



S.A.No.648 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.10.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.648 of 2019

Shakila Banu

...Appellant

Vs

1.Kathija Bi

2.Sheik Bash

3.Murthuja

4.Sharmila

5.Reshma

(Respondents 2 to 5 were represented
in the Courts below by their power agent
the 1st respondent/1st plaintiff)

... Respondents

Prayer: Second Appeal is filed under Section 100 of C.P.C against the Judgement and Decree dated 21.12.2018 passed by the Subordinate Court, at Kallakurichi in A.S.No.14 of 2014 confirming the judgment and decree dated 10.09.2015 passed by the III Additional District Munsif Court at Kallakurichi in O.S.No.139 of 2007.



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For Appellant : Mr.Sharath Chandran

For Respondents : R1, R4 & R5 - Served - No
Appearance

R2 & R3 Not Ready in Notice.

JUDGMENT

The unsuccessful defendant in the Courts below is the appellant before this Court. The above second appeal gives rise to an interesting question of law as to "Whether *lis pendens* would apply in respect of a transaction that has taken place during the pendency of a suit before a Court that did not have jurisdiction to consider the *lis*?"

2. The second appeal no doubt has been admitted on the following substantial questions of law:

"i) In the light of the Division Bench of the Kerala High Court in Govinda Pillai v. Aiyyappan Krishnan, AIR 1957 Ker 10, whether the courts below have committed a manifest error in applying the principle of lis pendens to transactions that took place during the pendency of



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O.S.No.600 of 1985 which was admittedly returned by the Court below in 1990 for want of jurisdiction?

ii) Whether the application of the principle of lis pendens to a proceeding in a court without jurisdiction is illegal and contrary to the explanation appended to Section 52 of the Transfer of Property Act, 1882?

iii) In the absence of any challenge to the sale deed in favour of the appellant or her predecessor's in title, whether the suit, as framed, was maintainable?

iv) Whether the Courts below have committed a manifest error in assuming, without any legal basis, that the judgment in O.S.No.33 of 1996 would bind the appellant and her predecessor's in title even though none of them were parties to that proceeding?

v) Whether the courts below have patently erred in granting relief to the respondents overlooking the fact that the registered instruments executed in favour of the



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appellant and her predecessor's have not been set aside in any legal proceeding till date?"

3. The second appeal arises from out of the suit O.S.No.139 of 2007 filed before the III Additional District Munsif, Kallakurichi. It is necessary to allude to the facts which has culminated in the filing of the second appeal and the parties in the course of the discussion are referred to in the same ranking as they were before the Courts below.

4. The reliefs sought for in the plaint translated from the vernacular are as follows:

- a) To declare the plaintiff's title to the suit schedule property.*
- b) To recover possession of the property through Court.*
- c) To direct the defendant to pay damages from the date of the suit till the date of handing over the*



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possession.

5. Subject matter of the suit:

Vacant site measuring 107 sq.ft. East-West and 87 ft. North-South in Natham Survey No.70/1A, syed khulam Street, Thyagadurugam village of Kallakurichi, bounded on ;

West by : Arumugham Pillai's site;

East by : Syed Khulam Street;

South by : Syed Babu's Vacant site;

North by : Rahim's Vacant site.

6. Plaintiffs case:

The plaintiffs would contend that the 1st plaintiff and her sister Kujur bi, mother of the plaintiffs 2 to 5 had instituted a suit in O.S.No.600 of 1985 on the file of the District Munsif Court, Kallakurichi for declaration and recovery of possession against one Badhusha sherif and others. The plaint was thereafter returned to be represented before the proper Forum. The



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plaint was presented before the Sub-Court, Viruthachalam and renumbered as O.S.No.203 of 1990. After the bifurcation of the District and formation of the Sub-Court, Kallakurichi the suit was transferred to Sub-Court, Kallakurichi and renumbered as O.S.No.33 of 1996. On 28.09.2001, the suit was decreed in respect of an extent of 38 ½ feet on the west, 39 feet on the East, 40 feet on the north and 53 feet on the south which is the present suit property. On 28.10.2004, the plaintiffs had taken possession through Court and had planted survey stone on four corners and raised a fence with granite stones up to the ground level. Kajur bi died intestate and leaving behind her surviving plaintiffs 2 to 5 who succeeded to her estate including the suit property. The defendant was attempting to trespass into the property and therefore, the plaintiffs had issued a legal notice dated 16.08.2006 putting him on notice about their possession and threatening legal action. To this, a reply dated 21.08.2001, was received which contained absolutely false details. In the reply, the defendant had contended that no delivery of the suit property was taken and further the property in O.S.No.33 of 1996 does not relate to the suit property. That apart, they had contended that the



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defendant and her predecessors in title have acquired title by prescription.

