

(1971) 10 KL CK 0002
In the High Court Of Kerala
Case No : Second Appeal No. 664 of 1968

Marath Veettil Raghavan Nair

APPELLANT

Vs

Nediyadath Bhagyalakshmi Amma and Others

RESPONDENT

Date of Decision : 21-10-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97
Transfer of Property Act, 1882 — Section 52

Citation : AIR 1972 Ker 125

Hon'ble Judges : P. Subramonian Poti, J

Bench : Single Bench

Advocate : K. Kuttikrishna Menon and A.P. Chandrasekharan, for the Appellant;
T.S. Venkiteswara Iyer and P.K. Balasubramoniam, for the Respondent

Final Decision : Dismissed

Judgement

P. Subramonian Poti, J.—This appeal at the instance of the second defendant in the suit arises from a suit for declaration that a compromise decree entered into between defendants 1 to 3 on the one hand and defendants 4 to 6 on the other, in O. S. 481 of 1956 of the Munsiff's Court of Alathur is not valid and binding on the plaintiff. The consequential relief prayed for in the suit is one of setting aside the order passed in execution of that compromise decree on E. A. 605 of 1960, directing delivery of possession of the plaint property from the plaintiff after removing the obstruction by the plaintiff to the delivery. It is the plaintiff's case that pending the disposal of the suit O. S, 481 of 1956 defendants 5 and 6 who were in possession of the property at that time as tenants of the 4th defendant, the jenmi, put the plaintiff (I am referring in this judgment to the parties with reference to their position in this suit unless otherwise indicated) in possession in part performance of an agreement of sale of the property to the plaintiff and that behind her back defendants 4 to 6 on the one hand and defendants 1 to 3 on the other who were the plaintiffs in that suit compromised the suit authorising the plaintiffs in that suit to take delivery of the property through Court. Even before the compromise was recorded by court, the plaintiff herein appeared in the suit

and objected to the compromise. But, naturally, as a stranger to that suit, her objection was not countenanced. The compromise was recorded and the suit was decreed in terms thereof. Plaintiff would contend that the compromise was entered into fraudulently and collusively to defeat the interests of the plaintiff, and defendants 5 and 6 having parted with their possession under an agreement of sale were no longer competent to enter into a compromise whereby they purported to convey possession to the 4th defendant by way of surrender of the leasehold. It is the plaintiff's case that actually no such possession was conveyed. The plea of defendants 1 to 3 is that the compromise decree was not brought about by any fraud, that the plaintiff was never in possession of the property and therefore plaintiff could not have successfully resisted delivery in execution of the compromise decree. The 4th defendant who was supported in his defence by defendants 5 and 6 contended that defendants 5 and 6 had surrendered possession of the property to him at the time of the compromise and subsequently the property was leased to defendants 1 to 3 and 8. It is contended that the plaintiff having taken possession, if at all, during the pendency of the earlier suit, the right of the plaintiff was subject to the result of that suit and therefore her claim to possession will be hit by *lis pendens*. Of course, if that be the case, plaintiff cannot contend to be in independent possession of the suit property on the date of delivery, and therefore, her interest would not be sufficient to enable her to obstruct the delivery of property effected in pursuance of the compromise decree-In that event the suit must fail. Therefore one of the questions which naturally arose for decision in the suit was whether the transaction in favour of the plaintiff was hit by *lis pendens* and it is one of the main questions that I have to decide here.

2. The trial court held that plaintiff had failed to prove her possession of the property pursuant to the agreement of sale and further held that the agreement was hit by the provisions of Section 52 of the Transfer of Property Act, so that the plaintiff did not derive any right, title or interest justifying her obstruction in execution of the decree in O. S. 481 of 1956. The plaintiff challenged the decree before the appellate court. The appellate court came to a conclusion different from that reached by the trial court. It found that plaintiff obtained possession pursuant to the agreement of sale and was in possession thereof on the date of delivery. It further found that though the agreement of sale was pending the suit O. S. 481 of 1956, it would not be hit by the doctrine of *lis pendens*.

3. Before I consider the main contention raised here, namely whether the plaintiff's possession under the agreement of sale is hit by the rule of *lis pendens*, I have to consider whether plaintiff did actually get possession and was in possession on the date of delivery. As a prelude it is necessary to refer to certain other circumstances to understand the situation in which the compromise was entered into in O. S. No. 481 of 1956.

