

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

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**RSA-3562-1987 (O&M)
Date of Decision : 15.10.2018**

Bhajan Singh

....Appellant

vs.

Smt. Balwant Kaur and another

....Respondents

CORAM : HON'BLE MR. JUSTICE AJAY TEWARI

Present: Mr.R.S.Bains, Advocate
for the appellant.

Ms. O.P.Goyal, Senior Advocate with
Ms. Deepshikha, Advocate
for the respondent No.1.

None for respondent No.2.

AJAY TEWARI, J. (Oral)

This appeal has been filed against the concurrent judgments of the Courts below decreeing a suit filed by the respondent No.1.

Brief facts of the case are that respondent No.2 had executed agreement to sell of the land measuring about 2 Kanals in favour of the appellant on 11.2.1978 and had made agreement to sell on 6.1.1979 in favor of the respondent No.1 of the land measuring about 38 Kanals. The appellant filed a suit for specific performance against respondent No.2 which was decreed on 5.2.1981. During the pendency of the suit the respondent No.2 executed a sale deed in favour of respondent No.1. It is thereafter that respondent No.1 filed the instant suit claiming that the sale deed in her favour was executed pursuant to a prior agreement to sell (dated

11.2.1978) and she therefore challenged the decree of the specific performance which the appellant had obtained against the respondent No.2. Both the Courts having decreed the suit the appellant is before this Court.

The Courts below have not given any finding adverse to any of the purchasers regarding their bonafides. It is against the back drop of these facts that issue which has arisen before this Court is as to whether the sale made by the respondent No.2 in favour of the respondent No.1 is protected or whether the decree of specific performance obtained by the appellant would get precedence.

The contention of the learned counsel for the appellant is that the sale made in favour of the respondent No.1 is squarely hit by lis pendens and would have no effect.

Learned Senior Counsel appearing on behalf of the respondent No.1 on the other hand argues that even if this is accepted yet respondent No.1 had an anterior agreement to sell in her favour and therefore, the Courts below rightly held that the sale was not really a pendente lite transfer but merely an acknowledgment of pre existing and subsisting right. He has further argued that if in case no sale deed has been executed in favour of the respondent No.1 and both the intending purchasers had filed separate suit for specific performance, in that case the suit of the respondent No.1 would have been decreed because she had a prior agreement to sell in her favour.

Counsel for the the appellant has countered by stating that hypothetical argument may or may not have worked but in the present case there is a direct judgment of the Full Bench of the Mysore High Court in which the exact similar factual situation had prevailed and the claim of the party whose

case was similar to that of the present appellant was accepted. As per him, the judgment relied upon by the Courts below are not applicable since the issue was related to pre-emption rights and it was only in the case of pre-emption that the Courts had held that it was an existing and subsisting right. He has further argued that origin of the pre-emption right can be traced by the Supreme Court in the judgment passed in the matter of **Bishan Singh vs. Khazan Singh** reported as **[1958] 0 AIR (SC) 838** (and this fact has been accepted by the learned Senior Counsel appearing for the respondent No.1). He has pointed out that this judgment has been analyzed and discepted by the judgment passed by Mysore Full Bench in the matter of **Khaja Bi and others vs. Mohammad Hussain** reported as **AIR 1964 MYSORE 269 (Vol.51, C, 67)** and their Lordships have drawn the distinction between the existing and subsisting right of the pre emptor vis-a vis the actionable claim ('of an intending purchaser'). Paragraph Nos. 34 to 38 of the said judgment are as follows :-

*34. It is, however, argued on the footing that the agreement of sale pursuant to which Mohamad Hussian obtained conveyance was one anterior in date to the institution of the suit that the same must be viewed not a transfer of property during the pendency of the suit by merely the perfection or completion of a pre-existing right and that therefore the doctrine of 'lis pendens' cannot operate to imperil the title conferred by the sale. The strongest support for this proposition is sought in the following passage occurring in the judgment of the Supreme Court reported in **Bishan Singh v. Khazan Singh, A.I.R. 1958 SC 838 at p. 844** :*

"The doctrine of 'lis pendens' applies only to a transfer 'pendente lite', but it cannot affect a pre-existing right. If the sale is a transfer in recognition of a pre-existing and

subsisting right, it would not be affected by the doctrine as the said transfer did not create new right 'pendente lite'; but if the pre-existing right became unenforceable by reason of the fact of limitation or otherwise, the transfer, though ostensibly made in recognition of such a right, in fact creates only a new right 'pendente lite'."

