

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

**SECOND APPEAL NO. 578 OF 2022
ALONGWITH
INTERIM APPLICATION NO. 17177 OF 2022
IN
SECOND APPEAL NO. 578 OF 2022**

1. Mr.Saiyad Masroor Ghorl (deceased)
Through his legal heirs
- 1/1. Smt. Bilques S. Ghorl
Age 73 Years, Occupation : Household
- 1/2. Shrl. Sharafat A. Ghorl
Age 60 Years, Occupation : Business
- 1/3. Smt. Shamida M. Behlim
Age 58 Years, Occupation : Household
- 1/4. Shrl. Shafakat A. Ghorl
Age 55 Years, Occupation : Business
- 1/5. Shrl. Shaukat A. Ghorl
Age 54 Years, Occupation : Business
- 1/6. Shrl. Irshad A. Ghorl
Age 52 Years, Occupation : Business
- 1/7. Shrl. Irfan A. Ghorl
Age 49 Years, Occupation : Business
- 1/8. Mrs. Dilshad Behlim
Age 47 Years, Occupation : Household
- 1/9. Miss. Nasreen Bano Ghorl
Age 46 Years, Occupation : Household
2. Shrl. Zakir Ramzan Qureshi
Age 55 Years, Occupation : Business
Nos.1/1, 1/2, 1/4 to 1/9 Resident of
22, Glnar Chappal Line, Santacruz (West),

Mumbai : 400 054.

No. 1/3 Resident of 6 Girnar Chappal Lane,
Santacruz (West), Mumbai : 400 054.

No.2 Resident of R.K. Hospital,
Qureshi House No. 6, Nehru Road,
Near Railway Station, Santacruz (East),
Mumbai : 400 055.

...Appellants
(Original Obstructionist)

Versus

1. Purushottam Tahliram Rohira
(deceased) Through legal heirs
- 1/1. Smt.Naina Purushottam Rohira
Age 76 Years, Occupation : Household
- 1/2. Shri. Jatin Purushottam Rohira
Age 56 Years, Occupation : Business
- 1/3. Shri. Rohit Purushottam Rohira
Age 53 Years, Occupation : Business
- 1/4. Shri. Shekhar Purushottam Rohira
Age 47 Years, Occupation : Business
Nos. 1/1 to 1/4 Resident of 301/302,
Sawan Town, Behind Pratap Society,
4 Bangla, Andheri (W), Mumbai.
2. Smt. Nayara Purushottam Rohira
Age 76 Years, Occupation : Household
3. Shri. Hotchand Tahilram Rohira
Age 58 Years, Occupation : Business
4. Shri. Kiran Hotchand Rohira
Age 51 Years, Occupation : Business
Nos. 2 to 4 Resident of Plot No. 24,
My Little Home, North South Tenth
Road, J.P.D. Scheme, Andheri (W),
Mumbai : 400 058.

5. Shri. Krishna Barku Karale
Age 51 Years, Occupation : Business
6. Smt. Parvati Barku Karale
Age 76 Years, Occupation : Household
7. Smt. Phusabai Bandu Karale
Age 71 Years, Occupation : Household
8. Shri. Ramdas Bandu Karale
Age 40 Years, Occupation : Business
9. Shri. Shankar Bandu Karale
Age 56 Years, Occupation : Business
10. Smt. Sakhubai Bandu Karale
Age 66 Years, Occupation : Household
11. Smt. Nanda Dattatraya Karale
Age 40 Years, Occupation : Household
Nos. 5 to 11 Resident of Bekare,
Taluka : Karjat, District : Raigad.
12. Shri. Sardarmal Daramchand Oswal
Age 76 Years, Occupation : Business
Resident of Mahavir Peth, Karjat,
Taluka : Karjat, District : Raigad. ...Respondents
(Nos.1/1 to 3/Original Decree
Holders, Nos. 4 to 11/Original
Judgment Debtors)

Mr.Surel Shah i/b. Mr.Rohit D. Joshi, Advocate for the Appellants.

Mr.Drupad S. Patil a/w Mr.Suyash Sule, Advocates for the Respondent
Nos. 1(1) to 1(4) and Respondent Nos. 3 & 4.

CORAM : S. M. MODAK, J.

RESERVED ON : 12th AUGUST 2022
PRONOUNCED ON : 2nd DECEMBER 2022

JUDGMENT :

1. The issues raised in this Appeal are procedural irregularity committed while deciding the objection by both the Courts below and secondly, right of bonafide purchaser of the suit property against the Decree-holder.

