



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 834 OF 2020

IN

FIRST APPEAL NO. 128 OF 2020

- | | | |
|--|---|-----------------------------|
| 1. Jyoti Metharam Khiani |] | |
| 2. Sanjay Metharam Khiani (since deceased) |] | |
| 3. Devansh Khiani |] | |
| R/at: Urvashi Building, Flat No. 192 |] | |
| 19 th Floor, Nepean Sea Road, |] | |
| Mumbai 400 036. |] | <u>...Applicants</u> |

In the matter between :

- | | | |
|------------------------------------|---|------------------------------|
| 1. Arjan Motiram Khiani |] | |
| (since deceased, through LRs) |] | |
| 1(a) Malti Arjan Khiani, |] | |
| 1(b) Rishi Arjan Khiani |] | |
| 1(c) Karan Arjan Khiani |] | |
| 1(d) Pooja Arjan Khiani |] | |
| 2. Raj Motiram Khiani |] | |
| R/at: 6, Brij Bhavan, Peddar Road, |] | |
| Mumbai 400 026. |] | |
| 3. Ashok Motiram Khiani |] | |
| R/at: A-31, Darshan Apartments, |] | |
| Mount Pleasant Road, Malabar Hill, |] | |
| Mumbai 400 026. |] | <u>...Appellants.</u> |

Versus

- | | | |
|---------------------------------------|---|--|
| 1. Metharam Rijhumal Khiani |] | |
| (Deleted since expired on 23.02.2019) |] | |
| 2. Nari Rijhumal Khiani |] | |
| R/at: 91B, Embassy Apartments |] | |
| 46, Nepean Sea Road, Mumbai 400 036. |] | |
| 3. Sunder Rijhumal Khiani |] | |
| (Deleted since expired on 02.08.2017) |] | |

- 3a. Laju Sunder Khiani]
3b. Manoj Sunder Khiani]
3c. Manisha Sunder Khiani]
All R/at: 14, Shri Jorawar Bhava]
93M, Karve Marg, Marine Lines,]
Mumbai 400 020.]
4. Sitabai Rijhumal Khiani]
(Deleted since expired on 8-10-1998)]
5. Jyoti Metharam Khiani]
6. Sanjay Metharam Khiani]
(since deceased, through LRs)]
6(a) Reshma Sanjay Khiani]
6(b) Rahul Sanjay Khiani]
7. Priya Metharam Khiani]
8. Devansh Metharam Khiani]
R/at: Urvashi Building, Flat No. 192]
19th Floor, Nepean Sea Road,]
Mumbai 400 036.] **...Respondents.**

Mr. Aspi Chinoy, Senior Advocate a/w Mr. Ramesh Soni, Mr. Archit Jayakar, Ms. Bhoomi Upadhyay i/b Jayakar and Partners for Respondents/Original Appellants.

Mr. Pravin Samdani, Senior Advocate a/w Ms. Kausar Banatwala, Ms. N. Thakkar i/b Mr. Tushar A. Goradia for Respondent No. 8.

Mr. Farhan Dubash, Ms. Harshal Manik, Mr. Gobinda C. Mohanty i/b Mohanty and Associates for Applicant and Respondent Nos. 5 to 7.

Coram : Sharmila U. Deshmukh, J.

Reserved on : 24th April, 2025.

Pronounced on : 30th April, 2025.

ORDER :

1. The instant Interim Application has been preferred by the original Defendants-Respondents in the First Appeal. The First Appeal impugns the judgment dated 15th June, 2019 of dismissal of Suit No

7559 of 1981 by the City Civil Court. The prayer in the Interim Application is for lifting of the operation of *lis pendens* in respect of the schedule property. For sake of convenience, the Appellant who are the Respondents in the Interim Application are referred to as 'Plaintiffs' and the Applicants are referred to as 'Defendants'.

