

(1960) 08 MP CK 0039

In the Madhya Pradesh High Court

Case No : Letter Patent Appeal No. 102 of 1958

Munnilal Shyamle and Another

APPELLANT

Vs

Bhaiyalal Hazari and Others

RESPONDENT

Date of Decision : 29-08-1960

Acts Referred:

Transfer of Property Act, 1882 — Section 52, 54

Citation : AIR 1962 MP 34 : (1963) ILR (MP) 702 : (1962) MPLJ 142 : (1961) 6 MPLJ 191

Hon'ble Judges : T.C. Shrivastava, J; S.P. Bhargava, J

Bench : Division Bench

Advocate : B.L. Seth, for the Appellant; R.K. Pandey, for Respondents 2 and 3, for the Respondent

Judgement

Shrivastava J.

This Letters Patent appeal has been filed against the judgment of a single Judge of this Court (Chaturvedi J.) in Second Appeal No. 278 of 1957.

The suit out of which that second appeal arose was filed by respondents 1 and 2 (Bhaiyalal and Bhajni) against the appellants Munnilal and Ramdayal as defendants 1 and 2 and respondent No. 3 Bharosa as defendant No. 3. For convenience we shall refer to respondents 1 and 2 as the plaintiffs and the appellants Munnilal and Ramdayal as the defendants.

The subject-matter of the suit was 29.29 acres of land, situated in Khiria Khawas, Tahdil Rebli District Sagar, as also a house in that village. These properties belonged to Bharosa (respondent No. 3). On 30-9-1953 he contracted to sell these properties to the defendants. On 3-10-1953 the defendants gave a notice to the plaintiffs and others that they were purchasing the suit properties from Bharosa. On 2-12-1953 they filed a suit for specific performance against Bharosa and that suit was decreed. In April 1955, the defendants, dispossessed the plaintiffs from the land in execution of the decree obtained in the suit for

specific performance.

The plaintiffs" (respondents 1 and 2) case was that on 20-9-1953, i.e., 10 days prior to the contract in favour of the defendants, Bharosa had contracted to sell the suit properties to them and had taken Rs. 600/- as part payment towards the sale price. The agreement was to execute a sale-deed within two months from that date. Such a sale-deed was executed in their favour on 25-1-1954. They continued in possession of the suit properties thereafter till they were dispossessed in April 1955 by the defendants. The plaintiffs, therefore, prayed that the decree obtained by the defendants in the suit for specific performance of the contract was not binding on them and they were entitled to get back possession of the suit properties.

The defendants resisted the suit on the ground that the contract, dated 20-9-1953, was really entered into to defeat their claim on the basis of the contract dated 30-9-1953. According to them, it was an ante-dated document without consideration. They further contended that the sale-deed, dated 25-1-1954, which was executed during the pendency of the suit for specific performance, was hit by Section 52 of the Transfer of Property Act and was not, therefore, binding on them.

The trial Court dismissed the suit upholding the contentions of the defendants that the plaintiffs" contract was ante-dated and was entered into on 2-10-1953 after the contract with the defendants and with full knowledge of that contract. The Court also held that as the transfer was pendente lite, the plaintiffs were bound by the result of the suit for specific performance. The lower appellate Court, however, reversed these findings of the trial Court and concluded that the agreement, dated 20-9-1953 was real, genuine and for consideration. It further held that the defendant"s took the subsequent agreement, dated 30-9-1953, with the knowledge of the agreement in favour of the plaintiffs. Accordingly, it held that the doctrine of lis pendens did not apply to case and u/s 40 of the Transfer of Property Act the defendants could not claim possession of the lands as against the plaintiffs. The suit was accordingly decreed.

In second appeal, though the appellants had raided several grounds, the appeal was decided only on the question whether the transaction in favour of the plaintiffs was hit by Section 52 of the Transfer of Property Act. The learned single Judge came to the conclusion that that section did not apply to the facts of the case. The appeal was accordingly dismissed and it is against that decision that the defendants 1 and 2 have filed this Letters Patent appeal.

