Present: De Sampayo J. and Schneider A.J.

1920.

PERIANAN CHETTY *v.* FERNANDO.

331—D. C. Colombo, 52,613.

Lis pendens—*Sale in execution pending action for specific performance.*

A by deed agreed to sell a land to defendant within three months. The defendant brought an action for specific performance and obtained decree in September, 1911. The deed of conveyance in pursuance of the decree was executed in November, 1911. In the meantime a creditor of A sold the land in execution of a money decree in July, 1911, when plaintiff became purchaser. Fiscal's transfer was issued to plaintiff in March, 1912.

Held, that defendant had superior title.

The doctrine of *lis pendens* is applicable to sale in execution. An action for specific performance is a *lis*, to which the doctrine is applicable.

THIS was an action for declaration of title. The facts are set out in the judgment of the District Judge (L. M. Maartensz, Esq.):—

By an indenture No. 1,007 dated September 15, 1908, A. S. Alwis agreed to sell and convey to the defendant an undivided one-third share of the land in question within three months from the date thereof, and agreed further that in default he should be liable, in addition to his liability, to be compelled to perform the agreement, to pay the defendant a sum of Rs. 500 as liquidated damages.

The defendant sued on the agreement in case No. 31,593, D. C. Colombo, on October 17, 1910, and obtained judgment on September 4, 1911. The Court executed a transfer of the land to the defendant on November 8, 1911.

In case No. 31,989, D. C. Colombo, one Nalla Caruppen Chetty sued the defendant to recover a sum of Rs. 494 due on a promissory note. Judgment was entered for Nalla Caruppen Chetty on February 28, 1911. The land was sold on July 26, 1911, and purchased by Perianan Chetty, the present plaintiff. The sale was confirmed on October 14, 1911, and a Fiscal's transfer was issued to the purchaser on March 14, 1912. I may note in passing that the plaintiff made no effort to vindicate his title prior to this action filed on March 14, 1919.

The agreement No. 1.007 refers to an undivided one-third share of the land in dispute, but no issue was suggested regarding the extent of the land, and I presume there is no question between the parties on that point.

There can be no doubt that the execution sale at which the plaintiff purchased the land took place during the pendency of case No. 31,593, D. C. Colombo. Plaintiff's counsel contended that the sale in execution to the plaintiff was not affected by the rule of *lis pendens*, because (*a*) the action No. 31,593 did not involve a dispute concerning the right of *dominium* or ownership of the land in question: (*b*) the sale to plaintiff

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was not a voluntary sale, but a sale in execution. In support of his first proposition, he cited sections 2, 3, 4, and 5 of chapter IX. of Sande's *Restraints on Alienation.*

Section 1 lays down that "a *res litigiosa* is a thing concerning the *dominium* or right of ownership, of which there is going on between the possessor and the plaintiff a dispute by judicial proceedings." Therefore, says Sande in section 3: "If there is no dispute about the *dominium*, but only about the servitude or any other right over a thing, then the right which has been subjected to judicial decision becomes *litigiosum*, but the thing does not, and therefore it can be freely alienated."

In sections 4 and 5 it is laid down that an *actio hypothecaria* and a personal action do not make a thing *res litigiosa*. One of the questions to be decided is whether a sale pending an action to compel specific performance of an agreement to sell a land is void. This question must, I think, be answered by the application of the principle laid down in *Bellamy v. Sabine*,[1] that "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." On the principle laid down in this case, it was held in the case of *Muheeth v. Nadarajapillai* [2] that the doctrine of *lis pendens* applied where the action which was pending was a mortgage action.

If the doctrine is applicable to a mortgage action, I see no reason why it should not be applicable to an action for specific performance of a contract for the sale of a land. It is doubtful whether an action for specific performance lay under the Roman-Dutch law, but it has been held in a series of cases that such an action lies in Ceylon. The earliest case in which the question was specifically raised and decided in the affirmative is the case of *Holmes v. Alia Marikkar*,[3] since that date it is settled law that an action for specific performance does lie.

