

(2011) 06 BOM CK 0139

In the Bombay High Court

Case No : Writ Petition No. 3451 of 2007

Lalit Malick, Shyam Malick and Madhu Bhatti

APPELLANT

Vs

Bajinder Singh through his Assignee Satnam Singh, Joginder
Singh Sawhaney and Bhupinder Singh

RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 4, Order 21 Rule 1, Order 21 Rule 2,
Order 21 Rule 55, Order 21 Rule 58
Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Article 137
Specific Relief Act, 1963 — Section 2(15), 21, 28

Citation : (2011) 4 BomCR 310 : (2011) 113 BOMLR 2087 : (2011) 4 MhLj 451

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : G.S. Godbole, instructed by A. Bharat and Co, for the Appellant;
Kannan Kapur, Pankaj Shah, instructed by Pankaj Shah, for Respondent No. 2,
V.K. Kapur Usha Rahi, instructed by Mayur Narendra and Co., for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—An interesting question, as to whether a decree holder and a judgment debtor can insist on auction of a flat under attachment, when the Petitioners who are admittedly in possession of the said flat, are willing to satisfy the decree by paying the decretal amount, arises for consideration in the present petition.

2. The facts necessary for adjudication of the present petition are as under:

3. It is the contention of the Petitioners that one Abdul Gafoor Khan was owner of a flat bearing No. A/5, Ravidarshan C.H.S. Ltd., Carter Road, Bandra (West), Mumbai 400 050. It is further contention of the Petitioners that the father of the Petitioners namely K.L. Malick entered into an agreement for purchase of the subject flat with the said Abdul Gafoor Khan Wazir Khan on 4th March, 1971. It is their contention that said agreement was witnessed by Respondent No. 2

Joginder Singh Sawhney. It is also their contention that in pursuance to the said agreement, Shri K.M. Malick was put in possession of the said flat. It is contended by the Petitioners that by mistake the Society issued share certificate in respect of the said flat in the name of Respondent No. 2, who according to them was close acquaintance and associate of their father. It is contended by the Petitioners that in this premise, their father was required to get an agreement entered into between the Respondent No. 2 herein, by which the Respondent No. 2 agreed to sale the flat in the name of Mrs. Rajinder Malick, the wife of Shri K.L. Malick and mother of the Petitioners. It is contended that accordingly an indemnity bond was also executed by the Respondent No. 2 and that he also addressed a letter to the Society, to transfer the shares so also the flat in the name of Mrs. Rajinder. It is contended by them that since then the Petitioners' parents resided in the said flat till death and that the Petitioners were also in possession of the said flat alongwith their parents and after the death of their parents, they continued to be in possession.

4. A commercial suit No. 332/1972 was filed by the Respondent No. 1 against the Respondent No. 2 at Delhi, for recovery of an amount of Rs. 10,000/-. The said suit was decreed on 26th February, 1975. The decree was put in execution by the original decree holder. However, since the Defendant claimed not to have any property in Delhi to satisfy the decree, the decree was transferred to the City Civil Court at Bombay for execution. Subsequently the said exparte decree was assigned in favour of the Respondent No. 3, by the original decree-holder.

5. In the said execution proceedings, an order of attachment came to be passed in respect of the said flat. On noticing that the warrant of attachment was issued in respect of the said flat on 24th April, 1989, the mother of the Petitioners vide Chamber Summons No. 857/1989 in Delhi Suit No. 332/1972, had prayed for lifting the attachment in respect of the said flat. The learned Judge of the City Civil Court, Mumbai vide order dated 20th February, 1991 dismissed the said chamber summons. Vide order dated 12th December, 1994 the learned Judge of the City Civil Court fixed the reserved price of Rs. 49,50,000/-and issued consequential directions regarding auction of the said flat. In the meanwhile, the mother of the Petitioners had also filed a Short Cause Suit No. 73605/1994 before the City Civil Court, Mumbai. In the said suit a Notice of Motion No. 6137/1994 was also filed for the ad-interim orders against the Respondents 1 and 2 herein restraining them from executing the decree passed in Delhi Suit No. 332/1972. After considering the statement on behalf of the Plaintiffs, that they are willing to deposit the decretal amount, the learned City Civil Court vide order dated 14th December, 1994 granted an ad-interim relief. However, since the said suit was not pursued, the notice of motion was rejected on 13th August, 1997 and suit was also dismissed for want of prosecution on 12th September, 1997.

6. Subsequently, an application on 19th November, 2006 purportedly under the provisions of Rule 1 and 55 of the Order 21 came to be filed before the learned City Civil Judge, Mumbai by the order impugned dated 20th February, 2007, the

application is rejected. In the meanwhile, an application was also filed by the father of the Petitioners before the Delhi Court u/s 151 of the Code of Civil Procedure. After the demise of Petitioner's father, the Petitioners were brought on record as legal heirs. The learned Commercial Civil Judge, Delhi vide order dated 30th March, 2007 observed that Petitioners had no locus and apart from that the application for similar relief filed before the Executing Court at Mumbai was rejected on 20th February, 2007 and, therefore, it would have been appropriate for the applicants to approach the Appellate Court at Mumbai for setting aside the order dated 20th February, 2007 passed by Executing Court at Mumbai. Being aggrieved by the order dated 20th February, 2007 passed by the City Civil Court, Mumbai, the present petition.

7. Initially, the petition had come up for hearing before the learned Single Judge of this Court (Oka, J) on 4th May, 2007. The learned Judge passed the order which reads thus:

1. Heard Advocate appearing for the Petitioners and the Advocate appearing for the third Respondent. According to Advocate for the Petitioners, the total amount due and payable under the decree as of today is Rs. 36,474/-. He states that the Appellants are ready and willing to deposit the said amount with the trial Court. The third Respondent is the assignee of the money decree passed in favour of the first Respondent. The learned Advocate for the third Respondent is unable to state the exact amount which is due and payable to the third Respondent under the decree. The flat allegedly in possession of the Petitioners is put to the auction in execution and the auction was scheduled to be held today.