35. That passage however, in our opinion, has to be read in the light of the facts of that case and the discussion of the law contained in the earlier the judgment. The case was one of competition between two sets of pre-emptors, each claiming pre-emption under the law prevailing in Punjab. In the earlier part of the judgment, their Lordships have examined the principles of law relating to pre-emption in Punjab and summarised the position as follows :

"1. The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right.

2. The pre-emptor has a secondary right or a remedial right to follow the thing sold.

3. It is a right of substitution but not of repurchaser i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee.

4. It is a right to acquire the whole of the property sold and not a share of the property sold.

5. Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place.

6. The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."

After discussing the effect of the Punjab pre-emption Act on the pre-existing general law of Punjab relating to pre-emption, their Lordships refer to the decisions of the Punjab High Court bearing on the question as to how the doctrine of 'lis pendens' is affected or

*modified by the law of pre-emption. Their Lordships refer particularly to three Full Bench rulings of the Lahore High Court viz., those reported in **Mool Chand v. Ganga Jal, ILR 11 Lah 258 : A.I.R. 1930 Lahore 356 (FB)**, **Mt. Sant Kaur v. Teja Singh, ILR (1946) Lah 467 : A.I.R. 1946 Lahore 142 (FB)** **Mohammad Saddiq v. Ghasi Ram, ILR 1947 Lah 213 : A.I.R. 1946 Lahore 322 (FB)**. The law as established by that Full Bench rulings and accepted as correct by the Supreme Court may be briefly stated thus : The doctrine of 'lie Pendens' does apply to suits for enforcement of the right of pre-emption. But before the plaintiff in a pre-emption suit gets a decree in enforcement of his right of pre-emption, it is open to the vendor and the vendee in the transaction of sale giving rise to the plaintiff's right of pre-emption to defeat the plaintiff by the vendee surrendering the bargain in favour of another person having the right of pre-emption arising out of the same sale, either equal to or superior to that claimed by the plaintiff.*

In such a case, the transaction pending suit whereby the other person with equal or superior right of pre-emption gets the property is not a transfer at all pending suit but merely has the effect of substituting the pre-emptor in the place of the vendee defendant. Because he has a right equal to or superior to that of the plaintiff which he has succeeded in enforcing before the plaintiff gets a decree, such successful exercise of the right of pre-emption defeats the right claimed by the plaintiff. If, however, the second pre-emptor or the pre-emptor other than the plaintiff in a suit has lost the right of pre-emption by omitting to enforce it within the period of limitation prescribed therefor and he obtained a surrender from the defendant's vendee after the expiry of the period, the surrender to him is no longer a substitution but an actual repurchase or transfer.

Such a transfer pending suit will be affected by 'lis pendens'. In the case reported in ILR (1947) Lah 213 : (MR 1946 Lah 322) (FB), the second pre-emptor had an agreement of sale in his favour before the institution of the suit and the sale deed was executed after his right of

*pre-emption got barred by limitation. The Full Bench of the Lahore High Court held that he could not escape the operation of the doctrine of lis pendens. The same view was accepted by a Full Bench of the High Court of East Punjab in the case reported in **Wazir Ali Khan v. Zahfr Ahmad Khan, AIR 1949 East Punjab 193 (FB)**. As already stated their Lordships of the Supreme Court accepted the law laid down by these Full Benches to be correct and made the statement of principle cited above and relied upon by Mr. Ethirajulu Naidu with the following express preamble thereto :*

"In view of the aforesaid four Full Bench decisions - three of the Lahore High Court and the fourth of the East Punjab High Court - a further consideration of the case is unnecessary. The settled law in the Punjab may be summarised thus."

