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[FULL BENCH.]

Present: Wood Renton C.J. and Shaw and De Sampayo JJ.

MUHEETH *v.* NADARAJAPILLA *et al.*

41—D. C. Colombo, 45,446.

Lis pendens—*Action on a mortgage bond—Lease by a mortgagor before service of summons but after institution of action.*

A lease by a mortgagor after the institution of an action on the mortgage bond by the mortgagee, but before service of summons on him, cannot be regarded as having been executed *pendente lite*. A *lis pendens* arises only upon the service of summons, so as to affect any dealing with the subject of litigation by the party defendant.

The rule of *lis pendens* applies as much to a mortgage action as to any other action relating to immovable property.

THE facts are set out in the judgment.

Bawa, K.C., and *Samarawickrema*, for plaintiff, appellant.

A. St. V. Jayewardene, for defendants, respondents.

Cur. adv. vult.

June 19, 1917. WOOD RENTON C.J.—

The argument of this appeal has been inevitably delayed by the simultaneous absence of my brother De Sampayo and myself on circuit. The material facts are these. Florence Casie Chetty and her husband, by deed No. 110 dated November 8, 1912, mortgaged to T. A. J. Noorbhai an undivided one-third of the premises No. 15, Fourth Cross street, in the Pettah of Colombo, to which she was entitled. On November 14, 1913, the mortgagee put the bond in suit, and, in execution of the decree in that action, the property was, on December 3, 1914, sold by the Fiscal and purchased by the plaintiff, who obtained a Fiscal's transfer on July 19, 1915. After the filing of the plaint, but before the service of the summons, in the mortgage action, Florence Casie Chetty, by deed No. 2,975 dated October 25, 1913, leased the property to the defendants for a period of four years, commencing from March 1, 1915, at an annual rent of Rs. 750, a sum of Rs. 1,580 being payable as an advance. The plaintiff sues in this action for a declaration of his title to the property and for the recovery of damages from, and the ejectment of, the defendants, who, he alleges, have been in wrongful possession of the property since December 3, 1914. The defendants in their answer relied upon the lease above mentioned, pleaded that

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they had also taken a lease of the remaining two-thirds of the premises—their title under this lease was admitted at the trial—and contended further that the action was not maintainable, as they had not received notice of it from the plaintiff.

The main issue in this case is whether or not the lease by Florence Casie Chetty of the one-third share in suit should be regarded as having been executed *pendente lite*. That question in turn depends on the point of time at which, under the law of this Colony, an action may be said to be "pending." The learned District Judge, following the decision of Middleton and Grenier JJ. in *Perera v. Silva*,[1] held that there is no *lis pendens* till knowledge of the action has been brought home to the defendant by service of the summons, and consequently that as the defendants had not in fact been served with summons when the lease was executed, the plaintiff, while he had a right to a declaration of title to his admitted interests in the premises, could not recover damages against them.

On this part of the case I entirely agree with the learned District Judge. While it is no doubt true, as was pointed out by the Court of Appeal in Chancery in *Bellamy v. Sabine*,[2] in passages so well known that it is unnecessary to cite them at length, that a *lis pendens* affects a litigant, not through the doctrine of notice, but because the policy of the law will not allow a litigant to create *pendente lite* rights to the property in dispute to the prejudice of his opponent, the law of England has never excluded the question of notice from consideration in this matter. The theory on which the effect of *lis pendens* rested was that the proceedings in courts of justice enjoyed such publicity as to import notice,[3] and, under the law prior to the Judgments Act, 1839,[4] it was only on service of the subpœna that a *lis pendens* was constituted. The Judgments Act, 1839,[4] only made this difference in the law that, in order to bind a purchaser or a mortgagee, either he must have express notice of the action, or the *lis pendens* must be registered. The Roman-Dutch law proceeded on the same principle. An action became litigious, if it was *in rem*, as soon as the summons containing the cause of action was served on the defendants; if it was in *personam*, on *litis contestatio*,[5] which appears to synchronize with the joinder of issue or the close of the pleadings.[6]

