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written statement that, so far from overlooking or disregarding the decree, he had before sale given a copy thereof with the title-deeds to the appellant's next friend. We observe, too, that the appellant was ousted by the respondent's coparcener within about three months after his purchase.

On being dispossessed, the appellant should have given his vendor notice of the proceedings. Although the respondent No. 1 has admitted that he has all along been aware of the decree for partition, and yet has never set up that the house was his self-acquisition, he may still be able to prove that he had in fact the interest which he assumed to transfer. There has been no direct issue upon this point, and notwithstanding his admissions, we think that the respondent No. 1 is entitled to show that the alleged defect in his title did not exist.

We will ask the Judge to return findings, within six weeks from the receipt of this order, on the following issues :—

1. Did the respondent No. 1 fraudulently conceal from the appellant the existence of the decree for partition?
2. Is the house the self-acquisition of respondent No. 1?
3. To what damages, if any, is the appellant entitled, and against which of the respondents?

Further evidence may be adduced by either side on the second issue only.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

1885. September 25.

BRAHANNÁYAKI (REPRESENTATIVE OF MUTTU, DEFENDANT No. 2), and KRISHNA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43—Lis pendens.

N being mortgagee in possession of five-eighths of a pangu (share) of certain and—security for a debt of Rs. 400—hypothecated his rights to M in 1876. In 1878 K bought two-eighths of the said five-eighths from the mortgagor. In 1879, K sued N claiming possession of his two-eighths on payment of Rs. 400 and obtained a decree and possession thereof.

Pending this suit, N assigned his mortgage to M. M was aware of the suit, and K was aware of the assignment when he paid Rs. 400 into Court for N. In 1883,

* Second Appeal 30 of 1885.

K bought the remaining three-eighths from the mortgagor and sued N and M to recover possession thereof.

M pleaded that the suit was barred by s. 43 of the Code of Civil Procedure, inasmuch as K might have recovered the five-eighths in the suit against N :

Held, that this plea was bad. M also pleaded that he had a valid mortgage over three-eighths :

Held, by Muttusámi Ayyar, J., that, if the assignment of the mortgage by N to M was a real transaction, this plea was good.

Per Muttusámi Ayyar, J.—The doctrine of *lis pendens* can only be relied on as a protection of the plaintiff's right to property actually sought to be recovered in the suit.

THIS was an appeal from the decree of G. A. Parker, District Judge of Tanjore, dismissing an appeal from the decree of E. Muttusámi Ayyar, Acting District Múnsif of Patukota, in suit 698 of 1883.

The facts appear sufficiently, for the purpose of this report, from the judgments of the Court (Muttusámi Ayyar and Hutchins, JJ.).

Bháshyam Ayyangár for appellant.

Hon. *Rámá Ráu* for respondent.

HUTCHINS, J.—In 1871 defendant No. 1 (Naráyana Ayyan) obtained an assignment of five-eighths of a pangu (share) by way of usufructuary mortgage to secure the repayment of Rs. 400, and was put in possession.

In November and December 1876 he hypothecated the whole five-eighths to Muttu Ayyan, the appellant (defendant No. 2), as security for two sums of Rs. 50 and 99 respectively—exhibits I and II. Neither of these deeds was registered.

The original mortgagor died, leaving him surviving his brother Rámakrishna Ayyan and his mother Nacharammál. In 1878 both these sold to Krishna Ayyangár, the respondent (plaintiff), two out of the five-eighths mortgaged as aforesaid, together with other properties not in dispute, in consideration of Rs. 500, it being agreed that the purchaser should redeem the mortgage for Rs. 400 out of the purchase money.

On 10th March 1879 the respondent instituted Original suit 83 against defendant No. I alone, claiming redemption of the two-eighths so sold to him upon payment of the 400 rupees. A decree was passed accordingly in October 1879, affirmed in appeal in June 1880, and duly executed in October 1881.

While that suit was pending, on the 28th June 1879, defendant No. 1 settled accounts with the appellant and executed in his favor

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an assignment (III) of the original mortgage for Rs. 400, including the sums mentioned in exhibits I and II and a further sum of Rs. 163. The appellant was aware of the suit then pending, but did not apply to be made a party to it; nor did he resist the execution of the decree by the respondent, who paid the money into Court and obtained delivery of the two-eighth pangu then in the appellant's possession.

On the other hand, the respondent must have been aware of the assignment of the mortgage by defendant No. 1 to the appellant at least in June 1881, when he wrote the letter IV, some 15 months before he paid the money into Court for defendant No. 1. He has also attested the assignment deed III itself.

In September 1883 Rámakrishna Ayyan sold the remaining three-eighth pangu to the respondent for Rs. 500 (A), and also his right to recover the mesne profits which had accrued thereon since the payment of the mortgage money into Court (B). Thereupon the respondent demanded from defendant No. 1 the return of the residue of the five-eighths mortgaged to him and mesne profits, and eventually instituted the present suit against him and the appellant

The appellant pleaded that Rámakrishna Ayyan was incompetent to inherit, as he was lame, and that there had been no *bonâ fide* sale. Both these pleas were overruled and are no longer insisted on. The appellant does not rely on the unregistered hypothecations but on the third mortgage (III). As regards that the Judge held that, having been made during the pendency of Original suit 83, it was subject to the result of that suit; he further stated that he entertained a strong suspicion (as did also the Múnsif) that it was not a *bonâ fide* transaction at all, but there is no positive finding to that effect.

