
(2001) 08 BOM CK 0076

In the Bombay High Court

Case No : Notice of Motion No. 2280 of 2000 in Suit No. 1941 of 1999

Shantilal Jethabai Khona

APPELLANT

Vs

Anandrai Shivilal Dave and Others

RESPONDENT

Date of Decision : 13-08-2001

Acts Referred:

Transfer of Property Act, 1882 — Section 52, 52(1), 52(2)

Citation : (2002) 3 BomCR 346 : (2002) 2 MhLj 339

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : H.V. Gala, for the Appellant; Virendra V. Tuljapurkar, instructed by L.D. Shah and D.H. Mehta and C.D. Patel, instructed by Kanga and Co., for the Respondent

Judgement

F.I. Rebello, J.—This Motion by defendant No. 3 seeks amongst others reliefs, a declaration that the lis pendens notice registered u/s 52 of the Transfer of Property Act with the Sub Registrar at Bombay, on 29th April 1999, be declared as null and void, illegal and ineffective and the same be set aside. The further prayer sought is that pending hearing and final disposal of the suit, this Court be pleased to forthwith deregister the notice of lis pendens dated 29th April, 1999. There are also some other prayers. The Motion is supported by the affidavit of Pratap C. Lodaya, partner of defendant No. 3. Defendant No, 3 is the purchaser of the property from defendant No. 1. In the affidavit it is averred as to why the reliefs as prayed for should be granted. The plaintiff has filed his reply dated 5th September, 2000. In the said affidavit it is averred that the defendant's motion is not maintainable and is liable to be dismissed. The plaintiff has been replied to the averments in the affidavit in support of the Motion. It is pointed out that the 2nd defendant was a co-purchaser along with the plaintiff in the agreement entered into with defendant No. 1 for purchase of the property. Pending suit, is for specific performance of that Agreement. It is pointed out that in an earlier suit filed by the defendant No. 1 wherein both the plaintiff and the defendant No. 2 were parties, consent terms were filed and the suit against the present plaintiff

was withdrawn. The consent terms as filed in the Court did not disclose that the Defendant No. 3 had paid money to defendant No. 2 and to the 1st Defendant. The object and consideration of that deal, according to the plaintiff, is unlawful and opposed to public policy. There are various other averments which I need not refer to for the reasons set out hereinafter. In sum and substance the contention of the plaintiff is that the reliefs prayed for in the motion ought not to be granted and the Motion be dismissed.

2. The plaintiff in the suit had also taken out Notice of Motion No. 1088 of 1999. In that motion the plaintiff had sought an interim injunction against the defendants. The suit filed by the plaintiff is for specific performance of a contract against defendant No. 1. The suit is based on a contract between the plaintiff and defendant No. 2 on the one hand as the purchasers and defendant No. 1 on the other hand as the seller. The defendant No. 1 for various reasons terminated the said agreement. Defendant No. 1 thereafter filed a suit for a declaration that the termination is valid and for recovery of possession. In that suit the plaintiff and defendant No. 2 were parties. The plaintiff was served. Consent terms came to be filed therein between the defendant No. 1 and defendant No. 2 herein. Pursuant to the said consent terms the defendant No. 2 herein handed over possession of the suit property. The suit against the present plaintiff was withdrawn. The plaintiff at the relevant time was not present though served. In the Motion by the plaintiff in the present suit, considering that the defendant No. 2 has not joined the plaintiff in the suit for specific performance of the contract and further that the defendant No. 2 had handed over possession and as development had taken place on the property and also as the suit was filed with great delay subsequent to the termination of the contract by order dated 10th August, 2001, the motion came to be dismissed. It may be set out that while disposing of the Motion, this Court has taken a view that the plaintiff in the present suit considering the facts and circumstances prima facie if so entitled can claim alternative relief by way of damages in lieu of specific performance. With the above background the present motion can now be heard and decided.

Section 52(1) of the Transfer of Property Act as amended in the State of Maharashtra reads as under:--

"Transfer of property pending suit relating thereto,-- (1) 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, if a notice of the pendency of such a suit or proceeding is registered u/s 18 of the Indian Registration Act, 1908, the property after the notice is so registered 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."

