

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 02.08.2018

Judgment Pronounced on : 09.11.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

C.M.S.A.No.16 of 2018
and CMP.No.12748 of 2018

1. Rajendran
2. M.Murugan ... Appellants

Vs

Mohanambal ... Respondent

Prayer :- Civil Miscellaneous Second Appeal filed under Section 100 read with Order 21 Rule 103 of CPC, against the order and decretal Order dated 19.06.2018 passed in C.M.A.No.12 of 2017 on the file of the Subordinate Judge, Kanchipuram in E.A.No.52 of 2013 in E.P.No.24 of 2009 in O.S.No.71 of 1976 on the file of the District Munsif cum Judicial Magistrate, Sriperumbudur.

For Appellants : Mr.V.Raghavachari

For Respondent : Mr.R.Balachandran

JUDGMENT

The obstructors before the Execution Court in E.A.52 of 2013 in E.P.24 of 2009, having lost successively both before the Execution Court and the first appellate Court have come forward with the present appeal.

2. There then exists a set of facts that provides the setting for the appellants to approach the Execution Court. They may now be introduced:

- The property involved in this appeal is a specific plot representing $\frac{1}{4}$ share out of an extent of 81 cents in S.F.No:43 Venkatapuram village, Sriperampudhur Taluk.
- The aforesaid property in S.F.No:43 along with other properties originally belonged to a certain Subramania Gramani. He had two daughters namely Venganayakiammal and Muthunayakiammal. Venganayakiammal had two daughters Kamalammal and Mohanambal.

- Some time in 1958, Subramania Gramani executed a settlement deed in favour of his grand daughters Kamalammal and Mohanambal. On 07.12.1962, the minor's mother Venganayakiammal along with Kamalammal and her mother Kanniammal had executed a sale deed in favour of Muthunayakiammal referred to above.
- The appellants' father was Mohalingam alias Rajabathar (hereinafter would be referred to as Mohanalingam). He along with one Poongavana Muthaliar was said to have been a cultivating tenant of the property in S.F.No:43 under Muthunayakiammal.
- While so, Venganayakiammal along with her two daughters Kamalammal and Mohanambal, who, as earlier stated, had sold the entire suit properties to Muthunayagiammal, had instituted a suit in O.S.71 of 1976, (the decree passed in which has resulted in the present appeal through the Execution route) against Muthunayakiammal and her eight children for a declaration that the sale deed dated 07.12.1962, which the former had executed was sham and nominal, and hence, void. In the suit, the property in S.F.No:43 was scheduled as Item 6 in the I Schedule.
- This suit was laid on 20.04.1971 initially before the District Munsif Court, Poonamallee. On 23.08.1975, it was returned for being presented before proper Court and on 28.08.1975, it was presented before the Sub-Court, Chengalpattu, wherein, it was taken on file in O.S.No.71 of 1976.
- Be that as it may, a couple of months prior to the institution of this suit, on 23.01.1971, Muthunayakiammal and appellants' father Mohanalingam had entered into an agreement of sale for the sale of the property comprised in S.F.No:43, measuring 81 cents. And after the institution of the suit, when it was still pending before the District Munsiff Court, Poonamallee, the sale agreement fructified into a sale, when on 05-08-1976, Mohanalingam purchased the aforesaid property in S.F.No:43 in entirety from Muthunayakiammal in the names of his two sons, the appellants herein.
- On 10-04-1978, O.S.No.71 of 1976 was dismissed by the trial Court. The plaintiffs had preferred A.S.No.275 of 1978 before the District Court, Chengalpattu, and on 08.04.1981, the First Appellate Court dismissed the appeal. A further appeal was preferred to this court in S.A.No.1512 of 1981, and here, the plaintiffs met

with partial success in that this Court had declared Vide its judgment dated 28.11.1988 that only the sale pertaining to the share of the third plaintiff Mohanambal was void, and held that Mohanambal would be entitled to $\frac{1}{4}$ th share in all the items of the suit properties including the property in S.F.43. It may be stated that during the pendency of the second appeal Muthunayakiammal had died.

- Thereafter, for obtaining a metes and bounds division of her $\frac{1}{4}$ th share in all the suit items of properties including the one in S.F.No:43 (the one that concerns this court in this appeal), Mohanambal approached the trial Court with an application in I.A.241 of 1992 for passing a final decree. On 20-04-2004 final decree was passed. As Muthunayakiammal had passed away, the final decree was passed against her legal representatives. Neither Mohanalingam, who claimed himself to be the cultivating tenant of the property under Muthunayakiammal, nor his two sons (appellants herein) who claim title by virtue of the sale deed dated 05.08.1976 were parties to the final decree petition.
- Subsequently, the decree holder filed E.P.No.24 of 2009, for delivery of the specific plot allotted to her in terms of the final decree. On coming to know of these developments, the appellants, who hitherto were on the outer orbit of the litigation, came forward to file E.A.No.52 of 2013 for registering obstruction. This was resisted by the decree holder.

3.1 In their affidavit filed in support of the E.A.52 of 2013, the appellants have contended:

- That the appellants' father Mohanalingam was a cultivating tenant of the property under Muthunayagiammal. While so, claiming a right of cultivating tenancy over the property in S.F.No:43, a certain Marimuthu had filed a suit in O.S.145 of 1971 for permanent injunction against Mohanalingam. This suit was dismissed, and the appeal preferred by Marimuthu in A.S.69 of 1975 too came to be dismissed, affirming Mohanalingam as a cultivating tenant. The respondent knew about Mohanalingam's possession as a tenant, and hence he should have been made a party to the suit in O.S.71 of 1976. Had Mohanalingam been impleaded in the suit, his right would have been defended adequately in the suit. Therefore, the decrees passed in the suit, both the preliminary and the final, will not bind the petitioners. And, the respondent cannot take advantage of Sec.52 of the Transfer of Property Act.
- Since purchase was in their favour, the appellants have partitioned the property on 17-12-1999.

