

Subba Reddi Vs. Veeraraghava Reddi

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Court : Chennai

Decided On : Apr-23-1919

Reported in : (1920)ILR43Mad37

Judge : Oldfield, ;Seshagiri Ayyar and ;Kumaraswami Sastri, JJ.

Appellant : Subba Reddi

Respondent : Veeraraghava Reddi

Judgement :

Seshagiri Ayyar, J.

1. The material facts, as they came before this Court at the hearing and as we accept them, are that plaintiff sued first defendant and others on a mortgage, and having failed in the Court of first instance appealed in 1910. Pending disposal of the appeal, two mortgages on the property in suit were given by first defendant to fourth respondent, the present appellant in June and November 1914. Meanwhile, negotiations for a compromise had gone on between first defendant and plaintiff; but it is sufficient, without reference to the exact stage they had reached when the mortgages were given, to say that they resulted in a compromise on 22nd December 1914, which was reported to the Court on 16th September 1915, and which awarded to plaintiff as against first defendant the full relief asked for, Fourth respondent had, however, in consequence of his acquisition of an interest in the suit properties, been made a party to the appeal on 11th February 1915. The

question we have to decide is whether he is concluded by first defendant's action or is entitled to contest the appeal on its merits.

2. There are no English or Indian decisions, which can be applied to these facts directly, for in *Annamalai Chetty v. Malayandi Appaya Naik* I.L.R. (1906) Mad. 426, although a Full Bench of this Court held that the doctrine of *lis pendens* was not the less applicable, because the litigation ended, as it must do here between plaintiff and first defendant, in a compromise, the present case differs, because in it the alienee has been made a party, whilst litigation is still pending; and *Manpal v. Sahib Ram* I.L.R. (1905) All. 544 was decided in favour of the alienee pendente lite on the ground that he was impleaded at the plaintiff's instance and an issue was raised between them at the trial, where as here the joinder of fourth respondent was opposed by plaintiff and there have been no proceedings since it.

3. The case it resembles most closely in point is *Tarakant Bannerjee v. Puddomoney Dossee* (1866) 10 M.I.A., 476 in which it was held that a person, who acquired title pending the litigation and whose application to be impleaded was refused on the objection of a party, was not concluded by the decision reached before he could appeal against that refusal or institute a suit as supplemental to the one in which he sought to intervene. The learned Chief Justice has distinguished the principle then applied by the Judicial Committee on the grounds that the alienee claimed not, as fourth respondent here has done, to be added as a party but to be substituted for his alienors, and that Section 52 of the Transfer of Property Act had not then been enacted. But with all respect although fourth respondent no doubt in terms applied to be added as a party, his application was in substance to be substituted as one for first defendant in respect of the portion of the latter's interest, which had devolved upon him; and as regards Section 52 the decision of the Judicial Committee is in point, not with direct reference to the general doctrine of *lis pendens* enunciated in it but as indicating the effect on the application of that doctrine, which an order such as fourth respondent has obtained in the present case and such as would have been passed in England even before the English Order XVII, Rule 3, was enacted would have had. It is on the meaning and legal consequences of such an order that our decision must depend.

4. The order in fourth respondent's favour was passed by Tyabji, J., in the exercise of his discretion in the usual course under Order XXII, Rule 10. It was not appealed against, or so far as appears, attacked before the Division Bench; and, although some objection to it has been mooted in argument before us, we have no reason in the absence of any ground of appeal relating to it for refusing to give it effect. As regards the effect, which it should receive, plaintiff's position is not clear. For his argument is, as I understand it, that fourth respondent, having been impleaded, is nevertheless not to be heard on the merits of the appeal. If so the order he has obtained will be deprived of meaning. For an order under Order XXII, Rule 10, is statedly one permitting the continuance of the proceeding against the person in question, subject presumably to his enjoyment of the rights of procedure, ordinarily available to a person in his position. The doctrine of *lis pendens* is, as explained in *Bellamy v. Sabine* (1857) 1 DeG. & J. 566, founded not on any implied notice to the world of the pending litigation or other substantive consideration, but on the practical ground that in the absence of such a doctrine there would be no certainty that the litigation would ever come to an end; and there is therefore no objection to reading Order XXII, Rule 10, as enabling the Court in the exercise of its discretion to exclude from the operation of the doctrine cases in which that mischief need not be apprehended. In *Chunni Lal v. Abdul Ali Khan* I.L.R. (1901) All. 331 Bannerjee, J., no doubt said with reference to the position of a respondent impleaded under the provision formerly corresponding with Order XXII, Rule 10, that

