

HUMMADE
BEARI
v.
SECRETARY
OF STATE
FOR INDIA.

In this case the appellate officer has not cancelled the grant within the time allowed by law. It is unnecessary, therefore, to consider whether the Collector could have set aside the grant on account of the failure by the Tahsildar to give notice to the Port Officer in the absence of any objection on the part of that officer.

The notice to the Port Officer is only a formality, and the omission to give such notice cannot be more than an irregularity, as the revenue officers are not bound to follow the opinion of the Port Officer, and are entitled to make the grant even in opposition to it. If the grant in favour of the plaintiff is taken to have been made by the Tahsildar on the 20th February 1895 (exhibit K), then, as he was a competent officer to make the grant, and his order has not been cancelled by the Appellate Court within the time allowed, the plaintiff has acquired a valid title to the property.

If, on the other hand, the grant must be deemed to have been made by the Divisional Officer by his order (exhibit J) passed on appeal on the 29th December 1894 from a previous order of the Tahsildar refusing the plaintiff's application, the same result follows, as there was no appeal from the order passed by the Divisional Officer within the prescribed time.

The lower Court's decrees are therefore reversed, and a decree will be passed in favour of the plaintiff with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

SETTAPPA GOUNDAN AND OTHERS (COUNTER-PETITIONERS),
APPELLANTS,

v.

MUTHIA GOUNDAN AND SEVEN OTHERS (PETITIONERS),
RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, s. 52 - Lis pendens exists until the final decree in appeal is passed.

The functions of an Appellate Court are not the same in India as in England and America.

* Civil Miscellaneous Appeal No. 193 of 1906, presented against the order of Lionel Vibert, Esq., District Judge of Coimbatore, in Civil Miscellaneous Petition No. 245 of 1906, dated the 5th November 1906.

In India, the decree of the Appellate Court is, under the Code of Civil Procedure, the final decree in the case, and the proceedings in appeal must for the purposes of section 52 of the Transfer of Property Act, be treated as a continuation of the proceedings in the lower Court.

SRTTAPPA
GOUNDAN

v.

MUTHIA
GOUNDAN.

A transfer of property, which is the subject-matter of contentious litigation, by a party thereto *after* the date of the decree of the lower Court and *before* an appeal is preferred against such decree, will be affected by the principle of *lis pendens* under section 52 of the Transfer of Property Act.

THIS appeal arose out of proceedings in execution of a decree passed in Original Suit No. 32 of 1899.

The facts necessary for the purposes of the report are set out in the judgment.

A. Nilakanta Ayyar for appellants.

T. R. Krishnaswami Ayyar for respondents.

JUDGMENT.—The appellant is the purchaser of certain properties from the first defendant in Original Suit No. 32 of 1899, which was a suit for partition brought by the respondent. The purchase was made after the decree in the Court of First Instance which awarded the property now in dispute to the first defendant and before an appeal was filed. In appeal the decree of the first Court was modified and the property now in dispute awarded to the respondent. The appellants contend that the sale is binding on the respondent (the plaintiff in the original suit) as his vendor sold the property to him as the managing member of the family to discharge debts binding on the family. It is clear from the sale-deed that the vendor did not profess to act on behalf of the family. He sold properties which are therein described to be his own separate properties and self-acquisition. The debts are not stated to be family debts. The decree in the partition suit does not, as between the plaintiff and the first defendant therein, make the plaintiff (respondent) liable to pay the same. It is then argued that the appellant is at any rate entitled to recover the consideration money as the respondent has enjoyed the benefit of the transaction by the discharge of the debts which are binding on him. There is no evidence in this case that any family debt has been paid off or that the plaintiff (respondent) has in any way derived any benefit. It is then urged that an opportunity should now be given to enable the appellant to produce such evidence. But no valid reason is alleged before us for his omission to adduce such evidence in the lower Court. The lower Court has also found that the sale is invalid as it contravenes

SETTAPPA
GOUNDAN
v.
MUTHIA
GOUNDAN.

the provisions of section 5, Transfer of Property Act. It is contended that, as the properties were sold after the decree was passed by the Court of First Instance and before any appeal was filed from that decree, section 52 does not apply, and reliance was placed on the opinions expressed in Sugden's 'Vendors and Purchasers,' p. 758, Fisher on 'Mortgage,' p. 532; 2 White and Tudors, p. 247; and the cases reported in II Coote, p. 1344; Ghose on 'Mortgage,' p. 792; 17 American Decisions, p. 603; and 39 American Decisions, p. 441. The same view appears to have been taken by *Glover, J.*, in *Chunder Koomer Lahoree v. Gopee Kristo Gossamee* (1). We are not inclined to accept this view.

It does not appear that the functions of an Appellate Court are the same in England and America as in India. The decree of the Appellate Court is under the Code of Civil Procedure, the final decree in the case, and the proceedings in the Appellate Court, therefore, must be treated, so far as the question before us is concerned, as a continuation of the proceedings in the lower Court. It is not open to a defeated suitor to file an appeal immediately, as he has to obtain copies of decree and judgment and he ought not to suffer for the delay imposed by law. There is no reason why this delay should prejudice him in this respect any more than the delays due to adjournments or stay of proceedings. The law of *lis pendens* in this country is founded on the necessity, if possible, of a final adjudication, and it appears unjust that a plaintiff should be prejudiced by any Act of the defendant subsequent to the institution of the suit and with notice thereof; if the plaintiff fails in the first Court in his second suit for the same property against the alienee, that decision also will be of no avail to him against a second or subsequent alienee.

For these reasons we agree with *Mitter, J.*, in *Chunder Koamar Lahoree v. Gopee Kristo Gossamee* (1) and the Calcutta High Court *Dinonath Ghose v. Shama Bibi* (2).

We accordingly dismiss the appeal with costs.

(1) 20 W. R., 205.

(I.L.R., 28 Calc., 23.