

## APPELLATE CIVIL.

*Before Mr. Justice Prinsep and Mr. Justice Harington.*

1904  
March 29.

KRISHNA KAMINI DEBI  
*v.*  
DINO MONY CHOWDHURANI.\*

*Transfer of Property Act (Act IV of 1882) s. 52—Lispendens—Contentious suit  
—Suit for partition—Admission of share in plaint—Transfer after filing of  
plaint—Objection to share in written statement.*

*A* instituted a suit against *B* and other co-sharers, for partition, admitting that *B* had a share in the property. Afterwards *C* purchased the share, which *B* claimed to have held. Some of the defendants, who were co-sharers of the property under partition, then put in written statements in which they denied that *B* had any share.

A preliminary decree was passed by the Court specifying the shares of the several proprietors and declaring that *B* had no share at all. *B* did not enter appearance in these proceedings. After the decree declaring the shares of the proprietors had been passed, *C* applied to be made a party to that suit, but her application was rejected. *B* appealed against the preliminary decree, but his appeal was dismissed.

Upon a suit by *C* for possession of the share purchased by her from *B*, the defence mainly was that the suit was barred by reason of s. 52 of the Transfer of Property Act.

*Held*, that the suit was not so barred. The suit did not become contentious, until the written statement was put in by the opposing defendants disputing any right, title or interest of *B* in the property under partition, as, in the plaint in the partition suit, it was admitted that he had a share in the property under partition; and that, having regard to the fact that *C*, the transferee, was not allowed to become a party to that suit, she could not properly be regarded as prejudiced by the result. *Jogendra Chunder Ghose v. Ful Kumari Dassi*(1) distinguished.

SECOND APPEAL by defendants Nos. 1 and 2 Sreemutty Krishna Kamini Dobi and another.

\* Appeal from Appellate Decree Nos. 1654 and 1655 of 1901, against the decree of Dwarkanath Mitter, Additional Judge of Mymensingh, dated the 11th of May 1901, affirming the decree of Rajendra Kumar Bose, Subordinate Judge of that District, dated the 10th of September 1900.

(1) (1899) I. L. R. 27 Calc. 77.

This appeal arose out of an action brought by the plaintiff to recover possession of certain immoveable property. The allegation of the plaintiff was that the disputed property,  $\frac{1}{2}$  share of Mouzah Singtia, originally belonged to one Kali Nath, which on his death devolved upon his two widows. In execution of a money decree against the widows, the property was sold and was purchased by Rash Govind Biswas, father of defendants Nos. 12 to 16, on the 4th June 1855, both on his behalf and also on behalf of his younger brother, Mahesh Govind Biswas, defendant No. 11. Subsequently in execution of a money decree obtained by the Loan office of Tangail against Mahesh Govind Biswas, one-half of the  $\frac{1}{2}$ th share of the disputed property was sold and was purchased by the plaintiff on the 10th February 1893. The sale was confirmed on the 14th April 1893 and formal possession was taken by the plaintiff on the 2nd September 1893. The other moiety of the  $\frac{1}{2}$ th share was sold to the plaintiff by Mahesh Govind's son by a *kobala* dated 6th July 1893. A suit for partition of Mouzah Singtia was brought by the defendant No. 8, who admitted in his plaint that the Biswas defendants (Nos. 11 to 16) were owners of  $\frac{1}{2}$ th share of the said Mouzah and made them parties to the suit. The Biswas defendants did not enter appearance. On the 6th July 1893 defendants Nos. 3, 4 and 5, who were co-sharers to the property under partition, put in a written statement, in which they denied that Biswas defendants had any share. On the 16th February 1894 a preliminary decree was passed by the Court specifying the shares of the several co-sharers and declaring that the Biswas defendants had no share at all. On the 14th March 1894 the plaintiff applied to be made a party to the partition suit, but her application was refused. Against the preliminary decree the Biswas defendants appealed, but their appeal was dismissed by the District Judge on the 9th August 1894. The present suit was brought by the plaintiff for possession of the share of the property purchased by her in execution of the decree and also by private sale from the Biswas defendants.

The defence was that the plaintiff's predecessor in title had no title in the disputed property and that the plaintiff having purchased the disputed property during the active prosecution

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of the partition suit, the transfer could not affect the right of the co-sharers of the property. The Court of First Instance decreed the plaintiff's suit holding that, notwithstanding the decree in the partition suit the Biswas defendants had  $\frac{1}{6}$ th share, which passed to the plaintiff. On appeal to the District Judge of Mymensingh, the decision of the First Court was affirmed.

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*Babu Nil Madhab Bose* (with him *Babu Shib Chunder Palit*) for the appellant.

*Babu Srinath Dass* (with him *Babu Basanto Kumar Bose* and *Babu Dwarka Nath Chakravarti*) for the respondent.

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PRINSEP J. A suit for partition was brought by Jagat Chander Munshi, predecessor of defendants 8 and 9, in which the other co-sharers were made defendants, and in the plaint the plaintiff admitted that the Biswas defendants had a share in the property.

At an execution sale, a  $\frac{1}{12}$ th share, being one-half of what the Biswas defendants claimed to have held, was sold on the 10th February 1893 and was bought by the plaintiff who, at a private sale, purchased also the remaining portion of the share on the 6th July of the same year.

