

MYSORE HIGH COURT

Mohammed Ali Abdul Chanimomin

Vs

Bisahemi Kom Abdulla Saheb Momin

Second Appeal No. 1192 of 1969

(A. Narayana Pai, C.J. and E.S. Venkataramiah, J.)

03.10.1972

JUDGMENT

A. Narayana Pai, C.J.

1. This second appeal has been referred to a Bench by Venkataswami, J. because some questions relating to lis pendens and limitation of general importance arose for consideration.
2. Such questions as arise are, in our opinion, capable of being answered on decisions already rendered by this Court.
3. The salient facts are the following :- The first respondent as plaintiff filed the suit out of which this second appeal arises against the second respondent and the appellant as defendants 1 and 2 respectively. We shall refer to the parties by their rank in the suit.
4. First defendant was the owner of house bearing C. T. S. No. 3192 in Belgaum. Second defendant was occupying it as a tenant. The plaintiff filed a suit against the first defendant for specific performance of an agreement (Exbt. 59) dated 14-9-48 said to have been entered into between him and the first defendant agreeing to sell the said house to her (plaintiff). First defendant filed a written statement stating that with the knowledge of the plaintiff he had agreed to sell the same house to second defendant under Exbt. 98 dated 8th August 1948, but did not take further interest in the suit. Instead, he executed a sale deed in favor of the second defendant on 30th December 1948. Plaintiff's suit for specific performance proceeded ex parte and resulted in a decree in her favor on 29th March, 1950. In execution thereof the plaintiff sought to get the second defendant impleaded as a party. The application for impleading him was rejected by an order dated 21st September, 1955 (Exbt. 63). In a subsequent execution petition, the plaintiff got a sale deed of the house executed through court on 29th December 1955.
5. The present suit out of which the second appeal arises was filed on 14th December, 1961 seeking recovery of possession of the house from both the defendants. The decree for possession passed in favor of the plaintiff has been confirmed by the lower appellate Court. Hence this second appeal.

6. The question of lis pendens arises because the sale deed in favor of the second defendant dated 30th December, 1948 was executed by the first defendant during the pendency of the plaintiff's suit for specific performance. That such a sale would be affected by the doctrine of lis pendens under Section 52 of the Transfer of Property Act notwithstanding that the alleged agreement for sale in favor of the second defendant was of a date earlier than that of the agreement in favor of the plaintiff is the direct decision of a Full Bench of this Court reported in *Khajabi v. Mohammad Hussain*¹,

7. On the question of lis pendens therefore, there is no difficulty whatever because the matter is fully covered by a Full Bench ruling of this Court.

8. The question of limitation has been raised by the appellant-second defendant on the basis that from the date of the sale deed in his favor namely, 30th December, 1948, his possession was adverse to that of not only the first defendant but also the plaintiff and that therefore, the suit filed by the plaintiff more than twelve years thereafter is barred whether one looks at the question under Article 142 or Article 144 of the first schedule of the Limitation Act, 1908 which governs this suit.

9. It appears to us that the foundation for the case of limitation so put forward is very weak and is not capable of being substantiated on any established principles of law.

10. As already stated, the sale in favor of the appellant-second defendant is undoubtedly affected by the doctrine of lis pendens under Section 52 of the Transfer of Property Act. That Section, to the extent material reads :

"During the pendency in any court having authority of any suit or proceeding which is not conclusive and in which any right to immoveable property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose."

11. Before proceeding to discuss the legal effect of this section in this case, it is necessary to dispose of an argument that the suit for specific performance filed by the plaintiff was a collusive one. That question has been found by both the courts below against the appellant. The finding is one of fact and it is difficult for the appellant to ask us to interfere with it unless some error of law is made out. An attempt in that direction is made by pointing out that in the order (Exbt. 63) refusing to im-plead the second defendant in the execution proceedings taking out by the plaintiff, the court has observed as follows :-

"An agreement to sell a land operates only in personem and no right in rem arises to follow it in the hands of a person in Mahamad Ali's position. If the