2. Place the petition for admission on 26th June, 2007. If the Petitioners deposit a sum of Rs. 36,474/- with the Sheriff of Mumbai within a period of one week from today, there will be an ad-interim relief in terms of prayer Clause (b) till the next date. The Advocate for the Petitioners states that the Petitioners have no objection if the said amount is paid over to the third Respondent. Therefore, it will be open for the third Respondent to apply to the Sheriff and on such Application being made, the Sheriff will pay the amount deposited by the Petitioners to the third Respondent.

3. If the Petitioners fail to deposit the amount within the stipulated time, ad-interim relief will stand vacated. At this stage, the learned Advocate appearing for the third Respondent prays for stay of operation of this order. The third Respondent is interested in executing money decree. If the Petitioners are ready and willing to pay entire amount due and payable under the decree, there is no prejudice to the third Respondent. Therefore, the prayer for stay is rejected.

4. Parties and the concerned Court to act upon an authenticated copy of this order.

8. Subsequently, the matter had come for hearing on 26th July, 2007 before the Learned Single Judge of this Court (A.P. Deshpande, J as he then was). This Court disposed of the petition, by the order which reads thus:

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. Heard the advocate appearing for the Petitioners and the advocate appearing for the third Respondent. According to the advocate for the Petitioners, the total amount due and payable under the decree as of today is Rs. 36,474/-. Inviting my attention to an order passed by this Court on 4th May 2007, it is stated that the Petitioners have already deposited the said amount. The flat has been attached which is allegedly in possession of the Petitioners and the Petitioners claim an interest in the said flat. As the Petitioners have claimed interest in the flat which is attached, and having deposited the decretal amount with a view to satisfy the decree, hence the Petitioner has prayed for withdrawal of the attachment. The Respondent No. 3 is the assignee of the money decree passed in favour of the first Respondent. In view of the deposit of the amount with the Sheriff of Mumbai in compliance of the order dated 4th May 2007, the petition need to succeed. The Respondent No. 3 was permitted to withdraw the amount. In case the same is not so withdrawn, it shall be open for the Respondent No. 3 to withdraw the amount. In view of the payment of the decretal amount, the writ petition is allowed. The impugned order is quashed and set aside. In view of the satisfaction of the decree, the attachment of the flat stands withdrawn. Rule made absolute in above terms.

9. The Respondent No. 2 herein challenged the order passed by this Court by way of Civil Appeal No. 881/2010. Noticing that the order passed by this Court allowing the writ petition was passed without hearing judgment debtor, who was the Appellant before it, the Apex Court passed the order on 11th January, 2010 which is as under:

Leave granted.

Although, the Appellant has challenged the impugned order on several grounds, we do not consider it necessary to deal with the same because, in our view, the impugned order is liable to be set aside only on the ground that the Appellant was neither given any notice nor an opportunity of hearing.

Learned Counsel for Respondent Nos. 1 to 3 very fairly stated that notice of the writ petition filed by his client was not issued to the Appellant.

In view of the above, the appeal is allowed. The impugned order is set aside and the writ petition is remitted to the High Court for fresh disposal in accordance with law. Since some of the parties are senior citizens, we request the High Court to make an endeavour to dispose of the writ petition at an early date as per the policy of giving priority to the cases of senior citizens.

10. After the matter was remanded back by the Hon''ble Supreme Court, the learned Single Judge of this Court vide order dated 16th April, 2010 again issued notices to the Respondents. The matter had come for hearing before me on 25th March, 2011. On the said day a statement on behalf of Respondents 2 and 3 as

under was recorded and the following order was passed:

Learned Counsel appearing on behalf of Respondent Nos. 2 and 3 submit that original Respondent No. 1 as well as Bajinder Singh so also Satnam Singh have already expired and their legal heirs are already on record and as such it is not necessary for the Petitioner to take steps to bring legal heirs of Respondent No. 1 on record. Learned Counsel submit that they would file pursis to that effect during the course of the date.

Since learned Counsel for Respondent Nos. 2 and 3 are coming from Delhi, the matter is fixed peremptorily on 11.04.2011 at 3.00 p.m.

Thereafter, on various dates I have extensively heard the learned Counsel for the parties. The Respondents have also filed their written submissions.

11. Shri Godbole, the learned Counsel appearing on behalf of the Petitioners submits that, the learned trial Judge has grossly erred in holding that the earlier order dated 20th February, 1991 in the Chamber Summons filed by the Petitioners operates as resjudicata. The learned Counsel submits that under the provisions of Sub-rule 1(a) of Rule 1 of order 21, it is not provided that payment has to be made only by the judgment debtor. He submits that since the Petitioners are in possession of the suit property, they are very much entitled to make the payment and on the payment being made the decree stands satisfied and as a consequence thereof, in view of provisions of Order 21 Rule 55(a) the attachment has to be withdrawn. The learned Counsel in this respect relies on the judgment of the A.P. High Court in the case of K.S. Hussain Peeran Vs. Kadapala Venkata Ramana Reddy, and Allahabad High Court in the case of Thomas Skinner Vs. Ram Rachpal, and on the Privy Council in the case of Mohd. Rahimutulla Haji Joosab v. Esmail Allarakhia AIR 1924 Privy Council 133. The learned Counsel also relies on the judgment of the Apex Court in the case of Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, in support of the submission, that alternatively it be held that the application made by the Petitioner deserves to be allowed by taking recourse to Section 151 of the CPC. The learned Counsel relies on the judgment of Apex Court in the case of Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon 1969 (1) Supreme Court Cases 869 in support of the submission that the procedural laws are hand made of justice and that they cannot be permitted to come in the way of substantive justice.

12. Shri Godbole further contends that the suit between the Respondent No. 2 and the original Plaintiff was collusive. He submits that suit in fact was filed, so as to overcome the fact that rights in the flat were transferred by the Respondent No. 2 in favour of the Petitioner's mother and to get the said flat auctioned and realise huge amount.