3.2 A counter was filed wherein the entitlement of the decree holder to execute the decree was reiterated and stressed.

3.3 The Execution Court, Vide its order dated 14.12.2017, had dismissed E.A.No.52 of 2013, essentially on the ground that the same is not maintainable since the petitioners thereof are pendente lite transferee but without pointedly referring to Order 21 Rule 102 C.P.C. This order of the Execution Court was challenged by them in C.M.A.No.12 of 2017 before the Subordinate Court, Kancheepuram, and it met the same fate that visited it before the Execution Court. In its order the first appellate court has held:

- That the appellants are pendente lite transferees. And they are not necessary parties to the suit and are not entitled to a right of hearing.
- That they have not shown that they have been in possession before 1971 when the oral agreement for sale was stated to have been made or at any time prior to the sale in their favour.

Aggrieved by this order, the obstructors have come forward with the present appeal.

4. Given the undeniable fact that the appellants are pendente lite alienees, the substantial questions of law that this Court considers as involved in this appeal are:

(a) whether the finding of the first appellate court that the appellants, inasmuch as they are pendente lite purchasers, are not entitled to a right of hearing during the final decree proceedings valid.

(b) Is there an exception to Order XXI Rule 102 CPC for the appellants to obstruct delivery of the property by the Execution Court?

(c) Whether the approach of the Courts below in not entering a pointed finding on the appellants' plea of tenancy valid.

5. Arguing for the appellants, their counsel Mr. V.Raghavachari, submitted:

a) Appellants, though pendent lite transferees, claim possession not just based on their title traceable to their sale deed, but on the basis of a pre-existing right of tenancy which their father had and judicially came to be recognised in Ext.P-10 judgment. Therefore, even de hors the sale in their favour, there is a heritable right of tenancy that devolved on the appellants when their father Mohanalingam died, and to that extent their possession of the property cannot be

considered as unlawful. Neither of the Courts below attempted to consider this issue.

b) When this Court in S.A.1512 of 1981 had granted some benefit to the decree holder to the extent of $\frac{1}{4}$ th share, it did confirm the title of Muthunayakiammal to the remainder $\frac{3}{4}$ th share in the property. However, the Courts below have over simplified the issue and have concluded the obstructors are mere pendente lite transferees and treated them as spectators and not as necessary participants to the final decree proceedings. A pendente lite transferee from one of the sharers is not a stranger to the proceedings and his presence is required for passing final decree. Therefore, the final decree passed is bad in law.

Therefore, in fitness of things the Execution Court should have denied the decree holder the delivery of the property through the judicial process, and should have referred the matter back to the trial side for reopening the final decree already passed. Reliance was placed on the authorities in *Dhanalakshmi & Others v. P.Mohan & Others* [(2007) 10 SCC 799], *Shreenath and Others v. Rajesh and Others* [MANU/SC/0286/1998], *Kondi Munisami Chetti and Another v. Dakshanamurthi Pillai* [MANU/TN/0092/1882], *Kuruvamani v. A.Muthu* [MANU/TN/1303/2014], and *Janaki Ammal v. Ganapathi Konar and two others* [1996(II) CTC 243].

6.1 Per contra, Mr.R.Balachandran, the learned counsel appearing for the respondent would contend that the appeal itself would not be maintainable. Under Order 21 Rule 98 CPC, the Execution Court is first required to ascertain preliminarily if there exists any question for determination within the meaning of Rule 101, and it is only thereafter it would proceed to frame the issues arising between the parties to the proceedings and decide it under Rule 98. In this case, inasmuch as the Execution Court has held that since the obstructors were pendente lite transferees within the meaning of Order 21 Rule 102, the Execution Court has decided not to embark on an enquiry under Rule 101 and has proceeded to pronounce its order Under Rule 98. It is only those orders which fall under Rule 98 that are deemed to be decrees within the meaning of Rule 103, and not the one rejecting the plea of obstructors on grounds of non-maintainability. Since, E.A.52 of 2013 was rejected on a preliminary point without touching upon the merit of the controversy raised by the obstructors, no appeal would lie. The authority in *Sameer Singh & Another v. Abdul Rab & Others* [CDJ 2014 SC 860] is relied on.

6.2 Secondly, it is wrong to construct the decree passed in the present case as a decree passed in a partition suit since the suit did not emanate as a suit for partition, but

as one for declaring that the sale deed which Venganayakiammal and her daughters had executed in 1962 was sham. When this Court declared that the third plaintiff/decreed holder Mohanambal was entitled to $\frac{1}{4}$ share, it was based on its finding that the sale deed, to the extent of Mohanambal's share was void, and therefore, no equity would flow in favour of Muthunayakimmal in the first place as if it is a case of partition.

