

1899  
June 13.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

PARSOTAM\* SARAN (PLAINTIFF) v. SANEHI LAL (DEFENDANT).\*

Act No. IV of 1882 (*Transfer of Property Act*), section 52—*Lis pendens*—*Transfer pendente lite*—Time when a suit becomes contentious.

Held, that a suit becomes a "contentious suit" within the meaning of section 52 of the Transfer of Property Act, 1882, at the time when the summons is served on the defendant. *Radhasyam Mohapatra v. Sibū Panda* (1) and *Abboy v. Annamalai* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Harendra Krishna Mukerjee*) for the appellants.

Mr. *Abdul Majid* for the respondent.

STRACHEY, C.J. and BANERJI, J.—This was a suit for sale of mortgaged property. The defendant-respondent was the purchaser at a sale in execution of a decree obtained by him upon a prior unregistered mortgage. The plaintiff's mortgage was a registered one, and it is found that he had no notice of the prior unregistered mortgage of the defendant-respondent. He is therefore *prima facie* entitled to priority for his mortgage and to enforce it against the property in the hands of the respondent. The respondent resists the claim upon the ground that the plaintiff-appellant's mortgage was executed pending the suit upon the prior unregistered mortgage, and that having regard to section 52 of the Transfer of Property Act, the property could not, pending that suit, be dealt with by the mortgagor so as to affect the rights which the respondent obtained under the decree subsequently passed upon his mortgage, and in execution of which he purchased the property. The respondent's suit was instituted on the 17th of April, 1893. The plaintiff's mortgage was executed on the 20th of April, 1893, that is, pending the respondent's suit. It is alleged on behalf of the plaintiff that at the time of the execution of the mortgage of the 20th of April, 1893, no summons had been

\* Second appeal No 65 of 1897, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated 7th December 1896, reversing a decree of Munshi Gokal Prasad, Munsif of Moradabad, dated the 4th September 1896.

(1) (1888) I. L. R., 15 Calc., 647.

(2) (1888) I. L. R., 12 Mad., 180.

served in the present respondent's suit upon the mortgagor, the defendant in that suit, and consequently, having regard to the ruling of the Calcutta High Court in *Radhasyam Mohapattra v. Sibū Pandā* (1) and of the Madras High Court in *Abboy v. Annamalai* (2) the mortgage was made before the suit became contentious, and therefore was not affected by the rule contained in section 52 of the Transfer of Property Act. We are prepared to follow the rulings in question, to which there is nothing contrary in any of the decisions of this Court. There is, however, no finding as to the date of the service of summons in the present respondent's suit. We must have such finding before we can dispose of this appeal. We therefore refer the following issue to the lower appellate Court under section 566 of the Code of Civil Procedure:—On what date was the summons served upon the defendant mortgagor in the suit brought by the present respondent upon his mortgage of the 24th November, 1891? The lower appellate Court may take such evidence as it may deem necessary for determination of this issue. Upon the return of the finding ten days will be allowed for objections.

*Issue referred.*

*Before Mr. Justice Barkitt.*

ABDUS SAMAD KHAN AND OTHERS (APPLICANTS) v. ABDUR RAZZAQ KHAN (OPPOSITE PARTY).\*

*Act No. IV of 1898 (Partition Act) section 10—Partition—Offer by a party to a partition suit of compensation—Decree in partition suit when final—Civil Procedure Code, section 396.*

*Held*, that section 10 of Act No. IV of 1898 would apply to a suit for partition in the stage where an interlocutory decree for partition had been made, but that decree had not become final by the Court's acceptance of the lots prepared by the officer appointed for that purpose. *Shah Muhammad Khan v. Hanwant Singh* (3) and *Zubaida Jan v. Muhammad Taieb* (4) referred to.

\* Second Appeal No. 3 of 1899, from a decree of Babu Nilnadh Roy, Judge of Small Cause Court, with powers of Subordinate Judge of Cawnpore, dated the 28th September 1898, confirming a decree of Babu Banke Behari Lal, Munsif of Fatehpur, dated the 2nd July 1898.

- (1) (1888) I. L. R., 15 Calc., 647.  
 (2) (1888) I. L. R., 12 Mad., 180.

- (3) (1898) I. L. R., 20 All., 311.  
 (4) Weekly Notes, 1898, p. 99.

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