In that case it was held that, where it was impossible for the defendant to execute the conveyance ordered, the Court should decree the defendant to pay to plaintiff the damages claimed. The agreement then sued on provided for the payment of damages in lieu of performance. The agreement sued on in case No. 31,593 makes no such provision, but distinctly provides that the party in default should pay a sum of Rs. 500 as damages, in addition to being compelled to perform his agreement specifically.

The action No. 31,593, in my opinion, involved a dispute concerning the right of ownership of the land in question. It would, I think, be most inequitable to allow a person in the position of the defendant to put it out of his power to specifically perform the agreement sued on by selling the land to a third party pending the action against him. For the reason given by me, I am unable to adopt the argument that the doctrine of *lis pendens* is not applicable to the action No. 31,593.

In support of his second proposition, plaintiff's counsel argued that the rule of *lis pendens* was analogous to the prohibition against alienation contained in section 17 of the Partition Ordinance, and contended that the rule laid down in the case of *Perera v. Perera* [4] that section 17 applies to voluntary and not to necessary alienation, and that a Fiscal's sale of some of the shares of some of the co-owners pending a partition suit is valid was applicable to the case of a sale of a land in execution during the pendency of another suit in which the *dominium* or the right of ownership of the land was in dispute.

[1] *I Dc. G. & S. 578.*
[2] *(1917) 19 N. L. R. 461.*
[3] *I N. L. R. 282.*
[4] *(1906) 9 N. L. R. 217.*

I was at first impressed by the argument that section 17 of the Partition Ordinance was, in fact, a statutory enactment of the rule of *lis pendens*, but on further consideration I am of opinion that that is not the case. The object of the Partition Ordinance is to provide for the partition of land, and is not a measure for the settlement of disputes. When it appears that the plaintiff is making use of the Ordinance merely as a substitute for an action *rei vindicatio*, the Court has power to order the parties to stamp the proceedings, and deal with the action as one for declaration of title.

Section 17 prohibits alienation whether there is any dispute regarding the shares or not. Again, a party whose share is not in dispute is prohibited from alienating it by section 17, the object being, I take it, to prevent the course of the action being delayed by parties having to be added from time to time; such an alienation would not be a violation of the rule of *lis pendens*, as the sale would not affect the title of any of the other parties. Thus, the prohibition against alienation provided by section 17 goes far beyond the rule of *lis pendens*.

Mr. Justice Wendt based his judgment, in the case of *Perera v. Perera*,[1] mainly on the fact that section 17 did not forbid a sale in execution. He says: "The very terms of section 17 are, in my opinion, in appellant's favour. The Legislature, had it been minded to forbid a sale in execution as well, could (and, I think, would) have enacted that once a partition suit was commenced no change in the ownership of the land should be effected until its determination. Instead of such an enactment, it merely says that 'it shall not be lawful for any owner to alienate or hypothecate his undivided share or interest.' *Prima facie*, this language is not applicable to a sale *in invitum* by the Fiscal."

Mr. Justice Middleton agrees that a sale by the Fiscal being *ex necessitate* and involuntary is not an alienation by the owner within the meaning of section 17 of the Partition Ordinance.

Mr. Justice Wood Renton holds that the distinction between voluntary and necessary alienation and the principle that the latter did not constitute a contravention of the prohibition of the alienation of dotal property, or of the property of a ward, or (as regards a right of action against the alienator himself) of property subject to a *fidei commissum* were clearly established in the Roman-Dutch law, and, in conclusion, he lays down that the language of section 17 of the Partition Ordinance seems to point only to voluntary alienation, as it speaks of alienation by the owners.

I am of opinion that the case cited is not an authority for holding that a sale by the Fiscal is not a violation of the rule of *lis pendens*. The question, however, still remains whether a sale in execution is not affected by the doctrine of *lis pendens*.

