

DOCTRINE OF LIS PENDENS AND ITS CONTINUING CONUNDRUM IN INDIA

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Abstract - *The paper is an attempt to unravel the reason behind the lack of reforms in Section 52 of Transfer of Property Act, 1882, which deals with the doctrine of lis pendens. In order to discuss the issue at hand in-depth, the paper first discusses the rationale behind Section 52 TPA and the existing gaps in the formulation of the provision on the statute book. Then the paper turns the readers' attention to reforms undertaken by a few states in this respect and the recommendations of the Law Commission and Supreme Court of India to substantiate its significance. Finally, the paper concludes with a few suggestions regarding the transaction of properties and points out the underlying reason behind the lackadaisical approach of the legislature towards this important provision.*

Keywords: *Property; lis pendens; fundamental right; Constitution.*

INTRODUCTION

The right to property, though no longer a fundamental right holds special relevance in India. Property, as understood by some of the Western theorists, is a means of storing the fruits of one's labour. In India's context, considering the social status and economic importance attached to property, unambiguous property legislations are not sufficient but a necessary condition to create a welfare state and equitable society. To achieve this, laws must be regularly reviewed and amended according to the changing needs of the society. The doctrine of lis pendens, embodied in Section 52 of the Transfer of Property Act, 1882 is one of the provisions that has not served its purpose due to lack of required amendments. In what follows, the paper seeks to analyse the reasons behind such attitude of the despite consistent reminders from the Law Commission and the Judiciary.

THE RATIONALE OF SECTION 52

Section 52 of the Transfer of Property Act, 1882 is about the transfer of immovable property *pendente lite*. The provision of Section 52 has a significant impact on the question of title to land, which is essential in the functioning of the economy. Therefore, there should not be any gaps in the implementation of Section 52 or in the formulation of the provision itself on the statute book.

As is well-established, rights are consequently dependent on remedies.¹ The same applies to the right to property. The justice system must ensure that when a party's right to property is infringed, and they approach the court for relief, during the course of the proceedings, no other party shall affect the interests of the aggrieved party. This means that no transaction or deals shall be made by other parties concerning a property which is already in dispute as this would defeat the very purpose of the right to seek remedy. Thus based on this premise, a general principle of law has developed, called lis pendens. The purpose of lis pendens is to protect the interests of the owner of the property in such a way that parties to a dispute regarding a property are barred from alienating that party till the dispute is settled by a competent court.²

EXISTING LOOPHOLE IN SECTION 52

The principle of lis pendens as it stands today does not even spare the bona fide purchasers from the application of Section 52 TPA. While the provision intends to protect property owners by barring the transfer of property during a pending court proceeding, it fails to take into account the

¹ H.W.R. WADE AND FORSYTH, ADMINISTRATIVE LAW, 579 (1994).

² Govinda Pillai v. Aiyapan Krishnan, (1957) AIR Ker 10, ¶7.



persons who purchase the property in good faith. Moreover, the principle of *lis pendens* comes into play even if the buyer has no beforehand knowledge that the property is, in fact, a disputed one. In short, as the Court held in *Mohd. Ali Abdul Chanimomin v. Bisaheni Kom Abdulla Saheb Momin*³, it is irrelevant whether the alienee was aware of the pending suit or not. Although the provision is a matter of public policy, it disregards the plight of the prospective buyers.⁴

As the Law Commission has acknowledged, it is a common practice among the defendants in a suit regarding the disputed property to sell the property in dispute to a third party. During and even after the transfer to the third person, the defendants refrain from informing about the pending proceeding.⁵ Additionally for the potential buyers, even in the day and age of digital technology, there is no proper mechanism in place to verify whether the property they intend to buy is a disputed one and if there is a court proceeding going on with respect to it. Since they are made aware of the pendency of the suit *only* after their purchase, they are hit by the principle of *lis pendens* embodied in Section 52, and thus in many instances, the buyers lose the property *entirely*. Further, let alone the compensation of their loss, the bona fide purchaser, has no right to demand compensation for any enhancements made by them in the property.⁶ Moreover, the Court has held that the buyer who purchases a property in dispute is obliged to discharge the compromises signed by their transferor and is also bound by the order contingent upon such compromises.⁷ The loophole is significant because apart from leaving the bona fide buyers without any remedy, the provision also enables (albeit its noble intentions) the devious and dishonest elements to harass such buyers. As such, the cost and sale of properties have steadily increased in the last few decades, making this issue all the more relevant.⁸

