Amit Kumar Shaw & Anr vs Farida Khatoon & Anr on 13 April, 2005

Equivalent citations: AIR 2005 SUPREME COURT 2209, 2005 (11) SCC 403, 2005 AIR SCW 2078, (2005) 29 ALLINDCAS 1 (SC), (2005) 2 ALLMR 458 (SC), (2005) 4 CTC 47 (SC), (2005) 5 JT 20 (SC), 2005 (4) CTC 47, 2005 SCFBRC 325, 2005 (2) BLJR 1273, 2005 (2) ALL MR 458, 2005 (5) JT 20, 2005 (5) SRJ 586, 2005 (4) SCALE 108, 2005 BLJR 2 1273, 2005 (3) SLT 705, (2005) 2 CIVILCOURTC 423, (2005) 2 LANDLR 653, (2005) 4 MAD LJ 36, (2005) 3 SUPREME 670, (2005) 2 RECCIVR 651, (2005) 3 ICC 65, (2005) 4 SCALE 108, (2005) 3 MAD LW 728, (2005) 3 MAH LJ 330, (2005) 3 PUN LR 201, (2005) 99 REVDEC 193, (2005) 3 SCJ 452, (2005) 4 ANDHLD 98, (2005) 3 KCCR 1834, (2005) 59 ALL LR 584, (2005) 2 ALL RENTCAS 174, (2005) 3 CAL HN 83, (2005) 1 CAL LJ 261, (2005) 4 CIVLJ 365, (2005) 2 CURCC 185, (2005) 1 WLC(SC)CVL 793, (2005) 2 ALL WC 1348, (2005) 5 BOM CR 690, AIRONLINE 2005 SC 100, (2005) 2 KER LT 806

Author: Ar. Lakshmanan

Bench: Ashok Bhan, Ar. Lakshmanan

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           CASE NO.:
Appeal (civil)  2592 of 2005

PETITIONER:
Amit Kumar Shaw & Anr.

RESPONDENT:
Farida Khatoon & Anr.

DATE OF JUDGMENT: 13/04/2005

BENCH:
Ashok Bhan & Dr. AR. Lakshmanan

JUDGMENT:
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J U D G M E N T (Arising out of S.L.P.(C) No.17780 of 2004) WITH CIVIL APPEAL NO. OF 2005 (Arising out of S.L.P.(C) No. 18076 of 2004) Dr. AR. Lakshmanan, J.

Leave granted.

These two appeals are directed against the judgment and order dated 15.06.2004 passed by the High Court at Calcutta in C.A.N. No. 2642 of 2004 in S.A.No. 631 of 1993 and in C.A.N. No. 2643 of 2004 in S.A.No. 632 of 1993 whereby the High Court dismissed the applications filed by the appellants for substitution of their names, namely, Amit Kumar Shaw and Anand Kumar Shaw as contesting respondents in place and stead of Birendra Nath Dey and Smt. Kalyani Dey, both since deceased and represented by their legal heirs in their place. According to the appellants, the respondents above named had sold the suit property to the appellants, who are the only persons interested in the said suit property.

The service of notice is complete in both the matters but no one has entered appearance on behalf of the respondents.

The short facts are as follows:

> The property in question originally belonged to Khetra Mohan Das and subsequently by way of lease and transfer; the said property ultimately came in the hands of Birendra Nath Dey and Smt. Kalyani Dey. There were troubles in between the original owner and the said Birendra Nath Dey and Smt. Kalyani Dey and as a result of that, the suit was filed. One Fakir Mohammad claimed his right, title and interest in respect of the property in question by way of adverse possession. Ultimately, both the appeals being Title Appeal No. 400 of 1989 and Title Appeal No. 7 of 1990 were allowed by a common judgment and decree dated 25.06.1992 and the suit was remanded back for rehearing before the trial Court. Being aggrieved by the said decree, Fakir Mohammad filed S.A.Nos. 631 and 632 of 1993 challenging the said judgment of the first appellate Court. On 15.12.1995, by a deed of assignment Birendra Nath Dey assigned his leasehold interest in respect of 132A, Circular Garden Reach Road, Calcutta in favour of the present appellants. Similarly, by a sale deed on 15.12.1995, Kalyani Dey sold and transferred 132 B Circular Garden Reach Road, Calcutta in favour of the present appellants. Therefore, the appellants filed applications for recording their names in the Municipal records. At that time, the appellants, for the first time, came to know about the pendency of the above two appeals. Immediately thereafter, the appellants filed the petitions praying for adding them as a party in connection with those two appeals. In this factual background, the following questions of law arise for consideration by this Court in these appeals:
>
> "1) Whether on a combined reading of Order 1 Rule 10, Order XXII Rule 10 of the Code of Civil Procedure, 1908 and Section 52 of the Transfer of Property Act, 1882, an application for substitution by a subsequent transferee can be rejected and he be non-suited altogether?
>
> 2) Whether a decree for adverse possession is set aside in First Appeal in the year 1992 and no stay application was filed for long 12 years (till 2004) in the Second Appeal, whether a transferee interregnum from the owner/defendant, without knowledge of the second appeal, is a necessary party or whether their application for

