

the minor. There is no reason to suppose that the Collector was not acting in good faith—that, in other words, he arranged for and agreed to a colourable transfer with no intention that the transferors should really part with their rights. The transfer was not merely of the share of the respondent's judgment-debtor. The mother and the grandmother also relinquished their shares. It is not suggested that these two were involved in debts at the time or had any motive of defeating or delaying any present or future creditors. The fact that they joined the respondent's judgment-debtor in the relinquishment is additional proof of the *bond fides* of the transaction. The evidence, no doubt, shows that since the relinquishment the minor's mother and grandmother have been in physical possession of the property and that they, not the Collector, have paid the taxes. But that circumstance is not sufficient to throw suspicion on the good faith of the transferee, who in this case was the Collector acting for the minor. As mother and grandmother respectively of the minor, it is but natural that they have been allowed by the Collector to live with her.

For these reasons we must reverse the decree of the Subordinate Judge and reject the claim with costs throughout on the respondent.

R. R.

Decree reversed.

FULL BENCH.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Chandavarkar and Mr. Justice Aston.

SHIVLAL BHAGVAN (ORIGINAL PLAINTIFF), APPELLANT, v. SHAMBHU-PRASAD PARVATISHANKAR, DECEASED, AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

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April 18.

Decree on mortgage against minors—Sale in execution—Reversal of decree in appeal—Attachment in execution of a money-decree—Title of the purchaser in execution of the decree on the mortgage—Lis pendens—Stay of execution.

* Second Appeal No. 514 of 1904.

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A certain house belonged to a joint family consisting of two brothers Nathubhai and Dayabhai and their cousin Bhagubhai. A mortgage of the house was said to have been effected by Bhagubhai during the minority of his two cousins. The mortgagee got a decree for the recovery of the mortgage-debt from the mortgaged property. An appeal was presented on behalf of the minors on the ground that they were not bound by the decree and pending the appeal the mortgaged property was sold in execution of the decree and purchased by the defendants' father. Then the appeal came on and the decree was varied as to the minors by dismissing the suit against them and their property.

Subsequently the plaintiff obtained a money-decree against Nathubhai and attached in execution thereof what he claimed to be his judgment-debtor's $\frac{1}{4}$ th share in the house. The attachment was, however, raised at the instance of the defendants who relied on their father's Court-purchase and contended that the judgment-debtor Nathubhai had no claim to the house. The plaintiff, thereupon, brought the present suit for a declaration affirming his right to attach.

Held, confirming the decree which dismissed the suit, that the title of the defendants' father as purchaser at the Court-sale must prevail. Though the decree on the mortgage was varied in appeal by dismissing the suit as against the minors and their property, still as the defendants' father purchased in execution of the decree pending the appeal, his title could not be impugned in the absence of fraud, collusion or any other disqualifying circumstances.

Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan,⁽¹⁾ *Tomney v. White*,⁽²⁾ referred to.

The doctrine of *lis pendens* does not defeat a purchaser under a decree or order for sale when the *lis pendens* is the very suit in which that decree or order is passed. The doctrine rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party.

Bellamy v. Sibine,⁽³⁾ *Wigram v. Buckley*,⁽⁴⁾ referred to.

Where an appeal is presented from a decree directing the sale of property in dispute in a suit, then the only course is to take such steps as will secure that, by stay or otherwise, no detriment shall be suffered by the appellant in case the appeal succeeds.

SECOND APPEAL from the decision of H. L. Hervey, District Judge of Surat, confirming the decree of Chimanlal Lallubhai, First Class Subordinate Judge.

A firm styled Lalubhai Vanmalidas had for its members one Bhagubhai Parmanandas and his two paternal cousins Nathubhai *alias* Dwarkadas and Dayabhai Gangabhai. The two latter were minors. All three were members of a joint Hindu family. A

(1) (1887) 10 All. 166.

(3) (1857) 1 De G. and J. 566.

