

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

**RSA No.1564 of 2012 and other
connected matters
Date of Decision:09.10.2018**

Smt.Madhu Sharma

...Appellant(s)

Versus

N.K.Mair and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Animesh Shamra, Advocate for the appellant(s) in
RSA No.472 of 2012.

Mr.Adarsh Jain, Advocate for the appellant(s) in
RSA Nos.4, 5 and 1021 of 2012.

Mr.Gopal Sharma, Advocate for the appellant(s) in
RSA Nos.287, 1564, 615 of 2012 and for the petitioners in
CRM-M No.23184 of 2012.

Mr.Amar Vivek, Advocate for respondents No.1,3 and 4.
Mr.Pardeep Bajaj, Advocate for respondent No.2.

Mr.Saurabh Girdhar, AAG, Haryana for respondents No.3, 4 and
11 in CRM-M-23184-2012.

ANIL KSHETARPAL, J.

By this judgment, seven regular second appeals bearing RSA Nos., 4, 5, 287, 472, 615, 1021 and 1564 of 2012 and one CRM-M No.23184 of 2012 shall stand disposed of, as all seven appeals are arising from 7 civil suits filed by different plaintiffs which were consolidated and decided by a single judgment by the learned trial court as well as by the learned first Appellate Court. The criminal misc. is arising from proceedings initiated

under Section 145 of the Code of Criminal Procedure with respect to same property. Decision in the aforesaid criminal misc. would depend upon the decision in the appeals.

In the considered view of this Court, following substantial questions of law arise for determination:-

(i) Whether rule of lis pendence as provided under Section 52 of the Transfer of Property Act, 1882 applies to the sale-deeds which are consequent upon a prior agreement to sell executed before filing of the suit.

(ii) Whether a separate suit for declaration to the effect that the judgment and decree does adversely affect their rights, is maintainable after dismissal of objections filed by them (third party persons who were not party to the suit) which have been dismissed summarily?

Facts

In the present case, detailed facts would be required to be noticed. Smt. Rekha Rani (Respondent-Defendant No.2) was undisputed owner of property in dispute i.e. Shop cum-Flat No.224, Sector-9, Faridabad. She had constructed commercial building, consisting of basement, ground floor and first floor, dividing the property into various shops. She entered into an agreement to sell with Shri O.P.Gupta on 24.7.1995 for a total sale consideration of Rs.14,76,000/-lacs out of which Rs.3,00,000/- was received as an earnest money. However, when Shri O.P.Gupta came to know that Rekha Rani wanted to resile from the agreement to sell, he made a

representation dated 8.3.1996 to the Estate Officer, Haryana Urban Development Authority (Allotting Authority), with a request, not to permit transfer of the property to anyone else. Thereafter Shri O.P.Gupta got issued a notice on 12.3.1996, calling upon Rekha Rani to comply the agreement to sell within seven days or pay double amount of the earnest money. Since there was no response, Shri O.P.Gupta further sent a letter to the Deputy Commissioner, Faridabad and Sub Registrar Faridabad on 22.3.1996. Due to aforesaid communications, Rekha Rani came to terms and agreed to fulfill her promise and honour the agreement to sell. Shri O.P.Gupta assigned his rights and thus a fresh agreement to sell was executed by Rekha Rani in favour of Shri Shantvir Vasishth, Karambir Vasishth and Raman Sharma whereas Sh.O.P.Gupta signed as a witness. In the agreement to sell, Rekha Rani acknowledged receipts of entire sale consideration by including the amount received from Sh.O.P.Gupta except Rs.2 lacs which was payable by the intended purchasers to Haryana Urban Development Authority. In the aforesaid agreement to sell, reference was also made to agreement to sell dated 24.7.1995 entered into between Rekha Rani and O.P. Gupta. It was further mentioned in the agreement to sell that she has also executed a general power of attorney in favour of Karambir Vasishth, who can get the sale-deed executed in their favour or in favour of their nominees. It was further written that she would never revoke this general power of attorney executed in favour of Karambir Vasishth with the consent of the purchasers. A day prior to the execution of agreement to sell dated 26.3.1996 i.e. on 25.3.1996, Rekha Rani also executed an irrevocable general power of

attorney in favour of Karambir Vasishth, authorizing him to sell the property attested by the Executive Magistrate.

