

## APPELLATE CIVIL.

*Before Mullick and Kulwant Sahay, J.J.*

MUSSAMMAT RAMDULARI KUER

1924-25.

v.

UPENDRANATH BASU.\*

Dec., 2, 3.  
Feb., 25.

\* *Transfer of Property Act, 1882, (Act IV of 1882), section 52—Lis pendens, doctrine of, whether applies to purchase at an execution sale—compromise-decree in a pending suit whether affects the doctrine.*

The doctrine of *lis pendens* applies to a purchase during the pendency of a suit which terminates in a consent decree and it also applies to a purchase at an execution sale.

*Timoodhan Chatterji v. Trailokhya Charan Sanyal*(1), relied on.

The fact that payment is made by a decree-holder to the judgment-debtor in order to obtain a consent decree does not affect the doctrine of *lis pendens*.

*Tangor Manjhi v. Jaldhar Diari*(2), followed.

Appeals by defendants nos. 1 and 2.

These appeals arose out of a suit brought by the plaintiff-respondent for declaration of his title to and recovery of possession of a four-annas share in the eight-annas *purwari takhta* of *mouza* Garua. Both the Courts below decreed the suit. Appeal no. 615 was by the defendant no. 2 and appeal no. 677 by the defendant no. 1.

The facts giving rise to the suit were shortly these :

*Mouza* Garua in *Mahal* Rampur Mafi, *Touzi* no. 6758, in the District of Gaya was divided into two *takhtas* of eight-annas each, known as the *purwari*

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\* Appeal from Appellate Decrees nos. 615 and 677 of 1922, from a decision of J. A. Sweeney, Esq., I.C.S., District Judge of Gaya, dated the 21st February, 1922, affirming a decision of B. Bijoy Keshab Mitra, Subordinate Judge of Gaya, dated the 14th December, 1920.

(1) (1912-13) 17 Cal. W. N. 413. (2) (1909-10) 14 Cal. W. N. 322.

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*takhta* and the *pachhiari takhta*. Four-annas out of the eight-annas *pachhiari takhta* belonged to the plaintiff and the father of the defendant no. 4. The remaining four-annas was *wakf* property. Defendant no. 3, Reyaz Ali Khan, was the owner of the entire *purwari takhta*. He, however, sold a one-anna share to a third person and he had seven-annas of the *purwari takhta* left to him. The four-annas share belonging to the plaintiff and to the father of the defendant no. 4 in the *pachhiari takhta* was held in lease by the defendant no. 3. In 1915 a rent suit was brought by the plaintiff and the father of the defendant no. 4 against the defendant no. 3, and a decree was passed against the defendant no. 3 on the 23rd November, 1905. In execution of this decree the defendant no. 3's four-annas share in the *purwari takhta* was attached on the 5th of June, 1907, and it was sold in execution on the 19th September, 1907, and was purchased by the plaintiff and the father of the defendant no. 4. The sale was confirmed on the 26th November, 1907, and a sale certificate was granted and delivery of possession was formally given to the auction-purchasers on the 12th June, 1908. It was alleged by the plaintiff that he and the father of the defendant no. 4 applied for mutation of their names by right of the purchase in the execution sale; but they discovered that in the Collector's register the name of the original defendant no. 2 Rai Bideswari Prasad stood recorded by right of purchase under a deed of sale dated the 16th November, 1907, executed by the defendant no. 3 in favour of Rai Bideswari Prasad. The application for registration of names was accordingly withdrawn. The father of the defendant no. 4 sold his interest to the plaintiff on the 15th of October, 1908, and the plaintiff, as the owner of the entire four-annas share purchased at the auction sale on the 19th of September, 1907, brought the present suit for declaration of his title and for recovery of possession.

The suit was contested by the defendant no. 1 and the defendant no. 2. The original defendant no. 2,

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Rai Bindeswari Prasad, died after filing a written-statement and his widow Mussammat Ramdulari Kuer was substituted in his place.

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The defendant no. 1 was a purchaser from defendant no. 2 under a deed of sale dated the 20th *Baisakh*, 1323 (May 1916). Their defence was that the property originally belonged to one Jaikaran Lal who was the maternal grandfather of Rai Bindeswari Prasad. Jaikaran Lal died leaving a widow, Jasodar Kuer, and on her death the property passed to her daughter, Mussammat Lochan Kuer, who was the mother of Rai Bindeswari Prasad. Mussammat Lochan Kuer sold the property to one Mussammat Peyari and she in her turn sold it to the defendant no. 3.

