

reference to the latter observation of Mr. Justice Banerjee that we mentioned at the outset that in the case before us we do not know what the nature of the former suit was, as the pleadings are not before us.

1900
MAY 18 & 25.

APPELLATE
CIVIL.

28 C. 17.

But, apart from that case, it is argued before us that in a suit brought merely for rent, if the defendant does not raise any plea as to any portion of the rent claimed being an illegal *abwab*, it precludes him from raising the question afterwards. We are aware of no authority in support of this contention excepting the bare words of explanation II of s. 13, which in our opinion do not bear it out.

As regards the cases cited by the learned pleader for the respondents, they only go to show what an illegal *abwab* is and what is not. In our opinion this matter requires to be dealt with upon the facts.

We think that the case must go back to the District Judge to find on the evidence before him, whether the sum which is claimed by the plaintiffs as included in the rent of this *putni taluk* as Iswar Bhawanipur's *mamuli*, Rs. 3-7-6 is an illegal cess or rent. We accordingly set aside the judgment of the learned District Judge and send the case back to be tried in view of the observations we have made. If he finds that the sum claimed as Iswar Bhawanipur's *mamuli* is an illegal cess, then it will follow that it cannot be recovered. If it is not an illegal cess, the judgment of the Lower Court will be upheld.

The costs of this appeal will abide the result.

The cross-objections are disallowed without costs.

Appeal allowed; case remanded.

28 C. 23.

[23] Before Mr. Justice Rampini and Mr. Justice Pratt.

DINONATH GHOSE AND ANOTHER (Plaintiffs) v. SHAMA BIBI, WIDOW OF CHHANU LAL AGARWALLA (Defendant).*

[25th and 28th May and 1st June 1900].

Lis pendens—Sale in execution of decree—Transfer of Property Act (IV of 1892), s. 52—Active prosecution of a contentious suit—Possibility of appeal—Auction purchase pendente lite—Decision subsequent to purchase to which purchaser was no party.

A mortgage-decree was obtained against R, on whose death his legal representatives, S and others, were substituted in his place. In execution of that decree, the decree-holder applied for the sale of the mortgaged property. Thereupon S objected to the sale on the ground that the property was trust property which on a partition had fallen to his share, and was therefore not liable to sale in execution of the decree. The objection was allowed by the lower Court on the 12th November 1892, and the decree allowing the objection was prepared on the 20th February 1893. Subsequently the High Court on appeal reversed that decision, and held that the property was liable to sale. Meanwhile, on the 28th December 1892, the same property was purchased by B and D in execution of another decree against S. B and D were not, however, made parties to the appeal in the High Court.

Held, that the doctrine of *lis pendens* applied to the purchase by B and D, who must be taken to have purchased the property during the active prosecution of a contentious suit relating thereto, within the meaning of s. 52 of the Transfer of Property Act. *Gobind Chunder Roy v. Guru Churn Kurmohar* (1)* followed.

Held, further, that B and D were as much bound by the decision of the High Court against S, as S himself was, although they were no parties thereto.

* Appeal from Appellate Decree No. 1250 of 1898, against the decree of C. P. Caspersz, Esq., Additional District Judge of 24 Parganas, dated the 28th of March 1898, affirming the decree of Babu Jogendra Nath Roy, Additional Subordinate Judge of that district, dated the 25th of November 1896.

(1) (1897) I. L. R. 15 Cal. 94.

1900
MAY 25 & 28
& JUNE 1.
—
APPELLATE
CIVIL.
—
28 C. 23.

ONE Ram Lal Agarwala, father-in-law of the defendant, Shama Bibi, obtained a mortgage-decree on the 6th October 1890, against one Rahimuddin. The said Rahimuddin died on the 22nd December 1890, and on the 4th July 1891, his heirs, including one Suleman Bukt, were substituted in his place. The decree-holder then applied for the sale of the mortgaged property, whereupon Suleman Bukt put in an objection alleging that [24] the mortgaged property could not be sold, as it was purchased out of the Mysore family Trust Fund, and as under an award on a partition made of the trust properties, it was allotted to the share of the said Suleman Bukt. That objection was allowed on the 12th November 1892, and the decree allowing the objection was prepared on the 20th February 1893.

The decree-holder preferred an appeal against the said order of the 12th November 1892, to the High Court on the 5th April 1893. The appeal was decreed *ex parte* by the High Court on the 18th June 1894, and the property was held liable to be sold in execution of the mortgage-decree.

