

Dusane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.534 OF 2022
WITH
INTERIM APPLICATION NO.16639 OF 2022**

Shaikh Mustaq Haji Majid Khatik ...Appellant/Applicant

V/s.

Ramanlal Nathmal Jain & Ors. ...Respondents

**WITH
SECOND APPEAL NO.536 OF 2022
WITH
INTERIM APPLICATION NO.16641 OF 2022**

Altaf Abdul Rahaman Sheikh ...Appellants/
(since deceased) thru LRs Farida Applicants
Altaf Sheikh & Ors.

V/s.

Ramanlal Nathmal Jain & Ors. ...Respondents

**WITH
SECOND APPEAL NO.535 OF 2022
WITH
INTERIM APPLICATION NO.16640 OF 2022**

Iqbal Abdul Rahaman Sheikh ...Appellants/
thru' POA Mr. Mustak Shakkar Applicants
Sheikh

V/s.

Ramanlal Nathmal Jain & Ors. ...Respondents

**WITH
SECOND APPEAL NO.537 OF 2022**

**WITH
INTERIM APPLICATION NO.16642 OF 2022**

Manish Kundalik Sarkate
thru' POA Kundalik Shankar
Sarkate

...Appellants/
Applicants

V/s.

Ramanlal Nathmal Jain & Ors.

...Respondents

Mr. Bhushan Walimbe i/by Ms. Preeti Walimbe for
Appellants/Applicants.

Mr. D.S. Mhaispurkar a/w Mr. Sumedh S. Modak
and Mr. Hrishikesh Pawaskar for Respondent Nos.1
to 4 in all SAs and IAs.

**CORAM: MADHAV J. JAMDAR, J.
DATE: 4th July 2023**

P.C.:

1. Heard Mr. Bhushan Walimbe, learned Counsel appearing for the Appellants and Mr. Mhaispurkar, learned Counsel appearing for the Respondent Nos. 1 to 4.

2. The Supreme Court in **Griesheim Gmbh Vs. Goyal MG Gases Private Limited**¹ observed in para 2 as follows:

"2. It is an old saying that **the difficulties of the litigant in India begin when he has obtained a decree. The evil was noticed as far back in 1872 by the Privy Council in relation to the difficulties faced by the decree-holder in execution of the decree** [*General Manager, Raj Durbhunga v. Coomar Ramaput Sing*, 1872 SCC OnLine PC 16 : (1871-72) 14 Moo IA 605 : 20 ER 912] , Moo IO p. 612. **After more than a century, there has been no improvement and still**

¹ (2022) 11 SCC 549

the decree-holder faces the same problem what was being faced in the past. A litigant coming to court seeking relief is not interested in receiving a paper decree when he succeeds in establishing his case. What he primarily wants from the court of justice is the relief and if it is a money decree, he wants that money what he is entitled for in terms of the decree, must be satisfied by the judgment debtor at the earliest possible without fail keeping in view the reasonable restrictions/rights which are available to the judgment debtor under the provisions of the statute or the code, as the case may be."

(Emphasis added)

3. In the case of **Jini Dhanrajgir Vs. Shibu Mathew**², the Supreme Court observed in para 2 as under :

"2. More than a century and a half back, the Privy Council (speaking through the Right Hon. Sir James Colville) in *The General Manager of The Raj Durbhunga, Under the Court of Wards v. Maharajah Coomar Ramaput Singh*¹ lamented that the difficulties of litigants in India indeed begin when they have obtained a decree. A reference to the above observation is also found in the decision of the Oudh Judicial Commissioner's Court in *Kuer Jang Bahadur v. Bank of Upper India Ltd. Lucknow*². It was ruled there that **the Courts had to be careful to ensure that the process of the Court and the laws of procedure were not abused by judgment-debtors in such a way as to make the courts of law instrumental in defrauding creditors, who had obtained decrees in accordance with their rights.**"

(Emphasis added)

Thus, the Supreme Court held that the Courts have to be careful to ensure that the process of the Court and the laws of procedure were not abused by judgment-debtors in such a way

² (2023) SCC Online SC 643

as to make Courts of law instrumental in defrauding creditors, who had obtained decrees in accordance with their rights.

4. The above observations of the Supreme Court are squarely applicable to the present case. In the present case, *inter alia*, the money decree was passed on 16th June 2003 and the execution of the same is delayed for last more than 20 years as a result of collusion between the Appellants i.e. Obstructionists and the Respondents- Judgment-Debtors resulting in immense hardship to the Respondent Nos. 1 to 4 i.e. Judgment-Debtors.

5. Mr. Walimbe, learned Counsel appearing for the Appellants submitted that in all these Second Appeals, the same substantial questions of law arise and the same are as set out hereinbelow:

(i) Whether both the Courts erred in not considering the fact that the Decree Holders and the Judgment Debtors are in collusion with each other and they are trying to dispossess the Appellant under the guise of executing the compromise decree?

(ii) Whether both the Courts were justified in law that even as per the compromise *pursis* the decree holder is entitled to completion certificate first and then further proceedings of the *darkhast* can go on. However, in the present matter, the decreeholder has requested to attach the shop and proceed for sale. Is this against the compromise decree?