¹ (1964) 1 Mys LJ 236

sale to Mahamad Ali by Ibrahim was effected during the suit and in breach of agreement with decree-holder purchaser Mahamad Ali cannot be answerable in execution to decree-

holder. We cannot import the principle of lis pendens in a case of this kind where no interest in the property is involved but only the enforcement of a contractual right to get a sale deed. Decree-holder cannot be believed when she says she discovered Mahamad Ali's name at Exbt. 14, property-card, only after filing the darkhast application. She did have knowledge of the sale in prior suit which was decided in her favor on 29-3-50 whereas the sale is of 30-12-48 and defendant Ibrahim had pleaded that he had sold the house."

12. The last sentence has reference to the written statement of the first defendant in the previous suit in which he had stated that with the knowledge of the plaintiff the property had been sold to the second defendant. The argument of Mr. Tarakaram, learned counsel for the petitioner is that imputation of knowledge to the plaintiff of the sale and the subsequent inaction on the part of the first defendant is clearly indicative as collusion between them motivated by the idea of keeping the second defendant out of the suit and thus prejudicially affecting rights. If any act between the plaintiff and the first defendant is at all to be called as collusion, it must be some sort of an agreement, the principal object of which is to benefit the plaintiff at the expense of the second defendant. But the very statement of fact that the plaintiff was made aware of the sale in favor of the second defendant, if she was not already aware of it, was itself sufficient to put her on notice of the necessity of impleading the second defendant also. If she did not do so, the result will be more trouble for her and not conferment of any special benefit upon her. Further in actual effect first defendant's conduct was an abandonment of a defense which by itself cannot be regarded as collusive between the defendant and the plaintiff.

13. The observation contained in the extract from the order (Exbt. 63) given above to the effect that the agreement to sell a land operates only in personem and that therefore, there could be no lis pendens in regard thereto is either an unnecessary observation or a mere erroneous step in the reasoning leading to a decision to reject the plaintiff's application for impleading the second defendant in the execution proceedings. As the second defendant was not at all impleaded it is impossible to suggest that any question was decided between him and the plaintiff so as to attract the principles even remotely relating to res judicata. We are therefore, unable to find any legal complexion in the finding of fact against the appellant that the previous suit of the plaintiff for specific performance was collusive in nature and was therefore beyond the scope or operation of Section 52 of the Transfer of Property Act.

14. So far as the legal aspect is concerned, little argument is necessary to make out that the object of Section 52 is to subordinate all derivative interests or all interests derived from parties to a suit by way of transfer pendente lite to the rights declared by the decree in the suit and to declare that they shall not be capable of being enforced against the rights acquired by the decree-holder. A transferee in such circumstances therefore takes the consequences of the decree which the party who made the transfer to him would take as the party to the suit. The principle of lis pendens embodied in Section 52 being a principle of public policy, no question of good faith or *bona fides* arises. Such being the position, the transferee from one of the parties to the suit cannot assert or claim any title or interest adverse to any of the rights and interests acquired by another party under the decree in suit. The principle of lis pendens prevents anything done by the transferee from operating adversely to the interest declared by the decree.

15. Another aspect of the matter is that whether or not a decree for specific performance expressly gives the relief of recovery of possession (we may state that in this case the decree expressly contains such a relief), the liability to deliver possession is necessarily implied in a decree for specific performance directing the defendant to execute a sale deed on the principle of clause (f) of sub-section (1) of Section 55 of the Transfer of Property Act, according to which the liability to deliver possession arises immediately upon execution of a sale deed unless by agreement, the date for delivery of possession is postponed. That was what was held by this Court in *Venkatesh v. Parappa*². The effect of that decision is that the plaintiff's right to ask for possession arose on the execution of the sale deed in her favor, i.e., 29th December, 1955 and the suit has been filed in less than six years from that date.

16. The plea of limitation therefore, cannot successfully be pressed against the plaintiff's claim for recovery of possession in this case.

17. The second appeal is therefore, dismissed.

Appeal dismissed.

²(1966) 1 Mys LJ 799