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the parties." The order of remand was, therefore, opposed to sections 562 and 564 of the Code of Civil Procedure (XIV of 1882), and cannot be sustained—*Vithábái* v. *Hashya bin Bendia*(1) and *Mudun Mohan Poddar* v. *Bhoggomanto Poddar*(2). The decision of this Court in *Rágho Sálvi* v. *Bálkrishna Sakhárám*(3) was cited to us as justifying such an order as the lower Appellate Court has made in this case; but the order of remand in that case was made by the High Court on a second appeal, in which the Court could not deal with the merits under section 565, which is to be read with sections 562 and 564. Under section 587 of the Code, the provisions of these sections apply only to second appeals "as far as may be." And cases have frequently occurred in which this Court has, in second appeal, remanded cases for reasons not contemplated in section 562. There can be no question, however, that sections 562 and 564 are strictly binding on all Courts of first appeal. In the present case, we think that the proper course for the Assistant Judge would have been to join the parties whom he found to be necessary, and then to raise the proper issues as between the plaintiff and those parties, and, if necessary, to refer the issues to the Court of first instance for trial under section 566—*J. P. Wise* v. *Ishun Chander Banerjee*(4).

We, therefore, reverse the Assistant Judge's order, and direct him to proceed with the appeal with reference to the foregoing remarks. Costs to be costs in the cause.

Order reversed and case remanded.

(1) Printed Judgments for 1883, p. 190.
(2) I. L. R., 8 Calc., 923.
(3) I. L. R., 9 Bom., 128.
(4) 14 Calc. W. R. Civ. Rul., 380.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1886. *February* 26.

LALU MULJI THA'KAR, (ORIGINAL DEFENDANT), APPELLANT, *v.* KA'SHIBA'I AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Lis pendens—Applicability of the doctrine to a Court sale in execution of a decree—The Code of Civil Procedure (Act VIII of 1859), Secs. 240, 270, 271—Effect of a decree obtained by an attaching creditor in a suit against successful interveners or claimants.

*Second Appeal, No. 167 of 1884.

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In 1872 the plaintiff obtained a money decree against two brothers, P. and K. In execution of that decree he attached their one-half share in certain fields in 1874. The attachment was removed at the instance of two claimants, S. and B. In 1875 the plaintiff sued the claimants, and obtained a decree in his favour in 1878. Meanwhile in December, 1874, after the plaintiff's attachment had been removed, one V. obtained a decree against one of the brothers, P. In 1876, while the plaintiff's suit against S. and B. was pending, P.'s right, title and interest in the one-half share of the fields belonging to himself and K. was sold in execution of V.'s decree, and purchased by the defendant. In 1881 the plaintiff again attached the one-half share belonging to the two brothers under his decree of 1872. Thereupon the defendant, relying on his purchase of 1876, applied for the removal of the attachment. It was removed from P.'s one-fourth share, and maintained on K.'s share, which was in due course sold. The plaintiff now sued to establish his right to sell P.'s one-fourth share under his decree of 1872.

Held, that the doctrine of *lis pendens* did not apply to this case; that the defendant, though he purchased P.'s share during the pendency of the plaintiff's suit of 1875, was not bound by the decree made in that suit—first, because, as an auction-purchaser at a Court sale in execution of a decree, he derived title, not from P., but by operation of law; secondly, because P. was not the person against whom the decree was made in the suit of 1875; and, thirdly, because P. was not represented in that suit by the plaintiff, simply because the plaintiff sought to establish his right to attach and sell the property as P.'s property.

Ali Sháh v. Husain Baksh(1) followed.

Held, also, that though the effect of the decree obtained by the plaintiff in his suit against the claimants S. and B. was to efface entirely their obstruction to his attachment of 1874, to reinstate that attachment as in full force *ab initio*, and to restore the state of things that had been disturbed by the order of release, yet the plaintiff could not succeed in the present suit, as the sale to defendant under V.'s decree was perfectly valid, and P.'s property having been sold under that decree, could not be sold again under the plaintiff's decree.

The rights of rival decree-holders, taking out execution against the same judgment-debtor, considered.

THIS was a second appeal from the decision of E. Hosking, Acting District Judge of Thána, reversing the decree of Ráv Sáheb Anandráo K. Kotháre, Second Class Subordinate Judge of Bassein.

In 1872, the plaintiff obtained a money decree against Pitámber and his brother Khusál, who were owners of a one-half share in certain fields, and, in 1874, he attached this half share in execution of the decree. The attachment was removed at the instance of two claimants, Sadáshiv and Bápuji. In 1875, plaintiff brought

(1) I. L. R., 1 All., 588.

