
(1942) 08 CAL CK 0006
In the Calcutta High Court

Hiranya Bhusan Mukherjee and Others	APPELLANT
Vs	
Gouri Dutt Maharaj and Others	RESPONDENT

Date of Decision : 27-08-1942

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1943 Cal 227

Hon'ble Judges : Pal, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

Pal, J.—This appeal is by defendant 4 and defendants 3(a) to 3(h) in a suit for sale in enforcement of a mortgage. The mortgage in question is dated 21st September 1932, on which date defendant 1 borrowed from the plaintiff a sum of Rs. 6000 and executed the mortgage bond in his favour agreeing to pay interest at the rate of 21 per cent. per annum. The bond is Ex. 1 in the suit and constitutes a simple mortgage. The property given in mortgage is defendant 1's interest in C. Section Plot No. 5820 of Khatian No. 1178 measuring 17 kattas 5 chattaks in area within the municipal town of Asansol together with pacca structures and the fixtures, etc., described in Schedule A to the plaint. It is a cinema house in the town of Asansol. The plot of land belongs to one Harihar Mukherjea and his co-sharers. Defendant 1 took lease of this land from him for the purpose of establishing a cinema house on it.

2. The present suit was instituted on 8th July 1938. By that date, the mortgage money amounted to Rs. 13,501-2-0. The claim was laid at Rs. 12,000 after relinquishing rupees 1501-2-0. Defendants 2 to i were made parties as having acquired interest in the equity of redemption by subsequent purchases. Defendant 3 died during the pendency of the suit and his legal representatives were substituted in his place as defendants 3(a) to 3(h). Defendant 1, the sole mortgagor, did not contest the claim. The claim, however, was contested by defendants 2 to 4. Defendants 2 and 3 filed one written statement and defendant 4 filed another. The written statement filed by defendant 3 was adopted by his

legal representatives, defendants 3(a) to 3(h). Defendant 4 in his written statement set up a title paramount to the mortgage. His case inter alia was that defendant 1 having defaulted in the payment of rent, the landlords Harihar Mukherji and others brought a suit for arrears of rent, and, in accordance with the terms of the lease, obtained a "a first charge decree" in respect of defendant 1's leasehold interest in the land together with the structures, machineries and furniture, etc., put these to sale in execution of that decree and the contesting defendant purchased the same at that sale on 12th May 1935. He, therefore, contended that the title thus acquired by him was not an interest in the equity of redemption but was paramount to the mortgage in question.

3. The case of defendants 2 and 8 is that the mortgage in question is not available to the plaintiff against the property in their hands, the same having been hit by the principle of lis pendens. Their case is : (1) That on 8th June 1932 defendant 1 entered into an agreement with defendants 2 and 3 whereby in consideration of a sum of Rs. 15,000 he agreed to transfer to these defendants a moiety share in the property in question in the present suit and in the cinema business and to execute (a) a proper deed of conveyance for the same, and (ii) a deed of partnership relating to the cinema business. (2) That pursuant to this agreement these defendants forthwith paid rupees 5000 to defendant 1 and that thereafter the balance of Rs. 10,000 was also paid to them gradually; that besides this sum of Rs. 15,000 another further sum of Rs. 2375 was advanced by these defendants to defendant 1 for further development of the property and the business. (3) That defendant 1 having neglected and failed to execute the proper and necessary documents in favour of these defendants, they on 20th September 1932 instituted the title Suit No. 229 of 1932 in the Court of the Subordinate Judge, Asansol, in which a right to this property was directly and specifically in question. (4) That the said suit ended in a compromise decree on 17th November 1932 whereby these defendants obtained a final charge decree for Rs. 18,500 against defendant 1 in respect of the property which formed the subject-matter of that suit and which is also the subject-matter of the present suit. (5) That according to the terms and conditions of that decree, the property was ultimately sold on 5th May 1933 pursuant to the said final charge decree and was purchased by these defendants for Rs. 15,050 that the said sale was confirmed on 18th December 1933 and the defendants took possession through Court on 5th June 1934.

