



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

**APPEAL FROM ORDER NO.256 OF 2013**

Shri. Prakash Gobindram Ahuja ]  
Adult, Occ.: Business & Agriculture, ]  
R/at Nitesh Niwas, O.T. Section, ]  
Ulhasnagar No.3, Taluka Ulhasnagar, ]  
District : Thane. ] .... Appellant

***Versus***

1. Ganesh Pandharinath Dhonde ]  
Adult, Occupation : Agriculturist ]  
2. Mrs. Sharada Pandharinath Dhonde ]  
Alias Mrs. Sharada Bala Patil ]  
3. Mrs. Savitribai Pandharinath Dhonde ]  
Adult, Occupation : Housewife ]  
4. Mrs. Yamunabai Dattatraya Dhonde ]  
Adult, Occupation : Housewife ]  
5. Mrs. Surekha alias Rekha Ramesh Dhonde ]  
Adult, Occupation : Housewife ]  
6. Kum. Seema Bhagwan Dhonde ]  
Adult, Occupation : Housewife ]  
All residents of Chikoli, Taluka Ambernath, ]  
District Thane. ]  
7. Shri. Dattu alias Datta Maruti Bhoir ]  
Adult, Occupation : Business, ]  
Taluka Chikoli, District Thane. ]  
8. Shri. Vasant Maruti Bhoir ]  
Adult, Occupation : Business, ]  
R/at Mahalaxmi Niwas, Mahad, ]  
Apat Wadi, Badlapur (East), ]  
Taluka Ambernath, Dist. Thane. ] .... Respondents

Ms. Kalyani Tulankar a/w. Mr. Sandeep Pathak, i/by Mr. Sugandh D. Deshmukh, for the Appellant.

None for the Respondents.

**CORAM : S.C. DHARMADHIKARI &  
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

**RESERVED ON : 22<sup>ND</sup> JULY 2016.**

**PRONOUNCED ON : 4<sup>TH</sup> OCTOBER 2016.**

**JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]**

1. As per the order passed by the Hon'ble the Acting Chief Justice, this Appeal is placed before us for deciding following questions of law, which are framed by learned Single Judge of this Court [*Coram : R.C. Chavan, J.*], when the Appeal was placed before him for admission :-

- (I) Does Section 52 of the Transfer of Property Act provide adequate protection to the parties from transfers pendente lite since such transferees are not required to be, or entitled as of right to be, impleaded as parties to the suit and cannot resist execution proceedings in view of provisions of Order XXI Rule 100 of the Code as amended by this Court ?

- (II) Would plaintiffs' registering notices of their suits under Section 18 of the Indian Registration Act (though such registration may not be compulsory) not secure for plaintiffs more than what an injunction could secure since transferees, who purchase property, pendente lite in spite of such registration would be deemed to have notice of pendency of the lis and could not claim to be transferees without notice ? And, would such registration not be preferable to clamping an injunction on adversary ?
- (III) Since a plaintiff seeking a temporary injunction is required to show that he would suffer irreparably if temporary injunction is not issued, would it be inappropriate to expect such plaintiff to show that the provisions of Section 52 of the Transfer of Property Act do not afford adequate protection before an injunction to restrain transfer pendente lite is issued ?
- (IV) Would it be appropriate, in cases of claims for temporary injunction to restrain transfers pendente lite, to consider imposition of conditions short of granting injunction, which should protect the plaintiff's interest, like, seeking an

undertaking that no equities would be claimed on account of sale or development of properties; effecting sales only after putting transferees to notice that their rights would be subject to the pending suit, or requiring the party to inform the Court promptly of creation of every such interest ?

- (V) Whether the observation in para (13) of the judgment in *Vasant Tatoba Hargude and others v. Dikkaya Muttaya Pujari (AIR 1980 Bombay 341)* that in the event of there being conflict, the decision of later Bench would bind only lays down that judgment later in point of time as explaining the earlier judgment would bind ?

2. The facts of the Appeal, which may be relevant for deciding these questions of law, can be stated as follows :

The appellant herein has filed Special Civil Suit No.104 of 2012 before the II<sup>nd</sup> Joint Civil Judge, Senior Division, Kalyan for specific performance of Agreement to Sale. Along with the suit, appellant has also filed an application for injunction at Exhibit-5, restraining Respondent No.7 from creating third party interests in the suit property pending hearing of the suit. It is the case of the Appellant that Respondent Nos.1 to 6 owned

the suit land and agreed to sell the same to the appellant by executing two Agreements of Sale for consideration of Rs.30,00,000/- and Rs.17,40,000/-. Out of these two Agreements of Sale, the Agreement of Sale for Rs.30,00,000/- was registered on 28<sup>th</sup> January 2011 and the second Agreement of Sale remained to be registered. The appellant paid to Respondent Nos.1 to 6 Rs.13,36,600/- towards the transaction as earnest money. Respondent Nos.1 to 6, however, executed registered Sale Deed of the said land in favour of Respondent No.7 on 29<sup>th</sup> March 2012. The appellant now apprehends that Respondent No.7 may create further third party interests in the said property, pending the suit. Therefore, he sought temporary injunction by filing application at Exhibit-5 along with the suit.

3. The said application came to be rejected by the Trial Court vide its impugned order holding that the appellant had not made out a prima facie case and balance of convenience was not in his favour. Moreover, the appellant has also not shown that any irreparable loss would be caused to him, if injunction was not granted. Aggrieved by this order, the appellant has preferred this Appeal and sought an order of interim injunction seeking the same relief of restraining respondent No.7 from creating third party interests in the suit property during the pendency of the Appeal.

4. When the Appeal came up for hearing before the learned Single Judge, he referred to his earlier Judgment in *Kachhi Properties Vs. Ganpatrao Shankarrao Kadam & Ors.*<sup>1</sup> and remarked that since the appellant had not made out a case that protection under Section 52 of the Transfer of Property Act, 1882, (*for short*, “TP Act”), was not adequate, the appeal was liable to be dismissed. Thereupon, learned counsel for the appellant pointed out that in the case of *Pralhad Jaganath Jawale & Ors. Vs. Sitabai Chander Nikam & Ors.*<sup>2</sup>, another learned Single Judge of this Court [*Coram : A.S. Oka, J.*], after carefully considering the Judgment in *Kachhi Properties (supra)*, had concluded that in view of binding precedents of the Apex Court, the observation in *Kachhi Properties*, that provisions of Order 39 Rule 1 of Code of Civil Procedure, 1908, (*for short*, “CPC”), could be invoked only if protection provided by Section 52 of the TP Act is shown to be inadequate, could not bind the Court and the finding of the Court in the case of *Kachhi Properties (supra)* that Section 52 of the TP Act provides adequate protection, did not create a binding precedent.

5. The learned Single Judge, before whom this Appeal was placed, in such situation, felt that this necessitated a fresh look or rather a second fresh look, at the conclusions drawn in *Kachhi Properties*, as also the observations thereon made by another learned Single Judge in *Pralhad*

1 2010 (5) Bom.C.R. 43

2 2011 (6) Bom.C.R. 619

*Jaganath Jawale (supra)*, since in *Kachhi Properties*, he has re-examined the same issue, which he had decided earlier also in the case of *Sharad Jamnadhari Mor Vs. Arjun Yeshwant Dhanwatey & Anr.*<sup>3</sup>.

6. The learned Single Judge then heard learned counsel for the appellant, who unfolded all aspects of the matter and threw light on all pros and cons, so as to decide the controversy. After referring to number of decisions of the Hon'ble Supreme Court of India and this Court, the learned Single Judge came to the conclusion that, the view he had taken in his earlier Judgment in *Kachhi Properties*, being the correct view, the Appeal could have been dismissed as untenable and as resulting in heaping upon the judicial system an unwarranted burden. However, learned Single Judge felt that, *“since conflicting Judgments of the Courts of record tend to create confusion in the Trial Courts and result in uncertainty in law, and, since on this question, there are at-least three Hon'ble Judges, who seem to have accepted that Section 52 of the TP Act affords adequate protection, which view has not found favour with the Hon'ble Judge deciding the case of Pralhad, it would be appropriate to have the matter referred to a Larger Bench, rather than committing judicial indiscipline of taking a different view.”*

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<sup>3</sup> 2009 (4) Bom.C.R. 523

7. The learned Single Judge, therefore, thought it necessary to refer the above referred questions for decision to a Division Bench. That is how this matter came to be placed before us, in pursuance of the order of the Acting Chief Justice, for decision on these five questions.

8. In this Appeal, with the able assistance of learned Senior Counsel for the Appellant, we have gone through the Judgment of learned Single Judge in *Kachhi Properties (supra)*; Judgment of another learned Single Judge in *Pralhad Jagannath Jawale (supra)* and then the copious observations made by learned Single Judge in this Appeal, while referring these questions of law for decision before the Division Bench. The learned Senior Counsel for the Appellant has also taken us through the plethora of Judgments of the Hon'ble Supreme Court and this Court, which touch substantially or peripherally the controversy involved herein. Learned senior counsel for the appellant has further referred to the relevant provisions of Transfer of Property Act, 1882, Code of Civil Procedure, 1908, Civil Manual and, most importantly, the 157<sup>th</sup> Report of Law Commission of India, on Section 52 of the TP Act and its amendment.

9. It is in this backdrop that we have been called upon to decide the questions of law, which essentially pertain to the protection given under Section 52 of the TP Act against transfer pendente lite vis-a-vis protection

granted by order of temporary injunction and whether in view of such protection, the party can be entitled to get the relief of interim injunction against such transfer pendente lite.

10. To understand the exact nature of controversy and the circumstances in which these conflicting decisions in the cases of *Kachhi Properties and Pralhad Jawale (supra)* came to be delivered, it would be necessary to make brief reference to the facts of these two decisions and the legal position, as enunciated therein.

### **Legal position set out in Kachhi Properties (supra)**

11. The first case which came to be decided in point of time is of *Kachhi Properties*. In that case a common question was raised in a bunch of Appeals about the necessity of granting a temporary injunction to restrain a Defendant from creating third party interests / alienating the property during the pendency of the Suit, in the face of provisions of Section 52 of the TP Act. The facts giving rise to those Appeals were also, more or less, the same. It was common ground that the appellants in the said Appeals were the plaintiffs and they had filed suits of various natures, like for partition and separate possession of their shares in the joint family properties, for specific performance of an Agreement for Sale or

Development Agreement, suits based on possession of property seeking to avoid transfer, either executed or to be executed, or suits by plaintiffs not in possession of the properties transferred to them, where transferor repudiated the transfer and of the like nature. In these nature of suits, a common relief was sought seeking temporary injunction with a limited nature of restraining the Defendants from alienating the property or creating third party interests during pendency of the suit. In some of the suits, such relief was granted by the Trial Court and in some suits, it was not granted.

12. When these Appeals were placed before the learned Single Judge, the learned Single Judge posed a question, as to whether in such cases even if the plaintiff may have established a prima facie case, whether in the face of provisions of Section 52 of the TP Act, the plaintiff could complain that he would suffer irreparable loss, if an injunction to restrain creation of third party interests is not issued, and could it be held that the balance of convenience would lie in favour of granting such an injunction.

13. While deciding this question, the learned Single Judge referred to his earlier Judgment in the case of *Sharad Jamnadhariji Mor (Supra)*, wherein he had held that, refusal of temporary injunction by the Trial Court need not be interfered with in such cases in view of the protection

statutorily provided by Section 52 of the TP Act. As on the same question again the arguments were advanced, the learned Single Judge took it as an opportunity to re-examine the question, as also the correctness of the logic of his own Judgment, in the case of *Sharad Jamnadarji Mor (Supra)*.

14. Learned Single Judge then referred to the provisions of Section 52 of the TP Act, as amended by Bombay Act XIV of 1939, in reference to an amendment in Section 18 of the Registration Act introducing sub-section (ee). Learned Single Judge then also referred to the various decisions as follows :-

1. *Sharad Jamnadarji Mor v. Arjun Yeshwant Dhanwatey*, 2009 (4) Bom.C.R. 523 (N.B.)
2. [\*Nathaji Anandrav Patil v. Nana Sarjerao Patil\*](#), 1907(9) Bom.L.R. 1173
3. *Bellamy v. Sabine*, 1857 (1) De G.&J. 585.
4. *The Bishop of Winchester v. Paine*, 1805 (11) Ves. 197.
5. *Metcalf v. Pulvertoft*, 1813 (2) Ves.& B. 204.
6. *Landon v. Morris*, 1832(5) Sim. 263.
7. [\*Pramatha Nath Roy v. Jagannath Kishore Lal Singh Deo\*](#), 16 I.C. 359 : 1913(17) Cal.L.J. 427.
8. [\*Smt. Muktakesi Dawn v. Haripada Mazumdar\*](#), AIR 1988 Cal 25.
9. [\*Nagubai Ammal v. B. Shama Rao\*](#), 1956 DGLS (soft) 38 : AIR 1956 SC 593.

10. [Jayaram Mudaliar v. Ayyaswami](#), 1972 DGLS (soft) 220 : 1972 (2) SCC 200.
11. *Rajendra Singh Vs. Santa Singh*, 1973 DGLS (soft) 240 : 1973(2) S.C.C. 705.
12. *Hadley v. London Bank of Scotland*, 1865 (3) De GJ & S 63.
13. *Kishorsinh Ratansinh Jadeja v. Maruti Corporation*, 2009 DGLS (soft) 449 : (2009) 11 SCC 229.
14. [Sanjay Verma v. Manik Roy](#), 2006 DGLS (soft) 971 : 2006(13) SCC 608 : AIR 2007 SC 1332.
15. [Bibi Zubaida Khatoon v. Nabi Hassan Saheb](#), 2003 DGLS (soft) 625 : 2004 (1) SCC 191.
16. [Sarvinder Singh v. Dalip Singh](#), 1997 (Supp) Bom.C.R. 53 (S.C.) : 1996 DGLS 1133 : 1996 (5) SCC 539.
17. [Dhurandhar Prasad Singh v. Jai Prakash University](#) 2001 DGLS (soft) 885 : 2001 (6) SCC 534 : AIR 2001 SCW 2674.
18. *Moti Lal v. Karrabuldin*, ILR 1898 (25) Cal 179.
19. *Prannath Roy Chowdry v. Rookea Begum*, 1857-60 (7) MIA 323.
20. [Usha Sinha v. Dina Ram](#), 2008 DGLS (soft) 365 : 2008(7) SCC 144.
21. *Vijayalakshmi Leather Industries Vs. K. Narayanan, Lalitha*, AIR 2003 Mad 203.
22. [Silverline Forum \(P\) Ltd. v. Rajiv Trust](#), 1998 DGLS (soft) 378 : 1998 (3) SCC 723.
23. [Rukhana Enterprises v. Ashoka Marketing Ltd.](#), 2010 (1) Bom.C.R. 765 (O.S.).

24. [Anand Nivas Private Ltd. v. Anandji Kalyanji's Pedhi](#), 1963 DGLS (soft) 188 : AIR 1965 SC 414.
25. [Veyindramuthu Pillai v. Maya Nandan](#) [(1920) ILR 43 Mad 696.
26. *Gangubai Babiya Chaudhary v. Sitaram Bhalchandra Sukhtankar*, 1983 DGLS (soft) 168 : AIR 1983 SC 742.
27. [Abdul Salam v. Sheikh Mehboob](#), 2006(3) Bom.C.R. 700 (N.B.) : 2006 (2) Mh.L.J. 277.
28. [Keshrimal Jivji Shah v. Bank of Maharashtra](#), 2004(4) Bom.C.R. 842 (O.S.) : 2004 (3) Mh.L.J. 893.
29. [Dinkar Dada Mahadik v. Shrirang Dada Mahadik](#), 1992 B.C.I. 74 : 1992 Mh.L.J. 248.

15. Out of these authorities relied upon by learned counsel for the parties, the learned Single Judge, after referring to the facts of those authorities, found that so far as the decisions in *Pramatha Nath Roy Vs. Jagannath Kishore Lal Singh Deo*<sup>4</sup>, *Smt. Muktakesi Dawn and Ors. Vs. Haripada Mazumdar and Anr.*<sup>5</sup>, *Nagubai Ammal and Ors. Vs. B. Shama Rao & Ors.*<sup>6</sup>, *Jayaram Mudaliar Vs. Ayyaswami and Ors.*<sup>7</sup> and *Rajendra Singh and Ors. Vs. Santa Singh and Ors.*<sup>8</sup> are concerned, they are not directly relevant to the controversy involved, as the issues raised therein were not the one of grant of temporary injunction, but they pertain to only the doctrine of lis pendens, as contained in Section 52 of the TP Act.

