

(1963) 07 KAR CK 0003
In the Karnataka High Court
Case No : Second Appeal (H) No. 2 of 1956

Khaja Bi and Others

APPELLANT

Vs

Mohammad Hussain

RESPONDENT

Date of Decision : 08-07-1963

Acts Referred:

Transfer of Property Act, 1882 — Section 40, 52

Citation : (1963) 07 KAR CK 0003

Hon'ble Judges : N. Sreenivasa Rau, C.J; Ahmed Ali Khan, J; A. Narayana Pai, J

Bench : Full Bench

Advocate : T. Krishna Rao, V. Krishna Murthy, Bheemasenachari Ashrit, H.B. Datar and Mohammad Zakauallah, for the Appellant; G.R. Ethirajulu Naidu, M.P. Somasekhara Rau, Manohar Rao Jagirdar, K. Jagannath Shetty, K. Habeebulla Khan and S.L. Simha, for the Respondent

Judgement

Narayana Pai, J.—This second appeal was originally filed in the erstwhile High Court of Hyderabad and was transferred to this Court under the provisions of the States Re-organization Act. The details of the earlier proceedings in this second appeal are fully set out in the order dated 24th June 1963 of the Bench of five Judges which after hearing the arguments on the preliminary point relating to the reference to a Full Bench by the Division Bench of the erstwhile High Court of Hyderabad which heard the appeal in the first instance, held that the same should be heard and disposed of by a Full Bench of three Judges, it is unnecessary to repeat those details. It is enough to take note of two points.

The suit, out of which this appeal arises, having been instituted long before the Indian CPC (Central Act V of 1903) was extended to the erstwhile State of Hyderabad, the scope of the Second Appeal is as determined by the relevant provisions of the CPC of that State. According to those provisions, the parties are entitled to raise and the High Court empowered to examine and interfere with both questions of fact and questions of law. Secondly, the Division Bench which made the reference to a Full Bench has in accordance with the provisions of the

Hyderabad High Court Act referred to the Full Bench not specified questions of law but the entire case. We have therefore heard arguments both on the questions of fact and on the questions of law raised in this appeal.

2. The appellants are the surviving legal representatives of the original first defendant Ladle Saheb, The respondent Mohamad Hussain was the plaintiff. The second defendant was one Shivappa. He died during the pendency of the suit itself. But, it appears that his legal representatives were not brought on record. We shall refer to the parties by their names.

3. The facts as alleged by the plaintiff in his plaint and as found by the trial Court and the lower appellate Court are briefly the following:-

The land comprised in survey No. 495 of Hungunata village in Gulbarga District called by the name Gopal Kai Khait belonged to the deceased second defendant Shivappa On 29-3-1938, he entered into an agreement with Mohamad Hussain to sell the land to him for Rs. 2,601/- and received Rs. 25/- as advance. Exs. I and II are respectively the agreement and the receipt for payment of advance On 12-4-1936 Shivappa entered into an agreement with the deceased first defendant Ladle Saheb for the sale of the same land to the latter for Rs. 2,000/- and received an advance of Rs. 400/-. Ex. VIII is that agreement. On 21-6-1936 Ladle Saheb instituted a suit against Shivappa for specific performance of the agreement Ex. VIII. The property had been mortgaged with possession by Shivappa on 24-8-1931 to one Sharanappa under Ex. VI. The period of the mortgage was 12 years. On 11-7-1936 Ladle Sachet purchased the mortgagee's right and got into possession.

On 20-8-1936 Mohamad Hussain made an application Ex. XI in Ladle Saheb's suit for specific performance to get himself impleaded as a defendant therein, alleging that he had purchased the land in dispute In the case In terms of the agreement Ex. I. That application was opposed by Ladle Saheb and ultimately dismissed by the Court on 2-9-1936. The order is marked Ex. 111. Thereafter on 1-4-1937, Shivappa executed a sale deed Ex. III in favour of Mohamad Hussain purporting to be pursuant to the agreement Ex. I. Ladle Saheb's suit for specific performance was decreed on 4-4-1937. Ex. XIII is the decree and Ex. XVI the Judgment therein. In the meanwhile, Mohamad Hussain filed a suit against Shivappa to get the patta of the land transferred to him pursuant to the purchase by him under Ex. 111. It was decreed in his favour by consent on 22-4-1937. Shivappa filed an appeal against the decree for specific performance passed against him in Ladle Saheb's suit on 2-5-1938, That appeal was dismissed on 16-4-1952.