as he took the assignment *pendente lite* the doctrine of *lis pendens* applied to his case.

5. But his meaning appears from the immediately succeeding sentence.

Section 372 was consequently applicable and appellant was not competent to raise any plea which his assignors could not have put forward.

to have been that he would be restricted to such pleas, not that he could not plead at all or that his right to plead was still to be determined. In *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy* I.L.R. (1884) Bom., 323 the facts were similar to those before us except that a suit, not an appeal, was in question, and that in applying to

be made a party the alienee relied, not like the fourth respondent here, on his alienor's intention to compromise, but on facts indicating his intention to collude with the plaintiff; and the alienee was, after an exhaustive review of the English and Indian law, made a party, statedly in order that he might put forward the defences open to his alienor. No case consistent with plaintiff's contentions has been shown us; and in these circumstances I concur with Srinivasa Ayyangar, J., and direct; that the appeal be posted for further hearing on the merits.

Srinivasa Ayyangar, J.

6. Both the learned Judges who heard the appeal have agreed upon the facts and although it is open to us to go behind their judgments, I am satisfied that the findings come to by them are amply borne out by the evidence given in the case. Therefore the facts on which the question of law has to be decided may be stated as follows: The first defendant executed to the fourth respondent two mortgages in June and November 1914. The plaintiff's mortgage was long anterior to the fourth respondent's mortgages. It was on the 28th of February 1895. The suit was brought upon this mortgage in February 1907. The judgment of the lower Court was given in March 1910. An appeal was preferred to this Court in August of the same year. During the pendency of the appeal the mortgages to the fourth respondent were executed. Thereupon he applied to the High Court to be made a party-respondent to the appeal--and this application was granted in February 1915. The plaintiff presented an application on the 16th of September 1915 that a compromise entered into between him and the first defendant in December 1914 should be accepted and that a decree should be passed in terms of it. This was resisted by the fourth respondent on various grounds. Issues were sent down by the learned Judges for finding whether the alleged deed of compromise was in fact executed, whether the terms were settled prior to the alienation in favour of the fourth respondent, and whether the compromise was the result of fraud or collusion intended to defeat the rights of the fourth respondent. The District Judge found that the razinama was executed on 22nd December 1914, that although there were negotiations for the compromise for some time the final terms were settled only on that date, and that there was no fraud or collusion between the first defendant and the fourth respondent. These findings were accepted by the

learned Chief Justice and Srinivasa Ayyangar, J. But they differed on the question whether the fourth respondent was bound by the terms of the compromise.