Meanwhile, in execution of a decree against the said Suleman Bukt, one Hasmutunessa Begum brought the disputed property to sale, and it was purchased by the plaintiffs, Dino Nath Ghose and Brojo Nath Ghose, on the 28th December 1892. These plaintiffs were not made parties to the appeal which the decree-holder, Ram Lal Agarwala, preferred to the High Court.

The present suit was instituted by the plaintiffs on the allegation that attempts were being made by the decree-holder in the mortgage-suit to bring to sale the disputed property, which they had purchased. They prayed for a declaration that the said property had been purchased out of the Mysore family Trust Fund, that the said mortgage-decree was fraudulent and collusive, that Rahimuddin had no right to the property, that the plaintiffs were entitled to it by right of their purchase, and that it was not liable to be sold in execution of the mortgage-decree.

The defendant contended among other things that the suit was barred as *res judicata*, and that the order passed by the High Court was binding on the plaintiffs, who were bound to pay the money due to the defendant.

The Subordinate Judge dismissed the suit, holding that it was barred by s. 13 of the Code of Civil Procedure, and that the doctrine of *lis pendens* applied to the case, and affected the title of the plaintiffs.

The plaintiffs appealed to the District Judge, who confirmed the decision of the Lower Court, and dismissed the appeal.

[25] The plaintiffs appealed to the High Court.

1900, MAY 25, 28. Dr. Rash Behary Ghose, Babu Hara Prasad Chatterjee, and Babu Haran Chandra Banerjee, for the appellants.

Mr. W. C. Banerjee, Babu Nilmadhav Bose, and Babu Shib Chandra Palit, for the respondent.

Gur. adv. vult.

1900, June 1. The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

The facts of this case are as follows:—The plaintiffs sue for a declaration that a certain plot of 2 bighas of land with the building thereon is their property by right of purchase on the 28th December 1892 at an execution of a decree obtained against Suleman Bukt. They further pray that the defendant may be restrained from selling this property in execution of a mortgage-decree obtained by the defendant's predecessor

against Prince Rahimuddin. The defendant's predecessor sued Prince Rahimuddin on an equitable mortgage, and obtained a decree on the 6th October 1890. Subsequently Prince Rahimuddin died, and his heirs, including his son Suleman Bukt, were substituted at their own request as defendants in the mortgage case. Afterwards the mortgage-decree was made absolute; upon which, that is, on the 12th November 1892, Suleman Bukt raised an objection that the property belonged to him in his own right. This objection was allowed by the Subordinate Judge of the 24-Parganas. The plaintiffs thereafter, as already mentioned, purchased the property. Then, on the 20th February following, the decree in the execution case was prepared, and an appeal was preferred to this Court, which was successful on the 18th June 1894. It was held by this Court on the facts that the property in dispute was not the property of Suleman Bukt in his personal capacity. Now the Lower Court has held (1) that the plaintiffs as the purchasers of Suleman Bukt's rights are bound by the decision of this Court, dated the 18th June 1894, and (2) that in any case the plaintiffs purchased *pendente lite*, and accordingly acquired no right in the property.

Dr. Rash Behary Ghose on behalf of the appellants contends that the Judge's decision on both points is wrong. We, however, [26] cannot agree with him. In the first place, as the learned pleader for the appellant admits, it makes no difference that the appellant purchased the right of Suleman Bukt at an execution sale, and not at a private sale. See *Gobind Chunder Roy v. Guru Churn Kurmoker* (1). In the second place, as the appellants purchased the rights of Suleman Bukt, and are in every way his representatives in interest and as will presently be shown, they purchased *pendente lite*, and as the proceedings in which Suleman Bukt's objection was disallowed, though subsequent to their purchase, were yet proceedings which they "might expect would take place" [see *Kasumunnissa Bibee v. Nilratan Bose* (2)], they are as much bound by a decision against Suleman Bukt, though personally no parties to it, as he, Suleman Bukt himself, is. It is true that the question which Suleman Bukt was allowed by the Subordinate Judge of the 24-Parganas to raise, was one which as the substituted heir of his father Prince Rahimuddin he perhaps should not have been allowed to raise; but he did raise it of his own accord, and he is bound by the ultimate decision of the objection, and the appellants as his representatives in interest and purchasers *pendente lite* are equally bound by it.