2. Question is whether appeal needs to be admitted or requires summary dismissal. Law on this point is very clear. It is not mandatory on the Second Appellate Court to frame substantial questions of law. Only when this Court is satisfied, then only they needs to be framed. The test of satisfaction needs to be fulfilled. The discretion is not arbitrary. But it is governed by settled principles of law as interpreted by Hon'ble Supreme Court in various judgments. If materials are not considered, law not properly interpreted are some of the parameters. Furthermore when concurrent findings are there, the scope is very limited. If the findings are to be reversed, then questions need to be framed and not otherwise. With this background the appeal can be decided.

3. There was a decree for specific performance passed by the Court of Civil Judge Senior Division at Panvel. It was on the basis of agreement for sale dated 1/3/1988. The suit land is survey no.104, hissa no.3, situated at village Bekare, Taluka : Karjat, District : Raigad. There were eight Defendants. None of them have contested the suit. Defendant No.8 half-heartedly preferred an Appeal against the judgment of the trial Court. That is to say, he has not filed the Appeal

in time. After his Delay Condonation Application was allowed, he could secure an order thereby staying execution of decree for specific performance. In addition to that, there was a condition not to create third party interest by both the parties. Conveniently, he has not followed up with his Advocate appearing in that Appeal. Resultantly, his Advocate filed no instruction purshis. Accordingly, the appeal came to be dismissed on 11/2/1999.

4. When the Appeal was alive, cleverly he has sold the property vide sale deed dated 11/7/1996 to the present Appellant. Again, the Defendant No.8 made a feeble attempt to restore the Appeal by filing Miscellaneous Application. It was rightly dismissed by the First Appellate Court. He had taken up the matter to this Court by way of Writ Petition. However, it was also dismissed.

5. Now, it was the turn of the Appellant. In the meantime, the Decree-holder has put the decree to execution. The Decree- holder got a sale-deed executed on 4/10/2000 through Court by appointing a Court Commissioner. When possession decree was put to execution, present Appellant obstructed the same. The Appellant initially filed a suit thereby challenging the decree for specific performance. It was rejected by the trial Court on 23/10/2000 on the ground that the suit is not maintainable. Subsequently, the present Appellant filed an Objection in the execution proceedings vide Exhibit-47.

6. The trial Court gave an opportunity to both the parties to adduce evidence. There is oral as well as documentary evidence. There were

two issues before the trial Court ;

One is about maintainability of the Objection Petition. Trial Court held that it is not maintainable.

Second is about merits. It was not accepted.

7. The present Appellant filed First Appeal. There, he was successful in convincing the Appellate Court that the Objection is maintainable. However, he could not convince the First Appellate Court about merits of the matter. Accordingly, his Appeal was dismissed and that is how he has filed the present Second Appeal.

8. I have heard learned Advocate Shri.Surel Shah for the Appellant and learned Advocate Shri.Drupad Patil for the Respondent Nos. 1(1) to 1(4) and Respondent Nos. 3 & 4. Original Decree-holder expired and that is how, his legal heir was brought on record who is Respondent No.1/1. Notice was not issued to other Respondents who are Original Defendant Nos. 1 to 7. They have not contested the Execution Petition when objection was filed by present Appellant. They have also not contested the First Appeal. Hence, on the request of both the learned Advocates, the present Appeal is heard without issuing notice to them.

9. Learned Advocate Shri.Surel Shah has extensively argued the Appeal and according to him, various substantial questions of law are involved and they are pleaded as Question Nos. A to I and additional substantial questions of law Nos. J to L. Whereas, according to learned

Advocate Shri.Drupad Patil, all these proposed substantial questions of law, in fact, do not arise and either they fall within the realm of appreciation of evidence which is hardly possible to interfere or they deal with a question of law which is settled by the Hon'ble Supreme Court and by this Court in various judgments. He also submitted that even the proposed substantial questions of law are also of such kind which can be dismissed at the threshold and even do not require a detail hearing after admitting the Appeal. Hence, he prayed for dismissal of the Appeal at an admission stage itself.

10. With the assistance of both the learned Advocates, when I have perused those proposed substantial questions of law, I think some of them do not require any consideration at all. For that purpose, it is material to consider the findings given by the trial Court as well as the first Appellate Court on the issue of maintainability.

Objection about procedural irregularity

11. There are two objections raised by learned Advocate Shri.Surel Shah. They are as follows :-

- (a) The trial Court held that the Objection is not maintainable and inspite of that, trial Court has gone into the issue of merits.
- (b) Whereas, the First Appellate Court held that the Objection is maintainable and still, instead of remanding the matter, the First Appellate Court has gone into the merits.

