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by the second class Subordinate Judge, the application under section 344 was rightly made to that Subordinate Judge, and that Court had power to entertain the application, and make the declaration and orders referred to in sections 344 and 359, notwithstanding the fact that the amount of the scheduled debts exceeded Rs. 5,000. In that decision we fully concur.

For the above reasons we allow the preliminary objection. We direct that the memorandum of appeal be returned to the appellant to be presented in the proper Court. The respondent is entitled to his costs here.

Memorandum of appeal returned for presentation to the proper Court.

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Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.

SUKHDEO PRASAD AND ANOTHER (DEFENDANTS) *v.* JAMNA (PLAINTIFF).*

Lis pendens—Execution of decree—Sale in execution pending an appeal in a suit under section 283 of the Code of Civil Procedure—Title of auction-purchaser subject to the result of the appeal.

J brought a suit under section 283 of the Code of Civil Procedure for a declaration that certain property was the property of the plaintiff, and not liable to be sold in execution of a decree against a third person. Her suit was dismissed by the Court of first instance. She thereupon appealed; but while her appeal was pending, the decree-holder caused the property, the subject of the suit, to be sold, and it was purchased by *S P*, who subsequently transferred a portion of it to *J L*. On appeal *J's* claim was decreed, and her title to the property established. Some considerable time after the passing of the decree in appeal *J* brought a suit against *J L* and *S P* for recovery of the property purchased, as above mentioned, by *S P* at auction sale.

Held, that the doctrine of *lis pendens* applied, and that the title taken by *J L* was subject to the result of *J's* appeal, which was pending at the time when the property was brought to sale.

Chunder Nath Mullick v. *Nilakant Banerjee* (1), *Raj Kishen Mookerjee* v. *Radha Mahdub Holdar* (2), *Ram Narain Singh* v. *Mahtab Bibi* (3) and *Rajah Enayat Hossain* v. *Girdharee Lall* (4) referred to.

THE facts of this case are fully stated in the judgment of Aikman, J.

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* First Appeal No. 27 of 1899 from an order of Babu Raj Nath Prasad, Subordinate Judge of Agra, dated the 12th January 1899.

(1) (1882) I. L. R., 8 Calc., 690.
(2) (1874) 21 W. R., C. R., 349.
(3) (1880) I. L. R., 2 All., 828.
(4) (1869) 12 Moo. I. A., 366.

Pandit *Baldeo Ram Dave*, for the appellants.

Babu *Ratan Chand*, for the respondents.

AIKMAN, J.—The following is a short statement of the occurrences which led up to the institution of the suit out of which the present appeal has arisen.

On the 28th April, 1889, one Harpal got a simple money decree against Khem Karan and another, in execution of which he attached the property now in dispute as that of his judgment-debtors.

Musammat Jamna, the respondent to this appeal, filed an objection in the execution department claiming the property as hers. Her objection was disallowed. She forthwith instituted a suit under section 283 of the Code of Civil Procedure to establish the right which she claimed to the property in dispute. Her suit was dismissed on the 15th November, 1889. On the 9th December, 1889, she filed an appeal against the decree of the 15th November, 1889. On the 9th January, 1890, whilst Musammat Jamna's appeal was pending, the property in dispute was brought to sale in execution of Harpal's decree, and purchased by Sukhdeo Prasad, one of the appellants before us. Sukhdeo Prasad subsequently sold part of the property, which is house property in the town of Shamsabad, to Jawahir Lal, the other appellant in this case, who is said to have expended a considerable sum in improving it.

On the 17th November, 1890, Musammat Jamna's appeal was decreed, her right to the property now in dispute being held to be established. On the 23rd May, 1898, *i.e.*, 7½ years after the decree had been pronounced in her favour, Musammat Jamna instituted the present suit against the auction-purchaser, Sukhdeo Prasad, and his transferee Jawahir Lal, claiming to recover from them possession of the house property to which her right had been declared by the decree of 1890, and also asking to have the new constructions made by the defendants demolished.

The Court of first instance, purporting to apply the principle laid down in the case of *Zain-ul-abdin* v. *Muhammad Asghar Ali Khan* (1), held that the appellate decree of the 17th November, 1890, declaring the plaintiff's right to the property in

(1) (1887) I. L. R., 10 All., 166.

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dispute, had not the effect of invalidating the auction sale in execution of Harpal's decree, and consequently dismissed the suit. The plaintiff appealed. On appeal the learned Subordinate Judge held that the auction sale at which the defendant Sukhdeo Prasad purchased the property was a transfer *pendente lite*, and that consequently the defendants were bound by the appellate decree of the 17th November, 1890, although they were no parties to the suit in which that decree was passed. From what the Subordinate Judge says in his judgment, it appears that he considered the case to be governed by the provisions of section 52 of the Transfer of Property Act. It is clear from section 2, clause (d) of that Act that section 52 does not apply to this case. The Subordinate Judge holding that the auction-purchaser had constructive notice of the pendency of the appeal, and might have applied to have himself brought on the record, arrives at the conclusion that he was not a *bonâ fide* purchaser, and that his transferee Jawahir Lal is in no better position. In this reasoning I am unable to follow the learned Subordinate Judge. If the learned Subordinate Judge is right in holding that the case is governed by the doctrine of *lis pendens*, the question of notice does not arise—*vide Bellamy* v. *Sabine* (1). If it is not, there is no ground whatever for impugning the *bona fides* of either of the defendants.

