

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

**FIRST APPEAL NO.1586 OF 2016
WITH
CIVIL APPLICATION NO.4519 OF 2016**

Rohit Gujarilal Anand .. Appellant

Vs.

1) Arcade (India) Pvt. Ltd.
(Through Its Managing Director
Shri M. G. Ramchandra) & Ors. .. Respondents

**WITH
FIRST APPEAL NO.1587 OF 2016
WITH
CIVIL APPLICATION NO.4520 OF 2016**

Sanjeev Pyarelal Prajapati
Proprietor of M/s. Saroj Enterprises .. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd.
(Through Its Managing Director
Shri M. G. Ramchandra) .. Respondent

**WITH
FIRST APPEAL NO.1588 OF 2016
WITH
CIVIL APPLICATION NO.4521 OF 2016**

Mr. Rajesh Pyarelal Prajapati
Proprietor of M/s. Saroj Enterprises .. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd.
(Through Its Managing Director
Shri M. G. Ramchandra) .. Respondent

**WITH
FIRST APPEAL NO.1589 OF 2016
WITH
CIVIL APPLICATION NO.4522 OF 2016**

Mr. Rajesh Pyarelal Prajapati & Ors. .. Appellants

Vs.

M/s. Arcade (India) Pvt. Ltd.
(Through Its Managing Director
Shri M. G. Ramchandra)

.. Respondent

**WITH
FIRST APPEAL NO.1590 OF 2016
WITH
CIVIL APPLICATION NO.4523 OF 2016**

Mrs. Nirupama Rajesh Prajapati
(Prop. M/s. Soham Enterprises)
Vs.

.. Appellants

M/s. Arcade (India) Pvt. Ltd.
(Through Its Managing Director
Shri M. G. Ramchandra)

.. Respondent

**WITH
FIRST APPEAL NO.1591 OF 2016
WITH
CIVIL APPLICATION NO.4524 OF 2016**

M/s. Pyarelal Trading & Marketing
Through Mr. Rajesh Pyarelal Prajapati
& Ors.

.. Appellants

Vs.

M/s. Arcade (India) Pvt. Ltd.
(Through Its Managing Director
Shri M. G. Ramchandra)

.. Respondent

**WITH
FIRST APPEAL NO.1592 OF 2016
WITH
CIVIL APPLICATION NO.4525 OF 2016**

Piyus Ramniklal Mehta

.. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd.

.. Respondent

**WITH
FIRST APPEAL NO.1593 OF 2016
WITH
CIVIL APPLICATION NO.4526 OF 2016**

Mrs. Manjula Kushalchandra Jain
Vs.

.. Appellant

M/s. Arcade (India) Pvt. Ltd.

.. Respondent

**WITH
FIRST APPEAL NO.1594 OF 2016
WITH
CIVIL APPLICATION NO.4527 OF 2016**

Mrs. Kokila L. Shah

.. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd.

.. Respondent

**WITH
FIRST APPEAL NO.1595 OF 2016
WITH
CIVIL APPLICATION NO.4528 OF 2016**

M/s. Shreepal Trade Impes

.. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd.

.. Respondent

**WITH
FIRST APPEAL NO.1627 OF 2016
WITH
CIVIL APPLICATION NO.4613 OF 2016**

Sunil Medical & General Store

Prop.Mr. Rajaram Kumbhar

Through its POA Sunil Raja

.. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd. & Anr.

.. Respondents

**WITH
FIRST APPEAL (L) NO.30523 OF 2016
WITH
CIVIL APPLICATION NO.4753 OF 2016**

Gopal Vasudeo Singh

.. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd. & Ors.

.. Respondents

**WITH
FIRST APPEAL (L) NO.30533 OF 2016**

M/s. Anuj Hotel through the

heir Partners Mr. Pratap Yaav Shetty
& Ors.

.. Appellant

Vs.

M/s. Arcade (India) Pvt. Ltd. & Ors.

.. Respondents

.....

Mrs. Savita Ganoo i/b. Mr. V. K. Hingorani, Advocate for the Appellant in F.A. 1586 of 2016.

Mr. M. P. S. Rao, Senior Advocate i/b. Mr. V. K. Hingorani, Advocate for the Appellants in F.A. No.1587, 1589, 1590 and 1591 of 2016.

Mr. V. K. Hingorani, Advocate for the Appellants in FA 1588 of 2016.

Mr. Onam Hingorani i/b. Mr. V. K. Hingorani, Advocate for the Appellants in F.A. 1592 of 2016.

Mr. M. D. Nagle and Mr. V.M. Parkar, Advocate for the Appellant in FA 1593 to 1595 of 2016.

Mr. S.S. Lanke with Mr. Salim Nawab, Advocate for the Appellant in FA (St.) No.30533 of 2016.

Mr. Puthenpurail Oommen Varghese, Advocate for Respondents.

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**CORAM : SHANTANU S. KEMKAR AND
PRAKASH D. NAIK, JJ.**

**RESERVED ON : JANUARY 23, 2017
DELIVERED ON : FEBRURY 14, 2017**

JUDGMENT (Per P.D. Naik, J.) :

Learned counsel appearing for the parties had submitted that instead of passing any order on the stay application, the matters may be finally heard. Hence, the matters were listed for final disposal. By consent of counsel for respective parties, the matters are taken up for final disposal.