The defendant would trace her title to one Ghudu Sherif who had sold the property to Mehrunnisa under sale deed dated 22.01.1987. The above said Ghudu Sherif was arrayed as 3rd defendant in the suit O.S.No.33 of 1996. Therefore, it was the contention of the plaintiffs that the sale in favour of Mehrunnisa is hit by *lis pendens*. The defendant had trespassed into the suit property and put up constructions on the foundation put up by the plaintiffs and therefore the suit.

7. Written Statement of the Defendant:

The defendant had filed written statement inter-alia contending that the decree in the earlier suit is an exparte one. She had further contended that she and prior to her, her predecessor in title have been in continuous possession of the property for over two decades. The defendant had spent more than a sum of Rs.5,00,000/- and put up a construction thereon. The allegation contained in the plaint are totally false and the plaintiff had no right over the suit property and was never in possession of the same.

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8. Trial Court:

The learned District Munsif had framed the following issues which when translated would read as follows:

- i) Whether the plaintiffs are entitled to a declaration that they are the owners of the suit property?*
- ii) Whether the plaintiffs are entitled to claim recovery of possession in respect of all the constructions put up on the suit property?*
- iii) What is the relief that the plaintiff is entitled to?*

9. These issues were thereafter re-cast on 20.11.2013 (the date of the judgment) as follows:

- i) Whether the plaintiff is entitled to the relief claimed to?*
- ii) What is the other relief that the plaintiff is entitled to?*

The 4th plaintiff Sharmila was examined as PW1 and marked Exs.A1 to A5. The defendant had examined herself as DW1 and one Hyder Sahib and Govindan were examined as DW2 and DW3 respectively and marked Exs.B1 to B20.



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10. The learned District Munsif on considering the evidence on record had decreed the suit as prayed for.

11. Lower Appellate Court:

Challenging the aforesaid judgment and decree, the defendant had filed A.S.No.14 of 2014 on the file of the Sub-Court, Kallakurichi. The Appellate Court had simply confirmed the judgment and decree of the trial Court without independently considering the grounds of appeal and thereby dismissing the appeal.

12. Second Appeal:

Therefore, aggrieved by the same, the defendant has filed this second appeal and the same has been admitted on the substantial questions of law which in extenso has been set out in paragraph No.1 supra.

13. The respondents / plaintiffs though served have not entered appearance either in person or through counsel.

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14. Submissions:

Mr.Sharath Chandran, learned counsel appearing on behalf of the defendant/appellant would submit that before the suit O.S.No.600 of 1985 was returned for presentation before the proper Court and renumbered as O.S.No.203 of 1990 on the file of the Sub Court, Viruthachalam, the sale in favour of the plaintiffs' vendor Mehrunnisa had taken place on 22.01.1987. However, Mehrunnisa was not impleaded as party to the proceedings after the suit was re-presented in the Sub-Court, Viruthachalam. Therefore, the defendant/appellant is now before this Court on a pure question of law as to whether the sale in favour of Mehrunnisa would be hit by the doctrine of *lis pendens* especially when the sale had taken place when the suit in question was pending before the Court which lacked jurisdiction and was not competent to try the same.

15. The learned counsel would show the distinction to the provision of Section 52 as it stood originally and after it was amended in the year 1929 where in the explanation to Section 52, the term "*competent jurisdiction*"

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has been inserted. He would further draw the attention of the Court to the contents of paragraph No.4 of the plaint, wherein, the plaintiffs had stated as to why the sale in favour of Mehrunnisa would hit by *lis-pendens* as follows:

"It is relevant to note that the defendant traces title to the suit property through one Ghudu Sherif who sold the suit property to Mehrunnisa, under the sale deed dated 22.1.1987. The aforesaid Sheriff Saheb was the third defendant to the suit in O.S.33/96, which was originally instituted on 29.7.1985. Hence the sale deed by Ghudu Sheriff in favour of Mehrunnisa, after the institution of the suit is clearly hit by lis pendens. As a result, the decree which is binding on Ghudu Sheriff, is also binding on his successors-in-interest. Viz., Mehrunnisa, Selvi and the defendant. Hence the claim of the defendant through Ghudu Sherif is unsustainable and is barred by resjudicata. The defendant has no better title than Ghudu



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Sheriff."