FACTUAL MATRIX:

2. For clarity, a brief exposit of facts is necessary. Suit No. 1452 of 1981 was filed seeking *inter alia* division of the properties mentioned in Exhibit-B to the Plaint between the parties in equal half shares and necessary directions to effectuate the same i.e. rendering and taking accounts and valuation of properties. The Plaintiffs case was that the distribution of the assets of the four firms between the Plaintiffs group and Defendants group under an Interim Award of 27th April, 1975 is null and void and of no effect in absence of Final Award being passed upon the finalisation of accounts and determination of amounts due and payable. The Defendants after being allotted high value properties did not participate in further proceedings and Final Award could not be passed.

3. The suit came to be resisted by the Defendants contending that there was just and fair distribution of the assets on the basis of valuation and the interim award was fully implemented and acted upon.

4. The suit of the year 1981 was initially filed in the High Court and upon enhancement of the pecuniary jurisdiction of City Civil Court, the suit came to be transferred to City Civil Court. Vide impugned judgment dated 15th June, 2019, the suit has been dismissed. During pendency of the suit, there were no interim reliefs in favor of the Plaintiff.

5. On 7th January, 1995, the plaintiffs registered *lis pendens* notice in the office of Sub-Registrar of Assurance under Serial No. 100/1/8-1995 in respect of two properties allotted to Defendants under the Interim Award-one at Mumbai and other at Delhi. The Mumbai property is described as land together with the structures admeasuring 16293 sq. yards bearing CTS No. 544, 544/1 to 14 together with building sheds of Village Kanjur, L.B.S. Road, Bhandup (West), Mumbai on which the factories of M/s. Valson Dyeing, Bleaching and Printing Works and New Prabhat Silk Mills are located and also retail shop in the name of Valiram Sons is located and Delhi property was described as ownership building bearing Municipal No. II/ 867-68 (New) situated at Bazar Gubir Attar, Chandni Chowk, Delhi 110 006 in possession of M/s. Valiram Sons. After the suit came to be transferred to the City Civil Court, in the year 2013, second notice of *lis pendens* was registered in respect of Mumbai and Delhi properties. The third notice of *lis pendens* was registered on 8th May, 2019 only in respect of Mumbai property being

land bearing C.T.S. Nos. 544, 544/1 to 14 of village Kanjur, L.B.S. Road, Bhandup (West), Mumbai.

6. The present Application seeking lifting of operation of *lis pendens* pleads that despite dismissal of the suit, notice of *lis pendens* registered by the Plaintiffs continues placing restrictions on right of Defendants to deal with their Mumbai property.

7. The defence of the Plaintiffs was that the Appeal is continuation of suit and the *lis* is still pending. It was contended that the notice of *lis pendens* was registered and continued since 1995 on the property. Due to passage of time, the Plaintiffs were constrained to surrender some of their properties to the landlord and the Defendants group, despite the *lis pendens*, has sold the business of Valiram Sons in Delhi along with three valuable properties allotted to them under the Interim Award. As the properties allotted to the Plaintiffs were tenanted, no *lis pendens* could be registered in respect of their properties.

8. In rejoinder, it was contended that the Plaintiffs have acted in terms of the Interim Award by dealing and disposing of the properties allotted to them for which no consideration was paid to the Defendants. The Plaintiffs are now desirous of dealing with the properties allotted to the Defendants group by restricting the Defendant's right to deal with their properties. The sur-rejoinder reiterates the earlier stand of the Plaintiffs.

SUBMISSIONS:

9. Mr. Samdani, learned Senior Advocate for the Defendants would submit that the parties acted upon the Interim Award of the year 1975 and the Plaintiffs have dealt and disposed of the properties allotted to them. Thereafter, the present suit came to be filed in the year 1981 claiming unequal distribution. Pointing out to prayer clause (a) of the Plaint, he submits that the said relief was no longer available to the Plaintiffs in view of alienations by the Plaintiffs. He would further submit that the interim relief of appointment of Court Receiver was dismissed by order of 27th October, 1994 and subsequently the suit has been dismissed, however, the notice of *lis pendens* remains. He would submit that as per the settled position in law, to relieve the Defendants from the operation of *lis pendens*, the Court will have to come to a *prima facie* finding on merits. He has taken this Court through the issues framed by the Trial Court and findings to contend that the Plaintiff has failed on all counts and in particular the issue of division of properties being null and void. He would further submit that the Interim Award was not challenged and parties acted on the same. He submits that the Trial Court has recorded the admission of the plaintiffs that they have dealt with the properties which had come to their share. He would further submit that the subject-matter of *lis pendens* is only the Defendants properties and not the Plaintiffs

properties. He would submit that as all the properties have been dealt with, prayer clause (i) cannot be granted. He would further submit that there is no merit in the Plaintiffs case as there is no evidence to indicate valuation, the Plaintiffs properties have not been preserved and the sale proceeds not revealed.