It has, however, been urged that the appellants purchased at a time when Suleman Bukt's objection had been allowed, and when no appeal against the Subordinate Judge's order had been preferred. We have been referred to the terms of s. 52 of the Transfer of Property Act which prohibits the transfer of property during "the active prosecution" in any Court of a contentions suit relating to such property. It is said that when the appellants purchased, the suit of the defendant was not being "actively prosecuted." Dr. Rash Behary Ghose has also referred us to Sugden on *Vendors and Purchasers*, p. 758, and to other English authorities.

But we are of opinion that the only reason why an appeal had not been preferred against the Subordinate Judge's order of the 12th November 1892 at the time when the appellants purchased was because the

(1) (1861) I. L. R. 15 Cal. 94 (97), also *Kailas Chandra Ghose v. Fulchand Jaharri*, (1871) 8 B. L. R. 474—*Rep.*]

(2) (1881) I. L. R. 8 Cal. 79 (85) [See

1900
MAY 25 & 28
& JUNE 1.

APPELLATE
CIVIL.

28 G. 23.

1900
MAY 25 & 28
& JUNE 1.

APPELLATE
CIVIL.

28 C. 23.

decree had not been prepared. The [27] appeal, "the inevitable appeal," as the Lower Court correctly describes it, was preferred without undue delay after the decree had been drawn up on the 20th February 1893. We therefore consider that the appellants in this case may be said to have purchased during the "active prosecution" of the suit.

Then, as to the English authorities cited by Dr. Rash Behary Ghose, we would only say that the law of *lis pendens* in England is different from that prevailing in this country. The law of *lis pendens* in this country is founded on the fact that it would be impossible to bring any suit to a successful termination if alienations *pendente lite* were permitted to prevail.

The case of *Gobind Chunder Roy v. Guru Churn Kurmohar* (1) is directly in point. In that case, the facts of which are very similar to those of the present one, it has been said:—"The proceedings of the Appellate Court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favour of the present plaintiff's predecessor in title, yet that was a decree which was open to appeal, and the decree having been appealed against, we ought to take it that the decree of the Appellate Court was the decree in the suit, and the sale at which the plaintiff purchased having taken place pending the suit in which that decree was pronounced, we think the doctrine of *lis pendens* does apply to the case." Other cases of this Court on the subject are *Inderjeet Kooer v. Pootee Begum* (2), *Chunder Koomar Lahooree v. Gopee Kristo Gossamee* (3), and *Kishory Mohun Roy v. Mahomed Mujaffar Hossein* (4). See also *Moti Lal v. Karrabuldin* (5). These on the whole support the view we take of this case.

We therefore dismiss the appeal with costs.

Appeal dismissed.

28 C. 28.

[28] *Before Mr. Justice Stevens and Mr. Justice Pratt.*

TROYLOKHYANATH BOSE AND OTHERS (*Plaintiffs*) v. M. N. MACLEOD AND OTHERS (*Defendants*).^{*} [27th August 1900].

Jurisdiction of Civil Court—Suit for possession and mesne profits—Bengal Tenancy Act (VIII of 1885 as amended by Bengal Act III of 1898), ss. 101 to 111-A—Suit to settle disputes prior to completion of record of rights—Status of tenants—Civil Procedure Code (Act XIV of 1882), ss. 11, 12.

There is no legal bar to the maintenance of a suit in the Civil Court for possession and mesne profits by ejection of the defendants from certain plots of land in respect of which a survey and preparation of a record of rights have been ordered under Chapter X of the Bengal Tenancy Act (VIII of 1885 as amended by Bengal Act III of 1898), in which record the defendants have already been recorded as tenants when the plaintiff's objections to such record are still pending before the Revenue Officer and the record has not been finally published.

Achha Mian Chowdhry v. Durga Churn Lal (6) distinguished.

THE plaintiffs purchased the proprietary rights in certain villages in the district of Durbhanga and proceeded to take direct possession of the

Appeal from original decree No. 293 of 1899, against the decree of A. E. Stanley, Esq., District Judge of Tirhoot, dated the 12th of August 1899.

(1) (1887) I. L. R. 15 Cal. 94 (99).

(2) (1878) 19 W. R. 197.

(3) (1878) 20 W. R. 204.

(4) (1890) I. L. R. 18 Cal. 188 (194).

(5) (1897) I. L. R. 25 Cal. 179 (185)

L. R., 24 I. A. 170 (174.)

(6) (1897) I. L. R. 25 Cal. 146.