

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Pronounced on: April 16, 2014*

+ **CM(M) No.493/2012 & C.M. No.7470/2012**

OMESH MISHRA MEMORIAL CHARITABLE TRUST

.... Petitioner

Through Mr.Sanjiv Bansal, Adv.

versus

SRIRAM HOUSING FINANCE & INVESTMENT INDIA LTD &
ORS

..... Respondents

Through Mr.Ravi Gupta, Sr. Adv. with
Mr.Naresh Gupta and Mr.Ankit Jain,
Adv. for R-1.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the abovementioned petition under Article 227 of the Constitution of India in order to invoke the jurisdiction of this Court against the order dated 13th January, 2012 passed in Execution No.46/06, titled as *Sh.N.D.Mishra vs. Ms.Nisha Chauhan*, whereby the Executing Court while entertaining the objections filed under Order 21 Rules 97 to 101 CPC framed the issues and issued the directions to the parties to lead their evidence on those issues.

2. The submission of the learned counsel appearing on behalf of the petitioner/decreed holder is that the issues as framed by the Executing Court are beyond the scope of judgment and decree dated 1st February, 2003 which is sought to be executed. The adjudication of the title of the decree-holder at

the instance of a transferee pendent lite would be beyond the scope of decree already passed in which the Executing Court cannot travel beyond the decree. All the issues framed in the execution have already been determined by the various courts from time to time. Fresh trial in the matter is not called for even when as per settled law the objections filed by the respondent are not maintainable. The impugned order is not legally correct and is liable to be set-aside as the learned trial court has failed to appreciate the facts and law and particularly the judgments rendered by the Supreme Court on the issue involved in the present matter.

3. Brief facts are that one Sh.N.D.Mishra was the owner of the property in dispute bearing No.27, Ishwar Nagar, New Delhi. The completion certificate was issued in his name by the competent authority on 8th July, 1988. On 24th August, 1995, leasehold rights were converted into freehold and a conveyance deed came to be executed in his favour. The property in question was self-acquired property. Sh.N.D.Mishra who had a family of his wife, son Mr.Yogesh Mishra and three married daughters. Mr.Omesh Mishra, his another son had expired and in his memory a Public Charitable Trust was created by his wife Smt. Raj Mishra with the name and style of “OMESH MISHRA MEMORIAL CHARITABLE TRUST” in January, 1992.

4. Sh.N.D.Mishra being the lawful owner of the property in October, 1986 had inducted a tenant Ms.Nisha Chauhan at the monthly lease rent of Rs.7000/-.

5. After the expiry of the lease as the tenant failed to vacate the suit property, Sh.N.D.Mishra had filed a suit for possession against the tenant, i.e. Ms.Nisha Chauhan being Civil Suit No.181/94. He was also examined

as PW-1 in the said suit, however, during the pendency of the suit, he expired on 27th May, 1998. After his death, an application was filed on 13th August, 1998 by his legal heirs under Order 22 Rule 3 CPC seeking substitution in his place. The said application was allowed by order dated 13th August, 1998. His wife Mrs.Raj Mishra, Mr.Yogesh Mishra (son), Mrs.Dheera Sharma, Mrs.Neena Bhardwaj and Mrs.Meena Sharma, all three daughters, are brought on record as being legal heirs.

6. As per pleadings of the trial Court, it appears that in August, 1992 he executed a will on 29th August, 1992 bequeathing the property in question in favour of the Trust created by his wife in the name of son i.e. Omesh Mishra Memorial Charitable Trust. A perusal of the said Will executed by him reveals that Sh.N.D.Mishra had enlisted various properties owned by him and had further stated that he had already spent huge amount upon his son Mr.Yogesh Mishra, including purchasing of a plot and construction of a house for him at Jalandhar and therefore, he was now excluding his son Mr.Yogesh Mishra from inheriting any of his properties. It was further stated that after his death, the property in dispute shall vest in the Trust created by his wife. Two trustees shall arrange to sell the house 75% of the sale proceeds shall be kept by the Trust, whereas the remaining 25% of the sale proceeds shall be equally apportioned between the three daughters.

7. In August, 1999 the petitioner-Trust filed an application in suit proceedings before the learned trial Court seeking substitution as plaintiff on the strength of a Will dated 29th August, 1992 executed by the deceased Sh.N.D.Mishra in favour of the petitioner. Legal heirs of deceased filed reply to the application in which it was stated that they were not aware about the said Will dated 29th August, 1992 in favour of the Trust and they first

came to know about the Will on 6th June, 1998 however, the factum of the Will was not disputed. They infact in their reply to the said application accepted that the petitioner-Trust had become the owner of the property. The said application was allowed by order dated 30th November, 2000. The petitioner became co-plaintiff in the suit along with the other legal heirs of the deceased.

