



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.12195 OF 2024

1. Kashinath Ramji Shinde (Died Through LRs.)
- 1a. Sumanbai w/o. Kashinath Shinde,
Age : 56 Years, Occ. Household,
- 1b. Suresh s/o. Kashinath Shinde,
Age : 55 Years, Occ. Painter,
- 1c. Ramesh Kashinath Shinde,
Age : 56 Years, Occ. Medical Practitioner,

All r/o. Shambhu Nagar,
Gadiya Vihar, Aurangabad

..Petitioners

Vs.

1. Pradip s/o. Madhavrao Shinde,
Age : 57 Years, Occ. Nil,
r/o. Block No.14, jai Mauli Co-operative
Housing Society, M. Sector, N6,
CIDCO, Aurangabad
2. Smt. Kusumbai w/o. Jagannath Shinde,
Age : 65 Years, Occ. Service,
r/o. Govt. Quarters, Labour Colony,
Aurangabad
3. Municipal Corporation, Aurangabad
Through its Administrator/Deputy
Commissioner, Aurangabad
4. City Survey Officer,
City Survey Office,
Near Municipal Corporation,
Aurangabad



5. Shantilal Dagaduram Muthiyan,
Age : 89 Years, Occ. Business,
r/o. 5-1-33/p Samta Nagar,
(Rambhapura), Aurangabad
6. Chandrakant Sriram Patil,
Age : 61 Years,
r/o. Ramandu,
Plot No.14, Maya Nagar,
Near Deogiri Co-operative Bank,
N2, CIDCO, Mukundwadi,
Aurangabad
7. Dr. Ashok B. Lohalekar,
Age : Adult, Occu. Doctor,
r/o. Nutan Colony, Aurangabad ..Respondents

Mr. R.F.Totala, Advocate h/f. Mr.V.S.Kabra i/b. Mr.Swapnil Lohiya,
Advocate for petitioners

Mr. P.V.Mandlik, Senior Advocate i/b. Mr.P.P.Mandlik, Advocate for
respondent no.7

CORAM : AJIT B. KADETHANKAR, J.
RESERVED ON : 27th March, 2026
PRONOUNCED ON : 20th April, 2026

JUDGMENT :-

Rule. Rule made returnable forthwith. At the instance of learned counsel for the parties, the Writ Petition is heard for final disposal. Parties submit that their pleadings are already complete and they do not want to file on record any additional pleadings.



2. Preface:

2.1 Feeling aggrieved by an order dated 19.08.2024 passed by the learned Civil Judge, Senior Division (Corporation Court), Aurangabad, rejecting petitioner's application filed below Exh.145-D in Regular Darkhast No.08 of 2013, the Petitioner/Decree-Holder is before this Court.

2.2 After a long Court battle initiated in 1987, the Petitioner succeeded in 2011 to get a Decree for Possession, Declaration and Mesne Profit in his Suit. In 2013, the Petitioner/Decree holder lodged proceedings under Order 21 Rule 35 of the Code of Civil Procedure 1908 ['C.P. Code of 1908' for the sake of brevity] for possession of the decretal property. In the execution proceedings, the petitioner's application seeking directions against the Respondent No. 7 - a purchaser *pendente lite* for possession came to be turned down by the Executing Court. Notably, the Petitioner had once added name of Respondent No. 7 in the Suit and later deleted him under Order 1 Rule 10 of the C.P. Code of 1908.

Petitioner's case is that the Respondent No.7 being a purchaser *pendente lite* u/s 52 of the Transfer of Property Act 1882, falls within the meaning of 'any person bound by Decree' as



provided in Order 23 Rule 35 of the C.P. Code of 1908. Per contra, Respondent No.7's case is that once he was deleted in the suit, the Decree holder Petitioner lost every claim against him.

2.3 As such, conundrum in the case in hand is, if a purchaser *pendente lite* who was once added and later deleted in the suit U/o 1 Rule 10 of the C.P.C.1908, is immune from applicability of Order 21 Rule 35 of the C.P.C.1908.