4. The present suit, out of which this second Appeal arises, was filed by Mohamad Hussain on 3-3-1937. In the first instance, the suit appears to have been filed before the Court of the Munsiff praying merely for a declaration that the decree for specific performance obtained by Ladle Saheb was void and ineffective against him and the right of ownership acquired by him by the

purchase under Ex. III. Later, however because Ladle Saheb had obtained possession by acquiring mortgagee Sharanappa's interest as stated above, the prayer was amended by asking for possession also. The suit was disposed of on 26-11-1951, the Court granting him a decree for possession against Ladle Saheb and dismissing it in other respects. Ladle Saheb appealed against the decree for possession made against him. Mohamad Hussain cross-objected against the refusal of the declaration sought by him. Both the appeal and the cross-objections were dismissed by the first appellate Court on 164-1652. Hence the second appeal by the legal representatives of the deceased Ladle Saheb.

5. The questions of fact argued on behalf of the appellants are (1) whether the agreement Ex. I relied upon by Mohamad Hussain had been executed on the date it bears before the agreement Ex. VIII in favour of Ladle Saheb or was executed during the pendency of Ladle Saheb's suit for specific performance and deliberately antedated, and (2) whether Mohamad Hussain had proved that Ladle Saheb had notice of the alleged prior agreement in his favour.

6. The questions of law raised are (1) whether the sale deed Ex. III by Shivappa in favour of Mohamad Hussain admittedly executed during the pendency of Ladle Saheb's suit for specific performance is not affected by *lis pendens* and (2) whether Mohamad Hussain can claim immunity from the operation of the principle of *lis pendens* by relying upon Ex. I allegedly executed before the institution of Ladle Saheb's suit.

7. With regard to the questions of fact as formulated above, it has been contended on behalf of the respondent Mohamad Hussain that the question as to the alleged antedating of agreement Ex. I had not been specifically raised in the written statement of Ladle Saheb which contained only a total denial of the agreement and that even the first issue raised in that connection reflects merely an assertion of the agreement by Mohamad Hussain and a denial thereof by Ladle Saheb. So far as the question of notice is concerned, the argument is that there is no reference whatever thereto either in the written statement of Ladle Saheb or in any one of the issues framed in the suit.

8. The first issue framed in the suit reads as follows:

"Whether the defendant Ho. 2 entered into an agreement of sale with the plaintiff on 25th Ardihehsh 1345 F and obtained Rs. 25/- as advance money and the agreement deed document (1) and the receipt document (2) has been executed by the defendant No. 2?" (Sic)

9. It is true that the pleadings not merely of the defendants but also of the plaintiff are not quite so clear or specific as one would ordinarily expect them to be in a case of this nature. It should, however be remembered that the pleadings were in Urdu and the summary of the contentions found in the Judgment of the trial Court indicates now the court itself understood the nature of the pleas raised. With reference to the written statement of the first defendant Ladle Saheb, this is what is found stated in the judgment of the trial Court.

"Brief facts of the written statement of Syed Ladle the defendant No. 1 are as follows: It is correct that defendant No. 2 Sivappa is the owner of suit land. But it is incorrect that he entered into an agreement with the plaintiff on 25th Ardibehesht to sell the suit land to him. But on the other hand, he agreed to sell it to the defendant. Had Sivappa made an agreement of sale with the plaintiff Mahammad Hussain then certainly he would not have agreed to sell it to the defendant No. 1 and after the presentation of the suit for specific performance by the defendant No. 1 the plaintiff and Sivappa belong in conspiracy are claiming on the strength of fabricated agreement deed of sale. The sale of suit land In the favour of plaintiff had been executed during the pendency of the suit of defendant No. I. Therefore u/s 52 of T. P. Act is void". (Sic)

10. Further, even as a matter of pleading, we did not think that it Is quite accurate to say that here is no suggestion of antedating with regard to Ex. I. The plaintiff referred to the agreement of sale and the payment of advance by him and to the execution of Exs. I and II in paragraph 1 of his plaint. In paragraph 2 he stated that even before a sale deed could be executed pursuant to Ex. I the first defendant filed a suit for specific performance of the agreement under Ex. VIII and questioned the propriety and tenability of Shivappa executing an agreement in favour of Ladle Saheb in the face of the prior agreement in his (Plaintiff's) favour. Paragraphs 1 and 2 of Ladle Saheb's written statement in answer to the first two paragraphs of the plaintiff are translated as follows: "1. The para 1 of the plaint is denied.