8. After recording the evidence of the parties including the evidence of the deponent PW-4 of the Trust who appeared and proved the case, the suit for possession filed against the tenant was decreed by the judgment and decree dated 1st February, 2003 in favour of the plaintiffs. As the name of the petitioner was not incorporated in the judgment and decree subsequently decree was corrected by order dated 16th October, 2004 whereby correction with respect to the names of the parties in the decree-sheet was carried out.

9. It is apparent from the record that after the death of Sh.N.D.Mishra on 27th May, 1998 till the time suit was decreed on 1st February, 2003, Mr.Yogesh Mishra neither claimed any right nor at any stage came out with any Will alleged to have been executed by late father Sh.N.D.Mishra in his favour. However, on filing of execution by the petitioner in the Court of Civil Judge, Delhi on 9th February, 2004 claiming possession of the property on the basis of the judgment and decree dated 1st February, 2003 against tenant Ms.Nisha Chauhan, it came to the notice of the petitioner that Mr.Yogesh Mishra on the basis of the mutation entry in his favour transferred the suit property in favour of the respondent by virtue of a sale deed dated 12th April, 2004 by claiming himself as one of the decree holders and his becoming owner of the entire property on the basis of the Will. The respondent purportedly acting as agent of Mr.Yogesh Mishra took the

possession of the suit property directly from the tenant on 22nd December, 2003. The copy of the possession shows that the respondent was termed as bonafide agent/authorised agent/power of attorney holder of Mr.Yogesh Mishra. It was stated by the decree-holder before the learned trial Court that the deceased's son colluded with the respondent/objector and hatched conspiracy.

10. In the execution, the respondent/ objector filed an application under Order 21 Rule 58 CPC dated 23rd September, 2004 praying for dismissal of the execution proceedings on the ground that the objector had become owner of the suit property by virtue of the registered sale deed dated 12th April, 2004 executed by Mr.Yogesh Mishra in its favour.

11. The Executing Court by order dated 27th November, 2004 dismissed the application/objections filed by the respondent/objector under Order 21 Rule 58 CPC. The respondent/objector thereafter filed a review petition against the order dated 27th November, 2004. The said review was also dismissed by order dated 24th December, 2004 by the Executing Court.

12. The respondent/objector preferred a Civil Revision Petition bearing No.34/2008 challenging the order dated 27th November, 2004 rejecting its objections as well as the order passed in the review petition on 24th December, 2004 before this Court. The said revision petition was dismissed after hearing both parties by judgment dated 27th November, 2008. It was held that since the respondent/objector was a purchaser pendent lite, therefore, the respondent could not have instituted the objections and the only remedy available to it was to file a separate suit.

13. The respondent filed a Special Leave Petition before the Supreme Court which was also dismissed by order dated 12th January, 2009 with the

observation that since the High Court has permitted filing of a suit, therefore, the said proceedings will not be determinable issue if the suit was filed.

14. The application filed by Mr.Yogesh Mishra seeking recording of satisfaction of the decree, the same also came up before the Executing Court, who also after hearing dismissed the said application on 13th February, 2009. The Executing Court while relying upon the judgment dated 27th November, 2008 passed by this Court and held that it was the petitioner-Trust which was the decree-holder and, therefore, Mr.Yogesh Mishra who had no share in the property had no right to take the possession of the property from the judgment-debtor, i.e. Ms.Nisha Chauhan and it was also held that unilaterally he could not have deprived the decree-holder from the fruits of the decree. The said order was not challenged by Mr.Yogesh Mishra by initiating any proceedings and the same became final. The Executing Court accordingly issued the warrants of possession.

15. The respondent on 28th February, 2009 filed the suit being CS(OS) No.434/2009 for declaration and permanent injunction against the petitioner and legal representatives of late Sh.N.D.Mishra, with the prayer that the judgment dated 1st February, 2003 and the decree dated 2nd September, 2003 in Suit No.181/94 is not binding upon the respondent as the said decree is not executable and the respondent be declared as sole and absolute owner of the suit property and the petitioner shall not interfere in the peaceful possession of the property in dispute on the basis of the impugned judgment and decree. In para 24 of the plaint, the respondent/objector in its suit has stated that for and on behalf of Mr.Yogesh Mishra and under his authority, the objector had negotiated with tenant Ms.Nisha Chauhan who was in

physical possession of the suit property regarding vacation of the property. The tenant had under the said negotiation vacated the suit property and handed over the actual, physical and vacant possession of the suit property to Mr.Yogesh Mishra through its representative Mr.S.R.Pandey on 22nd December, 2003. As such, Mr.Yogesh Mishra came in actual and physical possession of the property and the tenant went out of his possession. The physical possession continued with him till the time it was handed over by him to the respondent.

