

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

APPEAL FROM ORDER NO. 51 OF 2016

SK. NIZAM SK. GULAB
VERSUS
FAHIM IBRAHIM PATHAN AND OTHERS

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Advocate for Petitioner : Mr. Nitin K. Chaudhari.

Advocate for Respondent No.1 : Mr. V. D. Salunke.

Advocate for Respondent No.4 : Mr. S. B. Ghatol Patil.

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

RESERVED ON : 15th February, 2017.

PRONOUNCED ON : 22nd March, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and order dated 8th August, 2016 passed by the District Judge-5, Aurangabad in Regular Civil Appeal No.201 of 2016, the original Respondent No.1 in the above appeal has preferred this appeal.

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

- a) The Appellant had instituted Regular Civil Suit No.45 of 1980 for decree of perpetual injunction

and recovery of possession against present Respondent Nos.2 to 4 in respect of the land bearing Gut No.220 to the extent of 2 Acres 28 Gunthas situated at village Navgaon, Taluka Paithan, District Aurangabad. The learned Civil Judge Senior Division, Paithan vide its judgment and decree dismissed the said suit. Being aggrieved by the same, the Appellant had preferred Regular Civil Appeal No.232 of 1985 before the District Court, Aurangabad. However, the said appeal came to be dismissed by the District Judge by judgment and decree dated 11th March, 1991. Being aggrieved by the same, the Appellant had preferred Second Appeal No.482 of 1991 and this Court by judgment and order dated 17th July, 2009 allowed the said appeal by setting aside the judgment and decree passed the Civil Judge Senior Division, Paithan in Regular Civil Suit No. 45 of 1980 dated 31st August, 1985 and the judgment and order dated 11th March, 1991

passed in Regular Civil Appeal No.232 of 1985 by learned District Judge, Aurangabad. This Court in the aforesaid second appeal decreed the suit of the Plaintiff with costs and directed the Defendants to handover the possession of the suit property, land Survey No.112, Gut No.220 to the extent of 2 Acres 28 Gunthas situated at village Navgaon, Taluka Paithan, District Aurangabad, subject to the sale-deed dated 27th April, 1979 within six months from the date of the order. Being aggrieved thereby, Respondent No.4 / Judgment Debtor filed Special Leave Petition No.2986 of 2014 before the Supreme Court. However, the Supreme Court dismissed the said special leave petition on 27th January, 2014. Respondent No.4 / Judgment Debtor filed Review Petition No.633 of 2014 in above special leave petition before the Supreme Court and the same also came to be dismissed on 25th March, 2014. Respondent No.4 / Judgment Debtor filed

Curative Petition No.290 of 2014 in above special leave petition before the Supreme Court. However, the same also came to be dismissed. The Appellant, however, filed RD No.19 of 2013 before the Executing Court seeking possession of the suit property. Respondent No.1 herein, who happened to be a son of Respondent No.4 / Judgment Debtor is obstructing the delivery of possession by filing the application before the Executing Court. However, the Executing Court proceeded further by issuing possession warrant. Respondent No.1 herein filed Writ Petition No.9361 of 2015 before this Court and after elaborate hearing of the same, the Respondent herein opted to withdraw the said writ petition. Accordingly, the said writ petition came to be disposed of as withdrawn.

- b) Thereafter, Respondent No.1 herein has filed another application Exhibit – 94 before the Executing Court. The learned Judge of the

Executing Court by order dated 30th June, 2016, dismissed the said application. Being aggrieved by the same, Respondent No.1 has filed Regular Civil Appeal No.201 of 2016 before the District Court, Aurangabad. Learned District Judge-5, Aurangabad by impugned judgment and order dated 8th August, 2016 in Regular Civil Appeal No.201 of 2016, partly allowed the appeal and set aside the order passed by the Executing Court below Exhibit 94 in RD No.19 of 2013 and remanded the matter to the Executing Court for hearing afresh. Hence, this appeal.

