

## Kusum Srivastav Vs Rekha Jiwaani

**Court:** Allahabad High Court (Lucknow Bench)

**Date of Decision:** Aug. 8, 2014

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 1 Rule 10, Order 1 Rule 10(2), Order 22 Rule 10, 146  
Transfer of Property Act, 1882 â€” Section 52

**Citation:** (2014) 7 ADJ 250

**Hon'ble Judges:** Ram Surat Ram (Maurya), J

**Bench:** Single Bench

**Advocate:** Santosh Kumar Mehrotra and Ishwar Dutt Shukla, Advocate for the Appellant; Manish Kumar and R.K. Srivastav, Advocate for the Respondent

**Final Decision:** Dismissed

### Judgement

Ram Surat Ram (Maurya), J.

Heard Sri S.K. Mehrotra, for the petitioner and Sri R.K. Srivastav, for respondent-9.

2. The writ petition has been filed against the orders of Civil Judge (Senior Division), Court No. 15, Faizabad dated 17.12.2013, allowing the

application of respondent-9 for his impleadment as defendant in O.S. No. 392 of 2009 filed by the petitioner and District Judge, Faizabad dated

17.12.2013, dismissing the revision of the petitioner, from aforesaid order.

3. Smt. Kusum Srivastav (the petitioner) filed a suit (registered as O.S. No. 392 of 2009), for declaration of her title over house No. 3/1/170,

situated at mohalla Rikabganj, Faizabad and for permanent injunction, restraining Smt. Rekha Jiwaani and others (respondents-1 to 8) from

interfering in her possession over the aforesaid house. It is alleged by the petitioner that after service of summons, the defendants appeared before

Trial Court and filed written statement. Thereafter, issues have been framed. In the meantime, the petitioner filed an application for amendment of

the plaint as such evidence was not started.

4. During pendency of the suit Rajiv Kumar, Ashish Kumar, Vishnu Kumar and Smt. Kishori Srivastav for herself and for Anil Kumar through his

general power of attorney, (respondents-4 to 7) executed a sale deed dated 20.03.2013 in respect of northern half portion of the house in dispute

in favour of Mohd. Zia-ur-rahman (respondent-9). Respondent-9 filed an application (73-C) for his impleadment in the suit as the defendant. The

petitioner filed an objection in the impleadment application and stated that defendants-4 to 8 had nothing to do with house in dispute. On the basis

of sale deed executed by defendants-4 to 8, Mohd. Zia-ur-rahman has neither become owner nor was given possession over the house in dispute.

Defendants-4 to 8 did not take leave of the Court for executing sale deed dated 20.03.2013 in favour of respondent-9 as such he has no legal

right for being impleaded as the defendant in the suit. He is neither necessary nor proper party as such the impleadment application was liable to be

rejected.

5. Trial Court after hearing the parties, by order dated 20.09.2013 held that Mohd. Zia-ur-rahman purchased the house in dispute from

defendants-4 to 8 through sale deed dated 20.03.2013, as such he is necessary party in the suit. Evidence in the suit has not started as such his

impleadment will not cause any prejudice to the plaintiff. On these findings impleadment application was allowed. The petitioner filed a revision

(registered as Civil Revision No. 126 of 2013) from the aforesaid order. The revision was heard by District Judge, Faizabad, who by order dated

17.12.2013, held that as on the basis of sale deed dated 20.09.2013 interest in the property in dispute has been created in favour of Mohd. Zia-

ur-rahman as such he is entitled to contest the suit. Order of the trial court does not suffer from any illegality. On these findings, the revision was

dismissed. Hence this writ petition has been filed.

6. The counsel for the petitioner submitted that Section 52 of Transfer of Property Act, 1882 operates as an injunction and restrains the litigants of

pending litigation from transferring the subject matter of suit. Any transfer of subject matter of suit without leave of the Court is void. On its basis,

transferee pendente-lite has no right to be impleaded in the suit. Section 52 is based upon public policy to save time of Court and unnecessary

harassment of the parties as there may several transfers one after others. The plaintiff is a dominus litis and is not obliged to implead transferee

pendente-lite in the suit. The impleadment application has been illegally allowed. He relied upon the judgment of Chief Court Oudh, in AIR 1935

486 (Oudh) in which during pendency of suit, Deputy Commissioner was appointed as the manager of the subject matter of the suit under U.P.

