LAW COMMISSION OF INDIA
ONE HUNDRED FIFTY-SEVENTH REPORT
ON
SECTION 52: THE TRANSFER OF PROPERTY ACT, 1882 AND ITS AMENDMENT
April 1998

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D.O. No. 6(3)(46)/98-LC(LS) April 23, 1998

Dear Law Minister,

I have great pleasure in forwarding herewith the One Hundred Fifty Seventh Report of the Law Commission on "S. 52: Transfer of Property Act, 1882 and its Amendment". This section deals with transfer of property pending suit or proceeding relating thereto.

2. It may be mentioned that a few years ago, 'the Law Commission forwarded to the Government of India its Seventieth Report on the Transfer of Property Act, 1882. The report awaits implementation. In the meantime, the Commission considered it proper to take up the subject suo motu, having regard to the urgent and pressing need, in the present day situation, of ensuring a minimum degree of certainty in the matter of title to immovable property. The wide wording of the said provision as it stands at present, presents numerous difficulties and has a great impact on the certainty of title to land and other categories of immovable property. Land being a resource of vital importance in any economy, it is necessary that title thereto should be as clear as possible.

3. The recommendations have been made with a view to plug the above loophole and make the provisions contained in S. 52 more purposeful and justice oriented. We hope that the recommendations, if implemented, will protect the bona fide purchasers for value to a considerable extent.

With regards,
Yours sincerely,
(B.P. Jeevan Reddy)

Dr. M. Thambi Durai,
Hon'ble Minister for Law, Justice & Company Affairs,
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CHAPTER 1

Introduction

1. INSTINCT OF MAN TO HAVE PROPERTY:

1.1. Property is in a sense accumulated labour, that is, the fruit of man's labour as labour otherwise perishable can only be stored in property. It is almost universally recognised fact that every man has got a natural instinct to enjoy the fruits of his labour. According to some jurists, it is this instinct that brings the property into being. The law, in fact, recognises this instinct by conferring certain rights on individuals over the things which they have acquired.

1.2. Locke is the Pioneer of a school of thought which projects the right to property as man's supreme natural right and a limitation upon the State. Locke assumed that the natural state of man was a state of perfect freedom, in which men were in a position to determine their actions and dispose of their persons and possessions as they saw fit, and that it was, furthermore, a state of equality, in the sense that no man in this state was subjected to the will or authority of any other man. This state of nature was governed by a law of nature which, looking towards the peace and preservation of mankind, taught men that all persons being equal and independent, no one ought to harm another in his life, health, liberty, or possessions[1]. As long as the state of nature existed, everybody had the power to execute the law of nature and punish offences against it with his own hand. This situation was fraught with disadvantages, inconveniences, and dangers. In the first place, the enjoyment of the natural rights of life, liberty, and property was uncertain and constantly exposed to the invasions of others. Second, in punishing infractions of the law of nature, each man was a judge in his own cause and liable to exceed the rule of reason in avenging transgressions.[2] In order to end the confusion and disorder incident to the state of nature, men contemplated a body politic or a community. In contrast to Hobbes, who construed the social contract as a pact of complete subjection to an absolute sovereign, Locke asserted that men in establishing a political authority retained those natural rights of life, liberty, and property (often grouped by Locke under the single concept of property[3]) which were their own in pre-political stage. In Locke's contemplation the right to property was not created by the community or state, but existed already in the state of nature. To him, State came into existence for its protection. His follower Pound expresses “In civilised society men must be able to assume that they control, for purposes beneficial to themselves, what they have discovered and appropriated to themselves, what they have created by their own labour, and what they have acquired under existing social order.” To Aristotle property is the condition of good life. He regards it as the extension of human personality. He is of the view that property is essential for

satisfaction of a natural instinct of possession as of an equally natural impulse of generosity.

.3. Locke wrote: “The measure of property Nature well set, by the extent of men's labour and the conveniency of life. No man's labour could subdue or appropriate all, nor could his enjoyment consume more than a small part, so that it was impossible for any man, this way, to entrench upon the right of another or acquire to himself a property to the prejudice of his neighbour, who would still have room for as good and as a large a possession (after the other had taken out his) as before it was appropriated.[4]

1.4. In 1302 John of Paris argued that property was a means to enable clergy to do their spiritual work and therefore, there was nothing wrong in their owning property.[5] Similarly in Mahabharat, it is engrafted “From wealth come all religious acts (like charity); it is the means of enjoying all pleasures, heaven itself can be attained, Oh king, through (Artha) wealth.”[6] Kautaliya also holds that “wealth and wealth alone is important inasmuch as charity and desire depend upon wealth for their realisation.”[7]

1.5. To Bodin as to Locke the right of property is rooted in the law of nature, for basic instinct of man is self-preservation. Bodin regards property as an attribute of family and family according to him is the basis of the State. Hegel maintained that property was necessary for the expression of man's personality. “It is in possession first of all”, he said, “that a man becomes rational”. He justifies private property as the objectification of man's will.”[8]

1.6. According to Bentham property is the basis of man's expectations and he enjoins on the legislature not to disturb man's expectations if it wants to promote social happiness.

1.7. Right to property is, therefore, an incentive to effort. It induces men to industry and prudence. The State should guarantee it not only to meet the demand of natural justice that man should be entitled to the reward of his labour but also to promote economic growth.[9]

1.8. The concept of property also changes with economic evolution.[10] In the primitive stage (hunting and fishing) of man's existence right to property was confined to effective occupation. Ownership and use went together. Rousseau defends the rule of “first occupancy” as forming the basis of property right in land. In the past, with the knowledge of agriculture, the land and cattle became important forms of wealth. Later, the invention of money was a landmark in the history of propety. Prior to it, barter system also prevailed but barter economy inherently restricted the extent and scope of property right. Monetary economy revolutionised, property relations in society. With the application of machines to the process of production, monetary economy turned into capitalism. Capitalism has brought further development in the concept of property. We have arrived at a concept of property consisting, inter alia, of bundle of paper representing securities, promissory notes, shares, certificates, bonds, debentures, stocks and other negotiable instruments. In the Hindu religious endowment's case[11] the

Supreme Court took the view that the term property should be given a liberal and wide connotation and extend to those well recognised types of interests which have the insignia or characteristics of proprietary right.

1.9. Legal concepts of what is property differ from time to time and place to place. What is property in one legal system may not be so according to another legal system, in as much as the law may fail to provide that the particular assertion deserves to be recognised or protected by law. This is partly due to the differences in the social order in which a legal system operates, and partly due to the state of juristic thinking in the particular country.

1.10. Need to Recognise Man's Right to Property.—It is trite saying that property can be earned only under the protection of the State. Indeed property is that to which law gives recognition. Nevertheless, it goes without saying that property rights cannot be absolute. As Lindsay remarked, right to property requires social recognition. There is no inherent right to appropriate any commodity irrespective of social approval. In the early times, even property right in 'slaves' was duly recognised but with the abolition of slavery no such claim could be advanced on any supposed theory of rights. Without social recognition, therefore, there is no right to property even over one's own person.[12] (Locke asserts that every man has property in his own 'person')

The property and its recognition depend on social recognition. It was an aspect well-known to Hindu jurists. According to some Hindu jurists, the idea of property is exclusively indicated in the Sastras and ownership can be acquired only in the modes recognised[13] by them. This view is favoured by Dhareswara, Jimutayahana and their followers. On the other hand, Vijnaneswara and his followers maintain that the idea of property has its basis on popular recognition without any dependence on Sastras, the modes of acquisition of ownership being to collect and prescribe those means of acquisition recognised by popular usage that are regarded as commendable and as such worthy of being pursued. This latter view represents *the doctrine that property has its basis in popular recognition*. Right to property is also recognised as one of the basic human rights. Art. 17 of the Universal Declaration on Human Rights declares that "every one has the right to own property alone as well as in association with others" and that "no one shall be arbitrarily deprived of his property".

Property is, therefore, a creation of social recognition and economic evolution. The State which directs social recognition and promotes economic development must ultimately determine the measure in which right to property shall be guaranteed. Right to property is thus indicative of the social and political philosophy of a State. It goes to the very foundations of the political system.[14]

1.11. Recognition of subsequent dispositions.—Any society must, as a pre-requisite of social order, allocate rights of control over the land and goods existing in its territory. The pattern of allocation may vary, but there must be some allocation of its resources. Once proprietorship/ownership of the resources is recognised, there must also be a provision for recognising

subsequent dispositions of the rights as recognised in their origin. This shows the significance of a law relating to the transfer of property. Transfer of a right, of course, pre-supposes the existence of that right.

The rights may be allocated according to the norms of the particular society, but there must be some form of allocation. The transition from the natural state to civil society, according to Rousseau,[15] "changes usurpation into a true right and enjoyment into proprietorship". Civilised society thus postulates the transformation of de facto acts into legal doctrines in the field of property. Once the rights are recognised by society-setting its seal of approval-their transfer must also be provided for. The provisions for transfer could also vary according to the norms of the particular society but the provisions must be there.[16]

K.K. Mathew observes[17] that a system of property, in the sense of a set of norms allocating control over the physical resources at its disposal, is essential to any community. By referring to Hobbes and Rousseau, he infers that any society must allocate rights of control over the land and goods at its disposal as a pre-requisite of a social order.[18]

Property is an essential guarantee of human dignity, for, in order that a man may be able to develop himself in a human fashion, he needs a certain freedom and a certain security.[19]

1.12. Right to Property in the Constitution of India.—Realising the man's natural instinct and expectation to enjoy the fruits of his labour, right to property was initially included in the Constitution of India as a Fundamental Right under Arts. 19(1)(*f*) and 31, subject, of course, to certain exceptions carved out therein keeping in view the larger interests of the society. Now, while cl. (1) of Art. 31 has been shifted from Part III to Art. 300-A, cl. 2 of that article, which dealt with compulsory acquisition of property, has been repealed by the Constitution (44th Amendment) Act, 1978. Sub-cl. (*f*) of cl. 1 of Art. 19 which guaranteed the right to acquire, hold and dispose of property has also been deleted by that Act. Newly inserted Art. 300-A of the Constitution now provides that "no person shall be deprived of his property save by authority of law". The result of these changes, in short, is that the right to property has ceased to be a fundamental right under the Constitution of India but has been retained as a constitutional right under Art. 300-A.