4 The learned counsel for the Appellant submits that the impugned judgment and order is *prima-facie* contrary to the facts and circumstances of the case. The pleading of Respondent No.1 / objector in application Exhibit 94, itself demonstrates that, his claim is based on falsehood and that he is an imposter in disguise set up by Judgment Debtor only. Admittedly, the suit property came to be mutated in the name of Respondent No.1 / objector during the pendency of the second appeal and as such, the principle of *lis-*

pendens contained in Section 52 of the Transfer of Properties Act is clearly attracted. The learned counsel submits that Respondent No.1/ objector is not a stranger to the decree, which has now attained finality and he is bound by the said judgment and decree. The facts pleaded by Respondent No.1 / objector himself demonstrate that he has no independent status having primary title in his own right. In the disguise of genuine claim of title to the property, a family member of the Judgment Debtor himself is opposing the execution of the decree under the garb of third party objection, which claim is not independent and in execution of the Judgment Debtor. The objector is set up by the Judgment Debtor and he is not a stranger to the proceedings.

5 The learned counsel for the Appellant submits that during the pendency of Second Appeal No.482 of 1991 before this Court, the father (original Judgment Debtor) of Respondent No.1 / objector created a farce about the matrimonial discord leading to filing of Petition No.A-374 of 1999 in the Family Court, Aurangabad and the cause title is “Aminabi Ibrahim Pathan Vs. Ibrahim Walekhan Pathan”. In the said proceedings, attempt has been made to indicate that the parties to the said proceedings have

arrived at a compromise *inter alia* recording the willingness of petitioner's father to mutate the suit property and other property totally admeasuring 5 Acres agricultural land in the name of his wife (mother of Respondent No.1/objector) and to resume the cohabitation thereon. It is pertinent to note that the said compromise pursis no where records that the suit property and the other property is being recorded in the name of present Respondent No.1 and his mother for the purposes of maintenance. Thereafter, the father of Respondent No.1 / objector recorded the names of Respondent No.1 and his mother in the revenue record vide mutation entry No.6317 dated 22nd October, 1999. On perusal of the said mutation entry, it appears that the land to the extent of 1 Hectare 8 Ares is being mutated in the name of Respondent No.1 / objector and some portion of the land is being mutated in the name of his mother on the basis of partition. It is apparent that the picture of matrimonial discord and the consequent recording of mutation entry is superficial and imaginary having deliberately created as a backup in anticipation of defeat in the suit/appellate proceedings and to be utilized in future in an attempt to defeat the decree holder's right and interest in the suit property. The said family court

proceedings as well as the effecting of mutation entry are in fact carried out behind the back of the Appellant. The said subsequent events, however, were not brought to the notice of this Court when the second appeal was pending for adjudication. It also requires consideration that Respondent No.1 and his family belong to Muslim religion and as such, principles of inheritance in Muslim Law categorically do not recognize the mode of devolution of property to the heirs of a Muslim by way of partition.

6 The learned counsel for the Appellant submits that the lower Appellate Court has failed in correctly appreciating the facts and circumstances of the cases in **Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal**, reported in, **AIR 1997 Supreme Court 856** and **Bhanwar Lal Vs. Satyanarain and another**, reported in, **AIR 1995 Supreme Court 358**. In the peculiar facts and circumstances of these two cases, the objectors in those cases possessed the right, title and interest independent of the Judgment Debtor and as such, the issues involved therein are different as compare to the peculiar facts and circumstances of the instant case. The lower Appellate Court has failed to appreciate the proposition of law laid down by the Supreme Court in the cases (i) **Silverline**

Forum Pvt. Ltd., Vs. Rajiv Trust and another, reported in, **(1998) 3 Supreme Court Cases 723**, (ii) **Usha Sinha Vs. Dina Ram and Ors**, reported in, **AIR 2008 Supreme Court 1997** as well as the proposition of the law laid down by 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**. The lower Appellate Court has thus, erroneously quashed and set aside the order passed by the Executing Court below Exhibit 94 and remanded the matter for hearing afresh. The impugned order is grossly illegal and therefore, the same is liable to be quashed and set aside.

