

Esha

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 86 OF 2022

1. Shri. Madan Waman Chodankar,
(Since Deceased) Now through his legal
representatives,

a) Smt. Medha Madan Chodankar,
widow, Age 67, wife of Madan
Chodankar,

b) Mr. Jatin Madan Chodankar, Age 44,
son of Madan Chodankar

c) Mr. Jaimeen Madan Chodankar, Age
38, son of Madan Chodankar,

All residing at Betim, Bardez-Goa.
(Original plaintiffs, and are Decree
Holders in Exe. Appl. No. 92/2008).

... PETITIONERS

Versus

1. M/s. Keshav Malik Hardware
Corp. H. No. 15, Ward No. 13, Opp.
Office of Capt. of Ports Building, D.B.
Marg, Panjim, Goa.

2. Shri. Dyneshwar Keshav Malik,
Partner of M/s. Keshav Malik Hardware
Corp. Residing at Alto Porvorim, Goa.

3. Shri Ramakant Keshav Malik,
Partner of M/s. Keshav Malik Hardware
Corp., Residing at Alto Porvorim, Goa.

4. Shrikant Keshav Malik, Partner of
M/s Keshav Malik Hardware Corp.
Residing at Alto Porvorim, Goa.

5. Mr. Gurudas Malik (since
deceased),

5(a) Smt. Laxmi Gurudas Malik

5(b) Keshav Gurudas Malik,

5(c) Dr. (Mrs.) Sudha Shivanand Gawas

5(e) Mrs. Latita Mohan Kavlekar

5(f) Ms. Vinanti Gurudas Malik

5(g) Anju Gurudas Malik

5(h) Lina Gurudas Malik

5(i) Amita Gurudas Malik

5(j) Nima Gurudas Malik

All major of age and Residing at Savitri
Niwas, Alto, Porvorim, Bardez, Goa.

(Res. No. 1 to Res. No. 5 (h) were original
Defendants, and are Judgment Debtors in
Exe. Appl. No. 22/2008)

6. Mr. Tahir V. Isani, Major of age,
businessman, Residing at Altinho,
Mapusa-Goa (Third Party/Obstructionist
in Exe, Appl. No, 22/2008)

... RESPONDENTS

Mr. S.D. Lotlikar, Senior Advocate with Mr. Terence
Sequeira and Ms. Sailee Kenny, Advocates for the
Petitioners.

Mr. Shivan Desai with Mr. Varun Bhandankar, Advocates
for Respondent No. 6.

CORAM: SANDEEP K. SHINDE, J.

RESERVED ON: 14 JULY 2022

PRONOUNCED ON: 25 JULY 2022

JUDGMENT:

1. Heard Mr. Lotlikar, learned Senior Counsel for the petitioners and Mr. Desai, learned Counsel for the respondent no. 6.

2. Rule. Rule made returnable forthwith. Mr. Shivan Desai, learned Counsel, waives service on behalf of the respondent no. 6. Heard finally by consent of parties.

3. The short question, arises for consideration, is, whether, the Executing Court was justified in continuing enquiry, in an Application, purporting to have been filed by the third party, under Order XXI, Rules 97 and 101 of the CPC, although, enquiry has revealed that third party-respondent no. 6 was pendente lite of the judgment debtor.

4. Briefly stated facts of the case are as under:

The petitioners instituted a suit in the Court of Civil Judge Senior Division at Panaji, being Special Civil Suit No. 97/1996/B, for dissolution of partnership; recovery of mesne profits and eviction of judgment debtor nos. 1 to 5(i), who were defendants in the said suit. It was the petitioner's case that the original plaintiff no. 1 was tenant of the suit premises, wherein the business of defendant no. 1 (partnership firm) was carried on. In terms of partnership deed, the tenancy rights of the said premises

continued to be the personal property of the original plaintiffs. On account of disputes between the plaintiffs and other partners of the firm, the original plaintiffs, gave a notice of dissolution of the partnership firm to the defendant nos. 2 to 4 and sought discontinuation of the use of the suit premises and delivery of vacant possession to them alongwith other reliefs.