I do not think that the Indian authorities discussed in the argument of the appeal are of much assistance in the ascertainment of the law of Ceylon on the point now under consideration, inasmuch as they all turn on the language of section 52 of the Transfer of Property Act, 1882,[7] which prohibits the transfer of

[1] *(1910) 13 N. L. R. 81.*
[2] *(1857) 1 De G. and J. 566.*
[3] See *Worsley v. Scarborough, 3 Atk. 392; Price v. Price, (1887) 35 Ch. D. 297, at p. 301; Wigram v. Buckley, (1894) 3 Ch. 483.*
[4] *2 & 3 Vict., ch. 11, s. 7.*
[5] *Sande on Cession of Actions (Anders) 66; Maas. vol. 4, p. 226.*
[6] *Berwick's Voet 390; 4 Nathan 1994.*
[7] *Act IV. of 1882.*

immovable property, the subject of a contentious suit or proceeding, during "the active prosecution of any such suit in Court." A suit may well have a "contentious" character impressed upon it before the service of summons. In this conection I may quote the language of Maclean C.J. in the case of *Jogendra Chunder Ghose v. Tulkumari Dassi*:[1] "It is said, upon the authority of the case of *Radhasyam Mohapattra v. Sibu Panda*,[2] that a suit does not become 'contentious' until the summons has been served upon the opposite party, but no reason is assigned by the learned Judges for their conclusion. I am inclined to think this view proceeds upon some confusion between what is 'contentious' and the exact point of time when *lis pendens* is constituted. I should infer that the conclusion was arrived at by analogy to the English cases, which decided that, as between plaintiff and defendant, the service of the subpœna constitutes the *lis pendens* between them (see *Bellamy v. Sabine* [3]). We are, however, relieved from going into the question as to the precise point of time when a *lis pendens* is constituted in this country, whether as between plaintiff and defendants or as between co-defendants, for the section says: 'During the active prosecution . . . . . of a contentious suit,' &c., which indicates with reasonable clearness that, while the suit is being actively prosecuted, the property is not to be transferred or dealt with so as to affect the rights of any other party thereto under any decree or order which may be made therein. It is not suggested that this suit was not being actively prosecuted when the transfer was executed. In this view I fail to see how the case cited is any authority as to what is or what was not a contentious suit. A contentious suit is a suit involving contention, and it is perhaps difficult to predicate of any suit, at the moment of its inception, whether or not it is likely to be contentious; but if in point of fact it turns out to be a suit which was contested, as is the case here, then, to my mind, the suit is a contentious one, and the section applies. It seems to me that in order to appreciate whether the section applies we must regard the event, and in this case the event showed a contested suit." There does not appear to me to be anything in the decision of the Privy Council in *Faiyaz Hussain v. Munshi Prag Marain* [4] that compels us to hold that under the law of Ceylon an action is a *lis pendens* on the mere filing of the plaint.

There are decisions under some of our local enactments which do not, however, afford us much help in solving the problem that arises in the present case. It was held, for instance, in *Abram Fernando v. Silvestre Perera*,[5] that, for the purposes of the

[1] (1889) I. L. R. 27 Cal. 77, at pp. 83 and 84; and cp. Krishnappa v. Shivappa, (1907) I. L. R. 31, Bom. 393. at p 399.

[2] 15 Cal. 647.

[3] (1875) 1 De G. and J. 566, 578, 584.

[4] (1907) 5 Cal. L. J. 564.

[5] (1880) 3 S. C. C. 158.

