1913.

SHIVAYAG-APPA v. GOVINDAPPA.

West observed in *Gangadhar Sakharam* v. *Mahadu Santaji*[1], It is a general principle "that exceptional provisions are not to receive a development to all their logical consequences contrary to the general principles of the law". Here we are asked to extend by analogy the provisions of a special section contrary to the general principles expressed in Order 23, Rule 3. A compromise which is made by parties who are *sui juris* should be given effect to. We do not think that there is anything unlawful in the compromise or contrary to public policy. The line of reasoning would involve the consequence that every consent decree in a mortgage suit, in which less time than six months or a greater time than six months is given to the mortgagor to discharge his mortgage debt, is illegal, because it violates the provisions of the Civil Procedure Code, Order 34, Rule 2 (*c*), which would be absurd. We, therefore, answer the question, limited in the manner above stated, in the negative.

Answer in the negative.

G. B. R.

[1] (1883) 8 Bom. 20 at p. 24.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1913.

June 23.

BHOJE MAHADEV PARAB (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGABAI WIDOW OF VITHAL BHIKAJI NAIK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 52—Lis pendens—*Maintenance decree—Execution proceedings after a long period—Alienation of property during the period—Active prosecution.*

In 1902 defendant No. 1 obtained a maintenance decree which declared a charge in her favour on the family property. In 1906 the judgment-debtors

* Second Appeal No. 850 of 1912.

1913.

BHOJE MAHADEV PARAB v. GANGABAI.

sold a portion of the property to plaintiff. Defendant No. 1 applied in 1907 to execute the decree. In the execution proceedings, one of the lands sold to plaintiff was put up to sale and purchased by defendant No. 3 in 1910. The plaintiff sued for a declaration that the sale to him was not affected by the subsequent sale. The lower Court rejected his claim on the ground that the sale in plaintiff's favour was affected by *lis pendens*. On appeal :—

Held, reversing the decree, that the doctrine of *lis pendens* had no application to the case, for the decree was passed four years earlier and no execution proceedings were taken; and it could not be said that the purchase by the plaintiff was made during the active prosecution of a contentious suit or proceeding.

SECOND appeal from the decision of K. H. Kirkire, First Class Subordinate Judge with appellate powers at Ratnagiri, reversing the decree passed by B. M. Butti, Additional Subordinate Judge at Malvan.

Suit for declaration.

The facts were that Gangabai (defendant No. 1) sued her husband's *bhaubandhs* and obtained a decree for maintenance in 1902. The decree declared a charge on the family property. In 1906 the judgment-debtors sold two lands, forming part of the family property, to the plaintiff for Rs. 1,000. Gangabai applied to execute her decree in 1907; and in execution one of the two lands was attached and sold at a Court-sale to defendant No. 3 on the 21st May 1910. The plaintiff, thereupon, sued for a declaration that the land in question was of his ownership and for setting aside the sale in favour of defendant No. 3. It was contended in defence that the sale to plaintiff was not binding on defendant No. 3.

The Subordinate Judge was of opinion that as the maintenance decree did not specifically impose a charge on any definite property, the sale to plaintiff was not affected by *lis pendens*. He, therefore, decreed the plaintiff's suit. On appeal, the lower appellate Court dismissed the suit; and following I. L. R. 22 Bom. 939 and 6 Bom. L. R. 303 held that the sale to plaintiff was affected by *lis pendens*.

The plaintiff appealed to the High Court.

P. B. Shingne, for the appellant :—The doctrine of *lis pendens* does not apply to this case, for when the decree was passed the litigation came to an end. The subsequent execution proceedings revive it: but till they are taken, there can be no active prosecution of the suit: see *Shivjiram* v. *Waman*[1]; *Makanji* v. *Babaji*[2]; *Worsley* v. *Earl of Scarborough*[3]; *Kinsman* v. *Kinsman*[4].

A. G. Desai, for the respondent :—On the point of *lis pendens*, the lower Court's decision is correct: see *Ghunni Lal* v. *Abdul Ali Khan*[5]. The title of defendants Nos. 1 and 3 is unaffected by any alienations subsequent to the date of the decree: see *Sakharam* v. *Sadashiv*[6]; *Kasandas* v. *Pranjivan*[7]; *Mohan Manor* v. *Togu Uka*[8]; *Kuloda Prosad Chatterjee* v. *Jageshar Koer*[9].

