
(2008) 07 CAL CK 0028

In the Calcutta High Court

Case No : R.V.W. No. 30 of 2008 and C.O. No's. 3291 of 2007 and 1238 of 2008

Padmavati Estate Pvt. Ltd.

APPELLANT

Vs

Smt. Kusum Agarwal and Others

RESPONDENT

Date of Decision : 04-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 10, Order 47 Rule 1, 146
Constitution of India, 1950 — Article 227
Specific Relief Act, 1963 — Section 16
Transfer of Property Act, 1882 — Section 52

Citation : (2008) 3 CALLT 312

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : S.P. Roy Chowdhury, Arindam Banerjee and Surabhi Banerjee, for the Appellant; Partha Sarathi Bose and Sanghamitra Bagchi, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirmay Bhattacharya, J.—In this application the petitioner/applicant has sought for review of the order passed by this Court on 30th January, 2008 in CO. No. 3291 of 2007.

2. For proper appraisal of this application for review, short background of this case is required to be taken note of. Accordingly, the background of this case, in brief, is given hereunder.

3. The opposite party No. 1, as plaintiff, filed a suit for specific performance of contract against one Ranendra Kishore Mazumdar, the predecessor-in-interest of the defendants/opposite parties, for enforcement of the agreement for sale dated 20th May, 1983 wherein the plaintiff/opposite party No. 1 agreed to purchase 55 Kothas of property with structure free from all encumbrances at a sum of Rs. 5,51,000/- from the said Ranendra Kishore Mazumdar. Several other incidental reliefs including mandatory injunction were prayed for in the said suit.

During the pendency of the said suit the original defendant died and upon his death the defendants/opposite parties being his successors and legal representatives were added as defendants in, the said suit by way of substitution.

4. The original defendant filed his written statement in the said suit contending inter alia that he had never agreed to sell the undivided half share in the suit property to the plaintiff for a sum of Rs. 5,51,000/- on the basis of the alleged agreement dated 20th May, 1983. The defendant, thus, claimed that since there was no agreement for sale between the parties, the question of performance of the alleged agreement specifically does not arise. In the additional written statement filed by Anjali Mazumdar, one of the substituted heirs of the original defendant, it was disclosed that the suit property has been sold by the defendants to one Padmavati Estate Pvt. Ltd. on 30th, September, 2003 and since then, the purchaser became the owner of the said suit property. It was further disclosed therein that the possession of the suit property was also delivered to the said purchaser.

5. In this background, the said pendente lite transferee filed an application for its addition as defendant in the said suit. Such application for addition was filed by the pendente lite transferee almost four years after the date of its purchase, without giving any explanation for such delay in filing such application. In fact, the said application was filed at a stage when the suit was matured for hearing and was at the stage of peremptory hearing. Though the pendente lite transferee claimed in the said application that the said transferee is a bona fide purchaser and is in possession of the property since the time of its purchase, but, it has not been disclosed in the said application that the said pendente lite transferee purchased the suit property in good faith and without notice of the suit.

6. The learned Trial Judge rejected the said application for addition of party by an order No. 222 dated 2nd August, 2007.

7. The propriety of the said order was challenged by the said pendente lite transferee before this Court, by filing an application under Article 227 of the Constitution of India which was registered as CO. No. 3291 of 2007.

8. After considering various decisions which were cited at the Bar in support of the respective contention of the parties, this Court held that since no independent interest was created in the suit property in favour of the pendente lite transferee by virtue of such purchase, such pendente lite transferee whose purchase is hit by Section 52 of the Transfer of Property Act, cannot be impleaded as a party in a suit for specific performance of contract where the only consideration before the Court was to find out as to whether there was any enforceable contract between the parties and further as to whether the plaintiff succeeded in proving his readiness and willingness for purchasing the suit property as per Section 16(c) of the Specific Relief Act or not. This Court, thus, held that the presence of the pendente lite transferee was not necessary for consideration of the dispute involved in the suit. This Court also held that in view

of Section 52 of the Transfer of Property Act, the decree which will be passed in such a suit against defendants (vendors) will be binding upon the pendente lite transferee. As such, such pendente lite transferee is neither a necessary party nor a proper party in the present suit. Long delay in filing such application for addition of party was taken note of, by this Court. Effect of the absence of specific pleading as to whether such transferee purchased the suit property without notice of suit or not, was also taken note of, by this Court, very seriously. Holding as such, the aforesaid revision application was rejected by this Court on 30th January, 2008.