2 Since the Appeals and the Civil Applications involves the common issue and the common impugned order, same are disposed of by common judgment.

3 The Appellants had preferred these First Appeals challenging the impugned judgment and order dated 16th September, 2016 passed by the Joint Civil Judge Senior Division, Thane below Exhibit - 365 in the proceedings arising out of Special Darkhast No.104 of 2010 by which the learned Judge has allowed the application preferred by respondent no.1 (hereinafter referred to as “the decree holder”, for the sake of brevity).

4 The said application Exhibit-365 was filed by the Respondent No.1 for dismissal of the applications preferred by the obstructionist vide Exhibit Nos. 317, 323, 325, 327, 332, 336, 341, 345, 349, 353, 355, 358, 361 and 381.

5 The factual matrix leading to the impugned order is as follows:

- (i) Respondent no.1/decreed holder (hereinafter referred to as “DH” for the sake of brevity) had filed a Special Suit

No.224 of 1992 for specific performance of the contract dated 11th May, 1987 for the purchase of 28 constructed shops having total carpet area of 13520 sq. feet for a consideration of Rs.35 lakhs.

- (ii) After filling of the said suit, there were several proceedings initiated by either parties on various issues. The suit was ultimately decreed vide order dated 17th July, 2010. As per the said decree, defendant nos.1 to 3 and 3A were directed to jointly and severally perform their part of contract by handing over possession of 27 shops to the plaintiff as agreed under the agreement dated 11th May, 1987 and were directed to execute a conveyance in favour of the plaintiff within one month from the date of the said judgment and decree. Defendant no.2 in the said suit was M/s. Om Shanti Construction Company, defendant no.3 was Shri Pyarelal R. Prajapati (Chairman of Shree Om Shanti Co-operative Housing Society Ltd. partner of Om Shanti Construction Company/Defendant no.2), defendant no.3A was Pyarelal R. Prajapati (Chairman of Defendant no.1 society) and defendant no.4 was City and Industrial Development Corporation of Maharashtra. The aforesaid

judgment and decree has attained finality after three rounds of First Appeals concerning substantive challenge, the executability of the decree before in this Court and the Supreme Court.

- (iii) The decree was made against the original defendants. According to the DH M/s. Om Shanti Commercial Premises Co-operative Society is the successor-in-interest qua the defendants/ judgment debtor and therefore has stepped into the shoes of the original defendant/judgment debtor.
- (iv) DH filed Special Darkhast No.104 of 2010 for execution of decree dated 17th July, 2010 before the concerned Court. M/s. Om Shanti Commercial Premises Co-operative Society preferred an application dated 6th February, 2013 in the Court of Civil Judge Senior Division, Thane vide Exhibit - 28. In the said application, it was prayed that the said applicant had independent right over the subdivided plot of construction standing thereon and the members of the said society are entitled to use and occupy the respective shops and the decree passed in Special Civil Suit No.224 of 1992 is not binding on the said applicants. It was contended that

the decree cannot be executed against the said applicant society and its members. It was a case of the applicants therein that the said decree cannot be executed in respect of subdivided plot and constructions standing thereon as it would amount to dispossessing the applicants from their respective shops without giving any opportunity of being heard.

- (v) During the pendency of the aforesaid application, the aforesaid applicants preferred Writ Petition Nos.8141 of 2013 and 8142 of 2013 seeking certain relief in the context of their claim. This Court by order dated 5th February, 2013 directed the executing court to give full opportunity to adduce evidence in support of Exhibit-28.
- (vi) In pursuance to the aforesaid order, the Chairman of the said applicant society Shri Gopal Vasudeo Singh and Member Shri Sanju Pyarelal Prajapati filed affidavit of examination in Chief dated 16th July, 2013 and 24th February, 2014, respectively. They also produced documents which were exhibited as Exhibits - 81 to 99 and 93 to 103. Shri Gopal Singh in his affidavit of evidence has

stated that he is the Chairman of M/s. Om Shanti Commercial Premises Co-operative Society and he has produced the share certificate issued by the Society which appears the signature of Rajesh Prajapait. In his evidence he also mentioned the list of members of the society. He also produced the membership register which bears the signature of Mr. Rajesh Prajapati, Mr. Pyarelal Prajapati, Mr. Sanju Prajapati as office bearers of the said society. He was cross examined at the instance of the decree holder. Mr. Sanjeev Prjapati also tendered an affidavit as a member of the said society. In the said affidavit, it was contended that the original defendants were not constructing as per the agreed layout as referred to in the para nos. 14, 15, 16, 17 (1,2,3,21) plaint of the decree holders suit. He also stated that the applicant has got independent right over the subdivided plot and construction standing thereon and they are not claiming the right through any of the judgment debtor. It was also contended that the applicants are not bound by the decree passed and the same cannot be executed against them and its members in respect of subdivided plot and construction standing thereon executed against them and its members.

It is further stated that what was alleged to be agreed under the suit agreement is yet to be constructed and construction has come up as per the different lay out plan sanctioned on the land of different description of 12 August, 1991. The decree holder on his own act and omission has rendered the decree un-executable as the construction of different description has been allowed to come up on the distinct demarcated land and that too as per different sanctioned layout. The said witness was also cross examined.

