

(2001) 11 KAR CK 0005

In the Karnataka High Court

Case No : Regular Second Appeal No. 446 of 1984

Ramanagouda Siddanagouda Biradar and Others	APPELLANT
Vs	
Basavantraya Madivalappa Mulimani and Others	RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54
Transfer of Property Act, 1882 — Section 52

Citation : AIR 2002 Kar 96 : (2002) 1 CivCC 263 : (2001) ILR (Kar) 5474 :
(2001) 6 KarLJ 545 : (2001) 4 KCCR 441 SN

Hon'ble Judges : H. Rangavittalachar, J

Bench : Single Bench

Advocate : C.B. Srinivasan for Shantha W. Joshi, for the Appellant; K.I. Bhatta, B.S. Patil and Jayavittal Rao Kolar, for the Respondent

Final Decision : Dismissed

Judgement

H. Rangavittachar, J.—This is a plaintiffs second appeal.

2. Briefly stated the facts giving rise to the filing of this second appeal as gathered, from records are as under:

3. Plaintiff filed a suit O.S. No. 6 of 1975 on the file of the Civil Judge, Bijapur for a declaration that alienation made by defendant 6 to the suit in favour of defendants 1, 4 and 5 is not binding, and declare him as the owner of suit properties and for consequential relief of possession; Suit properties are 2 items of agricultural lands bearing Sy. No. 94/2 of Yelwar Village, Basavanabageewadi Taluk measuring 15 acres 24 guntas, 21 acres and 34 guntas of land in Sy. No. 3 of Mannur Taluk. "

4. The suit properties originally belonged to one Hanumantharaya. He had 3 sons, Ramachandrappa, Saheb Gowda, Shivasangappa. Plaintiffs are the children of Shivasangappa. After the death of Saheb Gowda, his widow adopted Basavanagowda Saheb Gowda, defendant 6 in the present suit (since deceased

by his legal representatives).

5. The said Basavanagowda Saheb Gowda (defendant 6 in the present suit) had originally filed the suit O.S. No. 67 of 1948 against the present plaintiffs and others on the file of the Civil Judge, Bijapur, for a declaration that he is the adopted son of Saheb Gowda and for partition and separate possession of his 1/3rd share in the property of Hanumantharaya and obtained an ex parte preliminary decree of partition on 12-12-1949. Subsequently, he filed a suit special DAE No. 40 of 1953 for drawing final decree which was allowed and the matter was sent to the Special Deputy Commissioner for effecting partition u/s 54 of the Code of Civil Procedure.

6. This ex parte decree came to be challenged by the present plaintiffs 3, 4 and 5 by filing a suit O.S. No. 12 of 1956 against defendant 6 and others before the Civil Judge, Bijapur for declaring that the ex parte, decree in O.S. No. 67 of 1948 is a nullity.

7. During the pendency of the suit O.S. No. 12 of 1956, defendant 6 under registered sale deed dated 31-10-1956 sold properties bearing block No. 4 i.e., lands in Mannur Taluk in Sy. No. 3 to defendant 1 who in turn sold it to defendant 2. Similarly, he sold properties bearing Sy. No. 94/2 in favour of defendant 4 under a registered sale deed dated 12-9-1962, who in turn sold it to defendant 5 on 17-1-1968.

8. The suit O.S. No. 12 of 1956 came to be dismissed. The dismissal of the suit was challenged by the present plaintiffs 2, 3 and 5 by filing a regular first appeal in R.A. No. 23 of 1965. This appeal ended in a compromise under which, the plaintiffs recognised the adoption of 6th defendant-Saheb Gowda and his right to 1/3rd share in the joint family. However, the suit properties that was allotted to the share of defendant 6 in the suit O.S. No. 67 of 1948 was reallocated to the share of the plaintiffs, as a mode of effecting partition and a compromise decree was accordingly drawn on 11-7-1966. This compromise decree was filed in the suit O.S. No. 67 of 1948 and a final decree was accordingly redrawn in terms of the compromise decree by the Civil Judge on 19-4-1974.

9. Plaintiff contended on the basis of the above facts that they have acquired title to the suit properties as per the compromise. The alienations made by defendant 6 in favour of defendants 1, 4 and 5, having taken place during the pendency of the suit O.S. No. 12 of 1956, was hit by the doctrine of lis pendens, u/s 52 of the Transfer of Property Act. Since defendant 6 by then had expired, his L.Rs were brought on record. They supported the case of the plaintiffs.

10. The purchasers of the suit properties, defendants 1, 4 and 5 contested the suit. They defended the alienations made in their favour by defendant 6, by contending that the compromise decree obtained in R.A. No. 23 of 1965 was a collusive one between the plaintiffs and defendant 6 and hence the doctrine of lis pendens has no application. It was also contended that the preliminary decree in O.S. No. 67 of 1948 having culminated in drawing of the final decree and

effecting a partition u/s 54 of the CPC, the Civil Court had become functus officio and it could not have amended the preliminary decree in O.S. No. 67 of 1948.

