

Before Rakesh Kumar Jain, J

BHAGAN BAI .. Appellant

versus

CHIRANJI LAL AND ANOTHER .. Respondents

R.S.A. No. 472 of 2005

20th January, 2009

*Code of Civil Procedure, 1908—O.21 RI.97, O.21 RI.102—
Transfer of Property Act, 1882—S.52—Principles of lis pendens—
Respondent No. 2 entering into an agreement to sell with appellant—
Registration of sale deed after payment of entire sale consideration—
Before execution of sale deed respondent No. 1 filing suit against
respondent No. 2 on strength of another agreement to sell—
Respondent No. 2 failing to contest suit—Respondent No. 2 failing
to disclose fact of earlier agreement with appellant in written
statement filed in suit—Execution application—Respondent 1
admitting possession of appellant and impleading him as a party—
Appellant filing objections—Courts below dismissing objections of
appellant without framing issues—Appellant categorically alleging
that decree obtained by respondent No. 1 by collusion of respondent
No. 2—Provisions of S. 52 of 1882 Act not applicable—Executing
Court has to adjudicate fact after framing an issue and give proper
opportunity to both parties to lead evidence—Appeal allowed, orders
of both Courts below set aside and case remitted back to Executing
Court.*

Held, that the exception provided in Section 52 of the Transfer of Property Act, 1882 is that ‘Rule of lis pendens’ shall not apply where the suit or proceeding is collusive, meaning thereby the Section shall not apply if it is proved by the person resisting the possession that the decree which is sought to be executed has been obtained by the decree holder is a collusive one. Since the question involved in the execution is whether the decree is collusive or not, is a question of fact, then it has to be tried like a suit for which the Executing Court should have framed the issue. Once there is a categorically allegation containing the objection that the decree

which is sought to be executed has been obtained by collusion by the decree holder with the judgment debtor, the provisions of Section 52 of the Transfer of Property Act, shall not apply and the Court has to adjudicate this fact after framing an issue in this regard and give proper opportunity to both the parties to lead their evidence.

(Paras 11 & 12)

L.N. Verma, Senior Advocate, with Ashok Verma, Advocate,
for the appellant.

Vikas Kumar, Advocate, *for respondent No. 1.*

RAKESH KUMAR JAIN, J (ORAL)

(1) This appeal is directed against the order of the Executing Court dated 14th August, 2003 passed by the Civil Judge (Junior Division), Sirsa and order dated 2nd November, 2004 by the learned Additional District Judge, Sirsa, whereby objections filed by the appellant were dismissed.

(2) The case set up by the appellant is that Sohan Lal—Judgment debtor (hereinafter referred to as respondent No. 2) was in possession as absolute owner of the land measuring 7 kanals 14 marlas (in short, the land in dispute) being ½ share of the total area of 15 kanals and 8 marlas comprised in Rectangle No. 85, Killa No. 14/2 (7-8) and 15 (8-0) situated in the revenue estate of village Sultanpuria, Tehsil Rania, District Sirsa.

(3) Respondent No. 2 entered into an agreement with the objector/appellant (hereinafter referred to as the appellant) for the sale of the land in dispute @ Rs. 80,000 per acre and executed an agreement of sale dated 31st March 1998 and had received a sum of Rs. 50,000 towards earnest money from the appellant. Date for execution of the sale deed was fixed as 30th March, 1999 but actual possession of the land in dispute was delivered to the appellant on 30th April, 1998 in part performance of the said agreement of sale. Since the sale deed could not be registered on 30th March, 1999, therefore, time was extended with mutual agreement and all other terms and conditions mentioned in the agreement were kept intact. The time for registration was further extended up to 4th July, 2000 with all the terms and conditions remaining the same. As per the case of the appellant, the sale deed in respect of the land in dispute was executed in

