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share in the interest of one of the partners and to treat him as a partner because of a partition with which the other partners have no concern. In cases of a mere change of status which according to the recent decision of the Privy Council can be effected by a mere unilateral declaration of intention the position is still more complicated as it may well be that on actual partition of the various items of joint family property the interest of the family in the business may go to some other co-parcener. I do not think that any consideration of inconvenience to the members of a joint family should affect the settled rules of law as to the rights and obligations of partners *inter se*.

I am of opinion that the decision of Mr. Justice SPENCER is right and would dismiss the Letters Patent Appeal with costs.

WALLIS, C.J. WALLIS, C.J.—I agree.

BAKEWELL, J. BAKEWELL, J.—I agree.

N. R.

APPELLATE CIVIL.

Before Sir John Wallis, Chief Justice, Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastriyar.

1917, September 11 and 21.

MANJESHWARA KRISHNAYA (THIRD DEFENDANT), APPELLANT,

v.

VASUDEVA MALLYA AND FOUR OTHERS (PLAINTIFFS NOS. 1 TO 5 AND FIRST DEFENDANT), RESPONDENTS.*

Lis Pendens—*Transfer of Property Act (IV of 1882), sec. 52—No contest between defendants—Alienation by one defendant to a stranger pending suit, whether affected by* lis pendens.

The rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act does not differ from the English rule and it protects parties to litigation against alienations by their opponents pending suit; and the prohibition contained in the section is like *res judicata* inapplicable between parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. 'Any other party' in section 52 means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

Bellamy v. *Sabine* (1857) 1 De. G. & J., 566 and *Faiyaz Husain Khan* v. *Prag Narain* (1907) I.L.R., 29 All., 339 and 245 (P.C.), applied.

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* Letters Patent Appeal No. 283 of 1916.

In a previous suit by *A* to set aside a sale made by him to *B* as void and invalid and consequently to set aside a mortgage made by *B* to *C* also as invalid, the plea of *B* and *C* that both the sale and mortgage were good was upheld. Pending the suit *D* bought *B*'s rights in a Court auction. In a subsequent suit by *C* to enforce the mortgage,

Held that *D*'s purchase was not affected by *lis pendens* as there was no contest between *B* and *C* in the previous suit as to the validity of the mortgage and that *D* was entitled to plead that the mortgage was invalid as having no consideration.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., who differed from OLDFIELD, J., in *Krishnaya* v. *Vasudeva Mallya*(1).

One Manjunatha Bhandari filed a suit (O.S. No. 114 of 1898) for a declaration that a sale-deed of the suit properties which he had executed in favour of one who was the first defendant in that suit and in this, was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the first defendant in favour of the third defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question then was as to the validity of the sale under Exhibit D, as, if that was upheld, the plaintiff had no concern with the subsequent mortgage executed by the vendee, the first defendant, to the third defendant (the father of the present plaintiffs). The first and third defendants in that suit made common cause by pleading the validity of the sale and the mortgage and succeeded in upholding the validity of the sale under Exhibit D, subject to the plaintiff's lien for unpaid purchase money. The first defendant in his written statement in the previous suit admitted his mortgage to the third defendant, and the High Court in second appeal decided in effect that the plaintiff was entitled to a charge on the property for his unpaid purchase money in priority to the third defendant's mortgage. While that suit (O.S. No. 114 of 1898) was pending, the present second defendant, by Exhibit H, dated 18th December 1899, acquired the first defendant's interest in the same properties at a sale in execution. Thereafter the plaintiffs in the present suit, viz., the sons of the third defendant in the previous suit

(1) Second Appeal No. 1736 of 1914 preferred against the judgment of E. L. THORNTON, the District Judge of South Kanara, in Appeal Suit No. 45 of 1913, preferred against the decree of D. RAGHAVENDRA RAO, the Subordinate Judge of South Kanara, in Original Suit No. 60 of 1911 (Original Suit No. 63 of 1906) on the file of the District Court of South Kanara.

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brought this suit to enforce the mortgage against the first defendant and the second defendant, who was the purchaser of his rights in Court auction, and the present third defendant who was the alienee from him. The defendants pleaded *inter alia* that the mortgage had no consideration and was not valid.