The two points urged upon our consideration by the learned Pleader for the appellant are—(1) that the suit is barred by s. 43 of the Civil Procedure Code; (2) that the *lis pendens* affected the two-eighths only, the three eighths not being directly and specifically in question in Original suit 83; and that as to the three-eighths the appellant cannot be affected by respondent's payment of the debt to the original mortgagee after becoming aware of its transfer to the appellant.

The first contention is, in my opinion, unsound. It is true

that the assignee of the mortgagor's equity of redemption over a portion of the mortgaged property is generally entitled to redeem the whole and to hold the residue as against the mortgagor charged with its due proportion of the debt—*Asansab Baruchan* v. *Vámana Rău*(1); and if he fails to claim the whole in his suit for redemption, he would probably not be at liberty to bring another suit to enforce the right which he might have put forward before. But the present suit is not based on any right to hold the residue of the property as against the mortgagor, nor on any right which the respondent had acquired at the time of the previous litigation. It seems to me clear that, after the respondent had paid off the entire debt, the mortgagor became entitled to eject the mortgagee from the residue of the property. Such a suit would not, in my opinion, have been barred under s. 43; and under the conveyance A the respondent has now acquired all the rights then vested in the mortgagor. I further observe that, in the particular circumstances, the respondent could not have laid claim to the three-eighths at all in the former suit: he had acquired a title to two-eighths only on the express condition that he should pay off the entire mortgage debt.

Upon the second contention I am disposed to think that the appeal should be allowed, but it will not be necessary to determine this if the Judge intended to find that exhibit III did not represent a real *bonâ fide* transaction at all. I, therefore, propose that we should ask for a distinct finding on this point—to be submitted within a month and with reference to the evidence already recorded.

MUTTUSÁMI AYYAR, J.—Two questions are raised for decision in this appeal. It is urged first that the suit is barred by s. 43 of the Code of Civil Procedure. The respondent instituted Original suit 83 of 1879 to recover two-eighth pangu which he purchased in 1878 and he instituted the present suit to recover three-eighth pangu which he bought in September 1883. The causes of action in the two suits are not only distinct but the second cause of action had also no existence at the date of the first suit. But it is urged that, when the respondent instituted the first suit, he might have recovered the three-eighth pangu in trust for his vendors on another ground, viz., the payment

(1) I.L.R., 2 Mad., 223.

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which he then offered to make extinguished the charge which defendant No. 1 had on the whole five-eighth pangu. Assuming that he was entitled to do so, it does not follow that he could not enforce a right of purchase which he acquired subsequent to that suit. The original mortgagor might sue to recover three-eighth pangu after the respondent satisfied the mortgage of defendant No. 1 over five-eighth pangu, and the respondent, who stands in his place as purchaser in regard to the three-eighth pangu, is equally competent to maintain the suit. Section 43 is clearly no bar to the present suit. The next contention is that, as Original suit 83 was instituted to recover two-eighth pangu only, the assignment of the mortgage from defendant No. 1 to the appellant, whilst that suit was pending, could invalidate it against the respondent only to that extent and that the assignment must be upheld as against the three-eighth pangu now in suit if it is valid in other respects. This contention is, in my judgment, well-founded. The true rule as to *lis pendens* does not rest either on implied notice of everything deducible from, or appearing in, the suit, or on the constructive extension of parties so as to warrant the purchaser *pendente lite* being treated as if he was a party to the suit in every respect. But it consists, as stated in *Bellamy* v. *Sabine*(1), in that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent." In that case the Lord Chancellor observed that the doctrine was not peculiar to Courts of Equity, and that in the old real actions the judgments bound the lands in suit notwithstanding any alienation by the defendant pending litigation. Lord Justice Turner also observed that the doctrine of *lis pendens* rests on this foundation; that it would plainly be impossible that any suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail, and that the plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or the decree and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceeding. According to the Roman law, after *litis contestatio*, the subject in dispute became litigious and passed into *quasi*-judicial c both parties came under an obligation not to withdr the decision of the Judge—(Lord Mackenzie's Roman

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

329, and Tomkins' and Jenkins' Modern Roman Law, page 91). It follows then that *lis pendens* can only be relied on as a protection of the plaintiff's right to the property actually sought to be recovered by the suit.

This being so, the further question arises whether apart from *lis pendens* an express notice or knowledge of the pending suit would make any difference. In the case before us, the Judge finds that the appellant was aware of the suit when he took the assignment and that he did not intervene until the decree was satisfied. If with the plaint the money due by the mortgagor were paid into Court, or if the respondent satisfied the decree before he became aware of the assignment, the question of actual knowledge might be material. But it appears that the appellant became aware of the assignment at all events in 1881, and before he satisfied the decree, whilst in the plaint in the suit of 1879 there was only an offer to pay the appellant's assignor the debt due to him. Thus, the payment made by the respondent, though it was in satisfaction of a decree, was made with the knowledge of the appellant's claim and could not be accepted against him as valid.

The Judge observes, however, that he suspects that the submortgage in favor of the appellant was not a *bonâ fide* transaction but merely an attempt to evade the respondent's claim. It is, therefore, necessary before disposing of this second appeal to have a clear finding on the point. For these reasons I also think that the Judge must be asked to try the issue whether exhibit III represented a real transaction at all.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

THE QUEEN-EMPRESS

against

SESHAYA.*

1885. October 9.

Abkári Act, 1864, *s.* 26—*Police Act*, 1859, *s.* 1—*Police officer—Village police—Mohatád.*

The term "Police officer" used in s. 26 of the Ábkárí Act (Madras Act III of 1864) includes a mohatád or village policeman.

* Criminal Revision Case 531 of 1885.