There are two cases in which it has been held that a sale in execution was void because it took place during the pendency of an action. In the first case *Silva v. Silva*,[2] the plaintiff claimed title to the life interest, which was the subject of the action under a Fiscal's transfer. The land was purchased by him when it was sold in execution of a simple money decree. The added defendant claimed the life interest as purchaser at a sale in execution under a mortgage decree. The sale to the plaintiff took place during the pendency of the mortgage action. The Commissioner entered judgment for plaintiff, on the ground that at the date of the institution of the action the added defendant had not obtained a Fiscal's transfer. Lascelles C. J. reversed the Commissioner's

[1] *(1906) 9 N. L. R. 217.*

[2] *(1913) 16 N. L. R. 89.*

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judgment, holding that "the right which he (plaintiff) obtained was subject to the result of the mortgage action, on the ground that he bought the life interest during the pendency of the mortgage action." It does not appear from the arguments reported on the judgment whether any point was made of the fact that the plaintiff had purchased the land at a Fiscal's sale.

In the other case, *Cornelis v. Fonseka*,[1] the land in question belonged to one Solomon Fonseka. He died in 1902 leaving a will, by which his wife, Francina, was appointed sole executrix and devisee. Francina obtained probate in the same year, but the probate was not registered. On October 21, 1902, Francina sold the land to her brother Marthenis. It was subsequently seized in execution of a decree against Francina as executrix at the instance of Pedro Fonseka. Marthenis filed a claim, which was upheld on March 17, 1903. Pedro Fonseka thereupon brought a partition action against Francina and Marthenis, and obtained judgment in the District Court on July 13, 1903, which was affirmed in appeal on June 16, 1904. In the meantime the land was seized and sold at the instance of a Chetty on April 9, 1904. This Chetty had obtained judgment against Marthenis and Francina on a promissory note made by both of them. The Chetty sold to the defendant.

Two questions were argued and adjudicated on. The first question was raised by the tenth issue, which is as follows: "The probate of the last will of Solomon Fonseka not being registered, and the Fiscal's transfer in favour of the defendant's predecessors being duly registered, is the defendant's title superior to that of plaintiff?" This issue was considered by a bench of three Judges and answered in defendant's favour. It was held that the defendant by reason of the registration of the Fiscal's transfer in favour of his predecessors in title was entitled to half the land. But he was deprived of the benefit conferred on him by the registration of the Fiscal's transfer, on the ground that though Letchiman (plaintiff's predecessor in title) was entitled to a half share (Francina's share as intestate heir) by reason of prior registration as against Pedro (plaintiff's predecessor in title), yet, as Letchiman bought the land pending the Paulian action, the sale was subject to the result of it, and consequently the sale under Pedro's writ, though subsequent in date, prevailed over the sale under Letchiman's writ. Plaintiff's counsel sought to distinguish this case in this way. He said that the reason why Pedro's transfer prevailed was because the sale at which Letchiman became the purchaser was, in fact, a sale against Marthenis, as Francina had transferred her interest to him, and Marthenis was held to have had no title at the time of the sale. In support of this argument, he referred me to Mr. Justice de Sampayo's statement at page 110, that in lieu of the transfer to Marthenis Fernando, the land should be more properly taken to have been sold at the proposals of Marthenis. But Mr. de Sampayo held that the sale was void, as it took place during the pendency of the Paulian action, even on the assumption that the land belonged to Francina at the time of the sale.

In this case, too, the report does not indicate whether the different effect of a sale in execution was argued and considered. Another argument submitted by plaintiff's counsel was that the result of the action by plaintiff's predecessor in title rendered the land liable to seizure and sale. That was no doubt the effect as against Marthenis Fernando, but it did not bind the defendant's predecessor, who was not a party to the action.

[1] *(1917) 19 N. L. R. 97.*

I was also referred by him to the cases mentioned by Sande, in which a thing can be alienated although prohibited by the testator from alienation. One of the cases is where the property is distrained for the debt of the testator. I do not think that this case is at all applicable. Another case is where the goods bequeathed to the family are distrained by creditors of the heir. The sale in such a case is of effect during the lifetime of the heir, because, even if the goods had not been sold, he would have been the only person who could have held them during his lifetime. The sale here is clearly held to be good, because it does not prejudice the family, and the exception is not applicable to the case of a sale in execution *pendente lite*.