The plaintiffs answered that the defendants were not entitled to raise this defence as the Court sale to them was, pending the suit in which the sale under Exhibit D, and the mortgage were in question. The lower Courts, upholding this answer allowed the suit. A second appeal filed by the third defendant was heard by OLDFIELD and PHILLIPS, JJ. OLDFIELD, J., allowed the appeal holding that the defendants were not affected by *lis pendens* as there was no contest in the previous suit as to the validity of the mortgage and remanded the suit for disposal on the merits of the plea as to the want of consideration for the mortgage. PHILLIPS, J., agreed with the lower Courts and dismissed the second appeal. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code. The third defendant preferred this Letters Patent Appeal.

B. Sitarama Rao for the appellant.—I am not affected by *lis pendens*, as there was no *lis* between the defendants about the mortgage in the previous suit. The previous suit was by the plaintiff therein to have the sale by him to the first defendant herein and the mortgage executed by the first defendant to the second defendant therein declared void. The decree was that the sale was good and that the plaintiff therein was entitled to a charge for unpaid purchase money in priority to the mortgage. Once it was declared that the sale was good, plaintiff therein had no right or interest to question the mortgage and the Court could not and did not give any declaration as to the validity of the mortgage. An adjudication as to the mortgage was unnecessary to give the necessary relief to the plaintiff and both the defendants pleaded that the mortgage was good.

A. Narasimhachariar for *V. V. Srinivasa Ayyangar* for respondent.—The defendant is affected by *lis pendens*. There was in the previous judgment an actual adjudication that the mortgage in my favour was good. The plaintiff attacked the mortgage.

[Court—But not the defendants *inter se*, all of whom supported the mortgage. It was not then necessary to decide the validity of the mortgage.]

I rely on *Bellamy* v. *Sabine*(1).

[WALLIS, C.J.—That lays down that an alienation cannot be made *pendente lite* so as to prejudice the opposite party. That is the meaning to be given to the words 'other party' in section 52 of Transfer of Property Act.]

I rely on *Tyler* v. *Thomas*(2). The principle of *lis pendens* is not that there is a judgment against one party or another but that the judgment affects the land; Story's Equiety Jurisprudence, sections 405 and 406.

B. Sitarama Rao in reply quoted *Annamalai Chettiar* v. *Malayandi Appaya Naik*(3) to show that there must be a contest between the defendants. He referred to *Faiyaz Husain Khan* v. *Prag Narain*(4) and *Krishna Kamini Debi* v. *Deno Money Chowdhurani*(5). Section 52 of the Transfer of Property Act does not in terms apply but its principle applies.

WALLIS, C.J.

WALLIS, C.J.—Manjunatha Bhandari filed a suit, Original Suit No. 114 of 1898, for a declaration that the sale deed of the suit properties which he had executed in favour of the first defendant in that suit and this was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the first defendant in favour of the third defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question was the validity of the sale under Exhibit D, as if that was upheld, the plaintiff had no concern with the subsequent mortgage by the vendee, the first defendant, to the third defendant, the father of the present plaintiffs. The first and third defendants in that suit made common cause and succeeded in upholding the validity of the sale under Exhibit D, subject to the plaintiffs' lien for unpaid purchase money. The first defendant in his written statement admitted his mortgage to the third defendant, and as there was no contest about the mortgage what the High Court apparently

(1) (1857) 1 De. G. & J., 566. (2) (1858) 25 Beav. 47.
(3) (1906) I.L.R., 29 Mad., 426 at p. 434.
(4) (1907) I.L.R., 29 All., 339 at p. 345 (P.C.).
(5) (1904) I.L.R., 31 Calc., 658 at p. 663.

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decided was that the plaintiff was entitled to a charge on the property for his unpaid purchase money in priority to the third defendant's mortgage. While this suit, Original Suit No. 114 of 1898, was pending, the present second defendant, by Exhibit H, dated 18th December 1899, acquired the first defendant's interest in the suit properties at a sale in execution. It is well settled that the doctrine of *lis pendens* applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienations by the parties, and the question before us is whether the second defendant's purchase from the first defendant pending the suit was subject to the result of the suit and whether the result of the suit was to preclude the present second defendant as alienee from the first defendant from disputing the validity of the mortgage executed by the first defendant to the third defendant, the father of the present plaintiffs, in the present suit which they have brought to enforce it. That again raises the question whether the alienation by the first to the second defendant pending suit is affected by the doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act. As there was absolutely no contest on the point between the first and third defendants in that suit, it seems clear that the present case is not within the English doctrine as to *lis pendens* which is intended to protect the parties to litigation against alienations by their opponents pending suit. This is clearly explained by Lord CRANWORTH in *Bellamy* v. *Sabine*(1) where he observes that *lis pendens* affects a purchaser,

"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."

