

## Shivaji Vs Jijabai Prabhakar Alwane and Others

**Court:** Bombay High Court (Aurangabad Bench)

**Date of Decision:** Oct. 21, 2015

**Acts Referred:** Civil Procedure Code, 1908 (CPC) - Order 1 Rule 1, Order 1 Rule 10(2), Order 1 Rule 9, Order 21 Rule 101, Order 21 Rule 102

Registration Act, 1908 - Section 18

Specific Relief Act, 1963 - Section 16(c), 19, 19(2), 19(b), 20

Transfer of Property Act, 1882 - Section 52

**Hon'ble Judges:** T.V. Nalawade, J.

**Bench:** Single Bench

**Advocate:** V.J. Dixit, Senior Counsel instructed by Ashutosh Kulkarni, Advocate, for the Appellant

**Final Decision:** Dismissed

### Judgement

@JUDGMENTTAG-ORDER

T.V. Nalawade, J.

The appeal is filed to challenge the judgment and order of Regular Civil Appeal No. 17/2015 which was pending in the

Court of the District Judge-1 Vaijapur and also to challenge the order made on Exhibit 42 in Special Darkhast No. 30/2013 which was pending in

the Court of the Civil Judge, Senior Division, Vaijpur. The execution proceeding is filed by the present respondent, original plaintiff of Special Civil

Suit No. 401 of 2007 which was filed for relief of specific performance of contract of sale of immovable property. The decree is given in favour of

the plaintiff and the decision has become final. By filing application at Exhibit 42 in execution proceeding, present appellant, objection petitioner,

contended that he has purchased the suit property for valuable consideration and without notice and so he is entitled to keep the possession. The

executing Court has rejected the application by holding that in view of Rule 99 of Order 21 of Civil Procedure Code and Rule 101 of the same

Order, the application is not tenable as it is not the contention that he is dispossessed. The First Appellate Court has held that as the application

itself is not decided on merit and it is held that the application of the objection petitioner was not tenable, the appeal cannot be entertained.

2. The learned Senior Counsel for the appellant submitted that both the Courts have committed error. He submitted that in view of law settled, the

application of the objection petitioner is tenable under provision of Order 21 Rule 97 of the Civil Procedure Code. He placed reliance on a case

reported as Shreenath and Another Vs. Rajesh and Others, . The words ""any person"" used in Rule 97 are considered and interpretation is made

by the Apex Court that words "any person" may be either the person bound by the decree, the person claiming title through judgment debtor or

claiming independent right of his own including a tenant not party to the suit or even a stranger. The facts of the said case were totally different and

it was noticed that the tenant was already in possession, before institution of the suit. In view of that circumstance, his right to continue the

possession was required to be considered. It was held that said person was in possession in his own right and he was not representing the

judgment debtor's interests. There cannot be dispute over this proposition. Following reported cases on this point were also cited.

(i) Sameer Singh Vs. Abdul Rab, ;

(ii) N.S.S. Narayana Sarma and Others Vs. Goldstone Exports (P) Ltd. and Others, ;

(iii) Sharad Gajanan Ambole and Others Vs. Gauramma Kumarappa Medar and Others, ;

(iv) 1980 Bom.C.R. 140 (Sitaram v. Laxman);

(v) Pralhad Jaganath Jawale and Others Vs. Sau. Sitabai Chander Nikam and Others, .

3. The learned Senior Counsel for the appellant, objection petitioner, submitted that the objection petitioner is a bona fide purchaser and so his

objection is in independent right and he is not representing the interests of the judgment debtor. He submitted that there is Bombay Amendment to

section 52 of the Transfer of Property Act, 1882 and some procedure is required to be followed like registration of the suit and as that procedure

was not followed, the appellant, objection petitioner, has right to say that he is bona fide purchaser. He submitted that due to Bombay Amendment

to rule 102 of Order 21 of the Civil Procedure Code, this rule cannot be used against the objection petitioner who has purchased the property

pendente lite and his application needs to be considered and decided on merit under provisions of Rule 97 and Rule 98 of Order 21 of the Civil

Procedure Code.

