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DOCTRINE OF LIS PENDENS: AN AID OR A HINDRANCE IN PENDING SUITS?

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ABSTRACT

Section 52 of the Transfer of Property Act, 1882 codifies the doctrine of Lis Pendens. This section is based on the maxim "ut lite pendente nihil innovetur," which states that nothing new must be brought up in a case that is already in progress. As a result, neither party to the dispute should sell or otherwise deal with the property at issue while the lawsuit or action is pending. The fundamental concepts of this theory are consistent with the principles of equity, good conscience, or justice as they are based on the equitable and just premise that it will be impossible to successfully conclude an action or suit if alienations are allowed to prevail. This concept appears to serve the purpose, however, is that really the case? This paper focuses upon the doctrine of Lis Pendens in its current nature and form while attempting to uncover certain inconsistencies in relation to other doctrines. Further, certain trends and developments in the law of Lis Pendens have been analysed.

INTRODUCTION

The Transfer of Property Act came into existence in the year 1882 and quite a few sections of the Act find their basis in equitable principles. Section 52 of the Act is one such section and reads as follows: "Transfer of Property pending suit relating thereto." It is known that upon transfer of some property, along with the right to ownership there also exists the right to dispose or transfer property as per the likes of the said owner. However, this particular right is not absolute in nature and brings along certain exceptions. One such exception can be found in Section 52 of the Transfer of Property Act. As per this section, alienation of property is not allowed when a dispute regarding the rights of the concerned property is pending in a competent court of law. The notion reflected in this particular section is derived from the classic doctrine of *Lis Pendens*. It essentially refers

to ‘pending litigation’ and is derived from a common law principle “*ut lite pendente nihil innovetur*” which translates to “during pendency of litigation, nothing new interest should be introduced or created in respect of the property.”¹

Although one was not a party to the dispute and was not heard in it, any person that acquires an interest in the subject property *pendente lite* through a party litigant is usually obligated by the judgement rendered in the case.² The general requirements for applying the rule as well as the rule itself are well established. Consequently, there cannot be a *Lis Pendens* where there is no property that could be affected by the judgement or when the nature of the property makes it against public policy to enforce the rule, as in the case of negotiable instruments that are taken before maturity.³ The general logic behind this provision is that no new change must be introduced in the property so long as there is a *pendente-lite* that may affect the title of the property. This would also affect the rights of the parties concerned and will subsequently affect the court’s decision in favour of the parties originally concerned.

However, it may be observed the basis of the doctrine itself, is controversial in nature. One line of reasoning states that the doctrine is equitable and finds its basis in constructive notice,⁴ and another line states that the doctrine finds its basis in the notion *Res Judicata*.⁵ It is thus derived that there are confusions that arise even in the applicability of this doctrine to cases.

A. Scope and Objective

This paper shall examine the principles of application of the doctrine of *Lis Pendens* as present in Section 52 of the Transfer of Property Act 1882 and shall also critically examine the development and jurisprudence of the same. While exploring the situations when this doctrine would apply, the paper shall also aim at arriving at a conclusion whether the doctrine is an aid or hindrance to pending suits in general.

B. Research Problem

The Doctrine of *Lis Pendens* in its current nature and form has certain inconsistencies in relation to other doctrines and this proves to be a hindrance in pending suits.

¹ Black’s Law Dictionary (2nd Edition) Co. Litt. 344.

² *Thompson v. Baker*, 141 U. S. 648; *Mellen v. Moline, etc., Iron Works*, 131 U. S. 352.

³ *Warren v. Marcy*, 97 U. S. 96.

⁴ *Wortley v. Birkhead*, 2 Ves. Sr. 571; *Murray v. Ballou, X Johns. Ch. (N. Y.)* 566

⁵ *Bellamy v. Sabine*, 1 De G. & J. 566; *Geishaker v. Pancoast*, 57 N. J. Fq. 60.

