



This order dated 4th November, 2023 is corrected and uploaded in view of the order dated 10th November, 2023

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
APPEAL FROM ORDER NO. 55 OF 2011**

Manik S/o Motiram Dalwale Died,
Through L.Rs.

- 1) Madan S/o Manik Dalweale,
Age : 43 Years Occ. Nil,
- 2) Smt. Prabhawati wd/o Raju Dalweale,
Age : 40 Years, Occ. Household,

Both resident of Nagai Colony, Deopur,
Dhule

.. Appellants
(Orig. Plaintiffs)

VERSUS

1. Suhas Vasantrao Jawadekar,
Age : 53 Years, Occ. Service,
R/o. 304, Menas "B" Wing,
Sher-E-Punja Society,
Mahakale Caves Road, Andheri (E),
Bombay 400 093
2. Sudhir Vasantrao Jawadekar,
Age : 40 Years, Occ. Service,
R.o. 116 Nandanvan Society,
Sec. No. 17, Nerul,
New Mumbai.
3. Sau. Vjaya Hemant Sardesai,
Age : 49 Years, Occ. Household,
R/o. 4, St. James Court,
Dinasha Vaccha Road,
Churchgate Mumbai
4. Bhaskar Vishwanath Jawadekar,
Age : Adult Occ. Service,
R/o. Building No.1, Plot No.6,
L.I.C. Quarter, Aurther Road,
Khadaki, Pune.

5. Dattatraya Vishwanath Jawadekar,
Age : Adult Occ. Service,
R/o. Parel Chauk,
Near Phule Road, Dombivali (East),
Dist. Thane
6. Ganesh Vasantrao Jawadekar,
Age : Adult Occ. Service,
R/o. 75, 76 “ Ashakiran”
Chipalunkar Road
Pune
7. Gulabsing Bajiraosing Raghuvanshi,
Age : Adult Occ. Agri. & Business,
R/o. Gali No.2, Navagrahi, Dhule
Dist. Dhule
8. Vijaysing Bajiraosing Raghuvanshi,
Age : Adult, Occ. Business,
R/o. Navagrahi, Dhule
Dist. Dhule
9. Nimalkumar Dayaram Suryavanshi,
Age : Adult, Occ. Business,
R/o. Galli No.2, Navagrahi, Dhule
Dist. Dhule 424 001
10. Sau. Smita Atul Ajamera,
Age: 39 Years, Occ. Business,
R/o. House No. 1455/1, Lane No.2,
Navagrahi Dhule,
Dist. Dhule
11. Shindubai Manikrao Dalwale,
Age: 75 Years, Occ. Household
12. Kantilal Manikrao Dalwale,
Age: 49 Years Occ. Agriculture
13. Ravi Manikrao Dalwale,
Age: 48 Years, Occ. Agriculture,
All R/o. Plot No.5, Nagai Colony,
Nakane Road, Deopur, Dhule.

14. Hirabai Motilal Pawar Died
Legal heirs of Respondent No.14

14-A) Motilal Bhaidas Pawar,
Age: 64 Years, Occ. Agriculture,
R/o. Plot No. 13, Maniknagar,
Alankar Society, Market Yard,
Dhule

14-B) Sonali Ajay Patil,
Age: 37 Years, Occ. Household,
R/o. Gat No. 64, Datta Nagar,
Patil Niwas, Chunchale, Satpur,
Nasik

14-C) Sagar Motilal Pawar,
Age: 35 Years, Occ. Business,
R/o. Plot No. 133, Maniknagar,
Alankar Society, Market Yard,
Dhule

14-D) Amol Motilal Pawar,
Age: 32 Years, Occ. Business,
R/o. Plot No. 13, Maniknagar,
Alankar Society, Market Yard,
Dhule.

15) Pushpabai Rajendra Marathe,
Age : 52 Years, Occ. Household,
R/o. Plot No.11, Manik nagar,
Market Yard, Dhule.

16) Sharda Raju Patil,
Age : 48 Years, Occ. Household,
R/o. Plot No. 12, Manik Nagar,
Market yard, Dhule.

... Respondents

Mr. P.R.Katneshwarkar and Mr. **R.R.** Kazi, Advocates for the appellants;
Mr. Subhodh P. Shah, Advocate for respondent No.10;
Mr. A.S. Savale, Advocate for respondent No.14-A to 14-D (Absent)

CORAM : S. G. MEHARE, J.
Reserved on : 29.08.2023
Pronounced on : 04.11.2023

JUDGMENT:-

1. The original plaintiff/decreed-holder has impugned the order of the learned District Judge-2 Dhule in Civil Appeal No. 57 of 2008 dated 16.10.2009.
2. The plaintiff had filed a suit for specific performance of the contract against the deceased vendor, Vasantrao Jawadkar. The trial Court denied the specific performance but granted the alternate relief of refund of earnest money. The plaintiff had preferred the appeal. The appeal was allowed, and the specific performance of the contract was granted. The Hon'ble Supreme Court confirmed the decree for specific performance.
3. During the pendency of the suit, the vendor, the original defendant, sold the suit premises to Rajaram Kadu Patil and Dharmraj R Patil on 27.11.1978. They inducted the tenants in the suit premises. The above vendors sold the suit premises to Nagraj Borse and his sons Ashok and Arjun in 1986 and 1988. Borse's family again sold the suit premises to Chandrakant Kele and Rajesh Khankari. On 30.11.1996, they transferred the suit premises to Kamalabai C Ajmera and Ashish

R Ajmera. Kamlabai Ajmera and Ashish Ajmera gifted the suit premises to respondent No. 10 Smita Ajmera in 2003.