(iii) Whether both the Courts were justified in law in considering the fact that the Executing Court has

jurisdiction to decide all the questions raised by the obstructionist including questions regarding right, title or interest in the property; however, has the learned Executing Court failed to exercise the said jurisdiction vested in it?

(iv) Whether both the Courts were justified in law in ignoring the fact that execution was filed by the Decree-holder for recovery of amount by attaching the property of judgment-debtor and auctioning the same for recovery of the amount. Therefore, the observation of the First Appellate Court that there exists an earlier agreement for sale executed in favour of Decree-holder and therefore, the Appellant has no right to file obstructionist application is wrong. The First Appellate Court ought to have taken into consideration that the compromise decree was in three parts. Firstly, it was agreed by the Judgment-Debtor that he shall pay an amount of Rs.33,81,500/- to the decree-holder. Second part was towards security of Rs.16,59,000/- out of the amount of Rs.33,81,500/-, the decree-holder/Judgment Debtor will execute Sale-Deed of 6 shops in favour of the decree holder and third part was the Judgment Debtor can sell 6 shops for an amount of Rs.6,00,000/- each and shall pay an amount of Rs.6,00,000/- each to the decree-holder and the decree-holder shall cancel the agreement for sale in respect of 6 shops. In the alternative, the judgment-debtor shall sell the 6 shops as per the instructions of the decree-holder to the persons intimated by the decree-holder. However, the execution was filed for

recovery of the amount of Rs.33,81,500/-, thus out of three auctions mentioned in the decree, the decree-holder has chosen to execute the decree in respect of first part only. Therefore, the decree-holder cannot insist upon other two parts in the same execution. Moreover, if the decree-holder was seeking the sale of the shops, then he ought to have filed separate suit for specific performance. However, he has chosen to file the execution petition only for recovery of the amount. Therefore, is the observations of the First Appellate Court to continue the attachment of property purchased by the Appellant for the purpose of sale of the same for recovery of the money, perverse?

6. All these Second Appeals take exception to the orders of the learned Executing Court by which Objection Petition filed to the execution of the decree by the strangers to the decree i.e. the present respective Appellants has been dismissed. The respective appeals filed challenging the dismissal of Obstructionist Application also dismissed by the learned First Appellate Court.

7. It is the submission of Mr. Walimbe, learned Counsel appearing for the Appellants that the Appellants have purchased respective Shop Nos. 8, 9, 10 and 11 respectively by registered sale-deed and the respective Appellants are in possession of these shops. He submitted that the Consent Terms were executed on 16th June 2003 and accordingly, the Special Civil

Suit No. 90 of 2003 was decided within a span of less than two months. He states that the said consent decree is a collusive decree. Mr. Walimbe, learned Counsel submitted that apart from the above substantial questions of law, following additional substantial question of law also arises in all these Second Appeals:-

Whether the Courts are right in dismissing Appellant's execution application on the ground that he has no locus to file such application?

8. Learned Counsel for the Appellants submitted that both the Courts have completely ignored that the decree was obtained by the decree-holders and judgment-debtors by collusion. He further submitted that unless completion certificates of four shops are obtained, *Darkhast* is not maintainable as per the compromise decree. He also submitted that both the Courts failed to appreciate that the decree-holder has suppressed material facts from the Court and therefore *Darkhast* is required to be dismissed. He submitted that the decree which is sought to be executed is for recovery of the amount by attaching the property of the Appellants and auctioning the same and therefore the entire property of the judgment-debtors could have been attached and sold. Instead, the four shops which are of the respective Appellants are chosen for attachment and sale

by the decree-holder. The same clearly shows that there is a collusion between the decree-holders and judgment-debtors.

9. On the other hand, it is the contention of Mr. Mhaispurkar, learned Counsel appearing for the Respondents that the Consent Terms between the parties are very clear and the *Darkhast* has been filed on the basis of the Consent Terms. He submitted that *Darkhast* was filed as the judgment-debtor has failed to handover possession of the shops or pay monetary consideration and therefore the Consent Terms are sought to be executed in the manner as more particularly stated in the execution petition. He also submitted that pursuant to the Consent Terms, registered agreements for sale were executed in favour of the decree- holders. In spite of this position under the registered agreements, the judgment-debtors sold four shops to the respective Appellants i.e. Obstructionists. He submitted that in fact the judgment-debtors and the obstructionists are in collusion. It is his submission that the transactions in favour of the obstructionists are hit by the doctrine of *lis pendens* as contemplated under Section 52 of the Transfer of Property Act, 1882. He therefore prayed that all these Second Appeals be dismissed with compensatory cost.

10. Before considering the rival submissions, it is necessary to set out certain factual aspects:

(i) The Respondent Nos.1 to 4 i.e. Decree-Holders are the owners of certain land situated at Dombivli, District Thane. The decree-holders executed development agreement dated 18th December 2001 and Power of Attorney dated 20th July 2000 for development of their land with Respondent Nos.5 to 9 i.e. Judgment-Debtors -M/s Janhavi Builders and their partners.

