

VENKATA
v.
CHENGADU,
&c.

Parker, J.—I agree that the suit is governed by the special limitation prescribed by s. 59, Madras Act II of 1864, for the reasons expressed by us in making the order of reference. The suit is therefore barred.

Wilkinson, J.—I concur.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.*

ABBOY (PLAINTIFF), APPELLANT,
and

ANNAMALAI AND ANOTHER (DEFENDANTS NOS. 3 AND 4),
RESPONDENTS. *

Lis pendens—Transfer of Property Act—Act IV of 1882, s. 52—When a suit becomes contentious—Priority of registered mortgage.

As soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*.

A mortgage was executed on 26th June and was registered. On the same day, prior mortgagees filed a suit against the mortgagors on an unregistered mortgage of the same land: they obtained a decree and attached the mortgage property:

Held, that the registered mortgagee was entitled to priority and his mortgage was not affected by the rule of *lis pendens*.

APPEAL against the decree of E. C. Johnson, Acting District Judge of South Arcot, in appeal suit No. 209 of 1887, affirming the decree of V. Malhari Rau, District Munsif of Chidambaram, in original suit No. 553 of 1886.

This was a suit to recover Rs. 196-8-0 due on a registered mortgage-deed executed to the plaintiff by defendants Nos. 1 and 2 on 25th June 1884. Part of the consideration for the execution of this mortgage to the plaintiff was the discharge by him of a previous encumbrance. On the 4th September 1878 defendants Nos. 1 and 2 had executed a mortgage of the same lands to the father of defendants Nos. 3 and 4. This mortgage was unregistered. On the date of the execution of the registered mort-

* Second Appeal No. 647 of 1888.

gage to the plaintiff, defendants Nos. 3 and 4 filed a suit—original suit No. 231 of 1884—on the unregistered mortgage of 4th September 1878; and subsequently having obtained a decree, attached the mortgage property in execution. The present plaintiff intervened in execution, but his objections were overruled. He accordingly filed the present suit against the mortgagors and the prior mortgagee.

Defendants Nos. 1 and 2 were *ex-parte*.

Defendants Nos. 3 and 4 pleaded, *inter alia*, that the plaintiff and defendants Nos. 1 and 2 had fraudulently colluded together to defeat their rights under the prior mortgage, that the plaintiff's mortgage had been executed *pendente lite*, and that they were accordingly entitled to priority in respect of their prior mortgage though unregistered.

The District Munsif observed:—"defendants Nos. 3 and 4 made no attempt . . . to show there was any fraud in the transaction. On the other hand there is enough to make out that the plaintiff acted *bonâ fide* and with great circumspection I hold there was no collusion between plaintiff and defendants Nos. 1 and 2 to defraud defendants Nos. 3 and 4." The District Munsif, however, held that the rule of *lis pendens* was applicable and passed only a personal decree against defendants Nos. 1 and 2 and dismissed the suit as against defendants Nos. 3 and 4.

The Acting District Judge affirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Krishnasami Ayyar for appellant.

Pedrosa for respondents.

The arguments adduced on this second appeal appear from the judgment of the Court (Collins, C.J., and Wilkinson, J.).

JUDGMENT.—Three questions have been argued in second appeal. First, it is argued that the doctrine of *lis pendens* does not apply, as the suit does not become contentious until summons is served on the defendant; secondly, it is maintained that the plaintiff's suit as against defendants 3 and 4 should not have been dismissed, as even if defendants 3 and 4 have priority, the plaintiff would be entitled to a decree declaring his lien on the property subject to the mortgage of defendants 3 and 4. It is further argued that plaintiff is entitled to priority as he stands in the

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shoes of a prior mortgagee. Both the Lower Courts have held that, as the plaintiff's mortgage-deed, exhibit A, was executed on the day on which defendants 3 and 4 presented their plaint in original suit No. 231 of 1884, the plaintiff took subject to the decree passed in that suit. The question we have to decide is when does a suit or proceeding become contentious? The doctrine of *lis pendens* is that no alienation during suit can be allowed to affect the rights of those claiming under the decree in the suit. But in order that third parties should be bound by the decree passed in the suit it is, it appears to us essential that they or that the parties through whom they claim should have had notice, for as remarked by Couch, C.J., in *Kailas Chandra Ghose v. Fulchand Jaharri*(1) practically there is no substantial difference between *lis pendens* and having notice of the suit. Until therefore defendants 1 and 2 had notice of the suit filed by defendants 3 and 4 to recover the amount due on the mortgage to their father, they were at liberty to transfer or create a further encumbrance on the property. It was apparently on this ground that a Bench of the Calcutta Court recently held in *Radhasyam Mohapatra vs Sibi Panda*(2) that a suit did not become contentious until the summons was served on the defendant. It may, of course, happen that the defendant will not contest the claim, but that does not really affect the question. So soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*. In the present case, therefore, the plaintiff was not affected, and as his mortgage is registered, it has priority over the unregistered deed of defendants 3 and 4.

The decrees of the Lower Courts are, therefore, modified so far as the defendants 3 and 4 and the property comprised in their mortgage is concerned, and plaintiff will obtain a decree rendering the mortgaged property liable for the sum of Rs. 196-8-0 with further interest and costs in all Courts.

(1) 8 B.L.R., 474.

(2) I.L.R., 15 Cal., 647.