

Privy Council Appeal No. 47 of 1935

Allahabad Appeal No. 14 of 1933

Parmeshari Din - - - - - *Appellant*

v.

Ram Charan and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 14TH JUNE, 1937

Present at the Hearing :

LORD MACMILLAN.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by SIR SHADI LAL.*]

This appeal, which has been heard *ex parte*, raises the question of the application of the doctrine of *lis pendens* to a transfer of immovable property, upon which the appellant founds his claim. The facts bearing upon the question lie within a narrow compass. The plaintiffs, who are respondents before their Lordships, were mortgagees of the property in dispute, and commenced in 1923 an action for the foreclosure of the mortgage against the mortgagor, Nurul Hassan and one Ram Narain. They obtained, on the 30th September, 1924, a preliminary decree for foreclosure, which, after an unsuccessful appeal by Ram Narain to the Chief Court at Lucknow, was followed on the 28th July, 1928, by a final decree for foreclosure.

The decree-holders then made an application for the recovery of the property by executing their decree, and obtained symbolical possession from the judgment-debtors. The appellant, Parmeshari Din, was, however, in actual possession of it, and he based his title to it upon a usufructory mortgage granted to him by Nurul Hassan on the 15th February, 1924, and upon a sale of the equity of redemption in February, 1928, in execution of a money decree against the mortgagor. It will be observed that the mortgage and the sale invoked by the appellant took place during the pendency of the plaintiffs' suit for foreclosure; and the plaintiffs, relying upon the rule of *lis pendens*, sought to recover possession of the property from the transferee. The Court of first instance dismissed the application, but the Court of Appeal has granted it, holding that the transfer in favour of the appellant being *pendente lite* cannot adversely affect the rights of the plaintiffs; and that the appellant is bound by the decree in their favour to the same extent as his transferor.

Against the judgment of the Court of Appeal, the transferee has preferred this appeal, and it is argued on his behalf that the doctrine of *lis pendens* does not apply, as there was no active prosecution of the suit, when the transfer in question was made. Now, section 52 of the Transfer of Property Act IV of 1882, which embodies the rule of *lis pendens*, prohibited a transfer made during the active prosecution of a suit or proceeding in which any right to immoveable property was directly and specifically in question. The expression "active prosecution", which existed in the section before its amendment in 1929, led to much uncertainty in the application of the rule, and caused a divergence of judicial opinion. It was felt that the standard of diligence, which would constitute "active prosecution", could not be defined with precision. To remove this uncertainty, the law was amended in 1929, and the amending Act XX of 1929 substituted the word "pendency" for the phrase "active prosecution"; and there can now be no difficulty in deciding whether the transfer was made during the pendency of a suit or proceeding.

It is clear that the question of the active prosecution of a suit is one of fact, but it was not suggested in either of the Courts in India that the plaintiffs had not actively prosecuted the suit, and were consequently debarred from availing themselves of the rule of *lis pendens*. The learned Judges of the Court of Appeal had, therefore, no opportunity to express their opinion on this point; and their Lordships cannot entertain an objection, which depends upon a question of fact not dealt with below. Upon the record before them, there is no indication of any delay or remissness in the prosecution of the suit, for which the plaintiffs can be held responsible.

Their Lordships, therefore, agree with the High Court that the transfer relied upon by the appellant cannot prejudice the rights of the decree-holders, and that he cannot resist the decree obtained by them.

It is then said that the appellant was not a party to the decree which is sought to be executed against him. But he took the property from the defendant *pendente lite* and must be treated as his representative in interest. He is bound by the result of the decree. If he had not obtained possession of the property from the defendant, the latter would have been required to deliver it to the plaintiffs. And the mere circumstance that he got possession from the defendant in pursuance of a transfer, which was invalid as against the plaintiffs, cannot detract from their rights under the decree. As observed by Cranworth, L. C. in *Bellamy v. Sabine* (1857) 1 De G. and J., 566, "*pendente lite* neither party to the litigation can alienate property in dispute so as to affect his opponent". The decree-holders are, therefore, entitled to execute the decree against the appellant, who is the representative of their judgment-debtor. As stated above, they obtained only symbolical possession from the judgment-debtor, and there is no reason why they

should not be allowed to proceed against his representative who is in actual possession of the property.

The dispute between the appellant and the decree-holders related to the execution of the decree, and, as he was the representative of the judgment-debtor, the Court executing the decree had jurisdiction under section 47 of the Civil Procedure Code to determine that dispute. The Court of first instance did determine it, and, as all the requirements of the section were satisfied, the decree-holders were entitled to appeal against that decision to the High Court.

In their Lordships' opinion the appellant cannot be allowed to defeat the claim of the decree-holders. Their Lordships, will, therefore, humbly advise His Majesty that the appeal should be dismissed. They will, however, make no order as to the costs of the appeal, as there is no appearance before them by, or on behalf of, the respondents.

In the Privy Council

PARMESHARI DIN

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DELIVERED BY SIR SHADI LAL

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