The instant application for review was, thus, filed by the said pendente lite transferee.

9. It is settled law of the land that review cannot be treated as an appeal in disguise. There are marked differences between the scope and/or ambit of consideration in appeal and in review. The scope of consideration in appeal is much more wider than that of review. Review has its own limitations as prescribed under Order 47 Rule 1 of the Code of Civil Procedure. All errors of fact and law in the judgment and/or order of the Court cannot be corrected by the same Court by review. However, if such error is apparent on the face of the record and when such error can be detected at a glance and without detailed investigation and/or scrutiny at length, such error which is apparent on the face of the record, can be corrected by the same Court under order 47 Rule 1 of the Code of Civil Procedure.

10. Here is the case where Mr. Roy Chowdhury, learned senior counsel appearing in support of this application submits that since the error in judgment is apparent on the face of the record, such error can be rectified by this Court by way of review.

11. What is such error which is apparent here on the face of the record ?

12. According to Mr. Roy Chowdhury, no Court has yet declared that the pendente lite transfer without leave of the Court, is a void transfer. He contended that if the pendente lite transfer is not a void transfer, then no Court can refuse such transferee's prayer for its addition in such a suit, particularly when such transferee will be ultimately affected if a decree for specific performance of contract is passed in favour of the plaintiff against his vendor namely the defendants in this suit.

13. Relying upon a decision of the Hon''ble Supreme Court in the case of Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, Mr. Roy Chowdhury submitted that even the Hon''ble Supreme Court while considering as to what should be the proper form of decree in a suit for specific performance of contract, held in the said decision that proper form of a decree in a suit for specific performance of contract demands issuance of direction upon the subsequent transferee to join in the conveyance along with the vendors so that the title which resides in him can also be conveyed together with the vendor's title in

favour of the prior agreement holder for making his title perfect. Mr. Roy Chowdhury further pointed out from the said decision that the Hon''ble Supreme Court further held therein that the subsequent transferee is not required to be joined for any special covenant made between the prior transferee and his vendor; All he does is to pass on his title to the prior transferee.

Mr. Roy Chowdhury relied upon another decision of the Hon''ble Supreme Court in the case of R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, wherein the earlier decision of the Hon''ble Supreme Court as referred to above, on the question as to what should be the proper form of decree in a suit for specific performance of contract, was followed.

14. Mr. Roy Chowdhury also relied upon another decision of this Court in the case of Chhotalal Hariram and Anr. v. Dilip Kr. Chatterjee and Ors. reported in AIR 1976 Cal 337 to show that for conveying perfect title to the plaintiff, both the vendor and the subsequent transferee are required to be joined in the deed of conveyance to convey perfect title to the vendee.

15. Relying upon those citations, Mr. Roy Chowdhury submitted that when the subsequent transferee is required to be Joined in the conveyance for perfecting the title of the vendee, no Court can say that the presence of such subsequent transferee is not necessary in the suit for specific performance of contract. Mr. Roy Chowdhury, thus, submitted that if the aforesaid decisions of the Hon''ble Apex Court as well as of this Court are taken into consideration, then there will be no confusion with regard to the necessity of the presence of the subsequent transferee in the suit for specific performance of contract as in the absence of such subsequent transferee, no direction can be passed upon him for Joining him in the conveyance to be executed in favour of the prior agreement holder.

16. Mr. Roy Chowdhury, thus, contended that this aspect of the law which was long settled by the Hon''ble Supreme Court as well as by this Hon''ble Court was not taken into consideration by this Court while disposing of the said Civil Revisional Application. According to Mr. Roy Chowdhury, if any decision is passed by any Court by overlooking the settled binding judicial precedent, such decision will be an erroneous decision and such omission is an error apparent on the face of the record and such error can well be corrected by the Court under Order 47 Rule 1 of the Code of Civil Procedure.

17. Mr. Roy Chowdhury further submitted that apart from the power of review under Order 47 Rule 1 of the Code of Civil Procedure, High Court being the Court of records is incidentally a Superior Court of plenary jurisdiction and is competent to determine scope of its Jurisdiction and, thus, it has not only the power but also has a duty to correct any error apparent on the face of the record. In support of such submission Mr. Roy Chowdhury cited a decision of the Hon''ble Supreme Court in the case of M.M. Thomas Vs. State of Kerala and Another, .

