

(1968) 03 MP CK 0008

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 2 of 1965

Dhan Singh and Others

APPELLANT

Vs

Smt. Sushilabai Laxminarayan Gujar and Others

RESPONDENT

Date of Decision : 13-03-1968

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1968 MP 229 : (1968) JLJ 698 : (1969) 14 MPLJ 44 : (1968) MPLJ 35

Hon'ble Judges : P.V. Dixit, C.J.;A.P. Sen, J

Bench : Division Bench

Advocate : A.R. Choube, for the Appellant;

Final Decision : Dismissed

Judgement

Dixit, C.J.

This is a Letters Patent Appeal from an order of Bhargava J. dismissing an appeal preferred by the present appellants against an order passed by the Additional District Judge. Hoshangabad, in execution proceedings of a decree for possession of certain lands in favour of the respondent Sushilabai and against the other two respondents Thakurlal and Nanhelal.

The material facts are that one Ayodhyabai held some sir fields situated in mauza Mangrul, district Hoshangabad, as an occupancy tenant. After her death the fields were inherited by Baliram as the next reversionary heir. On 24th July 1944 Baliram and his wife Parvatibai executed a deed of gift in respect of the fields in favour of their minor daughter, the respondent Sushilabai. On 13th April 1945 Baliram and his wife, acting on behalf of Sushilabai executed a surrender deed in favour of the respondents Thakurlal and Nanhelal.

Subsequently. Baliram and Sushilabai, through her next friend Badriprasad, filed a suit against Thakurlal, Nanhelal and Parvatibai for declaration that the surrender effected in favour of Thakurlal and Nanhelal was void and not binding

on Sushilabai and for a decree against Thakurlal and Nanhelal for delivery of possession of the fields to Sushilabai. In that suit Parvatibai was made a pro forma defendant. It was alleged as against her that she was a party to the bogus and illegal surrender deed and acted against the interest of the minor Sushilabai as well as that of Baliram. The learned Additional District Judge, Hoshangabad, who tried the suit, passed a decree on 3rd October 1950 against Thakurlal and Nanhelal holding that Sushilabai was entitled to get Rs. 600/- as mesne profits from Thakurlal and Nanhelal and liable to refund Rs. 700 to them for the benefits received and that, therefore, on payment of Rs. 100 to Thakurlal and Nanhelal, they, that is Thakurlal and Nanhelal, shall deliver possession to Sushilabai of the occupancy fields. Thakurlal and Nanhelal then preferred an appeal in this Court. In that appeal Parvatibai was not impleaded as a respondent; nor did she join Thakurlal and Nanhelal as an appellant. In appeal, a Division Bench of this Court on 19th April 1957 set aside only the direction of the trial Court with regard to payment of Rs. 600 as mesne profits by Thakurlal and Nanhelal to Sushilabai and thus modified the decree passed by the Additional District Judge by directing that on payment of Rs. 700 by Sushilabai to Thakurlal and Nanhelal, they shall deliver possession of the fields to her.

In execution proceedings of the decree, Sushilabai sought delivery of possession of the fields from the judgment-debtors Thakurlal and Nanhelal and from the transferees of the fields during the pendency of the civil suit filed by her. The learned Additional District Judge, Hoshangabad, rejected the objection of the present appellant-transferees that the decree passed in favour of Sushilabai for possession of the fields could not be enforced against them and they were under no obligation to deliver possession of the fields covered by the decree. Thereupon, they filed an appeal in this court which was heard and dismissed by Bhargava J.

Before the learned Single Judge, as before us, the appeal was pressed only in regard to the claim of the appellant Onkarsingh to hold possession of the field bearing khasra No. 85 included in the decree passed in favour of Sushilabai and against Thakurlal and Nanhelal. The appellant Onkarsingh claimed that khasra No. 85 was sold to him by Parvatibai on 3rd September 1956, that since then he was in possession of the field and he was not bound by the decree obtained by Sushilabai against Thakurlal and Nanhelal; and that no decree was passed against Parvatibai. his vendor, in the suit filed by Sushilabai.

This objection of Onkarsingh was rejected by the executing Court holding that the transfer in his favour made by Parvatibai was affected by the doctrine of lis pendens laid down in Section 52 of the Transfer of Property Act, 1882. Bhargava J. also took the same view. While rejecting Onkarsingh's contention he observed:--

"There is no doubt that Smt. Parvatibai was a party to the suit and if the claim of the appellant Onkarsingh is allowed, it would without the shadow of any doubt affect the right of the decree-holder to get possession of survey number 85

under the decree. The doctrine with which Section 62 of the Transfer of Property Act is concerned rests upon the foundation that it would plainly be impossible that any action or suit would be brought to a successful termination if alienations pendens lite were permitted to prevail. Sir Hari Singh Gour in his famous treatise on the Law of Property has pointed out in Vol. 1 of the book (7th Edition) at page 582 that "not only actual parties but those pro forma added are subject to the rule." The words "by any party to the suit or proceeding" used in Section 52 of the said Act are wide enough to include even the party against whom no relief in particular may be granted. So even if Smt. Parvatibai was treated to be merely pro forma defendant in the suit, the principle of lis pendens would still apply to the sale made by her during the pendency of the suit. However, in my view, it is wrong to say that the claim against Smt. Parvatibai was not decreed. She had made a surrender of the property in suit including survey No. 85 in favour of Thakurlal and Nanhelal. This surrender deed was finally set aside by the High Court in the first appeal, above referred to. Setting aside of the deed of surrender amounts not only to the granting of relief against the person in whose favour the deed of surrender was executed but also against the person or persons who had executed that document"