OF DISCUSSION & DECISION

On Maintainability:

7.1 When an application under Order XXI Rule 97 CPC is dismissed as not maintainable, will it not amount to a decree in order an appeal can be maintained? In Sameer Singh & Another v. Abdul Rab & Others [CDJ 2014 SC 860], the Hon'ble Supreme Court has held that in all cases where a court fails to exercise its jurisdiction or exceeds the extent of its jurisdiction, a revision would lie previously under Sec.115 of the CPC and, since the amendment of the CPC in 2002, under Article 227 of the Constitution. This Court however considers that in the present case the Courts below have decided to exercise its jurisdiction. When the Execution Court has decided that E.A.52 of 2013 which the appellants have filed under Order XXI Rule 97 CPC as not maintainable under Rule 102, it is apparent that it did exercise its jurisdiction on the matter. Now the point is, can it be termed as one falling within the meaning of "all the questions (including questions relating to right, title or interest in the property) arising between the parties to the proceedings" under Order XXI Rule 101 CPC. This provision reads:

101. Question to be determined :- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by 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.

If read carefully, it will be evident that the provision does not limit the questions or issues that may arise between the parties only as to their disputed right, title, or interest in the property, but to other issues as well. The first word in the parenthesis, namely 'including' implies that the phrase 'all questions' with which the provisions opens should be given its widest meaning, and it

necessarily includes a question on the maintainability of the petition within the meaning of Order XXI Rule 102 CPC. Rule 102 in effect goes to qualify those who could obstruct delivery of possession in execution of a decree, and if this point were to be considered then it necessarily should have to fall under Rule 101, as it can well be termed as one of the issues arising between the parties. Secondly, if it has to be considered as falling outside Rule 101, then it will lead to multiplicity of proceedings, which the latter part of Rule 101 itself prohibits. The spirit behind the provision is to provide a single, comprehensive window for resolving all issues between the obstructors and the decree holder and this objective behind the provision cannot be ignored. Thirdly, the point on maintainability is raised for the first time before this court, and was not seen to have been raised before the first appellate court. Fourthly, the Order in the CMA 12 of 2017 which is now in challenge cannot be termed as one on a preliminary point of maintainability under Rule 102 alone, as it touches upon the merit of the cause to the extent it considered necessary.

7.2 This Court therefore holds that the Order passed by the Courts below fall within the meaning of Rule 101, and hence the consequent order dismissing it under Rule 98 would amount to a decree under Rule 103. The appeal is therefore maintainable.

Is tenant a necessary party in a final decree proceeding for partition?

8.1 If the averments in aid of appellants' application are scanned for their details, the thrust is on non-impleadment of their father Mohanalingam, who according to them was a tenant of the property in the suit even prior to the sale in their favour. He, according to them, is a necessary party to the suit. The Courts below however, have seemingly let their line of reasoning to be consumed entirely by Rule 102 of Order XXI CPC, and omitted to consider this aspect.

8.2 Was Mohanalingam a necessary party to the suit? It is addressed on the premise that he was a cultivating tenant of the disputed property. In the context of the present suit, it cannot be termed that he was a necessary party for the following two reasons:

- The suit per se did not commence as a partition suit. It is only the decree of this court passed in S.A.1512 of 1981 which has given it that complexion.
- Secondly, the fact that a property was under tenancy cannot affect an action founded on the ownership of the property. Nor can a decree passed in it be defeated because a tenant was not impleaded in an action where right over ownership was in dispute. A tenant's right is derived from a right of ownership

but it still remains as an independent right. Salmond terms ownership as a 'residuary right' over a property that remains in a person after accommodating a few derivable rights, of which lease is one. And, the lessor has only a right of eviction and to restore to himself the right of enjoyment of the property, which is a residual right left in him. With ownership and lease falling under two different slots of legal character, in a suit concerning the former, the need to implead a lessee is immaterial. Having stated thus, it is commonly seen that lessees are arrayed as parties to a suit where ownership is in dispute, and it is done to decide the right over the rental income. And, in a partition suit context, there is a possibility of severance of lease which may concern the lessee, but in the context of the action, he is only a proper party and not a necessary party.

It therefore follows that while the decree passed in the suit which binds the parties who litigate on a title of a specific character, cannot bind the one who claims title of a different character.

Rights over the property in lis pendens

9. The other aspect on which the reasoning of the Courts below was founded was that the appellants were pendente lite transferees. While the appellants' core contention was pivoted more on the right of tenancy that their father had over the property, the Courts below have shifted the focus more on appellants' right to obstruct delivery of possession of the property on the ground that they were pendente lite purchasers. In this context, it could be seen from the order of the first appellate Court that it had taken a view that a pendente lite transferee need not be impleaded in the pending suit, which going by the several authorities on the point, was not entirely faulty. However, it throws open a space to test if the reasoning, or rather the approach of the first appellate Court is valid in the context of a partition decree, more specifically a proceeding for passing a final decree.

10. How long can the lis pendens doctrine deny the right of hearing to a transferee pendente lite? To state it in the context of the facts of this case, when the decree in S.A.1512 of 1981 had secured to the respondent an undivided $\frac{1}{4}$ th share in the disputed property, it simultaneously operates as an implied confirmation of present appellants' right over the remaining $\frac{3}{4}$ th share. Should the tag of pendente lite transferee be attached to them even after the preliminary decree? The final decree is yet to come. Is there then, vested in a pendente lite transferee a right of hearing in a proceeding for passing the final decree, or is that right also is consumed by lis pendens? And, in the

context of Order XXI Rule 102 CPC (which denies a pendente lite transferee the right to obstruct in executing a decree for delivery of an immovable property), has a pendente lite transferee become procedurally irrelevant? It need not be forgotten that in our procedural scheme of things even a trespasser is granted a right of hearing under Order XXI Rule 101 CPC.

11. Given the scope of this appeal and the conclusion that is finally arrived, delving on this point in its deeper layers may constitute a mild deviation, but this court considers it as justly required.