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Prescription Ordinance, No. 8 of 1834, section 3, an action "commenced" either on the filing of the libel or on the issue of the summons.[1] There is also a decision of the Full Court to the effect that, from the standpoint of section 17 of the Partition Ordinance, 1863,[2] the filing of the libel is the institution of the proceedings.[3] The "commencement" of the action, within the meaning of the Prescription Ordinance, is not, however, necessarily coincident with its acquisition of the character of *lis pendens;* and the language of section 17 of the Partition Ordinance, 1863,[2] "whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property," offers a reasonable explanation of the decision of the Full Court in *Perera v. Perera.*[4]

There does not appear to me to be any authority that runs counter to the decision of Middleton and Grenier JJ. in *Perera v. Silva.*[5] The principle laid down in that case is in conformity both with English and with Roman-Dutch law, and every consideration of convenience and fairness is in favour of its adoption as the law of Ceylon.

I agree with the observations of my brother De Sampayo as to the applicability of the doctrine of *lis pendens* to mortgage actions. I would dismiss the appeal, with costs. I agree to the reservation of the plaintiff's right in regard to the rent under the lease proposed by my brother De Sampayo.

SHAW J.—

The question arising for decision is whether the filing of a plaint under Chapter VII. of the Civil Procedure Code constitutes a *lis pendens* that prevents the parties to the suit from transferring rights in the subject-matter of the suit, even although summons has not been effected on the defendant to the action, and he has no knowledge that the suit has been instituted.

The doctrine of *lis pendens* is common to both the English and Roman-Dutch law, the only difference being in the time when the *lis pendens* has been held to attach.

Under the English law, prior to the legislation necessitating the registration of *lis pendens*, it was held to attach at the time of the service of summons on the defendant (*Bellamy v. Sabine* [6]). Under the Roman-Dutch law it appears to have attached when the suit became contentious, which occurred in different kinds of actions at different times. Under the Roman-Dutch law as administered in South Africa it has been held to attach in all cases on the close of pleadings (*4 Nathan 216*). Under neither system does it appear to have attached before notice of the action has been given to the defendant party.

[1] *Cp. Adiriana v. Prolis Hamy,* (1884) *6 S. C. C. 93, and Perera v. Perera,* (1890) *9 S. C. C. 105.*

[2] *No. 10 of 1863.*

[3] *Cf. Banda v. Cader,* (1913) 17 *N. L. R. 79*

[4] (1890) *9 S. C. C. 105.*

[5] (1910) *13 N. L. R. 81.*

[6] (1857) *1 De G. and J. 566.*

I do not think I need discuss the rule adopted in India or the cases cited as to the law in that country, as the law there depends upon the direct legislative enactment contained in the Transfer of Property Act of 1882.

In *Perera v. Silva* [1] a *lis pendens* has been held to attach in Ceylon upon the service of the summons on the defendant, and this case has been followed in the subsequent cases, D. C. Galle, No. 11,524,[2] and *Meyappa Chetty v. Hadjiar.*[3]

In view of the uncertainty in the date of attachment under the Roman-Dutch law, and the inconvenience of adopting the practice established in South Africa in a country like Ceylon, where fraudulent transfers of property are so common, I think it convenient to follow here the English rule as adopted in *Perera v. Silva* [1] and the other cases I have referred to.

In the present case there is no evidence that the defendant was aware of the institution of the action, or was evading service, so I need not consider what effect such circumstances might have in a case where they are proved to exist.

In my opinion the decision of the District Judge is correct, and I would dismiss the appeal, with costs.

I agree to the reservation of the plaintiff's right in regard to the rent under the lease proposed by my brother De Sampayo.

DE SAMPAYO J.—

An undivided one-third share of the property in dispute belonged to Florence Casie Chetty, and she and her husband on November 8, 1912, mortgaged it to one Jeevunjee Noorbhai. The mortgagee on October 14, 1913, put the bond in suit against the mortgagors in action No. 37,308 of the District Court of Colombo, but summons on the defendants in that action was not served till June 11, 1914. In the meantime the mortgagors, by deed dated October 25, 1913, leased the one-third share to the defendant in this action for a term of four years from March 1, 1915. The mortgagee, however, proceeded with the action as it was brought, and having obtained a decree, he had the mortgaged property sold on December 3, 1914. The plaintiff in this action became purchaser, and obtained a Fiscal's transfer on July 10, 1915. He sued the defendant in ejectment, and has appealed from the judgment of the District Judge dismissing the action.