The case of the defendants 1 and 2 was that the sale by Mussammat Lochan Kuer was without any legal necessity and all that passed by the conveyance executed by Mussammat Lochan Kuer was only her life interest. Mussammat Lochan Kuer died on the 5th of May, 1906 and, on the 5th of May 1907, Rai Bindeswari Prasad instituted a suit (no. 69 of 1907) against the defendant no. 3 for possession of the property on the allegation that the sale by Lochan Kuer was inoperative after her death. This suit was compromised and a compromise decree was passed in favour of Rai Bindeswari Prasad on the 13th of December, 1907. It was contended on behalf of the contesting defendants that the purchase of the plaintiff in execution sale on the 19th September, 1907, was during the active prosecution of the suit brought by Rai Bindeswari Prasad which was a contentious suit and that the doctrine of *lis pendens* applied to the plaintiff's purchase. It was further contended that the sale by Mussammat Lochan Kuer was without any legal necessity and was not binding on the reversioner Rai Bindeswari Prasad after the death of Lochan Kuer. It was further alleged that the deed of sale dated the 16th of November, 1907, mentioned by the plaintiff in his plaint as having been executed by the

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defendant no. 3 in favour of Rai Bideswari, was not executed with the knowledge or permission of Rai Bideswari and that he did not acquire the property under that deed of sale but under the compromise decree passed on the 13th December, 1907.

Both the Courts below held that suit no. 69 of 1907, instituted by Rai Bideswari, was a collusive suit, and the compromise decree was also a collusive decree and, that, therefore, the doctrine of *lis pendens* did not apply to the plaintiff's purchase. They further held that the deed of sale of the 16th of November, 1907, was executed with the knowledge and consent of Rai Bideswari Prasad and that having regard to the fact that the interest of defendant no. 3 had already been sold in the execution of the plaintiff's decree on the 19th September, 1907, no interest passed to the defendant no. 2 under that deed of sale.

*Sir Ali Imam* (with him *G. S. Prasad* and *N. C. Ghose*), for the appellant in appeal no. 677.

*Sultan Ahmed* (with him *N. K. Prasad*), for the appellant in appeal no. 615.

*S. M. Mullick* and *S. N. Bose*, for the respondents in both appeals.

*Cur. adv. vult.*

25th Feb.  
 1925.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): The important question for decision in the present appeals is as to whether the purchase of the plaintiff at the auction sale held on the 19th September, 1907, is affected by the doctrine of *lis pendens*. This would depend on a finding as to whether the suit no. 69 of 1907 brought by Rai Bideswari Prasad against the defendant no. 3 was a *bonâ fide* and contentious suit or whether it was a collusive suit. The learned District Judge as well as the learned Subordinate Judge have held that this suit was a collusive suit. This finding is based on mere suspicion. The dates of the various transactions are set out in the judgment of the learned District Judge and from the fact that the suit of Rai Bideswari was brought in May, 1907, within a month

of the date on which the plaintiff had filed his application for execution, namely the 11th of April, 1907, and that Rai Bindeswari entered into an agreement of sale with defendant no. 3 while his suit was still pending and after attachment of the property in the execution of the plaintiff's decree and, in fact, after the auction sale thereof, and that on the 16th of November, 1907, Rai Bindeswari took a *kabala* of the same property from the defendant no. 3 while the suit was still pending, and that in December 1907 after the sale in execution in favour of the plaintiff had been confirmed there were consultations between Rai Bindeswari and his pleaders with reference to his suit and that on 12th December, 1907, a petition was filed in Bindeswari's suit that the parties were compromising and on the next day, that is on 13th December, 1907, a petition of compromise was filed in the suit wherein the defendant no. 3 stated that Bindeswari's claim was correct and that he was not in a position to refute it by evidence, the learned Judge came to the conclusion that Rai Bindeswari's suit was not a *bonâ fide* and contentious suit, but was a fraudulent and collusive suit in order to defeat the plaintiff, I am, however, not prepared to agree with the conclusion of the learned Judge. It is not safe to come to a finding of collusion and fraud on mere suspicion. The suit brought by Rai Bindeswari on the face of it appears to be a *bonâ fide* suit. It appears that the suit was instituted on the 5th of May, 1907; written-statement was filed on 24th of June, 1907; issues were settled on the 2nd July, 1907; documents were filed by the defendant on 11th of July, 1907; time was taken by the plaintiff to produce evidence and on the 25th of July, 1907, a list of witnesses was filed by the plaintiff Rai Bindeswari. All these took place before the auction sale in favour of the present plaintiff and there is no reason to assume that the proceedings taken in Rai Bindeswari's suit were not *bonâ fide* proceedings in active prosecution of a contentious suit. I agree with the learned Judge that the *kabala* of the 16th of November, 1907, must be