1.1. RESEARCH QUESTIONS

2. What are some drawbacks in the doctrine of Lis Pendens and whether they can be solved?
3. What are the current trends and developments in the law of Lis Pendens, and what implications do they have for the future of this doctrine?
4. Whether the doctrine is consistent with other legal doctrines, such as *Res Judicata* and *Forum Non Conveniens*?

1.2. RESEARCH OBJECTIVES

1. To explore the underlying principles as well as the benefits and drawbacks of the doctrine of Lis Pendens.
2. To focus on the consistency of the doctrine of Lis Pendens with other doctrines.
3. To focus on the trends and developments of the doctrine find out whether it poses a hindrance to pending suits.

1.3. HYPOTHESES

Lis Pendens is a doctrine that has been established to promote welfare and safety of persons affected by alienation of property during proceedings, however, this effect has been lost in implementation.

2. PRINCIPLES OF THE DOCTRINE OF LIS PENDENS

The Latin proverb "pendente lite nihil innovature," which means "during pendency of litigation, nothing new interest should be introduced or created in respect of the property," serves as the foundation for the doctrine of Lis Pendens. In accordance with Section 52 of the Transfer of Property Act, 1882, which codifies the concept of Lis Pendens, no transfer of an immovable property can take place while a suit directly involving those rights exists before a court of competent jurisdiction without the court's approval. Nevertheless, if a property is transferred while a lawsuit is pending without the court's consent, the buyer of that property is obligated by any judgement that may be rendered in the case⁶. Like numerous provisions in the Transfer of Property Act, this particular section is based on equity and good conscience and the main objective of its existence is protection of the parties involved in the litigation from alienation of the property by the opponent while the case is still being heard.

⁶ Balwant Singh v. Buta Ram, 2009 (4) 156 PLR 52 (P&H).

But, the main driving force of this particular section is the fact that right over immovable property be directly as well as specifically in question⁷, just the mentioning of an immovable property in a plaint shall not suffice and is not enough to attract applicability of this section⁸. The immovable property must be the object of the dispute and the rights in respect of the same must be directly and substantially in question. If these conditions have been sufficed, that property shall not be transferred while the suit is pending.

However, it is of utmost importance that the suit must be bona fide and the doctrine of Lis Pendens shall not apply if there exists mala fide intent or collusion⁹. The suit has to be further filed in a court possessing competent jurisdiction, be it pecuniary or territorial, and in case the court does not possess said jurisdiction, Lis Pendens cannot be applied.

2.1. ESSENTIAL CONDITIONS FOR THE DOCTRINE OF 'LIS PENDENS'

Mere existence of a pending suit relating to property is not sufficient to apply the doctrine. There exist certain other conditions that must be met so as to qualify for the application of the doctrine. In the case of *Dev Raj Dogra v. Gyan Chand Jain*¹⁰, three essential conditions for application have been laid down. They are-

- “1) A suit or a proceeding in which any right to immovable property must be directly and specifically in question, must be pending;
- 2) The suit or the proceeding shall not be a collusive one;
- 3) Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of Court. In other words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of Court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding.”¹¹

Thus, upon drawing inference from the above case, the conditions are-

⁷ *Kedarnath Lal v. Sheonarain Ram*, AIR 1957 Pat 408.

⁸ DR. R.K. SINHA, TRANSFER OF PROPERTY ACT 199 (19th Ed., 2017).

⁹ *R. Siddanagouda v. B. Madivalappa Mulimani*, AIR 2002 Kant 96 at 99.

¹⁰ *Dev Raj Dogra v. Gyan Chand Jain*, AIR 1981 SC 981 at 987.