(2) (1850) 3 H. L. C. 49.

(4) (1894) 3 Ch. 433.

certain house belonging to the joint family was alleged to have been equitably mortgaged by Bhagubhai to a firm called Motiram Jagjivandas who filed a suit, No. 141 of 1891, in the Court of the First Class Subordinate Judge of Surat, to recover the mortgage-debt by sale of the mortgaged property. Nathubhai and Dayabhai represented by their guardian and mother, Bai Kashi, were joined as co-defendants to the suit. Their defence was that the mortgage was not binding on them. The First Court passed a decree on the 7th November 1891 against the mortgaged property and other estate belonging to the family. Against the said decree the minors preferred an appeal, No. 167 of 1891, to the District Court at Surat and applied for stay of execution of the decree, but the execution was not stayed owing to their failure to furnish the requisite security. While the appeal was pending the house was sold in execution and was purchased by the defendants' father Parvatishankar Durgashankar on the 18th June 1892 at the auction-sale which was confirmed on the 23rd August following. On the 3rd February 1893 the District Court varied the decree by dismissing the suit against the minors' share in the property. The auction-purchaser took possession of the house on the 20th February 1893. At the time of the auction-sale there were two other decrees outstanding against the joint family, namely, (1) No. 311 of 1890 and (2) No. 300 of 1891. The first decree, No. 311 of 1890, which was dated the 9th November 1891, was obtained by a firm called Chhaganlal Ranchoddas for Rs. 7,589-12-9 on a mortgage-bond executed by Bhagubhai. The mortgage-deed did not comprise the house in dispute. The decree, amongst other things, directed the sale of the estate of the minors and of the firm for the realization of the mortgage-debt. The minors appealed against the said decree to the High Court which, on the 13th August 1894, decided, in appeal No. 46 of 1892, that with the exception of the mortgaged property the shares of the minors were not liable. The other decree, No. 300 of 1891, which was a money-decree and was dated the 28th November 1891, was obtained by the auction-purchaser Parvatishankar Durgashankar. In the suit he sought to recover Rs. 3,699 from the minors as well as from Bhagubhai but the decree was passed against Bhagubhai alone and the suit was dismissed as against the minors.

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After the decision of the District Court in appeal No. 167 of 1891, mentioned above, the mother of the minors as their guardian brought a suit, No. 253 of 1893, in the Court of the First Class Subordinate Judge of Surat, to set aside the auction-sale of the 18th June 1893, or in the alternative to recover possession of the minors' share in the house or to recover Rs. 7,500 as the value of that share. The suit was dismissed on the grounds that it was not a suit for general partition and that the plaintiff should have proceeded under section 244 of the Civil Procedure Code (Act XIV of 1882). The minors' mother, thereupon, made an application, No. 7 of 1895, for setting aside the sale and to recover possession of the minors' share in the house or to recover their share in the proceeds of the sale. The First Court ordered payment of Rs. 1,589 to the minors including interest. This order was passed on the 7th March 1896. The minors as well as the decree-holder preferred cross appeals, Nos. 34 and 37 of 1896, to the District Court which on the 7th June 1897 reversed the order of the First Court and dismissed the application on the ground that the auction-purchaser had not purchased the house in execution of his own money-decree.

Afterwards the minors on attaining majority preferred an application, No. 9 of 1899, to the First Class Subordinate Judge of Surat on the 6th January 1899, for the recovery of Rs. 2,694-14 from the decree-holder in suit No. 141 of 1891, as the value of their share in the house. The First Court, on the 11th August 1899, granted the application by awarding to the applicants Rs. 2,322-13-0. The decree-holder appealed to the District Court which, on the 23rd September 1901, confirmed the order of the First Court. The decree-holder, thereupon, preferred a second appeal, No. 515 of 1901, to the High Court which (Jenkins C. J. and Chandavarkar J.) reversed the order on the 7th January 1902 holding:—

In our opinion the proceeding is misconceived. The decree of this Court in appeal (No. 46 of 1892, dated the 13th August 1894, referred to above) decided that the present respondents' (that is, the minors who subsequently attained majority) interest was not bound by the mortgage. The result is that this interest could obviously not be affected by any sale under a decree on the mortgage and the proper remedy is to sue for possession of that interest.