18. Mr. Roy Chowdhury further submitted that review is also permissible when it

is found that if an error is permitted to stand, retention of such error will lead to failure of justice. Mr. Roy Chowdhury, thus, submitted that when the foremost requirement of achieving justice can be achieved by way of review, the Court should not feel any hesitation to correct its own judgment by review. In support of such submission he also relied upon another decision of the Hon''ble Supreme Court in the case of Rajender Kumar and Others Vs. Rambhai and Others, .

19. By relying upon the following decisions of the Hon''ble Supreme Court, Mr. Roy Chowdhury further submitted that even in those decisions, the Hon''ble Supreme Court not only recognised the subsequent transferees as representatives of the transferor but, in fact, held by taking into consideration of various provisions of the CPC including the provisions contained in Section 146, Order 1 Rule 10 and Order 22 Rule 10 of the CPC that when a pendente lite transferee is bound by the proceeding taken against his vendor by another party, Justice requires that such pendente lite transferee should be given an opportunity to protect his right:

1. In the case of Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, .
2. In the case of Khemchand Shankar Choudhari and Another Vs. Vishnu Hari Patil and Others, .

20. Thus, Mr. Roy Chowdhury invited this Court to review its earlier judgment for doing justice to the parties.

21. Mr. Bose, learned senior counsel, appearing for the plaintiffs/opposite parties opposed this review petition by challenging its maintainability on the ground that since there is no error apparent on the face of the record, the earlier judgment of this Court cannot be reviewed under Order 47 Rule 1 of the Code of Civil Procedure. Mr. Bose contended that the error apparent on the face of the record has been decided by the Hon''ble Supreme Court as well as by this Hon''ble Court on numerous occasions and in no occasion it has been held either by the Hon''ble Supreme Court or by this Hon''ble Court that if the Counsel failed to discharge his duties by not pointing out the judicial precedent on a subject and as a result there of, if any erroneous decision is passed by any Court, such erroneous decision can be corrected by way of review on the basis of subsequent discovery of those judicial precedents. In support of such submission Mr. Base relied upon the following decisions of the Hon''ble Supreme Court:

1. In the case of Haridas Das Vs. Smt. Usha Rani Banik and Others, .
2. In the case of Kewal Chand Mimani (d) by Lrs. Vs. S.K. Sen and Others, .

22. Mr. Bose further submitted that even when two views are possible on a particular point but one of such views was accepted earlier resulting an erroneous conclusion, such erroneous conclusion cannot be corrected by review on the ground that the other possible view is much more acceptable and if that view was accepted then the conclusion could have been otherwise. Mr. Bose pointed out that even under such circumstances it was held by the Hon''ble

Supreme Court in the case of Harinagar Sugar Mills Ltd. and Anr. v. State of Bihar and Ors. reported in 2006 7 SCC 509 that when two views are possible and one view was accepted by discarding the other view, non-acceptance of the other possible view cannot be a ground for review as it does not fall within the scope of review jurisdiction.

23. Mr. Bose further contended that when the Hon''ble Supreme Court in various decisions held that the pendente lite transferees are not necessary party in a suit for specific performance of contract and such transferee also cannot be Joined as a party in such a suit, this Hon''ble Court did not commit any illegality in refusing to add the pendente lite transferee herein as defendant in the instant suit. Mr. Bose further contended that apart from the decisions which were relied upon by this Hon''ble Court at the time of passing the earlier decision, there were other decisions of the Hon''ble Supreme Court wherein an identical view was taken with regard to the claim of the pendente lite transferee for his addition in the suit.

24. Relying upon a decision of the Hon''ble Supreme Court in the case of Sanjay Verma Vs. Manik Roy and Others, Mr. Bose submitted that when in an identical situation the Hon''ble Supreme Court held that the pendente lite transferee whose transfer is hit by Section 52 of the Transfer of Property Act cannot be allowed to be joined as a party in the suit, it cannot be contended that this Hon''ble Court committed an error in refusing to allow such a pendente lite transferee as a party to the suit by overlooking the earlier judicial precedent. Mr. Bose submitted that there is no direct precedent in this regard wherein it was held that, in fact, such pendente lite transferee should be joined as a party in a suit for specific performance of contract.