4. The defendants contended that in these circumstances the mortgage in question in the present suit having been given by defendant 1 during the pendency of the above suit, their rights under the decree made in that suit could not be affected by this mortgage. The learned Subordinate Judge over, ruled these contentions of the defendants and gave the plaintiff the usual preliminary mortgage decree with this reservation only that he will not be able to execute this decree at all against any of the defendants unless he pays to defendant 4 or deposits in his favour in Court the sum of Rs. 320 plus interest thereon at 12 per cent, per annum from 12th March 1935 to 8th July 1938. Defendant 4 and

defendants 3(a) to 3(h) have preferred the present appeal from this decree and the plaintiff has taken a cross-objection to that part of the decree whereby he has been directed to make payments to defendant 4. So far as the appeal by defendant 4 and the cross-objection taken by the plaintiff are concerned, it is conceded by both sides that the question of defendant 4's title should be left open for decision in a separate suit. The part of the decree and judgment wherein the title of defendant 4 has been decided and the plaintiff has been directed to make payment to that defendant is accordingly set aside and the question is left open.

5. The rest of the decree of the learned Subordinate Judge was founded on the following conclusions arrived at by him : (1) That the agreement alleged by defendants 2 and 3 dated 8th June 1932, was inadmissible in evidence for want of registration: This document was marked "x" by him for identification; (2) that the above unregistered agreement could not, under the law, create any charge or mortgage, as it was not registered; (3) that the said agreement was given a complete go-by by defendants 1 to 3 and it was definitely agreed between them by the compromise that defendant 1 was the absolute owner of these properties and was freed from the terms of the unregistered agreement of 8th June 1932; (4) that the charge by the compromise decree was created for the first time on 1st November 1932, whereas the plaintiff's registered mortgage is dated 21st September 1932; (5) that it was on 1st November 1932 that defendant 1 for the first time created a valid charge by the compromise; (6) that the plaintiff's claim is not hit by Section 52, T.P. Act, (a) as "the title suit No. 229 of 1932 was not a suit for enforcement of any registered mortgage or registered charge;" (b) as the suit was for specific performance of an unregistered contract to sell half of defendant 1's share; (e) as the Court in Title Suit No. 229 of 1932 did not declare any charge on the footing of the unregistered contract but accepted the terms of the compromise whereby for the first time charge was created on 1st November 1932; (7) that defendants 2 and 3 auction purchased the property on 5th May 1933 subject to plaintiff's mortgage.

6. Mr. Gupta appearing in support of the appeal contends : (1) That the decision of the learned Subordinate Judge is based on irrelevant considerations, (a) that for the purpose of the application of the doctrine of lis pendens, (i) it is not at all a relevant consideration whether the right claimed in the suit No. 229 of 1932 was or was not validly created or acquired; the only relevant consideration is whether this right was in question in that suit, (ii) it is not at all a relevant consideration how the decree was made in that suit; the only relevant consideration is whether any decree was made therein and what was the right given to the party concerned under that decree: (2) That the suit No. 229 of 1932 satisfied all the requirements of Section 52, T.P. Act, and that the right now claimed by defendants 2 and 3 enured to them under the decree in that suit; consequently the mortgage in question cannot affect this right. (3) That the learned Subordinate Judge was wrong in saying that the purchase by defendants 2 and 3 was subject to the plaintiff's mortgage. Though according to him it is not

necessary for his present purpose, Mr. Gupta further contends that the deed of agreement "x" did not require registration and was, in Suit No. 229 of 1932, and is, in the present suit, admissible in evidence. His further contention is that the right in question in the previous suit was, as a matter of fact, a perfectly valid right.

7. Mr. Bose appearing for the plaintiff-respondent does not support the finding of the learned Subordinate Judge that the auction sale of 5th May 1983 at which defendants 2 and 3 purchased was subject to the plaintiff's mortgage. The finding of the learned Judge is indeed not supportable on the evidence on record. Exhibit 2, the order-sheet in that execution case only shows that the existence of the alleged mortgage was directed to be notified to the intending bidders. Mr. Bose, however, contends: (1) That in order to attract the operation of the doctrine of *lis pendens*, (a) the right claimed in the suit must be one actually in existence at the date of that suit and must be shown to have been a valid right then in existence; (b) the right decreed in the suit must be the right claimed in that suit. (2) That the deed of agreement dated 8th June 1932 required registration u/s 17(i)(b), Registration Act, as it was not registered, (a) the charge purporting to be created by it expressly for any sum in excess of Rs. 15,000 could not be created, (b) the charge u/s 55(6)(b), T.P. Act, also failed to arise; (3) That on a proper construction of the terms of the compromise, the decree in suit No. 229 of 1932 should be taken to have negatived the right in question in the suit, and that the right which defendants 2 and 3 are now claiming in the present suit was not a right under the decree in that suit but a new right created by the agreement of the parties arrived at on 1st November 1932 and incorporated into the petition of compromise filed on that date; this right is not protected by Section 52, T.P. Act; (4) That on a proper construction of the terms of the compromise, specially in view of the provisions contained in term No. 12, these defendants agreed to accept and did accept the plaintiff's mortgage as binding on them.