4. The learned counsel for the decree holder, respondent, submitted that this Court had occasion to consider the defence taken by the present

appellant in the case reported as Murlidhar Vaidya and Another Vs. Nababbi Yousufkhan, deceased through legal heirs and Others, . He placed

reliance on the following observations made by this Court :-

The amended provision of S.52 of T.P. Act as amended by Acts of 1939 and 1959 is not applicable unless and until the notification is issued by

the Government as provided in proviso to Sec. 2 of Act of 1939 and as there is no notification issued, when the transaction in question has taken

place in 1969, the question of lis pendens will have to be considered as per the provisions of the Central Act and not as per the provisions of the

Bombay Amended Act of Transfer of Property Act. Under the Central Act, it is not necessary to register the lis pendens under section 18 of the

Registration Act or under any other Act and, therefore, the purchase of the suit land by the purchasers, while the tenancy proceedings were

pending, are affected by the principle of lis pendens.

5. This Court had referred a Supreme Court case for making the aforesaid observations. The learned Senior Counsel tried to say that the Bombay

Amendment was made applicable on 14-10-1959 itself. The amendment is as follows :-

(1) The Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939 (Bom. XIV of 1939) shall apply to notices in respect

of suits or proceedings which relate to immovable properties situate wholly or partly in the Greater Bombay with effect from such date as may be

directed by the State Government in this behalf by notification in the Official Gazette :

Provided that the State Government may, by similar notification, direct that the provisions of the said Act shall apply to such notices relating to

immovable properties situate wholly or partly in such other area as may be specified in the said notification.

(2) Section 52 shall be renumbered as sub-section (1) of that section, and

(i) In sub-section (1) so renumbered after the word "question", the words and figures ""if a notice of the pendency of such suit or proceeding is

registered under Sec. 18 of the Indian Registration Act, 1908", and after the word "property" where it occurs for the second time the words "after

the notice is so registered", shall be inserted; and

(ii) after the said sub-section (1) so renumbered the following shall be inserted, namely :

(2) Every notice of pendency of a suit or a 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 properties 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"".

(3) The provision of the Transfer of Property Act and the Indian Registration (Bombay Amendment) Act, 1939 (Bom. XIV of 1939) which amend

the Transfer of Property Act, 1882, in its application to the pre-reorganisation State of Bombay are hereby extended to, and shall be in force in,

that part of the State of Bombay to which they did not extend immediately before the commencement of this Act [namely, the Transfer of Property

(Bombay Provision for Uniformity and Amendment) Act, 1959], and the Transfer of Property Act, 1882 shall, from the commencement of this

Act, be deemed to be amended accordingly also in that part of the State.

6. Sufficient time was given to the learned Senior Counsel for the appellant, objection petitioner, to produce the said notification but he could not

produce such notification. In view of this circumstance, the Central Law as it is needs to be applied to the present case.

7. The learned Senior Counsel for the appellant placed reliance on one more reported case like Shrikrushna Narayan Tupkari Vs. Mahadeo and

Smt. Priyawanda, . In that case this Court has considered the provisions of Sections 16(c) and 20 of the Specific Relief Act, Section 52 of the

Transfer of Property Act and Order 1 Rule 1 of the Civil Procedure Code. The purchaser pendente lite had applied for permission to join the suit

as defendant and the suit was filed for relief of specific performance of contract of sale of immovable property. This Court had held that the petition

ought to have been allowed and the purchaser ought to have been joined as a defendant in the suit. It needs to be mentioned that provision of

Section 19 of the Specific Relief Act is not touched and similarly the other provisions like Order 1, Rule 9 of the CPC were also not considered.