11. The learned Civil Judge who tried the suit accepted the case of the plaintiffs and decreed the suit. He has held that the compromise decree in O.S. No. 67 of 1948 establishes the fact that plaintiffs have acquired title to the suit properties. Since the alienations were made by defendant 6 during the pendency of the suit O.S. No. 12 of 1956, the same is hit by the doctrine of lis pendens, therefore the alienations are not valid in law.

12. The said judgment and decree was challenged by defendants 1 and 2 by filing R.A. No. 16 of 1979 and defendants 4 and 5 by filing another appeal R.A. No. 17 of 1979.

13. These two appeals were heard by the learned Additional District Judge, Bijapur and by his judgment and decree dated 20-1-1984 has reversed the judgment and decree of the Trial Judge and consequently dismissed the suit. He has held that whenever an alienation is made during the pendency of suit, the burden is on the person who takes benefit of the section to show that the compromise was not collusive. On facts, learned Appellate Judge has held that the compromise decree entered into between the parties in R.A. No. 23 of 1956 was a collusive one. He has relied on the following circumstances to reach the said conclusion. According to him, the circumstances being:

(I) In the compromise decree, one of the clauses mentions "During the pendency of the suit O.S. No. 12 of 1956, the plaintiffs have alienated other properties, and defendant 6 has alienated some properties. These alienations are not binding on the non-alienating parties", which clause demonstrates that the plaintiffs even being aware of the alienations made by defendant 6 still insisted that these alienated properties should be allotted to their share.

(II) The compromise decree, does not indicate the shares allotted to each of the branches when essentially the suit of the 6th defendant in O.S. No. 67 of 1948 was a suit for partition.

(III) Even though the compromise decree was passed by the District Court in R.A. No. 23 of 1956 on 15-8-1956, the said decree was not presented for necessary action before the Civil Judge in O.S. No. 67 of 1948 for a period of 4 years which certainly raises a doubt in the mind of the Court about the genuineness of the compromise.

(IV) That in pursuance to the alienations made, necessary mutations were effected in favour of defendants 1, 2, 4 and 5 and they were exercising all acts of ownership for a considerable period of time i.e., from 1956 in one case and 1962 in another case and the compromise petition was filed by the parties after an inordinate delay even though the parties were fully aware of such situations.

14. Learned District Judge also rejected another argument advanced on behalf of the plaintiffs that in order to attract the provisions of Section 52 of the Transfer

of Property Act, the collusion referred to in the section should be at the inception of filing of the suit and not later by holding that if collusion is established in obtaining a decree that is also enough compliance of Section 52 of the T.P. Act.

15. This judgment and decree of the Appellate Judge is challenged by the plaintiffs in this appeal.

16. At the time of filing the appeal, this Court admitted the appeal to consider the following substantial questions of law:

(1) Is the lower Appellate Court having held that the sale of suit properties in favour of defendants 1 to 5 being subsequent to the filing of O.S. No. 12 of 1956 and having held that the suit properties were the subject-matter of litigation in O.S. No. 12 of 1956 rights in holding that the sale of the suit properties not hit by the provisions of Section 52 of the T.P. Act?

(2) Is the lower Appellate Court right in holding that the suit is barred by limitation in view of Article 65 of the Limitation Act through the suit O.S. No. 12 of 1956 and O.S. No. 67 of 1948 were pending till 19-4-1974?

Though the appeal was admitted to consider the above two questions, but the arguments were addressed only on the substantial question of law at No. 1 i.e., regarding the application of the doctrine of lis pendens to this case. Hence only substantial question of law at No. 1 is considered.

17. The submission of Sri C.B. Srinivasan, learned Counsel for the appellant being that in order to escape the rigour of Section 52 of the Transfer of Property Act, it must be shown that the suit filed by the parties was at its inception collusive. If a suit filed at the inception is not collusive, even if the compromise decree passed is collusive in character, then the provisions of Section 52 of the Act is applicable in all its force. He relied on the decision of the Supreme Court in Nagubai Ammal and Others Vs. B. Shama Rao and Others, .

18. Per contra, Sri Jayavittal Rao Kolar and B.S. Patil, learned Counsels appearing for the respondents defended the order of the District Judge and submitted that it is not necessary for the doctrine of lis pendens to apply that the collusion referred to in Section 52 of the Transfer of Property Act must be only at the inception of filing the suit. Even where a decree is obtained by the parties by colluding with each other to defeat the rights of bona fide purchasers by a compromise or otherwise such decrees also are also hit by the doctrine and they relied on the following decisions:

(i) Ram Narain v. Nawab Sajjad Ali Khan;

(ii) Lekshmi Gnanapakiam v. Thynes Nadar Ponnian Nadar;

(iii) Moran Mar Masselious Gheevarghese II Catholicos of the East v. Most. Rev. Paulose Mar Athanasius;

(iv) Mallamma Vs. B.S. Venkataram,

(v) AIR 1928 146 (Oudh) .