3. Facts in brief:

Facts are almost undisputed, and can be sequentially narrated as below: -

3.1 The petitioner purchased a residential property vide a registered sale deed from its predecessor owner on 06-09-1976. Dispute arose as the Respondent Nos. 1 and 2 entered their names in the city survey record of the 'subject-matter property' and obtained construction permission from the Municipal Corporation. The Respondent Nos.1 and 2 even sold portions of the 'subject-matter property' to the Respondent Nos. 5 and others (defendants Nos. 5 to 10).



3.2 The Petitioner was constrained to file Regular Civil Suit No.435 of 1987 in the court of the learned Civil Judge (S.D.) Aurangabad in respect of municipal property no. 5-17-33/PART situated at Mohalla Samatanagar at Aurangabad ('Suit property/Decretal property' for the sake of brevity). The record reveals that the Suit was once renumbered as Special Civil Suit No. 277 of 1998, and then again renumbered as Regular Civil Suit No.777 of 2002.

In the course of time, the Suit for injunction was amended with prayers for Declaration, Possession and Mesne profit. Construction permission granted by the then Municipal Corporation and the conveyance deeds executed by the Respondent Nos. 1 and 2 in favour of Respondent No. 5 and others were also under challenge.

The Respondent Nos. 1 and 2, on the other hand filed Regular Civil Suit no. 413 of 1987 seeking injunction against the Petitioner.

3.3 During pendency of the Suit, the Respondent Nos.1 and 2 also sold a portion of the 'Suit property' to the Respondent No.7. Consequently, the Respondent No. 7 was added in Petitioner's suit as Defendant No.11 at the fag end of the Trial. The evidence part was



over. Petitioner was cross-examined by the Respondent No. 2, from whom the Respondent No.7 has claimed interest in the Suit property.

3.4 During the Trial, an application was filed by the Respondent No.7 (Defendant no. 11) seeking permission to cross-examine the petitioner/plaintiff. It was objected by the Petitioner citing the reason that the subsequent purchaser can not re-open cross examination of the plaintiff. However, after hearing the parties the Trial Court allowed the application vide order dated 27.01.2005.

3.5 The petitioner challenged the order dated 27.01.2005 in this Court vide Writ Petition No. 1653 of 2005. The Petitioner submitted that the defendant no. 11 is purchaser *pendente lite*. That, the Defendant no. 11 was trying to prolong the Suit and permitting him to cross-examine the plaintiff would amount to *de-novo* Trial. This Court vide order dated 30.03.2005 allowed the petitioner to withdraw the Writ Petition with liberty to file an application before the Trial Court to delete the name of Defendant No.11 from the array of Defendants. Directions were given to the Trial Court to decide Petitioner's application on merits.



3.6 The petitioner accordingly filed an application at Exh.236 before the Trial Court seeking leave to delete the Defendant no.11 from the array of the Defendants. The application was contested by the Defendant no. 11. On 28.09.2005, the Trial Court allowed the application, however observing that the application was treated as 'withdrawal of suit' against the Defendant no.11. Hence it was held that the suit stood 'withdrawn' as against the Defendant no. 11.

3.7 The Petitioner sought review of the order dated 28.09.2005. However, the Review application i.e. M.A.R.J.I. No. 205 of 2006 came to be rejected.

The Petitioner challenged the orders passed on application under Order 1 Rule 10 of C.P. Code 1908 and the order passed in Review application M.A.R.J.I. No. 205 of 2006 before this Court vide Writ Petition no. 8020 of 2006.

3.8 Vide order dated 09.01.2007 this Court quashed and set aside both the orders under challenge (supra) and directed the Trial Court to re-consider the petitioner's application for deletion of the Defendant No.11 under Order 1 Rule 10 of C.P. Code of 1908 on merits within a time-frame. This Court observed that the Trial Court could not have gone beyond the pleading in the application and Order 1 Rule 10 of the C.P. Code of 1908.



