

Sankaran and ors. Vs. Rajamma and ors.

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Court : Kerala

Decided On : Jun-20-1974

Reported in : AIR1975Ker155

Judge : T. Chandrasekhara Menon, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 52

Appeal No. : Second Appeal No. 180 of 1971

Appellant : Sankaran and ors.

Respondent : Rajamma and ors.

Advocate for Def. : Joseph Augustine, Adv.

Advocate for Pet/Ap. : V. Vyasani Poti, Adv.

Disposition : Appeal dismissed

Judgement :

T. Chandrasekhara Menon, J.

1. This second appeal is filed by defendants 1 and 2 in a suit for declaration of title to, and possession of the plaint property and for consequential injunction. The plaintiff claimed title and possession on the basis of a Court sale and delivery through Court. Ex. p-1 is the sale certificate and Ex. P-2 the copy of delivery list in

the matter. Patta for the property was also issued in her name. Ex. P-2, and she Paid tax for the property for which she obtained Ex. P-4 receipt. Before delivery of property the first defendant had filed the original of Ex. P-5 petition objecting to the delivery on the ground that the plaint schedule property belongs to him and it is not liable to be sold for the decree debt concerned. Ex. p-5 petition was rejected. The order of rejection has not been produced in the case. Sri Vyason Poti, learned counsel for the petitioner submitted that he may be allowed to produce the said order as it would indicate that Ex. P-5 was rejected only on the ground that it was an anti delivery obstruction petition and as such not maintainable in law and the dismissal was not on the merits of the matter. As there is no application made under Order 41. Rule 27. I have not allowed the document to be produced and marked in the case. I would state, however that even proceeding on the basis that Ex. P-5 was disposed of not on the merits but only on the ground of its maintainability will not make my conclusion in the case any different.

2. The suit in which delivery is alleged to have been taken by the plaintiff was a suit for setting aside a Partition deed and recovery of the plaintiff's 1/4th share in the plaint schedule properties in that suit. The present plaint item was included in the plaint schedule as Item No. 12. In that suit the allegations were that all the properties scheduled to the plaint absolutely belonged to one Ummini Kochan, maternal grandfather of the plaintiff in the suit (who is the plaintiff in the present suit also) as well as of the third defendant therein, 1st defendant there was Ummini Kochan's wife and the 2nd defendant, a daughter. One Narayanan Sreedharan through whom the defendants in the present Suit claim title was the 4th defendant in that suit (which was O. S. 1229/1113 of Tri-vandrum Munsiff Court). The partition deed that was sought to be set aside in that suit was a deed of 1113 entered into by defendants 1 to 7 therein. By that document Narayanan Sreedharan had got the properties. The preliminary decree was- passed in the suit on 18-1-1943 (the preliminary decree and the final decree are contained in Ex. D-10 marked in the case). That had set aside the partition deed of 1113 and the plaintiff was declared entitled to get 1/4th share in the properties. There was also a direction therein for partition by metes and bounds of plaintiff's 1/4th share. Defendants 1 and 2 were made liable for costs and mesne profits were to be provided in the final decree. As per the final decree we find properties which do

not take in Item 12 of the plaint in that suit (plaint schedule property in the present suit) allotted to plaintiff, 3rd defendant and 4th and 5th defendants. Defendant 1 is made liable for mesne profits of the properties to be paid to plaintiff and 3rd defendant. A charge is also created for the mesne profits over the 1st defendant's share in the properties. It is in pursuance of this that the plaintiff not the present plaint property sold in Court auction and is now alleged to have sot delivery of the same,

3. The appellants (defendants in the present suit) were admittedly not parties to the earlier suit. However, they claim through Narayanan Sreedharan. who was the 4th defendant in the earlier suit. According to the appellants Narayanan Sreedharan was the owner of the plaint schedule property and his rights were assigned to 1st appellant by Ex. D-7 dated 11-9-1953. They have also produced Exs. D-4. 0-5 etc., to prove that Ummini Kochan had only a leasehold right in the property, which Nara-yanan Sreedharan sot in the partition of 1113 and then from the jenmi. the lessor's right was also obtained by Sreedharan. The appellants contended that the plaintiff never obtained delivery of property and they were in possession and enjoyment of the property.

4. Both the Courts below held against these defendants and therefore they have come up in second appeal.

5. Mr. Vyasani Poti learned counsel for the appellants strongly contended before me that the basis of the finding entered into by the lower Court as well as by the trial Court, namely, that the defendants are bound by the decision in the earlier suit and that the transfer to them is affected by lis pendens. cannot be sustained. According to him though this property was taken in by the earlier suit, but the decree plaintiff has not got any rights over the same. Plaintiff claims her right on the Court sale and delivery in pursuance of the decree in that suit. Before that the defendants had got possession from Narayanan Sreedharan. It was argued that the decree in O. S. 1229 of 1113 was only a decree for mesne profits and not one which involved the plaint property. It was further submitted that Ex. P-2 was only a paper delivery without actually dispossessing the persons in possession of the property.