12. In *Amit Kumar Shaw & another Vs Farida Khatoon & another* [(2005) 11 SCC 403] the Hon'ble Supreme Court sums up the law on impleading transferee pendente lite with sizeable pragmatism:

"16. The doctrine of lis pendens applies only where the lis is pending before the Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case."

The above passage would reflect that a transferee pendente lite is not under an eternal embargo in seeking his

procedural space to defend his right, which the Supreme Court describes as his 'substantial' interest, or 'right in entirety' in the property litigated upon. In other words, while the plaintiff is not under any obligation to implead a pendente lite transferee, the latter on his own can seek (under Order XXII Rule 10 CPC), or the Court in its discretion can direct his impleadment.

13. The basic premise that unassailably gets registered here is that a transfer of an immovable property pendente lite is not a sin in law, nor is it void. The law, as our jurisprudence has understood through the judicial interpretation of Sec. 52 of the Transfer of Property Act is not to defeat any just and equitable claim of a transferee, but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward. (See Jayaram Mudaliar Vs Ayyaswami, [AIR 1973 SC 569]). Accordingly, every transfer of an immovable property pendente lite is only subject to the outcome of the litigation in which the property is the subject matter. Amidst the innumerable authorities on the topic, see Thomson Press (India) Ltd., Vs Nank Builder & Investors (P) Ltd., [(2013) 5 SCC 397] and T. Ravi & another Vs B. Chinna Narasimha & Others [(2017) 7 SCC 342]. Secondly, there is no bar on any of the parties to the litigation to deal with the property during the litigation, [See: Sanjay Verma Vs Manik Roy, (2006) 13 SCC 608, Hardev Singh v. Gurmail Singh, (2007) 2 SCC 404,], except that if it is done with the leave of the Court, it saves the transaction beyond the reach of lis pendens principle.

14. Neither the provisions of the statute, nor its interpretations have gone to the extent of declaring that the right transferred pendente lite will remain inchoate, or in a state of suspense, and will have to wait for the litigation to conclude for it to vest in the transferee. It therefore follows, that the right in the immovable property gets conveyed and vested in the transferee immediately, no matter a suit involving the said property is pending. As far as the doctrine of lis pendens goes, in every such instance this vesting of right or title in the immovable property is impacted by the outcome of the suit more like a condition subsequent (an ex post facto divestiture of the right vested right in the pendente lite transferee), and is essentially declaratory in character, based on the pre-existing right or title of the parties. Accordingly, what gets vested in a pendente lite transferee is the right which his vendor (a party to the litigation) has had in the property litigated upon. A decree is but a judicial confirmation of such right, of its character and extent, which a pendente lite seller of the property purports to possess, or that which he claims to have possessed. Consequently, an outcome of the suit can produce three alternate situations: (a) it may affect the title already vested in a pendente lite

transferee entirely, or (b) it may not affect it at all, or (c) it may affect the title vested in a pendente lite transferee partially. And, in all the three cases, what the decree declares in effect is the extent of right a pendente lite seller of a suit property has. It is hence, when the decree is ultimately passed in the suit affecting the right or the title conveyed under a pendente lite transfer, neither of the parties to the same are required to do anything for vesting or divesting the title, as the case may be, impacted by the decree.

15. The principle that a pendente lite transferee need not be arrayed as a party to the suit is founded on the rationale that every sale of immovable property carries with it an implied warranty as to the title of the vendor under Sec.55 of the Transfer of Property Act, and a seller of a pendente lite transfer will be, if not has to be, conscious of his duty and be vigilant to protect the title of his purchaser. This implied warranty of title burdens the seller to protect it, and as long as this burden is remembered and realised, and the duty to protect a purchaser's title is discharged by the seller, there cannot be an issue. However, the statutory imperative which Sec.55 of the Transfer of Property Act prescribes, often stays at a distance from the experience that reality breeds, where a pendente lite seller invariably does a vanishing act from the litigious scene, and will choose not to defend his purchaser's title. The Amit Kumar Shaw case does record the prevalence of such tendencies among pendente lite sellers.

16. If the Amit Kumar Shaw case is taken as a reference point (since it deals with the right to implead a pendente lite transferee, among the countless number of authorities on different shades of lis pendens effect), while it makes it optional for the plaintiff to implead a pendente lite transferee, it recognises the latter's right to implead himself under Order XXII Rule 10 CPC, even as it recognises the discretion vested in the Court to implead him. The last two situations however, presupposes that a pendente lite transferee, or the Court, as the case may be, has the knowledge about a pending suit and/or the substantial interest which a transferee pendente lite has obtained in the property litigated upon.

17. What about a transferee pendente lite without the knowledge of a pending suit? An institution of a suit is not considered as an encumbrance on the property, and consequently it need not be intimated to the Registration Authority for him to enter it in the encumbrance register. None, except the parties to the litigation will ever know that a property is involved in a litigation. The institution of the suits, though are maintained by an institution for the public, which the Courts are, yet the

information as to the involvement of a particular property in a suit is not in the public domain. Every purchaser of an immovable property, not necessarily a known pendente lite transferee, is therefore under a perennial vulnerability as to his title, and a decree of a court in a suit whose pendency he knows not, can destabilize his belief in his title. In T.G.Ashok Kumar Vs Govindammal [(2010)14 SCC 370], the Hon'ble Supreme Court has expressed its serious concern over the fate of (pendente lite) purchasers who walk innocently into a snare of pendente lite transactions, the inadequacy of the law in addressing it, and has suggested recommendations to the law makers to bring out suitable amendments. (In this judgment the Hon'ble Supreme Court refers to the Maharashtra Model, which has introduced an amendment to Sec.52 of the Transfer of Property Act, which will now require that notice of pendency of the suit be given under Sec.18 of the Registration Act to the Registration Authority. However, it may have two shortcomings: First, under Sec.18 of the Registration Act, registration is optional, which implies that there is no absolute protection to the pendente lite alienees. Second, this can be misused by land grabbers and greedy realtors, who can interfere with the rights of the owners with vexatious litigations. Hence, another model is suggested which is given as Directions in paragraph 30 below)

