



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 195 OF 2022

Sau. Shraddha W/o Satish Burghate,
Aged about 56 years,
Occu. : Housewife and Agriculturist,
R/o. 29 Samparpan Colony,
V.M.V. Road Amravati,
Tq. and Dist. - Amravati.

.... APPELLANT

// VERSUS //

- 1) Jaiprakash Mahadeoji Rinwa,
Aged about 76 years, Occu. : Service,
R/o. Satkhidi Road, Amravati,
Tq. and Dist. - Amravati.
- 2) Shri Parag Purushottam Khakare,
Aged about 48 years, Occ.- Agriculturist,
R/o. Gosavi Colony, Amravati,
Tq. and Dist. - Amravati.
- 3) Shri Thakurdas Ramchandra Zanwar,
Aged about 74 years, Occ.-Business,
R/o. Sabnura, Amravati,
Tq. and Dist. - Amravati.
- 4) Shri Ashok Ajabrao Bhilkar,
Aged about 60 years, Occ.-Service,
R/o. Ravikiran Colony, Amravati,
Tq. and Dist. - Amravati.
- 5) Shri Pramod Ajabrao Bhilkar,
Aged about 40 years, Occ.-Nil,
R/o. Ravikiran Colony, Amravati,
Tq. and Dist. - Amravati.

.... RESPONDENTS

WITH

SECOND APPEAL NO. 171 OF 2022

- 1) Sau. Kalpana Ashokrao Gulhane,
Aged about 55 years,
Occu. : Housewife and Agriculturist,
R/o. Wadgaon,
Tq. and Dist. - Yavatmal.
- 2) Sau. Nilima Satishrao Gulhane,
Aged about 50 years,
Occu. : Housewife and Agriculturist,
R/o. Vaibhav Colony, Amravati,
Tq. and Dist. - Amravati.
- 3) Smt. Shobhatai Purushottam Gulhane,
Aged about 75 years,
Occu. : Housewife and Agriculturist,
R/o. Nilkanth Chowk, Budhwara
Amravati, Tq. and Dist. Amravati.

.... APPELLANTS**// VERSUS //**

- 1) Jaiprakash Mahadeoji Rinwa,
Aged about 75 years, Occu. : Service,
R/o. Satkhidi Road, Amravati,
Tq. and Dist. - Amravati.
- 2) Parag Purushottam Khakare,
Aged about 47 years, Occ.- Agriculturist,
R/o. Gosavi Colony, Amravati,
Tq. and Dist. - Amravati.
- 3) Shri Thakurdas Ramchandra Zanwar,
Aged about 73 years, Occ.-Business,
R/o. Sabnura, Amravati,
Tq. and Dist. - Amravati.
- 4) Shri Ashok Ajabrao Bhilkar,
Aged about 60 years, Occ.-Service,
R/o. Ravikiran Colony, Amravati,
Tq. and Dist. - Amravati.

- 5) Shri Pramod Ajabrao Bhilkar,
Aged about 40 years, Occ.-Nil,
R/o. Ravikiran Colony, Amravati,
Tq. and Dist. - Amravati.

.... RESPONDENTS

In both appeals :

Mr. A. V. Bhide, Advocate for Appellants.

Mr. A. M. Sudame, Advocate for Respondent Nos.1 to 3.

CORAM : SANJAY A. DESHMUKH, J.

DATE : 17th OCTOBER, 2024.

COMMON JUDGMENT.

1. Since the subject matter of both these appeals is identical, these appeals are being disposed of through this common judgment.

2. **Admit.** Heard finally with the consent of the learned Advocates for the parties.

3. This Second Appeal No.195/2022 is preferred against the Judgment and decree passed by the District Judge-3, Amravati in Regular Civil Appeal No.147 of 2018, dated 14.01.2022. This appeal was preferred against the Judgment and decree passed by by the 3rd Joint Civil Judge, Senior Division, Amravati, in Regular Civil Suit No.256/2012 (old Spl.C.S. No.2/2012), dated 14.08.2018.

4. This Second Appeal No.171/2022 is preferred against the Judgment and decree passed by the District Judge-3, Amravati in Regular Civil Appeal No.207/2019, dated 14.01.2022. This appeal was preferred against the Judgment and decree passed by the 3rd Joint Civil Judge, Senior Division, Amravati in Regular Civil Suit No.8/2012, dated 14.10.2019.

