

Form No: HCJD/C.
JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No.1188 of 2014.

Muhammad Zahid Aslam

Vs.

Haji Dilbagh & seven (7) others.

Petitioner's by: Raja Abid Hussain Janjua, Advocate

***Respondents by: M/s Ch. Zubair Mehmood Gujjar &
Abdul Kamran Butt, Advocates.***

Date of hearing: 12.05.2015.

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AAMER FAROOQ, J.- Brief facts giving rise to the instant constitutional petition are that respondent No.1 filed a suit for preemption against respondent No.5 on 21.11.2003 with respect to property measuring 5-Kanals 10-Marlas falling in Khasra Nos.484, 459, 77, 78, 79, 150, 37, 1290-45, 1288-41, 1289-41, 1293-42-1, 38, 39, 1286-40, 1291-42, 1287-40, 1266-148, 1269-157, 478 and 1256-147 situated in Revenue Estate of Pagah, Islamabad (the **Property**). In the referred suit on 22.11.2003, interim injunction was allowed to respondent No.1 which was confirmed on 07.10.2005. On 21.11.2004, respondent No.5 sold 5-Kanals of land out of the above mentioned property to the petitioner. The suit filed by respondent No.1 was decreed in his favour vide judgement & decree dated 23.12.2010. During the course of trial the right of

respondent No.5 to lead evidence was closed under Order XVII Rule 3 Code of Civil Procedure, 1908 (CPC) on 27.04.2010. Respondent No.5 filed civil revision against the referred order which was accepted and an opportunity was allowed to respondent No.5 to lead evidence, however, despite the same no evidence was lead and the right was closed again on 06.12.2010. The petitioner filed an application for setting aside judgement & decree dated 25.04.2011. The said application was dismissed by the Trial Court i.e. respondent No.3 vide order dated 26.03.2013. The revision, filed by the petitioner was dismissed by respondent No.2 vide judgement dated 31.01.2014 which has been assailed in the instant constitutional petition.

02. The learned counsel for the petitioner, inter alia, submitted that the petitioner is a bonafide purchaser for valuing without notice and the property in question has been purchased by him without notice of litigation pending in the Civil Court. It was further contended that the application filed by the petitioner was under section 12(2) CPC, therefore, it was incumbent upon the Trial Court to frame issues in the matter and lead evidence regarding the fact that respondent No.1 misrepresented the Court; the petitioner was a necessary party and the judgement and decree is of no effect as the same has been passed in his absence. In support of his contentions learned counsel placed reliance on cases titled “Allah Ditta vs. Ahmed Ali Shah and others” reported as **(2003 SCMR 1202)**, “Muhammad Nawaz Khan vs. Muhammad Khan and two others” **(2002 SCMR 2003)**, “Sunni View Cooperative Housing Society vs. Irshad Hussain and others” **(1993 CLC 2336)**, “Muhammad Rauf Khan vs. Muhammad Ashraf & others ” **(2010**

YLR 2178) and “Mrs. Anis Haider and others vs. S. Amir Haider and others” (*2008 SCMR 236*).

03. The learned counsel for the respondent No.1, inter alia, submitted that in the present case Section 52 of the Transfer of Property Act, 1882 shall apply whereby under the principle of **lis pendens** petitioner acquired title in the property subject to litigation pending between respondents No.1 & 5. It was further contended that it is not essential that in every case the Trial Court has to frame issues when application under section 12(2) CPC is filed. Learned counsel also submitted that the petitioner was not a necessary party in the proceedings.