4. The plaintiffs had filed a Special Darkhast No. 34 of 1978. The transferee pendente lite, namely Rajaram Kadu Patil, Dharmaraj Rajaram Patil, Gulabsingh Bajiraosingh Raghuwanshi, Vijaysingh Raghuwanshi and Nirmalkumar Suryawanshi were also impleaded as defendant Nos. 5 to 9.

5. The executing Court had issued the possession warrant. Respondent No.10 had resisted the execution of the possession warrant. She claimed that she was a *bona fide* transferee without notice. Thereafter, the decree-holder applied for police aid. Respondent No.10 Smita had filed an application under Order XXI Rule 97 of the Civil Procedure Code (for short, "C.P.C.") contending that she was the exclusive owner of the suit property, being the *bona fide* and lawful owner, for valuable consideration without notice is exclusive owner of the suit. She claimed the title based on a gift deed by Kamalabai Ajmera and Ashish Ajmera. She has been in possession since 30 November 1996. The application was rejected on merit, and a possession warrant was issued against her. She, on 11.04.2008, filed another application Exh. 79, under Section 47, 151 and Order XXI Rule 101 of C.P.C. and came with a defence that the decree is hit by

Section 52 of the Transfer of Property Act (Maharashtra amendment) because the lis pendens notice was not registered with the Office of Sub-registrar. Hence, the decree became inexecutable. By order dated 11.04.2008, the executing Court rejected her application.

6. On 25.03.2008, she again filed an application Exh. 81, under sections 114 and 151 of the C.P.C. for review of the order passed below Exh. 65 and 70. On 11.04.2008, both applications were rejected.

7. The appeal was preferred to the first Appellate Court against the said orders.

8. Hearing the parties, the learned District Judge-2 Dhule allowed the appeal and set aside the order passed below Exh. 65 (for police aid) Exh.70 Under Order XXI Rule 101 of the C.P.C. Exh.79 (filed under Section 47 and 151) and under Order 21 Rule 101 of the C.P.C. and also allowed the review application Exh.81. The learned District Judge-2 Dhule remitted the matter back to the executing Court for deciding and adjudicating the right, title and interest of respondent No.10 in the suit property in accordance with the law and thereafter to proceed with the execution.

9. The learned Counsel for the appellant has vehemently argued that the first appellate Court failed to consider that respondent No. 10 cannot obstruct the possession warrant under the scheme of the relevant rules, requiring a decision concerning right, title and interest. The suit premises was transferred to her during the pendency of the suit. She had applied every tactic to protract the execution of the decree. She had come with a specific case that she acquired the title by way of a gift deed from her relatives who had acquired the title by way of a sale deed; therefore, the enquiry ought not to have been ordered to make an investigation about her title by granting her opportunity to examine the witnesses. He would submit that subsequent sale deeds were hit under section 52 of the Transfer of Property Act. The suit premises was defamed due to litigations, and most people in the town, particularly from the business field, knew that the suit was pending about the suit premises.

10. The learned Counsel for the appellant submits that respondent No.10 entered into the shoes of the original Judgment- debtor.

11. It is further submitted that when the facts as regards deriving the title were admitted, leading evidence was not required. It is not mandatory that in every application under Order XXI Rule 97 of the C.P.C., the parties should lead the evidence to prove the title. Such

application may be decided on the basis of the document. However, the First Appellate Court erred in recording the finding that the executing Court failed to comply with the mandate of law regarding trying the proceeding as if it were a civil suit and not granting opportunity to the parties to lead the evidence. The claim of the plaintiff was based upon a document of title. Its effect on the right of the Decree holder was to be tested. Whether she could resist the suit independently was the question before the Appellate Court, but the First Appellate Court was distracted from the issues involved in the matter. All the issues raised by respondent No. 10 were to be decided strictly in accordance with the law. The learned First Appellate Court misunderstood the purpose and object of Order XXI Rule 97 of the C.P.C. Respondent No.10, in her application, had explained when she got the title by way of a gift and the donor's rights and title. She never denied that the suit property was transferred to her predecessor in title from the original defendant during the pendency of the suit. Therefore, the trial Court has correctly considered that all the subsequent transactions during the pendency of the suit were hit under Section 52 of the Transfer of Property Act. He would submit that the impugned Judgment and order of the learned First Appellate Court be quashed and set aside.

