

1887

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## APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice  
Nanabhai Haridas.

VENKATESH GOVIND (Original Plaintiff), Appellant v. MARUTI  
(Original Defendant), Respondent.\* [5th September, 1887.]

*Lis pendens*—Mortgage—Purchase, without notice, of land declared liable for mortgage-debt by a decree.

In 1864, A. mortgaged four shops to the plaintiff's father. Subsequently, however, A's father brought a suit, and obtained a decree declaring that two of these shops were not included in the mortgage. In 1869 the plaintiff's father (the mortgagee) sued A upon the mortgage, and prayed in the same suit that certain other land not included in the mortgage-deed might be held liable for his debt in lieu of the two shops. He obtained a decree on the 29th November, 1869, which ordered Rs. 1,291 to be paid "on the liability of the land in the plaint mentioned." No steps were taken by the plaintiff to execute this decree for seven years. On the 18th August, 1876, A. sold to the defendant, by a registered deed of sale, a portion of the land so declared liable, and the defendant entered into possession without notice of the plaintiff's decree. The plaintiff now sued to obtain a declaration, that the land was liable to be sold in execution of his decree of 1869. Both the lower Courts dismissed his suit. On appeal to the High Court,

*Held*, that the defendant was a purchaser for value, without notice of the plaintiff's decree, and took the land unaffected by the plaintiff's equitable lien created by the decree. There was no *lis pendens*. The *litis contestatio* had ceased. The decree, which was a final one, had terminated the litigation between the parties, and now only remained to be executed. There was, moreover, in this case the further circumstance that nothing had been done in the suit after the decree and during the seven years which elapsed between it and the defendant's purchase in 1876.

[R., 23 A. 331; 22 B. 939; 9 Ind. Cas. 840; 19 P.L.R. 1904; 52 P.L.R. 1908=45 P. W.R. 1908.]

THIS was a second appeal from a decision of G. Druitt, Acting District Judge of Kanara.

[218] By an unregistered deed, dated the 15th August, 1864, one Apaya mortgaged four shops to the father of the plaintiff. Subsequently, however, Apaya's father brought a suit, and obtained a decree declaring that two of the shops, which had been mortgaged by Apaya, were not subject to the mortgage. In 1869 the father of the plaintiff (the mortgagee) sued Apaya on the mortgage, and in the same suit prayed that certain other land not included in the mortgage might be declared liable for the mortgage-debt, in lieu of the two shops. He obtained a decree on the 29th November, 1869, by which Rs. 1,291 and interest from the date of the plaint were ordered to be paid "on the liability of the land in the plaint mentioned."

No steps were taken by the plaintiff to execute the decree. On the 18th August, 1876, Apaya sold a portion of this land to the defendant, who had no notice of the plaintiff's decree. The defendant obtained possession, and got his sale-deed registered.

The plaintiff—his father having died—now sued to have it declared that the land was liable to be attached and sold in execution of the decree obtained by him in 1869.

\* Second Appeal No. 397 of 1885.

The defendant contended that the land was not included in the mortgage, on which the plaintiff's decree was passed; that the mortgage-deed obtained by the plaintiff's father was not registered, and that he (the defendant) was in possession under a registered deed of sale passed by Apaya.

Both the lower Courts dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

*Ghanasham Nilkanth Nadkarni*, for the appellant:—The plaintiff's decree of 1869 had bound the land, no part of which could be alienated before the decree had been fully executed. The defendant's purchase was a purchase *pendente lite*. Litigation comes to an end with the execution of a decree; until that time it operates as notice.

*Shamrav Vithal*, for the respondent:—The purchase by the defendant is unaffected by the decree of the plaintiff. He was a purchaser for value without notice. The doctrine of *lis pendens* cannot apply to the present case. To constitute *lis pendens* there [219] must be a continuous prosecution of a suit: see *White and Tudor's Leading Cases*, Vol. II, p. 79. Act IV of 1882 adopts in s. 52 the same principle. The sale to the defendant was in 1876, and the plaintiff not having taken steps to execute the decree of 1869, cannot now impeach the defendant's purchase. Even if the decree be considered as creating a charge on the land in question, the defendant's purchase cannot be affected, his title having been completed by possession. Here is an equitable lien of the plaintiff as against the defendant's legal title.

