



GAHC010141292023

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/197/2023

KAMALA DEVI AJITSARIA AND 5 ORS
W/O- LATE RUKMANAND AJITSARIA, R/O- JAI NARAYAN ROAD, FANCY
BAZAR, GUWAHATI, PIN- 781001, DIST.- KAMRUP (M), ASSAM

2: RENU SUREKHA AJITSARIA
D/O- LATE RUKMANAND AJITSARIA
R/O- JAI NARAYAN ROAD
FANCY BAZAR
GUWAHATI
PIN- 781001
DIST.- KAMRUP (M)
ASSAM

3: LALITA KESHAN
D/O- LATE RUKMANAND AJITSARIA
R/O- JAI NARAYAN ROAD
FANCY BAZAR
GUWAHATI
PIN- 781001
DIST.- KAMRUP (M)
ASSAM

4: INDIRA AGARWALLA
D/O- LATE RUKMANAND AJITSARIA
R/O- JAI NARAYAN ROAD
FANCY BAZAR
GUWAHATI
PIN- 781001
DIST.- KAMRUP (M)
ASSAM

5: PINKI AGARWAL
D/O- LATE RUKMANAND AJITSARIA
R/O- JAI NARAYAN ROAD



FANCY BAZAR
GUWAHATI
PIN- 781001
DIST.- KAMRUP (M)
ASSAM

6: RAJESH AGARWAL
S/O- SRILAL AGARWAL
R/O- SONAPUR SAW MILL
SONAPUR
PIN- 782402
DIST.- KAMRUP (M)
ASSA

VERSUS

SEEMA DEVI PATNI AND ANR.
W/O- SRI MAKHAN LAL PATNI, R/O- FLAT NOS. 303 AND 304, SEWDA
COMPLEX, NEAR GUWAHATI GAUSALA, K.C. CHOUDHURY ROAD,
SATRIBARI, GUWAHATI- 781008, DISTRICT- KAMRUP (M), ASSAM

2: BANWARILAL SHARMA
S/O- DURGA PRASAD SHARMA BOTH ARE RESIDENT OF ADARSH NAGAR
NEAR MAHESHWARI BHAWAN
ATHGAON
GUWAHATI
DIST.- KAMRUP (M)
ASSAM
PIN- 78100

For the Petitioner(s) : Mr. S. Ali, Advocate
: Mr. A. Iqbal, Advocate
For the Respondent(s) : Mr. D. Das, Sr. Advocate
: Mr. B. D. Deka, Advocate

Date of Hearing : **22.04.2024**
Date of Judgment : **22.04.2024**



**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Heard Mr. S. Ali, learned counsel appearing on behalf of the petitioners and Mr. D. Das, the learned Senior counsel assisted by Mr. B. D. Deka, the learned counsel appearing on behalf of the Respondent No.1.

2. The instant petition has been filed under Article 227 of the Constitution challenging the order dated 15.05.2023 passed by the learned Court of the Civil Judge No.2, Kamrup (M) at Guwahati (hereinafter referred to as "the learned Executing Court") in Misc. (J) Case No.775/2022 arising out of Title Execution Case No.17/2022 whereby the prayer of the petitioners for rejection of the said application was turned down.

3. For deciding the instant proceedings, this Court finds it relevant to take note of the brief facts which are narrated herein infra.

4. The Respondent No.2 herein had instituted a suit being Title Suit No.223/1997 seeking a declaration that the defendants (the petitioners herein) had no right to evict the Respondent No.2 i.e. the plaintiff, from the suit premises as described in the Schedule to the plaint without following the due process and for permanent injunction. The Schedule land as described in the said suit was a plot of land measuring 2 Kathas 17 Lechas covered by K.P. Patta No.661 of Dag No.1107 of village Sahar Guwahati 2nd Part, Mouza Guwahati wherein houses were standing thereon bearing Guwahati Municipal Corporation Holding No.388 of Ward No.XVIII.

