

(1917) 03 MAD CK 0054
In the Madras High Court

Cherlo Subba Reddi

APPELLANT

Vs

Amparayani Venkataseshiah and Others

RESPONDENT

Date of Decision : 20-03-1917

Acts Referred:

Citation : 43 Ind. Cas. 502

Hon'ble Judges : John Wallis, C.J.;Srinivasa Aiyangar, J

Bench : Division Bench

Judgement

John Wallis, C.J.—This case raises the question whether an alienee of Immovable property pendente lite from the defendant in the suit is entitled to object to a decree being passed in terms of a compromise arrived at between the plaintiff and the defendant after the date of the alienation in question and before the date when the alienee was made a party to the suit. It was held by a Full Bench of this Court in Annamalai Chettiar v. Malayandi Appaya Naik 1 M.L.T. 145 that an alienation made pendente lite was subject to the decree subsequently made in the suit, even though the decree was based on a compromise. In that case the alienee was not made a party, whereas here he has been made a party after the compromise and objects to the passing of the decree.

2. As I understand the cases, the rule pendente lite nihil innovetur which is embodied in Section 52 of the Transfer of Property Act was introduced for the protection of the other party to the suit, and that the latter is entitled to disregard alienations made by his opponent during the pendency of the suit and to treat them as non-existent. Therefore, as held in Annamalai Chettiar v. Malayandi Appaya Naik 1 M.L.T. 145 a decree passed on a compromise between the original parties to the suit was held binding in the absence of fraud or collusion upon an alienee from one of the parties to the suit, even though the alienation preceded the compromise. The English and American cases have carried this even further. In Landon v. Morris (1832) 5 Sim. 247, where the defendant failed to put in any answer and left the country and judgment was entered against her pro confesso, the decree so passed was held binding upon

alienees from her pendente lite. I find the same view was taken in two recent American decisions for which I am indebted to my learned brother. In *Mellen v. Moline Malleable Iron Works* (1888) 131 U. St. Sup. Court Rep. 33 Law. Ed. 178 the Supreme Court of the United States held that an alienee from a defendant pendente lite was bound by a decree passed, even though the defendant failed to appear and judgment was given against him pro confesso, and the judgment of the Court cited with approval the words of Sir William Grant, M.R., in *Winchester (Bishop of) v. Paine* 8 R.R. 131 "The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed." The decision of the Supreme Court of Illinois at Chicago in *Harding v. American Glucose Co.* (1899) 64 L.R.A. 737 is even more in point. That was a suit to restrain the defendant, the American Glucose Company, from alienating its property and business to an alleged illegal trust, and pendente lite the defendant, company conveyed its property, and business to a nominee who reconveyed to the Glucose Sugar Refining Company, which was then made a party to the suit. Some time after the alienee company had been made a party, the alienor company withdrew its answers and allowed judgment to be given against it pro confesso. That judgment was held binding on the alienee company even though it was a party on the record at the time when the alienor company confessed judgment. It is not necessary to go so far in the present case. Here at the time the compromise was entered into the alienee was not a party to the suit and under the decision of *Annamalai Chettiar v. Malayandi Appaya Naih* 1 M.L.T. 145 the alienor defendant had clearly power to compromise it in the absence of fraud or collusion. If this be so, I can see no sufficient reason why the Court should refuse to give effect to the compromise by decree in the usual way merely because the alienee was made a party after compromise and before the decree. The decision of the Full Bench that the party alienating pendente lite has power to enter into a compromise with the other side after the alienation and that the decree embodying such compromise is binding on the alienee seems to me to involve that a compromise so arrived at should be embodied in the decree notwithstanding that the alienee has been made a party before the passing of the decree, if the Court cannot say the compromise was bad at the time it was made, and on the diffusions I think it cannot, I fail to see on what ground the Court can disregard it and proceed with the trial of the suit as if no such compromise had ever been made. The decision of their Lordships of the Judicial Committee in *Tarakant Bannerjee v. Puddomoney Dossee* 10 M.I.A. 476 undoubtedly presents some difficulty, as in that case their Lordships held that a decree between the original parties to the suit made after contest was not binding on the alienee pendente lite. This was before the passing of the Transfer of Property Act. and the alienee who had acquired the whole interest of one of the parties pendente lite had applied not to be added but to be substituted on the record for his alienors (see now Order XXII, Rule 10) and his application had been refused. In the present case, as I have already said, the compromise was arrived at before the alienee had applied to be made a party, and though I am not anxious to extend the rule against alienations pendente lite I am unable,

consistently with the authorities by which we are bound, to see any sufficient reason for refusing to give effect to the compromise entered into between the original parties before the alienation had been made a party. My learned brother differs as to the compromise being binding on the 4th respondent, the alienee, as well as on the 1st respondent as to which we are agreed. As to the 4th respondent we think my opinion prevails under Clause 86 of the Letters Patent, and there will accordingly be a decree in terms of the compromise petition, Exhibit W", on the plaintiff paying Rs. 1,000 into Court within fourteen days and that otherwise the petition will be dismissed. There will be no order as to costs of this petition. The appeal will proceed against the remaining respondents.