1.13. Machinery for settlement of disputes.—Once a man's right to acquire and hold the property is recognised by the State, need to allow him to enjoy his property without any disturbance, subject to certain well defined exceptions which may be made by the state to protect public interests as also to ensure socio-economic justice, naturally arises therefrom. Unless peaceful enjoyment of property by its owner is ensured by the state, his right to property would be meaningless. In the absence of State protection, ultimately the rule "might is right" would govern the state of affairs. This may lead to conflicts and tension having tendency to disturb law and order in the society, if no machinery for settlement of such disputes

is provided by the State. Therefore, it is the fundamental obligation of every government to provide for mechanism for resolution of such disputes. No government can afford to have their citizens perpetually engaged in finding solutions to their disputes by an unending process. It is a fundamental principle of law that where there is a right there is a remedy — ubi jus ibi remedium.

Keeping in view the paramount importance and need of providing effective means for settlement of disputes, adequate provisions have been made in our country for the purpose not only under our Constitution but also under other laws. Apart from constitutional remedies, in our country a litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in civil court having jurisdiction over the matter unless its cognizance is expressly or impliedly barred (S. 9, CPC). The Supreme Court has held—

"There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice."[20]

It may also appear to be justified in terms of providing simple procedure which may help in fighting the delay in the disposal of disputes simultaneously reducing the cost and making justice effective, inexpensive and substantial in character. Inevitable, it is to conclude that such a forum for resolution of disputes should also be able to resolve the lis of interests arising out of disposition of properties.

As observed in the Fifty Fourth Report of the Law Commission on the Code of Civil Procedure, 1908, procedure is a means to justice and it is the duty of the State to see that its legal system does not leave scope for processess which are likely to hinder or defeat justice (para 1. B. 2. thereof).

1.14. Jurisdiction of machinery for resolution of dispute is not ousted during pendency of proceedings.—Once a suit or petition is instituted before a court or forum having jurisdiction over the subject-matter of the case, it is empowered to pass all suitable directions for administration of justice till it becomes functus officio. Thus it is well established that if a suit was validly filed and the Court had jurisdiction to entertain it on the date of institution, subsequent events would not lead to the defeat of the suit unless expressly provided to that effect by a legislative enactment[21]. A Court must have jurisdiction throught the proceedings until termination of those proceedings by the judgment of the Court.[22] Once the jurisdiction of court is attached, private dealings that may remove the subject-matter of litigation from the ambit of the power of the court to decide a pending dispute or which may frustrate its decree should not be allowed as a matter of public policy. If sale of property in dispute is permitted during the pendency of suit or proceeding, it would not only defeat the proper administration of justice, but it would also lead to multiplicity of proceedings which itself may create an unacceptable situation in the administration of justice. In order to ensure that such a situation does not occur, a provision was rightly enacted

in S. 52 of the Transfer of Property Act, 1882 to the effect that during the pendency of any suit or proceeding, 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. Although the doctrine of lis pendens enacted in the above section is a noble concept which not only aims at preventing multiplicity of proceedings, but it also ensures uninterrupted process of dispensation of justice, yet there are certain vital issues having a bearing on the just application of this principle in all situations which require consideration in order to meet the demands of justice in an even manner so as to protect various interests involved therein. We propose to discuss these issues in the succeeding chapters of this report.

1.15. Scope and object of the Report.—This Report deals with a short question arising out of S. 52 of the Transfer of Property Act, 1882, which is concerned with the transfer of immovable property *pendente lite*. The subject has been taken up by the Law Commission of India *suo motu*, having regard to the magnitude and frequency of the difficulties that arise from the wide wording of the section as it stands at present. These difficulties will be presently dealt with (Ch. III, *infra*).

1.16. Earlier Report and need for present report.—It may be mentioned that a few years ago, the Law Commission forwarded[23] to Government a comprehensive report on the Transfer of Property Act, 1882. The report awaits implementation. In the meantime, the Commission has considered it proper to take up the subject under consideration, having regard to the urgent and pressing need, in the present day situation, of ensuring a minimum degree of certainty in the matter of title to immovable property. The statutory provision with which this Report is concerned has a vital impact on the certainty of title to land and other categories of immovable property. Land being a resource of vital importance in any economy, it is necessary that title thereto should be as clear as possible. And, since certainty of title depends, to a large extent, on the soundness of legal provisions relevant thereto and to their practical application and impact, it is obvious that those provisions should be subjected to scrutiny and review at reasonable intervals, so that the law may adequately achieve its objective of promoting the certainty of title to the important economic resource of land.

1.17. Legislative Competence.—Fortunately, the subject of transfer of property, and the connected subject of registration (which is also proposed to be dealt with in the legislative proposals formulated in this Report), are matters included in the Concurrent List in the Seventh Schedule to the Constitution of India, entry 6 of which covers transfer of property other than agricultural land, registration of deeds and documents.

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1 . Locke, of Civil Government (Everyman's Library ed., 1924), Bk. II, Ch. II, Ss. 4 and 6. On Locke see Fredrick Pollock, “Locke's Theory of the State” in his Essays in the Law (London

1922), pp. 80-102; Cains, Legal Philosophy from Plato to Hedgel, pp. 335-361; G.J. Schocher, Life, Liberty and Property (Belmot, Cal 1971) C.B. Macpherson, The Political Theory of Possessive Individualism (Oxford, 1962) pp. 194-262.

2 . Locke, of Civil Government, Bk. II, Ch. IX, S. 123; Ch. II, Ss. 12-13.

3 . Id., Ch. VII, S. 87; Ch. IX, S. 123.

4 . Id., p. 4.

5 . Refer to H.M. Jain, Right to Property under the Indian Constitution, pp. 1-2.

6 . Mahabharat Sutra Parva, Ch. VIII, Sloka 17 (Gita Press, Gorakhpur), referred in Id., p. 2.

7 . Arthshastra, Bk, I Ch. VII, para 12 (tr. R. Shamsastry), referred in ibid., p. 2.

8 . See Note 5.

9 . Ibid.

10 . Id., pp. 7-9.

11 . *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar*, AIR 1954 SC 282.

12 . Cf. Locke, referred in note 2, pp. 6-7.

13 . P.N. Sen, Hindu Jurisprudence (1918), p. 42, cited in Law Commission of India's 70th Report on the Transfer of Property Act, 1882, p. 6.

14 . See note 5, p. 9.

15 . Rousseau, Social contract, referred in Law Commission of India's 70th Report on the Transfer of Property Act, 1882, p. 2.

16 . Ibid.

17 . Justice K.K. Mathew, former Judge of the Supreme Court of India and former Chairman of LCI. The Right to Equality and Property under the Indian Constitution, Lecture II, p. 47.

18 . Id., p. 49.

19 . Id., p. 75.

20 . *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393 : AIR 1974 SC 1126, para 16.

21 . *Venugopala Reddiar* v. *Krishnaswami Reddiar*, AIR 1943 FC 24 referred in *Official Receiver* v. *Jugal Kishore Lachhi Ram Jaina*, AIR 1963 All 459.

22 . AIR Commentaries on the Code of Civil Procedure, 1908, 9th Edn., Vol. I, p. 86.

23 . 70th Report of the Law Commission on “The Transfer of Property Act, 1882”.

CHAPTER 2

Doctrine of Lis Pendens—Its General Meaning and Relevance

2.1. Rights depend upon remedies[1].—This also holds good as regards the right to property. Since speedy and efficient remedies are of utmost importance, it has to be ensured that once a person has initiated legal process in any court to seek remedy against any invasion on his right or threat of invasion thereto, the legal process should not be defeated on account of private deals or any transaction, that is, transfer of property in dispute or on account of any other action of any party to such legal process, otherwise the very purpose of seeking relief against any grievance would be meaningless and ineffective. In order to ensure that the legal remedy remains efficient throughout the legal process, jurists had evolved a general principle known as "lis pendens" basing it on the necessity that neither party to the litigation should alienate the property in dispute so as to affect his opponent.[2]

2.2. What we are concerned with in this Chapter is not so much the application of a specific statutory provision as of the general principle governing such matters. "Lis" means an action or a suit. "Pendens" is the present participle of "Pendo" meaning continuing or pending, and the doctrine of Lis pendens may be defined as "the jurisdiction, power, or control that courts have, during the pendency of an action over the property involved therein". (34 American Jurisprudence 360).

2.3. The basis of the doctrine is given as follows in the aforesaid volume:

"Two different theories have been advanced as the basis of the doctrine of lis pendens. According to some authorities, a pending suit must be regarded as notice to all the world, and pursuant to this view it is argued that any person who deals with property involved therein, having presumably known what he was doing, must have acted in bad faith and is therefore, properly bound by the judgment rendered. Other authorities, however, take the position that the doctrine is not founded on any theory of notice at all, but is based upon the necessity, as a matter of public policy, or preventing litigants from disposing of the property in controversy in such manner as to interfere with execution of the court's decree. Without such a principle, it has been judicially declared, all suits for specific property might be rendered abortive by successive alienations of the property in suit, so that at the end of the suit another would have to be commenced, and after that, another, making it almost impracticable for a man ever to make his rights available by a resort to the courts of justice." (34 American Jurisprudence 363); and its origin and history:

"The doctrine of lis pendens is of ancient lineage. Originating, it is said, in the civil law, it seems to have been operative at an early date as the basis of the common law rule by virtue of which the judgment in a real action was regarded as overreaching any alienation made by the defendant during its pendency. In the course of time the doctrine was adopted by

equity, being embodied in one of the Lord Bacon's ordinances “for the better and more regular administration of justice in the court of Chancery”. This ordinance, commonly known as Bacon's Twelfth Rule, provides “that no decree bindeth any that cometh in bone fide by conveyance from the defendant, before bill is exhibited, and is made no party neither by bill nor order; but where he comes in pendente lite, and while the suit is in full prosecution and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of the suit, or the court made acquainted with the court is to give order upon the special matter according to justice. The principle thus adopted at an early period in the history of chancery jurisprudence has been followed and acted on by various successive chancellors, and is admitted by writers on the subject to be the established doctrine.” (34 American Jurisprudence 365).

2.4. Bennet in his Treatise on the Law of Lis Pendens was not inclined to accept ‘notice’ as the basis of the rule. He quoted Lord Chancellor Cranworth[3]:

“It is scarcely correct to speak of lis pendens as affecting the purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party.... The necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so there could be no certainty that the litigation would ever come to an end, and said:

“The foundation for the doctrine of lis pendens does not rest upon notice, actual or constructive; it rests solely upon necessity — the necessity, that neither party to the litigation should alienate the property in dispute so as to affect his opponent”.

2.5. The doctrine of lis pendens is an expression of the principle of the maxim “ut lite pendente nihil innovetur” (pending litigation nothing new should be introduced). In the Corpus Juris Secundum (LIV, p. 570) as quoted by the Supreme Court in *Jayaram Mudaliar* v. *Ayyaswami*[4] and *Rajender Singh* v. *Santa Singh*[5], we find the following definition:—

“Lis pendens literally means a pending suit, and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein”.