8. The law of *lis pendens* is given in Section 52, T.P. Act. The doctrine with which this section is concerned rests upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail : *Bellamy v. Sabini* (1857) 1 De. G. & J. 566 at p. 584, per Turner L.J. See also at p. 105 where their Lordships of the Judicial Committee pointed out that the correct mode of stating the doctrine, as Cranworth L.C. observed in *Bellamy v. Sabini* (1857) 1 De. G. & J. 566 is that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent." During a litigation nothing new should be introduced - *pendente lite nihil innovetur*.

9. But perhaps it does not signify much what the reason for the rule is, if and when the rule itself is incorporated in a statute. The words of the Legislature are of greater significance than the thoughts which might have inspired them, at least so long as there is no ambiguity in the expressed words. The relevant

portion of Section 52, T.P. Act, stands thus:

During the pendency in any Court...of any suit...which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred...by any party to the suit...so as to affect the rights of any other party thereto under any decree...which may be made therein.

10. An explanation is added to this provision saying that

for the purposes of this section the pendency of a suit...shall be deemed to commence from the date of the presentation of the plaint...in a Court of competent jurisdiction....

11. The requirements of the section are : (1) the pendency of a suit, (2) non-collusive character of the suit, (3) any right to immovable property being in question in that suit, (a) being in question directly and specifically, (4) the other party (other than the party making the transfer pendente lite) having some right under the decree in that suit. The consequence of the doctrine is that the transaction pendente lite shall not be allowed to affect the right under the decree. As the section stands it seems immaterial how the decree is obtained in that suit, whether after contest or by consent. It seems immaterial whether the decree in that suit is right or wrong. It is beyond the competence of the Court invited to apply the doctrine of lis pendens to sit in judgment on the previous decree. The express words of the section" seem sufficiently clear to support the above view and the decision in *Bharat Ramanuj Das v. Srinath Chandra* ("22) AIR 1922 Cal. 358 lends a great support to the same. In *Bharat Ramanuj Das v. Srinath Chandra* ("22) AIR 1922 Cal. 358 (Mookerjee and Buckland JJ.) the suit was for the enforcement of a mortgage security executed in favour of the plaintiff by defendant 1 during the pendency of a suit for pos" session on declaration of title to the property. The suit for possession was ultimately compromised and the plaintiff thereof relinquished his interest in the property in consideration of a sum of money promised by the defendant and secured by a mortgage of the property. The question was whether this mortgage under the compromise decree would be affected by the prior mortgage given during the pendency of the suit which resulted in this compromise. It was held that the mortgage in suit was affected by lis pendens and consequently failed to affect the mortgage obtained by compromise. The principle of lis pendens was held applicable though the right claimed in the suit was not the right given by the decree and though the decree itself did not make the mortgage enforceable. This case is a complete answer to all the contentions raised by Mr. Bose. In it Mookerjee J. observed:

It has been repeatedly ruled that one acquiring interest pendente lite in a proceeding which is lis pendens is bound by the decree without regard to its form, or whether it is erroneous, and it is immaterial that the relief granted in the suit is the result of agreement or compromise, except where it is the result of fraud or collusion between the parties.

12. It is not disputed that the mortgage in question in the present suit was

created during the pendency of the title Suit No. 229 of 1932. The plaint in that suit was presented on 20th September 1932 and the mortgage was created on the next day, i.e., on 21st September 1932. That suit cannot be said to be a collusive one. Indeed, it has not even been alleged to be collusive. The plaint in that suit is Ex. F in this case and it cannot be disputed that in it rights to the property which was subsequently mortgaged were directly and specifically in question. The plaint set up an agreement to sell a half-share of the properties to the then plaintiffs who are defendants 2 and 3 in the present suit, made a case of full payment of the price settled as also of another sum in excess of that price, and claimed inter alia (1) a decree declaring their title to a half-share of the properties, or (2) a decree for specific performance of the agreement to sell that share in the property, or (8) in the alternative (a) a decree for the repayment of the money received by defendant 1 and (b) a decree declaring that the entire decretal amount including costs formed a first charge on the properties and that the plaintiffs in that suit were entitled to realise the same by sale of these properties.