18. Here, except presuming that a transferee pendente lite knows about the pending suit, there is nothing in procedure to impute knowledge to him. The success of lis pendens lies in attributing this presumption of imputed knowledge to a transferee pendente lite, but it is a judicial invention, which Sec.52 of the Transfer of Property Act, does not manifestly provide. This consequently exposes the vested right of a pendente lite transferee, whose rights are decided chiefly in absentia, to lethal consequences. This is more felt in a final decree proceedings of a partition suit.

Right of hearing in Proceedings for passing final decree and lis pendens

19. In a partition suit scenario (which includes decrees which will have the effect of a decree passed in a partition suit, such as the one passed in this case) when a preliminary decree is passed, the extent of the shares of the parties in the suit property gets crystallized, and in the context of a pendente lite transfer, it is the judicial confirmation of such a right to which his vendor is entitled to, the effect of which is ultimately transmitted to his purchaser. But the suit is not concluded yet, as the metes and bounds-partition of the properties is yet to take place. And given the fact that there is no period of limitation prescribed for approaching the court for passing the final decree, a transfer can happen after passing of the preliminary decree and before the final decree. And, if the

transfer is effected after the preliminary decree, then it is recognised in procedural law as an assignment of the decree. If it is before the institution of the suit, then law understands it as a sale of an undivided interest/right, which grants the purchaser thereunder the status of a co-owner (though without the right of joint-enjoyment till a metes and bounds partition is effected). However, if the same transfer happens either before the preliminary decree, or before the final decree, it is termed pendente lite transfer, and the transferee there of is picked up for a differential treatment in procedure on the right of hearing.

20. In Venkatammal Vs Sinna Venkatarama Chettiar & others [AIR 1975 Madras 316] this Court inter alia has held that an alienee of an undivided share of a coparcenary property is entitled to such equities which his vendor is entitled to. It necessarily brings within its fold all instances of alienation by co-sharers/co-owners since the basic features of the right transacted are similar in character. In Shub Karan Bubna alias Shub Karan Prasad Bubna Vs Sita Saran Bubna & others [(2009) 9 SCC 689] the Hon'ble Supreme Court has held:

"7. In a suit for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession..... The consequential division by metes and bound, considered to be a ministerial or administrative act requiring physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) (Order XX) and is the subject matter of the final decree under Rule 18(2).

15. that every application which seeks to enforce a right or seeks a remedy or relief on the basis of any cause of action in a civil court... will be subject to the law of limitation. But where an application does not invoke the jurisdiction of the court to grant any fresh relief based on a new cause of action, but merely reminds or requests the court to do its duty by completing the remaining part of the pending suit, there is no question of limitation....

20.....in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing the final decrees is only an application in a pending suit, seeking further progress. In partition

suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree, or there can be merely a single decree with certain steps to be taken by the court. In fact, several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is no really judgment-debtor in a partition decree."

If on passing of a preliminary decree, a pendente lite purchaser has acquired a right through his vendor, then necessarily his right has to be similar to that of the other parties to the preliminary decree. Necessarily, a right to file an application for passing a final decree should be available to him, since no law bars him from filing one. And, if he can file one, does it not then logically follow that he is heard in a proceeding for passing the final decree initiated at the instance of another party.

21. In this setting, it is necessary to consider if lis pendens be let to haunt post preliminary decree to deny the pendente lite purchaser, a right of hearing in the final decree proceedings? If it is to be held that he is not entitled to a right of hearing, then law is required to negotiate a jurisprudential incongruence in splitting the right of ownership and the right to defend, separate the latter from the former, vest the ownership in the pendente lite purchaser, and the right to defend it on his seller. This is permissible during the pendency of a suit which directly threatens the warranty of title that accompanies the property of a pendente lite transferee, and the law requires a seller to defend it. Ceteris paribus, if the pending suit is considered as the only threat to the warranty of title of a pendente lite purchaser, does not the seller's duty to support the warranty end vis a vis a pending suit, during whose pendency he chose to sell the property on passing the preliminary decree? Contextually, warranty of title cannot have a life beyond the expiry of the threat it faced. And the threat perception on the title of the pendente lite transferee concludes in all cases where his seller obtains absolute or partial success. (It is clarified that threats of other kind to warranty of title is kept as a constant here).

22. Now, in a suit for partition, or where the decree which has the effect of partitioning the property, is it legally appropriate and justifiable to presume that the warranty of the seller's title continues to operate post preliminary decree? If it were to be so, then it defies logic that a right which is already crystalised in a preliminary decree,

and that which has unquestionably enured to the benefit of a pendente lite purchaser, must be presumed to the contrary as if the rights of the parties to the litigation are yet to be decided.