As was observed by the Supreme Court in *Jayaram case*[6], supra, “Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove any part of the

subject-matter outside the power of the Court to deal with it and thus make the proceedings infructuous."

2.6. The principle on which the doctrine of lis pendens rests is explained in the leading case of *Bellamy* v. *Sabine*[7] where Turner, L.J. observed—

"It is as I think, a doctrine common to the courts both of Law and Equity, and rests, as I apprehend, upon this foundation — that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."

In the same case, Lord Cranworth explained that the doctrine did not rest on the ground of notice. His Lordship said:

"It is scarcely correct to speak of lis pendens as affecting purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party".

2.7. The above judgment was quoted and followed by the Privy Council in *Faiyaz Hussain Khan* v. *Munshi Prag Narain*[8], which is a leading case on the doctrine of lis pendens in India. It would be pertinent to briefly mention the relevant facts of that case in order to understand the ratio laid down by the Judicial Committee of the Privy Council. On June 14, 1889, Hamid Husain, the owner of Mauza Bangawan, mortgaged it to Newal Kishore. On July 13, 1891, Newal Kishore brought a suit on his mortgage. On August 23, 1892, he obtained a decree for sale, which was made absolute on November 21, 1895. On February 21, 1901 the property was sold in execution of Newal Kishore's decree and purchased by the respondent Prag Narain, who was the son and the representative of the decree-holder. On July 2, 1901, Prag Narain obtained a sale certificate and attempted to recover possession of the property. He was however, obstructed in every possible way by the appellant Faiyaz Husain, who was in possession under a decree for sale obtained on a subsequent mortgage. Prag Narain was, therefore, compelled to bring the suit. There was no encumbrance upon the property either at the date of the mortgage of June 14, 1889, to Newal Kishore or at the date of the institution of Newal Kishore's suit on July 13, 1891. But on July 15, 1891, before any summons in Newal Kishore's suit was served, a second mortgage was granted by the mortgagor to Mirza Muzaffar Beg. Mirza Muzaffar Beg put his mortgage in suit on March 20, 1894, without making the first mortgagee a party, and in the absence of the first mortgagee obtained a decree for sale. In execution of this decree the property mortgaged to Mirza Muzaffar Beg was put up for sale on December 20, 1900, and bought by the appellant Faiyaz Husain, who was the son of Hamid Husain, and who had obtained his majority in 1894. Faiyaz Husain managed to get possession and resisted

all attempts on the part of the respondent Prag Narain to dispossess him. Their Lordships observed as follows:—

"The mortgage to Mirza Muzaffar Beg was made during the pendency of Newal Kishore's suit, which was in its origin and nature a contentious suit, and was at the time being actively prosecuted. Therefore, under S. 52 of the Transfer of Property Act (No. 4 of 1882), it did not affect the rights of Newal Kishore under the decree made in his suit. Their Lordships are unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of S. 52 of the Act of 1882 until a summon is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty.

The doctrine of lis pendens, with which S. 52 of the Act of 1882 is concerned, is not as Turner L.J. observed in *Bellamy* v. *Sabine*[9] "founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is.... a doctrine common to the Courts both of law and of equity, and rests.... upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail." The correct mode of stating the doctrine, as Cranworth L.C. observed in the same case, is that "pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent.

Apart, however, from the doctrine of lis pendens, which seems to their Lordships to apply to the present case, it is plain that at the date of his purchase Faiyaz Husain knew all about the mortgage to Newal Kishore and the decree made on the basis of that mortgage, and he knew that the sale proceedings were actually in progress, for in July 1898, he brought a suit against Prag Narain asking for a declaration that Newal Kishore's mortgage, and the decree passed upon it, were invalid, and that the property was not liable for attachment and sale."

2.8. The principle is, therefore, based not on the doctrine of notice, but on expediency, that is, the necessity for final adjudication. It is quite reasonable that when the jurisdiction of the Court once attached, it should not be ousted by the transfer of the defendant's interest. If that were not so, there would be no end to litigation and justice would be defeated.[10] In the following case, however, it has been said that the principles contained in this section are in accordance with the principle of equity, good conscience or justice because they rest upon an equitable and just foundation. Therefore, where S. 52 of the Transfer of Property Act is not applicable as such the principle contained in it will be applicable.[11]

2.9. While considering the true import of lis pendens in relation to the principle of res judicata, Bhagwati, J. in *Digambarrao Hanmantrao Deshpande* v. *Rangrao Ragunathrao Desai*[12], observed as follows:—

"Res judicata means a matter adjudicated upon or a matter on which judgment has been pronounced. The rule of res judicata has been put on two grounds, the one the hardship to the individual that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the State that there should be an end of litigation; See *Lockyer* v. *Ferryman*[13]. The rule is based on this principle that the cause of action which would sustain the second suit does not any more survive, it being merged in the judgment of the first. It is well established that every suit has got to be sustained by a cause of action, and if by the decision reached in the first suit, meaning thereby a previously decided suit, the cause of action no more survives, being merged in the judgment, where could be the cause of action left which would sustain the second suit after the decision was reached in the first suit? Up to the time the decision was reached in the first suit it would be possible to say that there is a cause of action which could sustain both the suits. The suits are pending and the cause of action can be litigated between the contending parties. Once, however, the cause of action ceases to exist being merged in a judgment duly pronounced by a Court, the decision reached in that suit becomes res judicata. The cause of action which till then sustained the second suit does not survive any more and no court after such decision has been reached by a competent court in the previously decided suit would under the provisions of S. 11, Civil Procedure Code or otherwise on general principles try any suit in which the same cause of action is contested between the same parties or parties under whom they or any of them claim litigating under the same title.... Lis Pendens is an action pending and the doctrine of lis pendens is that an alienee pendente lite is bound by the result of the litigation. As Turner L.J. said in the leading case of an *Bellamy* v. *Sabine*[14], De G&J at pp. 578, 584:

"It is, as I think a doctrine common to the courts both of Law and Equity, and rests, as I apprehend, upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings, de novo subject again to be defeated by the same course of proceeding."

The Privy Council also has adopted the same principle in *Faiyaz Husain Khan* v. *Pragnarain*[15], where they lay stress on the necessity for final adjudication and observe that otherwise there would be no end to litigation and justice would be defeated. The doctrine of lis pendens is expounded in Story's Equity Jurisprudence Vol. I, S. 406 in the terms following:

"Ordinarily, it is true, that the decree of a court binds only the parties and their prives in representation of estate. But he who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title....Where there is a real and fair purchase, without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise alienations made

during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, pendente lite, nihil innovetur; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them."

It is also settled law that in the absence of fraud or collusion the doctrine of lis pendens applies to a suit which is decided ex parte or by compromise. If the compromise has not been fairly and honestly obtained, the suit which ended in compromise will not operate as lis pendens. This is the doctrine of lis pendens.

These principles are quite clear, and we have got to determine whether in the event of a conflict arising between the rule of res judicata and the doctrine of lis pendens either the one or the other should prevail. As has been observed before, the rule of res judicata rests on the necessity of having a finality in litigation, and so does the doctrine of lis pendens. Both have the same end in view, the former that as between the same parties, or their representatives-in-interest litigating under the same title, once the decision is reached in a suit, the same question shall not be canvassed in any other suit, and the latter that whatever the party may choose to do by way of transfers pendente lite, the transferee pendente lite shall be bound by the result of the litigation. There is, however, this difference between the two that the rule of res judicata is concerned with more actions than one, whereas the doctrine of lis pendens is concerned with the very same suit during the pendency of which there is an alienation of the right title and interest of one of the parties thereto. In the case of res judicata the same cause of action may sustain various actions simultaneously, but once the cause of action is merged in the judgment pronounced a previously decided suit, there is no cause of action left to sustain the second suit. In the case of lis pendens, however, the cause of action continues as it was sustaining the suit which has been filed for the adjudication of the rights of the various parties thereto and the doctrine applies during the pendency of that suit sustained on that cause of action, whatever be the transfers pendente lite, they do not affect the result of the litigation qua the parties to the suit, and the transferee pendence lite is bound by the result of that litigation, irrespective of whatever has happened between his transferor and himself. Once, however, even in the case where the doctrine of lis pendens applies a judgment is pronounced and the cause of action is merged in the judgment that judgment is the final pronouncement which binds not only the parties to the suit but also the transferees pendente lite from them. The conveyance is treated as if it never had any existence. As Story has put it in the passage above quoted the effect of it is not to annul the conveyance but only to render it subservient to the rights of the parties in the litigation. Whether this decision is reached in the same suit or in a different one and whether the cause of action which sustained the suit in which the doctrine of lis pendens applies was merged in the judgment pronounced in the very same suit or in another one, the position would be that decision would determine

the rights of the parties and would be binding on them as well as the transferees pendente lite from them. The transferee pendente lite would be legitimately treated as the representative-in-interest of the parties to the suit and the judgment which has been pronounced, whether in the same suit or in another, would be determinative of the rights of the parties. There would be then no lis or action which would survive. The lis or action can only be sustained by a cause of action. If the cause of action was merged in a judgment duly pronounced by a competent court there would be no more occasion for any lis to continue pending. If a judgment duly pronounced on that particular cause of action was to merge the cause of action in itself, that judgment would govern the rights of the parties, whether it is pronounced in the same suit in which the doctrine of lis pendens applies or in any other. If it is in the same suit, there would be no question of the applicability of the rule of res judicata. The rule of res judicata would come into operation only if it was pronounced in another suit which came to be decided earlier than the one in which the doctrine applied. But once that judgment was pronounced it would have the effect of finally determining the rights of the parties and the cause of action which would sustain the suit in which the doctrine of lis pendens applied would be merged in the judgment duly pronounced in what may be described as the previously decided suit. In our opinion, therefore, the rule of res judicata prevails over the doctrine of lis pendens and we have come to the conclusion that once a judgment is duly pronounced by a competent court in regard to the subject-matter of the suit in which the doctrine of lis pendens applies, that decision is res judicata and binds not only the parties thereto but also the transferees pendente lite from them."

2.10. In *Simla Banking and Industrial Co. Ltd.* v. *Firm Luddar Mal Khushi Ram*[16], Tek Chand, J., said:

"....the rule of lis pendens lays down that whoever purchases a property during the pendency of an action, is held bound by the judgment that may be made against the person from whom he derived his title (to the immovable property, the right to which is directly and specifically in question in the suit or proceeding) even though such a purchaser was not a party to the action or had no notice of the pending litigation....

The intention of the doctrine is to invest the Court with complete control over alienations in the res which is pendente lite, and thus to render its judgment binding upon the alienees, as if they were parties, notwithstanding the hardship in individual cases...."