4. The plaintiff property belonged in *jennm* to the *illom* of the 4th defendant. It is said to have been leased to one Kunhiraman Nair who, in turn, is said to have

sub-leased the property to the 7th defendant and his brother. To evict the sub-lessees 4th defendant and Kunhiraman Nair jointly instituted O. S. 307 of 1946 of the Munsiff's Court of Alathur. That was compromised and as a result the 4th defendant obtained actual possession of the property. Thereafter, by a lease deed dated 28-7-1956, he leased the, property to defendants 5 and 6 and thus defendants 5 and 6 came into possession of the property. Thereupon defendants 1 to 3, as plaintiffs, filed a suit O. S. 481 of 1956 of the Alathur Munsiff's Court claiming certain rights as the Desakars of Kuzhalmannam alleging that the compromise decree was invalid and inoperative and claiming that the rights of Desakars were not affected by the decree. In effect the claim to title was independent of defendants 5 and 6 and. according to them, they were entitled to recover the property from defendants 5 and 6 on the strength of their title. Later, after defendants 5 and 6 had executed Ext. A2 in favour of the plaintiff agreeing to sell the property for Rs. 500/- and receiving Rs. 300/- out of this, the compromise was entered into between defendants 4. 5 and 6 on the one hand and defendants 1 to 3, who were the plaintiffs in that suit, on the other. Ext. A2, according to the plaintiff, was followed by possession as provided therein so much so that though defendants 5 and 6 purported to surrender their lease-hold right under the compromise, they could not convey any possession to the 4th defendant jenmi. Defendants 1 to 3 who were the plaintiffs in that suit who claimed title and on that basis claimed recovery in that suit, gave up their claim and conceded the title of the 4th defendant. But the compromise provided that the 4th defendant who was said to have come into possession by the surrender by defendants 5 and 6 was to lease out the property to defendants 1 to 3 and the 8th defendant representing the Desakaras. Therefore, apparently the 4th defendant claimed to be in possession and claimed to have leased out the property to defendants 1 to 3 and 8. Nevertheless the compromise provided that on its basis defendants 1 to 3 and 8 may execute the decree and take recovery of possession through court, a provision which was apparently unnecessary if those defendants obtained possession by the compromise. It is pursuant to this decree, copy of which is Ext. A7 and which is based upon Ext. A8 compromise, that attempt was made to take delivery in execution, which attempt was sought to be obstructed by the plaintiff, though unsuccessfully.

5. Before I go into the question of *lis pendens* and its applicability to the facts of this case, I have to consider whether the plaintiff was in possession on the date of obstruction, and if so, under what right plaintiff was in such possession. This is a matter in controversy. Apparently, based on the statement in the compromise petition that defendants 5 and 6 had surrendered the leasehold right to the 4th defendant, it is claimed that plaintiff was never in possession and that notwithstanding Ext. A2 the defendants were in possession. But it is pointed out that the plaintiff is none other than the sister of the 5th defendant whose husband is the 6th defendant. Ext. A2 letter which is considered as the agreement of sale mentions the agreement entered into between the parties to sell the property to the plaintiff for a consideration of Rs. 500/-and further

mentions that Rs. 300/- out of this had been received as advance. There is also a statement in that document that plaintiff was put in possession and that she was to look after the pro-perty from that date. The case is not that such possession was not as possession by a person who had been put in possession under an agreement of sale, but that no Possession whatsoever was given to the plaintiff under this agreement. There is no reason why the statement in Ext. A2 about handing over of possession to the plaintiff has to be doubted. Apparently, therefore. I should assume that the plaintiff was put in possession pursuant to Ext. A2. But it is pointed out that the near relationship of the 5th defendant and the plaintiff is a circumstance which the court must take note of. It has to be noticed that the plaintiff had come up with her objection to the compromise even before the court acted on the compromise. In those circumstances, any collusion between defendants 5 and 6 on the one hand and the plaintiff on the other could be ruled out. That apart, there is another significant circumstance. If, in fact, 4th defendant obtained possession by surrender from defendants 5 and 6 notwithstanding Ext. A2, and therefore was in a position to put defendants 1 to 3 and 8 in possession under the lease, one sees no logic in incorporating a provision in the compromise petition. Ext A8, for recovery of property through the help of the amin. That could have been only because they were out of possession, and they wanted to oust the plaintiff from possession of the property though plain-tiff was not a party to the compromise. Of course, it would be possible if the plaintiff was bound by the decree passed in the suit. This is a different question and with that I will deal in due course. But the provision in Ext. A8 as to the recovery of the property through court, a property, which according to the compromise itself, could have been put in the possession of the lessees if the lessors were in possession, indicates to my mind the fact that plaintiff was in possession on the date of the compromise. It is also apparent that such possession of the plaintiff was under the agreement of sale. Ext. A2. It is true that the document was taken pendente lite and if the rule of pendente lite applies, there is no case for the plaintiff. If it does not apply, then plaintiff's possession is independent of the parties to the suit and therefore she would be entitled to obstruct recovery of the property from her in execution.