her favour on 30th June, 2000 by respondent No. 2 on receipt of the entire balance sale consideration before the Sub Registrar and symbolic possession was delivered to her and thereafter, she has been in continuous cultivating possession as absolute owner. According to the appellant, respondent No. 2, in the meantime, colluded with the decree holder (hereinafter referred to as respondent No. 1) and executed a fictitious agreement of sale in respect of the land in dispute in his favour on 21st June, 1999 despite having already executed the agreement of sale dated 31st March, 1998 in favour of the appellant and the sale price was fictitiously settled @ Rs. 1,50,000 per acre. The date for execution of the sale deed was fixed as 22nd December, 1999. However, the said date was mutually extended to 4th January, 2000 on which date, respondent No. 1, is stated to have attended the office of the Sub Registrar, Rania, for registration of the sale deed in his favour but respondent No. 2, is alleged to have failed to come present and, thereafter, respondent No. 1 issued a notice to respondent No. 2, calling upon to execute the sale deed on or before 3rd February, 2000. Respondent No. 1 is stated to have gone to the office of the Sub Registrar on 3rd February, 2000, but respondent No. 2 is alleged to have not turned up and consequently, respondent No. 1 filed a suit for possession of the land in dispute by way of specific performance of the agreement of sale dated 30th June, 1999 on 1st May, 2000 against respondent No. 2 only and the appellant was not deliberately made a party to the suit.

(4) According to the appellant, respondent No. 2 appeared in the suit and filed written statement taking wholly frivolous and irrelevant pleas and did not disclose the agreement of sale already executed by him in favour of the appellant on 31st March, 1998 and also about the delivery of possession of the land in dispute to the appellant and receipt of earnest money of Rs. 50,000. All these facts have not been disclosed in the second agreement of sale, dated 30th June, 1999 executed in favour of respondent No. 1. It is further the case of the appellant that respondent No. 1 adduced his complete evidence set up in the plaint but respondent No. 2 did not deliberately contest the suit and led no evidence despite opportunities having been granted by the Court and consequently, his defence was struck off. The suit was decreed in favour of respondent No. 1 on 22nd May, 2002 on the basis of unrebutted evidence and respondent No. 2 was directed to get the sale deed registered in favour of respondent No. 1, in terms of

the agreement of sale, dated 21st June, 1999. It was further held that failure of respondent No. 2 to execute the sale deed within three months from the date of judgment and delivery of possession of the land in dispute, respondent No. 1 would be at liberty to get the sale deed registered through the Court. It is further alleged that respondent No. 1 filed execution application dated 2nd September, 2002 in which it was admitted that respondent No. 2 had sold the land in dispute to the appellant and has already delivered possession to her. In the execution application, the appellant herein was impleaded as respondent No. 2 for the first time. On notice of the execution proceedings, the appellant appeared and filed objections dated 23rd October, 2002 stating inter alia, that respondent No. 2 had already executed an agreement of sale, dated 31st March, 1998 in respect of the land in dispute in her favour and had received Rs. 50,000 as earnest money from her and had also delivered actual possession to her on 30th April, 1998. It was also averred that respondent No. 2 was not competent to execute second agreement of sale, dated 21st June, 1999 in favour of respondent No. 1 and that the decree obtained from the Civil Court on 22nd May, 2002 was collusive between respondent No. 1 and respondent No. 2 in order to defeat the legitimate right of the appellant over the suit land. It was also alleged that since respondent No. 2 did not lead any evidence inspite of opportunities having been granted by the Court and allowed his defence to be struck off, therefore, it is an ample proof of collusiveness between respondent No. 1 and respondent No. 2. The objections were, however, dismissed by the Executing Court on the ground that admittedly, the sale deed was got registered by respondent No. 2, in favour of the appellant on 30th June, 2000, whereas respondent No. 1 had filed civil suit on 1st May, 2000 and after filing the suit, respondent No. 1 had also got issued a notice in the newspaper "**Samar Ghosh**" qua pendency of the suit regarding the suit land on 7th June, 2000, which is prior to the execution of the sale deed in favour of the appellant. The Executing Court held that this case is covered by the Principle of '**lis pendens**' and the appellant has no right to stall Execution of the decree. It was also held that framing of issue and leading evidence is not necessary to determine the objections filed by the appellant due to **lis pendens**.

(5) Aggrieved by the order of the Executing Court, dated 14th August, 2003, the appellant filed first appeal before the learned Addl. District Judge, Sirsa, which too was dismissed,—*vide* order, dated 2nd November, 2004 almost on the same analogy of **lispendens**.

