

Indian Law On Lis Pendens: Hassles And Solutions

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ABSTRACT

This academic paper seeks to critically analyse the present status of law regarding registration of lis pendens in India, understand the pertinent problems posed such as unnecessary litigation endured unjustly by a purchaser of property, and compare the law with laws in England and selects states in India, specifically the Indian Registration (Bombay Amendment) Act, 1939. This is done in order to arrive at a workable solution i.e. an amendment to the Transfer of Property Act, 1882 and the Indian Registration Act, 1908 that addresses the problems both on real as well as theoretical levels.

INTRODUCTION TO THE PRINCIPLE OF LIS PENDENS

The common-law doctrine of lis pendens says, if property was the subject of litigation, the defendant-owner could transfer all or part of his or her interest in the property during the course of litigation, but not to the detriment of the rights of the plaintiff. In other words, a third party purchaser pendent lite is bound by the judgment of the court as though he or she is a party to the suit². This principle is based on the maxim, "*ut lite pendent nihil innovetur*" meaning nothing new should be introduced into a pending litigation³.

In the Indian Law, S. 52 of Transfer of Property Act, 1882 reads, "*During the pendency in any court... 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 right of any other party thereto...*" Therefore the property, which is in dispute, should not either be sold or otherwise dealt in by any party to the dispute pendent lite. But, if at all the transfer has taken place, the law does not wipe off the sale by invalidating it but only renders the purchaser subservient to the court's decision⁴.

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²See CRANDALL et al., supra note 3, 6.05[2][b]; 54 C.J.S. Lis Pendens § 2 (1987) (stating that pendent lite purchasers take "subject to the rights of the parties to the litigation as finally determined by the judgment or decree")

³Singh, A. (2009) Textbook on The Transfer of Property Act. Second edn. Universal Law Publishing Co. Pg. 159

⁴JayaramMudalier v Ayyaswami and Ors., AIR 1973 SC 569

This principle of *lis pendens* underlying the object of section 52 is to maintain the status quo unaffected by the act of parties to the pending litigation. But while the principle contained in this section ought to be in accordance with equity, good conscience and justice⁵, the same is lacking to a certain extent resulting not just in disturbance in its intended equitable and just foundations, but also in serious practical troubles to bona fide purchasers of property *pendent lite*.

SUPREME COURT'S RECOGNITION OF THE CONCERN

In a 2010 case *T. G. Ashok Kumar v Govindammal*, the Supreme Court recognizes the hardship, loss, anxiety and unnecessary litigation caused on account of absence of a mechanism for prospective purchasers to verify whether a property is subject to any pending suit or a decree or attachment. At present, a prospective purchaser can easily find out about any existing encumbrance over a property either by inspection of the Registration Registers or by securing a certificate relating to encumbrances from the jurisdictional Sub-Registrar under Section 57 of the Registration Act, 1908. But a prospective purchaser has no way of ascertaining whether there is a suit or proceeding pending in respect of the property, if the person offering the property for sale does not disclose it or deliberately suppresses that information.

As a result, after parting with the consideration, which is many a time the life time savings, the purchaser gets a shock of his life when he comes to know that the property purchased by him is subject to litigation, and that it may drag on for decades and ultimately deny him title to the property. The *pendent lite* purchaser will have to wait for the litigation to come to an end or he may have to take over the responsibility of conducting the litigation if the transferor loses interest after the sale. The purchaser may also face objections to him being impleaded as a party to the pending litigation on the ground that being a *lis pendens* purchaser, he is not a necessary party.

The court observes that all these inconveniences, risks, hardships and misery could be avoided and the property litigation could be reduced to a considerable extent, if there is some satisfactory and reliable method by which a prospective purchaser can ascertain whether any suit is pending (or whether the property is subject to any decree or attachment) before he decides to purchase the property.

⁵*Narendrabhai Chhaganbhai Bharatia v Gandevi Peoples Co-operative Bank Ltd.*, AIR 2002 Guj 209

ANALYSIS OF THE LAW IN ENGLAND

The Transfer of Property and The Indian Registration (Bombay Amendment) Act, which was passed in 1939 is in the wisdom of the Supreme Court, "... a solution [that] has been found to this problem in the States of Maharashtra [and Gujarat] by an appropriate local amendment." This was an advancement initiated by the British legislators in the law relating to *lis pendens* in the pre-independence era, applying the basic common law principles of equity and doctrine of notice, in order to resolve the problem that is even today, posed in India, save Maharashtra and Gujarat. But, before this Amendment Act is understood, it of some interest that the relevant law, as it stands in England, needs to be analysed, in lines of how it acts as a perfect solution, as well as a back drop to the aforesaid Act.

As observed already, it is impossible to bring an action relating to land to a successful termination if alienation *pendent lite* is permissible⁶, and therefore, in order that a plaintiff may not lose the fruits of his action, the law provides him with the means of protecting himself. These means includes not just the law restricting transfer of property *pendent lite* but also an additional right provided to the plaintiff, i.e. the right to register a land action or proceeding which is pending in court, and which relates to land or to any interest in, or charge on, land⁷.

