

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Faiyaz Husain Khan v. Munshi Prag Narain and others, from the Court of the Judicial Commissioner of Oudh; delivered the 21st March 1907.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from the Court of the Judicial Commissioner of Oudh which affirmed a decision of the Subordinate Judge of Sitapur.

Leave to appeal was granted on the ground that the Appeal involved a substantial question of law. What the question was that was supposed to be involved is, however, left somewhat in obscurity.

The facts are not in dispute.

On the 14th of June 1889 Hamid Husain, the owner of Mauza Bangawan, mortgaged it to Newal Kishore.

On the 13th of July 1891 Newal Kishore brought a suit on his mortgage.

On the 23rd of August 1892 he obtained a decree for sale which was made absolute on the 29th of November 1895.

On the 21st of February 1901 the property was sold in execution of Newal Kishore's decree and purchased by the Respondent Prag Narain, who was the son and the representative of the decree holder.

On the 2nd of July 1901 Prag Narain obtained a sale certificate and attempted to recover possession of the property. He was, however, obstructed in every possible way by the Appellant Faiyaz Husain, who was in possession under a decree for sale obtained on a subsequent mortgage. Prag Narain was therefore compelled to bring this suit.

There was no encumbrance upon the property either at the date of the mortgage of the 14th of June 1889 to Newal Kishore or at the date of the institution of Newal Kishore's suit on the 13th of July 1891. But on the 15th of July 1891, before any summons in Newal Kishore's suit was served, a second mortgage was granted by the mortgagor to Mirza Muzaffar Beg. Mirza Muzaffar Beg put his mortgage in suit on the 20th of March 1894 without making the first mortgagee a party, and in the absence of the first mortgagee obtained a decree for sale. In execution of this decree the property mortgaged to Mirza Muzaffar Beg was put up for sale on the 20th of December 1900 and bought by the Appellant Faiyaz Husain, who was the son of Hamid Husain, and who had attained his majority in 1894. Faiyaz Husain managed to get possession and resisted all attempts on the part of the Respondent Prag Narain to dispossess him.

The case seems to their Lordships to be clear. The mortgage to Mirza Muzaffar Beg was made during the pendency of Newal Kishore's suit, which was in its origin and nature a contentious suit, and was at the time being actively prosecuted. Therefore, under Section 52 of the Transfer of Property Act (No. IV. of 1882) it did not affect the rights of Newal Kishore under the decree made in his suit. Their Lordships are unable to agree in the view which seems to have obtained in India that

a suit contentious in its origin and nature is not contentious within the meaning of Section 52 of the Act of 1882 until a summons is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty.

The doctrine of *lis pendens*, with which Section 52 of the Act of 1882 is concerned, is not, as Turner, L.J., observed in *Bellamy v. Sabine* (1 D. & J. 566, at p. 584), "founded upon any of  
 " the peculiar tenets of a Court of Equity as to  
 " implied or constructive notice. It is . . . .  
 " a doctrine common to the Courts both of law  
 " and of equity, and rests . . . . upon this  
 " foundation, that it would plainly be impossible  
 " that any action or suit could be brought to a  
 " successful termination if alienations *pendente*  
 " *lite* were permitted to prevail." The correct mode of stating the doctrine, as Cranworth, L.C., observed in the same case, is that "*pendente lite*  
 " neither party to the litigation can alienate  
 " the property in dispute so as to affect his  
 " opponent."

Apart, however, from the doctrine of *lis pendens*, which seems to their Lordships to apply to the present case, it is plain that at the date of his purchase Faiyaz Husain knew all about the mortgage to Newal Kishore and the decree made on the basis of that mortgage, and he knew that the sale proceedings were actually in progress, for in July 1898 he brought a suit against Prag Narain asking for a declaration that Newal Kishore's mortgage, and the decree passed upon it, were invalid, and that the property was not liable for attachment and sale.

At the hearing of the Appeal to the Court of the Judicial Commissioner Faiyaz Husain asked to be let in to redeem. The Court very

properly rejected that application. It has been repeated at the hearing before this Board. There seems to be no ground for the application. Before the sale to Prag Narain was confirmed Faiyaz Husain had every opportunity of redeeming the property. He never offered to do so. On the sale being confirmed the equity of redemption was extinguished. Prag Narain appears to be in as good a position as any outside purchaser unconnected with the property would have been. Their Lordships will, therefore, humbly advise His Majesty that this Appeal should be dismissed.

The Appellant will pay the cost of the Appeal.

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