

VYTHI-
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by the vendor to convey the property to them as an absolute property."

We therefore dismiss the second appeal with costs. The decree will be without prejudice to the right of the defendants Nos. 2 and 3 to their charge on the land.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran Nair.

DOSE THIMMANNA BHUTTA (PLAINTIFF), APPELLANT,

v.

KRISHNA TANTRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 52—Lis pendens—Suit for maintenance by widow praying it to be charged on immoveable property—Right to immoveable property in dispute in such suit.

A suit in which a widow claims to get her maintenance made a charge on immoveable property is one in which a right to such immoveable property is directly and specifically in question within the terms of section 52 of the Transfer of Property Act; and any transfer of the property during the pendency of the suit, not effected for the purpose of paying off any debt entitled to priority over the claim for maintenance will be affected by the *lis pendens* created by the suit.

Bazayet Hossain v. Dooli Chund, (I.L.R., 4 Cal., 402 at p. 409), referred to and followed.

SUIT to recover the amount due on a mortgage bond executed on the 23rd January 1889 by D, the wife of the first defendant in favour of the plaintiff, under a power of attorney executed by the first defendant in favour of D. One Y, the widow of the first defendant's brother, filed a suit—Original Suit No. 17 of 1888—on the 10th January 1888 for maintenance against the first defendant and D and prayed that the decree amount should be made a charge on the two properties mortgaged to the plaintiff. A decree was passed for maintenance charging the properties on the 31st January 1889. In execution of the decree, Y attached the properties and the first defendant applied to the Court for a certificate

* Second Appeal No. 356 of 1904, presented against the decree of M.R. Ry. U. Achutan Nair, Subordinate Judge of South Canara, in Appeal Suit No. 221 of 1902, presented against the decree of M.R. Ry. T. V. Anantan Nayyar, District Munsif of Mangalore, in Original Suit No. 188 of 1901.

authorising private alienation under section 305 of the Code of Civil Procedure. The certificate was granted and the first defendant mortgaged one of the properties, item I of the plaint to the third defendant, on 15th December 1892, and the money raised on the mortgage was paid into Court, and was duly paid out to Y.

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The third defendant contended that the mortgage to him should have priority over the plaintiff's mortgage which was affected by the doctrine of *lis pendens*.

The Court of First Instance granted a decree in favour of the plaintiff against item II above, exonerating item I from all liability.

This decree was confirmed on appeal.

Plaintiff preferred this second appeal.

K. Naraina Rao for appellant.

P. R. Sundara Ayyar for third respondent.

JUDGMENT.—The question is whether the plaintiff's mortgage is affected by the *lis pendens* created by the suit brought by a Hindu widow against the mortgagor for the recovery of the amount due to her for maintenance. That suit was filed on the 10th January 1888 and there was a distinct prayer that her maintenance should be made a charge on the property which was afterwards mortgaged by the defendants in that suit to the plaintiff on the 23rd January 1889. On the 31st a decree was passed "on the responsibility of the properties" sued for. It is argued before us on behalf of the plaintiff that this was not a sufficient *lis pendens* as against him.

It is not alleged that, so far as the property in dispute before us is concerned, the mortgage debt due to him was contracted for the purpose of paying off any debt entitled to any priority over the widow's claim for maintenance, or already due by the mortgagor.

In the case of *Bazayet Hossain v. Dooli Chund*(1), the widows of one Khorshed Ali brought a suit against his heir Najmooddin to recover the dower due to them, and they prayed that the dower should be paid out of the estate of the deceased. A decree was passed for an account, declaring the liability of the defendant to pay the amount decreed out of the assets that might have come

(1) I.L.R., 4 Calc., 402 at p. 409.

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into his hands. The Privy Council held that a purchaser under the decree upon a mortgage bond executed during the pendency of that suit was bound by the decree of the widow. They agreed in the view of the law laid down by Mr. Justice Phear in these terms "I need hardly say that a decree of this kind, directing the person in whose hands the property was to account for it in order that it might be applied for the purpose of discharging the debts due from Khorshed Ali, was a decree against that property, and operative to bind it in the hands of Najmooddin, and therefore of any other person who took from Najmooddin with notice of the decree or under such circumstances as to make him affected by the doctrine of *lis pendens*."

It is contended before us that in the above case there was a prayer by the plaintiff's widows for possession of the property in dispute and that therefore the right to immoveable property was directly and specifically in question within the terms of section 52 of the Transfer of Property Act. We do not think that this fact makes any difference. There was no decree for possession and their Lordships of the Privy Council had reference to the decree that was actually passed in so far as it granted the relief that was prayed for. No question of *lis pendens* can arise with reference to a prayer that has been disallowed. This is also the view taken by the Allahabad High Court in *Yasin Khan v. Muhammad Yar Khan*(1).

A suit in which a widow claims to get her maintenance made a charge on immoveable property is one in which in our opinion a right to immoveable property is directly and specifically in question.

The case before us is stronger than the case in *Bazayet Hossain v. Dooli Chund*(2) above referred to. Here the claim is not simply to recover out of the property in the possession of the defendant, but it was to charge a particular estate.

The plaintiff is therefore bound by the *lis pendens*. It is pointed out that, even in this view, the plaintiff's prayer should not have been entirely dismissed so far as item No. 1 is concerned as the third defendant who now stands in the shoes of the decree-holder claims only as mortgagee. This is so. The plaintiff is entitled to recover his debt out of the property subject to the third defendant's mortgage right.

(1) I.L.R., 19 All., 504.

(2) I.L.R., 4 Calc., 402 at p. 409.

With this modification the decree of the Court below will be confirmed. As the appellant has substantially failed he will pay the third respondent's costs.

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APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

RATHINAVELU MUDALIAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

KOLANDAVELU PILLAI (PLAINTIFF), RESPONDENT.*

1906
March 21,
22,
April 5.

Prescription—Right to cornice acquired by, after 12 years' enjoyment.

Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position.

A cornice overhanging a neighbour's land cannot be removed by such neighbour if it has been in existence for more than 12 years.

Mohanlal Jechand v. Amratal Becharadas, (I.L.R. 3 Bom., 174), referred to and followed.

THE plaintiff and the defendant were owners of adjoining houses. The two houses were originally tiled houses. The defendant purchased the house now owned by him in 1880, and pulling down the original tiled building erected, in 1883, a substantial terraced building. The cornice projected about one foot over the adjoining house now owned by the plaintiff, who had acquired it by purchase in 1900. The plaintiff pulled down his building and commenced to erect a new structure on the site, and in the course of such construction he attempted to remove the cornice of the defendant's house and to block some new windows opened by the defendant in his newly erected building. On being prevented by the defendant he instituted this suit for a decree directing the defendant to remove the cornice and for other reliefs.

* Second Appeal No. 93 of 1904, presented against the decree of Vernon A. Brodie, Esq., District Judge of Coimbatore, in Appeal Suit No. 97 of 1902, presented against the decree of M.R. Ry. T. Sadasiva Aiyar, District Munsif of Coimbatore, in Original Suit No. 901 of 1900.