Rekha Rani, rather than honouring either the first agreement to sell or subsequent agreement to sell, is alleged to have entered into another agreement to sell with N.K.Mair (respondent-defendant) on 5.3.1996 with regard to same property. Shri N.K.Mair-defendant No.1 is alleged to have filed a suit for injunction on 29.3.1996. In the written statement, Rekha Rani disclosed that she has entered into an agreement to sell with Shri Shantvir Vasishth, Karambir Vasishth and Raman Sharma. and have also executed a irrevocable general power of attorney in favour of Karambir Vasishth and she was left with no right in the property. During the pendency of the suit, counsel representing Smt.Rekha Rani also made a statement on 14.10.1998 that Smt.Rekha Rani has sold the property in favour of Shri Shantvir Vasishth, Karambir Vasishth and Raman Sharma and possession of the property has been delivered to the aforesaid persons. It will be noted that N.K.Mair initially only filed a suit for permanent injunction which was later on amended and converted into a suit for specific performance of the agreement to sell on 4.6.1998. In the meantime, Karambir Vasishth on the basis of general power of attorney had executed registered sale-deeds of various shops consisting of Shop-cum-Flat No.224, Sector-9, Faridabad in favour of various appellants. Details of the registered sale-deeds are as under:-

(i) 14.7.1997

(ii) 30.5.1997

(iii) 22.4.1998

(iv) 8.4.1999

(vi) 26.6.2001

(vii) 6.4.2004

During the pendency of the suit filed by Sh.N.K.Mair defendant-respondent herein (plaintiff in the previous suit) filed an application dated 14.10.1998 for impleading the purchasers as party-defendants in the case which was opposed by Smt.Rekha Rani on the ground that in the written statement itself, she had disclosed this fact and, therefore, at this stage the application is not maintainable. The aforesaid application was dismissed by the learned trial court vide order dated 6.2.1999. It will be noted here that the order was passed by the court on the basis of a statement made by an official of the Haryana Urban Development Authority on 4.2.1999 to the effect that property is still in the name of Rekha Rani as per their record. The operative part of the order passed by the court, dismissing the application is as under:-

“From the statement of official of HUDA Ram Kishan made from record on 4.2.1999, it is not proved that the defendant has alienated the suit property to Shantvir Vasishtha etc. and it is still in the name of defendant-Rekha Rani and hence the application of the plaintiff for impleading Shantvir etc. as defendants being purchasers has become infructuous when the suit property has not been alienated and no document has been produced by the defendant on record.”

It may be significant to mention here that the agreement to sell dated 5.3.1996 in favour of Mr.N.K.Mair is not executed on a non-judicial stamp paper rather on a plain paper with adhesive revenue stamp affixed. The suit filed by

N.K.Mair was decreed by the trial court vide judgment and decree dated 18.10.2003. It may be noted that in the execution petition, various plaintiffs filed objections but all objections were dismissed by the court summarily by observing that the plaintiffs are purchasers are governed by rule of *lis pendence*. Various revision petitions were filed against the aforesaid order passed by the executing courts. One revision petition, i.e. CR No.6796 of 2005 decided on 3.1.2006 was dismissed on merits, whereas in other revision petitions, the court dismissed the petition as not pressed while granting liberty to the appellant herein to file civil suits. The order passed in one of the Civil Revision bearing No.6888 of 1995 is extracted as under:-

“After arguing for some time, counsel for the petitioner, on instructions from the petitioner, states that the petitioner does not want to press this revision petition against the impugned order dated 23.11.2005 with liberty to file a civil suit for establishing his title.

Dismissed as not pressed with the aforesaid liberty.”

That is how, seven suits came to be filed, impleading N.K.Mair, Rekha Rani, Sandeep Sangwan and Jai Pal Sangwan as party defendants. All seven suits were consolidated. Both the courts after appreciating the evidence have found that there was a prior agreement to sell in favour of Shri O.P.Gupta, as also subsequent agreement with Shantvir Vasishth, Karambir Vasishth and Raman Sharma, primarily dismissed the suit on the ground that the plaintiffs did not make any effort to get themselves impleaded as party-defendants in the previous suit filed by N.K.Mair and the sale-deeds executed

in their favour is governed by the rule of *lis pendence*. The learned trial court has also held that bifurcation of the property into nine shops was not permitted and therefore also sale deeds executed in their favour are wrong. The learned trial court has further held that the plaintiffs have purchased the property from Karambir Vasishth who had no title and agreement to sell dated 25.3.1996 has not been acted upon.

