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(2011) 02 MP CK 0036

Madhya Pradesh High Court (Gwalior Bench)

Case No: F.A. No. 07 of 2002

Basant Kumar Gaur — APPELLANT

Vs

Suggamal and Another — RESPONDENT

Date of Decision: Feb. 17, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13, 47
- Constitution of India, 1950 - Article 226
- Evidence Act, 1872 - Section 44
- Madhya Pradesh Stamp Rules, 1942 - Rule 38
- Specific Relief Act, 1963 - Section 27
- Transfer of Property Act, 1882 - Section 52

Citation: (2011) ILR (MP) 1534 : (2011) 2 MPLJ 342

Hon'ble Judges: Abhay M. Naik, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Abhay M. Naik, J.

This first appeal has been preferred by Defendant/Appellant against judgment and decree dated 25-9-2001 passed by the Court of V Additional District Judge, Gwalior, in Civil Suit No. 59-A/1984.

Plaintiff/Respondent No. 1 instituted a suit with allegations, inter alia, that the suit property belonged to Mahila Akhtar Begum, who being Pardanasheen, had appointed her husband, namely, Irtiza Hussain as her power of attorney. She through her power of attorney entered into a written agreement to sell the suit property to the Plaintiff on 12-10-1979 for a consideration of Rs. 14,000/-. According to agreement, Rs. 10,000/- were to be paid at the time of sale-deed. Plaintiff paid Rs. 4,000/- vide bank-draft dated 6-11-1979. Balance money Rs. 10,000/- were paid on 6-3-1980 at the time of obtaining

permission from Urban Land Ceiling Department. All the aforesaid facts were known/within knowledge of Defendant/Appellant. Pursuant to the aforesaid sale agreement, Mahila Akhtar Begum through her power of attorney executed registered sale-deed dated 09-3-1981 in favour of Plaintiff in respect of the suit property. Thus, the Plaintiff is the sole owner of the suit property and is in its possession as owner from the date of registered sale-deed dated 9-3-1981. Plaintiff issued a notice dated 19-4-1981 for demand of rent to Defendant No. 1 who asserted his ownership. Defendant No. 2 who was in occupation in the suit property asserted his possession as tenant of Defendant No. 1. Defendant/Appellant in his reply dated 8-6-1991 in response to Plaintiff"s notice stated for the first time that he had obtained an ex parte decree for specific performance against Mahila Akhtar Begum on the basis of an alleged sale agreement and its execution was pending. On collecting information, Plaintiff came to know that Defendant No. 1 had prepared a fake and forged sale agreement dated 11-3-1980 which bears forged signatures of Mahila Akhtar Begum. Ex parte decree dated 2-8-1980 was obtained by Defendant No. 1 without due service of summons on her. Civil Suit No. 59-A/1980 instituted by Defendant No. 1 against Mahila Akhtar Begum was conducted keeping in mind the various dates when Mahila Akhtar Begum was present at Gwalior for execution of various sale-deeds in respect of different pieces of her property. It is pleaded that agreement of sale in favour of Plaintiff on 12-10-1979 and registered sale-deed pursuant thereto was duly executed on 9-3-1981. However, the alleged sale-agreement and registered sale-deed in favour of Defendant/Appellant were subsequent to the sale agreement dated 12-10-1979 in favour of the Plaintiff. This being so, Defendant/Appellant has not acquired any right or title in the suit property. Since the sale agreement and registered sale-deed in favour of the Plaintiff were within the knowledge of the Defendant/Appellant right from the beginning, he is bound to execute a deed of conveyance in favour of Plaintiff.