(ii) As certain disputes arose between them, the decree-holders filed Special Civil Suit No.90 of 2003 against M/s Janhavi Builders and their partners i.e. judgment-debtors seeking that the said development agreement and said Power of Attorney be declared as cancelled and for other reliefs.

(iii) It is significant to note that the said development agreement is dated 18th December 2001 and the Suit was filed for cancellation of the same on 25th April 2003 i.e. after about one and half year. In the said suit, a compromise was arrived at between the decree-holders and the judgment-debtors on 16th June 2003 and the said Suit has been decreed in terms of said compromise. In the said Suit, a compromise decree was passed on 16th June 2003. The said compromise reads as under :

"वादी व प्रतिवादी यांचेमध्ये झालेल्या तडजोडीची पुरसीस

वादी व प्रतिवादी यांचे दरम्यान आपसांत तडजोड ठरली आहे. ती खालील प्रमाणे —

१) दाव्याच्या विषय असलेल्या करारांत नमूद केलेल्या शर्तीप्रमाणे प्रतिवादी यांनी वादींना देणे असलेला दावा मिळकतीच्या विकासाचा मोबदला / किंमतीचा

मोबदला या पोटी प्रतिवादी यांचेकडे बाकी असलेली रक्कम रूपये २९,००,०००/- (अक्षरी रूपये एकोणतीस लाख) मात्र व त्यावर दिनांक १८ जून २००३ पर्यंतचे होणारे व्याज रूपये ४,८१,५००/- (अक्षरी रूपये चार लाख एक्क्याऐंशी हजार पाचशे) मात्र मिळून (एकूण रूपये ३३,८१,५००/-) (अक्षरी रूपये तेहतीस लाख एक्क्याऐंशी हजार पाचशे) मात्र दिनांक १८ जून २००३ पर्यंत प्रतिवादीकडून वादींना देय होत असल्याचे प्रतिवादींना कबूल आहे. व सदर रक्कम आणि मुळ रक्कम रूपये २९,००,०००/- यावर करारातील शर्तीप्रमाणे दरमहा रूपये ४३,५००/- (अक्षरी रूपये त्रेचाळीस हजार पाचशे मात्र) याप्रमाणे होणारे पुढील व्याज अशी सर्व रक्कम आजपासून १२ महिन्यांच्या आत प्रतिवादींनी वादींना देण्याची आहे.

- २) वर कलम १ यांत नमूद केल्याप्रमाणे देय होणा-या रकमेपोटी प्रतिवादींनी दाव्यातील मिळकतीवर प्रतिवादी बांधकाम करीत असलेल्या नियोजित इमारतीमधील तळमजल्यावरील सोबत जोडलेल्या फ्लॅंअर प्लॅनमध्ये दर्शविलेले ६ (सहा) दुकान गाळे एकूण बिल्टअप एरिया १६५९ चौ.फूट हे दर चौ.फूटास रूपये १,०००/- (अक्षरी रूपये एक हजार मात्र) याप्रमाणे होणा-या किंमतीस मालकी हक्क तत्वावर वादींचे लाभांत विकत देण्याचे आहेत. व त्याबाबत महाराष्ट्र ओनरशिप फ्लॅटस् अॅक्ट, १९६३ चे तरतुदीनुसार जरूर असलेले करार प्रतिवादींनी वादींचे लाभांत रितसर लिहून, नोंदवून देण्याचे आहेत. व त्याबाबतचा मुद्रांक शुल्क, नोंदणी फी वगैरे सर्व खर्च प्रतिवादींनी सोसावयाचा आहे. सदर सहा दुकान गाळ्यांचे बांधकाम प्रतिवादींनी आजपासून तीन महिन्यांचे आत पूर्ण करावयाचे आहे. व त्याबाबत महानगरपालिके कडून बांधकाम पूर्णतेचा दाखला व वापर परवाना मिळवून सदर सहा दुकान गाळ्यांचा प्रत्यक्ष कब्जा प्रतिवादींनी वादींना देण्याचा आहे. अशा त-हेने सदर सहा दुकान गाळ्यांचा कब्जा ज्या दिवशी देण्यांत येईल, त्या दिवशी वर कलम १ यांत नमूद केल्याप्रमाणे व्याजासहित देय होणा-या रकमेपोटी सदर सहा दुकान गाळ्यांचे एकूण क्षेत्राची दर चौरस फूटास रूपये १,०००/- (अक्षरी रूपये एक हजार मात्र) याप्रमाणे होणारी रक्कम १६,५९,०००/- (अक्षरी रूपये लाख एकोणसाठ हजार मात्र) प्रतिवादीकडून वादींना मिळाली असे समजण्यात येईल.

