

pre-emption in respect of what Man Kunwar had power to convey and did convey, that is her widow's interest, and that the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to the matter of the suit.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

Solicitor for the appellant—*The Solicitor, India Office.*

Solicitor for the respondents—*T. L. Wilson & Co.*

J. V. W.

1907

DEPUTY
COMMISSIONER OF
KHURI
REPRESENTING THE
COURT OF
WARDS
v.
KHANJAN
SINGH.

FAIYAZ HUSAIN KHAN (DEFENDANT) v. PRAG NARAIN (PLAINTIFF) AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow].
Lis pendens—Contest between prior purchaser under a second mortgage and subsequent purchaser under a first mortgage—Second mortgage executed after institution of suit on first mortgage but before summons served—“Contentious” suit—Act No. IV of 1882 (Transfer of Property Act), section 52.

The plaintiff was purchaser in execution of a decree based on a first mortgage of the property in suit. The defendant was in possession as a prior purchaser in execution of a decree on a second mortgage of the same property, passed in a suit to which the first mortgagee was not made a party. The second mortgage was executed after the institution of the suit on the first mortgage but before the summons had been served. *Held* that the doctrine of *lis pendens* applied, and that the plaintiff had the better title.

Where a suit is contentious in its origin and nature it is not necessary that the summons should have been served in the suit in order to make it a “contentious” one within the meaning of section 52 of the Transfer of Property Act (IV of 1882) and render the doctrine of *lis pendens* applicable.

Irrespective of the doctrine of *lis pendens* it appeared from the circumstances of the case that the defendant was cognizant of the first mortgage, of the decree made on the basis of it and of the sale proceedings which took place in execution of the decree.

APPEAL from a decree (August 10th, 1904) of the Court of the Judicial Commissioner of Oudh, which affirmed a decree (July 4th, 1903) of the Court of the Subordinate Judge of tahsil Biswan in district Sitapur.

Present :—Lord MACNAGHTEN, Lord DAVEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

P. C.
1907
February 6,
March 21.

1907

FAYYAZ
HUSAIN
KHAN
v.
PRAG
NARAIN.

The main question on this appeal was whether the appellant or the respondent had acquired a prior title to a village called Bangawan under purchases in execution of decree.

The village in suit was owned by one Hamid Husain Khan, who on 14th June 1889 executed a mortgage of it in favour of one Newal Kishore the predecessor in title of the respondent Prag Narain in consideration of a loan of Rs. 3,000 with interest. The mortgagor failing to pay as stipulated in the mortgage deed, Newal Kishore, on 13th July 1891, brought a suit in the Court of the Subordinate Judge of Sitapur to recover the amount due on the mortgage by sale of the mortgaged property in accordance with section 88 of the Transfer of Property Act (IV of 1882), and on 23rd August 1892 obtained a decree which directed sale of the mortgaged property in default of payment of the mortgage money on or before 23rd February 1893. An order absolute for sale was made on 29th November 1895 under section 89 of Act IV of 1882. The summons in that suit was not served on Hamid Husain Khan until September 12th, 1891.

Meanwhile, on 15th July 1891, Hamid Husain Khan mortgaged the village to the respondent Muzaffar Beg, who sued on the mortgage and obtained a decree for sale, which was made absolute in January 1897. To that suit Newal Kishore ought to have been, but was not, made a party.

Proceedings in execution were taken under the decree in Newal Kishore's suit, which resulted in an order directing the village to be sold on 20th July 1898. Faiyaz Husain Khan on 16th July 1898 brought a suit against Prag Narain (as representative of Newal Kishore then deceased) and against the mortgagors in the Court of the Subordinate Judge of Sitapur for a declaration that the village was not liable to attachment and sale as the mortgagors had no transferable interest therein : and he obtained a postponement of the sale pending the decision in his own suit which was finally dismissed on appeal by the Court of the Judicial Commissioner on 3rd January 1900.