12. While observing that the Objection Petition is not maintainable, the trial Court gave following two reasons :-

- (a) An application under Order 21, Rule 97 of the Code of Civil Procedure is maintainable only if it is filed by the Decree-holder for removal of the obstruction. (The objection at Exhibit-47 was taken by the Obstructionist and not by the Decree-holder).
- (b) The Appellant is a purchaser during the pendency of litigation and as per proviso to Rule 100 (Bombay Amendment), an application by transferee *pendent lite* has to be dismissed.

13. These reasonings find place in Para No. 31. Whereas, the First Appellate Court held that the Objection is maintainable. The relevant reasonings find place in Para Nos.19 to 24. An objection to the execution of a decree can be taken by any person. The Appellate Court treated the Obstructionist as falling within the category of '*any person*'. Even the observation of Hon'ble Supreme Court in case of ***Silverline Forum Pvt. Ltd. V/s. Rajiv Trust and Another [(1998) 3 Supreme Court Cases 723]***, is relied upon by the First Appellate Court. I do not find any fault committed by the First Appellate Court. Even though, the trial Court held that the Objection at the instance of the Appellant is not maintainable, yet has given findings on merits. It is certainly necessary. Because, it gives an opportunity to the First Appellate Court to go into merits of the matter. If the trial Court would have simply

dismissed the application on the point of maintainability and particularly after evidence is recorded, the First Appellate Court could not have got an opportunity to go into correctness of those findings.

14. So also, I do not think that any wrong is committed by the First Appellate Court in not remanding the matter. No purpose could have been served in remanding the matter because already parties have adduced evidence. So on the basis of the evidence, the First Appellate Court was right in deciding the matter on merits. The First Appellate Court was right in holding that the Objection is maintainable. It was on the basis of observations made by Hon'ble Supreme Court in case of *Silverline Forum Pvt. Ltd. V/s. Rajiv Trust and Another [cited supra]*. There, the word 'any person' is interpreted. The First Appellate Court has in fact corrected the mistake committed by the trial Court (in holding that objection is not maintainable). It is surprising to note that the trial Courts are committing the mistakes of dismissing the execution application if not filed by the decree-holder but other than the decree-holder. This is happening inspite of the interpretation given by Hon'ble Supreme Court in case of *Silverline*.

15. There is also an objection on behalf of learned Advocate Shri.Surel Shah that the Appellant cannot be made remedy-less. It is true that the Appellant prior to filing objection before the Executing Court, has instituted a Civil Suit bearing Special Civil Suit No.83 of 2000. It was dismissed on the ground that it is not maintainable as per the order dated 23rd October 2000. Subsequently, the Appellant filed

an Objection Petition before the Executing Court. It is material to note that the trial Court gave fullest opportunity to the Appellant even to adduce evidence. The Appellant examined himself and his Advocate who had given Title Certificate and even the person who has taken a search. So, the Objection Petition was decided after full-fledged trial. It is one thing to say that the Objection Petition is not maintainable at the threshold and it is another thing to say that there is no merit in the Objection Petition. For the above reasons, it cannot be said that the Appellant was denied of an opportunity to raise his grievances. So, I do not find any merit in this objection also.

Claim as bonafide purchaser

16. Now, I will deal with the objection about the right of the bonafide purchaser as against the Decree-holder.

17. There are three provisions of law quoted by both of them. They are as follows :-

- (a) Provisions of Section 19 (b) of the Specific Relief Act.
- (b) Provisions of Section 52 of Transfer of Property Act.
- (c) Provisions of Order 21, Rule 97 onwards of Code of Civil Procedure.

Provisions of the Code of Civil Procedure, 1908

18. There are certain provisions which deal with transfer *pendent lite*. Provision says that certain provisions will not be applicable if there is an objection taken by transferee *pendente lite*. There are also certain Bombay Amendments. These provisions can be resorted in case of two contingencies. They are :-

- (a) When there is an obstruction to the execution, the provisions of Rule 97 can be resorted to for removal of this obstruction.
- (b) Whereas, when there is a dispossession in pursuance of execution of the decree, the provisions of Rule 99 can be resorted to.