(In Second Appeal No.195/2022)

5. Brief facts of the case are as follows :

(i) The appellant filed a Regular Civil Suit No.256/2012 (old Spl.C.S. No.2/2012) and prayed for a declaration that the sale confirmed by the Court in Special Darkhast No.2/92, dated 14.09.1994, is deemed to be cancelled against the original owner, Ajabrao Bhilkar, as he had deposited the entire amount in the Court with the permission of Court.

(ii) The defendant No.2 filed an application under Order VII Rule 11 of the Code of Civil Procedure (for short the, "CPC") for rejection of the plaint on the two grounds, that there is no cause of action, and the suit is barred as per Order XXI Rule 97 and Section 47 of the CPC.

(iii) The learned trial Court by it's order dated 14.08.2018, rejected the plaint by holding that the suit is barred in view of Rule

92(3) of Order XXI of the CPC. It is also held that the cause of action does not arise and the core relief is not claimed within the period of limitation.

(iv) The appellant, thereafter, filed the First Appeal No. 147/2018. The first appellate Court also held that the suit is barred as per Rule 92(3) of Order XXI of the CPC.

(v) The appellant in Second Appeal No.195/2022 prayed for a declaration, that respondent No.1's sale confirmation dated 14.09.1994 in execution proceeding bearing Special Darkhast No. 2/1992 is deemed to be cancelled, as the original owner, Ajabrao Bhilkar, had deposited entire amount in the Court with permission of the Court.

(In Second Appeal No.171/2022)

6. Brief facts of the case are as under :

(i) The appellant filed a Special Civil Suit No.8/2012 and prayed for a declaration that the sale confirmed by the Court in Special Darkhast No.2/92, dated 26.07.1996 and 22.06.2007, is deemed to be cancelled against the original owner, Ajabrao Bhilkar, as he had deposited the entire amount in the Court with the permission of the Court.

(ii) The defendant No.2 filed an application under Order VII Rule 11 of the CPC for rejection of the plaint on the two grounds that there is no cause of action, and the suit is barred as per Order XXI Rule 97 and Section 47 of the CPC.

(iii) The learned trial Court, by its order dated 14.10.2019, rejected the plaint, holding that the suit is barred by law in view of Rule 92(3) of Order XXI of the CPC. It had also held that the cause of action does not arise.

(iv) The appellant, thereafter, filed the First Appeal No. 207/2019. The first appellate Court also held that the suit is barred as per Rule 92(3) of Order XXI of the CPC.

(v) The appellant, in Second Appeal No.171/2022, prayed for a declaration that respondent No.1's sale confirmation dated 26.07.1996 and 22.06.2007 in execution proceeding bearing No. 2/1992 is deemed to be cancelled, as the original owner, Ajabrao Bhilkar, had deposited the entire amount in the Court with permission of the Court.

7. This Court, by order dated 04.05.2022, formed the following substantial questions of law in **Second Appeal No.195/2022** as under :

(1) Whether the lower appellate court was justified in confirming the decree of rejection of plaint, on the basis

of the contents of the written statement and other documents, when for considering the application for rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure, the contents of the plaint are only required to be seen ?

- (2) *Whether the lower appellate court found that the judgment debtor in Spl. Darkhast No.2/92 had already deposited the decretal amount of 44,445/- (Rupees Forty ₹ 44,445/- (Rupees Forty Four Thousand Four Hundred and Forty Five), during the pendency of darkhast No.2/92 i.e. on 26-4-1995 and during the pendency of C.R.A. No.6/95, in which interim stay was granted by the Hon'ble High Court, the learned judge of the lower appellate Court, ought to have allowed the Regular Civil Appeal No.147/2018 filed by the appellant?*
- (3) *Whether the learned judge of the lower appellate Court has erroneously observed in para 23 of the impugned judgment that the plaintiff has not raised the plea of fraud in the plaint, however, the appellant plaintiff had specifically raised the plea of fraud in para 12 of the plaint and had also elaborated the plea of fraud by stating that the defendant No.1 had suppressed the fact that the defendants No.4 and 5 are not in possession of the suit field?*

8. This Court, by order dated 04.05.2022, formed the following substantial questions of law in **Second Appeal No.171/2022** as under :

- (1) *Whether the learned Judge of the lower appellate Court was justified in referring to the written statement and other documents, when as per the provisions of Order 7 Rule 11 of the Code of Civil Procedure, while rejecting the plaint, only the contents of the plaint are to be seen ?*