- (vii) On the basis of application vide Exhibit-28 adjudication was made by the Executing Court by judgment and order dated 21st March, 2014. The Executing Court rejected the prayers that applicant/ obstructionist, its members have independent right over the suit plot and the construction thereon. The Court had analyzed the evidence put forth by the obstructionist. The Court observed that the obstructionist has failed to prove any independent right in the property which is the subject of execution proceeding and hence the obstruction has not sustainable under Order XXI Rule 97 of the CPC. It was also observed that the

judgment debtor no.3 Pyarelal Prajapati was the chairman of judgment debtor No.1 society and partner of judgment debtor no.2 construction firm. Witness Sanjeev Prajapati has stated in paragraph no.1 of his affidavit-in-evidence that he is the member of obstructionist society and in the cross examination it was admitted that he is the son of Pyarelal Prajapati (judgment debtor no.3A) and his brother Rajesh is also member of obstructionist society. He also admitted that he himself, brother Rajesh, father Pyarelal, mother were directors of the construction company (J.D.No.2). It was further observed that the obstructionist did not sought its impleadment in the suit no.224 of 1992 and could not render any satisfactory explanation for the same. The explanation tendered was that; obstructionist was not aware of pendency of special suit no.224 of 1992. The Court further observed that the explanation is not acceptable and probable particularly when all the family members of Pyarelal are concerned either with J.D. No.2 or with obstructionist society and Pyarelal is concerned with J.D. Nos.1 and 2. The obstructionist maintained shrewd silence, during pendency of suit. The executing court, therefore held that the

obstructionist has no independent right over the subdivided plot and the construction and not entitled to occupy the shops. It was also held that decree in suit is binding upon the obstructionist.

- (viii) The order dated 21st March, 2014 passed by the executing court was challenged by the obstructionist by preferring First Appeal No.468 of 2014 before this Court. The said Appeal was rejected by Judgment and order dated 16th January, 2015. The Court reiterated that the appellants therein are *transferee pendant lite* and therefore cannot claim any independent right and were bound by decree dated 17th July, 2010. The Court also analyzed the evidence recorded by the Executing Court. In paragraph 7 of the said judgment it was observed that the original defendant no.3/JD 3 was the chairman of the original society and the partner of the construction firm and the witness Sanjeev Prajapati was the member of the said appellant who also admitted in his cross examination that he is the son of Pyarelal Prajapati. Thus, the Court observed that it cannot be accepted that the appellant therein was not aware of the decree till 11th September, 2012.

- (ix) Being aggrieved by the order dated 16th January, 2015, the society preferred Special Leave Petition before the Apex Court which was dismissed vide order dated 1st April, 2015.
- (x) The obstructionist society thereafter preferred First Appeal No.11333 of 2015 and Civil Application No.1526 of 2015 for grant of leave to prefer an appeal against judgment and decree dated 17th July, 2010 passed by the Civil Judge on the suit filed by the decree holder. The said Appeal was dismissed vide Judgment and order dated 5th August, 2015. In paragraph 9, this Court had observed that the case of the applicant that it is not bound by the decree has been negatived by the Trial Court and the Division Bench of this Court. The case of the applicant therein that he was not aware of the decree till 11th September, 2012 is also not accepted. After having raised the contention that the impugned decree was not binding on the applicant and after failing to establish the said contention upon the Apex Court, it is not open for the applicant to contend that as it is bound by the decree and an opportunity may be granted to the said applicant to challenge the decree in the year

2015 by condoning the delay.

- (xi) The said obstructionist preferred Special Leave Petition before the Apex Court challenging the Judgment and order dated 5th August, 2015 which was also dismissed vide order dated 12th October, 2015.
- (xii) The obstructionist society thereafter preferred an application before the executing Court under Section 47 of CPC objecting to the execution of the decree on the plea that the property in respect of which the specific performance has been directed does not exist at the site on account of revision of plans. The executing court appointed court receiver to identify and mark the suit shops in question. The Court Commissioner submitted report dated 20th June, 2015 specifically marking the suit shops covering an area of 13170 sq. feet carpet area.
- (xiii) The obstructionist thereafter filed applications vide Exhibits 133, 136 and 144 before the executing court seeking report from another Architect or furnish fresh report from the same Architect etc. The said application was dismissed by

order dated 28th August, 2015 and 15th September, 2015. The obstructionist society thereafter filed two writ petitions against the said orders vide Writ Petition Nos.9192 and 9193 of 2015. This Court vide judgment and order dated 13th October, 2015 dismissed the said petitions. The Court had observed that the Court Commissioner had identified the properties in respect of which decree of specific performance was made and the circumstances that the suit property is now subdivided into a larger area of shops, though having lesser area is not a circumstance which would entitle the petitioner to urge that the suit property does not even exist at the site. Such a plea is unreasonable and aimed at protracting the execution proceedings or if possible frustrating the decree obtained by the decree holder. It was also observed that on the basis of self-serving circumstances, neither the original judgment debtor nor the petitioner were stepped into the shoes of the original judgment debtor can be permitted to frustrate the execution of the decree of specific performance and the executing court has rightly observed that entertaining of objections of such nature would virtually amount to conferring upon the petitioner a

premium for having changed plan after committing the sale of 27 shops in terms of agreement/booking memo dated 11th May, 1987. The petitioner cannot claim a vested right for making application after application for obstructing the execution proceedings and denying the decree holder the fruits of the decree. It was also observed that, to be really meaningful and efficient the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. The Court while dismissing the said petition imposed cost of Rs.50,000/- upon the petitioner.