- ३) परंतू प्रतिवादींना यावरून अशी सवलत देण्यांत येत आहे की -

अ) वर नमूद केल्याप्रमाणे वादींचे लाभांत मालकी हक्क तत्वावर विक्री केलेले सदर सहा दुकान गाळे प्रत्येक दुकान गाळ्यापोटी कमीत कमी रूपये ६,००,०००/- (अक्षरी रूपये सहा लाख मात्र) याप्रमाणे प्रतिवादींनी वादींना दिल्यास त्या त्या दुकान गाळ्या बाबतचे विक्रीकरार वादी रितसर रद्द करून देतील व त्याबाबत जरूर ते दस्तऐवज प्रतिवादींचे लाभांत लिहून, नोंदवून देतील. मात्र त्याबाबतचा मुद्रांक शुल्क, नोंदणी फी वगैरे सर्व खर्च प्रतिवादींनी सोसावयाचा आहे. अशा रितीने ज्या ज्या दुकान

गाळयाबाबतचे विक्री करार रद्द होतील. त्या त्या वेळी त्याबाबत प्रतिवादींनी वादींना दिलेल्या रकमा प्रतिवादींकडून वर कलम १ यांत नमूद केल्याप्रमाणे देय होणा—या रकमेपोटी मिळालेला वसूल म्हणून समजण्यात येईल.

आणि / किंवा

- ब) वर नमूद केल्याप्रमाणे वादींचे लाभांत मालकी हक्क तत्वावर विक्री केलेले सदर सहा दुकान गाळे प्रतिवादी त्यांचे मर्जीनुसार निर्देश करतील. त्या व्यक्तींचे लाभांत वाढीव किंमतीत फेरविक्री करून देण्यास वादी जबाबदार असतील. तशा फेरविक्री व्यवहाराबाबतचे करार दस्तऐवज प्रतिवादींच्या मान्यतेने तशा व्यक्तींचे लाभांत वादी लिहून नोंदवून देतील. मात्र त्याबाबतचा मुद्रांक शुल्क नोंदणी फी वगैरे सर्व खर्च प्रतिवादी किंवा तशा खरेदीदार व्यक्ती यांनी सोसावयाचा आहे. अशा त—हेने वादींनी फेर विक्री करून दिल्यास त्यानुसार वादींना मिळणारी विक्रीची किंमत ही त्यावेळी वर कलम १ यांत नमूद केल्याप्रमाणे प्रतिवादींकडून देय होणा—या रकमेपोटी मिळालेला वसूल म्हणून समजण्यांत येईल.

मात्र वर नमूद केलेली सवलत सदर सहा दुकान गाळयाबाबत महानगरपालिकेने दिलेल्या बांधकाम पूर्णतेचा दाखला व वापर परवाना याच्या तारखेपासून फक्त सहा महिन्यापर्यंत अंमलात राहील. व याच कालावधीत प्रतिवादींनी वर नमूद केल्याप्रमाणे सदर दुकान गाळयाचे वादीचे लाभातील विक्री करार रद्द करून न घेतल्यास अथवा सदर दुकान गाळयांची प्रतिवादींनी निर्देश करावयाच्या व्यक्तींचे लाभांत फेर विक्री करून न घेतल्यास सदरची सवलत रद्द होईल. सदर सवलतीचे मुदतीत सदर सर्व सहा दुकान गाळयांचे वादींचे लाभातील विक्री करार रद्द होऊ न शकल्यास अथवा सदर सर्व सहा दुकान गाळयांची प्रतिवादींनी निर्देश करावयाच्या व्यक्तींचे लाभांत फेर विक्री होऊ न शकल्यास जे दुकान गाळे वादींकडे शिल्लक राहतील, त्याबाबत सदरची सवलत संपुष्टात येईल. आणि परिणामी तशा वादींकडे शिल्लक राहिलेल्या दुकान गाळयाचे क्षेत्र/ बिल्टअप एरियाबाबत दर चौरस फुटास रुपये १,०००/— (अक्षरी रुपये एक हजार मात्र) याप्रमाणे होणारी रक्कम त्यावेळी प्रतिवादींकडून वर कलम १ यांत नमूद केल्याप्रमाणे देय होणा—या रकमेपोटी वसूल समजण्यांत येईल.

- ४) वर नमूद केलेल्या मुदतीत त्यावेळी वर कलम १ यांत नमूद केल्याप्रमाणे प्रतिवादींकडून देय असलेल्या रकमेचा सर्व भरणा वादींना होऊ न शकल्यास बाकी राहणारी रक्कम प्रतिवादींनी वर कलम १ यांत नमूद केलेल्या मुदतीत वादींना अदा करावयाची आहे.

- ५) वरील प्रमाणे प्रतिवादींकडून वादींना देय असलेली व होणारी अशा सर्व रकमेचा बोजा दाव्यातील जमीन मिळकत व त्यावर प्रतिवादी बांधकाम करीत असलेली नियोजित इमारत यांचे वर राहील व त्यानुसार प्रतिवादींकडून देय होणा—या रकमेची वसुली करण्याचा वादींना हक्क राहील .
- ६) वर नमूद केल्याप्रमाणे सदर सहा दुकान गाळ्यांची मालकी हक्क तत्वावर विक्री वादींचे लाभांत पूर्ण करून दिल्यावर दाव्याचा विषय असलेल्या करारानुसार दावा मिळकतीवरील पुढील विकास काम व नियोजित इमारतीचे पुढील बांधकाम वगैरे सुरू करून पूर्ण करण्याचा प्रतिवादींना हक्क राहील .
- ७) या दाव्याच्या नियमाप्रमाणे होणारा खर्च प्रतिवादींनी वादींना द्यावा. प्रतिवादींनी आपला खर्च सोसावा.