19. The scope of enquiry in a proceeding either under Rule 97 or Rule 99 is prescribed in Rule 101. There are also provisions about what type of order which can be passed after determination of questions. Type of order depends upon what is the nature of the complaint that is to say under Rule 97 or Rule 99. Clause (a) and clause (b) of Rule 98 / Rule 100 lay down what type of orders which can be passed after adjudication. The type of orders are as follows :-

- (a) Allowing the application and putting the applicant into possession of the property or dismissing the application
- or**
- (b) Pass such orders depending upon the facts.

20. Above said provisions find place in both Rule 98 and Rule 100.

Only difference is in title of those Rules. Title of Rule 98 is “*Orders after adjudication*”. Whereas, title of Rule 100 is “*Order to be passed upon application complaining of dispossession*”. It suggests that if there is a dispossession in pursuance to execution of a decree, the provisions of Rule 99 read with Rule 100 will be applicable. Whereas, when there is obstruction to execution, the provisions of Rule 97 read with Rule 98 will be applicable. Now let analyze the provisions of both Rules 97 and 99 and 99 and 100. Comparative analysis is as follows:-

Rule 97	Rule 99
(i) Rule 97 empowers the decree holder to take steps if there is resistance or obstruction to execution.	(i) Rule 99 can be resorted to when the decree holder obtains possession and dispossess a person.
(ii) He may make a complaint to the Executing Court thereby complaining of resistance or obstruction.	(ii) It gives a remedy to a possessor to ask for a restoration of possession.
(iii) Such objection can be taken by any person.	(iii) However, if The judgment debtor is dispossessed, he does not get a remedy under the Rule 99.
	(iv) This remedy can be exercised by a person other than judgment debtor.

21. If we go by strict meaning of Rule 97, one can say that a complaint about obstruction can be made only by decree-holder. However, the Hon’ble Supreme Court in case of ***Silverline*** has

interpreted this provision in a broad manner. The word ‘any person’ used in the Rule 97 has been interpreted. So to say, if the decree-holder does not make a complaint of dispossession, whereas it is made by a person in possession, such application can also be entertained under Rule 97. Now let us see the provisions of Rule 98 and Rule 100.

Rule 98	Rule 100
(i) Under Sub Rule 1, the Executing Court may either allow the application or may dismiss the same. As per the circumstance of the case, the Executing Court can also pass such other order. (ii) Sub-Rule 2 (Substituted by way of Bombay Amendment) deals with the powers of the Court. The Executing Court may pass following orders:- (a) May direct the Applicant to be put into possession. (b) May detain the judgment debtor or his representative in Civil prison. (c) May direct payment of compensation. (d) Pass any other order.	(i) The Executing Court may either allow the application or dismiss the same or may pass any other order as the circumstances of the case justifies.

22. It is true that an objection to execution can be taken by various categories of persons. It may be taken by judgment debtor, it may be taken by a person claiming through judgment debtor or it can be taken by transferee *pendente lite*. The emphasis is whether a transferee *pendente lite* can take an objection to the execution of decree in

question and what are his rights. Rule 102 of Civil Procedure Code specifically says that the provisions of Rule 98 and Rule 100 are not applicable if there is an objection taken by transferee *pendente lite*. So to say if an objection is taken by transferee *pendente lite*, when the decree holder applies for removal of an obstruction under Rule 97, such objection cannot be entertained.

23. At the same time, if there is a dispossession of transferee *pendente lite*, if he applies for restoration of possession, then this objection also cannot be entertained under Rule 100 of Code of Civil Procedure. However, it is material to note that Rule 102 is deleted as per the Bombay Amendment of 1983. It is material to note that at the same time, similar provision is incorporated by way of proviso to Rule 100 by way of amendment made in 1983. It is important to note that when Rule 102 is deleted and when it is added by way of proviso to Rule 100, similar provision is not incorporated in Rule 98 of CPC.

24. According to learned Advocate Shri Surel Shah, this proviso is applicable to Rule 100 only. According to him, if the title of Rule 100 is perused, it is applicable only in case of dispossession and it is not applicable when there is no dispossession. He is right in his submission. The legislatures have not incorporated this provision by way of proviso to Rule 98. Whereas as per Rule 102, in both contingencies as laid down in Rule 98 and Rule 100, the transferee *pendente lite* was not having any locus.

25. So if we consider the law as applicable in the State of Maharashtra, we can say that the bar for entertaining an application complaining of dispossession by transferee *pendente lite* is applicable only when there is a complaint of dispossession under Rule 99. However, when there is a complaint for removal of obstruction under Rule 97, the bar for transferee *pendente lite* does not find place in a Rule 98. Sub Rule 2 to Rule 98 is substituted by way of Bombay Amendment carried out in the year 1983. It lays down the powers of the Court. Only difference is the powers of the Court are widened.