The agreement of sale alleged by Defendant/Appellant is forged and concocted document. It does not bear signatures of Mahila Akhtar Begum. Proceedings of Civil Suit No. 59-A/1980 are based on fraud and collusion and the same are, therefore, null and ineffective. Defendant No. 2 Veerumal is in collusion with Defendant No. 1/Appellant. However, Plaintiff being the sole owner of the suit property, Veerumal is bound to deliver possession to him. Plaintiff prayed that:

(i) He be declared as the sole owner of the suit property and it be further declared that Defendant/Appellant is not its owner; and

(ii) Defendant/Appellant be directed to execute the document of reconveyance (re-transfer) in respect of the suit property in favour of the Plaintiff; and

(iii) Possession may be delivered to the Plaintiff; and

(iv) Mesne Profits at the rate of Rs. 300/- per month may be awarded.

Any other relief which is found suitable/appropriate in the facts and circumstances of the case, may also be awarded.

Defendant Akhtar Begum submitted written statement in favour of the Plaintiff. She, inter alia, contended that she being Pardanasheen had appointed her husband, namely, Irtiza Hussain as her power of attorney. She admitted the agreement of sale dated 12-10-1979 as well as registered sale-deed dated 9-3-1981 in favour of the Plaintiff. She admitted receipt of consideration and proceedings for permission from Urban Land Ceiling Department initiated on her behalf. She also stated that all the aforesaid facts were well within the knowledge of Defendant/Appellant right from the beginning. She denied that any agreement was executed in favour of Defendant/Appellant. She further stated that summon in the civil suit instituted by Defendant/Appellant against her was not served upon her. She, for the first time, came to know about the earlier suit after service of summons of the present suit along with copy of plaint. Till then, she was not, at all, aware of earlier suit allegedly instituted by Defendant/Appellant for specific performance. Alleged agreement in favour of Defendant/Appellant has been disputed by her as a forged document. She stated that ex parte decree was obtained by the Defendant/Appellant against her by procuring wrong endorsement. On coming to know about the said ex parte decree, application for setting aside the same was submitted by her on 17-4-1980, which is still pending.

Defendant/Appellant submitted his written statement denying thereby the claim of the Plaintiff. He stated that Mahila Akhtar Begum had duly executed the sale agreement in respect of the suit property in his favour on 11-3-1980. He disputed the sale agreement dated 12-10-1979 in favour of the Plaintiff. According to Defendant/Appellant, registered sale-deed dated 9-3-1981 in favour of Plaintiff was a pendente lite transfer having been made during pendency of Civil Suit No. 59-A/1980 for specific performance. Payment of consideration by Plaintiff to Mahila Akhtar Begum was also disputed. He further stated that decree in Civil Suit No. 59-A/1980 was rightly passed for specific performance by the Court of III Civil Judge Class-I, Gwalior, and pursuant to the said decree, balance money of Rs. 5,000/- was deposited with the Court and the execution was started against Mahila Akhtar Begum. Notice was issued in execution case through newspaper "Dainik Amar Ujala", Moradabad edition. Since Mahila Akhtar Begum did not execute the sale-deed, the same has been duly executed by the Court itself in execution proceedings on 25-3-1981. Accordingly, it has been submitted that Plaintiff is not the owner of the suit property. On the contrary, Defendant/Appellant is its owner by virtue of registered sale-deed dated 25-3-1981, duly executed by the Court itself in execution of the decree for specific performance. As regards Defendant No. 2, Veerumal, it has been stated by Defendant No. 1/Appellant in the written statement that Veerumal was his tenant and the Plaintiff is not entitled to obtain possession from him. It was pleaded by way of amendment that during pendency of the suit, the Defendant/Appellant has obtained possession from Veerumal, therefore, Veerumal was no more necessary party.

After recording evidence, learned trial Judge found that Defendant Mahila Akhtar Begum had executed through her husband an agreement of sale dated 12-10-1979 in respect of the suit property in favour of the Plaintiff, which was well within the knowledge of the Defendant/Appellant. It has been further found that registered sale deed dated 9-3-1981 was duly executed by Mahila Akhtar Begum through her husband, namely, Irtiza Hussain for due consideration. Possession pursuant to it was also handed over to the Plaintiff. Learned trial Judge found that the alleged agreement dated 11-3-1980 in favour of the Defendant/Appellant is a forged and concocted document. It has further been found that the judgment and decree dated 2-8-1980 was obtained in ex-parte manner by playing fraud on the Court and also without due notice to Mahila Akhtar Begum. Accordingly, sale-deed executed in favour of Defendant No. 1/Appellant in execution proceedings is null and ineffective vis-a-vis Plaintiff. It has also been held that Plaintiff is the owner of the suit property and is entitled to possession as well as mesne profits at the rate of Rs. 300/- per month from the date of institution of the suit.