2. In para 2 of the plaint the only correct, fact is that the defendant No. 1 had filed a suit against defendant No. 2 for the specific performance of the contract and the agreement dated of 28th Khurdad, 1345-F., had been really executed and the remaining other facts regarding the right of plaintiff are denied, and 25th Ardibehesht, 1345-F the date of the agreement of sale." (Sic)

It follows from this that Ladle Saheb while asserting that Ex. VIII had in fact been executed in his favour denied not merely the execution of Ex. I in favour of Mohamad Hussain but also the correctness of the date it purports to bear.

11. Regarding the argument that the question of notice was not specifically pleaded, it must be observed-that Ladle Saheb's case to the effect that Ex. I had not been executed on the date it bears and that it must have been collusively executed subsequent to the filing of his suit does not necessarily call for an alternative plea that even if Ex. I is true, he had no notice of it. We should add that Mohammad Hussain's plaint itself while questioning the propriety of Shivappa entering into an agreement with Ladle Saheb having already executed one in favour of Mohamad Hussain does not anywhere put forward the case that the agreement Ex. VIII in favour of Ladle Saheb was bad in law or ineffective against Ex. I for the reason that Ladle Saheb had notice of Ex. I.

12. If we look into the evidence to which we shall refer presently, it becomes clear that the attempt on the part of Mohamad Hussain was to prove that his

agreement Ex. I was prior in point of time to that of Ladle Sahat, Ex. VIII, and that Ladle Saheb had notice of Ex. I whereas the attempt on the part of Ladle Saheb was to question the credibility of the evidence tending to show that he had notice of Ex. I and to establish by cross-examination of Mohamad Hussain's witnesses that Ex. 1 must have been executed after the institution of his suit for specific performance.

13. We are therefore satisfied that in spite of same imperfections in the pleadings, the principal controversy between the parties, of which or of the exact nature of which both of them were fully aware and in respect of which each adduced evidence or tried to discredit the evidence adduced by the other, was whether Ex. I represented a genuine transaction which took place on the date the document bears or was written subsequent to the filing of Ladle Saheb's suit for specific performance an* antedated with a view to support the case of Mohamed Hussain.

14. The execution of Exs. I and II and the receipt of Rs. 25A as advance under the latter document are spoken to by Shivappa himself deposing in favour of Mohamad Hussain and by two other witnesses, Gundappa and Gulam Mohiuddin, who figure as attestors to these documents.

15. Both Shivappa and the attestors say that the documents were executed in the house of Mohamad Hussain at Shahabad, that the attestor Gundappa who is 3 resident of Hungunta village was taken by Shivappa from Hungunta and that Gulam Mohiuddin was called from the bazar of Shahabad where Shivappa happened to meet him.

These witnesses have attested not merely the agreement Ex. I but also the sale deed Ex. III.

16. Both Shivappa and Gundappa speak in general terms about the execution of Ex. I in the house of Mohamad Hussain at Shahabad after conversation or discussion about the terms of the transaction which, according to Shivappa, occupied one or two hours. Neither of them mentions any dates though to both of them Exs. I, II and III were shown, their respective signatures on which they identified and admitted. Both of them say that the sale deed was executed one year after the agreement Ex. I. The deposition in examination in chief of Gulam Mohiuddin is also in general terms. He also mentions no dates but- states that the sale deed Ex. III was executed one year after the agreement Ex. I. In fact, the narration of events in the course of the examination in chief of all these three witnesses is almost identical. In his cross-examination Gulam Mohiuddin deposed as follows:

"Has the defendant 2 executed the land in favour of defendant? I do not know. I have heard that the defendant 1 has filed a suit against the defendant 2. After the institution of suit by defendant 1 the- agreement had been executed. I do not remember the date of the agreement deed and of the receipt. Conversation taken in the house. The defendant 2 has called and taken me. I have no

friendship with the defendant nor I did any joint business with him. I have given evidence on behalf of plaintiff in another case. For the execution of sale deed

myself, and Gundappa and plaintiff and defendant had gone to Gulbarga by the Mail train of 4 P.M. and at once we went to the house of defendant's sister and amount was given". (Sic)

Thereupon the Advocate for Mohamad Hussain sought the permission of the Court to cross-examine his own witness. The Court, however, refused permission.

17. This is all the oral evidence adduced by Moha-

mad Hussain in support of his case relating to Ex. I. He himself did not step into the witness-box.

18. The trial court did not examine or discuss the evidence in any detail nor did it consider the probabilities of the case. The manner in which it dealt with this important question of fact can be seen from the following extracts from his Judgment!

"When the owner of the land himself says that he has as per agreement deed sold the suit land to plaintiff, then the statement of defendant No. 1 who is third person and is not even a party to agreement that the agreement had not been executed is entirely baseless"

"From the statements of Gundappa and Gulam Mohiuddin it becomes established that defendant No. 2 Shiv appa had agreed to sell the suit land to the plaintiff Mohamad Hussain, for a consideration of Rs. 2601/- and out of that sum he received Rs. 25/- as advance money. The agreement deed Ex. No. 1 was executed before them and the said deed bears their signature. The witnesses after seeing the agreement deed dated 25th Ardibehesht, 45-F document Ex. No. 1 in file No. 2/1 1951 A.D. have identified It. There is no Important difference In the evidence of these witnesses in connection of the subject- matter. The defendant No. 1 did not produce any defence evidence against it. Therefore the issue No. 1 is decided in favour of plaintiff", (sic). The proposition made by the trial Court that a mere statement by Shivappa who Is himself the owner Is sufficient to establish the case of Mohammad Hussain is clearly unacceptable. His further statement that there is no important difference or discrepancy in the evidence of the witnesses is obviously mistaken. There is in the cross-examination of Gulam Mohiuddin what in actual effect is not a mere discrepancy but a statement which is totally destructive of Mohamad Hussain's case.

19. Much stress appears to have been placed on behalf of Ladle Saheb on what Gulam Mohiuddin had stated in his cross-examination. The learned appellate Judge, however, did not attach any value to it but disposed of the argument with the following observations:

"While interpreting any document the contents of It should be looked into as a whole; interpretation of a sentence cut out from its content is not proper, this

witness in his examination in chief has deposed that he was present at the time of execution of agreement and sale deed as well. The cross-examination commenced with a question regarding the agreement in favour of defendant 1 and in that connection some question was put to which the above answer was given by the witness. It is not clear which agreement was in view of the witness. It is a fact that the sale deed executed after the suit by defendant 1 was instituted. The agreement of sale bears a date previous to the date of filing the suit. Therefore it cannot be safely interpreted that the witness meant agreement that is the sale deed".

20. He proceeded to state that defendant Ladle Saheb had not produced any evidence to prove his allegation of Ex. I having been antedated and wound up the discussion " by stating "I do not like to go against this finding of fact given by the lower court."

It is obvious from the above extracts from his judgment that the learned appellate Judge has misdirected himself into thinking that appreciation of oral evidence is in no manner different from interpretation of a document. The suggestion that the witness might have been under some misapprehension or confusion seems to us to be too farfetched in the face of the clear record made by the trial court. It is no doubt true that the first question to the witness in the cross-examination related to the agreement in favour of Ladle Saheb. But, that by the agreement executed after the institution of Ladle Saheb's suit the witness meant the agreement in favour of Mohamad Hussain, viz., Ex. I, is clear from the immediately following sentences in his deposition to the effect that he did not remember the date of the agreement and the receipt, that the conversation had taken place in the house and that Shivappa had called and taken him.