12. The learned Counsel, Mr. Subodh Shah, for the contesting respondent No.10, has vehemently argued that the *pendente lite* rule would not apply to the present case as Section 52 of the Transfer of Property Act (Maharashtra Amendment) applies. The said amendment mandates that *lis pendens* notice of every suit about the immovable property should be registered with the office of the Sub Registrar. The notification was also applied to Dhule taluq. Therefore, it cannot be said that respondent No.10 and her predecessor-in-title had notice of the pendency of the suit. She was a *bona fide* purchaser without notice. He also argues that the subsequent purchaser should have been added as a party in such a suit.

13. He would submit that the sale transactions were made after the decree for refund of money and before preferring the appeal. The appeal was preferred belatedly, along with the application of condonation of delay. Hence it cannot be said that it was a continuation of the suit. Therefore, Section 52 of the Transfer of Property Act would not bind respondent No.10.

14. He would submit that the opportunity to prove the *bona fides* to respondent No.10 by leading the evidence was not granted, and the parties did not appear before the Court to prove the facts. The application under Order XXI Rule 97 has not been dealt with in its

letter and spirit. Rule 101 of the Order 21 of the C.P.C. has been deleted for Maharashtra. Hence, the questions raised by respondent were to be determined as if it was a suit. The impugned Judgment and decree is legally correct. The impugned order has not finally adjudicated the appellant's rights.

15. Both the learned counsels for the appellants and respondent No.10 have relied on a bunch of case laws. Those would be considered at the relevant stage.

16. Advocate Anil Salve for respondent No.14A to 14-D absent.

17. After hearing respective counsels, the following points fall for consideration.

- (i) Whether recording the evidence of respective parties in an application under Order XXI, Rule 97 of the C.P.C. like a suit was mandatory?
- (ii) Whether preferring an appeal with an application for condonation of delay is *lis pendens*?
- (iii) Whether the registration of the *lis pendens* notice was mandatory in view of Section 52 of the Maharashtra Amendment Act?
- (iv) Whether the Transfer of the suit property after the decree of refund of money and before preferring an appeal exempts the application of Section 52 of the Transfer of Property Act?

- (v) Whether respondent No. 10 was a *bona fide* purchaser without notice?
- (vi) Whether respondent No.10 has acquired an independent right and did not enter into the shoes of the original judgment-debtor?

Point No. I :

18. Rule 97 of Order XXI of the C.P.C. gives a right to the obstructionist to protect the possession from the execution of the decree. He may file an application for adjudicating his title, right or interest in the suit property to the executing Court. The Executing Court has to determine the questions, including questions relating to the right, title or interest in the property arising between the parties to a proceeding under Rule 101 of the C.P.C. and not by a separate suit. The executing Court is deemed to have jurisdiction to decide such questions. After determining the question under Rule 101 of the C.P.C., the executing Court can make an order to issue the possession warrant or dismiss the application or pass such order, as in the circumstances of the case may deem fit. Sub-rule 2 of Rule 98 of Order XXI of the C.P.C. is relevant; hence, it is reproduced thus:-

“(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasion without any just

cause by the Judgment-debtor or by some other person at his instigation or on his behalf or by any transferee, where such Transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.”

19. It is clear from above sub-rule 2 that the obstructionist should establish that there was a just cause to obstruct the execution of the possession warrant. The above sub-rule indicates that such a person should have an independent right or title apart from the liability imposed upon the judgment debtor by the Judgment of the Court.

20. Whether the objections raised by the obstructionist shall only be determined as a suit was the question before the Madras High Court in the case of *A.V. Raju Vs. H. Phoolchand (deceased by L.RS) A.I.R. 2011 Madras 83*. In the said case, provisions of Order XXI Rule 98 of the C.P.C. Code were referred to. In that case, also the obstructionist was the lis pendens purchaser. On the above fact in paragraph No.10, it has been observed thus :-

“10. A bare perusal of the above proposition (Order 21 Rule 98 of the C.P.C.) of law would plainly and patently make the

point clear that an obstructer claiming right under the judgment debtor cannot call upon the Court to decide his obstruction, like a suit. What is contemplated under the law is that if any obstructer sets a claim independent of the judgment debtor in a decree, then such an obstructer's obstruction has to be dealt with like a suit and not the obstruction of one caused by the appellant/obstructer in this case.

In paragraph No. 11, it has been further observed thus

“I would like to observe that the Courts below would have done well by simply invoking this trite proposition of law and dealt with the matter summarily. However, they took much time to ponder over all the features involved in this case and rendered elaborate judgments.”

21. The facts of the case at hand are undisputed that the predecessor-in-title of the obstructionist had acquired the title during the pendency of the suit. The objections raised by the obstructionist should not be decided like a suit but were to be determined summarily. Therefore, the Court is of the view that the First Appellate Court erred in observing that the objection of the obstructionist should have been determined as if it is a suit by giving an opportunity to examine the obstructionist and her predecessor in title.

Point no. II :

22. The contention of respondent No.10 was that no appeal was preferred when her immediate predecessor-in-title had purchased the suit premises. Hence, the rule of *lis pendens* could not apply to her. Admittedly, the appeal was not preferred in time. It was filed along with the application for the condonation of delay.