4 1913 (17) Cal.L.J. 427

5 AIR 1988 Calcutta 25

6 AIR 1956 SC 593

7 1972(2) SCC 200

8 1973(2) SCC 705

16. Learned Single Judge found that the only Judgment which directly deals with the question of grant of temporary injunction in cases where plaintiff could have protection of Section 52 of the TP Act was, one of a Division Bench of the Calcutta High Court in *Smt. Muktakesi Dawn (supra)*. Learned Single Judge reproduced para No.4 of the said Judgment, which deals with the said question.

*“4. Mr. Roy Chowdhury has secondly urged that an injunction restraining the defendant from transferring the suit property was absolutely unnecessary as no post-suit transfer by the defendant can adversely affect the result of the suit because of the provisions of section 52 of the T.P. Act whereunder all such transfers cannot but abide by the result of the suit. It is true that the doctrine of lis pendens as enunciated in section 52 of the T.P. Act takes care of all pendente lite transfers; but it may not always be good enough to take fullest care of the plaintiff's interest vis-a-vis such a transfer. The suit giving rise to the impugned order is one for specific performance of sale in respect of the suit property and if the defendant is not restrained from selling the property to a third party and accordingly a third party purchases the same bona fide for value without any notice of the pending litigation and spends a huge sum for the improvement thereof or for construction thereon, the equity in his favour may intervene to persuade the Court to decline, in the exercise of its discretion, the equitable relief*

*of specific performance to the plaintiff at the trial and to award damages only in favour of the plaintiff. It must be noted that Rule 1 of Order 39 of the Code clearly provides for interim injunction restraining the alienation or sale of the suit property and if the doctrine of lis pendens as enacted in section 52 of the T.P. Act was regarded to have provided all the panacea against pendente lite transfers, the Legislature would not have provided in Rule 1 for interim injunction restraining the transfer of suit property. Rule 1 of Order 39, in our view, clearly demonstrates that, notwithstanding the Rule of lis pendens in section 52 of the T.P. Act, there can be occasion for the grant of injunction restraining pendente lite transfers in a fit and proper case.”*

17. According to learned Single Judge, in this decision, the only reason for holding that an injunction could still be issued, despite protection given under Section 52 of TP Act, was found to be that, otherwise the Legislature would not have provided under Order XXXIX, Rule 1 of CPC for grant of an injunction restraining alienation or sale. While dealing with the observations made in the said Judgment that, *“Section 52 of the TP Act was not a panacea and that in spite of rule of lis pendens, there could be occasions for grant of temporary injunction”*, learned Single Judge, in Para No.15 of its Judgment, observed as follows :-

“15. *There can be no doubt that there could always be cases where rule of lis pendens may be inadequate to prevent the mischief and a temporary injunction to prevent such mischief would be warranted. This would imply that a person claiming injunction in such a situation would have to show that protection under section 52 of the TP Act is not adequate. Merely because there is a power, its exercise could not be sought as a matter of course; or simply because its exercise is unlikely to hurt the defendant; for, while granting injunction the Court must see that plaintiff makes out a case of irreparable loss and it is not for the defendant to prove that he would suffer if an injunction is issued. After plaintiff proves irreparable loss, comes the question of balance of convenience or rather balance of inconvenience, when the Court would enquire as to who would suffer greater inconvenience and decide whether injunction ought to be granted.*”

18. Then the learned Single Judge dealt with the Judgments in the cases of *Kishorsinh Ratansinh Jadeja Vs. Maruti Corporation and Ors.*<sup>9</sup> and that of *Sanjay Verma Vs. Manik Roy and Ors.*<sup>10</sup> and found that while dealing with the issue involved therein, as to whether the alienees pendent lite would be necessary or proper parties to the suit, the Supreme Court has held in the later Judgment of *Sanjay Verma* that if the alienation is without the permission or leave of the Court, the transferees have no

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9 2009(11) SCC 229

10 2006(13) SCC 608

right of impleadment. Hence, plaintiff would be under no obligation to chase the alienees or file proceedings against them. Alienees would not even be able to raise an obstruction in execution proceedings. Thus, the learned Single Judge held that protection afforded by Section 52 of TP Act is sufficient and there is no need of granting temporary injunction on the specious plea of avoiding multiplicity of proceedings.

19. The learned Single Judge then referred to the decisions of Supreme Court in *Silverline Forum (P) Ltd. (supra)*, *Sarvinder Singh (supra)*, and *Anand Niwas Private Ltd. (supra)* and held that, in view of Rule 102 of Order XXI CPC, as transferee pendent lite cannot resist the execution, the plaintiff need not worry at all about transfers pendent lite and so occasions for invoking powers under Order XXXIX Rule 1 and 2 would arise only in rare cases where plaintiff can demonstrate that Rule of Lis Pendens is inadequate to protect his interests.

20. Learned Single Judge then also referred to the facts of the case in *Dhurandhar Prasad Singh Vs. Jai Prakash University and Ors.*<sup>11</sup>, which dealt with the principles of lis pendens specified in Section 52 of the TP Act as follows :-

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11 2001(6) SCC 534

“12. *The principles specified in section 52 of the TP Act are in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. The principle of lis pendens embodied in section 52 of the TP Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying section 52 is that a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court.*”

21. Thereafter, considering the other Judgments relied upon by learned counsel for the parties, which are referred supra, learned Single Judge dealt with the submission raised by learned counsel for the appellant therein. It was to the effect that, for over 100 years, Section 52 of the TP Act, as also Order XXXIX, Rule 1 of the CPC co-exist, and if for a century, it has not been felt necessary to refuse injunctions to alienate on the

ground that such claim is redundant in view of Section 52, there must be a good reason and so such a restraint may not now be imposed. Learned Single Judge felt that, *“it was, undoubtedly, a point to ponder”* and was pleased to observe that, *“in the face of judgments, which clearly hold that such transferees pendente lite have no right to be impleaded or to even obstruct the execution proceedings, wastage of judicial time in trial and appellate Courts on an utter redundancy, which may only give some mental solace to a plaintiff may have been tolerable in the past, but cannot be allowed to continue now with tremendous pressure on judicial time at all levels. Available time must be utilised judiciously by prioritizing cases where there are real disputes demanding Judge's time. The magnitude of the problem would become apparent from the fact that almost 25 such appeals, claiming injunctions in disregard of section 52 of the TP Act, have been lined up for adjudication today. Therefore, this argument of letting things be as they are cannot be accepted.”*

22. Learned Single Judge has, then, in para No.30 of its Judgment, proceeded to sum up the legal position as follows :-

*“(a) Section 52 of the TP Act provides adequate protection to the parties from transfers pendente lite and such transferees are neither required to be impleaded nor can*

*claim impleadment. They cannot even resist execution proceedings.*

- (b) In Mumbai (as also elsewhere as and when amended provisions are made applicable) plaintiffs could (or rather ought to) have notices of their suits registered under Section 18 of the Indian Registration Act, in view of the amended provision of the TP Act and the Registration Act. They cannot seek to restrain adversary by an injunction by refusing to go in for registration of the lis.*
- (c) Rule 1 of Order XXXIX of the Civil Procedure Code enabling Court to grant temporary injunctions to restrain transfers pendente lite is only an enabling provision, recognizing the power in the Court to issue such injunction and does not imply that because there is power, it must be exercised. The provision could be invoked only if protection provided by Section 52 of the TP Act is shown to be inadequate.*
- (d) In the face of protection provided by Section 52 of the TP Act, Courts should be cautious in examining the claims by plaintiffs of irreparable loss if injunction to restrain alienations is refused.*
- (e) In suits for specific performance/right to develop against the recorded/rightful owners, Courts may consider if an injunction would cause greater inconvenience to a rightful owner by being deprived the right to deal with his property for the sake of a claim which is yet to mature into right and*

*which metamorphosis rests in the discretion of the Court and is not certain.*

- (f) *Courts may consider necessity of imposing suitable conditions to protect plaintiffs' interests short of granting injunction - like seeking undertaking that no equities would be claimed, on account of sale/development of properties; effecting sales only after putting transferees to notice that their rights would be subject to suit etc.. Interests of prospective purchasers would also be protected if plaintiffs in such cases register the lis, though it may be optional.”*

23. The learned Single Judge was, thus, pleased to confirm the trial Court's order refusing the relief of temporary injunction against pendente lite alienation.

### **Legal position set out in Pralhad Jawale (supra)**

24. In the case of *Pralhad Jawale*, another learned Single Judge of this Court had an occasion to deal with the same controversy, which was raised in the above said decision of *Kachhi Properties*. In this case, there were two appeals against the orders of the Trial Judge passed in two different suits rejecting the applications of the appellants / plaintiffs for temporary injunction, for restraining the respondent / defendant from

creating third party interests in the suit property during pendency of the suit. The learned counsel for the respondents, while supporting the said orders, brought to the notice of the learned Single Judge that the impugned orders were in tune with the decision of this Court in *Kachhi Properties*. Thereupon, learned counsel for the appellants made detailed submission as to how the decision in the case of *Kachhi Properties*, apart from the fact that it does not lay down any proposition of law, it has also no binding effect, as the same has been delivered by ignoring the binding precedents and specific provisions of law. While advancing these submissions, learned counsel for the appellant placed reliance on several decisions of the Apex Court and this Court.

25. Considering that there are large number of matters in which this issue is involved, learned Single Judge heard the submissions advanced by learned counsel for the parties, especially, having regard to the fact that the Special Leave Petition preferred against the Judgment in the case of *Kachhi Properties* has been summarily dismissed on 1<sup>st</sup> October 2010 by the Hon'ble Supreme Court by a non-speaking order. In view thereof, the learned Single Judge proceeded to interpret the legal position, as summarized in Para No.30 in the Judgment of *Kachhi Properties*.

26. While dealing therewith, learned Single Judge referred to Section

52 of the TP Act and also to the amendment made therein by Section 2 of the Bombay Amendment Act XIV of 1939 and found that there is no notification issued making applicable the substituted Section 52 to other parts of the State of Maharashtra, except the city of Mumbai. Hence, learned Single Judge held that, the substituted Section 52 can be applicable only to the suits filed in relation to the immovable properties situate in the city of Mumbai, which consists of two Revenue Districts. In the circumstances, ratio, if any, laid down by Clause (b) of para No.30 of the decision in *Kachhi Properties* will not have any application to the suits relating to the properties situated outside the city of Mumbai, in the absence of any notification issued under the Bombay Amendment Act XIV of 1939.

27. It was further held by learned Single Judge that, the Legislature has, while amending Section 52 of the TP Act, by the same Bombay Act XIV of 1939, amended Section 18 of the Registration Act, by adding clause (ee) providing that registration of notices of pending suits or proceedings, as referred to in Section 52, is optional. In other words, the Legislature did not make registration of the notice of lis pendens compulsory. Hence, in respect of the property situate in city of Mumbai also, even if notice of lis pendens is not registered, no other consequence

is provided, except the fact that Section 52 will have no application to the transaction effected during pendency of the suit and the proceedings in respect of the property concerned. As far as the properties situated in other parts in the State of Maharashtra are concerned, Section 52 does not require registration of notice of lis pendens. The learned Single Judge, therefore, found that the protection offered by Section 52 of TP Act is not adequate to restrain transfers pendent lite.

28. Thereafter, referring to the legal effect of Section 52 of the Act, as illustrated in the decision of *Sanjay Verma*, which was considered in the case of *Kachhi Properties* also, the learned Single Judge held, in para No.14, of his Judgment, that Section 52 of the TP Act does not put any restraint on a party to the suit from alienating the suit property, but only provides that the alienation will in no manner affect the rights of any party under any decree, which may be passed in the suit. Thus, such pendent lite transfer, even if effected without permission of the Court, is neither illegal nor void.

29. The reference was then made by learned Single Judge to the decision of the Supreme Court in the case of *T.G. Ashok Kumar Vs. Govindammal and Anr.*<sup>12</sup>, wherein the Apex Court has noted certain

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<sup>12</sup> 2011(1) All.M.R. 462

deficiencies in Section 52 and made several suggestions, including a suggestion that registration of notice of lis pendens should be made compulsory. By placing reliance on the observations of the Apex Court, in para No.10 of the said Judgment, learned Single Judge held that this decision of the Apex Court also does not hold that a transfer pendent lite is either illegal or void.

30. The learned Single Judge then made reference to another decision of the Division Bench of this Court in the case of *Keshrimal Jivji Shah & Anr. Vs. Bank of Maharashtra & Ors.*<sup>13</sup>, in which, in paragraph No.26, the Division Bench was pleased to lay down the law that transfer of immovable property made in violation of an order of injunction issued by the Court of law confers no right, title or interest in the transferee, as it is no transfer in the eyes of law. The learned Single Judge, therefore, held that the effect of the order of prohibitory injunction restraining alienation during the pendency of the suit can be distinguished from the effect of Section 52 of the TP Act, which does not attach any illegality to a transaction, which had taken place pendent lite. The learned Single Judge was, therefore, pleased to hold that the order of prohibitory injunction grants protection, which is not available under Section 52 of the TP Act, in the event of a transfer pending the suit. Moreover, the party who breaches

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<sup>13</sup> 2004 (4) Bom..C.R. 842

the order of temporary injunction may have to face drastic consequences provided in Rules 2A and 11 of Order XXXIX of the Code, which consequences are in the nature of an order of detention or striking out the defence.

31. Then, while turning to the position of law, as laid down in clause (a) of paragraph No.30 of the Judgment of *Kachhi Properties (supra)*, that the transferees pendent lite are neither required to be impleaded nor can claim impleadment, the learned Single Judge was pleased to observe that, *“the attention of the learned Single Judge in the case of Kachhi Properties was not invited to the decision of the Apex Court in the case of Amit Kumar Shaw & Anr. Vs. Farida Khatoon & Anr.<sup>14</sup>, wherein the Apex Court had an occasion to consider the effect of Section 52 of the TP Act in the context of provisions of Rule 10 of Order I, Rule 10 of Order XXII and Section 146 of the Code and it was held that an alienee pendent lite would ordinarily be joined as party to enable him to protect his interest, as he is bound by the decree passed in the suit. It was further held that, under Rule 10 of Order XXII, the alienee is entitled to be impleaded in the suit or other proceedings, where his predecessor-in-interest has been made a party to the litigation.”* The learned Single Judge hence held that, *“in view of what is held by the Apex Court in the decision of Amit Kumar*

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14 AIR 2005 SC 2209

*Shaw (supra), the last part of the observation in clause (a) of paragraph No.30 of Kachhi Properties Judgment, that such transferee pendent lite cannot claim impleadment, cannot be read as a binding precedent.”*

32. The learned Single Judge then proceeded to decide whether Section 52 of the TP Act provides adequate protection to the parties from transfer pendent lite and was pleased to hold that the first part of clause (a) of paragraph No.30 in *Kachhi Properties* decision, does not lay down an absolute proposition of law that in every case, a plaintiff will be adequately protected by Section 52 of the TP Act. The power to grant relief of temporary injunction under Rules 1 and 2 of Order XXXIX of the said Code is always discretionary. Therefore, in a given case, considering the facts of the case, the Court can always come to the conclusion that the plaintiff may get adequate protection by virtue of Section 52 of the TP Act.

33. While dealing with the last part of clause (c) of paragraph No.30 in the decision of *Kachhi Properties*, that Rule 1 of Order XXXIX of the Code can be invoked only if protection provided by Section 52 of TP Act is shown to be inadequate, the learned Single Judge found that the attention of the Court in *Kachhi Properties* was not invited to the decision of the

Apex Court in the case of *Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass*<sup>15</sup>, wherein the Apex Court was pleased to find substance in the submissions of learned counsel therein that, unless and until a case of an irreparable loss is made out by the parties to the suit, the Court should not permit the nature of property being changed, which also includes alienation or transfer of the property, which may lead to loss or damage being caused to the party, who may ultimately succeed and may further lead to multiplicity of proceedings and hence the order of the High Court and the Appellate Court, permitting the Respondent to change the nature of property by putting up construction as also by permitting the alienation of property on whatever may be the condition on which the same was done, was set aside and the order of the Trial Court, restraining respondent from alienating the suit property and putting up any construction thereon, was restored.

34. Learned Single Judge then noted that in the subsequent decision in the case of *N. Srinivasa Vs. Kuttukaran Machine Tools Limited*<sup>16</sup>, the Apex Court had quoted with approval what is held by the said Court in paragraph No.10 in its earlier decision in the case of *Maharwal Khewaji Trust (supra)* and upheld the order of the Trial Court directing the parties

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15 AIR 2005 SC 104

16 (2009) 5 SCC 182

to maintain status-quo in the matter of transferring, alienating or creating any third party interest in the suit property.