3.9 The application Exh.236 was re-heard by the Trial Court. Vide order dated 24.09.2007, the Trial Court then allowed the application and permitted the Petitioner 'to delete' the name of the Defendant No. 11 in the Suit. Accordingly, the Petitioner amended the title clause of the Suit. Name of the Defendant No. 11 (R.No.7) came to be deleted in the Suit.

3.10 At the conclusion of the Trial, the suit filed by the Petitioner as also the Suit filed by the Respondent No.2 were dismissed by the Trial Court on merits vide a common Judgment and Decree dated 27.10.2009. The Petitioner challenged dismissal of his Suit vide Regular Civil Appeal No. 169 of 2011. The District Court, Aurangabad, allowed Petitioner's Appeal and reversed the findings of the Trial Court. The petitioner's Suit came to be decreed vide Judgment and decree dated 02.01.2013. The Decree in favour of the Petitioner is intact even today. Dismissal of the suit filed by Respondent nos. 1 and 2 also remains intact.

3.11 Consequent to the Decree in his favor, the petitioner instituted an Execution Proceeding before the Corporation Court, Aurangabad bearing Regular Darkhast No. 08 of 2013 .



3.12 In the Execution Proceeding, the other Judgment Debtors - subsequent purchasers accepted the decree. As such, vide order dated 16.11.2019, Regular Darkhast was withdrawn against such Judgment Debtors who were claiming right through the Respondent no.2.

3.13 At this juncture, the Petitioner filed present application at Exh. 145/D praying directions against the present Respondent No. 7 (i.e. the deleted Defendant No. 11) for handing over possession of the portion of the 'Decretal property' which the Respondent No.7 purchased during pendency of the Suit.

3.14 Respondent No. 7 appeared before the executing court and objected the application exhaustively. He submitted that the decree is not passed against him and no directions could be issued to him. He pointed out that his name was deleted in the suit at the behest of the plaintiff. That, he was not made party in the appeal. That, in those circumstances, decree can not be executed against him who is a third party. The Respondent No. 7 thus prayed to reject the application. The petitioner countered the reply by filing affidavit-in- rejoinder.



3.15 Upon hearing the parties, the Executing Court was pleased to reject Petitioner's application vide impugned order dated 19.08.2024. The Executing Court observed at paragraph No. 5 of the impugned order :

"5. In the aforesaid circumstances of the case, it is necessary to consider the provisions of Order 21 Rule 35 of the Civil Procedure Code which provides for execution of Decree for the delivery of immovable property. It is to be noted that, the possession of such property is required to be delivered to the party to whom it has been adjust and for this purpose the Court may remove any person bound by the Decree who refuses to vacate the property . In the present case the part of the property which is to be delivered is in possession of third party who refuses to vacate it. However, in the light of deletion of his name by treating said application for withdrawal of Suit he can not be said to be a person bound by the Decree within the meaning of Order 21 rule 35 of Civil Procedure Code. Therefore, no direction as sought by D.H. can be given. Hence I pass following order.

ORDER

Application stands rejected."

3.16 It is against the impugned order, the Petitioner/Decree Holder plaintiff is before this Court.



4. Submissions :-

4.1 Mr. Rameshwar Totla, learned Counsel for the Petitioner raises his punctilious objection to the impugned order that, the Petitioner has 'deleted' name of the Respondent No. 7 in the Suit. That, it does not mean that the Petitioner abandoned claim/right against Respondent No. 7 within the meaning of Order 23 (1) of the Civil Procedure Code 1908. He would point out under which circumstances and for what reasons the Respondent No. 7 was added in the Suit and was later deleted. Mr. Totla submits that the Respondent No. 7 was arrayed as Defendant, being a purchaser *Pendente Lite*. Since the Respondent No. 7 was prolonging the suit by seeking re-opening of the plaintiff's evidence, he was deleted in the suit. He submits that Respondent No.7 is claiming his right through the Respondent No.2.