23. The learned Counsel for respondent N.10/obstructionist would submit that her title is absolute as when her predecessor-in-title acquired the title, and no appeal was pending. Therefore, the rule of *lis pendens* would not apply.

24. Appeal is a continuation of the suit. An application for condonation of delay in preferring an appeal is also a legal proceeding. The law is settled that the dispute does not attain finality unless decided by the last Court of the land. In law, the finality of a dispute is the concept that certain disputes must achieve a resolution from which no further appeal may be taken or from which no collateral proceedings may be permitted to disturb that resolution. In other words, the Judgment and decree attain finality where the remedies to dispute its legality and correctness are closed or stopped by the law.

25. A decree in the suit for specific performance of the contract is a preliminary decree because, in such decrees, only the rights and liabilities of the parties are declared, leaving the actual result to be worked out in further proceedings. In such a suit, the Court declares the entitlement of the plaintiff to seek specific performance by performing the part of the contract if any remained to be performed, and the opponent also gets a direction to do a certain thing in a certain way. Hence, in the facts and circumstances of the case, it can safely be said that preferring an appeal with delay condonation application is *lis pendens*.

Point No. III :

26. The learned Counsel for contesting respondent No.10 has vehemently argued that since Section 52 of the Transfer of Property Act (Maharashtra Amendment Act) was made applicable by notification to the area where the suit premises situated, and no notice of *lis pendens* was registered as required under Section 18 of the Registration Act, she is protected from the rule of *lis pendens* as provided in Section 52 of the Transfer of Property Act.

27. Per contra, the learned Counsel for the appellant would submit that respondent No.10 cannot take advantage of Section 52 of

the Transfer of Property Act Maharashtra Amendment Act as the notification did not specify the Dhule town or taluqa.

28. The learned Counsel for respondent No.10 has produced the pages from the books which do not disclose the name of the Author and Publisher (Marked as Exhibit 1 for identification) wherein Section 52 of the Maharashtra Amendment Act is reproduced, which reads thus:-

“Maharashtra In its application to the pre-recorganisation State of Bombay-

(1) The Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939 (Bom.XIV of 1939) shall apply to notices in respect of suits or proceedings which relate to immovable properties situated wholly or partly in the Greater Bombay with effect from such date as may be directed by the State Government in this behalf by notification in the Official Gazette:

Provided that the State Government may, by similar notification, direct that the provisions of the said Act shall apply to such notices relating to immovable properties situate wholly or partly in such other area as may be specified in the said notification.

(a) Substituted for :City of Bombay" by Bombay Act XVII of 1945, S. 9 and Sch E read with Bombay LVII of 1956 S.3

(2) Section 52 shall be renumbered as sub-section (1) of that Section and -

(i) In sub-section (1) so renumbered after the word 'question', the words and figures ' if a notice of the pendency of such suit or proceeding is registered under Sec. 18 of the Indian Registration second time the words 'after the notices is so registered', shall be inserted; and

(ii) after the said sub-section (1) so renumbered the following shall be inserted, namely :

- (a) the name and address of the owner of immovable property or other person whose right to the immovable property is in question;
- (b) the description of the immovable property, the right to which is in question;
- (c) the Court in which the suit or proceeding is pending;
- (d) the nature and title of the suit or proceeding, and
- (e) the date on which the suit or proceeding was instituted".

Bom Act of 14 of 1939, Ss 2 and 3 (15.6.1939)

(3) The provisions of the Transfer of Property Act and the Indian Registration (Bombay Amendment) Act, 1939 (Bom. XIV of 1939) which amend the Transfer of Property Act, 1882, in its application to the pre-re-organisation State of Bombay are hereby extended to, and shall be in force in that part of the State of Bombay to which they did not extend immediately before the commencement of this Act (namely, the Transfer of Property (Bombay Provision for Uniformity and Amendment) Act 1959] and the Transfer of Property Act, 882 shall, from the commencement of this Act, be deemed to be amended accordingly also in that part of the State.

Bom Act LVII of 1959, S. 3 (14.10.1959)

29. The Maharashtra amendment speaks of the application of Section 52 to the Pre-reorganisation State of Bombay whereby the Transfer of Property Act and the Indian Registration (Bombay Amendment) Act 1939 was made applicable to the notices in respect of suit or proceeding which relate to immovable properties situate

wholly or partly in the [Greater Bombay] with effect from such date as may be directed by the State Government in this behalf by notification of the Official Gazette. Sub-section 1 of the Maharashtra Amendment Act under the proviso clause confers the power to the State Government to add the areas covered under the amended provisions by issuing a similar notification. By way of the Maharashtra Amendment, if a notice of the pendency of such suit or proceeding is registered under Section 18 of the Indian Registration Act 1908, the suit properties cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affects the rights of any other party thereto under any decree or order which may therein except under the authority of the Court or such terms as may be imposed. In short, by way of the Maharashtra Amendment, the rule of *lis pendens* was made applicable in the area notified by the State Government as provided under sub-section 1. It has been clarified that the provisions of the Transfer of Property Act and Indian Registration Act (Bombay Amendment Act 1939) (Bombay IXV of 1939), which amend the Transfer of Property Act 1882, in its application of pre-reorganized State of Bombay, were extended to and deemed to be enforced in, that part of the State of Bombay to which they did not extent immediately before the commencement of this Act (namely Transfer of Property Bombay Provisions of Uniformity and Amendment Act) 1959 and

Transfer of Property Act 1882 its application was brought into force from the commencement of the said Act. By way of deeming provision, it was amended in that part of the State.