Aggrieved by the aforesaid, Defendant/Appellant submitted the present appeal.

Shri S. S. Bansal and Shri Amit Bansal, Advocates for Appellant, Shri P. C. Chandil, Advocate for Respondent No. 1 and Shri Kamal Rochlani, Advocate for Respondent No. 2 made their respective submissions.

Shri Chandil submitted that suit has also been decreed against Veerumal, who was Defendant No. 2. Defendant/Appellant has avoided to implead him in the present appeal, therefore, the appeal is not competent and is liable to be dismissed as incompetent. Shri Bansal, learned Counsel appearing for the Defendant/Appellant, submitted that LA. No. 6736/2003 was submitted long back for impleadment of Veerumal. This being so, the appeal cannot be treated as incompetent.

It may be seen that learned trial Judge has granted decree against Veerumal for mesne profits at the rate of Rs. 200/- per month from the date of institution of the suit. Defendant/Appellant by way of amendment incorporated on 21-2-1986 stated that Veerumal had delivered possession to him. This being so, Veerumal is not found to be a necessary party in the present appeal. Plaintiff/Respondent No. 1 would be at liberty to execute decree for mesne profits against said Veerumal since it has attained finality against him. LA. No. 6736/2003 accordingly stands disposed of with a finding that absence of Veerumal has no ill-effect on the competency of the appeal.

It has been contended on behalf of the Appellant that the findings of the learned trial Judge that Defendant/Appellant knew about the sale agreement dated 12-10-1979 in favour of Plaintiff as well as execution of registered sale-deed dated 9-3-1981 in favour of Plaintiff are contrary to the evidence on record. They are based on incorrect appreciation of evidence. According to him, the same having not been duly proved, the suit was liable to dismissal. Shri Chandil, learned Counsel supported the said findings.

On perusal, it is found that the Plaintiff as well as Defendant/Appellant, both, claimed to have derived title from Mahila Akhtar Begum who was admittedly the owner of the suit property. Defendant/Appellant was himself residing in the upper portion of the suit property. Agreement of sale dated 12-10-1979 marked as Ex.P/1 has been duly proved by Plaintiff himself, Irtiza Hussain and attesting witness Laxmandas. It was executed at the house of Laxmandas, which is in front of the suit property. As per all the witnesses, Defendant/Appellant was tenant at the time of execution of Ex.P/1. Defendant/Appellant has nowhere denied this fact in his statement. This apart, it has been stated that at the time of submitting the application for permission from Urban Land Ceiling Department, the suit property was inspected by the Plaintiff in presence of the Defendant. Learned Counsel for the Appellant has been unable to point out contrary evidence on the point. Thus, the finding that Plaintiff was aware of the agreement of sale dated 12-10-1979 is not liable to be interferred with and is accordingly affirmed.

It has been further contended that there is no mention in the registered sale-deed dated 9-3-1981 (Ex.P/2) in favour of Plaintiff that it was in pursuance of the sale agreement dated 12-10-1979. Map mentioned in Ex.P/1 has not been produced at all. Thus, the sale agreement is fake in the absence of map. Sale deed Ex.P/2 cannot be treated to be in furtherance of Ex.P/1. Reliance for this purpose has been placed on the decision of the Apex Court in the case of Vimlesh Kumari Kulshrestha Vs. Sambhajirao and Another,

In the case of Vimlesh (supra), it was found that proper description of the property was not contained in the agreement and therefore, agreement was fully uncertain.