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a suit against the claimants, Sadáshiv and Bápuji, to have it declared that the half share was liable to be attached and sold. That suit was decided in plaintiff's favour in 1878.

Meanwhile, in December 1874, after plaintiff's attachment had been removed, one Vanmáli obtained a money decree against Pitámber, one of the two brothers, in the First Class Subordinate Judge's Court at Násik. In 1875, Pitámber's one-fourth share was attached under that decree, and in 1876 was sold and purchased by the defendant, while the plaintiff's suit against Sadáshiv and Bápuji was pending.

In 1881, plaintiff presented a *darkhást*, and got the half share of the two brothers re-attached under his decree of 1872. The defendant, relying on his purchase of the right, title and interest of Pitámber in 1876, applied for the removal of the attachment. The attachment was removed from Pitámber's one-fourth share.

Plaintiff now sued to have it declared that this one-fourth share (of Pitámber) was liable to be attached and sold under his decree, and that the sale to the defendant, *pendente lite*, was void.

The Court of first instance was of opinion that the doctrine of *lis pendens* was not applicable, because Pitámber was not a party to the suit of 1875, and dismissed the plaintiff's suit.

The Appellate Court held that the plaintiff sufficiently represented Pitámber to make an alienation by Pitámber during the pendency of the suit void, and that if Pitámber could not himself sell the property, the Court could not sell it, to the prejudice of the attaching creditor, while he was suing to establish the liability of the property to sale in execution of this decree against Pitámber. The decree of the Subordinate Judge was reversed.

The defendant then preferred a second appeal to the High Court.

Macpherson (with *Shántárám Nárávan*) for the appellant:—The doctrine of *lis pendens* does not apply to this case. The defendant is an auction-purchaser at a Court sale held in execution of a decree. He does not derive his title from the judgment-debtor; he derives it by operation of law. In this respect his position is materially different from that of a private purchaser, who cannot acquire a better title than his vendor—*Dinendronáth*

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Sannial v. *Rámcoomár Ghose*(1). The sale to the defendant was not a voluntary alienation by one of the parties to the suit of 1875. Pitámber, whose right, title and interest the defendant purchased at the Court sale, was not a party to that suit. Nor was he represented in that suit by the plaintiff. The decree in that suit, therefore, cannot bind either Pitámber or the defendant. The doctrine of *lis pendens* has, therefore, no application to this case—Coote on Mortgage, p. 862; *Kondi Manisami* v. *Dakshana-murthi*(2). Plaintiff's attachment of 1874 was not subsisting at the date of the sale to the defendant. Assuming that it was revived by the result of the suit of 1875, it does not render the sale invalid. It only entitles the plaintiff, under section 270 of the Civil Procedure Code (Act VIII of 1859), to have his decree satisfied first out of the sale-proceeds. It gives him a cause of action against Vanmáli, and not against defendant.

Máháder Chimnáji A'pte for respondents:—The result of the suit of 1875 against the claimants was to revive the attachment placed on the property in 1874—*Mahomed Warris* v. *Pitámbur Sen*(3); *Booboo Pyároo Tuhobildarinee* v. *Syud Názir Hossein*(4); *Paras Rám* v. *Gardner*(5). That being the case, the sale to the defendant, which was subsequent to the attachment, does not affect the plaintiff's right to have the property sold in execution of his decree. The doctrine of *lis pendens* applies to this case. The attachment being revived, the defendant's purchase was subject to the decree in the suit of 1875. The fact that defendant was an auction-purchaser at a Court sale does not protect him—*Lálá Káli Prusád* v. *Boli Singh*(6); *Párvati* v. *Kisansingh*(7). In both these cases the doctrine of *lis pendens* was applied to a sale in execution of a decree.

Macpherson in reply:—The cases cited do not apply. They are cases in which specific charges were sought to be enforced, and were finally decreed against the property sold *pendente lite*. The present is not such a case. The year allowed for a suit

(1) L. R., 8 I. A., 65; S. C., I. L. R., 7 Calc., 107.
(2) I. L. R., 5 Mad., 371.
(3) 21 Calc. W. R. Civ. Rul., 435.
(4) 23 Calc. W. R. Civ. Rul., 183.
(5) I. L. R., 1 All., 355.
(6) I. L. R., 4 Calc., 789.
(7) I. L. R., 6 Bom., 567.