26. In the initial paragraph of Sub Rule 2 of Rule 98, there is a category of persons whose objection can be dealt with by the Executing Court. One of them is transferee *pendente Lite*. It lays down how such objection has to be dealt with. However, by no stretch of interpretation, it can be said that the application taking objection by transferee *pendente lite* needs to be dismissed summarily.

27. It means if transferee *pendente lite* takes an objection, the Executing Court is required to decide it. In other words just like Bombay Amendment to Rule 100, the objection cannot be dismissed summarily if taken by the transferee *pendente lite*. Even though, above are the observations, this Court never meant to say that the objection taken by bonafide purchaser to the execution has to be accepted. Ultimately, that will be subject to the provisions of substantive law so to say the provisions of Section 19(b) of Specific Relief Act, 1963 and Section 52 of Transfer of Property Act, 1882.

28. The trial Court wrongly observed that the application preferred under Rule 97 is liable to be dismissed as per proviso to Rule 100 (Bombay Amendment) (Para No.31). These observations are incorrect. Because, the provisions as per Bombay Amendment will be applicable only when there is complaint of dispossession. So to say, when a person in possession has made grievance that he has been wrongly dispossessed in an execution of a decree. Trial Court has lost sight of this basic requirement.

29. First Appellate Court has rightly corrected this mistake and entertained the Objection Petition of the transferee *pendent lite* (Para No.21). However, the First Appellate Court committed one mistake by recognizing proviso that is Bombay Amendment to Rule 100. It finds place in Para No.34. First Appellate Court took note of omission of Rule 102 of Code of Civil Procedure by 1977 Amendment and addition of proviso to Rule 100. However, the First Appellate Court overlooked the fact, that this proviso is to Rule 100 (which deals with orders to be passed in case of dispossession) and not there to Rule 98 of Code of Civil Procedure. First Appellate Court overlooked this fact. Both the Courts below have mixed up the relevant provisions of Order 21 relating to obstruction to possession and relating to complaint of dispossession.

30. It is true that there may be difference in modes of deciding objection taken in an Execution. It can be on the basis of pleadings and documents or it can be on the basis of adducing evidence. In this

Appeal, already parties have adduced evidence. So, the issue remains whether the objection taken by transferee *pendent lite* to the execution of a decree can be entertained. So, it will be material to consider substantive provisions of other laws.

Provisions of Section 19(b) of S.R. Act.

31. For ready reference, Section 19(b) of Specific Relief Act, 1963, is reproduced below :-

“19. Relief against parties and persons claiming under them by subsequent title. – Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against
(a).....
(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
(c).....
([ca).....
(d).....
(e).....
Provided that.....” (*Emphasis supplied*)

32. If one will read it, we may find that a party can enforce a specific performance even against the person who has acquired title subsequent to his contract. There is one exception to this Rule. If the transferee can show that he has paid the money in good faith and he was not having notice of the original contract, there cannot be specific performance against such transferee even though it is after acquiring title by the first purchaser.

33. Whereas, Section 52 of the Transfer of Property Act, 1882, prohibits transfer of a property which is a subject matter of a suit. A party to the suit cannot transfer the property so as to affect the rights of other party. There are various judgments in which Courts have interpreted both these provisions. Whereas, the provisions of Order 21, Rule 97 onwards, lays down what is the procedure to be followed by the Courts when there is an objection to the Execution of a decree. It lays down the obligation on the Executing Court to decide all questions raised by the parties subject to fulfillment of certain conditions. The Executing Court is supposed to decide those questions in the Execution itself and without insisting on the party to file a separate suit. As such, the provisions of Order 21, Rule 97 of the Code of Civil Procedure, 1908 onwards do not lay down what are the substantive rights of the parties. They will be governed as per the provisions of the substantive law. A guidance is given to the Executing Court in case of an Objection is taken to the Execution of decree by transferee *pendente lite*.

34. Learned Advocate Shri.Surel Shah buttressed his submission about *bonafide purchaser* on following two grounds :

- (a) the evidence adduced before the trial Court and
- (b) the legal pronouncements.

Evidence adduced by the Parties

35. The Obstructionist examined following witnesses :-

- (i) Obstructionist himself Shaukat Ghori

- (ii) Advocate A.B. Mankodi and
- (iii) Shri. S.A. Chipkar

36. He relied upon the following documentary evidence :-

- (a) A notice published in a Loksatta newspaper dated 26.4.1996 at Exhibit-103.
- (b) A search report taken by 18.4.1996 given by Shrinivas Chipkar (Exhibit-102).
- (c) Title report issued by Advocate A.B. Mankodi (Exhibit-101).

