

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5008 OF 2013**

Dinesh Kumthekar

..Petitioner

Vs.

Yashwant D. Kumthekar

..Respondent

**Mr. Harshad Sathe I.b Mr. Harshad Bhadbhade for the Petitioner
Mr. Onkar Warange for the Respondent Nos.1, 2, 4, 6 and 7**

**CORAM : R. M. SAVANT, J.
DATE : 22nd JANUARY, 2015**

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 12-3-2013 passed by the Executing Court i.e. the Learned Civil Judge Junior Division, Dapoli, by which order, the application Exhibit 95 for stay of the execution proceedings came to be rejected.

2 The said application Exhibit 95 was filed by the original Defendant No.2(c). The stay of the proceedings is sought on the ground that since it is the decree for partition unless a final decree is passed, the decree is not executable. It is required to be noted that the Suit filed by the Respondent No.1/Plaintiff being Regular Civil Suit No.57 of 2001 has been decreed by holding that the Plaintiff is entitled to 8/49th share in the suit properties. Amongst the suit properties are house structures bearing house Nos.814, 814(a), 814(b) and

814(c), 451 and 451(a). The said decree was put in execution by the Plaintiff by filing Regular Darkhast No.5 of 2007. Having regard to the fact that the partition of the house properties was to be done, the Court Commissioner by way of Advocate Mr. V. V. Pawar was appointed, the said Court Commissioner after going through the process of site inspection, measurement of the properties etc., wherein the parties were present, has submitted his report suggesting the manner in which the partition is to take place by way of a report which is marked as Exhibit 44. It seems that prior thereto, the parties had arrived at a compromise to partition the suit properties by filing Exhibits 45 to 47 which were filed by the various Defendants to the Suit.

3 In so far as the present application Exhibit 95 is concerned, it is required to be noted that the Defendant Nos.1, 2(a) to 2(c), 5, 6, 7, 11 and 12 have filed a compromise pursis Exhibit 76 dated 10-11-2011 in the Executing Court consenting to the house properties being partitioned in terms of the report of the Court Commissioner Exhibit 44 and the possession to be handed over on the said basis. It seems that possession has already been handed over to the Plaintiff of his share in respect of the portions which are not in possession of the Defendant No.2(c). The instant application Exhibit 95 has been filed on 28-8-2012 seeking stay of the execution on the ground that no final decree has been passed. The Executing Court having regard to the pursis Exhibit 76 has held that no stay could be granted to Applicant i.e. the

Defendant No.2(c). The Trial Court observed that in the light of the said pursis by filing the application Exhibit 95, the Defendant No.2(c) is acting contrary to the said pursis Exhibit 76.

4 It is required to be noted that the Defendant No.2(c) led evidence in the matter. It has come in his evidence that he is in possession of a portion which is bigger than the share to which he is entitled. He has further admitted that he has agreed to the execution of the decree in terms of the bailiff report Exhibit-44. Hence in the light of the aforesaid facts, the application Exhibit 95 can be said to be a gross abuse of the process of the Court as a party who has filed the compromise pursis Exhibit 76 along with the other Defendants now wants to renege from the said pursis by filing the said application Exhibit 95. The reasons for the same are not far to seek, as obviously the Defendant No.2(c) does not want to hand over possession of the property which is in his possession and which admittedly is beyond his entitlement in terms of the compromise which has been arrived at. Hence no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

5 In the facts and circumstances of the case, which this Court has found that the application Exhibit 95 is an abuse of the process of the Court, the Petitioner to deposit costs of Rs.10,000/- with the Maharashtra Legal Aid

Fund within 4 weeks from date. Since the execution proceedings have been initiated in the year 2007, the Executing Court is directed to hear and decide the same expeditiously.

[R.M.SAVANT, J]