In Ex.P/1, boundaries of the property in question are clearly and expressly mentioned. It is a trite law that when the property is shown to have been bounded by four side boundaries, property surrounded by boundaries would pass. This being so, non-production of map will not be fatal. Moreover, specific objection about uncertainty for the purpose of identification of the suit property is not found to have been raised.

Specific defence of the Defendant is that the suit property was agreed to be sold to him by Mahila Akhtar Begum vide sale agreement dated 11-3-1980 and the suit for specific performance having been decreed on its basis, the sale-deed has also been rightly executed by the Court in execution proceeding on 26-3-1981 as revealed in Ex.D/11. It has been further argued that limitation of four months was agreed between the parties vide Clause 4 of Ex.P/1, therefore, registered sale-deed dated 9-3-1981 cannot be stated to be in furtherance of Ex.P/1.

On perusal of Clause 4, it is found that it was agreed between the parties that an application for permission from Urban Land Ceiling Department was to be submitted by Mahila Akhtar Begum. After grant of permission, the balance consideration of Rs. 10,000/- would be paid and the sale-deed would be executed within a period of four months. Application for permission was submitted on 6-3-1980 as revealed in Ex.D/5C along with the draft sale-deed. Plaintiff has clearly pleaded in the plaint that agreement of

sale was executed in his favour on 12-10-1979 and in furtherance of it permission was obtained from the competent authority under the provisions of Urban Land (Ceiling and Regulations) Act, 1976 and the sale-deed was ultimately executed by Mahila Akhtar Begum vide Ex.P/2 on 9-3-1981 in pursuance of Ex.P/1. This being so, question of limitation does not come in the way of the trial Court in holding that the sale-deed in favour of Plaintiff was got executed in furtherance of Ex.P/1.

Shri Bansal further argued vehemently that Civil Suit No. 59-A/80 was instituted by Defendant/Appellant. It was decreed ex parte in his favour against Mahila Akhtar Begum on 2-8-1980. The decree was put into execution and the learned Executing Judge in exercise of his powers executed registered sale deed on 26-3-1981 in respect of the suit property in favour of the Defendant/Appellant. Plaintiff having purchased the suit property during this period vide registered sale deed (Ex.P-2) dated 9-3-1981 is a transferee pendente lite and is bound by the ex-parte decree unless the same is set aside. It is contended by him that in the absence of collusion between Defendant/Appellant and Mahila Akhtar Begum, the Plaintiff would be bound by the ex parte decree in view of Section 52 of the Transfer of Property Act, 1882. It is also submitted by him that the alleged sale agreement dated 11-3-1980 (Ex.D-11) was found proved by the Court of III Civil Judge Class I, Gwalior which passed the decree for specific performance in his favour on 2-8-1980. This being so, the findings of the learned trial Judge that the alleged sale agreement dated 11-3-1980 is a forged document is not sustainable in law.

Shri Chandil, learned Counsel appearing for the Plaintiff/Respondent No. 1, on the other hand submitted that the finding in respect of Ex.D-11 is based on correct appreciation of the evidence on record and the decree in Civil Suit No. 59-A/80 having been obtained by fraud and collusion can be avoided legally by taking shelter of Section 44 of the Indian Evidence Act.

Original sale agreement dated 11-3-1980 is written on two stamp papers. First is of Rs. 3/- and another is of Rs. 2/-, respectively. It is contained in the record of the Civil Suit No. 59-A/80 which was received by this Court at the time of hearing. On the reverse of the stamp papers, there is no seal or signatures of the stamp vendor. Purchaser"s name is also not mentioned on the stamp papers. Rule 38 of M.P. Stamp Rules 1942 lays down that every stamp vendor shall fix his legible signature along with a rubber stamp of his name and place of sale. Defendant/Appellant has stated in paragraph 7 of his cross-examination that he met Mahila Akhtar Begum only for once on 11-3-1980. He stated that Mahila Akhtar Begum visited his house at 08:00 a.m. She was all alone and stayed there only for half an hour. She left his house at 08:30 a.m. Thereafter, Defendant/Appellant did not meet Mahila Akhtar Begum. He has further stated in paragraph 8 that there had been no negotiation about purchase of the suit property before 11-3-1980. In paragraph 10 of his cross-examination, he has further stated that the stamp paper marked as Ex.D-11 was purchased by him on 11-3-1980. Thereafter, he stated that his wife had accompanied Mahila Akhtar Begum for purchase of stamp. He stated further that the map Ex.D-6 was bought by Mahila Akhtar Begum herself. He