35. Thus, looking to the law, as laid down by the Apex Court from time to time in various authorities, the learned Single Judge was pleased to summarize as follows :-

*“24. .... Looking to the law laid down by the Apex Court, it is apparent that the Apex Court has not accepted the proposition that the principles incorporated in section 52 of the said Act of 1882 offer adequate protection to the parties to a substantive civil suit or other proceedings. What is held by the Apex Court is that normally during the pendency of a substantive suit where rights to immovable properties are in dispute, status quo cannot be allowed to be altered which includes creation of third party interests. In fact, the Apex Court in the case of Maharwal Khewaji Trust (supra) has observed that a defendant is required to make out a case that irreparable loss or damage will be caused to him during the pendency of the suit, if he is not allowed to alter the status quo. It is a well settled requirement of law that while exercising the powers under Rules 1 and 2 of Order XXXIX of the said Code, the Court has to consider the issues of prima facie case, irreparable loss and balance of convenience. In the circumstances, in view of the aforesaid binding precedents of the Apex Court, the observation in Clause (c) of paragraph No. 30 that the*

*provision of Rule 1 of Order XXXIX could be invoked only if protection provided by section 52 is shown to be inadequate cannot bind this Court. Therefore, even the observation in first part of Clause (a) that section 52 provides adequate protection to the parties from transfers pendent lite cannot be read as a binding precedent. In any event, in view of the law laid down by the Apex Court, it cannot be said that provisions of section 52 of the said Act of 1882 in any manner put fetters on the powers of Civil Court conferred by Rules 1 and 2 of Order XXXIX of the said Code. As stated earlier, in a given case, while exercising discretionary powers, the Court can always come to the conclusion in peculiar facts of the given case, that in view of provisions of section 52 of the said Act of 1882, equitable relief of temporary injunction need not be granted.*

25. *Where there is an apprehension shown that the defendant may transfer or alienate the suit property, where all three ingredients are satisfied, the applicability of section 52 of the said Act of 1882 will not take away power of the Court to grant temporary injunction. As noted earlier, a transaction effected in breach of section 52 is not rendered illegal or void, but a transaction entered into in breach of order of temporary injunction is held as illegal by the Division Bench of this Court. Apart from this, the breach of injunction can visit the offending party with very serious consequences under Rule 2 A of Order XXXIX and Rule 11 of Order XXXIX of the said Code.*

26. *Where there is an apprehension established that the defendant may create third party rights and all three ingredients are satisfied, if temporary injunction is not granted, it may result into multiplicity of proceedings inasmuch as the alienee pendente lite may apply for impleadment, which will result in delay in proceedings of the suit.*
27. *It must be observed that Clauses (d) to (f) of paragraph No.30 of the said decision lay down mere guidelines. It is obvious that the guidelines cannot affect the powers of the Court, which are conferred by Rules 1 and 2 of Order XXXIX of the said Code.”*
36. The learned Single Judge then laid down the conclusions drawn from the aforesaid discussion as follows :-

*“28 (i) as far as right of impleadment of transferre pendente lite is concerned, what will bind this Court is what is held by the Apex Court in the case of Amit Kumar Shaw & anr. (supra);*

*(ii) in view of the binding precedents of the Apex Court, the observation in Clause (c) of paragraph No.30 that the provision of Rule 1 of Order XXXIX could be invoked only if protection provided by section 52 is shown to be inadequate cannot bind this Court. Even the observation in first part of Clause (a) of paragraph No.30 that section*

*52 provides adequate protection to the parties from transfers pendent lite cannot be read as a binding precedent. In any event, in view of the law laid down by the Apex Court, it cannot be said that provisions of section 52 of the said Act of 1882 in any manner put fetters on the powers of Civil Court conferred by Rules 1 and 2 of Order XXXIX of the said Code. As stated earlier, in a given case, while exercising discretionary powers, the Court can always come to the conclusion in peculiar facts of the given case, that in view of provisions of section 52 of the said Act of 1882, equitable relief of temporary injunction need not be granted.”*

**Legal position discussed in present appeal  
by learned Single Judge while making Reference**

37. It may be recalled that in this Appeal, when the matter was argued before the learned Single Judge [*Coram : R.C. Chavan, J.*] and learned Single Judge remarked that in view of his Judgment in *Kachhi Properties (supra)*, the appellant/plaintiff had not made out a case that protection under Section 52 of the TP Act was not adequate and the Appeal was liable to be dismissed, learned counsel for the appellant brought to his notice the Judgment in *Pralhad Jawale (supra)*. Thereupon, the learned Single Judge took “a fresh look, or, rather, a second fresh look”, as stated by him, to his decision in *Kachhi Properties* and the earlier decision in *Sharad Jamnadhariji Mor (supra)* and, in his elaborate and detailed order,

endeavoured to justify how the legal position, as laid down by him in *Kachhi Properties* in paragraph No.30, was just and correct. The learned Single Judge again referred to various decisions earlier considered by him in his Judgment in *Kachhi Properties*, including those decisions like *Keshrimal Jivji Shah and N. Srinivasa (supra)*, which were referred in *Pralhad Jawale's case*, and arrived at the conclusion that what was casually referred in *N. Srinivasa* as ratio of the Judgment in *Maharwal Khewaji Trust*, were, in fact, the observations based on the facts and circumstances of that case. Learned Single Judge then held that the law of injunction is well settled and it is always for the party seeking injunction to say that it will suffer irreparable loss, if an injunction is not issued.

38. Learned Single Judge then considered the provisions of Rule 98, Rule 100 and Rule 102 of Order XXI of CPC in the light of the effect of alienation pendent lite and found that plaintiff can derive no additional advantage even if he has secured temporary injunction than the protection given by Rule 98 of Order XXI of the Code. Learned Single Judge then further held that one who is bound by the injunction is transferor and not the transferee, who may not at all be a party to the suit. The learned Single Judge then also relied upon the chart submitted by learned counsel for the appellant analyzing the advantages and disadvantages of “/is

*pendens*”, under Section 52 of TP Act, and “*order of temporary injunction*”, under Rule 1 and 2 of Order XXXIX CPC, in various situations relating to transfer of properties pending the suit and opined that, “*the claims of full protection or full advantage under Section 52 of the TP Act are illusory, as Section 52 clearly makes transfers ineffective as against the parties to the suit and nothing more*”. He further observed that, “*at the cost of repetition, it has to be stated that this vaccine of injunction neither prevents the infection nor reduces the cost of treatment of such infection of obstruction. It may only give an advantage to the legal profession in making the clients go in for this illusory remedy. It is for those in the profession on either side of the bar to examine and decide whether ethically they would like to be parties to an expedition of making the clients seek an illusory protection at substantial cost and expense in the trial as well as appellate Courts*”.

39. The learned Single Judge felt that, “*this question assumes importance in the light of the fact, which, in fact, should not require any expert opinion that the Courts are over-burdened with work and, therefore, cannot pay adequate attention to the genuine problems, which litigants place before the Courts.*” After quoting extensively from the research paper of Dr. Arun Mohan, a senior advocate from the Supreme Court, learned Single Judge posed a question as to why Courts cannot

think of avoiding mindless litigation, which serves no purpose, and, in his view, applications for injunction to restrain creation of third party interest is one such specie of this type of litigation. He further added, as was done in *Kachhi Properties*, that there could always be cases, where litigant may satisfy the Court of the necessity of seeking such injunction, by pointing out that the protection provided by Section 52 of the TP Act is not adequate.

40. The learned Single Judge then also referred to 157<sup>th</sup> Report of the Law Commission, wherein the Law Commission had considered various provisions of Order XXI of the CPC, which recognize the principle of lis pendens. Thus, after trying to, carefully and objectively, re-examine the premises on which the Judgment in *Kachhi Properties* rested and not finding any reason to alter the view taken therein, the learned Single Judge was pleased to observe, in paragraph No.54, as follows :-

*“54. .... In fact, at the cost of repetition, it has to be pointed out that the Hon'ble Judge deciding Pralhad's case also agreed that Section 52 of the TP Act could provide protection to the plaintiff. The observation of the Hon'ble Judge that the transfer pendente lite is not held to be illegal or void is correct, but since such transfers are ineffective against the parties to the suit, that is all what the party needs. As*

*far as observations of the Hon'ble Judge about the judgment in Kachhi Properties having been given in ignorance of the judgment of the Supreme Court in Amit Kumar Shaw, it has humbly to be pointed out that Amit Kumar Shaw does not hold that transferees pendente lite have a right to be impleaded. It only lays down that there could be circumstances where they ought to be treated as proper parties. The observations based on Maharwal Khewaji and N. Srinivasa have already been elaborately discussed and they come in the context of facts in those cases and cannot be read to mean that the burden of proving irreparable loss need not be discharged by the plaintiff or that initial burden to prove that an injunction would not cause irreparable loss would be on the defendant, who may not even be before the Court when an ex-parte ad interim injunction is granted. And, lest we forget, this would amount to casting a negative burden.”*

41. Lastly, in paragraph No.55 of its Judgment, the learned Single Judge came to the conclusion that, *“ordinarily, with these observations, the Appeal could have been dismissed as untenable and as resulting in heaping upon the judicial system an unwarranted burden. However, since conflicting judgments of the Courts of record tend to create confusion in the trial Courts and result in uncertainty in law, and, since on this question, there are at least three Hon'ble Judges, who seem to have accepted that Section 52 of the TP Act affords adequate protection, which*

*view has not found favour with the Hon'ble Judge deciding Pralhad, it may be appropriate to have the matter referred to a larger Bench rather than committing judicial indiscipline of taking a different view.”*

42. The learned Single Judge also felt that this is necessary since a Division Bench of this Court in *Vasant Tatoba Hargude & Ors. Vs. Dikkaya Muttaya Pujari*<sup>17</sup>, holds that Judgment later in point of time would be binding in case there is a conflict in the Judgments of Courts of equal strength. According to learned Judge, *“this leads to a piquant situation, as after the Judgment in Pralhad, another learned Judge of this Court, deciding Rafique Barkatulla Khan Vs. Shahenshah*<sup>18</sup>, which is later in point of time, has followed the decision in *Kachhi Properties”*.

43. In the light of all these facts, circumstances and legal position, the learned Single Judge formulated the questions, reproduced in paragraph No.1 above, for decision to a Division Bench and that is how the matter came to be placed before us.

### **Our Discussion on Legal Position**

44. Thus, after carefully considering the legal position, as spelt out in

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<sup>17</sup> AIR 1980 Bombay 341

<sup>18</sup> 2011 (3) Mah. L.R. 732

these two decisions, we now deem it appropriate to resolve the conflicting legal issues involved in this Reference, so as to answer the questions referred for our decision.

### **Discussion on Question Nos.(I) to (IV)**

45. As these questions are interlinked and deal with the efficacy of Doctrine of Lis Pendens vis-a-vis the temporary injunction, they are discussed together. As far as question No.5 is concerned, it is discussed separately as in order to record the answer to question No.(V) referred above, this Court has also to consider now the binding precedent of the case law, in the event there is conflict between the decisions of the two co-ordinate Benches.

46. In order to properly and effectually adjudicate this conflict of legal opinion for the purpose of answering question Nos.(I) to (IV), in our view, it would be necessary to consider the relevant provisions of Section 52 of the TP Act; Section 18 (ee) of Registration Act, 1908, along with Rules 1, 2, 2A and 11 of Order XXXIX and Rule 98 and 100 of Order XXI of Code of Civil Procedure, 1908, (*"CPC" for short*), coupled with legal position laid down by the Apex Court and this Court in various of its decisions.

47. Now coming first to the Doctrine of Lis Pendens, in order to understand the exact scope, effect and legislative history of the said Doctrine, as contained in Section 52 of TP Act, it will be interesting and enlightening to refer to the 157<sup>th</sup> Law Commission Report, submitted in the year 1998 and relied upon by learned senior counsel for the appellant. As held by Law Commission in its 157<sup>th</sup> Report, the '*Doctrine of Lis Pendens*' is of ancient lineage. Originating, in the Civil Law, in the early ages, it has been operative on the basis of the common law rule by virtue of which the Judgment in a real action was regarded as over-reaching any alienation made by the defendant during its pendency. In the course of time, the doctrine was adopted by equity, being embodied in one of the Lord Bacon's Ordinances "*for the better and more regular administration of justice in the Court of Chancery*".

48. The oldest leading case on the Doctrine of Lis Pendens in India is *Faiyaz Husain Khan Vs. Munsiff Prag Narain*<sup>19</sup>, in which the Privy Council has referred to the leading case of English Court, namely, *Bellamy Vs. Sabine*, wherein Turner, L.J. has explained the principle on which the Doctrine of Lis Pendens rests. It was observed by the Privy Council that, "*the Doctrine of Lis Pendens, with which section 52 of the Act of 1882 is concerned, is not as Turner L.J. observed in Bellamy v. Sabine "founded*

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19 29 ALL 339

*upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is ..... a doctrine common to the Courts both of law and of equity, and rests ..... upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail.” The correct mode of stating the doctrine, as Cranworth L.C. observed in the same case, is that “pendent lite neither party to the litigation can alienate the property in dispute so as to affect his opponent.”*

49. In the cases of *Jayaram Mudaliar and Rajendar Singh (supra)*, the Hon'ble Supreme Court has quoted the definition of "*Lis Pendens*", as given in the "Corpus Juris Secundum", as the expression of the principle of the maxim "*ut lite pendente nihil innovetur*" (pending litigation nothing new should be introduced). On that basis, the Hon'ble Supreme Court defined "*Lis Pendens*" as follows :-

*“Lis Pendens literally means a pending suit, and the 'Doctrine of Lis Pendens' has been defined as the jurisdiction, power, or control, which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein.”*

50. As observed by the Hon'ble Supreme Court in *Jayaram's* case,

*“exposition of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject matter of litigation, so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings infructuous.”*

51. The object of Section 52 of the TP Act is thus not to defeat any just and equitable claim, as observed by the Apex Court in the case of *Jayaram Mudliar (supra)*, but only to subject them to the authority of the Court, which is dealing with the property, to which claims are put forward. This principle applies not merely to actual transfer of rights, which are subject matter of litigation, but to other dealings with it by any party to the suit or proceedings, so as to affect the right of any other party thereto. If one acquires property by way of transfer or otherwise pendent lite, he is bound by the decree, which may be ultimately obtained in the proceedings pending at the time of acquisition.

52. The Hon'ble Supreme Court in the case of *Sarvinder Singh Vs. Dalip Singh*<sup>20</sup> made this legal position further clear by observing that, *“the effect of the Doctrine of Lis Pendens is not to annul the transfer, but only to render it subservient to the rights of the parties to the litigation. In other*

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20 1996 (6) SCALE 59

*words, the section 52 in fact, does not have the effect of wiping out a transfer pendent lite altogether, but only subordinates it to the rights of parties based on the decree to the suit. As between the parties to the transfer, that is, the transferor and the transferee, transfer of the title is perfectly valid, and operates to vest the title of the transferor in the transferee. The words “so as to affect the rights of any other party thereto under any decree or order which may be made therein” make it quite clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order (vide T. Bhup Narain Singh v. Nawab Singh, AIR 1957 Patna 729 at 731). A transfer or a dealing by a party to a suit during the pendency of the suit or proceeding is not, ipso facto void. It only cannot affect the rights of any other party to the suit under any decree or order that may be made in the suit or proceeding.”*

*[Emphasis Supplied]*

53. This position is affirmed by the Supreme Court in the case of *Nagubai Vs. B. Sharma Rao (supra)* by observing that, “the effect of Section 52 of the TP Act is not to wipe out the sale made pendent lite but to subordinate it to the rights based on the decree in the suit”.

*[Emphasis Supplied]*

54. While explaining the rationale behind Section 52 of the TP Act, the Law Commission Report, in paragraph No.3.11, observed that;

*"The rationale underlying section 52 is simple enough and easily intelligible. If a party against whom relief is claimed were to be allowed to transfer his right pendente lite, then the plaintiff would be indirectly compelled to make the transferee a party to the litigation. If the first transferee is himself free to transfer his own right, then (on such a transfer), the plaintiff would be indirectly compelled to make the second transferee a party. The process could thus turn out to be endless, and so would be the hardship that might be experienced by the plaintiff, unless some restriction on the right of transfer is imposed by law.*

*It is precisely this object which section 52 has in view, when it enacts that the transfer or other dealing shall not affect the rights of any other party thereto under any decree or order to be passed in the suit (except with the authority of the court). Thus, the section, in effect, freezes proprietary rights as they stood at the time when the suit was instituted. No subsequent transactions can make a change in the situation as it existed when the suit was commenced. The law throws its cloak of protection around the party's rights, protecting those rights against the onslaughts of subsequent transfers. It is to be pointed out that the section does not totally invalidate the transfer. It only prevents the transfer from affecting the right of any other party. In other words, it introduces its own scheme of priority, its own scale of superior and inferior rights, consequential to transfer pendente lite. [Emphasis Supplied]*

*The underlying principle is that a litigant who has obtained a judgment is entitled, not to be deprived of it, without any solid grounds. Interest rei publicae ut sit finis litium. (Public interest requires finality in litigation)"*

55. The Law Commission, therefore, felt that as the principle of lis pendens embodied in Section 52 of the TP Act, being a principle of public policy, no question of good faith or *bona fides* arises. Hence, the transferee from one of the parties to the suit cannot assert or claim any right, title or interest adverse to any of the rights and interests acquired by another party under the decree in the suit. As a result, the interests of transferee in such transactions are definitely affected. Even the bonafide purchaser or the purchaser acting in good faith is not saved by the existing provisions of Section 52 of the TP Act. Hence, the Law Commission felt that there is definitely a need to strike a proper balance between the public convenience which seeks to bar the transfer of title during the pendency of suit or proceedings and interests of persons, who buy the property in dispute in good faith and acting *bona fide*; especially, when the Doctrine of Lis Pendens applies not merely to actual transfers of rights, which are subject matter of litigation, but to other dealings with it by any party to the suit or proceedings, so as to affect the right of any other party thereto.