#### JUDGMENT.

SARGENT, C.J.—In this case one Apaya mortgaged four shops to plaintiff's father on the 15th August, 1864—the bond not being registered. Apaya's father subsequently obtained a decree declaring that two of the shops were not liable to the mortgage, and in 1869, plaintiff's father sued on the mortgage-bond, and also prayed that certain land not included in the mortgage might be held liable for the debt in lieu of the two shops. A decree was passed on the 29th November, 1869, by which Rs. 1,291 and interest from date of plaint were ordered to be paid "on the liability of the land in the plaint mentioned." On the 18th August, 1876, Apaya sold a portion of this land to defendant, who obtained possession from Apaya without notice of the plaintiff's decrees. This sale-deed was registered.

The Acting Judge held, on the authority of *Kanu Khandu v. Krishna Bhulaji Shet* (1), that the defendant's deed of sale was entitled to preference. In that case the ordinary decree in a suit on a mortgage-bond had been passed for the recovery of the money from the mortgaged property; but it was held that the decree could not have the effect of possession under the mortgage; and that a subsequent purchaser, without notice of the decree or mortgage, had a preferable right, and obtained a title free from the mortgage lien. It has, however, been contended before us that, although a decree may not, of itself, be notice, there was, in the present one, a *lis pendens* until execution of the decree of 1869. That decree, directing that the plaintiff should recover the mortgage-debt "on the liability of the land mentioned in the [220] plaint," is virtually, although not in form, the same as is made in every suit to enforce an existing mortgage. The

(1) 5 B.H.C.R. A.C.J. 147.

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only difference being that the decree in this case would have to be executed by attachment and sale. In Sugden on Vendors and Purchasers, p. 760, it is said: "Decrees are not notice to a purchaser, but the *lis pendens* is not terminated where the decree does not put an end to the suit." But in *Kinsman v. Kinsman* (1), Lord Lyndhurst says: "In order that there may be a *litis pendentia* there must be a continuance of *litis contestatio*," and the case of a decree for account in an administration or creditors' suit is an illustration of this proposition. In *Higgins v. Shaw* (2), Lord St. Leonards says: "A decree for account does not put an end to a suit; it is a continuance of the litigation, and, consequently, the suit operates as notice to all the purchasers." Here, however, the decree was a final one; the litigation between the parties, which had for its subject the liability of other property than what was contained in the mortgage-bond for the payment of the mortgage, was terminated by the decree, which only remained to be executed against that property. In other words, the *litis contestatio* had ceased.

The cases cited for the plaintiff are not in point. In the Privy Council decision in *Bazayet Hossein v. Dooli Chund* (3), it is not plain whether the mortgage-bond was executed after the decree in the suit instituted by the widow Tayyuban; but, assuming it to have been so, the decree directed an account to be taken, which brings it within the class of cases above mentioned. In *Ravji Narayan v. Krishnaji Lakshman* (4), the plaintiff purchased under a common money-decree, and, therefore, subject to the previous mortgage and decree, and the question whether there was *litis pendentia* after decree did not arise. But, apart from the above considerations, there is in the present case the further circumstance that nothing was done in the suit after the decree and during the seven years which elapsed between it and the date of defendant's purchase in 1876. In *Kinsman v. Kinsman* (1), Lord Lyndhurst says: "Without going so far as to say with [221] Lord Bacon that there must be a constant and vigorous prosecution of the suit, still something must be done to keep it alive and in activity"—and again "there must be a continuous *litis contestatio*." The suit in which the decree of 1869 was passed cannot, therefore, in our opinion, affect the defendant's title as a *lis pendens*. The defendant was a purchaser for value without notice of the plaintiff's decree, which created the lien on the land from Apaya, who was in possession at the time, and he, therefore, takes unaffected by the plaintiff's equitable lien created by the decree.

We must, therefore, confirm the decree with costs.

*Decree confirmed.*

(1) 1 Russ. & M. 632.  
(3) 4 C. 409.

(2) 2 Dr. & War. 361.  
(4) 11 B.H.C.R. 139.