16. The written statement was filed by the petitioner who denied that the respondent for and on behalf of Mr.Yogesh Mishra under his authority had negotiated with the tenant Ms.Nisha Chauhan who was in actual possession of the suit property. It was submitted that Ms.Nisha Chauhan was also roped into conspiracy to cause damage to the petitioner and the legal representatives of the deceased, as the respondent was fully aware about the pendency of the suit for possession and the proceedings against Ms.Nisha Chauhan as well as passing of a judgment and decree against her and also the Will dated 29th August, 1992 which could not be challenged in the suit filed by the respondent. It was denied that the tenant had vacated the premises and handed over the actual, physical and vacant possession of the suit property to Mr.Yogesh Mishra through Mr.S.R.Pandey on 22nd December, 2003 and ultimately he came in actual and physical possession of the suit property and the tenant went out of the possession. It was alleged in the written statement that Mr.Yogesh Mishra was not in possession of the suit property nor he was competent to receive any such possession from the tenant. In fact, the possession of the suit property was taken by the

respondent directly through its representative Mr.S.R.Pandey from the tenant.

17. After hearing both parties and in view of objection taken by the petitioner, the said suit was dismissed as withdrawn by the respondent on 22nd December, 2010. It was recorded in the order that after brief submissions with regard to the maintainability of the suit on the ground of limitation, counsel for the plaintiff on instructions, has very fairly stated that he may be given liberty to withdraw the suit with liberty to file objections under Order 21 Rules 98 and 99 CPC in the Execution Petition bearing No.13/2004. It was also recorded in the said order that whatever the plaintiff wants to file, that shall be without prejudice of the rights of the defendant to raise such objections regarding maintainability of the objections as may be permissible in law.

18. After the dismissal of the earlier objections filed by the respondent under Order 21 Rule 58 CPC and thereafter withdrawal of the suit, the respondent in view of the liberty granted by this Court on 3rd January, 2011 filed the objections under Order 21 Rules 97 to 101 CPC.

The petitioner herein filed reply to the said objections on 15th July, 2011 challenging the maintainability of the said objection petition on the ground that the earlier objections filed under Order 21 Rule 58 CPC by the respondent stood already dismissed up to the Supreme Court. An option was granted to the respondent to file a separate suit, who instituted the suit on 28th February, 2009 and the same was withdrawn by the respondent. Now, it is not open for the objector to have again taken the recourse of filing the objections under Order 21 Rules 97 to 101 CPC which as per settled law are not maintainable.

19. The Executing Court while dealing with the said objections and reply passed the impugned order dated 13th January, 2012 and framed the issues and directed the parties to lead their evidence on the issues framed. The issues framed are reproduced below:

- “1. Whether the will of Sh. N.D. Mishra dated 23.05.1998 bequeathing the entire suit property in favour of Sh. Yogesh Mishra was last and genuine will of Sh. N.D. Mishra. If so, its effect? (OP Objector)
2. Whether the sale deed executed by Sh. Yogesh Mishra in favour of the objector is fraudulent transaction? (OPDH)
3. Whether the will executed by Sh. N.D. Mishra in favour of the trust was last and genuine will of Sh. N.D. Mishra. If so, its effect? (OPDH)
4. Whether the trust can claim possession under the execution in the present form? (OP Parties).
5. Whether the objector is liable to vacate and hand over the property to the decree holder/applicant/trust? (OPDH)”

20. The said order has been challenged by the petitioner, inter alia, for the reasons that the said impugned order dated 13th January, 2012 was passed beyond the scope of judgment and decree dated 1st February, 2003. The contention of the petitioner is that the said objections ought to have been summarily dismissed by the Executing Court who has passed the impugned order. The same is legally incorrect and contrary to the facts and law laid down by the Supreme Court.

21. In view of the abovementioned facts and settled law, it is to be examined in the present petition as to whether the impugned order passed by the learned trial Court is sustainable in law and the issues framed in the

impugned order are necessary to be framed in case all the requisite issues involved in the matter already decided between the parties. And whether the objections filed by the respondent/objector were maintainable under the law despite of liberty having been granted in the independent suit filed by the respondent subject to objection to be raised by the petitioner. The said suit under these circumstances was withdrawn by the respondent. And what is the implication of Rule 102 of Order 21 CPC which excludes the applicability for a transferee pendent lite under the present situation and circumstances of the matter.

22. It is settled law that an Executing Court cannot go behind the decree. The respondent admittedly has purchased the suit property after passing the decree. The fresh objections filed by the respondent under Order 21 Rules 97 to 101 are apparently not maintainable.