2.11. From the analysis of the aforementioned decisions of different courts on the subject, it would appear that the doctrine of lis pendens, as Turner L.J., observed in *Bellamy case*[17], is a principle of law common to both the courts of law and equity which mandates from the point of view of expediency that suit or proceeding once instituted should be brought to a logical termination. It would be impossible to achieve this purpose if alienations pendente lite are permitted to prevail. Since the principle is based on expediency, that is, the necessity for final adjudications, it would

bring about frustrating results in the administration of justice if the alienations pendente lite are allowed. The principle, thus, is in accordance with the principle of equity, good conscience and justice. As stated by the Kerala High Court in *Govinda Pillai case*[18], since the principle rests upon an equitable and just foundation, it will apply even in the absence of law. Since there seems to be utmost relevance and need of the principle in the administration of justice, it may be difficult to entirely dispense with the same. Nevertheless, we are of the view that in the interests of justice, that is, to bring about equitable results, if certain conditions such as registration of the notice of suit or proceeding are set out as a pre-requisite for the applicability of the principle, it may not run counter to the basic spirit of the doctrine of lis pendens. We propose to discuss this aspect in the subsequent Ch. III.

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1 . Administrative Law (7th Edn.) by H.W.R. Wade and Forsyth, at p. 579.

2 . *Govinda Pillai* v. *Aiyyappan Krishnan*, AIR 1957 Ker 10, para 7.

3 . *Bellamy* v. *Sabine*, (1857) 1 De G&J 566: 26 LJ Ch 797.

4 . (1972) 2 SCC 200 : AIR 1973 SC 569: (1973) 1 SCR 139, para 47.

5 . (1973) 2 SCC 705 : AIR 1973 SC 2537: (1974) 1 SCR 381.

6 . (1972) 2 SCC 200 : AIR 1973 SC 569: (1973) 1 SCR 139, para 47.

7 . (1857) 1 De G&J 566: 26 LJ Ch 797.

8 . (1906-07) 34 IA 102.

9 . (1857) 1 De G&J 566: 26 LJ Ch 797.

10 . *Jahar Lal Bhutra* v. *Bhupendra Nath Basu*, ILR (1922) 49 Cal 495: 67 IC 108: 1922 AC 412.

11 . *Govinda Pillai* v. *Aiyyappan Krishnan*, AIR 1957 Ker 10 at 11.

12 . AIR 1949 Bom 367.

13 . (1877) 2 AC 519 (HL).

14 . (1857) 1 De G&J 566: 26 LJ Ch 797.

15 . ILR (1906-07) 29 All 339: (1906-07) 34 IA 102 (PC).

16 . AIR 1959 Punj 490.

17 . *Bellamy* v. *Sabine*, (1857) 1 De G&J 566: 26 LJ Ch 797.

18 . *Govinda Pillai* v. *Aiyyappan Krishnan*, AIR 1957 Ker 10.

CHAPTER 3

Section 52: Transfer of Property Act, 1882 and its Amendment

3.1. Dealing with the effect of Transfer of immovable property during the pendency of a suit or proceeding, S. 52 of the Transfer of Property Act, 1882 was *originally enacted* as follows:

"During the active prosecution in any Court having authority in British India or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable 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."

3.2. The section was amended by Act 20 of 1929 by substituting the word "pendency" for the words "active prosecution" and the words "any suit or proceeding which is not collusive" for the words "a contentious suit or proceeding" and by the addition of an Explanation which fixes the time during which a suit is deemed to be pending for the purposes of the section. The section as amended reads as follows:

"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 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."

3.3. *Scope of Section 52 analysed*

Analysing S. 52, one can note its important ingredients, as under:

(a) The suit or proceeding should be one in which "any right to immovable property is directly and specifically in question". (The section does not extend to suits concerning moveable property).

(b) The suit or proceeding should be pending in—

(i) any court within India having authority; or

(ii) any court outside India established by the Central Government (This would be a court established under a statutory order issued by the Central Government under legislation enacted in pursuance of Parliament's power to legislate on foreign jurisdiction).

(c) The suit or proceeding must not be collusive. Collusion in judicial proceeding is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. (Wharton's Law Lexicon, 14th Edn., p. 212). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties.[1]

If these conditions are satisfied, then the effect would be, that a party to the suit or proceeding cannot transfer or otherwise deal with the property, so as to affect the rights of any other party thereto, except with the authority of the court and on terms imposed by the Court.

Theoretically, every party to the suit is subject to the restrictive effect of S. 52. In practice, however, it is the party against whom relief is claimed in the suit that would be the transferor.

3.4. S. 52 applies to transfers during the entire "pendency" of the suit or proceedings. The question then arises is for what period can a suit or proceeding be said to be pending for the purpose of this section. The question is to a great extent answered by the explanation now added by the Amendment Act 20 of 1929, and the principle laid down in the explanation has been applied as a rule of justice, equity and good conscious. The explanation under S. 52 provides that for the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of a 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 any limitation prescribed for the execution thereof by any law for the time being in force. This abunduntly makes it clear that even appeals and execution proceedings are continuation of the pendency of the suit or proceeding within the meaning of the section and accordingly lis pendens continues to have force even during the appeal or execution also.

3.5. While considering the true import and scope of S. 52 of the Act the Supreme Court in *Jayaram Mudaliar* v. *Ayyaswami*[2] observed:

"It is evident that the doctrine as stated in S. 52, applies not merely to actual transfers of right which are subject-matter of litigation but to other dealings with it "by any party to the suit or proceeding, so as to affect the right of any other party thereto". Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of

litigation, without anything done by a litigating party, the resulting transaction will not be hit by S. 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the court dealing with the litigation, the court may bind them to their own acts. All these are matters which the court could have properly considered. The purpose of S. 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the court which is dealing with the property to which claims are put forward."

3.6. If one acquires property by way of transfer or otherwise pendente lite, he will be bound by the decree which may be ultimately obtained in the proceedings pending at the time of acquisition. This result is not avoided by reason of the earlier attachment. This was made clear by the Supreme Court in *Kedar Nath* v. *Ganesh Ram*[3] observing as follows:—

"Attachment of property is only effective in preventing alienation but it is not intended to create any title to the property. On the other hand, S. 52 places a complete embargo on the transfer of immovable property right to which is directly and specifically in question in a pending litigation. Therefore, the attachment was ineffective against the doctrine. Authority for this clear position is hardly necessary but if one is desired it will be found in *Motilal* v. *Karrab-ul-Din*[4]."

3.7. Apart from doctrine of lis pendens under S. 52 of the Transfer of Property Act, the subsequent purchaser does not get any right to lead any evidence as he steps into the shoes of the defendant who has given up the right to lead evidence. (*Dhanna Singh* v. *Baljinder Kaur*[5], Scale at p. 748) Defendants or any party is prohibited by operation of S. 52 to deal with the property or transfer or otherwise to deal with it in anyway affecting the rights of the other party except with the order or authority of the court. Alienation made during the pendency of the suit or proceeding would obviously be hit by the doctrine of lis pendens by operation of S. 52. (*Sarvinder Singh* v. *Dalip Singh*[6], Scale at para 6.)

3.8. The effect of the doctrine of lis pendens is not to annul the transfer, but only to render it subservient to the rights of the parties to the litigation. In other words, the S. 52 in fact, does not have the effect of wiping out a transfer pendente lite altogether, but only subordinates it to the parties based on the decree to the suit. As between the parties to the transfer, that is, the transferor and the transferee, transfer of the title is perfectly valid, and operates to vest the title of the transferor in the transferee. The words "so as to affect the rights of any other party thereto under any decree or order which may be made therein" make it quite clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order (vide *Thakurai Bhup Narain Singh* v. *Nawab Singh*[7], AIR at p. 731). A transfer or a dealing by a party to a suit during the pendency of the suit or proceeding is not, ipso facto void. It only cannot affect the rights of

any other party to the suit under any decree or order that may be made in the suit or proceeding[8].

3.9. Thus, the effect of S. 52 is not to wipe out a sale pendente lite altogether, but to subordinate the rights based on the decree in the suit. As between the parties to the transaction, however, it is perfectly valid and operates to vest the title of the transferor in the transferee. While considering and analysing the true effect of S. 52 of the Transfer of Property Act on a sale pendente lite, the Supreme Court in *Nagubai* v. *B. Shama Rao*[9] concluded as follows:—

"(24)3. It was finally contended that the purchase by Devamma in execution of the decree in Q.S. No. 100 of 1919-20 was void and conferred no title on her, because the Official Receiver in whom the estate of Keshavanada, the mortgagor, had vested on his adjudication as insolvent on 19-2-1926 had not been made a party to those proceedings, and that, in consequence, the title of Dr. Nanjunda Rao and his successors under the sale deed dated 30-1-1920 continued to subsist, notwithstanding the court auction sale on 2-8-1928.

The obvious answer to the contention is that the properties which were sold on 2-8-1928 did not vest in the Official Receiver on the making of the order of adjudication on 19-2-1926, as they had been transferred by the mortgagor, long prior to the presentation of Insolvency Case No. 4 of 1925-26 under the very sale deed dated 30-1-1920 which forms the root of the appellants' title. That sale was no doubt pendente lite, but the effect of S. 52 is not to wipe it out altogether but to subordinate it to the rights based on the decree in the suit.

As between the parties to the transaction, however, it was perfectly valid, and operated to vest the title of the transferor in the transferee. Under S. 28(2) of the Insolvency Act, what vests in the Official Receiver is only the property of the insolvent, and as the suit properties had ceased to be his properties by reason of the sale deed dated 30-1-1920, they did not vest in the Official Receiver, and the sale held on 2-8-1928 is not liable to be attacked on the ground that he had not been impleaded as a party thereto.

(25) But it is argued for the appellants that having regard to the words in S. 52 that pendente lite "the property cannot be transferred", such a transfer must, when it falls within the mischief of that section, be deemed to be non est, that in consequence Keshavananda must, for purposes of lis pendens, be regarded as the owner of the properties, notwithstanding that he had transferred them, and that the Official Receiver who succeeded to his rights had a right to be impleaded in the action.

This contention gives no effect to the words "so as to affect the rights of any other party thereto under any decree or order which may be made therein", which make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers pendente lite have been held to be valid and operative as between the parties thereto.

It will be inconsistent to hold that the sale deed dated 30-1-1920 is effective to convey the title to the properties to Dr. Nanjunda Rao, and that at the same time, it was Keshavananda who must be deemed to possess that title. We are, therefore, unable to accede to the contention of the appellants that a transfer pendente lite must, for purposes of S. 52 be treated as still retaining title to the properties."