Shri Choube, learned counsel for the appellants, urged before us that as Parvatibai was a pro forma defendant in the suit filed by Sushilabai, the judgment of the Additional District Judge decreeing Sushilabai's claim could not operate as res judicata as against her; nor could the judgment of this Court in the appeal which Thakurlal and Nanhelal preferred against the decision of the Additional District Judge in the suit and in which appeal Parvatibai was not impleaded as a party, so operate; and that therefore, the doctrine of lis pendens as stated in Section 52 of the Transfer of Property Act could not be applied to the transfer effected by her in favour of the appellant Onkarsingh. Learned counsel pointed out that the sale by Parvatibai in favour of Onkarsingh was made not during the pendency of the suit but after the decision of the Additional District Judge and during the pendency of the appeal filed by Thakurlal and Nanhelal. It was said that the words "any party" as used in Section 52 did not include a pro forma party.

It is quite true that Parvatibai was a pro forma defendant in the suit filed by Sushilabai. The suit proceeded against her ex parte and no issue was tried and decided as between her and any party to the suit in the appeal which Thakurlal and Nanhelal filed in this Court she was not impleaded as a party. The learned Single Judge has held that the words "by any party to the suit or proceeding" occurring in Section 52 of the Transfer of Property Act are wide enough to include even the party against whom no relief is sought, and that, therefore, even if Parvatibai was a pro forma defendant in the suit, the principle of lis pendens would still apply to the sale made by her in favour of the appellant Onkarsingh. He referred to the statement in Gour's Law of Transfer (7th Edition, Vol. 1, at page 582) made on the authority of Nallakumara Goundan Vs. Pappayi Ammal and Another, that "not only actual parties but those pro forma added" are subject

to the incapacity imposed by Section 52. On a perusal of the judgment in Nallakumara Goundan Vs. Pappayi Ammal and Another, we do not find anything therein to support the statement made by the learned author.

Be that as it may, it is not necessary to consider whether when Parvatibai was a pro forma defendant and no issue was tried and decided as between her and any party to the suit, the judgment in the suit or in the appeal to which she was not a party could operate as res judicata against her and if the judgment did not operate as res judicata as against her, whether the rule of lis pendens, which was but only an extension of the rule of res judicata, could be applied and she could be regarded as falling within the expression "by any party to the suit of proceeding" used in Section 32 of the Transfer of Property Act. Even if the contention of learned counsel for the appellants is accepted and it is held that the transfer made by Parvatibai in favour of Onkarsingh is not affected by the doctrine of lis pendens, still the objection of Onkarsingh that he cannot be called upon to deliver possession of khasra No. 85 to Sushilabai in execution of the decree obtained by her against Thakurlal and Nanhelal cannot be accepted

The reason is that this khasra number is included in the decree under execution. In the first appeal which Thakurlal and Nanhelal filed against the judgment and decree of the Additional District Judge, Hoshangabad, it was held by this Court that Thakurlal and Nanhelal were in possession of this field and that they obtained the possession from Parvatibai and Baliram under the deed of surrender executed by them. It is, therefore, manifest that if Onkarsingh now claims to be in possession of the field, khasra No. 85, he obtained possession of the field from Thakurlal and Nanhelal during the pendency of the first appeal filed by them and not from Parvatibai under the deed of sale executed by her in his favour. All that Parvatibai did was to execute the sale deed. Onkarsingh thus having obtained possession of the field from Thakurlal and Nanhelal during the pendency of the appeal, the doctrine of lis pendens as stated in Section 52 of the Transfer of Property Act clearly applies. Thakurlal and Nanhelal were clearly parties to the suit and to the appeal; they are judgment-debtors and Section 52 says that "during the pendency of any suit or proceeding which is not collusive and in which any right to Immovable 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 the rights of any other party thereto under any decree or order which may be made therein." Thus, u/s 52 not only the transfer of the property but also "otherwise dealing" with the property is also prohibited. In our judgment, the delivery of possession of khasra No. 85 by the judgment-debtors Thakurlal and Nanhelal to Onkarsingh during the pendency of the appeal falls within the bar imposed by the expression "cannot be otherwise dealt with" occurring in Section 52 of the Transfer of Property Act. In this view of the matter, the appellant Onkarsingh is bound by the decree passed against Thakurlal and Nanhelal for delivery of khasra No. 85 to Sushilabai, and his claim to retain possession of that field cannot be accepted.

If the appellant Onkarsingh thinks that the sale effected in his favour by Parvatibai of khasra No. 85 is valid and he is entitled by virtue of that sale to obtain possession of the property from Sushilabai, then he is at liberty to file a suit for the purpose. In saying so, we should not be taken as holding in any way that such a suit would be within limitation or would be maintainable

For these reasons, we agree with the conclusion of the learned Single Judge dismissing the appeal preferred by the present appellants. The result is that this appeal fails and is dismissed. As none appeared for the respondents, there will be no order as to costs of this appeal.