येणे प्रमाणे तडजोड झाली असून त्याप्रमाणे हुकूमनामा व्हावा. वरील प्रमाणे झालेली तडजोड मे. कोर्टासमोर कबूल करण्यास वादी व प्रतिवादी यांनी आपापल्या वकीलांना यावरून खास अधिकार दिलेले आहेत.”

(Emphasis added)

Thus, what has been agreed between the decree-holders and judgment-debtors is that the judgment-debtors agreed to pay the amount of Rs.33,81,500/- and interest of Rs.43,500/- per month and that said payment would be made within a period of twelve months from the date of the said Consent Terms. Clause 2 of the said Consent Terms contemplates sale of six shops to the decree-holders which will satisfy decree to the extent of total amount of Rs.16,59,000/-. In Clause 3 of the Consent Terms, certain concessions to which the judgment-debtor was entitled, are set out. According to the same, if Rs.6,00,000/- per shop are paid then the decree-holders would cancel the respective agreement with respect to the shop. It also contemplates that the said shops can be sold to the nominee of the judgment-

debtors even for a higher amount. It further contemplates that if the said cancellation mentioned in Clause No.3 is not availed within a period of six months from receipt of building completion certificate, then the said concession will not be available.

(iv) In compliance with the above Consent Terms and the Consent Decree, four separate registered agreements of sale were executed with respect to shop Nos. 8, 9, 10 and 11 with the judgment-debtors. The details of the same are as follows :-

Sr. No.	Date of Registered Agreement of Sale	Shop No.
1	02.07.2003	10
2	02.07.2003	11
3	15.07.2003	8
4	15.07.2023	9

(v) In spite of the above Consent Terms and the Consent Decree, the judgment-debtors have not complied with the terms and conditions of the same and therefore, the decree-holders filed Darkhast bearing Special Darkhast No. 32 of 2004 on 18th December 2004. In the said Darkhast, the decree-holder has stated as follows:

हुकूम . नाम्यावर अपील झाले आहे की काय	कोणतीही रक्कम दिलेली असल्यास किंवा उलगडा झालेला असल्यास तो	पूर्वी दरखास्त केली असल्यास ती व तिचा निकाल काय झाला	हुकूमनाम्या वर येणे असलेली व्याजासहित रक्कम किंवा हुकूमनाम्यात दुसरी काही दाद देवविली	खर्च देवविला असल्यास त्याची रक्कम	कोणावर बजावायचा ते	कोर्टाचे कोणत्या प्रकारे मदत करावयाची ते
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			असल्यास ती व कोणतीही परस्पर विरुद्ध हुकूमनामा असेल तर त्याचा तपशील			
नाही	नाही. कोणतीही रक्कम मिळालेली नाही.तडजोडी नुसार फक्त चार गाळ्यांचे करार करण्यात आले. बांधकाम पूर्ण केले नाही व कब्जाही दिला नाही. सबब रकमेचा उलगाडा करता येत नाही	नाही	पान नं. २ ते ५ वर दिलेला आहे	रू. ३२२११	सर्व प्रति वादी / जजमेंट डेटर यांचे वर	१८ जून २००३ पर्यंत देय रक्कम २९,००,००० रू ४,८१,५०० व्याज असे एकूण रू ३३,८१,५०० १९ जून ते १८ डिसेंबर २००४ दरमहा ४३,५०० प्रमाणे १८ महिन्यांचे व्याज रू७,८३,००० व दाव्याचा खर्च ३२,२३९ एकूण ४१,९६,७३९

In the said Execution Application relief is sought *inter alia* to attach the entire building by exercising power under Order XXI Rule 54 of the Code of Civil Procedure, 1908 (for short "**the CPC**") and sale of the same under Order XXI Rule 64 of the CPC.

(vi) The learned Executing Court passed following order on 13th November 2008 :

"O R D E R

Read Exh.62 filed by D.H. for issuing warrant of attachment under Order 21 Rule 54 of the C.P.C. with say filed by J.D. at Exh.64. Heard respective advocates for the parties. Perused the record. D.H. also filed the similar application at Exh.55 and **considering say of J.D. it was directed one month time to J.D. to pay balance amount or to furnish bank guarantee or remaining payment as per order dated 07/07/2008, however, till date no further payment nor bank guarantee furnished.** D.H.'s advocate objected prolonging the matter by the J.D. who from time to time sought time till today. However, their contention rejected. So, **considering the nature of the proceeding issue attachment warrant under Order 21 Rule 54 of the C.P.C. against J.D. attaching their property** more particularly described in the application at Exh.62. R/o. 01/12/2008."