Shingne, in reply, referred to *Venkatesh Govind* v. *Maruti*[10].

BATCHELOR, J. :—This appeal, which is preferred by the plaintiff in the original suit, arises in the following circumstances

In 1902 the first defendant Gangabai kom Vithal obtained a decree for her maintenance against Ramchandra, Vinayak and others. The plaintiff is a purchaser, from some of these judgment-debtors, of two of the plots mentioned in the maintenance suit, but in this appeal we are concerned only with one of these two plots, namely, Survey No. 108, Falni Nos. 1, 2 and 4, and Plot Nos. 1, 2 and 3. This purchase was made by the plaintiff in 1906. Prior to then no attachment or other proceeding had been taken out by the first defendant

(1) (1897) 22 Bom. 939.
(2) (1904) 6 Bom. L. R. 303.
(3) (1746) 3 Atk. 392.
(4) (1830) 1 R. & M. 617.
(5) (1901) 23 All. 331.
(6) (1878) P. J. 147.
(7) (1870) 7 B. H. C. R. (A.C.J.) 146.
(8) (1885) 10 Bom. 224.
(9) (1899) 27 Cal. 194.
(10) (1887) 12 Bom. 217.

1913.

BHOJE MAHADEV PARAB v. GANGABAI.

under her decree of 1902. In 1907, however, she applied for execution of her decree for maintenance. In 1910 this particular plot along with others was attached and sold, and was purchased by the third defendant.

The suit was brought by the plaintiff for a declaration that the sale to him in 1906 was binding on the first and other defendants and in order that the Court should set aside the auction-sale of 1910.

In the trial Court the plaintiff succeeded. He was, however, defeated in the lower appellate Court, the learned Judge being of opinion that the doctrine of *lis pendens* was fatal to his suit.

The first point that we have to decide is whether this view of the learned Judge of the Court below was right. It appears to me that, in the circumstances of this case, the doctrine of *lis pendens* cannot be applied. The decree which was obtained by the first defendant is Exhibit 65 and the purport of it was to place a charge in her favour upon the family property. It was declared that her charge was for arrears amounting to Rs. 61 and for future maintenance.

As I have noted, the decree was obtained in 1902. Plaintiff's purchase was in 1906, and between these dates no execution or other proceeding in the litigation was at any time pending. It was not till a year after the plaintiff's purchase that the decree-holder applied for execution of her decree.

The learned Judge below realized these facts which he has correctly stated. He says, however, that proceedings in execution must be regarded as a continuation of the suit, and the purchase during their pendency is consequently void, and he refers to the cases of *Shivjiram* v. *Waman*[1] and *Makanji* v. *Babaji*[2]. It seems to me, however, that if these cases be accurately

(1) (1897) 22 Bom. 939. (2) (1904) 6 Bom. L. R. 303.

apprehended, they will be seen to be hostile rather than favourable to the view which the learned Judge took.

In the first place, however, I must note that the phrase used by the learned Judge as to this being a purchase "during the pendency of the execution proceedings" is incorrect. The purchase, as the Judge himself observes in another part, was made prior to the institution of execution proceedings.

The doctrine of *lis pendens* is for us embodied in section 52 of the Transfer of Property Act which, so far as concerns the present appeal, limits the applicability of the doctrine to purchases made "during the active prosecution in any Court of a contentious suit or proceeding." If these words are not to be strained, but are to carry only their natural and ordinary meaning, it seems to me clear that they cannot cover such a case as this. The decree had been passed four years earlier. The execution proceedings were not yet taken, and I think it is not possible with any propriety of language to say in these circumstances that this purchase by the plaintiff was made during the active prosecution of a contentious suit or proceeding.

Mr. A. G. Desai for the respondents endeavoured to assimilate the facts here with those with which Sir Arthur Strachey, C. J., was dealing in *Chunni Lal* v. *Abdul Ali Khan*[1]. There, however, the Chief Justice was speaking expressly of mortgage decrees only, and while it is clear that in mortgage suits the *lis* is not terminated by the decree *nisi*, but only by the final decree, I do not think that any such distinction can properly be made in regard to the decree which we have before us. In my opinion this decree awarding maintenance and laying a charge for it upon a particular property was a final decree and, as such, it ended the *litis contestatio*. If that is so, then I think under the rulings

[1] (1901) 23 All. 331 at p. 334.