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under section 246 of the old Code or section 283 of the present Code of Civil Procedure is a period of suspense during which, if the contention of the plaintiff were allowed, no person would be safe in purchasing under a decree of another creditor of the judgment-debtor.

BIRDWOOD, J. :—The plaintiff obtained a money decree against two brothers, Pitámber and Khushál, in 1872; and, in execution, attached their one-half share in certain fields in 1874. The attachment was raised at the instance of two claimants, Sadáshiv and Bápuji. In 1875, the plaintiff sued the claimants. He was unsuccessful in the Court of first instance; but the Appellate Court awarded his claim, and its decree was confirmed by the High Court in 1878.

In December, 1874, after the plaintiff's attachment had been raised, one Vanmáli obtained a decree against Pitámber. In 1876, while the plaintiff's suit against Sadáshiv and Bápuji was pending, Pitámber's right, title and interest in the one-half share of the fields belonging to himself and Khushál were sold in execution of Vanmáli's decree on an attachment placed in 1875; and the present defendant was the purchaser.

In 1881, the plaintiff again attached the one-half share of the two brothers under his decree of 1872. Thereupon, the defendant, relying on his purchase of 1876, applied for the removal of the attachment. It was removed from Pitámber's one-fourth share, but was maintained on Khushál's share, which was, in due course, sold.

The plaintiff now sues to establish his right to sell Pitámber's one-fourth share in execution of his decree of 1872.

The Subordinate Judge has rejected the claim, on the ground that Pitámber's share, having already been sold in 1876, cannot be again sold on the plaintiff's attachment of 1881. He has held that the property was not subject to the plaintiff's attachment of 1874, when it was sold to the defendant in 1876; and, further, that the defendant was not bound by the decree made against Sadáshiv and Bápuji in plaintiff's suit of 1875.

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The District Judge has reversed the Subordinate Judge's decision and awarded the claim, on the ground that the sale to the defendant was void, because made while the liability of the property to sale was the subject of litigation. He has held that the plaintiff sufficiently represented Pitámber, in the suit of 1875, to make an alienation by Pitámber, during the pendency of the suit, void. "If Pitámbar", he argues, "could not himself sell the property, the Court could not sell it to the prejudice of the first attaching creditor, while he was suing to establish the liability of the property to sale in execution of his decree against Pitámber."

We are unable to concur with the District Judge in the view he has taken of the case. He has, in effect, applied the doctrine of *lis pendens* to the defendant's purchase. In *Manual Fruval* v. *Sanagapalli*[1], the doctrine was applied in the case of a sale, in execution of a decree, *pendente lite*. In *Ali Sháh* v. *Husain Baksh*[2], however, a doubt is raised as to its applicability to such sales; and Pearson, J., remarks that "that doctrine appears to be applicable to cases in which the alienation is of a voluntary nature and not to an alienee who has bought a property sold in execution of a decree." And this doubt seems to be well grounded, if regard be had to the object of the law relating to *lis pendens*, which affects a purchaser "because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." See *Bellamy* v. *Sabine*[3], as cited in *Bálāji Ganesh* v. *Khushálji*[4]. Where the property is sold in execution of a decree, it cannot be correctly said that the owner gives any rights to the purchaser, who acquires his rights by operation of law. According to the rule, as stated in section 406 of Story's Equity Jurisprudence, "he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title." But, as pointed out in *Dinendronáth Sannial* v. *Rámcoomár Ghose*[5], "there is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and

(1) 7 Mad. H. C. Rep., 104.
(2) I. L. R., 1 All., 588 at p. 590.
(3) 1 De Gex & Jo., 566.
(4) 11 Bom. H. C. Rep., 24.
(5) L. R., 8 I. A., 65 at p. 75; S. C. I. L. R. 7 Calc., 107, at p. 11.

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purchaser alone; in the latter, the sale must be made by public auction, conducted by a public officer, of which notice must be given, as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution." It would not be correct, therefore, to say that the defendant derived title from Pitámber. Moreover, Pitámber was not the person against whom the decree was made in the suit of 1875; nor do we think that Pitámber was represented in that suit by the plaintiff, simply because the plaintiff sought to establish his right to attach and sell the property as the property of Pitámber. We cannot, therefore, hold that the doctrine of *lis pendens* has any application to the circumstances of this case. It may be that Pitámber would have had no right to make a private alienation of the property in 1876; and, indeed, in the view we take of the case, we hold that he had no such right, but that was because, in our opinion, the plaintiff's attachment of 1874 was then, by reason of the final decree in his favour in the suit of 1875, still operative, and not because that suit was then pending. And it does not follow that because a private alienation would have been void in 1876, the sale by the Court in execution of Vanmáli's decree was also void. For, pending the attachment of 1874, if that was operative in 1876, a private sale would have been null and void under the express provision contained in section 240 of Act VIII of 1859. But neither by that section nor by the corresponding section (section 276) of the present Code of Civil Procedure is property under attachment in execution of a decree made saleable only under that decree. There may be several decrees against the judgment-debtor and separate executions may be taken out by each decree-holder. In such a case, a single sale would be held on a single attachment; but it would be a sale, not under any particular decree, but one under all the decrees. For such a case, provision was made in sections