In the considered view of this Court all the reasons given by the Courts are erroneous.

The property was divided into nine shops by the original owner (Smt.Rekha Rani), who was undisputedly owner of the property. The learned trial court has held that it amounts to violation of provisions of the Haryana Urban Development Authority Act, 1977. However, what provisions of law have been violated, has not pointed out and what are the consequences of the aforesaid violations have not been adverted to. Learned counsel for the respondent also did not press this point at the time of arguments, therefore, this Court is not dealing with the aforesaid issue any further.

As regards passing of title, it may be noted that Karambir Vasishth was appointed as a general power of attorney by Rekha Rani which has never been cancelled/revoked. This general power of attorney was executed, after receipt of entire sale consideration. Thus, it is Smt.Rekha Rani who had in fact executed the sale-deeds through her attorney. Rekha Rani was undisputedly owner of the property.

Next reason assigned by the learned trial court that the agreement to sell dated 25.3.1996 has not been acted upon is equally erroneous as pursuant to agreement to sell dated 25.3.1996 (in fact correct date is 26.3.1996), Shri Karambir Vasishth was appointed as a general power of attorney, who executed the sale-deeds as such. Therefore, the courts were in error in recording a finding that agreement to sell dated 24.7.1995 or 26.3.1996 have not been acted upon.

On behalf of defendants, Sandeep Sangwan appeared in evidence. On reading of the evidence of Shri Sandeep Sangwan, it is apparent that he did not know anything with regard to agreement to sell entered into between Shri O.P.Gupta and Rekha Rani. He also did not know with regard to the general power of attorney executed by Rekha Rani in favour of Karambir Vasishth and further sale-deed by Karambir Vasishth in favour of various appellants. He also did not know about the various complaints made by Shri O.P.Gupta to the Estate Officer, Deputy Commissioner and notice got issued to Rekha Rani. He further feigned his ignorance about the fact that the plaintiffs were found in possession when Hon'ble Lokayukta had inspected the site. He further goes on to admit that general power of attorney executed by Sh.N.K.Mair in his favour is not registered. Apart from Sandeep Sangwan an official from the record room has been produced. Thus, neither Mr.N.K.Mair nor Rekha Rani have appeared in evidence to defend their case. Since Sandeep Sangwan, does not know about the facts of the case, therefore, the courts ought to have drawn adverse inference against the defendants.

Now the stage is set for considering the questions of law.

Question No.1

(i) Whether rule of *lis pendence* as provided under Section 52 of the Transfer of Property Act, 1882 applies to the sale-deeds which are consequent upon prior agreement to sell executed before filing of the suit.

Section 52 of the Transfer of Property Act, 1882 (the Act of 1882) provides that during the pendency of any suit or proceeding which is not collusive, and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with and if it is dealt with the subsequent purchaser would be governed by rule of *lis pendence* and therefore bound by the result in the litigation. Section 52 of the Act of 1882 is extracted as under:-

“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 immovable 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.”

The reason for enacting Section 52 of the Act of 1882 is to secure the interest of the party during the pendency of the suit so that the party is not called upon to indulge in repeated litigations against the transferee who had purchased the property during the pendency of the suit or the proceedings. Section 52 of the Act of 1882 makes all subsequent transactions by the parties to the litigation sub-

servient to the result of the litigation. This is called rule of *lis pendence*. However, question is whether rule of *lis pendence* would apply to the aforesaid transfer of property which was in continuation of series of transactions which took place before filing of the suit. Rule of *lis pendence* is to save an honest litigant from the adverse effects of subsequent transfers by other party to the litigation. However, rule of *lis pendence* is not to save an unscrupulous litigant who is misusing the process of court.

Rule of *lis pendence* is known as '*pendente lite nihil innovetur*'. Such principle is based on equity and good conscious and is intended to protect the parties to a litigation against alienation made by their opponents during the pendency of the suit. The doctrine of *lis pendence* does not operate so as to defeat the right existing before the date of filing of the suit.