I am bound by the judgments in the cases of *Silva v. Silva* [1] and *Cornelis v. Fonseka*,[2] and hold that the plaintiff is not entitled to succeed, on the ground that the sale *pendente lite* was a sale in execution.

A. St. V. Jayawardene, for plaintiff, appellant.—The doctrine of *lis pendens* does not apply to a sale in execution. A Fiscal's sale is not a voluntary sale, but a necessary alienation. Sande (*Weber 140*) states that the doctrine of *lis pendens* does not apply to a necessary alienation.

See also section 17 of the Partition Ordinance. In *Perera v. Perera*[3] the Full Court held that a Fiscal's sale of a share of a land the subject of a partition action is good and valid.

The defendant sued Alwis for specific performance. There was no dispute concerning the right of *dominium* or ownership of the land in question in this action. The doctrine of *lis pendens* does not therefore apply. *Sande 130.*

H. J. C. Pereira (with him *Canakeratne*), for defendant, respondent.—The Privy Council has held that the doctrine of *lis pendens* applies to sales *in invitum*. *19 C. W. N. 152; 15 Cal. 756; 25 Cal. 179.* The passage from Sande does not support the appellant's contention. The Supreme Court has held that a mortgage action is affected by the doctrine of *lis pendens* (*19 N. L. R. 461*). An action for specific performance of an agreement to sell land is an action for the recovery of land. The Court decrees the defendant to transfer the land. *41 L. J. Q. B. 169.*

Cur adv. vult.

April 1, 1920. DE SAMPAYO J.—

In this case certain questions relating to the law of *lis pendens* arise for decision on the following state of facts. One Alwis, being the owner of the land in dispute, entered into a deed dated September 15, 1908, by which he agreed to sell and convey the land to the defendant within three months. Alwis having failed to convey the land in accordance with the agreement, the defendant on October 17, 1910, brought the action No. 31,593 for specific performance, and the Court on September 4, 1911, decreed specific performance accordingly. The deed of conveyance in pursuance of the

[1] *(1913) 16 N. L. R. 89.*

[2] *(1917) 19 N. L. R. 97.*

[3] *(1906) 9 N. L. R. 217.*

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decree was executed on November 8, 1911. In the meantime a creditor of Alwis seized the land in execution of a money decree and had it sold by the Fiscal on July 26, 1911, when plaintiff became the purchaser, and the Fiscal's transfer was issued to the plaintiff on March 14, 1912.

It will be noted that the Fiscal's transfer was subsequent in date to the decree in action No. 31,593 and to the conveyance in defendant's favour in pursuance of the decree, though the sale itself was prior. It is true that under section 289 the plaintiff is deemed to have been vested with the legal estate from the time of sale, but I doubt whether it is the sale and not the Fiscal's transfer that comes into competition with the conveyance to defendant and the decree in pursuance of which it was executed. I shall, however, consider the questions raised on the footing that it is the date of the Fiscal's sale which has to be taken into account in connection with the plea of *lis pendens*.

The question is whether the Fiscal's sale having taken place pending the action No. 31,593, the plaintiff's title is not subject to the result of that action. Two points are taken on behalf of the plaintiff: (1) That the doctrine of *lis pendens* does not apply to a Fiscal's sale; and (2) that the action No. 31,593 was a personal action against Alwis, and not an action in which the land had been *res litigiosa*, and that consequently it was not a *lis pendens*, which would affect the Fiscal's sale.

The authority cited in support of the first point is *Sande on Restraints*, which, after stating four exceptions given in the Roman Law Code to the rule prohibiting alienations pending a litigation, proceeds as follows: " A fifth exception can be added to these, where the alienation is necessary " (*Weber's Trans. 140*), and reference is made as authority on the point to *Dig. X., 2, 13.* The argument on behalf of the plaintiff is that a Fiscal's sale is a necessary alienation as contemplated in the passage from Sande, but I am unable to accede to this view. A Fiscal's sale is no doubt a sale *in invitum* and not a voluntary alienation, but I think the expression " necessary alienation " in this connection has a different significance, as appears from the *Digest* and from the passage in Sande itself. The *Digest* treats of the action for the partition of an inheritance, and discusses in *l. 12* the case of a legacy *sub conditione* being carried out on the fulfilment of the condition after the commencement of an action *familiæ erciscundæ*, and *l. 13* gives the reason for allowing the alienation as follows: " *Alienationes enim post judicium acceptum interdicatæ sunt dumtaxat voluntariæ, non quæ vetustiorem causam, et originem juris habent necessariam.*" And Sande himself follows the same reasoning and says: " In this case alienation is allowed, because the origin of the alienation is prior to the *lis contestata.*" so that, I think the exception contemplated is an alienation necessitated by a prior obligation and not a