¹¹ *Ibid*

1. A pending suit or proceeding has to exist
2. This suit or proceeding must be in a court exercising competent jurisdiction
3. There must be specific involvement of a right to immovable property
4. This suit or proceeding shall not be collusive in nature
5. The property under dispute is required to be transferred or dealt with by any party to the suit
6. This transfer of property must affect the rights of the other party of the suit.¹²

2.2. CRITICAL EVALUATION OF THE OBJECTIVE OF THE DOCTRINE

1. Position of transfer

The main aim of this particular section is to essentially prohibit certain actions and thus, is prohibitive in nature. Section 52 uses the phrase “the property cannot be transferred or otherwise dealt with” Transfer *pendente lite* is, however, not void either¹³. It is only subjected to the result of that suit. This makes the transfer thus voidable at the option of the affected party, however, except to the instance where it may be in contradiction with the rights decreed¹⁴.

2. Right of alienee pendente lite to be pleaded as a party to the suit

According to the majority opinion, a transferee pendente lite may not be allowed to request impleadment in circumstances where the transfer was impacted by the appeal's pending status without the court's authorization and with full awareness of the matter. He may not be able to assert rights relating the suit property that outweigh the rights of the seller who is a party to the suit, and the court cannot use its discretion to implead him. This is in place to ensure that anyone breaking the law is not considered as possessing a legitimate, enforceable right, and as a result, is not qualified to have their case decided.

3. Right of other parties as under decree

The doctrine of Lis Pendens does not solely affect actual transfers that are the essential subject matters of the suit, but to other dealings as well. “Any other party” refers to any other person between whom and the party to the suit there exists an issue for decision¹⁵, that has scope for prejudice by the said alienation. This doctrine primarily exists for benefitting the third party, and does not exist for the party that is making the transfer.

¹² DR. R.K. SINHA, TRANSFER OF PROPERTY ACT 194 (19th Ed., 2017).

¹³ G.C.V Subba Rao, *Law of Transfer of Property*, 6th ed. (2008).

¹⁴ *Ibid.*

¹⁵ Mulla, “Transfer of Property Act” 17th Ed. (2009)

4. *Supreme Court recommendation*

The recommendation of the Supreme Court to the Law Commission of India and the Parliament recommended change in law in certain terms¹⁶:

“It is important to refer to the hardship, loss, anxiety and unnecessary litigation caused due to the absence of mechanism for prospective purchasers to verify whether or not a property is subject to any pending suit or decree or attachment. These hardships may be reduced to a considerable extent if there is some satisfactory and reliable method by which a prospective buyer may be able to ascertain whether a particular suit is pending before he decides to purchase such property.”

3. **CONSISTENCY OF THE DOCTRINE OF LIS PENDENS COMPARED AGAINST OTHER DOCTRINES**

In contrast to the “theory of notice”, which is governed by the three common law principles of justice, equity, and good conscience, the Lis Pendens doctrine closely conforms to the “theory of necessity”. Therefore, it is essential to making sure that justice is served without violating the rights of either party. However, this doctrine is not the sole existing doctrine when concerned with the topic of property. There are two essential doctrines, *Res Judicata*, and *Forum Non Conveniens*. In some circumstances, the doctrine of Lis Pendens is at crossroads with these doctrines.

3.1. ***DOCTRINE OF LIS PENDENS AND DOCTRINE OF RES JUDICATA***

Lis Pendens as well as Res Judicata are extremely important and basic principles of procedural law, and property law. At first glance, they may appear to be very clear and not subject to controversy or unambiguity. However, a closer look at these topics as well as their application in the real world reveal that these principles are on some occasions less self-evident as compared to the degree that they are taken as being evident. This is largely seen in cases when a certain interplay exists between judgements and arbitral awards.

What is Res Judicata?