23. In the context of granting a right of hearing in a proceeding for passing the final decree, it is necessary to understand that lis pendens chiefly concerns itself with the right of the parties to the litigation over the property litigated upon (which concludes with the passing of a preliminary decree), and not exactly with how the properties are divided by metes and bounds. This is deducible from the judgment in Shub Karan Bubna case [(2009)9 SCC 689]. This can be demonstrated:

- If a party to a partition suit dies after the preliminary decree, necessarily their legal representatives have to be impleaded in an application for passing final decree, because such rights which the deceased party has had in the suit properties based on the preliminary decree would have devolved on them. Does it not then indicate that the need to implead a party to a proceeding for passing final decree is property centric and not party centric? And, where the property has already been transferred by the deceased party himself pendente lite, and where the outcome of the suit has already secured the right to which a pendente lite purchaser would be entitled to pursuant to the preliminary decree, what right in the deceased pendente lite seller would survive on his death? None. After all, the duty to support the warranty of title is not heritable even though it is answerable in law where, and only where, the right in the seller survives on his legal representatives. Does it now stand to law, logic or life's experience to let the legal representatives of a pendente lite seller to defend the title of a pendente lite transferee in final decree proceedings? Conversely, if the seller pendente lite did not have anything to leave for his legal representatives to inherit or succeed to because the preliminary decree has confirmed the vested right in a pendente lite purchaser, where from the seller himself will derive the right?
- There is yet another circumstance: In a partition suit, once the preliminary decree is passed, the suit is not terminated but adjourned sine die, leaving the parties to approach the Court for passing the final decree, if they so require without any period of limitation. (See in Shub Karan Bubna case, [(2009)9 SCC 689], the Hon'ble Supreme Court has declared that the duty to pass a final decree is that of the Court, and it is not obligatory on the part of the parties to approach it for one) To let lis pendens operate during the

interregnum period between the passing of the preliminary decree and the initiation of proceedings for passing the final decree, will be a license to flirt with uncertainty, and this will not comfort public policy. Neither law, nor the legal system can preserve or perpetuate uncertainty in rights. Necessarily, the operation of lis pendens as affecting right of hearing of a pendente lite transferee shall end when the preliminary decree is passed and extent of shares are crystallized.

- A final decree translates the preliminary decree into a physical reality. In deciding how to divide a property, and how equities may be adjusted as between the parties, the parties have a right to suggest their choice. To state it differently, how to enjoy one's share is the choice that belongs to the one who has title to the share. This right of choice is associated with the title, and is personal to the title-holder. This is available to all the co-sharers/co-owners. In a proceeding for passing a final decree, the parties who do not share consensus on how to enjoy their respective shares, suggest to the Court their choice for convenient enjoyment. Now, having confirmed the title of a pendente lite transferee (by ascertaining the share of his vendor in the preliminary decree), except by over-stretching the doctrine of lis pendens beyond the preliminary decree, a pendente lite transferee cannot be forced to outsource his right to make his choice of enjoyment of his vested undivided share to the one who has no title in him: His vendor. In this process, a pendente lite transferee's right to property faces a threat. And, when his right to his share is identical in character (post its confirmation in the preliminary decree) with the other co-sharers/co-owners, to mark him for a differential treatment for denying him the right to suggest his choice for enjoying his share in a proceeding before the Court because he was a pendente lite transferee will be plainly discriminatory.

Revisit lis pendens and Right of Hearing

24.1 A right, however insignificant it might be, deserves respect in law, and the legal system should be sensitive, and must be constantly evolving in protecting it. It is therefore necessary that a pendente lite transferee is heard in the final decree proceedings for partition. If legal representatives of the deceased party have to be impleaded as necessary parties on the ground that the right to defend has survived on them, why not the same be extended to the pendente lite transferee? In what way are his rights inferior to the right of an assignee of a decree, or a legal representative? To deny a right of audience in Court to the

one who has a right vested in him in law is an exhibition of procedural unfairness and processual discrimination.

24.2 As long as lis pendens remains in the statute book, it will remain as an inviolable and inalienable doctrine, yet lis pendens should not be emotionally approached and given the law that has been developed, it has the potential to destroy the vested right of a pendente lite transferee without a hearing. If it has to be revisited, the exercise should not be spared. In Ashok Kumar case [(2010)14 SCC 370], the Supreme Court has insisted a need for it, but it is not seen as yet to evoke a reaction in the law makers.

Pendente lite transferee and Order XXI Rule 102 CPC

25. It is in the backdrop of the foregoing, Order XXI Rule 102 CPC must be viewed. It reads: It reads:

102. Rules not applicable to transferee pendente lite :- Nothing in Rules 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 person.

A plain reading of the provision indicates that it treats pendente lite transferees as a class, and does make provisions to deal with (a) a pendente lite transferee with no notice of a pending suit, and more particularly proceeding for passing the final decree and (b) those pendente lite transferees who are the victims of their vendors' fraud in not defending the title conveyed.