37. Whereas, learned Advocate Shri.Drupad Patil relied upon notice of *lis pendens* registered with Sub-register Office. According to him, admittedly the Appellant has purchased the property during the pendency of litigation and hence, his transaction is hit by provision of Section 52 of the Transfer of Property Act, 1882. He submitted that without admitting even if it is admitted that there are certain lacunae in the evidence, it will not make his case weak because law is in his favour. He submitted that giving of *lis pendens* notice is optional in case the property is situated in the erstwhile city of Bombay and if the property is situated outside Bombay even giving of *lis pendens* notice is not at all required.

38. To rebut this contention, learned Advocate Shri.Surel Shah submitted that the notice of *lis pendens* was registered subsequently and the Decree-holder cannot rely upon this notice. The trial Court has decided this objection and observed in Para No.39 that “*though the Obstructionist issued public notice and took search in the office of Sub-*

register, he purchased the property during the pendency of litigation". About lis pendens notice, it is observed that "it was the fault of the Registrar". It is further observed that "the Decree-holder filed an application below Exh.36 before the Executing Court to add Obstructionist as party but Court has not passed order. So, it was the mistake of the Court". The First Appellate Court also dismissed the objection of the Appellant for the reason that he is a transferee pendent lite.

39. According to the learned Advocate Shri.Surel Shah, these findings by the Courts below are not correct. He relied upon following judgments :

- (a) ***Menka Gupta V/s. Umashree Devi [(2020) 19 Supreme Court Cases 490]***
- (b) ***Thomson Press (India) Limited V/s. Nanak Builders and Developers Private Limited and Others [(2013) 5 Supreme Court Cases 397]***

40. Whereas, according to learned Advocate Shri.Drupad Patil, the law on the point of transfer of property during pendency of litigation has been interpreted in various judgments and the law is well settled. He relied upon the following judgments :-

- (a) ***Sharma Construction Company, Nagpur and others V/s. Praveenkumar s/o Lilapat Bansal and others [2019 SCC OnLine Bom 8685]***
- (b) ***Usha Sinha V/s. Dina Ram and Others [(2008) 7 Supreme Court Cases 144]***

(c) ***Jehal Tanti and Others V/s. Nageshwar Singh (Dead) Through Lrs. [(2013) 14 Supreme Court Cases 689]***

Transfer during pendency of litigation

41. With their assistance, I have perused those judgments. In case of ***Usha Sinha V/s. Dina Ram and Others [cited supra]***, Hon'ble Supreme Court interpreted the principle laid down in Section 52 of Transfer of Property Act, 1882. Similarly, the provisions contained in Order 21, Rule 97 onwards of Code of Civil Procedure, 1908 were also considered. The relevant observations are *"It is thus settled law that a purchaser of suit property during pendency of litigation has no right to resist execution of a 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 the 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 (Para 23)"*. Rule 102 was made applicable.

42. In case of ***Sharma Construction Company, Nagpur and others V/s. Praveenkumar s/o Lilapat Bansal and others [cited supra]***, learned Single Judge of this Court has considered this issue and observed that the purchaser *pendent lite* is deemed to be aware about litigation pertaining to said property. The observations by Hon'ble Supreme Court in case of ***Thomson Press (India) Limited*** were also considered (Para 8). The provisions of Order 21 Rules 98, 99, 100, 102 of Order 2 of Code of Civil Procedure, 1908 were also considered.

43. It may happen that a person may purchase the property during pendency of litigation. He may be told by his vendor that property is subject to litigation or he may not be told. It may also happen that first vendor may sell the property to second purchaser even though his transaction with the first purchaser is incomplete. In such an eventuality, the first purchaser can file a suit for specific performance against his vendor and he may join second purchaser as a defendant. Section 19(b) of Specific Relief Act, 1963, permits him to ask for specific performance even against the second purchaser of his vendor. Section 19(b) nowhere says that the exception will be applicable prior to filing of suit or after filing of suit. The subsequent purchaser can avoid a decree of specific performance on showing payment of money in good faith and when he was not aware about transaction of first sale by his vendor. This provision of Section 19(b) nowhere talks contingency wherein an agreement for sale is executed on second occasion during pendency of suit for specific performance. However, it will be material to note that Section 52 of Transfer of Property Act, 1882 bars transfer of property pending litigation.