23. In the impugned order, the learned trial Court has framed the issues, mainly on the reasons given that the question as to the title of the decree-holder/Trust and/or the L.R. Mr.Yogesh Mishra was never decided as the decree was passed against the tenant who handed over the vacant possession of the suit property to Mr.Yogesh Mishra who happens to be a L.R. of Sh.N.D.Mishra, although the possession was handed over through intervention of the objector.

Let me now consider whether the said questions raised by the learned trial Court in the impugned order have been discussed or decided in the earlier proceedings or not as well as the conduct of the parties at the earlier stage.

CONDUCT OF YOGESH MISHRA

24. Admittedly, he is the son of late Sh.N.D.Mishra who executed a Will dated 29th August, 1992 bequeathing the property in question in favour of the petitioner-Trust created by his wife in the memory of another son, late Mr.Omesh Mishra. In the Will, it was specifically mentioned that he has already spent huge amount on his son Mr.Yogesh Mishra including the purchasing of a plot and construction of a house for him at Jalandhar. Therefore, he excluded him from inheriting any of his remaining properties. Mr.Yogesh Mishra never challenged the order dated 13th August, 1998 thereby allowing the application under Order 22 Rule 3 CPC as well as the order dated 30th November, 2000 thereby allowing the application under Order 1 Rule 10 CPC of the Trust. In the judgment dated 27th November, 2004 passed by this Court in the Civil Revision Petition filed against the dismissal of the objections by the respondent under Order 21 Rule 58 CPC, it was observed that Mr.Yogesh Mishra with malafide intention to frustrate the case of the decree-holders has colluded with the respondent and forged certain documents on the basis of which the transfer of the property is shown to have taken place by Mr.Yogesh Mishra in favour of the respondent when Mr.Yogesh Mishra was not having any right, title or interest to transfer the property. The said order was confirmed by the Supreme Court.

25. Firstly, he got the property mutated in his name admittedly on 19th March, 2001 in the record of the Municipal Corporation of Delhi at the strength of the alleged final Will dated 23rd May, 1998. The suit was decreed on 1st February, 2003. He was aware about the pendency of the suit as being one of the decree-holders he executed the sale deed in favour of the respondent. He did not point out at any time either to the remaining legal

heirs of the deceased or to the petitioner with regard to the said mutation of the property in his name. He also did not disclose in the office of the Municipal Corporation about the pendency of the suit, nor he mentioned the factual position when he executed the sale deed in favour of the respondent, although at that time he was fully aware that the suit has already been decreed in favour of the petitioner and legal heirs of the deceased.

26. In the execution proceedings, he filed an application dated 20th December, 2004 for recording the satisfaction of the decree. In the said application, there is an admission made by him that during the pendency of the suit, his father Sh.N.D.Mishra who was the original plaintiff expired on 27th May, 1998. He along with his mother and sister filed an application under Order 22 Rule 3 CPC for their substitution in place of Sh.N.D.Mishra and the said application was allowed on 13th August, 1998. He also made the statement that later on, the Trust, namely, Omesh Mishra Memorial Charitable Trust filed an application under Order 1 Rule 10 CPC thereby claiming the Will dated 29th August, 1992 alleged to have been executed by his late father in favour of the Trust and the petitioner was impleaded in the suit proceedings as co-plaintiff. The said application filed by him in the execution proceedings was dismissed by the Executing Court. The order passed became final as the same was not challenged by him. Therefore, the findings of the learned trial Court that the rights of Mr.Yogesh Mishra are still to be decided are incorrect, as the rights have already been decided against him.

27. After the decretal of the suit, in execution proceedings Mr.Yogesh Mishra set up the Will who also filed the application for dismissal of execution filed by the petitioner. The decree-holder before the learned trial

Court was that the Will set up by Mr.Yogesh Mishra, allegedly, executed by late Sh.N.D.Mishra was forged. It was allegedly executed by Sh.N.D.Mishra four days prior to his death. The same was got registered by him at Jalandhar on 25th April, 2000 excluding his widow and daughters. The contention of the petitioner was that after the death of Sh.N.D.Mishra, his wife Smt.Raj Mishra and other legal heirs including Mr.Yogesh Mishra moved the application under Order 22 Rule 3 CPC in the suit seeking possession against the tenant. The said application was allowed and the legal heirs of the deceased were brought on record on 13th August, 1998. Mr.Yogesh Mishra did not bring the factum of alleged Will dated 23rd May, 1998 before the learned trial Court. He did not during the pendency of the suit neither challenged the order when he became one of the LRs of deceased nor when the petitioner became co-plaintiff in the suit for possession. Rather the Will got registered by him after about one year and 11 months. No probate was filed by him. It was the case of the decree-holder that on the basis of forged Will, Mr.Yogesh Mishra got mutated the suit property from the Municipal Corporation of Delhi, on 19th March, 2001 in his favour by concealing the fact of the pendency of the suit and the claim of the Trust on the basis of the Will dated 29th August, 1992.