26. The helplessness to which fraud drives a pendente lite transferee without an effective remedy can be best illustrated with an example from common experience. One situation is that, during the pendency of a suit for partition between siblings, one of the parties will sell a specific property without the pendente lite purchaser ever knowing about the suit. The seller will now, not only not participate in the suit to defend the title of his purchaser, but will participate in the final decree proceedings, watch the property he sold allotted to another party, and he himself will walk with yet another property towards his share. It is a naked fraud that a pendente lite seller is unmindful of practising. Now, in an Execution proceeding for delivery property, a pendente lite purchaser cannot obstruct under Rule 102, and hence he may have to file a separate suit as his case does not qualify for a decision under Rule 101 on the point of title (as the same has already been decided in the suit). And if a suit were

to be filed by the purchaser, it is unlikely he would secure the property he purchased as lis pendens in the former suit might stare on him. In the end result, fraud, which the Courts generally frown upon, now gets a shelter within law. And, the prevailing understanding of law on lis pendens vis a vis the right of hearing of a pendente lite alienee, will now find it difficult to avoid a criticism that it prefers protecting the consequences of this fraud to saving the victims of fraud. Is this what the law intends to achieve? (See in the context Annammal Vs Chellakutti [76 (1963) LW 215], where the First Bench of this Court has kept the termination of suit without a bonafide contest and its abandonment by the plaintiff outside the purview of lis pendens, but it requires judicial intervention in each particular case of similar variety, and does not provide a procedural safety to a pendente lite alienee)

27. With no procedural insistence on the one who approaches the Court to implead the pendente lite transferee (particularly in the final decree proceedings) and grant him an opportunity of hearing, the distinction between defending the title in a suit, which is in the domain of the procedural law, and the outcome of a litigation affecting the very title, which belongs to the realm of the substantive law, gets erased. And, the substantive law now feverishly looks to the procedural law for establishing the right it has vested in a pendente lite transferee, even though the procedural law is considered as a mere aid to establish the rights created by the former. This only exposes the fact that within the present scheme of the Civil Procedure Code, 1908 and its understanding, there exists situations which put a premium on the attitude of a pendente lite seller to ignore his statutory responsibility of protecting the title of his purchaser, expose the latter to peril of the decree, play fraud on him, and snatch the vested right in him, without a hearing. It is possible and is frequently happening. If the procedural law is to be believed as fairness written on all its pages, in the absence of any abuse of procedural or judicial process, pendente lite transferees deserves a right of hearing at least at the stage of execution of the decree for delivery of possession of the property. This perhaps will be his first and the only opportunity to defend his right.

28. Set in this context, Order XXI Rule 102 CPC, appears to be a bit draconian. While the substantial law permits transfer during the pendency of a suit, enables vesting of right over the property transferred in the transferee, the procedural law does not consider the transferee worthy of being granted a right of hearing at any stage. Order XXII Rule 10 CPC operates only at the instance of the pendente lite purchaser who comes to know of the pendency of the suit. But that is no insurance in a situation where his

right goes undefended in a cause. Is there not, therefore, a manifest procedural unfairness in Order XXI Rule 102 CPC?

29. It is hence necessary that the procedural law is shown its place as a hand maid of justice in order it subserves the cause of justice as dictated by the substantive law, and not to subvert it. To let the procedure and its understanding pegged to a pole of antiquated past, far distanced from the contemporary challenges will make the legal system irrelevant to our society. It breeds a category of litigations resisting the divestiture of right which the procedure law cannot restrict. It is therefore, time, that the Law Commission, or the Parliament, or/and High Court (empowered to make appropriate Rules under Sec.122 CPC), appreciated and addressed the issue within the sphere of their respective powers.

Direction to the District Judiciary

30. There are two significant aspects which the Hon'ble Supreme Court has spotlighted: First, in Ashok Kumar case, [(2010)14 SCC 370] while expressing its concern for a pendente lite transferee exposed to the vagaries of a litigation which he was not aware of, it also recorded the helplessness of law as it now stands in addressing his predicament; Second in the Amit Kumar Shaw case, it recognised the discretionary power vested in the Courts to implead a pendente lite transferee, no matter it might be optional for the plaintiff to do so, if the former has acquired a substantial interest and not peripheral interest in the property. Given the fact that law tends to remain pegged to a pole with its slow paced dynamics towards change, in order the predicament of an innocent pendente lite purchasers is ameliorated, it is necessary that following directions are given to all the Civil Courts that are subordinate to this Court:

- In every case, where a proceeding for passing a final decree is pending or instituted, in order that the Court helps itself with an occasion to assess if it has to exercise its power of discretion in impleading a pendente lite transferee as required by the Amit Kumar Shaw & Another Vs Farida Khatoon & another [(2005) 11 SCC 403], the party approaching the court for passing the final decree must be directed to produce an encumbrance certificate besides such particulars as may be required by the Court, whereupon the court shall decide if a pendente lite transferee should be impleaded or not.
- In all cases, Courts shall exercise their discretion to implead a pendente lite transferees consistent with the spirit of the law declared in Amit Kumar Shaw case.

These directions, if followed with discipline and purpose, may simultaneously benefit in enthrone fairness in procedure to its rightful place at least till the law makers step in, and also aid in avoiding multiplicity of multi-staged proceedings at the instance of a frustrated pendente lite transferee.

On the track to conclusion

31. Now returning to the facts of this case, ultimately, what the plaintiffs have achieved in the suit they had laid was only partial success, in that this Court has granted $\frac{1}{4}$ th share alone to the respondent in all the items of suit properties, and to this extent appellants' title necessarily gets reduced. It therefore, follows that the sale in favour of the appellants to the extent of the remainder - $\frac{3}{4}$ th share to be precise, in item 8 in the suit, remains unaffected by the preliminary decree passed. See T.K.Ravi case [(2017) 7 SCC 342].

32. The appellants surely cannot avoid losing $\frac{1}{4}$ th share of his title in the property in terms of the preliminary decree to the respondent, but as has been held in the earlier paragraphs, the right of the appellants to participate in the proceedings for passing the final decree should not have been denied to them. In Chithralekha & others Vs R. Ranganayaki & others [2017 (1) MWN (Civil) 727 (DB)], this court has permitted a purchaser pendente lite to participate in the final-decree proceeding, but then that was a case where the purchaser at least knew about the pendency of some proceedings or passing of a preliminary decree in which the property he had purchased was involved.