The rest of the section has not been reproduced as it is not necessary for the purpose of disposing of the issue.

3. On behalf of the defendant No. 3 it is contended that though lis pendens has been registered, the defendant No. 3 as the purchaser from defendant No. 1 should be relieved of the said registration. It is contended that lis pendens can be registered irrespective proof of the strength or weakness of the case of the parties. In the instant case, however, the suit is based on an agreement in respect of which specific performance is sought. Assuming there may be charge on the property however, no relief insofar as the consideration paid under the agreement been sought. In these circumstances this would be a fit and proper case where this Court relieves the defendant No. 3 from lis pendens. Reliance has been placed on the authorities which will be adverted to hereinafter.

On the other hand on behalf of the plaintiff it is contended that there is a validly registered lis pendens in favour of the plaintiff. The object behind permitting registration of lis pendens in the course of a suit is to protect the plaintiffs interest in the suit property pending the suit. The property even if transferred or alienated in the course of the proceedings, the plaintiff has not to pursue such subsequent purchasers of the property. In such a suit if after registration of the lis pendens, the property is transferred or alienated the said transfer or alienation is not binding on the plaintiff nor does it confer a right or title in the property in the purchaser and the plaintiff is not bound to seek any relief against such third parties. They can seek possession in the suit itself. It is, therefore, contended that it is a right which can be registered irrespective of the strength of the case. In the instant case the plaintiff has registered the lis pendens after complying with the formalities as required in the State of Maharashtra. The suit filed by the defendant No. 1 was for a declaration that the termination was illegal, null and void. It has been withdrawn. No leave was sought from the Court to sue plaintiff in respect of the reliefs which were prayed for in that suit in subsequent proceedings. Possession of the property was not taken from the plaintiff. In these circumstances the Motion should be dismissed.

4. With the above background the issue before this Court can now be considered. The issue for decision under what circumstances the Court can relieve a defendant from lis pendens after it is registered and what are the terms it can impose. The purpose behind and rights flowing from registering of lis pendens u/s 52 of the Transfer of Property Act is no longer res Integra. A right to so register does not depend on the strength or weakness of the case of the plaintiffs. It is a right conferred by statute on a person who has entered into an agreement to sell. The law was long settled in the case of AIR 1948 147 (Privy Council) . While considering the issue the Privy Council considering the object of Section 52 observed as under:--

".....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 strength or

weakness of the case on one side or the other in bona fide proceedings. To apply any such test is to misconceive the object of the enactment....."

This has been reiterated by the Apex Court in the case of Kedar Nath Lal and Another Vs. Ganesh Ram and Others, , wherein the Apex Court has observed insofar as the object of the section as under:--

"On the other hand, Section 52 places a complete embargo on the transfer of immovable property, right to which is directly and specifically in question in a pending litigation....."

The Apex Court thereafter went on to observe as under:--

"Secondly, the doctrine of lis pendens applies irrespective of the strength or weakness of the case on one side or other. See AIR 1948 147 (Privy Council) . There is, however, one condition that the proceedings must be bonafide."

From the above it is clear that when the plaintiff files a suit for specific performance the statute confers on him a right to register the lis pendens after complying with the necessary formalities as contemplated under Sub-section (2) of Section 52 of the Transfer of Property Act. In the State of Maharashtra as the section has been amended there has to be compliance with those provisions.

The only test noted both by the Privy Council and the Apex Court is that the proceedings or suit must be bona fide. In other words the suit as filed is not meant to oppress the defendant or such other like cases. The plaintiff must come to the Court with a case that there is an agreement in his favour and that he is ready and willing to perform his part of the agreement and that it is the defendant who was not ready and willing to perform the part of the agreement. In the instant case on the pleadings as they stand it cannot be said that the suit as filed is not bona fide. The merits or demerits or the strength of the plaintiff as to whether he would be entitled to the relief of specific performance or otherwise is immaterial for the purpose of registering lis pendens. Therefore, in the present case in my opinion the lis pendens was properly registered and the suit being bonafide the registration has to be upheld.

