

Raj Kumar vs Sardari Lal on 20 January, 2004

Equivalent citations: 2004 AIR SCW 470, 2004 (2) SCC 601, (2004) 2 ANDH LT 1, (2004) 2 ANDHLD 95, (2004) 1 CTC 549 (SC), (2004) 2 CAL HN 13, (2004) 2 CURLJ(CCR) 340, (2004) 2 SCALE 17, (2004) 1 LANDLR 566, (2004) 3 MAD LW 524, 2004 ALL CJ 1 784, (2004) 16 ALLINDCAS 322 (SC), (2004) 2 CIVLJ 331, (2004) 2 ICC 1, (2004) 1 WLC(SC)CVL 381, (2004) 1 KHCACJ 665 (SC), (2004) 1 CLR 305 (SC), (2003) 4 ICC 471, (2003) 3 CALLT 627, (2004) 2 CURCC 1, (2004) 1 SUPREME 532, (2004) 54 ALL LR 505, (2004) 2 ALL WC 1186, 2004 SCFBRC 268, (2004) 2 JT 196 (SC)

Author: R.C. Lahoti

Bench: Ashok Bhan, R.C. Lahoti

CASE NO.:

Appeal (civil) 400 of 2004

PETITIONER:

RAJ KUMAR

RESPONDENT:

SARDARI LAL

DATE OF JUDGMENT: 20/01/2004

BENCH:

R.C. LAHOTI & ASHOK BHAN

JUDGMENT:

JUDGMENT 2004 (1)SCR 838 The Judgment of the Court was delivered by R.C. LAHOTI, J. Leave granted.

During the pendency of a civil suit relating to an immovable property, respondent No.4 herein purchased the suit property from the defendants (respondent Nos. 2 & 3) by a registered deed of sale dated 24.9.1995. the respondent No.4, it appears, was not aware of the pendency of the suit; rather the vendors stated in the deed of sale that the property was not a subject matter of any litigation. On 27.11.1995, the suit was decreed ex- parte against the defendants (respondent nos. 2 & 3). On 30.5.1998, the respondent No.4 filed an application under Order 9 Rule 13 of the CPC seeking setting aside of the decree and also making a prayer under Order 22 Rule 10 of the CPC for being brought on record. Prayer was also made for condoning the delay in filling the application inasmuch as the ex-parte decree was not in the knowledge of the respondent No.4. The trial Court has allowed the application condoning the delay in filling the same and held that a sufficient cause for setting

aside the decree within the meaning of Order 9 Rule 13 of the CPC was made out. The appellant preferred a civil revision in the High Court which has been dismissed.

The only plea raised and vehemently urged by Shri S.N. Mishra, the learned senior counsel for the appellant before this Court, as was done before the trial Court and the High Court too. is that an application under Order 9 Rule 13 of the CPC can be filed only by a defendant and by no one else. The respondent No.4 is a transferee pendente lite and in the absence of his having promptly taken steps under Order 22 Rule 10 of the CPC for being brought on record, he remains bound by the result of the suit. He must suffer the consequences of an adverse decree passed against his vendors who have not chosen to lay any challenge to the ex-parte decree, submitted the learned counsel.

We have heard Shri S.N. Mishra the learned senior counsel for the appellant and Shri Manoj Swarup. learned counsel for the respondent No.4 We are satisfied that there is no merit in the appeal and the same is liable to be dismissed.

The doctrine of *Us pendens* expressed in the maxim '*at lite Pender nihil innovetur*' (during a litigation nothing new should be introduced) has been statutorily incorporated in Section 52 of the Transfer of Property Act 1882. A defendant cannot, by alienating property during the pendency of litigation, venture into depriving the successful plaintiff of the fruits of the decree. The transferee pendente lite is treated in the eye of law as a representative-in-interest of the judgment-debtor and held bound by the decree passed against the judgment-debtor though neither the defendant has chosen to bring the transferee on record by apprising his opponent and the Court of the transfer made by him nor the transferee has chosen to come on record by taking recourse to Order 22 Rule 10 of the CPC. In case of an assignment creation or devolution of any interest during the pendency of any suit. Order 22 Rule 10 of the CPC confers a discretion on the Court hearing the suit to grant leave for the person in our upon whom such interest has come to vest or devolve to be brought on record. Bringing of a *lis pendens* transferee on record is not as of right but in the discretion of the Court. Though not brought on record the *lis pendens* transferee remains bound by the decree.

The present case has a peculiar feature. The transfer took place during the pendency of the suit but the decree passed ex-parte in the suit is sought to be set aside not by the defendant on record but by a person who did not come or was not brought on record promptly and hence apparently appears to be a third party. However, as we have already stated hereinabove, the person would be a representative-in interest of the defendant judgment- debtor The solution lies in Section 146 of the Code of Civil Procedure, 1908. It provides -

"146. Proceedings by or against representatives -Save as otherwise provided by this Court or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or application may be made by or against any person claiming under him."

