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A.R.A. ARUMUGAM CHETTYAR AND ONE v. V.K.S.K. N.M. KANAPPA CHETTYAR.

RUTLEDGE, C.J., AND BROWN, J.

it to the interest of the appellants to do all that they can to expedite the taking of accounts. We accordingly allow the appeal and vary the order appealed from on the following terms: The second appellant will be appointed receiver in the place of the Official Receiver on the respondent being allowed to withdraw from the amount paid into Court the sum of Rs. 75,000 without security and in respect of the balance Rs. 25,000 before withdrawing it he must give security to the satisfaction of the Court. The appellants are entitled to costs five gold mohurs.

APPELLATE CIVIL.

Before Mr. Justice Heald, and Mr. Justice Cunliffe.

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Jan. 17.

MA THAN
v.
MAUNG BA GYAN.*

Transfer of Property Act (IV of 1882), *section* 552—Lis pendens, *doctrine of—"Suit or proceeding" when can be said to be actively prosecuted—Effect of transfer during interval between return of plaint for presentation in proper Court and its actual presentation in that Court—Analogous phraseology of section* 14, *Limitation Act (XV of* 1877) *and of Order* 7, *Rule* 10 *of the Civil Procedure Code (Act V of* 1908).

Held, that where the subject-matter of the suit is land and the valuation which the plaintiff puts on the land is disputed and where the proper valuation is after inquiry found to be beyond the pecuniary limits of the Court in which the plaint was presented, so that the plaint is returned for presentation in another Court, and where further the plaint is so presented without undue delay, a transfer made in the interval between the return of the plaint and its presentation to the proper Court is a transfer which is prohibited by section 52 of the Transfer of Property Act. The wording of section 14 of the Limitation Act and of Order 7, Rule 10 of the Civil Procedure Code shows that a suit remains a suit though a Court cannot entertain it for want of jurisdiction and has to return the plaint to be presented to the Court in which "the suit" should have been instituted.

Sitaramaswami v. *Lakshmi Narasimha*, 41 Mad. 510; *Tangor* v. *Jaladhar*, 14 C.W.N. 322—*referred to.*

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* Letters Patent Appeal No. 8 of 1926.

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MA THAN v. MAUNG BA GYAN.

Ba Thein (2)—for Appellant.

Villa—for Respondent.

HEALD, J.—On the 6th December 1919 the appellant Ma Than sued one Maung Maung, her divorced husband, for partition and possession of her half-share of a holding of paddy land. She valued the land at Rs. 20 per acre, and the share which she claimed at Rs. 350. She accordingly filed her suit in the Township Court at Bogale, which deals with suits up to Rs. 500 in value. The defendant Maung Maung filed a written statement in which he pleaded *inter alia* that the land was worth at least Rs. 60 an acre and that the share which appellant claimed was worth at least Rs. 1,000. The Court which had already admitted the plaint and registered it under the provisions of Order 4, Rule 2, framed a preliminary issue as to the proper valuation of the suit and took evidence as to the acreage of the holding and the value per acre.

On the 14th of May 1920 the Court recorded a finding that the proper valuation of the suit would be Rs. 750 and on that finding it directed that the plaint be returned for presentation in the proper Court, the proper Court being the Subdivisional Court at Pyapôn.

On the 20th of May 1920 Maung Maung, undoubtedly with the intention of defeating appellant's claim, executed a conveyance of the land to one Maung Tin, who has since conveyed it to respondent.

On the next day, the 21st of May 1920, appellant presented the plaint which had been returned to her in the Subdivisional Court. The suit was tried in that Court and appellant obtained a decree for half the land.

She then sued Maung Maung for mesne profits in respect of her half share in the land and she joined

respondent as being in possession of that share and as therefore being liable to her for her share of the profits.

In that suit the question arose whether or not the sale of the land by Maung Maung to Maung Tin, in so far as it affected her half share, was prohibited by section 52 of the Transfer of Property Act.

The trial Court said that both the transfer to Maung Tin and the transfer to respondent took place while appellant's suit against Maung Maung was pending and found that those transfers did not affect appellant's interest in the land.

The lower appellate Court said that the only question which arose in the appeal before it was whether or not on the 20th May 1920, when the land in question was sold by Maung Maung to Maung Tin there was a suit pending so as to introduce the doctrine of *lis pendens* as expounded in section 52 of the Transfer of Property Act. On this question the learned Judge held that appellant's active prosecution of the suit began in December 1919 when she first filed her plaint in the Township Court and that because the transfer of the land by Maung Maung was made during that active prosecution of the suit the trial Court was right in applying the doctrine of *lis pendens* and in giving appellant a decree against respondent.

The case came before a single Judge of this Court on second appeal and the learned Judge held that because the value of appellant's claim was found to be beyond the pecuniary limits of the jurisdiction of the Court in which her plaint was first presented, there was no suit instituted or prosecuted in that Court and that therefore no suit was pending until the plaint was presented in the Subdivisional Court, so that the sale by Maung Maung to Maung Tin, which took place on the day before the presentation of the

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plaint in the Subdivisional Court, was not affected by the principles of *lis pendens*.