13. As against this Shri Kannan Kapur, the learned Counsel appearing on behalf of the Respondent No. 2 submits that Petitioners have failed to approach this Court with clean hands. He submits that there are various material suppressions

in the petition and on this ground alone the petition is liable to be dismissed. The learned Counsel in this respect relies on the following judgments:

K.D. Sharma Vs. Steel Authority of India Ltd. and Others,

Dalip Singh Vs. State of U.P. and Others,

Behari Kunj Sahkari Avas Samiti Vs. State of U.P. and Others,

S.P. Chengalvaraya Naidu v. Jagannath (dead) by LR's (1994) I SCC 1.

14. The learned Counsel further submits that the jurisdiction of this Court under Article 226 and 227 of judicial review is very limited and this Court does not act as a Court of appeal and, therefore, the petition is liable to be rejected. In this respect reliance is placed on following judgments:

Shamshad Ahmad and Others Vs. Tilak Raj Bajaj (Deceased) through LR's. and Others,

Jai Singh and Others Vs. Municipal Corporation of Delhi and Another,

State of West Bengal and Others Vs. Samar Kumar Sarkar,

Mr. Murari Lal (Deceased) (through Shri Pawan Kumar Arora, Legal heir and Son) Vs. Shri Sunder Singh and Another and Shri Balbir Singh both and Another,

15. The learned Counsel further submits that in an earlier proceedings in the Chamber Summons filed by the Petitioner's mother under Order 21 Rule 58 the rights between the parties have been adjudicated. It is, therefore, submitted that the Petitioners who claim through their mother could not have filed the present application, in view of provisions of Section 11 of CPC. The learned Counsel in this respect, relies on the following judgments:

M/s. Deepak Grit Udyog and others etc. Vs. State of Haryana and others,

Rasika Tulsidas and Others Vs. Mount Mary Vaikunta Co-op. Housing Society Limited and Others,

Bhagwandas D. Tandel Vs. S.N. Sinha, Director General of Police and Others,

Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another,

Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others,

Ashok Kumar Srivastav Vs. National Insurance Company Limited and Others,

16. The learned Counsel further submits that the provisions of Section 151 cannot be used to circumvent the other provisions of CPC. He relies on the judgment of the Apex Court, in the case of Vinod Seth v. Devinder Bajaj and Anr.

17. The learned Counsel further contends that both equity and law are in favour

of the judgment debtor and, therefore, no interference is warranted. The learned Counsel in this respect, relies on the judgment of the Apex Court.

Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others,

Shiv Kumar Sharma Vs. Santosh Kumari,

Shamsu Suhara Beevi Vs. G. Alex and Another,

18. The learned Counsel for the Petitioner further contends that though the application is purportedly filed under Order 21 Rule 1(a) read with Rule 55, the application is infact under Order 21 Rule 58 and as such an appealable order and, therefore, the writ petition against the impugned order would not be tenable. Learned Counsel further submits that for considering as to whether the application is in fact the one under Order 21 Rule 58 or under Order 21 Rule 1 and 5, it will be necessary to refer to the pleadings made in the application. Learned Counsel in this respect, relies on the following judgments:

Mr. Gurram Seetharam Reddy Vs. Gunti Yashoda and Another,

Shishant Agarwal Vs. Krishna Kumar Agarwal and Others,

Ghasi Sahu and Anr. v. Himachal Sahu and Anr. AIR 1986 Ori 17.

19. Shri Y.K. Kapoor, the learned Counsel appearing on behalf of Respondent No. 3 supports the submissions made on behalf of the Respondent No. 2.

20. I will first deal with the contention raised on behalf of the Respondents regarding tenability of the petition. The present petition is being heard after it is remanded back by the Apex Court. Initially, this Court had not only entertained the petition but had also allowed the same. Nodoubt that the learned Counsel is right in contending that jurisdiction of this Court under Article 226 and 227 is limited jurisdiction and that the Court cannot sit as a Court of appeal, to correct the errors committed by the Lower Courts. However, this Court cannot be said to be without any powers, when the lower Courts exercise the jurisdiction with manifest error which can be termed as perversity. This Court as a Court of record would be bound to exercise jurisdiction vested in it under Article 226 or 227 to correct such a manifest error and do the justice between the parties. The law on this point is well settled and, therefore, I do not find it necessary to refer to the judgments referred in this regard by the learned Counsel for the Respondent No. 2.

21. Insofar as the second contention regarding the suppression and misrepresentation is concerned, the learned Counsel basically relies on the fact that in the petition, the Petitioners have not pleaded regarding the earlier order passed in the Chamber Summons filed by their mother. It is a settled law that the person who seeks equity must do equity. It is equally settled that the person who seeks equitable jurisdiction, must approach the Court with clean hands. The learned Counsel relies on the aforesaid judgments of the Apex Court to contend that a person would not be entitled to any equitable relief if he is guilty of

material suppression of facts or withholding of relevant documents from the Court. In the present case it would have to be seen as to whether the Petitioners can be held guilty of suppression of material facts. In this respect, the basic grievance of the Respondent No. 2 is that the Petitioner has not pleaded in the memo of petition regarding rejection of Chamber Summons No. 857/1989 filed by their mother. However, it is to be noted that in the order impugned before this Court itself, the learned Judge has referred to the order passed in Chamber Summons No. 857/1989 and it is basically the rejection of this Chamber Summons, which has weighed with the learned City Civil Judge in rejecting the application of the Petitioners. The impugned order is very well annexed to the petition. The Petitioners have also in paragraph 7 of the petition, referred to the dismissal of the suit. It is thus clear that the Petitioners were not to gain anything, by non-mentioning of the fact regarding the dismissal of the Chamber Summons filed by their mother. It appears to be a negligent act on the part of the lawyer, who has drafted the petition and has failed to make an averment which could have been noticed by him upon the bare perusal of the impugned order. I find that the Petitioners cannot be non-suited on account of negligence by the Counsel, when the non-averment of the said fact in the petition could not have been of any benefit to the Petitioner, as the said fact is evident from the order impugned in the petition. In that view of the matter, I am not inclined to non-suit the Petitioners on the said ground.

