

Before Mr. Justice Lindsay and Mr. Justice Sulaiman, and,
on a reference, before Mr. Justice Mukerji.

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SHIAM LAL AND ANOTHER (PLAINTIFFS) v. SOHAN LAL
AND OTHERS (DEFENDANTS).³²

April, 26.

May, 23.

June, 29.

Act No. IV of 1882 (*Transfer of Property Act*), section 52—
Lis pendens—*Mortgage of property in suit pendente lite*—*Effect of decree on rights of mortgagee.*

T and *D* sued *DD* for the recovery of certain property. The suit was decreed, and the defendant appealed. Pending this appeal, the plaintiffs mortgaged an 8 biswa share in village Urena, which was part of the property in dispute, to one *W*. Subsequently the parties compromised the case, and by the decree which was passed in accordance with the compromise each of the parties got half of the property mortgaged, and it was further provided that the defendant *DD* should be liable for the debt due to *W* and that neither *T* nor *D* nor their property should be liable therefor. *W* having sold his rights as mortgagee, the vendees then sued on the mortgage.

Held by SULAIMAN and MUKERJI, JJ., that the mortgage was enforceable only against the 4 biswa share of the village Urena which was still held by *T* and *D*.

Per LINDSAY, J., dissenting :—

A transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part.

The mortgage, therefore, was enforceable only against the 4 biswa share which had fallen to *DD* under the compromise.

Sheo Narain v. Chunni Lal (1), *Gulzari Lal v. Madho Ram* (2), *Faiyaz Husain Khan v. Prag Narain* (3), *Radhamadhub Haldar v. Monohur Mukerji* (4), *Moti Lal v. Karrabuddin* (5), *Bellamy v. Sabine* (6), *Hukm Singh v. Zauki Lal* (7), and *Annamali Chettiar v. Malayandi Appaya* (8), referred to.

³²First Appeal No. 286 of 1924, from a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 25th of April, 1924.

(1) (1900) I.L.R., 22 All., 243.

(2) (1904) I.L.R., 26 All., 447.

(3) (1907) I.L.R., 29 All., 339.

(4) (1888) I.L.R., 15 Calc., 756.

(5) (1897) I.L.R., 25 Calc., 179.

(6) (1857) 1 DeG. and J., 566.

(7) (1884) I.L.R., 6 All., 506.

(8) (1906) I.L.R., 29 Mad., 426.

THE facts of this case were as follows :—

In 1908 Tori and Duli brought a suit for possession as reversioners against Damodar Das, who was in possession of the estate, alleging himself to be the adopted son of the deceased male owner. The suit was decreed by the court of first instance and Damodar Das appealed to the High Court. While the appeal was pending, Tori and Duli executed a mortgage of 8 biswas out of 18 biswas, 10 biswansis, in village Urena, which was part of the property in suit, in favour of one Wahid-ud-din, on the 3rd of August, 1911. Subsequently, on the 17th of March, 1913, Tori and Duli on the one hand, and Damodar Das on the other, compromised their claims. It was agreed between them that Tori and Duli would take half the share in the property and that Damodar Das would take the other half. It was also provided that Damodar Das should discharge the debt due to Wahid-ud-din and that neither Tori nor Duli nor their property should be liable therefor. Wahid-ud-din, the mortgagee, was no party to this compromise. A decree was framed in terms of the said compromise. After this decree was passed Wahid-ud-din sold his rights under the mortgage of the 3rd of August, 1911, to Shiam Lal and another for a sum of Rs. 1,471. The purchasers then brought the present suit for sale.

One common plea raised by all the defendants was that it was Damodar Das himself who took this sale-deed in 1913 *benami* in the name of the present plaintiffs, in order to defeat his creditors and transferees. It was pleaded that by this arrangement Damodar Das had really discharged the mortgage of 1911, which under the compromise decree he was bound to pay up.

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The representatives of Tori and Duli pleaded that, the mortgage being *pendente lite*, Wahid-ud-din and his representatives were bound by the compromise decree, and that, inasmuch as that decree provided that the share of Tori and Duli would not be liable for the mortgage-debt, the suit against them should be dismissed.