Mr. Bose also relied upon other decisions of the Hon''ble Supreme Court in the case of Bibi Zubaida Khatoon Vs. Nabi Hassan Saheb and Another, as well as in the case of Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, wherein the Hon''ble Supreme Court uniformly held that even in a suit of different nature, the pendente lite transferee whose transfer is hit by Section 52 of the Transfer of Property Act, cannot be joined as a party in the suit.

25. Mr. Bose of course cited various other decisions of the Hon''ble Supreme Court, Privy Council's decisions and Federal Courts' decisions to appraise this Court about the scope of review but, in my view, those citations need not be dealt with herein specifically as those are simply repetition of the decisions which were cited by Mr. Bose as mentioned above.

26. Mr. Bose, thus, submitted that this is not a fit case where this Court is required to review its own decision, as there is no error apparent on the face of the record.

27. Let me now consider the submission of the counsel of the respective parties in the facts of the instant case. There is no conflict on this proposition of law that even an error apparent on the face of the record cannot be rectified and/or corrected by way of review under Order 47 Rule 1 of the Code of Civil Procedure.

Mr. Roy Chowdhury contended that here is the case where error is apparent on the face of the judgment as this Court while deciding the said Civil Revisional Application overlooked the judicial precedent on the subject wherein it was uniformly held that the title of the vendee cannot be perfected unless both the vendor and the pendente lite transferee are Joined in the conveyance to convey perfect title in favour of the vendee and. as such, for complete adjudication of the dispute, the presence of the pendente lite transferee whose transfer is not void as such, cannot be held unnecessary.

28. Mr. Bose, on the other hand, is very specific in his submission that none of the authorities which were cited by Mr. Roy Chowdhury with regard to the form of the decree in a suit for specific performance of contract, is a direct authority on the point as to whether a pendente lite transferee whose transfer is hit by Section 52 of the Transfer of Property Act is a necessary party in a suit for specific performance of contract or not.

29. On consideration of the aforesaid submission of the parties and also by giving anxious consideration to the decisions relied upon by Mr. Roy Chowdhury, this Court holds that the decisions which were cited by Mr. Roy Chowdhury is not a direct authority on the question as to whether a pendente lite transferee whose transfer is hit by Section 52 of the Transfer of Property Act, can be allowed to be joined as a party in a suit for specific performance of contract or not. Thus, it cannot be held that those decisions are direct precedent on the issue in question.

30. On the contrary, this Court finds that the decisions which were referred to by this Court in its earlier judgment as well as the decision which Mr. Bose has now relied upon in the case of Sanjay Verma v. Manik Roy (supra) declare unequivocally and in uniform voice that the transferee pendente lite whose transfer is hit by Section 52 of the Transfer of Property Act, is not a necessary party in a suit for specific performance of contract and, as such, such a pendente lite transferee cannot be allowed to be joined in the suit. In the case of Sanjay Verma v. Manik Roy (supra), I find that the learned Trial Judge did not allow the prayer of such pendente lite transferee for his addition in the suit for specific performance of contract but such order of the learned Trial Judge was set aside by the High Court and thereby the pendente lite transferee was allowed to be joined in the suit but the Hon"ble Supreme Court while deciding the appeal arising therefrom, set aside the order of the Hon"ble High Court and thereby restored the order of the learned Trial Judge by holding as follows:

Para 12: The principles specified in Section 52 of the Transfer of Property Act are in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. The principle of *lis pendens* embodied in Section 52 of the Transfer of Property Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying Section 52 is that a litigating party is exempted

from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court.

Thus, if the aforesaid decision is read conjointly with the decision cited by Mr. Roy Chowdhury in the case of Durga Prasad and Anr. v. Deep Chand and Ors. (supra), in the case of Ramesh Chandra v. Chuni Lal (supra.) as well as in the case of Chhotalal Hariram and Anr. v. Dilip Kr. Chatterjee (supra), then this Court has no hesitation to hold that even without joining the pendente lite transferee whose purchase is hit by Section 52 of the Transfer of Property Act, they can be directed to joined with the vendor in the conveyance which is required to be executed for conveying perfect title in favour of the vendee.

31. Since such transferee pendente lite whose transfer is hit by Section 52 of the Transfer of Property Act has no independent interest in the subject matter of suit and since the decree which will be passed ultimately in the suit against the vendor will also bind such subsequent transferee, presence of such subsequent transferee is not necessary for complete adjudication of the dispute involved in the suit.