(Emphasis added)

(vii) It appears that in the meanwhile, the judgment-debtors executed four separate agreements of sale with respective Appellants as per the following details :

Sr. No.	Second Appeal No.	Name of Appellant/ Obstructionist	Date of Agreement of Sale	Shop No.
1	534/2022	Shaikh Mustaq Haji Majid Khatik	12.02.2007	10

2	535/2022	Iqbal Abdul Rahaman Sheikh	29.12.2004	8
3	536/2022	Altaf Abdul Rahaman Sheikh	29.12.2004	9
4	537/2022	Manish K. Sarkate	25.03.2004	11

(viii) The learned Executing Court passed following order on 30th July 2009 :

**"ORDER BELOW EXH.72 IN SPECIAL DARKHAST
NO.32/2004**

Read it, filed by the Decree Holders, under Order 21, Rule 64, of the C.P.C. Requisite valuation is produced at Exh.87 of property attached belonging to Judgment Debtors, issued by Sub-Registrar Officer, Kalyan-3, at Exh.87, it is worth of Rs.4,00,34,040/-. According to the Judgment Debtors property attached, constructed with ground floor and two upper floors and they are already sold to the customers and Judgment Debtors are making efforts to settle the matter. Perusal of decree show that Decree Holders are entitled for sum of Rs. 41,96,731/- from Judgment Debtors. Admittedly, property valuation is more than decretal amount, so, D.H. is directed to suggest, which portion is require to be attached and to make auction of sale, as per rule."

It appears that thereafter, the decree-holders have applied for

sale of aforesaid four shops.

(ix) The respective Appellants filed respective obstructionist proceedings in the said Special Darkhast No. 32 of 2004 and the same were dismissed by the learned Executing Court. The respective appeals challenging the same were also dismissed by the learned First Appellate Court.

11. It is necessary to consider substantial questions of law raised by Mr. Walimbe, learned Counsel appearing for the Appellants and the submissions of both the learned Counsel in the light of the above factual position.

12. The first substantial question of law raised is regarding the collusion between the decree-holders and the judgment-debtors. However, the factual position on record as set out hereinabove clearly shows that as the developer i.e. judgment-debtors were not complying with the development agreement dated 18th December 2001, the suit was filed for cancellation of the same and the said suit was filed after a period of about 1½ year. By the Consent Terms what has been agreed in effect is the manner in which the said development agreement will be implemented. Accordingly, Clause No.1 provides for payment of balance consideration as per the said development agreement. The further terms and conditions also show that for ensuring payment of said consideration as agreed in Clause No.1, some

shops were agreed to be sold to the decree-holders and some concessions were also agreed to be given to the judgment-debtors in that regard. It is admitted position that the judgment-debtors have not paid huge amount to the decree-holders as per the decree till date. Therefore, the factual aspects on record clearly show that there is no substance in the first substantial question of law raised by Mr. Walimbe, learned Counsel appearing for the Appellants.

13. Apart from the above aspects, it is clear that the said question is factual. Perusal of the evidence-affidavit of the Appellants i.e. Obstructionists clearly shows that the contention raised is that the respective obstructionist/Appellants are the *bonafide* purchasers of the respective shops. It is further mentioned that after the shop is attached the respective Appellants-Obstructionists approached the judgment-debtors and the judgment-debtors informed them about the Consent Decree and that the judgment-debtors have given in writing in the Court that for ensuring compliance of the consent terms, some other shops except the shops, which has been sold to the respective Appellant, be sold. Therefore, it is clear that the said contentions raised in the Evidence-Affidavit is in fact contrary to the contention that there is collusion between the decree-holders and judgment-debtors. In fact, the said contentions

establishes that the judgment-debtors have not paid to the decree-holders any amount whatsoever as per the consent decree and they have represented that instead of the shop sold to the respective Appellants, some other shop would be sold. Therefore, there is no substance in the contention that there is collusion between the decree-holders and judgment-debtors.

14. It is significant to note that all the respective Appellants in the respective applications for objection to attachment and sale under Order XXI Rule 58 of the CPC levelled allegations against the judgment-debtors and *inter alia* contended as follows :

"6/ The Applicant states that he is bonafide purchaser of the said shop and the Applicant has no notice of Suit or Decree at the time of purchase and taking possession of the said shop. The Applicant has paid entire amount out of his life savings and from borrowings nothing remained with him for further investments. **The Judgment Debtors have also left all the works incomplete. The Applicant recently come to know that the judgment debtor and cheated so many persons in the city. There are many cases filed and pending against the judgment debtors.** The Applicant had no knowledge of the same. The Applicant would not have gone for such purchase if he would have come to know about the litigation of debts of the judgment debtors."

(Emphasis added)

It is significant to note that identical contention is raised by all the Appellants in their respective applications filed under Order XXI Rule 58 of the CPC.