22. The next question that requires to be considered, is as to whether the application is a question has to be termed as one under Order 21 Rule 58 and not the one under Order 21 Rule 1(a) read with Rule 55. By now it is a settled law, that for considering the jurisdiction, the averments in the plaint/application will have to be considered. The perusal of the application would clearly reveal that jurisdiction that is invoked by the Petitioners is under Order 21 Rule 1(a), wherein they have specifically contended that they are willing to make the payment of the decretal amount and satisfy the decree. In the application they have no way raised any objection to the decree. In that view of the matter, I am also not inclined to accept the contention in that regard and as such reference to the various judgments made by the learned Counsel would not be necessary.

23. That leaves to the next question as to whether the application filed by the Petitioners would be hit by Section 11 of the Code of Civil Procedure. It is the contention on behalf of Respondent that the application as filed by the Petitioners, was hit by principles of resjudicata and as such not tenable. The learned Counsel in this respect presses into service Section 11 of the CPC and explanation IV thereof. The Apex Court in the case of Sheodan Singh Vs. Smt. Daryao Kunwar, while considering the scope of Section 11 has observed thus:

(9) A plain reading of S. 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely-(I) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit; (II) The former

suit must have been a suit between the same parties or between parties under whom they or any of them claim; (III) The parties must have litigated under the same title in the former suit; (IV) The court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and (V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Further Explanation-I shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as *res judicata* it will have to be seen whether all the five conditions mentioned above have been satisfied.

24. It can thus be seen that for considering as to whether the application filed by the Petitioners was hit by principle of *resjudicata*, it will have to be seen as to whether all the five conditions as mentioned by the Apex Court have been satisfied in the present case or not. Nodoubt that the learned Counsel is right in contending that principle of *resjudicata* also applies to two stages of same litigation, to the extent that the Court, whether the trial Court or the Higher Court having at an earlier stage decided the matter in one way will not allow the parties to re-agitate the same matter again at the subsequent stage of the same proceedings. The reliance placed by the learned Counsel on the various judgments in this respect is well placed. However, for ascertaining as to whether the present application is hit by principle of *resjudicata* or not, one of the conditions that will have to be satisfied is that the matter directly and substantially in issue in the present application, must also be a matter directly and substantially in issue in the Chamber Summons filed by their mother. As held by the Apex Court in the case of *Usha Singh v. Sarvan singh* AIR 1964 SC 948 the question will have to be determined with reference to the pleadings, issues before the Court and the final order. The perusal of Chamber Summons and the affidavit filed by Smt. Rajinder Malick, the mother of the Petitioners would reveal that it has been pleaded by her in the said application that the Respondent No. 2 herein had sold and transferred the said flat to her on 3rd August, 1971. She has averred that thereafter she has been residing in the said premises, with her husband and sons. She has also averred that though she has made an application to the Society for admitting her as a member, on account of internal dispute, the Society had failed and neglected to transfer the said flat or to admit her as a member. She has specifically averred that there is an obvious collusion and connivance between the Defendant and assignee with a view to deprive her rights, title and interest in the said premises. She has specifically pleaded that Defendant had relinquished all rights, title and interest in the said premises. It is the specific case, that the attachment levied upon the said premises was bad, illegal and inoperative and liable to be lifted forthwith. Her specific contention is that the Defendant had no right, title or any interest in the said premises and that she was the absolute owner of the said premises since 12th November,

1970. It was her further contention that without prejudice to her other submissions, she was entitled to ownership of the said flat, on account of her uninterrupted adverse possession. It can thus be seen that the matter directly and substantially in issue in the said Chamber Summons was the claim of the Petitioner's mother, for lifting the attachment on the ground that the decree in pursuance to which an order of attachment was passed was a collusive decree. However, the perusal of the present application would reveal that the Petitioners have not raised objection to the decree. In the present application, the applicants say that the applicants nor their parents, are judgment debtors in the said matter, however, since they were dragged into the execution application, they were willing to satisfy the decree by making the payment. It can thus be seen that in earlier Chamber Summons the mother of the Petitioners had challenged the decree and prayed for lifting the attachment. Whereas in the present application the applicants have merely prayed for permission to deposit the decretal amount and satisfy the decree. It can thus clearly be seen that matter directly and substantially in issue, in the earlier proceedings filed by the mother of the Petitioner, was challenge to the attachment on the ground that decree was a collusive decree and not binding on her whereas the matter in issue in the present application was regarding the payment by a person interested in the flat to satisfy the decree. I am, therefore, of the considered view that the matter in issue in the present application was not a matter directly or substantially in issue in the Chamber Summons filed by the mother of the Petitioners. I am also of the considered view that the contention of the Respondent that the present application would not be tenable in view of explanation IV is also without substance. As I have already discussed hereinabove that the matter in issue in both the applications is not directly and substantially same. The Chamber Summons filed by the mother of the Petitioners was for challenging the attachment, whereas the present application is for satisfying the decree without challenging the attachment or the decree. In that view of the matter, I am of the considered view that explanation IV to Section 11 of CPC will not apply to the facts of the present case.

25. That leaves us to the last question as to whether the Petitioners are entitled to make the payment and satisfy the decree. For considering the rival submissions it would be necessary to refer to Rule 1 of Order 21 and Rule 55 thereof.

Order XXI, Rule 1

1. Modes of paying money under decree-(1) All money, payable under a decree shall be paid as follows, namely:

(a) by deposit into the Court whose duty it is to execute the decree, or sent to that Court by postal money order or through a bank; or

(b) out of Court, to the decree-holder by postal money order or through a bank or by any other mode wherein payment is evidenced in writing; or

(c) otherwise, as the Court which made the decree, directs.

(2) Where any payment is made under Clause (a) or Clause (c) of Sub-rule (1), the judgment-debtor shall give notice thereof to the decree-holder either through the Court or directly to him by registered post, acknowledgment due.

(3) Where money is paid by postal money order or through a bank under Clause (a) or Clause (b) of Sub-rule (1), the money order or payment through bank, as the case may be, shall accurately state of following particulars, namely:

(a) the number of the original suit;

(b) the names of the parties or where there are more than two Plaintiffs or more than two Defendants, as the case may be, the names of the first two Plaintiffs and the first two Defendants;

(c) how the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs;

(d) the number of the execution case of the Court, where such case is pending; and (e) the name and address of the payer.