The Supreme Court in *T.G. Ashok Kumar v. Govindammal*⁹ has expressed its concern over the lack of a mechanism for bona fide property purchasers to verify if the property they intend to buy is disputed and pending judgment in a court of law. The Court opined that this results in “hardship, loss, anxiety and unnecessary litigation for the prospective buyers.”¹⁰ Further, the Court observed that the Parliament should amend the Section 52 TPA by introducing the condition of registration of the notice of pendency of court proceedings under Section 18 of Indian Registration Act, similar to the amendment that is in force in Maharashtra and Gujarat.¹¹

THE BOMBAY AMENDMENT

The former province of Bombay (today’s Gujarat and Maharashtra) in 1939 amended Section 52 TPA by enacting the Transfer of Property and The Indian Registration (Bombay Amendment) Act, 1939 [“The Bombay Amendment”]. Since the amendment is crucial to the discussion of this paper, the same is reproduced below:

“(2) S. 52 shall be renumbered as sub-s. (1) of that section, and

(i) in sub-s. (1) so renumbered, after the word “question”, the words and figures “if a notice of the pendency of such suit or proceeding is registered under S. 18 of the Indian Registration Act, 1908”, and after the word property, where it occurs for the second time, the words after the notice is so registered, shall be inserted; and

(ii) after the said sub-s. (1) so renumbered the following shall be inserted, namely:

(2) Every notice of pendency of a suit or proceeding referred to in sub-s. (1) shall contain the following particulars, namely:

(a) the name and address of the owner of immovable property of other person whose right to the immovable property is in question;

(b) the description of the immovable property, the right to which is in question;

(c) the Court in which the suit or proceeding is pending;

(d) the nature and title of the suit or proceeding;

(e) the date on which the suit or proceeding was instituted.”

³ *Mohd. Ali Abdul Chanimomin v. Bisaheni Kom Abdulla Saheb Momin*, (1973) AIR Mys 131, p. 133.

⁴ *Balwinderjit Kaur v. Financial Commr. (Appeals)*, (1987) AIR P&H 189, p. 190

⁵ LAW COMMISSION OF INDIA, 157TH REPORT: SECTION 52: THE TRANSFER OF PROPERTY ACT, 1882 AND ITS AMENDMENT, 3.1 (1998).

⁶ *Hari Bachan Singh v. S. Har Bhajan Singh*, (1975) AIR P&H 205, p. 210 at ¶11.

⁷ *Uttam & Co. v. Babu Ram*, (1982) All LJ 188, ¶10-11

⁸ KNIGHT FRANK, THE WEALTH REPORT 2019, <https://www.knightfrank.com/publications/the-wealth-report-2019-6214.aspx> (last visited May 17, 2020)

⁹ *T.G. Ashok Kumar v. Govindammal*, (2010) 14 SCC 370, ¶19.

¹⁰ *Id.* at ¶19.

¹¹ *Id.* at ¶21.



The amendment serves to tackle both the issues arising out of the ambiguity in Section 52 TPA. First, it safeguards the interests of the prospective buyers and secondly, removes the possibility of mischievous elements cheating the bona fide buyers. It is pertinent to note that for attracting the application of Section 52 TPA, the notice of the concerned pendency must be duly registered with requisite details under Section 18 of the Indian Registration Act, 1908.¹² It is reasonable to assume that usually, the aggrieved person in the suit would register the pendency of the suit as the fraudulent party normally benefits from selling the disputed property. A bona fide buyer is likely to acquire a “non-encumbrance certificate” as regards the property he intends to buy from the registration office. If the notice of the pendency of the suit is registered under the Registration Act, the registration office will issue the certificate along with the relevant information about pendency. Thereafter, the buyer is subjected to the principle of *lis pendens*, and their fate depends on the result of the court proceedings. Consequently, Section 52 will apply only if notice of the pending suit is duly registered. As such, to alleviate the concerns of the public, Parliament must amend the Section 52 TPA along the lines of the Bombay Amendment which will streamline the procedure envisaged under the principle of *lis pendens*.