3.10. It may be stated that the rule/principle enacted in this section is in a sense an extension of the rule of res judicata, and makes the adjudication in the suit binding on alienees from parties during the pendency of the suit, just as much as the doctrine of res judicata makes the adjudicating binding, not only on the parties themselves but also on alienees from them after the decree. It affects a purchaser pendente lite, not because it amounts to notice, but because the law does not allow a litigant party to give to others, pending the litigation rights, to the property in dispute, so as to prejudice the opposite party. If this were not so, there would be no certainty that the litigation would ever come to an end. Ordinarily, a decree binds only the parties to the suit, but he who purchases during the pendency of the suit, is bound by the decree, that may be made against the person from whom he derives the title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed. Otherwise, suits would be indeterminable, or which would be the same, in effect, it would be in the pleasure of one party at what period the suit should be determined.

3.11. Rationale.—The rationale underlying S. 52 is simple enough and easily intelligible. If a party against whom relief is claimed were to be allowed to transfer his right *pendente lite*, then the plaintiff would be indirectly compelled to make the transferee a party to the litigation. If the first transferee is himself free to transfer his own right, then (on such a transfer), the plaintiff would be indirectly compelled to make the second transferee a party. The process could thus turn out to be endless, and so would be the hardship that might be experienced by the plaintiff, unless some restriction on the right of transfer is imposed by law.

It is precisely this object which S. 52 has in view, when it enacts that the transfer or other dealing shall not affect the rights of any other party thereto under any decree or order to be passed in the suit (except with the authority of the court). Thus, the section, in effect, freezes proprietary rights as they stood at the time when the suit was instituted. No subsequent transactions can make a change in the situation as it existed when the suit was commenced. The law throws its cloak of protection around the party's rights, protecting those rights against the onslaughts of subsequent transfers. It is to be pointed out that the section does not totally invalidate the transfer. It only prevents the transfer from affecting the right of any other party.[10] In other words, it introduces its own scheme of priority, its own scale of superior and inferior rights, consequential on transfer *pendente lite*.

The underlying principle is that a litigant who has obtained a judgment is entitled, not to be deprived of it, without any solid grounds. *Interest rei publicae ut sit finis litium.*[11] (Public interest requires finality in litigation).

3.12. Object and purpose of the section.—As was observed by the Supreme Court in *Jayaram case*[12], "the purpose of S. 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the court which is dealing with the property to which claims are put forward." The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending by private dealings which may remove the subject-matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it, are held to be bound by the application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of doctrine of lis pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the court so as to prevent the object of a pending action from the defeated.[13]

S. 52 seeks to subordinate all derivative interests or all interests derived from parties to a suit by way of transfer pendente lite to the rights declared by the decree in the suit and to declare that they shall not be capable of being enforced against the rights acquired by the decree-holder. A transferee in such circumstances, therefore, takes the consequences of the decree which the party who made the transfer to him would take as the party to the suit. The principle of lis pendens embodied in S. 52 being a principle of public policy, no question of good faith or bona fides arises. Such being the position, the transferee from one of the parties to the suit cannot assert or claim any title or interest adverse to any of the rights and interests acquired by another party under the decree in suit. The principle of lis pendens prevents anything done by the transferee from operating adversely to the interest declared by the decree.[14]

3.13. Conclusion.—As already stated as between the transferor and the transferee, the transfer of the title by way of sale or otherwise may be valid, but the fact remains that such a transfer cannot affect the rights of any other party which may be decreed by the court under a decree or order. Consequently, the interest of transferee in such transactions are definitely affected. As already stated, even the bona fide purchaser or the purchaser acting in good faith is not saved by the existing provisions of S. 52 of the Act. It is a common perception that if such persons are put on a sort of notice about the pendency of the suit or proceeding between the parties, most of the persons may not buy property. So there is definitely a need to strike a proper balance between the public convenience which seeks to bar the transfer of title during the pendency of suit or proceeding and the interests of persons who buy the property in dispute in good faith and acting bona fide.

It is evident that the doctrine as stated in S. 52 applies not merely to actual transfers of right which are subject-matter of litigation but to other dealings

with it "by any party to the suit or proceedings, so as to effect the right of any other party thereto". Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as Tax Collection Authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by S. 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealing with property in such a way that they cannot resile from or disown the transaction impugned before the court dealing with the litigation, the court may bind them to their own acts. All these are matters which need to be properly considered.

The doctrine of lis pendens enshrined in S. 52 of the Transfer of Property Act is presently attracted even where the transferee has no prior knowledge of the suit or proceeding. In other words, at present it is immaterial for the applicability of the doctrine of lis pendens under S. 52 of the Transfer of Property Act whether the alienee pendente lite had, or had not, notice of the pending proceeding. No question of good faith or bona fides is relevant. (*Mohd. Ali Abdul Chanimomin* v. *Bisaheni Kom Abdulla Saheb Momin*[15]) This is of course, no longer the case in Gujarat and Maharashtra where, in view of the Bombay Amendment Act, doctrine of lis pendens only affects transactions pendente lite if the lis has been duly registered.

3.14. Need for amendment of Section 52.—Notwithstanding this laudable objective of the doctrine of *lis pendens* (underlying S. 52) there are certain difficulties arising from the categorical manner in which it finds expression in S. 52. In practically prohibiting *transfers pendente lite*, the section, if one may say so, has overlooked the interests of prospective purchasers of the disputed property.

3.15. Practical experience.—Experience has shown that very often, the defendants transfer the suit property to third parties without intimating them of the pendency of the suit. There is no proper or convenient means available to the purchasers for finding out the pendency of a suit with respect to the property being purchased by them. Searching the registers of courts is not a practical course, particularly in major cities and towns where there are a number of courts and the number of suits run into thousands, and when there is no comprehensive system of indexing of suits. It is just not possible for any person to find out whether any of these pending suits pertains to the property being purchased by him. In such a situation, they purchase the property and, much later, they come to know that the property was directly and specifically in question in a suit and that the purchase is, therefore, subject to the decree or order passed in that suit. In many cases, they lose the property completely by virtue of the operation of the rule contained in S. 52.

3.16. Bona fide purchase not relevant.—It is relevant in this behalf to point out, that in such a situation, the plea of "bona fide purchaser for value without notice" is not available to such a purchaser.[16] Indeed, he is not even entitled to be compensated for improvements, if any made by him.[17] It

has been held that he is bound by any compromises entered into by his transferor, as also by the decree based upon such compromises.[18] Absence of notice is immaterial.[19]

Such a situation not only gives room for mischief by unscrupulous parties to the suit (in which the property being sold by them is directly and specifically in question), but also results in grave loss and deprivation to the unwitting and bona fide purchasers of the property in dispute.

3.17. Reforms elsewhere.—It appears that the rigour of the strict common law doctrine of *lis pendens* (which is the doctrine incorporated in S. 52) has been sought to be softened in many jurisdictions by statutory modifications which provide for notice. It is understood that such a reform has been effected in England[20] as well as in certain American jurisdictions.[21] The previous U.K. Land Charges Act, 1925 contained the following provision:—

"Register of pending actions

2. (1) A pending action, that is to say, any action, information or proceeding pending in court relating to land or any interest in or charge on land, and a petition in bankruptcy filed after the commencement of this Act, may be registered in the register of pending actions.

(2) Subject to general rules, every application to register a pending action shall contain particulars of—

(a) the name, address, and description of the estate owner or other person whose estate or interest is intended to be affected thereby; and

(b) the court in which the action, information or proceeding was commenced or filed; and

(c) the title of the action, information or proceeding; and

(d) the day when the action, information or proceeding was commenced or filed.

(3) The Registrar shall forthwith enter the particulars in the register, in the name of the estate owner or other person whose estate or interest is intended to be affected.

(4) In the case of a petition in bankruptcy filed against a firm, the application to register the pending action shall state the names and addresses of the partners, and the registration shall be effected against each partner as well as against the firm.

(5) No fee shall be charged for the registration of a petition in bankruptcy as a pending action if the application therefor is made by the registrar of the court in which the petition is filed.

(6) The court, if it thinks fit, may, upon the determination of the proceedings, or during the pendency thereof if satisfied that the proceedings are not prosecuted in good faith, make an order vacating the registration of the pending action, and direct the party on whose behalf the registration was made to pay all or any of the costs and expenses occasioned by the registration and vacating thereof.

(7) When an office copy of an order of discharge or an acknowledgement of satisfaction in the prescribed form is lodged with the registrar, he may enter discharge or satisfaction of the registered pending action to which it refers, and may issue a certificate in the prescribed form of such discharge or satisfaction.

(8) The registration of a pending action shall cease to have effect at the expiration of five years form the date of registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of renewal.

Protection of purchasers against unregistered pending actions.

3. (1) A pending action shall not bind a purchaser without express notice thereof unless it is for the time being registered pursuant to this Part of this Act:

Provided that as respects a petition in bankruptcy, this sub-section only applies in favour of a purchaser of a legal estate in good faith, for money or money's worth, without notice of an available act of bankruptcy.

(2) As respects any transfer or creation of a legal estates, a petition in bankruptcy filed after the commencement of this Act, which is not for the time being registered as a pending action, shall not be notice or evidence of any act of bankruptcy therein alleged.

(3) The title of a trustee in bankruptcy acquired after the commencement of this Act shall be void as against a purchaser of a legal estate in good faith for money or money's worth without notice of an available act of bankruptcy claiming under a conveyance made after the date of registration of the petition in bankruptcy as a pending action, unless, at the date of the conveyance, either the registration of the pending action is in force, or the receiving order is registered pursuant to Part III of this Act."

3.18. The relevant S. 5 of the present U.K. Land Charges Act, 1972 which provides for the registration of pending actions is as follows:—

"The register of pending actions

5. (1) There may be registered in the register of pending actions—

(a) a pending land action;

(b) a petition in bankruptcy filed on or after 1st January, 1926.

(2) Subject to general rules under S. 16 of this Act, every application for registration under this section shall contain particulars of the title of the proceedings and the name, address and description of the estate owner or other person whose estate or interest is intended to be affected.

(3) An application for registration shall also state—

(a) if it relates to a pending land action, the court in which and the day on which the action was commenced; and

(b) if it relates to a petition in bankruptcy, the court in which and the day on which the petition was filed.

(4) The registrar shall forthwith enter the particulars in the register, in the name of the estate owner or other person whose estate or interest is intended to be affected.

(5) An application to register a petition in bankruptcy against a firm shall state the names and addresses of the partners, and the registration shall be effected against each partner as well as against the firm.

(6) No fee shall be charged for the registration of a petition in bankruptcy if the application for registration is made by the registrar of the court in which the petition is filed.