Court of Ward Act. The Court rejected his application for impleadment in the suit under Order 22 Rule 10 C.P.C. Judgment of Supreme Court in

Dev Raj Dogra and others Vs. Gyan Chand Jain and others, in which it has been held that subject matter of the suit cannot be transferred so as to

affect the right of other party except under the authority of the Court and Section 52 of Transfer of Property Act, 1882 imposes a prohibition on

transfer. Sanjay Verma Vs. Manik Roy and Others, in which it has been held that it would, therefore, be clear that the defendants in the suit were

prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the

appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of

those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendence by operation of Section 52. Under these

circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit." Jagan Singh (Dead) through L.Rs. Vs.

Dhanwanti and Another, in which it has been held that it would plainly be impossible that any action or suit could be brought to a successful

termination if alienations pendente-lite were permitted to prevail. The Explanation to this section lays down that the pendency of a suit or a

proceeding shall be deemed to continue until the suit or a proceeding is disposed of by a final decree or order, and complete satisfaction or

discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed

for the execution thereof by any law for the time being in force. Vidur Impex and Traders Pvt. Ltd. and Others Vs. Tosh Apartments Pvt. Ltd. and

Others, in which it has been held that the agreements for sale and the sale deeds were executed by respondent 2 in favour of the appellants in a

clandestine manner and in violation of the injunction granted by the High Court. Therefore, it cannot be said that any valid title or interest has been

acquired by the appellants because they are claiming right on the basis of transactions made in defiance of the restraint order passed by the High

Court. Therefore, their presence is neither required to decide the controversy involved in the suit filed by respondent 1 nor required to pass an

effective decree. Division Bench Judgment of this Court in Shahzad Ahmad Khan and Others Vs. Mohd. Ahmad and Others, , in which it has been

held that in view of Section 52 of Transfer of Property Act, 1882, no valid transfer can be made during pendency of the suit without leave of the

Court and such a transferee is neither proper nor necessary party and cannot be impleaded and Shyoraj Singh and Others Vs. Zahir Ahmad and

Others, in which it has been held that sale deed executed during pendency of the suit is void.

7. I have considered the arguments of the counsel for the parties and examined the record. In order to appreciate arguments of the parties, relevant

provisions of Transfer of Property Act, 1882 and Civil Procedure Code, 1908 are quoted below:-

52. Transfer of property pending suit relating thereto.-- During the pendency in any Court having authority within the limits of India excluding the

State of Jammu and Kashmir or 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, the property cannot be transferred or otherwise dealt with by any

party to the suit or proceeding so as to affect the rights of any other party thereto 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.

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

presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has

been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become

unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

146. Proceedings by or against representatives.-- Save as otherwise provided by this Code or by any law for the time being in force, where any

proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or

against any person claiming under him.

Order I Rule 10. Suit in name of wrong plaintiff.--(1).....

(2) Court may strike out or add parties.--The Court may at any stage of the proceedings, either upon or without the application of either party, and

on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be

struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court

may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be

added.

Order 22 Rule 10. Procedure in case of assignment before final order in suit.-- (1) In other cases of an assignment, creation or devolution of any

interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has

come or devolved.