substitution can be rejected, when there is no allegation of mala fide or ill motive?

3) Whether the High Court has not committed serious error while concluding that the presence of the appellants is not necessary in order to decide the appeal and there is no merit in the application for addition of party though the application was made by the appellants for substitution of their names in place and stead of contesting defendant No.10, who sold the suit property to the appellants?

4) Whether the High Court has not committed error by rejecting the appellants' application for substitution treating the same as addition of party and thereby rendering the appellants non-suited and remediless?

We heard Mr. L. Nageswara Rao, learned senior counsel, appearing for the appellants and perused the pleadings, the annexures and the impugned order passed by the High Court.

Mr. L.Nageswara Rao, learned senior counsel, appearing for the appellants submitted that the presence of the appellants is absolutely necessary in order to effectively and completely adjudicate the issues in between the parties. As against the similar argument before the High Court, learned counsel for the respondents therein submitted that a person is not to be added as a defendant merely because he or she would be incidentally affected by the judgment and that the main consideration should be whether or not the presence of such a person is necessary to enable the Court to effectually and completely adjudicate upon and settle the questions involved in the suit. It was also submitted before the High Court that in a suit for declaration of title, a transferee from the defendant pendente lite is neither a necessary party nor a proper party inasmuch as he would be bound by the decree in the suit in view of the principle laid down in Section 52 of the Transfer of Property Act, 1882. While disposing of the applications, the High Court held as under:

"So far as the case in our hand is concerned, it is the admitted position that the litigation was going on in between the parties for a long time and the parties were contesting the said suit and subsequently the appeals. The dispute in between the parties was in respect of the validity of the grant of the lease as well as a claim of title by way of adverse possession. So those disputes in between the parties have got no connection whatsoever with the present applicants. The presence of the applicants is in no way required for effectively adjudicate the appeals and as such the presence of the applicants in my opinion is not at all necessary. In this respect, it can be said that the applicants purchased the property during the pendency of the appeal and in all probability with the knowledge of the said pendency. An attempt has been made by the applicants to show that they were not aware about the pendency of the appeals. But this claim, in my opinion, is not believable since the litigation is going on for more than 40 years. Moreover being a purchaser, it is the duty of the applicants to make proper enquiry before the purchase. Section 52 of the Transfer of Property Act has clearly prohibited the transfer of property which is subject matter of a pending suit. The purchase, in this respect, can only be done with the permission of the Court. Admittedly no permission has been obtained and as such, this transfer in favour of

the applicants is certainly hit by the doctrine of lis pendens as provided under Section 52 of the Act. So, the applicants cannot claim at this stage that their interest is going to be affected unless they are made a party in this appeal. In my considered opinion, the presence of the applicants is not at all necessary in order to decide the appeals in question effectively and conclusively. As such, I hold that there is no merit in the applications of the applicants praying for adding them as parties in these two appeals.

Therefore, from my above discussion, I am of the opinion, that there is no merit in the present applications and as such the applicants' prayer for adding them as parties in these two appeals are rejected. Both the CAN applications are thus disposed of."

It is beneficial to reproduce Order 1 Rule 10, Order XXII Rule 10 of the Code of Civil Procedure, 1908 and Section 52 of the Transfer of Property Act, 1882 which read as under:

Order 1 Rule 10 (1) Suit in name of wrong plaintiff - Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended -

Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

Order XXII Rule 10 Procedure in case of assignment before final order in suit (1) In other 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 has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule(1)."

Section 52 of the Transfer of Property Act 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.

Explanation - For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a 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."

On a combined reading of Order 1 Rule 10, Order XXII Rule 10 of the Code of Civil Procedure and Section 52 of the Transfer of Property Act, can an application for substitution by a subsequent transferee be rejected and the subsequent purchaser be non-suited altogether is the prime question for consideration in these appeals.