1913.

BHOJE MAHADEV PARAB v. GANGABAI.

by which we are bound, the plaintiff is entitled to succeed, and I rely in particular upon the same cases which the learned Judge below cited in support of his decision. Sir Charles Farran's judgment in *Shivjiram* v. *Waman*[1] is, I think, of special importance. The facts there were that the impugned sale was made to the defendants while the plaintiff's execution proceedings were actually pending. It was held that the sale was therefore to be considered as made *pendente lite*. Even this conclusion was not arrived at without some little difficulty; for the Chief Justice begins by saying that "the general rule of law is that the *lis pendens*, except in administration suits and suits for an account ... in which the decree is the inception of subsequent proceedings, ends with the decree. This," as his Lordship says, "was laid down by Lord Hardwicke in *Worsley* v. *Earl of Scarborough*[2] and was recognized by Sir Charles Sargent, C. J., in the abovecited case of *Venkatesh Govind* v. *Maruti*[3]. In *Kinsman* v. *Kinsman*[4] Lord Lyndhurst says: 'After decree and before execution [which is precisely the case before us now in this present appeal] it was not pretended that *lis pendens* could any longer exist'." The question, however, that Sir Charles Farran and Mr. Justice Candy had to consider was whether execution proceedings, which had been instituted, can be said to revive or give continuance to the *lis* which otherwise had terminated. In view of the numerous Calcutta decisions which had been approved in principle by the Judicial Committee, though they were hardly consistent with the observations of Sir Charles Sargent in *Venkatesh Govind* v. *Maruti*[3] the learned Judges came to the conclusion that execution proceedings subsequently filed did operate to revive the *lis pendens*. That, however, as I have said,

(1) (1897) 22 Bom. 939.
(2) (1746) 3 Atk. 392.
(3) (1887) 12 Bom. 217.
(4) (1830) 1 R. & M. 617.

was a case where the purchase was made during the actual pendency of the execution proceedings and *Makanji* v. *Babaji*[1] was another case of precisely the same character. There is no case which has gone the length to which respondents are forced to ask us to go here. The case which nearest approaches the needs of the respondents is that of *Rachappa Nilkanthappa* v. *Mangesh Mahadaji*[2]. That, however, as I regard it and as I understand the judgment of Mr. Justice Ranade, was a case decided rather upon its own peculiar facts than upon any hard and fast point of principle. The peculiar facts were that although the sale had been rapidly interposed between the decree and the execution proceedings, yet no appreciable delay had occurred on the part of the decree-holder, and while the sale took place only a few days before the execution, the *darkhast* had been given only a few days after the decree had been passed. The view of the Court, therefore, appeared to be that though the purchaser had been abnormally active, his opponent had been as active as the law required. Moreover, it is to be observed that in that case the Court was dealing with a mortgage decree and that in such a suit the *lis* would not terminate until there had been a final decree.

As to *Dose Thimmanna Bhutta* v. *Krishna Tantri*[3] to which reference was also made, it appears that there was no question but that the alienation was effected during the pendency of the actual suit. On the whole, therefore, no case, as I have said, goes so far as to support the judgment now under appeal, and from the language used by Sir Charles Farran, I am led to suppose that the cases have already been taken as far as he would have approved.

For these reasons and because of the words of section 52 of the Transfer of Property Act, I am of opinion that

(1) (1904) 6 Bom. L. R. 303. (2) (1898) P. J. 386.

(3) (1906) 29 Mad. 508.

1913.

BHOJE MAHADEV PARAB v. GANGABAI.

the doctrine of *lis pendens* cannot be made to apply to such facts as those in this case. I ground my decision on the opinion that this purchase was not made during the active prosecution of any contentious suit or proceeding.