admitted in para 10 itself that the stamp marked as Ex.D-11 did not bear the name and signature of the stamp vendor. He expressed ignorance about particulars of the stamp vendor. Further, in paragraph 11, he expressed ignorance about person who had typed Ex.D-11. Thus, according to this witness (who happened to be none else than the Defendant/Appellant himself), there was no earlier negotiation about purchase of the suit property by him from Mahila Akhtar Begum. She had brought with her registered deed and map executed in her favour by Afroz Begum. She had not brought any other document. According to him, she came to his house at 08:00 a.m. and left his house at 08:30 a.m. In the intervening period, according to the Defendant/Appellant, Mahila Akhtar Begum went with his wife to purchase the stamp. She got typed the agreement on stamp, which runs in two pages. She came back and executed the sale-agreement in his favour. It may be seen that sale agreement Ex.P-1 dated 12-10-1979 is already found to have been executed in presence and within the knowledge of Defendant/Appellant. As revealed in Ex.D-5C, application for seeking permission from competent authority under Urban Land Ceiling Act for sale of the suit property in favour of Plaintiff was submitted on 6-3-1980. It perhaps might have instigated the Defendant/Appellant to prepare the forged agreement on 11-3-1980. In the matter of purchase of immovable property fixation of consideration has vital role which normally needs at least little negotiation. Defendant/Appellant has clearly stated in para 7 of his statement that he had not even talked to Mahila Akhtar Begum before or after 11-3-1980. It has been clearly stated that he met Mahila Akhtar Begum only for once i.e. on 11-3-1980, at 08:00 a.m. She left his house at 08:30 and thereafter did not further meet him. It is not the case of the Defendant/Appellant that any negotiation about purchase of the suit property was made earlier and consideration for the same was paid. In the absence of earlier negotiations, the learned trial Judge has rightly disbelieved that within half an hour Mahila Akhtar Begum could have visited the Defendant/Appellant, for the first time, in his house and further would have purchased the stamp, got prepared the sale agreement and map and would have executed it in favour of Defendant/Appellant. Mahila Akhtar Begum was admittedly residing at Moradabad. Her statement has been recorded on commission at Moradabad. She has denied her signatures on Ex.D-11 and D-6. Entire evidence read in the context of earlier sale agreement in favour of Plaintiff dated 12-10-1979, application submitted before competent authority under Urban Land Ceiling Act for permission on 6-3-1980, absence of seal and signatures on the stamp papers of the stamp vendor as well as Defendant''s version about purchase of the stamp and preparation for the sale agreement as well as production of map and execution thereof within half an hour support the finding of the learned trial Judge that Ex.D-11 as well as Ex.D-6 are forged documents which did not contain the signature of Mahila Akhtar Begum. Moreover, after denial of the signatures by Mahila Akhtar Begum, Defendant/Appellant could have got them examined from the handwriting expert. This having not been done, no fault is found with the finding of the learned trial Judge with regard to fraud by way of procuring forged document while obtaining ex parte decree.

Shri Bansal, learned Counsel, drew attention of this Court to Ex.P/3, a notice issued by Defendant/Appellant for purchase of the suit property which is contained in the record of Civil Suit No. 59-A/1980.

On perusal, it is found that it was published in the newspaper "Swadesh" Gwalior Edition whereas Mahila Akhtar Begum was admittedly residing at Moradabad (UP). This also shows lack of bona fide on the part of the Defendant/Appellant.