Later on he observes

"*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent,"

and in *Faiyaz Husain Khan* v. *Prag Narain*(2) Lord MACNAUGHTEN, delivering the judgment of the Judicial Committee in a case governed by section 52 of the Transfer of Property Act, referred to this as the 'correct mode of stating the doctrine'. If then the English doctrine and the principle on which it rests is only

(1) (1857) 1 De. G. & J. 566. (2) (1907) I.L.R., 29 All., 339 at p. 345 (P.C.).

applicable as between opponents with regard to alienations made by any one of them during suit, does the language of section 52 of the Transfer of Property Act compel us to apply the doctrine as between parties to the suit who were ranged on the same side and between whom there was no issue for adjudication? The section provides that

"during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred 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."

It is not, I think, putting an unduly restrictive construction on the section to say that 'any other party' whose rights are not to be affected means any other party who can be said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against alienations by the other. In other words 'any other party' in this section means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

To hold otherwise would have strange and incongruous results which cannot have been contemplated by the legislature. The law of *lis pendens* is an extension of the law of *res judicata*, and makes the adjudication in the suit binding on alienees from the parties pending suit, just as the law of *res judicata* makes the adjudication binding on the parties to the suit and on alienees from them after decree. Now it is well settled that the bar of *res judicata* does not arise between defendants in a suit unless there is an active contest between them. Consequently the issue as to the validity of the mortgage would not be *res judicata* as between the present plaintiffs, the representatives of the third defendant in the former suit, and the first defendant in that suit and this, or between them and the second defendant if the alienation by the first defendant to the second defendant had been made after the decree instead of during the pendency of the suit. It would be indeed incongruous if the effect of section 52 were to bar a transferee from one of the parties pending suit from raising an issue which his transferor and

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transferees from his transferor after decree are at liberty to raise. In these circumstances I think we are justified in placing a restrictive construction on the language of section 52 so as to avoid this incongruity and to bring the section into line with the English law, more especially as the observations of Lord MACNAUGHTEN already referred to seem to support this interpretation. This is the construction put on the section by OLDFIELD, J., with whom I agree.

This is sufficient to dispose of the appeal but, as some reliance has been placed on the fact that the decree of the High Court in Second Appeal No. 323 of 1902 on appeal from the decree of the District Judge in Appeal No. 299 of 1900 affirming the decree of the District Munsif in Original Suit No. 114 of 1898 contains a declaration of the validity of the mortgage, Exhibit I, by the first defendant to the third defendant subject to the plaintiff's claim for Rs. 1,000 for unpaid purchase money which, it is said, amounts to an adjudication on the question, I may state that this declaration is not, in my opinion, an adjudication between the first and the third defendants in that suit. In their judgment, Exhibit E, the High Court expressly directed the decree of the lower Court to be modified by the insertion of this declaration 'as between the plaintiff and the third defendant' and accepted the findings of the lower Court, one of which was that the mortgage by the first defendant to the third defendant was fraudulent and without consideration (paragraph 5). It is not easy to reconcile their acceptance of this finding with the declaration they granted of the validity of the mortgage as between the plaintiff and the third defendant. But, as already pointed out, in the result of the suit the plaintiff was not concerned with the validity of the mortgage seeing that it was postponed to his claim for unpaid purchase money and that he had failed to set aside his sale to the first defendant, and probably all that was meant was that the mortgage, which the first defendant the mortgagor did not dispute, was to be subject to the plaintiff's lien for Rs. 1,000 for unpaid purchase money. In the result I agree with OLDFIELD, J., and would allow the Letters Patent Appeal with costs and make the order proposed by him.

BAKEWELL, J.

BAKEWELL, J.—I agree.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree.

N.R.