13. The suit ended in a compromise decree. This decree is Ex. G in this case. The bona fide character of this compromise is not challenged in any way, and there is no charge of any fraud or collusion or any other vitiating circumstances against it. The suit was decreed in terms of the petition of compromise and the solenama was made a part of the decree. Clause 6 of the solenama declared the decretal dues a first charge on the properties, and Clauses 7 and 8 provided for the terms and conditions when this charged property would be liable to be sold in execution of this decree. In the concluding paragraph of the solenama, the parties prayed that a final charge decree for Rs. 18,500 be passed in favour of the plaintiffs of that suit in terms of the petition of compromise, and the Court pursuant to this prayer expressly made the decree final. It is not disputed that the execution of this final decree and the sale of the charged property on 5th May 1933 were all in accordance with the terms and conditions of this compromise decree. Prima facie, therefore, the right to the property which defendants 2 and 3 are claiming in the present suit is what they got under the decree in title Suit No. 229 of 1932, and, consequently, cannot be affected by the mortgage created during the pendency of that suit.

14. The fact that the decree in Suit No. 229 of 1932 was based on compromise does not in the least affect the question. Mr. Bose appearing for the plaintiff-respondent frankly conceded that nothing turns upon the decree being based on compromise. Since the decision in *Bharat Ramanuj Das v. Srinath Chandra* ("22)A.I.R. 1922 Cal. 358 (*Mookerjee and Buekland JJ.*) the question whether or not a consent decree falls within the scope of Section 52, T.P. Act, has always been taken by this Court to have been settled in favour of such decree. Though a charge does not create any interest in the property, it is not disputed that it none the less amounts to a right to the property within the meaning of Section 52, T.P. Act. There is, indeed, ample authority in support of this view : *Bazayet Hossain v. Dooli Chand* ("79) 4 Cal. 402, *Dose Thimmanna Bhutta v. Krishna Tantri* ("06)

29 Mad. 508 and Sathuluru Seetharamanujacharyulu Vs. Narra Venkatasubbamma and Another, . Mr. Bose contends that before a transaction can be affected by *lis pendens* it must be shown that the right that was in question in the pending suit was claimed in that suit as a right existing at the date of the suit and actually existed at that date independently of the ultimate decree. In support of this contention he relies on the decision of Devadoss J. in Paruchuri Rattamma Vs. Surugutchi Seshachalam Sarma and Others, . That was a case of a Hindu wife claiming maintenance from her husband. As far as can be gathered from the judgment of Devadoss J., the wife seems to have asked for a charge on the estate of the husband without specifying these properties in the plaint. The learned Judge, however, did not base his decision on any ground of non-specification of the property. He observed:

There is difference between the case of a widow seeking for maintenance against her husband's relations on the ground of their receiving family property and the case of a wife asking for maintenance against the husband. The liability of the husband to maintain his wife or to provide for her maintenance is a personal one and if he has property, charge will be given against the property.

15. On the ground of this difference the learned Judge distinguished the cases in Dose Thimmanna Bhutta v. Krishna Tantri ('06) 29 Mad. 508 and Krishana Pattar v. Alamelu Ammal ('15) AIR 1915 Mad. 646 and overruled the plea of *lis pendens*. He observed:

The contention is that the moment the wife brings a suit for maintenance and asks for a charge on his property, it should be considered that a charge is given to her from the date of the suit in case the suit is decreed in her favour. I do not find any authority for that position. A charge taken effect only from the date of the decree.

16. No doubt there is the difference between the case of a wife claiming maintenance from her husband and that of a widow claiming maintenance from her husband's coparceners. But it is difficult to see how this difference will affect the question whether or not a claim to have charge on certain property made in a suit for this maintenance brings into question in that suit a right to immovable property. It is only this last named question which is a relevant consideration for the purpose of seeing whether or not the doctrine of *lis pendens* shall be attracted. If it be contended that in the case of a widow claiming maintenance from her deceased husband's coparceners, a right to immovable property comes in question even without any specific claim in the suit to have a charge on the property, the above difference will have some bearing on the question. But when that is not the contention, and the whole question is how far a claim to have a charge on certain property in a suit attracts the doctrine of *lis pendens*, this difference will be absolutely without any distinction.