The doctrine of Res Judicata is one of public policy and exists in order to offer a private benefit to individual parties to a suit¹⁷. The primary principle finds its expression in the maxim “*Interest*

¹⁶ “Supreme Court on Lis Pendens and Registration of Documents”, *Law and Legal Developments*

¹⁷ Robert von Moschzisker, “Res Judicata” 38(3) *The Yale Law Journal*, 299 (1929).

reipublicae ut sit finis litium”, and the later one in “*Nemo debet bis vexari pro una et eadem causa*.”¹⁸ Essentially, Res Judicata refers to “a matter adjudicated upon or a matter on which judgement has been pronounced.” This doctrine rests on two grounds, one is that there is hardship caused to the individual who is to be vexed twice for the same cause, and the second relates to public policy, as it is in the interest of the state that there must be an end to litigation¹⁹. It is based on the principle that the cause of action which would sustain the second suit cannot further survive, it being merged in the judgment of the first. As long as the lawsuits are still pending, the disputing parties may still fight the cause of action. However, the decision made in that suit becomes Res Judicata once the cause of action is integrated in a judgement properly rendered by a Court and no longer exists.

Consonance with Lis Pendens

The doctrine of Lis Pendens is applied in cases wherein the proceedings instituted have not been concluded and disposed of. Similarly, it restricts a second litigation among the same parties in the same case. As per this rule, initiation of new proceedings is not permissible while a previous suit is still pending. This principle is deeply rooted in the procedural rules of national legal systems²⁰. It is based on the same policy rationale as Res Judicata in its role of judicial economy, by way of prevention of costly parallel suit, of legal security by avoiding conflict in judgements, and of protecting the defendants by providing protection against oppressive tactics. In the case of *Digambara rao Hanumanta rao Deshpande vs Ranga rao Reghunatha rao Desai*²¹, it was stated that Res Judicata shall prevail over Lis Pendens and Lis Pendens cannot be placed above the rule of Res Judicata. Further, it was observed that similar to the law of Res Judicata, the doctrine of Lis Pendens simply behaves as an extended part of Res Judicata and makes the specific suit enforceable against alienees of the parties. But in a world of expanded dispute resolution options, only if the two principles are applied in a way that goes beyond strict formalism will their shared primary goals of preventing costly parallel proceedings, avoiding conflicting judgements, and protecting parties from oppressive litigation tactics be realised.

¹⁸ Broom, Legal Maxims, * 327 et seq.

¹⁹ Lockyer v. Ferryman, 519 (1877).

²⁰ August Reinisch, “The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes”, 3(1), *Law and Practice of International Courts and Tribunals*, 44 (2004)

²¹ *Digambara Rao Hanumanta Rao Deshpande vs Ranga Rao Reghunatha Rao Desai*, (1949) 51 BOMLR 623

3.1. DOCTRINE OF LIS PENDENS AND DOCTRINE OF FORUM NON CONVENIENS

Forum Non Conveniens and Lis Pendens are two different doctrines that the courts use in order to exercise jurisdiction, and decide whether or not to even exercise it. In the conflicts that involve the question of jurisdiction, a court that has competent jurisdiction may still decline to hear the case as according to Forum Non Conveniens or Lis Pendens. These doctrines may be differentiated based on various features, such as the scope, procedure as well as the criteria of application.

What is Forum Non Conveniens?

Forum Non Conveniens is an equitable principle which essentially bestows upon the court, the power to withhold from exercising jurisdiction over any case of action²². Lis Pendens, in contrast, permits the court to stay its proceeding in case some other case falling in the ambit of the same cause of action as well as among the same parties, is already taken by some other court. This doctrine is present in order to maintain a balance between the plaintiff, defendant as well as the forum²³. The doctrine has been used occasionally in recent years to deny foreign plaintiffs a forum where their primary goal in bringing the case is to take advantage of a more advantageous law. The choice of a plaintiff for the forum is generally given more importance and more importantly when it is their home forum. Thus, a court must refrain from depriving a plaintiff of the forum they choose unless: a) the facts of the case prove to be oppressive and establish vexation to the defendant so as to establish the fact that it is out of all proportion to the convenience of a plaintiff; or b) proceeding with a trial in the forum as chosen may not be appropriate due to the various considerations that affect the court's administrative as well as legal issues.