This question can be examined from another angle. While deciding the suit for specific performance of the agreement to sell the court only records finding with regard to genuineness of the agreement to sell and adjudicate upon the rights of the plaintiff to get relief of specific performance of the agreement to sell. In such suit, question of title of the owner is not decided. While decreeing a suit for specific performance of the agreement to sell, the court is declaring that the agreement to sell propounded by the plaintiff is capable of specific performance. However, such specific performance of the agreement to sell would always be subject to the rights of vendor.

This aspect can further be examined from yet another angle. No doubt, the agreement to sell does not create any right in the property, however, it

certainly creates right to the property in favour of agreement holder. The agreement to sell or contract for sale is defined under Section 54 of the Act of 1882, which is extracted as under:-

“Section 54 in The Transfer of Property Act, 1882

54. “Sale” defined.—*“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*

Sale how made.—*Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.—*A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.”*

A careful reading of the aforesaid last clause, which deals with contract for sale (Agreement to sell) only provides that the agreement to sell or contract for sale does not create any interest in such property. However, the agreement to sell create a right to the immovable property in favour of the agreement holder who can seek specific performance. Hence, in the considered

view of this Court, the rule of *lis pendence* in the facts of the present case would

not apply. The rule of *lis pendence* cannot be applied in a manner which would defeat the rights of prior agreement holders of the agreement to sell only because sale-deeds were executed in their favour during the pendency of the suit. In the present case, as noted while discussing the facts, execution of the prior agreement to sell in favour of Shri O.P.Gupta, who assigned his rights in favour of Karambir Vasishth etc is proved on file, therefore, the rights of Rekha Rani in the property were subject to the rights of Shri O.P.Gupta or Karambir Vasishth. Shri N.K.Mair has also stepped into the shoes of Smt.Rekha Rani. Hence, Shri N.K.Mair is also bound by the agreement to sell executed by his predecessor-in-interest, i.e. Smt.Rekha Rani.

The courts have recorded that Smt.Rekha Rani entered into an agreement to sell with Sh.O.P.Gupta on 24.7.1995 and received earnest money to the tune of Rs.3 lacs out of total sale consideration of Rs.14,76,000/-. The agreement to sell is part of the record. Still further, execution of the agreement to sell dated 24.7.1995 is not being disputed by Smt.Rekha Rani from very beginning. The execution of the agreement to sell is also proved from a subsequent agreement to sell dated 26.3.1996. It is further proved from letter dated 8.3.1996 written to Haryana Urban Development Authority by Shri O.P.Gupta as also to Deputy Commissioner dated 19.3.1996.

Merely because a decree for specific performance of the agreement to sell has been passed in favour of Mr.N.K.Mair, his rights do not become larger than those of his vendor Smt. Rekha Rani. He only steps into the shoes of Smt.Rekha Rani. Smt. Rekha Rani was bound by the contracts which had been entered into by her before filing of the suit. In the present case, subsequent sale

deeds are with reference to agreement to sell executed by Smt. Rekha Rani in favour of Shri O.P.Gupta on 24.7.1995 and in a way the right to the property in favour of appellants relate back to the date of agreement to sell with Mr.O.P.Gupta.

In view of the aforesaid discussion, the question of law is answered in favour of the appellants.

Question No.2

Whether a separate suit for declaration to the effect that the judgment and decree does adversely affect their rights is maintainable after dismissal of objections filed by them (third party persons who were not party to the suit) which have been dismissed summarily).

As per the provisions of Order 21 Rule 97 of the Code of Civil Procedure, if execution of a decree for possession of immovable property is resisted or obstructed by any person, the decree holder is entitled to move an application before the Court. Order 21 Rule 98 provides that the Court would determine all the questions referred to in Rule 101 of Order 21. Rule 101 of Order 21 provides that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding, on an application under Rules 97 and 99 or their representative and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suit. Rule 103 provides that the orders passed are to be treated as decree. For facility of reference, Section 47, Order 21 Rules 97, 98, 101 and 103 of the Code of Civil Procedure are extracted as under:-

“Section 47-Questions to be determined by the Court executing decree.-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit

*(2) [***]*

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.”

Order 21 Rule 97. Resistance or obstruction to possession of immovable property.—*(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. 6 [(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]*

Order 21 Rule 98. Orders after adjudication.—(1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2),— (a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or (b) pass such other order as, in the circumstances of the case, it may deem fit. (2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

Order 21 Rule 101. Question to be determined.—All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

Order 21 Rule 103. Orders to be treated as decrees.—Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.”