In case the plaintiff fails to register the pending suit regarding the property and a purchaser buys it from the seller in good faith, the court would have no power to order the property to the plaintiff from the purchaser, should the plaintiff win the case. He might only be allowed compensation from the seller, but would not receive the property from the *bona fide* buyer. This makes a substantial inroad on the doctrine of the *bona fide* purchaser for value without notice.

In the Indian context, irrespective of a buyer's knowledge or its absence with respect to the pending litigation, the property bought by him, even in good faith, will be subjected to the court's decision. This is because the reasons underlying the *lis pendens* doctrine are largely considered as matters of public policy and are self-evident: if a defendant could convey his interest in property to a *bona fide* purchaser during the course of litigation concerning the title of the property, a court would be limited in its ability to provide a meaningful remedy to a successful plaintiff⁸.

If the above-discussed law in England is emulated, like done by Maharashtra and Bombay, and similar changes are made in the whole of India,

⁶17th edition, E H Burn and J Cartwright, *Modern Law of Real Property*, 2006, pg. 937

⁷LCA 1972 s. 5(1), (4A) as added by LP (Miscellaneous Provisions) Act, 1994, s. 15(3) (registration after death), s. 17(1)

⁸Janice Gregg Levy, *Lis Pendens and Procedural Due Process: a Closer Look After Connecticut v. Doe*, Maryland Law Review Volume 51, Issue 4, 1992, pg. 1057

this lacuna in Property Law can be eliminated and Section 52 of TPA can be given a stronger jurisprudential foundation of justice and equity rather than mere public policy. This can be achieved by making a rule that gives the option to the plaintiff to register the suit he has filed against the seller of the land. The consequence of non-registration would be that in case the seller sells the land to a purchaser, even if the plaintiff should win, the land remains with the purchaser⁹.

On the other hand, since *lis pendens* is registered, it will become a duty of the prospective buyer under the concept of 'caveat emptor' to find out about it during the title and encumbrance search of the property. Hence, the knowledge of the buyer regarding the pending litigation can be presumed when the notice is registered, and he will be subservient to the Court's decision.

THE TRANSFER OF PROPERTY AND THE INDIAN REGISTRATION (BOMBAY AMENDMENT) ACT, 1939

This Act passed in 1939 applicable only in Maharashtra and Gujarat (the erstwhile Bombay province), does 2 things: 1. Allowing plaintiffs to register notices of *lis pendens*, and 2. Adding the words, "after the notice is so registered" *inter alia*. By doing this, the law exactly as it is in England (and many other nations), applies in Maharashtra and Gujarat. Registration of pending suit serves as a notice to the prospective buyer and hence, he will be subjected to courts decision if he purchases, and non-registration of the suit renders the court powerless to provide the property to the successful plaintiff.

This strikes at the very crux of the problem put forward by the Supreme Court, i.e. unnecessary and excessive property litigation and inconveniences, risks, hardships and misery to the purchaser in good faith. By burdening the plaintiff to register the notice of *lis pendens*, a satisfactory and reliable mechanism has been created for prospective purchasers to ascertain whether a property is subject to any pending suit or a decree or attachment.

While the practical application of the principle has thus been improvised, Section 52 TPA, as applicable in the states of Maharashtra and Gujarat, has also augmented the rationale and jurisprudential background of the law by 2 ways:

Inducting the Doctrine of Notice. Under the doctrine of notice, a bona fide purchaser of a legal estate for value takes priority over any pre-existing equitable interest¹⁰. Here, the expression 'bona fide' connotes non-registration of *lis pendens* by the plaintiff, resulting in lack of notice to the purchaser, rendering the property immune to the court's subsequent decision.

⁹ Provided they did not have actual, constructive or imputed notice of their existence, and the concept of 'overreaching' doesn't apply.

*Estoppel: a legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial. The rationale behind estoppel is to prevent injustice owing to inconsistency or fraud*¹¹. In the current issue too, the seller of an immovable property has a duty to inform the buyer of the pending litigation, under Section 55(1) TPA. A buyer acting on this abstinence of the seller cannot unjustly be subjected to court's decision regarding the property.

CONCLUSION

Indian law on lis pendens, contained in S. 52 of the Transfer of Property Act, 1882 is inadequate and unfair in spite of conspicuous scope to improvise it and raise it to commendable standards like the English Law or the Bombay Amendment Act of 1939 have done. A buyer in good faith is being unduly being troubled with unnecessary litigation.

An amendment is needed at national level, or several at local level, which makes the provisions of lis pendens applicable only when the person who files a case registers the pending litigation, or otherwise not, so that a reliable and satisfactory mechanism is brought in place where a prospective buyer can formally verify the character of the land with respect to any pending litigation avoid the needless legal complications, hardships and risks and at the same time, give Section 52 of TPA more meaning and justificatory footing rather than a mere excuse of public policy.

¹¹"Equitable Estoppel." West's Encyclopedia of American Law, edition 2. 2008