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taken to have been executed with the knowledge and consent of Rai Bindeswari and the defence of the defendants nos. 1 and 2 in the present case that the said *kabala* was executed at the instance of a servant of Rai Bindeswari without his knowledge and consent cannot be true. But it is quite evident that that *kabala* was really in settlement of the dispute between Rai Bindeswari and the defendant no. 3. No doubt a sum of money was paid by Rai Bindeswari to the defendant no. 3 as a consideration for the *kabala* but that would not in any way affect the result of the case. When, however, Rai Bindeswari discovered that before the execution of his *kabala* on the 16th of November, 1907, the property had already been sold in execution of a decree in favour of the plaintiff there was a consultation between him and his lawyers and as his suit had not been finally disposed of Rai Bindeswari was advised by his lawyers to file a petition of compromise in the suit and to obtain a compromise decree. To my mind the fact that Rai Bindeswari had taken a *kabala* before the compromise petition was filed will not affect the rights of the parties and it must be held that the purchase of the plaintiff was during the active prosecution of a contentious suit. That the doctrine of *lis pendens* will apply to a purchase during the pendency of a suit which terminates in a consent decree is settled by authorities. I need only refer to the case of *Tinoodhan Chattarji v. Trailokhya Charan Sanyal*(<sup>1</sup>). This case is also an authority for the proposition that the doctrine applies to a purchase at an execution sale. The fact that payment was made by Rai Bindeswari to the defendant no. 3 in order to obtain the consent decree will not affect the doctrine of *lis pendens*. This view is supported by the case of *Tangor Manjhi v. Jaldhar Diari*(<sup>2</sup>) where, in spite of the fact a sum of Rs. 2,000 was paid by the plaintiff in order to induce the defendant to agree to a compromise decree, it was held not to affect the doctrine of *lis pendens*.

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(1) (1912-13) 17 Cal. W. N., 413. (2) (1909-10) 14 Cal. W. N. 323.

The learned District Judge has observed that the plaintiff in the present suit had established his title as against the defendant no. 3 before any proceedings were instituted by the defendant no. 2. It is difficult to understand what the learned Judge means by this observation. The mere fact of the plaintiff having applied for execution and asked for attachment of the property at the time when the suit of Rai Bindeswari was brought did not establish the title of the plaintiff as against the defendant no. 3. I have already observed that the sequence of dates as set out in the judgment of the District Judge do not lead to the irresistible conclusion that Rai Bindeswari's suit was not a contentious suit. I am, therefore, of opinion that the purchase of the plaintiff is affected by the doctrine of *lis pendens* and under section 52 of the Transfer of Property Act his purchase must be subject to the rights of Rai Bindeswari under the compromise decree passed in suit no. 69 of 1907.

It has been contended on behalf of the plaintiff that the *kabala* of the 16th of November amounts to an admission on the part of Rai Bindeswari that the sale by Lochan Kuer was a valid sale and binding upon the reversioner and, in this view of the case, it must be held that the defendant no. 3 had a valid title which passed to the plaintiff under the auction sale. The question as to whether the sale by Lochan Kuer was a sale binding upon the reversioner need not be gone into in the present case. The learned District Judge has refused to consider this question on grounds which do not appear to be sound. The question was distinctly raised in the written-statement and in the issues framed in the trial Court and evidence was adduced on the point. Had it been necessary to consider this question it would have been necessary to make a remand; but in view of the fact that the plaintiff's purchase is affected by the doctrine of *lis pendens* it is not necessary to decide this question.

In the circumstances the plaintiff is not entitled to the declaration asked for by him and his suit must be

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dismissed. The decision of the learned District Judge must be set aside and the suit dismissed with costs throughout, and the appeals allowed. There will be only one hearing fee in both the appeals.

MULLICK, J.—I agree. In my opinion there was no legal evidence to support the finding that the suit brought by Rai Bindeswari Prasad on the 5th of May, 1907, was fraudulent and collusive. I agree that the plaintiff's purchase was subject to the rule of *lis pendens* and he acquired no title as against Rai Bindeswari Prasad.

The appeal must therefore be decreed.

S. A. K.

*Appeal decreed.*

## APPELLATE CRIMINAL.

*Before Bucknill and Kulwant Sahay, J.J.*

RUPAN SINGH

v.

KING-EMPEROR \*

1925.

Feb., 6, 9,  
10, 11, 25.

*Code of Criminal Procedure, 1898 (Act V of 1898), section 367(5)—Heads of charge, directions regarding.*

The proviso to section 367(5) of the Code of Criminal Procedure, 1898, does not require that the "heads of charge to the jury" should be a *verbatim* reproduction of the Judge's summing-up; nor is it necessary that the charge should be written out before it is delivered. But whether the heads of charge are written out before delivery or not they should be placed on record by the Judge as soon as it is possible for him to do so and whilst what he said is fresh in his recollection.

The heads of charge need not be meticulous or lengthy but must give accurately the substance of what the Judge said to the jury so that the High Court may, if occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the jurors.

\* Criminal Appeal no. 5 of 1925, from an order of J. A. Sweeney, Esq., I.C.S., Sessions Judge of Patna, dated the 24th December, 1924.