- (xiv) The obstructionist society thereafter sought hearing of Exhibit - 136 before the executing court and also prayed for framing issues and leading evidence under Section 47 of CPC. The issue was in fact covered by this Court's order dated 13th October, 2015, passed in the aforesaid petitions. The executing court gave hearing to the parties and rejected the application below Exhibit-136 vide order dated 29th October, 2015. The said order dated 29th October, 2015 was challenged by obstructionist society by preferring Civil Revision Application No.80 of 2016 before this Court which is apparently still pending. The obstructionist society

preferred another application below Exhibit-157 before the executing court for stay of execution proceedings. The court rejected the said application on the same day i.e. 29th October, 2015. While rejecting it was observed that the said applicant had earlier preferred an application under Order XXI Rule 97 of CPC on the same ground which was rejected and the said order was confirmed by the High Court. It was further observed that repeated applications were preferred protracting the decree.

- (xv) This Court vide order dated 13th October, 2015 referred to herein above had directed the executing court to dispose of the execution proceedings within a period of three months. However, the obstructionist society forwarded the notice dated 23rd November, 2015 to the Members of the Om Shanti Commercial Premises Society stating that the decree of 27 shops will be executed against 44 shops of the present society and, therefore, the members are appraised of the situation and were advised to take independent stand for safeguarding their individual shops.

- (xvi) In pursuant to the said notice, individual society members

filed Special Suit No.699 of 2015 before the Civil Judge Senior Division, Thane challenging the decree dated 17th July, 2010 and the suit contract dated 11th May, 1987. The said suit is pending in the said Court. However, the individual members preferred First Appeals which are the subject matter of these proceedings. They also preferred several applications for stay of the decree dated 17th July, 2010 and the contract dated 11th May, 1987 before the Civil Judge.

- (xvii) Defendant no.2/judgment debtor no.2 M/s. Om Shanti Construction Company vide another obstruction application under Order XXI Rule 97 read with Rule 101 of CPC for determination of its right stating that they were not party to the suit but the decree holder had got issued the warrant of possession of shop nos. 19, 20, 21 to 24, 25, 26, 28, 29 to 32 and 33 to 36. The obstructionist application Exhibit-168 was signed and verified by Mr. Rajesh Pyarelal Prajapati who has preferred First Appeal No.1588 of 2016 and 1589 of 2016 which is subject matter of the present proceedings. The executing court rejected the application below Exhibit-168 by order dated 14th January, 2016. The

Court while rejecting the said application had observed that the obstructionist private limited company being not having independent locus than the erstwhile partnership firm, the said application was not maintainable and imposed cost of Rs.5,000/-.

(xviii) The order dated 14th January, 2016 was challenged before the District Court, Thane by preferring Civil Appeal No.49 of 2016. By order dated 16th June, 2016 the District Court held that it is not the competent court to hear the Appeal on account of valuation of the suit.

(xix) The executing court issued warrant of possession on 16th January, 2016 for possession of shop nos. 12 to 15 and 17 to 56. The bailiff visited the site on 25th January, 2016 and submitted report of resistance by the members of the society to the executing court. The decree holder preferred application vide Exhibit-187 for re-issuance of possession warrant by appointment of special bailiff and aid of police. Court directed the decree holder to take steps as provided under Order XXI Rule 97 of CPC vide order dated 30th January, 2016.

(xx) In pursuant to the said order, the decree holder preferred an application vide Exhibit-198 under Order XXI Rule 97 of the CPC. The said application was preferred on 25th February, 2016. Concerned persons occupying shop nos. 12 to 15 and 17 to 56 filed their reply. The executing court gave prolonged hearing to the parties and decided the right of the persons who resisted the warrant of possession dated 16th January, 2016. The executing Court by common order dated 30th January, 2016 allowed the application of the decree holder below Exhibit-198 and rejected application for persons occupying the 44 shops in respect of which the decree of specific performance was made. The executing Court had referred to the respective applications and summarized the objections raised by the obstructionist.

(xxi) The obstructionist/appellant preferred Appeals in this Court challenging the order dated 30th April, 2016. By orders dated 24th June, 2016 and 27th June, 2016, First Appeals were withdrawn as appellants preferred to move the executing court by preferring application under Order XXI

Rule 97 of the CPC. The said order dated 27th June, 2016 reads thus:

“1] Learned counsel for the appellants seeks leave to withdraw these appeals, as the appellants wish to move the trial court by an application under Order 21 Rule 97 of the Code of Civil Procedure. All contentions of parties in that regard are kept open. Appeals are disposed of as withdrawn with liberty as prayed. Learned counsel for the appellants makes a statement that the application before the trial court will be filed within a period of one week from today. Statement accepted.

