
(1962) 03 KL CK 0022
In the High Court Of Kerala
Case No : A.S. No. 767 of 1958

Josna Bank Ltd.

APPELLANT

Vs

Asian Bank Ltd. and Others

RESPONDENT

Date of Decision : 21-03-1962

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1962 Ker 309

Hon'ble Judges : T.C. Raghavan, J

Bench : Single Bench

Advocate : V. Rama Shenoi and R. Raya Shenoi, for the Appellant; T.K. Kurien, for 1st Respondent and S. Boothalinga Iyer, for 3rd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

T.C. Raghavan, J.—The 3rd defendant, namely, the Josha Bank Ltd., is the appellant and the main question in controversy is whether the appellant is entitled to priority on the amount in court deposit or whether the plaintiff-1st respondent, namely the Asian Bank Ltd., has priority. The lower court decided the question in favour of the latter and the former has come up in appeal. The 2nd respondent before me is the 1st defendant and the 3rd respondent the 2nd defendant. The 4th respondent is the liquidator of the 1st respondent-Bank in voluntary liquidation.

2. The facts that led to the appeal, which are not in dispute may be briefly stated. The 1st defendant had an open loan account with the 3rd defendant from 1946. While so, the 3rd defendant filed O. S. No. 156 of 1124 against the 1st defendant; and the 1st defendant filed the statement Ex. II on 1st Meenam 1124 to the effect that he would deposit in court half the amount realised by sale of timber involved in the suit. Thereafter the 1st defendant executed a document of hypothecation and pledge of goods, namely Ex. A, on 27th February 1950 in favour of the plaintiff. Subsequent thereto the 2nd defendant, another simple

creditor of the 1st defendant, filed O. S. No. 154 of 1950 against the 1st defendant; and in that suit an order for attachment before judgment was passed. On 31st January 1951 the Amin went to effect the attachment, when he found the agent of the plaintiff on the spot. The said agent objected to the attachment claiming that the plaintiff had a mortgage over the goods and was in possession of the goods. The Amin reported the matter to the court and the court ultimately directed the appointment of a receiver. The receiver was directed to take possession of the goods and sell them in public auction. This was done and the money realised was deposited in court. Now the contest is as to who, whether the plaintiff or the 3rd defendant, is entitled to the said amount in deposit.

3. The 1st defendant remained *ex parte* in the lower court and is *ex parte* before me. No relief is claimed in *ap-peal* against the 2nd defendant, though he is also impleaded in the appeal. The dispute is between the appellant-3rd defendant and the plaintiff-1st respondent, who is now represented by the liquidator, the 4th respondent.

4. Two points have been elaborately argued before me by Mr. V. Rama Shenoji on behalf of the appellant. The first is regarding the effect of the recitals in the document executed by the 1st defendant in favour of the 3rd defendant in comparison with the recitals in the document executed by him in favour of the plaintiff. The question is whether there is any difference in the recitals and if so, what is its effect on the respective claims made by the 1st defendant and the plaintiff to the money in court. The second point raised by the learned counsel is the effect of Ex. A, which came into being *pendente lite*, that is, pending O. S. No. 156 of 1121. According to him Ex. A is hit by *lis pendens*.

5. I would straightaway dispose of the first question. The earliest document in favour of the 3rd defendant is Ex. VI dated 16th February 1946. This contains a rental at the end that a schedule of goods and materials hypothecated is also attached, though that schedule is not now before court. The next document in favour of the 3rd defendant is Ex. VII of 8th September 1947. This is also in the same printed form, the only difference being that the open loan limit which was fixed at Rs. 7500/- in Ex. VI was reduced to Rs. 5000/- in Ex. VII. A schedule is attached to Ex. VII, which mentions some logs of timber, planks, scantlings and general light wood as the properties covered by the document. This appears to be a copy of Ex. V executed on the same day. Ex. V, however, does not contain the schedule. For the purposes of this case I would accept the schedule in Ex. VII.

6. The document in favour of the plaintiff is Ex. A dated 27th February 1950. This document is captioned "hypothecation and pledge of goods to secure a demand cash credit". This contains a schedule, which mentions finished items of furniture like benches, desks, chairs and tables. There is also a general item in the schedule reciting "all other movables and articles stored in the godown or yard and workshop". Moreover, it is worthy of note that the boundaries of the godown, yard or workshop are specifically given, this, I mean, the recital of boundaries, is

absent in the documents in favour of the 3rd defendant.

