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"The season for which an enhanced rent was claimed for this land is that, commencing 5th June 1870, as shown by the notice, dated December 1870, which claims enhanced rent for the season 1870-71. Cultivation would commence after the "*mrigsál*" of 1871 or June 5th, and this notice was, therefore, *about six months previous* to the season for which enhanced rent was claimed."

The appeal was argued before WEST and PINHEY, J.J., on 30th March 1874.

Shántárám Náráyan for the appellant.

WEST, J. :—The finding of the District Judge on the fifth issue is fatal to the claim set up by the plaintiff and exempts us from the necessity of discussing the other issues sent down to the District Court. He could not, by a notice given in December 1870, entitle himself to enhanced rent for the then current year 1870-71. The decree of the District Court must, therefore, be amended, and the plaintiff be awarded Rs. 40 as the rent of two years at the previously established rates minus Rs. 9-2-6 found by the Lower Courts to have been paid as *názár chauthái* by the defendants on account of the plaintiff. The defendants admitted the claim to this extent and appear to have been always willing to pay what was due. The plaintiff must, therefore, pay their costs throughout.

[APPELLATE CIVIL JURISDICTION.]

April 8.

Special Appeal No. 406 *of* 1872.

BA'LA'JI GANESH..................*Defendant and Appellant.*
KHUSHA'LJI, SON AND HEIR OF
BAHIROJI.....................*Plaintiff and Respondent.*

Lis Pendens.—Mortgage—Possession—Priority—Possession under a subsequent mortgage created during the pendency of a suit by a prior mortgagee.

A sale or mortgage *pendente lite* is invalid as against the plaintiff and the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff in the pending suit, to the party who be-

comes a purchaser or mortgagee during the pendency of the suit whether or not the purchaser or mortgagee *pendente lite* has knowledge of the prior sale or mortgage as to which the litigation is pending or of the litigation itself.

Kasim Shaw v. *Unodapersad Chatterjee* (a) and *Manual Fruval* v. *Sanapalli Latchmidevamma* (b) followed.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, reversing the decree of the Subordinate Judge of Tasgaum.

The appeal was argued before Westropp, C.J., and Melvill, J.

Dhirajlál Mathurádás (Government Pleader) for the appellant.

Shántárám Náráyan, contra.

The facts of the case and the arguments used on both sides fully appear from the following judgment delivered by—

WESTROPP, C.J. :—This suit was brought by the plaintiff, Khushâlji, to recover from the defendant, Báláji, possession of a house situated at Tasgaum in the Collectorate of Satara.

The original owner, Rávji Kassâi bin Rághu, upon the 12th of November 1858, mortgaged the house to the plaintiff, who commenced, against his mortgagor Rávji, upon the 25th of February 1860, a suit upon that mortgage for possession, and obtained in the Munsiff's Court, on the 25th of April 1860, a decree awarding to him such possession. That decree was reversed in appeal, and the cause was remanded for trial. Upon the 15th November 1861, the plaintiff obtained against Rávji a fresh decree from the Munsiff for possession. In the period intervening between the plaintiff's first decree (25th April 1860) and his last decree (15th November 1861), Rávji mortgaged the same house to the present defendant Báláji upon the 11th May 1861, and let Bálájí into possession. Neither the mortgage to the plaintiff nor that to the defendant Bálájí was registered. The plaintiff having, on the 17th September 1868, instituted the pre-

(a) 1 Hyde 160. (b) 7 Mad. H. C. Rep. 104.

sent suit against Bálájі for possession, the Subordinate Judge of Tasgaum dismissed the suit on the ground that Báláji's mortgage having been accompanied by possession was preferable to that of the plaintiff, notwithstanding its being prior in date. The District Judge reversed the decree of the Subordinate Judge and decreed that, if Báláji did not pay the amount of the plaintiff's decree against Rávji with costs, the house should be sold, and the proceeds of the sale applied in payment of the plaintiff's claim. Báláji has filed the present special appeal against that decree. Upon a special issue, the District Judge has found that, at the time of the execution by Rávji of the mortgage of the 11th May 1861, neither Báláji nor his father Ganesh Tátiá had any knowledge of the plaintiff's mortgage of the 12th November 1858, nor of the suit brought by the plaintiff against Rávji on that mortgage.

The question then is, whether the mere fact that the mortgage of 1861 was executed and possession under it given by Rávji to Báláji during the pendency of the plaintiff's suit against Rávji, to which suit Báláji was never made a party, invalidates that mortgage, albeit with possession, as against the plaintiff who has never had possession.

For the plaintiff, it was contended that, as well under Sec. 223 of the Civil Procedure Code as under the ordinary rule of equity, independently of that code, the defendant Báláji having accepted the mortgage of 1861 *pendente lite*, did so subject to the plaintiff's claim.

For the defendant, it was argued that, until the passing of Bombay Act III. of 1863, Satara was not subject to the Civil Procedure Code; and that the defendant being a mortgagee for valuable consideration without notice of the plaintiff's mortgage or of his suit, and with possession, had a superior equity to the plaintiff, both by English and Hindu law.