The reference to the house is obviously to the house of Mohamad Hussain in Shahabad to which Shivappa took him calling him from Shahabad bazar, and the conversation referred to is the conversation which preceded the execution of the agreement and the receipt, Exs. I and II, to which conversation reference is made in the examination in chief of not only this witness but also Shivappa and Gundappa. Further, the fact that Mohamad Hussain's Advocate immediately sought permission of the court to cross-examine his own witness also makes it clear "that the witness in cross-examination had given answers which were damaging to the case of Mohamad Hussain.

21. We should also refer to the evidence of another witness for Mohamad Hussain, viz., Bandage Patel, who was apparently examined to prove that Ladle Saheb had notice of Shivappa having executed an agreement in favour of Mohamad Hussain before agreeing to sell the property to him. In his examination in chief this witness who is the patel of Hungunta village states:

"At the time of the agreement of sale, I was not present. When I had gone to Shaliabad Shivappa had told me about it. Shivappa met me on the road. There is a Kirana shop of -Dadle Saheb at Shahabad. And on the very day Ladle Saheb

also met me at his shop. I had said before Ladle Saheb that It was the half No. of Gopal Kai Khait, which Shivappa had given to Mohamad Hussain."

Apparently what Mohamad Hussain sought to prove by this evidence was that on the very day of execution of his agreement Ex. I this witness Bandagi Patel had told Ladle Saheb about it. In cross-examination however, he deposes as follows:

"I have not seen the agreement deed of Shivappa. Ladle Saheb had filed a suit against Shivappa. When the suit was going on, Shivappa told me that I have executed an agreement to Mohamad Hussain. What Shivappa had told Mohamad Hussain, I do not know."

22. If what the witness stated in his examination in chief, viz., that Shivappa told him of Ex. 1 on the very day of its execution, is taken along with what he states in his cross-examination, viz., that when Shivappa told him of Ex. I Ladle Saheb's suit was pending, the clear inference is that Ex. I must have been executed after the institution of Ladle Saheb's suit. That is exactly what Gulam Mohiuddin states in the course of his cross-examination.

23. The position therefore is that out of the three

witnesses examined by Mohammad Hussain (besides of course Shivappa), two have completely given up his case and have in cross-examination given answers which fully support the case of Ladle Saheb that agreement Ex. I was executed after the filing of his suit for specific performance and deliberately antedated.

24. In the light of the clear admissions extracted from the plaintiffs witnesses which go to show that Ex. I must have been executed after the institution of Ladle Saheb's suit, the criticism by both the lower courts that Ladle Saheb did not enter the box or adduce independent evidence appears to be unjustified and could furnish no reason for accepting the plaintiff Mohamed Hussain's case. In the circumstances, the question of notice obviously becomes immaterial. There was nothing therefore on which Ladle Saheb himself was required to speak as a witness.

25. It has been argued on behalf of Mohamad Hussain that when Shivappa was deposing on his behalf, not a single question, nor even a suggestion, has been put to him that Ex. 1 was executed during the pendency of Ladle Saheb's suit and deliberately antedated. Apart from the obvious futility of making suggestions of the type mentioned above to Shivappa who was strongly supporting the case of Mohamad Hussain, the argument, in our opinion, " loses all force if one remembers that Mohamad Hussain himself did not get into the witness box to speak in support of the documents on which he relies.

26. The probabilities of the case also, In our opinion are in support of Ladle Saheb's case that Ex. I could not have been executed before the institution of his suit for specific performance. The consideration agreed to be paid under Ex. I is said to be Rs. 2601/- whereas the consideration agreed to be paid by Ladle Saheb under Ex. VIII was only Rs. 2000/-. It is against all human probabilities to

think that the owner of a property who has already agreed to sell his property at a certain price would think -of entering into (sic) another person to sell the sama property for a lower price. Normal cases which one comes across are cases where subsequent agreements of sale fire entered into for a higher price than the one secured by the prior agreement. It is faintly suggested on behalf 01 Mohamad Hussain that the inducement to enter into a second or subsequent agreement with Ladle Saheb was the immediate payment of Rs. 4007- as advance as against the advance of Rs. 25/- by Mohamad Hussain.