On the 19th July the defendants Nos. 3, 4 and 5, who were co-sharers of the property under partition, put in a written statement, in which they denied that the Biswas defendants had any share.

On the 16th February 1894, what is termed a preliminary decree was passed by the Court specifying the shares of the several proprietors of this property and declaring that the Biswas defendants had no share at all. It seems that in these proceedings the Biswas defendants never entered appearance. We cannot learn from the learned pleaders engaged before us whether the suit proceeded further to a partition by metes and bounds. We understand that by the use of the terms "preliminary decree defining the shares," the object of the suit was to obtain a complete partition.

On the 14th March 1894, that is, shortly after the decree declaring the shares of the several owners of this property had been passed, the plaintiff applied to be made a party to that suit and her application was refused. Against what is termed the preliminary decree the Biswas defendants appealed, but their appeal was dismissed by the District Judge on the 9th August 1894. The plaintiff now sues for possession of the share purchased by her in execution of the decree and also by private sale from the Biswas defendants and it has been found by both Courts that, notwithstanding the decree in the partition suit, the Biswas defendants had a 1/4th share, which has passed to the plaintiff.

The only objection raised before us in second appeal is that the suit is barred by reason of the proceedings in the partition suit, inasmuch as, under s. 52 of the Transfer of Property Act, the transfer being made during the active prosecution of a contentious suit, in which the right to the immoveable property was directly and specifically in question, could not affect the rights of the other co-sharers therein.

The first question that arises is how far the proceedings in that suit can be regarded as contentious so as to affect the transfers made to the plaintiff. The first transfer was, as has been held by the Lower Court, on the 10th February 1893 at an execution sale before the institution of the partition suit, but it is contended that, inasmuch as this sale was not confirmed until a later date, that is, until the 14th of April after the institution of the partition suit, there was no valid transfer and, therefore, the transaction comes within the terms of s. 52. The title to property sold in execution of a decree vests in the purchaser from the date of his receiving a certificate from the Court after the sale has become absolute and not before. (S. 316 of the Code of Civil Procedure.)

The second transfer by private sale no doubt took place after the institution of the partition suit.

It is contended on behalf of the plaintiff that there was then no contentious suit before the Court. The case then before the Court was on a plaint, in which the title of the Biswas was admitted and it was not contentious, until the written statements of the objecting defendants had been filed, when only it became contentious. On the other hand, it is stated by the learned

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pleader for the appellants that of necessity a suit for partition must be contentious and that consequently sec. 52 of the Transfer of Property Act would apply to any transfer made after the plaint had been filed. The case of *Jogendra Chander Ghosh v. Fulkumari Dassi*(1) has been referred to as containing a definition by the learned Judges of the meaning of a contentious suit. That case is not in point, because the plaint as shown by the learned Judges itself indicated that the suit would be contentious as its object was to have determined a specific share, which was doubtful and in dispute. The expression, we find, is also defined by s. 253A of the Indian Succession Act (X of 1865) as amended by Act VI of 1881, sec. 7 in respect of proceedings for grant of probate or letters of administration and we think that that definition may be usefully applied to the present case. The explanation declares that by contention is understood "the appearance of any one in person or by his recognized agent or by a pleader duly appointed to act on his behalf to oppose the proceeding." In this view it seems to me that the suit did not become contentious, until the written statement was put in by the opposing defendants disputing any right, title or interest of the Biswas defendants in the property under partition as in the plaint they were described as parties to the partition as co-sharers, and I further think that, having regard to the fact the plaintiff, the transferee, was not allowed to become a party to that suit, she cannot properly be regarded as prejudiced by the result.

In my opinion, the suit is not barred by reason of s. 52 of the Transfer of Property Act.

The plaintiff was no party to the partition suit and was even not allowed by the Court to become a party to it, although she had succeeded to whatever right, title or interest was with the Biswas defendants, who were parties, and consequently her rights are not affected by the proceedings in the partition suit.

Both appeals are accordingly dismissed with costs.

HARRINGTON J. I agree that the appeals must be dismissed. By s. 52 of the Transfer of Property Act it is provided that

(1) (1899) I. L. R. 27 Calc. 77.

“during the active prosecution in any Court of a contentious suit or proceeding in which any right to immoveable property is directly and substantially in issue, the property in question cannot be transferred so as to affect the right of any other party thereto under decree or order, which may be made therein.”

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In the present case the property was transferred after a suit for partition in respect of it had been commenced, but the plaintiff in that suit admitted the defendant transferors' right on partition, to the share which the present plaintiff now claims.

There was at the time of the transfer no contention between these parties to the suit and in fact there never was any contention between the plaintiff and the defendant transferors in that suit.

That being the case I do not think the claim of the present plaintiff is affected by the order in the partition suit made against their then transferors in favour of co-defendants, who had made no claim against the transferors, until after the transfer.

In the case of *Bellamy v. Sabine* (1) Lord Justice Turner points out the difficulties there are in the application of the doctrine of *Lispendens* as between co-defendants and pertinently asks when the *lispendens* between them is to commence.

Whatever may be the answer to that question I think it is clear that the *lispendens* cannot be said to commence, until the co-defendant has by his pleading contested the rights of the other defendant.

*Appeal dismissed.*

S. C. G.

(1) (1857) 1 De G. & Jones. 566.