- (2) *When the lower appellate court found that the judgment debtor in Spl.Darkhast No.2/92 had already deposited the decretal amount with the permission of the court, during the pendency of the darkhast, and during the pendency of Civil Revision Application No.6/95, in which interim stay was granted by the Hon'ble High Court, ought to have allowed the Regular Civil Appeal No. 207 of 2019 filed by the appellant ?*
- (3) *Whether the learned judge of the lower appellate court has erroneously observed in the impugned judgment that the appellants/plaintiffs had not raised a plea of fraud in the plaint, however, the appellants had specifically raised a plea of fraud in para 12 of the plaint ?”*

9. The learned Advocate Mr. A. V. Bhide for the appellants argued that in both the proceedings, the learned trial Court as well as the first appellate Court failed to consider that the plaintiffs/appellants were in possession of the suit property. The written statement and the other documents were considered by the first appellate Court while deciding the application under Order VII Rule 11 of the CPC, which is not permissible, as only the plaint is required to be considered. He further submitted that in view of the substantial question of law No.1, the appeals deserve to be allowed.

10. The learned Advocate for the appellants further submitted that the first appellate Court failed to consider that there was an interim stay granted by the High Court in C.R.A. No.91/1995

in the execution proceeding No.2/1992 by order dated 26.04.1995. However, even the amount of Rs.44,445/- was deposited by the judgment debtor, which was not considered by the first appellate Court. He further pointed out that though the plaintiffs had specifically raised the plea of fraud in the plaint in para 23, the first appellate Court did not consider this fact and held that no such fraud was pleaded.

11. The learned Advocate further submitted that the appellants are *bona fide* purchaser for value without notice. They were unaware of the execution proceedings pending in the Court against the Ajabrao Bilkar. It was argued that the appellants are in possession of the suit property. There is no such legal bar, as contemplated by Order VII Rule 11 of the CPC, to file such suit. He argued that it is not a case of *lis pendens*. A public notice was issued by the predecessor in title of the appellants while purchasing the suit property, which was not objected by the respondent No.1.

12. The learned Advocate for the appellants, further submitted that no any fact is suppressed by the plaintiffs. It was only the decree for the refund of earnest money, and upon depositing that amount by Ajabrao, the execution proceeding ought to have been

disposed of. He lastly prayed to allow both the appeals, by setting aside the impugned judgments and the decrees of the first appellate Court.

13. The learned Advocate, Mr. A. M. Sudame, for the respondents submitted a chronological events of various litigations between the parties. He submitted that Special Civil Suit No.88/1998 was filed by the Thakurdas Zanwar, against Ajabrao Bhilkar, the father of defendant Nos.4 and 5, for specific performance of contract. The said suit was partly decreed, and directions were given to Ajabrao to refund the earnest amount of Rs.21,000/- with interest @ 18%. The Thakurdas filed the execution proceeding bearing Special Darkhast No.2/1992, which was later renumbered as Regular Darkhast No.25/2001, against the judgment debtor - Ajabrao Bhilkar. A warrant of attachment of suit property was issued following the due procedure of law, and the sale proceedings were also initiated. Ajabrao appeared in the execution proceedings and prayed for grant of time to pay the decretal amount in installments. But this was rejected. An auction sale was conducted on 29.06.1994, where the respondent No.1 purchased the property as the highest bidder and deposited amount of sale in the Court, and the sale was confirmed by the Court in favour of respondent No.1. The decree-holder withdrew

the entire decretal amount of Rs.91,000/- from the Court. Meanwhile, Ajabrao filed C.R.A. No.6/1995 on 10.01.1995, in which this Court issued notices and granted a stay on the execution proceedings. However, prior to that, the sale has already been confirmed in favour of respondent No.1 on 14.09.1994. Ajabrao was directed to deposit decretal amount to show his *bona fide* within four weeks, but he did not deposit the said amount. But this was after the sale had already been confirmed. The learned Advocate for the respondents, pointed out that Ajabrao, neither objected nor paid to set aside the sale confirmed in favour of respondent No.1.

14. The learned Advocate for the respondents submitted that the appellant purchased the suit property from one Prabhakar Burghate by sale-deed dated 22.06.2007, and Prabhakar had purchased the suit property by sale-deed dated 26.07.1996. He submitted that after the confirmation of sale by the executing Court, Ajabrao committed a legal mischief. Ajabrao later passed away on 18.11.2011 and on 26.11.2011, the execution proceedings were finally satisfied and disposed of.

15. The learned Advocate for the respondents further argued that the plaintiff claimed that, she came to know about the execution

proceedings on 26.12.2011, but she did not take any action regarding that execution proceedings. On 02.01.2012, the plaintiff filed a suit with a factitious cause of action. The learned Advocate for the respondents, therefore submitted that both the Courts, by their concurrent findings, rightly rejected the claim as contemplated under Rule 11 of Order VII of the CPC. There is a concurrent finding of fact as well as law, leaving no scope for interference with the impugned judgment and decree.