16. He would further argue that the order passed by this Court in C.M.A.No.2400 of 2015 arising out of a very same suit has been misconstrued by the Courts below.

17. He would draw the attention of this Court to the provisions of Section 52 as it originally stood and as it now stands after the amendment in 1929 and would explicate this distinction by quoting the judgment reported in *ILR(1918) 41 Mad 510* in the case of *Sitaramaswami Vs. D.Lakshmi Narasimha and Another*, which was a judgment prior to the amendment. The Court held that when a plaint is returned for presentation to a proper Court and there is any devolution of interest in the interregnum the same should be held to be a *pendente lite* sale.

18. He thereafter relied upon the judgment reported in the case of *Ma Than Vs. Maung Ba Gyan* reported in *AIR 1927 Rangoon 145* which was also under the old regime, where the learned Judge has stated as follows:

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"From the commencement, the plaintiff in the words of S.52 was engaged in "actively prosecuting" her suit. I am of the opinion that even if a person actively prosecutes a suit in a Court which from defect of jurisdiction is an inappropriate tribunal, yet such active prosecution is contemplated by the section under regard."

19. He would thereafter rely upon the judgment in ***Karusinga Kushansing Vs. Narasinha Rangrao Patil*** reported in ***AIR 1938 Bombay 121*** which had been pronounced after the amendment of the said Act and after the explanation had been added there to. In the said judgment, the Hon'ble Judges have held that the doctrine of *lis pendens* would not apply in the case of the suit pending in the Court having no jurisdiction. Similar view has been taken in the judgment in the case of ***Nathusingh Ratansingh Vs. Anandrao Laxmanrao Kunbi*** reported in ***AIR 1940 Nagpur 185*** and ***Govinda Pillai Vs. Aiyyappan Krishnan*** reported in ***AIR 1957 Kerala 10***. He would also rely upon the judgment in the case of ***Exl Careers and***



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another v. Frankfinn Aviation Services Private Limited reported in (2020)

12 SCC 667, in support of the arguments that the re-presentation of the plaint before the Sub-Court, Viruthachalam and its registration as O.S.No.203 of 1990 has to be considered only afresh and not a continuation of the earlier suit.

20. Discussion:

The dictionary meaning of the term *lis pendens* is "*pending legal action*". In Black's Law Dictionary *lis pendens* has been defined as follows: "*1. A pending law suit, 2. The jurisdiction, power, or control acquired by a Court over property while a legal action is pending*". Section 52 of the Transfer of Property Act, as it originally stood is extracted herein below:

"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



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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."

21. This Section was later amended by Act 20 of 1929, wherein, the words "*pendency*" was substituted for the word "*active prosecution*" and the words "*any suit or proceeding which is not collusive*" for the words "*contentious suit or proceeding*". The amended Section also had an explanation added to it. The Section as amended and its explanation is extracted herein below:

"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



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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 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."



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22. Therefore, with the insertion of the explanation, it is clarified that in order to consider a transaction to be *lis pendens*, the proceedings should be one instituted in a Court of competent jurisdiction which would mean that in the case of a suit which has been instituted in a Court not having competent jurisdiction and the transaction had taken place while the said suit was pending before the said Court which had no jurisdiction, then such a transaction would not tantamount to *lis pendens*. This distinction can be tested by considering the judgment of this Court reported in ***ILR (1918) 41 Mad 510***, where, the Division Bench of this Court was considering Section 52 of the Transfer of Property Act prior to its amendment. The Bench had observed as follows:

"As at present advised we are inclined to think that when a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court."



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23. After the amendment of Section 52 by Act 20 of 1929, the judgment in the case of ***Nathusingh Ratansingh Vs. Anandrao Laxmanrao Kunbi*** reported in ***AIR 1940 Nagpur 185*** was pronounced, where the Court was considering a mortgage created when the suit was pending before the Court which did not have jurisdiction to try the same. The learned Judge ultimately held as follows:

"It has been contended that the doctrine of lis pendens, as enunciated in S.52, T.P.Act, applies. The mortgage was executed after S.52 was amended by the Transfer of Property (Amendment) Act, 20 of 1929. The only order that was made in the proceedings pending at the time when the mortgage was executed was an order that the plaint should be returned for presentation in a proper Court. The suit in which the decree for partition was passed was not instituted until after the mortgage was executed, and therefore the doctrine of lis pendens cannot apply. The



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appeal therefore fails and is dismissed with costs.