(7) A pending land action shall not bind a purchaser without express notice of it unless it is for the time being registered under this section.

(8) A petition in bankruptcy shall not bind a purchaser of a legal estate in good faith, for money or money's worth, without notice of an available act of bankruptcy, unless it is for the time being registered under this section.

(9) As respects any transfer or creation of a legal estate, a petition in bankruptcy which is not for the time being registered under this section shall not be notice or evidence of any act of bankruptcy alleged in the petition.

(10) The court, if it thinks fit, may, upon the determination of the proceedings, or during the pendency of the proceedings if satisfied that they are not prosecuted in good faith, make an order vacating a registration under this section and direct the party on whose behalf it was made to pay all or any of the costs and expenses occasioned by the registration and by its vacation."

3.19. Bombay amendment.—Presumably inspired by the reforms effected in Western countries, the (erstwhile) Province of Bombay had amended S. 52 as far back as 1939, (being Bombay Act 14 of 1939). The Bombay amendment is to the following effect:

"(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. "[(vide Bombay Act 14 of 1939, Ss. 2 & 3 (w.e.f. 15-6-1939)]."

The Bombay amendment contains a salutary principle and serves to eliminate any mischief on the part of dishonest and unscrupulous parties to the suit, besides protecting bona fide purchasers. The amendment contemplates[22] that for the rule in S. 52 to operate, it is necessary that a notice of the pendency of such suit or proceeding is registered under the Indian Registration Act, 1908 with the necessary particulars. Normally, it is the party who files the suit (i.e. the plaintiff) who would be interested in registering the pendency of such a suit or proceeding. A normal diligent purchaser is expected to obtain what is called a 'non-encumbrance certificate' from the registration office with respect to property being purchased by him. If the notice of the suit or proceeding is so registered under the Registration Act, the registration office will naturally include the said information in the certificate issued by it, which would put the purchaser on notice. He cannot thereafter complain if he suffers any loss by operation of the rule contained in S. 52.

We may mention that by virtue of the Bombay Amendment Act 14 of 1939, rule of "lis pendens" applies only when a notice of pendency of the suit in which any right to involve property is directly and specifically in question, is registered under S. 18 of the Registration Act vide *Anand Nivas (P) Ltd.* v. *Anandji Kalyanji's Pedhi.*[23]

The Commission, in its earlier report (70th Report, para 47.11) had occasion to consider the issue of the necessity of providing for registration of notice of a suit on the lines of the Bombay Amendment but was not inclined to recommend such an amendment because it was thought that it may involve an amendment of the Registration Act; secondly, such an amendment in that Act was not favoured by the Law Commission in its report on that Act and besides the Commission was not certain whether the amended procedure would be appropriate for all the territories to which the Transfer of Property Act extends.

The Commission has given a serious thought to the problem and is of the considered view that having regard to the escalating prices of land there is an inherent tendency of committing fraud, upon a bona fide purchaser, whose interest will be jeopardised to a greater extent in the existing scenario. He becomes a victim to mischief by unscrupulous parties to the

suit (in which the property being sold by them is directly and specifically in question), apart from suffering from grave loss and deprivation.

With a view to check such inequitous situations, it is felt that it is essential to bring in the amendment to remedy the wrong. It may, however, be noted that upon the incorporation of the requirement of the registration of a notice of the pendency of suit or proceeding on the lines of the amendment made to this section by the Bombay Act No. 14 of 1939, one more ingredient, viz., registration of notice of the pendency of suit or proceeding under the Indian Registration Act, would stand incorporated in the section. It is quite natural that if any essential ingredient of any provision of law is missing in a particular situation, the applicability of the section would not be attracted. In other words, where notice of the pendency of suit or proceeding is not got registered by any party, S. 52 would not be attracted and obviously in the absence of such registration, the parties will be legally at liberty to dispose of the property in dispute, which is at present not legally permissible under the existing S. 52. On account of certain facts and circumstances beyond the control of any party, there may be some delay in getting the notice of the pendency of suit or proceeding registered. It really gives rise to a vital question as to whether any party to the suit or proceeding should have legal sanction to dispose of the property in dispute during such an interregnum. Such a situation may arise in a case where the plaintiff is in the need of immediate relief in the nature of temporary injunction or interim orders, etc. and he may not have any time to simultaneously get the notice of the pendency of suit or proceeding registered under the Indian Registration Act. This grey area requires to be plugged, preferably by allowing some reasonable time to the party for having the notice of the pendency of suit or proceeding registered. The other course which may be adopted is to provide for non-applicability of the requirement of registration of the notice of suit or proceeding for reasons beyond the control of any party to the suit or proceeding. In such an event, if any party is not in a position to get the notice of the pendency of a suit or proceeding, so registered for reasons beyond its control, mere non-registration of such notice shall not give right to the other party to transfer or otherwise deal with the property so as to affect the rights of any other party to the suit or proceeding under any decree or order which may be made therein. As regards the option for making a provision dispensing with the requirement of the registration of notice of suit or proceeding under the Indian Registration Act for reasons beyond one's control, it may be stated that making of such a provision may at times give rise to disputed questions of fact as to whether the reasons for the purpose which may be given by any party to the suit or proceeding can be said to be the reasons beyond its control. Therefore, we are of the view that the first option mentioned above regarding prescription of a reasonable time limit for the registration of the notice of a suit or proceeding would appear to be more appropriate. However, while prescribing any reasonable time limit, it has to be ensured that no party should get any right to transfer or otherwise deal with the property in dispute during the pendency of the suit or proceeding till the expiration of the prescribed time limit. Having

regard to different geographical conditions of our country, it appears to us that the period of three months may be sufficient to enable the parties to the suit or proceeding to get the notice of suit or proceeding registered under the Indian Registration Act.

3.20. Recommended amendment of Section 52, Transfer of Property Act.—We are of the view that the provision regarding "Notice of *lis pendens*". introduced by the Bombay amendment is a salutary one and it should be incorporated on an all India basis by amending S. 52 of the Transfer of Property Act, 1882. We would, however, also like to provide (in substance) that if the purchaser has notice of the actual pendency of litigation then he should not be protected (even where no notice of *lis pendens* has been registered), because the very object of providing for registration of notice of a suit or proceeding is that if a person comes to know about the pendency of a suit or proceeding on account of registration, then the doctrine of lis pendens contained in S. 52 should have full effect against him. The same analogy can be appropriately applied to a person who has knowledge or notice of the pendency of a suit or proceeding and the doctrine of lis pendens can be logically applied to such person also even in the absence of registration of notice of a suit or proceeding under the Indian Registration Act. Since the provisions contained in Ss. 64, 74 and Or. 21 R. 102 of the Code of Civil Procedure are a distinct and self-contained code, the same need to be saved for the reasons discussed by us in Ch. IV. Our recommendation, therefore, is that S. 52 of the Transfer of Property Act, 1882 should be revised as under:

"52. *Transfer of immovable property pending suit relating thereto.*

(1) If, 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 *and the notice of the pendency of such suit or proceeding, containing the particulars specified in sub-s. (2) is registered under S. 18 of the Indian Registration Act, 1908, within a period of 90 days from the date of institution of the suit or, proceeding in the case of plaintiff or petitioner or from the date of the knowledge of the pendency thereof in the case of any other party, as the case may be, then, after the notice is so registered*, 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 the court may impose:

Provided that during the aforementioned period of 90 days, no party shall have any right to transfer or otherwise deal with the property so as to affect the rights of any other party to the suit or proceeding under any decree or order which may be made therein:

Provided further that nothing in sub-s. (1) shall affect Ss. 64, 74 and Or. 21 R. 102 of the Code of Civil Procedure, 1908.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence on and 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.

(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 the immovable property or 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 proceedings; and

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

(3) The provisions of sub-s. (1) shall also apply to any transfer or other dealing with the immovable property, effected by a party to the suit or proceeding in favour of any person who has actual knowledge of the pendency of such suit or proceeding, even where no notice thereof has been registered."

3.21. Amendment in the Registration Act, 1908 (insertion of a proviso to S. 78).

We are further of the view that in order that the parties, to a suit may be encouraged to get notices of lis pendens (as envisaged above) registered, the registration fee should be kept at a low level. Our recommendation therefore is, that in the Indian Registration Act, 1908, the following proviso should be inserted in S. 78:—

"Provided that the fee for the registration of notice of the pendency of a suit or proceeding, whether given by referring to S. 52 of the Transfer of Property Act, 1882 or otherwise, shall not exceed rupees one hundred, irrespective of the value of the property to which the notice relates but in the case of any suit or proceeding instituted in forma pauperis, no fee for the registration of notice of the pendency of a suit or proceeding shall be payable."

3.22. Amendment of Section 18 of the Registration Act, 1908.

It is also desirable to amend S. 18 of the Indian Registration Act, 1908 which deals with documents whose registration is optional. It opens with these words—

"18. Any of the following documents may be registered under this Act, namely,".

The clauses of the section that follows these words contain an enumeration of documents. Cls. (*e*) and (*f*), read as under—

"(e) wills; and

(f) all other documents not required by S. 17 to be registered."

It would be convenient to add in S. 18, a new clause, as under:

"(ee) notices of pending suits or proceedings, referred to in S. 52 of the Transfer of Property Act, 1882."

1 . *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593.

2 . (1972) 2 SCC 200 : AIR 1973 SC 569: (1973) 1 SCR 139 at 581.

3 . (1969) 2 SCC 787 : AIR 1970 SC 1717 at 1721.

4 . (1896-97) 24 IA 170 (PC).

5 . (1997) 5 SCC 476 : (1997) 3 Scale 747.

6 . (1996) 5 SCC 539 : (1996) 6 Scale 59.

7 . AIR 1957 Pat 729.

8 . *Prabhacar Arjuna Coulekar* v. *Antonia Sebastiao*, AIR 1971 Goa 42 at 43, and *Agarwal & Co.* v. *State of Rajasthan*, 1985 RLW 676.

9 . AIR 1956 SC 593 at 602.

10 . *T. Bhup Narain Singh* v. *Nawab Singh*, AIR 1957 Pat 729, 731 para 9.

11 . *T. Bhup Narain Singh* v. *Nawab Singh*, AIR 1957 Pat 729 (Ramaswamy, C.J. and Raj Kishore Prasad, J.)

12 . *Jayaram Mudaliar* v. *Ayyaswami*, (1972) 2 SCC 200 : AIR 1973 SC 569: (1973) 1 SCR 139.

13 . *Rajender Singh* v. *Santa Singh*, (1973) 2 SCC 705 : AIR 1973 SC 2537: (1974) 1 SCR 381.