28. It is also pertinent to mention that when the application filed by Mr.Yogesh Mishra in the Executing Court for recording the satisfaction of the decree dated 2nd September, 2003, he admitted in para (C) of the application that during the pendency of the aforesaid suit, his father expired on 27th May, 1998 and he along with his mother and sisters filed an application under the provisions of Order 22 Rule 3 CPC for their substitution in place of late Sh.N.D.Mishra and the said application was

allowed by order dated 13th August, 1998. However, in the said application, he did not mention, as to why he did not place the fact of execution of the alleged Will dated 23rd May, 1998 during the pendency of the suit and passing of the final decree, rather it confirms that he was aware about the pendency of the suit.

CONDUCT OF RESPONDENT

29. The respondent has not denied the fact that earlier its objections under Order 21 Rule 58 CPC were dismissed by the Executing Court who after hearing arrived on, inter-alia, the following findings:-

“It is also clear that judgment/decreed for possession has been passed in favour of the Trust and thus Shri Yogesh Misra has/had got no right to transfer the title/possession of the suit property to anyone. Decree dated 1st February, 2003 passed in favour of the Trust/LR of Shri N.D. Misra has not been challenged by the JD or anyone else, thus, the same has become final. Applicant has purchased the suit property from Shri Yogesh Misra and thus liable to hand over the peaceful and vacant possession of suit premises to DH.

Ld. Counsel for the objector argued that since the objector has purchased the suit property from one of the DHs i.e. Yogesh Misra on 12th April, 2004, thus, nothing survives in the present exhibition proceedings. There is no merit in this plea as it is clear from the record that Mr. Yogesh Misra was not given any share the suit property and this fact was not disputed by Mr. Yogesh Misra and other LRs of deceased Sh. N.D. Misra. It is clear from record that the said property was bequeathed to Omesh Misra Memorial Charitable Trust, as well as other LRs of Sh. N.D. Misra, who are DH in the present suit and they have not sold out this property to the applicant, thus, the dealings between the objector as well as Mr. Yogesh Misra is of no consequence and has no value in the eyes of law.”

30. The respondent thereafter filed the review petition against the said order which was also dismissed on 27th December, 2004. Both the orders were challenged in this Court by filing of the Civil Revision Petition bearing No.34/2008 which was also dismissed on 27th November, 2008. The operating part of the said order are read as under:

“Since the applicant in the present case had purchased the property after passing of decree by the competent court, if he has any claim, he will have to establish this by filing an independent suit. The decree holder cannot be deprived of the fruits of the decree on the basis of fraudulent transactions by one of the LRs of the deceased. In this case Yogesh Misra, who allegedly sold the property on the basis of a will was one of the party to the suit, as a LR of deceased N.D. Misra. Will dated 29th August, 1992 was relied upon by respondent No.6 in his presence. The will categorically stated that Yogesh Misra, would have no share in this property. He did not object to the will or respondent No.6 being impleaded as a party neither the order impleading respondent No.6 on the basis of this will was challenged. Yogesh Misra did not file any probate petition for probate of the subsequent will alleged in his possession. It is obvious that in order to defeat the claim of the respondent No.5 and others, some documents seem to have been forged by Yogesh Misra on the basis of which the transfer the property to the applicant. None of the decree holders, except Yogesh Misra is bound by this transfer. Yogesh Misra, since had no share in the property as per the will brought on the record of the court, he had no right to take possession of the property from the JD and had no right to sell the property. No application for satisfaction of decree was filed in the court by Yogesh Misra or by the JD. The entire deal seems to be fishy. The application under Order 21 Rule 58 CPC was not maintainable. The trial court rightly dismissed the application and the review application.”

31. Even, the Special Leave Petition filed by the respondent was dismissed. While passing the order in the Civil Revision Petition, it was observed that in order to claim independent right, the respondent was at liberty to file the independent suit and the said suit was duly filed by the respondent in this Court which was also withdrawn by the respondent on 22nd December, 2010 and the following order was passed:-

“1. After brief submissions with regard to the maintainability of the suit on the ground of limitation, Mr. Gupta, learned Senior counsel for the plaintiff on instructions, has very fairly stated that he may be given liberty to withdraw the suit with liberty to file objections under Order 21 Rules 98 and 99 CPC in the Execution Petition bearing No.13/2004 filed by the defendants herein.