Counsel's fee Rs.60. (Leave to appeal was refused.)"

24. A more detailed discussion on the above subject is available from a perusal of the judgment of the Division Bench of Kerala High Court in the case of ***Govinda Pillai Vs. Aiyyappan Krishnan*** reported in ***AIR 1957 Kerala 10***, wherein, the Division Bench was considering whether the gift deed executed pending the suit would be affected by rule of *lis pendens*. The doctrine of *lis pendens* was explained in detail as follows:

"5....."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).

6. The basis of the doctrine is given as follows in the said volume:



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"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, of 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



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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 over-reaching 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 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 bona 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



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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).

25. Thereafter, the learned Judges, relied upon and discussed the judgment in ***AIR 1927 Rangoon 145*** (which has been discussed supra) and brought out the difference in the Section as it stood before the amendment and post amendment as follows:

"12. Whatever may be the correctness of the decision on the basis of S.52 before the amendments effected by Act



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20 of 1929 it cannot be considered as a correct interpretation of the section as it stands today. In Gowri Dutt v. Shanker AIR 1933 Sind 117 Rupchand, A.J.C., said: "The legislature has thought fit to amend the provisions of S.52, T.P. Act, by Act 20 of 1929, two years after the case in AIR 1927 Rang. 145 was decided to make it abundantly clear that the pendency of the suit or proceedings for the purpose of the doctrine of lis pendens shall be deemed to commence from the date of presentation of the plaint or the institution of the proceedings in the Court of competent jurisdiction. The Rangoon case is therefore no longer good law" and added:

"If a suit remains a suit though a Court cannot entertain it for want of jurisdiction and has to return the plaint to the Court in which the suit should have been presented, as held in the Rangoon case, the provisions of S.14 (The Indian Limitation Act, 1908), so far as they



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provide for extending the period of limitation in such cases would be redundant. But this is not so. In a number of rulings it has been held that where the suit had been instituted in a wrong court and the plaint has been ordered to be returned, the period of limitation does not commence from the date when the plaint was first presented but from the date when it was subsequently presented in the proper Court, although it is open to the plaintiff to rely upon the provisions of S.14 to claim exemption for the time during which he was prosecuting with due diligence and in good faith his first suit."

"(14) We take the view that Section 52 of the Transfer of Property Act, 1882, as it stands today embodies a correct version of the rule of lis pendens and that is is that rule that should be applied in this case. If the said rule is applied there can be no doubt that there was no suit pending in a court of competent jurisdiction prior to



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29.11.1095 and that Ext.I dated 3.6.1095 should hence be held as not vitiated by the rule of lis pendens."

26. This judgment brought out the doctrine of *lis pendens* by comparing it to the Section as it stood prior to the amendment and as it now stands. In the instant case, the suit O.S.No.139 of 2007 was filed before the District Munsif, Kallakurichi which was not the competent Court on 29.07.1985. Thereafter, the plaint was returned and re-presented before the Sub-Court, Viruthachalam and numbered as O.S.No.203 of 1990. The sale in favour of the appellant's predecessor in title took place on 22.01.1987 when the suit was pending before the Court of incompetent jurisdiction. Therefore, applying the provisions of Section 52 read with its Explanations and relying upon the judgments reported in ***AIR 1938 Bombay 121*** and ***AIR 1957 Kerala 10***, the sale is definitely not hit by doctrine of *lis pendens*. Therefore, the suit for declaration and recovery of possession filed based on the doctrine of *lis pendens* has to necessarily be dismissed.



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27. In the result, this Second Appeal is allowed and the Judgement and Decree dated 21.12.2018 passed by the Subordinate Court, at Kallakurichi in A.S.No.14 of 2014 confirming the judgment and decree dated 10.09.2015 passed by the III Additional District Munsif Court at Kallakurichi in O.S.No.139 of 2007 is set aside. There shall be no order as to costs.

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Index : Yes/No
Speaking order/non-speaking order
ssn

To

1. The Subordinate Court,
Kallakurichi.
2. The III Additional District Munsif Court,
Kallakurichi.
3. The Section Officer,
V.R.Section,
High Court, Madras.

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