4.2 He would submit that Section 52 of the Transfer of Property Act read with Section 146 of the C.P. Code 1908 protects the petitioner's interest and right against the Respondent No.7. That, deletion of the Respondent No.7 in the Suit, does not disentitle the Decree holder from seeking execution against the Respondent No.7.



4.3 Mr.Totla further submits that the Respondent No. 7 is 'bound by the Decree' within the meaning of Order 21 Rule 35 of the C.P. Code 1908. He relies upon (i) Dhanna Singh and others vs. Baljinder Kaur and others, (1997) 5 SCC 476; (2) Raj Kumar Vs. Sardari Lal and others, (2004)2 SCC 601; and (3) Smt. Ved Kumari (dead Through Her Legal Representative) Dr. Vijay Agarwal Vs. Municipal Corporation of Delhi Through its Commissioner, (2023)13 SCC 651.

To conclude, learned Counsel for the petitioners submits that the Respondent No.7 is claiming his right through the Respondent No.2 and hence the Decree against Respondent No.2 is squarely binding on the Respondent No.7. Hence, the Executing Court ought to have issued necessary directions to the Respondent No.7 under Order 21 Rule 35 of the C.P. Code of 1908.

4.4 Mr. Pravin Mandlik, learned Senior Advocate i/b Mr. Pratap Mandlik, however strongly advocates the impugned order passed by the executing Court. He submits that the Petitioner has not approached the Court with clean hands and that the petitioner has suppressed material facts. Mr.Mandlik further submits that the Petitioner's suit came to be dismissed against the Respondent No. 7 on account of deletion of Respondent No.7's name in the Suit itself.



4.5 Mr.Mandlik's main thrust is, if the Respondent No.7 was not a judgment debtor to the Decree, Petitioner's application below Exh. 145-D was not at all maintainable. That, the Respondent No.7 was not party to the suit and appeal while the Decree was passed therein. He would submit that the Respondent No.7 was excluded from the Suit at the behest of the Petitioner. That, the Petitioner cannot seek benefit of his own wrong. That, in the given circumstances the Respondent No.7 is a Third Party against whom the Decree can not be executed.

4.6 He submits that the application was filed in collusion with other Defendants to defeat Respondent No.7's right. Withdrawal of the execution proceedings against the other purchasers- Judgment Debtors demonstrate that the petitioner only wants to corner the Respondent No.7. He also submits that the application was not timely filed which shows that it was not a *bona fide* application. As such, referring to his reply affidavit learned Senior Advocate Mr. Pravin Mandlik prays to dismiss the Writ Petition.

The Respondent No.7 chose not to place any citation into service in support of the response and strenuously rely upon the facts, the sequence of events and the findings of the Executing Court .



5. In view of the rival arguments advanced by the respective parties, following law points emerge for discussion:

- 5.1** Consequences of 'deletion of a party in a suit' *vis-a-vis* 'withdrawal of suit against a party';
- 5.2** Can the Respondent No. 7 be said to be "any person bound by decree' within the meaning of Order 21 Rule 35 of the Civil Procedure Code 1908 in the light of Section 52 of the Transfer of Property Act?
- 5.3** Whether, in given set of facts, deletion of Respondent No.7's name in the Suit estops the Petitioner from taking recourse to the law governed by Section 52 of the Transfer of Property Act read with Section 146 of the C.P. Code of 1908?

6. Discussion and consideration:

6.1 I find that there is no material controversy as regards the facts as observed supra. Crucial facts around which the debate wriggles are:-

- (i) While Petitioner's Suit of possession was pending against the Respondent No.2, the Respondent No. 7 purchased a portion of the Suit property from the Respondent No.2. The transfer was without any leave of the Court.



(ii) The petitioner added Respondent No. 7 in the Suit as Defendant no.11, and later with leave of the Court deleted his name. Initial observation of the Trial Court recording the 'deletion' as 'withdrawal of Suit' was subsequently cured by the Trial Court under the orders of this Court. The petitioner explained the deletion taking recourse to Section 146 of 1908 Code read with Section 52 of the Transfer of Property Act.