10. He would further submit that the requirements for registration of notice of *lis pendens* are not satisfied in the present case as no right to immovable property remains and the claim is only a money claim. In support, he relies upon the following decisions:-

***B. J. Patel vs. M/s. Vadilal Dolatram and Sons*¹**

***M/s. Govindji Jevat & Co. v. Shree Saraswati Mills Ltd.*²**

***Shantilal J. Khona vs. Anandrai S. Dave*³**

***Hilton Builders & Textiles Pvt. Ltd. vs. Special Paints Limited*⁴**

***Mukundrai Dipchand Sanghavi vs. Ambaji Developers*⁵**

11. *Per contra*, Mr. Chinoy, learned Senior Advocate appearing for the Plaintiffs would submit that the order of admission of Appeal records that several issues of fact and law are raised. He submits that Appeal is continuation of suit and therefore, notice of *lis pendens* of

1 AIR 1982 Bom 66.

2 AIR 1982 Bom 76.

3 2002(3) Bom. C.R. 346.

4 Appeal (L) No. 397 of 2013, dtd. 9th October, 2013.

5 Notice of Motion No. 1397 of 2018, dtd. 19th June, 2019.

pending suit would continue. He would submit that even if the properties are alienated, the relief of equalization after accounts are drawn up and properties valued remains and therefore, there is money claim. He would further submit that prayer clause (vii) seeks charge to be created on the properties which demonstrates that the issue of right in the immovable property survives. He would further submit that the Trial Court has held the suit to be barred by jurisdiction under Sections 32 and 33 of the Arbitration Act, 1940 without noticing that the Interim Award was not made rule of the Court. He would further submit that after the Interim Award was passed, the net valuation of the businesses for purpose of final award was required to be determined and after being allotted high valued properties, the Defendants adopted dilatory tactics and stopped attending the Arbitration proceedings by reason of which the final Award could not be passed. He submits that as the issue of accounts and compensatory payments remained unresolved, the plaintiffs were constrained to file this suit. He would further submit that there is specific deposition that as per the ready reckoner value of 1980-81, the properties allotted to plaintiffs group were valued at Rs. 50,00,000/- whereas the property allotted to Defendants group were valued at about Rs. 3,74,00,000/-. He submits that the Defendants did not lead any evidence in the Trial Court.

12. He submits that initially the Defendants ownership properties of Mumbai and Delhi were subject-matter of notice of *lis pendens*, however, thereafter, as the properties were dealt with, in 2019, the Mumbai property which was remaining was made subject-matter of *lis pendens*. He would further submit that the Defendants in the Written Statement have accepted the accounts remained to be taken and the net valuation of assets and properties of the firm remained to be done after considering various liabilities owed by each firm. He submits that considering the admitted position of the accounts remaining to be drawn leading to unpaid amounts, the relief of creating a charge on the property for the unpaid amount was prayed. He submits that *prima facie* case is made out by the plaintiffs to continue the notice of *lis pendens*. He submits that the decision in the case of **Hilton Builders and Textiles Pvt. Ltd.** (supra), relied upon by the Respondents dealt with the situation where in a specific performance suit, the Appellants therein had accepted refund of the amounts paid and based on the said facts, the Court came to a *prima facie* finding that the Appellant would not succeed in specific performance suit. He submits that in that factual situation, the Court held that the same would be manifestly contrary to the interest of justice and that the claim for the damages is *prima facie* untenable, which is not the situation in present case. He would further submit that one of the factors to be considered is that

the Appeal was directed to be heard finally and as it was the Defendants who reneged on the Agreement, it would be travesty of the justice if the notice of *lis pendens* is lifted and the Defendants are permitted to deal with the property. He submits that in event, the Appellants succeed in the Appeal, there would be no property left for execution of the claim. In support, he would rely upon the following decisions:

***Kirpal Kaur vs. Jitender Pal Singh*⁶**

***Tikkamchand Ramvilas Gilda vs. Sarlabai w/o Nandalal Shrivastava*⁷**

13. In rejoinder, Mr. Samdani would submit that the provisions of Section 52 of Transfer of Property Act, 1882 provides for the right in immovable property to be specifically in issue for the operation of doctrine of *lis pendens*. He would further submit that the submission on charge being created has no substance in absence of any issue being framed and in view of Section 100 of Transfer of Property Act, 1882. He would further submit that there is no fresh *lis pendens*, registered in the Appeal and the registration of *lis pendens* of the suit is continued. He would further submit that there is no evidence on valuation, no balance sheet of the firms filed. He submits that the plaintiffs have not rendered accounts and no evidence has been produced in respect of

6 (2015) 9 SCC 356.

7 2014 SCC OnLine Bom 437.

ready reckoner value. He points out that the evidence of the plaintiffs is that the valuation of properties has been considered as per ready reckoner rate by excluding the value of stocks as well as other business allotted to two groups. He would further submit that in cross-examination, the plaintiffs have admitted that after the Interim Award, what remained was settlement of accounts, assets and liabilities and valuation of properties. He would further point out that the plaintiffs have admitted that the plaintiffs were not able to conduct the valuation because it was for all the parties to carry out the valuation. He submits that the claim is therefore, a monetary claim for which no interlocutory injunction could have been granted and by registering a notice of *lis pendens*, an Injunction has been placed in a monetary claim.

REASONS AND ANALYSIS:

14. The issues which arise from the relevant facts and submissions are:

(a) Whether consequent to the alienation of the properties by the parties, any right to immovable property was directly and specifically in issue in the suit to attract doctrine of *lis pendens*?

(b) Whether on merits, a *prima facie* case of probability of dismissal of Appeal is made out so that the continuation of *lis pendens* would result in serious inequity?

15. Dealing first with the frame of the suit filed by the Plaintiffs. The

Plaintiffs came with a case of unequal distribution of properties by the Interim Award, which Interim Award is required to be ignored, as the final Award dependent on finalisation of accounts was not passed due to Defendants default. The following reliefs were sought in the Plaint:

“20. The Plaintiffs therefore pray -

- (i) that all the properties including the assets mentioned in Ex.B hereto be divided and distributed between the Plaintiffs and the Defendants so that the Plaintiffs and the Defendants each have an equal half share therein.
- (ii) that this Honourable Court be pleased to give such directions and pass such orders and make such enquiries as may be necessary for the purposes aforesaid including orders for rendering and taking account and the valuation of the said properties and provision be made for the debts and liabilities in respect of the said properties.
- (iii) that this Honourable Court be pleased to ascertain and secure to the Plaintiffs their share in the said properties and the amount coming to their share for the purpose of equalising the distribution and division of properties.
- (iv) that the Defendants be ordered and decreed to pay to the Plaintiffs interest on the amount so ascertained at the rate of 18% p.a. with yearly rests from such date as this Honourable Court may determine till payment or realisation.
- (v) the said properties be valued and provision be made for the debts and liabilities of the said properties and the amount payable to the Plaintiffs to equalise their share be ascertained and secured to the Plaintiffs and the Defendants be ordered and decreed to pay to the Plaintiffs the sum so ascertained together with interest thereon at 18% p.a. with such costs from such date prior to the suit as this Honourable Court may determine and during the pendency of suit till payment or realisation.
- (vi) without prejudice to the prayers above and in the alternative the affairs of the suit firms be wound up and for the purposes aforesaid this Honourable Court be pleased to give such directions pass such orders and make such enquiries as may be necessary including directions for taking accounts and the properties and assets of the firm be applied in discharge of the debts and liabilities of the suit firms and the same be sold by and under the directions of this Honourable Court and the amount coming to the share of the Plaintiffs be ascertained and secured.
- (vii) it be declared that the properties purportedly allotted to

the defendants group and/or in the possession and power of the defendants group stand charged for the payment of the amount ascertained under prayers (a) or (b) or (c) and the same be ordered to be sold by and under the directions of this Honourable Court in the event the Defendants fail to pay the amount within the time fixed for payment and the net sale proceeds be appropriated towards the decretal dues.