5. The matter does not end there. The section itself contemplates that the Registration would be binding except under the authority of the Court and on such terms as it may impose. Therefore, even if there is a valid registration of lis pendens a power has been conferred on the Court whereby the Court can permit the transfer of the property on such terms as it may impose. In other words there is a discretion in the Court pending the suit, to relieve a party from the registration of lis pendens on such terms as it may impose. The language of the section shows that it is not a blanket power, but subject to the order by the Court in the course of the proceedings and on such terms as it thinks fit. My attention was invited to the judgment of this Court in the case of B. J. Patel v. Vadilal Dolatram and Sons and Ors., 1982 Mh.L.J. 252 . In that case also lis pendens had been registered. The plaintiff had filed a suit for specific performance of the

contract. The suit was based on an oral agreement. In opposing the relief for being relieved from *lis pendens* it was contended that the plaintiff had no cause of action. Considering the market conditions the defendant was anxious to sell the property. Several enquiries were received but the purchaser was not willing to make an agreement. The defendant also averred that on valuation it could be safely said that the fair market value of the property would be around Rs. 20.00 lacs. The plaintiff made a statement that they were willing to purchase the property for Rs. 21,33,600/- which was equivalent to the value of the property as alleged by the defendant themselves and that they would give up rest of the claim. This offer was not acceptable to the defendants. It is in this background that the Court was examining the issue whether the permission as sought u/s 52 of the Transfer of Property Act should be granted. This Court noted the absence of authorities for matters of the present kind and then observed as under:--

"This being a discretionary relief, it will depend on the several circumstances which *inter alia*, can be, the nature of the plaintiffs case and the defence, the nature of property market and the circumstance of the defendants. If the Court is convinced on the affidavits and the pleadings that even if all the evidence was led by the parties there is a very strong probability that the plaintiff will lose the matter, it will be a very important factor, possibly conclusive for granting relief. The Court will also have to consider the inconvenience and injustice that is likely to be caused to the defendants if the relief is not granted and balance it with the inconvenience and injustice that is likely to be caused to the plaintiff if the relief from *lis pendens* is granted. While comparing this comparative injustice and inconvenience, the Court must necessarily take into consideration the price at which the property is allegedly agreed to be sold originally and the present market value....."

It is, therefore, clear and which flows from a natural reading of the section itself that there is a discretion in the Court. That discretion has to be decided on the facts of each case and there cannot be any exhaustive enumeration of principles.

While considering the issue to my mind this Court must pose to itself atleast the following questions which are not exhaustive :--

- (i) Is it a requirement of the section that a party can be relieved of *lis pendens* only on a Court imposing conditions. Is imposition of condition a prerequisite?
- (ii) Whether on the facts as pleaded will be plaintiff *prima facie*, be entitled to the relief of specific performance of the contract. (iii) If the Court comes to the conclusion that specific relief cannot be granted, then whether considering the alternative relief of damages Which the plaintiff in the suit for specific performance is entitled to, whether the plaintiff should be secured.
- (iv) If to be secured should it only be the market value of the property on the date of the suit at time when the suit is filed be considered.

6. With the above background it may now be considered whether the defendant

No. 3 is entitled to the reliefs as prayed for. As noted earlier in Notice of Motion No. 1088 of 1999, after considering the facts on record, this Court came to the conclusion that the plaintiff prima facie would not be entitled to the relief of specific performance and that the plaintiff if and at all on the circumstances of the case, would be entitled to the relief by way of damages. Once that be the case, the second test has to be answered in favour of the defendant No. 3 namely that this would be a fit and proper case where this Court must exercise its discretion and relieve the Defendant No. 2 from lis pendens and permit the defendant No. 3 who has paid the owner of the property, the co-purchaser and thereafter developed the property, the right to create third party interest without being burdened by lis pendens.