Prohibition under Section 52 of T. P. Act

Following conditions needs to be satisfied :-

- (a) Suit of proceeding must be pending in any Court
- (b) It is not collusive
- (c) Right to immovable property is in question
- (d) Directly and substantially

- (e) The transfer must affect the rights of other party

44. Such transfer is permissible under the authority of the Court. Now, the argument is whether the exception to 19(b) of Specific Relief Act, 1963, protects subsequent purchaser from facing a decree for specific performance against him if he purchases the property during the pendency of suit. Appellant wants to suggest that provisions of Section 19(b) will overcome the bar contained in Section 52 of Transfer of Property Act, 1882.

Public Policy

45. Even though this argument is attractive, the law on this point is well settled. Courts have not appreciated the practice of selling the properties during the pendency of litigation. Because, if it is made permissible, parties will go on selling the properties and thereby, prolonging the litigation and defeating the claim of purchaser from enforcing his agreement. Specific Relief Act, 1963 was enacted after repealing the Specific Relief Act of 1877. Whereas, Transfer of Property Act, was enacted in the year 1882. The provisions of Section 19(b) cannot be interpreted in such a way so as to permit parties to the litigation to sell the properties and enable a purchaser from taking a plea that he pays the money in good faith and without notice of the earlier transaction. So, this Court feels that the provisions of Section 52 of T.P. Act will prevail and either of the party cannot take the benefit of his acts (whether bonafide or not).

Transfer in violation of injunction

46. There is one more factual angle to the present dispute. Not only the Appellant purchased the land during pendency of the litigation, but also in violation of an injunction order. In an Appeal filed by Judgment-debtor No.8, not only decree was stayed but it was conditional. There was a direction not to create third party interest. Contention of Decree-holder is that Appellant executed the sale-deed on 11th July, 1996 and accordingly, breached the injunction order.

47. In *Thomson Press (India) Limited V/s. Nanak Builders and Developers Private Limited and Others [cited supra]* relied upon by the Appellant, there was an issue about effect of sale executed in disregard to an injunction order. Hon'ble Supreme Court dealt with the matter threadbare. The practice of selling the property during the pendency of litigation / in disregard to an injunction order was deprecated. There is also an opinion about validity of such sale if executed during the pendency of litigation. It does not become *void ab initio* but it is subject to rights of the plaintiff in the suit. (Para No.53).

48. Whereas, this Court in case of *Keshrimal Jivji Shah V/s. Bank of Maharashtra reported in 2004 (3) Mh.L.J. 893*, decided similar issue of transfer of immovable property in violation of order of injunction. It is observed :

“the court exercises its powers on the foundation of respect and regard for its authority by litigating public. People will loose faith and respect completely

if the court does not curb and prevent this tendency”

(Para 26). (Relied upon by Respondent).

49. On this background, even if the oral and documentary evidence adduced by the parties is considered, one fact is true that the decree holder as well as the Appellant has taken few steps in order to assert their rights. There are few lacunae in their claims. Furthermore, giving of *lis pendens* notice is not at all contemplated if the property is situated outside the city of erstwhile Bombay. There has to be a notification issued by the State Government thereby applying the requirement of giving of notice of *lis pendens* in case the property is situated outside Bombay. If it is situated in erstwhile Bombay, such notice is also optional. (As per 1939 Bombay Amendment to Section 52 of T.P.Act and Section 18 (ee) of Indian Registration Act).

50. Considering the legal provisions mentioned above and considering the overriding effect of the provisions of Section 52 of the Transfer of Property Act, the transferee *pendente lite* takes the property subject to rights of the parties to the litigation. That is what is held in ***Thomson Press***. Transfer *pendente lite* is not illegal *ipso jure* but remains subservient to the pending litigation. Here, there is a decree in favour of the plaintiff. The competent courts have adjudicated the rights of the decree holder over the suit land. The decree holder is having right of the preferential purchase of the property. The purchase by the obstructionist is in violation of the order of injunction passed by the First Appellate Court. His sale deed was

executed when the Appeal was alive. His vendor/judgment debtor no. 8 sold the property in violation of the order of injunction.

51. The observations of this Court in case of *Keshrimal* are relevant. As per the provisions of Section 23 of the Indian Contract Act, the agreement is unlawful if the consideration/object of the agreement is forbidden by law. The First Appellate Court has restrained judgment debtors from creating third part interest. It confers no title.