Srinivasa Aiyangar, J.

3. This is an application by the plaintiff-appellant for a decree in terms of a compromise alleged to have been entered into between him and the 1st defendant, by which the 1st defendant confesses judgment for the whole of the amount sued for together with the costs of the plaintiff in the first Court and in the appeal, though the suit had been dismissed with costs in the first Court.

4. The compromise is said to have been signed by the 1st, defendant on the 22nd of December 1914, though the terms are alleged to have been settled in or about June 1914 prior to an alienation pendente lite in favour of the 4th respondent. The application for a decree was made only on the 15th of September 1915. The application was opposed by the 1st defendant on the ground that he never entered into any compromise at all and that the signature purporting to be his in the deed of compromise is not his. The 4th respondent who obtained two mortgages from the 1st defendant, one in June and the other in November 1914, pending the appeal, was made a party respondent in February 1915 on his application and he now contends, first, that the compromise entered into between the plaintiff and the 1st defendant, even if true, was the result of fraud and collusion, and in the next place, that whether the compromise was bona fide or not, no decree on that compromise can be passed now so as to bind his interest in the subject-matter of the litigation, as he is now a party to the appeal.

5. Before deciding the question of law raised by the 4th respondent, we wanted to have the facts ascertained and sent down certain issues for trial to the lower Court. It is now found that the negotiations for a compromise between the plaintiff and the 1st defendant began in January 1914 and had proceeded so far in July 1914 that a draft in writing of the terms settled between the parties was made, which, however, was not engrossed and signed by them. Nothing further was done till the end of December when the parties met in the house of Mr. Venkatramier, Vakil, and the application, Exhibit W, containing the terms of the compromise was written and signed by the 1st defendant. The plaintiff at the same time paid into the hands of the Vakil Rs. 100, the sum agreed to be paid to the 1st defendant after a decree in accordance with the compromise was passed. Though it was intended that the petition of compromise should be signed by the

plaintiff and presented in Court soon after the Court re-opened after the Christmas vacation, it was not so presented, and the 1st defendant apparently wanted to withdraw from the compromise. The plaintiff did not quite make up his mind as to whether he should agree to the cancellation of the contract and his Vakils were considering whether it would be better for him to abandon it, till the appeal was posted for hearing in September 1915, when the plaintiff applied for a decree in terms of the compromise. In the meantime in January or February, the plaintiff got back the Rs. 1,000 he had paid to the Vakils.

6. Mr. Krisnaswamy Aiyar, Vakils for the 4th respondent, now argues that the evidence of Mr. Venkatrama Aiyar shows that either there was no contract between the plaintiff and the 1st defendant in December 1914, the petition Exhibit W being only an offer by the 1st defendant, or if there was the plaintiff abandoned the contract long before September 1915. He strongly relies in support of his argument on the long delay in presenting the compromise in Court and on the plaintiff withdrawing the Rs. 1,000 from Mr. Venkatrama Aiyar. There is something in the argument and the conduct of the plaintiff is suspicious; but no such point was made at the first hearing of the appeal, and the issues sent down by us proceeded on the assumption that if the petition Exhibit W was signed by the 1st defendant it contained the terms of a concluded contract, and that that contract was in force when the application to enforce it was made. Further the evidence of Mr. Venkatramier fairly read does not support the argument; for he says that "the position in regard to the razinama until the 15th September 1915 was that the 1st defendant had resiled from it and that plaintiff had very nearly abandoned it." It was not suggested during his examination that Exhibit W merely contained the terms of an offer by the 1st defendant. On the other hand in an affidavit filed by the plaintiff in February 1915 when he opposed the application of the 4th respondent to be brought on the record as a party, he distinctly set up this compromise as a concluded and subsisting compromise, which he desired to enforce. On the evidence of Mr. Venkatrama Aiyar which I wholly accept, I arrive at the conclusion that the compromise WAS concluded after the two mortgages to the 4th respondent, and that it was a subordinating contract in September 1915, when the application to enforce it was made. There is no reason to think that it was entered into to defraud the 4th respondent, as the terms were practically settled long before he became the alienee. For the present purpose it is also unnecessary to determine the exact amount due to the 4th respondent on his mortgages.