5. The defendants in the said suit who are the petitioners herein filed a



written statement-cum-counter claim denying the allegations made in the said suit and further seeking that the defendants had right, title and interest over the suit property; for declaration that the Sale Deed No.7213/1992 dated 30.11.1992 was fraudulent, collusive and void ab initio and the same did not confer any right, title and interest upon the Respondent No.2 herein over the suit property or any part thereof and for delivery and cancellation of the said deed; ejectment of the plaintiff/the Respondent No.2 herein from the suit property; recovery of khas possession of suit property by evicting and removing the plaintiff/Respondent No.2 herein and all his men, materials therefrom; for permanent injunction restraining the plaintiff and his men, agents, servants, workmen from entering into the suit property and from interfering with the peaceful enjoyment and possession of the defendants over the suit property; recovery of Rs.1,00,000/- as compensation for the wrong done to the godown, house structures on the suit land, for issuance of precept etc.

6. On the basis of the said suit so filed as well as the counter claim, as many as 6 issues were framed. After adducing the evidence by the parties, the learned Trial Court i.e. the Court of Civil Judge No.2, Kamrup (M) at Guwahati vide a judgment and order dated 25.09.2006 dismissed the suit and decreed the counter claim of the defendants/petitioners herein.

7. Being aggrieved, an appeal was preferred by the Respondent No.2 herein which was registered and numbered as Title Appeal No.109/2006 before the Court of the District Judge, Kamrup (M) at Guwahati. Vide a judgment and decree dated 15.09.2007, the said appeal was dismissed by affirming the judgment and decree passed by the learned Trial Court. Being



aggrieved, the Respondent No.2 herein preferred an appeal before this Court which was registered and numbered as RSA No.56/2008.

8. At this stage, this Court finds it pertinent to take note of a development which took place post the dismissal of the appeal by the learned First Appellate Court. The Respondent No.1 in the instant proceedings purchased a RCC Roof with Super built up area with roof casting measuring 1307.06 sq. ft. marked as 303 on the 3rd floor of Sewda Complex together with parking space marked as Parking No.303 vide a registered deed of sale bearing Deed No.10558/08 dated 31.07.2008. The said Respondent No.1 further purchased another RCC Roof with Super built up area with roof casting measuring 1404 sq. ft marked as 304 on the 3rd floor of Sewda Complex together with parking space marked as Parking No.304 vide a registered deed of sale bearing Deed No.10561/08 dated 31.07.2008.

9. The above purchase which have been made by the Respondent No.1 were purchased post the filing of the suit as well as the counter claim. Not only that, the said Respondent No.1 purchased the same after both the learned Trial Court and the learned First Appellate Court had decreed the counter claim and the Appeal thereagainst was dismissed respectively.

10. Moving forward, this Court finds it very pertinent to take note of that on 13.05.2022, this Court vide a detailed judgment and order dismissed the said Regular Second Appeal bearing No.56/2008. This Court also finds it very apposite to take note of that the learned Trial Court while deciding the Issue Nos. 4, 5 and 6 had duly taken note of the submissions so made by the counsel for the Respondent No.2 herein who was the plaintiff that during the



pendency of the suit, the plaintiff had sold the flats to 20 flat owners. The learned Trial Court had also taken note of that an application was filed by one of the flat owners seeking impleadment which was rejected by the learned Trial Court vide an order dated 10.05.2006. The learned Trial Court further observed that the dispute in the suit and the counter claim was in relation to the land and at the time of institution of the suit and the counter claim, the building was not in existence. This Court also while dismissing the said Second Appeal had taken into consideration the submission which were made that during the pendency of the suit, a multi storied building was constructed whereby various flats have been sold to the individual owners and it was opined by this Court that as the construction of the building was carried out during the pendency of the litigation, and as such any change brought to the status of the property shall be always subject to the result of the litigation.