Damodar Das did not put in any written statement, but the position taken up by his representatives was that the plaintiffs not being a party to the decree, could not take advantage of it, nor could they ignore one part of the decree and try to enforce the other part. The trial court on the question of fact came to the conclusion that the purchase of 1913 was made by Damodar Das himself and the mortgage-debt had been discharged. On the question of law he was inclined to the view that "so far as the moiety of Tori and Duli is concerned, it is not absolved from liability, and so far as the other moiety is concerned, it is equally unaffected by the compromise".

The plaintiffs appealed from the decree and urged that the whole claim should be decreed against the entire share.

Dr. *Surendra Nath Sen*, Mr. *B. Malik* and *Munshi Harnandan Prasad*, for the appellants.

Pandit Uma Shankar Bajpai, *Babu Surendra Nath Gupta* and *Munshi Shabd Saran*, for the respondents.

The judgement of *SULAIMAN, J.*, after setting out the facts as above, thus continued :—

As to the question of fact whether the purchase of 1913 was a *benami* transaction, we find ourselves unable to uphold the finding of the court below. [His Lordship discussed the question of fact.]

The next question that requires consideration is whether both or either of the moiety shares is liable to be sold. Mr. *Bajpai* on behalf of Ram Sarup, a transferee from Sohan Lal, son of Duli and a representative of Tori and Duli, has strongly urged that the plaintiffs being representatives of Wahid-ud-din, who was a *pendente lite* transferee, are bound by the compromise decree and by all its terms. His contention is that a transfer *pendente lite* is subject to the terms of the decree that is eventually passed and further, that a transferee *pendente lite* is really a representative of one of the parties, and as such is bound by the decree. He, therefore, contends that as a result of the compromise decree, the half share which was occupied by Tori and Duli should be exempt from all liability, and as directed by the decree the entire debt should fall on the half share of Damodar Das in the hands of his representatives. Strong reliance has been placed by him on the case of *Sheo Narain v. Chunni Lal* (1) and the case of *Gulzari Lal v. Madho Ram* (2), and on the remarks contained in those judgements that a *pendente lite* transferee is bound by the decree and is a representative of a party.

It seems to me that those remarks should be understood in the light of the facts of those cases. The expressions "subject to the decree" or "bound by the decree" are certainly true in one sense. It would, however, not be fair to substitute these expressions in place of the words actually used in section 52 of the Transfer of Property Act in order to give it a meaning. What that section provides is that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party there-to under any decree or order which may be made therein. What we have, therefore, to see is not whether the enforcement of the mortgage would in any way affect the

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(1) (1900) I.L.R., 22 All., 243.

(2) (1904) I.L.R., 26 All., 447.

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rights of the mortgagors, Tori and Duli, but whether its enforcement would affect the rights of Damodar Das. As observed by their Lordships of the Privy Council in the case of *Faiyaz Husain Khan v. Prag Narain* (1), the correct mode of stating the doctrine of *lis pendens*, with which section 52 is concerned, is, as was observed by CRANWORTH, L. J., in an earlier case, that “*pendente lite* neither party to the litigation can alienate the property in dispute, so as to affect his opponent.” The transferor himself cannot complain that his rights are affected by the transfer. A grantor cannot derogate from his own grant. Section 52 is, in my opinion, not intended for the protection of transferors in a pending litigation. So far as they themselves are concerned, they are bound by their own transfers. The other parties thereto require to be protected, otherwise, in the words of TURNER, L. J., quoted by their Lordships, “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.” Now Damodar Das was the party other than the transferors Tori and Duli. It has to be seen whether the rights of Damodar Das will be affected if the mortgage is enforced against the half share of Tori and Duli. It seems to me that even if Damodar Das and his representatives be temporarily relieved of their liability by the enforcement of the mortgage against the share of Tori and Duli, their rights are in no way injuriously affected thereby. I do not think that a temporary relief of his liability is tantamount to affecting the rights of Damodar Das. If any part of the mortgaged property is retained by the mortgagors under the decree, I see no good ground for holding that such property is absolved from its liability.

