APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1905. October 19, 24. 1906. February 5, 6, 27.

ANNAMALAI CHETTIAR (PLAINTIFF), APPELLANT,

v.

MALAYANDI APPAYA NAIK AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1824, s 52—*The doctrine of* lis pendens *applies to cases in which decrees are passed on compromise—'Contentious suit or proceeding,' meaning of.*

The doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding, even when such suit or proceeding is subsequently compromised and a decree passed in pursuance of such compromise, provided such compromise is not tainted by fraud or collusion.

The word 'contentious' is used in section 52 of the Transfer of Property Act in the sense in which it is used in Probate Practice and means the opposite of common form or voluntary business.

Vythinadayyan v. *Subramania*, (I.L R., 12 Mad., 439), overruled.

SUIT by the plaintiff (appellant) to recover from the first defendant personally, and by sale of the hypothecated properties the amount due on a hypothecation bond executed by the first defendant and his deceased father on the 11th November 1897 for Rs. 5,200. Defendants Nos. 2 and 3 are the undivided sons of the first defendant. The fourth defendant had purchased the properties hypothecated to the plaintiff in execution of a compromise decree in Original Suit No. 23 of 1897 passed in favour of the fourth defendant. Among other reliefs the plaintiff asked for a declaration that the sale to the fourth defendant was fraudulent and collusive and not binding on the plaintiff.

The further facts are stated in the order of reference to the Full Bench.

The Subordinate Judge upheld the sale in Original Suit No. 23 of 1897 and gave the plaintiff a simple money decree.

Plaintiff preferred this appeal.

The case came in the first instance before (Sir Arnold White, Chief Justice, and Subrahmania Ayyar, J.), who made the following

* Appeal No. 165 of 1902, presented against the decree of M.R.Ry. T. M. Rangachariar, Subordinate Judge of Madura (West), in Original Suit No. 45 of 1900.

ORDER OF REFERENCE TO A FULL BENCH.—The fourth defendant, the Commercial Bank, having advanced large sums of money to Appayasami Naicker, the Zamindar of Kannivadi, and his son, obtained on 14th December 1895, a registered agreement from them whereby *inter alia* it was provided that the Zamindar and his son were to execute to the Bank a mortgage on the terms and conditions stated in the agreement for the amount advanced and for any further sums that may in pursuance of the agreement be advanced. Pending the execution of the mortgage deed the Bank was put in possession of the property mortgaged, and it proceeded to collect the rents and dues and manage the property as stipulated in the agreement. Part of the property made security to the Bank, viz., a tract of land in one of the hill villages in the zamindari was at the time of the said agreement in the possession of Mr. Nicholson who had entered on it without right. A suit was brought by the Zamindar for the recovery of the land from Mr. Nicholson, the Bank also being a plaintiff. Possession was decreed on the 9th April 1896, and the decree, with the consent of the Bank, directed that the delivery of possession was to be to the Zamindar.

The Zamindar failed to execute the mortgage to the Bank and obstructed it from realising the rents, and otherwise interfered with its possession. The Bank thereupon on the 26th April 1897 instituted Original Suit No. 23 of 1897 on the file of the lower Court to enforce specific performance of the contract on the part of the Zamindar and to be secured in quiet and peaceable possession of the mortgaged property and the enjoyment of its rights in accordance with the terms of the mortgage to be executed by the Zamindar and his son. It prayed, in the alternative, that an account should be taken of all the moneys paid by the Bank under or by virtue of the said agreement, and of the moneys to which it would be entitled under or by virtue thereof had the mortgage referred to in the agreement been duly executed, that the Zamindar and his son should be directed to repay the same with interest thereon, and that, in default, the mortgaged property or a sufficient part thereof should be sold and the proceeds applied towards the discharge of the amount found due to the Bank. The alternative prayer was made with reference to express provisions in the agreement which created in favour of the Bank a charge for all moneys due to it in accordance with the agreement on the whole of the property to be included in the instrument of

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mortgage contemplated to be executed. Pending this suit by the Bank against the Zamindar and his son, the Zamindar transferred his right to the land covered by the decree against Mr. Nicholson, to the plaintiff in the present suit. After this, that is, on the 18th August 1898, the Bank's suit against the Zamindar was decreed. The decree was in pursuance of a compromise entered into between the Bank and the Zamindar. Under the compromise the Bank waived the claim to specific performance, the amount due by the Zamindar to the Bank was settled and fixed to be thirteen lakhs and fifteen thousand rupees and was made payable with interest on the 15th August 1900, and, in default, the mortgaged property, inclusive of the land transferred to the present plaintiff, was to be sold in execution. The Zamindar having failed to pay in accordance with the decree, the land referred to with the other properties made security by the decree was sold by order of Court and purchased by the Bank itself at the Court sale.