The appeal is supported on the ground that, although the defendant was not a party to the mortgage action, he is bound by the decree, inasmuch as he took the lease pending the mortgage action, while the defendant contends that as no summons had been served in that action on his lessors before the date of the lease the action was not pending so as to prejudice him. I think the defendant's contention should prevail in view of the law relating to *lis pendens*. It is not necessary for me to refer to all the authorities cited at the

[1] *(1910) 13 N. L. R. 81.* [2] *S. C. Min., Oct. 20, 1913.* [3] *3 C. W. R. 159.*

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argument; I need only say that I agree with the decision in *Perera v. Silva*,[1] in which, upon a consideration of the principal authorities, English, Indian and Roman-Dutch, it was held that *lis pendens* arose only upon the service of summons, so as to affect any dealing with the subject of litigation by the party defendant.

I entertained some doubt as to whether the doctrine of *lis pendens* applied where the action which was pending was a mere mortgage action. In *Bellamy v. Sabine*,[2] which is the leading case on the subject, the principle was stated by Lord Cranworth as follows: "The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit." I could not quite see that in a mortgage action there was any "property in dispute," or that the litigation was as to the "right to any particular estate," as to which there would be a "decision of the Court in the suit," and I thought that so long as the mortgage action was duly constituted by all those having at its institution any interest in the mortgaged property being made parties, the mortgagee and the purchaser under the decree would be secure. But on reconsideration I think that this is taking too narrow a view of the nature of the mortgage action. Such action is a real action, and involves a claim to bring to sale "a particular estate." The claim may be disputed by the denial of the existence of the debt, and thus the right to the mortgage security will be potentially "in dispute," and there will be a decision of the Court thereon when it orders that the property shall or shall not be sold in realization of the mortgage. I, therefore, think that the rule of *lis pendens* applies as much to a mortgage action as to any other action relating to immovable property. The result may be hard for a mortgagee who may not be aware of any alienation by the mortgagor after the date of the action, but the hardship is no greater than if the alienation was before the date of the action and the mortgagee failed to take advantage of the provisions of sections 643 and 644 of the Civil Procedure Code.

Mr. Bawa, for the plaintiff, urged that in the alternative the plaintiff was entitled to the rent payable under the lease. But no specific claim for rent was made in this case, and there is nothing to prevent the plaintiff from bringing another action for rent if he is so advised. But in order to remove any doubts on the point, liberty to bring any such action will be reserved to him.

I agree that the appeal should be dismissed, with costs.

Appeal dismissed.

[1] *(1910) 13 N. L. R. 81.*

[2] *(1857) 1 De G. and J. 578.*

WIJESEKERA *v.* BANDA. 1917.

