

(2017) 05 GUJ CK 0048
In the Gujarat High Court
Case No : 1819 of 2016

USMANGANI ABDULKADAR KARBHAARI APPELLANT
Vs
AJIT INDRAVADAN THAKKAR & ORS. RESPONDENT

Date of Decision : 02-05-2017

Acts Referred:

[Transfer of Property Act, 1882](#), [Section 41](#), [Section 43](#), [Section 52](#) - Transfer by ostensible owner - Transfer by unauthorised person who subsequently acquires Interest in prop- erty transferred - Transfer of property pending suit relating thereto

Citation : (2017) 05 GUJ CK 0048

Hon'ble Judges : Rajesh H.Shukla

Bench : Single Bench

Advocate : NANAVATI, PR THAKKAR

Final Decision : Allowed

Judgement

1. Rule. Learned advocate, Shri P.R. Thakkar waives service of notice of Rule for respondent nos.1 to5.
2. The present Civil Application is filed by the applicantthird party seeking leave to appeal to file the Second Appeal challenging the impugned judgment and order in Regular Civil Appeal No.82 of 2004 by the learned 4th Additional District Judge, Bharuch dated 23.01.2015 on the grounds stated in the application.
3. As referred to in the details, Special Civil Suit No. 333 of 1993 came to be filed before the court of learned Civil Judge, Bharuch and it was dismissed in September 2004. The same was carried by way of Misc. Civil Appeal No. 23 of 1995 before the learned Assistant Judge, Bharuch and the same Appeal was allowed, by which the alienation and transfer of the suit land was restrained pending the hearing of the Suit. Though ultimately the Special Civil Suit No. 333 of 1993 came to be dismissed as stated herein above, against which First Appeal No. 82 of 2004 was filed though no stay was operating in the First Appeal. Thereafter further transactions took place as stated in detail by way of registered

sale deed executed by Kashiben in favour of Ismailbhai in the year 2004 and thereafter in the year 2008 Kashiben executed the registered sale deed dated 23.8.2008 in favour of Mohammad Ismail Patel and the entry has been mutated being Revenue Entry No. 7104. Again, said Mohammad Ismail executed a registered sale deed in favour of Siraj Hasan Vijaysinh Rana in the year 2012. The said Siraj Hasan Vijaysinh Rana further sold the land in question in favour of Usmanbhai by registered sale deed dated 29.5.2012 for which entry was mutated being Revenue Entry No. 7309. First Appeal No. 82 of 2004, which was filed against the judgment and order in Civil Suit NO.333 of 1993, was allowed. During the pendency of the proceedings, there was no injunction or stay, resulting in series of transactions, and therefore, the present Applicant - Third Party claims to be a bona fide purchaser by registered sale deed, and that the subsequent purchaser, without knowledge, has filed the application seeking leave to appeal on the grounds stated in the application.

4. Heard learned Senior Counsel, Shri S.I. Nanavati appearing with learned advocate, Shri Digant Popat for the applicant third party and learned advocate, Shri P.R. Thakkar for the respondent nos.1 to 5.

5. Learned Senior Counsel Shri Nanavati has submitted that the notice has been served to respondent nos.1 to 5 and the heirs of respondent no.9. Similarly he submitted that respondent nos.6, 7 and 10 have expired during the pendency of the First Appeal and respondent no.8 has expired during the pendency of the Suit and therefore the Suit would have stand abated.

6. Learned Senior Counsel Shri Nanavati has referred to the background of the facts wherein he has traced the history regarding the transaction between respondent nos.6, 7 and 8 - Original coowners having executed an agreement to sell in the year 1990 in favour of Indravadan and thereafter the same coowners executed the registered sale deed in favour of one Kashiben i.e. respondent no.10 and respondent no.9 Dahyabhai, whose heirs are at 9.1 to 9.5.