Section 52 of the Transfer of Property Act provides that the property in suit cannot be transferred or otherwise 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 requirements of Section 52 were stated to be: (i) the pendency of a suit (ii) non-collusive character of the suit, (iii) any right to immovable property being in question in that suit and (iv) the other party having

some right under the decree in that suit. If these requirements are satisfied, the other party is not bound by the transfer made during the pendency of the suit. (See *Hiranya Bhusan Mukherjee and Others Vs. Gouri Dutt Maharaj and Others*,). The doctrine with which Section 52 is concerned rests upon the 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.

As provided in Section 54 of the Transfer of Property Act, a contract for the sale of Immovable property does not, of itself, create any interest in or charge on such property. On the basis of such a contract, it is not therefore possible to contend that an interest in the property has been created. If a sale takes place in enforcement of such, a contract during the pendency of a suit, the sale cannot affect the parties to the suit. Under the English Law, a contract of sale for real property makes the purchaser the owner in equity of the estate. Such a distinction is not recognised in India. (See *Maung Shwe Goh v. Maung Inn* AIR 1916 PC 139 and also *Mohammad Saddiq v. Ghasi Ram* AIR 1946 Lah 322 (FB)). Accordingly, by a mere agreement to sell no interest in the Immovable property is created. The observations from *Blackwood v. London Chartered Bank of Australia* 1874 LR 5 PC 92 at p. 111, quoted by the learned single Judge have no application to India where the distinction between legal and equitable estate does not exist

The first case referred to by the learned single Judge is *Sheikh Bikala Vs. Sheik Ali and Others*, . In that case, a mortgage was created by the defendant prior to the institution of the suit during the pendency of which sale in enforcement of the mortgage took place. It was held that that transfer was not affected by Section 52 of the Transfer of Property Act. The reason for this is that the transfer had already taken place prior to the institution of the suit and it was only that right which was later enforced. The only principle which was laid down in that case is that rights prior to the institution of the suit are not affected by Section 52. The same principle has been laid down in *Renuka Bala v. Nagendra Nath*, AIR 1939 Cal 055, which is the second case referred to.

In the third case, *Narayan Prasad v. Rajkishore* AIR 1951 Pat 613, A had agreed to grant a lease to B of a cinema theatre at a future date provided B made the necessary repairs to make it fit for purpose of cinema shows within a period of 9 months. B entered into possession under the agreement to make the repairs. C who had notice of this contract took a lease from A of the theatre within the period of 9 months. On A's failure to give possession, C sued A for specific performance and obtained a decree. During the pendency of the suit, A executed a registered lease in favour of B in pursuance of the prior agreement. B then brought a suit against C for injunction restraining him from executing the decree against him. It was held, under these circumstances, that B was not bound by the result of the suit filed by C as his rights were in enforcement of a prior agreement.

It appears from the discussion in paragraph 4 of that judgment that the agreement to lease was actually treated as a lease, as Section 2 of the Transfer of Property Act defines a lease to include "an agreement to lease". According to that definition, an agreement to lease is not just an agreement but it "effects an actual demise and operates as a lease". Under these circumstances, the agreement in that case operated as a transfer of property and the doctrine of lis pendens did not therefore apply, as the subsequent transfer was merely to enforce the earlier transfer. That case, therefore, fell within the principle laid down in the Orissa and the Calcutta cases, cited in the earlier paragraph.

The fourth case which has been cited by the learned single Judge is Akki Guru Basappa and Another Vs. Vuluvathi Setra Santhappa and Others, . In that case, a sale-deed was executed prior to the suit for specific performance, but it was registered after the institution thereof. In such a case, the registration of a document under the Registration Act operates from the date of the document and therefore in that case the transfer really took place before the suit. Naturally, "therefore, the doctrine of lis pendens did not apply, as the case did not at all fall within Section 52 of the Transfer of Property Act. The observations of their Lordships that the mere filing of a Plaint by any person in respect of the property already conveyed would not prevent the vendee from enforcing his rights under the document, which had been executed, fully disposed of the case before them. And the further observations that the vendee in such a case could sue for specific performance of the contract of sale were unnecessary and are in the nature of obiter. The respondents 1 and 2, in the instant case, do not derive any help from that decision.