6. In this connection I have to notice a contention urged by counsel for the appellant, namely that in order to maintain an obstruction under Order 21, Rule 97 of the Code of Civil Procedure, it is not sufficient if a party shows that he had possession independent of the judgment-debtor or that he had a right to possession independent of the judgment-debtor, but he must show ap-solute title to the property. I cannot certainly accept this contention. What is required to be shown in order to maintain an obstruction to delivery of property is really possession of the person so obstructing. But such proof of possession would be of no avail unless it is further established that possession was not obtained from or under the judgment-debtor, for if it be otherwise, it would naturally be subject to the result of the suit Any transaction during the pendency of the suit would be hit by the rule of lis pendens. and therefore possession of a person obstructing,

based upon his coming into possession pendente lite, would of course be not sufficient. That is why what has to be shown is independent possession. If it is shown that his possession is not subject to the result of the decree in the case, he can maintain an obstruction irrespective of the nature of the right by which he holds such possession. It may be that his possession is that of a lessee or of a mortgagee or even of a trespasser. If he is in possession the quantum or nature of the right that he has is not material at all when one considers whether his obstruction should be upheld by a court.

7. Now I come to the main controversy between the parties and that concerns the doctrine of *lis pendens* as applicable to the facts of this case. A rather interesting question has been raised. On the facts of the case it has to be noticed that the decree in the suit pending which the obstructor came into possession under one of the defendants in the suit is a compromise decree. It has further to be noticed that in the compromise the plaintiffs who sought relief against defendants on the basis of their title save up their case as to their title. Therefore, necessarily the relief that the plaintiff obtained under the compromise decree was not in any way in recognition of the claim made in the suit. On the other hand, the claim that the defendant set up by way of defence was recognised and there was practically a conveyance of certain rights to the property by the defendants to the plaintiff under the compromise. The question is how far in such a case a transferee from one of such defendants will be bound by the decree passed in the case so as to have the claim subject to the rule of *lis pendens*.

8. De hors any authority on the subject it appears to me that the rule of *lis pendens* which is based on the doctrine that a decree obtained in a suit shall not become infructuous by reason of anything done by the parties to the suit during its pendency must necessarily be limited to cases where in any compromise entered into between the parties, the rights created or recognised in the parties are in recognition of the rights claimed in the suit. If on the other hand, such rights are beyond the scope of the controversy raised in the suit, it is difficult to invoke the application of the rule which underlies Section 52 of the Transfer of Property Act. The safeguard intended by Section 52 of the Transfer of Property Act is apparently that any immovable property in regard to which any right is directly and specifically in question cannot be so dealt with by any party to the suit so as to affect the rights of any other party thereto under any decree or order which may be made therein. The words "any decree" in Section 52 is of course of such amplitude that it may be said that it will literally take in any compromise decrees wherein the nature of the agreement reached as to rights of parties is entirely foreign to the scope of the suit. But I do not think there is justification to read the words "any decree or order" in this fashion. It must necessarily be limited by the context in which it appears in the section. The apparent object of the rule is to save a party from being denied the fruits of litigation by reason of a third party setting up rights independently, on the basis of dealings during the pendency of the litigation. If that be the object there can

be no logic or reason in extending the rule to a case as the one before me, where the compromise recognises entirely different rights than that claimed by the parties in the suit. In fact, it will be an abuse of the principle of section 52 of the Transfer of Property Act to extend it to such cases,