While the above proceedings were going on the present plaintiff got a money-decree, No. 8 of 1900, against Nathubhai *alias* Dworkadas, since deceased, and others and in execution attached a quarter share in the house as belonging to his judgment-debtor Nathubhai. The attachment was, however, raised at the instance of Shambhuprasad, one of the sons of the auction-purchaser Parvatishankar Durgashankar. The plaintiff, thereupon, brought the present suit for a declaration that he was entitled to attach and sell his judgment-debtor Nathubhai's share in the house.

Defendant 1 Shambhuprasad contended that the decree on which the suit was based was not a real and *bond fide* decree; that the various suits, appeals and other proceedings mentioned in the plaint were not binding on him; that his father purchased the whole house at the Court-sale for valuable consideration and *bond fide* and his title became absolute on the confirmation of the sale; that Bai Kashi, the mother and next friend of Nathubhai and Dayabhai, had filed a suit, No. 253 of 1893, against the defendants' father and others to set aside the sale and that suit having been dismissed the present claim had become *res judicata*; that the suit could not be maintained until the sale was legally set aside; that the claim was time-barred and that the plaintiff's judgment-debtor had no right in the house. The defendant having died pending suit, his widow, Bai Samrat, was brought on the record.

Defendant 2 Chunilal Parvatishankar, brother of defendant 1, who was subsequently joined, raised almost the same defences.

The Subordinate Judge found that the suit was not barred under Article 12, Schedule II of the Limitation Act (XV of 1877), inasmuch as it was one for a declaration filed within one year from the date of the order made under section 280 of the Civil Procedure Code (Act XIV of 1882) and not for setting aside the Court-sale; that it was barred as being *res judicata* by reason of the decision in suit No. 253 of 1893 and was also barred by the conduct of the judgment-debtor, that the plaintiff's judgment-debtor had a quarter share in the house in dispute at the time of the auction-sale which was binding on that share; and that the plaintiff was not entitled to any relief. He, therefore, dismissed the suit.

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On appeal by the plaintiff the Judge held that the suit was time-barred, that the claim was *res judicata*, and that the suit was not maintainable without seeking to set aside the Court-sale of the 18th June 1892. He, therefore, confirmed the decree.

The plaintiff preferred a second appeal.

(Originally the second appeal was heard by Jenkins C. J. and Aston J. who expressed a desire that it should be heard by a Full Bench. The case was, therefore, argued before a Full Bench composed of Jenkins C. J. and Chandavarkar and Aston JJ.)

G. S. Rao appeared for the appellant (plaintiff):—Our suit has been rejected on three grounds, namely, limitation, *res judicata*, and the auction-sale being not set aside, the suit cannot lie.

We contend that the doctrine of *lis pendens* applies to sales in execution as well as to private sales. There is an agreement of all the High Courts and the Privy Council on the point, *Byramji v. Chumilal*⁽¹⁾, all authorities are reviewed in this case, *Gobind Chunder Roy v. Guru Churn Kurmohar*,⁽²⁾ *Moti Lal v. Karabuldin*.⁽³⁾

[CHANDAVARKAR, J. :—In these cases the purchasers were outsiders and were not parties to the suits.]

We submit that the present case stands on a stronger footing than the case of a purchaser being an outsider. In the case of a money-decree the doctrine of *lis pendens* would not apply because there is no property which is the subject-matter of the suit. The doctrine applies where there is a dispute with respect to the title to immoveable property, *Bellamy v. Sabine*.⁽⁴⁾

[JENKINS C. J. :—Was it not necessary to get the execution-sale postponed ?]

