
(1943) 06 BOM CK 0007
In the Bombay High Court
Case No : Second Appeal No. 370 of 1941

Ramchandra Gururao Joshi	Vs	APPELLANT
Kamalabai Sheshagirirao Sarathi		RESPONDENT

Date of Decision : 28-06-1943

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1944 Bom 191 : (1944) 46 BOMLR 358

Hon'ble Judges : Sen, J; Divatia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Divatia, J.—This appeal arises in execution proceedings of a decree for past as well as future maintenance obtained by Ambabai, a widow, against the defendants. It is a compromise decree under which certain properties having fallen to the share of the different defendants were separately charged for the amount of the widow's maintenance. We are only concerned in this litigation with one property, Survey No. 3, at Shinganapur, which in the division of the defendants' family came to the share of the first defendant and which according to the plaintiff-widow has been charged for her maintenance. This property has been purchased during the pendency of the suit from the first defendant by the present appellant who was not a party to the suit but who was made a party in the execution proceedings as opponent No. 4. This purchase took place on September 8, 1921, after the suit was filed on June 30 of the same year. On September 13, 1922, there was a compromise between the parties and on September 20 a decree was drawn up in terms of the compromise. The material portion of the decree is that "out of the amount of maintenance, defendant No. 1 is liable to pay Rs. 57, which shall be the amount of his share, and to the extent of this sum the property of his share is subject to the charge." There is no doubt, and it is conceded, that Survey No. 3 fell to his share in the partition. There is, therefore, no question of the liability of defendant No. 1. But the

appellant's case is that, although he purchased it during the pendency of the suit, the plaintiff has no right to proceed against it for several reasons.

2. It was firstly contended that there was no charge created upon that survey number because the compromise upon which the decree proceeded was to the effect that the property in possession of the defendants was to be charged and that at the time of execution this property was not in the possession of the first defendant but had come to the appellant's possession as purchaser. Secondly, the decree was not definite in creating a charge on this particular property because it only stated that the property of defendant No. 1's share was subject to the charge without mentioning this particular property. Thirdly, it was contended that the charge was not binding on the appellant because he was a bona fide purchaser for value without notice of the charge and, lastly, it was urged that the appellant had purchased the property from defendant No. 1 to pay off the latter's mortgage debt and that therefore he was entitled to be subrogated to the position of the mortgagee, and that debt being paramount to the widow's charge for maintenance, the property in the appellant's hands was not liable to be sold in execution of the decree. All these contentions have been repelled by both the lower Courts, and it is ordered that execution should proceed against the property.

3. On behalf of the appellant the same grounds which were urged in the lower Courts have been repeated here. It was contended that the provisions of *lis pendens* which apply to this case were the provisions of Section 52 of the Transfer of Property Act as it stood before the date of the amendment. Even so, however, we do not think that it would make any difference so far as the application of the old section to the facts of the present case is concerned. That section says that during the active prosecution in any Court in British India of a contentious suit or proceeding in which the right to Immovable property was in question, the property cannot be transferred or dealt with so as to affect the rights of any other party thereto under the decree. There is no doubt that the principle of *lis pendens* applies to a suit for maintenance in which it is sought to have certain properties charged for the maintenance, and the *lis* would apply to those properties if they are charged under the decree.

4. With regard to the first two contentions of the appellant we do not think that there is any substance in them at all. It is no doubt true that in the compromise application it was stated that the properties in the possession of the respective defendants should be charged under the decree. But when the decree was drawn up, and we have to look to the decree and not to the compromise application, it was clearly stated that the property of defendant No. 1's share was subject to the charge. The decree states that it was passed in terms of the compromise, but it was clearly contemplated that under the decree what was to be charged was the property which came to the share of the respective defendants. Secondly, there is no difficulty in ascertaining what the property is. It is common ground that this particular land fell to the share of defendant No. 1, and the plaintiff has also

given the various survey numbers which fell to the respective defendants" shares. It cannot, therefore, be said that the decree is in any way indefinite.

5. It is the third contention urged by Mr. Desai on behalf of the appellant that has some importance. The contention is that all that the decree created was a charge on the property and that the decree-holder is, therefore, merely a charge-holder and nothing more. Section 100 of the Transfer of Property Act provides that save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. The argument is that Section 52 must be read along with Section 100 and as controlled by it with the result that even though a charge may be created in favour of the plaintiff the latter cannot proceed against the charged property purchased pending the suit by a person who was not aware of the creation of the charge. Indeed, in such a case the purchaser would never have notice of the charge at the time of his purchase during the pendency of the suit because ex hypothes the charge would be created by the decree. The contention, therefore, amounts to this that whenever a property is sold pending the litigation and thereafter a charge is created in the decree, the charge is in all cases not binding on the transferee because at the date of his transfer he would have no notice of the charge which is going to be imposed in the decree. If this argument is correct, the plaintiff will have no remedy against the property in the hands of the appellant. But we do not think that that is the correct legal position. The underlying principle of Section 52 of the Transfer of Property Act is that no Immovable property which is the subject-matter of the litigation can be transferred or dealt with by any party to the suit to the detriment of the other party. The decree may be for possession or sale of the property or it may only create a charge on the property. But whatever the nature of the decree, it is binding on the person to whom the property is transferred during the litigation. If the decree created a charge, that charge is in all cases binding on the transferee, and the question of notice is immaterial. Section 100 of the Transfer of Property Act saves any other express provision of law. Moreover, that section would apply only when the transferee takes the property without notice of the charge, in other words, the charge must have been created before and the transfer must have taken place after the creation of the charge. But in the case of a transfer during the pendency of the litigation, the position would be the reverse. The transfer would necessarily take place before the charge is created in the decree. It is difficult to see, therefore, how the provisions of Section 100 would apply to a case of transfer during the pendency of a litigation. That section is a general provision relating to a charge and it provides, among other things, that a transferee after the charge would be affected only if he has notice of the same. It does not provide as to what might happen if the transfer takes place before the charge is created. Such a case when it happens pending the suit is covered by Section 52, under which the transfer cannot take place to the detriment of the person in whose favour the charge is created.

6. By way of analogy, we might refer to a decision of the Allahabad High Court in *Shafiq Ullah Khan v. Sami Ullah Khan* ILR (1929) All. 139. There the question was as to the relation between Section 52 and Section 41 of the Transfer of Property Act. The latter relates to a transfer by an ostensible owner of the property with the consent of the true owner. It was urged in that case that Section 52 would not apply to a case which falls u/s 41. But it was held that those two sections are mutually exclusive and that Section 41 is only a general section dealing with estoppel in the circumstances mentioned therein, while Section 52 was a special section which applies to a transfer during the pendency of a suit. On the same principle, it can be said here that Section 100 would not apply to the present case which falls clearly under the provisions of Section 52. We, therefore, think that the lower Court was right in holding that even though the appellant may be a transferee with consideration and even without notice of the pending litigation, he is bound by the charge created by the decree.

7. The last contention relates to subrogation. There is no definite finding of the lower Court that the appellant has paid off the previous mortgage. But the lower Court has proceeded on the basis that he has. Even so, the point is concluded by a recent decision of our Court in *Gangabai Pandurang Dombé Vs. Pagubai Narayan Kore*, . It was held in that case that a charge created over specific property in a decree for maintenance takes precedence over the right of a private or auction purchaser of the same property during the pendency of the suit. There is no doubt, therefore, that even if the appellant has paid off the previous mortgagee, he is bound by the charge.

8. All the four contentions urged by the appellant, therefore, fail, and the appeal is dismissed with costs.