The learned Judge recorded, however, that the question of law which arose in the appeal was important, and he declared that the case was a fit one for appeal under Clause 13 of the Letters Patent.

The question which thus comes before us in this appeal is whether in a case where the subject-matter of the suit is land and the valuation which the plaintiff puts on on the land is disputed and where the proper valuation is after enquiry found to be beyond the pecuniary limits of the Court in which the plaint was presented, so that the plaint is returned for presentation in another Court, and where further the plaint is so presented without undue delay, a transfer made in the interval between the return of the plaint and its presentation to the proper Court is a transfer which is prohibited by section 52 of the Transfer of Property Act.

There seems to be no direct authority on the subject. The only cases cited at the Bar and in the text-books are the cases of *Sitaramaswami* v. *Lakshmi Narasimha* (1) and *Tangor* v. *Jaladhar* (2). In the former of these cases the property in dispute was mortgaged by the defendant while the suit was pending in the Court in which the plaint was filed. The plaint was subsequently returned for presentation in the proper Court on the ground that the value of the subject-matter of the suit was beyond the pecuniary limits of the jurisdiction of the Court in which the plaint was first presented. The mortgagee was not made a party to the suit, but he claimed that he was entitled to appeal against the decree passed in it. A Bench of the High Court at Madras said that they were

(1) (1918)41 Mad. 510. (2) (1910) 14 C.W.N. 322.

"inclined to think that when a plaint is returned for presentation to the proper Court any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be devolution in the course of the suit which was subsequently tried in the second Court". This remark, was, however, *obiter*, and the circumstances of that case were different, since in the present case the alleged devolution took place in the interval between the return the plaint by the first Court and its presentation in the second Court. In the case of *Tangor* v. *Jaladhar* (2), which does not seem to have been officially reported, the facts were also different. In that case the plaint was first presented in a lower Court, which found that the subject-matter was beyond the pecuniary limits of its jurisdiction and returned the plaint to be presented in the proper Court. It was presented in a higher Court, which found that the valuation was within the pecuniary limits of the lower Court and returned the plaint again to be presented in the lower Court. The devolution of interest took place while the case was pending before the higher Court, and there can be no doubt that that Court had jurisdiction to try the case, although it refused to do so. The Bench of the Calcutta High Court said that "even if the higher Court had no jurisdiction it does not follow that the case would not fall within the provisions of section 52 of the Transfer of Property Act. The words 'active prosecution' in that section must refer to prosecution by the plaintiff. That a plaintiff can actually prosecute a suit in a Court which from defect of jurisdiction is unable to entertain it is clear from the wording of section 14 of the Limitation Act, XV of 1877, in which the legislature has adopted that very phraseology".

It is clear that neither of these decisions is an an authority on the question before us, which is in

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effect whether a plaintiff who has presented his plaint in a wrong Court can be regarded as actively prosecuting a suit or proceeding in the interval between the return of the plaint for presentation in another Court and its actual presentation in that Court.

The learned Judge who decided the question in this Court held, as I have said, that there was no "suit" until the plaint was properly presented in the second Court. In my opinion this view was unduly technical. As a matter of fact the plaint was admitted and the proceedings were registered as a suit in the Township Court. A preliminary issue was framed there and evidence was taken. It would seem therefore there was actually a suit instituted, although, as appeared later, that particular Court had not jurisdiction to decide it. I am fortified in this view by the actual wording of Order 7, Rule 10 which says that at any stage of "the suit" the plaint shall be returned to be presented to the Court in which "the suit" should have been instituted. I have no hesitation therefore in holding that in this case there was a suit instituted in the Township Court and I see no reason to doubt that for the purposes of section 52 of the Transfer of Property Act, the suit in the Subdivisional Court was the active prosecution of that suit.

But even if the proceedings in the Township Court were not technically a suit they were undoubtedly a "proceeding", and a "contentious proceeding" and the words used in section 52 of the Transfer of Property Act are "a contentious suit or proceeding." The "suit" in the Subdivisional Court was in my opinion part of the "active prosecution" of the "suit or proceeding" which started in the Township Court, and the only question which remains for decision is whether the interval between the return of the plaint

in the suit or proceeding in the Township Court and its presentation in the Subdivisional Court can reasonably be regarded as part of the active prosecution of appellant's " suit or proceeding."

On the authorities the criterion as to whether or not the doctrine of *lis pendens* applies seems to be whether or not the suit or proceeding was being prosecuted with due deligence at the time when the alleged transfer was made. It cannot be said, and indeed it is not suggested, that in this case the period of seven days which elapsed between the return of the plaint in the Township Court at Bogale and its presentation in the Subdivisional Court at Pyapôn was unreasonably long or indicates any want of due diligence. It cannot be said either that the filing of the plaint in the wrong Court indicates any want of due diligence since the valuation of land is a matter of difficulty and is largely a matter of opinion the price of land in this country fluctuating enormously.

I would hold therefore that there was no want of due diligence and that the transfer in favour of respondent, which took place on the 20th of May 1920, took place during the active prosecution of appellant's suit or proceeding which began in the Township Court on the 6th of December 1919, and, so far as it affected appellant's interest, was a transfer which is prohibited by section 52 of the Transfer of Property Act.