7. The recitals in these two sets of documents are almost similar, though there may be some slight variations. I do not propose to go minutely into the various recitals to assess their effect. Ex. 1 is the decree in the suit filed by the 3rd defendant, namely O. S. No. 155 of 1124. That gives a schedule of the properties. Thirteen items are given therein, of which 12 are logs of timber, planks and scantlings. Item 13 alone generally recites furniture found in the premises. Now in Ex. XIV, which is the copy of the list of articles attached and sold by the receiver, what appears is that the major items therein were furniture and only two or three items related to logs of timber and scantlings.

8. From these, I am inclined to think that the goods intended to be hypothecated to the 3rd defendant were different from goods included in the hypothecation in favour of the plaintiff. In the documents in favour of the 3rd defendant the stress appears to be on logs of timber, planks and scantlings; whereas in Ex. A in favour of the plaintiff finished articles of furniture appear to be the main items. Moreover, in the document in favour of the plaintiff the boundaries of the workshop or the godown are specifically shown, which are not so shown in the documents in favour of the 3rd defendant. From the latter circumstance I am tempted to conclude that it might not have been the intention of the parties to give possession to the 3rd defendant; whereas the specification of the boundaries in Ex. A might indicate that the 1st defendant intended to give possession to the plaintiff. I may not be understood to hold that these are conclusive tests. I only point out these circumstances to show that the intention in the two cases might be different. In this connection, it is also relevant to note that the plaintiff put up a board on the premises of the godown to show that they were in possession; and that such an attempt does not appear to have been made by the 3rd defendant.

In these circumstances, I would not be far from right if I hold that the 1st defendant intended to convey possession to the plaintiff of the finished articles of furniture lying in his godown specifically described in the schedule by boundaries and the plaintiff got possession thereof; whereas that such an intention to convey possession to the 3rd defendant does not appear to be present, nor did the 3rd defendant take possession of the goods in the godown. It may also be observed that the charge was sought to be created, in the latter case, not on items of furniture but on logs of timber, planks and scantlings. The goods sold by the receiver being mainly furniture, the contention of the 1st respondent that those were the goods hypothecated to them and taken possession of by them appears to be well-founded.

9. I would now consider the second question raised by Mr. Rama Sheno, namely, that Ex. A was hit by lis pendens as it came into existence pending O. S. No. 156 of 1124. Some argument has been advanced at the bar that Ex. A was without notice either of Ex. V or of the pendency of O. S. No. 156 of 1124. There is no evidence that the plaintiff had notice of either Ex. V or of the pending litigation;

nor is that fact seriously disputed. The proposition that, where a person purchases goods which have already been mortgaged with a third person, the purchaser being not aware of the mortgage when he purchases the goods from the mortgagor, who has possession at the time of the sale, the purchaser takes them free from the mortgage, is well established : (vide *Nara-siah v. Venkataramiah*, ILR 42 Mad 59 : AIR 1919 Mad 779(1) and *Backer Khorasanee v. Ahmed Esmail Jamal* AIR 1923 Ran 28. But Mr. Rama Shenoi rests his contention on the maxim "pendente lite nihil innovator" (during a litigation nothing new should be introduced). He argues that, notice or no notice, if a transaction relating to property, about which a litigation is already pending, takes place pending such litigation, that transaction cannot confer any right on the transferee in derogation to the rights of the parties to the pending litigation. According to the learned counsel, *lis pendens* does not depend on notice, actual or constructive; it depends entirely on necessity. He invites my attention in this connection to a passage in *Gour's Law of Transfer*, 7th Edn., Vol. 1, p. 579, paragraph 931. The passage reads:

"There can be no doubt that the principle of *lis pendens* does not rest upon an implied or constructive notice of the proceedings of the law courts, but rather upon necessity --the necessity that neither party to the litigation should alienate the property in dispute so as to affect his opponent, for, if during the pendency of any action at law or in equity the claim to the property in controversy could be transferred from the parties to the suits so as to pass to a third party, unaffected by either the prior proceedings or the subsequent result of the litigation, then all transactions in our courts of justice would, as against men of ordinary forethought, prove mere idle ceremonies. The rule, no doubt, originated in the Roman law which provided "*Rem de qua controversia prohibimur in acrum dedicare*".

10. But the question in the case before me is not whether the plaintiff had notice of the previous mortgage or of the pending litigation; but the question is whether the principle of *lis pendens* applies to movables. In *Wigram v. Buckley* (1894) 3 Ch 483 the question whether the doctrine of *lis pendens* applied to personal property came up for consideration before the Court of Appeal in England. Chitty, J. took the view that the doctrine applied in all cases where specific property was sought to be affected by the suit, no matter whether such specific property was land or realty or goods, or choses in action, or, in other words, personalty. It was this view of Chitty, J. that was questioned before the Court of Appeal and the Court of Appeal reversed the decision of Chitty, J. Lindley L. J. after considering some of the earlier decisions observed at p. 494 of the reports.