04. Admittedly, the petitioner purchased 5-Kanals of land out of the suit property during pendency of the above mentioned suit between respondents No.1 & 5 and also while an injunctive order was in field. Nothing is evident from record or the allegations made in the application that any fraud or mis-representation was committed and the judgement and decree was obtained by respondent No.1 through concealment of facts. Therefore, in the circumstances it was not essential for the Trial Court to frame issues for leading evidence. In case titled “Muhammad Akram Malik vs. Dr. Ghulam Rabbani & others” (*PLD 2006 SC 773*), the Hon’ble Supreme Court of Pakistan observed that there is no cavil with the proposition that an application preferred under section 12(2) CPC could have been summarily dismissed if it is without any substances but generally where misrepresentation and fraud has been alleged and prima facie case is made out in such an eventuality an application should not be dismissed summarily and without recording evidence.

05. Under section 52 of the Transfer of Property Act, 1882 where a property is purchased during the course of any litigation, with respect to the property then, purchaser acquires title subject to the result of litigation. The referred section is reproduced for the sake of brevity and is as follows:

"52. Transfer of property pending suit relating thereto. During the '2[pendency] in any Court having authority in ','[Pakistan], or established beyond the limits of [Pakistan] by "[the [Federal Government,'s* * *, "[any] suit or proceeding '8[which is not collusive and] in which any right to immovable property is directly and specifically in question, the property cannot be transferred to otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

'9[Explanation.--For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction of 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.]

In the present case Section 52 *ibid* is applicable as the property was purchased during the course of proceedings in the suit filed by respondent No.1 against respondent No.5. Therefore, the property purchased by the petitioner is subject to **lis pendens**. In case titled “Khadim Hussain vs. Abid Hussain & others” (*PLD 2009 SC 419*), the Hon’ble Supreme Court of Pakistan observed as follows:

19. We may observe here that filing of an application, to

restrain the appellant from selling the property and passing order on the same, had no bearing on the proceedings, because during pendency of the suit for possession, filed by the respondents, the parties rights shall be governed under section 52 of the Transfer of Property Act, 1882. As per the implication of this section, during the pendency of the suit, property cannot be disposed of and if some one opts to do so, he shall be responsible for such deeds. In addition to it, if a transaction of sale had taken place after the institution of the suit, the rights of the decree holder shall be protected, therefore, the arguments so raised by the learned counsel has not advanced his case in any manner.

In “Mohammad Ashraf Butt vs. Mohammad Asif Bhatti” (PLD 2011 SC 909) the Hon’ble Supreme Court of Pakistan clinched the law on the subject and held as follows:

“The aforesaid section manifestly embodies the rule of lis pendens, which is available both in equity and at the common law. The rule and the section is founded upon the maxim "pendente lite nihil innovetur", which means that pending litigation, nothing should be changed or introduced. The virtual and true object of lis pendens is to protect and safeguard the parties to the suit and their rights and interest in the immovable suit property against any alienation made by either of the parties, of that property, during the pendency of the suit in favour of a third person. The rule unambiguously prescribes that the rights of the party to the suit, who ultimately succeed in the matter are not affected in any manner whatsoever on account of the alienation, and the transferee of the property shall acquire the title to the property subject to the final outcome of the lis. Thus, the transferee of the suit property, even the purchaser for value; without notice of the pendency of suit, who in the ordinary judicial parlance is known as a bona fide purchasers in view of the rule/doctrine of lis pendens shall be bound by the result of the suit stricto sensu in all respects, as his transferor would be bound. The transferee therefore does not acquire any legal title free from the clog of his unsuccessful transferor, in whose shoes he steps in for all intents and purposes and has to swim and sink with his