In the cases relied upon by the learned single Judge we do not find anything directly laying down that a sale after the suit in pursuance of an agreement before the suit is protected against the operation of Section 52 of the Transfer of Property Act

In Bishan Singh and Others Vs. Khazan Singh and Another, , their Lordships of the Supreme Court laid down the principle in the following words:

"The doctrine of lis pendens applies only to a transfer pendente lite, but it cannot affect a preexisting 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 not create new right pendente lite; but if the pre-existing right became unenforceable by reason of the fact of limitation or otherwise, the transfer, though ostensibly made in recognition of such a right, in fact created only a new right pendente lite."

In our opinion, the expression "pre-existing and subsisting" right was intended by their Lordships to refer to a transaction amounting to a transfer of interest in property and not to a mere agreement to sell.,

In Dakshinamurthi v. Sitharamayya 1958-1 Andh WR 85, the question arose in the context of a transfer of a specific item of joint Hindu family property by a co-

sharer pending a partition action in pursuance of an agreement entered into prior to that suit. It was held that the sale was hit by Section 52 of the Transfer of Property Act, though the alienee was entitled to work out his equities in the partition suit. The conclusion was supported thus:

"The terms of Section 52 are quite clear that 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 during the pendency of the suit or proceeding. The transfer u/s 54 can be effected only by a registered instrument. The facts establish beyond doubt that the sale was effected only after the institution of the suit. So, on the date of the filing of the suit, defendants 2 and 3 had a right in the B schedule properties. The fact that they entered into an agreement prior to that date to sell the properties to the 5th defendant does not affect the application of Section 52 of the Transfer of Property Act."

On a plain reading of the words of Sections 52 and 54 of the Transfer of Property Act, we have no doubt that a sale which takes place after the institution of the suit in pursuance of a prior agreement to sell, is hit by Section 52 of the Transfer of Property Act. It is not necessary that the person who is adversely affected by Section 52 should have been made a party to the suit or that he should have had notice of the suit, (see *Lakshmanan Vs. Kamal*, and *Krishnabai v. Savlaram* AIR 1927 Bom 93). The contention that respondents 1 and 2 did not have any notice of the suit, which was filed by the appellants for specific performance, has therefore no force.

Shri R. K. Pandey for the respondents points out that the lower appellate Court had found that respondents 1 and 2 had been placed in possession of the property on 20-9-1953 and the appellants had notice of their contract on 30-9-1953. Shri Pandey further contends that as the sale in favour of respondents 1 and 2 was in writing and as they were placed in possession, they had a right to contest the appellants' claim u/s 53A of the Transfer of Property Act. If the vendor himself could not claim possession from the respondents, the position of the appellants could be no better. Shri B. L. Seth, learned counsel for the appellants, on the other hand, contests the accuracy of these findings on the ground that they are contrary to the pleadings of the plaintiffs in the case and are not supported by any evidence.

As we have said earlier, the learned single Judge decided the second appeal on the abstract proposition of law that a transfer in pursuance of a prior agreement to sell cannot be affected by Section 52. The other points, which were raised in the grounds of appeal, were not considered by him, as the decision on this point was considered sufficient to dispose of the appeal. The decision in the Letters Patent appeal should be confined to examining the correctness of the point actually decided by the learned single Judge. It will not be right for us to decide all the other grounds raised in support of the appeal. Accordingly, the only proper course which should, in our opinion, be adopted in this case is to send back the case for a decision on the other points.

Accordingly, the decision of the learned single Judge dismissing the second appeal is set aside. The appeal shall now be heard as a second appeal on other grounds raised by the appellants. Costs of this Letters Patent appeal shall be borne in accordance with such orders as may be passed in second appeal in this respect.