

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

APPEAL FROM ORDER NO. 22 OF 2016

SATYABHAMABAI W/O. CHANDRAKANT TANDLE, AND
CHANDRAKANT LAXMANRAO TANDLE (BOTH DIED)
THROUGH L.RS. SUNIL S/O CHANDRAKANT TANDLE AND OTHERS

VERSUS

SAU. GURUMMABAI W/O SHIVRAJ MATHPATI (DIED)
THROUGH L.RS. SHIVRAJ S/O MADHAVRAO MATHPATI AND OTHERS

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Advocate for Petitioners : Mr. P. R. Tandale.

Advocate for Respondent Nos.2(1) to 2(4) : Mr. A. V. Patil Indrale.

None present for Respondent No.1(b) / Caveator.

Respondent No.4 served.

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CORAM : **V. K. JADHAV, J.**

DATE : 16th March, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and order dated 22nd February, 2016 passed by the learned District Judge-2, Udgir in Regular Civil Appeal No.19 of 2015, original Respondent Nos.1-a to 1-e and Respondent No.2 before the lower Appellate Court have preferred this appeal from order.

3 Brief facts giving rise to the present appeal from order are as follows:

Deceased Satyabhamabai and present Appellant No.2 Lalita had instituted Regular Civil Suit No.101 of 1981 for possession of the encroached portion and decree of perpetual injunction in respect of the suit plot against Respondent Nos.3 and 4 herein. The learned Civil Judge Junior Division, Udgir by judgment and decree dated 12th March, 1992 in Regular Civil Suit No.101 of 1981 decreed the suit of the Plaintiffs against Respondent No.3 herein and accordingly directed him to handover the possession of the encroached portion from the suit plot as shown in the plaint and also restrained him from interfering with Plaintiffs' possession over the suit plot. The said judgment and decree dated 12th March, 1992 as aforesaid has attained the finality. Respondent Nos.1 and 2 herein have filed objection petition before the Executing Court, Udgir below Exhibit – 62. The learned 3rd Joint Civil Judge Junior Division, Udgir / Executing Court by order below Exhibit 62 and 69 in RD No.16 of 2002 dated 25th February, 2015 rejected the said application. Being aggrieved by the same, Respondent Nos.1 and 2 herein preferred Regular Civil Appeal No.19 of 2015 before the District Court, Udgir and the learned District Judge-2, Udgir vide its impugned judgment and order allowed the appeal thereby quashed

and set aside the order passed by the Executing Court below Exhibit 62 and 69 as aforesaid and remanded the matter to the Trial Court by directing to give opportunity to the objection Petitioners to lead the evidence and thereafter, decide the execution petition as per law. Hence, this appeal from order.

4 The learned counsel for the Appellants submits that the impugned judgment and order is contrary to the facts and circumstances of the case. The averments of the objectors in the application Exhibit 62 and 69 itself demonstrate that the principle of *lis-pendens* contained in Section 52 of the Transfer of Properties Act is clearly attracted and as such, the objectors are bound by the judgment and decree passed by the Trial Court, which has now attained the finality. Respondent Nos.1 and 2 / objectors are not the strangers to the proceedings and they are claiming their title through the Judgment Debtor. The status of the objectors is not of an outsider or total stranger, unrelated to the litigation between the Judgment-Debtor and the Appellants. The impugned judgment and order passed by the lower Appellate Court is contrary to the well settled proposition of law laid down by the Supreme Court in the cases of **Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another,**

reported in, **AIR 1998 Supreme Court 1754(1)**, and **Usha Sinha Vs. Dina Ram and Ors**, reported in, **AIR 2008 Supreme Court 1997** respectively as well as of this Court in the cases of **Jagdish s/o Motilal Joshi Vs. Chandrapal s/o Tulsiram Bhola and other**, reported in, **2007 (1) Mh.L.J. 402** and **Shivaji Vs. Jijabai Prabhakar Alwane and Ors**, reported in, **2016 (4) Mh.L.J. 939**.

5 The learned counsel for Appellants submits that as per the averments made in applications Exhibit 62 and 69 respectively by Respondent Nos.1 and 2 herein, one Subhash s/o Shivrudrappa Patil, resident of Udgir had purchased the house property i.e. M.C. House No.5-1-273 from one Shivajirao Pundlikrao Patil (Died) L.Rs / Judgment-Debtor Nos.1 to 1(d) in the year 1982. It has been further contended in the said applications that one Manmahappa Nagthane had purchased the aforesaid property from Shri Subhash Patil under the registered sale-deed dated 11th January, 1983. One Sau. Guruammabai Shivraj Mathapati purchased the aforesaid property on 11th January, 1983 from said Manmahappa Nagthane under the registered sale-deed.

6 The objectors are the legal heirs of said sau

Guruammabai Mathapati. According to them, from the date of the aforesaid sale-deed, Sau. Guruammabai was the owner in possession of the aforesaid house property and after her death, the objectors become the owner in possession of the said house property. The learned counsel for Appellants submits that it is clear from the averments made in the applications Exhibit 62 and 69 respectively by the objectors themselves that said Subhash Patil purchased the above property from Defendant No.1 (Shivaji Pundlikrao Patil) in Regular Civil Suit No.101 of 1981 in the year 1982 i.e. during the pendency of Regular Civil Suit No.101 of 1981. The predecessor in title of the objectors namely Sau. Guruammabai had purchased the same property from the subsequent purchasers as contended by the objectors themselves. Thus, Respondent Nos.1 and 2 herein / objectors are bound by the judgment and decree in Regular Civil Suit No.101 of 1981, which has now attained the finality. The learned Judge of the Executing Court has rightly rejected the applications Exhibit 62 and 69 respectively. However, the lower Appellate Court contrary to the record and the averments made by the objectors themselves in the aforesaid applications Exhibit 62 and 69, observed that the property appears to be not

purchased from the Judgment-Debtor and thus, the question is answerable with the evidence only. The observations made by the lower Appellate Court are perverse and the impugned judgment and order thus, liable to be quashed and set aside.