"Upon principle and authority I am of opinion that the doctrine in question is inapplicable to personal property other than chattel interests in land".

This view appears to be still prevailing in England and no subsequent decision taking a different view has been brought to my notice.

11. So far as the courts in India are concerned, the aforesaid view appears to have been accepted; (vide the observation of Bhashyam Ayyangar, J. in *Puninthavelu Mudaliar v. Bhashyam Ayyangar* ILR 25 Mad 40G : *Govind Baba Gurjar v. Jijibai Saheb* ILR 36 Bom 189: *Varkey Cheriyan v. Kanakku Keralan Narayana Filial*, 29 Trav LJ 1252 and *Official Receiver Vs. Sait Lalchand Khushalchand Firm and Others*, : see also *Gour's Law of Transfer*, 7th Edn., Vol. 1, p. 577, where the learned author says that the doctrine has no application to movables though its principle is held to apply equally to movables, other than money if the alienee takes with notice of lis: and *Mulla's Transfer of Property Act*, 4th Edn., p. 234, where the learned author says that the doctrine of lis pendens does not apply to movables).

12. But the argument of Mr. Rama Shenoi is that there is no justification for a distinction between movables and immovables regarding the application of the doctrine of lis pendens; and if as a rule of necessity it is essential in the case of immovables, it is equally essential in the case of movables as well for the same reasons. And he urges that the reasoning of Chitty, J., should weigh with me rather than the observations of Lindley L, J. In this connection he draws my attention to *Bennet's Law of Lis Pendens*. At p. 198 of the treatise the learned author in Section 128 observes:

"I am thorounhly satisfied from a review of the authorities, that at the present time the doctrine is well established that with the exception of negotiable paper, lis pendens applies to personal property as well as real estate".

At pp. 141 to 143 the learned author considers some of the decisions of the American Courts and observes that a Ms pendens, involving personal property, commenced and prosecuted with due diligence to a decree, in any of the States, should have full force and conclusive effect as well upon pendente lite purchasers as upon the parties and privies, throughout ail of the United States and such a rule would have a uniform application everywhere, and would have the salutary effect of defeating all attempts to deprive the courts of jurisdiction and successful litigants of the fruits of their litigation. The learned author says further that the hardships resulting from such a rule are not of an unavoidable character; that the seller would be held to a more rigid accountability as guarantor of title; that the doctrine of caveat emptor would soon compel caution on the part of buyers, and possibly indemnity in cases of dealings between strangers, against failure of title and loss thereby.

The author, however realises that such a rule might somewhat retard the freedom of commercial exchanges; but, according to him, dealers of responsibility and commercial character would be little affected by it. This view appears to have found favour with another author *Hukm Chand* in his *Law of Res Judicata*. At page 717 of his book in Section 283 the learned author approvingly quotes *Bennett*. At page 719 he observes that the rule as enacted in British India has reference only to immovable property; and that it may be that the Legislature considered that in regard to movable property, Section 492 of the

CPC would be sufficient protection. According to him, it is more probable that the rule enacted in India did not refer to movable property, because the enactment in which the rule was contained related to immovable property; there was nothing to show that the rule, as so enacted, purported to be exhaustive; and the application of the doctrine to movable property, though apparently not recognised in the published cases in this country, would still be governed by general principles.

13. I do not propose to delve into the reasons behind the doctrine of lis pendens. It appears to be a rule of necessity; and it does not appear to depend, for its operation, on notice, actual or constructive, of the pending lis. In the case of movables, at any rate, normally possession is considered to be the basis of title. In equity an innocent transferee for value of a movable from a person in possession has to be protected; and there may be instances where this principle of equity comes into conflict with the rule of necessity, namely, the doctrine of lis pendens. Rightly or wrongly the English Courts and the courts in India have taken the view that in the case of movables the rule of equity, that an innocent purchaser from a person in possession without notice of the pendency of a lis regarding the property should be protected, should prevail over the rule of necessity, namely, the doctrine of lis pendens. This rule has remained unchallenged in our courts for a fairly long time; and, to borrow the words of Lindley L. J. in (1894) 3 Ch 483,

"the inconvenience of extending the doctrine to ordinary personal property is so extremely serious that it would, in my opinion, be very wrong so to extend it now for the first time, even if such extension could be justified by reasoning from well-established general propositions which might serve as premises for arriving at such a conclusion".

14. I am thus of the opinion that both the points raised by the appellant's learned advocate have failed to convince. The appeal therefore fails and is dismissed with costs of the plaintiff-1st respondent, now represented by the 4th respondent. The other parties will bear their respective costs.