6. In regard to the first point argued before me that the transfer is not vitiated by lis pendens the learned counsel for the appellants placed before me a decision of the Andhra High Court. *Aha-mad Ali v. Veerallu*, AIR 1959 Andh Pra 280 where the principle of lis pendens has been very pithily explained. The statement of the doctrine in the words of Cranworth. L. C. as being 'pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent' which was quoted with approval by Lord Macnaghten in *Faiyaz Husain Khan v. Prag Narain*. (1907) ILR 29 All 339 (PC) has been extracted in this Andhra decision. This principle which is embodied in Section 52 of the Transfer of Property Act, as correctly pointed out by Seshachala-palhy. J.. in the aforementioned case, does not declare that all the transfers made pendente lite are null and void, but what is provided for is that such transfers will be subject to the decree or order passed or made in the suit. The transfer will be effective only subject to the decree or order. It is also a consequential inference from this that if the decree or order does not create a right in any party in respect of any specific property transferred, no question of lis pendens can possibly arise. To get at this principle one need not go to any decision at all. It is apparent on 'the face of the section' itself. The principle behind this doctrine of lis pendens has been stated in the well known English case *Bellamy v. Sabine*. (1857) 1 DeG & J 566, In that case Turner. L. J. said.

'It is as I think, a doctrine common to the Courts both of law and Equity, and rests, as I apprehend upon this foundation--that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo subject again to be defeated by the same course of proceeding.'

In the same case Lord Cranworth said:

'It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but

because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.'

These have been approved of by the Privy Council in Faiyaz Kussain Khan's case mentioned earlier.

7. Therefore, what we have to look at is whether the right to the property was directly in question in the earlier suit and whether the transfer would affect the right of any party to the decree. In this case I am of the view that the doctrine applies. The property concerned was one of the items in the plaint schedule with respect of which the plaintiff sets up the case that they belong to her maternal grandfather and she has got a share in the same. Though it is not set apart to her share it is obvious from the decree that it falls to the first defendant's share (1st defendant of the earlier suit) over which a charge is given for mesne profits due to plaintiff. It is in execution of that decree for mesne profits that plaintiff has got this property sold in Court auction and delivered over to her. The defendants' predecessor-in-interest who is bound by the decree gets no right over this item of property. In the light of Ex. D-10 one need not go into the earlier documents Exs. D-4 and D-5 to see whether it has conveyed any right to Narayanan Sreedharan. I might also here state that Ex. D-4 does not really take in the plaint item as stated by the lower Court.

8. In regard to possession by the plaintiff, Mr. Poti put forward the plea that as the lower Courts proceed on the alleged delivery of the property to plaintiff as per Ex. P-2 and on a misconception of law that the burden is on the defendants to show that they were in possession in spite of the delivery, the finding in respect of possession is erroneous in law. He cited a decision of this Court in *Vellakutty v. Karthiyani*, 1967 Ker LT 667 = (AIR 1968 Ker 179) in support of his contention. There Madhavan Nair, J. stated that it is not correct to say that in every case a delivery proceeding would bind not only the judgment debtor but any and every one in the world. Rights in immovable property cannot be left to the mercy of the Amin deputed to carry out a delivery order of the Court. They can be affected only by judicial determinations. A decree for money or for property and an execution sale would affect only the right, title and interest of the judgment-debtor. It follows

that a proceeding had in pursuance of such a decree or Court sale cannot affect a larger interest or a larger group of Persons.

9. However, in this case the delivery was taken in pursuance of a decree in a suit where the assignor of the defendants Narayanan Sreedharan was a party and in which suit Sreedharan did not claim the right which he is said to have conveyed to his assignee as Per Ex. B-7. On the basis of the Court sale and delivery, the plaintiff has obtained oatta in her name. Though patta is never conclusive evidence of title or possession, it certainly should be given due weight in considering the Question of possession. Mutation in the registry is not without any significance. Official acts are presumed to be properly done unless proved otherwise. Therefore, I do not think the Courts below committed any error in this respect.

10. In the light of these. I confirm the judgment and decree of the Court below and dismiss the appeal. As there was no appearance on behalf of the respondents there will be no order as to costs.

11. Before concluding I express my gratitude to Sri Joseph Augustine, who in the absence of any appearance on behalf of the respondent-plaintiff, on my request was kind enough to assist the Court, by placing the relevant factors in support of the plaintiff's contentions before me

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