The lower appellate Court, holding that the Court of first instance had dismissed the suit on a preliminary point, and in so doing had acted on a mistaken view of the law, set aside its decree and remanded the case under the provisions of section 562 of the Code of Civil Procedure for the trial of other issues which the Munsif had framed.

It is against this order of remand that the present appeal is brought by the defendants.

The first plea raised is that the Court below erred in applying the provisions of section 52 of the Transfer of Property Act.

I have already shown that this contention is sound. But this will not dispose of the case, for it may be governed by the doctrine of *lis pendens*, even though section 52 has no application.

(1) (1857) 1 DeG. and J., 566.

The next plea is that the appellants, not having been parties to the decree in execution of which the property in dispute was sold, and having been *bonâ fide* purchasers for value, the suit against them is not maintainable. This plea raises a question which is by no means free from difficulty; but after giving it careful consideration, and consulting all the authorities I have been able to discover, I arrive at the conclusion that it cannot be sustained.

I would remark, in the first place, that this case is distinguishable from that class of cases in which property, admittedly the property of the judgment-debtor, is sold in execution of an *ex parte* decree, which is afterwards set aside, or of a decree which is subsequently reversed on appeal. The law in such cases is clear. The purchaser at the sale in execution, provided he is not himself the decree-holder, gets a good title by his purchase, even though the decree under which the property is sold is afterwards set aside. But the facts of this case are different.

Suppose *A* sues *B* for a certain landed estate. *A's* suit is dismissed by the Court of first instance. *A* files an appeal. After the filing of the appeal and whilst it is pending, *B* transfers the property to *C*. Here I think it will be admitted that the doctrine of *lis pendens* applies, and that *C* will be bound by the result of the appeal, even if he has not been made a party to it and has in fact had no notice of it.

Will the result be different if the property, instead of being voluntarily transferred by *B*, is sold by a Court in execution of a money decree against *B*, and purchased by *C* whilst *A's* appeal is pending?

On the answer to this question depends the decision of the plea raised in the second ground of the memorandum of appeal in this case.

There is, as is shown in pp. 118-120 of Shephard and Brown's Commentaries on the Transfer of Property Act (Fourth Edition) a considerable conflict of authority on this point. In the case *Chunder Nath Mullick* v. *Nilakant Banerjee* (1) the learned Judges (Cunningham and Tottenham, JJ.), observed that it did not follow that the rule of *lis pendens* would hold good "when

(1) (1882) I. L. R., 8 Calc., 690.

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the alienation is not by the mortgagor, but by the Court acting on behalf of the creditors against the mortgagor, and where proceedings with a view to the sale had commenced before the suit was instituted." That case was taken in appeal to the Privy Council, but it was not necessary for their Lordships to decide the question we have to consider. In their judgment, however, they said "whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted." The reference is to an earlier passage in the judgment which is as follows:—"Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable."

Messrs. Shephard and Brown show that the preponderance of authority is in favour of the view that the doctrine of *lis pendens* applies as well to sales in execution of decrees as to voluntary alienations. And this, in my judgment, is the correct view. The reasons in support of the view are well set forth in the judgment of Couch, C.J., in the case of *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (1). When a Court sells property as belonging to a judgment-debtor, the purchaser can acquire, and the Court can convey, no higher interest in the property than the judgment-debtor himself has. If there is an infirmity in the title of the judgment-debtor, that infirmity attaches to the title of the auction-purchaser, just as it would in the case of a private sale. As was observed in the case of *Ram Narain Singh* v. *Mahtab Bibi* (3):—"In judicial sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor in the property sold on the part of the decree-holder or of the officer conducting the sale." In my opinion when the property of the judgment-debtor is sold in execution of a decree against him, the purchaser can acquire no higher title than the judgment-debtor would be competent to convey were he selling the property privately. In this opinion I am borne out by what was said by their Lordships of the Privy Council in *Rajah Enayat Hossain* v. *Girdharee Lall* (4) at pp. 378 and 379 of their judgment, when they say that there is no foundation in principle or authority for making any distinction between the case

(1) (1874) 21 W. R., 349. (2) (1880) I. L. R., 2 All., 828.
(3) (1869) 12 Moo. I. A., 366; at pp. 378, 379.

of a claimant under an execution sale, and a claimant under any other conveyance or assignment. In the case before us, any private transfer of the property in dispute by the judgment-debtors would have been invalid as against the plaintiff. The circumstance that the transfer of the rights and interests of the judgment-debtors was in execution of a decree against them would not, in my opinion, cure the infirmity of the judgment-debtors' title to the property arising from the fact that at the time of the transfer their right to the property was *sub judice*. I would, therefore, overrule the second plea in the memorandum of appeal, and hold, in concurrence with the lower appellate Court, that the plaintiff's suit was maintainable.

