

IN THE HIGH COURT OF ORISSA AT CUTTACK**CMP No. No. 608 of 2022*****Rama Chandra Nayak* *Petitioner***

Mr. Manoj Mishra, Senior Advocate
being assisted by Mr. Tanmay Mishra, Advocate

-versus-

Jadu Simadri and others* *Opp. Parties

**CORAM:
JUSTICE K.R. MOHAPATRA**

**ORDER
06.09.2022**

Order No.

3. 1. This matter is taken up through Hybrid mode.
2. Petitioner in this CMP seeks to assail the order dated 12th September, 2009 (Annexure-7) passed in RFA No. 2 of 2019, whereby learned District Judge, Ganjam at Berhampur rejected an application filed by the Petitioner-Appellant under Order VI Rule 17 CPC to incorporate the prayer '*to declare the Regd. Sale deed being document No. 11841900780 of 2019 be decreed as null and void*'.
3. The petition under Order VI Rule 17 CPC was taken up along with a petition under Order I Rule 10 CPC to implead the *lis pendens* purchasers as parties to the appeal in whose favour the aforesaid sale deed was executed by the Respondent No. 20. Both the petitions were disposed by a composite order dated 12th September, 2019 rejecting both the applications. The order in respect of rejection of petition under Order I Rule 10 CPC was assailed before this Court in CMP No.1127 of 2019, which was disposed of on 19th May, 2022 with the following direction:-

“5. In the circumstance, this Court finds, there is no proper application of mind in considering the application by the lower appellate court. In the process and as there is necessity of inclusion of such party at least for the purpose of injunction, this Court allowing the application for bringing the new party as Respondent nos. 21 & 22, also directs the Appellants to file amended cause title in the memorandum of appeal at least within a period of seven working days. Upon bringing the amended cause title, the lower appellate court shall issue notice to such parties in appeal so also involving him in interlocutory matters. Since this CMP does not involve rejection of the amendment, in the event there is just requirement of new pleadings, it shall be open to the Petitioner to file a fresh C.M.P.”

Accordingly, the *lis pendens* purchasers were impleaded as parties to the appeal. In view of the observation made by this Court as aforesaid, this petition has been filed assailing rejection of application under Order VI Rule 17 CPC.

4. Mr. Mishra, learned Senior Advocate for the Petitioner submits that the judgment in the suit (C.S. No. 92 of 2017) was passed on 15th November, 2018. Assailing the same, the appeal (R.F.A. No. 2 of 2019) was filed on 2nd January, 2019. Before the appeal was taken up for admission, the Respondent No.20 sold some portion of the suit land to Respondent-Opposite Party Nos. 21 and 22 (newly impleaded) vide RSD dated 20th March, 2019. It is submitted that before its admission, there was no appeal in the eye of law. The appeal was admitted only on 23rd April, 2019. As such, the sale in question cannot be said to be *lis pendens* in nature. Thus, Section 52 of the Transfer of Property Act, 1882 (for convenience referred to as ‘the Act’) has no application to the case at hand. As such, the amendment sought for is imperative for just adjudication of the suit. However, learned appellate Court rejected the petition for amendment holding that as the Court already held that presence of the *lis*

pendens purchasers is not required to adjudicate the issue involved in the suit, the amendment to declare the sale deed executed in favour of the *lis pendens* purchasers as null and void, is not necessary. It is submitted that since the prayer for impletion of *lis pendens* purchasers has already been allowed, there is no difficulty in allowing the application for amendment by the appellate Court. He, therefore, prays for setting aside the impugned order and to issue a direction to the appellate Court to permit the Petitioner to amend the plaint accordingly.

4. In course of hearing, an issue cropped up for consideration as to whether the sale in question can be treated to be *lis pendens* under Section 52 of the Act.

4.1 Hon'ble Supreme Court has already explained the doctrine of *lis pendens* on many occasions. In **Jagan Singh (dead) through LRs. Vs. Dhanwanti and another**, reported in (2012) 2 SCC 628, the Hon'ble Supreme Court held as under:-

“32. The broad principle underlying Section 52 of the TP Act is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to lis pendens, if an appeal is afterwards filed, as held in Krishanaji Pandharinath v. Anusayabai. In that matter the respondent (original plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15-7-1952 under Order 9 Rule 2, of the Code of Civil Procedure, 1908 for non-payment of process fee. The husband sold the house immediately on 17-7-1952. The respondent applied for restoration on 29-7-1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The plaintiff impleaded the appellant to the darkhast as purchaser. The appellant resisted the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows:

“... In Section 52 of the Transfer of Property Act, as it stood before it was amended by Act 20 of 1929, the expression ‘active prosecution of any suit or proceeding’ was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the ‘lis’ continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered. At p. 228 in Sir Dinshah Mulla’s ‘Transfer of Property Act’, 4th Edn., after referring to several authorities, the law is stated thus:

‘Even after the dismissal of a suit a purchaser is subject to “lis pendens”, if an appeal is afterwards filed.’