7 The learned counsel for Appellants in order to substantiate his contentions placed reliance on the following cases in addition to the above cited cases:

- i) **A.V. Raju Vs. H. Phoolchand (deceased by L.Rs)**,
reported in, **AIR 2011 Madras 83**,
- ii) **Smt. Yashodhara Ameta Vs. Vishnu Shankar Paliwal and Ors**, reported in, **AIR 2011 Rajasthan 43**,
- iii) **Dilip Kumar Vs. Vijay Bahadur Singh and Ors**,
reported in, **AIR 2009 Madhya Pradesh 165**,

8 The learned counsel for Respondent Nos.1 and 2 / objectors submits that Respondent Nos.1 and 2 / objectors are exercising their right in terms of the provisions of sub-Rule (1) of Rule 97 of Order XXI of the Code of Civil Procedure, and as such,

the duty cast upon the Executing Court to decide the application Exhibit 62 and 69 in terms of the provisions contained in Rule 97 of Order XXI of the Code of Civil Procedure. The learned counsel submits that the house of the objection petitioners consist of five rooms of R.C.C. and they are in lawful possession over the suit property as owner thereof. The lower Appellate Court has rightly observed that though the aforesaid regular civil suit, which has attained the finality instituted against two defendants and the suit came to be dismissed against Defendant No.2 for want of effective steps, there was no dispute about purchasing of the property by the predecessor in title of the objection petitioners. The suit property was not purchased from the Judgment Debtor and therefore, adjudication of the said application Exhibit 62 is required in terms of the provisions of Order XXI Rule 97 of the Code of Civil Procedure. The learned counsel submits that the impugned judgment and order passed by the lower Appellate Court calls for no interference. There is no substance in the appeal and the same is thus, liable to be dismissed.

9 On careful perusal of the averments made in applications Exhibit 62 and 69 and the judgment and decree passed

in Regular Civil Suit No.101 of 1981, which has now attained the finality, it appears that the impugned judgment and order passed by the lower Appellate Court is contrary to the facts and circumstances of the case, the documentary evidence on record and the well settled judicial pronouncement by the Supreme Court in the aforesaid cases of *Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another* (supra) and *Usha Sinha Vs. Dina Ram and Ors* (supra).

10 Deceased Satyabhamabai and Appellant No.2 herein had instituted Regular Civil Suit No.101 of 1981 against Shivaji Pundlikrao Patil and one another for possession of encroached portion and perpetual injunction. The judgment and decree passed in Regular Civil Suit No.101 of 1981 has now attained the finality. Admittedly, the predecessor in title of the objection petitioners had purchased the suit property during the pendency of Regular Civil Suit No.101 of 1981. As per the averments made in the applications Exhibit 62 and 69, the subsequent purchasers and also the predecessor in title of the objectors, were the necessary parties to the suit. It has been contended that in the Regular Civil Suit No.101 of 1981, right and title of the property is not clarified in the proper way and without joining all he necessary parties. Therefore, the

judgment and decree passed in Regular Civil Suit No.101 of 1981 is not binding on the objection petitioners. It is, thus, clear that the objection petitioners have no any independent right in the suit property and they are claiming the title and the possession in respect of the suit property through the Judgment-Debtor. The objection petitioners are not the strangers to the judgment and decree passed in Regular Civil Suit No.101 of 1981 and they have no independent right to claim any title over the property, which was subject matter of Regular Civil Suit No.101 of 1981.

11 In the case of *Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another* (supra) relied upon by the learned counsel for Appellants, in para 12-13 of the judgment, the Supreme Court made the following observations:

“12-13. It is clear that executing Court can decide whether the resistor or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the

parties to adduce evidence for such determination if the Court deems it necessary.”

12 In the case of *Usha Sinha Vs. Dina Ram and Ors* (supra) in para 21 of the judgment by referring Silverline Forum's case, the Supreme Court made the following observations:

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

13 It is, thus, clear that the question raised by the resistor or obstructor must legally arise between him/them and the decree-holder. In the adjudication process as envisaged under Order XXI Rule 97 (2) of the Code of Civil Procedure, the Executing Court can decide whether the question raised by the resistor or objector legally arises between the party. The adjudication mentioned therein need

not necessarily involved the detailed inquiry or collection of evidence. The Court can make adjudication on admitted facts or even on the averments made by the resistor.

14 In view of the above discussion and the authoritative pronouncement of the Supreme Court in the aforesaid cases and the view taken in the other cases by the High Court as referred by the learned counsel for Appellants (supra), I find that the lower Appellate Court has not correctly dealt with the question. The impugned judgment and order thus, liable to be quashed and set aside. The order passed by the Executing Court below Exhibit 62 and 69 stands confirmed. Hence, the following order:

ORDER

- I. The appeal from order, is hereby allowed with costs.
- II. The judgment and order passed by the District Judge-2, Udgir dated 22nd February, 2016 in Regular Civil Appeal No.19 of 2015, is hereby quashed and set aside.
- III. The common order passed by 3rd Joint Civil

Judge Junior Division, Udgir dated 25th February, 2015 below Exhibit 62 and 69 in RD No.16 of 2002, stands confirmed.

- IV. The appeal from order is accordingly disposed of.
- V. Pending civil application stands disposed of.

[V. K. JADHAV, J.]

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