7. In the arguments before us on behalf of the respondent there was unconsciously a confusion of ideas. The main contention was that, if the fourth respondent were not a party to the appeal he would have been bound by the result of the litigation; it followed that he must be deemed to have accepted the mortgages subject to the possibility of the first defendant and the plaintiff entering into a compromise, and that therefore although he may have been a party to the litigation he was bound by the terms of the compromise in the same way as if he had not been made a party at all. As I said before there are two ideas involved in this contention which should be kept distinct. In the first place there is the protection of law or the disability arising therefrom owing to the fact that a property which is the subject of litigation has been privately dealt with. That protection or disability is provided for by Section 52 of the Transfer of Property Act. There is a distinct right which is independent of the theory of *lis pendens* which a party to a suit has. That right is that, where a party is before the Court and is interested in the subject-matter of the litigation, his rights should not be affected by any adjustment or compromise to which he is not a party. If these two distinct principles are borne in mind the solution of the problem may not be difficult. I will first deal with Section 52 of the Transfer of Property Act. I do not wish to embark upon any lengthy historical review of the principle of *lis pendens*. But I may be permitted to point out that the rule owes its origin to the maxim of Roman Law '*Rem de qua controversia prohibetur in acrum deducere*,' which I understand to mean that where the subject in dispute owing to contest passes into the custody of the judiciary, parties to it are under an obligation not to withdraw it from the protection of the Judge. From this initial principle, the law of *lis pendens* has been developed in the jurisprudence of the various countries.

8. In England by 28 Edw. I, Ch. II, a purchase *pendente lite* was declared champertous and was held void. Subsequently it was held mostly by the intervention of the Equity Courts that the transaction, however repugnant to law, was not void altogether, but was enforceable subject to the result of the litigation pending in the Court. The historical judgment in *Bellamy v. Sabine* (1857) 1 DeG.

& J. 566 is now the basis of the principle of *lis pendens* in England. Lord Cranworth, the Lord Chancellor, said in that case:

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.... The necessities of mankind require that the decision of the Court shall be binding not only on the litigating parties but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of pending proceedings.

9. In order to avoid the possibility of fraud it was held that to attract the principle of *lis pendens* there must be active controversy in the litigation that is pending. This principle has been recognized in Section 52 of the Transfer of Property Act. The meaning of the expression 'contentious proceeding' has given rise to conflict of views. It was ultimately held in *Annamalai Chettiar v. Malayandi Appaya Naik* I.L.R. (1906) Mad. 426 that, if the suit was contentious in its inception, this character of contentiousness was not taken away by the fact that the parties subsequently entered into a compromise. This must be treated as an exception to the general rule. The result of the legislation and of the authorities is that, if the purchaser is not a party to the suit, he will be bound by a litigation which was in its inception contentious whatever may be the process by which the ultimate conclusion is reached, whether by obtaining after active contest a decision by the Judge or by a compromise outside Court and its recognition by the Judge. That is all that; is implied in or expressed by Section 52 of the Transfer of Property Act and by *Annamalai Chettiar v. Malayandi Appaya Naik* I.L.R. (1906) Mad. 426.

10. Now comes the question how far this principle is to be modified where the purchaser is a party to the litigation. In *Bennett on Lis Pendens* all the authorities relating to the impleading of the purchaser as a party have been fully considered. He has come to the conclusion that a purchaser is not a necessary party. He goes further and says that Courts should not allow the purchaser to be made a party to the pending suit. This pronouncement appears to me to go too far. There are some cases in which it was held the suit will be defective for want of proper parties if after notice of a purchase *pendente lite* the plaintiff does not make the purchaser

a party. However that may be, in this country the matter is set at rest by Order XXII, Rule 10, of the Code of Civil Procedure. Under that rule 'in cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest bus come or devolved'.

11. It was held in Muhammad Masihullah Khan v. Jarao Sai I.L.R. (1916) All. 226 that a mortgage pendente lite is within this rule. It has also been held in this Court--vide Sitaramaswami v. Lakshminarasimha I.L.R. (1918) Mad. 510--that the purchaser pendente lite has the right of preferring an appeal against a decision adverse to his assignor. No doubt Courts should exercise great caution in permitting a purchaser of this kind to become a party. Unless it is satisfied that the transferor is likely to act in violation of the rights of the transferee the records of the Court should not be burdened by the pleadings of the purchaser and the proceedings should not be lengthened by enabling such a purchaser to intermeddle with the suit already pending, But when once the order has been made permitting the purchaser to come in, it seems to me that the subject-matter of the dispute in which he is interested should not be decided upon to his prejudice without hearing him. That is a right which as suitor ha possesses by virtue of his being a party to the litigation. Order XXIII, Rule 3, provides for the compromise of a suit. It presupposes that all the parties interested have entered into the compromise. If any one of them stands out it is a well-recognized principle of jurisprudence that the compromise between the other parties should not in the least derogate from his rights. It follows from these provisions of the Code of Civil Procedure that although a purchaser pendente lite takes the transfer subject to the result of the litigation, and if he is not impleaded as a party he will be bound by any lawful compromise or adjustment which may be entered into between the plaintiff and his transferor, the moment that he becomes a defendant, the only detracton of right to which he subjects himself is the result of the litigation which has been openly and in his presence tried and decided upon. Once ha is in the array of parties what could have been done by way of compromise or adjustment if he is not before the Court should not be allowed to interfere with his claim for a fair trial and a decision on the merits.

