APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

1929

June 13.

K. Y. CHETTYAR FIRM AND ANOTHER
v.
JAMILA BI BI.*

Lis pendens, *doctrine when applicable to transfer of property at Court-sale—Administration Suit—Land forming part of estate—Court auction sale of land—Auction-purchaser when bound by doctrine of* lis pendens.

Although the provisions of s. 52 of the Transfer of Property Act do not apply specifically to a transfer of property under a Court-sale, nevertheless the doctrine of *lis pendens* does apply to such a transfer independently of the operation of that Act; and in deciding whether the rule should be applied to the facts of a particular case, the general principles as set forth in s. 52 must be considered.

In the present case there was an administration suit in which the right to a particular piece of land as forming part of the estate was directly and specifically in question and the Commissioner appointed to take accounts had held it to be part of the estate. Appellant brought the property with notice of this at a Court auction in execution of a money decree against one of the heirs. *Held* that the doctrine of *lis pendens* applied and that the auction purchaser was bound by the decision in the administration suit.

Moti Lal v. *Karrabuldin*, 25 Cal. 179; *Nilakant* v. *Suresh Chundra*, 12 Cal. 414; *Price* v. *Price*, 35 Ch. Div. 297; *Radhamadhub* v. *Monohur*; 15 Cal. 756; *Sukdeo* v. *Jamna*, 22 All. 60— *referred to.*

Lee Lim Ma Hock v. *Saw Mah Hone*, 2 Ran. 4—*distinguished.*

Hay for the appellants.

Chari for the respondent.

RUTLEDGE, C. J., and BROWN, J.—In Civil Regular No. 7 of 1914 of the District Court of Hanthawaddy, the present respondent Jamila Bi Bi brought a suit for the administration of the estate of her deceased father K. E. Cassim Rowther. The first defendant in that suit was K. E. Mohamed, one of the heirs. The District Court passed a preliminary administration decree on the 8th of January 1917. The proceedings

* Civil First Appeal No. 289 of 1928 from the judgment of the District Court of Hanthawaddy in Civil Regular No. 3 of 1928.

then went before a Commissioner for an enquiry amongst other things as to what the estate consisted of.

The land in dispute, Holding No. 27 of 1914-15 of Nanyaw *kwin*, was claimed before the Commissioner to be part of the estate. The Commissioner submitted his report on the 26th of April 1917 and recorded amongst his findings that Holding No. 27 was part of the estate.

Very considerable delay then occurred in the disposal of the suit. But on the 29th of April 1926 a final decree was passed. In that decree Holding No. 27 was declared to be part of the estate and it was directed that the defendant should give to the plaintiff two-third share of this and other immoveable property.

Meanwhile the K. Y. Chettyar firm, the first appellant, obtained a money-decree against K. E. Mohamed, the first defendant, in the administration suit. In the execution of that decree they put the land now in suit up for sale and they themselves purchased the land in execution on the 30th of October 1917. They have since transferred their rights to K.Y.C.M. Chettyar firm, the second appellant.

In the suit out of which the present appeal has arisen Jamila Bi Bi has sued the two appellants for possession of two-thirds of the land in question and for mesne profits. The suit has been decreed in her favour and the two Chettyar firms have come up to this Court in appeal.

The trial Court held that at the time of the purchase of the land at the Court auction by the K. Y. Chettyar firm the right of K. E. Mohamed to the property in suit was directly and specifically in question in the administration suit. The Court therefore held that in accordance with the doctrine of *lis pendens* the auction purchaser was bound by the

1929

K. Y. CHETTYAR FIRM v. JAMILA BI BI.

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

decision in the administration suit and could therefore make no defence to the present suit instituted by Jamila Bi Bi. The correctness of this decision has been contested on two main grounds. It is contended, firstly, that the doctrine of *lis pendens* does not apply at all to the case of a voluntary transfer of property under a Court-sale and it is contended, secondly, that the doctrine cannot be applied to an administration suit and that the right to the property in dispute here was not directly and specifically in question in the administration suit. The doctrine of *lis pendens*, so far as it applies to private transfers, is laid down in section 52 of the Transfer of Property Act. Under section 2 (*d*) of the Act nothing in the Act save as provided by section 57 and Chapter IV shall apply to any transfer by operation of law, or by, or in execution of, a decree, or order of a Court of competent jurisdiction. It is clear therefore that the provisions of section 52 are not made applicable under the Transfer of Property Act to the circumstances of the present case. But that does not necessarily conclude the matter. The effect of section 2 (*d*) of the Act is that the provisions of the Act generally apply to private transfers only and that transfers under order of a Court are not in any way affected by the Act. It cannot, however, be assumed that the Legislature intended that the general principle specifically declared by the Act to apply to private transfers should not also apply to voluntary transfers under the orders of a Court. The Act does not affect the law relating to some such transfers in any way. It leaves the law as regards to them exactly where it was before.