11. Pursuant to the dismissal of the second appeal, a Special Leave to Appeal was filed before the Supreme Court by the Respondent No.2 herein which was dismissed vide an order dated 01.08.2022. Subsequent thereto, a Title Execution application was filed by the petitioners herein which was registered and numbered as Title Execution Case No.17/2022 seeking the assistance of the Court for execution of the judgment and decree passed by the Court. In the said Title Execution Case being Title Execution Case No.17/2022, an application was filed by the Respondent No.1 which was registered and numbered a Misc.(J) Case No.775/2022 challenging the execution of the decree primarily on the ground that the decree obtained by the petitioners herein who were the defendants/counter claimants was a collusive decree.



12. Against the said application, written objection was filed by the petitioners herein challenging the maintainability of the said application specifically in view of the mandate of Order XXI Rule 102 of the Code. The learned Executing Court vide the impugned order held that notwithstanding the bar contained in Section 52 of the Transfer of Property Act, 1882 as well as Order XXI Rule 102 of the Code, the application so filed by the Respondent No.1 in the instant application was maintainable as the said Respondent No.1 was prima facie able to establish that there was element of fraud played upon them while executing the Sale Deed in their favour and on the basis thereof opined that the application filed by the Respondent No.1 was maintainable. It is under such circumstances, the order dated 15.05.2023 being passed in Misc.(J) Case No.775/2022 had been assailed in the present revision application.

13. I have heard Mr. S. Ali, the learned counsel appearing on behalf of the petitioners who submitted that from the very application filed by the Respondent No.1 herein, it is clear that the Respondent No.1 had purchased the flats during the pendency of the suit and as such, the Respondent No.1 was a pendente lite transferee for which there is a specific bar under Order XXI Rule 102 of the Code and consequently, the application so filed by the Respondent No.1 was not maintainable. The learned counsel referred to the judgment of the Supreme Court in the case of ***Usha Sinha Vs. Dina Ram and Others reported in (2008) 7 SCC 144*** and submitted that the learned Executing Court committed grave error of law which should shock the judicial conscience of this Court inasmuch as the law being well settled, the continuation of the proceedings filed by the Respondent No.1 before the learned Executing Court is nothing but a gross abuse of the process of law.



14. On the other hand, Mr. D. Das, the learned Senior counsel appearing on behalf of the Respondent No.1 in the instant revision application submitted that the Respondent No.1 had purchased the said flats without the knowledge of the litigation. Referring to the application filed under Order XXI Rule 97, 99 and 101 of the Code, the learned Senior counsel submitted that the builder i.e. the Respondent No.2 in the instant revision application who was the plaintiff in the suit did not disclose to the Respondent No.1 about the pendency of the litigation. He further submitted that the Petitioners herein who were the counter claimant also did not file any application to bring on record the Respondent No.1 in the suit and in view of the non-disclosure by either the petitioners herein as well as the Respondent No.2 who were the Plaintiff and the Defendants in the suit, the Respondent No.1 had been cheated/deprived. He therefore submitted that this is a pure and simple case where fraud have been committed upon the Respondent No.1 in view of the collusive act on the part of the plaintiff and the defendants for which the application under Order XXI Rule 97, 99 and 101 of the Code which were filed by the Respondent No.1 was maintainable and had therefore rightly been held to be maintainable by the learned Executing Court. In that regard, the learned Senior counsel referred to two judgments. The first judgment refers to a judgment passed by the Single Bench of the Punjab and Haryana High Court rendered in the case of ***Bhagwan Bai Vs. Chiranji Lal and Another reported in 2009 SCC OnLine P&H 695***. The second judgment is the judgment rendered by the Division Bench of the Bombay High Court in the case of ***Kuber Housing Investment and Finance Pvt. Ltd. Vs. TCI Finance Ltd. and Others reported in 2013 SCC OnLine Bom 1644***. The learned Senior counsel further expanding his arguments contended that the



Rule of lis pendens as stipulated in Section 52 of the Transfer of Property Act, 1882 shall not apply in view of the very language used in the said Section taking into account that when a decree has been obtained collusively, the principle of lis pendens does not apply. He further submitted that the question as to whether the decree obtained by the defendants i.e. the petitioners was collusive or not, is a question of fact which can be adjudicated only before the learned Executing Court in the said proceedings. The learned Senior counsel further submitted that taking into account the judgment of the Division Bench of the Bombay High Court in **TCI Finance Ltd. (supra)**, the learned Executing Court was justified in holding the application filed by the Respondent No.1 as maintainable.