We do not think that there is anything of value to Mohamad Hussain's case in this circumstance. On the contrary, the circumstance that Ladle Saheb felt obliged to file a suit for specific performance whereas Shivappa voluntarily executed a sale deed in favour of Mohamad Hussain for a price higher than that offered by Ladle Saheb would indicate that Shivappa was induced or temple by the higher price offered by Mohamad Hussain to sell the property to him and also assist him to defeat the claims of Ladle Saheb. It has been further argued that the case of antedating Ex. I is improbabilised by the fact that it was not only produced along with the plaint in the suit but its execution and date were mentioned so early as on 20th August 1336 when Mohamad Hussain made an application to implead himself in Ladle Saheb's suit. There would have been some- force in this argument if the production or the first mention of Ex. I had been before the filing of Ladle Saheb's suit.

In actual event, however, the first mention of the agreement Ex. I was two months after the filing of the suit by Ladle Saheb, and the dismissal of Mohamad Hus-sain's application to implead himself in Ladle Saheb's suit was closely followed by the execution of the sale deed Ex. III in his favour and the consent decree for transfer of patta in his name. In any view of the matter, therefore, the conduct of Mohamad Hussain examined in the light of the circumstances strongly supports the suggestion on behalf of Ladle Saheb that everything relating to" the sale of the property in favour of Mohamad Hussain took place after he had filed his suit for specific performance.

27. On the question of fact, therefore, we are clearly of opinion that both the Courts below were in error in deciding the relevant issues in favour of Mohamad Hussain while the effect of the oral evidence examined in the light of the probabilities is entirely opposed to his case.

28. We hold that Mohamad Hussain has failed to establish either that Ex. I had been executed before Ex. VIII or that Ladle Saheb was ever aware of the execution of Ex. I when he entered into an agreement with Shivappa under Ex. VIII, and that the probabilities are all in favour of the view that Ex. I was executed after Ladle Saheb had Instituted his suit for specific performance.

29. On this finding of fact, no further questions Of law regarding the application of the doctrine of "lis pen-dens" can arise or call for examination. However, because the case has been placed before a Full Bench for the express purpose of

considering the questions of law and we have heard full arguments thereon, we propose to indicate briefly our opinion on the Question of law raised.

30. Although the case is governed by the Transfer of property Act of the erstwhile State of Hyderabad, the provisions thereof which are relevant to the present case have been read out to us and we find that they are not in any respect different from the corresponding provisions of the Indian Transfer of property Act. The Transfer of property Act deals with the doctrine of "lis pendens" in Section 52, the material portion of which reads as follows:

"During the pendency in any court having authority 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,"

31. Admittedly the sale deed Ex. III in favour of Mohamad Hussain was executed during the pendency of Ladle Saheb's suit for specific performance of the agreement Ex. VIII. It is not disputed that the Court which tried the suit was a competent court having authority to try that suit, nor is it alleged that the suit was in any manner collusive. The only remaining question before Section 52 can be applied is whether a suit for specific performance may be said to be a suit in which any right to immovable property is directly and specifically in question; That it is such a suit is well established. Mr. Krishna Rao for the appellants has, however, cited in support of it the following cases:

Mati Lal Pal v. Preo Nath Mitra 9 Cal L J 96; Dulloo Singh and Others Vs. The Deputy Inspector General of Police, C.I.D. Bengal, ; Vedachari Vs. Narasimha Mudali and Others, ; Hiranya Bhusan Mukherjee and Others Vs. Gouri Dutt Maharaj and Others, and Dutt Maharaj v. Sukur Mohommed ,

and some other cases of the Allahabad and Bombay High Courts. As Mr. Ethirajulu Naidu, learned counsel for the respondent Mohamad Hussain, does not question the correctness of this position in law, it is unnecessary for us to discuss these cases in any detail. It would be enough to, extract the following short passage from the judgment of the Privy Council in the last of the cases mentioned above which was a suit for specific performance with an alternative prayer for a declaration of a charge .

"In the opinion of their Lordships there can be no doubt that in suit No. 229 a right to immovable property the leasehold on which the cinema was erected - was, in the words of the section, "directly and specifically in question" both on the claim for specific performance and alternative claim for the declaration of a charge in respect of the sum advanced. The broad purpose of Section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in bona fide proceedings. To apply any such test is to misconceive the object of

the enactment,"

32. We should also observe parenthetically that we find it difficult to accept the proposition stated in *Dulloo Singh and Others Vs. The Deputy Inspector General of Police, C.I.D. Bengal*, to the effect that when a decree for specific performance is passed transferring title to the plaintiff, that title relates back to the date of the agreement on which the suit is based.