It was contended in the lower Court by the plaintiff that the compromise was fraudulent. It was urged there, as also before us, that the amount settled as due to the Bank was in excess of what was really due to it. But there is no foundation whatever for these contentions, and we are satisfied that the compromise was entered into *bonâ fide* and that the sum payable thereunder to the Bank was not in excess of what it was entitled to. The order for sale in default of payment on the date fixed was the appropriate relief that would have had to be granted with reference to the alternative prayer in the plaint and independently of the provision for such an order in the compromise.

One of the questions for determination in the present case is whether the transfer to the plaintiff pending the Bank's suit is subject to the decree and execution proceedings therein. That the Bank's suit had become contentious by service of notice on the defendants before the transfer to the plaintiff is undisputed. That the transfer was made during the active prosecution of such a suit is also undisputed. The only point about which the parties are at issue is whether the transfer was or was not affected by the decree, having regard to the circumstance that the decree was in pursuance of a *compromise*. According to *Vythinadayyan* v. *Subramania*(1), the question will have to be answered in the

(1) I. L. R., 12 Mad., 439.

negative. As, however, we entertain a doubt as to the soundness of the rule therein laid down on the point, we refer for the opinion of a Full Bench the question :—

Whether the transfer to the plaintiff was not subject to the decree and execution proceedings in Original Suit No. 23 of 1897?

The appeal came on for hearing in due course before the Full Bench constituted as above.

Sir *V. Bhashyam Ayyangar* and the Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

Mr. *E. Norton* and *S. Srinivasa Ayyangar* for fourth respondent.

The other respondents not appearing in person or by Counsel

The Court expressed the following

OPINION (SIR ARNOLD WHITE, C.J.).—In this reference the question for determination is whether the doctrine of *lis pendens*, as embodied in section 52 of the Transfer of Property Act, applies when the suit during the pendency of which the transfer takes place is subsequently compromised and a decree is given in pursuance of the compromise; or, in other words, was the case of *Vythinadayyan* v. *Subramania*(1) rightly decided?

Section 52 of the Transfer of Property Act is in these terms :—

"During the active prosecution in any Court having authority "in British India, or established beyond the limits of British India "by the Governor-General in Council, of a contentious suit or "proceeding in which any right to immoveable property is directly "and specifically in question, the property cannot be transferred "or otherwise dealt with by any party to the suit or proceeding "so as to affect the rights of any other party thereto under any "decree or order which may be made therein, except under the "authority of the Court and on such terms as it may impose."

In support of the view that the section did not apply in the case of a compromise decree, it was argued that the word 'contentious' was introduced for the express purpose of excluding the operation of the doctrine of *lis pendens* when the decree was a decree by consent. I find myself quite unable to accept this view. A suit is either contentious or non-contentious, and the fact that there is a decree by consent cannot by a sort of relation back alter the nature and character of the suit. The word contentious as distinguished from voluntary, or common form, is used to

(1) I.L.R., 12 Mad., 439.

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describe the jurisdiction of the Courts whose powers were vested in the Court of Probate by the Probate Act, 1857. The expression "voluntary and contentious jurisdiction and authority" occurs in sections 3 and 4 of that Act, and the practice of the Probate Division is governed by rules which distinguish between contentious and non-contentious business. I think the word contentious is used in section 52 of the Transfer of Property Act in the sense in which it is used in the Probate Act and Rules.

If the nature of the suit or proceeding is such that no contest is involved—as in probate common form business—the suit or proceeding is non-contentious. If a contest is involved it is contentious. I am quite prepared to accept the definition adopted by the Calcutta High Court in *Upendra Chandra Singh* v. *Mohri Lal Marwari*(1). With reference to the authorities bearing upon the meaning of the words 'contentious suits' their Lordships say (p. 752) "what we think may be gathered from these cases, however, "is that to constitute a suit 'contentious,' it must be a suit, which "upon the face of the proceedings would appear to involve some "contention as to the right of one or other of the parties in the "immoveable property, which is claimed in the suit, and whether "there is such a contention may be gathered from the plaint itself, "or the defence of the defendant, when it is put in."