- (viii) that the Court Receiver or some other fit person be appointed receiver of properties purportedly allotted to the Defendants group and/or the possession and power of the defendants group with all powers under the Code of Civil Procedure, 1908 including the power to sell the movable properties which are likely to depreciate and/or deteriorate.
- (ix) that pending the hearing and final disposal of the suit the Defendants their servants and agents be restrained by an order and injunction of this Honourable Court from selling, mortgaging, changing or otherwise encumbering or transferring leasing or parting with the possession of the properties purportedly allotted to the Defendants group and/or in the possession and power of the Defendants group or bringing thereupon any person whether by way of licencees or otherwise.
- (x) that the Plaintiffs be granted ad-interim reliefs in terms aforesaid.
- (xi) that the the Plaintiffs be granted costs and such further and other reliefs as the nature and the circumstances of the case may require."

16. The substantive prayer (i) sought re-distribution of all the properties in equal shares after rendition of accounts and valuation of properties. By virtue of prayer clause (i), the Plaintiffs right in the immovable properties, which formed subject matter of the Interim Award, was directly and specifically in issue in the suit.

17. It will be necessary to understand the genesis of doctrine of *lis pendens*, which is found in Section 52 of Transfer of Property Act, 1882 [for short, "**TOPA**"], and is amended in its applicability to State of Maharashtra, which reads as under:

52. (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: (As in the original Act.) This amendment was declared by Bombay Act 57 of 1959 to be in force in the whole of the then recognised State of Bombay and is, therefore, in force in the whole of the present State of Gujarat and Maharashtra. Under section 2 of the Bombay Act of 1939, however, the amended section only *applies* to immovable properties situated wholly or partly in Greater Bombay; but the State Government is empowered to extend its application to other areas by notification. A suit regarding immovable properties situated outside areas so notified is not, of course, affected by the amendment. In view of the amendment, the rule of *lis pendens* under section 52 of the Act will operate in the notified areas provided the *lis* is registered in the manner required by the local amendment."

18. The statutory provision mandates that for applicability of doctrine of *lis pendens*, it is necessary (a) that the suit or proceeding is

pending, (b) that the suit or proceeding is not collusive, (c) that a right to immovable property is directly and specifically in issue and (d) that there is registration of notice of *lis pendens*. The *sine qua non* is thus filing of the suit qua the immovable property. The purpose of validly registered *lis pendens* is to protect the Plaintiffs interest in the suit property so that even if it is alienated in the course of proceedings, the alienation does not bind the Plaintiff and he is not bound to seek any relief against such third parties. The intent behind providing additional safeguard by registration of notice of *lis pendens* under the Maharashtra Amendment is to ensure that upon registration of the notice, the Transferee who purchases the property would be deemed to have notice of pendency of *lis* and cannot claim to be *bona fide* purchaser without notice. Section 52 of TOPA freezes the proprietary right as they stood at the inception of the suit making it evident that it is right to the immovable property which should be directly and specifically in issue for doctrine of *lis pendens* to be applicable.

19. Understanding the legislative intent which is to protect the Plaintiffs right to immovable properties against transfers *pendente lite*, the prime consideration is whether the doctrine of *lis pendens* continues to apply upon the alienation of the properties as in such event there is no question of freezing the proprietary rights as they stood at the inception of suit. It cannot be debated that at the

inception, the rights to the immovable properties allotted to both the groups was directly and specifically in issue. It is an admitted position that post the Interim Award, not only the properties allotted have been subject matter of division between each group *inter se* but that both the groups have alienated the ownership properties or surrendered the tenanted properties. Post alienation by way of sale or surrender, the immovable properties are no longer available for distribution and what remains is money claim based on accounts and valuation of properties. Post alienation, the complexion of the suit changed into a suit for accounts or at the best a money claim to which the doctrine of *lis pendens* has no applicability.