(6) Mr. L.N. Verma, learned counsel for the appellant has vehemently contended that principle of **lispendens** shall not apply in this case as agreement of the appellant is prior in time. The execution proceedings were alleged to be nullity against the appellant because she was not made a party in the suit. It is further contended that she cannot be impleaded as a party for the time in the execution proceedings and the objections could not have been disposed off by the Courts below without framing issues. Mr. Verma has also argued that the appellant has a statutory right in view of provisions of Section 53-A of the Transfer of Property Act being in possession of the land in dispute in part performance. It is further urged that the appellant has taken a categorical plea in the objection petition that the suit is collusive between respondent No. 1 and respondent No. 2 and this question of fact should have been decided by the Courts below after framing issues and affording opportunity of leading evidence to the appellant. Thus, it is submitted by Mr. Verma, that the orders of the Courts below should be set aside and the matter be remanded back to the Executing Court to decide afresh after framing issues and allowing the parties to lead their respective in view of the provisions of Order 21 Rule 47 of Civil Procedure Code (for short, 'CPC').

(7) As against this, Mr. Vikas Kumar, learned counsel for respondent No. 1 has contended that it is the admitted case on record that the appellant was not a party to the suit because agreement to sell does not confer any title on her. Moreover, **principle of lispendens** shall apply to this case in view of the provisions of Section 52 of the Transfer of Property Act. which provides that **lispendens** would start from the date of the presentation of the plaint which was presented on 1st May, 2002 and the sale deed has been executed thereafter. Therefore, any transaction which has been made by respondent No. 1 in favour of the appellant is hit by the principle of **lispendens**. Regarding the prayer of Mr. Verma that the execution application should be treated as a suit in view of Rule 97 and 101 of C.P.C., Mr. Vikas Kumar, learned counsel for respondent No. 1. has argued that Order 21 Rule 102 of C.P.C. categorically provide that Rules 98 and 100 and Order 21 shall not apply to resistance or obstruction in execution of a decree for

possession of immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which decree was passed. Mr. Vikas Kumar, learned counsel for respondent No. 1, has heavily relied upon the fact that since the property in dispute has been transferred to the appellant during the pendency of the suit, therefore, it is hit by the principle of **lis pendens**. He has cited **Sanjay Verma versus Manik Roy and Others (1)** and **Jaswant Singh versus Ralla Singh and Others (2)** to contend that transferee pendente lite is bound by the decree as if he was a party to the suit. Objections of subsequent purchaser during pendency of suit are not to be adjudicated upon like a civil suit but have to be summarily disposed of. On the other hand, learned counsel for the appellant relied upon a decision of this Court in the case of **Gram Panchayat, Hassanpur versus Jagdish Chand and others (3)** to contend that third party objections are like a suit which is to be tried and adjudicated like an independent suit. **Charanjit Singh and another of Chandigarh versus Manmohan Singh and others (4)** to contend that the Executing Court cannot dismiss the objections without framing the issues and without allowing the parties to lead evidence. Learned counsel has also cited an Order passed in Civil Revision No. 690 of 204 **M/s Inderjeet and Company versus Satish etc.** in this regard. He also cited a decision of Division Bench of Madras High Court in the case of **Pulaavarthi Ammanna and others versus Bommireddipalli Ramakrishna Rao and others (5)** to the effect that a person who ought to have been joined as a party to a suit but had not been joined before the decree cannot, after the decree, be impleaded in the course of execution proceedings so as to make him bound by the decree to which admittedly he was not a party. The learned counsel also cited **Prasantha Banerji versus Pushpa Ashoke Chandani and others (6)** to show that after initiation of execution proceedings in respect of property, suit regarding same property by a person not being party to the decree is not maintainable in view of objections in execution proceedings.

(8) I have heard learned counsel for the parties and have perused the record with their assistance.

-
- (1) 2007 (1) Civil Court Cases 401
 - (2) 2005(3) Civil Court Cases 262 (P&H)
 - (3) 2007 (4) R.C.R. (Civil) 636
 - (4) 1989 H.R.R. 108
 - (5) A.I.R. 1949 Madras 886
 - (6) 2001 (2) P.L.J. 136