7. We then come to the third question. The doctrine of lis pendens confers on the plaintiff a valuable statutory right. This right conferred does not require him to initiate proceedings against the subsequent purchasers or transfers and he is entitled to all the reliefs including possession as prayed for in the suit against all such subsequent transfers. The subsequent acts of transfer or alienation where lis pendens is registered are not binding on the plaintiff. The other aspect is that in a suit for specific performance, if the Court arrives at a conclusion that specific performance cannot be granted, then the plaintiff is entitled under the Specific Relief Act itself, to the alternative relief by way of damages. That relief again depends upon whether the Court comes to the conclusion that there is a valid agreement between the parties, but that agreement in view of the circumstances which I need not enumerate cannot be specifically performed. In the instant case there was an agreement between the parties. However, it is the plaintiff and Defendant No. 2 who were the co-purchasers. The pleadings are that the defendant No. 1 terminated the contract. The defendant No. 1 then filed a suit for declaration that the contract has been validly terminated. The plaintiff was a party in the suit as a defendant. The defendant No. 1 withdrew the said suit wherein such a declaration was sought without obtaining leave of the Court, insofar as that relief is concerned. What are the consequences of failure of defendant No. 1 in not seeking relief will be an issue to be decided on merits. The other aspect is in the matter of limitation which has been raised on behalf of the defendants. That again will be an issue on merits as to whether the suit as filed by the plaintiff can be said to be barred by limitation and/or as adverted to by the plaintiff it is within limitation. Considering these aspects and as the Court has answered the second question in favour of the defendant No. 3 and considering the language of u/s 52 of the Transfer of Property Act, if the Court seeks to relieve a party from the lis pendens the Court may do so on such terms as it may impose. This will answer question No. 1. Whether conditions need to be imposed will be based on the material before it. Ordinarily some conditions will have to be imposed, unless the documentary material on record by itself must result in holding that the plaintiff has no case. In my opinion the plaintiff on the facts of this case will have to be protected. The Court must whilst relieving a party from the registration of lis pendens do so on such terms as it may impose.

In other words there is a power to relieve. The terms to be imposed are in the discretion of the Court. The defendant No. 3 has filed an affidavit before this Court. In the said affidavit he has set out that he had paid to the defendant No. 1 as consideration for the transaction a sum of Rs. 50.00 lacs. It is also set out that defendant No. 3 settled the High Court Suit No. 591 of 1978 with defendant No. 2 by paying to defendant No. 2 a sum of Rs. 20.00 lacs. In other words defendant No. 3 valued the property on the date of the consent terms at about Rs. 70.00 lacs. The plaintiff was a co-purchaser along with defendant No. 2. Defendant No. 2 by the compromise terms gave up his rights including the right to specific performance. The date of the consent terms prima facie would be the date on which the property should be valued for the purpose of imposing terms. If, therefore, the plaintiff succeeds he would be entitled to half the consideration. Considering that, defendant No. 2 would be entitled to the other half. The defendant No. 2 has given up his right in the property by accepting compensation from defendant No. 3. Considering that in my opinion it would be just and proper that the defendant No. 3 secures the plaintiff in a sum of Rs. 35,00,000/-.

7. In the light of that the following order :--

Defendant No. 3 is relieved from registration of lis pendens, in the event the defendant No. 3 furnishes a bank guarantee in the sum of Rs. 35.00 lacs within 8 weeks from today in the name of the Prothonotary and Senior Master and to the satisfaction of the Prothonotary and Senior Master and continues to keep it valid till the hearing and final disposal of the suit and for a period of twelve weeks thereafter. This will be a term in the guarantee itself. It is further made clear that if the guarantee is not renewed before the expiry of the term of the guarantee the Prothonotary and Senior Master to invest the amounts on the guarantee being revoked in a Nationalised bank initially for a period of two years and thereafter for successive periods, pending the hearing and final disposal of the suit.

Notice of Motion disposed of accordingly.

There shall be no order as to costs.

8. Learned Counsel on behalf of the plaintiff seeks stay. The plaintiff has been secured. The property has been transferred. The building has been constructed and injunction prayed for by the plaintiff in his Motion has been vacated. In these circumstances this would not be a fit and proper case where the order of this Court ought to be stayed. Hence application for stay rejected.

Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associate/Personal Assistant of this Court.