(iii) The Respondent No.7 was not party to the Decree due to his deletion in the Suit. However, Respondent No.7 claims his right through the respondent No.2 - his vendor.

(iv) The Decree for Possession is intact even today. The Respondent no.7 has never challenged the said Judgment and Decree independently or otherwise.

6.2 Paragraph No.5 of the impugned order are the findings rendered by the Executing Court. It has observed that the Respondent No.7's name was deleted in the Suit by treating the said application for withdrawal of the Suit and that therefore, the Respondent No.7 can not be said as 'any person bound by the Decree within the meaning of Order 21 Rule 35 of CP Code 1908'.



6.3 Apparently, these findings of the Executing Court are perverse to the record. The Executing Court has neither taken into consideration the observations made by this Court vide order dated 09.01.2007 in Writ Petition No. 8020 of 2006, nor has looked into the order dated 24.09.2007 subsequently passed by the learned Judge of the Trial Court.

6.4 While disposing of the Writ Petition No. 8020 of 2006, this Court specifically observed that Petitioner's application Exh. 236 was for simplicitor deletion of Respondent No.7's (Deft. No.11) name from the array of Defendants. It is further observed that the Trial Court then travelled beyond the scope of the application. Thus, directing the Trial Court to decide Petitioner's application Exh.236 exclusively under Order 1 Rule 10 of the C.P. Code 1908, this Court observed as below:-

"7. Coming to the facts of the present case, it can be seen that the application below Exh.236 filed by the present petitioner was for a limited purpose for deleting the present respondent i.e defendant No.11 from the array of defendants. In my considered view, the learned trial court could not have travelled beyond the scope of the application, treating it as an application for withdrawal of the suit against the said defendant. The court could have considered whether the application for



deleting defendant No.11 could be granted or not. For that, it would have been guided by Order 1 Rule 10 of C.P.C.

8.In the result, the writ petition is partly allowed. The impugned orders dated 28th September, 2006 passed by the Civil Judge (S.D.), Aurangabad and the one passed in review i.e. MARJI NO. 205/2006, dated 17.3.2006, are quashed and set aside. The learned trial court is directed to consider the application of the present petitioner for deletion of the defendant No.11 on its own merits, in view of the observations made herein above, and decide the same preferably within a period of six weeks. (emph.)”

6.5 Upon remittance of the matter back, the Trial Court then rightly passed order on 24.09.2007 allowing Petitioner’s application Exh. 236; and respondent No.7’s name was deleted as Defendant No.11. This was a plain deletion of the Respondent No.7 in the Suit under Order 1 Rule 10(2) of the C.P. Code of 1908.

6.6 In view of above, while passing the impugned order, the Executing Court manifestly overlooked the observations made by this Court in Writ Petition No. 8020 of 2006 and the order dated 24-09-2007 passed by the Trial Court.



The reasoning rendered by the Executing Court in the impugned order remained impressed only with the earlier orders passed by the Trial Court on 28.09.2005 on application Exh. 236 and order dated 16.11.2006 in review proceedings. The both orders were already quashed and set aside by this Court in Writ Petition no. 8020 of 2006. As such, the findings of the learned Judge of the Trial Court at paragraph No.5 of the impugned order are struck down.

6.7 Now, the arguments of both sides on merit need to be tested on the provisions of law.

Order 1 Rule 10 of the C.P. Code of 1908 deals with addition and deletion of parties to a Suit. Relevant portion reads thus:

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.



The provision speaks about striking out a party (plaintiff/defendant). This empowers the Court to delete name of such party whose presence there in suit is improper. Court can exercise this power *suo motu* or at the instance of a party. Term 'improper' in the context of Order 1 Rule 10 of the C.P. Code of 1908 means 'not suitable or required for the situation'.