2] In view of disposal of the appeals the respective civil applications do not survive and accordingly are disposed of”

(xxii) In the aforesaid circumstances, appellants filed applications before the executing court purportedly under order XXI Rule 97 of the CPC. The said applications were rejected vide order dated 16th September, 2016. The applications were rejected on the ground that the same are not maintainable as the obstructionist are claiming through M/s. Om Shanti Commercial Premises Co-operative Society

who had made earlier applications and they cannot claim any independent right.

(xxiii) The aforesaid order dated 16th September, 2016 is being challenged by preferring the present appeals by the appellants.

6 The learned counsel for the appellants submits that the appellants have independent right to challenge the execution proceedings which ought to have been considered by the Court. It was further submitted that the order dated 30th April, 2016 entail that the warrant of possession be reissued and the warrant of possession to be executed in favour of the decree holder. Whereas, the High Court by order dated 27th June, 2016 permitted the appellant to file a fresh application under Order XXI Rule 97 to be considered a fresh by the learned executing court keeping all contentions open. Having permitted such an opportunity to the appellant by a specific directions to that effect, the High Court order dated 27th June, 2016 necessarily means that the impugned order therein dated 30th April, 2016 set aside. The order dated 30th April, 2016 and 27th June, 2016 cannot be co-existed. Therefore, the order dated 27th June, 2016 is an order

of remand, liberty to the appellant to file a fresh application so that all contentions could have been heard afresh. It was further submitted that the executing court had wrongly applied the principles of *Res Judicata* which were not applicable in the present proceedings as the parties are not same and the issues are different. It was further submitted that Exhibit - 198 was summarily decided by the Civil Court and not decided on merits. The rights of the properties at the hands of the appellant has not been decided at all and no opportunity was given to them to prove that they are bonafide purchaser without notice. It was also submitted that the decree holder was owner of the shop. The executing court failed to consider that the appellants had established their title to the suit property and their right, title and interest in the property. The executing court has committed an error in summarily deciding the claim of the appellant under misconception of the fact that the objections filed by Om Shanti Commercial Premises Co-operative Society have been decided and the same have been dismissed. The claim of the appellant ought to have been adjudicated. It was also submitted that none of the titled documents have been dealt with despite the fact that an application under Order XXI Rule 97 ought to have been tried as a suit and issues in respect of the rights of the obstructionist

ought to have been framed. It was further submitted that neither the bailiff, new society i.e. Om Shanti Commercial Premises Co-operative Society of which the appellants are members nor of the respective occupants are made party defendant to the civil suit no.293/290 of 1992. The decree in the said suit was obtained by the decree holder by concealing relevant facts. It was submitted that proper opportunity was not given to the appellants for adjudication of their objections. Provision of Order XXI Rule 97 requires opportunity to be given to the parties to lead evidence and it required to be adjudicated on merits. It is submitted that the appellants had raised several issues which were not considered in the earlier application by executing court. Learned counsel for the appellants placed reliance upon the decision of the Supreme Court in the case of **Anita Enterprises and Anr. Vs. Belfer Co-operative Housing Society and others**¹. By relying on the said decision it was submitted that the members has independent rights from the co-operative society. Learned counsel also relied upon a decision of the Supreme Court in the case of **Anwarbi Vs. Pramod Joshi & Ors**². In the said decision, it was observed that the obstructionists possession can only be

1(2008) 1 SCC 285

2. 2000(10) SCC 405

dispossessed in accordance with law. The persons in possession claiming legal entitlement cannot be dispossessed unless their rights are adjudicated in appropriate proceedings. Decree holder cannot take possession unless such proceedings terminate in his favour.

7 Learned counsel for respondent no.1 had countered the submissions of the appellants. He also tendered his reply containing his objections to the prayers made by the appellants. He submitted that the executing court has rightly passed the order which does not require interference. The executing court has given reasons for not entertaining claims of the appellants. It is submitted that the obstructionist cannot claim any independent right as observed by the civil court. The parties are bound by the decree dated 17th June, 2010 and the appellants cannot be said to be strangers claiming right, title and interest through the defendant against whom the suit was pending. He further submitted that it is a matter of res judicata. M/s. Om Shanti Commercial Premises Co-operative society is the successor in interest qua the defendants and stepped into the shoes of the original defendant/judgment debtor.

8 It was further submitted that all the contentions raised by the appellants were already raised by M/s. Om Shanti Commercial Premises Co-operative Society while deciding the application Exhibit - 28. It was further submitted that M/s. Om Shanti Commercial Premises Co-operative Society had made an application Exhibit - 168 which was also rejected. The appellants/obstructionists appeared and filed their say to the application Exhibit - 198 and after hearing them at length, court had allowed the application Exhibit-198 rejecting their objections and contentions raised in their say/reply. Learned counsel further submitted that the order passed below Exhibit - 198 has not been set aside by the High Court and it attained finality. One such, obstructionist registered the objection made by the decree holder. He cannot make further application for the same by invoking Order XXI Rule 97. He submitted that order passed below Exhibits-28, 198 and 168 have become final and operate as *res judicata* under Section 11 of the CPC and there is no provision of CPC for further making any applications. He submitted that the applications made before the executing court are not maintainable in law and, therefore, the same were rightly rejected.

