

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

P. KATHIR (SECOND DEFENDANT), APPELLANT,

v

C. MAREMADISSA AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 3), RESPONDENTS. *

1913.
July 23, 24
and 25.

Transfer of Property Act (IV of 1882), sec. 52—Lis pendens—Contentious suit, meaning of—Friendly suit, no contest—Plea of lis pendens not taken in the written statement—Point of law—Plea permitted after remand.

The words "contentious suit" in sec. 52 of the Transfer of Property Act (IV of 1882) are used in contradistinction to a friendly suit in which there is no contest. Every suit other than such a friendly suit, by its origin and nature, falls within the definition of a contentious suit.

Jogendra Chander Ghose v. Fulkumari Dassi (1900) I.L.R., 27 Calo., 77, followed.

Krishna Kamini Devi v. Dinu Mony Choudhurani (1904) I.L.R., 31 Calo., 658 and *Upendra Chandra Singh v. Mohri Lal Marwari* (1904) I.L.R., 31 Calo., 745, dissented from.

Fayaz Husain Khan v. Prag Narain (1907) I.L.R., 29 All., 339 (P.C.), referred to.

A point of law such as *lis pendens* which was argued before the first court, and which required no further facts than those already on record must be considered by the Appellate Court though the defendants did not plead it in the written statement.

SECOND APPEAL against the decree of K. IMBICHUNNI NAIR, the Subordinate Judge of South Malabar at Calicut, in Appeal No. 118 of 1911, preferred against the decree of T. V. NARAYANAN NAIR, the District Munsif of Mangeri, in Original Suit No. 655 of 1909.

The facts appear from the judgment of the High Court.

T. R. Ramachandra Ayyar for the appellant.

The Honourable Mr. *T. Richmond* for the first respondent.

SADASIYA
AYYAR AND
TYABJI, JJ.

JUDGMENT.—The Munsif, on remand by the Subordinate Judge, held that the plaintiff, who had obtained an assignment of the rights of one Kotta Athan, was bound by the decision in Original Suit No. 414 of 1907 (Exhibit VI). In that decision it was held that the land referred to in the plaint belonged to the second defendant and not to the said Athan. The plaintiff obtained

* Second Appeal No. 1422 of 1912.

from Athan the assignment on which he relies in January 1908 during the pendency of the said suit. Applying the doctrine of *lis pendens* the Munsif held that the plaintiff could not set up a title to the said land as against the second defendant. The Subordinate Judge on appeal refused to consider the plea of *lis pendens* because it was not raised specifically by the defendants in their written statement, and the Munsif by the remand order was directed to decide the case on the merits irrespective of the effect of the doctrine of *lis pendens*.

The argument based on the doctrine of *lis pendens* had evidently been argued before the Munsif. It was a pure question of law, and required for its disposal no additional evidence beyond what was already on record. It ought therefore in our opinion to have been considered by the Appellate Court.

That question has been fully argued before us. We agree with the decision of MACLEAN, C.J., and BANERJEE, J., in *Jogendra Chunder Ghose v. Fulkumari Dassi* (1) that the words "contentious suit" in section 52 of the Transfer of Property Act are used in contradistinction to a friendly suit in which there is no contest. Every suit other than such a friendly suit, by its origin and nature, falls within the definition of a contentious suit. We think that the observations to the contrary in other cases [two of them *Krishna Kamini Debi v. Dino Mony Chowdhurani* (2) and *Upendra Chandra Singh v. Mohri Lal Marwari* (3)] must be held to be erroneous in view of the dictum of their Lordships of the Privy Council in *Faiyaz Husain Khan v. Prag Narain* (4).

In the result we reverse the Lower Appellate Court's decree and dismiss the plaintiff's suit. As the second defendant (appellant) has succeeded on a point not properly raised by him in the Lower Courts, we direct the parties to bear their respective costs throughout.

KATHIR
V.
MAREMA-
DISSA.
SADASIYA
ANNAR AND
TYABJI, JJ.

(1) (1900) I.L.R., 27 Calc., 77.

(2) (1904) I.L.R., 31 Calc., 658.

(3) (1904) I.L.R., 31 Calc., 745.

(4) (1907) I.L.R., 29 All., 339 (P.C.).