5. On 24.04.2008, the learned Adhoc Civil Judge Senior Division at Panaji, decreed the suit, whereby, the defendants/ judgment debtor were *inter alia* directed to vacate the suit premises and deliver its vacant possession to the plaintiffs. Since the possession of the suit premises was not handed over by the judgment debtor, despite the decree attaining finality, the original plaintiffs filed an Application for execution of the decree, which came to be registered as Execution Application No. 22/2008/B. Pending Execution, in February, 2009, an Application, purporting to be an Application under Order XXI, Rules 97 and 101 of CPC, came to be filed on behalf of respondent no. 6, as a third party. Respondent no. 6 claimed that by Deed of Sale dated 24.04.2007, he had purchased the suit property alongwith the house from its owner, M/s Rizwi Estate and Hotels Private Limited. He would further claim that M/s Keshav Malik Hardware Corporation (partnership firm–respondent no. 1) was tenant of the suit premises and it had surrendered its tenancy rights in his favour, by Deed of Surrender dated 05.07.2007 and handed over the vacant possession of the same to him. On this premise, respondent no. 6, submitted that the decree in question could not be executed against him, since, he has independent right, title and interest in the property.

6. The Application under Order XXI, Rules 97 and 101 of CPC was opposed by the decree holders, on the ground that the Deed of Surrender dated 05.07.2007, purportedly made by M/s Keshav Malik Hardware Corporation (Firm-Defendant No. 1), was during the pendency of the suit, instituted by the original plaintiffs against the firm and its partners, therefore, was governed by doctrine of lis pendens and objection under Order XXI, Rule 97 of the CPC, was not maintainable.

7. On 18.08.2011, an Application was moved by the respondent no. 6, by which, he prayed to the Executing Court that, the issues which arise for determination of the Court between the parties, be framed before proceeding with the Execution. The Application was opposed by the petitioners, that there was no scope for framing such issues or points for determination as the very Application made by respondent no. 6, under Order XXI. Rules 97 and 101 of CPC was not maintainable.

8. By order dated 05.09.2013, the Executing Court allowed the Application of respondent no. 6 and framed the following issues.

- i. Whether the respondent no. 6-third party proves that he is the owner in possession of the entire premises, except 10 square metres ?*
- ii. Whether the respondent no. 6-third party proves that the decree is nullity and is not binding on the third party as it was a collusive suit ?*

9. Before advertizing to next developments, two facts may be noted; one, that the suit instituted by the plaintiffs was not contested by the defendant nos. 1 to 5; and second, pending suit, the defendant no. 1, partnership firm, executed a deed of surrender on 05.07.2007 in favour of respondent no. 6-third party and surrendered it to third party, although, original plaintiff was tenant. Whereafter, the suit was decreed on 24.04.2008.

10. In the backdrop of these facts, the respondent no. 6-third party would contend that the decree is not binding on him, since it was a decree in a collusive suit.

11. Be that as it may, after framing the issues, nearly, after five years i.e. on 18.12.2019, the respondent no. 6-third party stepped into the witness box and filed his evidence. He was partly cross examined by the petitioners. Mr. Lotlikar, learned Senior Counsel has taken me through the cross examination of respondent no. 6, wherein, he admits that document of surrender dated 05.10.2007 was not a manipulated document, being a registered document.

12. Thus, the respondent no. 6 having admitted that the defendant/respondent no. 1 executed the Deed of Surrender in his favour, pending suit on 05.10.2007, he was a transferee pendente lite of the judgment debtor. On this admission by the respondent no. 6-third party, the petitioners moved an Application on 22.10.2019 and prayed for discontinuance of the enquiry, on the ground that Application under Order XXI, Rule 97 of CPC was not maintainable as the respondent no. 6 was transferee pendente lite.

13. The Executing Court rejected that Application and refused to discontinue that enquiry by order dated 17.09.2021. This order is

challenged in this Petition under Article 227 of the Constitution of India.

14. Mr. Lotlikar, learned Senior Counsel for the petitioners submitted that, since respondent no. 6 is transferee pendente lite of the judgment debtor, the resistance offered by him, to execution of the decree, purported to be under Order XXI, Rules 97 and 101 of CPC, the scope of adjudication is limited to finding out whether, he is such a transferee. Once evidence clinches and confirms this fact, such a transferee has no right to resist the decree in view of the clear language contained in Rule 102 of Order XXI of the CPC.

