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desired it, of acting on that notice by receiving from the defendant as managing Khot what the plaintiff would be entitled to receive if the tenancy by sufferance had continued.

Neither of the Courts below has approached the case from this point of view. The lower Appellate Court has rejected the plaintiff's claim on the ground that the tenancy ceased on the expiry of the kabulayat. That, for the reasons above set forth, is erroneous. We must, therefore, reverse the decree and remand the case for disposal with reference to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

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December 16.

BYRAMJI JAMSETJI (ORIGINAL DEFENDANT), APPELLANT, v. CHUNILAL LALCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Lis pendens—Court-sale—Auction-purchaser—Applicability of the rule of lis pendens to a purchaser at an execution sale.

The rule of *lis pendens* applies to purchasers at execution sales.

SECOND appeal from the decision of E. M. Pratt, District Judge of Ahmednagar, confirming the decree passed by Ráo Sáheb Kashidas Narayendas Dalal, Joint Subordinate Judge of Ahmednagar.

Suit by a purchaser at a Court-sale for possession of the property purchased.

The property in question originally belonged to one Sitabai. She mortgaged it to the plaintiffs on the 22nd April, 1891.

In 1897 the plaintiffs sued Sitabai on the mortgage (Suit No. 612 of 1897) and on the 31st May, 1898, obtained a decree for sale. In execution of this decree the property was sold; and the plaintiffs (the mortgagees) purchased it with the leave of the Court.

Meantime, however; and while the above suit was pending, a creditor obtained a money decree against Sitabai and in

* Second Appeal No. 400 of 1902.

execution attached and sold the said property on the 17th November, 1897.

At this sale the defendant purchased and immediately afterwards took possession.

Subsequently the plaintiffs attempted to take possession, but were resisted by the defendant. They therefore applied to the Court under section 335 of the Civil Procedure Code (Act XIV of 1882), but failing in that application they filed this suit to recover possession from the defendant.

The Subordinate Judge passed a decree for the plaintiffs and ordered that the possession of the property should be given to them, holding that though the defendant had purchased at a Court-sale he was affected by the doctrine of *lis pendens*.

On appeal the District Judge confirmed this decree.

The defendant appealed to the High Court.

Ráo Bahádur Vasudev J. Kirtikar, Government Pleader, and *R. W. Desai*, for the appellant (defendant):—The rule of *lis pendens* does not apply to Court-sales: see *Lalu v. Kashibai*⁽¹⁾; *Kasumunnissa v. Nilratna*.⁽²⁾ In *Dinendronath v. Ramkumar*⁽³⁾ the Privy Council makes a distinction between a private sale and a Court-sale. The rulings, therefore, relating to private sales cannot be applied to Court-sales. See also *Itakshmandas v. Dasrat*.⁽⁴⁾

Branson (with him *B. A. Bhagvat*) for the respondents (plaintiffs):—An auction-purchaser at a Court-sale is affected by the doctrine of *lis pendens*: see *Dinonath v. Shama Bibi*⁽⁵⁾; *Sukhdeo Prasad v. Jamna*⁽⁶⁾; *Shivjiram v. Waman*.⁽⁷⁾

Aston, J.:—The plaintiff house belonged to one Sitabai, who mortgaged it to respondents in April, 1891. The respondents on 31st May, 1898, obtained, in Suit No. 612 of 1897, a decree against their mortgagor Sitabai for sale of the mortgaged house, and at the Court-sale held in execution of the said decree they

(1) (1886) 10 Bom. 400.

(2) (1881) 8 Cal. 79.

(3) (1881) 7 Cal. 107.

(4) (1880) 6 Bom. 168 at p. 173.

(5) (1900) 28 Cal. 23.

(6) (1900) 23 All. 60.

(7) (1897) 22 Bom. 939.

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purchased the right, title and interest of Sitabai in the said house.

Meanwhile during the pendency of the respondent's mortgage suit.No. 612 of 1897 against Sitabai, the appellant had, at a Court-sale held in execution of a money decree obtained by a creditor against Sitabai, purchased the right, title and interest of Sitabai in the said house as existing at the date of the attachment of the said house in the creditor's suit in which the money decree was passed.

There is no express finding by the lower Courts whether this attachment in the money suit was placed soon after, or just before, the institution of the mortgage suit No. 612, but it is not in dispute that the attachment was long after the house had been mortgaged by Sitabai to the respondents.

The respondents and the appellant are thus rival purchasers at different Court-sales of Sitabai's equity of redemption, and this suit No. 714 of 1900 was brought by respondents after an unsuccessful obstruction, removed in Miscellaneous Application No. 99 of 1900, to recover possession of the plaint house from the appellant who had obtained possession.

The Court of first instance, applying the doctrine of *lis pendens* to the rival Court-sales, decided that the title of the respondents is superior to that of the appellant and awarded the respondents' claim for possession. The lower Appellate Court confirmed this decree.

At the hearing of this second appeal it was argued for the appellant, first, that the doctrine of *lis pendens* does not apply to a Court-sale; secondly, that the question whether the plaint house was attached in the money suit before mortgage suit No. 612 of 1897 was instituted is material and should have been decided; thirdly, that the question whether the mortgage by Sitabai to the respondents was without consideration and, therefore, the mortgage decree collusive and fraudulent, is material in the present suit and should have been decided.

Taking these points in order :

In the well-known case of *Bellamy v. Sabine* ⁽¹⁾ Lord Cranworth said: "Where a litigation is pending between a plaintiff and a

(1) (1857) 1 De Gex, & J. 566.

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."

The doctrine of *lis pendens* is discussed in the Bombay cases of *Balaji v. Khushalji* ⁽¹⁾ and *Gulabchand v. Dhondi*, ⁽²⁾ where it is applied to private sales.

