the doctrine should be inapplicable, for example, to a suit upon a mortgage for sale of the mortgaged property, where only the amount claimed is reduced by consent of parties and the usual mortgage decree is passed merely because it is a consent decree and not founded on adjudication by the Court after trial.

15. Having regard to the statutory rule of lis pendens as contained in Section 52 of the Transfer of Property Act, and to the meaning of the word "contentious" as explained by the Privy Council and in some recent cases in this country, we are of opinion that the mere fact that a suit is terminated by a consent decree does not take the suit out of the operation of the doctrine of lis pendens enunciated in Section 52 of the Transfer of Property Act.

16. No doubt, a purchaser pendente lite is not bound by a decree obtained by fraud or collusion, but in the present case, the facts found are that the suit on the mortgage was not collusive and assuming the defendant in that suit concealed material facts from the Court, the mortgagee was not to blame. It is true, at the time of the compromise, the rights of Kedar's daughter to the property had already passed to the plaintiff and Kedar's daughter entered into a compromise by which the entire property including the share of Rajendra which Kedar had no right to mortgage was to be sold in execution of the decree which was to be passed, Kedar's daughter being absolved from personal liability. But if there was fraud, there is nothing to show that the mortgagee was a party to it. The mortgagee gave up a portion of his claim and agreed to a decree for a lesser sum on condition that the property mortgaged was to be sold forth with, the defendant being absolved from personal liability. This agreement cannot be said to be unlawful in any way, and half the consideration which the mortgagee received has proved to be illusory. The decree passed upon the compromise was not inconsistent with the nature of the suit. We are of opinion that the doctrine of lis pendens applies to the plaintiff's purchase, and he is not entitled to redeem the 8-annas share of the property which belonged to Kedar.

17. The second contention raised on behalf of the appellant must also prevail. Upon the finding arrived at by the lower Appellate Court that the defendant was no party to any fraud, the decree in the mortgage suit cannot be held to be fraudulent.

18. The decree of the District Judge will accordingly be varied so far as it relates to Rajendra's share only to this extent, that plaintiff will not get mesne profits, (so far as the period prior to the suit is concerned) for more than three years before the date of the suit. So far as Kedar's share is concerned, plaintiff's suit will be dismissed, each party bearing his own costs throughout.