36. From what is stated above, it is clear that the expression "pre-existing right" in the above extract was not intended by their Lordships to apply to all types of rights but only to the right of a pre-emptor in Punjab: which has not become barred by limitation, the underlying principle being that a surrender to such a pre-emptor in recognition of his right is not a transfer at all but a mere substitution of one purchaser by another.

*37. Another case relied upon by Mr. Etnirajulu Naidu is the decision of a single Judge of the Bombay High Court sitting on the Nagpur Bench reported in **Chand Mohammad v. Murtuza Khan Md. Mustafa Khan, A.I.R. 1958 Bombay 194**. In that case the question of lis pendens did not arise at all. The facts were that the owner of a property entered into an agreement of sale with the plaintiff therein in respect of that property on 3rd September 1945 but actually sold the property to the first defendant there in on 5th September 1945. Later, at the insistence of the plaintiff, the owner executed another sale deed on 6th December 1945 in favour of the plaintiff. The plaintiff then filed the suit for declaration that he was the owner and that the first defendant had acquired no title under the sale deed*

dated 5th September 1945 in his favour. In holding in favour of the plaintiff on the strength of Section 40 of the Transfer of Property Act and Section 91 of the Trusts Act, the High Court expressed the view that there was no reason to suppose that the plaintiff should enforce his right only by a suit for specific performance and that in the circumstances of the case, viz., that the owners having executed the conveyance in his favour the plaintiff was absolved from the necessity of filing such a suit.

With great respect, we are unable to see how either Section 40 of the Transfer of Property Act or Section 91 of the Indian Trusts Act could be so read as to ignore the title actually acquired by the first defendant in that case by the sale in his favour dated 5th September 1945. The very principle of Section 40 of the Transfer of Property Act which permits an obligation arising out of a contract to be enforced against a transferee with notice thereof shows that the transferee has acquired title but that the said title is burdened with the previous obligation of the transferor of which he, the transferee, had notice. Likewise, Section 91 of the Indian Trusts Act also proceeds on the footing that the person who acquired the property with notice that another person has entered into a contract affecting that property does acquire title to that property but imposes on him the obligation to hold the property for the benefit of the other person to the extent necessary to give effect to the contract provided that the contract is one of which specific performance can be enforced.

*38. The correct position in law, in our opinion, is one on which a Bench of the Madhya Pradesh High Court decided the case reported in **Munnilal v. Bhaiyalal**, A.I.R. 1962 Madhya Pradesh 34. The facts of that case are similar to the facts of the present case, in that case also there were two agreements of sale executed by the owner of a property and a sale deed executed by him pursuant to the earlier of the agreements during the pendency of a suit for specific performance of the second agreement. The suit for specific performance was decreed whereupon the purchasers under the first*

agreement were dispossessed. Thereafter the purchasers under the first agreement brought a suit for a declaration that the decree for specific performance was not binding on them. The Bench of the High Court, after examining the cases relied upon by the plaintiffs in that case, held that the sale in favour of the plaintiffs in that case having been executed during the pendency of the defendant's suit for specific performance was clearly affected by the doctrine of lis pendens.

Learned Senior Counsel appearing on behalf of the respondent No.1 has argued that this would be very inequitable judgment and since the judgment of the Mysore High Court is not binding on this Court an equitable judgment may be taken and the appeal be dismissed.

In my considered opinion, even if the judgment of the Mysore High Court is not binding precedent yet it has the strong persuasive value, moreso, it was delivered by three Hon'ble Judges. Resultantly, it has to be held that the sale deed executed in favor of the respondent No.1 during the pendency of the civil suit filed by the appellant was ineffectual against the rights of the appellant and just as in the case of Khaja Bi and others vs. Mohammad Hussain (supra) the anterior agreement to sell would have to give way to the decree for specific performance obtained by the appellant.

Consequently, the appeal stands allowed.

Since the main case has been decided, the pending civil miscellaneous application, if any, also stands disposed of.

(AJAY TEWARI)
JUDGE

15.10.2018
anuradha

Whether speaking/reasoned - Yes/No

Whether reportable - Yes/No