(4) On any amount paid under Clause (a) or Clause (c) of Sub-rule (1), interest, if any, shall cease to run from the date of service of the notice referred to in Sub-rule (2).

(5) On any amount paid under Clause (b) of Sub-rule (1), interest, if any, shall cease to run from the date of such payment:

Provided that, where the decree-holder refuses to accept the postal money order or payment through a bank, interest shall cease to run from the date on which the money was tendered to him, or where he avoids acceptance of the postal money order or payment through bank, interest shall cease to run from the date on which the money would have been tendered to him in the ordinary course of business of the postal authorities or the bank, as the case may be.

Perusal of Clauses (a) and (b) of Sub-rule 1(1) would reveal that it does not mention as to who would be entitled to make the payment.

26. The Andhra Pradesh High Court had an occasion to consider a similar case with little difference. In the said case the Petitioner claiming that property belonging to him were being brought in execution of decree and that his claim petition was dismissed in default, claimed to have made the payment of Rs. 5000/- in full settlement of decretal amount and obtained a receipt from the decree holder. The decree holder took a preliminary objection about the maintainability of the application under Order 21 Rule 2 of the CPC at the instance of third party. The Andhra Pradesh High Court after considering the rival submissions has observed thus:

Rule 1 is concerned with diverse modes of payment of the decretal amount. Clause (b) of Rule 1 visualises the payment out of Court to the decree-holder and

such payment should be evidenced by postal money order or through Bank or a receipt reduced into writing. There is absolutely no semblance of indication as to the person who can pay the amount in the manner postulated in Clause (b). Regarding payments under Cls. (a) and (c), the judgment-debtor is unable to give notice of such payment to the decree-holder in the manner provided therein. The requirement of furnishing the name and address of the payer in clause 3(e) furnishes a clue to the person who can be payee and such payer is not confined to the judgment-debtor. This can be viewed from another perspective also namely the decree-holder is concerned with the payment of his decretal amount whatever be the source for such payment and if any person comes forward to pay the amount on behalf of the judgment-debtor or such person is obligated to pay the decretal amount due to several sorts of circumstances the decree-holder welcomes the payment. The best possible situation in which a person is obligated to pay is when his property is attached and his claim petition is rejected and to avert the attachment and resultant loss and hardship to him when he comes forward to wipe out the decree by payment to the decree-holder and when he seeks to have the satisfaction recorded he should not be foreclosed on the ground of maintainability of the application at his instance. Sub Clause (1) of Rule (2) obligates the decree-holder to certify payment or adjustment of the decretal amount. Sub Clause (2) provides that the judgment-debtor or surety also apart from the decree-holder indicated in Sub-rule (1) may bring to the notice of the Court the payment or adjustment of the decretal amount. R. 2 does not prohibit or preclude any person other than the decree-holder, judgment-debtor or surety to apprise the Court regarding payment and record satisfaction of the decree. Further there is no rationale or purpose behind the rigid interpretation of enabling the judgment-debtor or surety alone to set in motion the proceeding for recording satisfaction of the decree. There is no prejudice if any person, whatever may be his concern seeks satisfaction of the decree on proof of payment of the decretal amount as provided in Rule 1.

(Emphasis supplied)

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I am in respectful agreement with the view taken by the Andhra Pradesh High Court.

27. In the case of Mohd. Rahimtulla Haji Joosab (supra) before the Privy Council in a suit to set aside the sale conditional decree was passed, that the Plaintiff decree holder shall pay certain sum within certain time. In pursuance to the decree the payment was made by the Plaintiff's mortgagee instead of Plaintiff by depositing money in the Court. The privy Councils observed thus:

Various contentions were put forward by the Appellant in support of his appeal from this order: (1) He contended that on a sound construction of the decree the sum that was provided to be paid by the Plaintiffs in that suit fell to be paid to

the Appellant and that a deposit in Court did not satisfy the condition in the decree. Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the Appellant in person, which he accepted it was equally satisfied by a payment into Court, and that the later was, in the circumstances, the appropriate mode of satisfying the condition. (2) It was contended that a deposit made by another than a party to the suit did not satisfy the condition, and that the mortgagee, who was not a party, had no right, in a question with the Appellant, to make the deposit. Their Lordships agree with the learned Judges of the High Court in rejecting this argument for the reasons they state. They are further of opinion that the mortgagee had for an absolute protection of his own property to make the deposit and so prevent his security from becoming valueless. To the extent of the value of his mortgage granted by the Plaintiffs in his favour he had acquired their rights, and the mortgage-deed expressly authorises him to charge on the mortgaged property any expenses which the mortgagee might be required to make for his protection.

Lastly, it was contended that the mortgagee had an absolute right to withdraw the deposit. If no other interests were in question but those of the mortgagee and the Appellant this would no doubt have been the case. But it cannot be overlooked that the real object of the application for the withdrawal was to defeat the claims of the Respondent who was the only other person that had an interest in the condition expressed in the decree being satisfied. Their Lordships think that the benefit of the deposit, having been made before the expiry of the time limit, necessarily enured to all parties having an interest in the condition being purified. The legitimate interest of the Appellant was to obtain payment of the sums to which he was preferably entitled and this was secured to him by the deposit. Just as the Plaintiff's suit would have stood dismissed if the deposit had not been made, so equally the decree provided that if the sums in question were paid the Plaintiffs were to recover possession of the land in suit. The Respondent in virtue of the agreement of the 10th June, 1918, of which he subsequently obtained a decree of specific implement, is now in right of this decree and entitled to enforce it against the Appellant. As, however, the money deposited by Dattatraya had been actually uplifted by him before the order of the High Court was made, the condition which the Court imposed on the Respondent appeared to be the only method by which the position which had been inverted by the Appellant's action could be restored so as to do justice between the parties. Their Lordships are accordingly of opinion that the decision of the High Court was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

(Emphasis supplied)

28. It can thus clearly be seen that the Privy Council in the aforesaid case has held that since the mortgagee for an absolute protection of his own property made the payment, the condition as stipulated in the conditional decree stood satisfied. If a mortgagee for protection of the interest is entitled to make a

payment towards the satisfaction of a decree, by same analogy a person who is interested in property and in possession thereof, in my view would be entitled to make the payment for satisfaction of the decree for protection of his right in the property concerned.