7. These being my conclusions on the facts, the farther question for determination is whether a compromise entered into between the original parties to a suit can be made a decree of Court so as to affect the interests of the alienee pendente lite after he is made a party.

8. The doctrine of *lis pendens* is based on reasons of public policy founded on necessity [see *Bellamy v. Sabine* (1857) 1 De. G. & J. 566 : 6 W.R. 1, *Faiyaz Husain Khan v. Prag Naryan* in 11 C.W.N. 561 : 4 A.L.J. 344. But inasmuch as its

application may involve great hardship on purchasers for value, more especially in India where there is no system of registration of an action as *lis pendens*, we are bound to construe strictly the language of Section 52 of the Transfer of Property Act which enacts the rule of *lis pendens*. In *Tarakant Banerjee v. Puddomoney Dossee* 10 M.I.A. 476 a person who had acquired a title to the subject-matter of the litigation by an alienation *pendente lite* applied to be made a party to the suit, but his application was rejected on the objection of one of the alienors. Before he could appeal against that order or file an independent suit, the original litigation came to an end by a decision adverse to the title of his alienors. On his filing a fresh suit, the previous judgment against his alienor was pleaded as a bar to his claim. Lord Justice Turner, who was a party to the decision in *Bellamy v. Sabine* (1857) De. G. & J. 566 : 3 Jur. 943 in delivering the judgment of the Privy Council said: "As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the defendants who obtained their decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter with them, should not be permitted to prevail by this objection" (page 488 Page of 10 M.I.A.--Ed). And in the case of *Tenison v. Sweeny* 1 Jo & Lat. 710, the Lord Chancellor of Ireland observed as follows: "I regret that the doctrine of *Us pendens* has gone as far as it has. I never will extend that doctrine further than it stands at present. Nothing can be harder than that a purchaser should have his title affected by some proceeding taken behind his back and of which he never had actual notice or the means of acquiring it." Bearing these principles in mind I think for the application of the rule of *lis pendens* there must be, first, a decree or order of a Court, and, secondly, that decree or order must have been passed when the alienee *pendente lite* was not a party on the record; for the rule of *lis pendens* is an exception to the general rule that a decree or order is binding only on the parties to the suit *Winchester (Bishodp of) v. Prime* 11 Ves. 194. As observed by Couch, C.J., the alienee is bound by the proceedings in the suit after the alienation and before he becomes a party. See *Kailas Chandra Ghose v. Fulchand Jaharri* 8 B.L.R. 474 ; see also *Rai Charan Mandal v. Biswanath Mandal* 26 Ind. Cas. 410. This Court in *Annamalai Chettiar v. Malayandi Appaya Naik* 1 M.L.T. 145 has carried the doctrine of *lis pendens* as far as is necessary, by holding that alienees *pendente lite* are bound by decrees or orders made on compromises between the original parties to the suit; and I do not think it ought to be extended to cases where the alienee has been made a party to the suit for the purpose of protecting his own interests, as I think it is not necessary to do so for the protection of the parties to the litigation. The language of Section 52 is quite in accordance with this view, and the provisions of Order XXII, Rule 10, which provide for the coming in of the alienee as a party with the leave of the Court also lead to the same conclusion. On the other hand, if we hold that the alienee *pendente lite* even after he is made a party to the suit is bound by a decree or order passed against his alien or in the same way as if he had not been made a party, the consequences may be disastrous. In the first place, it would be

absurd for a Court to allow a person to be made a party to a suit on the ground that he has acquired an interest in the subject-matter of the litigation which he was entitled to protect by becoming a party, and at the same time tell him that his coming in was only an idle formality inasmuch as he was bound by the acts of his alienor in the conduct of the suit. In cases where the Court is called upon to decide the suit on the merits it would be impossible for any party to contend that the alienee is not entitled to be heard or to adduce evidence if necessary, but should be bound by the conduct of the case by the alienor, who may have no interest whatever in the subject-matter of the litigation. In cases of compromise or confession of judgments, the compromise or confession may be (1) before the alienation, (2) after the alienation but before the alienee is made a party or (3) after the alienee is made a party. The learned Pleader for the appellant contended that in the first case where a party to the suit enters into a compromise and afterwards alienates, it would be unjust to hold that the compromise had become useless or ineffective if before the Court passes a decree in terms of the compromise the alienee becomes a party. There are two answers to this; in the first place, the alienee is not entitled, as a matter of course, to be made a party and he could not have been made a party without the consent of the original parties to the suit or without notice to them and hearing their objections, if any. The party prejudiced can object to the alienee being brought on the record on the ground that the suit has been compromised, and in fact has come to an end except for the formal purpose of passing a decree in terms of the compromise. In the second place, where there is a binding compromise whether it by itself establishes or settles title to property, or operates only as a contract, the parties are at perfect liberty to enforce the compromise by a suit and the alienee pendente lite would be in exactly the same position as a mesne purchaser, subject to the legal title of the prior alienee or the rights of the prior contracted according as he is a bona fide purchaser for value or not. It is curious that in this case, although the compromise is said to have been entered into so early is December 1914, if not earlier, the plaintiff-appellant did not either ask for a decree in terms of the compromise before or at the time when the alienee pendente lite applied So be made a party. In the second case where the compromise is made after the alienation but before the alienee is made a party, it may be that the compromise was entered into by the party opposed to the alien or without any notice of the alienation. In this case though the merits of his claim may be less than in the first case the Courts have power to do justice between the parties as in the first. If the compromise is made after notice of the alienation the other party deserves no protection and if he obtains a decree before the alienee is made a party, it would be as much as he would be entitled to. On the other hand if the alienor makes a compromise after the alienation and after the alienee is made a party, I think it would be unjust to pass a decree in terms of the compromise so as to bind the interests of the alienee. When I put this case to the learned Pleader for the appellant, he had to admit that his contention went as far as this, though in this particular case it was not necessary for him to go so far; as far as I was able to understand him he did not suggest