This definition is in accordance with the definition of 'contention' contained in the explanation to section 253 A of the Succession Act-"By 'contention' is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding." It may be said that the very fact that there is a compromise shows that the suit was originally contentious. Otherwise there would be nothing to compromise.

With all deference to the learned Judges who decided *Vythinadayyan* v. *Subramania*(2), I cannot agree with the view that a Court in giving a decree in pursuance of a compromise performs a ministerial and not a judicial function. A decree is none the less a decree as defined by the Code of Civil Procedure, because it is based on a compromise, and the legal effects of the decree contemplated by section 375 do not differ from the legal effects of a decree where the suit has been fought out to the end. The fact that a decree is given in accordance with the terms which have

(1) I L R, 31 Calc., 745. (2) I.L.R., 12 Mad., 439.

been come to between the parties does not prevent the decree being the formal expression by the Court of an adjudication on a right claimed or a defence set up within the meaning of the definition. The test is not—has the Court exercised its mind in deciding the terms of the decree? If it were, a decree in pursuance of an award would not be 'decree.'

As regards the English authorities the principle on which the doctrine of *lis pendens* is based is laid down by Lord Cranworth in *Bellamy* v. *Sabine*(1). The Lord Chancellor observes:—(p. 578) "It is scarcely correct to speak of *lis pendens* as affecting a "purchaser through the doctrine of notice, though undoubtedly "the language of the Courts often so describes its operation. It "affects him not because it amounts to notice, but because the law "does not allow litigant parties to give to others, pending the "litigation, rights to the property in dispute, so as to prejudice the "opposite party."

"Where a litigation is pending between a plaintiff and a "defendant as to the right to 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." Lord Justice Turner in giving judgment in the same case observes:—(p. 584) "It is, "as I think, a doctrine common to the Courts both of Law and of "Equity, and rests, as I apprehend, upon this foundation—that it "would plainly be impossible that any action or suit could be "brought to a successful termination, if alienations *pendente lite* "were permitted to prevail. The plaintiff would be liable in every "case to be defeated by the defendant's alienating before the "judgment or decree, and would be driven to commence his "proceedings *de novo*, subject again to be defeated by the same "course of proceeding." A general order of Lord Bacon of 1649 which is cited by the Lord Justice (p. 585) is in these terms:—"No "decree bindeth any that cometh in *bonâ fide* by conveyance from "the defendant before the bill exhibited, and is made no party, "neither by bill nor order; but where he comes in *pendente lite*, "and while the suit is in full prosecution, and without any colour

(1) 1 DeG. & J., 566.

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"of allowance or privity of the Court, there regularly the decree "bindeth."

I can find nothing in the judgments in *Bellamy* v. *Sabine*(1) which is the leading English case upon the subject, which suggests that the doctrine of *lis pendens* does not operate when the decree of the Court is a decree based upon a compromise.

On the other hand, our attention was called to the case of *Landon* v. *Morris*(2) where it was held that a decree taken *pro confesso* was binding on a purchaser who had entered into a contract after the filing of the bill. Our attention was also called to an old case reported in 2 Freeman—"Decree by consent, for a lease, or other personal estate, shall bind purchasers, otherwise, said the Lord Keeper, you will blow up the Court of Chancery' [see *Windham* v. *Windham*(3)]. This report, however, is too meagre to be of any value. Moreover, it would appear that the decree was in connection with personal estate.

With regard to the Indian authorities in *Kailas Chandra Ghose* v. *Fulchand Jaharri*(4), there was a consent order and it was held the doctrine did not apply. The order by consent was of a very special character, being an order for the sale of property to provide funds for the payment of costs. Moreover the decision of the Appellate Court of which Sir Richard Couch was a member was based not on the ground of the order having been made by consent but on the ground that the defendant had notice of the plaintiff's claim (see pp. 489 and 490). It does not seem to me easy to reconcile Sir Richard Couch's judgment in this case with the principles of the doctrine of *lis pendens* as enunciated by Lord Cranworth. In a case which came before Sir Richard Couch three years later [*Raj Kishen Mookerjee* v. *Radha Madhub Holdar*(5)] where it was held that a purchaser under an execution was bound by a *lis pendens*, this decision was not referred to. In *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein*(6), there is no doubt an *obiter dictum* which is in favour of the view which was contended for by Sir Bhashyam Ayyangar, viz., that the doctrine did not apply in the case of a compromise decree. In *Upendra Chandra Singh* v. *Mohri Lal Marwari*(7), the suits which were held to

(1) De G. & J., 566.
(2) 2 L.J. Ch., 35 (more fully reported 5 Sim., 247).
(3) 22 Eng. Rep., 1103.
(4) 8 B.L.R., 474.
(5) 21 W.R., 349.
(6) I.L.R. 18, Calc., 188.
(7) I.L.R., 31 Cal., 745.

be not 'contentious' within the meaning of section 52 were undefended suits for moneys due on mortgages by sale of the properties, in which no question as to the right to the properties was involved.