15. It is further significant to note that the respective Appellants filed evidence-affidavit. The Appellants i.e. Obstructionists in Second Appeal No. 534 of 2022, Second Appeal No. 535 of 2022 and Second Appeal No. 537 of 2022 have filed affidavit through their constituted attorney who are their close relatives. All these witnesses have admitted in the cross-examination that they came to know about the Consent Terms as well as the registered agreement executed with the decree-holders and inspite of that, they have not taken any action against the judgment-debtors and only filed application obstructing the execution of decree. Mr. Walimbe, learned Counsel appearing for the Appellants submitted that the Appellants came to know about these aspects in the year 2009. Even assuming that the respective Appellants came to know about the same in the year 2009, the respective cross-examinations of all these witnesses are of the year 2011 wherein they admit that they have not taken any action against the judgment-debtors. Mr. Walimbe fairly admits, after taking instructions, that none of the Appellants have filed any proceedings against the judgment-debtors even till date. Thus

all these aspects in fact show that there is a collusion between judgment-debtors and the obstructionists to defeat the execution of the decree.

16. It is significant to note that in fact, cross- examination of the witnesses of the Appellants in Second Appeal No.534 of 2022 (Shop No. 10) and in Second Appeal No. 536 of 2022 (Shop No.9) shows that the said shop premises in question are not in possession of the Appellants and the same are in the possession of one political party namely Maharashtra Navnirman Sena. Thus, it is clear that every attempt is made to ensure that the decree remains un-executed.

17. In any case, there is nothing to show that there is collusion between the judgment-debtors and the decree-holders. It is admitted position that there is no satisfaction of the consent decree passed by the learned Trial Court for last about 20 years and huge decretal amount has remained to be recovered. It is the contention of Mr. Walimbe that the collusion is seen from the fact that the decree is being executed only against shops purchased by the present respective Appellants and the same is not being executed against other shops. The learned Executing Court in the impugned order has observed that the entire building is attached. Apart from that, it is to be noted that these shops are specifically earmarked in the Consent Terms to ensure

compliance of at least part payment of money under the Consent Decree and in fact registered agreements for sale were executed by the judgment-debtors in favour of the decree-holders with respect to these four shops. It is further significant to note that the consent decree in the said Suit was passed on 16th June, 2003, registered agreements for sale with respect to these four shops were executed in favour of the decree-holders on 15th July 2003 and 2nd July 2003 and the registered agreements of sale were executed in favour of respective Appellants on 25th March 2004, 29th December 2004 and 12th February 2007.

18. The witnesses who have been examined by respective Appellants have accepted that no previous enquiry was made by them. In fact, they have accepted that they have not sought any information from the judgment-debtors, regarding whether these shops were sold to any other parties or any agreement is executed with any other party. They have not taken any search from the Registrar's office. Just for illustrative purpose, relevant cross-examination of Kundalik Shankar Sarkate i.e. Constituted Attorney and father of the Appellants in Second Appeal No. 537 of 2022 is set out.

"१२. माझा मुलगा मनिष याने गाळा क्र. ११ हा जान्हवी बिल्डर, मालक—
जयसींग राणे यांच्या कडून खरेदी केला. त्या कामी मी त्याने सदरहू गाळा विक्री

करणेपूर्वी दुसऱ्याबरोबर काही व्यवहार केले आहेत की नाही, याची चौकशी केलेली नाही. तसेच दुय्यम निबंधक कार्यालय यांचे कार्यालयात जाऊनही चौकशी केलेली नाही. त्या कामी मला सदरहू कार्यालयात जाऊन चौकशी करण्याची गरज भासली नाही. सदरचा करार झाला त्यापूर्वीच सदरहू दरखास्ताचे काम न्यायालयात सुरू होते, याची माहिती मला नाही.

१३. सदरचा वादग्रस्त गाळा क्र. ११, दि. २.७.२००३ रोजी सामनेवाल्याने हुकूमनामा धारकास रजिस्टर खरेदीपत्राने विकला याची माहिती मला नाही. हुकूमनामा धारकाचे म्हणणे की त्याकामी वादग्रस्त गाळा खरेदी करण्यापूर्वी अर्जदाराने दुय्यम निबंधक कार्यालयातून शोध घेणे गरजेचे होते. याची मला माहिती नाही. सदरहू वादग्रस्त गाळा खरेदी करणेपूर्वी अर्जदाराने आवश्यक कायदेशीर बाबींची पूर्तता केली नाही, हे खरे नाही त्यामुळे अर्जदार हा प्रामाणिक खरेदीदार नाही, हे म्हणणे मला मान्य नाही. वादग्रस्त गाळा हुकूमनामा धारक व सामनेवाला यांच्यातील स्पे.मु. क्र. ९०/२००३ निकाल दि. १६.६.२००३ नुसार तडजोडीने हुकूमनामा धारकास देण्यात आला, हे अर्जदारास माहित नाही.”

(Emphasis added)

Thus, it is clear that no enquiry whatsoever has been made by the respective Appellants. In fact, it is admitted position that no action whatsoever has been taken by the obstructionists against the judgment-debtors even till date. Thus, it is clear that there is no collusion whatsoever between the judgment-debtors and decree-holders and the factual position on record clearly shows that the collusion is between the judgment-debtors and the Appellants i.e. Obstructionists.