56. The Law Commission, therefore, in its report, after referring to the laws operating in the U.K. and other countries, recommended amendment in Section 18 of the Indian Registration Act, 1908, on the lines of the Bombay Amendment Act. In view thereof, the Rule of Lis Pendens now applies only when a notice of pendency of the suit, in which any right to involve property is directly and specifically in question, is registered under Section 18(ee) of the Registration Act. The Law Commission, accordingly, suggested corresponding amendment in Section 52 of the TP Act, on the lines of Bombay Amendment Act XIV of 1939.

57. As far as State of Maharashtra is concerned, as observed by the Law Commission in its Report, the provisions of Section 52 of the TP Act already stand amended by Bombay Act XIV of 1939. They read as follows:

**52. Transfer of property pending suit relating thereto.-**

- (1) *During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, if a notice of the pendency of such suit or proceeding is registered under*

*section 18 of the Indian Registration Act, 1908, the property after the notice is so registered cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.*

(2) *Every notice of pendency of a suit or proceeding referred to in sub-section (1) shall contain the following particulars, 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.*

*Explanation.- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to*

*commence from the date of the presentation of the plaint or the institution of the proceedings in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.*

58. Section 2 of the Bombay Amendment Act XIV of 1939 provides that the Amendment Act shall apply to properties situated wholly or partly in the City of Bombay (now Mumbai) from the date of notification in the official gazette (which has been issued) and provides for similar notification extending applicability of the Amending Act to other areas to be issued (which is not shown to have been issued). Thus the amended provisions apply to properties in Mumbai and the unamended section applies to rest of the State.

59. Simultaneously, Section 18 of the Registration Act, 1908 is also amended by adding Clause (ee) to provide for registration of notices of pending suits as follows :-

**Section 18 of the Registration Act, 1908**

**S.18 Document of which registration is optional**

*Any of the following documents may be registered under this Act, namely:*

- (a) Instruments (other than instrument of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;*
- (b) Instruments acknowledging the receipt or payment of any consideration of account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;*
- (c) Leases of immovable property for any term not exceeding one year, and leases exempted under Section 17;*
- (cc) Instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future any right title or interest, whether vested or contingent, or a value less than one hundred rupees, to or in immovable property;*
- (d) Instruments (other than wills) which purport or operate to create, declare, assign, limit or*

*extinguish any right, title or interest to or in movable property;*

- (e) *Wills;*
- (ee) ***notices of pending suits or proceedings referred to in Section 52 of the Transfer of Property Act, 1882; and***
- (f) *All other documents not required by Section 17 to be registered.*

60. As the questions posed for our consideration deal essentially with the inter-play between the Doctrine of Lis Pendens and Temporary Injunction, in this context, now we may consider the provisions of Order XXXIX Rule 1 and 2 of CPC, which can be reproduced as follows :-

**“ORDER XXXIX  
TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS**

***Temporary injunctions***

**1. *Cases in which temporary injunction may be granted.-***

*Where in any suit it is proved by affidavit or otherwise-*

- (a) *that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or*

(b) *that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,*

*[(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]*

*the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.*

**2. Injunction to restrain repetition or continuance of breach.-**

(1) *In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.*

- (2) *The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise as the Court thinks fit.”*

61. In this context, it is also necessary to reproduce Rule 2A and 11 of Order XXXIX CPC, which deals with the consequences of non-obedience of Court's order of interim injunction.

***“2A. Consequence of disobedience or breach of injunction-***

- (1) *In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.*
- (2) *No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the*

*proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.”*

**Order XXXIX Rule 11 of Code of Civil Procedure, 1908**

11. *Procedure on parties defying orders of Court and committing breach of undertaking to the Court -*

*(1) Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strikes out the defences, if the default or contravention or breach is committed by the defendant or the opponent.*

*(2) The Court may, on sufficient cause being shown and on such terms and conditions, as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach, as aforesaid, makes or amends for the*

*default or contravention or breach to the satisfaction of the Court:*

*Provided that, before passing any order under this sub-rule, notice shall be given to the parties likely to be affected by the order to be passed – See Mah. Govt. Gaz., 15-9-1983, Pt. 4, Ka. p. 422 (1-10-1983).“*

62. As the questions referred for our consideration also pertain to the provisions of Order XXI Rule 98 and 100 CPC, it would be necessary to reproduce those provisions also, which have been amended by the Bombay Amendment Act, 1983.

**Order XXI Rule 98 of Code of Civil Procedure, 1908**

**Orders after adjudication**

98 (1) *Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule*

*(2) -*

- (a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or*
- (b) pass such other order as, in the circumstances of the case, it may deem fit.*

(2) *Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned 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 proceedings, 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. The Court may also order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expenses caused to him in obtaining possession. Any order made under this rule shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. (As substituted by the Bombay Amendment of 1983).*

***Rule 100 in Order XXI of CPC - Order to be passed upon application complaining of dispossession –***

*Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination –*

- (a) make an order allowing the application and directing that the applicant be put into possession of the property or dismissing the application; or*
- (b) pass such other order, as in the circumstances of the case, it may deem fit.*

***Proviso :-***

*Where it is determined that the application is made by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed, the Court shall dismiss the application under sub-rule (a) above. (As added by Bombay Amendment, while deleting Rule 102).*

63. On the bare perusal of these provisions, thus, it can be said that Section 52 of TP Act does not restrain the parties to the suit from entering into alienation. It only makes such alienations subservient to the decision of the suit or proceedings. Whereas, order of temporary injunction restrains the parties from entering into any such alienation and if any party does so, it provides for consequences of detention and attachment of the

property. Rules 98 and 100 of Order XXI of the Code provide that objection to execution raised by alienee pendent lite does not require any inquiry and Court shall dismiss his application.

64. In our considered view, two things must be emphasized to underline the difference and distinction between lis pendens, Section 52 of TP Act and Order XXXIX CPC dealing with temporary injunction, which, with great respect, has escaped the attention of the learned Single Judge deciding *Kachhi Properties (supra)* and passing the referring order. Section 52 of the TP Act is relied upon, but the language thereof needs to be carefully perused and understood. The title of Section 52 itself is indicative of the intent of the Legislature, which is “Transfer of property pending suit relating thereto”, The section itself speaks of pendency in any Court having authority within the limits of India, excluding the State of Jammu and Kashmir, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question. The section states that during the pendency of such suit, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto. However, the crucial words are “*under any decree or order, which may be made therein*”. Such transfer cannot be except under the authority of the Court and on such terms, as it may impose. An Explanation has been

added so as to explain what is meant by pendency of the suit or proceeding. We have already explained the ambit and scope of this provision. However, it must be understood that it operates to cover transfer of property pending suit. It deals with both, transfer or otherwise dealing with, and if that affects the rights of any party to the suit and is made, except under the authority of the Court and on such terms, as it may impose, then, that alone is impermissible.

65. Order XXXIX of CPC provides for grant of temporary injunctions and interlocutory orders. Order XXXIX Rule 1 provides for cases in which temporary injunction may be granted and Order XXXIX Rule 2 provides for injunction to restrain repetition or continuance of breach. The injunction under Order XXXIX Rule 2 can be granted for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff, in such a suit, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. Order XXXIX Rule 2(2) empowers the Court to impose terms.

66. The sweep of this injunction order and the power to grant it must be seen in the back-drop of the cases in which Order XXXIX Rule 1 permits grant of temporary injunction. It, firstly, enables the Court to grant an injunction in any suit. Secondly, Order XXXIX Rule 1(a) enables the grant of temporary injunction in the event any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. This is an injunction which can be claimed by any party to the suit and can be granted, provided the conditions for grant of the same are fulfilled. Therefore, it is erroneous to assume that the temporary injunction is always and necessarily granted at the instance of the plaintiff and to prevent the property in dispute in the suit from being wasted, damaged or alienated or wrongfully sold in execution of a decree. Clause (b) of Order XXXIX Rule 1 CPC enables grant of temporary injunction, where the defendant to the suit threatens or intends to remove or dispose of his property with a view to defrauding his creditors and clause (c) enables grant of injunction when the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

67. Thus, a temporary injunction may be granted so as to preserve the

property in dispute in a suit and to prevent its wastage, damage or alienation by any party to the suit or its wrongful sale in execution of a decree. It can also be granted to restrain the defendant from dispossessing the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit. The words “any property” are of wide amplitude. The injunction can also be granted when the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors. In comparison to Section 52 of the TP Act, which deals with any suit or proceeding in which any right to immovable property is directly and specifically in question, the immovable property in regard to which the right is directly and specifically in question cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto; Order XXXIX Rule 1 speaks of “any suit” and by sub-clauses (a) to (c), takes care of a situation where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. Therefore, it is not restricted to only a right in immovable property. Secondly, it takes care of a situation where defendant to the suit threatens or intends to remove or dispose of his property with a view to defrauding his creditors. Lastly and importantly, it takes care of a threat of the defendant to dispossess the plaintiff or otherwise cause injury to the

plaintiff in relation to any property in dispute in the suit. Therefore, it is not a situation only of transfer of immovable property, which is dealt with in Rule 1 of Order XXXIX CPC. It is also not controlled by the nature of the suit or proceeding. The same also is not restricted to transfer or otherwise dealing with the immovable property, if that is in dispute in the suit, but prevents its wastage, damage or alienation, as above.

68. Further, we have found from the language of Order XXXIX Rule 1 CPC itself that the Court may, by order, grant temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit. Pertinently, the order granting a temporary injunction to restrain the above acts or such other order for the purpose of staying and preventing the wasting, damaging, etc. can be passed and its duration is until the disposition of the suit or until further orders.

[ Emphasis Supplied ].

69. With greatest respect to the learned Single Judge making the Reference and the parties before us, what we have noted is that Order XXXIX CPC not only deals with temporary injunction and which is the field

covered by the Order XXXIX Rule 1 and Order XXXIX Rule 2, but provides for the consequences of disobedience or breach of injunction in Order XXXIX Rule 2A. By Order XXXIX Rule 3 and 3A, the entire procedure to be followed for granting injunction is set out. By Order XXXIX Rule 4, the Court has been empowered on an application made to it by any party dissatisfied with the injunction order to apply for its discharge, variation or setting aside. The further consequence of obtaining an injunction by knowingly making a false or misleading statement in relation to a material particular is set out in the first Proviso to the said Rule. By second Proviso to Order XXXIX Rule 4, the Court is empowered to discharge, vary or set aside the order of injunction, if that is necessitated by a change in the circumstances or on reaching the satisfaction that the order has caused undue hardship to the party. It has to be done after giving an opportunity of being heard to the party applying for its vacation, discharge or setting aside, the same has caused undue hardship to that party.

70. We have, therefore, very wide sweep of the powers of granting injunction, while granting it and after granting it. Importantly, Order XXXIX Rule 5 clarifies that injunction to Corporation binds its officers, whose personal action it seeks to restrain.

71. By Order XXXIX Rule 6, the Court is empowered to make interlocutory orders and which are not of injunction, but permitting sale of any movable property, being the subject-matter of such suit or attached before Judgment in such suit; if that is subject to speedy and natural decay, or if that is required for any other just and sufficient cause, which makes it desirable to have it sold at once. Order XXXIX Rule 7 permits, detention, preservation, inspection etc. of subject-matter of the suit and interlocutory order can be made in that behalf. How such orders have to be made is provided by Rule 8. By Order XXXIX Rule 9, party may be put in immediate possession of land, the subject-matter of the suit. Therefore, where land of the nature and categories specified in Order XXXIX Rule 9 is the subject-matter of a suit, then, in the eventuality set out and specified in Order XXXIX Rule 9, such property can be immediately put in possession of any other party to the suit claiming to have an interest therein. By Order XXXIX Rule 10, an interlocutory order in a suit for money or some other thing capable of delivery can be granted on an admission. The details with regard to such admission are also set out in Order XXXIX Rule 10, coupled with a discretion in the Court to make an interlocutory order or deposit of the money in Court or delivery of the thing capable of delivery, if that thing capable of delivery is admitted to be held in trust or that it belongs or is due to another party.

72. The power to grant temporary injunction in a mandatory form also flows from the same provision, namely, Order XXXIX Rule 1 CPC. A temporary injunction in a mandatory form is distinct and separate from a mandatory injunction. The object of such a temporary injunction is to preserve status-quo and to prevent irretrievable injury and grant of the same is not a matter of quest.

73. By the Bombay High Court Amendment, 1983, the consequences for parties defying orders of Court or of committing breach of undertaking to the Court are spelt out. Once we appreciate the wide ranging powers conferred and vesting in a Court so as to enable it to render justice for passing an effective and binding order, then, it is futile to urge that presence of Section 52 of the TP Act, which takes care only of one situation, at best, acts as a fetter or places an embargo on the power of the Court to grant injunction. We hope that this much is enough to explain the fallacy in the understanding of these distinct legal provisions.

74. We, at once, clarify that the exercise of the discretionary power, as noted above, is depending upon a satisfaction to be reached by the Court and which is also defined in Order XXXIX Rule 1 and 2 CPC. The exercise of discretionary power in favour of the party, therefore, necessarily

involves the satisfaction of the Court to be reached by applying germane and relevant tests and on a consideration of the materials placed before it. The exercise of discretion must depend upon the facts and circumstances in each case. There are defined guiding principles for granting injunction in the matter of discretion and the Court is not bound to grant such relief merely because it is lawful to do so. The exercise of discretion must be sound and reasonable and not arbitrary. The equitable principles have a defined place in this exercise of discretion. Therefore, it is further futile and unnecessary to discuss whether pendency of application seeking temporary injunction and interlocutory orders slows down the speed and pace in delivery of justice. Once the power to grant injunction is discretionary and sound and not uncontrolled, unrestricted or unbridled, then, there is no reason to be unnecessarily apprehensive. There are in-built checks and safeguards in the system and in the law itself to prevent any abuse of these discretionary powers by the parties and an arbitrary, erroneous and illegal exercise of the discretion by the Court.

75. As held in the case of *Vareed Jacob Vs. Sosamma Geevarghese and Ors.*<sup>21</sup>, “the source of power of the court to grant interim relief is under Section 94. However, exercise of that power can only be done if the circumstances of the case fall under the rules. Therefore, when a matter

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<sup>21</sup> AIR 2004 SC 3992

*comes before the court, the Court has to examine the facts of each case and ascertain whether the ingredients of Section 94 read with the rules in an order are satisfied and accordingly grant an appropriate relief. It is only in cases where circumstances do not fall under any of the rules prescribed that the Court can invoke its inherent power under Section 151 CPC. Accordingly, the courts have to grant relief of attachment before judgment, if the circumstances fall under O. 38 CPC. Similarly, Courts will grant temporary injunction if the case satisfies Order 39. So depending on the circumstances falling in the prescribed rules, the power of the Court to grant specified reliefs would vary. Therefore, each set of rules prescribed are distinct and different from the other and therefore, one cannot equate rules of temporary injunction with rules of attachment before judgment although all are broadly termed as interlocutory orders.”*

76. Thus, having considered all these legal provisions, now we may turn once again to the questions of law referred to us. The first four questions of law necessarily refer to the issue, ‘as to whether the protection given under Section 52 of the TP Act to the party against the transfer pendent lite is sufficient or equivalent to the protection given to the party against such transfer under Order XXXIX Rule 1 and 2 CPC’.