If after the dismissal of a suit and before an appeal is presented, the ‘lis’ continues so as to prevent the defendant from transferring the property to the prejudice of the plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit under Order 9 Rule 2 of the Civil Procedure Code and the date of its restoration, the ‘lis’ does not continue.’

33. It is relevant to note that even when Section 52 of the TP Act was not so amended, a Division Bench of the Allahabad High Court had following to say in *Moti Chand v. British India Corpn. Ltd.*:

“10... The provision of law which has been relied upon by the appellants is contained in Section 52, TP Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate court are merely continuation of those in the suit.”

34. If such a view is not taken, 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 explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by 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.

35. In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken

21. The execution of the alleged gift deed by the deceased-first defendant in favour of the second defendant is also hit by Section 52 of the Transfer of Property Act, 1882, as the said deed in respect of 'B' schedule property by the deceased first defendant, which property has been devolved in his favour, to the notice of this Court as provided under Order 22 Rule 10 of the C.P.C. and defended his right as required under the law as laid down by this Court in a catena of cases.

26. The legality of the alleged gift deed executed in favour of the second defendant by the deceased-first defendant in respect of the schedule 'B' property has been further examined by us and the same is hit by Section 52 of the of the Transfer of Property Act, 1882, in the light of the decision of this Court in the case of Jagan Singh v. Dhanwanti[3], wherein this Court has laid down the legal principle that under Section 52 of the Transfer of Property Act, 1882, the 'lis' continues so long as a final decree or order has not been obtained from the Court and a complete satisfaction thereof has not been rendered to the aggrieved party contesting the civil suit. It has been further held by this Court that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail.

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“37. In *Parmeshari Din Vs. Ram Chran*, reported in (1937)39 BOMLR 2019, it was held : (SCC ONLINE PC)

It is clear that the question of the active prosecution of a suit is one of fact, but it was not suggested in either of the courts in Indi that the plaintiffs had not actively prosecuted the suit, and ere consequently debarred from availing themselves of the rule of lis pendens. The learned Judges of the Court of Appeal had, therefore, no opportunity to express their opinion on this point; and their Lordships cannot entertain an objection, which depends upon a question of fact not delat with below. Upon the record before them, there is no indication of any delay or remissness in the prosecution of the suit, for which the plaintiffs can be held responsible.

Their Lordships, therefore, agree with the High Court that the transfer relied upon by the appellant cannot prejudice the rights of the decree-holders, and that he cannot resist the decree obtained by them.”

38. *The abovesaid principle of law settled in the year 1937 by the Privy Council is still valid as discerned from the latest judgment of this Court rendered in Kirpal Kaur Vs. Jitender Pal Singh and others, (2015) 9 SCC 356.”*

5. In view of the ratio decided by the Hon'ble Supreme Court in the case, there remains no iota of doubt that even if a transaction taken place in respect of the suit property after dismissal of the suit and before filing of the appeal, the same would be governed under Section 52 of the Act. It is further clarified that even if the appeal is filed beyond the period of limitation, the transaction in question will attract the provision of Section 52 of the Act, in the event the delay is condoned. In the instant case, the sale in question took place after the appeal is filed, but before it was formally admitted. In that view of the matter, the sale in question is covered under the principles of *lis pendens*. As such, the relief to declare the RSD No.11841900780 of 2019 to be *null* and *void* is not required to be considered for just adjudication of the suit/appeal. Hence, the amendment sought for is not necessary for proper adjudication of the suit/appeal.

6. Accordingly, the order dated 12th September, 2009 (Annexure-7) passed by learned District Judge, Ganjam at Berhampur in RFA No.2 of 2019 warrants no interference even after changed circumstances of impletion of parties.

7. Accordingly, the CMP being devoid of any merit stands dismissed.

(K.R. Mohapatra)
Judge

s.s.satapathy