It has been further contended by Shri Bansal, learned Counsel, that ex-parte judgment and decree contained in Civil Suit No. 59-A/1980 operates as res judicata and the Plaintiff having stepped into shoes of the Defendant of Civil Suit No. 59-A/1980 is bound by it.

Suffice it to say that ex parte judgment and decree passed in Civil Suit No. 59-A/1980 is under challenge in proceeding under Order IX, Rule 13, CPC and thus, has not attained finality. This being so, plea of res judicata is not available to the Defendant/Appellant. This apart, it may be seen that the Plaintiff has pleaded, in specific, that Defendant/Appellant has obtained judgment and decree in Civil Suit No. 59-A/1980 by fraud and collusion. It is a trite law that fraud robes away the sanctity of a judgment and decree. This being so, plea of res judicata cannot be invoked by the Defendant/Appellant.

It has further been submitted that in view of absence of collusion between the parties to Civil Suit No. 59-A/1980, the Plaintiff being pendente lite transferee is not entitled to get any benefit against the outcome of Civil Suit No. 59-A/1980. Reliance for the purpose has been placed on AIR 1944 96 (Privy Council) . It has been contended that execution proceedings pursuant to the ex-parte decree passed in favour of the Defendant/Appellant in Civil Suit No. 59-A/80 for specific performance were started on 23-8-1980. Registered sale deed in execution case was executed by the Executing Judge vide Ex.D-12 which obviously is continuance of lis. Plaintiff having purchased the suit property vide registered sale deed Ex.P-2 dated 9-3-1981 is transferee pendente lite and is bound by the ex parte judgment and decree in view of Section 52 of Transfer of Property Act, more so, because Plaintiff has nowhere pleaded about collusion between the parties to the litigation in Civil Suit No. 59-A/80 and execution thereof.

Reliance has also been placed by Shri Bansal, learned Counsel appearing for the Appellant on the following passages from various decisions:

2008 (4) MPLJ 465 Guruswamy Nadar v. P. Lakshmi Animal (dead) through L Rs. and Ors.

Normally, as a public policy once a suit has been filed pertaining to any subject-matter of the property, in order to put an end to such kind of litigation, the principle of lis pendens has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject-matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked, otherwise,

litigation will never come to an end.

Raj Kumar Vs. Sardari Lal and Others,

9. 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.

Abdul Aziz and others Vs. District Judge, Rampur and anothers,

4. Relying upon the doctrine of lis pendens the Courts below have held that the Petitioners were as much bound by the decree and judgment dated 16th August, 1973 as their transferor Abdul Habib, the judgment debtor. The view taken by the Courts below is sound. Lis comes into existence from the point of the institution of the suit and continues to survive till the satisfaction of the decree. In view of this legal position, the impugned orders and judgments do not warrant any interference by this Court in exercise of its special and extraordinary jurisdiction under Article 226 of the Constitution of India.

Sri Jagannath Mahaprabhu Vs. Pravat Chandra Chatterjee and Others,

7. The effect of Section 52, therefore, is that a lis pendens transferee is bound by the decree whether on contest, ex parte or on compromise. The Plaintiff is under no obligation to implead a lis pendens transferee. We do not agree with the view expressed by the Full Bench of the Kerala High Court in Lakshmanan v. Kamal AIR 1959 Kerala 67 (supra) that "the effect of Section 52 is to render void as against the decree-holder transfer or other dealing with the suit property pendente lite and he is entitled to ignore it" because Section 52 has been enacted with a view to safeguarding the interest of the Plaintiff so that his decree is not defeated at the instance of a third party in whose favour there has been a lis pendens transfer.

Reliance has also been placed by Shri Bansal on a Single Bench judgment of this Court in the case of Nand Kishore and Others Vs. Pandu and Others, to contend that ex-parte judgment and decree dated 2-8-1980 (Ex.D-16) would operate as res judicata because the Court rendering the said judgment and decree was having requisite jurisdiction.