We submit that that circumstance would not affect the doctrine of *lis pendens*, *Metcalf v. Pulvertoft*,⁽⁵⁾ *Gulabchand v. Dhondi*,⁽⁶⁾ *Sukhdeo Prasad v. Jamna*.⁽⁷⁾ It was not necessary to get an injunction staying the execution-sale. The litigant parties are entitled to proceed as if no such alienation had taken place,

(1) (1902) 27 Bom. 266.

(2) (1887) 15 Cal. 94.

(3) (1897) 25 Cal. 179.

(4) (1857) 1 De G. and J. 563.

(5) (1813) 2 Vesey and Beames, 200 at p. 205.

(6) (1873) 11 Bom. H. C. R. 64.

(7) (1900) 23 All. 60 at p. 65.

Sugden on Vendors and Purchasers (14th edition), Ch. 24, p. 758; Story on Equity Jurisprudence (2nd edition), p. 263, sec. 406; *Indurjeet Kooer v. Pootee Begum*,⁽¹⁾ *Chunder Koomar Lahoree v. Gopce Kristo Gossamee*.⁽²⁾ Section 52 of the Transfer of Property Act is wide enough to cover a case like the present.

Our next point is that the purchaser having purchased the property subject to the decision of the appeal, the interest of the minors was not affected by the sale and they are entitled to recover it from the purchaser. Our contention is supported by the decision of this Court in second appeal, No. 515 of 1901⁽³⁾, decided on the 7th January 1902.

Our suit has been dismissed on the ground of *res judicata* by reason of the decision in suit No. 253 of 1893. We contend that the said decision cannot operate as *res judicata* because that suit was decided upon a preliminary point. The Court, no doubt, laid down findings on several issues in the case but those findings were not necessary for the determination of the case; nor can the order in application No. 7 of 1895 operate as a bar to the present suit because that application was dismissed on the ground that section 294 of the Civil Procedure Code did not apply.

As to limitation we submit that Article 12,* Schedule II of the Limitation Act, does not apply, *Vishnu Keshav v. Ramchandra Bhaskar*.⁽⁴⁾ The sale did not affect the minors' interest, therefore, there was no sale at all with respect to it.

N. V. Gokhale appeared for respondent 2 (defendant 2) :— The question of *lis pendens* was not raised in the lower Courts. The plaintiff, who now for the first time in second appeal claims the benefit of that doctrine, was himself the decree-holder. What the plaintiff wants is a declaration that the property which he had attached under his money-decree was not liable to sale under the decree on the mortgage. Such a case is not covered by section 52 of the Transfer of Property Act, *Kailas Chandra Ghose v. Fulchand Jaharri*,⁽⁵⁾ Sugden on Vendors and Purchasers (14th edition), pp. 759, 760. The doctrine of *lis pendens* does not apply

(1) (1873) 19 W. R. 197.

(3) Unreported.

(2) (1873) 20 W. R. 204.

(4) (1886) 11 Bom. 130.

(5) (1871) 8 Beng. L. R. 474 at p. 478.

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between co-defendants and it cannot be extended to persons who were not parties to the suit, *Mead v. Lord Orrery*.⁽¹⁾ Section 2 (d) of the Transfer of Property Act must be read along with section 52, and when so read, the latter section cannot apply. The term alienation means a private sale and not a Court-sale, *Gourmoney Dabee v. Reed*.⁽²⁾ As the auction-sale took place some months before the date of the decree in appeal, the auction-purchaser ought to have been joined as a party to the appeal, Story's Equity Pleadings (8th edition), pp. 340-342.