8. Section 52 of Transfer of Property Act, 1882 safeguard the right of the litigant from pendente-lite transfer. However it does not impose a

complete prohibition of the transfer of subject matter of the suit as the Court is given jurisdiction to grant leave to transfer. The Court has been

empowered to have the control over the subject matter of the suit so that decree obtained by successful party would not be defeated by pendente-

lite transfer. In Dev Raj Dogra"s case (supra), relied upon by the counsel for the petitioner, it has been held that subject matter of the suit cannot

be transferred so as to affect the right of other party except under the authority of the Court. In this case Supreme Court has nowhere held that

such a sale deed is void. The issue in this respect came for consideration before a bench of three Hon"ble Judges of Supreme Court in Jayaram

Mudaliar Vs. Ayyaswami and Others, in which it was held that expositions of the doctrine of lis pendence indicate that the need for it arises from

the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove

any part of the subject-matter outside the power of the court to deal with it and thus make the proceedings infructuous. The purpose of Section 52

of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing

with the property to which claims are put forward. Supreme Court again in Hardev Singh Vs. Gurmail Singh (Dead) by LRs., held that Section 52

of the Transfer of Property Act, 1882 merely prohibits a transfer. It does not state that the same would result in an illegality. Only the purchaser

during the pendency of a suit would be bound by the result of the litigation. The transaction, therefore, was not rendered void and/or of no effect.

Same view has been taken in T.G. Ashok Kumar Vs. Govindammal and Another, and Thomson Press (India) Ltd. Vs. Nanak Builders and

Investors P. Ltd. and Others, In view of authoritative pronouncements of Supreme Court, contrary view taken by High Court are not good law

and have no binding effect.

9. A Bench of four Hon"ble Judges of Supreme Court in Saila Bala Dassi Vs. Sm. Nirmla Sundari Dassi and Another, held that Section 146 was

introduced for the first time in the Civil Procedure Code, 1908 with the object of facilitating the exercise of rights by persons in whom they come to

be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a

restricted or technical sense. The right to file an appeal must therefore be held to carry with it the right to continue an appeal which had been filed

by the person under whom the applicant claims, and the petition of the appellant to be brought on record as an appellant in Appeal No. 152 of

1955 must be held to be maintainable u/s 146.

10. Supreme Court in Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, held that the plain language of Order 22 Rule 10 C.P.C.

does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued

by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a

case where interest of the defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either

eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court

has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of a party to the suit has devolved during

its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for

him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply

for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or

with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his

interest may be properly represented as the original party, if it ceased to have an interest in the subject-matter of dispute by virtue of devolution of

interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If the

submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from

challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of

dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Similar view are taken by Supreme Court

in Raj Kumar Vs. Sardari Lal and Others,

11. Supreme Court in Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, held that a transferee pendente lite to the extent he has

acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having

no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no

obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed,

the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to

protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the

party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is

made a party to the litigation; he is entitled to be heard in the matter on the merits of the case. This judgment has again been followed in Thomson

Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others,

12. So far as the provisions of Order 1 Rule 10(2) C.P.C. on one hand and Section 146 and Order 22 Rule 10 C.P.C. on the other hand are

concerned, there is a basic difference between two provisions. While deciding an application under Order 1 Rule 10(2) C.P.C., the Court is

required to record a finding that person sought to be impleaded as party in the suit is either necessary or proper party. While Section 146 and

Order 22 Rule 10 C.P.C. confers right upon the legal representative of a party to the suit to be impleaded with the leave of the Court and continue

the litigation. While deciding an application u/s 146 and Order 22 Rule 10 C.P.C., the Court is not required to go in the controversy as to whether

person sought to be impleaded as party in the suit is either necessary or proper party. If the person sought to be impleaded as party is legal

representative of a party to the suit, it is sufficient for the Court to order impleadment/substitution of such person. Thus the case law relied upon by

the counsel for the petitioners under Order 1 Rule 10 C.P.C. has no application.

13. Thus in view of judgment of Supreme Court in Jayaram Mudaliar's case (supra) that purpose of Section 52 of the Transfer of Property Act is

not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims

are put forward and such a transfer is not void and in view of judgment of Supreme Court in Saila Bala Dassi's case (supra) holding that the object

of Section 146 is to facilitate the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent

provision should be construed liberally and so as to advance justice and not in a restricted or technical sense, the orders of Courts below allowing

application of respondent-9 for impleadment as defendant in the suit do not suffer from any illegality.

14. In view of the aforesaid discussions, the writ petition has no merit and is dismissed.