29. Admittedly, in the present case the parents of the Petitioners and the Petitioners alongwith mother were in possession of the said flat. Admittedly, after the demise of their parents, Petitioners are in possession of the said flat. Admittedly, there are certain documents placed on record by the Petitioners, purported to be an agreement of sale, in respect of the said flat between the Petitioner's mother and the Respondent No. 2. There are certain documents allegedly addressed by Respondent No. 2, in the nature of indemnity bond and request to the Society for transferring the shares in the name of the Petitioner's mother. I do not wish to comment anything about the genuineness or otherwise of the said documents, inasmuch as any observation in that regard may prejudice the rights of the Petitioners or the Respondent No. 2, but certainly it cannot be said that the Petitioners are not at all interested in the said flat. I do not find it appropriate to go into the question as to what would be extent of their interest in the flat concerned.

30. The matter can be viewed from another angle. It is the allegation of Petitioners that the suit in question was filed against the Respondent No. 2, by his own brother-in-law. It is contended that suit is a collusive suit and was filed with an intention to circumvent the agreement entered into between Petitioner's mother and Respondent No. 2. I do not wish to go into the said controversy, again for the same reason, that any observation in that regard may prejudice rights of either of the parties. However, let us consider and examine a hypothetical situation. An unscrupulous litigant after entering into an agreement of sale of a property, after receiving consideration thereof and after delivering possession does not want to honour the agreement. He may very well instigate someone close to him, to file a suit for money decree for a paltry sum. The suit may be decreed. He may very well put up a claim that he does not have any other property and the only property that he has is the one in respect of which the agreement of sale is entered and possession delivered. In the proceedings for execution of said money decree, the said property would be attached and put to an auction. Can a person who has paid a consideration for the said property in pursuance to an agreement and is in possession of the said property, be said to be a person not entitled to make payment and satisfy the decree, so as to avoid auction of the said property? If the answer to this question is "No", then it would result in giving a tool in hands of unscrupulous cantankerous litigants to circumvent the rights they have transferred in favour of third parties after receiving a consideration, to realise huge amount by auction of said property.

31. In the present case, the matter is remanded by their Lordships of the Apex Court, basically on the ground that notice of present writ petition filed by the present Petitioners was not issued to the Appellant, before the Apex Court (i.e.

the Respondent No. 2 herein). However, it is pertinent to note that the Respondent No. 2 had addressed a communication to this Court on 10th May, 2007, i.e. much earlier to the order passed by the Apex Court. The relevant portion of the said letter reads thus:

This is to bring under your kind information that I have come to know that your Hon"ble Court have passed the order on May 04, 2007 on the above mentioned Ritz Petition. I have no Advocate and nor I have been informed for the same, therefore, I was not present in your Hon"ble Court.

That the Petitioners should deposit the decree amount of Rs. 36,474.00 in the Sheriff of Bombay Office within one week time etc.

I, Joginder Singh Sawhney R/o. C-12, Malviya Nagar, New Delhi-110017, is Defendant/Judgment Debtor in this case.

Whereas I have not been informed by the concerned Department regarding the said case hearing in High Court Bombay.

I have written so many letters by Speed Post, A/D to Sheriff Office that I have "No Objection" for the sale of my Flat No. A-5, Ravi Darshan Co-operative Housing Society Ltd., Carter Road, Bandra (West), Bombay-400 050, which is already attached by City Civil Court, Bombay by Warrant of Attachment dated 24th April, 1989.

I request your honour that I do not want any obligation of any Party/Parties to deposit my Decree amount in the Sheriff Office as per your Order dated 04.07.2007.

I humbly request you that you please pass necessary orders that my above mentioned flat of which I am the owner should be put on Auction (Sale) and out of which Decree amount should be paid to Decree holder and the balance amount should be paid to me for which I have no objection.

Once again I request your honour that please pass necessary orders for Auction that flat in question and after detecting the Decree amount, the Balance amount should be paid to me. I do not want any obligation of any Party or Parties to deposit Decree amount on my behalf.

32. It can thus be seen that the Respondent No. 2, is insisting that the said flat should be put on auction and out of which the decree amount should be paid to the decree holder and the balance amount should be paid to him. He states that he does not want any obligation of any party to deposit the decree amount on his behalf. From the perusal of the order passed by this Court dated 4th May, 2007 and 26th July, 2007, it would reveal that the amount payable under the decree is Rs. 36,474/-which is already deposited by the Petitioners in this Court, which is in addition to the amount which was already deposited by the Petitioner's mother in the suit filed by her. From the order passed by the learned City Civil Judge dated 9th December, 1994, it would reveal that the reserve price for