12. It was not seriously disputed that, if there was a private adjustment outside the Court which is not reported to it, that would not bind the purchaser pendente lite. Therefore what gives force to the adjustment is the sanction of the Court, and the question therefore resolves itself into this. Can a Court sanction a compromise so as to affect the rights of one of the parties before it although it may be a lawful agreement between the other parties? My answer is in the negative. It was said that the finding that there was no fraud or collusion is conclusive against the rights of the fourth respondent. I am unable to follow this reasoning. If there was fraud or collusion even though the purchaser is not a party he can impeach the compromise in a fresh suit and how is his position bettered by intervening at an earlier stage to protect his rights. Further the prejudice to the purchaser would not necessarily be consequent upon fraud or collusion. The transferor and the plaintiff may honestly believe that a certain amount is due. They may not embark upon a complicated inquiry into the question of limitation. They may not desire to go behind what is apparent on the face of the record and may agree honestly to fix the amount that is payable by one party to the other. But the purchaser pendente lite has a larger right. He can litigate the question whether the amount claimed in the suit was really due, whether it was barred by limitation and whether it is a binding debt. Therefore the mere fact that there has been no fraud or collusion does not settle the rights of the purchaser pendente lite. There are observations in *Rai Charan v. Biswa Nath* (1914) 20 CRI.L.J. 107 to the effect that the purchaser would be affected only if he does not choose to make himself a party. *Haradhun Chuckerbutty v. Protap Narain Chowdhry* (1870) 14 W.R. 401 is to the same effect. In *Tarakant Bannerjee v. Puddomoney Dossee* (1866) 10 M.I.A. 476 there are dicta at page 487 which very strongly support the view that the rights of a person who can and does intervene should not be affected by any adjustment or agreement between the other parties. I am therefore of opinion that the compromise, although it may be binding upon the first defendant, cannot affect the rights of the fourth respondent to claim a judicial decision on the question.

13. It was said that this would lead to inconsistent decrees being passed in respect of the same subject-matter. I feel no difficulty on this point. Any decree to which the first defendant subjects himself will *prima facie* be personal and would affect property only in so far as the fourth respondent's interests are not prejudiced. I

agree in the order proposed by my learned brother regarding rehearing.

Kumaraswami Sastri, J.

14. This appeal arises out of a difference of opinion between the Chief Justice and Mr. Justice Srinivasa Ayyangar as to the right of an alienee pendente lite who has been brought on record as a party under the provisions of Order XXII, Rules 10 and 11, of the Civil Procedure Code to object to the recording of a compromise entered into between the original parties to the suit after the alienation in his favour and to the passing of a decree in terms thereof. The facts are fully set out in the judgment of Srinivasa Ayyangar, J., and the appeal has been argued on the basis of the findings arrived at by the District Judge and accepted by the learned Judges who first heard the appeal.

15. A Full Bench of this Court in Annamalai Chettiar v. Malayandi Appaya Naik I.L.R. (1906) Mad. 426 has held that an alienee pendente lite who is not brought on record will be bound by a decree passed on a bona fide compromise arrived at between the parties but there is, so far as I am aware, no decision where the right of an alienee pendente lite who is a party to the suit to object to the compromise has been decided.