14 . *Mohd. Ali Abdul Chanimomin* v. *Bisaheni Kom Abdulla Saheb Momin*, AIR 1973 Mys 131 at 133.

15 . AIR 1973 Mys 131.

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

17 . *Hari Bachan Singh* v. *S. Har Bhajan Singh*, AIR 1975 P&H 205, 210, para 11.

18 . *Uttam & Co.* v. *Babu Ram*, (1982) All LJ 188, 191, 192, paras 10, 11.

19 . (a) *Feiyaz Husain Khan* v. *Pragnarain*, ILR (1906-07) 29 All 339: (1906-07) 34 IA 102 (PC).
(b) *Rappel Augusthi* v. *Gopalan Ramakrishna Panicker*, AIR 1970 Ker 188.

20 . Section 5(7), Land Charges Act, 1972 (U.K.).

21 . Black Law Dictionary (1990) p. 932, left hand column.

22 . *Anand Nivas (P) Ltd.* v. *Anandji Kalyanji's Pedhi*, AIR 1965 SC 414.

23 . Ibid, and *Kanbi Vaju Vasta* v. *Kanbi Popat Vasta*, AIR 1985 Guj 184.

CHAPTER 4

Section 52 and Allied Provisions

4.1. Applicability of S. 52 does not depend on any attachment of a property which may be ordered by the court. In fact, it is ineffective against the doctrine of lis pendens[1]. It may, however, be pointed out that transfer of property during the pendency of the proceedings are barred under S. 64 of the Code of Civil Procedure de hors S. 52 of the Transfer of Property Act, which provides as follows:—

64. *Private alienation of property after attachment to be void.*—Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

4.2. While considering the true import and scope of this section, the Supreme Court in *Nancy John Lyndon* v. *Prabhati Lal Chowdhury*[2], observed that even if it is doubtful as to whether an order for restoration of the suit or execution, application dismissed for default would have the effect of restoring attachment levied in execution retrospectively so as to affect alienations made during the period between dismissal of the suit or execution and the order directing restoration, it is quite clear that an order of restoration would certainly restore or revive attachment for the period during which it was in subsistence, namely, prior to the dismissal of the suit or execution application. As such where the sale by the judgment-debtor of the property attached in execution was effected during the subsistence of the judgment and before the case was dismissed for default, it would be incorrect to say that by reason of the dismissal of the execution case, the attachment came to an end and the order for restoration of the execution case would not affect any alienation made before the restoration although such alienation have been made during the subsistence of the attachment.

4.3. S. 64 of the Civil Procedure Code puts a complete ban on alienation of property after attachment. Under the section where an attachment has been made, any private alienation or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment. For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets. In *Supreme General Films Exchange Ltd.* v. *Brijnath Singhji Deo*[3] lease of a theatre executed during the attachment was upheld to have been struck by the doctrine of lis pendens and also by provisions of S. 64 of the Civil Procedure Code. While considering the inter-

relationship of S. 52 of the Transfer of Property Act and S. 64 of the Civil Procedure Code, the Supreme Court observed as follows:—

"18. The contention that the case fell outside the purview of S. 52 of the Transfer of Property Act as the lease was executed in purported satisfaction of an antecedent claim rests upon the terms of an agreement of 1948, embodied in a letter, on the strength of which the defendant-appellant had filed his suit for specific performance. We find that the terms of the compromise decree in that suit and lease-deed of 1956 purported to confer upon the defendant-appellant new rights. Indeed, there are good grounds for suspecting that the compromise in the suit for specific performance was adopted as a device to get round legal difficulties in the execution of the lease of 1956 in favour of the defendant-company. We are unable to accept the argument, sought to be supported by the citation of *Bishan Singh* v. *Khazan Singh*[4], that the lease was merely an enforcement of an antecedent or pre-existing right. We think that it purported to create entirely new rights pendente lite. It was, therefore, struck by the doctrine of lis pendens, as explained by this court in *Jayaram Mudaliar* v. *Ayyaswami*[5], embodied in S. 52 of the Transfer of Property Act.

19. An alternative argument of the appellant was that a case falling within S. 65-A(2)(*e*) of the Transfer of Property Act, confining the duration of a lease by a mortgagor to three years, being a special provision, displaces the provisions of S. 52 of the Transfer of Property Act. This argument overlooks the special objects of the doctrine of lis pendens which applies to a case in which litigation relating to property in which rights are sought to be created pendente lite by acts of parties, is pending. Moreover, for the purpose of this argument, the defendant appellant assumes that the provisions of S. 65-A(2)(*e*), Transfer of Property Act are applicable. If that was so it would make no substantial difference to the rights of the defendant-appellant which would vanish before the suit was filed if S. 65-A applies. We, however, think that as the special doctrine of lis pendens is applicable here, the purported lease of 1956 was invalid from the outset. In this view of the matter, it is not necessary to consider the applicability of S. 65-A(2)(*e*) which the defendant-appellant denies, to the facts of this case.

20. As regards the applicability of S. 64, Civil Procedure Code, we find that parties disagree on the question whether the attachment made by the Central Bank on 20-4-1955, in execution of the decree of which the plaintiff-respondent was the assignee existed on the date of the impugned lease of 30-3-1956. Learned Counsel for the appellant relied upon the terms of an order recorded on the order sheet, in the court of Additional District Judge, Jabalpur in Civil Suit No. 3-B of 1952 on 25-1-1956 showing that in view of the stay order received from the High Court execution could not proceed. The order sheet, however, also contains the enigmatic statement that execution was dismissed as infructuous but the attachment was to continue for six months. The High Court had treated the last part of the statement in the order sheet as void and ineffective presumably on the ground that the Additional District Judge had no jurisdiction either to lift

the attachment or to dismiss the execution proceedings after the High Court had given its order staying all further action in execution proceedings. The terms of the High court's order are not evident from anything placed before us. On the other hand, learned counsel for the plaintiff-respondent relies upon a subsequent order of the same court passed on 30-4-1960 in the same suit. This order shows that a compromise had been arrived at between the decree-holder and the judgment-debtor under which the decree-holder had agreed to lift attachment of property except with regard to Plaza Talkies which was to continue. We are, therefore, unable to hold that the concurrent findings of the trial court and the High Court that the Plaza Talkies was attached in execution of a decree in Suit No. 3-B of 1952 on 4-5-1955 and that this attachment was in existence when the impugned lease was executed on 30-3-1956 are erroneous. On these findings, the lease of 1956 was certainly struck by the provisions of S. 64 Civil Procedure Code also. S. 64 Civil Procedure Code in fact, constitutes an application of the doctrine of lis pendens in the circumstances specified there."

4.4. S. 74 of the Code of Civil Procedure which bars any resistance or obstruction to execution of a decree without any just cause also appears to be relevant. This section reads as follows:—

"Where the court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property."

Any person who acquires property pendente lite in violation of the provisions of S. 52 would naturally be covered by the aforesaid S. 74. In other words, the transferee acquiring property from the judgment-debtor against the provisions of S. 52 will have no legal authority or any just cause to resist or obstruct execution of decree.

4.5. Provisions contained in Rr. 97, 98, 99, 100, 101, 102, 103 and 104 of Order 21 of the Code which also recognise the principle of lis pendens, are reproduced below:—

"97. *Resistance or obstruction to possession of immovable property*.— (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) Where any application is made under sub-r. (1), the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

98. *Orders after adjudication.*—(1) Upon the determination of the questions referred to in R. 101, the court shall, in accordance with such determination and subject to the provisions of sub-r. (2),—

(a) make an order allowing the application and directing that the applicant be put into possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit

(2) Where, upon such determination, the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

99. *Dispossession by decree-holder or purchaser.*—(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) Where any such application is made, the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

100. *Order to be passed upon application complaining of dispossession.*— Upon the determination of the questions referred to in R. 101, the court shall, in accordance with such determination,—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

101. *Question to be determined.*—All questions (including question relating to right, title or interest in the property) arising between the parties to a proceeding on an application under R. 97 or R. 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

102. *Rules not applicable to transferee pendente lite.*—Nothing in Rr. 98 and 100 shall apply to 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 in which the decree was passed or to the dispossession of any such person.

Explanation.—In this rule, 'transfer' includes a transfer by operation of law.

103. *Orders to be treated as decrees.*—Where any application has been adjudicated upon under R. 98 or R. 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

104. *Order under R. 101 or R. 103 to be subject to the result or pending suit.*—Every order made under R. 101 or R. 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under R. 101 or R. 103 is made has sought to establish a right which he claims to the present possession of the property".

4.6. A perusal of the scheme contained in the above rules would show that by virtue of R. 102 of Or. 21, an exception to the operation of orders passed under Rr. 98 and 100 of Or. 21 of CPC, is carved out where the resistor or the obstructor to the execution of the decree is the person to whom the property is transferred by the judgment-debtor during the pendency of the suit in which the decree was passed. This exception is primarily based on the principle that a transfer of possession of immovable property during the pendency of the suit which involves any right to the property in question would be incapable in law of affecting the rights that arise in relation to such property from a decree that may be passed in the suit. The transfer referred to in this rule in not merely transfer of title to the property but also of its possession, whether accompanied by transfer of title or not *Kanagasabai* v. *Poornathammal*[6]. On the question whether R. 102 applies or not to involuntary sales, there was difference of opinion of the High Courts. The Patna High Court held the view that it did not (*Guna Durga Prasad Rao* v. *D.V. Krishna Rao*[7], while the Calcutta High Court held that it did *Bepin Chandra Gorain* v. *Hem Chandra Mukherjee*[8], This controversy now no longer subsists after the insertion of an Explanation under R. 102 of Or. 21 by the CPC (Amendment) Act, 1976, by which the word 'transfer' has now been defined as including a transfer by operation of law. The Calcutta High Court in *Nagendra Nath Sau* v. *Ram Krishna Sau*[9], while relying on its earlier decision in *Bepin case*[10], considered the precise effect of R. 102 of Or. 21 as follows:—

(21) The reasons which weighed with Edgley, J. in the case reported in *Bepin Chandra Gorain* v. *Hem Chandra Mukherjee*[11], are hereinbelow quoted:

"The general provisions of the law with regard to the principle of lis pendens are contained in S. 52 of the Transfer of Property Act. Having regard, however, to the terms of S. 2(*d*) of the Transfer of Property Act, the provision of S. 52 would not directly apply as regards the matter with which we are now dealing. At the same time, as regards transfers in the course of execution proceedings, the rule of lis pendens is expressly recognised in Or. 21 R. 102 of the Code of Civil Procedure. The precise effect of this Rule must therefore be considered.... In order to ascertain the precise meaning of this rule some reference is necessary to some of the preceding rules of Or. 21. If there is resistance or obstruction to the execution of a decree for the possession of immovable property, the decree-holder may complain under R. 97. R. 98 of Or. 21 provides that, when the resistance or obstruction was occasioned without any just cause, the decree-holder will be put into possession of the property. If however, there is any just cause for the resistance or obstruction of the nature mentioned in R. 99 of Or. 21, the decree-holder's application is rejected. But, having regard to the provisions of R. 102, the person in possession cannot be said to have a right to be in possession if he has received the property on transfer from the judgment-debtor, after the institution of the suit in which the decree was passed. In such a case the decree-holder's application would be allowed under R. 98. The two succeeding Rr. 100 and 101, relate to applications which may be made by the person other than the judgment-debtor in possession of property which is the subject-matter of the execution proceedings. If any person in possession of the such property other than the judgment-debtor is dispossessed, he may complain under R. 100 of Or. 21. If it is found that he was in possession on his own account, the court will order him to be restored to possession, unless in view of the provisions of R. 102, the judgment-debtor has transferred property to him after the institution of the suit in which a decree was passed. The terms of R. 102 are therefore such as to exclude from the benefit of R. 99 a transferee pendente lite from the judgment-debtor, who has resisted or obstructed the execution of the decree, and from the benefit of R. 101 any such transferee who has been dispossessed of the transferred property.