19. In order to appreciate the said contentions it is necessary to refer to Section 52 of the T.P. Act. Section 52 of the Act reads as under:

"Section 52. Transfer of property pending suit relating thereto.--During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government 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 the decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose".

20. This section is an expression of the principle "pendens lite nihil in novetur" meaning "Nothing is to be changed during the pendency of the suit". It embodies an "equitable principle" and should be so construed as to effectuate its purpose. As held by the Supreme Court, in Jayaram Mudaliar Vs. Ayyaswami and Others, , "The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward".

21. Section 52 of the Act will not wipe out the effect of a sale validly executed by the person who has the authority to sell pendente lite but it is only to subordinate the rights based on the decree in the suit. As between the seller and the purchaser, the transaction is perfectly valid and operates to vest a title in the purchaser (See the decision of the Supreme Court in Nagubai Ammal's case, supra).

22. In order for application of Section 52, it is clear that a suit must be pending and it should be non-collusive in character and involves any right to immovable property and there must be a transfer by a party to the suit who has some right under the decree in the suit (See the decision of the Calcutta High Court in Hiranya Bhusan Mukherjee and Others Vs. Gouri Dutt Maharaj and Others, .

23. Thus one of the important ingredients for application of the principle of lis pendens is that the suit should be non-collusive in character. But then the further question is whether the element of collusiveness must be present necessarily at the inception of the suit or subsequently arise, it begins to operate resulting in a decree obtained either by compromise or otherwise, though the institution of the suit at the inception was honestly done. On this question, various High Courts have taken the view that even when the suit is honestly instituted but during trial or later if parties, enter into a compromise collusively and obtain a decree which affects the transaction of transfer of immovable property, then the doctrine of lis pendens has no application evidently on the principle of equity. Sufficient for my purposes to refer to few of the decisions cited at the Bar. The Travancore and Cochin High Courts in the case of Lekshmi Gnanapakiam, supra, has held:

"The rule of lis pendens will apply to compromise decrees but will not apply only if the compromise was not result of fraud or collusion. A suit may be collusive in its very inception or a decree may be obtained by collusion in a suit which was honestly begun. When the parties to a suit enter into an agreement for the express purpose of defeating the rights of a transferee pendens lite and a decree is passed in terms of the agreement, the doctrine of lis pendens will not apply to the case".

24. The Bombay High Court in *Nathu Dhoju Gholap Vs. Ramchand Balchand*, , has also taken the view that the rule of lis pendens applies to the compromise decrees also provided, the compromise is honest and not fraudulent or collusive. It has also, been held that since appeal is a continuation of a suit, Section 52 applies even to decrees obtained in appeal, provided as stated they are not collusive. Similar is the view of the Patna High Court in the case of *Juthan Tewari and Others Vs. Parasnath Singh and Another*, , of the Oudh High Court, *Sat Narain Singh's case*, supra.

25. I am in respectful agreement with the views expressed by the Bombay and Calcutta High Courts as the doctrine of lis pendens being essentially a doctrine of equity, and fraud and collusion, being antithesis of equity, cannot be encouraged by Courts nor any decrees obtained by fraud or collusion can defeat the rights of the alienees of immovable property.

26. Sri C.B. Srinivasan has mainly relied on the decision of the Supreme Court in *Nagubai Ammal's case*, supra, in support of the contention.

27. I have gone through that decision in detail. That was a case where the Court was dealing the question whether there was any collusion between the parties at the inception of suit. This question viz., that if the suit at the inception is honest but if a decree is obtained by collusion later whether the doctrine of lis pendens applies or not had not come up for consideration. Certainly the doctrine has no applications, in all cases where the very suit is instituted by collusion between the parties so also it does not apply to compromise decrees obtained by collusion or by fraud.

28. On collusion, Appellate Judge has in detail considered the evidence and has found as a matter of fact, collusion between the plaintiff and defendants to the appeal, R.A. Nos. 16 and 17 of 1979 in entering into the compromise and obtaining a decree thereunder. No arguments are advanced by the learned Counsel for the appellant as to how these findings are riot based on evidence or against the evidence. Under the circumstances, the reasoning of the Appellate Court on this finding cannot be faulted.

29. For the reasons stated above, the substantial question of law No. 1 is answered holding that the Appellate Court was right in holding that the alienations made by defendant 6 in favour of defendants 1, 4 and 5 are not hit by the doctrine of lis pendens.

30. For the reasons stated above the appeal is dismissed with costs throughout.