I would therefore set aside the judgment of this Court in Civil Second Appeal No. 397 of 1924 and restore the decree of the District Court dismissing respondent's appeal with costs for appellant throughout.

CUNLIFFE, J.—This is an appeal from a judgment of Mr. Justice Carr. It involves a short point of law and has been specially certified under the Letters Patent by the learned Judge as fit for appeal.

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The facts are shortly as follows :—Plaintiff, who had secured a divorce from her husband, brought an action against him for a half share in certain paddy land. It was contended on behalf of the husband that the amount involved was in excess of the jurisdiction of the Township Court in which the action was lodged. The Judge of the Township Court agreed with this contention and returned the plaint to be filed in the Subdivisional Court. The case was there heard and the plaintiff's claim was dismissed. On appeal, however, to the Divisional Court, plaintiff obtained a decree in her favour.

She then sued for mesne profits on the share of the land which had been awarded to her. It was argued that her husband had sold the whole of the land to one Ba Tin on a date between that on which the original suit was filed and a date on which it was returned to the appropriate Court as mentioned above. The question before Mr. Justice Carr was whether the purchaser's title was subject to the doctrine of *lis pendens* although the first suit was improperly brought.

The two Courts below found that the conveyance of the land took place *pendente lite*. Mr. Justice Carr came to an opposite conclusion by virtue of his construction of the provisions of section 52 of the Transfer of Property Act. That section runs as follows : " During the active prosecution in any Court having authority in British India or established beyond the limits of British India by the Governor-General in Council of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, 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 thereto under any decree or order which

may be made therein, except under the authority of the Court and on such terms as it may impose."

The learned Judge took the view that it could not be said at the material time that any suit was pending because the suit concerned was a misconceived action in a Court which had no jurisdiction. He went so far as to hold that no suit within the meaning of section 52 was pending at all at the material time and that the doctrine of *lis pendens* did not accrue until the institution of the suit in the Subdivisional Court which actually took place a day after the execution of the conveyance.

There is direct authority on this very point in the case of *Tangor Majhi and others* v. *Jaladhar Deari and others* (1). There it was held that the rule of *lis pendens* will operate in favour of a plaintiff, who, at the time of the transfer was erroneously prosecuting his suit in a Court which from defect of jurisdiction was unable to entertain it and in consequence returned it for presentation to the appropriate Court, which Court ultimately decreed the suit on the basis of a lawful compromise. The decision in question appears to me to be based on a sound principle of equity. Here the suit was eventually decreed in the wife's favour. There was no evidence that the mistake in the institution of the original suit in the first Court was due to her negligence or fault. She, indeed, as far as the evidence showed, acted with due diligence and *bonâ fide*. Eventually, as has been observed, she was successful.

From the commencement, the plaintiff in the words of section 52 was engaged in " actively prosecuting " her suit. I am of the opinion that even if a person actively prosecutes a suit in a Court which from defect of jurisdiction is an inappropriate tribunal, yet such

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active prosecution is contemplated by the section under regard.

The same principle has been adopted in a construction of the Limitation Act. For these reasons I am of opinion that the appeal should be allowed with costs.

APPELLATE CIVIL.

Before Mr. Justice Heald, and Mr. Justice Cunliffe.

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Jan. 17.

U KALA
v.
MA HNIN U AND ONE.*

Civil Procedure Code (Act V of 1908), section 47, Order 21, Rules 58, 61 and 63; Order 1, Rule 10 (2)—Person wrongly joined as a party and so dismissed from the suit whether still a party within the meaning of section 47—Whether appeal lies on order made on application by such person and another for removal of attachment—Effect of proceeding under Order 21, Rule 61.

Appellant in suing his debtor on certain promissory-notes joined the 1st respondent as a party on the allegation that she had promised to mortgage her lands as security if the debtor failed to pay within a certain time. The suit against the 1st respondent was dismissed on the ground of misjoinder. In execution of his decree against the debtor, appellant attached certain properties as belonging to his debtor. The 1st respondent and her husband the 2nd respondent (who was never a party to the suit) applied for removal of attachment claiming the attached properties as their own. The application was heard and allowed under the provisions of Order 21, Rules 58 and 61. Instead of filing a suit under Rule 63, appellant appealed to the High Court against the order and contended that the explanation to section 47 of the Code applied to his case.

Held, that where a suit is dismissed against a person on the ground that he was wrongly joined as a party having no real concern with the suit, such a person does not remain a party to the suit for the purpose of section 47 of the Civil Procedure Code. A more appropriate way, in case of misjoinder, is to strike out the name of the party under Order 1, Rule 10 (2) of the Code, so as to take him out of the operation of section 47.

Held, also, that as the proceedings in this case were all under Order 21, Rules 58 to 62, and the order on the joint application was not and could not have been made in the execution proceedings of the suit, appellant who had acquiesced in the adoption of the procedure could not contend that Rule 63 did not apply.

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* Civil Miscellaneous Appeal No. 130 of 1926 against the order of the District Court of Toungoo in Civil Miscellaneous No. 126 of 1925.