

*Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter,
and Mr. Justice Maclean.*

HARI RAM AND ANOTHER (DEFENDANTS) *v.* DENAPUT SINGH AND
ANOTHER (PLAINTIFFS).*

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July 13.

Unpaid Vendor—Lien—Creditor of Vendor, Right of, to Lien—Mortgage.

Although an unpaid vendor holds a lien upon property sold for the consideration-money, yet a creditor of that vendor cannot claim the same right.

THE facts of this case were, that the plaintiffs, under a chitti dated March 1873, lent to Ram Nath and Hem Nath a sum of Rs. 192, and that Hem Nath and Ram Nath being possessed of a share in a certain mauza, the former sold his share to one Gokoola Persad, defendant No. 2, on the 10th July 1874, and on the same date, Hem Nath, as guardian of his deceased brother's child, granted a zurpeshgi lease of Ram Nath's share to Gokoola Persad, defendant No. 2. Out of the consideration-money of these two transactions by an arrangement between the parties, Rs. 192 was left in the hands of defendant No. 2, to be paid over to the plaintiffs in satisfaction of their loan of March 1873. Defendant No. 2 neglected to pay over this sum, and the plaintiffs brought a suit for its recovery; and on the 13th September 1876 obtained a decree against defendant No. 2 for the amount due, and in execution of this decree caused the property bought by Gokoola Persad, the defendant No. 2, to be sold, and themselves became the purchasers at the sale on the 2nd April 1877, and were put into possession by the Court.

Defendant No. 2, on the 10th April 1875, had given a mortgage of the properties so purchased in execution by the plaintiffs, to defendant No. 1; and the latter, on the 18th May 1877, brought a suit on his mortgage-bond and obtained thereon a decree. Defendant No. 1 executed his decree by putting up the property to sale, and purchasing it himself on the 6th May 1878. The plaintiffs objected to the sale, alleging that they held

* Appeal from Appellate Decree, No. 131 of 1881, against the decree of Baboo Kali Prosunno Mookerjee, Second Subordinate Judge of Sarun, dated the 13th September 1880, reversing the decree of Baboo Purno Clunder Banerjee, Officiating Munsif of Pursa, dated the 9th July 1879.

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an equitable lien on the properties, as the money for which they had obtained a decree was in reality part of the purchase-money which defendant No. 2 had to pay to Hem Nath and Ram Nath, and that they stood in the place of these two latter; and on their objections being overruled on the 23rd March 1878, brought this present suit on the 22nd March 1879 to have the sale of the 6th May 1878 set aside, and to reverse the execution-proceedings which disallowed their objections, on the ground that their purchase prevailed over the defendants' mortgage, inasmuch as they had a prior lien upon the property.

Defendant No. 1 contended that the decree obtained by the plaintiffs was merely a simple money-decree which could create no lien on the property in suit; that the property having been previously mortgaged by the judgment-debtor to him, the plaintiffs could, by their purchase, which extended merely to the rights and interests of the judgment-debtor, only acquire a right of redemption in the property, and not having redeemed it before it was brought to sale in execution of his decree, their right lapsed.

The Munsif dismissed the plaintiffs' suit, holding that the plaintiffs only purchased the right of redemption, and not having exercised their right before the purchase of defendant No. 1, their right was annihilated.

The plaintiffs appealed to the District Judge, who held, that defendant No. 1 acquired nothing by his purchase, the plaintiffs not having been made parties to the suit of defendant No. 1, and that the plaintiffs' purchase was not therefore affected; and that they being in possession, the order of the 23rd March 1878, made against them when objecting to the sale, was wrong, and for these reasons he reversed the decree of the Munsif and set aside the miscellaneous order of the 23rd March 1878.

The defendant No. 1 appealed to the High Court.

Moonshee Mahomed Yusuf for the appellant.—The appellant has a preferential title to the property, his decree being a mortgage decree, the suit was brought upon a mortgage-bond, and the whole claim decreed, it must therefore be taken that not only the claim for money, but also the claim upon the property;

was decreed—*Debi Charan v. Pirbhu Din Ram* (1). The suit upon the mortgage-bond was instituted on the 17th January 1877, and the present plaintiff purchased in execution of his money-decree on the 2nd April 1877, therefore the doctrine of *lis pendens* applies.