2. Mr. Chadha, learned Senior counsel for the defendants has stated that the plaintiff does not need any liberty of this Court to file objections if they are maintainable in law. It has further been pointed out that the plaintiff herein has already filed one set of objections under Order 21 Rule 58 CPC which were dismissed up to Supreme Court and he cannot be permitted to file fresh objections under a different provision.

3. It is further stated that in any case whatever the plaintiff wants to file that shall be without prejudice of the rights of the defendant to raise such objections regarding maintainability of the objections themselves as may be permissible in law.

4. I have considered the respective submissions of the learned Senior counsel.

5. Since the learned Senior counsel for the plaintiff has sought permission to withdraw the suit with liberty to file objections, the same is allowed subject to all objections being raised by the defendants herein as may be permissible in law.

6. The suit is accordingly dismissed as withdrawn with liberty as prayed for.”

32. Mr.Yogesh Mishra also filed an application dated 20th December, 2004 before the Executing Court for recording the satisfaction of the decree by making inter alia the following statement:-

“C. That during the pendency of the aforesaid suit, the father of the applicant Sh. N.D. Misra who was the original plaintiffs expired on 27th May, 1998. The present applicant alongwith his mother and sisters filed an application under the provisions of Order 22 Rule 3 CPC for their substitution in place of late Sh. N.D. Misra. The said application was allowed wide order dated 13th August, 1998.

D. That later on the Trust namely Omesh Misra Memorial Charitable Trust filed an application under Order 1 to 10 CPC, thereby claiming to one will dated 29th August, 1992, alleged to have been executed by late Sh. N.D. Misra in favour of the said trust, thereby, seeking impleadment in the suit proceedings as co-plaintiff.

As the suit proceedings were being delayed by the judgment debtor on one ground or another, the present applicant did not file any objection to the said application filed by the said trust. The applicant was advised that the said alleged will and the application has a limited scope i.e. only for the purposes of continuation of the suit proceedings. The title of the said trust was not to be decided in the suit proceedings. Otherwise, the applicant has nowhere admitted the fact and the legality of the alleged will dated 29th August, 1992.

It was further alleged that the possession of the suit premises had already been handed over by the judgment debtor to Yogesh Misra and as such the decree stood satisfied. A prayer was accordingly made that satisfaction of the decree may kindly be recorded in the execution proceedings may be dropped.”

33. At the time of withdrawal of the suit, though liberty was granted by this Court to the respondent to file the objections, however, if they are maintainable in law. The objection of the petitioner in a way kept alive and the same was recorded in the order. Under these circumstances, the second set of objections filed by the respondent are to be decided in accordance with law and not merely on the basis that since the liberty was granted to the respondent to file the objections, therefore, the same are maintainable and are to be treated in the same manner as the said proceedings are decided as alleged by the respondent. All the objections raised by the respondent under Order 21 Rules 96 to 104 have been considered by the Courts from time to time and are decided either raised by the respondent in earlier proceedings and the objections raised by Mr.Yogesh Mishra. The validity of the Will of Sh.N.D.Mishra in favour of petitioner who becomes owner of the suit property and the order passed on 13th August, 1998 thereby allowing the application under Order 22 Rule 3 CPC and also the order dated 30th November, 2000 allowing the application under Order 1 Rule 10 CPC of the Trust have not been disputed by the legal heirs of the deceased, rather they filed an affidavit and reply confirming the ownership of the petitioner in the suit proceedings. The challenge of Mr.Yogesh Mishra has failed and the order passed thereof attains the finality. Thus, it cannot be re-agitated at this stage.

CONDUCT OF PETITIONER

34. Admittedly, it has come on record that Sh.N.D.Mishra executed the Will dated 29th August, 1992 bequeathing the suit property in favour of the petitioner-Trust which was created by his wife in the memory of his son Late Sh.Omesh Mishra. The name of the petitioner-Trust is also Omesh Mishra

Memorial Charitable Trust. The beneficiaries of the Will are his three daughters. The petitioner filed the application under Order 1 Rule 10 read with Section 151 CPC for impleading as plaintiff in the suit for possession.