Consonance with Lis Pendens

Both the doctrines have different applications that essentially depend upon the residence of the parties, the international factors (if any) and more importantly the subject matter of the issue. The location of the defendant's residency alludes to the scope of Forum Non Conveniens, however the whole case may have some international components. Lis pendens, on the other hand, is used in parallel proceedings of civil and commercial issues²⁴. In these situations, the defendant's residence, the site of the accident in issue in tort cases, or the place of the contract's performance

²² Barry J. Rodger, "Forum Non Conveniens Post-Owusu", 2(1), *Journal of Private. International Law*, 71 (2006).

²³ LOUIS F. DEL DUCA & GEORGE A. ZAPHIRIOU, "Rules for Declining to Exercise Jurisdiction in Civil and Commercial Matters: Forum Non Conveniens, Lis Pendens", 42, *The American Journal of Comparative Law*, 968 (1994).

²⁴ *Ibid.* at 969.

in contract dispute cases are used to determine the jurisdictional component. In the case of Lis Pendens, there is hardly any protection in place if the defendant believes the court that first seized the case is not appropriate. But, it is precisely this particular feature that maximises the predictability, efficiency as well as uniformity of the court²⁵. On the other hand, the ability of a defendant to enable the forum of their choice is fairly greater as under the Forum Non Conveniens. However, this is also dependant on whether or not the defendant is able to meet the required burden of proof.

It may be stated that, the doctrine of Forum Non Conveniens proves to be better suited in common law countries and in countries where the primary mode of settling a dispute is not litigation, whereas Lis Pendens is better suited in civil law countries and other places where the primary mode of dispute settlement is litigation. Both these doctrines do, however, aid in the obtainment of substantial justice.

4. DEVELOPMENT OF THE DOCTRINE OF LIS PENDENS

As observed from above, the wide scope and purpose of Section 52 is to try and maintain the status quo unaffected by the acts of any of the parties to a particular dispute that is still pending. This doctrine does not by default restrict the vesting of right in properties, rather, it makes the party that purchases this property bound to the result of the litigation²⁶.

Although this doctrine restricts the transfer of any property during the suit is ongoing, this transfer is not *ipso facto* illegitimate, rather, the purchaser is bound by the outcome of the suit²⁷.

Development Through the Years

- In one of the rather important cases with reference to Lis Pendens, Gouri Dutt Maharaj v. Sheikh Sukur Mohammed and Ors.²⁸, which is a 1948 case, stated that the broad principle mentioned in Section 52 of the Transfer of Property Act, is to maintain status quo and remain free from the effect of any party to the suit.
- The case mentioned above presents an explanation to what the Section 52 entails, however, in 1972 the case of *Jayaram Mudaliar v. Ayyaswami*²⁹ provided an explanation to what the law

²⁵ Lawrence W. Newman & Michael Burrows, "Practice of International Litigation" 688 2nd ed. (2013).

²⁶ Thomson Press (India) Ltd. v. Nanak Builders and Investors Pvt. Ltd., AIR 2013 SC 2389.

²⁷ Darashaw J. Vakil, "Commentaries on Transfer of Property Act" 592, 5th Ed (2017).

²⁸ Gouri Dutt Maharaj v. Sheikh Sukur Mohammed and Ors. AIR 1948 PC 147.

²⁹ *Jayaram Mudaliar v. Ayyaswami* 1972 (2) SCC 200.

does not entail. The court stated that the section “was not present to defeat any just and equitable claim, but only subject them to the authority of Court”. The Supreme Court further explained that “*it is evident that the doctrine, as stated in section 52, applies not merely to actual transfers of rights 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.*”