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

- 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 No.1 / original objector submits that the Appellant / Decree Holder has filed RD No.19 of 2013 for execution of the decree and added Respondent No.1 as party to the said execution petition. The learned counsel submits that Respondent No.1 / original objector is the owner in possession of the suit property by way of decree passed by the Family Court and therefore, the inquiry as contemplated under Order XXI Rule 97 of the Code of Civil Procedure is necessary.

9 The learned counsel for Respondent / objector submits that Order XXI Rule 102 on which much reliance is placed by the Appellant, is deleted by way of Bombay High Court amendment dated 1st October, 1983. As the said rule is deleted, therefore, it cannot be said that the objection to the decree filed by Respondent No.1 is not maintainable. In view of the provisions of Order XXI Rule 101, whenever any objection is raised to a decree in execution under Rule 97 or 99, then all questions including questions relating

to right, title or interest will be decided by the Executing Court and not by a separate suit. The learned counsel submits that the proviso to Rule 100 is added to the Code of Civil Procedure by way of amendment and the said proviso is necessary to be read alongwith the main provisions. In view of the provisions of Order XXI Rule 100, determination of question raised by the respondent / objection petitioner is necessary. The said added proviso to Rule 100 does not bar such objection if raised at the inception. Respondent No.1 / objector is in possession of the suit property on the basis of the Court decree. The Executing Court ought to have decided such objections in the light of the provisions of Section 52 of the Transfer of Properties Act. The learned Judge of the Executing Court has committed serious error of law by rejecting the objection petition. The Executing Court ought to have decided the objection petition on merits by conducting proper inquiry. The learned District Judge has rightly observed the same and accordingly remanded the matter for hearing afresh. There is no substance in the appeal and the same is thus, liable to be dismissed.

in order to substantiate his contentions placed reliance on the following cases:

- i) **Sameer Singh and Anr Vs. Abdul Rab and Ors,**
reported in, **2014 AIR SCW 6552,**
- ii) **Shreenath and another Vs. Rajesh and others,**
reported in, **(1998) 4 Supreme Court Cases 543,**
- iii) **Pralhad Jagannath Jawale & Ors Vs. Sitabai**
Chander Nikam & Ors, reported in, **2011 (6)**
Bom.C.R. 619.

11 I have also heard the learned counsel for Respondent /
original Judgment Debtor.

12 The impugned judgment and order is contrary to the
facts and circumstances of the case, documentary evidence on
record and judicial pronouncements by the Supreme Court on this
point. On careful perusal of the contents of the application Exhibit –
94, it appears that Respondent No.1 / objector is claiming the title
and possession in respect of the suit property through the Judgment
Debtor. Pending adjudication of Second Appeal No.482 of 1991
before this Court, the Judgment Debtor alongwith his son and wife

has done overt acts for creating and recording the mutation entries in respect of the suit property. Though the basis of the mutation entry is shown as compromise effected amongst the family members of the Judgment Debtor including his son (present Respondent No.1 / objector) and the wife, the mutation entry No.3617 speaks about the partition of the land including the suit land by the Judgment Debtor. Respondent No.1 / objector is bound by the decree, in as much as, the source behind recording of the mutation entry of the suit property, is the Judgment Debtor himself. Respondent No.1 / objector by any stretch of imagination cannot be treated as a stranger to the judgment and decree in Regular Civil Suit No.45 of 1980, which has now attained the finality as per the judgment of this Court in Second Appeal No.482 of 1991 confirmed by the Supreme Court.

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

“12. The words "all questions arising between the parties to a proceeding on an application under Rule 97"

would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which the executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g., if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, execution court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.”