16. As far as substantial questions of law are concerned, the learned Advocate for the respondents submitted that no substantial questions of law arises for determination, though questions of law have been framed. The respondents cannot suffer due to the mischief of the Court and the consideration of the written statement and other documents. From a bare reading of the plaint, the suits filed by the plaintiffs are barred, and therefore, the plaints were rightly rejected. The raising of plea of fraud in the plaint is also not helpful to the appellants as the suit itself is barred by law, as held by both the Courts.

17. The learned Advocate for the respondents is relying upon the following authorities :

(i) ***Usha Sinha Vs. Dina Ram & Ors.***, reported in ***AIR 2006***

SC 1997, para 12 and 13 reads as under :

“12. Bare reading of the rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases the property which is the subject matter of litigation. It recognizes the doctrine of lis pendens recognized by Section 52 of the Transfer of Property Act, 1882. Rule 102 of Order XXI of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree. Every time the decree holder seeks a direction from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction. To avoid such a situation, the rule has been enacted.

13. Before one and half century, in Bellamy v. Sabine, (1857) 1 DG & J 566 : 44 ER 847, Lord Cranwoth, L.C. proclaimed that where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigating parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end.”

(ii) ***Pattam Khader Khan Vs. Pattam Sardar Khan & Anr.,***

reported in ***1996 AIR SCW 3984***, para 11 reads as under :

“11. Order 21 Rule 95 providing for the procedure for delivery of property in occupation of the judgment-debtor etc, requires an application being made by the purchaser for delivery of possession of property in respect of which a certificate has been granted under Rule 94 of Order 21. There is nothing in Rule 95 to make it incumbent for the purchaser to file the certificate along with the application. On the sale becoming absolute, it is obligatory on the Court though; to issue the certificate. That may, for any reason get delayed. Whether there be failure to issue the certificate or delay of action on behalf of the Court or the inaction of the purchaser in completing the legal requirements and formalities, are factors which have no bearing on the limitation prescribed for the application under Article 134. The purchaser cannot seek to extend the limitation on the ground that the certificate has not been issued. It is true though that order for delivery of possession cannot be passed unless sale certificate stands issued. It is manifest therefore that the issue of sale certificate is not “sine qua non” of the application, since both these matters are with the same Court. The starting point of limitation for the application being the date when the sale becomes absolute i. e. the date on which title passed, the evidence of title, in the form of sale certificate, due from the Court, could always be supplied later to the Court to satisfy the requirements of Order 21 Rule 95. See in this regard Babulal Vs. Annapurnabai - AIR 1953 Nagpur 215, which is a pointer. It therefore becomes clear that the title of the Court auction-purchaser becomes complete on the confirmation of the sale under Order 21, Rule 92, and by virtue of the thrust of Section 65 CPC, the property vests in the purchaser from the date of sale; the certificate of sale, by itself, not creating any title but merely evidence thereof. The sale certificate rather is a

formal acknowledgment of a fact already accomplished, stating as to what stood sold. Such act of the Court is prestinely a ministerial one and not judicial. It is in the nature of a formalisation of the obvious.”

(iii) ***Dahiben Vs. Arvinbhai Kalyanji Bhanusali (Gajra) Dead through LR. & Ors.***, reported in ***(2020) 7 SCC 366***, para 23.15 read as under :

“23.15. The provision of Order VII Rule 11 is mandatory in nature. It states that the plaint “shall” be rejected if any of the grounds specified in clause (a) to (e) are made out. If the Court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the Court has no option, but to reject the plaint.”

(iv) ***Rajendra Bajoria & Ors., Vs. Hemant Kumar Jalan & Ors.***, reported in ***(2022) 12 SCC 641***, para 20 reads as under :

“20. It could thus be seen that this Court has held that the power conferred on the court to terminate a civil action is a drastic one, and the conditions enumerated under Order VII Rule 11 CPC are required to be strictly adhered to. However, under Order VII Rule 11 CPC, the duty is cast upon the court to determine whether the plaint discloses a cause of action, by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law. This Court has held that the underlying object of Order VII Rule 11 CPC is that when a plaint does not disclose a cause of action, the court would not permit the plaintiff to unnecessarily protract the proceedings. It has been held that in such a case, it will be necessary to put an end to the sham litigation so that further judicial time is not wasted.”

18. The learned Advocate for the respondents, lastly prays to dismiss both the appeals as there is no substantial questions of law to decide.