17. In Hindu law the obligation to maintain others arises in some cases from the mere relationship between the parties independently of the possession of any

property. In other cases, it depends altogether on the possession of property. The maintenance, for example, of a wife, aged parents and a minor son is a matter of personal obligation arising from the very existence of the relation between the parties and quite independent of the possession of any property, ancestral or acquired. The nature and the extent of a widow's right to maintenance under the Hindu law was discussed by West J., in *Laxmana Ram Chandra Jashi v. Satyabhama Bai* ("77-78) 2 Bom. 494 which is still the leading authority on the subject. A widow, who does not succeed to the estate of her husband as his heir, is entitled to maintenance only out of her husband's separate property as also out of the property in which he was a coparcener at the time of his death. An heir is legally bound to maintain out of the estate which descends to him those persons whom the late owner was legally or morally bound to maintain. But the right of maintenance even of a Hindu widow falls short of a charge on the property. It is not a charge unless it has been made so by a decree or agreement or unless the widow is in possession of specific property allotted for her maintenance. Before it is made a charge on the property it may have the protection of Section 39, T.P. Act. But that again is very different from a charge. If, when Devadoss J. says that the charge takes effect only from the date of the decree, he says so on the construction of the particular decree, then we need not quarrel with the proposition. If a particular decree gives a charge only from its date it may be that the right under that decree being thus limited in its operation from the date of the decree will not affect any prior transaction though *pendente lite*. This may follow from the provisions of Section 52, T.P. Act, itself, as the section extends its protection to the right under the decree only to this extent that the transaction *pendente lite* shall not affect such right. Even such reading of the section is not free from difficulties. But in the facts of the present case we are not called upon further to examine this position.

18. In the case before us the very charge which was (Ultimately decreed on compromise was claimed in the suit. No doubt in the preamble of the solenama it was recited that the parties had agreed to relinquish all their rights, title, interest whatsoever arising under the agreement dated 8th June 1932; but it was also recited that this was done "in consideration of the defendant agreeing to repay to the plaintiffs the sum of Rupees 18,600 under the terms and conditions stated below." The relevant terms and conditions were stated in clauses 6, 7 and 8 and these covered the alternative claim made in para. 17 (chha and ja) of the plaint. Reading the solenama as a whole, we are of opinion that in consideration of the defendant's agreeing to this alternative claim made in the plaint the plaintiffs thereof gave up their other claims under the agreement. We are not prepared to read the consent decree as only negating all the rights in question in that suit. The charge decreed was also one of the rights in question in that suit, and certainly this charge is a right to the property made available to the then plaintiffs under the decree in that suit. The present case, in this respect, is stronger than the case in *Bharat Ramanuj Das v. Srinath Chandra* ("22) AIR 1922 Cal. 358 in which the plaintiff relinquished his interest in the zemindary in

consideration of a promised price secured by the mortgage of the property. Even this mortgage was given the benefit of the section. As regards para. 12 of the solenama, we do not see how this can be taken as indicating in any way that the mortgage was accepted by the parties as binding on them. The clause is one of assurance given by the then defendant and only states a fact, namely, that during the pendency of that litigation he created a mortgage. What will be the legal consequence of that mortgage was left to the provisions of law, and was nowhere sought to be determined by the terms of this solenama.

19. In our opinion, the mortgage in question of the present suit is hit by the doctrine of lis pendens and is not available against the present appellants or against the property in their hands. The view that we have taken of the meaning and scope of Section 52, T.P. Act, renders it unnecessary for us to consider whether or not the deed of agreement dated 8th June 1932 required registration, and whether it would have been inadmissible in evidence in the Title Suit No. 229 of 1932 or whether it is inadmissible in evidence in the present suit. In the result the appeal is allowed with cost. The judgment and decree of the Court below in so far as these decreed the suit against defendants 2 to 4 and against the property in their hands are set aside and the suit is dismissed with costs as against them. The decree against defendant 1 alone stands. The question regarding the title of defendant 4 is left open. The cross-objection is allowed to the above extent but without cost.

B.K. Mukherjea, J.

20. I agree.