32. The decision of the Hon"ble Supreme Court in the case of M.M. Thomas (supra) has no doubt declared that if any decision is taken without taking note of the relevant provision of law, then such decision will be erroneous and such error which is apparent on the face of the record can be corrected by the Court, by review. But, in the present case, the said principle has no application as it is nobody's case that this Court, while disposing of the said revisional case, passed any order which de hors any provision of law.

33. Mr. Roy Chowdhury submitted that passing of an order by overlooking the settled judicial precedent also rests on the same footing but such submission cannot be accepted in the facts of the instant case, as this Court does not find that even the Hon"ble Supreme Court in the case of Durga Prasad and Anr. (supra) has decided in clear term that the pendente lite transferee whose transfer is hit by Section 52 of the Transfer of Property Act is required to be added in a suit for specific performance of contract. Of course it was decided therein that the subsequent transferee should be directed to be joined with the vendor in the transfer deed which will be executed in favour of the vendee for perfecting his title, but, that was a case where the subsequent purchasers were added in the suit itself and thus, they were all before the Court. In the said case the subsequent purchasers were all pre-suit transferees. The status of the subsequent purchaser where transfer is hit by Section 52 of the Transfer of Property Act was neither under consideration before the Hon"ble Supreme Court in the said decision, nor any decision was given thereon, by the Hon"ble Supreme Court.

34. By drawing an analogy from those decisions of the Hon''ble Supreme Court, on the point of proper form of decree Mr. Roy Chowdhury submitted that there is no law which provides that even a stranger who is not a party to the suit, can be directed to do something in terms of the decree. Thus, it necessary follows that even the pendente lite transferee whose transfer is hit by Section 52 of the Transfer of Property Act should be joined as party in such a suit as the proper form of decree to be passed in such a suit as settled by the Hon''ble Supreme Court in the said decision, should be kept in mind.

35. Though this Court finds some substance in the submission of Mr. Roy Chowdhury but still then when this Court does not get any clear exposition of law with regard to the addition of such pendente lite transferee in such a suit in the said decision and on the contrary when the Hon''ble Supreme Court in various decisions cited by Mr. Bose including the recent decision of the Hon''ble Supreme Court in the case of Sanjay Verma (supra) has declared that such pendente lite transferee cannot be allowed to be joined in such a suit, this Court has no hesitation to hold that there is no error apparent on the face of the judgment which is presently under review before this Court.

36. The other decisions which were cited by Mr. Roy Chowdhury on this point have also no application in the instant case, as those decisions were given in different types of suits such as partition etc. which rests on a different footing altogether. In a partition suit, the subsequent transferee and/or pendente lite transferee can represent his vendor and even in his absence his share can be represented by such transferee unlike in the suit for specific performance of contract wherein the subsequent transferee cannot represent his vendor and as such it was decided by this Hon''ble Court in the case of Chhotalal Hariram (supra) that abatement of the suit cannot be avoided even in the presence of the subsequent transferees in the suit, when the legal heirs of the vendor are not substituted in the suit in proper time.

37. To summarise, this Court concludes by recording that Mr. Roy Chowdhury has failed in his attempt to cite any direct authority on this point showing that the pendente lite transferee whose transfer is hit by Section 52 of the Transfer of Property Act, is required to be Joined as party in a suit for specific performance of contract.

38. On the contrary, the decisions cited by Mr. Bose squarely applies in the facts of the instant case. That apart, in a very recent decision of the Division Bench of the Hon''ble Allahabad High Court in the case of Sahajad Ahamed Khan and Ors. v. Md. Ahamed and Ors. reported in 2008(3) ALJ 191, this Court finds that Allahabad High Court refused to add a pendente lite transferee whose purchase is hit by Section 52 of the Transfer of Property Act in a suit for specific performance of contract by following the decision of the Hon''ble Supreme Court in the case of Sanjay Verma (supra) in a similar set of facts where such transferee applied for his addition seven years after his purchase. Here also such transferee applied for his addition, four years after his purchase without even

giving any explanation for such delay.

39. In such circumstances, this Court does not find any apparent error on the face of its earlier judgment which is sought to be reviewed herein. In my, opinion the application does not deserve any merit for consideration. The application for review, thus, stands rejected.

Re: C.O. 1238 of 2008

40. In view of the order passed by this Court on the petitioner's application for review in R.V.W. No. 30 of 2008, no further order need be passed on the instant revisional application.

The Revisional Applications is thus, disposed of with a direction upon the learned Trial Judge to dispose of the said suit as expeditiously as possible.

Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.