forced sale, such as a sale in execution. The analogy of the decisions on section 17 of the Partition Ordinance, which were also cited, is not available, because section 17 expressly aims at alienations by the co-owners, and therefore private alienations. No Roman-Dutch authority has been cited, except the scanty and somewhat doubtful passage from Sande. Moreover, I think that on a question like this we should follow the principles of the English law, which have been fully adopted in India. See the English and Indian cases discussed by *Hukm Chand at p. 710 et seq.* I need only refer to one or two of the numerous Indian cases in which it has been held that the doctrine of *lis pendens* applied to sales in execution. In *Moharaj Bahadur Singh v. Surendra Narain Singh* [1] it was stated that the law to that effect was well settled. See also the earlier case, *Holdar v. Mookerjee.* [2] I think, therefore, that the first point must be decided against the plaintiff.

With regard to the question whether the action No. 31,593 for specific conveyance of the land was a *lis pendens* for the purpose of applying the doctrine, Mr. Jayawardene's contention is that it was not, because there the titile to the land was not in dispute. Here, again, the authority relied on is Sande (*Weber's Trans. 130*), where it is stated that " a *res litigiosa* is a thing concerning the *dominium* or right of ownership, of which there is going on between the possessor and the plaintiff a dispute by judicial proceedings." But later on in the same passage Sande qualifies this by saying that the dispute may be to a lesser right, such as a servitude or any other right over a thing, in which case the right becomes *litigiosum*. It seems to me that the *res* is the subject-matter of the action, whatever it may be; it may be a right, corporeal or incorporeal. See *4 Nathan 2160.* Voet's definition is: " *Res litigiosa dicitur, super qua lis mota est, sive corporalis sit, sive incorporalis.*" (*Voet 44, 6, 1.*) I think the right to the specific delivery of a thing is a *res litigiosa*, and the action relating to the pursuit of it is a *lis* with regard to it. *Voet 44, 7, 11,* says (*actiones*) *rei persecutoriæ sunt quibus persequimur rem nostram aut nobis debitam.* I see no difficulty in regarding an action for specific performance as one in which we seek to obtain a thing *nobis debitam.* The subject-matter of the action No. 31,593 was in reality the land which the plaintiff there claimed to have transferred and delivered to him specifically. When a suit to obtain specific property is instituted, and the object of the suit may be defeated by a sale, it is a case of *lis pendens. Plant v. Pearman.* [3] There is another principle of the English law which may be remembered in this connection. An agreement for the sale of land, which may be specifically enforced, operates as an alienation of the vendor's beneficial proprietory interest in the land, and he becomes constructively a trustee for the purchaser

[1] *(1911) 19 Cal. W. N. 152.* [2] *21 Sutherland's W. R. 349.*
[3] *41 L. J. Q. B. 169.*

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in respect of the legal estate. *Wall v. Bright* [1] *Shaw v. Foster* [2]. Again, if a mortgage action which does not involve any question of *dominium*, but only the mortgagee's right to bring the mortgaged property to sale in satisfaction of the debt, is *lis pendens*, as has been held in the Full Bench decision *Muheeth v. Nadarajapillai*[3] and in many Indian cases, I do not see why an action for specific performance of an agreement to sell a land should not be regarded in the same light.

I think the appeal fails on both points urged on behalf of the plaintiff, and I would dismiss it, with costs.

SCHNEIDER *A.J.*—

I have had the advantage of reading my brother's judgment in this appeal. There is nothing I can usefully add to what he has said. I, therefore, agree with him.

Appeal dismissed.