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V.T. Vijayan v. U. Kuttappan Nair (Kerala)(F.B.) : Law Finder Doc Id # 1423628



KERALA HIGH COURT

(F.B.)

Before:-K. Harilal, A. Muhamed Mustaque and Mrs. Annie John, JJ.

RFA No. 657 of 2015 and RFA.No. 660 of 2015. D/d. 1.3.2019.

V . T . Vijayan - Appellant

Versus

U. Kuttappan **Nair** and Others - Respondents

For the Appellant in RFA.No. 657 of 2015 :- Sri. **T** . Krishnanunni (Sr.), R. Bindu Sasthamangalam & M.P. Prasanth, Advocates.

For the Respondent in RFA No. 657 of 2015 :- Sri. K.S. Bharathan (Caveator) Smt. S. Anjusha Sri. B.C. Menon Sri. K.S. Bharathan Sri.K.S..Bharathan Caveator, Advocates.

For the Appellant in RFA.No. 660 of 2015 :- Sri. **T** .Krishnanunni (Sr.), R.Bindu Sasthamangalam & M.P. Prasanth, Advocates.

For the Respondent in RFA.No. 660 of 2015 :- S. Anjusha, Advocate.

IMPORTANT

Agreement to sell - Transfer of property pending litigation - Doctrine lis pendente lite - Transfer of property pendente lite is not void - Such transfer, however, subservient to right of parties to such suit.

A. Transfer of Property Act, 1882 Section 52 Transfer of property pending litigation - Doctrine lis pendente lite - Transfer of property pendente lite is not void - Such transfer,however, subservient to right of parties to such suit.

[Para [8](#)]

B. Transfer of Property Act, 1882 Section 52 Expression 'other wise dealt with' - Meaning - Expression has very wide meaning - Any act or any mode of dealing with subject-matter of suit during pendency of suit or proceedings, which would adversely affect rights of any other party thereto, under any decree or order that may eventually be passed in suit - Would fall under said expression.

[Para [14](#)]

C. Transfer of Property Act, 1882 Section 52 Pending litigation - Transfer of property - Execution of agreement for sale of subject-matter of suit, during pendency of suit - Is dealing with subject-matter of suit, which would adversely affect rights of other party under decree, that may be passed in suit - Agreement for sale executed by parties to the lis is hit by doctrine of lis pendens.

[Para [17](#)]

Cases Referred :

[Jayaram Mudaliar v . Ayyaswami, AIR 1973 SC 569.](#)

[Kubra Bibi v . Khudaija Bibi, AIR 1917 Oudh 193.](#)

Moti Lal v . Karrab-ul-Din, (1897) 24 IA 170.

Nilkant v . Suresh Chandram, (1885) 12 IA 171.

Radhamadhub Holder v . Manohar, (1887) 15 IA 97.

[Rajendar Singh v . Santa Singh, AIR 1973 SC 2537.](#)

[Samarendranath Sinha v . Krishnakumar Nag, AIR 1967 SC 1440.](#)

[Wellington B. v . D. Shyama Prasad 2014 \(3\) KHC 560.](#)

ORDER

K. Harilal, J. - Whether an agreement for sale executed by a party to the lis, during the pendency of the suit is hit by the doctrine of lis pendens or not? This is the question that has been referred to this Full Bench for an authoritative pronouncement by the Reference Order. According to the Division Bench, which passed the reference order, section 52 of the Transfer of Property Act, 1882 (hereinafter referred to as the 'Act') is categoric, that the property cannot be transferred or 'otherwise dealt with' by any party to the suit, so as to affect the rights of the other. This is the view expressed in ***Kubra Bibi v . Khudaija Bibi [AIR 1917 Oudh 193]***. In this decision, the court held as follows:

"The creation of a contract, capable of specific performance, though not an alienation by itself, is a mode of dealing with the property pregnant with the very mischief which section 52 of the Transfer of Property Act seeks to obviate."

2. But, a Division Bench of this Court in ***Wellington B. and others v . D.Shyama Prasad and others [2014 (3) KHC 560]***, took a different view and held as follows:

"In fact, the contention that Ext.A1 is unenforceable as it is hit by section 52 of the Transfer of Property Act is not legally sustainable. As rightly found by the Court below, the bar under Section 52 is for the transfer of the property in respect of which a suit or proceedings is pending, in which any right to the said immovable property is directly and specifically in question. Here, the sale deed has not been executed and the property has not been transferred during the pendency of the suits or the appeals and therefore, the bar under section 52 of the Transfer of Property Act will not come into play in this case. Ext.A1 agreement is only a contract for sale of the said properties, and the same cannot be construed as a document of transfer of the property."

3. Further, the Division Bench doubted the aforesaid view, by observing that it is difficult to agree with the exposition of law by the Division Bench on the rigour of Section 52 of the Act, which has a vital bearing on the enforceability of an agreement, executed during the pendency of the original suit. Thus, the legality and correctness of the aforesaid view expressed by the Division Bench of this court in Wellington B. and others case (supra) have been doubted in this reference.

4. Heard Sri.Bindu Sasthamangalam, the learned counsel appearing for the appellant and Sri.K.S.Bharathan, the learned counsel appearing for the respondents.

5. The learned counsel appearing for the appellant advanced arguments contending that the decision laid down by the Division Bench in Wellington B. and others case (supra), is not in terms with the statutory mandate under section 52 of the Act. The decision in Kubra Bibi's case (supra) is the correct law, which stands in conformity with section 52 of the Act.