The argument that the *pendente lite* mortgagee is a representative of his mortgagors and is bound by the de-

(1) (1907) I.L.R., 29 All., 339.

decree cannot be pushed to an extreme limit. The cases relied upon by Mr. *Bajpai* were cases where the purchaser of the property in dispute was allowed to raise objections in the execution department as a representative of all the judgement-debtors. That is quite a different matter. In such cases the property has devolved on the transferee and he is certainly a representative of the judgement-debtor *qua* that property. It is also undoubtedly true that a *pendente lite* transferee is bound by the decree so far as it goes against his transferor, but it is quite a different thing to say that such a transferee should be treated for all purposes as if he were a party to the suit. Let us take an extreme case by way of illustration. A property is in dispute in a suit between *A* and *B*. While the suit is pending, *A* mortgages the property to *C*. Having transferred it, *A* enters into a compromise with *B* and on paying him some cash consideration, retains the entire property but throws the liability to pay the mortgage debt on *B*. The compromise specifically states that the property in the hands of *A* will be free from the liability of the mortgage and that *B* will be personally liable to pay the debt to *C*. Can, in such a case, *A* insist on *C* suing *B* on his personal liability? Can such a compromise put an end to the charge which had been created in favour of *C*? A transfer *pendente lite* is not absolutely void, but is only voidable at the instance of the other party to the suit whose rights are affected thereby. In my view, in such a case, the charge will remain alive. On the same principle I am of opinion that the mortgagees are entitled to enforce the charge against the half share retained by *Tori* and *Duli* which has now devolved on their representatives. It would be no consolation to the mortgagees to suggest that they may have a remedy against *Damodar Das*. That remedy, as will be shown hereafter, is not open to them, and in any case, even if it were open, the mortgaged property would be reduced to half,

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if the compromise decree means that a charge was to be created on the half share of Damodar Das.

As regards the moiety share of Damodar Das, I am, in the first place, very doubtful whether the plaintiffs, when their predecessor Wahid-ud-din was no party to the compromise decree, can enforce it against Damodar Das's representatives. No doubt, in equity, Damodar Das and his representatives are bound to pay the amount, but if a breach is committed by them, the representatives of Tori and Duli are entitled to damages. The plaintiffs cannot be deemed to be a party to the compromise so as to be in a position to take advantage of it against the will of Damodar Das and his representatives. In the second place, I feel another difficulty in giving the plaintiffs a decree against this half share also. No doubt the compromise itself provided that Damodar Das would be liable for the amount and it may, therefore, be stated that Damodar Das's rights under the decree would not be affected by the enforcement of the mortgage against him. It, however, seems to me that the plaintiffs are entitled to enforce their mortgage against the half share of Tori and Duli on the only ground that they are not bound by the decree so far as that interest is concerned. It is by ignoring the provisions of the decree that they can succeed against Tori and Duli. At one and the same time they cannot be allowed to take advantage of the very decree which they ignore in that way, and to enforce that decree against the representatives of Damodar Das. It would be approbating and reprobating the compromise simultaneously, which cannot be tolerated. I, therefore, think that the plaintiffs' only remedy is against the representatives of the transferors of their predecessor, and they cannot be allowed to proceed against Damodar Das's representatives.

I would, therefore, decree the claim for the entire amount due on the mortgage against the half share of

Tori and Duli which is now in the possession of Ram Sarup, defendant No. 3, and would dismiss the claim *in toto* against Damodar Das and his representatives.

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LINDSAY, J.—The facts are all set out in the judgment of my learned brother and I agree with him in finding that the court below was wrong in holding that the assignment of the mortgage in suit was a *benami* transaction.

There remains the question of law, namely, the application of the doctrine of *lis pendens* to the facts of the case.

It is not disputed that the mortgage now in suit was executed *pendente lite* by Tori and Duli on the 3rd of August, 1911. The litigation in which Tori and Duli were arrayed against Damodar Das was terminated by a decree of this Court passed in terms of a compromise on the 17th of March, 1913. (See the decree in First Appeal No. 168 of 1911).