77. For deciding these questions, essentially, one has to again go to the

provisions of Section 52 of the TP Act, which are reproduced earlier and which are considered once again, in detail, in the latest Judgment of the Hon'ble Supreme Court in the case of *Thomson Press (India) Limited Vs. Nanak Builders and Investors Private Limited and Ors.*, (2013) 5 SCC 397. In this case, the Apex Court has, in para No.26 of its Judgment, after reproducing Section 52 of the TP Act, was pleased to observe that,

*“it is well settled that the Doctrine of Lis Pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but also on those who derive title pendent lite. The provision of this section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation.”*

78. The Apex Court then relied upon the decision of the Privy Council in *Gouri Dutt Maharaj Vs. Sk. Sukur Mohammed*, AIR 1948 PC 147, wherein, while discussing the principle of lis pendens, it was observed that, *“the broad purpose of Section 52 is to maintain the status-quo unaffected by the act of any party to the litigation pending its determination.”*

79. The Apex Court also considered in this decision the observations

made by it in the case of *Kedar Nath Lal Vs. Ganesh Ram*, AIR 1970 SC 1717, which referred the earlier decision in *Samarendra Nath Sinha Vs. Krishna Kumar Nag*, AIR 1967 SC 1440, that the purchaser pendent lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him.

80. In para No.29 of its Judgment, the Apex Court also reaffirmed the legal position relating to Section 52 of the TP Act, as considered by it in *Rajender Singh (supra)*, in which the Supreme Court, with approval of the principles laid down in *Jayaram Mudaliar (supra)*, reiterated that;

*“15. The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from the ambit of the court’s power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of lis pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a*

*litigation, to the power and jurisdiction of the court so as to prevent the object of a pending action from being defeated.”*

81. In his separate supplementing Judgment, the *Hon'ble Justice T.S. Thakur* (as His Lordship was then) dealt with the effect of the sale pendent lite in view of the principles of lis pendens and was pleased to refer to earlier Judgment of Supreme Court in *Nagubai Ammal (supra)*, wherein while interpreting Section 52 of the TP Act, it was observed that, “a *transfer pendent lite is not illegal ipso jure but remains subservient to the pending litigation*”. In para 25 of the said Judgment of *Nagubai Ammal (supra)*, it was held as follows :-

“25. .... the words ‘so as to affect the rights of any other party thereto under any decree or order which may be made therein’, make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers pendent lite have been held to be valid and operative as between the parties thereto.”

82. The Hon'ble Supreme Court then also relied upon its decision in *Vinod Seth Vs. Devinder Bajaj, AIR 1956 SC 593*, wherein also it was affirmed that, Section 52 of the TP Act does not render transfers effected

during the pendency of the suit void, but only render such transfers subservient to the rights, as may be eventually determined by the Court.

83. The Hon'ble Supreme Court then thought it appropriate to refer to paragraph No.42 of the Judgment in *Vinod Seth's case (supra)*, which reads as follows :-

*“42. It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit.” [Emphasis Supplied]*

84. Then Hon'ble Supreme Court observed that, the decision in the case of *A. Nawab John Vs. V.N. Subramaniam, (2012) 7 SCC 738*, is a recent reminder of the principle of law enunciated in the earlier decisions, as in that case the Court summed up the legal position thus :-

*“18. .... '12. .... The mere pendency of a suit does not prevent one of the parties from dealing with the*

*property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court.” [Emphasis Supplied]*

85. The Hon'ble Supreme Court then was pleased to finally refer to its decision in *Jayaram Mudaliar (supra)*, in which the observations made on the *Doctrine of Lis Pendens* in Commentaries on the Laws of Scotland, by Bell, are extracted with approval, in paragraph No.43, as follows :-

“43. .... Bell, in his Commentaries on the Laws of Scotland said, that it was grounded on the maxim : *Pendente lite nihil innovandum*. He observed :

*‘It is a general rule which seems to have been recognized in all regular systems of jurisprudence, that during the pendency of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced’.*”

86. Thus, after taking recourse to all its earlier decisions, in paragraph No.53, the Hon'ble Supreme Court has summed up its conclusion as follows :-

*“53. There is, therefore, little room for any doubt that the transfer of the suit property pendent lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. (Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor).”*

87. The effect and impact in legal terms on the alienation or transfer of an immovable property in the teeth of an order of injunction is distinct and that a prohibitory or preventive order passed by a competent court restrains the party to it from indulging in the above acts. If that is breached, the consequences are that the transaction may not be void but it is illegal. We are concerned in this reference with the issue of presence of Section 52 of TP Act, 1882; is it enough protection and whether an order of injunction would still be required or should be passed to take care of the apprehension of the plaintiff ?

88. Thus, from the above-said emphatic pronouncement of the Apex Court, it is crystal clear that the principle of lis pendens contained in Section 52 of the TP Act, neither restrains the party from alienating the property, nor it has the effect of rendering such transaction pendent lite *ipso facto* or *ipso jure* illegal or void. It also does not make such transaction *void ab-initio*, nor the transfer ineffective. It only makes the alienation subservient to the decision of the Court. As it does not contemplate the Court passing any order of restraining the party to the suit from alienating the said property, the party, thus, alienating the property during pendency of the litigation does not incur any consequences for breach of any order of the Court.

89. Thus, the object of Section 52 of the TP Act is merely to make the alienation subservient to the decision of the Court and not to restrain the parties from entering into it or making it void, ab-initio or illegal or making the party subject to consequences for breach of order of the Court. Thus, the effect of the Doctrine of Lis Pendens is not to annul the conveyance, but only to render it subservient to the rights of the parties to the litigation. As held by the Apex Court in the case of *Sanjay Verma (supra)*, “the principle underlying Section 52 of TP Act is that a litigating party is

*exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree, which may be passed in a suit.”*

90. Thus, as far as Section 52 of TP Act is concerned, it is apparent that it does not put any restraint on a party to the suit from alienating suit property, nor does it render the alienation illegal or void.

91. In this respect, we can also make reference to the decision of the Apex Court in the case of *T.G. Ashok Kumar Vs. Govindammal and Anr.*, 2011 (1) ALL M.R. 462, wherein Apex Court has again reiterated that Section 52 of TP Act does not declare a pendent lite transfer by a party to the suit as void or illegal and the only effect of such transfer is that the transferee is bound by the decision in the pending litigation.

92. As against it, the object of Order XXXIX Rule 1 and 2 CPC is to totally restrain a party, pending the litigation, from creating any third party interests in the suit property and ensuring that the suit property remains in

the same condition as it was on the date of filing of the suit. Thus, the object of Order XXXIX Rule 1 and 2 CPC, under which the order of injunction is passed, is totally different from that of Section 52 of the TP Act. This provision restrains the party from entering into any sort of transaction or alienation, whatever may be the circumstances or whatever may be the exigencies.

93. If we consider the effect of breach of such order of interim injunction, then, the consequences are laid down in Rule 2A and Rule 11 CPC. As stated in Rule 2A of Order XXXIX CPC, in the case of disobedience of any injunction granted or other order made under Rule 1 or 2 or even in the case of breach of any of the terms on which the injunction was granted or order made, the Court may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in civil prison. Thus, the consequences of disobedience or breach of injunction order entails attachment and sale of the property of the concerned person or even detention of such person in civil prison. Rule 11 of Order XXXIX of Bombay Amendment also lays down that in case of breach of any order passed by the Court, suit of the party committing the breach is liable to be dismissed or if the party committing such breach is defendant, then his defence is liable to be struck off.

94. The provisions of the Contempt of Courts Act, 1971 also lay down the consequences for committing the breach of any order passed by the Court, including the order of interim injunction, and such consequences again provide for punishment for contempt of Court.

95. Thus, it is not only the purport, import and object of Order XXXIX Rule 1 and 2 of CPC of granting the relief of interim injunction restraining the other party from creating third party interest in the property pending the suit, is different than that of the Principle of Lis Pendens contained in Section 52 of TP Act, but even the consequences for the breach of such order are different, as it may entail into punishment, which consequences are not at all contemplated under Section 52 of TP Act.

96. Moreover, as against the transfer made pendent lite, the transfer made in violation of injunction order is held to be no transfer in the eyes of the law. The legal position in this respect is well settled that, if any property is alienated in the face of order of interim injunction passed by the Court, such alienation becomes *ipso facto* illegal and not at all binding on the parties thereto. It confers no right, title or interest on the transferee. This legal position is very well illustrated in the Division Bench Judgment of this Court in the case of *Keshrimal Jivji Shah (supra)*, to which one of us [*Coram* : S.C. Dharmadhikari, J.] was a Member.

97. The question raised before the Division Bench in this case was exactly 'as to whether the transfer of an immovable property in contravention of a prohibitory or injunction order of a Court is illegal or void?' It was argued by learned counsel for the petitioner that there is no provision either in CPC or elsewhere which makes transfer of immovable property done in violation of an injunction order or a prohibitory order, null and void. It was contended that the law visits parties acting in violation of orders of Court with serious penalties, in view of the provisions of Order XXXIX Rules 1, 2, 2A of CPC and Bombay Amendment i.e. Rule 11, but it does not render the transaction itself null and void or of no legal effect. It was urged that, once the law does not make such provision, then it is not permissible for the Courts to hold that transfer in favour of petitioners is void. It was further contended by learned counsel for the petitioners in the said case that, the right, title and interest in the immovable property does not come to an end merely because a restraint is placed by Court of law on its alienation or disposal and if this is the legal position, then, there was no impediment in respondent No.2 transferring the said property in favour of petitioners.

98. As against it, learned counsel for the respondent therein has submitted that, a transaction, which is entered into either to defeat the

order of Court of law or to violate it, confers no right, title or interest in favour of the transferee. If parties are allowed to claim an advantage from a transaction, which is in violation of an order of Court of law, then, drastic consequences will follow. Entire respect for Rule of law and administration of justice is gone, if, despite prohibitory orders, immovable properties are alienated or disposed of with impunity. Such an approach is contrary to public policy.

99. While dealing with these rival contentions, this Court felt it necessary to refer to the decision of the Hon'ble Supreme Court in the case of *Sujit Singh & Ors. Vs. Harbans Singh & Ors.*, 1995 (6) SCC 50, wherein the Hon'ble Supreme Court was pleased to observe as follows :-

*“23. .... In defiance of the restraint order, the alienation / assignment was made. If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise. The Court, in these circumstances has the duty, as also the right to treat the alienation / assignment as having not taken place at all for its purposes. Once that is so, Pritam Singh and his assignees, respondents herein, cannot claim to be impleaded as parties on the basis of assignment.*

*Therefore, the assignees-respondents could not have been impleaded by the trial Court as parties to the suit, in disobedience of its orders. The principles of lis pendens are altogether on a different footing. We do not propose to examine their involvement presently. All that is emphasized is that the assignees in the present facts and circumstances had no cause to be impleaded as parties to the suit. ....”*

100. The Division Bench in this case also referred to the decision in *Ramchandra Ganpat Shinde Vs. State of Maharashtra, 1994 (1) Bom.C.R. 460*, wherein the Hon'ble Supreme Court, in paragraph Nos.12 and 13, has observed as under :-

*“12. Mr. Justice Arthur J. Venderbilt in his “The Change of Law Reforms 1955” at pages 4 and 5, stated that :*

*..... It is the courts and not in the legislature that our citizens primarily feel the keen, the cutting edge of the law. If they have respect for the work of their courts, their respect for law will survive the short comings of every other branch of the Government; but if they lost their respect for the work of the courts, their respect for the law and order will vanish with it to the great detriment of society.”*

*13. Respect for law is one of the cardinal principles for an effective operation of the Constitution, law and the popular Government. The faith of the people is the source and*

*succor to invigorate justice intertwined with the efficacy of law. The principle of justice is ingrained in our conscience and though ours is a nascent democracy which has now taken deep roots in our ethos of adjudication – be it judicial, quasi judicial or administrative as hallmark, the faith of the people in the efficacy of judicial process would be disillusioned, if the parties are permitted to abuse its process and allowed to go scot free. It is but the primary duty and highest responsibility of the Court to correct such orders at the earliest and restore the confidence of the litigant public, in the purity of fountain of justice; remove stains on the efficacy of judicial adjudication and respect for rule of law, lest people would lose faith in the courts and take recourse to extra constitutional remedies which is a death-knell to the rule of law.”*

101. The Division Bench then also made reference to the case of *Satya Brata Biswal Vs. Kalyan Kumar Kisku & Ors.*, AIR 1994 SC 1837, in which, while outlining the importance of rule of law, administration of justice and the role of courts, the Supreme Court has observed :

*“29. Apart from the fact whether A.K. Ghosh had a legal authority to sub-lease or not, it was not open to him to grant a sub-lease in violation of the order. It is no use contending as Mr. Chidambaram, learned counsel for the respondents, does, that there was a bar to such a sub-lease under the terms of the status qua order. It has the effect of violating the preservation of status of the*

*property. This will all the more be so when this was done without the leave of the Court to disturb the state of things as they then stood. It would amount to violation of the order. The principle contained in the maxim : Aactus Curiae Neminem Gravatt” has no application at all to the facts of this case when in violation of status qua order a sub-tenancy has been created. Equally, the contention that even a trespasser cannot be evicted without recourse to law is without merit, because the state of affairs in relation to property as on 15-9-1988 is what the Court is concerned with. Such an order be circumvented by parties with impunity and expect the Court to confer its blessings. It does not matter that to the contempt proceedings Somani Builders was not a party. It cannot gain an advantage in derogation of the rights of the parties, who were litigating originally. If the right of sub-tenancy is recognized, how is status qua as of 15-9-1988 maintained? Hence, the grant of sub-lease contrary to the order of status-quo is clearly illegal. All actions including the grant of sub-lease are clearly illegal.”*

102. The Division Bench then expressed its inability to accept the contention of petitioners’ counsel that, the decision of the Supreme Court in *Sujit Singh’s case (supra)* should be read as restricted to proceedings under Order XXII Rule 10 CPC and the same cannot be extended to defiance of injunction order issued under Order XXXIX Rule 1 CPC. It was held in paragraph No.26 that;

“26. .... Once the issue is placed on the pedestal of public policy and the very faith of litigants in Rule of law and administration of justice, then it is not possible to make the distinction or bifurcation suggested by Shri. Naphade. It would mean that consequences of nullifying such transaction not being provided by the statute, it would not lose its legal efficacy even if it is in utter disregard to or in violation of or breach of prohibitory order or order of injunction issued by a Court of law. It would mean that parties can breach and violate Court orders openly and with impunity and neither they nor the beneficiaries suffer any consequences. It is time that we recognize the principle that transfer of immovable property in violation of an order of injunction or prohibition issued by Court of law, confers no right, title or interest in the transferee, as it is no transfer at all. The transferee cannot be allowed to reap advantage or benefit from such transfer merely because he is not party to the proceedings in which order of injunction or other prohibitory direction or restraint came to be issued. It is enough that the transferor is a party and the order was in force. These two conditions being satisfied, the transfer must not be upheld. If this course is not adopted, then the tendency to flout orders of courts which is increasing day by day can never be curbed. The Court exercises its powers on the foundation of respect and regard for its authority by litigating public. People would loose faith and respect completely if the Court does not curb and prevent this tendency. The note of caution of the Supreme Court

*must be consistently at the back of everybody's mind. Therefore, Shri. Naphade is not right in the distinction which he is trying to make.” [Emphasis Supplied]*

103. The Division Bench was also pleased to reject the contention of the learned counsel for the petitioners therein that, the order of injunction will bind only the transferor and not the world at large, as ownership rights are neither taken away nor restricted in any manner by order of injunction or other preventing directions. It was held that, *“the order of injunction reaches and touches a party to the lis. Hence, when during pendency of an order of injunction, immovable property, which is subject-matter of restraint or injunction, is transferred, there is no choice but to declare the transaction as illegal.”* [Emphasis Supplied].

104. It was further held that, *“an order issuing interlocutory injunction is issued with a view to preserve and protect the status-quo during the pendency of litigation. The true effect of such an order is, therefore, preservation of status-quo prevailing as on the date of issuance of the order. Any alteration in the status qua as prevailing and directed to be maintained by the Court of law is not permissible except with leave or sanction of Court. It is well settled that if courts are not to honour and implement their own orders and encourage party litigants, be they public*

*authorities, to invent methods of their own to short circuit and give a go by to the obligations and liabilities incurred by them under orders of courts, the Rule of law will become casualty in the process – a consequence to be jealously avoided? by all and at any rate by the highest courts in the State.”*

105. The Court in this case was also pleased to hold that, *“the Court cannot allow a party to get away with violation of its prohibitory orders and uphold the transactions contrary to and in violation of its directions on the spacious plea that only way in which the Court can regulate such acts is to visit the guilty party with penalties. It is time that the Courts reach the transaction itself and put an end to purported rights created thereby. Failing which, it will become possible for the parties to retain fruits and benefits of such acts by suffering penalties. It is well settled that no person can take advantage of his own wrong.”*

106. Thus, this Court came to the categorical conclusion that a prohibitory order has the effect of placing restriction on powers of disposition and respondent No.2 therein could not have illegally created a sub-lease in favour of the petitioners. In unflinching words, it was held that, *“the transfer despite the order of injunction had no legal effect and*

such transfer was illegal and cannot be recognized. Consequently, transferee gets no valid title nor does he acquire any rights or interests in the immovable property.” [Emphasis Supplied].