6. Per contra, the learned counsel appearing for the respondents opposed the said argument and contended that any mode of dealing with the subject-matter of the suit, during the pendency of the suit, is not absolutely barred by section 52 of the Act. In short, according to him, the 2nd limb "otherwise dealt with by any party to the suit" is not an absolute bar against all kind of transactions and agreement for sale would not fall in the mischief, which section 52 of the Act seeks to obviate.

7. At first, let us examine section 52 of the Act, the relevant law, from which the reference arises out. Section 52 reads thus:

"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 proceedings which is not collusive and in which any right to immoveable 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 any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.*

[*Explanation.*-For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]"

(emphasis supplied)

8. It is well discernible from the above provision that the doctrine of lis pendens is a doctrine based on the ground that the decision of a court in a suit should be binding not only on the litigating party, but also on those who derive title pendente lite. Section 52 does not render such transfers void; but render such transfers subservient to the right of the parties to such suit, eventually determined in the suit. The language employed in the section is unambiguous and very clear, to hold that during the pendency of any suit or proceedings, which is not collusive; "*the property cannot be transferred or otherwise dealt with by any of the parties to the suit or proceedings, so as to affect any other party thereto, except under the authority of the court.*

9. What is meant by the doctrine of lis pendens? The doctrine of lis pendens is seen defined in the Corpus Juris Secundum (Vol.LIV p.570)thus:

"Lis pendens literally means a pending suit and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit, pending the continuance of the action, and until final judgment therein."

10. In [AIR 1942 PC 147] the Privy Council 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."

11. In **Samarendranath Sinha v . Krishnakumar Nag [AIR 1967 SC 1440]** the Supreme Court observed thus:

"The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so it must bind the person deriving his right, title and interest from or through him. This principle is well illustrated in **Radhamadhub Holder v . Manohar (1887) 15 IA 97** where the facts were almost similar to those in the instant case. It is true that section 52 strictly speaking does not apply to involuntary alienations such as court sales but it is well-established that the principle of lis pendens applies to such alienations. (See **Nilkant v . Suresh Chandra (1885) 12 IA 171** and **Moti Lal v . Karrab-ul-Din (1897) 24 IA 170**".

12. In **Jayaram Mudaliar v . Ayyaswami & others [AIR 1973 SC 569]**, the Supreme Court held thus:

"Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of courts and their control over the subject-matter of litigation, so that parties litigating before it may not remove any part of the subject-matter outside the power of the court to deal with it and thus make the proceedings infructuous."

13. Relying on the aforesaid decision, the Supreme Court in **Rajendar Singh v . Santa Singh [AIR 1973 SC 2537]** reiterated thus:

"The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of lis pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the court so as to prevent the object of a pending action from being defeated."

14. Broadly, two kinds of transactions, by the parties to the lis, without the authority of the court, during the pendency of the suit are affected by the operation of section 52 of the Act, i.e., (1) Transfer of the property involved in the suit or proceedings, (2) any mode of dealing with the property, which would adversely affect the rights of any other party thereto under any decree or order, which may be made in the suit or proceedings. The expression 'otherwise dealt with' by any party has a very wide meaning and any act or any mode of dealing with the subject-matter of the suit during the pendency of the suit or proceedings, which would adversely affect the rights of any other party thereto, under any decree or order that may eventually be passed in the suit, would fall under the said expression. In other words, any mode of dealing with the subject-matter of the suit, by any party to the lis, which would adversely affect the rights of any other party under any decree that may be passed, would be subject to

the result of the suit.

15. Bearing the aforesaid principles in mind, we have considered the question referred to us, for an authoritative pronouncement of correct law. What is the effect and impact of an agreement for sale of the subject-matter of a suit or proceedings, during the pendency of such suit or proceedings.

16. According to section 5A of the Transfer of Property Act, a contract for sale of an immovable property, is a contract that the sale of such property shall take place on terms settled between the parties. Though it does not, of itself create any interest in or charge on such property, the buyer gets an enforceable right to get the sale deed executed in his favour, under the Specific Relief Act. section 19 of the Specific Relief Act makes it clear that a contract for specific performance may be enforced against parties to the contract and the persons specifically mentioned under Clauses (a) to (e). An obligation to perform contract is imposed on the parties to the contract under section 37 of the Contract Act, 1872. As per section 37 of the Contract Act, the parties to the contract must, either perform or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Contract Act or any other law. On a combined reading of the aforesaid provisions, we find that a contract for sale of the subject-matter of the suit during the pendency of the suit, would adversely affect the parties to the suit, and others claiming right under them.

17. Therefore, we find that execution of an agreement for sale of the subject-matter of the suit, during the pendency of the suit, is a dealing with the subject-matter of the suit, which would adversely affect the rights of other party under the decree, that may be passed in the suit. Hence, an agreement for sale executed by the parties to the suit, during the pendency of the suit is hit by the doctrine of lis pendens.

18. But, we noticed that in Wellington B. and others case (supra), the Division Bench of this court has lost sight of the 2nd limb of section 52, "otherwise dealt with by any party to the suit or proceedings so as to affect the right of any other party thereto under any decree or order, which may be made therein". The said provision was not brought to the notice of the court, while rendering the judgment. So, we find that the ratio laid down in Wellington B. and others case (supra) in respect of section 52 of the Act, is not a good law. Further, we also endorse the view expressed in Kubra Bibi's case (supra) that creation of a contract capable of specific performance, though not an alienation by itself, is a mode of dealing with the property, pregnant with very mischief, which section 52 of the Act seeks to obviate.

19. This reference is answered accordingly. The Registry is directed to place the files with this order, before the Division Bench concerned.

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