The cases relied on with respect to the doctrine of *lis pendens* are distinguishable on the principal ground, among others, that the alienations therein were private alienations. The rulings of this Court are not unanimous on the point. The earliest case of this Court in this connection is *Krishnappa v. Bahiru*.⁽³⁾ In this case the assistance of the doctrine of *lis pendens* was invoked; still it refers to other circumstances independently of the doctrine. Our contention that the doctrine does not apply is supported by *Labu Mulji v. Kashibai*.⁽⁴⁾ Owing to the failure to stay the sale pending the appeal, the sale took place under a valid and subsisting decree and the auction-purchaser acquired a perfectly legal title which cannot now be impeached, *Pranjivan v. Bajru*,⁽⁵⁾ *Indurjet Kooer v. Pootee Begum*,⁽⁶⁾ *Malkarjun v. Narhari*.⁽⁷⁾

[CHANDAVARKAR, J. :—In the last case the sale was held to be irregular but not a nullity.]

The observations in *Chitambar v. Krishnappa*⁽⁸⁾ support our contention, see also *Sukhdeo Prasad v. Jamna*,⁽⁹⁾ *Mukhoda Dassi v. Gopal Chunder Dutta*.⁽¹⁰⁾ There is no distinction between the case of a purchaser under a money-decree and that under a mortgage-decree, *Rewa Mahton v. Ram Kishen Singh*.⁽¹¹⁾

In suit No. 253 of 1893 all the issues arising in the case were raised and findings were recorded. One of the issues in that case

(1) (1745) 3 Atk. 235 at p. 243.

(6) (1873) 19 W. R. 197.

(2) (1851) 2 Taylor and Bell, pp. 113, 114.

(7) (1900) 25 Bom. 357.

(3) (1871) 8 Bom. H. C. R., A. C. J. 55.

(8) (1902) 26 Bom. 543.

(4) (1886) 10 Bom. 400.

(9) (1900) 23 All. 60.

(5) (1879) 4 Bom. 34.

(10) (1899) 26 Cal. 734.

(11) (1886) 14 Cal. 18.

related to the auction-purchaser's title and it was held that his title could not be questioned. Therefore the decision in that case operates as *res judicata*.

[CHANDAVARKAR, J. :—But there was no final adjudication on the merits. The suit was disposed of on the ground that the plaintiff ought to have proceeded under section 244 of the Civil Procedure Code.]

We submit that when matters are put in issue and the findings on the issues are given, the adjudication is complete whether the findings are embodied in the decree or not, *Peary Mohun Mukerjee v. Ambica Churn Bandopadhyaya*.⁽¹⁾

The suit is also barred by reason of the decision in application No. 7 of 1895.

As no suit was brought under Article 12, Schedule II of the Limitation Act, to set aside the auction-sale so far as the interests of the minors were concerned, the present suit is time-barred. The younger minor attained majority in January 1899 and the present suit was brought in July 1902.

Manmukhram K. Mehta appeared for respondent 1 (defendant 1) :—Before the appeal on the mortgage-decree was decided the auction-purchaser had already acquired interest in the property, therefore, he ought to have been made a party to the appeal. If he had been made a party he would have got an opportunity to show that the mortgage was valid and binding on the minors.

Neither the doctrine of *lis pendens*, nor section 52 of the Transfer of Property Act apply to the present case. At the time of the auction-sale there was a valid and subsisting decree. The auction-purchaser bought the property in good faith for value without notice of the appeal, therefore, his rights cannot now be prejudiced, *Kaunsilla v. Chandar Sen*.⁽²⁾ The judgment-debtors ought to have obtained a stay of execution of the decree appealed against under sections 545 and 546 of the Civil Procedure Code. The objection as to *lis pendens* is taken for the first time in second appeal.

In suit No. 253 of 1893 the Court had recorded findings on all the issues. That being so the decision in the suit operates

(1) (1897) 24 Cal. 900.

(2) (1900) 22 All. 377.