auction, has been set as Rs. 49,50,000/-. A period of about 16 years has lapsed therefrom. Undisputedly, with passage of time, the price of the said flat would be atleast more than a crore. The question, therefore, would be whether the decree passed against the Respondent No. 2, against which the amount payable is about 36,474/-could be permitted to be used by him to receive an amount in crores by auctioning the said flat. It is a known fact that the price received after auctioning the property under the orders of the Court would be less than the prevailing market rate. It is difficult to understand as to why the Respondent No. 2, who claims to be the owner of the property, does not want to pay the paltry sum of Rs. 36,474/-and save his valuable property from being auctioned. Certainly, there appears to be much more in the present matter than what meets the eye. The present matter has been argued on various dates. The Respondents have engaged the learned Counsels from Delhi. The matter was also adjourned on various dates to suit the convenience of the learned Counsels, at their request, as they were required to appear either before the Apex Court or the other Court. Giving a benefit to the Respondent No. 2, that he was not required to pay any fees to the learned Counsel, it can certainly be assumed that Respondent No. 2 was required to spend on traveling of these learned Counsels. The learned Counsels have appeared before me for atleast 5-6 dates. The order sheets reveal that on earlier occasions the matter was listed before the other learned Judges. The order sheets further reveal that on earlier occasions, the learned Counsels from Delhi had appeared in the matter. Even if the traveling expenses which were made on these trips are taken into consideration, it will be much more than the amount of Rs. 36,474/-which is required to be paid for satisfaction of the decree. Taking into consideration this aspect, the contention of the Petitioner that the decree is a collusive decree with intent to get the flat auctioned cannot be outrightly disbelieved. However, I make it clear, that I do not intend to make any observation regarding the rights of the Petitioners or the Respondent No. 2 in the said flat. Inasmuch as, limited question that arises for consideration is, as to whether the Petitioners can be permitted to make the payment and satisfy the decree. In case the Respondent has any rights in the said flat, he is always at liberty to take such steps, as are permissible in law to establish his right. If the Respondent No. 2 is the owner of the flat, he can also take such steps for evicting the Petitioners, from suit premises as permissible in law. The only question is whether he can be permitted to use the machinery of law to get the flat in question auctioned, which is admittedly in possession of the Petitioners and atleast prima-facie they have semblance of right in the said flat. I am of the considered view that if this is permitted, it will amount to nothing else than abuse of process of the Court.

33. Insofar as the contention of the Respondent No. 2 that when there is a conflict between the law and equity, the law shall prevail is concerned, there can be no second opinion about the same. The law is well settled. The reliance placed by the learned Counsel on the Judgments of the Apex Court is also well placed. However, it could be seen that none of the judgments relied on by the

Respondent No. 2, in this respect, would be applicable to the facts of the present case. In the case of Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others, the question was as to whether in case of conflict between the equity in favour of debtor to recover its debt and a law providing that no proceedings for execution beyond a period of twelve years as provided under Article 137 of the Limitation Act, whether equity would prevail over the law. In this background the Apex Court observed thus:

While we fully agree with the learned Counsel that equity is wholly in favour of the Respondent-Bank, since obviously a Bank should be allowed to recover its debts, we must, however, state that it is well settled that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim "*dura lex sed lex*", which means "the law is hard, but it is the law". Equity can only supplement the law, but is cannot supplant or override it.

Such is not the case here. The perusal of provisions of Order 21 Rule 1 do not provide that payment has to be made by the judgment debtor alone and therefore I do not find that there is any conflict between law and equity. In case of Shiv Kumar Sharma (supra) the High Court, in an appeal against the decree passed by the trial Court, had framed an additional issue on its own which did not arise for consideration in the suit or in the appeal. In this background the Apex Court observed thus:

A court of law cannot exercise its discretionary jurisdiction de hors the statutory law. Its discretion must be exercised in terms of the existing statute.

In Shamsu Suhara Beevi Vs. G. Alex and Another, this Court, while dealing with the matter relating to grant of compensation by the High Court u/s 21 of the Specific Relief Act in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance, observed:

Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration Court cannot ignore or overlook the provisions of the statute. Equity must yield to law.

We, therefore, are of the opinion that the High Court was not correct in framing the additional issues of its own which did not arise for consideration in the suit or in the appeal. Even otherwise, the High Court should have formulated the points for its consideration in terms of Order XLI, Rule 31 of the Code. On the pleadings of the parties and in view of the submissions made, no such question arose for its consideration. In any event, if a second suit was maintainable in terms of Order II, Rule 4 of the Code, as was submitted Ms. Luthra, no leave was required to be granted therefore. A civil court does not grant leave to file another suit. If the law permits, the Plaintiff may file another suit but not on the basis of observations made by a superior court.

34. In the case of *Sushma Suhara Beevi v. G. Alex and Anr.* the High Court had granted compensation u/s 21 of the Specific Relief Act in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or by amending the same. It is to be noted that under Sub-Section 5 of Section 21 there is a specific bar that unless such a prayer is made in the pleadings, compensation cannot be granted. In this background, the Apex Court observed thus:

The relief was claimed u/s 28 and not u/s 21 of the Act. The High Court came to the conclusion that Section 28 would not be applicable to the facts of the case but granted the relief u/s 21 of the Act. In our view, the High Court has clearly erred in granting the compensation u/s 21 in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance. Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable considerations court cannot ignore or overlook the provisions of the statute. Equity must yield to law.

35. It can thus be seen that in all these cases there is a conflict between the statutory law and the equity. In this background the Apex Court has held that equity must yield to law. However, in the present case as already discussed hereinabove there is no conflict between equity and law. There is nothing in the statutory provision which would prevent a person interested in the property to make the payment towards satisfaction of the decree to protect his property. The view is also supported by the judgment of the Privy Council and the Andhra Pradesh High Court. In that view of the matter, I am of the considered view that contention in that regard is liable to be rejected.

36. The last question that requires to be considered is whether alternatively, the facts in the present case would permit exercise of jurisdiction u/s 151 of the Code of Civil Procedure. It is the contention of the Petitioner, that if it is found that under Order 21 Rule 1 they are not entitled to make the payment, in the interest of justice, the provisions of Section 151 could be taken recourse to, so as to prevent abuse of process of law. The said contention is countered by the Respondents, contending that the provisions of Section 151 cannot be taken recourse to when there are other statutory provisions available and in any case not so as to circumvent the statutory provisions. The Petitioner in this respect relied on the judgment of *Manoharlal Chopra v. Raibhahadur Rao* (supra) whereas Respondents relied on the judgment of *Vinod Seth* (supra).