By the mortgage of the 3rd of August, 1911, an 8 biswa share of mauza Urena was hypothecated, and this share was one of the items directly and specifically in suit in the litigation concluded by the High Court decree above mentioned. That decree declared that a moiety of this 8 biswa share was awarded to the appellant Damodar Das and was to remain in his possession. It was also declared that Damodar Das was to discharge the debts incurred in favour of Shafi-ud-din (*sic.*) and Jammu of Sangrampur, and that neither the plaintiffs (Tori and Duli) nor their property were to be liable therefor. The name Shafi-ud-din in this decree is a mistake for Wahid-ud-din. The other half of this share and several other items of property were by the decree awarded to the respondents Tori and Duli subject to their discharging a debt owing to Mathura Prasad of Pilibhit. It was de-

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clared that neither Damodar Das nor his property were to be liable for this latter debt.

It cannot, I think, be seriously argued that if Wahid-ud-din the mortgagee had been a party to this litigation he would have been bound by the decree and could only enforce his mortgage against the moiety of the 8 biswas awarded by the decree to Damodar Das. He was not, however, a party. On the other hand he was a transferee *pendente lite* and there is, I think, ample authority for the proposition that such a transferee is as much bound by the decree passed in the *lis* as if he had been an actual party to it.

My learned brother has quoted one of the observations made by Lord CRANWORTH in the well-known case of *Bellamy v. Sabine* (1). I should like to supplement this by a further quotation from the same judgement. It is as follows :—

“Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigant parties but also on those who derive title under them by alienations made pending the suit, whether such alienee had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end.”

It is in the sense indicated in this passage that I interpret the judgements of their Lordships of the Privy Council in *Radhamadhub Haldar v. Monohar Mukerji* (2), and *Moti Lal v. Karrabuldin* (3).

In the Full Bench decision of this Court, *Gulzari Lal v. Madho Ram* (4), the former of these two judgements was cited by BANERJI, J., who at page 463 of the report expressed himself as follows :—

“In *Radhamadhub Haldar v. Monohar Mukerji* their Lordships of the Privy Council held that a person who had,

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

(2) (1888) I.L.R., 15 Cal., 756.

(3) (1897) I.L.R., 25 Cal., 179.

(4) (1904) I.L.R., 26 All., 447.

during the pendency of a mortgagee's suit for sale, purchased the mortgage property in execution of a simple decree for money was bound by the proceedings and the decree in the suit."

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A still earlier decision of this Court, *Hukm Singh v. Zauki Lal* (1), laid down that a purchaser *pendente lite*, being bound by the decree against the persons through whom he claimed could not be permitted to go behind the decree so as to show that there was an error patent on the face of the decree.

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With these authorities behind me I take the view that a transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and, if he is bound by the decree, he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part. The principle appears to be that a person who takes a transfer from any of the parties to a pending litigation thereby puts himself in privity with the suit, and must be treated, not as a stranger to the suit, but as a party to it and consequently bound by the terms of the decree in full.

It is true that in the case now being considered the final decree which was passed by this Court was founded upon a compromise. But that fact does not interfere with the application of the doctrine of *lis pendens*. A decree based upon a compromise is just as much binding as a decree founded upon a decision upon the merits. I may refer in this connection to the Full Bench decision of the Madras High Court, *Annamali Chettiar v. Malayandi Appaya* (2). And I also note that this matter was not contested before us.

Applying the above principles to the case before me, I am of opinion that the plaintiffs in this mortgage suit can enforce their mortgage only against that moiety of the property which the High Court's decree awarded

(1) (1884) I.L.R., 6 All., 506.

(2) (1906) I.L.R., 29 Mad., 426.

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to Damodar Das. Neither the latter nor his representatives who are impleaded as defendants can complain that the enforcement of the mortgage against the property in their hands "affects" the rights of Damodar Das under the High Court's decree. On the contrary the mortgage would, in this way, be enforced in strict accordance with the terms of the decree.

On the other hand, that decree by its terms has relieved the moiety share awarded to Tori and Duli of all liability for the discharge of the mortgage-debt now sought to be enforced; it has also absolved Tori and Duli from all personal liability for this debt, and the declarations to this effect are an integral part of the High Court's decree which, for the reasons given above, is binding upon the transferee *pendente lite* to the full extent of its terms.