There does not seem to be any reported decision in Burma on the point; but there is a considerable mass of authority in decisions of the different High

1929

K. Y. CHETTYAR FIRM v. JAMILA BI BI.

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

Courts in India to the effect that the general doctrine of *lis pendens* should be applied to voluntary transfers in a Court-sale, and on three separate occasions their Lordships of the Privy Council have clearly indicated their opinion that this is the correct view of the law.

In the case of *Nilakant Banerji* v. *Suresh Chandra Mullick* (1) the question arose whether a purchaser under a writ of *fieri facias* was bound by the decision in a suit affecting the property bought to which he was not a party but which was pending at the time of the purchase and to which his judgment debtor was a party. The High Court of Calcutta held that the purchaser was not bound by the decision in the pending suit. Their Lordships of the Privy Council, whose judgment was delivered by Lord Hobhouse, did not expressly decide this point ; but at page 421 of the judgment they state : "Whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted, but it is not worth while to pursue that question, because, assuming that they are right, the fact is that the plaintiff did not ignore the purchase by Khogendra."

The next case in which the Privy Council considered the point is the case of *Radhamahub Holdar and another* v. *Monohur Mukerji* (2). In that case a mortgagee had brought a suit to enforce his charge ; and during the pendency of the suit the appellant had purchased the property in dispute. It had been held by the High Court in an earlier rent suit between the parties that inasmuch as the mortgagee's suit to enforce his charge was pending at the time of the sale to the appellant, the appellant was bound by those proceedings. In the case before their Lordships of the Privy Council the appellant was seeking to enforce his right to redeem. Their Lordships of the

(1) (1885) 12 Cal. 414.

(2) (1888) 15 Cal. 756.

1929

K. Y. CHETTYAR FIRM v. JAMILA BI BI.

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

Privy Council at page 761, after setting forth the facts as to the rent suit state: "On that ground the rent suit was decided against Radhamadhub. Radhamadhub now comes to redeem; but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally: who is the true representative of Matangini? Therefore their Lordships conceive that the matter was expressly decided by the High Court in the rent suit; but they desire to add that even if it had not been so decided they see no reason to believe that any amount of argument would induce them to come to a different conclusion than that to which the High Court came." Here again the question of the applicability of the doctrine of *lis pendens* was not specifically decided. The appeal was decided on the ground of *res judicata*. But the judgment of their Lordships indicate very clearly their agreement with the view of the High Court in the earlier case that the doctrine of *lis pendens* did apply.

The third case in which the Privy Council have considered the question of the applicability of the doctrine of *lis pendens* to a sale in execution is the case of *Moti Lal* v. *Karrabuldin and others* (1). In that case the defendants had purchased at an auction sale certain properties. In the course of their judgment their Lordships remark at page 185: "It may be as well here to dispose of a very extraordinary contention set up for the defendant. He bought whatever interest belonged to the heirs of Agha who were mortgagees, and to Yusuf and Nasim who were mortgagors. But three months before he bought, Masih had instituted his suit against those very persons to establish his title against them, and it was established by the decree of November 1885. Is it possible for

(1) (1897) 25 Cal. 179.

the defendant to allege that, as against Masih or his heirs, the heirs of Agha or Yusuf or Nasim has any interest to convey to him? The District Judge holds that the defendant is free from the decree because he was no party to the suit, and because the transfer to him was made prior to the decree. If that were law, it is difficult to see in what cases a pending suit would be any protection; and Mr. Branson very properly declined to argue in support of that view." This is a clear pronouncement in favour of the view that the doctrine of *lis pendens* does apply to transfers of land under a Court auction sale. It is true that the provisions of the Transfer of Property Act bearing on the subject were not discussed and that the matter was not argued before their Lordships. But their Lordships clearly definitely adopt the view of the law already clearly indicated in the two earlier decisions to which we have referred.

The question was specifically considered with reference to the provisions of section 52 of the Transfer of Property Act by the High Court of Allahabad in the case of *Sukdeo Prasad and another* v. *Jamna* (1). In that case it was decided that although the application of the provisions of section 52 of the Transfer of Property Act was barred by the provisions of section 2 (*d*) of that Act, nevertheless the doctrine of *lis pendens* did apply to the case of a transfer at a Court sale. We do not think that it is necessary to cite any further authority on the point. Although there are some earlier decisions in support of the view argued for the appellants, those decisions must be taken to have been overruled by the decisions of their Lordships of the Privy Council and no recent authority has been cited to us in favour of the view that the doctrine of *lis pendens*

(1) (1900) 22 All. 60.