D. C. Kurunegala 5,969.

June 10, 1917. WOOD RENTON C.J.—

The plaintiff instituted this action for declaration of title to, and for the recovery of the possession of, a land called Galabodahena, alleging that it was chena land, in the Kandyan Provinces, that it was therefore at the disposal of the Crown, and that it had been acquired on a Crown grant by Ranasinghe Ranhamy, who, on May 16, 1915, sold it to the plaintiff himself. The defendant pleaded that the land belonged to Ukku Banda, Vidane, who died in 1895. The defendant is his posthumous son. His widow, Kiri Menika, took out letters of administration to his estate. She subsequently married Ranasinghe Ranhamy, who was appointed curator of the defendant's property. The land Galabodahena was inventoried in the testamentary case as belonging to the deceased, and in the curatorship case as the property of the minor. The defendant alleged that, when the land was advertised for settlement, Ranhamy appeared before the Settlement Officer and claimed the land, but that he had fraudulently obtained a Crown grant for it in his own name. On February 9, 1915, the defendant instituted case No. 5,476 of the District Court of Kurunegala against Ranhamy for the recovery of the land in dispute and other lands. Summons was served on Ranhamy in that action on March 12, 1915. The defendant filed his answer on the 12th, and his amended answer on May 26. On May 16 Ranhamy executed his deed of transfer in favour of the plaintiff. It was argued on behalf of the defendant in the District Court that this conveyance was invalid, inasmuch as it had been executed during the pendency of case No. 5,476, D. C. Kurunegala. The learned District Judge did not in terms deal with that question at all. It did not form the subject of an express issue at the trial, although it was no doubt meant to be included in the 12th issue—"Is the plaintiff bound by the decree in D. C. Kurunegala No. 5,476?"—and it was dealt with in the arguments in the District Court. The learned District Judge held that the land was at the disposal of the Crown; that there was nothing to show that Ranhamy had bought it with money belonging to his ward or in his fiduciary capacity as curator; that the purchase had been effected for valuable consideration; that the plaintiff knew nothing of any litigation between the defendant and Ranhamy; that he, too, had paid full consideration for the transfer; and that his title under that transfer should be upheld. He accordingly gave judgment in the plaintiff's favour, with damages and costs.

The defendant appeals.

The land in suit was bought from the Crown by Ranhamy in his own name along with other lands, which he purchased in the name of the defendant. The record of the proceedings in D. C. Kurunegala No. 5,476 shows that on October 21, 1915, Ranhamy appeared in Court and admitted that he had no longer any interest in the land Galabodahena, as he had sold it to a third party. The defendant, who, as I have already mentioned, was plaintiff in that action, was present at the time. A proctor appeared for him. The journal entry concludes as follows: "By consent of parties judgment for the plaintiff as prayed for. No damages and no costs." It results from the decision of the Full Court in 41—D. C. Colombo, No. 45,446 *(1917, 19 N. L. R. 461)*, that as the summons had been served on Ranhamy in D. C. Kurunegala No. 5,476 prior to the sale by him of the lot in question to the plaintiff, that sale was effected *pendente lite*, and was, therefore, invalid. It was contended by counsel for the plaintiff (i.) that as the judgment in D. C. Kurunegala No. 5,476 was a judgment by consent, the doctrine of *lis pendens* did not apply; and (ii.) that, in any event, that consent judgment was the result of collusion between the plaintiff and the defendant. The former of these contentions is disposed of by numerous decisions, in which it has been held that a judgment by consent involves the exercise of a judicial and not a ministerial function by the Court, and is quite as conclusive between the parties as if it had been

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pronounced by the Court after the action had been fought out. (See *In re South America and Mexican Co.*, *1895*, *1 Ch. 87*; *Annamatar Chettiar v. Malayandi Appaya Naik*, *1905*, *1906*, *I. L. R. 29 Mad. 426*; *Landon v. Morris*, *1832*, *5 Sim. 247*.) As regards the latter there was no issue on the subject; there was nothing in the pleadings to indicate that the action was collusive in its inception, and while the proper course for the plaintiff in D. C. Kurunegala No. 5,476 to have adopted might well have been to have invited either the Court to make Ranhamy's vendee a party to the proceedings, or to exclude the land here in dispute from the purview of the action, I am unable to find in the evidence any reliable proof of collusion or fraud. I would set aside the decree of the District Court, and direct a decree to be entered up dismissing the plaintiff's action, with the costs of the action and appeal.

If the law of *lis pendens* as it exists in Ceylon works hardship to *bona fide* purchasers, the remedy is for the Legislature to amend it on the lines of the English Judgments Act, 1839 (*2 and 3 Vict.*, *c. 11*, *s. 7*), by requiring either express notice or registration.

DE SAMPAYO J.—I agree.