15. Rule 102 of Order XXI of CPC, lays down an exception to the operation of orders, passed under Rules 98 and 100, where the resistor or the obstructor to the resistance of the decree, is a person whom, the property is transferred by the judgment debtor, during the pendency of the suit in which the decree was passed. Resistance or obstruction by a person to whom, the judgment debtor has transferred the property during the pendency of the suit, in which, the decree in execution is passed is not entitled to protection of operations of Rules 98 and 100.

16. In the case at hand, the cross examination of the respondent no. 6 bears out the fact that the judgment debtors i.e respondent nos. 1 to 5 surrendered the suit premises to him vide Deed of Surrender dated 05.07.2007, i.e. pending Special Civil Suit No. 97/1996/B, which was decreed on 24.04.2008. Thus, it stands proved that the respondent no. 6 is the transferee pendente lite of the judgment debtors. In the backdrop of this fact, Mr. Lotlikar, learned Senior Counsel, placed reliance on the decision of the Hon'ble Supreme Court in the case of **Usha Sinha Vs. Dina Ram &**

Others, (2008) 7 SCC 144 and a three-Judge Bench decision in the case of **Silverline Forum Pvt. Ltd. Vs. Rajiv Trust & Another, (1998) 3 SCC 723**.

17. In **Usha Sinha** (supra), the Supreme Court has held that the doctrine of lis pendens prohibits the party from dealing with the property, which is subject matter of suit. Rule 102 of Order XXI of CPC, therefore, clarifies that there should not be resistance or obstruction from the transferee pendente lite. The Supreme Court in the above case, explained the law as follows:

“It is thus settled law that a purchaser of suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by a competent Court. The doctrine of 'lis pendens' prohibits a party from dealing with the property which is the subject matter of suit. 'Lis pendens' itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit. Rule 102, therefore, clarifies that there should not be resistance or obstruction by a transferee pendente lite. It declares that if the resistance is caused or obstruction is offered by a transferee pendente lite of the judgment debtor, he cannot seek benefit of Rule 98 or 100 of Order XXI.”

18. Insofar as the decision in the case of **Silverline Forum Pvt. Ltd.** (supra) is concerned, the observations in paragraphs 10 and 14, squarely apply to the facts of the case at hand. Thus, paragraphs 10 and 14 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 is based on the salutary principle adumbrated in Section 52 of the Transfer of property Act.”

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14. 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."

19. Here, the evidence has established that respondent no. 6 being the transferee pendente lite of the judgment debtor, therefore, the Executing Court ought to have discontinued the enquiry, having regard to scope of adjudication; as explained in **Silverline Forum Pvt. Ltd.** (supra).

20. Mr. Desai, learned Counsel appearing for the respondent no. 6, supported the impugned order. He submitted that in 2013, the decree holders had moved an Application below Exhibit D-23 for identical reliefs. However, that Application was rejected in September 2013 and therefore, the Application seeking discontinuance of the enquiry made in October 2019 could not have been made. Mr. Desai submitted that the third party is claiming the right under Sale Deed dated 24.04.2007, whereby, he had purchased the suit property from M/s Rizwi Estate and Hotels Private Limited. Mr. Desai submitted that the respondent no. 6 was not party to the Special Civil Suit No. 97/1996/B and the defendants 1 to 5 therein, who had surrendered the suit premises to him, chose not to defend the suit and therefore, the decree passed therein, was a collusive decree. Mr. Desai also submitted that Section 52 of the Transfer of Property Act has no application to the facts of the case and therefore, until the issues framed by the Executing Court on 5th September 2013, are answered and rights

of third party are adjudicated, the Application seeking discontinuance of enquiry was not maintainable.

21. Mr. Desai in support of his submissions, relied on the judgments of the Hon'ble Supreme Court in the case of **Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal & Another**, (1997) 3 SCC 694; **Sameer Singh & Another Vs. Abdul Rab & Others**, (2015) 1 SCC 379 and **Sriram Housing Finance and Investment India Limited Vs. Omesh Mishra Memorial Charitable Trust** [Civil Appeal No. 4649/2022 decided on 06.07.2022].