33. Ideally, the appellants, with no right in them to question the preliminary decree passed in favour of the respondent, should have approached the court which passed the final decree to hear them on the issue of equitable division, if at all they have a grievance there. But they did not do it. Can an Execution Court hold that the final decree passed is non-binding on the appellants and hence delivery to the decree holder should be denied? This relates to the scope of enquiry contemplated under Order XXI Rule 101 CPC.

34. While Order XXI Rule 101 CPC (which is available in paragraph 7.1 above), though appears to grant wide powers to the Execution Court to decide 'all questions arising between the parties', which may seemingly include questions relating to the right, title, or interest in the property, yet the exercise of the said power is circumscribed by a limiting phrase 'relevant to the adjudication of the application'. The object behind the enquiry is for considering if the obstructor must be removed from possession, and whether delivery to the decree holder be

given under Order XXI Rule 97 CPC, even if the application has been filed by a third party-obstructor for recoding obstruction. Therefore, the validity of the decree sought to be executed has to be kept as a constant, and necessarily, only those rights other than those affected by the decree alone merit consideration in an enquiry under Order XXI Rule 101 read with Rule 98 CPC. After all, an Execution Court cannot go behind the decree. Hence, delivery of the property cannot be stopped by this Court on the ground that the appellants are not parties to the proceedings for passing the final decree. As already indicated, if at all the appellants feel aggrieved by the final decree passed, they should have agitated it only before the Court which passed the final decree and not before the Execution court.

35. Turning to the next question, if the appellants have any title to resist delivery other than one that was directly affected by the final decree, *de hors* their sale deed they have obtained *pendente lite*, appellants contend that they are successors-in interest to the right of cultivating tenancy of their father. Now, the questions if Mohanalingam was a cultivating tenant, and if the appellants have succeeded to it are questions of fact, neither of the Courts below have chosen to consider the point. Here, supporting their allegations in the affidavit, the appellants have produced Ext.P-10, a copy of the judgment in O.S.145 of 1971. (The difference between title of a owner and that of a lessee is already discussed in earlier paragraphs, and hence it is not re-visited.)

36. O.S.145 of 1971 was a suit filed by a certain Marimuthu Gramani against appellants' father Mohanalingam for a bare injunction, alleging that the former was a Cultivating Tenant of the property. Mohanalingam on his part defended the suit on the ground that he was the cultivating tenant. This suit came to be dismissed. *Prima facie*, Ext.P-10 judgment may not bind the respondents herein, as they are not parties to the same, but it is certainly a relevant evidence under Sec.11 and 13 of the Evidence Act.

37. Whether the property in question continues to be cultivable/agricultural property and if Mohanalingam continued to be a cultivating tenant till his death for his tenancy-right to devolve on the appellants, and if it has merged with their right as a lessor with regard to $\frac{1}{4}$ th share are all questions of fact, which the Courts below ought to investigate and pronounce their findings. Necessarily, the case has to be remanded back to the Execution court for it to undertake that endeavour. This will have a bearing since the Execution Court will now be required to decide if it has to deliver physical possession or symbolic possession of the property. Here, the

appellants are cautioned that any attempt to project a case of cultivating tenancy if the property has lost its character as a cultivable or an agricultural property will amount to an abuse of judicial process in delaying and defeating the rights of the respondents. Hence, as they go to play another innings on the point before the Execution Court, it is necessary for them to go with this underlying caution.

38. In the result, this appeal is allowed and orders passed in C.M.A.No.12 of 2017 by the Subordinate Court, Kanchipuram and in E.A.No.52 of 2013 in E.P.No.24 of 2009 in O.S.No.71 of 1976 by the District Munsif cum Judicial Magistrate Court, Sriperumbudur, are set aside, and the case is remanded back to the Execution Court, which is now required to consider whether the appellants are cultivating tenants within the meaning of Tamil Nadu Cultivating Tenants (Protection) Act, 1955. Before commencing its proceedings, the Execution Court is directed to explore possibilities of an amicable settlement between the parties within the meaning of Sec.89 CPC, in order that parties could avoid all their differences, more particularly on the point of line demarcating the respondent's share from appellants' share, if any, in the metes and bounds division of the property in the final decree, within the frame work of law. The entire exercise is directed to be completed and the matter is directed to be disposed of within 90 days excluding the Christmas holidays, 2018, and Pongal holidays, 2019. Parties are directed to appear before the Execution Court on 22-11-2018. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

ds

Note : The Registry is required to (a) circulate this judgment to all the Courts subordinate to the High Court, and (b) place it before the High Court Rule Committee, after obtaining necessary orders from the Hon'ble the Chief Justice.

Index : Yes / No

Speaking order / Non-speaking order

To:

1. The Subordinate Judge
Kanchipuram.

<https://hcservices.ecourts.gov.in/hcservices/>

2.The District Munsif cum Judicial Magistrate
Sriperumbudur.

Copy to :

1.The Registrar Judicial, High Court , Chennai. 104

2.The Registrar Judicial,
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4.The Deputy Registrar (Judicial)
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Judicial Department,
Madurai Bench of Madras High Court ,Madurai.

7. The section officer,
F Section,
High court,Madras

+5ccs to Mr.R.Balachandran , Advocate SR.No. 76691

+1cc to Mr.V.Raghavachari , Advocate SR.No. 76646

C.M.S.A.No.16 of 2018

A.SK(19/03/2019)



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