30. The learned Counsel for respondent No.10 would submit that the provisions of Bombay Act 14 of 1939 were extended to Shahada, Nandurbar and Taloda Talukas of West Khandesh District by Bombay extension laws to non-schedule (partly excluded) areas Act, 1954 (LXVIII of 1954) by Section 2 (15. 11. 54). He has further argued that Nandurbar city now the District, was part of Dhule District before its formation. Therefore, the said notification was extended to the entire Dhule District. He produced a copy of a textbook, Exhibit 1, to support his contention.

31. In reply, The learned Counsel for the appellants argued that there was no notification, as argued by the learned Counsel for respondent No.10 under Act 14 of 1939. He relied on the case of *Murlidhar s/o Bhima Vaidya & another Vs. Nababbi Yousufkha, deceased through legal heirs and others (2000) 1 Bombay cases reporter 670*. In this case, the transferee purchased the suit land *pendente lite*. In the said petition, the issue was raised that unless and until the *lis pendens* is registered with the office of sub-registrar as provided in the Maharashtra Amendment (Section 52 of the Transfer

of Property Act), the *lis pendens* rules will not affect the transfers of immovable properties. Section 2 of the Act of 1939 was reproduced in that case as to the applicability of the said amendment (Section 52 of the Transfer of Property Act), which reads thus;

“This Act shall apply to notices in respect of suit or proceedings which relate to immovable properties situated wholly or partly in (the Greater Bombay) with effect from such date as may be directed by the Provincial Government, in this behalf by notification in the Official Gazette. :-

Provided that the Provincial Government may by similar notification direct that the provisions of this Act shall apply to such notices relating to immovable properties situated wholly or partly in such other area as may be specified in the said notification".

In paragraph No. 13, it has been observed that

“The first part of section 2 is applicable to the Greater Bombay and the second part commencing from the words "provided" is applicable to the areas other than Greater Bombay. However, what is pertinent to be noted is that after the Act has come into force, it is further necessary for the Government to issue notification making application of this amended provisions and for the areas outside the Bombay such a notification is necessary in view of the later part of Section 2. Therefore, it reveals that the Act of 1939 itself does not apply even though the amendment has been assented to and it has come into force. Thus, on plain reading of Act 1959, it will be revealed that the Legislature has extended the provisions of Act of 1939, to that part of the State of Bombay, namely, Saurashtra and Hyderabad and it has further extended to that part of the State of Bombay, which was not earlier covered under the Act of 1939.

However, it is only an extension of 1939 amendment to the areas of State of Bombay. Thus, Section 2 of Act of 1939 stands also extended to the area, wherein the Act of 1959 is extended. In the result, in order to apply the provisions of Act 1939 in the extended areas of the Act of 1959, it is further necessary that the Government should have issued a notification applying the provisions of the said Act under proviso to of Section 2 of Act of 1939.”

32. In the case of *Anand Nivas (P) Limited Vs. Anandji A.I.R. 1965*

SC 414 it has been observed that

"By the Transfer of Property and the Indian Registration (Bombay Amendment) Act IXV of 1939, the rule of '*lis pendens*' applies only when a notice of pendency of the suit in which any right of immovable property is directly and specifically in question, is registered under Section 18 of the Registration Act. A suit relating to immovable property may, in certain circumstances, lie in a Court other than the Court within the territorial jurisdiction where it is situated (e.g. under Clause 12 of the Letters Patent and Section 17 of the C.P.C.), and it appears that the Legislature intended to make the Act applicable only to transfer of title of immovables only in areas where the litigants were sufficiently sophisticated to understand the importance of registration. As Bombay Act XIV 1939 is intended to apply to the suit of immovable property and not the Court proceeding, application of the Rule of *lis pendens* is, in respect of proceedings relating to immovable properties situated in certain areas, made conditional upon the registration of the notice of the pendency of the suit. The section in terms applies only to notices in respect of suits or proceedings which relate to immovable property in the Greater Bombay Area, it does not apply to any suits in which property in

Greater Bombay is not the subject matter in dispute. By the proviso to Section 2, the Act may be extended by the Provincial Government by notification to notices relating to immovable properties situate wholly or partly in such other areas as may be specified. No notification was however issued by the appropriate Provincial Government extending the Act to notices relating to immovable properties in areas outside Greater Bombay. Where the suit was filed in the Court of Small Causes at Ahmedabad the Act did not apply and the decree in suit was binding on the transferee whom the property in question was transferred during the pendency of the suit.