Order 1 Rule of the C.P. Code of 1908 is usually invoked in a Suit whereby : (i) Court may add or delete any party in the Suit; (ii) Plaintiff as also Defendant may file an application for addition or deletion of a party; and (iii) A third party may apply to the Court for its addition in the Suit. This is apropos the situation and the circumstances of each case. In no terms it bespeaks of perpetual forfeiture or waiver of a party's claim against another party in respect of the subject matter of the suit.

6.8 Placing Order 1 Rule 10 (2) into service is proportional to the status of a party corresponding to the claim 'by' or 'against' such party and the prevalent circumstances. By no stretch of imagination it can be said that striking out a defendant under Order 1 Rule 10(2) perpetually concludes right of a plaintiff against such defendant. This distinctly differs from abandonment of a claim against the defendant(s) under Order 23 Rule 1 of the C.P.C.1908.



6.9 The Law makers have therefore thoughtfully drafted Order 23 Rule 1 in the C.P. Code 1908. Withdrawal of a Suit is governed by Order 23 Rule 1 of the Civil Procedure Code 1908 which reads thus:

“ORDER XXIII

(Withdrawal and Adjustment of Suits)

3 [1. Withdrawal of suit or abandonment of part of claim. —(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2)....

(3).....

(4)....

(5).....”

6.10 The text of Order 23 Rule 1 of C.P. Code of 1908 in unequivocal terms provides that withdrawal results in an explicit and cautious abandonment of a claim by the plaintiff ‘for himself’, or ‘against such defendant’ against whom the Suit is sought to be withdrawn. ‘Abandonment of a claim is an object under Order 23 of the C.P. 1908 Code, while ‘Withdrawal’ is the procedure adopted for



the object'. The Oxford Learner's dictionary defines 'abandonment' as *"the act of giving up an idea or stopping an activity with no intention of returning to it."*

Thus, had the Plaintiff withdrawn a suit against all or any or some of the defendants, the plaintiff neither can re-sue such defendant(s) on the same subject-matter nor can reserve any further right, which the plaintiff could have gained upon getting the Suit decreed against such defendant(s). This is because the Plaintiff cautiously and explicitly 'abandons' the claim against such parties.

6.11 An exception to the general rule (supra) governing withdrawal of suit is carved out in Order 23 Rule 1 (3). This provision makes a room to the plaintiff to file a fresh suit on the same subject-matter subject to the permission from the Court.

6.12 'Order 1 Rule 10' and 'Order 23 Rule 1' are not at par as regards to the rights "of or against" a party sought to be placed out of the suit proceedings. Both provisions operate with absolutely different objects, in different circumstances, and with different consequences.



While the earlier comes into play on account of requirement or non-requirement of a party in the suit corresponding to situation prevalent; the later perpetually disables Plaintiff's right against the Defendant in respect of the Subject-matter of the Suit, unless leave of the Court was obtained.

Following the *ratio legis* as observed above, I am of the considered view that because the petitioner deleted Respondent No.7's name from the array of Defendants in the Suit, it would be incorrect to hold that the Respondent No.7 could not have been involved in the consequential proceeding.

These findings are supported by one more legal position.

6.13 It is an admitted fact that the Respondent No.7 (defendant no.11) purchased the Suit property from the Respondent No.2, during the pendency of Petitioner's Suit against Respondent No.2 for possession of the suit property.

The situation and the transaction is governed by Section 52 of the Transfer of Property Act, which reads thus:

"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.]”

No other words are needed to hold that status and right of the Respondent no.7 is seriously affected by Section 52 of the Transfer of Property Act 1882.

6.14 Although Mr. Pravin Mandlik, learned Senior Advocate argued that the Suit was in collusion with other Defendants, nothing on record is placed by the Respondent No.7 to convince that the Suit was a collusive one. I have also gone through the said objection incorporated in the reply affidavit. Mere settlement between the Petitioner and the other Judgment Debtors (JDs) - similarly situated subsequent purchasers, in the execution proceeding does not create any exceptional case for protection to the Respondent no.7.