9 Learned counsel appearing for respondent no.1 has placed reliance on the judgment of the supreme court in the case of **Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and Another**³. He placed reliance upon the observations of the Supreme Court in paragraphs 10, 11, 12 and 13 which read as under:

"10 It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under rule 97 or rule 99" 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 Rule 101 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 pendente 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 that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions

3 AIR 1998 SC Page 1754

is based on the salutary principle adumbrated in Section 52 of the Transfer of property Act.

11 *When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may be arising between the parties to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.*

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.

11 *In the above context we may refer to Order 21 Rule 35(1) which reads thus:*

"Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

12-13 *It is clear that executing court can decide whether the resistor or obstructor is a person bound by the decree and he refused 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 of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination. If the Court deems it necessary.”

10 He also placed reliance upon another decision of the Apex Court in the case of ***Usha Sinha Vs. Dina Ram & Ors.***⁴. In the said decision the Apex Court has analyzed the provision relating to the execution qua Order XXI Rule 97 to 106 of CPC. It was held that Rule 102 of Order XXI do not apply to *transferee pendant lite*. The said rule be based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before the 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. Rule 102 of Order XXI of the Code taking into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair,

4 (2007) 7 SCC 144

inequitable or undeserved protection is afforded to a transferee *pendente lite*, a decree holder will never be able to realise the fruits of the decree. Every time the decree holder seeks direction from the Court to execute a decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstructions.

11 We have perused the record and given anxious consideration to the submissions made by the learned counsel for both the parties. The application Exhibit - 198 was filed by the decree holder under Order XXI Rule 97 of CPC to remove the obstructionist and put the decree holder in actual possession of the subject shops. It was also stated that possession warrant was issued and for that purpose special Bailiff was appointed for implementing the said warrant for adjudication of a decree. The obstructionist Gopinath Patil had preferred application Exhibit - 194 with supporting documents for stay of the execution of possession warrant. Exhibit-205 was preferred for seeking permission to lead oral and documentary evidence to establish its right. The obstructionist Piyush Mehta and Rohit Anand preferred application at Exhibit-221 under Order XXI Rule 26 of CPC for stay of the proceedings till the decision of the Special

Civil Suit No. 669 of 2015 filed by them. They also filed documents in support of their application. They further made an application Exhibit-276 for returning application Exhibit-198. It is noted that the decree holder had obtained decree in Special Civil Suit No.224 of 1992 wherein the judgment debtor was ordered to hand over possession of 27 shops to the decree holder. The Court Commissioner was appointed for identification of the shops and said Court Commissioner had identified the shops. Possession warrant was issued. The said warrant was returned by the Bailiff. The occupants of the shop were obstructing. He sought assistance of at least 20 Bailiff and three experienced Senior Bailiffs. The decree holder also made an application at Exhibit-187 for appointment of Special Bailiff for execution of possession warrant with sufficient police force. The decree holder was directed by the executing court to resort to remedy under Order XXI Rule 97 of CPC and, therefore he preferred an application vide Exhibit-198. Said application was opposed by the parties. Obstructionist Gopinath Patil, Parsik Janta Sahakari Bank, Mrs. Kokila Shah, M/s. Shreepal Trade Impex, Anuj Hotel, M/s. Airoli Book Centre, Mrs. Manjula Shah, Smt. Sahajadi Prajapati, Mrs. Geeta Anchan, Mr. Jaydev Anchan, Mr. Gopal Singh, Mr. Rajesh Prajapati, Mr. Krishnawati Dubey, Mr. Piyush

Mehta and Mr. Rohit Anand opposed the said application by filing reply. The objections raised by the said persons are reproduced in order dated 30th April, 2016, passed by the executing court. The obstructionist also relied upon several decisions of the courts in support of that objection.

12 The Joint Civil Judge Junior Division, Thane while deciding Exhibit-198 and the objections of the obstructionists considered all the contentions of parties while passing order dated 30th April, 2016. It was observed that the property was identified by the Court Commissioner by visiting the site and the Court Commissioner submitted report. The objection raised by one of the obstructionist regarding said report and identification of property has been rejected, which order was confirmed by the High Court and hence it is not open to the obstructionist to say that the property could not be identified and decree becomes unexecutable. It was further observed that Om Shanti Commercial Premises Society has raised objection by application Exhibit-28 and at that time issues were framed and opportunities were given to obstructionist to lead evidence and after hearing the arguments it was observed that the obstructionist is claiming through the parent society and not independently. It was further

observed that the society has assigned the work of construction to the firm M/s. Om Shanti Construction Company Limited which was thereafter dissolved. Therefore, after completing of construction, the said firm cannot claim that it has an independent right in the property inasmuch as it had made construction for the society and not for itself. The work of the construction was assigned by the society and the firm was not acquired independent plot and made construction to claim independent right than the parent society. It was also observed that all the objections were considered while deciding application Exhibit-28. Thus, all the issues were decided and obstructionists therein cannot further be allowed to raise the said issues again. In view of the said observations, application Exhibit-198 was allowed and the applications of the obstructionists were rejected vide the aforesaid order dated 30th April, 2016.