20. The suit has been dismissed by the Trial Court and at the Appellate stage even after admission of the Appeal and presuming that the Appeal succeeds, the relief which can be granted is monetary relief. This position stands re-affirmed by the response of Mr. Chinoy to query by this Court, that the claim was monetary claim.

21. Mr. Chinoy would lay emphasis on prayer clause (vii) to contend that by creating charge on the property, the suit, inspite of alienations, involves right to immovable property. To counter this submission, Mr. Samdani has rightly relied upon Section 100 of TOPA, 1882 which provides that where the immovable property of one person is by act of parties or operation of law made security for the payment of money to

another, and the transaction does not amount to mortgage, the latter person is said to have a charge on the property. In the present case, it is not the Plaintiffs case that the Defendants immovable properties are made security for payment of money upon ascertainment of valuation either by act of parties or by operation of law and thus no charge can be said to be created on the immovable properties.

22. The alienation *pendente lite* has rendered infructuous prayer clause (i) seeking decree of re-distribution of all the properties. The *sine qua non* that in the suit the right in immovable property should be directly and specifically in issue does not stand satisfied. In my view, in the post inception changed position of the suit, the doctrine of *lis pendens* would no longer continue to apply.

PRIMA FACIE CASE ON MERITS FOR LIFTING OF LIS PENDENS:

23. With an assumption that the doctrine of *lis pendens* applies, I shall now consider whether the Defendants are required to be relieved from *lis pendens*.

24. The entire gamut of Section 52 of Transfer of Property Act was considered by Hon'ble Division Bench of this Court in ***Hilton Builders & Textiles Pvt. Ltd vs Special Paints Limited*** (supra). The suit in that case was for specific performance of agreement for sale. The Hon'ble Division Bench took note of the various decisions on the issue and has culled out the principles to be followed while adjudicating an

application seeking lifting of operation of *lis pendens*. It would be beneficial to note Paragraph Nos. 11 to 13 as under :-

“11. Section 52 confers a wholesome discretion on the Court as a result of which the operation of the doctrine of *lis pendens* can be lifted on such terms and conditions as the Court thinks fit to impose. The Court has a discretion, which like all other discretion in law, has to be exercised on judicious considerations. Whether a party should be relieved from the operation of *lis pendens* is a matter of discretion. Similarly, if the Court were to decide to relieve a party of the operation of the doctrine, it has been vested with the discretion to prescribe the terms and conditions which would subserve the interests of justice. In considering the interests of justice for the purpose of determining as to whether a party should be relieved from the operation of *lis pendens*, the Court must necessarily have regard to all the facts and circumstances of the case. The facts and circumstances of the case must undoubtedly include the merits *prima facie*. To hold that the merits should be completely excluded from consideration while assessing whether the discretion should be exercised would be to read a restriction which Section 52 has not statutorily imposed. On the contrary, where the statute allows the Court under its authority and on such terms and conditions as it may impose to relieve a party of the embargo which is imposed by the provision, the court should not read restrictions which would substantially dilute the efficacy of the provision. The operation of *lis pendens* is as a matter of law. But the same law which recognises the doctrine confers on the Court a discretion to relieve a party of the operation of *lis pendens*. The law confers such a discretion in recognition of the fact that in the facts of a given case, the doctrine will result in serious inequity.

12. The reason why the Court has been vested with a discretion to relieve a party of the operation of *lis pendens* is that the pendency of a suit and the registration of a *lis pendens* (as required in Maharashtra) substantially restricts the freedom of a party to secure a buyer at a fair market value. The Supreme Court has recognised that the mere filing of a suit may be an ingenious way to create a cloud over the title of a party. The suit may remain pending over a long period of time. This has been recognized in the decision of the Supreme Court in **Vinod Seth vs. Devinder Bajaj** [(2010) 8 SCC 1], in the following observations:

“We also agree with the High Court that having regard to the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act, 1882 ('TP Act' for short), the

pendency of the suit by the appellant shackled the suit property, affected the valuable right of the second defendant to deal with the property in the manner she deems fit, and restricted her freedom to sell the property and secure a fair market price from a buyer of her choice. When a suit for specific performance is filed alleging an oral agreement without seeking any interim relief, the defendant will not even have an opportunity to seek a prima facie finding on the validity of the claim. Filing such a suit is an ingenious way of creating a cloud over the title to the suit property. Such a suit, filed in the Delhi High Court, is likely to be pending for a decade or more. Even if a defendant owner asserts that his property is not subject to any agreement and the said assertion is ultimately found to be true, his freedom to deal with the property as he likes or to realize its true market value by sale or transfer is adversely affected during the pendency of the suit. The ground reality is that no third party would deal with a property in regard to which a suit for specific performance is pending. This enables an unscrupulous plaintiff to cajole and persuade a defendant to sell/give the property on plaintiff's terms, or force the defendant to agree for some kind of settlement."

Again while emphasising that the principle underlying Section 52 is based on justice and equity, the Supreme Court held as follows :

"The principle underlying section 52 of the TP Act is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject matter of the suit without being subjected to the rights of any party to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, in spite of the pendency of the suit."

13. A learned Single Judge of this Court in **B.J.Patel vs. Vadilal Dolatram and Sons**, [AIR 1982 Bombay 66] had occasion to consider the principles on the basis of which the discretion under Section 52 is to be exercised. Justice Mody

sitting singly held as follows :

"Though, there cannot be an exhaustive enumeration of principles one thing is clear that this is a discretionary order and *lis pendens* is a rule and relief is an exception and strong grounds must be made out to deprive the plaintiff of the fruits of litigation.

This being a discretionary relief, it will depend on the several circumstances which inter alia, can be, the nature of the plaintiff's case and the defence, the nature of property market and the circumstances of the defendants. If the Court is convinced on the affidavits and the pleadings that even if all the evidence was led by the parties there is a very strong probability that the plaintiff will lose the matter, it will be a very important factor, possibly conclusive for granting relief. The Court will also have to consider the inconvenience and injustice that is likely to be caused to the defendants if the relief is not granted and balance it with the inconvenience and injustice that is likely to be caused to the plaintiff if the relief from *lis pendens* is granted."

The earlier decision was considered in a subsequent judgment of Mr. Justice F.I.Rebello (as the Learned Judge then was) in **Shantilal Jethabai Khona vs. Anandrai Shivlal Dave** [2002(3) Bom.C.R. 346.]. The learned Judge referred to some of the considerations which must be borne in mind, clarifying that these were not intended to be exhaustive:

"While considering the issue to my mind this Court must pose to itself, at least the following questions which are not exhaustive:-

- (i) Is it a requirement of the section that a party can be relieved of *lis pendens* only on a Court imposing conditions. Is imposition of condition a prerequisite?
- (ii) Whether on the facts as pleaded will the plaintiff *prima facie*, be entitled to the relief of specific performance of the contract.
- (iii) If the Court comes to the conclusion that specific relief cannot be granted, then whether considering the alternative relief of damages which the plaintiff in the suit for specific performance is entitled to, whether the plaintiff should be secured.
- (iv) If to be secured should it only be the market value of the property on the date of the suit at time when the suit is filed be considered."

25. It is thus clear that while exercising the discretionary power to

relieve the Defendants from operation of *lis pendens*, regard must be had to the totality of facts and circumstances including *prima facie* consideration on merits and equity. The registration of *lis pendens* has been treated as restriction on freedom of party to secure a buyer at fair market value and that mere filing of suit may be an ingenious way to create cloud over title of a party. Strong probability of losing the Appeal and the comparative inconvenience and injustice are the prime consideration.

26. On the touchstone of these principles, the facts of the present case are to be considered. Having exercised their ownership/tenanted rights in the respective properties, which they could not have exercised de-hors the Interim Award, *prima facie* the Plaintiffs and Defendants have accepted the Interim Award and acted upon it, which constitutes a mutual agreement, especially when no relief of setting aside of Interim Award has been sought in the suit. The Trial Court has rightly appreciated the ratio of ***Kanshinathsa vs Narsinga***⁸ that the Defendants can set up the Award as defence of mutual agreement between the parties. Perusal of the Interim Award discloses that the Award dissolved the partnership firm and distributed the properties between the two groups. The Award refers to the various liabilities of the firms and provides for the modalities of payment of liabilities and

8 AIR 1961 SC 1077

finalisation of accounts. Upon *prima facie* reading of the Interim Award, it does not provide that consequent to the finalisation of accounts, the prior distribution of the properties between the two groups would be disturbed. The Interim Award only provides for valuation of businesses and not valuation of the properties. The acceptance of the Interim Award would *prima facie* affect the Plaintiff's case of unequal distribution and there would be no question of ignoring the Interim Award and consequently no question of rendition of accounts or valuation of properties.