The Transfer of Property (Bombay Provision for Uniformity and Amendment) Act, 57 of 1959 also did not apply. By that Act, amongst other things, uniformity in the provisions of the Transfer of Property Act as amended in its application to the State of Bombay as it existed after the enactment of the States Reorganization Act, 1956 was sought to be achieved. Section 3 of the Act enacted that the provisions of Bombay Act XIV of 1939 which amended the Transfer of Property Act in its application to the pre-reorganized State of Bombay, were extended to and shall apply to that part of the State to which they did not apply immediately before the commencement of that Act. Enactment of this Act was necessitated because of section 119 of the State Reorganization Act, 1956, which continued, notwithstanding the formation of the new States the territorial extent of the laws previously in operation. It was found expedient to secure uniformity of the laws in the State, and therefore it was enacted by the State Legislature that one of the conditions of the applicability of the Rule of 'lis pendens' was that notice of a suit or proceeding in which any right to immovable property within the area notified under Section 2 of Act XIV of 1939, was directly

and specifically in question, as registered under section 18 of the Registration Act.”

33. The learned Counsel for the appellant further relied on the case of *Kanbi Vaju Vusta Vs. Kanbi Popat Vasta A.I.R. 1985 Gujrat 184* in which it has been held that

"I find that the amended Section by Acts of 1939 and 1959 is not applicable unless and until the notification is issued by the Government as provided in the proviso to Section 2 of Act of 1939 and as there is no notification issued when the transaction in question, has taken place in 1969, the question of '*lis pendens*' will have to be considered as per the provisions of the Central Act and not as per the provisions of the Bombay Amended Act of Transfer of Property Act. Under the Central Act, it is not necessary to register the *lis pendens* under Section 18 of the Registration Act or under any other Act and, therefore, the purchase of the suit land by the purchaser, while the tenancy proceedings were pending, are affected by the principles of '*lis pendens*' .

34. It is clear that unless the notification covering the areas as regards the application of the Act of 1939 had been issued by the Government, the rule to register the notice of '*lis pendens*' under Section 18 of the Bombay Amendment Act would not apply. The learned Counsel for respondent No.10 relied on the case of Deepakbhai Manilal Patel and another Versus The State of Gujarat and

another, (2007) All MR 1, and argued that the rule registering the notice *pendente lite* under the Maharashtra Amendment Act is obligatory. It has not been followed in this case; hence, the title of respondent No.10 is not hit by section 52 of the Transfer of Property Act (Central Act).

35. From Exhibit-1, it appears that by notification dated 15.11.1954, the provisions of Bombay Act, 14 of 1939 were extended to Shahada, Nandurbar and Taloda Talukas of West Khandesh District. The notification does not specify that the entire District, but only some parts of the District were specified. However, the said notification did not specify the properties at Dhule or Dhule taluqa. The suit property was situated in Dhule town; therefore, there is no force in the argument of the learned Counsel for respondent No.10 that Section 52 of the Transfer of Property Act (Maharashtra Amendment) applied to the entire Dhule District and to the suit premises.

36. In the absence of any notification, as required under proviso to Section 2 of 1939, the rule of '*lis pendens*' as provided under the Central Act would apply.

Point No. IV :

37. The undisputed facts were that all the predecessor-in-title except the Ajmera family had acquired the title while the suit was pending. Even obstructionist/Respondent No.10 did not deny this fact. If the case of the obstructionist is admitted as it is, she has a case that she acquired the title from her predecessor-in-title, who had purchased the suit premises during the pendency of the suit. However, she came up with a case that on 30.11.1996, when her immediate predecessor-in-title acquired the right and title in the suit premises, the suit was decided, and no appeal was preferred.

38. The learned Counsel for the obstructionist has vehemently argued that since no suit was pending, it cannot be said that her title is subject to Section 52 of the Transfer of Property Act. He has argued that the trial Court did not grant him a decree for specific performance of the contract. The trial Court granted the decree for refund of earnest money. Therefore, it would be difficult to accept that there was a cloud over the title of the original vendor. He further argued that subsequently, the appeal was allowed granting the decree for specific performance of the contract. Therefore, the subsequent purchaser cannot be blamed.

39. Respondent No.10 tried to take advantage of the situation that the trial did not grant a decree for the specific performance of the

contract. However, the first appellate Court reversed the trial Court Judgment and granted the decree for the specific performance of the contract. The said Judgment was upheld by the Hon'ble Supreme Court.

40. In the facts and the circumstances of the case, the source of the title is significant. The first suit premises vendor, the original owner, had created a third-party interest during the pendency of the suit, and then all other sale transactions were done. When the original transaction from which the subsequent owners acquired the title was defective, the subsequent transferee could not acquire a better title than the predecessor. The same scale would be applied to every subsequent purchaser. Though it has been pointed out that when her predecessor-in-title had acquired the right, no appeal was preferred, the fact remains that her predecessors-in-title had acquired the title from their predecessor during the pendency of the suit. In such circumstances, it cannot be accepted that she is protected from the rule of *lis pendens*.

Point No. V :

41. The next limb of the argument of the learned Counsel for respondent no. 10, is that she is a *bona fide* purchaser without the

knowledge of the suit. Hence, Section 52 of the Transfer of Property Act (Central Act) did not hit her title.

