

Present: Fisher C.J. and Driberg J.

1928.

IBRAHIM SAIBO v. PALLAKU LEBBE *et al.*

155—D. C. (Inty.), Colombo, 1,614.

Lis pendens—Mortgage of movables pending action—Res litigiosa—Doctrine applicable to movables.

A seized certain movable property in execution of a decree against B, when the property was successfully claimed by C. While an action under section 247 of the Civil Procedure Code brought by A against B and C was pending, C mortgaged the property with D. D put the bond in suit, and having obtained a mortgage decree claimed the proceeds of the sale of the property held under A's decree in the 247 section.

Held that the mortgage executed by C during the pendency of A's action was void as against the rights acquired by A under his decree.

Under the Roman-Dutch law the doctrine of *lis pendens* is applicable to movable as well as to immovable property.

A PPEAL from an order of the District Judge of Colombo.

Hayley, K.C. (with *Bartholomeusz*), for petitioner, appellant.

H. V. Perera, for plaintiff, respondent.

January 23, 1928. DRIEBERG J.—

The plaintiff-respondent who had a money decree against the 1st defendant in this action seized movable property lying in certain shops in Matale. This property was successfully claimed by M. R. Seyadu Mohamed Ibrahim Saibu referred to in the proceedings as Seyadu.

On October 16, 1922, the plaintiff-respondent brought action (D. C., Kandy, 30,394) under the provisions of section 247 of the Civil Procedure Code, against the defendant and Seyadu for a declaration that the property was liable to be sold in execution of his decree against the 1st defendant. Judgment was entered in favour of the plaintiff-respondent in the District Court on April 27, 1925, and it was affirmed in appeal on December 16, 1925.

During the pendency of D. C. Kandy, 30,394 and after issues had been framed, Seyadu on May 10, 1924, mortgaged the property with the appellant. The appellant sued on his bond in D. C. Kandy, 32,797 and obtained a mortgage decree.

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The property was sold under the writ of the plaintiff-respondent, and the appellant claimed the proceeds of sale on his mortgage decree in D. C., Kandy, 32,797.

The appellant says that as he was not a party to D. C., Kandy 30,394, he is not bound by the decree in it and that it is open to him to prove that Seyadu was the owner of the property, and that therefore it was not liable to be sold in execution of the plaintiff-respondent's decree against the defendant.

The plaintiff-respondent contended that as the property mortgaged was to the appellant was *res litigiosa*, while D. C., Kandy, 30,384, was pending, the mortgage was void against the rights acquired by the plaintiff-respondent under the judgment in that case.

The learned District Judge upheld this contention of the plaintiff-respondent and held that he was entitled to the proceeds of the sale.

Mr. Hayley contended that the doctrine of *lis pendens* does not affect movable property. This is undoubtedly so under the law of England (*Wigram v. Buckley*¹). The Roman-Dutch law text books, however, draw no distinction between movable and immovable property, and there is express authority that the principle applies equally to movable property (*Voet XLIV. 6, 1: Nathan's Common Law of South Africa, Vol 4, s. 2173*).

The appellant cannot therefore claim the proceeds of sale against the plaintiff-respondent.

The appellant also claimed that the respondent was estopped from denying that Seyadu was the owner of the property by reason of the conduct of the judgment-debtor, who, it is said, allowed Seyadu to hold himself out as the owner of the business and the shops in which the property was. The learned District Judge has rightly held that even if the judgment-debtor had acted in such a manner it could not operate as an estoppel against the plaintiff respondent.

The appeal is dismissed with costs.

FISHER C.J.—I agree.

Appeal dismissed.

¹ C. A. (1894) 3 Chancery 483.