On December 20th, 1900, the village was sold in execution of Muzaffar Beg's decree and purchased by the appellant Faiyaz Husain Khan (son of the mortgagor Hamid Husain Khan), who succeeded in getting possession, and on 21st February 1901 the

village was again sold in execution of Newal Kishore's decree and purchased by Prag Narain, who had succeeded Newal Kishore as decree-holder, the sale on the earlier mortgage thus taking place after the sale on the later mortgage.

In pursuance of his purchase of 21st February 1901, the plaintiff endeavoured to obtain possession of the village, and being resisted, he instituted the present suit, on 2nd October 1902, for possession, making Faiyaz Husain Khan, Hamid Husain Khan, and Muzaffar Beg defendants. Of these Hamid Husain Khan did not enter appearance and the defence of Muzaffar Beg was found by both the Courts below to be groundless. Faiyaz Husain Khan claimed priority under his prior purchase, and of the five issues the only one now material was the fourth—"whether defendants are bound by the sale held in plaintiff's favour?"

— On this issue the Subordinate Judge held that the defendant Faiyaz Husain Khan as prior purchaser in an execution sale under a mortgage decree had priority over the plaintiff as a subsequent purchaser; but that the sale to Faiyaz Husain Khan was void under section 52, Act IV of 1882, on the ground that the mortgage dated 15th July 1891 had been executed after the institution of Newal Kishore's suit to enforce his mortgage of 14th June 1889. On this finding the Subordinate Judge made a decree in favour of the plaintiff for possession and mesne profits.

The Court of the Judicial Commissioner on appeal (E. CHAMIER, Officiating Judicial Commissioner and W. F. WELLS, Additional Judicial Commissioner) affirmed the decision of the Subordinate Judge. Mr. Chamier, delivering the judgment of the Court, in which Mr. Wells concurred, remarked:—

"I am disposed to hold the rule of *lis pendens* applies to this case, notwithstanding that the mortgage to Muzaffar Beg was made before the service of the summons on the mortgagor in the first mortgagee's suit. But, whether that is a correct view or not, I hold that a purchaser at a sale held in execution of a decree for sale on a first mortgage made by a person in possession of the property, the decree having been obtained in a suit brought in strict accordance with section 85 of Act IV of 1882, is entitled to possession as against a purchaser at a sale held in execution of a

1907

 FAIYAZ
 HUSAIN
 KHAN
 v.
 PRAG
 NARAIN.

1907

FAYYAZ
HUSAIN
KHAN
v.
PRAG
NARAIN.

decree for sale obtained in a suit brought on a second mortgage in defiance of the rule laid down in that section.

“Prag Narain purchased the rights of the mortgagor as they were at the date of the first mortgage and there can be no doubt that the mortgagor was then entitled to possession. The cases of *Hargu Lal Singh v. Gobind Rai* (1) and *Madan Lal v. Bhagwan Das* (2) in which purchasers at sales held in execution of a decree on a first mortgage were held to be not entitled to possession are distinguishable upon the ground that the decrees obtained by the first mortgagees in those suits were not binding on the persons in possession who, or whose predecessors in interest, ought to have been joined as parties to the suit on the first mortgage. There is no reported case that I am aware of which supports the contention of the appellant in the present suit. It appears to me that if we were to accept the appellant's contention in the present suit there might be no limit to the number of suits required to enforce a first mortgage. Assuming, without deciding, that the appellant Faiyaz Husain can now redeem the first mortgage, I think that he should not be allowed to do so in the present suit; first, because he did not offer to do so in the Court below and his conduct has in other respects been such as to disentitle him to any consideration, and, secondly, because there remains not only the question whether Faiyaz Husain can redeem the first mortgage, but also the question whether Prag Narain cannot also in turn redeem the second mortgage (see *Hassanbhai v. Umaji* (3)). The latter question has not been considered at all and no argument was adduced to us upon it. Moreover the materials on the record are not sufficient to enable us to make up the requisite accounts and pass a decree which will settle the question between the parties. I would dismiss the appeal with costs.”