(9) Undisputed facts available on record are that firstly, respondent No. 2 Sohan Lal had executed an agreement to sell in favour of the appellant on 31st March, 1998 and had paid Rs. 50,000 towards earnest money and delivered the possession; secondly, time for execution of sale deed by respondent No. 2 in favour of the appellant was extended twice and the sale deed was executed on 30th June, 2000 after the entire sale consideration was paid; thirdly, before the sale deed dated 30th June, 2000 could have been executed, respondent No. 1 had filed Civil Suit on 1st May, 2000 on the strength of sale deed, dated 21st June, 1999 only against respondent No. 2; fourthly respondent No. 2 did not contest the suit in the way that he did not lead any evidence inspite of the opportunities given to him by the Court and allowed his defence to be struck off; fifthly in the execution application, respondent No. 1 has admitted the possession of the appellant; sixthly, respondent No. 1 has impleaded the appellant as a party for the first time in the execution application; seventhly, in the objection, the appellant had categorically alleged that decree which is sought to be executed was collusive and eighthly, no issues have been framed inspite of the fact that various objections have been taken by the appellants. It is further undisputed that Sohan Lal respondent No. 2 did not disclose in his written statement filed in the suit the fact of earlier agreement with the appellant.

(10) Now the question in the present appeal is as to whether the Courts below have rightly dismissed the objections without framing issues or should have allowed the objection petition to be treated as a suit in view of the provisions of Order 21 Rule 97 and 101 of the C.P.C. No doubt, Order 21 Rule 102 of the Code specifically provide that Rules 98 and 100 of the Code shall not apply to the resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit on the ground of lispendens but there is an exception in Section 52 of The Transfer of Property Act 1882, which is reproduced below :—

Section 52—“Transfer of property pending suit relating hereto.—

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 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 by any party to the suit or proceedings 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”

(11) According to the above provision, the exception provided in Section 52 of the Act is that ‘**Rule of lispendens**’ shall not apply where the suit or proceeding is collusive, meaning thereby the Section shall not apply if it is proved by the person resisting the possession that the decree which is sought to be executed has been obtained by the decree holder is a collusive one. Since the question involved in the execution is whether the decree is collusive or not, is a question of fact, then it has to be tried like a suit for which the Executing Court should have framed the issue, specially when in the objections, the appellant has contended as under :—

“That from the facts given above it is clear that the agreement for sale in favour of the objector executed on 31st March, 1998 and possession of the suit land was delivered by the J.D. Sohan Lal on 30th April, 1998. In this way, the Decree Holder Chiranji Lal had full knowledge about the prior transaction between the objector and Sohan Lal JD as factum of possession is known to all, therefore, the alleged agreement for sale, dated 21.6.1999 and the judgement and decree, dated 22th May, 2002 is collusive one between Chiranji Lal and Sohan Lal with an oblique motive to defeat the legitimate right of the objector over the suit land. It will not be out of place to mentioned here that the J.D. Sohan Lal did not appear in the Court and his defence was struck off, it further goes to show that the judgment and decree, dated 22nd May, 2002 is a collusive one. For this reason also the aforesaid judgment and decree, dated 22nd May, 2002 is not executable.”

(12) The judgements relied upon by Mr. Vikas Kumar, learned counsel for respondent No. 1 are altogether on different facts in view of

Order 21 Rule 102 of C.P.C. that the objections are not supposed to be decided like a suit and can be adjudicated upon summarily, because in the present case, once there is a categorical allegation containing the objection that the decree which is sought to be executed has been obtained by collusion by the decree holder with the judgment debtor, the provisions of Section 52 of the Transfer of Property Act, shall not apply and the Court has to adjudicate this fact after framing an issue in this regard and give proper opportunity to both the parties to lead their evidence.

(13) In view of the above discussion, the present appeal is allowed, the orders of both the Courts below are set aside and the case is remitted back to the Executing Court with a direction to frame appropriate issues on the basis of pleadings of the parties and after allowing them reasonable opportunities to lead their respective evidence decide the matter afresh as expeditiously as possible, preferably within six months from the date of receipt of a copy of this order. No costs.

R.N.R.

Before Mahesh Grover, J

KARNAIL SINGH,—Appellant

versus

M/S KALRA BROTHERS, SIRSA—Respondent

R.S.A. No. 54 of 2005

27th January, 2009

Code of Civil Procedure, 1908—O. 7 Rl. 17—Indian Evidence Act, 1872—S. 62—Commission Agent filing suit for recovery—Farmer denying signatures on bahi entries—Photostat copies of bahi entries brought on record and marked as exhibits—Author of bahi entries not examined—Mere marking of an exhibit does not dispense with proof of documents—Documents have to be necessarily proved in accordance with law—Appeal allowed—Judgments and decrees of lower Courts below decreeing suit of plaintiff set aside.