The other Judgment Debtors -subsequent purchasers as also the Respondent no. 7 stand on the same platform. They all claim their interest through their vendor i.e. the Respondent No.2 - main Judgment Debtor. The decree against Respondent no.2 is squarely binding on all of them.

6.15 The above findings have candling effect on the Respondent No.7's objection against applicability of Order 21 Rule 35 of the C.P. 1908 Code. The net and straight consequence is that the Respondent No. 7 falls within the meaning of 'any person bound by decree' as texted in Order 21 Rule 35 of the C.P. Code of 1908.

6.16 The Petitioner claims that his application is benefited even by Section 146 of the C.P. Code 1908 which reads as thus:

"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".

Its an admitted fact that the Respondent No.7's claims his right through the Respondent No.2, being his vendee. The transfer of property was executed during pendency of Suit. The words '*by or against any person claiming under him*' incorporated in



the Section 146 of the C.P. Code of 1908 clearly demonstrate that the petitioners' right against the Respondent No.7 is well protected.

6.17 On facts, I have already observed that the learned Judge of the Execution Court erred in holding the deletion of Respondent No. 7 from the array of parties in the Suit was a withdrawal of suit against the Respondent No.7.

6.18 For the reasons recorded above, I am not convinced with the arguments advanced by learned Senior Advocate for the Respondent No.7, that 'deletion of the Respondent No.7 in the Suit bars the Petitioner from seeking enforcement of Order 21 Rule 35 of the 1908 Code. Since I have held that 'deletion of a Defendant from the array of parties' is not at par with 'withdrawal of a Suit against the Defendant', in view of Section 52 of the T.P.Act 1882, the case is covered by the doctrine of *lis pendens*. I do not comprehend with the Respondent No.7's case that execution cannot be warranted against him as he was a third party.

6.19 Pursuant to the arguments of learned Senior Counsel Mr.Mandlik for the Respondent No.7, I have gone through the reply affidavit filed by the Respondent No.7. He has referred to the arguments recorded and observations made by the Trial Court in the Judgment and Order dated 27.10.2009 while dismissing the Suit. The



Appellate Court reversed the findings of the Trial Court and allowed the Appeal of the Plaintiff. The Suit was decreed by the Appellate Court. Hence reliance placed on observations of the Trial Court would not help the Respondent No. 7.

6.20 The objection that the Petitioner filed application Exh. 145-D without quoting provisions of law would not stand fatal to the petitioner's application. The Court has to examine the prayer in a proceeding in the light of the pleadings and not presence/absence of title or even incorrect titling. In the case in hand, non-titling the application itself does not disqualify the application from being considered on merit. I have also gone through the application exh. 145-D itself. Looking into the text of Petitioner's application, it is seen that the application was filed clearly mentioning Section 52 of the Transfer of Property in the application. The sequence of events is also described. For these reasons, I do not accept this objection.

6.21 The other objection that the Petitioner did not approach with clean hands and has suppressed material facts is also not supported by any evidence. In fact the record shows that the Petitioner disclosed every proceedings and the concerned events. The Respondent No.7 could not demonstrate as to how and what delay, if any, is fatal to Petitioner's application.



6.22 On the other hand, recitals of the reply affidavit clearly show that the Respondent No.7 unequivocally admits that he claims his right through Respondent No. 2 from whom he has purchased Suit property during pendency of the Suit.

6.23 This tempts me to quote what the Honorable Supreme Court has observed at paragraph No. 9 of its Judgment in the case of

Raj Kumar Vs. Sardari Lal (supra) :

9. A Decree passed against the Defendant is available for execution against the transferee or assignee of the Defendant Judgment-Debtor and it doesn't make any difference whether such transfer or assignment has taken place after the passing of Decree or before the passing of the Decree without notice or leave of the Court."