7. Learned Senior Counsel, Shri Nanavati referred to the papers and paper book, which has been submitted and submitted that suit for specific performance being Special Civil Suit NO.333/1993 came to be dismissed on 08.09.2004 and Regular Civil Appeal No.82/2004 was filed but no stay was granted and in the meanwhile pending appeal, the respondent nos.6 and 7 expired on 29.07.2013 and 27.03.2005 respectively and registered sale deed in favour of Kashiben by the original owner was executed. Learned Senior Counsel, Shri Nanavati submitted that the sale deed which was executed, has not been challenged and only Suit for injunction was filed, where the injunction was not granted. He submitted that similarly as there was no injunction, further transaction took place and there is no lis pendens recorded. Learned Senior Counsel, Shri Nanavati, therefore, submitted that the judgment and order of the trial court in Regular Civil Suit No.333/1993 setting aside the sale deed and directing specific performance would cause prejudice to the applicant as he is the bonafide purchaser for value without knowledge and notice. Learned Senior Counsel, Shri Nanavati submitted

that the predecessor of title may not have any interest left in the property or suit land, whereas the applicant is the owner having possession of the suit land and is vitally affected by the judgment and decree and, therefore, he may be permitted to challenge the same, which would otherwise cause prejudice to his right and interest as the decree can be said to be passed without any opportunity provided to the applicant third party.

8. Learned Senior Counsel, Shri Nanavati submitted that the heirs of the deceased party cannot be brought on record in Second Appeal or at appellate stage. He submitted that the High Court of Gujarat in a judgment in case of State of Gujarat Vs. Chandramanishanker Jadhavlal Sanghvi & Ors., reported in 1963 GLR 943 has observed that the appellate court cannot pass an order under Order 22 of the Civil Procedure Code in respect of the party, who died during the pendency of the suit. Therefore, he submitted that if the applicant is not granted leave to appeal, meaning thereby, is not permitted to challenge the impugned judgment and order in Regular Civil Appeal No.82/2004, which would cause prejudice and in fact, the judgment and decree is nullity as it would have abated for want of bringing heirs on record. He also referred to and relied upon the order of the High Court of Coordinate Bench in Civil Application (for bringing heirs) No.7085/2011 in Second Appeal No.246/2010 (Coram : Harsha Devani, J.) dated 20.08.2011 and submitted that relying upon the judgment of the High Court in case of Chandramanishanker Jadhavlal Sanghvi (supra), it has been clearly observed that heirs of the legal representative of the deceased, respondent could not be brought on record pending appeal. If the party, who died during the pendency of the Appeal before the lower appellate court, the heirs could have been brought on record at the relevant time and cannot be brought on record subsequently in a proceeding of Second Appeal before the High Court. He, therefore, submitted that the applicant being a third party and bonafide purchaser will not have otherwise remedy and, therefore, the present application may be allowed.

9. Learned Senior Counsel, Shri Nanavati has also submitted that suit was only for injunction and no prayer for cancellation of the sale deed was made and the claim for specific performance of agreement to sell was not asked for and, therefore, decree itself would be nullity.

10. Learned advocate, Shri P.R. Thakkar on the other hand referred to the papers and background of the facts and submitted that the respondent nos.6, 7, 8 and 10 have died on the date of filing of the appeal. He submitted that it would amount to filing of the appeal against the dead person. Learned advocate, Shri Thakkar submitted that the respondent nos.1 to 5 are having valid title has executed registered sale deed. He submitted that public notice was given and, therefore, the applicant cannot be said to be a bonafide purchaser without notice. He submitted that there is no due diligence shown by the applicant and, therefore, the averments about the bonafide purchase for value, cannot be believed. Learned advocate, Shri Thakkar submitted that in view of Section 52 of

the Transfer of Property Act, the party cannot claim impleadment in view of the doctrine of lis pendens. Learned advocate, Shri Thakkar referred to and relied upon the judgment of the Hon'ble Apex Court in case of Sanjay Verma Vs. Manik Roy & Ors., reported in AIR 2007 SC 1332 and emphasized the observation in Para No.12, "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."

11. He, therefore, submitted that such alienation cannot affect the rights of the parties of the decree. He, therefore, submitted that any transaction or subsequent transaction would not make any difference and no right could be claimed by third party.