1929

K. Y. CHETTYAR FIRM v. JAMILA BI BI.

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

would not apply. On the first point raised by the appellant we are therefore of opinion that, although the provisions of section 52 of the Transfer of Property Act do not apply specifically to a transfer of property under a Court-sale, nevertheless the doctrine of *lis pendens* does apply to such a transfer independently of the operation of that Act; and in deciding whether the rule should be applied to the facts of a particular case, the general principles as set forth in section 52 must be considered.

We now come to the decision of the second point raised. Section 52 lays down that 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.

It is argued that this section does not apply to an administration suit; and we have been referred on this point to the case of *Lee Lim Ma Hock* v. *Saw Mah Hone and three* (1). In that case the parties to the suit had obtained Letters of Administration to the estate of a deceased person and as administrators had transferred certain immoveable property belonging to the estate. It was held that where an administrator disposed of property during the pendency of an administration suit the principle of *lis pendens* is not ordinarily brought into operation by the institution of that suit. The decision was based on an

(1) (1924) 2 Ran. 4.

unreported decision of the late Chief Court of Lower Burma in Civil Miscellaneous Application No. 14 of 1921 (*A.L.A.R. Chetty firm* v. *Ma Thwe and others*). In that case one Maung Tun Pe had obtained Letters of Administration to an estate. A suit was then brought by one Maung Thwe for a declaration that he was the sole heir and was entitled to the whole estate. It was held that the doctrine of *lis pendens* does not apply to a sale of a portion of the estate by Tun Pe as administrator. In the judgment in that case the following passage occurs: "The suit was in the nature of an administration suit and to such suits, speaking generally, the doctrine of *lis pendens* does not apply. . . . . The right to this particular plot of land must be 'directly and specifically in question'. In such a suit as this one the land in suit may no doubt be said to be directly in question, but it cannot be said to be specifically in question. The fact that possession was prayed for is not enough and the decree could not deal specifically with the land. It declared Maung Thwe to be a co-heir and as such co-owner of the estate with Tun Pe. The result was that as laid down in section 44 of the Transfer of Property Act Maung Thwe was held to be entitled to joint possession and joint enjoyment of the estate and also to a right to obtain partition thereof. The estate was however being administered by an administrator and Maung Thwe's rights were in respect of the estate as it remained after the administration. The administrator was entitled to sell any portion of the estate to pay the debts and the estate was liable for the expenses of the administration. Ma Shwe Pon could not be deprived of the benefit of her purchase as the purchase price came to the hands of the administrator. If he was guilty of misappropriation Maung Thwe's remedy

1929

K. Y. CHETTYAR FIRM v. JAMILA BI BI.

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

would be against him and his estate and to that estate Maung Thwe has now succeeded. He could only set aside the sale to Ma Shwe Pon on the ground of fraud which is not alleged or for want of the Court's sanction which remedy has lapsed and might never have been granted." It is clear therefore that the decision in this case was based largely on the fact that the person who sold the land was the administrator of the estate. The administrator can be considered as dealing with the estate on behalf of the heirs. That is not the position here. There is no suggestion that K. E. Mahomed was the administrator of the estate and the decree against him was a decree against him in his personal capacity. This decision is therefore no authority for the view that the doctrine of *lis pendens* cannot apply in a case such as the present one.

In the case of *Price* v. *Price* (1) it was held that a "creditor's action for general administration may be a sufficient *lis pendens*, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the *lis*, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action; a mere general claim for administration of the real and personal estate not being of itself a sufficient indication of intention to make liable the specifically devised real estate."

In the present case the action was not by a creditor but by an heir. But that is no reason for not applying the same principle. When the suit was first filed by Jamila Bi Bi in 1914 there was no specific mention of the property belonging to the estate and no indication as to the property which

(1) (1887) 35 Ch. Divn. 297.

was claimed; at that stage of the proceeding, we are of opinion that the doctrine of *lis pendens* could not have been held to apply. But the sale to K. Y. Chettyar firm did not take place until August 1917; and some time before that date the Commissioner had made a report to the Court in which he definitely found that the land in suit did belong to the estate and should be dealt with in the decree. He recorded a definite finding that the plaintiff was entitled to a third-share of the immoveable properties which included this land. There had clearly been a definite indication by this time as to the property claimed in the administration suit and we agree with the learned trial Judge that the right to this piece of land was before the auction sale directly and specifically in question in the administration suit. The fact that it was so in question was actually mentioned in the proclamation of sale before the purchase by the Chettyar and the notice attached to the proclamation was to this effect: "These properties are claimed to be part of the estate of the late Cassim Rowther in Civil Regular No. 7 of 1914 of this Court, which is still pending.

We are of opinion that in these circumstances the doctrine of *lis pendens* has been applied correctly in the present case by the trial Judge. We therefore dismiss this appeal with costs.