In the course of the argument it was urged that the plaintiff might have applied for an injunction staying the sale of the property pending the decision of her appeal. It is true that she might have done this. But I do not think she was bound to do so; even if she had made such an application, it does not follow that it would have been granted.

It was further contended on behalf of the appellants that as they were not parties to the appeal which ended in a declaration of the plaintiff's right, they are entitled in this suit to have the validity of the plaintiff's title to the property re-tried as against them. In my opinion this is not so. The auction-purchaser might have applied to have himself brought on the record as a defendant whilst the case was under appeal (sections 372 and 582 of the Code of Civil Procedure), but he did not choose to do so. To hold that he is entitled, owing to his purchase during the pendency of the appeal, to put the plaintiff again to proof of her title would be entirely opposed to the doctrine of *lis pendens* which applies to this case.

This may seem to bear somewhat hardly on purchasers at sales in execution of decrees, but it is only the application of the principle "*caveat emptor*." A Court sells such rights and interests as a judgment-debtor has in the property exposed for sale: it does not guarantee that he has any. If those rights and interests are nil, a purchaser, however complete may be his *bona fides*, acquires nothing. If it turns out that the judgment-debtor had no saleable interest in the property which purported to be sold

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as his, the purchaser is not entitled to retain the property on the ground that he bought it at a sale held under the orders of the Court. He is only entitled to receive back his purchase money from any person to whom the purchase money has been paid—*vide* section 315 of the Code of Civil Procedure.

In the last ground of appeal it is urged that Jawahir Lal being a *bonâ fide* transferee from the auction purchaser, and having been allowed by the plaintiff to spend a large sum of money on the property in dispute, is entitled to the benefit of section 41 of the Transfer of Property Act, and to have the suit as against him dismissed. I do not think this plea can succeed, as it is difficult to see how it can be held that the auction-purchaser was in possession of the property with the plaintiff's consent.

But, in my opinion, certain equities have arisen between Jawahir Lal and the plaintiff, to the benefit of which the former is entitled. As stated at the outset of this judgment, the plaintiff allowed upwards of 7½ years to elapse after she had got her decree before she took any steps to enforce her right against the defendants. We asked the learned vakil who represents the plaintiff, whether he could offer any explanation of this long delay, but he was unable to do so.

In connexion with this part of the case we referred the following issue to the lower appellate Court for trial under section 566 of the Code of Civil Procedure—whether or not the defendants, or either of them, have made any improvements upon the property in dispute to the knowledge of the plaintiff, and without any objection on her part? The lower Court finds that Jawahir Lal has made improvements on the property. The position taken up by the plaintiff when this issue was under trial in the lower Court was that she had no knowledge of the improvements made by Jawahir Lal. The lower Court finds that this is untrue, but it goes on to find that Jawahir Lal made the improvements *in spite of objection* on the plaintiff's part. As the plaintiff's case was that she had no knowledge of the construction, I do not think it was open to the lower Court to set up a different case for her and find that she had knowledge and did object. There can, I think, be no doubt from the facts stated in the return to the order of reference that the plaintiff did know of the improvements Jawahir

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Lal was making to the property. As she endeavoured to make out that she knew nothing of the improvements, the conclusion to be drawn is that this was because she had allowed the constructions to go on without any objection on her part. As held above, Jawahir Lal was a *bonâ fide* purchaser, and made additions to the house he had bought under the belief that he had a good title to it. The plaintiff knowing this allowed him to do so. In this state of circumstances, she is, in my judgment, entitled to a decree for possession of the property in Jawahir Lal's hands only on condition of her compensating him for his outlay. The result at which I arrive is that the order of remand should stand, and that the case should go back to the Court of first instance for disposal of the remaining issues with due regard to the observations now made.

I would therefore dismiss the appeal against the order of remand. Under the circumstances I would make no order as to costs of this appeal. As to the costs hitherto incurred and hereafter to be incurred in the lower Courts, I would direct that they abide the event.

KNOX, ACTING C. J.—I concur both in the judgment of my learned brother and in the order proposed.

The appeal is dismissed but without costs. Costs hereinbefore incurred and such as may be hereinafter incurred in the lower Court will abide the event.

Appeal dismissed.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.

1900
August 16.

BHAGWATI PRASAD AND ANOTHER (DEFENDANTS) *v.* HANUMAN PRASAD SINGH AND ANOTHER (PLAINTIFFS).*

Landholder and tenant—Mukaddami tenure—Nature of Mukaddami tenure considered.

In the absence of any special evidence to the contrary, the fact of a person holding land under what is known as a "mukaddami" tenure does not imply that the mukaddam has any heritable or transferable interest in the tenement.

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

Pandit *Madan Mohan Malaviya*, for the appellants.

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* First Appeal No. 48 of 1898, from a decree of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 18th November 1897.