42. The learned Counsel for respondent No.10 has relied upon the case of *Abdul Salam s/o Sheikh Rahim (died) through L.R.s. Salma Begum w/o Salam Abdul and others Vs. Sheikh Mehboob s/o Sheikh Amir and others 2006(2) Mh.L.J.*, and referred to No.12 of the said case paragraph and argued that the concept of lis pendens would not apply. The facts of that case were that the plaintiff had a case that there was an oral agreement to sell the suit house. In those circumstances, it has been held that Section 52 that the transaction of sale is not hit by Section 52 of the Transfer of Property Act because it has been brought on record in the evidence that defendant No.3 is the bona fide purchaser of the suit house and before the purchase of the suit house she had made full enquiry about the house from defendant No.1 and when she was fully satisfied that no prior agreement of sell is subsisting between defendant No.1 and the plaintiff or with any other person then only she purchased the suit house in her name.

43. He has also argued that if the vendor agrees to sell the property to a third person and not the purchaser under the agreement to sell, the title rests with a third person. In such circumstances, the correct form of the decree in a suit for specific performance requires the

subsequent purchaser to join the vendor in executing the sale deed. To bolster his argument, he relied on the case of *Lala Durga Prasad and another Vs. Lala Deep Chand And Others 1954 SCR 360: A.I.R. 1954 SC 75* and *Dwarka Prasad Singh and others Vs. Harikant Prasad Singh and others (1973) 1 Supreme Court Cases 179*. He further argued that Section 19(B) of the Specific Relief Act provides that the agreement to sell can be enforced against a subsequent purchaser only when he is not a bona fide purchaser. The claim of the purchaser of being a bona fide purchaser will have to be considered. If such purchaser is not impleaded in the suit, their case will have to be considered in the other proceeding. He relied on the case of *Savitri Devi Vs. District Judge, Gorakhpur and others (1999) 2 SCC 577*. The fact of the case of Savitribai was that the injunction was issued restraining the parties from transferring the suit properties in favour of any other person till the final disposal of the suit. The purchaser had applied for adding them as a party Under Order I Rule 10, read with Section 151 of the C.P.C.. They had come with a case that they were bona fide purchaser for value in good faith. In the said circumstances, it was held that it could not be said that the respondents were neither necessary nor proper party to the suit.

44. The contention of respondent No.10 about the knowledge is concerned, she did not state that before purchase by her predecessor-in-title, they had made the enquiry from their predecessor-in-title about the pendency of the suit. She has contended that nobody told her about the suit, including the plaintiff. Except for the bare word of *bona fide* purchaser, she did not elaborate the facts of what enquiry her predecessor-in-title had made before the purchase from the defective title holder. In the given circumstances, she could not be protected from Section 52 of the Transfer of Property Act, as she did not prove that she was a bona fide purchaser without the knowledge of the suit.

Point No.VI :

45. The learned Counsel for the appellant has vehemently argued that respondent No. 11 did not establish her independent interest from the judgment debtor; she entered in his shoes. Respondent No.10 had no right to obstruct the possession warrant in view of Order XXI Rule 97,98,101, 102 and 103.

46. The learned Counsel for the appellant relied on the case of *Usha Sinha Vs. Dina Ram and others A.I.R. 2008 SC 1997 Dilip Kumar Vs. Vijay Bahadur Singh and Others 2009 A.I.R. (M.P) 165*. In the case of Usha Sinha, the respondent had filed a title suit. During

the pendency of the suit, some of the defendants sold their share in the property about which the suit was pending to Usha Sinha. The title suit was decreed ex-parte. The decree-holder had filed an execution proceeding in which the purchaser pendente lite had applied for an injunction under Order XXI Rule 1 and 2 under Section 151 of the C.P.C.. In the meantime, the purchaser, pendente lite had filed a separate title suit and prayed to stay the execution till the decision of her suit. The trial Court rejected the said application. Then, the purchaser pendente lite appeared in the executing Court and filed an application for the stay to the execution proceeding. The executing Court allowed the application of the purchaser pendente lite. The said order was assailed before the High Court. High Court set aside the said order, and it was challenged before the Supreme Court. In the premise of these facts, the Hon'ble Supreme Court held that the litigation was pending in respect of the property involved; the matter was *subjudice*, and the appellant Usha Sinha had purchased those properties from defendants No.4 and 5 during the pendency of the suit. In this situation, the doctrine of lis pendens would apply to the transaction in question, and the High Court was wholly right in holding that the case was covered under Rule 102 of Order XXI of the Code. It has also been observed that the High Court, in our opinion, rightly held that the appellant could not be said to be a stranger to the

suit as much as she was claiming right, title and interest through defendants No. 4 and 5 against whom the suit was pending. She must, therefore, be presumed to be aware of the litigation which was before the competent Court in the form of title suit instituted by the respondents against the predecessor of the purchaser pendent lite as held in Bellamy. The fact that the purchaser of the property during the pendency of the proceeding had no knowledge about the suit appeal or other proceedings is wholly immaterial.