107. In the case of *Satya Brata Biswal Vs. Kalyan Kumar Kisku & Ors.* (*supra*) relied upon by learned senior counsel for the appellant in this appeal also, the Supreme Court was also pleased to hold that, the granting of sub-lease contrary to the order of status-quo, which was done in the teeth of such order, is clearly illegal and all actions taken, including the grant of sub-lease, are clearly illegal. It was held that, such an order of status-quo, as passed by the Court, cannot be circumvented by parties with impunity and expect the Court to confer its blessings. It does not matter that to the contempt proceedings, sub-lessee was not a party. It cannot gain an advantage in derogation to the rights of the parties, who were litigating originally. [Emphasis Supplied]

108. Thus, it is apparent that, both, “*the Principle of Lis Pendens*” and “*the order of temporary injunction*”, have not only different objects but the breaches thereof have also different consequences. The transaction made in breach of injunction order is apparently and patently illegal and binds no party, even the purchaser. Whereas, transaction effected during lis pendens does not attract the taint of illegality. It remains legal, valid and

binding on the parties, subject to the outcome of the litigation. It also does not entail the consequences of penalty or contempt, as there is no order passed by the Court in Doctrine of Lis Pendens.

109. As a result, from the perspective of litigating parties also, the “*Doctrine of Lis Pendens*” and “*Order of Temporary Injunction*” have different effects. The apprehension of action under Section 2A Rule 11 of CPC of attachment of property and the punishment of contempt of courts act as deterrent to the party against whom order of injunction is running. This deterrent has the further effect of avoiding multiplicity of transactions and proceedings. The Doctrine of Lis Pendens does / cannot create such deterrent effect as it does not entail drastic consequence of attachment of property, detention in civil prison, suit being dismissed or defence being struck off, as the case may be, or punishment for contempt of court.

110. Alienation of property lis pendens is merely in the nature of a gamble, which party may willingly enter into without any apprehension of above-said consequences as such party has always the chance of winning the case and thereby retaining the property. The only consequence the party may face, is of losing that property and nothing more. In that respect also, the transaction will always remain binding

between transferor and purchaser. Therefore, alienee can very much receive purchase-price from transferor as such transaction does not suffer from any taint of illegality. As against it, the order of temporary injunction can and does avoid multiplicity and complications by deterring the party at the threshold itself from entering into transactions, which effect Doctrine of Lis Pendens does not have.

111. The learned Single Judge in the case of *Prakash Jawale (supra)* has considered in detail some of these Judgments, which make appropriate distinction between the principle of lis pendens and the order of interim injunction in the context of the object and effect of both the provisions on the pending litigation and alienation. Learned Single Judge in *Prakash Jawale's case* has also considered the above-said Judgment of Keshrimal Jivji Shah, rendered in the case of transfer pendent lite, in the teeth of order of interim injunction as illegal and not binding and thereafter held that, *“transfer of immovable property in violation of order of injunction confers no right, title and interest on the transferee, as it is no transfer in the eyes of the law and hence it is no transaction at all. It has to be distinguished from the effect of Section 52 of the TP Act, which does not attach any illegality to a transaction which had taken place pendent lite. Thus, the order of prohibitory injunction grants protection, which is not*

available under Section 52 of the TP Act, in the event of a transfer pending the suit.” In our own analysis of legal position, we, therefore, find the conclusions drawn by the learned Single Judge in *Prakash Jawale's* case to be based on sound reasoning and in tune with Apex Court's decisions.

112. The learned Single Judge in *Prakash Jawale's* case has then also rightly considered the effect of the registration of lis pendens on the transaction. Admittedly, at present the provisions of the Amendment Act XIV of 1939 apply only to the properties situate wholly or partly in the city of Mumbai. The substituted Section 52 of the TP Act, which deals with the registration of the notice of pendency of the suit, can apply to the other areas only when the notification to that effect is issued under Section (2) of the said Act. It is, admittedly, not in dispute even till date that there is no such notification issued making applicable the substituted Section 52 of the TP Act to other parts of the State of Maharashtra. Furthermore, even the substituted Section 52 of the TP Act, would apply even in respect of immovable properties in the city of Mumbai, only in a case where the notice of pendency of suit or proceedings is registered under the Indian Registration Act. Though by the provision of the said Amendment Act XIV of 1939, in Section 18 of the Registration Act, clause (ee) has been

added, it provides that registration of notices of pending suits or proceedings referred to in Section 52 of the TP Act is only optional.

113. Thus, the Legislature, has not made registration of notice of lis pendens compulsory under the Registration Act. Non-registration of a document governed by Section 18 of the Registration Act does not visit a person with any adverse consequences, as registration of the document is itself optional. Therefore, conjoint reading of the provisions of Section 52 of the TP Act and Section 18 of the Registration Act, makes it clear that even in respect of the property situated in the city of Mumbai, if the notice of lis pendens is not registered, as it is optional, no other consequence follows, except the fact that Section 52 of the TP Act will have no application to the transaction effected during the pendency of the suit and the proceedings in respect of the properties concerned. Thus, even the amendments made in Section 52 of the TP Act and in Section 18 of the Registration Act also do not make the transaction illegal as such, whereas, the transaction made in breach of the injunction order is illegal and not binding.

114. Thus, if we once again have the comparative analysis of the provisions of Section 52 of the TP Act and that of Order XXXIX Rule 1 and 2 of CPC, it is clear that the protection granted by the order of interim

injunction is much more and far effective than that of the protection granted under Section 52 of the TP Act.

115. Once it is held to be so, it automatically follows that even if plaintiff registers the notice of his suit under section 18(ee) of the Registration Act, it will not secure the plaintiff more than what an injunction could secure. Even accepting that transferees pendent lite, in view of such registration, are deemed to have notice of such pendency of the lis and could not claim to be transferees without notices, such transfers do not have the effect of rendering the transaction illegal, which consequence is entailed in case of transaction, if it is in breach of injunction order. Therefore, it has to be held that registration of the suit or proceedings, though preferable and desirable, cannot be a substitute to the order of interim injunction, in terms of extending protection to the parties.

116. This brings us to consider the proposition of law laid down by the learned Single Judge in question No.1 while making reference that, *“the transferees pendent lite are not required to be or entitled as of right to be impleaded as party to the suit and cannot resist execution proceedings in view of the provisions of Order XXIX Rule 100 of CPC, as amended by this Court.”*

117. In our view, with greatest respect, this proposition of law, as laid down by the learned Single Judge, while framing question No.1 for reference, itself is not based on correct legal position, in view of the various decision of the Apex Court.

118. The decision directly on this point is of *Amit Kumar Shaw Vs. Farida Khatoon*, (2005) 11 SCC 403, wherein the Apex Court had an occasion to consider the effect of Section 52 of TP Act in the context of the provisions of Rule 10 of Order I; Rule 10 of Order XXII; and Section 146 of the Code and it was held as under :-

*“16. The doctrine of lis pendens applies only where the lis is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendent lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendent lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis.*

pendens transferee a party under Order 22 Rule 10 an alienee pendent lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests.  
[Emphasis Supplied]

The court further held that, “a transferee pendent lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.” [Emphasis Supplied]

119. One can, in this respect, also place reliance upon the observations of the Apex Court in the case of *Khemchand Shankar Choudhari Vs. Vishnu Hari Patil*, (1983) 1 SCC 18. In paragraph No.6, it was held as under :

“6. Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendent lite of an interest in an immovable property, which is the subject-matter of a suit from any of the parties to the suit, will be bound insofar as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to

be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record.” [Emphasis Supplied]

120. In the latest decision of the Apex Court in the case of *Thomson Press (India) Ltd. (supra)*, once again the Apex Court had an occasion to deal with legal position. In this case, despite having notice and knowledge of injunction order passed by the Court prohibiting transaction or alienation of suit property pending suit, the suit property was purchased by the appellant. Appellant then filed an application for impleadment under Order I Rule 10 CPC in a suit for specific performance of contract. The Division Bench of Delhi High Court rejected the said application, affirming the order of the learned Single Judge. Hence, the appellant approached the Supreme Court. The exact question, which fell for consideration in this decision, therefore, before the Apex Court was, *as to whether the appellant, who is the transferor pendent lite, having notice and knowledge about pendency of the suit for specific performance and order of*

*injunction, can be impleaded as party under Order I Rule 10 CPC on the basis of Sale Deed executed in his favour by the defendant?*

121. While answering this question, the Hon'ble Supreme Court referred to its number of earlier decisions in the cases of *Anil Kumar Singh Vs. Shivnath Mishra*, (1995) 3 SCC 147; *Surjit Singh Vs. Harbans Singh*, (1995) 6 SCC 15; *Savitri Devi Vs. District Judge, Gorakhpur*, (1999) 2 SCC 577; *Vijay Pratap Vs. Sambhu Saran Sinha*, (1996) 10 SCC 53; *Kasturi Vs. Iyyamperumal*, (2005) 6 SCC 733; and *Vidur Impex and Traders (P) Ltd. Vs. Tosh Apartments (P) Ltd.*, (2012) 8 SCC 384, and allowed appellant's application for impleadment as party-defendant.

122. In his separate Supplementing Judgment, Hon'ble Justice T.S. Thakur (as His Lordship then was), after referring to the effect of Lis Pendens on the transfers, was pleased to conclude that, “*though a transferee pendent lite cannot seek as of right addition as a party-defendant to the suit under Order I Rule 10 CPC, he can be added as a party under Order XXII Rule 10 CPC, so that he should not suffer prejudice on account of the transferor losing interest in the litigation post transfer.*” Relying upon above-said observations in the Judgments of *Amit Kumar Shaw and Khemchand Shankar Chowdhary*, His Lordship was

pleased to hold that even though appellant in the case was not a bonafide purchaser and is, therefore, not protected against specific performance of the contract, as he has purchased the entire estate that formed the subject-matter of the suit, he is entitled to be added as a party-defendant to the suit under the provisions of Order XXII Rule 10 CPC. [Emphasis Supplied]

123. In our considered, opinion, this Judgment of the Apex Court, thus, clinches the legal issue. Hence, the proposition laid down by learned Single Judge while formulating question No.1 that, “*transferees pendent lite are not required to be or entitled as of right to be impleaded as parties to the suit*”, cannot be called as laying down correct legal position.

124. Of-course, it need not be stated that, whether, either under Order I Rule 10 CPC or Order XXII Rule 10 CPC, transferee pendent lite can be or should be made a party to the suit or not, always depends on the facts and circumstances of the particular case. Especially, depending upon the interest, which he has acquired in the suit property, that is to say, whether the interest he has acquired is substantial or just peripheral. If the transferee pendent lite acquires interest in the entire estate that forms subject matter of the disputed property, then he becomes vitally interested

in the litigation. The transferor of the property, having no more interest in the property, in that situation, may not properly defend the suit and may collude with the plaintiff. Therefore, such transferee can apply to become a party to the suit and as held by the Hon'ble Supreme Court in above-said decision of *Thomson Press (India) Ltd. (supra)*, he is entitled to be joined as a party to the suit to enable him to protect his interest.

125. In view of this legal position, there cannot be any blanket proposition that transferees pendent lite are not required to be or entitled to be, as of right, impleaded as parties to the suit. Everything depends on the interest in the property, which such transferee has acquired during pendency of the litigation. If the interest is substantial, then, as held by the Apex Court, he becomes entitled to be impleaded as party to the suit. In that situation, he may also become entitled to resist the execution proceedings. His claim cannot be thrown out merely because Order XXI Rule 100 CPC, as amended by this Court, states that the obstruction raised by transferee pendent lite need not be considered and his application deserves to be straightway dismissed. Therefore, further proposition of law laid down by learned Single Judge in formulating question No.1 that Rule 100 leaves no discretion to the executing Court and provides that application by transferee pendent lite shall be rejected;

cannot be treated as laying down correct legal position. It would always be a question of fact situation in such cases; to be determined not only by having a mere look at the documents by which the property is transferred and by looking at the date of filing of the suit, as observed by learned Single Judge, but also at the other aspects as to whether such transferee has got substantial interest in the property or not.

126. Thus, it has to be held that the two legal propositions on the basis of which the learned Single Judge has formulated question No.(I) as to whether Section 52 of TP Act provides adequate protection to the parties from transfers pendent lite, are not laying down correct legal position. Hence, it has to be held that question No.(I) is not based on correct legal premises.

127. Hence, in that way, not formulated correctly.

128. Now, without referring to those two legal premises, if we once again come to the question whether Section 52 of TP Act grants adequate protection so as to refuse the relief of temporary injunction or in the alternate, to call upon the party seeking order of temporary injunction to show that provisions of Section 52 of TP Act do not afford adequate

protection, as stated in question No.(III) referred for our reference, then it has to be stated that, in addition to the protection referred above, which order of temporary injunction affords, the necessary advantage of order of temporary injunction is also that, it avoids multiplicity of proceedings and brings an end to further complications, which advantage Doctrine of Lis Pendens does not have. The order of injunction stops the party at the threshold itself from creating third party interests in the suit property. In absence thereof, not only the party to the suit but even alienee may also keep on creating further third party interest, thereby defeating plaintiff's rights endlessly. Moreover, if such alienee changes the nature of the suit property by carrying out construction thereon and if he or others claiming through him asserts that he/they are bonafide purchasers for value and without notice, his interests in the suit property and the equities created in his favour, may defeat the plaintiff's equitable right to get the specific performance of the suit property and thereby frustrate the very object of the suit itself. It is, therefore, always desirable to take fullest care of the plaintiff's interest and right in the suit property vis-a-vis such transfer by granting relief of temporary injunction, as Section 52 conspicuously lags behind in granting such protection or making improvement therein by spending huge amount.

129. In our considered opinion, the learned Single Judge in the case of

*Prakash Jawale (supra)* has considered in its proper perspective all these aspects and after referring to the provisions of Order XXXIX Rule 1 and 2 of the CPC, the learned Single Judge has rightly held in *Prakash Jawale's* case that, the power to grant relief of temporary injunction under these provisions is always discretionary and, therefore, in a given case, considering the facts of the case, the Court can always come to the conclusion that the plaintiff may get adequate protection by virtue of Section 52 of TP Act. But calling upon the plaintiff in each and every case to show that the protection granted under Section 52 of the TP Act is not adequate and thereafter only to pass the order of injunction, will be totally against the settled principles under which the order of interim injunction is passed. It is a well settled requirement of law that while exercising the powers under Rules 1 and 2 of Order XXXIX CPC, the Court has to consider the issues of prima facie case; of irreparable loss and balance of convenience, where there is an apprehension shown that the defendant may transfer or alienate the suit property. Normally, if all these three ingredients are satisfied, the applicability of Section 52 of the TP Act cannot take away power of the Court to grant temporary injunction.

130. The provisions of Section 52 of the TP Act cannot act as a further hurdle in the plaintiffs seeking the relief of injunction. While exercising discretionary powers, the Court can always come to a conclusion, in the

particular facts of the given case, that in view of the provisions of Section 52 of the TP Act, equitable relief of temporary injunction need not be granted. However, calling upon the plaintiff in each and every case to further satisfy the Court in addition to the three settled principles of prima facie case; balance of convenience and irreparable loss to show that the provisions of Section 52 of the TP Act do not offer an adequate protection is to read something, in the Legislation or the settled law, which is not there. However, we hasten to add that in appropriate cases and depending upon host of other relevant factors, including the conduct of the litigant, the Court may not exercise its discretion and refuse the interim injunction. While refusing it, the Court may take into account the presence of Section 52 of the TP Act, 1882 and, inter alia, indicate that to be one of the reason to refuse the equitable relief. Thus, there may not be need for the party to establish and prove that presence of Section 52 of TP Act does not afford him sufficient protection but in refusing the interim injunction, the order of the Court may note its presence on the statute book and refuse to assist the litigant. Everything must depend on the facts and circumstances of each case and no general rule can be laid down.