270 and 271 of Act VIII of 1859. The decree-holder who first attached was first satisfied in full out of the proceeds, and the surplus, if any, was "distributed rateably amongst any other persons who, prior to the order for such distribution," might "have taken out execution of decrees against the same defendant and not obtained satisfaction." Under section 295 of the present Code, the assets realized by sale or otherwise in execution of a decree are divisible rateably among all the persons, who, prior to the realization, have applied to the Court for execution. As the sale, in the present case, took place in 1876, the rights of the plaintiff as against Vanmáli would, if his attachment was then valid and subsisting, have been regulated by section 271 of the Code of 1859; but he would have had no right as against the purchaser at that sale, the present defendant; for the sale was perfectly valid, inasmuch as Vanmáli had as much right to take out execution as the plaintiff had.

Under the Code of 1859, if the sale is to be reckoned as one in execution of the plaintiff's decree as well as Vanmáli's decree, Vanmáli would only have been entitled to satisfy his decree out of any surplus left after the plaintiff had been satisfied. Whether the plaintiff's attachment was operative or not, he must fail in the present suit, because, if the sale of 1876 was valid, it cannot be held over again. We are of opinion that, when the plaintiff succeeded in his suit against Sadáshiv and Bápují, he succeeded in effacing entirely their obstruction to his attachment of 1872, and in re-instating that attachment as in full force, *ab initio*, and that the object of his application of 1881, though in form that was an application for execution, was really to restore the state of things that had been disturbed by the order of release. In so holding, we follow the decisions of the Calcutta High Court in *Mahomed Warris* v. *Pitámber Sen*[1] and *Booboo Pyároo Tuhobilddárinee* v. *Syud Názir Hossein*[2] But though we hold that the plaintiff's attachment was good and operative throughout, and that the sale of 1876 was, in effect, a sale under his attachment of 1874, which was prior to the execution taken out by Vanmáli in 1875, we cannot, by so holding, give

(1) 21 Calc. W. R. Civ. Rul., 435. (2) 23 Calc. W. R. Civ. Rul.,

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plaintiff any redress in the present suit. Whether he has any remedy now against Vanmáli, it is not for us to say.

We reverse the decree of the District Judge, and restore that of the Subordinate Judge, rejecting the claim. The plaintiff to pay costs throughout.

Decree reversed.

ADMIRALTY JURISDICTION.

Before Mr. Justice Bayley.

1886. *January* 14, 18, 19, 21, 25, 26, 28; *March* 8.

OOKERDA' POONSEY AND OTHERS, PLAINTIFFS, *v.* THE STEAM-SHIP "SA'VITRI," HER TACKLE, APPAREL AND FURNITURE, DEFENDANTS.*

Admiralty suit—Collision—Both vessels to blame—Suit for damages by owners of cargo—Costs.

The owners of cargo on board the H. sued the owners of the steam-ship S. for damages resulting from a collision which occurred between the H. and the S. The Court found that both vessels were to blame for the collision.

Held, following the English authorities, that the plaintiffs could only recover from the defendants half of the damages which they had sustained.

Held, also, on the authority of *The City of Manchester*(1), that in such suit each party should bear their own costs.

SUIT to recover the sum of Rs. 14,079-4-9 as damages alleged to have been sustained by the plaintiffs by reason of a collision between the steam-ship "Sávitri" and a *patimár* called the "Huttihanmunt."

The first and second plaintiffs were the owners and shippers and the third plaintiff was the consignee and insurer of certain cotton of the value of Rs. 15,884 which was shipped on board the "Huttihanmunt" on the 3rd January, 1883, to be carried from Kárwár to Bombay. Early on the morning of the 5th January, 1884, while proceeding on the said voyage with the said cargo on board, the "Huttihanmunt" was run into by the steam-ship "Sávitri" and became a total wreck. Most of the cotton was

* Suit No. 3 of 1883 (Admiralty).

(1) 5 Prob. Div., 221.