8. Before considering the relevant provisions, relevant facts need to be quoted. The decree of specific performance of contract of sale of

immovable property was given by the trial Court on 15-7-2008. The decree holder filed execution proceeding and in the execution proceeding

notice was given to judgment debtor (J.D.) for execution of the sale deed in December 2009. It was represented in the executing Court by J.D.

that appeal was filed and even copy of appeal memo was produced. Due to such representation no progress was made in the matter. It was a

special suit and so first appeal ought to have been filed in the High Court. Judges of the subordinate Courts are generally reluctant to pass orders

when statement is made that proceeding is filed in High Court even when there is no specific order of stay to the execution. The judgment debtor

then executed a gift deed in favour of his daughter on 16-12-2011. Then present appellant, objection petitioner purchased this property under a

sale deed on 7-2-2014 from the daughter of the judgment debtor. When under the agreement of sale, judgment debtor had agreed to sell the

property to decree holder, for consideration of Rs. 44,00,000/- in the year 1998, the present appellant, objection petitioner purchased the

property from daughter of judgment debtor for consideration of Rs. 22,00,000/-. In execution proceeding, the remaining part of consideration was

already deposited by the decree holder and most of the consideration was already paid. Only after that notice for execution of sale deed was

issued to the judgment debtor in the year 2009. The judgment debtor then filed the proceeding like Civil Application No. 4036 of 2014 in this

Court with appeal and she prayed for condonation of delay of 1955 days caused in filing the first appeal. This court rejected the application by

making following observations :

4. Relevant record like copies of the application filed before the executing court are produced. They show that after appearance in the execution

proceeding, application was filed for taking objection to the execution proceeding on 29.6.2010 by one counsel and he had contended in the said

objection application that decree was challenged before the Superior Court. It is the case of the applicant that the same counsel had prepared a

draft of delay condonation application. Copy of the said draft is produced on record and date mentioned therein is 7.1.2009. It can be said either

false record is created or false statement was made before the executing court in objection dated 29.6.2010. The case of the applicant that after

getting certified copy of the judgment and decree on 2.9.2008 the matter was handed over to one counsel for filing appeal but he did not file

appeal, has no support of anything. Even the name of the said counsel is not given. Thus, there is no record whatsoever with the applicant to show

that from 2.9.2008 at least till 7.1.2009 she had taken some steps for filing the appeal. One counsel had appeared in the execution proceeding and

had informed that appeal is filed in this Court by the applicant. The applicant has blamed that counsel also. There is no advocate before this court

to take the blame. There are only one sided allegations made by the present applicant. For filing appeal, the court fee is required to be paid which

is around Rs. 3.00 lac and there is no record to show that such arrangement was made by the applicant and then the matter was handed over to

the counsel. There is virtually nothing with the applicant to show that there was sufficient cause for not filing appeal in time.

9. The aforesaid circumstances show that on one hand the judgment debtor had created record of gift deed in favour of his daughter and from said

daughter present appellant had purchased the property and on the other hand in the year 2014 the same judgment debtor tried to file appeal in this

Court. It can be said that these are all tactics to create complication in the matter and even the appellant knew every thing. Till the year 2014, till

the decision of Civil Application No. 4036/2014 (decided on 1-8-2014), the appellant did not come forward and he tried to create complication

through judgment debtor. Only after rejection of the civil application, the appellant came forward and filed the objection petition. These

circumstances cannot be ignored though they may not be relevant for the present purpose and they may be relevant for deciding the matter on

merit. These circumstances show as to what extent the parties to the litigation are going and they are playing fraud even against Courts.

10. For ascertaining as to whether the appellant has any right which is independent of the judgment debtor and as to whether he can assert that he

has such independent right and whether that case can be considered under the provision of Order 21 Rule 97 of the Civil Procedure Code, some

relevant provisions need to be considered.

11. Provision of Order 1 Rule 9 of the CPC runs as under :

9. Misjoinder and non-joinder.--No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit

deal with the matter in controversy so far as regards the rights and interests of the parties actually before it :

Provided that nothing in this rule shall apply to non-joinder of a necessary party.

12. This provision shows that court may deal with the matter in controversy so far as the rights and interests of the parties before it are concerned,

and if the decree given in the matter can be effective without inclusion of third party.

13. The provision of Section 19(b) of the Specific Relief Act, 1963 runs as under :

19. Relief against parties and persons claiming under them by subsequent title.--Except as otherwise provided by this Chapter, specific

performance of a contract may be enforced against-

(a).....