predecessor in interest. The rule of lis pendens is founded upon the principle that it would be impossible that any action or suit could be brought to a successful termination if the alienations pendente lite are permitted to prevail, and the subsequent transferee is allowed to set out his own independent case, even of being the bona fide transferee against the succeeding party of the matter and ask for the commencement of de novo proceedings so as to defeat the claim which has been settled by a final judicial verdict. The foundation of the doctrine is not rested upon notice, actual or constructive, it only rest on necessity and expediency, that is, the necessity of final adjudication (Emphasis supplied) that neither party to the litigation should alienate the property so as to effect the rights of his opponent. If that was not so, there would be no end to litigation and the justice would be defeated. In support of the above, reliance is placed upon Messrs Aman Enterprises v. Messrs Rahim Industries Ltd. and another (PLD 1993 SC 292), Muhammad Nawaz Khan v. Muhammad Khan and 2 others (2002 SCMR 2003). Besides, in West Virginia Pulp and Paper Co. v. Cooper, 106 S.E. 55, 60, 87 W.Va. 781, it has been held "the doctrine of "lis pendens" is that one who purchases from a party pending suit a part or the whole of the subject-matter involved in the litigation takes it subject to the final disposition of the cause and is bound by the decision that may be entered against the party from whom he derived title.

In Tilton v. Cofield, 93 U. S. 168, 23 L.Ed. 858, the view set out is "the doctrine of lis pendens is that real property, when it has been put in litigation by a suit in equity, in which it is specifically described, will, if the suit is prosecuted with vigilance, be bound by the final decree, notwithstanding any intermediate alienation; and one who intermeddles with property in litigation does so at his peril, ,and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party from the outset.

In Simla Banking Industrial Co. Ltd. v. Firm Luddar Mal (AIR 1959 Punj 490), it has been prescribed:--

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

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

In Story's Equity Jurisprudence Vol. I, 5.406 the doctrine has been expounded in the terms following:--

Ordinarily, it is true, that the decree of a court binds only the parties and their privies in representation of estate. But he who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title Where there is a real and fair purchase, without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, pendente lite, nihil innovetur; the affect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them.

However, the application of the section and the doctrine is circumscribed by certain conditions: (1) the suit must be relating to a specific immovable property in which any rights of the parties are directly and specifically in question (2) the suit should be pending at the time when the alienation in favour of the third person has been made (3) neither the suit itself nor the outcome thereof must be collusive, fraudulent and/or is meant to entrap, deceive, and defraud an innocent transferee specially a bona fide purchaser."

In “Mohammad Iqbal & others vs. Khair Din & others” (2014 SCMR 33) the Hon’ble Supreme Court observed as follows:

“14. The essential ingredients for invoking section 41 ibid can be described as (1) that the transferor was the ostensible owner, (2) that the transfer was made by consent of the real owner, (3) that such transfer was for a consideration, and (4) that the transferee while acting in good faith had taken reasonable care before entering into the transaction.”

The petitioner in application for setting aside judgement and decree has alleged that he is a bona fide purchaser for value without notice but has not given any detail of the amount of consideration or any effort taken by him to check that no litigation was pending with respect to the property. Even otherwise in light of law laid down by the Apex Court in PLD 2011 SC 909 supra wherein it was held that transferee of the property which is subject matter of litigation shall swim or sink with his predecessor even if he is a bona fide purchaser for value without notice. There is also no allegation on part of the petitioner that the judgement and decree in favour of respondent No.1 was collusive and was obtained to deprive the petitioner of his property. The conditions laid down by the Hon’ble Supreme Court in **PLD 2011 SC 909** which circumscribe the doctrine of **lis pendens** are not attracted in the present case.

A subsequent vendee in the preemption suit is not a necessary party and for the referred principle reliance placed on **2004 YLR 466** and **1981 CLC 129**. In “Khalid Mehmood vs. Najeeb Khan” (**2004 YLR 466**) the Supreme Court of Azad Jammu & Kashmir observed that subsequent vendee in a suit for

preemption is not a necessary party.

06. The order passed in revisional jurisdiction can be assailed in the constitutional jurisdiction, if the same is without jurisdiction or there is patent illegality in the same. In the present case there is nothing on record that the order passed by respondent No.2 is without jurisdiction or otherwise suffers from legal infirmity.

07. In view of above, the present constitutional petition is without merit and is hereby dismissed.

(AAMER FAROOQ)
JUDGE

Altaf Malik

Approved For Reporting