9. That a compromise decree is one which falls within the scope of Section 52 of the Transfer of Property Act can no longer be in doubt. On that the courts in India have spoken unanimously, but as held by the Supreme Court in Kedar Nath Lal and Another Vs. Ganesh Ram and Others, in order to apply the doctrine of *lis pendens* the proceeding must be *bona fide*. A collusive decree cannot be the basis of a plea of *lis pendens*. That is so even if it is a collusive compromise decree, I am referring to this because, at one stage of the arguments, it was also urged that the decree in O. S. 481 of 1956 must be found to be collusive and for that reason it cannot be a decree on the basis of which a plea of *lis pendens* could be founded. But I do not think that in the view I take here on the question of *lis pendens* it is necessary for me to go into that question. I will, for the sake of argument, assume that it is a decree which was not collusive and which was properly obtained and then consider whether the rule of *lis pendens* would, nevertheless, operate.

10. Lord Mac Dermott said in the decision of the Privy Council in Dutt maharaj v. Sukur Mohommed referring to the purpose of Section 52 of the Transfer of Property Act 1882, thus:

"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."

This was a case in appeal from the decision of the High Court of Calcutta in Hiranya Bhusan Mukherjee and Others Vs. Gouri Dutt Maharaj and Others, . It is necessary to refer to the facts of this case as the decision therein could then be better appreciated.

11. In a suit for enforcement of a simple mortgage defendants 2 and 3 claimed that the mortgage was not available against the property in their hands. At the time the mortgage was taken by the plaintiff, there was a suit pending in the Court of the Subordinate Judge of Asansol in which a right to the property which was the subject-matter of the mortgage was directly and specifically in question. That suit was by defendants 2 and 3 in the later suit as plaintiffs and was based upon an agreement entered into by defendants 2 and 3 with the owner of the property, first defendant in that suit to transfer to them a moiety share in the property and to execute a deed of conveyance in regard to such share. That agreement had been acted upon. But the conveyance was not executed. The claim was, therefore, for specific performance of the agreement. The suit ended in a compromise decree after the date of the mortgage in favour of the plaintiff. Under the compromise defendants were to obtain a charged decree for Rs.

18,500/- against the owner first defendant in respect of the property which was the subject-matter of the mortgage. Pursuant to that the property was brought to sale and purchased by defendants 2 and 3 as decree-holders therein and that was confirmed. Therefore, apparently, the mortgage taken by the plaintiff was during the pendency of the suit for specific performance. It was a compromise decree that was passed in that case. Of course referring to that aspect of the case, the Court observed that since the decision in *Bharat Ramanuj Das v. Srinath Chandra* ILR 49 Cal 220 : AIR 1922 Cal 358 the question whether or not a consent decree falls within the scope of Section 52 of the Transfer of Property Act had always been taken by that Court to have been settled. The further question that engaged the attention of the learned Judges of the Calcutta High Court in that case was whether the mortgage in favour of the plaintiff could be said to be *pendente lite* when the compromise was one not in recognition of the right of the plaintiff therein for specific performance, but to a decree for charge on the property. In this connection the Court noticed that though the main prayer was for specific performance, alternatively there was a prayer in the suit that a decree may be given for money by sale of the property. It was contended by counsel for the plaintiff in that case 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 the decision of the Madras High Court in *Paruchuri Rattamma Vs. Surugutchi Seshachalam Sarma and Others*, was also relied on. The learned Judges distinguished the case before the Madras High Court and in so distinguishing observed:

"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*."

In the case before the Madras High Court a Hindu wife claimed maintenance from her husband and she appears to have claimed a charge on the estate of the husband without scheduling the properties in the plaint. The Court took the view that in a case where a widow claims maintenance from the deceased husband's coparceners, a right to immovable property came into question even without any specific claim in the suit to a charge on the property, but where no such charge was obtainable, if the decree grants a charge it will be operative only from the date of the decree. It would be a matter of construction of the particular decree. That is how the Madras decision, was distinguished.

12. On the facts of the case before Their Lordships of the Calcutta High Court *Hiranya Bhusan Mukherjee and Others Vs. Gouri Dutt Maharaj and Others*, they construed the decree itself as one recognising the charge in regard to the property and the learned Judges observed in that case thus:

"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."