14 In the instant case, Respondent No.1 / objector himself demonstrated in his objection petition Exhibit – 94 that his claim to the suit property is not independent and in exclusion of the

Judgment Debtor. In the adjudication process as envisaged under Order XXI Rule 97 of the Code of Civil Procedure, the Executing Court can decide whether the question raised by the obstructionist legally arises between the party.

15 The scope of adjudication is confined to a question whether the objector was a transferee during the pendency of the litigation in which the decree was passed. Once the finding is in the affirmative, the Executing Court must hold that he has no right to resist or obstruct and such person cannot seek protection from the Executing Court. The learned Judge of the Executing Court has rightly done so.

16 In the case of *Usha Sinha Vs. Dina Ram and Ors* (supra) relied upon by the learned counsel for Appellant, the Supreme Court by referring the observations made in the case of *Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another* (supra) in agreement with the proposition of law laid down in the case of *Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another* (supra) held that 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 the 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.

In the instant case, the case of the Appellant is on better footing. Respondent No.1 / objector is bound by the decree, which has now attained the finality and he is not entitled to get his claim adjudicated.

17 In the cases of *Jagdish s/o Motilal Joshi Vs. Chandrapal s/o Tulsiram Bhola and other* (supra) and *Shivaji Vs. Jijabai Prabhakar Alwane and Ors* (supra) this Court has also taken a similar view.

18 In the case of *Bhanwar Lal Vs. Satyanarain and another* (supra) referred by the learned Judge of the lower Appellate Court in the impugned order, the objection was raised by a person, who was neither judgment-debtor nor claiming derivate title from the judgment-debtor. Similarly, in the case of *Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal* (supra) referred by the lower Appellate

Court in the impugned judgment and order, the obstruction was raised by a stranger. In the facts of the said case, the Supreme Court held that it is the duty of the Executing Court to consider the averments in the petition and consider the scope of the applicability of the relevant rule. It has been observed that if the obstruction is raised by a stranger, it cannot be said that he can get his claim adjudicated only after losing the possession. He can get his claim adjudicated even prior to losing possession to decree-holder. The impugned order passed by the lower Appellate Court thus, *ex-facie* contrary to the well settled proposition of law laid down by the Supreme Court.

19 The cases relied upon by the learned counsel for Respondent / objector referred (*supra*) and the observations made therein are in the different context and cannot be made applicable to the facts and circumstances of the present case.

20 Though the provisions of Rule 102 of Order XXI of the Code of Civil Procedure came to be deleted in its application to Bombay, the amended proviso to Rule 100 in its application to Bombay takes care of that. Rule 100 of Order XXI of the with

provision as applicable to Bombay, reads as under:

“100. 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 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.

High Court Amendment—[Bombay]—Add the following proviso to Rule 100:—

“Where it is determined that the application is made by 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.”

21 In view of the provisions of Rule 100 of Order XXI of the Code of Civil Procedure, all questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application. The Supreme Court in the case of *Silverline Forum Pvt. Ltd., Vs. Rajiv Trust and another* (supra) in para 12 of the judgment as referred above, observed that all questions arising between the parties to a

proceeding on an application under Rule 97 would envelop only such questions as would legally arise for determination between those parties. In other words, the Court is not obliged to determine a question merely because the resistor raised it. I do not find any substance in the submissions by the learned counsel on behalf of Respondent No.1 / original objector.

22 In view of the above discussion and the authoritative pronouncement of the Supreme Court on this point, I proceed to pass the following order:

ORDER

- I. The appeal from order is hereby allowed with costs.
- II. The judgment and order passed by the District Judge-5, Aurangabad dated 8th August, 2016 in Regular Civil Appeal No.201 of 2016, is hereby quashed and set aside.
- III. The order passed by 3rd Joint Civil Judge Junior Division, Paithan, District Aurangabad below Exhibit – 94 in RD No.19 of 2013 dated 30th June,

2016, 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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