15. I have given due consideration to the said submissions so made by the learned counsels appearing on behalf of the parties. From the materials on record as had been stated in the previous segments of the instant judgment, it is clear that the Respondent No.1 in the instant revision application has purchased the flats in question during the pendency of the suit. This Court had put a specific query upon the learned Senior counsel for the Respondent No.1 as to what is the collusion between the plaintiff and the defendants which is being agitated by the Respondent No.1 in the application taking into account that the said application does not on the face of it disclose that there was any collusion more so when the plaintiff had challenged the decree passed in the counter claim in every forum available right upto the Supreme Court and further agitated that he constructed the flats and sold it to different flat owners. This Court had also drawn the attention to the learned Senior counsel for the Respondent No.1 to the observations made by the learned Trial Court while deciding the Issue Nos. 4, 5 and 6 as well as



also the observations made in paragraph No.34 by this Court in disposing of the Regular Second Appeal wherein the submissions were duly made on behalf of the Respondent No.2 herein i.e. the plaintiff as regards the sale of the flats made to 20 flat owners and the said contentions were rejected both by the learned Trial Court as well as by this Court holding inter alia that the flats were constructed during the pendency of the suit proceedings and as such the same would be subject to the decision in the suit. However, the learned Senior counsel submitted that the said aspect can only be discerned and proved during the proceedings before the Executing Court. This Court is not at all satisfied with the said answer taking into account that there can be no evidence beyond pleadings. It is also the opinion of this Court that the allegations so made in the application and more particularly to paragraphs 14, 15 and 16 which the learned Senior counsel relied upon do not show that there was any collusion between the plaintiff and defendants in the suit. In fact, in the present proceedings, the Respondent No.1 came into the scene only after the counter claim was decreed and the appeal thereagainst was dismissed. Further to that, the allegations so made can at best be said to be allegations whereby the Respondent No.2/plaintiff who sold the flats to the Respondent No.1 without informing the Respondent No.1 which may assume the character of fraud being played by the Respondent No.2 upon the Respondent No.1. However, the same can by no stretch of imagination be said that the decree so passed was collusive or the Defendants/Petitioners had any role to play in the fraud (if any) committed by the Respondent No.2 upon the Respondent No.1. Consequently, the decree could not have been touched on the basis of such allegations by the Respondent No.1.

16. Be that as it may, this Court finds it very pertinent to take note of the provisions of Order XXI Rule 102 of the Code. The said Rule being relevant is reproduced herein under:

“102. Rules not applicable to transferee pendente lite. —Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgement-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Explanation.—In this rule, “transfer” includes a transfer by operation of law.”

17. Rule 102 clarifies that Rule 98 and 100 of Order XXI of the Code do not apply to transferee pendente lite. A bare reading of the said Rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases a property which is a subject matter of the litigation. This Rule 102 recognizes the doctrine of lis pendens recognized by Section 52 of the Transfer of Property Act, 1882. The legislative intent behind the incorporation of the said Rule is to take into account the ground reality and to refuse to extend helping hand to the purchasers of the property in respect of which litigation is pending inasmuch as if unfair, inequitable or undeserved protection is accorded to a transferee pendente lite, a decree holder will never be able to realize the fruits of the decree. Every time the decree holder seeks a direction from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance by causing obstructions. It is on the basis of the said intent and to avoid such a situation, the Rule has been enacted.