27. Going one step further, at the Appellate stage, as physical re-distribution of the properties is no longer possible in view of the alienations, the maximum relief which could be granted to the Plaintiff is money equivalent of the unequal distribution of the businesses and properties. The same will require evidence on the valuation of businesses and properties including the money considerations received from alienation of properties. *Prima facie*, upon perusal of evidence, the Plaintiffs have deposed about the market value of the immovable properties based on Ready Reckoner Rate by excluding the respective liabilities, the stocks, machinery, profits, etc. of the businesses. Even if the evidence is accepted, no relief based on equalisation of accounts can be granted. There is no evidence on accounts, valuation of businesses and properties without which the Plaintiffs case is difficult

to be sustained. *Sans* any evidence to substantiate the valuation and accounts, the imposition of monetary liability upon Defendants is unlikely.

28. Upon cumulative appreciation of the evidence, the Trial Court has rendered specific finding that there is failure of the Plaintiffs to prove substantial documents which are the basis of his testimony. It is admitted by the Plaintiff's witness that they did not conduct valuation of properties allotted to them. The observations in the admission order of this Court while admitting the statutory Appeal cannot assist the case of the Plaintiffs. Even accepting, that the Appeal was directed to be heard finally, the directions cannot impede the right of the Defendants to seek relief from operation of *lis pendens* if the Appeal is not taken up for immediate hearing.

29. The registration of notice of *lis pendens* has indirectly operated as a restriction on freedom of the Defendants in getting fair market price for the property as prospective buyers tread with caution in case of *sub judice* property. Since the year 1995, the Defendant's right to deal with their property has been affected without the Court *prima facie* inquiring into the validity of the Plaintiff's claim. In 2019, when the suit has been dismissed, the notice of *lis pendens* continues to affect the Defendant's right.

30. Since the year 1995, by registration of *lis pendens* notice, the

Plaintiffs have succeeded in placing shackles on right of Defendants to deal with their properties indirectly, while reserving its own freedom to deal with their allotted properties. Although it was stated that the *lis pendens* could not be applied to the Plaintiffs properties as they were tenanted properties, PW-1 has admitted that Raja House building which was allotted to the Plaintiffs was ownership property. The operation of *lis pendens* only *qua* the Defendants properties causes inequity and manifest injustice to the Defendants.

31. As far as the submission that in event the Appeal succeeds, the claim is required to be secured, the doctrine of *lis pendens* will not apply to money claim. There cannot be interlocutory injunction in money claim.

32. Looking to the totality of facts and circumstances of the case, in my view, the Defendants are entitled to be relieved from the operation of *lis pendens*.

33. In light of the above, the Interim Application is required to be allowed in terms of prayer clauses (a) and (b), which reads thus:

“(a) That this Hon’ble Court be pleased to direct the Sub-Registrar of Assurances to remove the Lis-Pendens in respect of the property described in the Schedule at Exhibit “3” hereto.”

(b) That this Hon’ble Court be pleased to pass an order that the Applicants herein be permitted to deal with the said property without the same being subject to the operation of Lis Pendens under Section 52 of Transfer of Property Act, 1882.”

[Sharmila U. Deshmukh, J.]

34. At this stage, request is made for stay of the impugned Judgment for a period of six weeks from today. The said request is opposed by Mr. Thakkar, learned Senior Advocate contending that the submissions made during the hearing was that the claim is money claim and therefore, no right in immovable property is involved.

35. Considering that the notice of *lis pendens* was first registered in the year 1995. I am inclined to grant stay for period of six weeks from today. The impugned Judgment is stayed for period of six weeks from date of being uploaded on the official website.

[Sharmila U. Deshmukh, J.]