The Indian Parliament has the legislative prerogative to amend the legislation related to the matters of transfer of property and linked subject of registration as these are mentioned in the form of entry six of the Concurrent List of the Seventh Schedule to the Constitution of India.¹³ Entry six specifies the transfer of property apart from registration of deeds, documents and subject of agricultural land.¹⁴

THE NEED TO GO BEYOND THE BOMBAY AMENDMENT

In order to give full effect to the ultimate purpose of Section 52 TPA, i.e., protection of original owner and bona fide buyer, there has to be a provision to facilitate the convenient registration of the pendency of the suit. There can be instances where the registration of the pendency is not possible before its cognisance is taken by the prospective buyer due to reasons outside the control of the aggrieved party and this can result in the delay of registration of pendency. In this context, the question before us is whether any party to a court proceeding with respect to a disputed property should have a legal right to sell the property on account of the non-registration of pendency. There is a strong possibility of cases in which the aggrieved party is desperately in need of immediate injunctions or relief or temporary orders, and the concerned party does not have the adequate time or means to register the pendency of the suit under the Indian Registration Act as regards their property. Since the registration involves the submission of detailed particulars and information, it becomes all the more difficult for the aggrieved party to get the registration done.

This gap in the contemplated amendment of Section 52 TPA, which demands registration can be resolved by undertaking either of the following two measures. First, the provision can permit the application of Section 52 TPA even when the notice of the pendency of suit is not registered for reasons out of control the aggrieved party. However, determining the reasons beyond the control of the party is not an easy task and depends heavily on the discretion of the Court. Secondly, as recommended by the Law Commission of India in its comprehensive report on Section 52 TPA, the aggrieved party must be provided with a reasonable time to register the pendency of the suit under the Registration Act.¹⁵ The Law Commission, giving due regard to the uneven geographical settings of India, has suggested a time limit of three months to complete the registration process mandated by the Registration Act.¹⁶ Clearly, the second approach is a better way to fill the gap in the registration of the pendency of the suit as the provision of a time limit is not only a reasonable step to protect the interests of the buyer but also a warning for the prospective buyer to wait for a few more months before finalising the transfer of property.

A CALL FOR LARGER REFORMS

To tackle the menace of land mafias, who cause nuisance to both the original owners of the property and the prospective buyers, apart from amending Section 52 TPA by providing the requirement of registration of pendency, the Parliament should consider making registration of the

¹² Kanbi Vaju Vasta v. Kanbi Popat Vasta, (1985) AIR Guj 144.

¹³ VIDHI CENTRE FOR LEGAL POLICY, CLEANING CONSTITUTIONAL COBWEBS - REFORMING THE SEVENTH SCHEDULE, 44 (2019).

¹⁴ *Id.*

¹⁵ *Supra* note 7 at 3.19.

¹⁶ *Id.* at 5.1



agreement of sale under Section 54 TPA *mandatory*. This recommendation was also made by the Supreme Court in *T.G. Ashok Kumar v. Govindammal*¹⁷, in which the Court observed that making the registration of the sale of agreement compulsory would discourage the circulation of black money, undervaluation of documents for stamp duty, and prevent unnecessary property-related litigation. In most of the Indian States, agreements to sale are not mandatorily registrable as it does not involve a transfer of any right, title or interest in an immovable property. The land mafias in the process of entering into agreements of sale, demand large sums of earnest money and sell off the property to another person, causing hardship to both the parties.

CONCLUSION

Despite a strong precedent in the form of the Bombay Amendment, its subsequent commendation by the Apex Court and Law Commission's unequivocal recommendations, Section 52 TPA awaits amendment as there is a common perception (or rather misconception) that prospective buyers will shy away from buying the property if the notice of the pendency of the suit is registered. Indeed, the very purpose of such an amendment is to caution the bona fide purchasers about the uncertainty of title.

The Achille's heel in this regard is the nexus between real estate dealers and politicians at all levels who have deeply entrenched interests to perpetuate such dubious dealings because there is such a huge windfall gain in the form of black money as there is a vast difference between the prevailing market prices of such properties and the actual money declared in the transactions. In fact, the chief obstacle in the required amendment is the "big money" involved in so-called real estate as it is the root cause of corruption and maladministration. Of course, mobilisation of political will is the key.

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- [4] *Arthur Caspersz, Modern or Equitable Estoppel and Res Judicata*

¹⁷ *Supra* note 11 at 23.