I think section 52 of the Transfer of Property Act should be construed as applying to the case of a compromise decree in the absence, of course, of anything in the nature of fraud or collusion. This seems to be the natural construction of the section and it is in accordance with the principles on which the doctrine of *lis pendens* is based.

With all respect I think the case of *Vythinadayyan* v. *Subramania*(1) was wrongly decided and I am of opinion that the answer to the question referred to us should be that the transfer to the plaintiff was subject to the decree and execution proceedings in Original Suit No. 23 of 1897.

SUBRAHMANIA AYYAR, J.—I am also of the same opinion. Of course the words "under any decree or order made therein" in section 52 of the Transfer of Property Act upon their face lend no support to the argument of Sir V. Bhashyam Ayyangar on behalf of the appellant, that the fact of the Bank's decree having been passed on a compromise renders it unavailing as against him. But the argument was put thus: the word 'therein' after "decree or order" in the section refers back to the words "contentious suit or proceeding" and though in the present instance the suit was contentious up to the time the compromise was entered into, it ceased to be such when that was concluded; consequently the decree in question was not a decree of the description contemplated by the section. The argument of course assumes that the phrase "contentious suit or proceeding" in the section covers only a suit or proceeding in which the parties are actually disputing and that only so long as the actual contest continues. In my opinion the word 'contentious' is employed in quite a different sense, viz., that in which Blackstone uses it in the passage cited in the recent New English Dictionary by Dr. Murray, that passage runs:—I pass by such Ecclesiastical Courts, as have only what is called a voluntary and not a contentious jurisdiction; which are merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose (as granting dispensations, licenses, faculties and other remnants of the papal extortions), but

(1) I.L.R., 12 Mad., 439.

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do not concern themselves with administering redress to any injury [Blackstone's 'Commentaries,' VI edn. (1774), Vol. III, p. 66]. The contentious jurisdiction here spoken of is obviously that by invoking which a party having a difference with another puts the law in motion as against his adversary, in contradistinction to jurisdiction to be resorted to in matters which *ex hypothesi* admit of no opposition. The same idea is conveyed in Stroud's 'Judicial Dictionary' when the author in explaining the term "contentious" observes that contentious business is the opposite of common form business. This interpretation is also in conformity with the opinion of Dr. Ghose who in his learned work on *Mortgages* points out that the term "contentious proceeding" in the section has been borrowed from Probate Practice; where of course it merely means a proceeding in which there are adversary parties (III edn., p. 794). The unsoundness of the other view will be clearly seen if the startling consequence involved in it is borne in mind, for, according to Sir V. Bhashyam Ayyangar a decree passed *ex parte*, or on confession, or as the result of the defendant abandoning a defence set up would, equally with a compromise decree, not avail the successful party as against a transferee *pendente lite* from the defendant. This is virtually to abolish the salutary doctrine of *lis pendens* completely, inasmuch as a defendant desirous of defeating the plaintiff, however good his title may be, has only to transfer the property in litigation to a third party and abstain from doing anything in the suit. The essence of the doctrine of *lis pendens* undoubtedly is that where a proceeding before a Court exercising contentious jurisdiction is honestly brought to a termination in one of the modes which the law permits it to be terminated by and a decision of the Court is obtained, such decision is binding upon all persons who claim title by virtue of a transfer pending the litigation. With reference to this underlying principle there is no conceivable reason for attaching greater efficacy to a decision arrived at after actual contest than to decisions arrived at otherwise.