The object of Order 1 Rule 10 is to discourage contests on technical pleas, and to save honest and bona fide claimants from being non-suited. The power to strike out or add parties can be exercised by the Court at any stage of the proceedings. Under this Rule, a person may be added as a party to a suit in the following two cases:

> (1) When he ought to have been joined as plaintiff or defendant, and is not joined so, or (2) When, without his presence, the questions in the suit cannot be completely decided.

The power of a Court to add a party to a proceeding can not depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.

The application under Order XXII Rule 10 can be made to the appellate Court even though the devolution of interest occurred when the case was pending in the trial Court. In the instant case, the

suit was decreed in favour of Fakir Mohammad by judgment and decree dated 03.11.1989. The suit was contested by two sets of defendants, one set of defendants was Birendra Nath Dey and Kalyani Dey and other set of defendants was Jagat Mohan Das alone. The appeals were preferred by the parties. Both the appeals were heard and by a common judgment and order dated 25.6.1992, the said appeals were allowed and the judgment and decree passed by the Munsif was set aside. By a deed of Assignment dated 15.12.1995, the said Birendra Nath Dey assigned his leasehold right in respect of 132 A Circular Garden Reach Road, presently known as 132 A, Karl Marx Sarani), Kolkata in favour of the appellants. By a deed of sale executed on 15.12.1995, duly registered with the Additional Registrar of Assurances, Calcutta, Kalyani Dey Sold the property being 132 B of the above address to the other appellant. The second appeals filed by the parties were pending on the file of the High Court at Calcutta. The appellants had no knowledge of the second appeals. Thereafter on verification, the appellants came to know about the pendency of the appeals which necessitated them to file the applications for substitution in the second appeals. In the meanwhile, the appellants filed the applications before the Municipal authorities for mutation of their names in respect of the property on 24.12.2002 and the Municipal authority informed the appellants that they are not in a position to mutate the names of the appellants of the property in question because of the pendency of the two second appeals before the High Court at Calcutta. Thereafter the appellants engaged an advocate to find out whether any such appeals have been filed by the parties. The advocate so engaged informed the appellants that two appeals being S.A.Nos. 631 and 632 of 1993 were filed by Fakir Mohammad, Farida Khatoon & Ors. Respondent Nos. herein. It was also informed that the said appeals were admitted by the High Court but the impugned judgment and order was neither prayed for stay nor stayed. Therefore, it was also submitted by the appellants that since the appellants have become the absolute owners of the property, their interest will be highly prejudiced and they will be vitally affected, if any order is passed by the High Court without hearing the appellants in the matter. Therefore, they prayed that the appellants are to be substituted in place and stead of the present respondents, since they have no existing and subsisting right, title or interest in the property.

Under Order XXII, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit.

In this connection, the provisions of Section 52 of the Transfer of Property Act, 1882 which has been extracted above may be noted.

An alienee pendente lite is bound by the final decree that may be passed in the suit. Such an alienee can be brought on record both under this rule as also under O 1 Rule 10. Since under the doctrine of lis pendens a decree passed in the suit during the pendency of which a transfer is made binds the transferee, his application to be brought on record should ordinarily be allowed.

Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This Section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements must be present:

1. There must be a suit or proceeding pending in a Court of competent jurisdiction.

2. The suit or proceeding must not be collusive.

3. The litigation must be one in which right to immovable property is directly and specifically in question.

4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.

5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

In the instant case, the applications for substitution were filed by the respective appellants in the second appeals which are still pending on the file of the High Court though it was filed in the year 1993. The appellants have properly, sufficiently and satisfactorily explained the delay in approaching the Court. We see bona fide in their explanation in not coming to the Court at the earliest point of time. Therefore, the appellants who are transferees pendente lite should be made as parties to the pending second appeals as prayed for by them. In our opinion, the High court has committed serious error in not ordering the applications for substitution filed by the appellants. In our view, the presence of the appellants are absolutely necessary in order to decide the appeals on

merits. Since the High Court has committed error by rejecting the appellants' applications for substitution treating the same as additional parties and thereby rendering the appellants non-suited. We have no hesitation in setting aside the said orders and permit the appellants to come on record by way of substitution as prayed for. The High Court proceeded on a wrong premise that the appellants had made the application for addition of party whereas the application under consideration was for substitution as the owner had sold the suit property to the appellants and had no interest in the pending litigation.

In our opinion, the presence of the appellants was absolutely necessary since the appellants are the only persons who has got subsisting right, title and interest in the suit. The appellants are at liberty to contest the matter on merits.

Consequently, the appeals shall stand allowed. However, there shall be no order as to costs.