22. In **Brahmdeo Chaudhary** (supra), the question before the Apex Court was whether, stranger occupying the decretal premises and asserting his own right and who has offered resistance to the execution of the decree, obtained by the decree holder, against the judgment debtor qua such property can request the Executing Court to adjudicate upon his resistance and obstruction without being insisted upon that first he must hand over possession and then only move an Application under Order XXI, Rule 99 of the CPC.

23. Admittedly, in the case of **Brahmdeo Chaudhary** (supra), the appellant occupying the decretal premises was not transferee pendente lite of the judgment debtor and therefore, the law laid down in the said judgment relating to the scope of enquiry under Order XXI, Rules 97 and 99 of the CPC, has no application to the facts of the case at hand.

24. In the case of **Sameer Singh** (supra), the father of the appellants, Gopal Singh, was a decree holder in Title Suit No. 43/1974. In pursuance of the decree, a Sale Deed was executed on

10.10.1982 in favour of Gopal Singh through the Court and he was put in possession through Nazir of the Civil Court in respect of the property in question and after the demise of Gopal Singh, the appellants, being sons, inherited the said property and remained in possession till 27.04.2008, when all of a sudden, respondent no. 2 through the help of the Nazir took the delivery of the property after dispossessing the appellants therefrom. In the context of these facts, the Apex Court has held that the Executing Court has authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties and it includes the claim of a stranger, who apprehends the dispossession or has already been dispossessed from the immovable property.

25. Thus, it is to be noted that in the said case, application of Rule 102 of Order XXI of the CPC was not the issue or question for consideration. Therefore, the said judgment does not apply to the facts of the case at hand.

26. In **Sriram Housing Finance and Investment India Limited** (supra) in paragraph no. 14, the Supreme Court has held as under:

“14. From bare reading of the aforesaid provisions, it is clear that Order XXI Rule 97 deals with the resistance or obstruction to possession of immovable property by ‘any person’ obtaining possession of the property against the decree holder. It empowers the ‘decree holder’ to make an application complaining about such resistance or obstruction. On the other hand, Rule 99 of Order XXI deals with the right of ‘any person’ other than the judgment debtor who is dispossessed by holder

of a decree for possession of such property or in case where such property is sold in furtherance of execution of a decree. The said provision vests ‘any person’ with a right to make an application complaining about such dispossession of immovable property in the manner prescribed above. Rule 98 and Rule 100 deal with the power of the Court to pass appropriate orders upon an application preferred under Rule 97 and Rule 99 respectively. In so far as Rule 101 is concerned, it confers jurisdiction on the Court as well as casts an obligation to determine the questions relating to right, title or interest in the property, if any, arising between parties on an application made by the concerned person under Rule 97 or Rule 99 in the same proceedings for adjudication and not in a separate suit. Lastly, Rule 102 clarifies that Rule 98 and Rule 100 shall not apply in a case where resistance or obstruction in execution of a decree for the possession of immovable property is offered by ‘transferee pendente lite’ i.e., the person to whom the property is transferred by the judgment debtor after institution of the suit in which the decree sought to be executed was passed.”

27. In any case, the respondent no. 6-third party being a transferee pendente lite of judgment debtor, in view of the provisions of Rule 102 of Order XXI of the CPC, the Application under Order XXI, Rule 97 of the CPC, being not maintainable, the impugned order is quashed and set aside. As a consequence, the Application below Exhibit D-100 dated 22.10.2019 in Execution

Application No. 22/2008/B, moved by the decree holders is allowed. The Petition is allowed and made absolute in terms of prayer clause (a).

28. Rule is made absolute in the aforesaid terms.

SANDEEP K. SHINDE, J.

25.07.2022

JUDGMENT CONTINUED:

29. At this stage, learned Counsel for the Respondent, requested the Court to stay the operation of this judgment. However, in consideration of facts of the case, the request is rejected.

SANDEEP K. SHINDE, J.

VAIGANKAR
ESHA SAINATH

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