33. Prima facie, therefore, there can be no doubt that the sale in favour of Mohamad Hussain is affected by "lis pendens" and that therefore he cannot get rid of the decree for specific performance obtained by Ladda Saheb.

34. It is, however, argued on the footing of the agreement of sale pursuant to which Mohamad Hussain obtained conveyance was one anterior in date to the institution of the suit that the same must be viewed not as a transfer of property during the pendency of the suit by merely the perfection or completion of a pre-existing right and that therefore the doctrine of "lis pendens" cannot operate to imperil the title conferred by the sale. The strongest support for this proposition is sought in the following passage occurring in the judgment of the Supreme Court reported in *Bishan Singh and Others Vs. Khazan Singh and Another*, :

"The doctrine of "lis pendens" applies really to transfer "pendente lite", but it cannot affect "a pre-existing right. If the sale is a transfer in recognition of a pre-existing and subsisting right, it would not be affected by the doctrine as the said transfer did create a new right "pendente lite"; but if the pre-existing right became unenforceable by reason of the fact of limitation of otherwise, the transfer, though ostensibly made in recognition of such a right, in fact created only a new right

"pendente lite","."

35. That passage however, in our opinion, has to be read in the light of the facts of that case and the discussion of the "law contained in the earlier portion of the judgment. The case was one of competition between two sets of pre-emptors, each claiming pre-emption under the law prevailing in Punjab. In the earlier part of the judgment, their Lordships have examined the principle of law relating to pre-emption in Punjab and summarised the position as follows:

"1. The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right.

2. The pre-emptor has a secondary right or a remedial right to follow the thing sold.

3. It is a right of substitution but not of repurchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee.

4. It is a right to acquire the whole of the property sold and not a share of the property sold.

5. Preference being the essence of the right the plaintiff must have a superior right to that of the vendee or the person substituted in his place.

6. The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."

After discussing the effect of the Punjab Pre-emption Act on the pre-existing general law of Punjab relating to preemption, their Lordships refer to the decisions of the Punjab High Court bearing on the question as to how the doctrine of "lis pendens" is affected or modified by the law of pre-emption. Their Lordships refer particular to three Full Bench rulings of the Lahore High Court viz., those reported in *Mod Chand v. Ganga Jal* ILR 11 LA 258 : AIR 1930 Lah 356, *Mt. Sant Ram v. Teje Singh* ILR (1946) Lah 487 : AIR 1946 Lah 142 and *Mohammad Saddiq v. Ghasi Ram* ILR 1947 Lah 213 : AIR 1946 Lah 322. The law as established by that Full Bench rulings and accepted as correct by the Supreme Court may be briefly stated thus: The doctrine of "Lis Pendens" does apply to suits for enforcement of the right of pre-emption. But, before the plaintiff in a pre-emption suit gets a decree in enforcement of his right of preemption, it is open to the vendor and the vendee in the transaction of sale giving rise to the plaintiff's right of pre-emption to defeat the plaintiff by the vendee surrendering the bargain in favour of another person having the right of pre-emption arising out of the same sale, either equal to or superior to that claimed by the plaintiff.

In such a case, the transaction pending suit whereby the other person with equal or superior right of preemption gets the property is not a transfer at all pending suit but merely has the effect of substituting the pre-emptor in the place of the vendee defendant. Because he has a right equal to or superior to that of the plaintiff which he has succeeded in enforcing before the plaintiff gets a decree, such successful exercise of the right of pre-emption defeats the right claimed by the plaintiff. If however, the second pre-emptor or the pre-emptor other than the plaintiff in a suit has lost the right of pre-emption by omitting to enforce it within the period of limitation prescribed therefore and he obtained a surrender from the defendant's vendee after the expiry of the period, the surrender to him is no longer a substitution but an actual repurchase or transfer.