35. The following reply was filed by the legal representatives of the deceased:-

“.....It is correct that plaintiff/L.R.s did not disclose in the application filed under order 22 Rule 3 C.P.C. read with Section 151 C.P.C. about the execution of WILL dated 29/8/1992 by Shri N.D.Mishra. The legal heirs of Shri N.D.Mishra first time came to know regarding the execution of the WILL of Shri N.D.Mishra on 6/6/1998 when one of the Legal heir Smt.Neena Bhardwaj has attended the meeting of Umesh Mishra Memorial Trust Pvt. Ltd. It is correct that Shri N.D.Mishra on account of fact and by virtue of said WILL, the property bearing Kothi No.27, Ishwar Nagar, New Delhi has been bequeathed in favour of Umesh Mishra Memorial Charitable Trust. It is further correct that Shri Subhash Chander Sabharwal and Shri R.S.Dass and Smt. Neena Bhardwaj are the trustee. It is further correct that the said Trust shall be entitled to get the aforesaid property transferred in its own name and trust is also competent to dispose off said property and distribute the sale proceed in the ratio of 75% to the trust and remaining 25% to the daughters of Shri N.D.Mishra. It is further correct that by virtue of said Will Umesh Mishra Memorial Charitable Trust/applicant has become the owner of the suit property and entitled to the substitute as plaintiff/co-plaintiffs in the present suit alongwith the three daughters of late Shri N.D.Mishra namely Mrs. Dheera Sharma, Smt.Neena Bhardwaj and Mrs. Meena Sharma.”

36. The said application was allowed by order dated 30th November, 2000. The same reads as under:-

“Arguments on the application u/o 1 Rule 10 CPC heard. Initially the suit was filed by Sh. N.D. Mishra against the

deft. who was inducted as tenant in the suit property. After the death of Sh. N.D. Mishra his legal heirs have been brought on record but subsequently it has been revealed that he also executed a Will dated 29.8.92 and by virtue of that will the suit property has been bequeathed in favour of the applicant trust who now wants to be impleaded as co-plaintiff. In reply the pltf. has not opposed the application. So far as the deft. is concerned he was inducted as tenant and in reply the deft. has opposed the application.

As the execution of the will is not disputed even by his legal heirs and the legal heirs of pltf. have no objection if applicant trust is impleaded as co-plaintiff, the deft. has no right to oppose the same in view of his capacity of being inducted as tenant. Hence the application u/o 1 Rule 10 CPC is allowed. Amended memo of parties be filed by 14.12.2000.”

37. The affidavit of Sh.Subhash Chander Sabherwal on behalf of the petitioner as one of the trustees as PW-4 also filed before the learned trial Court as evidence in support of his case in the suit for possession. The wife of the deceased already expired. One of the daughters is trustee of the petitioner-Trust. No other legal heirs either challenged the judgment and decree or filed any objections in the execution petition. The remaining three daughters are beneficiaries to the Trust.

38. It is necessary to reproduce Rules 97 to 102 of Order 21 CPC. The same are read as under:-

“97. Resistance or obstruction to possession of immovable property

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make

an application to the Court complaining of such resistance or obstruction.

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

98. Orders after adjudication

(1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2),-

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

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

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

99. Dispossession by decree-holder or purchaser

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

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

100. Order to be passed upon application complaining of dispossession

Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,-

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

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

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 the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

102. Rules not applicable to transferee pendent 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 such person.”

39. It is not in dispute that Order 21 Rule 97 provides for a remedy available to a decree-holder and not to a person who obstructs the delivery of possession. As far as the Rules 98 to 100 are concerned, Rule 102 excludes the applicability of the said provision for a transferee pendent lite. The respondent has admitted in the pleading that the respondent came in the possession of the suit property after passing of the judgment and decree dated 1st February, 2003. Therefore, the objections under Order 21 Rules 97 to 102 are obviously not maintainable merely on reading the Rule 102 of Order 21 CPC. Thus, it is evident that the Executing Court did not consider the provision of Order 21 Rule 102 CPC as well as the law applicable in the facts and circumstances of the present case.

40. It is true that Rule 99 of Order 21 CPC is not available to any person until he is dispossessed of immovable property by the decree holder. Order 21 Rule 101 CPC stipulates that all questions “arising between the parties to a proceeding on an application under Order 21 Rule 97 CPC or Order 21 Rule 99 CPC” shall be determined by the executing Court, if such questions are “relevant to the adjudication of the application”. A third party to the decree who offers resistance would thus fall within the ambit of Order 21 Rule 101 CPC if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt, if the resistance was made by a transferee pendent lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding to be that point the Court has to hold that he has no right in view of the clear language contained in Order 21 Rule 102 CPC (*Silverline Forum*’s case).

41. The Supreme Court under similar circumstances in the case of *Silverline Forum (P) Ltd. vs. Rajiv Trust*, (1998) 3 SCC 723, at page 727, has held that:-

“12. The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which executing court is obliged to determine under rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in order 21 Rule 97(2) of the Code, execution court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.”

42. Yet in another case titled as *Usha Sinha vs. Dina Ram*, (2008) 7 SCC 144, at page 149, the Supreme Court has held as under:-

“17. Rule 102 clarifies that Rules 98 and 100 of Order XXI of the Code do not apply to transferee pendente lite. That rule is relevant and material and may be quoted in extensor:

“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 such person.”