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as *res judicata*. The order on application No. 7 of 1895 has also that effect, *Ganesh Rai v. Kalka Prasad*.⁽¹⁾

As the sale was held in execution of a subsisting and valid decree it had a binding effect on the minors and they ought to have brought a suit to set aside the sale under Article 12, Schedule II of the Limitation Act, *Parshadi Lal v. Muhammad Zain-ul-Abdin*,⁽²⁾ *Ram Kanth Chowdhry v. Kallee Mohun Mookerjee*,⁽³⁾ *Mahomed Hossein v. Purundur Mahto*.⁽⁴⁾

Rao, in reply:—Section 2 (d) read with section 52 of the Transfer of Property Act makes the application of that section doubtful as the sale was held in execution of the decree, *Kunhi Umah v. Amed*.⁽⁵⁾ We rely on the doctrine of *lis pendens* apart from the provisions of the Transfer of Property Act.

The ruling in *Gourmoney Dabee v. Reed*⁽⁶⁾ was dissented from in *Raj Kishen Mookerjee v. Radha Madhub Holdar*.⁽⁷⁾ See also *Dinonath Ghose v. Shama Bibi*,⁽⁸⁾ *Moti Lal v. Karrabuldin*,⁽⁹⁾ *Sukhdeo Prasad v. Jamna*,⁽¹⁰⁾ *Byramji v. Ohunilal*.⁽¹¹⁾

If the doctrine of *lis pendens* applies then the purchaser was not a necessary party to the appeal.

As to *res judicata*, suit No. 253 of 1893 was dismissed on two preliminary points. A Court cannot determine a suit on the merits when it has no jurisdiction to entertain it, *Ghela Ichharan v. Sankalchand*.⁽¹²⁾ A finding on an issue which is not material to a case cannot be *res judicata*. Such finding is merely an expression of opinion, *Ohamanlal v. Bapubhai*.⁽¹³⁾ Application No. 7 of 1895 was dismissed on the ground that the auction-purchaser himself was the decree-holder. Therefore that order also cannot operate as *res judicata*.

Article 12, Schedule II of the Limitation Act, does not apply because the minors' interest was left untouched by the appellate decree.

(1) (1883) 5 All. 595.

(2) (1883) 5 All. 573.

(3) (1874) 22 W. R. 84.

(4) (1885) 11 Cal. 287.

(5) (1891) 14 Mad. 491.

(6) (1851) 2 Taylor and Bell, 83 at p. 113.

(7) (1874) 21 W. R. 349 at p. 350.

(8) (1900) 28 Cal. 23 at p. 26.

(9) (1897) 25 Cal. 179.

(10) (1900) 23 All. 60.

(11) (1902) 27 Bom. 266.

(12) (1893) 18 Bom. 597.

(13) (1897) 22 Bom. 669.

The judgment of the Full Bench was delivered by:—

JENKINS, C. J. :—The plaintiff having obtained a money-decree against Nathubhai Gangabhai attached in execution thereof what he claimed to be his judgment-debtor's one-fourth share in a house. The attachment, however, was raised at the instance of the defendants, and hence this suit is brought for a declaration affirming the plaintiff's right to attach.

The defendants claim that the house is theirs and that Nathubhai has no claim therein relying for this purpose on a Court-sale under which they derive title.

The circumstances that led to this Court-sale were these :—The house belonged to a joint family consisting of Nathubhai, his brother Dayabhai, and his cousin Bhagubhai; A mortgage of it was said to have been effected by Bhagubhai during the minority of his two cousins. Then a suit was brought on the mortgage with the result that a decree was passed for recovery of the mortgage-debt from (among other things) the mortgaged property.

An appeal was presented on behalf of the minor cousins, who, it was contended, were not bound, and on an application for that purpose an order was made for a stay of execution on security being given. As security was not furnished the house was sold in-execution of the decree.

Then the appeal came on and the decree of the First Court was varied as to the minor defendants by dismissing the suit against them and their property with costs. Under these circumstances the question arises whether the title of the minors or of the purchaser should prevail.