It has been argued that the words "a person to whom the judgment-debtor has transferred the property" can only refer to a voluntary alienation on the part of a judgment-debtor and not to a transfer by a court sale or a sale under the Public Demands Recovery Act. Admittedly, the general doctrine of lis pendens under S. 52 of the Transfer of Property Act has been extended by judicial decision to involuntary alienations and I see no reason why the same principle should not apply in the case of transfers which are covered by R. 102. The transfer of property belonging to the judgment-debtor, whether such transfer be voluntary or involuntary, nevertheless operates as a transfer by the judgment-debtor and in this view of the case, I think that the language of R. 102 is sufficiently wide to cover both kinds of alienations by a judgment-debtor".

4.7. The conjoint effect of S. 52 of the Transfer of Property Act and R. 102 of Or. 21, CPC as observed in the case of *J.P. Shankar Singh* v. *Pacha Bee*[12], is as follows.

"A combined reading of S. 52 of the Transfer of Property Act and Or. 21 R. 102 CPC postulates that a purchaser pendente lite does not acquire any title to the property to the detriment of the rights of other party and if such a purchaser makes any obstruction or resistance to the execution of the decree so passed, an enquiry is not contemplated under Or. 21 Rr. 99 or 100 CPC."

4.8. Further in the case of *Shubhchandra Jain* v. *Amit Jain*[13], the High Court held that for attracting the provisions of Or. 21 R. 102, it was enough for the decree-holder to show that the applicants claim their title to the property on a date subsequent to the date of the institution of the suit in which the decree was ultimately passed by the appellate court in favour of the decree-holder.

4.9. On a glance through the aforecited decisions it is evident that having regard to the provisions of R. 102 of Or. 21 CPC, the person in possession of immovable property cannot be said to have a right to be in possession if he has received the property on transfer from the judgment-debtor, after the institution of the suit in which the decree was passed. The effect of R. 102 is, therefore, such as to exclude from the benefit of R. 99, a transferee pendente lite, from the judgment-debtor who has resisted or obstructed the execution of the decree, and from the benefit of R. 100 any such transferee who has been dispossessed of the transferred property. It is settled law that the general doctrine of lis pendens under S. 52 of the Transfer of Property Act has been extended to involuntary alienations and the same principles have been applied to the cases of transfer covered by R. 102.

4.10. The main objective behind the various provisions of the Code of Civil Procedure discussed herein above is to ensure that the decree-holder should not be deprived of the fruits of the decree. With this end in view, the Civil Procedure Code provisions have been enacted which are a distinct self-contained code having independent application de hors S. 52 of the Transfer of Property Act. It would run counter to the basic object of the administration of justice if the decree passed by a court is allowed to be rendered nugatory during the execution proceedings. Therefore we are of the view that the provisions of the Code of Civil Procedure contained in Ss. 64, 74 and Or. 21 R. 102 serve a definite purpose and they are, as such, very much required to be retained and that the proposed amendment in S. 52 of the Transfer of Property Act should not in any way have the direct or implied effect of repealing the said provisions. If no saving clause is added for the purpose, the possibility of a controversy arising in this regard cannot be ruled out, particularly when the provisions of S. 52, as already stated by us, also continue to have force until completion of the execution proceedings. We are, therefore, of the view that by way of abundant caution and in order to eliminate any controversy, it would be necessary to incorporate expressly a provision to the effect that nothing in Ss. 64, 74 and R. 102 of Or. 21 CPC shall be affected by virtue of the proposed incorporation of the requirement

of registration of the notice of suit or proceeding in S. 52 of the Transfer of Property Act.

1 . *Kedar Nath* v. *Ganesh Ram*, (1969) 2 SCC 787 : AIR 1970 SC 1717.

2 . (1987) 4 SCC 78 : AIR 1987 SC 2061.

3 . (1975) 2 SCC 530 : AIR 1975 SC 1810.

4 . AIR 1958 SC 838: 1959 SCR 878.

5 . (1972) 2 SCC 200 : AIR 1973 SC 569: (1973) 1 SCR 139.

6 . AIR 1957 Mad 458.

7 . ILR (1945) 24 Pat 695: AIR 1946 Pat 134.

8 . ILR (1939) 2 Cal 63: AIR 1939 Cal 709.

9 . AIR 1960 Cal 299.

10 . *Bepin Chandra Gorain* v. *Hem Chandra Mukherjee*, ILR (1939) 2 Cal 63: AIR 1939 Cal 709.

11 . ILR (1939) 2 Cal 63: AIR 1939 Cal 709.

12 . (1985) 2 An LT 428.

13 . (1989) 2 Delhi Lawyer 399.

CHAPTER 5

Conclusions and Recommendations

5.1. Conclusions.—The doctrine of lis pendens as enacted in S. 52 of the Transfer of Property Act, which is an expression of the principle of the maxim "ut lite pendente nihil innovetur" (pending litigation nothing new should be introduced), aims at preventing multiplicity of proceedings by disallowing transfer or otherwise dealing with the property in dispute during the pendency of a suit or proceeding. In fact, this principle is a noble and salutory one which is based on public policy and convenience, that is, the necessity of final determination of the matter. Since the principle as contained in S. 52 plays a vital role in the administration of justice, it may be difficult to entirely dispense with the principle, because if sale of property in dispute is permitted during the pendency of suit or proceeding without any limitations, proper administration of justice will suffer. Nevertheless, one has also to note one aspect, that is, since the present provision does not even protect the purchaser of the property acting under good faith during the pendency of a suit or proceeding, justice requires that a suitable amendment in the provision needs to be made to ensure equitable results in the matter of administration of justice by inserting therein the requirement of registration of the notice of a suit or proceeding under the Registration Act so that purchasers of the property in dispute during the pendency thereof are put on notice. However, we feel that during the time allowed for registration of such notice, any party to the suit should not get any right to transfer or deal with the property so as to affect the other party. Having regard to the varying conditions in different parts of our country, a reasonable period which may be three months needs to be prescribed for the purpose. That apart, it may be stated that since certain Civil Procedure Code provisions, namely, Ss. 64, 74 and Or. 21 R. 102 of the Code of Civil Procedure also contain the principle of lis pendens, the same needs to be saved so that no party may be in a position to deprive the decree-holder of the fruits of a decree. Further, the amendment of S. 52 may need consequential amendments in the Registration Act, 1908.

5.2. The following benefits will mainly flow from the proposed amendment to S. 52 of the Transfer of Property Act:—

(i) It would prevent unnecessary litigation because if persons know beforehand about the pendency of a suit or proceeding, they may not purchase the property in dispute.

(ii) The proposed amendment will enable the persons to know whether the property is involved in litigation and this would enable them to make a right decision in the matter.

(iii) The proposed amendment will be of a great assistance to persons in the matter of finalising property dealings without jeopardising their interests by avoiding transactions in disputed properties.

(iv) The proposed amendment will ultimately have the effect of preventing multiplicity of proceedings by putting persons on notice before indulging in dealings of disputed property.

5.3. Recommendations.—Having regard to the various beneficial effects which would flow from the proposed amendment in S. 52 of the Transfer of Property Act, 1882, discussed hereinabove, we hereby recommend the following amendments in the Transfer of Property Act and the Registration Act, 1908:—

5.3.1. Amendment of Section 52 of the Transfer of Property Act, 1882.

S. 52 be amended and substituted as follows:—

"52. *Transfer of immovable property pending suit relating thereto.*

(1) If, 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 *and the notice of the pendency of such suit or proceeding, containing the particulars specified in sub-s. (2), is registered under S. 18 of the Indian Registration Act, 1908, within a period of 90 days from the date of institution of the suit or proceeding in the case of plaintiff or petitioner or from the date of the knowledge of the pendency thereof in the case of any other party, as the case may be, then, after the notice is so registered*, 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 the court may impose:

Provided that during the aforementioned period of 90 days no party shall have any right to transfer or otherwise deal with the property so as to affect the rights of any other party to the suit or proceeding under any decree or order which may be made therein:

Provided further that nothing in sub-s. (1) shall affect Ss. 64, 74 and Or. 21 R. 102 of the Code of Civil Procedure, 1908.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence on and 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.

(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 the immovable property or 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 proceedings; and

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

(3) The provisions of sub-s. (1) shall also apply to any transfer or other dealing with the immovable property, effected by a party to the suit or proceeding in favour of any person who has actual knowledge of the pendency of such suit or proceeding, ever where no notice thereof has", been, registered."

5.3.2. Amendment of the Registration Act, 1908.

In S. 78 of 'the Registration Act, the following proviso be inserted:—

"Provided that the fee for the registration of notice of the pendency of a suit or proceeding, whether given by referring to S. 52 of the Transfer of Property Act, 1882 or otherwise, shall not exceed rupees one hundred, irrespective of the value of the property to which the notice relates but in case of any suit or proceeding instituted in forma pauperis, no fee for the registration of notice of the pendency of a suit or proceeding shall be payable."

5.3.3. Amendment of Section 18 of the Registration Act, 1908.

In S. 18, the following new cl. (*ee*) after the existing cl. (*e*) be inserted:—

"(ee) Notices of pending suits or proceedings, referred to in S. 52 of the Transfer of Property Act, 1882."

We recommend accordingly.

(JUSTICE B.P. JEEVAN REDDY)CHAIRMAN
(MRS. JUSTICE LEILA SETH)MEMBER (R.L. MEENA)MEMBER-SECRETARY

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