12. In view of these rival submissions, it is required to be considered whether the present application deserves consideration.

13. As could be seen from the background of the facts, the agreement to sell was executed by the original owner in favour of the respondent nos.1 to 5 and at the same time, registered sale deed was also said to have been executed in favour of the respondent nos.9 and 10 by the respondent nos.6 to 8, which has been set aside. The applicant has purchased from the respondent nos.9 and 10. Thus the original defendants have entered into transaction and no entry regarding lis pendens has been made nor any entry is made in the revenue record regarding such transaction. The submission made by learned advocate, Shri Thakkar that the applicant cannot be said to be bonafide purchaser for a value as they have not given any notice for title and on the other hand, there was public notice given pending the appeal, is misconceived. The public notice which has been given qua the property would not anyway affect the right, title, interest acquired by the applicant by registered sale deed and as there is no lis pendence entry made anywhere nor is any entry made in the revenue record qua subsequent transactions, which have taken place, the applicant would be justified in contesting the decree by way of appeal as he claims title, ownership and possession of the suit land pursuant to the registered sale deed.

14. The provision of Section 52 of the Transfer of Property Act referred to by learned advocate, Shri Thakkar requires a closer scrutiny, which provides that the property cannot be transferred or dealt with so as to affect the right of any party. However as could be seen, it refers to the doctrine of lis pendens. The effect is to make the decree passed binding on all transferee and bind third party though it may not be a party to the original proceedings. However it is also to be read with concept of lis pendens which provides the manner in which it has to be entered into by entry in the record pending proceedings.

15. Therefore the moot question is about the consequence if the lis pendens is not made. A useful reference can be made to the judgment of this Court in case of Premchand J. Panchal Vs. Shahjahanu Liyakatkhan Pathan & Ors., reported

in 2011 (2) GLR 1121, which has referred to the judgment of the Hon"ble Apex Court and Section 52 of the Transfer of Property Act. The principle of lis pendens embodied in Section 52 of the Transfer of Property Act being a principle of public policy and it postulates a condition that the alienation will in no manner affect the rights of the other party under any decree passed in the suit unless the property was alienated with the permission of the Court. The Transfer of Property (Bombay Provision for Uniformity and Amendment) Act, 1959 enacted and it has been provided for a uniformity in Transfer of Property Act in the entire State of Bombay, which would also apply to the State of Gujarat as it was forming a part of erstwhile State of Bombay at the relevant time in 1959. Moreover, the Transfer of Property Act and the Indian Registration (Bombay Amendment) Act, 1939 provides for the necessity for registration a condition precedent to the operations of the provision thereof. It has also been considered in a judgment of the High Court in case of Dipakbhai Manilal Patel & Anr. Vs. State of Gujarat & Anr., reported in 2007 (2) GLR 1297, wherein it has been observed that in view of the amendment made in Section 52 of the Transfer of Property Act by Bombay Act 14 of 1939 read with Act No.57 of 1959, notice would be necessary and if such notice is not issued or registered before the SubRegistrar, then the transferee, who is a bona fide purchaser pending the litigation, would not be affected. Moreover, reference can be made to the judgment of the Hon"ble Apex Court in case of Hardev Singh Vs. Gurmail Singh (Dead) By Lrs., reported in (2007) 2 SCC 404, wherein reference has been made to the scope of Sections 41 and 43 read with Section 52 of the Transfer of Property Act. It is in these circumstances, without much elaboration, the applicant claiming right, title, interest in the suit land deserves to be granted the permission. The fact that if the leave to appeal is granted, it would give opportunity to contest and put forward his case, which may be considered separately and independently on all issues before he could succeed at the relevant time. The issue with regard to the bonafide purchase without notice and/or the so called transfer in collusion could also be considered at the time of hearing of the Appeal.

16. In the circumstances, the present Civil Application seeking leave to appeal deserves to be granted. The prayer in terms of paragraph 6(B) is granted. The present Civil Application stands allowed. Rule is made absolute.