I cannot accept the argument that Tori and Duli or their representatives are debarred from availing themselves of these declarations on the ground that by doing so they are seeking to derogate from their own grant. They are, in my opinion, entitled to say that under the decree both they and their property stand free of all liability for this claim; and a mortgagee who takes a precarious transfer from one of the parties to a pending suit, and who knew, or must be taken to have known, that his transfer was subject to the result of the litigation then pending ought not to be heard to say that his transferor is seeking to derogate from his own grant because the decree which concludes the litigation has deprived the transferor of a portion of the property to which he could still make title at the date of the mortgage.

For these reasons I hold that the appeal should be allowed in part and that the plaintiff should be given a decree for sale against Damodar Das and his representatives in respect of the moiety share of the mortgaged property

in their possession. I would dismiss the suit as against the representatives of Tori and Duli with costs.

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BY THE COURT.—The members of this Bench have differed on the question whether, under the circumstances set forth above, the plaintiffs are entitled to enforce their mortgage against the half share of Tori and Duli, or the half share of Damodar Das, or both, or neither. Accordingly, under section 98 of the Code of Civil Procedure we refer the question as to what reliefs the plaintiffs are entitled to in this case, to one or more of the other Judges of this Court, whom the Hon'ble the CHIEF JUSTICE may select.

The point of law having been referred to MUKERJI, J.; his Lordship delivered the following judgement:—

MUKERJI, J.—This First Appeal was before two learned Judges of this Court for disposal. They differed on a point of law and that question alone has been referred for my opinion.

The facts involved, so far as I am concerned, are these. Two persons, Tori and Duli, claimed certain properties as belonging to one Than Chand against one Damodar Das and others. Damodar Das was the principal claimant of the property on the other side. The suit was instituted in 1908 and was decided in the then plaintiffs' favour on the 21st of February, 1911. After this decree was passed in their favour Tori and Duli mortgaged an 8 biswa share in the village Urena to one Wahid-ud-din, the predecessor in title of the present plaintiffs. A first appeal was filed by Damodar Das in this Court and it was settled by a compromise arrived at on the 7th of March, 1913. It was agreed as between Tori and Duli on one side and Damodar Das on the other that certain properties, including a half share in the 8 biswa of Urena, should go to Tori and Duli and they should discharge a certain debt due to one Mathura

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Prasad. Certain other properties, including the other half share in the 8 biswa of Urena, were given to Damodar Das and he agreed to discharge, among other debts, the debt due to Wahid-ud-din (the name of Wahid-ud-din appears to have been wrongly given as Shafi-ud-din in the compromise). It was further agreed that, so far as the debts undertaken to be paid by Damodar Das were concerned, neither Tori nor Duli nor their properties were to be liable.

The plaintiffs have brought the suit, out of which this appeal has arisen, to recover Rs. 11,000 and odd by sale of the entire 8 biswa share mortgaged to Wahid-ud-din on the 3rd of August, 1911. The entire 8 biswa share has passed out of the hands of Tori and Duli and Damodar Das. Tori and Duli's share (4 biswas) is now owned by the defendant second party, Ram Sarup, and the share of Damodar Das is now owned by the defendants third party. There are certain subsequent mortgagees as well as *pro formâ* defendants in the suit. The question on which the learned Judges differed was whether the 4 biswas given by the compromise decree to Tori and Duli was liable in the hands of the present owners and transferees or whether the 4 biswas given by the compromise decree to Damodar Das was liable. The learned Judges appear to have been agreed that the entire 8 biswas could not be sold.

Before me, Mr. *Malik* contended that the entire 8 biswas could be sold at the instance of the plaintiffs. There is no force in this contention, for reasons to be presently stated in deciding the point referred to me for opinion.