Passing to the authorities the only decision which conflicts with the view we are now taking is *Vythinadayyan* v. *Subramania*(1) decided by the late Chief Justice and Parker, J. At page 442 of the report the words "decision of the Court" are italicised, it being apparently thereby implied that a decree in pursuance of a

(1) I.L.R., 12 Mad., 439.

compromise is not a decision by the Court for the purposes of *lis pendens*. This, as appears from what follows in the judgment, is obviously due to the effect ascribed by the learned Judges to *Jenkins* v. *Robertson*(1) which seems to have been taken as a decision on the general law. That this is not so was pointed out in *In re South American and Mexican Co.*(2), where it was laid down that a judgment by consent or default is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case (see at pp. 45 and 46). In *Kailas Chandra Ghose* v. *Fulchand Jaharri*(3), also cited by the learned Judges all that was laid down was that there was no authority for the proposition that a transferee pending litigation who does not become a party to the proceeding is bound by *any order whatsoever* passed therein without reference to what would in the usual course take place having regard to the nature of the suit, the case set up in the plaint and the relief prayed for. In the course of his judgment Sir Richard Couch expressly abstains from entering into a consideration of the other effects of *lis pendens*. It is therefore difficult to see how anything in that case supports the view that the determination of the precise dispute in a case, in pursuance of a compromise, is for that reason any the less a decision by the Court. Be this as it may [*Kailas Chandra Ghose* v. *Fulchand Jaharri*(3)] does not seem to be altogether reconcileable with the two other decisions of the same High Court to which the attention of Collins, C.J., and Parker, J., was not drawn. They are *Nadiroonissa Bebee* v. *Aghur Ali*(4), an earlier decision and *Raj Kishen Mookerjee* v. *Radha Madhub Holdar*(5), decided after *Kailas Chandra Ghose* v. *Fulchand Jaharri*(3), and in both of them compromise decrees were held to bind transferees *pendente lite*. The judgment in the second of these cases, where the doctrine of *lis pendens* was exhaustively examined, was delivered by Sir Richard Couch himself and the conclusion arrived at by him received the complete concurrence of the Judicial Committee in *Radha Madhub Holdar* v. *Monohur Mukerjee*(6). Nor is it to be supposed, as Sir V. Bhashyam Ayyangar suggested, that English reports furnish no instance of a decision not following an actual contest, having been held binding on transferees from parties to pending proceedings.

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(1) L.R., 1 H.L.Sc., 117.
(2) (1895) 1 Ch., 37.
(3) 8 B.L.R., 474.
(4) 7 S.W.R., 103.
(5) 21 W.R., 349.
(6) I L.R., 15 Calc., 756 at p. 761.

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Landon v. *Morris*(1) cited for the Bank is one such instance. And *Partridge* v. *Shepard*(2), *Turner* v. *Bobb*(3) and *Mellwrath* v. *Hollander*(4) are American authorities in all of which the Courts held that compromise decrees prevailed as against purchasers *pendente lite* ('American Digest,' Century edition, Vol. 33, col. 1443, *a*, *d* and *e*).

Clearly therefore the answer to the question proposed must be in the affirmative.

BENSON, J.—I am also of the same opinion. At the time when the plaintiff obtained his interest in the property the suit (Original Suit No. 23 of 1897) was undoubtedly contentious, and was being actively prosecuted. Section 52 of the Transfer of Property Act therefore applies, and in the words of that section the property could not be transferred by any party to the suit (*i.e.*, by the Zamindar then a defendant) so as to affect the rights of any other party thereto (*i.e.*, the Bank then a plaintiff), under any decree which might be made therein, except under the authority of the Court. It is difficult to see how the compromise of the suit between the parties subsequent to the transfer can be held to render the suit non-contentious at the time of the transfer or, indeed, at any time. The very fact of the compromise shows that the suit was contentious. Moreover, if the compromise of a suit were held to render it non-contentious, it would never be safe for any party to enter into a compromise, since by so doing he would jeopardise the fruits of his decree, which might be made of no effect by a transfer made behind his back by the other party. I can find no reason why the law should be such as to involve consequences so completely at variance with the principles on which the doctrine of *lis pendens* is based. I have no doubt that the case of *Vythinadayyan* v. *Subramania*(5) was wrongly decided as shown in the judgments of my learned brothers.

The case came on for final hearing in due course before (Sir Arnold White, Chief Justice, and Subrahmania Ayyar, J.) when the Court delivered the following judgment.

JUDGMENT.—In accordance with the opinion of the Full Bench the appeal fails and is dismissed with costs.

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(1) 2 L.J., Ch. 35; 5 Sim. Rep. in Ch., 247.
(2) 71 Calc., 470.
(3) 60 Mo., 342.
(4) 73 Mo., 105; (S.C.) 39 Am. Rep., 484.
(5) I.L.R., 12 Mad., 439.