In *Ravji Narayan v. Krishnaji*, ⁽³⁾ where there were rival purchasers at different Court-sales, the doctrine of *lis pendens* was held clearly applicable. In the latter case Westropp, C.J., said: "But further, if there had not been any decree in the mortgage suit, the mere fact that that suit, which had been instituted in 1866, was pending in 1868, would have in itself been sufficient to defeat the plaintiff's present suit. His purchase in 1868" (at a Court-sale in execution of a money decree) "having been made *pendente lite* was completely subject to any decree which might be made in the mortgage suit."

In a later Bombay case, *Parvati v. Kisansing*, ⁽⁴⁾ the dispute was between a Court-purchaser Kisansing who, in the execution of a money decree against one Ramapa, had bought a house as the property of Ramapa, and on the other side a decree-holder Parvati who had obtained a decree against Ramapa declaring her right to reside in the house. There had been an attachment placed in the money suit prior to Parvati's suit, but the Court-sale under the money decree was during the pendency of Parvati's suit to declare her right to possession. It was held that what Kisansing bought at the Court-sale under the money decree was the right, title and interest of Ramapa, which being

(1) (1874) 11 Bom. H. C. R. 24.

(3) (1874) 11 Bom. H. C. R. 139.

(2) (1873) 11 Bom. H. C. R. 64.

(4) (1882) 6 Bom. 567.

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subject to the decree in Parvati's pending suit, the purchase by Kisansing at the Court-sale was likewise subject to the same, and the circumstance that a prior attachment had been placed on the house made no difference. Therefore, Kisansing could not eject Parvati during her lifetime.

The last two cases were not followed in *Lalu v. Kashibai*,⁽¹⁾ where in the judgment delivered by Birdwood, J., a distinction is sought to be drawn between private sales and Court-sales. The differences therein dwelt upon do not appear to touch the true foundation of the rule of *lis pendens* as laid down in the leading case of *Bellamy v. Sabine*⁽²⁾ or the reasoning contained in the passages quoted therefrom and adopted by Westropp, C.J., in *Balaji v. Khushalji*.⁽³⁾ It is not necessary to pursue this point further, because whatever doubts may have been cast by the judgment of Birdwood and Jardine, J.J., upon the correctness of the view taken in the earlier decisions in *Ranji Narayan v. Krishnaji*⁽⁴⁾ and *Parvati v. Kisansing*⁽⁵⁾ already cited, that the rule of *lis pendens* applies to Court-sales, are fully removed by the decisions of the Privy Council in *Radhamadhub Holdar v. Monohur Mukerji*⁽⁶⁾ and *Moti Lal v. Karrabuldin*,⁽⁷⁾ as well as by the provisions of section 52 of the Transfer of Property Act (IV of 1882), so that it may now be taken as settled law that the rule of *lis pendens* is applicable to Court-sales.

The second contention for the appellant, that his title would be superior to that of the respondents if the plaintiff's house was attached in the money suit against Sitabai prior to the suit or decree on the mortgage (No. 612 of 1897), is disposed of by the remark of their Lordships of the Privy Council in *Moti Lal v. Karrabuldin*⁽⁸⁾: "attachment, however, only prevents alienations; it does not confer title."

The respondent's right as a mortgagee existed before the attachment. "It was, therefore, unaffected by it": see *Parvati v. Kisansing*.⁽⁹⁾ It may here be pointed out that *Anundo v.*

(1) (1886) 10 Bom. 400.

(5) (1882) 6 Bom. 567.

(2) (1857) 1 De Gex. & J. 566.

(6) (1888) L. R. 15 I. A. 97; 15 Cal. 756.

(3) (1874) 11 Bom. H. C. R. 24.

(7) (1897) 25 Cal. 179.

(4) (1874) 11 Bom. H. C. R. 139.

(8) *Ibid* p. 185.

(9) (1882) 6 Bom. at p. 570.

Dhonendro,⁽¹⁾ which was a case of a purchase under an attachment upon a decree, has no application to this case, for there the attachment under which the sale took place was anterior to the mortgage upon which the mortgage suit was founded.

There remains, lastly, the contention that appellant should have been allowed to prove that the mortgage on which the decree was passed against Sitabai in the *lis pendens* (No. 612 of 1897) was without consideration. This was a plea which, if true in fact, Sitabai could have and ought (see section 13, Civil Procedure Code) to have set up in the *lis pendens* as a ground of defence. The appellant claims through Sitabai and is bound by the decree passed in the mortgage suit No. 612 of 1897 (the *lis pendens*) against her: see the decisions of the Privy Council in *Radhamadhub v. Monohur*⁽²⁾ and *Moti Lal v. Karrabuldin*⁽³⁾ already cited, and appellant bought the plaint house subject to such decree as might be passed in the *lis pendens*. The contention now set up is, therefore, barred as *res judicata* (see section 13, Civil Procedure Code, and *Chenvirappa v. Puttappa*⁽⁴⁾) and it is not open to the appellant to raise it in this suit.

For the above reasons the decree of the lower Appellate Court is confirmed with costs on the appellant.

Decree confirmed.

(1) (1871) 14 M. I. A. 101.
(2) (1888) L. R. 15 I. A. 97.

(3) (1897) 25 Cal. 179.
(4) (1887) 11 Bom. 708.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BALA (ORIGINAL PLAINTIFF), APPELLANT, v. SHIVA AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS.*

*Mortgage—Suit for redemption—Burden of proof on plaintiff—Evidence
—Proof of specific mortgage.*

The plaintiff sued for redemption and to recover possession of certain lands, alleging that they had been mortgaged to the ancestors of the defendants about

* Second Appeal No. 428 of 1901.

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December 10.