- In *Rajender Singh and Ors. v. Santa Singh and Ors*³⁰, a landmark case in the Supreme Court in 1973, it was noted that “*the doctrine of Lis Pendens was designed to counter efforts by parties to a litigation to evade the jurisdiction of a Court, in which an issue on rights or interests in immovable property is pending, by engaging in private dealings that could exempt the object of litigation from the court's authority to rule on an ongoing dispute or frustrate its decree.*”
- To further illustrate on certain wide concepts, the case of *Lov Raj Kumar v. Dr. Major Daya Shanker and Ors.*³¹ described certain aspects. The court in 1986, observed that “*the principles contained in Section 52 of Transfer of Property Act are in accordance with the principle of equity, good conscience or justice, because they rest upon an equitable and just foundation, that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.*”
- In the year 2000, the Supreme Court in the case of *Hardev Singh v. Gurmail Singh*³² provided a rather liberal interpretation of the section as compared to those from before. It essentially observed that Section 52 does not declare in itself a pendente lite transfer of a property in dispute by a purchaser as void or illegal rather, it merely makes the purchaser bound by the outcome of the suit. The court loosened the strings of the Section 52 that in its other judgements appear to be more restricted. This judgement did not defeat the object of the provision, but instead, interpreted it in a different light.
- Lastly, in the 2010 case of *T.G. Ashok Kumar v. Govindammal & Anr.*³³ The Supreme Court observed that “*the transferee's title shall not be impacted if the pendente lite transferor's title prevails in relation to the transferred property. The transferee's title will only be preserved in relation to that portion of the transferred property, however, and the transfer in relation to the remaining portion of the property that was transferred shall be invalid, and the transferee will not have any right, title, or interest in that portion, and in contrast, if the pendente lite*

³⁰ *Rajender Singh and Ors. v. Santa Singh and Ors* AIR 1973 SC 2537.

³¹ *Lov Raj Kumar v. Dr. Major Daya Shanker and Ors.* AIR 1986 Delhi 364.

³² *Hardev Singh v. Gurmail Singh*, Civil Appeal No. 6222 of 2000.

³³ *T.G. Ashok Kumar v. Govindammal & Anr*, Civil Appeal No. 10325 of 2010.

transferor's title is recognised or understood only in regard to a part of the transferred property.”

Through a gentle perusal of some of these important cases in relation to the doctrine of Lis Pendens, we are able to understand and observe even the court's evolution with regards to the interpretation of section 52 of the Act.

5. CONCLUSION

Along the course of this paper, the numerous situations wherein the doctrine of Lis Pendens may or may not apply have been analysed. One very important inference is that, the particular suit needs to be relating to an immovable property that its concerns itself in a direct and substantial manner with the rights. Thus, it is apparent that the doctrine cannot be misused by anyone just through a mention of an immovable property in the plaint. Secondly, this doctrine, in its pith and substance places a prohibition on the transferring of property of the suit is in pendency. However, the section does not explicitly state the consequences of still transferring the property. This clarity has been, however, obtained by way of judicial precedents, and the party to whom the transfer is made to, shall merely be liable to the outcome of the suit in progress.

The section as a whole, does not prove to be a hindrance to pending suits, as the reasoning behind its being in place is a rather rational one. It is indeed true that, no further progress must take place to a property that is a part of a suit in court, as there must not be any further changes to the subject matter. However, this does not mean that there are no hindrances in the section at all. There are two main areas that pose as viable threats or problems.

The first issue relates to the consonance of this doctrine as against other doctrines. In the case of Forum Non Conveniens and Lis Pendens, the policies put forward by both are contradictory nature, as the question arises whether to permit for derogation from the jurisdiction as provided by the former doctrine, and the latter provides for staying with the court as chosen primarily by the claimant. In the case of Res Judicata and Lis Pendens, there existed a question of which doctrine shall prevail if it comes to it, however, this is to an extent clarified by way of judicial precedents. The second problem lies with this doctrine being unfair to the innocent purchasers. Most of the times, these purchasers have no knowledge of the existence of the suit and are

automatically bound by the result of it. The doctrine mainly protects the parties to the suit and not the third parties. This situation can be tackled very easily with the provision of a doctrine of notice, as these persons can thereafter verify the title relating to the property.

Thus, rather than terming the entire doctrine as causing a hindrance to the pending suits, there merely exist certain elements in the doctrine that can be amended to further improve the effect of the same.

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