This very point arose a short time back before a Bench, of which I was a member, and I then expressed an opinion in favour of the minors. The purchaser, however, was not a party to that proceeding, nor had we the advantage of argument on the point, and, though sanction for that opinion may be found in what was said by Phear J., in *Indurjeet Kooer v. Potee Begum*,⁽¹⁾ still, on further consideration, I think, it is wrong.

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(1) (1873) 19 W. R. 197.

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Let us go back for a moment to first principles: ordinarily no greater interest passes on the realization by sale of a mortgage security than is comprised in the mortgage, for, apart from special circumstances, a man cannot pass more than he has, and here it was held in the final Court that the minors' shares were not affected by the alleged mortgage. This is all in favour of the minors and against the purchaser and his successors in title. But there is another principle which must be taken into account: it is that the Court will not ordinarily disturb a purchaser under a Court's order or decree in favour of a person bound thereby. And here the sale was under a decree of the Court valid at the time and binding on the minors. How then as applied to the facts of this case is effect to be given to these two conflicting principles?

It is well settled that a sale in execution of a money-decree is not affected by the subsequent reversal of the decree. This depends upon a principle recognized as far back as *Maning's case*.⁽¹⁾

This rule has been repeatedly applied in India in the case of money-decrees and has received the sanction of the Privy Council in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*.⁽²⁾

It has, however, been sought to distinguish the present case on the ground that here the question at issue in the suit was whether the minors' interest was affected by the alleged mortgage.

In support of this distinction the judgment in *Indurjeet Kooer's case*⁽³⁾ was cited where Phear J. said:—"The case is, we think, entirely different from the ordinary case of the sale of the property of a judgment-debtor made in execution of a decree which is the subject of appeal to a higher Court under circumstances such that the appeal proceedings do not have the effect of staying execution of the decree appealed against. In a case of that kind, no doubt, the sale in execution may effect a good and valid transfer of property to a purchaser for valuable consideration, even though the decree in execution of which it was made be subsequently reversed; for this simple reason, namely, that at the stage of the proceedings when the sale was made, the decree

(1) (1609) 8 Coke's Reports, 329.

(2) (1887) 10 All. 160.

(3) (1873) 19 W. R. 197.

was a valid decree, and the Court had authority at law to sell the judgment-debtor's property in execution of that decree. But here the very matter in litigation between the parties to the suit at the time when the sale was made was the right of the Court to sell this property. The highest Court of appeal afterwards determined that the Court executing the decree had no right or authority to sell and convey this property, supposing it to be the property of the defendant by any other title than that of inheritance from her father It appears to us clear that the party to the suit who had a decision of the highest Court in her favour to the effect that her property, if it had not come to her from her father, could not lawfully be taken and sold in execution of the decree, has an undoubted right to come into the Civil Court as against the purchaser, whoever that purchaser may be, to establish her right and title to the property which has so been unlawfully conveyed away from her. It seems to us that it would certainly be a great slur upon our procedure if this were otherwise."

This is undoubtedly a most forcible expression of the reasons in favour of the plaintiff's contention. From the judgment it is apparent that the learned Judge thought the doctrine of *lis pendens* applicable, and that has been the burden of Mr. Rao's ingenious argument before us. In my opinion, however, that doctrine does not defeat a purchaser under a decree or order for sale when the *lis pendens* is the very suit in which that decree or order is passed. The doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party, *Bellamy v. Sabine*,⁽¹⁾ *Wigram v. Buckley*.⁽²⁾

But if we except *Indurjeet Kooer's case*⁽³⁾ no decision has been cited to us, nor do I know of one, in which a sale effected under the authority of the Court in the suit, said to constitute the *lis pendens* as distinct from a private alienation, is affected by the pendency of an appeal in the suit. It appears to me to be outside the mischief of the doctrine.

(1) (1857) 1 De G. & J. 566.