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in

good faith and without notice of the original contract.

This provision has no reference to pending litigation and it shows that unless and until the transaction of nature mentioned in section 19(b) has taken

place it is not necessary for the plaintiff to make the purchaser party to the suit. In other words this provision shows that when one person has

made two different agreements in respect of the same subsequent matter, the agreement earlier in point of time must prevail and if the property is

not actually transferred, it is irrelevant that subsequent promisee had no notice of the prior agreement. In one way the provision of section 19 is

enabling provision and that is in favour of the plaintiff, the party in whose favour the agreement is made first in time. If there is one more subsequent

agreement, the plaintiff may choose to make the other person also party to the suit but when there is transfer for value and the defence of purchaser

in good faith and without notice may be available to the transferee, then it is desirable for the plaintiff to join the transferee as a party defendant to

the suit. In absence of such transferee the decree cannot be effective.

14. The provision of Order 1 Rule 10(2) CPC runs as under :-

10(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.

This provision shows that after institution of the suit no person can be allowed to be added, joined as defendant other than one who comes under

this provision i.e. who ought to have been joined as necessary party, or without whose presence the questions in the suit cannot be completely

decided. This provision needs to be read with the provision of section 19(b) of the Specific Relief Act and so after filing of the suit, if transferee

wants to join as a defendant as his transfer was prior to the date of suit, the Court is expected to allow such transferee to join as a defendant.

15. The provision of section 52 of the Transfer of Property, Act 1882 runs as under :

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 proceedings 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.

16. It is already observed that the Bombay Amendment cannot be read in the present matter. Law is settled that principle underlining section 52 of

the Transfer of Property Act, 1882 is that litigating party is exempted from taking notice of a title acquired during the pendency of the litigation.

Though pending of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit, the provision

shows that the alienation will in no manner affect rights of the other party under any decree which may be passed in the suit unless the property was

alienated with the permission of the Court. If doctrine of lis pendens is not applied the object of the suit, action, will itself will be defeated. The rule

is made on the ground of expediency and not on doctrine of notice.

17. The party to whom the immovable property is transferred during pendency of litigation becomes representative in interest of the vendor. Law is

settled that doctrine of lis pendens applies to the suit filed for specific performance of contract of sale of immovable property.

18. The provision of Order 21 Rule 97 of the CPC runs as under :-

97. Resistance or obstruction to possession of immovable property.--(1) Where the holder of a decree for the possession of immovable property

or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person obtaining possession of the property,

he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions

herein contained.

19. It is settled law that the person who has right, independent of the judgment debtor, can also file application under the same rule for getting

adjudication of the dispute. As the purchaser of property pendent lite represents the interests of the vendor, it needs to be presumed that he is

claiming the right under the judgment debtor. As he is representing the judgment debtor, he cannot call upon the Court to decide his objection in

view of the provision of section 52 of the Transfer of Property Act. Rights of purchaser pendente lite are subject to the decree and so such

transferee is bound by the decree. Thus the decree can be enforced against purchaser pendente lite.

20. It is already observed that provision of section 19(2) of the Specific Relief Act contemplates transfer subject to the original contract but it does

not contemplate transfer pendente lite. Section 19(2) does not cover the case where the suit is filed before transfer and so in such suit, or, for that

matter, the execution proceeding, there is no question of consideration of so called rights of transferee pendente lite.

21. In the present matter attempt was made to create complications by judgment debtor. He first created a show of transfer of property to his

daughter under a gift document and then present appellant got executed sale deed in his favour. These things cannot change the fate of the matter in

view of the discussion already made. In the case of Shreenath (cited supra) the Apex Court has discussed the nature of dispute which can be dealt

with under provision of Order 21 Rule 97 of the CPC and it is made clear that unless and until the person who is objecting to the execution has

independent right, title or interest in the immovable property, he cannot claim adjudication of his rights by using this provision. There is no such

possibility in the present matter and the aforesaid discussion shows that it is not possible to formulate any substantial question of law. Law is settled

on every aspect.

22. In the result, the appeal stands dismissed. The Civil Application stands disposed of.