To start with, no party who has made a transfer to another is entitled to say that the transferee has no right to the property. This is elementary law. This principle has been stretched so far as to enact a rule of law that

where a person, without owning a property, purports to transfer it, he would be bound to make good the transfer, if later he acquires that property, vide section 43 of the Transfer of Property Act. It seems to me, therefore, consistent with principles that Tori and Duli, who made the mortgage, should make it good by means of any property that may be in their hands out of the property mortgaged by them. Now, is there any principle or rule of law which enables Tori and Duli or their representatives to say that by reason of certain things that have since happened they are not liable to make good their promise as contained in the deed of mortgage? The law on the point under consideration has been embodied in section 52 of the Transfer of Property Act, which, for the purposes of the Indian Courts, contains the entire law on the subject of *lis pendens*. If section 52 of the Transfer of Property Act should enable Tori and Duli to say that they are entitled to plead that section as a bar to the enforcement of the mortgage against any property in their hands, they will succeed, otherwise not.

Looking to section 52 of the Transfer of Property Act, it runs as follows (omitting unimportant portions) :—

“ During the active prosecution . . . of a contentious suit . . . in which any right to immoveable property is directly and specifically in question, the property cannot be transferred . . . by any party to the suit . . . so as to affect the rights of any *other* party thereto under any decree or order which may be made therein . . . ”

This rule lays down that when a piece of immoveable property is in contest between two parties, one of the parties cannot transfer it so as to prejudice the other party if the result of the litigation is in favour of the other party. It will be noticed that the rule is enacted entirely for the benefit of the “other party” and not for the benefit of the party making the transfer. The reason seems to be clear. The party who makes the

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transfer is bound by it, while the question is whether the successful party in the litigation, who is not the party making the transfer, is also to be bound by the transfer. The rule is that the "other party" is not to be so bound. There is, therefore, nothing in section 52 of the Transfer of Property Act which would enable Tori and Duli to say to Wahid-ud-din: "We are not going to keep our contract and make good our word on account of the provisions of section 52 of the Transfer of Property Act."

In various cases a transferee *pendente lite* has been described as the representative of his transferor so far as the result of the suit is concerned. This description would be perfectly good as between the transferee and the party other than the transferor. As between the transferee and the party who is not the transferor, the transferee *pendente lite* cannot claim a higher right than his transferor. In this sense, no doubt, the transferee is a representative of the transferor. But I have not come across any case in which a question as to rights may have arisen, *as between the transferor and the transferee* and it has been said that the transferee is a representative of the transferor. As between these two, there is no question of representation. They are parties to a contract, they are bound by the terms. In my opinion we have to look for the whole law on the subject to the provisions of section 52 of the Transfer of Property Act alone and not elsewhere.

It will be noticed from the statement of facts made above, that Damodar Das made only a personal covenant to pay the debt due to Wahid-ud-din. He did not even say that Wahid-ud-din's debt was a mortgage-debt. (I sent for the record of First Appeal No. 168 of 1911 and examined the compromise in the case). The promise on the part of Tori and Duli to pay Mathura Prasad's

debt was purely a personal promise and so was the promise on the part of Damodar Das. Nowhere in the compromise was any property earmarked as being liable for the debts of Mathura Prasad or Wahid-ud-din or Jammu. It follows therefore that under the compromise decree Damodar Das got an absolute title to a 4 biswa share out of 8 biswas of Urena mortgaged to Wahid-ud-din. Wahid-ud-din being a transferee *pendente lite* could not touch the property which Damodar Das, being the "other party" to the litigation, got under the terms of the decree. This is the reason why the 4 biswas in the hands of defendants third party cannot be touched. Further, the undertaking on the part of Damodar Das to pay the debt of Wahid-ud-din was an undertaking which could not be enforced at the instance of Wahid-ud-din who was not a party to the contract or to the decree. He obtained a mortgage of 8 biswas and he could always insist on the terms of his contract being made good by his mortgagors or their representatives, so far as it lay in their power to do so.

My opinion therefore is that the mortgage in suit is enforceable against only those 4 biswas of Urena which are now held by the representatives of Tori and Duli and the mortgage is not enforceable against the 4 biswas share given to Damodar Das under the compromise decree.

[The case then was put up before LINDSAY and SULAIMAN, JJ., who decreed the claim against the 4 biswas of mauza Urena which were held by the representatives of Tori and Duli, and dismissed it against the 4 biswa share given to Damodar Das under the compromise decree.]

Decree modified.

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Mukerji, J.