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Baboo *Karuna Sindhu Mookerjee* for the respondents.—The decree obtained by the defendants was in reality a money-decree; the doctrine of *lis pendens* can have no application to the case of an execution-purchaser, but the doctrine would apply to cases of voluntary alienation—*Sreemutty Gourmoney Dabee v. Charles Reed* (2), *Dhurendro Chunder Mookerjee v. Anund Moyee Dossee* (3), *Nuffur Merdha v. Ram Lall Adhichary* (4), and *Ali Shah v. Husain Bahsh* (5). If a third party purchases at an auction-sale pending suit, he may be made a party by a supplemental bill—Story on Equity Pleading, 342.

The doctrine of *lis pendens* was held to apply in the following cases: *Rajkishen Mookerjee v. Radha Madhub Holdar* (6), *Lala Kali Prosad v. Buli Singh* (7), *Rabia Khanum v. J. P. Wise* (8); and *Manual Fruval v. Sanagapalli Latchmidevamma* (9) on the supposition that there was no distinction between voluntary and involuntary alienations; but the Privy Council, in the case of *Donendro Nath Sannyal v. Ram Coomar Ghose* (10) have decided that there is a distinction. If the doctrine of *lis pendens* does not apply, then even supposing that the decree which the defendant obtained was a mortgage-decree, still he would get nothing at the sale in execution of his decree. The mortgagee can only sell his lien and the property of the judgment-debtor; and if at the sale the judgment-debtor has no property, the lien cannot pass to the purchaser, because the lien is inseparable from the property—*Metharam Das v. Boloram Phukan* (11). The only remedy which the mortgagee has, is to

(1) I. L. R., 3 All., 388.

(2) 2 Taylor and Bell, 83.

(3) 1 W. R., 103.

(4) 15 W. R., 308.

(5) I. L. R., 1 All., 588.

(6) 21 W. R., 349.

(7) I. L. R., 4 Calc., 789; S. C., 3 C. L. R., 396.

(8) 23 W. R., 329.

(9) 7 Mad. H. C., 105.

(10) 10 C. L. R., 281.

(11) 9 C. L. R., 233.

1882 enforce his lien against the person in possession of the pro-
 HARI RAM property—*Chowdhry Jonmajoy Mullick v. Dassi Moni Dassi* (1).

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Moonshee Mahomed Yusuf in reply cited *Manual Fruval v. Sanagapalli Latchmidevamma* (2).

The judgment of the Court (GARTH, C.J., and MITTER and MACLEAN, JJ.) was delivered by

GARTH, C.J. — The facts of this case are briefly these: Two persons, Ram Nath and Hem Nath, took a loan of Rs. 192 from the plaintiffs, under a chitti dated the 17th Falgoon 1280 (March 1873). Hem Nath sold his share in Mauza Rizapore Damudur to Gokoola Persad, defendant No. 2, on the 24th July 1874. On the same date Hem Nath, as the guardian of his nephew Mothoora Persad, son of his deceased brother, the aforesaid Ram Nath, granted a zurpeshgi lease of Ram Nath's share in the same property also to Gokoola Persad, defendant No. 2. Out of the consideration-moneys of these two transactions, by an arrangement between the parties, Rs. 192 was left with the defendant No. 2 to be paid over to the plaintiffs in liquidation of the debt due under the chitti of the 17th Falgoon 1280 (March 1873), but this money was not paid by the defendant No. 2 to the plaintiffs, who brought a suit for its recovery; and, on the 13th September 1876, obtained a money-decree against the defendant No. 2.

Before this decree was passed, defendant No. 2, Gokoola Persad, mortgaged the mauza in suit, that is Rizapore Damudur, to the defendants, first party in this suit.

The plaintiffs, in execution of their decree, caused the property in suit to be sold, and purchased it themselves on the 2nd April 1877.