13 In pursuant to the order dated 30th April, 2016, Appeals were preferred before this Court which were allowed to be withdrawn vide order dated 27th June, 2016 and an earlier order dated 22nd June, 2016. In the first order, it was recorded that the appellants seeks leave to withdraw the appeals as the appellants application for obstructing the application of decree is

pending before the executing court. Appellant was allowed to withdraw pursuant to pending application according to law. Similarly, the latter order refers that the learned counsel seeks leave to withdraw the said appeals with liberty to file application before the trial Court. All contentions of the parties in that regard are kept open. Liberty was granted and they were permitted to make such application within a period of one week. While granting such withdrawal or liberty, this Court has not addressed the issue whether such applications are maintainable before the executing court. All contentions of the parties were kept open and that the applications be pursued in accordance with law would mean that it was open to object the maintainability of such application before the executing court.

14 While passing the impugned order dated 16th September, 2016, it was observed that M/s. Om Shanti Commercial Premises Co-operative Society being the representative of its members have already filed application under Order XXI Rule 97 of CPC vide Exhibit-28 which was rejected by the said Court. Therefore, the members of the society are not entitled to file their objections repeatedly. It was further observed that the High Court did not set aside the order of the

said Court below Exhibit-198, Exhibit-28 or Exhibit-168. There is no provisions in CPC to file repeated application under Order XXI Rule 97 of CPC by the decree holder or by the obstructionist. In the present case, M/s. Om Shanti Commercial Premises Co-operative Society of which present obstructionist are members had filed the application obstructing the decree which was dismissed. The said application was under Order XXI Rule 97 of the CPC. M/s. Om Shanti Construction Pvt. Limited Company also filed an application obstructing the execution of decree which also comes within the pervue of Order XXI Rule 97 of the CPC was also dismissed by the Court. The earlier order became final. It was also observed that there were three rounds of application under Order XXI Rule 97. The Court further observed that the objections and contentions which were raised by the obstructionists in their reply/stay to the application Exhibit-198 and the orders passed at Exhibit-198 was challenged in Appeal before the High Court which were withdrawn. Upon making application by the decree holder Exhibit-198, the obstructionist had appeared and contested the application. The objections were already considered while deciding the application. Hence, it is not permissible to again raise the said objection. The obstructionist could not show independent right than the

judgment debtor. The obstructionist had claimed rights through Om Shanti Commercial Premises Co-operative Society whose application vide Exhibit-28 was rejected and the order was confirmed by the High Court. In such circumstances, the applications were not maintainable and therefore, the same were rejected vide order dated 16th September, 2016. We do not find any infirmity or illegality in the said order.

15 On perusal of record and particularly the proceedings which are initiated time and again, apparently repeated obstructions are created for execution of the decree dated 17th July, 2010. The applications were repeatedly rejected and several orders had attained finality. The decree was also challenged up to the Apex Court and the same has sustained.

16 The observations made by the executing Court in the impugned order are justifiable. The decree dated 17th July, 2010 has attained finality and it is not permissible to go beyond the said decree. Appeals challenging the order dated 30th April, 2016 were withdrawn and the said order had attained finality. We find that the applications preferred by the appellants before the executing Court were not maintainable in law. It is only an

attempt to obstruct the decree and deprive the decree holder from enjoying the fruits of the said decree. The appellants were apparently waiting till obstructionist society exhausted all remedies and under the garb of intimation letter issued to them by society had created obstructions for execution of decree. The judicial pronouncement cited before this Court cannot come to the rescue of the appellants although it was stressed upon that the co-operative society and its members have independent right. In the present case, the members of the society had exercised that right and the same cannot be allowed to be exercised repeatedly causing obstruction to the decree.

17 It is pertinent to note that by the present appeals/applications the appellants are claiming a vested right in making applications with a view to obstruct the execution proceedings. This Court had directed expeditious disposal of the said proceedings by order dated 13th October, 2015. However, thereafter applications were preferred to stall the execution of the decree. After about 18 years of complete trial, the trial Court had passed the judgment and decree dated 17th July, 2010, directing the defendants therein to perform their part of contract. The said decree is made against original defendants. M/s. Om

Shanti Commercial Premises Co-operative society is the successor qua the defendant/judgment debtor and had stepped into the shoes of original defendant. The application Exhibit-28 preferred by M/s. Om Shanti Commercial Premises Co-operative Society was rejected. Even in that application, it was contended that the decree cannot be executed against the said applicant society and its members. It was further ample clear that the application was also preferred to protect the rights of the members of the said society which was rejected. In view of the directions of this Court opportunity was given to adduce evidence. The affidavit of examination in chief, evidence at the instance of one Gopal Singh and Sanjeev Pyarelal Prajapati were tendered. The said witnesses were also examined. They also produced and relied upon documents. In the said affidavit in evidence of Mr. Gopal Singh, the Chairman of M/s. Om Shanti Commercial Premises Co-operative Society in paragraph 11 is true copy of members "J" register was produced. The register was signed by Mr. Rajesh Prajapati and Mr. Pyarelal Prajapati. The said members were identified by Mr. Sanjeev Prajapati. On the basis of the said application Exhibit-28, adjudication was made by the Court and prayers of the obstructionists were rejected vide order dated 21st March, 2014. The court gave a