On this appeal *G. E. A. Ross* for the appellant contended that the doctrine of *lis pendens* did not apply to the case because, although the execution of the mortgage of 15th July 1891 was subsequent to the institution of Newal Kishore's suit, that suit did not become a contentious one within the meaning of section 52 of Act IV of 1882 until the service of the summons, which

(1) (1897) I. L. R., 19 All., 541.

(2) (1899) I. L. R., 21 All., 235.

(3) (1903) I. L. R., 28 Bom., 153.

took place two months after the mortgage had been executed: there was therefore no *lis pendens* at the date of the mortgage. Reference was made to *Radhasyam Mohapatia v. Sibn Panda* (1); *Parsotam Saran v. Sanehi Lal* (2) *Abboy v. Aunamalai* (3), Transfer of Property Act (IV of 1882), section 52; Cooto's Law of Mortgages, Volume II, 1344; Fisher on Mortgages, 5th ed., 533, para. 1119; Hukum Chand's Law of Res judicata 694, 695, Section 274; *Leitch v. Wells* (4) and *Dawson v. Mead* (5). The respondent had therefore, it was submitted, not made out any claim to possession of the property in dispute. Even assuming he had done so, the application of the appellant to be allowed to redeem should have been granted.

De Gruyther for the respondent contended that the sale to the appellant was void so far as the respondent was concerned under the general doctrine of *lis pendens*, and also under section 52 of Act IV of 1882. Newal Kishore's suit was contentious in its nature, and it was not necessary for a summons to be served on the defendant in order to make it a contentious suit within the meaning of section 52 of Act IV of 1882. Newal Kishore's suit was pending at the time the mortgage of 15th July 1891, under which the appellant claimed, was executed, and therefore the result of the suit could not be affected by the sale to the appellant under the decree on that mortgage.

It was also contended that the respondent as a purchaser in execution of a decree based on a first mortgage had a better title than the appellant who was a prior purchaser in execution of a decree based on a second mortgage to which the first mortgagee was no party. Besides, the appellant knew all the circumstances of Newal Kishore's mortgage and of the proceedings taken to enforce it, as was shown by his suit in 1898, to have the mortgage and decree passed on it declared invalid.

The application of the appellant to be allowed to redeem was rightly refused by the High Court. Had he in due course and within the proper time for doing so taken the necessary steps for redemption, his application to redeem might have been considered, but there was nothing for him to redeem after the

(1) (1888) I. L. R., 15 Cal., 647. (3) (1888) I. L. R., 12 Mad., 180.

(2) (1899) I. L. R., 21 All., 408. (4) (1872) 48 New York Reports, 685 (611).

(5) 71 Wisconsin Reports, 295.

1907

FAIZAZ
HUSAIN
KHAN
o.
PRAG
NARAIN.

1907

FAYYAZ
HUSAIN
KHAN
v.
PRAG
NARAIN.

confirmation of the sale to the respondent. The Transfer of Property Act (IV of 1882), sections 83 and 85 were referred to.

Ross replied.

1907, *March 21st*.—The judgment of their Lordships was delivered by LORD MACNAGHTEN:—

This is an appeal from the Court of the Judicial Commissioner of Oudh, which affirmed a decision of the Subordinate Judge of Sitapur.

Leave to appeal was granted on the ground that the appeal involved a substantial question of law. What the question was that was supposed to be involved is, however, left somewhat in obscurity.

The facts are not in dispute.

On the 14th of June 1889 Hamid Husain, the owner of *Matiza* Bangawan, mortgaged it to Newal Kishore.

On the 13th of July 1891 Newal Kishore brought a suit on his mortgage.

On the 23rd of August 1892 he obtained a decree for sale which was made absolute on the 29th of November 1895.

On the 21st of February 1901 the property was sold in execution of Newal Kishore's decree and purchased by the respondent Prag Narain, who was the son and the representative of the decree-holder.

On the 2nd of July 1901, Prag Narain obtained a sale certificate and attempted to recover possession of the property. He was, however, obstructed in every possible way by the appellant Faiyaz Husain, who was in possession under a decree for sale obtained on a subsequent mortgage. Prag Narain was therefore compelled to bring this suit.