Mr. Desai next contends that his client, respondent No. 2, is a Court-purchaser and consequently his title relates back to the date of the mortgage and is unaffected by any incumbrances. He refers to *Sakharam* v. *Sadashiv*[1]; *Kasandas Laldas* v. *Pranjivan Asharam*[2] and *Mohan Manor* v. *Togu Uka*[3]. These decisions appear to me to establish the propositions for which Mr. Desai contends. I am also of opinion under the authority of *Kuloda Prosad Chatterjee* v. *Jageshar Koer*[4] that the plaintiff's purchase was subject to the charge in favour of the first defendant irrespective of the question whether the plaintiff had or had not notice of that charge.

On these grounds I hold that the decree under appeal ought to be set aside and in its place there should be made a decree allowing the plaintiff to recover this property in suit from the third defendant on condition that the plaintiff pays to the third defendant the sum for which the property was put to sale. If there is any question as to this amount, or if, as we understand, this property in suit was sold together with another property as one single parcel, then the proportionate sum to be ascribed to this plot in suit must be ascertained by the lower Court in execution.

The appeal being thus allowed, the appellant must have his costs throughout.

SHAH, J. :—I concur. With reference to the question of *lis pendens*, I desire to add that having regard to the

(1) (1878) P. J. 147.
(2) (1870) 7 Bom. H. C. R. (A. C. J.) 146.
(3) (1885) 10 Bom. 224.
(4) (1899) 27 Cal. 194.

facts in this case, which have been stated by my learned colleague in his judgment, I am of opinion that there was no active prosecution of any contentious suit or proceeding from 1902 to 1907 (*i. e.*, from the date of the decree to the date of the execution proceedings), within the meaning of section 52 of the Transfer of Property Act. I think that the decree for maintenance, when it was passed, really put an end to the litigation. The case of *Venkatesh Govind* v. *Maruti*[1] is clearly an authority for the view that the litigation was terminated by the decree, which only remained to be executed if necessary against the properties mentioned in the decree. Though it was not a case under the Transfer of Property Act, I think the *ratio decidendi* of that case applies to the present case. The decree creating a charge on property in the present case is substantially similar to the decree in *Venkatesh's case*, in which the decretal amount was ordered to be paid "on the liability of the land in the plaint mentioned." The observations of Sir Charles Farran, C. J., in *Shivjiram* v. *Waman*[2], as I read them, do not in any way conflict with the reasoning upon which the conclusion in *Venkatesh's case* is based. The point which arose for decision in *Shivjiram's case* really did not arise in the case in *Venkatesh's case*, as in the latter case no execution proceedings were taken. As regards the general statement about the doctrine of *lis pendens*, the observations in both the cases are in harmony, and, in my opinion, support the appellant's contention.

As regards the case of *Rachappa Nilkanthappa* v. *Mangesh Mahadaji*[3] which is relied upon on behalf of the respondents, having regard to the facts in that case as stated in the judgments, it is clear that there was no appreciable lapse of time after the decree and before the

(1) (1887) 12 Bom. 217. (2) (1897) 22 Bom. 939.
(3) (1898) P. J. 386.

1913.

BHOJE MAHADEV PARAB v. GANGABAI.

institution of execution proceedings, and the case clearly turns upon the special facts of that case. Mr. Justice Parsons observed that the decree itself operated as an attachment of the property and nothing remained but to ask the Court to sell it. Mr. Justice Ranade said as follows :—"It is clear that, if *lis pendens* was revived by reason of this prompt execution, the appellant's deed of purchase must be considered as though it had been passed after the suit was instituted, and before it was decided." I am unable to treat this decision as an authority for the broad proposition, which the respondent has contended for in this case, that whatever may be the interval between the date of the decree and the institution of the execution proceedings, the moment the execution proceedings are taken, the *lis* must be deemed to be pending during that interval, and all dispositions made during the interval must be subjected to the doctrine of *lis pendens*.

As regards the second point I think that the plaintiff must be held to have purchased the property subject to the charge created by the decree in favour of defendant No. 1 : see *Kuloda Prosad Chatterjee* v. *Jageshar Koer*[1]. The defendant No. 3 has become entitled to that charge as an auction purchaser, and before the plaintiff could recover possession of the property, he is bound to satisfy the charge thereon.

Appeal allowed.

R. R.

[1] (1899) 27 Cal. 194.