19. As far as the judgment of first appellate Court with regard to the substantial question of law No.1 is concerned, from the consideration of the plaint itself reveal two things that the cause of action did not arise for filing the suit, as can be seen from the averments in the plaint, and that no specific incident is pointed out for occurrence of cause of action. As far as the second substantial question of law is concerned, it pertains to the interim stay granted by the High Court, and leave was granted to Ajabrao to deposit the amount under the decree to show his *bona fides*. He deposited that amount, but he did not proceed further for the cancellation of the sale. He also did not act as per Order XXI Rule 90 of the CPC to challenge the said auction sale. Thus, an equally efficacious remedy was available to the purchaser, Prabhakar Burghate. However, all of this occurred after the sale confirmation order was passed by the executing Court on 14.09.1994, as revealed by the sale-deed of Prabhakar dated 26.07.1996.

20. The question of passing of title as per Section 54 of the Transfer of Property Act, 1882 has a bearing on the execution proceedings regarding the suit property. Though the matter does not come within the purview of *lis pendens*, once the Court confirmed the sale in favour of respondent No.1, and Prabhakar Burghate purchased the suit property after that on 26.07.1996, no title is passed to him. As per the principle of “*Nemo dat quod non habet*” means “no one can give what he does not have”. Prabhakar Burghate did not have the title to sale the suit property. Therefore, the present appellants also have no title after purchase of the suit property by the sale-deed dated 22.06.2007 from him. Thus, Ajabrao lost his title, Prabhakar did not have title, as the sale was confirmed by the executing Court in favour of respondent No.1. If this aspects are considered, along with the allegations of dispossession in the execution proceedings, on 26.11.2011, there was ample opportunity for Ajabrao Bhilkar, Prabhakar Burghate, and the present plaintiffs to challenge the said auction sale, which was legalized in favour of respondent No.1. In such fact situation, the question of pleading, as well as considering the written-statement and allowing to deposit of the amount of consideration, are not truly questions of law to be determined by this Court. There are concurrent findings of both the Courts on the facts as well as the law. No illegality or perversity is

pointed out in the impugned judgments and orders of the executing Court. There is absolutely no scope for interference in the impugned judgments. As per law laid down by the Hon'ble Supreme Court in the case of ***Gurnam Singh (Dead) by legal representative and others Vs. Lehna Singh (Dead) by legal representatives***, reported in ***(2019) 7 SCC 641***, unless illegality or perversity is pointed out, no question of law arises for determination.

21. In view of the factual and legal aspects discussed above, this Court finds no substantial questions of law arise for determination, and the appellants cannot take advantage of any procedural error committed by the first appellate Court, such as consideration of written-statement and other documents etc. as held by the Hon'ble Supreme Court in the case of ***D. Purushottam Reddy Vs. K. Sateesh***, reported in ***AIR 2008 SC 505***, in which it is held that no person/party shall be prejudiced by the act of the Court, as per principle of "*Actus curiae neminem gravabit*". Considering all these aspects, the answer to the substantial questions of law Nos. 1 to 3 is that those questions can not arise for consideration as per Rule 5 of Section 100 of the CPC, as per the argument of learned Advocate for respondent that no such question involved.

22. The appellants are have no merit, and the appeals deserve to be dismissed. The appellants have compelled the respondents to face the appeal. The respondents have incurred some expenses for facing the appeal, and they must be compensated by awarding costs of Rs.10,000/- in each of the appeal. Hence following order :

- (i) Both the appeals are **dismissed**.
- (ii) The appellants are directed to pay the costs of **Rs.10,000/-** (Rs. Ten thousand only) to the respondents in each of the appeal within three months. If the costs are not paid within three months from today, the appellants must pay 9% interest on the said amount until the realization of entire amount.

(SANJAY A. DESHMUKH, J.)

The learned Advocate for the appellants submitted to continue the interim stay granted by this Court during the pendency of these appeals. He submits that he has to approach the Hon'ble Supreme Court.

The learned Advocate for the respondents strongly objected and submitted that already the respondents are facing these appeals without any justification either on law or fact.

The learned Advocate for the appellants submitted that their possession is protected by granting an injunction vide order dated 04.05.2022, in Civil Application No.494/2022, in Second

Appeal No.195/2022, and Civil Application No.497/2022, in Second Appeal No.171/2022, by this Court. Now, this Court has held that respondent No.1 has got the title to the suit property and as per the principle/presumption that title follows possession, no such relief can be continued. The prayer of learned Advocate for the appellants is, therefore, rejected.

(SANJAY A. DESHMUKH, J.)

Kirtak