13. I was referring to the above decision in such detail since reliance has been placed on that decision by both sides as if that decision supports their respective cases. But I understand the decision only to lay down the rule that where the decree creates rights operative from the date of the decree as pointed out by them by reference to the facts of the Madras case, the rule of *lis pendens* will have no application in regard to any transaction before the date of the decree, but where the decree is one in settlement of the existing rights to property such adjudication may be taken to be operative not merely from the date of the decree. That was the distinction on facts that the learned Judges drew so far as the case before them was concerned from that before the Madras High Court. There, though the suit was mainly for specific performance, plaintiff also wanted a charge in the alternative, and therefore, that was a right to the property which was litigated in the suit. It was not a case of plaintiff's rights being not found by the court. When this came up before the Privy Council in *Dutt maharaj v. Sukur Mohommed*, after referring to the broad purpose of Section 52 of the Transfer of Property Act, their Lordships considered the scope of the words "any decree or order which may be made therein" and their Lordships said-

"First, it was said that this decree accorded rights which were not claimed in the plaint and was, so to speak, outside the scope of the litigation. Their Lordships are unable to accede to this submission. It may well be that Section 52 does not contemplate a decree or order which is entirely alien to the issues raised between the parties. The wording is-- "any decree or order which may be made therein," that is, in the suit or proceeding. But it applies to a compromise decree and such a decree cannot, by reason of its very nature, be expected invariably to reflect the precise relief claimed. Here the plaint sought, as an alternative to specific performance, a charge on the property in question. In substance the compromise decree provided for that relief and the fact that the plaintiffs, by the terms of the compromise, relinquished their rights under the agreement of 8-6-1932, cannot, in the view of the Board, lead to a different conclusion," (Underlining is mine).

It is evident from these observations of their Lordships of the Privy Council that they indicated the possible view that Section 52 does not contemplate a decree or order entirely alien to the issues raised between the parties. The case before me is one where the decree is entirely alien to the issues raised between the parties. No doubt, the Privy Council has not finally expressed its view on this question. But independently I have taken the view which has been indicated by the Privy Council in that decision as a possible view on this question.

14. What I have expressed here has been more emphatically expressed by Ameer Ali, J. in the decision in *Ramdhone Bulakidas Vs. Kedarnath Mohata* and

Others, . The learned Judge said, discussing the scope of the term "any decree or order" in Section 52 of the Transfer of Property Act as follows:

"The relevant question to my mind, adopting the language of Sir G. Rankin, is what is the length of the Court's arms. So far as the English cases are concerned (see (1887) 35 Ch. D. 297 and Dart on Vendors and Purchasers), it appears to me that the doctrine does not extend to the case of any order whatsoever. On the contrary it does appear to be applicable only to orders appropriate (to use a neutral word) to the suit having regard to the nature of the property involved and the nature of the proceedings. In other words, the arm of the Court is not unlimited, not capable of unlimited extension.

In my view, for what it is worth, the section, although in general terms, does limit its own operation. It must be a suit in which the rights to immovable property are in issue; the order must be an order relating to rights to such property, and the transaction which will give place or be made subject to the order of the Court must be one which derogates from the other parties' rights to the property in suit.

What I mean is this. A cannot transfer his interest in X so as to affect any right in X which the Court might have established in favour of B. Therefore that any order which the Court might have made as to the right of B in respect of X will override or prevail over any alienation by A. I think however that the order of the Court must relate to rights which the parties claim, or which they might have claimed in the property X. The Court cannot create proprietary right in B on grounds distinct from the property itself."

I am in respectful agreement with the view taken by Ameer Ali, J. I have not been referred to any decision which holds any view to the contra.

15. On the facts of the case, therefore, it is not possible for me to find that Ext. A-2 is vitiated by lis pendens. That is because, while in the suit reliefs were claimed on the basis of the title of the plaintiff that case has been given a go-by. The title and possession of defendants 4, 5 and 6 was accepted and a new right was created in favour of the plaintiff in that suit under a lease. These show that while the plaintiff virtually failed in the suit, there was a transfer or assignment of the right by the successful defendants in that suit. The plaintiff in the present suit is a transferee from defendants 5 and 6 and therefore the rule of lis pendens will not apply in regard to Ext. A-2.

16. In view of what I have stated above it follows that the second appeal is to fail. It is dismissed with costs.