131. As to the fourth question formulated by learned Single Judge, *'whether it would be appropriate, in cases of claims for temporary*

*injunction to restrain transfers pendent lite, to consider imposition of conditions short of granting injunction, which should protect the plaintiffs' interest, like, seeking an undertaking that no equities would be claimed on account of sale or development of properties; effecting sales only after putting transferees to notice that their rights would be subject to the pending suit, or requiring the party to inform the Court promptly of creation of every such interest'*, in our considered opinion, the Court can always, in appropriate cases, impose such conditions. Those conditions, at times, may be in addition to or as part of the order of temporary injunction. However, mere imposition of such conditions cannot dispense with the effective relief of temporary injunction. As a matter of fact, the imposition of condition, like, seeking an undertaking that no equities would be claimed on account of sale or development of properties, is merely in the nature of the principle of lis pendens. Similarly, directing conditions of effecting a sale only after putting transferees to notice or requiring the party to inform the Court promptly of creation of every such interest, are in the same nature which are covered under the Doctrine of Lis Pendens. Merely requiring the other party to inform the Court promptly of creation of every such interest, cannot solve the plaintiff's difficulty in getting the property, because, then, such party would have to be impleaded in the suit. Even calling upon the party to effect sale only after putting

transferees to notice that their right would be subject to the pending suit, is again in the nature of the notice contemplated by registration of the lis pendens under amended Section 52 of TP Act. Once we have held that the consequences of alienation effected in breach of lis pendens and in breach of injunction order, are totally different and principle of lis pendens in Section 52 of TP Act do not offer adequate protection on that score, then, imposition of these additional conditions in place of granting relief of temporary injunction, cannot be an answer or substitute for not granting of the order of temporary injunction. Once again, it is open to the Court to mould the relief. It may not necessarily make an order of injunction but can clarify, in the event it finds that presently or right now there is no need to pass a restraint order, that before alienating or transferring the property, the party should seek prior leave of the Court or make any alienation or transfer conditional upon further orders of the Court in the lis.

132. This brings us to the last aspect on which learned Single Judge in this case has considered, the issue relating to the overburdening of the Courts with work. According to learned Single Judge, *“this question assumes importance in the light of the fact, which, in fact, should not require any expert opinion, that the Courts are over-burdened with work and, therefore, cannot pay adequate attention to genuine problems, which*

*litigants place before the Courts.” After referring to the research paper of Dr. Arun Mohan, a Senior Advocate from the Supreme Court, according to which, today, 90% of our Court time and resources (Civil Courts) are consumed in attending to uncalled for litigation, which is created and carried on only because our current procedures and practices hold out an incentive for the wrong-doer, the learned Single Judge opined that, “in such a scenario, the Court should consider avoiding mindless litigation, which serves no purpose” and in his view, “applications for injunction to restrain creation of third party interest is one such specie of this type of litigation, which could conveniently be avoided.”*

133. With greatest respect, though there cannot be and need not be any dispute about the proposition that the Courts should avoid mindless litigation, which serves no purpose, considering the constraints on the time and resources of the Courts, in our view, the Court cannot call the litigation as ‘mindless’, merely because there may be some other provisions also in which some relief can be granted. Once it is held that the very object, scope and effect of the provisions of Section 52 of the TP Act and Rules 1 and 2 of Order XXXIX of CPC is different and they operate in two different fields and in such situation, Section 52 of TP Act does not afford adequate and effective protection, as is afforded by Order

XXXIX Rule 1 and 2 CPC, then the litigation in the nature of applications for temporary injunction, cannot be called as 'mindless litigation'. It is not simplicitor a case that, *"the order of injunction only gives an advantage to the legal profession in making the clients go in for this illusory remedy and it is for those in the profession on either side of Bar, to examine and decide whether ethically they would like to be parties to an expedition of making the clients seek an illusory protection at substantial cost and expense in the trial as well as Appellate Courts"*, as observed by the learned Single Judge. But, it is a matter of making available the protection, which is given to a party under the statutory law, without putting any further fetters on such protection, even assuming that such provision may be for advantage of legal profession. Moreover, the protection afforded by the order of injunction can in no way be called as illusory, but it is definitely an effective protection, as the aforesaid discussion reveals. It saves the plaintiff from multiplicity of proceedings and also avoids his right to get property being defeated by purchaser creating equities in his favour with investment by making improvement in suit property or by carrying on construction thereon. The relief of interim injunction being discretionary one and such discretion is to be exercised under well settled principles of law, as enunciated and crystalized from time to time by the various decisions of the Apex Court and this Court, it is

also not a case that merely because there is a power, it has to be exercised. This power is to be exercised on the well-grounded legal principles and it is to be exercised because it affords effective protection to the plaintiff than the one afforded under Section 52 of the TP Act.

134. Though we will not and cannot deny the reality that our Courts are over-burdened with work, however, that fact will never justify our refusing to act according to law. The law confers some statutory rights on the parties, like making application for temporary injunction restraining other party from creating third party interest in the property during pendency of suit. Grant of such injunction after proper exercise of the discretion by the Court affords certain and better protection to the party against multiplicity of proceedings, against the alienee claiming equity and thereby defeating the plaintiff's rights to possession etc. The Court, therefore, cannot refuse to exercise its discretion in the grant of refusal of such protection on the specious plea that it is over-burdened and reject such applications simplicitor or put additional fetters on plaintiff's right, which are not contemplated by law. The Courts are meant to uphold the rule of law by implementing the statutory provisions of law; by exercising the discretion vested in it by law. Refusal to do so cannot be an answer to get rid from over-burdening of work. The solution for the overburdening of Court may be found somewhere else, but definitely and certainly not in refusing to

exercise the discretion vested in the Court by law or putting additional fetters on that discretion, which the Legislature in its wisdom not deemed it fit to impose, even when both these provisions of “*lis pendens*” and “*temporary injunction*” co-exist together for years and even when in its 157<sup>th</sup> Report devoted specifically to the “*Doctrine of Lis Pendens*”, the Law Commission has made certain suggestions for amendment to Section 52 of TP Act, but not on this score. It is pertinent to note that in its Report, the Law Commission has also considered the provisions of temporary injunction in the light of the Doctrine of Lis Pendens, but did not find it necessary to consider the provisions of temporary injunction as redundant in view of Doctrine of Lis Pendense, nor put any additional fetter on grant of temporary injunction, as suggested by the learned Single Judge.

135. The learned Single Judge, in this case as well, dealt with the question, *as to whether the order of interim injunction would be akin to Mareva injunction, which operates in rem*. Learned Single Judge then referred to the decision of the learned Single Judge in the Court of Appeal in *(Z Ltd. Vs. A)18, (1982) 1 All England Reporter 556*, and came to the conclusion that, observations of Lord Denning in respect of Mareva injunction are made in exercise of admiralty jurisdiction, which is in rem, unlike the jurisdiction in personam in suits inter-parties. According to

learned Single Judge, the order of interim injunction can, at the most, bind the defendant, but cannot bind the transferee pendent lite.

136. However, in our considered opinion, once it is held that the alienations made in breach of order of injunction are illegal as they are no transactions at all in the eyes of the law and for their validity or legality, they are not depending on the fate of the suit, as happens in case of lis pendens under Section 52 of the TP Act, then the effect of such injunction is to render even those subsequent transactions and transfers also illegal. The transaction which is illegal in itself cannot create any right in the subsequent transferee and, therefore, it is also having the effect of binding subsequent transferees. In that view of the matter, it cannot be accepted that the order of injunction will act only in *personam* and not in *rem*, as though technically it may be so, but, in effect, it may bind the other and subsequent transferees also, in rendering such alienations illegal and void *ab initio*.

137. As a result of the above entire discussion, we have no hesitation in concurring with the view expressed in the Judgment of *Prakash Jawale's* case, as it is in tune with the legal position expounded above. Accordingly, we answer the first four questions formulated for our consideration.

### **Discussion on Question No.(V)**

138. However, this will not complete the Judgment and the Reference, in view of the fifth question of law framed for our consideration, which pertains to the binding effect of the precedents in the event of there being conflicting decisions of co-ordinate Benches. According to learned Single Judge, as he could not find any reason to alter the view taken by him in *Kachhi Properties (supra)*, ordinarily, the appeal could have been dismissed as untenable and as resulting in heaping upon the judicial system an unwarranted burden. However, in his opinion, “*since conflicting judgments of the Courts of record tend to create confusion in the trial Courts and result in uncertainty in law, and, since on this question, there are at least three Hon'ble Judges, who seem to have accepted that Section 52 of the TP Act affords adequate protection, which view has not found favour with the Hon'ble Judge deciding Pralhad, it may be appropriate to have the matter referred to a larger Bench rather than committing judicial indiscipline of taking a different view*”.

139. Learned Single Judge also felt it necessary since a Division Bench of this Court in *Vasant Tatoba Hargude and Others v. Dikkaya Muttaya Pujari (AIR 1980 Bombay 341)*, holds that judgment later in point of time would be binding in case there is a conflict in the judgments of Courts of equal strength.

140. As the question No.5 is formulated in the context of the observations made in paragraph No.13 of *Vasant Hargude's Judgment (supra)* and which are quoted by learned Single Judge, they may be reproduced as follows :-

*“13. The contention of Mr. Rane as to the competency of the later Bench of three Judges to overrule the ratio of the earlier Bench of equal number of Judges need not detain us. In the event of there being clear conflict, the decision of such later Bench would be binding on us. Secondly, the decision in Anand Nivas case (AIR 1965 SC 414) is based not so much on the incidence of statutory tenancy as on the interpretation of Sections 12 to 15 of the Rent Act. All the Judges were unanimous on statutory tenant having no estate or property in the tenancy. Even while expressing dissent as to the extent and nature of any statutory tenant's “interest” in the tenancy. Sarkar, J. proceeded on the hypothesis that the power of transfer of even such “interest” required authority of law. The determination of true scope and import of Section 13(1)(e) and consequently of Sections 12, 14 and 15 appear to have been assumed to be the main point in controversy in that case and the decision on the first point indicating conflict on a narrow margin appears to have been treated as mere observations. This may have prompted the later Bench to dispense with any need to refer the point to a larger Bench.”*

*[Emphasis Supplied]*

141. According to learned Single Judge, *“as another learned Single Judge of this Court deciding Rafique Barkatulla Khan Vs. Shahenshah*

*Hussain Iqbal Munshi & Ors., reported in 2011 (3) Mah.L.R 732, has arrived at the same decision followed in Kachhi Properties (supra), which decision was subsequent to the decision in Pralhad Jawale's case, it may lead to piquant situations in view of the above-said observations laid down in Vasant Tatoba Hargude's case."*

142. The learned Single Judge further observed that, this observation in *Vasant Tatoba Hargude's case* does not appear to be preceded by any argument or discussion on the question on which this one-line pronouncement has come from the Division Bench. According to learned Single Judge, *"what the Division Bench sought to convey was that earlier Judgment, as explained by later Judgment, would bind. Reading the observation to universally mean that later Judgment would bind would hit at the very root of the Doctrine of Precedent, which is based on the principle that the Judgment rendered earlier in point of time would bind successive Courts"*. Therefore, according to learned Single Judge, there is no question of a Judgment later in point of time having a greater binding force over a Judgment given earlier and, therefore, this stray sentence, which has also resulted in a considerable turbulence for the Courts below, would require appropriate judicial consideration. Hence, learned Single Judge formulated the question No.5 to the effect, *"whether the*

*observation in para (13) of the Judgment in Vasant Tatoba Hargude and Others Vs. Dikkaya Muttaya Pujari (AIR 1980 Bombay 341), that in the event of there being conflict, the decision of later Bench would bind only lays down that judgment later in point of time as explaining the earlier judgment would bind?”*

143. In our considered opinion, so far as the Law of Precedent is concerned, it is undisputable that it's very premise lies in judicial discipline and in certainty of legal position. The judicial discipline requires that the Judgment rendered by higher Courts be binding on subordinate Courts, whereas certainty of legal position requires that the Judgment rendered earlier in point of time would bind successive Courts.

144. As to what is binding of the earlier decision, it is well-settled that it is only the ratio decidendi that has a precedent value. As observed by the Supreme Court in *S.P. Gupta & Ors. Vs. President of India & Ors.*<sup>22</sup>, *“It is elementary that what is binding on the court in a subsequent case is not the conclusion arrived at in a previous decision, but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion.”*

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22 AIR 1982 SC 149

145. A case is thus only an authority for what it actually decides and not what may come to follow logically from it. Hence, it is stated that the Judgments of courts are not to be construed as Statues.

146. The following observations in *The Mumbai Kamgar Sabha, Bombay Vs. Abdulbhai Faizullabhai & Ors.*<sup>23</sup> may be useful in this respect :

*“It is trite, going by Anglophonic principles, that a ruling of a superior court is binding law. It is not of scriptural sanctity but is of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu, we cannot impart eternal vernal value to the decision, exalting the doctrine of precedents into a prison-house of bigotry, regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of a subordinate court's casual observations, generalisations and subsilentio determinations must be judiciously read by courts of co-ordinate jurisdiction.”*

147. This position has been made further clear by the Hon'ble Supreme

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23 (1976) 3 SCC 832

Court in a decision in *CIT Vs. Sun Engineering Works P. Ltd.*<sup>24</sup>, at page 320, where it was observed :

*“It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this court. A decision of this court takes its colour from the question involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this court, to support their reasoning.”*

148. In the above decision, the Supreme Court, also quoted with approval, the following note of caution given by it earlier in *Madhav Rao Jivaji Rao Scindia Bahadur Vs. Union of India*<sup>25</sup>, that,

*“It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full*

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24 [1992] 198 ITR 297  
25 (1971) 1 SCC 85

*exposition of the law on a question when the question did not even fall to be answered in that judgment.”*

149. It is thus clear that it is only the ratio decidendi of a case which can be binding and not the obiter dictum. Obiter, at best, may have some persuasive efficacy, though, as far as pronouncements of Supreme Court are concerned, as per settled position of law, even its obiter dicta is also binding on High Courts and subordinate Courts.

150. The question as to whose decisions are binding, Article 141 of the Constitution, provides that, *“the law declared by the Supreme Court shall be binding on all courts within the territory of India.”*

151. It is also well-settled that though there is no specific provision, like, Article 141 of Constitution making the law declared by the High Court binding on subordinate courts, it is implicit in the power of supervision conferred on a superior Court that the Courts subject to its supervision would confirm to the law laid down by it. It is in that view of the matter that the Supreme Court in *East India Commercial Co. Ltd. Vs. Collector of Customs*<sup>26</sup>, held that, *“the law declared by the highest court in the State is binding on the Courts, authorities or Tribunals under its superintendence,*

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26 AIR 1962 SC 1893

*and they cannot ignore it.....”* There is essentially also no dispute about the legal position that the decision of larger Bench, whether of Supreme Court or of High Court binds the smaller Bench of the Supreme Court or that particular High Court.

152. This position has been very aptly summed up by the Supreme Court in *Mahadeolal Kanodia Vs. Administrator General of West Bengal*<sup>27</sup> :

*“Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view, the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench.”*

153. As held by the Apex Court in the case of *Commissioner of Income-*

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27 AIR 1960 SC 936

*Tax Vs. Thana Electricity Supply Ltd.*<sup>28</sup>, it is also a well accepted legal position that a single judge of a High Court is ordinarily bound to accept as correct judgments of courts of co-ordinate jurisdiction and of the Division Benches and of the Full Benches of his court and of the Supreme Court. Equally well settled is the position that when a Division Bench of the High Court gives a decision on a question of law, it should generally be followed by a co-ordinate Bench in the subsequent case. If it wants the earlier decision to be reconsidered, it should refer the question at issue to a larger Bench.

154. As to the binding nature of the Judgment given by the Coordinate Benches, again the law is settled, as laid down by the Apex Court, in the case of *State of U.P. & Ors. Vs. Jeet S. Bisht & Anr.*<sup>29</sup>. In this reported Judgment, in paragraph No.100, while regretting to express his inability to agree with Brother Katju, J., in regard to the criticism of various orders passed in this case itself by other Benches, *Justice S.B. Sinha, J.* observed that;

*“I am of the opinion that it is wholly inappropriate to do so. One Bench of this Court, it is trite, does not sit in appeal over the other Bench particularly when it is a coordinate Bench. It is equally inappropriate for us to express total disagreement in the same matter as also in*

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28 (1994) 206 ITR 727 Bom.