52. There cannot be any other intention on the part of judgment debtor No. 8 than to defeat the claim of the decree holder as adjudicated by the trial Court. It is cardinal principle of law that a person does not get a title better than his vendor. The judgment debtor Nos. 1 to 8 are bound by the decree for specific performance. They have no right to transfer or assign the property without leave of the Court as contemplated in Section 52 of the Transfer of Property Act. At the most the Appellant may be having a claim against his vendor/judgment debtor No. 8. He cannot obstruct to the execution of a decree by the decree holder. Whatever improvement is made by him will be subject to a remedy against judgment debtor No.8.

53. There are certain documents filed by the Appellant showing the improvements, erection of structure on the suit land and obtaining permissions. There is a practice of preparing panchanama when possession warrant is executed. The Appellant is at liberty to request the serving officers to mention what is the situation at the spot. On

that basis, he can make a claim against his vendor and certainly, he cannot obstruct execution of possession warrant. He has no alternative but to handover vacant and peaceful possession of the suit land.

Liberty to move under Order 9 Rule 13 of C.P.C.

54. On the basis of observations in case of **Menka Gupta**, learned Advocate Shri Shah seeks liberty to file an application under Order 9 Rule 13 of the Civil Procedure Code. It is opposed by learned Advocate Shri Patil. There is difference in scope of an inquiry under Order 21 Rule 97 on one hand and under Order 9 Rule 13 of the Civil Procedure Code (para 13). In that case, the judgment debtor filed an application under Order 9 Rule 13 of the Civil Procedure Code and he died. Execution of decree was obstructed by transferee from judgment debtor. The transferee *pendente lite* applied after his substitution in the proceedings of Order 9 Rule 13 of the Civil Procedure Code and it was rejected for the reason that it has abated. On this background those observations. Learned Adv. Shri Patil is right in his submission. Facts are different. Liberty cannot be granted to present Appellant. Because he has already exhausted his remedy of taking objection under Order 21 Rule 97 of the Civil Procedure Code. So there is no question of going back and grant him liberty under Order 9 Rule 13 of the Civil Procedure Code. Secondly, the judgment debtor Nos. 1 to 7 who are vendors of decree holder have kept mum.

55. Before concluding, I felt it necessary to issue directions to the executing / trial Courts to guide them for dealing with objections taken

in an execution of possession decree. In certain cases, execution petitions are dismissed summarily, whereas in some of the cases they lingered unnecessarily. It is true that even if the directions were issued by Hon'ble Supreme Court and by this Court time and again, ultimately, it altogether depends on a particular Judge to read them and follow them. Because, it is always said that execution takes more time than the trial of the suit. So, this is a one more attempt to issue certain guidelines to trial / executing Courts. These are the broader guidelines which may assist the executing Court in deciding objection taken to the execution of a possession decree. So, this Court feels it necessary to issue following guidelines to be considered by the executing Court in deciding an objection taken to possession decree :-

- (a) When such an objection is taken follow observations in case of ***Silverline Forum Pvt. Ltd. V/s. Rajiv Trust and Another [(1998) 3 Supreme Court Cases 723]***.
- (b) To decide whether the obstructionist is claiming through judgment – debtor or independently or is he a judgment debtor. (while doing this exercise, to follow the observations given by Hon'ble Supreme Court and this Court in various judgments).
- (c) To consider whether the facts are admitted or facts are disputed and which amongst them are admitted and disputed.

- (d) To hear the parties on the issue of admitted and disputed facts.
- (e) If facts are admitted, then may not record the evidence on admitted facts.
- (f) To give topmost priority to decide such objections as early as possible.

56. Both the learned Advocates have argued the matter at an admission stage, I really appreciate the efforts taken by learned Advocate Shri.Surel Shah and Shri.Drupad Patil for assisting the Court in deciding the dispute.

57. For the above discussion, I do not think that there is any substantial question of law involved in this appeal as suggested by the learned Advocate Shri Shah. Hence, the appeal is dismissed at an admission stage itself. Interim Application is also disposed of. Parties to bear their own cost.

[S. M. Modak, J.]

58. At this stage, learned Advocate Shri Joshi for the Appellants requested to issue direction to the Executing Court to defer that proceedings for six weeks. It is opposed on behalf of the Respondents.

59. Uptill today, the Appellants are protected either by Order of the Court or mutual understanding, hence following direction is issued :-

(i) The Executing Court is directed to keep the execution proceedings pending for six weeks from today subject to condition that the Appellants will give an undertaking till Tuesday, before the Executing Court, that they will not create third party interest or part away with the possession of the land and structures standing thereon.

[S. M. Modak, J.]