any dividing line. It is true, we are not concerned about the policy or the basis of the doctrine of *lis pendens* but have only to construe the words of Section 52 of the Transfer of Property Act, and it may at first sight appear as if my construction involves the addition of the words in cases where the alienee is not a party or words to that effect to the section. But a moment's consideration will show that this is not so, for as I have already observed it is only the order or decree of the Court which binds the alienee, and the question is, can such a decree or order be passed after the alienee is made a party without his consent or hearing him; that would depend on the jurisdiction of the Court and the rules of procedure. I know of no rule which enables the Court to pass such a decree. I am, therefore, of opinion that no decree on the compromise between the appellant and the 1st defendant could be passed so as to affect the interests of the 4th respondent. In the analogous case of representative suits it is well settled that as soon as a person similarly situated as the original plaintiff has come into the record in some proper way as a party plaintiff, thereafter nothing can be done by the original plaintiff in derogation of the rights and interests of the added co-plaintiff.

9. At one time I was disposed to take the view that the alienee *pendente liti* from a party to a suit must be taken to have authorised his alienor to represent him in the suit and that the alienee should be bound by a compromise *bona fide* entered into by him with the other parties. Both the learned Pleaders repudiated the suggestion that the alienor represented the alienee, and on further consideration I think they are right, though observations are not wanting in some of the cases that the alienor represented the interest of the alienee (see Bennet on *Lis Pendens*, page 272); for instance the alienee may be wholly unaware of the fact that there was any suit pending tot all.

10. That the doctrine of *lis pendens* should be applied with great caution is also well illustrated by what has happened here. It is to be observed that by the compromise the 1st defendant is really placing his alienee in a worse position than if the appeal had been tried on its merits, and there had been a decree in favour of the plaintiff in terms of his plaint. If such a decree had been passed the alienee would be in the position of a subsequent encumbrancer, would be entitled to redeem the first mortgage, and on his so redeeming, would be entitled to be subrogated to the rights of the first mortgagee including his right to a personal judgment against the 1st defendant [see *Greenough v. Littler* (1880) 15 Ch. D. 93.

11. The exact question now raised does not appear to have been decided by the Indian or the English Courts; at any rate no such decision was cited at the Bar. In a case, *Manpal v. Sahib Ram* 27 A. 544, an alienee *pendente lite* who was brought on the record and with whom the plaintiff joined issue was held entitled to retain his purchase, although the plaintiff would have been entitled to a decree against the original party, and the Full Bench of the Allahabad High Court held that if that purchaser was not made a party and if the plaintiff had not joined issue on the purchaser's title, the plaintiff would have been entitled to succeed.

12. In *Harding v. American Glucose Co.* (1899) 64 L.R.A. 737 : 55 N.E. 577 the Supreme Courts of Illinois apparently took a view opposed to the conclusion arrived at by me. In that case it was held that an alienees pendente lite, who was made a party by the plaintiff who had appeared and filed his answers, was bound by a judgment by default passed against his alienor, who withdrew his pleas long after the alienee had appeared and pleaded. No reasons are given for this conclusion and the observations appear to be obiter as the case was decided on the merits. The writ of error to the United States Supreme Court was dismissed without the Judges recording an opinion, apparently on a technical ground. See United States Supreme Court Reports 47 Law. Edition, page 849.

13. I, therefore, think that the plaintiff is entitled to a decree in terms of the compromise only against the 1st defendant.