On careful examination of provisions of Section 47 read with Order 21 Rule 101 of the Code of Civil Procedure, it is apparent that the executing court is required to adjudicate upon all questions arising between the parties to a proceeding. When a non party to the suit claims a prior right has to be adjudicated upon in a manner in which the suit is decided. The courts have interpreted these provisions to hold that such objections if filed would be decided by the court like a suit because no separate suit is maintainable.

In the present case, the objections have been decided summarily without granting opportunity to the plaintiff to lead any evidence. All the objection petitions were dismissed on the grounds that the sale-deeds executed in favour of appellants were hit by the rule of *lis pendence* and Karambir Vasishth was having no title. No doubt one of the civil revision petition arising from the aforesaid dismissal of the objections was dismissed by the High Court by affirming the reasons given by the learned executing court. However, in all other revision petitions, liberty was granted to the plaintiffs to file separate suits. One of the similar order passed by the High Court has already been extracted above.

Bar to the filing of separate suit would not apply where objection is to the validity of the decree and not to the execution of the decree. It is well settled that the executing court cannot go behind the decree. Once it is the case of the plaintiffs that the decree does not adversely affect their rights, the remedy of such person aggrieved is to file a separate suit and get a declaration to that effect. Further, this Court, while deciding revision petitions, have already granted liberty to the plaintiffs to file the suit and this order has never been challenged either by

Smt. Rekha Rani or by Mr.N.K.Mair before any superior courts.

In the considered view of this Court, such summarily dismissal of the objections would not attract a bar as provided under Rule 101 of Order 21 of the Code of Civil Procedure. The bar would be available only if the objections have been decided on merits like a suit after granting opportunity to the parties to lead evidence while adjudicating upon the rights of the parties. It will be noted that in one of the cases objections were filed under Section 47 of the Code of Civil Procedure, which were also dismissed.

The basic idea behind barring the separate suit is based upon the fundamental rule of *resjudicata* as provided in Section 11 of the Code of Civil Procedure. The basic requirement of *resjudicata* is that the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and the courts have adjudicated upon the aforesaid suit. In the present case, there has been no adjudication.

Learned counsel for the respondents have relied upon the judgment passed by Hon'ble the Supreme Court in ***Dadu Dayalu Mahasabha, Jaipur Vs. Mahant Ram Niwas and another (2008) 11 SCC 753*** to contend that a separate suit is not maintainable. In the aforesaid judgment, Hon'ble the Supreme Court was considering the question in an entirely different fact situation. Hence the aforesaid judgment can make applied in facts of the present case to hold that the suits filed by the plaintiffs-appellants were not maintainable. In the aforesaid judgment, Hon'ble the Supreme Court has held that judgment is not be read as statute.

In view of the aforesaid discussion, question No.2 is also answered in favour of the appellants.

Although learned counsel for the appellants have argued that the suit filed by Mr. N.K.Mair was in collusion with Rekha Rani, however, this Court does not find any substance in the aforesaid argument as reading of the judgment passed by the civil court, decreeing the suit filed by Mr.N.K.Mair dated 18.10.2009 does not prove that fact. Learned counsel for the appellants have further drawn attention of the Court to general power of attorney executed by Shri N.K.Mair in favour of Sandeep Sangwan. It has been contended that the aforesaid general power of attorney is not attested by the competent authority. The aforesaid attorney is a general power of attorney but never got attested from the Registrar or Sub Registrar. Learned counsel for the appellants have further pointed out that Shri Sandeep Sangwan, who is defendant No.3 in the present suit is son of defendant No.4, who was official from Indian Administration Services who had misused his position. However, this Court does not find any necessity of going into the aforesaid issue.

All these seven appeals are allowed and judgments and decrees passed by the courts below are set aside. Since it is not in dispute that possession has been taken by defendant Mr.N.K.Mair through Sandeep Sangwan in execution of a decree passed by the courts below, which is being set aside, therefore, the plaintiffs-appellants shall be entitled to apply for restoration of the possession under Section 144 of the Code of Civil Procedure, 1908.

Consequently, Criminal Misc. No.M-23184 of 2012, which is arising from proceedings under Section 145 of the Code of Criminal Procedure, is rendered infructuous and therefore, disposed of, as such.

Pending application(s), if any, shall also stand disposed of, in terms thereof.

09.10.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No