Suffice it to say that the said judgment and decree has not attained finality on account of the pendency of proceedings under Order 9, Rule 13 CPC Code.

Long back the Privy Council in the case of Rajwant Prasad Pande and Ors. v. Ram Ratan Gir and Ors. AIR 1915 PC 99 has clearly held that the decree passed cannot be challenged except on the ground of fraud practised on Court.

Section 52 of the Transfer of Property Act reads as under

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.

It is true that a transfer made by a party to the suit is made subject to the outcome of such suit by virtue of the said provision. It may be void as per the said section on the ground of collusion. However, a distinction is liable to be made between the transfer which is made newly for the first time during the pendency of the suit and a transfer which is made by a party to the suit in favour of a person having pre-existing right.

Aforesaid distinction has been noticed by this Court long back in the case of Munnilal v. Bhaiyalal 1961 MPLJ 191 : 1962 JLJ 338. It has been observed

The learned Counsel for the Appellants, however, urged that the legal implication of the decision of the Division Bench regarding applicability of the doctrine of lis pendens would be that the sale deed, dated 25-1-1954 cannot be the basis of any action in a Court of Law inasmuch as it being hit by the doctrine of lis pendens would be altogether void. In view of the wording of Section 52 of the Transfer of Property Act (which has been reproduced earlier), any transfer lis pendens would not be void or a nullity altogether; but would only be voidable and subject to the rights declared by the decree passed in the suit. Therefore, in each case it will have to be ascertained as to what rights are declared by the decree, which would be binding on the transferees pendente lite.

There can be no doubt that any transfer pendente lite would be subject to the rights declared by the decree and for that purpose, the transferee would be a representative-in-interest of the judgment-debtor. But this would hold good, so far as a simple transfer pendente lite is concerned. We have, therefore, exactly to ascertain the legal effect of the doctrine of lis pendens on the rights of a transferee pendente lite who takes a transfer in pursuance of an earlier contract of sale in his favour. And when the subsequent contractee has notice of the earlier contract and is unable to establish that he is a bona fide transferee in good faith for value without notice of the earlier contract, their

Lordships of the Privy Council have laid down the general principle; and it may have to be applied to the facts of each case to ascertain as to what the legal effect or the implication of the doctrine would be upon a particular set of facts. There can be no doubt that if the Appellants had filed a suit for enforcing their rights as subsequent contractees to establish a case u/s 27(b) of the Specific Relief Act, in that event alone the Respondent would become representative-in-interest of the vendor Ram Bharose. But unless that question u/s 27(b) of the Specific Relief Act is tried between the Appellants and the Respondents, the later cannot be said to be the representative-in-interest of the vendor merely because they took a sale deed during the pendency of the Appellants" suit wherein the Respondents were not parties.

In Azhar Hussain v. Mohammad Shibli and Ors. ILR 1939 Nag 548, a Division Bench of this Court consisting of Grille J, and Niyogi J, held that for the purpose of Section 47 of the CPC the term "Representative" would include representative-in-interest, such as the transferee of the decree-holder"s, or the judgment-debtor"s-interest, who so far as such interest is concerned, would not be bound by the decree. Any objection filed by such a transferee would be as a representative-in-interest of the judgment-debtor or the decree-holder and as such would be covered by Section 47 of the CPC Code. Such a transferee cannot be considered to be a stranger or a third person within the meaning of Order XX, Rule 58, CPC Code. It is true that as laid down by the learned Judges of the Division Bench, any transferee from either the judgment-debtor or the decree-holder during the pendency of the lis would certainly be a representative-in-interest, who would be bound by the decree. But, this case also lays down the general proposition. The exact situation which arises in the present case was not present in that case. The present one is a peculiar case where the question relating to doctrine of lis pendens has to be considered with reference to the rights of a prior as well as a subsequent contractee. Therefore, this case also is distinguishable. At this stage, I might observe that there can be no doubt about the dictum laid down by their Lordships of the Privy Council that a transferee pendente lite would be representative-in-interest of the transferor and would be bound by the rights or the obligations of transferor declared by the decree. It is here that the difficulty arises as to what rights exactly are obtained under the decree.