29 (2007) 6 SCC 586

*similar matters with the directions and observations made by the larger Bench. Doctrine of Judicial Restraint, in my opinion, applies even in this realm. We should not forget other doctrines which are equally developed viz. judicial discipline and respect for the Brother Judges.”*

155. Learned counsel for the appellant has also relied, in this context, on the decision of this Court in *Panjumal Hassomal Advani Vs. Harpal Singh Abnashi Singh*<sup>30</sup>, wherein Division Bench of this Court was pleased to observe that, “*now, it is well-settled that normally one Division Bench of a High Court cannot take a view contrary to the decision given by another Bench of that Court. It is equally well settled that an interpretation (and equally a misinterpretation) of a binding decision of the Supreme Court will itself be binding subsequently on co-ordinate courts and must be got corrected by a higher Court and no co-ordinate Court on that ground may refuse to follow an earlier decision, opining that in its view the said earlier decision had wrongly understood or improperly applied a decision of a higher Court.*”

156. In *V.R.G. & G.O.M.C. Co. Vs. State of A.P.*<sup>31</sup>, it has been observed that, “*the later Bench before whom a question arises is bound by the earlier decision.*”

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30 AIR 1975 BOMBAY 120

31 (1972) AIR SC 51

157. In this respect, the reliance was also placed on the observations in the case of *Young Vs. Bristol Aeroplane Co. Ltd.*<sup>32</sup>, wherein the following propositions have been set out in the head-note :

*“The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the ‘full’ court is in the same position in this respect as a division of the court consisting of three members. The only exceptions to this rule are:- (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.”*

158. In the case of *State of Gujarat and Anr. Vs. Mr. Justice R.A. Mehta (Retd.) and Ors.*<sup>33</sup>, also while considering the binding effect of the Judgment, the Hon'ble Supreme Court was pleased to observe as follows :-

*“35. There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding,*

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32 (1944) IKB 718  
33 AIR 2013 SC 693

*particularly, when the same is that of a co-ordinate Bench, or of a larger Bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, “merely because it was badly argued, inadequately considered or fallaciously reasoned”. The case must be considered, taking note of the ratio decidendi of the same i.e., the general reasons or the general grounds upon which, the decision of the court is based, or on the test or abstract, of the specific peculiarities of the particular case, which finally gives rise to the decision.”*

159. This being the legal position of judicial discipline and hierarchy, there can be no dispute that a larger bench decision will prevail over a smaller bench decision and one Bench of the High Court or Supreme Court cannot and does not sit in appeal over the other Bench, particularly when it is a Co-ordinate Bench. However, despite that, the fact remains that there are, at times, conflicting decisions of Co-ordinate Benches of the same Court. The reasons being myriad, like, the decision of earlier Bench not brought to the notice of the later Bench and so on. Hence, the real difficulty arises in case of the conflicting Judgments on a particular

point by co-equal Benches. This difficulty arises, especially, to the Trial and Appellate Court Judges, who are bound by the ratio of the law enunciated by the superior Courts. In the absence of Constitutional or Statutory guidance in this regard, the precedents and practice as such have not been uniform and consistent. There have been three mutually repugnant streams of Judgments / precedents on this very important and often recurring question of law. One view is that in case of conflict between two Judgments of Co-ordinate Benches, later decision should be followed; another view says that, decision earlier in point of time should be followed; the third view is that, the Court should follow the decision, which is more accurate and better in point of law; whether it be earlier or later.

160. For example, in the case of *Sundeeep Kumar Bafna Vs. State of Maharashtra and Anr.*<sup>34</sup>, while dealing with the conflicting decisions in the case of *Niranjan Singh Vs. Prabhakar Rajaram Kharote*<sup>35</sup>, and that of *Directorate of Enforcement Vs. Deepak Mahajan*<sup>36</sup>, the Hon'ble Supreme Court was pleased to observe as follows :-

*“It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable*

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34 AIR 2014 SC 1745

35 1980 (2) SCC 559

36 AIR 1994 SC 1775

*recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam.”*

161. Whereas, in the case of *State of U.P. Vs. Synthetics & Chemicals Ltd.*<sup>37</sup>, it was observed that;

*“The later decision must prevail over the earlier decision in a situation where an apparent conflict between an earlier and a later decision of the Apex Court by Benches consisting of equal number of judges is pointed out.”*

162. Similar is the view expressed in the above-said decision of Division Bench in *Vasant Tatoba Hargude Vs. Dikkaya Muttaya Pujari*<sup>38</sup>, by holding that, *“in case of a clear conflict between two decisions of the Apex Court of equal number of Judges, the later decision would be binding on the High Court”*.

163. As against it, since the mechanical adherence to later decision may hinder the cause of justice in many cases, the Supreme Court has in the case of *Municipal Corporation of the City of Ahmedabad Vs. Chandulal Shamaldas Patel*<sup>39</sup>, held as below :-

<sup>37</sup> 1991 (4) SCC 139

<sup>38</sup> AIR 1980 Bombay 341

<sup>39</sup> (1970) 1 SCWR 183

*“Now the contention that the latest Judgment of a Co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior court are of co-equal benches and therefore of matching authority, then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant, then both of them cannot be binding on the courts below. Inevitably a choice though a difficult one has to be made in such a situation. On principles, it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of co-equal Benches of the Superior Court are earlier or later is a consideration which appears to me as hardly relevant.”*

*[Emphasis Supplied]*

164. In coming to the above-said conclusion, the Apex Court placed reliance on few decisions of Courts in England, like, *Hampton Vs. Holman*<sup>40</sup>, (*Jessel M.R.*), *Miles Vs. Jarvis*<sup>41</sup>, (*Kay J*) and *Young Vs. Bristol*

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40 (1877) 5 Ch D 183

41 (1883) 24 Ch D 633

*Aeroplane Co. Ltd.*<sup>42</sup> and thereafter quoted with high regard and approval the view of the great constitutional visionary Sri. H.M. Seervai, as under :

*“Even though it is perhaps unconventional to quote a living authority, it deserves recalling that Mr. Seervai in his latest edition of his authoritative work in the Constitutional Law of India has opined as follows :-*

*“\*\*\* But Judgments of the Supreme Court, which cannot stand together, present a serious problem to the High Courts and to subordinate Courts. It is submitted that in such circumstances, the correct thing is to follow that Judgment which appears to the Court to state the law accurately or more accurately than the other conflicting Judgments.”*

165. It was also observed that,

*“I am keenly aware of the great difficulty of making a choice between the decisions of a Superior Court when they are in direct conflict with each other. However, when such divergence arises and the litigants' fortune depends thereon the issue cannot possibly be evaded. Obviously in such a situation, it is not the province of the High Courts or the subordinate Courts to comment on the judgments of a Superior Court which are patently entitled to respect. Its plain duty in the interest of justice is to respectfully follow that which appears to it to state the*

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42 (1994) KB 718

*law accurately or in any case more accurately than the other conflicting judgments.”*

166. The Full Bench of the Nagpur High Court in *D.D. Bilimoria Vs. Central Bank of India*<sup>43</sup>, also held that, “*in such case of conflicting authorities, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other, thereby indicating that the subordinate courts would have to prefer one to the other and, therefore, would be at liberty to follow the one or the other.*”

167. Even the Five-Judge Bench of the Supreme Court in the case of *Atma Ram Vs. State of Punjab*<sup>44</sup> has also indicated (at page No.527) that, “*such a task may fall on and may have to be performed by the High Court. According to the Supreme Court, when confronted with two contrary decisions of equal authority, the subordinate court is not necessarily obliged to follow the later, but would have to perform the embarrassing task “of preferring one view to another”.*

168. In the words of Supreme Court, “*we are inclined to think that no blanket proposition can be laid down either in favour of the earlier or the later decision*”.

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43 AIR 1943 Nag. 340 at Page 343  
44 AIR 1959 SC 519

169. The Special Bench of the Calcutta High Court in *Bholanath Vs. Madanmohan*<sup>45</sup>, has also, after relying on the Judgment of the Supreme Court in *Atma Ram's case (supra)*, held that, “the subordinate court would have to prefer one to the other and not necessarily obliged, as a matter of course, to follow either the former or the later in point of time, but must follow that one, which, according to it, is better in point of law. As old may not always be the gold, the new is also not necessarily golden and ringing out the old and bringing in the new cannot always be an invariable straight-jacket formula in determining the binding nature of precedents of co-ordinate jurisdiction.”

170. This Court has also in its Full Bench decision in *Kamleshkumar Ishwardas Patel Vs. Union of India and Ors.*<sup>46</sup>, expressed unqualified concurrence with the law, as enunciated in the Special Bench decision of *Bholanath (supra)*.

171. To some extent, this conflict was tried to be resolved by the Apex Court in the case of *Commissioner of Income-Tax Vs. Thana Electricity Supply Ltd.*<sup>47</sup>, by formulating its propositions as follows :-

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45 AIR 1988 Cal. 1

46 1995 (2) Bom.C.R. 640

47 (1994) 206 ITR 727 Bom.

172. From the foregoing discussion, the following propositions emerge :

- (a) The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.
- (b) The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.
- (c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same court may be summed up as follows :
  - (i) A single judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision.

Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question (see *Food Corporation of India Vs. Yadav Engineer and Contractor*).

(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it should refer the case to a larger Bench.

(iii) Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions. [Emphasis Supplied]

173. This legal position is also found reflected in the Full Bench decision of Madhya Pradesh High Court in the case of *Jabalpur Bus Operators Association & Ors. Vs. State of M.P. & Anr.*<sup>48</sup>, wherein it was held that;

*“In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the later Bench of equal strength, in which case the later decision is binding..... No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision is binding in all circumstances, or the High Courts and Subordinate Courts can follow any decision which is found correct and accurate to the case under consideration.” [Emphasis Supplied]*

174. As a matter of fact, this issue should no more detain us, as in the recent decisions, the Apex Court has settled this controversy by laying down in unequivocal terms that earlier decisions of co-equal Benches are binding on later Benches of the same size. In the case of *State of U.P. and Ors. Vs. Ajay Kumar Sharma and Anr.*<sup>49</sup>, the Hon'ble Supreme Court was, in paragraph Nos.10 and 11, pleased to observe as under :-

*“10. Time and again this Court has emphatically restated the essentials and principles of 'Precedent' and of*

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48 AIR 2003 MP 81

49 2015 SCC OnLine SC 1259

*Stare Decisis which are a cardinal feature of the hierarchical character of all Common Law judicial systems. The doctrine of Precedent mandates that an exposition of law must be followed and applied even by coordinate or co-equal Benches and certainly by all smaller Benches and subordinate courts. That is to say that a smaller and a later Bench has no freedom other than to apply the law laid down by the earlier and larger Bench; that is the law which is said to hold the field. Apart from Article 141, it is a policy of the courts to stand by precedent and not to disturb a settled point. The purpose of precedents is to bestow predictability on judicial decisions and it is beyond cavil that certainty in law is an essential ingredient of rule of law. A departure may only be made when a coordinate or co-equal Bench finds the previous decision to be of doubtful logic or efficacy and consequentially, its judicial conscience is so perturbed and aroused that it finds it impossible to follow the existing ratio. The Bench must then comply with the discipline of requesting the Hon'ble Chief Justice to constitute a larger Bench.*

11. *If binding precedents even of co-ordinate strength are not followed, the roots of continuity and certainty of law which should be nurtured, strengthened perpetuated and proliferated will instead be deracinated. Although spoken in a totally different context, we are reminded of the opening stanza of the poem 'The Second Coming' authored by William Butler*

*Yeats. The lines obviously do not advert to the principle of precedent but they are apposite in bringing out the wisdom of this ancient and venerable principle.*

*“Turning and turning in the widening gyre  
The falcon cannot hear the falconer; Things  
fall apart; the centre cannot hold; Mere  
anarchy is loosed upon the world.”*

175. In the decision of *New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Private Ltd.*<sup>50</sup>, the three-Judge Bench of the Hon'ble Supreme Court was once again pleased to quote with approval the law laid down by its five-Judge Bench in the case of *Central Board of Dawoodi Bohra Community Vs. State of Maharashtra*<sup>51</sup> and reiterated that the decision delivered by the Bench of larger strength is binding on any subsequent Bench of a lesser strength or co-equal strength. Thus, in this case, it was held that, when a three-Judge Bench in 2005 ignored the view taken by another three Judge Bench of 2002, as the 2005 Bench was bound by the view taken by earlier three-Judge Bench, the view expressed by 2002 Bench, being earlier in point of time, is required to be followed.

176. In view of this principle laid down by the Hon'ble Supreme Court

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<sup>50</sup> 2015 SCC OnLine SC 1280  
<sup>51</sup> (2005) 2 SCC 673

that, Co-ordinate Bench is bound by the view taken earlier by the co-equal or Co-ordinate Bench. Unless the view held by earlier Bench is *per incuriam*, such a binding Judgment of earlier Bench cannot be ignored or brushed aside. It has to be followed, as judicial discipline demands that there is a certainty in the views expressed by the Courts. The principle of finality and certainty of Judgments demands that the opinions and views expressed therein should not be altered or changed frequently and without any reason. Finally, in the event a situation emerges where two Judgments rendered by the Benches of equal strength are irreconcilable in their views, then, it is not the later, but the earlier one in point of time, which should be followed and applied by the Subordinate Courts to the facts and circumstances of a case before it. Considering that the view now taken by the Hon'ble Supreme Court is that, *“the later Judgment by Co-ordinate Bench is rendered ignoring the binding precedent and hence is per incuriam.”* As a result, we answer the question No.5 to the effect that, in case of conflict between the decisions of Co-ordinate Benches, it is not the later but the earlier one in point of time, which should be followed and applied by the Subordinate Courts to the facts and circumstances of a case before it, unless, of-course, earlier decision is considered and explained in the later decision.

177. In view of the above-said discussion, we answer the questions placed before us for reference as follows :

Question No.(I) : *Does Section 52 of the Transfer of Property Act provide adequate protection to the parties from transfers pendente lite since such transferees are not required to be, or entitled as of right to be, impleaded as parties to the suit and cannot resist execution proceedings in view of provisions of Order XXI Rule 100 of the Code as amended by this Court ?*

**Answer** : Section 52 of TP Act does not provide adequate protection to the parties from transfers pendent lite. The question does lay down a correct proposition of law that, transferees pendent lite are not required to be or entitled as of right to be impleaded as parties to the suit, and they cannot resist execution proceedings in view of provisions of Order XXI Rule 100 of the Code, as amended by this Court.

Question No.(II) : *Would plaintiffs' registering notices of their suits under Section 18 of the Indian Registration Act (though such registration may not be compulsory) not secure for*

*plaintiffs more than what an injunction could secure since transferees, who purchase property, pendente lite in spite of such registration would be deemed to have notice of pendency of the lis and could not claim to be transferees without notice ? And, would such registration not be preferable to clamping an injunction on adversary ?*

**Answer** : Mere registration of notices of pending suit cannot secure for plaintiffs more than or even equivalent to what an injunction could secure, as the consequences of alienation in breach of interim injunction render such alienation illegal and expose the party to the consequences provided under Order XXXIX Rule 2A and Rule 11 CPC, in addition to the punishment for contempt of Court. Hence, such registration of notices of pending suit, though desirable as an additional safeguard, cannot be preferable or substituted to clamping an order of injunction on adversary.

Question No.(III) : *Since a plaintiff seeking a temporary injunction is required to show that he would suffer irreparably if*

*temporary injunction is not issued, would it be inappropriate to expect such plaintiff to show that the provisions of Section 52 of the Transfer of Property Act do not afford adequate protection before an injunction to restrain transfer pendente lite is issued ?*

**Answer** : Though it may not be inappropriate for the Court to expect the plaintiff to show that the provisions of Section 52 of TP Act do not afford adequate protection, it cannot laid down as a blanket proposition of law that in each and every case, plaintiff is expected to show it as a condition precedent for grant of injunction order.

Question No.(IV) : *Would it be appropriate, in cases of claims for temporary injunction to restrain transfers pendente lite, to consider imposition of conditions short of granting injunction, which should protect the plaintiff's interest, like, seeking an undertaking that no equities would be claimed on account of sale or development of properties; effecting sales only after putting transferees to notice that their rights would be subject*

*to the pending suit, or requiring the party to inform the Court promptly of creation of every such interest ?*

**Answer** : Though depending on the facts of the case, the Court can consider imposition of conditions, like, seeking an undertaking that no equities would be claimed on account of sale or development of property; effecting sale only after putting transferees to notice that their rights would be subject to pending suit or requiring the parties to inform the Court promptly of creation of such interest, those conditions can be in addition to or independent of the order of injunction, but cannot be in place of or short of granting injunction.

Question No.(V) : *Whether the observation in para (13) of the judgment in Vasant Tatoba Hargude and others v. Dikkaya Muttaya Pujari (AIR 1980 Bombay 341) that in the event of there being conflict, the decision of later Bench would bind only lays down that judgment later in point of time as explaining the earlier judgment would bind ?*

**Answer** : In the light of the decisions of the Hon'ble Supreme Court in the case of *State of U.P. And Ors. Vs. Ajay Kumar Sharma and Anr. (supra)* and *New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd. (supra)*, we answer this question to the effect that, in case of conflict between the decisions of Co-ordinate Benches, it is not the later but the earlier one in point of time, which should be followed and applied by the Subordinate Courts to the facts and circumstances of a case before it, unless, of-course, earlier decision is considered and explained in the later decision.

178. Having answered all the five questions referred to us, we direct the Registry to place this matter, as per the present assignment, before the learned Single Judge for hearing of the Appeal.

**[DR. SHALINI PHANSALKAR-JOSHI, J.] [S.C. DHARMADHIKARI, J.]**