A *Us pendens* transferee from the defendant, though not arrayed as a party in the suit, is still a person claiming under the defendant. The same principle of law is recognized in a different perspective by Rule 16 of Order 21 of the CPC which speaks of transfer or assignment *inter vivos* or

by operation of law made by the plaintiff-decree-holder. The transferee may apply for execution of the decree of the Court which passed it and the decree will be available for execution in the same manner and subject to the same conditions as if the application were made by the decree-holder. It is interesting to note that a provision like Section 146 of the CPC was not be found in the preceding Code and was for the first time incorporated in the CPC of 1908. In Order 21 Rule 16 also an explanation was inserted through amendment made by Act No. 104 of 1976 w.e.f. 1.2.1977 where by the operation of Section 146 of CPC was allowed to prevail independent of Order 21 Rule 16 CPC.

A decree passed against the defendant is available for execution against the transferee or assignee of the defendant-judgment-debtor and it does not make any difference whether such transfer or assignment has taken place after the passing of the decree or before the passing of the decree without notice or leave of the Court.

The law laid down by a four-Judges Bench of this Court in Smt. Saila Bala Dassi v. Sm. Nirmala Sundari Dassi and Anr., [1958] SCR 1287. is apt for resolving the issue arising for decision herein. A transferee of property from defendant during the pendency of the suit sought himself to be brought on record at the stage of appeal. The High Court dismissed the application as it was pressed only by reference to Order 22 Rule 10 of the CPC and it was conceded by the applicant that, not being a person who had obtained a transfer pending appeal, he was not covered within the scope of Order 22 Rule 10. In an appeal preferred by such transferee this Court upheld the view of the High Court that a transferee prior to the filing of the appeal could not be brought on record in appeal by reference to Order 22 Rule 10 of the CIV. However, the Court held that an appeal is a proceeding for the purpose of Section 146 and further the expression "'claiming under' is wide enough to include cases of devolution and assignment mentioned in Order 22 Rule 10. Whoever is entitled to be but has not been brought on record under Order 22 Rule 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code A person having acquired an interest in suit property during the pendency of the suit and seeking to be brought on record at the stage of the appeal can do so by reference to section 146 of the CPC which provision being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. Their Lordships held that being a purchaser pendente lite, a person will be bound by the proceedings taken by the successful party in execution of decree and justice requires that such purchaser should be given an opportunity to protect his rights. In sm. Saila Bala Dassi case (supra) an earlier decision of this Court in Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd., [1955] I SCR 1369 was followed. It was a case where during the pendency of a suit for recovery of a debt from the defendant the plaintiff in that suit had transferred to a third person all the book and other debts. This Court held that the position of the transferor vis-a-vis the transferee is nothing more than that of a benamidar for the latter and when the decree is passed for the recovery of that debt it is the latter who is the real owner of the decree. When the transferee becomes the owner of the decree immediately on its passing, he must, in relation to the decree, be also regarded as person claiming under the transferor. The transferee is entitled under Section 146 to make an application for execution which the original decree-holder could do.

The executing Court can apply its mind to the simple equitable principle which operates to transfer the beneficial interest in the after-acquired decree under Section 146. As the assignee from the plaintiff of the debt which was the entire subject matter of the suit the transferee was entitled to be brought on record under Order 22 Rule 10 and must, therefore, be also regarded as a representative of the plaintiff within the meaning of Section 47 of the CPC.

In *Sardar Govindrao Mahadik and Anr. v. Devi Sahai and Ors.* [1982] 1 SCC 237, this held that an application not falling under Order 22 Rule 10 of the CPC *stricto sensu* could yet be held to be maintainable by having recourse to Section 146 of the CPC.

The appellant cannot dispute that the decree though passed against the respondent Nos. 2 and 3 could be executed even against the respondent No.4, he being a *lis pendens* transferee though not having been joined in the suit as a party. Such a person can prefer an appeal being a person aggrieved. Clearly the person who is liable to be proceeded against in execution of the decree, or can file an appeal against the decree, though not a party to the suit or decree does have *locus standi* to move an application for setting aside an *ex-parte* decree, passed against the person in whose shoes he has stepped in. In the expression employed in Rule 13 of Order 9 of the CPC that "in any case in which a decree is passed *ex-parte* against a defendant he may apply for an order to set it aside" the word 'he' cannot be construed with such rigidity and so restrictively as to exclude the person who has stepped into the shoes of the defendant, from moving an application for setting aside the *ex-parte* decree especially in the presence of Section 146 of the CPC.

Incidentally we may observe that in *Surjit Singh and Ors. v. Harbans Singh and Ors.*, [1995] 6 SCC 50, the assignees *pendente lite* were refused by this Court to be brought on record as they had purchased the suit property after the passing of the preliminary decree and in clear defiance of the restraint order passed by the Court *injunctioning* any alienation/assignment. It was a case of exercising discretion not to grant leave under Order 22 Rule 10 of the CPC, in the circumstance of the case, as in the opinion of this court permitting impleadment and recognizing the alienation/assignment would amount to defeating the ends of justice and the prevalent public policy. That case is clearly distinguishable.

We hold that a *lis pendens* transferee, though not brought on record under Order 22 Rule 10 of the CPC, is entitled to move an application under Order 9 rule 13 to set aside a decree passed against his transferor-the defendant in the suit.

As to the availability of sufficient cause for setting aside the decree within the meaning of Order 9 Rule 13 of the CPC and for condoning the delay under Section 5 of the Limitation Act, the finding in favour of respondent No.4 is purely one of fact and well reasoned.

The attack against the *locus standi* of respondent No. 4 to maintain the application under Order 9 Rule 13 of the CPC fails and so does the appeal.

The appeal is dismissed with no order as to the costs.