The defendants first party brought a suit against the defendant No. 2 to enforce their mortgage-bond dated the 10th April 1875, and obtained a decree on the 18th May 1877. The plaintiffs' decree was for a very small amount, *viz.*, for Rs. 192, with costs and interest. The decree obtained by the first party defendants was for a very large amount, *viz.*, about a lac of

(1) 9 C. L. R., 353.

(2) 7 Mad. H. C., 105.

rupees. The defendants first party, in execution of their decree, attached the property in suit. The plaintiffs thereupon intervened, and objected to the sale, on the ground of their prior purchase dated the 2nd April 1877; their case before the execution Court was that, under their decree, they held an equitable lien upon the property in dispute, because the money for which they had obtained a decree was really part of the consideration-money which Gokoola Persad, the vendee, had to pay to Hem Nath and Ram Nath. They contended that as Hem Nath and Ram Nath could claim a lien upon the property sold for that portion of the consideration-money which the vendee Gokoola Persad had not paid, they, standing in the shoes of Hem Nath and Ram Nath, were entitled to claim the same lien.

The Execution Court, however, on the 23rd March 1878, disallowed the claim and directed the property to be sold, unless the plaintiffs should satisfy the mortgage-decree. The value of the property in dispute being only Rs. 751, the plaintiffs, of course, did not pay the amount due upon the defendants' decree, which was for upwards of a lac of rupees, in order to save it; and it was accordingly sold in execution of the defendants' decree and purchased by the defendants on the 6th May 1878.

The plaintiffs then brought this suit on the 22nd March 1879, for the declaration of their title to the mauza in suit, on the ground that their purchase should prevail over the defendants' mortgage, because they had a prior lien upon the property. The Munsif tried this question only,—*viz.*, whether the plaintiffs held a prior lien upon the property or not. This question was raised in the first and the second issues framed by the Munsif. The Munsif was of opinion that the plaintiffs' contention was not valid. The plaintiffs being only creditors of the vendors, in his opinion, could not claim the same lien upon the property sold for any unpaid portion of the purchase-money which the vendors had. He accordingly dismissed the suit.

On appeal, the Subordinate Judge disposed of the case on an issue which was not raised by the parties. He decreed the plaintiffs' claim, because the plaintiffs were not made parties to the defendants' suit upon their mortgage-bond. The Subordinate Judge was not right in disposing of the suit by allowing

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the plaintiffs' to alter the nature of their contention in the Appellate Court. The plaintiffs, it seems to us, purposely did not put their case on the ground upon which the Subordinate Judge has decided it, because it would have enabled them only to obtain a temporary victory. If the defendants were to bring a suit against them to enforce their lien, the property in dispute could not be saved unless they would pay the whole of the mortgage-decree, which evidently they would not do because it is of small value compared with the amount of the mortgage-debt. The plaintiffs, therefore, put their case upon the only ground upon which, if they succeeded, they thought they would be able to reap a real benefit—that is, if they could establish their prior lien, they would be entitled to hold the property in dispute free from the defendants' mortgage. The Subordinate Judge was, therefore, not right in allowing the plaintiffs to make out a new case in the Appellate Court.

Then, as regards the Munsif's decision, we are of opinion that it is correct in law. It is true that an unpaid vendor holds a lien upon the property sold for the consideration-money, but a creditor of that vendor cannot claim the same right. The decree of the lower Appellate Court will be reversed with costs, and the decree of the Munsif will be restored with costs.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Bose.

1882
 June 22.

GOBIND LALL SEAL AND ANOTHER (DEFENDANTS) v. CHAND-
 HURRY MAITY AND OTHERS (PLAINTIFFS).*

Sale for Arrears of Rent—Publication of Notice of Sale—Material Irregularity—Reg. VIII of 1819, s. 8, cl. 2.

Clause 2, s. 8 of Reg. VIII of 1819, which provides that a notice of sale under the Regulation shall be stuck up in the cutchery of the zemindar, is not complied with by serving the notice upon the zemindar himself or his agent. The object of the Regulation is to make known to the holders of under-tenures and ryots and the residents of the place that the patni will be sold if

* Appeal from Original Decree, No. 170 of 1881, against the decree of Baboo Jodu Nath Roy, Subordinate Judge of Midnapore, dated the 31st May 1881.