Bare reading of the rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases the property which is the subject matter of litigation. It recognizes the doctrine of lis pendens recognized by Section 52 of the Transfer of Property Act, 1882?. Rule 102 of Order XXI of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree. Every time the decree holder seeks a direction from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction. To avoid such a situation, the rule has been enacted.

25. We are in respectful agreement with the proposition of law laid down by this Court in Silverline Forum. In our opinion, the doctrine is based on the principle that the person purchasing property from the judgment debtor during the pendency of the suit has no independent right to property to resist, obstruct or object execution of a decree. Resistance at the instance of transferee of a judgment debtor during the pendency of the proceedings cannot be said to be resistance or obstruction by a person in his own right and, therefore, is not entitled to get his claim adjudicated.

26. For invoking Rule 102, it is enough for the decree holder to show that the person resisting the possession or offering obstruction is claiming his title to the property after the institution of the suit in which decree was passed and sought to be executed against the judgment debtor. If the said condition is fulfilled, the case falls within the mischief of Rule 102 and such applicant cannot place reliance either on Rule 98 or Rule 100 of Order XXI.”

43. The objector/respondent in the present case alleged to be in possession of the premises after the decree passed against the tenant Ms.Nisha Chauhan and possession has been taken by it through Mr.S.R.Pandey being Power of Attorney holder of Mr.Yogesh Mishra after negotiation with the tenant on 22nd December, 2003.

44. The argument of the respondent, that the Trust could not have become the co-plaintiff in the suit when the application filed by the Trust under Order 1 Rule 10 CPC unless all the members of the Trust are impleaded in the matter, has no substance, as it is the admitted position that the application of the petitioner-Trust was allowed at that time. No such objection was taken by the judgment debtor. Even the said order was not challenged by the respondent and Yogesh Mishra passed on 30th November, 2001. The deceased wife was the creator of the trust. She was the party to the suit alongwith other legal representatives. When the judgment and decree was passed by the Court against the tenant in the suit for possession Yogesh Mishra did not come forward to place the factum of Will and raised such objection which is now raised by the objector at this stage when the objections themselves are not maintainable under Rule 102 of Order XXI CPC as well as the plea that the Executing Court requires to decide all questions raised by the objector by following the procedure akin to the procedure to be followed in suit if the objections under the law are not

maintainable. The decisions referred by the counsel for the respondent do not help the case of the respondent in view of the facts of the present case.

45. The issues framed by the learned trial Court are outside the preview of the judgment and decree dated 1st February, 2003 who failed to consider the decision passed by the Supreme Court in this regard and has also not considered the order passed in the revision petition arising out of the order dated 27th November, 2004 passed by the Executing Court wherein it was held that the objections at the instance of the respondent were not maintainable. The said issues are not necessary to be framed in view of the facts and circumstances in the present case, as all requisite issues involved in the matter have already been determined as discussed in earlier paras.

46. The Executing Court while framing the issues to lead the parties to evidence did not keep in mind that once the objections filed by the respondent objected to the execution of the decree by filing of the objections under Order 21 Rule 58 CPC were decided by the Executing Court, High Court and up to the Supreme Court against the respondent with the observation that the only remedy lies with the respondent to bring a separate suit which was filed by the respondent and the same was dismissed as withdrawn. And as per settled law, the objections filed by the respondent are not maintainable. In case, a fresh trial is conducted, the decree-holder may not be able to get the fruits of the decree for the next couple of decades and the illegal possession obtained by the respondent shall remain with them.

47. It is obvious that the respondent again would not take the same recourse to objecting a decree availing the provisions of Order 21 by filing of the objections of the similar nature which would operate as constructive

resjudicata. I agree with the counsel for the decree-holders that now the remedy available to the respondent is to file the suit against its vendor, namely, Mr.Yogesh Mishra, as the respondent was well aware of the legal proceedings in which the petitioner had become a party and was claiming absolute possession on the basis of having required the title in lieu of the Will of late Sh.N.D.Mishra. The vendor was a party to the said proceedings and had not objected to the claim and title of the petitioner-Trust. Therefore, the respondent who has stepped into the shoes of vendor, i.e. Mr.Yogesh Mishra could not have claimed better title than him and has purchased the property with open eye and now cannot plead as bonafide purchaser in the execution proceedings. The respondent in the garb of objections cannot raise the same objections which were raised by Mr.Yogesh Mishra who already lost his objections.

48. The present petition is accordingly allowed. The order dated 13th January, 2012 passed by the Executing Court is set-aside as the same suffers from legal infirmity. Pending application also stands disposed of.

49. No costs.

(MANMOHAN SINGH)
JUDGE

APRIL 16, 2014