finding that the obstructionist and its members do not have independent right over the subdivided plot and the construction thereon. First Appeal No.168 of 2014 was preferred before this Court challenging the aforesaid order which was dismissed vide order dated 16th January, 2015. This Court reiterated that the appeals therein were transferee pendant lite and again claim an independent right and were bound by decree dated 16th July, 2010. The findings of this Court were based upon the appreciation of evidence recorded before the executing court. In paragraph 7 of order dated 16th January, 2015, it was observed by this Court that original defendant no.3/JD No.3 Pyarelal Prajapati was also a member of the appellant therein and is the son of Pyarelal Prajapti. He also admitted that he along with his brother Rajesh, father Pyarelal and uncle Pradeep were directors of defendant no.2 which is said to be subsequently converted into a private limited company. The said judgment dated 16th January, 2015 was challenged before the Apex Court by preferring Special Leave Petition No.9402 of 2015 which was dismissed vide order dated 1st April, 2015. Surprisingly, even thereafter First Appeal Stamp No.11333 of 2015 was preferred alongwith Civil Applications before this Court by M/s. Om Shanti Commercial Premises Co-operative Society challenging the decree dated 17th

July, 2010 and sought stay of execution proceedings. The said appeals and applications were rejected vide judgment and order dated 5th August, 2015. It was observed that the case of the appellants/applicants that they are not bound by the decree has been negated by the trial Court and a Division Bench of this Court. A special leave petition preferred by the society challenging order dated 5th August, 2015 was dismissed vide order dated 12th October, 2015. The obstructionist thereafter initiated proceedings before the executing court to stall the execution of the decree on various grounds. In pursuant to the orders of the executing court, Commissioner was appointed to identify the property. The obstructionists society had preferred application vide Exhibit-136 for framing issues and lead evidence which was also rejected on 29th October, 2015. The said decision was challenged in civil revision application which is pending. As narrated in the factual matrix, several attempts were made for preferring repeated applications to create hindrance to the execution of the decree which are not required to be repeated here again. We have taken note of the said proceedings. It is pertinent to note that application vide Exhibit-168 was preferred at the instance of Mr. Rajesh Prajapati who is the appellant in present First Appeal Nos.1588 of 2016 and 1589 of 2016. The

said application was rejected by the executing Court on 14th January, 2016 on the ground that they do not have any independent right. Even thereafter, the proceedings were initiated as stated above by the obstructionists on seeking various reliefs. The decree holder was required to make the application vide Exhibit-198 under Order XXI Rule 97 of CPC. The persons occupied the shop filed a reply before the executing court and after prolonged hearing the Court decided the right of the persons who resisted the warrant of possession. The executing court allowed the application of decree holder and rejected the claim of the persons occupying the shops by order dated 30th April, 2016. A reference is made to the respective applications preferred by the occupants of the shop by the Court in the aforesaid order. The reasons were assigned in paragraph 26 of the said order for rejecting the claims of the said persons. This order dated 30th April, 2016 was challenged by preferring appeals before this Court bearing First Appeal Stamp No.15853 of 2016, but which was withdrawn on 24th June, 2016 and 27th June, 2016 as stated hereinabove. Thus, the order dated 30th April, 2016 had attained finality.

above, the appellants preferred applications before the executing court which were rejected on 16th September, 2016. The executing court has assigned the reasons for rejecting the said applications, does not warrant any interference. It is rightly observed that all the obstructionists are claiming through M/s. Om Shanti Commercial Premises Co-operative Society who had preferred earlier applications below Exhibit-28 which was rejected and order was maintained in Appeal. M/s. Om Shanti Commercial Premises Co-operative society has stepped into the shoes of original defendant/judgment debtor. M/s. Om Shanti Commercial Premises Co-operative Society and its members are *transferee pendant lite* and cannot claim any independent right. The decree dated 17th July, 2010 is binding upon them. The executing court has dealt with provisions of order XXI Rule 97(2) of CPC and has given a finding that obstructors are the persons bound by decree dated 17th July, 2010. The appellants had raised the same issues by preferring Appeals before this Court and has chosen to withdraw the same and prefer application before the executing court. This Court has allowed the appellants to withdraw the said appeals but has not adjudicated the right to prefer such application before the executing court.

19 In view of the factual circumstances as stated herein above and the observations made hereinabove and in the right of judicial pronouncements relied upon by the respondent no.1, we are not inclined to interfere into the impugned order dated 16th September, 2016 passed by the executing court. Hence these appeals and applications deserve to be dismissed.

20 Hence, we pass the following order:

:: ORDER ::

- (i) First Appeals alongwith Civil Applications are dismissed.
- (ii) No order as to costs.

(PRAKASH D. NAIK, J.) (SHANTANU.S. KEMKAR, J.)

21 At this stage, the learned counsel appearing for the appellants submits that the appellants will challenge the judgment and order passed today before the Hon'ble Supreme Court. Learned counsel appearing for the appellants therefore, pray for stay of the execution of the decree dated 17th July, 2010 for a period of four weeks. On due consideration, the prayer is allowed. The execution of decree dated 17th July, 2010 is stayed for a period of four weeks from today.

(PRAKASH D. NAIK, J.) (SHANTANU.S. KEMKAR, J.)