37. In the case of *Vinod Seth* the Apex Court was considering the legality of order passed by the learned Single Judge of the Delhi High Court wherein the learned Judge had directed the Appellant-Plaintiff to furnish an undertaking to pay Rs. 25 lacs to Defendants in the event of losing the case. The Apex Court, therefore, was considering as to whether such an order would be permissible u/s 151 of the CPC. The Apex Court in the said judgment has considered its earlier

judgments on the issue. Paragraphs 13, 14 and 15 of the said judgment are reproduced as under:

13. We will next examine whether the power to make such an Order can be traced to Section 151 of the Code, which reads-"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such Orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." As the provisions of the Code are not exhaustive, Section 151 is intended to apply where the Code does not cover any particular procedural aspect, and interests of justice require the exercise of power to cover a particular situation. Section 151 is not a provision of law conferring power to grant any kind of substantive relief. It is a procedural provision saving the inherent power of the Court to make such Orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. It cannot be invoked with reference to a matter which is covered by a specific provision in the Code. It cannot be exercised in conflict with the general scheme and intent of the Code. It cannot be used either to create or recognise rights, or to create liabilities and obligations not contemplated by any law.

13.1 Considering the scope of Section 151, in *Padam Sen and Another Vs. The State of Uttar Pradesh*, this Court observed:

The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and, therefore, it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature.

The inherent powers saved by Section 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the Courts for passing such Orders which would affect such rights of a party.

(Emphasis supplied)

13.2 In *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, this Court held: ...that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in Section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature.

13.3 In *Ram Chand and Sons Sugar Mills Pvt. Ltd. Vs. Kanhaya Lal Bhargava and Others*, this Court reiterated that the inherent power of the Court is in addition to and complementary to the powers expressly conferred under the Code but that power will not be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred

by the other provisions of the Code. Section 151 however, is not intended to create a new procedure or any new right or obligation. In *Nain Singh Vs. Koonwarjee and Others*, this Court observed: Under the inherent power of Courts recognised by Section 151 CPC, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words, the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code....

13.4 suit or proceeding initiated in accordance with law cannot be considered as an abuse of the process of Court, only on the ground that such suit or proceeding is likely to cause hardship or is likely to be rejected ultimately. As there are specific provisions in the Code, relating to costs, security for costs and damages, the Court cannot invoke Section 151 on the ground that the same is necessary for ends of justice. Therefore, we are of the view that a Court trying a civil suit, cannot, in exercise of inherent power u/s 151 of the Code, make an interim Order directing the Plaintiff to file an undertaking that he will pay a sum directed by the Court to the Defendant as damages in case he fails in the suit.

14. The direction to the Plaintiff to furnish an undertaking to pay Rs. 25 lacs to Defendants in the event of losing the case is an Order, in *terrorem*. It is made not because the Plaintiff committed any default, nor because he tried to delay the proceedings, nor because he filed any frivolous applications, but because the Court is unable to find the time to decide the case in view of the huge pendency. (The Division Bench has supported the Order of the learned Single Judge on the ground that "the heavy docket does not permit early disposal of suits and thus parties may take advantage of keeping frivolous claims alive"). Such an Order, punishing a litigant for approaching the Court, on the ground that the Court is not able to decide the case expeditiously, is unwarranted, unauthorised and beyond the power and jurisdiction of the Court in a civil suit governed by the Code. Such Orders are likely to be branded as judicial highhandedness, or worse, judicial vigilantism.

15. We appreciate the anxiety shown by the High Court to discourage land-grabbers, speculators, false claimants and adventures in real estate from pressurising hapless and innocent property owners to part with their property against their will, by filing suits which are vexatious, false or frivolous. But we cannot approved the method adopted by the High Court which is wholly outside law. In a suit governed by the Code, no Court can, merely because it considers it just and equitable, issue directions which are contrary to or not authorised by law. Courts will do well to keep in mind the warning given by Benjamin N. Cardozo in *The Nature of the Judicial Process*: (Yale University Press -1921 Edition Page 114):

The Judge even when he is free, is still not wholly free. He is not to innovate at

pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to "the primordial necessity of Order in social life.

The High Court can certainly innovate, to discipline those whom it considers to be adventurers in litigation, but it has to do so within the four corners of law.

38. It can thus clearly be seen that what has been upheld by the Apex Court, is that the powers u/s 151 cannot be exercised in conflict with the general scheme and intent of the Court. It has been further held that similarly it cannot be used either to create or recognise rights or to create liabilities and obligations in conflict of any law. As already discussed hereinabove, I do not find that the relief claimed by the Petitioners is in any way in conflict with the general scheme and intent of the Court. I do not find anything in the code, which prevents a person interested in property from satisfying the decree, for protecting his rights in the property. On the contrary I find that reading of Order 21 Rule 1(a) would show that, there is nothing which restricts the payment to be made by the judgment debtor alone. On the contrary, as held by the Andhra Pradesh High Court a person interested in the property would be entitled to make the payment. The view is also supported by the judgment of the Privy Council cited supra. I am, therefore, of the considered view, as already discussed hereinabove, that if the application as made by the Petitioners is not allowed, it would amount to permitting a party to take assistance of machinery of law, for getting the huge amount by auctioning the property, without his rights being determined. I am of the considered view that this is a fit case wherein exercise of Section 151 of the CPC is necessary to allow the application as made by the Petitioners for the ends of justice or to prevent abuse of process of the Court.

39. In the result, I am of the view that order passed by my learned pre decessor dated 26th July, 2007 needs to be maintained. As such I am inclined to allow the petition in terms of the operative order, passed by my learned predecessor, which reads thus:

In view of the deposit of the amount with the Sheriff of Mumbai in compliance of the order dated 4th May 2007, the petition need to succeed. The Respondent No. 3 was permitted to withdraw the amount. In case the same is not so withdrawn, it shall be open for the Respondent No. 3 to withdraw the amount. In view of the payment of the decretal amount, the writ petition is allowed. The impugned order is quashed and set aside. In view of the satisfaction of the decree, the attachment of the flat stands withdrawn. Rule made absolute in above terms.

40. However, while allowing the petition it is made clear that this Court has not considered the rival claims of the Petitioners or the Respondent No. 2 with respect to the title of the said flat. It is made clear that nothing observed herein

would come in the way of the parties, if the said parties take appropriate proceedings in accordance with law, for adjudication of their claim to the title of the said flat. If any such proceedings are initiated by either of the parties, before a competent forum, the same would be decided in accordance with law without being in any way influenced by any

41. In the facts and circumstances, no order as to costs.