(2) (1894) 3 Ch. 483.

(3) (1873) 19 W. R. 197.

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Those decisions of which *Byramji v. Chunilal*⁽¹⁾ is the most recent in this Court are clearly distinguishable. Moreover, it is to be noted that in *Bellamy v. Sabine*⁽²⁾ Turner L. J. was apparently of opinion that the doctrine operated only in favour of the plaintiff, and, if that be so, the minors, as defendants, and those claiming under them could not invoke its aid.

A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that it has on that investigation properly decreed a sale. He has no right to call upon the Court to protect him from a title not in issue in the cause and no way affected by the decree, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate the title although the decree may be erroneous and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this we shall introduce doubt on sales under the authority of the Court which would be highly mischievous. This is how the law was expounded by Lord Redesdale in *Bennett v. Hamill*.⁽³⁾ In *Bowen v. Evans*⁽⁴⁾ Lord St. Leonards remarks that it is of the greatest importance that sales made under the authority of the Court should not be lightly set aside, and he accordingly refused to disturb the purchaser. His decree was confirmed by the House of Lords.⁽⁵⁾

The effect of the reversal of a decree on a sale held under it was considered by the House of Lords in *Tommey v. White*.⁽⁶⁾ Lord Brougham in delivering his opinion said :—" We cannot set aside the sale, for the sale was under the decree of the Court, to a *bond fide* purchaser, there being no fraud, and consequently the setting aside that sale is utterly and absolutely out of the question; the sale must stand."

It is true that in these cases no appeal seems to have been pending at the date of the sale, but for the reasons I have already indicated I think this does not prevent their applicability to the circumstances of this case.

(1) (1902) 27 Bom. 266.

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

(3) (1806) 2 Sch. & Lef. 566, 577.

(4) (1844) 1 Jo. & Lat. 178, at p. 259.

(5) (1848) 2 H. L. C. 257.

(6) (1850) 3 H. L. C. 49 at p. 63.

Where an appeal is presented from a decree directing a sale of property in dispute in a suit, then the only course is to take such steps as will secure that, by stay or otherwise, no detriment shall be suffered by the appellant in case the appeal succeeds.

No effectual steps in this direction were taken on behalf of the minors, and the result is that in the absence of fraud, collusion or any other disqualifying circumstance the title acquired under the Court-sale cannot be successfully impugned.

Therefore the decree should be confirmed with costs. Two sets to be allowed.

Decree confirmed.

G. B. R.

1905.

SHIVLAL
BHAGVAN
v.
SHAMBU-
PRASAD.

CRIMINAL APPELLATE.

*Before Mr. Justice Russell and Mr. Justice Aston : on reference before
Mr. Justice Batty.*

EMPEROR v. JETHALAL HURLOCHAND.*

*Criminal Procedure Code (Act V of 1898), sections 233, 239—Joint trial of
different accused—Receiving stolen property at different times and from
different persons—Same transaction—Indian Penal Code (Act XLV of
1860), section 411.*

1905.

May 29.

A theft was committed of certain property including ornaments. S was one of the persons who received the stolen property from the thieves. S disposed of the property to several persons, and being indebted to J he gave a portion of the property to J in satisfaction of his debt. K was found to have in his possession a portion of the property identified as stolen in the same theft, but there was nothing to show when he received it and from whom. Under these circumstances the three persons S, J and K were tried together at one trial on charges of receiving stolen property knowing it to be stolen:

Held by RUSSELL and BATTY, JJ., that the three offences against the three accused S, J and K were distinct offences which could not be regarded as offences committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code, and that the trial of the three accused together was in contravention of the provisions of section 233 of the Code and was therefore illegal.

Per BATTY, J.:—"The offence punishable under section 414 of the Indian Penal Code is that of voluntarily assisting in disposing of stolen property and therefore must necessarily form part of the same transaction as the receipt by

* Criminal Appeal No. 571 of 1901.