47. Per contra the learned Counsel for respondent no 10 submitted that Rule 102 of the Order XXI of the C.P.C. has been deleted by Bombay High Court amendment.

48. The above Rule has been deleted by the High Court amendment (Bombay) dated 1 October 1983. Since the said Rule has been deleted, the rules under 97, 98, 100 and 101 shall apply to the resistance and obstruction to the possession warrant of immovable property.

49. The learned Counsel for respondent No. 10 relied upon the case of *Brahmadeo Chaudhari Vs. Rishikesh Prasad Jaiswal 1997(1) MhLJ 817* argued that any person in possession is entitled to resist the possession warrant and file an application under Order 21 rule 97 of

C.P.C. Even the purchaser or a person in possession of the suit property is entitled to file an application under order 21 rule 97 of C.P.C. In the above case, the law has been settled that the person possessing the immovable property need not wait until the decree-holder applies under Order 21 Rule 97 of C.P.C. and dispossessed. Such a person can also file such an application.

50. In the absence Rule 102, as deleted by the Bombay High Court amendment, the question is how to deal with the right of the person in possession of the suit property. In such a situation, the claim of the obstructionist is to be dealt with under Rules 101, 98 and 97 of order XXI of the C.P.C.

51. Rule 101 of Order XXI of the C.P.C. imposes a duty upon the executing Court to determine the questions, including right, title or interest in the suit property on an application under Rule 97. After the determination of the questions raised under Rule 101, the Executing Court under Rule 98 has to allow the application and order for the possession of the suit property or dismiss the application or may pass any order in the circumstance it may deem fit.

52. Under Sub-rule 2 of Rule 98 as per the Bombay High Court amendment, upon the determination of the questions under Rule 101, the Court is satisfied that the resistance or obstruction is without any

just cause by the Judgment debtor or by some other person at this instigation or on his behalf or the transferee during the pendency of the suit or execution, it shall direct that the applicant or Decree holder be put in possession of the suit property and if the resistance is repeated after such orders, the concern shall be sent to Civil Prison and also impose the cost.

53. The ratio laid down in the case of ***Babulal Vs. Raj Kumar And Others (1996) 3 Supreme Court cases 154***, and others cited supra relied upon by the respondent no. 10 needs no discussion as the law is clear that when the obstructionist claim right through the judgment debtor summary enquiry is to be made under Rule 98 of Order 21. Admittedly, respondent No.10 was not the party to the suit. She acquired the title from the transferee pendente lite. She failed to prove her independent title. However, her claim that she did not know about the pendency of the suit and that she is a bona fide purchaser without notice is also not accepted. She did not prove her independent right. Therefore, her resistance to the possession warrant was occasioned without any just cause, and her transaction was made during the pendency of the suit. She entered in the shoe of the judgment debtor. Hence, she had no right to resist the possession warrant.

54. The discussion made above leads this Court to answer the points that emerged for consideration in this case as follows:

Point No. I :- Where the facts of sale during the pendency of the suit are admitted, and the sale document is produced, the questions to be determined under Rule 101 of Order XXI of the C.P.C. should be determined summarily and not like a suit.

Point No. II :- Preferring an appeal with delay condonation application is *lis pendens*.

Point No. III :- Since no notification by the Bombay State under Section 52 of the Transfer of Property Act (Maharashtra Amendment Act) specifying Dhule town or taluqa was issued, the registration of *lis pendens* notice under Section 18 of the Registration was not mandatory.

Point No. IV:- In the facts and circumstances of the case, the title acquired by the predecessor in title of respondent no. 10 after the denial of specific relief and before the appeal was preferred does not exempt the Transfer from Section 52 of the Transfer of Property Act.

Point No. V:- Respondent No.10 was not a *bona fide* purchaser without knowledge of the suit.

Point No. VI:- Respondent no. 10 entered into the shoes of the Judgment debtor. Hence, she is not entitled to the protection.

55. For the reasons mentioned above, the Court concludes that the impugned Judgment and Order of the learned District Judge-2 Dhule passed in Civil Appeal No. 57 of 2008 dated 25.04.2008 remitting the matter to the executing Court for adjudicating the issues is bad in law and perverse. Hence, it is liable to be quashed and set aside.

ORDER

- (i) The appeal is allowed.
- (ii) The impugned Judgment and order of the learned District Judge Dhule passed in Civil Appeal No. 57 of 2008 dated 25.04.2008, stands quashed and set aside.
- (iii) The orders of the learned executing Court are restored.
- (iv) Respondent No.10 to bear the cost of the appellant.

**(S. G. MEHARE)
JUDGE**

55. The learned Counsel for respondent No.10 prayed to stay the effect implementation of the present Judgment and order for eight weeks.

56. Learned Counsel for the appellants strongly opposed the prayer, contending that the litigation was opened in 1997. It would be unjustifiable to ask the Decree-holder to wait further to enjoy the fruits of the decree.

57. The suit premises is used for commercial purpose, and respondent No. 10 has a business there. Hence, in the interest of justice, the effect and operation of this order is stayed for six weeks from today.

(S. G. MEHARE)
JUDGE

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