To the English Statute 2 Vic. C. 11 (which provides that a *lis pendens*, unless duly registered, shall not affect a purchaser without express notice) there is not any analogous enactment in this country.

In England, before that Statute, if there had been a close and uninterrupted prosecution of the suit, a purchaser *pendente lite*, although for a valuable consideration and without notice, was bound by the decree (c). A mortgagee is *pro tanto* a purchaser.

In the well known case, *Bellamy* v. *Sabine* (d), cited by Mr. Shântârâm Nárâyan for the plaintiff and heard in 1857 by Lord Cranworth, C., and Lords Justices Knight Bruce and Turner, the effect of *lis pendens* was much discussed. Lord Cranworth said: "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. Where a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence." After referring to *Culpepper* v. *Aston* (e), *Sorrell* v. *Carpenter* (f), and *Garth* v. *Ward* (g), he says: "The language of the Court in these cases as well as in *Worsley* v. *The Earl of Scarborough* (h) certainly is that *lis pendens* is implied notice to all the world. I confess I think that is not a perfectly correct mode of stating the doctrine.

(c) The cases are collected in 2 White and Tudor L. C. 47, 48; 1st ed.

(d) 1 De Gex & Jo. 566, 578, 584, S. C. 26 L. J. Ch. 797 N. S.

(e) 2 Ch. Ca. 115, 221.

(f) 2 P. Wms. 482.

(g) 2 Atk. 174.

(h) 3 Atk. 392.

What ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to Courts of Equity. In the old real actions the judgment bound the lands, notwithstanding any alienation by the defendant *pendente lite* (*i*), and certainly that did not depend on any principle arising from implied notice." Lord Justice Turner said: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. 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'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."

The maxim is *Pendente lite nihil innovetur* (*j*). Sir Thomas Plumer, M.R., in *Metcalfe* v. *Pulvertoft* (*k*) says that "the true interpretation of this rule is, that the conveyance does not vary the rights of the parties in the suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be interminable, if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act, therefore, of the defendant cannot vary the situation or affect the right of the plaintiff."

(*i*) See Co. Lit. 344, b.; 2 Inst. 376.

(*j*) Co. Lit. 344, b; 2 Inst. 376; 1 Story Eq: Jur. § 405, § 406; *Trye* v. *The Earl of Aldborough*, 1 Ir. Chan. Rep. 666; *Guskell* v. *Durden*, 2 Ball and B. 167; *Going* v. *Farrell*, Beatty 472.

(*k*) 2 Ves. & B. 200, 205.

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The doctrine of *lis pendens* and the limits of it are very fully discussed in the cases of *Metcalfe* v. *Pulvertoft*; *Bellamy* v. *Sabine* (*l*); *The Bishop of Winchester* v. *Paine* (*m*); Sugden's Vend. and Pur. 1044 *et. seq.* 11th ed. (*n*); and 2 Spence Eq. Jur. 705, 706.

The reasoning contained in the passages already quoted from the judgments in *Bellamy* v. *Sabine*, shows that it matters nought whether he who becomes a purchaser or mortgagee *pendente lite* has knowledge of the prior sale or purchase as to which the litigation is pending or of the litigation itself, and also shows that the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff to the party who becomes a purchaser or mortgagee during the pendency of the suit.

In *Kasim Shaw* v. *Unnodapersaud Chatterjee* (*o*), Mr. Justice Wells, quite irrespectively of Sec. 223 of the Civil Procedure Code, applied the doctrine of *lis pendens* to natives of this country. He spoke of it as "an equitable principle of universal application," and undoubtedly applicable to natives, and see per Holloway, J., to the same effect in *Mrs. Maria Varden Seth Sam* v. *Appundi Ibrahim Saib* (*p*). The general doctrine is very fully discussed by him in that case. It has been adopted also in Calcutta by Norman and Seton Karr, JJ., in *Umamoyi Burmoneea* v. *Tarini Prasad Ghose* (*q*), and by Peacock, C.J., and Bayley and Kemp JJ., in *Hunooman Doss* v. *Koomeroon-nissa* (*r*) without any reference to Sec. 223 of the Civil Procedure Code. The case of *Manual Fruval* v. *Sanagapalli Latchmidévamma* (*s*) decided in 1872 at Madras by Kernan and Kindersley

(*l*) 1 De Gex and Jo. 566. (*m*) 11 Ves. 194.

(*n*) And see Ibid pp. 673, 1013; and 2 Ball and Beatty 186 and 32 Beavan 615.

(*o*) 1 Hyde 160. (*p*) 6 Mad. H. C. Rep. 80.

(*q*) 7 Calc. W. R. 225 Civ. Rul.

(*r*) Calc. W. R. Spec. No. from 1862 to 1864 F. B. 40.

(*s*) 7 Mad. H. C. Rep. 104.

JJ., is directly in point here. The principle laid down in *Bellamy* v. *Sabine* was applied, and it was held that it was immaterial whether or not the purchaser *pendente lite* had notice, and that he could not question the decree.