6.24 I have gone through the another Judgment cited by the learned Counsel for Petitioner in the case of **Dhanna Singh** (supra). The Honorable Supreme Court observed that a subsequent purchaser of Suit property can not lead evidence if his predecessor in title has waived the opportunity to lead evidence. The petitioner's facts are a bit different than the facts in the cited case. However, it is held that a subsequent purchaser cannot have any right beyond and above his vendor.



6.25 The Honorable Supreme Court while protecting right of the Decree-Holder/Plaintiff, against hurdle caused by a third party in whose favor the Judgment Debtor Defendant transferred the Suit property, observed in the case of **Ved Kumari (Died) Vs. Municipal Corporation of Delhi, (2023)13 SCC 651:-**

“15. In view of the settled legal position, as noted (supra), it was the duty of the Executing Court to issue warrant of possession for effecting physical delivery of the suit land to the decree-holder in terms of suit schedule property and if any resistance is offered by any stranger to the decree, the same be adjudicated upon in accordance with Rules 97 to 101 of Order XXI of the CPC. The Executing Court could not have dismissed the execution petition by treating the decree to be in-executable merely on the basis that the decree-holder has lost possession to a third party/encroacher. If this is allowed to happen, every judgment-debtor who is in possession of the immovable property till the decree is passed, shall hand over possession to a third party to defeat the decree-holder’s right and entitlement to enjoy the fruits of litigation and this may continue indefinitely and no decree for immovable property can be executed.”

These observations by the Honorable Supreme Court clearly cover Petitioner’s case. In no case, deletion of a defendant U/O 1 Rule 10 of C.P.C.1908 shall come in the way of applicability of Order 21 Rule 35 r/w section 146 of the Civil Procedure Code 1908, while right of such defendant is affected by Section 52 of the Transfer of Property Act 1882.



6.26 From the above discussion, and the guiding principles articulated by the Honorable Supreme Court in the cases referred (supra), I hold that,

(I) Unlike Order 23 Rule (1) of the Civil Procedure Code 1908, a deletion of a Defendant in a Suit under Order 1 Rule 10 does not perpetually abandon/forfeit the plaintiff's claim against the deleted Defendant", subject to the procedure to be followed;

(ii) A Purchaser *pendente lite* a Suit for possession filed against his vendor, falls within the definition of "any person bound by Decree for possession" within the meaning of Order 21 Rule 35 of the Civil Procedure Code 1908.

(iii) While facts of a case are covered by Section 146 and Order 21 Rule 35 of 1908 Code read with Section 52 of the Transfer of Property Act, deletion of a Defendant in the suit under Order 1 Rule 10 of C.P. Code of 1908 does not bar the Decree holder from executing Decree against the deleted Defendant. There can be no estoppel against the Law.

7. I have dealt with every point of argument advanced by the Petitioner and the objections raised by the Respondent No.7. For the reasons recorded above, I am satisfied that the Petitioner has



made out a successful case for interference of this Court under Article 227 of the Indian Constitution. The petition deserves to be allowed.

8. Before parting, I express my sincere appreciation for the fair assistance by the learned Counsel for the Petitioner and the learned Senior Counsel for the Respondent No.7, respectively.

9. Hence I pass following order:-

ORDER

I. Writ Petition is allowed;

II. Impugned order dated 19.08.2024 passed by the learned Civil Judge, Senior Division (Corporation Court), Aurangabad in Regular Darkhast no. 08 of 2013 is quashed and set aside.

III. The Application Exh. 145-D filed by the Petitioner in Regular Darkhast no. 08 of 2013 pending before the learned Civil Judge, Senior Division (Corporation Court), Aurangabad, stands allowed. The Executing Court to proceed in accordance with law.



IV. Considering the long pendency of the Execution Proceeding, the Executing Court is directed to expedite the proceeding and conclude the same as expeditiously as possible and in any case, within a period of 06 months from today.

V. Rule made absolute in above terms.

[AJIT B. KADETHANKAR, J.]

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KBP