A Division Bench of this Court consisting of Niyogi and Digby, JJ in Gendmal and Ors. v. Laxman and Ors. ILR 1944 Nag 852, held that a purchaser pendente lite would be bound by the doctrine of lis pendens, as he would be a representative-in-interest of his vendor within the meaning of Section 47, Code of Civil Procedure; but the learned Judges have expressed the opinion that the mortgagee who pursued his remedy on a mortgage previously executed would not be affected by the doctrine of lis pendens arising from a suit subsequently instituted but instituted prior to the sale, unless he be impleaded in the suit. Of course, as has been laid down by the learned Judges of the Division Bench in the present case, a distinction would have to be made between the rights inchoate and vested rights. The case of superior mortgage would be one of a vested right while the case of an earlier contract of sale would be a case of inchoate right. Therefore, in the

present case, the ultimate result will depend upon the trial of the question u/s 27(b) of the Specific Relief Act in order to ascertain as to what rights the Appellants got in their decree for specific performance against the vendor, alone.

In the case in hand, it has also been found that the Plaintiff had an agreement of sale in his favour dated 12-10-1979, whereas the Defendant/Appellant had instituted the suit for specific performance on the basis of an agreement of sale dated 11-3-1980 (which has been held by the learned trial Judge as a forged document). The agreement in favour of the Plaintiff is found to be within the knowledge of the Defendant/Appellant right from the beginning. Thus, the right of the Plaintiff could not have been defeated by the decree for specific performance in favour of Defendant/Appellant, who was having inferior right.

I may successfully derive strength from the Full Bench decision of this Court in the case of Ramdeo and Anr. v. Gangubai and Ors. ILR 1951 Nag 831. It has been observed that the rule embodied in Section 52 does not permit the parties to a litigation to deal with the property pending the litigation in a manner prejudicial of the right of the litigant. But a transfer made in answer to a claim founded on a right prior and superior to the one in litigation is outside the rule of lis pendens. The Full Bench has reproduced the following words of Robertson J. "Put broadly and briefly the doctrine of lis pendens forbids creation of new rights over property already the subject of suit pendente lite which are calculated to injure the rights of the claimant. It does not, and if we consider for a moment we see that it could not, apply to the assertion of rights which existed prior to the institution of the pending suit."

Full Bench has finally concluded by observing that:

There is nothing in the Code to prevent a pre-emptor having a prior right from securing the pre-emptional property with the consent of the transferee. That right cannot be said to be affected by the mere fact that another person claiming the right of pre-emption has instituted a suit for enforcement of his right. Sub-section (4) of Section 174 of the Code, was not intended to start a race between rival pre-emptors in filing suits.

In view of the aforesaid discussion, I am of the considered view that the Principle of lis pendens does not apply to a lis pendens transferee, who has made purchase under his pre-existing rights. This apart, it has already been found on the basis of the evidence on record that the alleged agreement dated 11 -3-1980 set up by the Defendant/Appellant is a forged and concocted document and the Appellant obtained a decree for specific performance, on the basis of such forged document, by playing fraud on the Court. In this view of the matter the ex-parte judgment and decree obtained by the Defendant/Appellant in C. S. No. 59-A/80 may well be avoided by the Plaintiff/Respondent No. 1 by virtue of Section 44 of the Indian Evidence Act. None of the rulings cited by the learned Counsel for the Appellant deals with the lis pendens transferee under the preexisting rights or judgment and decree which stands vitiated u/s 44 of the Evidence Act.

In the result, the appeal fails and is hereby dismissed with cost throughout. Appellant to pay lawyers fee to the tune of Rs. 5000/- to the Plaintiff/Respondent, if pre-certified.

C.C. as per rules.