19. The next substantial question of law raised by Mr. Walimbe, learned Counsel appearing for the Appellants is that the execution could not have been filed unless completion certificate

was obtained regarding said shops. It is significant to note that in the cross- examination, all the witnesses have accepted that when they purchased said shops, there was no completion certificate and when their cross-examination was conducted, they again admitted that there was no completion certificate. Mr. Mhaispurkar, learned Counsel appearing for Respondent Nos. 1 to 4 i.e. Decree-Holders submitted that no completion certificate is obtained even till today. It is significant to note that the consent-decree in Clause No. 1, which is regarding money decree, states that the said amount was to be paid within twelve months. The said decree was passed on 16th June 2003. The said twelve months period expired on 15th June 2004 and the execution was filed in 2004. Therefore, there is no substance in the contention raised by Mr. Walimbe that the execution filed is not maintainable and the same has to be filed after getting completion certificate. It is important to note that the decree sought to be executed is basically a money decree as reflected in Clause No.(i) of the Consent Decree and the other clauses are incorporated to ensure the compliance of Clause No. (i). Therefore, there is no substance in the contention of the Appellant that the execution could not have been filed without obtaining the commencement certificate.

20. The third substantial question of law raised by Mr.

Walimbe, learned Counsel appearing for the Appellants is that the Courts have not examined the right, title and interest of the Appellants. It is the submission of Mr. Walimbe that the obstruction is required to be dealt with as a separate suit. It is to be noted that in all these matters, the respective obstructionist have lead oral evidence and they have been cross-examined. The relevant documents are brought on record by both the parties. Mr. Walimbe is right to some extent as the orders passed by the learned Executing Court in all matters, are not in detail. However, the learned Appellate Court has considered the contentions in detail after considering the entire evidence on record.

21. Mr. Mhaispurkar, learned Counsel appearing for Respondent Nos. 1 to 4 i.e. Decree-Holders relied upon the decision of the Supreme Court in the matter of **Silverline Forum Pvt. Ltd. Vs. Rajiv Trust & Another**³. He more particularly relied on paragraph 14 of the said decision, which reads as under:

"14. It is clear that the executing court can decide whether the register or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97(2) of the Code. **The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection**

³ (1998) 3 Supreme Court Cases 723

of evidence. The Court can make the adjudication on admitted facts or even on the averments made by the register. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."

(Emphasis added)

Thus, it is clear that the adjudication contemplated under Order 21, Rule 97(2) of Code of Civil Procedure, 1908 need not involve a detailed enquiry every time. There is substance in the contention raised by Mr. Mhaispurkar that although the order passed by the learned executing court is not in detail, but the same records the fact that the purchase by the respective Appellants is inspite of registered agreement of sale executed by the judgment-debtors in favour of the decree-holders. Therefore, there is no substance in the third substantial question of law raised by the learned Counsel appearing for the Appellant.

22. Mr. Walimbe, learned Counsel appearing for the Appellants has raised a fourth substantial question of law that although various options were provided in the consent terms, the Appellant has chosen only one option i.e. execution which is filed only for recovery of money. However, perusal of various terms and conditions of the consent terms clearly shows that Clause No.1 provides for money decree and Clause No.2 onward provisions are made to secure said money decree or at least part

of money decree to the extent of Rs.16,59,000/- for which six shops were agreed to be sold to the Appellants and the said clause 2 also makes reference to payment mentioned in Clause no.1. Therefore, there is no substance in the said substantial question of law raised by Mr. Walimbe.

23. As far as the additional substantial question of law raised by Mr. Walimbe, learned Counsel of the Appellants that both the Courts are incorrect in holding that the Appellants have no locus when the Appellants are the purchasers of the respective shops by registered sale-deeds, it is to be noted that the said contention was raised in the reply filed by the decree-holders and the perusal of the impugned order passed by the learned Executing Court and the learned First Appellate Court shows that the said contention has never been accepted or only reference is made to the said contention. The learned Executing Court through observation that the Appellant has no locus, wanted to convey that the Appellants have no independent right, title and interest. In any case, the learned First Appellate Court after considering the entire evidence on record, held that the Appellants have no independent right, title and interest and any right, title and interest created in their favour, is by the judgment-debtors after the decree has been passed and therefore the decree is also binding on them. The evidence on

record clearly show that the respective Appellants are not the bonafide purchasers without notice of the decree. Therefore, there is no substance in the said substantial question of law raised by the Appellants.

24. As, there is no substance in any of the substantial questions of law raised by the Appellants, all the Second Appeals are dismissed with costs.

25. In view of dismissal of the Second Appeals, nothing survives in the Interim Applications, and the same are also dismissed.

26. At this stage, Mr. Walimbe, learned Counsel appearing for the Appellants states that there is an interim relief granted by this Court on 17th August 2022 and the same operates till date and seeks continuation of said stay order for a period of twelve weeks. However, as the decree passed in the year 2003 has remained to be executed for more than 20 years and as the material on record shows that there is collusion between the Appellants i.e. Obstructionists and the Respondent Nos.5 to 9 i.e. Judgment-Debtors, no case is made out for continuation of said stay order. Therefore, the stay order is not continued and stands vacated forthwith.

[MADHAV J. JAMDAR, J.]