In *Krishnáppá Mahádáppá* v. *Bahiru Yádavráv* (t), some doubt was expressed as to the extent to which the rule of *lis pendens*, as stated in 1 Story Eq. Jur. 405, ought to be applied in India. In plac. 406, Story seems to base that rule upon the doctrine of notice. Neither *Bellamy* v. *Sabine*, nor the case in Hyde's Reports, appears to have been mentioned to the Court. It was, however, held there that a puisne mortgagee, who obtained possession of the lands under a decree in a suit against the mortgagor during the pendency of an earlier suit brought against the mortgagor by the prior mortgagee, could not maintain that possession against the decree in the last mentioned suit. The actual decision in that case, therefore, does not in any respect conflict with the doctrine laid down in *Bellamy* v. *Sabine* and the cases in 1 Hyde's Reports and in 7 Mad. H. C. Reports. The present case is a stronger one against the later mortgagee, for not only was his possession obtained, but his mortgage also was granted *pendente lite*.

We have not overlooked *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (u), which was the case of a purchase under an attachment upon a decree, which purchase was made pending a foreclosure suit upon a mortgage and the purchase was upheld. But there the attachment, under which the sale took place, was anterior even to the execution of the mortgage upon which the foreclosure suit was founded. The title, therefore, of the purchaser was paramount to any title that could be acquired under the decree in the foreclosure suit. That case, then, has not any bearing upon the present case.

Inasmuch as we think that the ordinary rule of *lis pendens* as acted upon in the cases in 1 Hyde and in 7 Madras H. C.

(t) 8 Bom. H. C. Rep. A. C. J. 55.

(u) 14 Moo. Ind. App, 101, S. C. 8 Beng. L. R. 122,

Rep. must be applied here, it is not necessary that we should give any opinion as to whether Sec. 223 of the Civil Procedure Code could, having regard to the chronology of the events in this case, be applied to it, or as to the construction of that section, or the effect of Sec. 230 upon it.

The mortgage of 1861 to the defendant Báláji having been executed, and the possession under it given, during the pendency of the plaintiff's suit on the mortgage of 1858, the mortgage of 1861 must be deemed to have been taken subject to the claim of the plaintiff, as ultimately established by him, on the 15th November 1861, by the decree of that date.

The District Judge has virtually held that to be so, but he has decreed a sale of the house in satisfaction of the plaintiff's claim, and has not made any provision as to the disposal of the surplus proceeds, if any, after the discharge of that claim, viz., as to whether they should be made over to the mortgagor or to the puisne mortgagee Báláji. The plaintiff did not by his plaint ask either for a decree of foreclosure or of sale, and the mortgagor not being a party to this suit, and no decree for foreclosure or sale having been made against him in the suit brought by the plaintiff against the mortgagor, but only a decree for possession under the mortgage of 1858, the District Judge had not power to make any such decree for sale in this suit as he did, but merely a decree for possession, thus giving effect to and not going beyond the decree obtained against the mortgagor. We must, therefore, vary the decree of the District Judge by cancelling so much of the same as directs a sale, and by ordering that possession of the house in the plaint mentioned be forthwith delivered over by the defendant Báláji to the plaintiff, and by directing that the defendant Báláji do pay the costs of the suit and of both appeals.

MELVILL, J. :—I entirely concur in this judgment, and will only add, with reference to the observations made by me in *Krishnáppá Mahadáppá* v. *Bahiru Yádavráv* (*supra*), that I am inclined to think that I gave undue effect to the omission

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in Sec. 230 of Act VIII. of 1859 of certain words contained in Sec. 223. I mean the words "or some person claiming under a title created by the defendant subsequently to the institution of the suit." It would appear that no person can become a plaintiff under Sec. 230, unless he is in a position to dispute the right of the decree-holder *to dispossess him under the decree;* and it is clear from Sec. 223 that a purchaser *pendente lite* cannot dispute that right.

March 13.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 399 *of* 1873.

SADA'SHIV A'NANT ... ... *Appellant.*
VITHAL A'NANT ... ... *Respondent.*

Mortgage of a village without specification of boundaries—Accretion—Redemption.

Where a village, without specification of boundaries, is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as a security with any casual increase or decrease which may occur to it; and is, on the other hand, subject to its redemption by the mortgagor to the same extent.

THIS was a special appeal from the decision of H. F. Parsons, Assistant Judge at Ratnagiri.

This was a suit for redemption of a certain share in the village of Mugij. When the mortgage of the share was effected, the village was described as a whole, and no boundaries were specified. Since the mortgage, additions had been made to the village by the Survey Officers; and the only question in the cause for determination was whether the mortgagor was entitled on redemption to obtain possession of the village with or without these additions.

Both the Courts answered this question affirmatively, and gave the plaintiff a decree accordingly.

The special appeal was heard by WEST and PINHEY, JJ.

V. N. Mandlik for the special appellant.

Dhirajlál Mathurádás, Government Pleader, for the special respondent.