16. Section 52 of the Transfer of Property Act which codifies the law as to lis pendens enacts that immoveable property, the right to which is directly and specifically in question in a suit or proceeding, cannot during its active prosecution be transferred or otherwise dealt with by a party so as to affect the rights of any other party thereto under any decree or order which may be made therein except with the leave of the Court.

17. To bring into operation Section 52 there should be a decree. A compromise arrived at between the parties to a suit is like any other contract or agreement only binding and enforceable as between the parties thereto or their privies. Ordinarily a person who has parted with his interest in property cannot by any contract or by any dealing with the interest he has parted with affect the rights of the alienee. If the compromise is not embodied in a decree it cannot be said that an alienee pendente lite is bound by it. Is he entitled if on record to object to the Court

passing a decree which would confer validity on a transaction not otherwise binding on him? I think the answer to the question must be sought not with reference to the doctrine of *lis pendens* which assumes a decree to attract to itself the provisions of Section 52 but to the provisions of the Civil Procedure Code as regards the right of parties to a suit.

18. There can be little doubt that a transferee *pendente lite* is entitled to come on record and to conduct all proceedings from the date he is added as a party though he would be bound by all orders passed up to that date and could not raise a defence not open to his transferor. Order XXII, Rules 10 and 11, are based on the principle that a person having an interest in the suit should be a party so that he may have an opportunity of proving his case and supporting his title and also to prevent any chances of fraud or collusion between his transferor who often after the alienation in his favour retains little or no interest in the subject-matter of the litigation. As observed by their Lordships of the Privy Council in *Tarakant Bannerjee v. Puddomoney Dossee* (1866) 10 M.I.A. 476

The law allows a party interested to intervene in the suit; that right should not be rigorously dealt with.

19. The danger of secret collusion referred to by their Lordships is as real to-day as it was when the case was decided in 1866. *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy* I.L.R. 1884) Bom. 823 is also authority in point. It is no answer to the request of the alienee to be added to say that; the alienation was pending suit as Order XXII, Rule 10, expressly refers to acquisition of interest *pendente lite*. Except under special circumstances I do not think the Court ought to refuse to join an alienee as a party under Order XXII, Rule 10.

20. When an alienee has been so added he gets all the rights of a party to a suit. I can see nothing in the Code which reduces him to a mere figurehead bound by all the acts of the original parties because his alienation was pending the suit. If for example his transferee remains *ex parte* can it be said that he cannot let in evidence or prosecute or defend the suit because it has been held that an alienee *pendente lite* is bound by an *ex parte* decree passed in the suit. Order XXIII, Rule 3, contemplates a compromise or adjustment between all the parties to the suit

and it is difficult to see how the Court can pass a decree on a compromise to which a party to the suit was not a party without such person's consent unless it can be held that a compromise as a compromise between the original parties is binding on an alienee pending suit. To do so would be to extend the doctrine of lis pendens to agreements between the original parties to a suit which may at some future date enable them to get a decree in terms thereof. I can find no authority for doing so.

21. There may be cases where the other party has had no notice of the alienation pendente lite and has bona fide compromised the suit and put himself in a disadvantageous position owing to the alienee not having taken steps either to give him notice of his alienation or to bring himself on record with due diligence. In such cases the alienee may be estopped or prevented from objecting to a decree being passed, These cases are outside any of the provisions of the Civil Procedure Code as Order XXIII, Rule 2, does not prevent a Court from passing a decree in terms of a compromise to which one of the parties to the suit is not a party if such compromise will be otherwise binding or if the party objecting has estopped himself from disputing its binding nature on him. No such pleas have been raised by the respondent. There is therefore no apparent hardship in his being required to prove his case.

22. I agree with the conclusion arrived at by my learned brothers Oldfield and Seshagiri Ayyar, JJ., and concur in the order passed by them.