18. This Court at this stage finds it relevant to take note of the judgment of the Supreme Court in the case of ***Usha Sinha (supra)*** wherein the Supreme Court in unequivocal terms observed that the purchaser of a suit property during the pendency of a litigation has no right to resist or obstruct execution of a decree passed by a competent Court. It was observed and declared that if resistance caused or obstruction is offered by a transferee pendente lite of a judgment debtor, he cannot seek benefit of Rule 98 or 100 of Order XXI of the Code. This Court finds it relevant to reproduce paragraph Nos. 23, 24, 25 and 26 of the said judgment as the same has a relevance to the adjudication of the proceedings.

“23. 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 Rules 98 or 100 of Order 21.

24. In Silverline Forum (P) Ltd. v. Rajiv Trust this Court held that where the resistance is caused or obstruction is offered by a transferee pendente lite, the scope of adjudication is confined to a question whether he was a transferee during the pendency of a suit in which the decree was passed. Once the finding is in the affirmative, the executing court must hold that he had no right to resist or obstruct and such person cannot seek protection from the executing court. The Court stated: (SCC pp. 727-28, para 10)

“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 a 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."

25. *We are in respectful agreement with the proposition of law laid down by this Court in Silverline Forum. In our opinion, the doctrine is based on the principle that the person purchasing property from the judgment-debtor during the pendency of the suit has no independent right to property to resist, obstruct or object execution of a decree. Resistance at the instance of transferee of a judgment-debtor during the pendency of the proceedings cannot be said to be resistance or obstruction by a person in his own right and, therefore, is not entitled to get his claim adjudicated.*

26. *For invoking Rule 102, it is enough for the decree-holder to show that the person resisting the possession or offering obstruction is claiming his title to the property after the institution of the suit in which decree was passed and sought to be executed against the judgment-debtor. If the said condition is fulfilled, the case falls within the mischief of Rule 102 and such applicant cannot place reliance either on Rule 98 or Rule 100 of Order 21."*

19. In the instant case, it would be seen that the Respondent No.1 who was the applicant in the application filed in the execution proceedings had



purchased the flats pursuant to filling of the suit as well as the counter claim. Under such circumstances, as the Respondent No.1 purchased the flats in question when the litigation was pending and the matter was sub-judiced, the Respondent No.1 in the instant proceedings cannot invoke the provisions of Order XXI Rule 98 and 100 of the Code in view of the specific bar contained in Rule 102 of the Code. The learned Executing Court vide the impugned order totally misdirected itself in not taking into account the provisions of Rule 102 of Order XXI of the Code in the proper perspective and more particularly in view of the law laid down by the Supreme Court in the case of ***Usha Sinha (supra)*** as well as ***Silverline Forum (P). Ltd. Vs. Rajiv Trust reported in (1998) 3 SCC 723.***

20. At this stage, this Court finds it relevant to take note of that the judgment of the Bombay High Court in ***TCI Finance Ltd. (supra)*** so relied upon by the learned Senior counsel for the Respondent No.1. In the opinion of this Court, the said judgment is not applicable to the present facts as the said judgment was rendered in the case where the applicant therein was a third party and not a pendent lite transferee as in the present case. As regards the judgment of the Punjab and Haryana High Court in the case of ***Bhagwan Bai (supra)***, this Court with regret observes that the said view seems to be contrary to the well settled principles of law laid down by the Supreme Court in ***Usha Sinha (supra)*** and ***Silverline Forum (P) Ltd. (supra)***.

21. Consequently, this Court is of the opinion that the application so filed by the Respondent No.1 being Misc. (J) Case No.775/2022 was not maintainable on the face of it and accordingly ought to have been rejected at the outset which the learned Executing Court failed to do so. Accordingly,



this Court therefore rejects the application filed by the Respondent No.1 and directs the Executing Court to proceed with the execution in accordance with the decree so passed. This Court further set aside the impugned order dated 15.05.2023 passed in Misc. (J) Case No.775/2022.

22. With above observations and directions, the revision application stands allowed.

JUDGE

Comparing Assistant