Such a transfer pending suit will be affected by "lis pendens". In the case reported in ILR (1947) Lah 213 : AIR 1946 Lah 322, the second pre-emptor had an agreement of sale in his favour before the institution of the suit and the sale deed was executed after his right of pre-emption got barred by limitation. The Full Bench of the Lahore High Court held that he could not escape the operation of the doctrine of lis pendens. The same view was accepted by a Full Bench of the High Court of East Punjab in the case reported in *Wazir fill Khan v. Zahir Ahmad Khan* AIR 1949 E P 193. As already stated their Lordships of the Supreme Court accepted the law laid down by these Full Benches to be correct and made "the statement of principle cited above and relied upon by Mr. Ethirajulu Naidu with the following express preamble thereto:

"In view of the aforesaid four Full Bench decisions -- three of the Lahore High Court and the fourth of the East Punjab High Court -- a further consideration of the case is unnecessary. The settled law in the Punjab may be summarised thus,"

(36) From what is stated above, It Is clear that the expression "pre-existing right" In the above extract was not intended by their Lordships to apply to all types ol rights but only to the right of a pre-emptor in Punjab which has not become barred by limitation, the irndar- lying principle being that a surrender to such a pre-emptoi in recognition of his right is not a transfer at all but a mere substitution of one purchaser by another.

37. Another case relied upon by Mr. Ethirajulu Naidu Is the decision of a single Judge of the Bombay High Court sitting on the Nagpur Bench reported in Chand Mohammad v. Murtuza Khan Md. Mustafa Khan AIR 1951 Bom 194. in that case the question of lis pendens did not arise at all. The facts were that the owner of a pro perty entered Into an agreement of sale with the plaintiff therein In respect of that property on 3rd September 1945 but actually sold the property to the first defendant there in on 5th September 1945. Later, at the insistence of the plaintiff, the owner executed another sale deed on 6th December 1945 in favour of the plaintiff. The plain-tiff then filed the suit for declaration that he was the owner and that the first defendant had acquired no title under the sale deed dated 5th September 1945 in his favour. In holding in favour of the plaintiff on the strength of Section 40 of the Transfer of property Act and Section 91 of the Trusts Act, the High Court expressed the view that there was no reason to suppose that the plaintiff should enforce" his right only by a suit for specific performance and that in the circumstances of the case, viz., that the owners having executed the conveyance in his favour the plaintiff was absolved from the necessity of filing such a suit.

With great respect, we are unable to see how either Section 40 of the Transfer of property Act or Section 91 of the Indian Trusts Act could be so read as to ignore the title actually acquired by the first defendant in that case by the sale in his favour dated 5th September 1945. The very principle of Section 40 of the Transfer of Pro- perty Act which permits an obligation arising out of a contract to be enforced against a transferee with notice thereof shows that the transferee has acquired title but that the said title is burdened with the previous obliga tion of the transferor of which he, the transferee, had notice. Likewise, Section 91 of the Indian Trusts Act also proceeds on the footing that the person who acquir ed the property with notice that another person has enter- ed into a contract affecting that property does acquire title to that property but imposes on him the obligation to hold the property for the benefit of the other person to the extent necessary to give effect to the contract provided that the contract is one of which specific perfor mance can be enforced.

38. The correct position in law, in our opinion, is one on which a Bench of the Madhya Pradesh High Court decided the case reported in Munnial Shyamle and Another Vs. Bhaiyalal Hazari and Others, . The facts of that case are similar to

the facts of the present case. In that case also there were two agreements of sale executed by the owner of a property and a sale deed executed by him pursuant to the earlier of the agreements during the pendency of a suit for specific performance of the second agreement. The " suit for specific performance was decreed whereupon the purchasers under the first agreement were dispossessed. Thereafter the purchasers under the first agreement brought a suit for a declaration that the decree for specific performance was not binding on them. The Bench of the High Court, after examining the cases relied upon by the plaintiffs in that case, held that the sale in favour of the plaintiffs in that case having been executed during the pendency of the defendant's suit for specific performance was clearly affected by the doctrine of lis pendens.

39. In the result, this second appeal is allowed and Mohamad Hussain's suit dismissed. Mohamad Hussain should pay the costs of the first defendant Lade Saheb (now represented by the appellants) in all the courts.

40. Appeal allowed.