There was no incumbrance upon the property either at the date of the mortgage of the 14th June 1889 to Newal Kishore or at the date of the institution of Newal Kishore's suit on the 13th of July 1891. But on the 15th of July 1891, before any summons in Newal Kishore's suit was served, a second mortgage was granted by the mortgagor to Mirza Muzaffar Beg. Mirza Muzaffar Beg put his mortgage in suit on the 20th of March 1894, without making the first mortgagee a party, and in the

1907

 FAIYAZ
 HUSAIN
 KHAN
 v.
 PRAG
 NARAIN.

absence of the first mortgagee obtained a decree for sale. In execution of this decree the property mortgaged to Mirza Muzaffar Beg was put up for sale on the 20th of December 1900 and bought by the appellant Faiyaz Husain, who was the son of Hamid Husain, and who had attained his majority in 1894. Faiyaz Husain managed to get possession and resisted all attempts on the part of the respondent Prag Narain to dispossess him.

The case seems to their Lordships to be clear. The mortgage to Mirza Muzaffar Beg was made during the pendency of Newal Kishore's suit, which was in its origin and nature a contentious suit and was at the time being actively prosecuted. Therefore, under section 52 of the Transfer of Property Act (No. IV of 1882) it did not affect the rights of Newal Kishore under the decree made in his suit. Their Lordships are unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of section 52 of the Act of 1882 until a summons is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty.

The doctrine of *lis pendens* with which section 52 of the Act of 1882 is concerned, is not, as Turner, L.J. observed in *Bellaamy v. Sabine* (1), "founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is . . . a doctrine common to the Courts both of law and of equity, and rests . . . upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail." The correct mode of stating the doctrine, as Cranworth, L.C., observed in the same case, is that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent."

Apart, however, from the doctrine of *lis pendens*, which seems to their Lordships to apply to the present case, it is plain that at the date of his purchase Faiyaz Husain knew all about the mortgage to Newal Kishore and the decree made on the basis of

1907

FAIYAZ
HUSAIN
KHAN
v.
PRAG
NARAIN.

that mortgage, and he knew that the sale proceedings were actually in progress, for in July 1898 he brought a suit against Prag Narain, asking for a declaration that Newal Kishore's mortgage, and the decree passed upon it, were invalid, and that the property was not liable for attachment and sale.

At the hearing of the appeal to the Court of the Judicial Commissioner Faiyaz Husain asked to be let in to redeem. The Court very properly rejected that application. It has been repeated at the hearing before this Board. There seems to be no ground for the application. Before the sale to Prag Narain was confirmed, Faiyaz Husain had every opportunity of redeeming the property. He never offered to do so. On the sale being confirmed the equity of redemption was extinguished. Prag Narain appears to be in as good a position as any outside purchaser unconnected with the property would have been. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant—*T. L. Wilson & Co.*

Solicitors for the respondent—*Barrow, Rogers, & Nevill.*

J. V. W.

APPELLATE CIVIL.

1907
January 21.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

THE MUNICIPAL BOARD OF NAJIBABAD (PLAINTIFF)

v. SHEO NARAIN (DEFENDANT)*.

*Act (Local) No. I of 1900 (N.-W. P. and Oudh Municipalities Act)
section 47—Contract—Mode of execution by Board.*

Where a contract entered into with a Municipal Board for the supply of material for road-making was endorsed both by the Secretary and the Vice-Chairman of the Board and this endorsement referred to the contents of the contract and its confirmation: *Held* that this was a sufficient compliance with the requirements of section 47 of the Municipalities Act.

THIS was a suit brought by the Municipal Board of Najibabad for damages for breach of a contract entered into by the

*Second Appeal No. 1142 of 1905, from a decree of C. H. Berthoud, Esq. Additional Judge of Moradabad, dated the 5th of August 1905, reversing a decree of Maulvi Muhammad Shafi, Additional Subordinate Judge of Moradabad, dated the 28th of September 1904.