

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

**CIVIL APPLICATION NO. 1221 OF 2015
IN
SECOND APPEAL NO. 749 OF 2010**

Laxman Dhondiba Pawar
since deceased through his Legal heirs ... Applicants.
V/s.
Shivram Dhondiba Pawar ... Respondent

Mr. S.D. Patil for the applicant.
Mr. S. P. Thorat for the respondent.

**CORAM : K. K. TATED, J.
DATED : 01/10/2015.**

P.C.:

. Heard learned Counsel for the parties.

2 This application is preferred by defendants for stay of operation and implementation of decree dated 29.06.2005 passed by Civil Judge, Junior Division, Saswad in Regular Civil Suit No. 128 of 1995 and decree dated 25.08.2010 passed by the District Judge-11, Pune in Civil Appeal No. 516 of 2005 till the hearing and final disposal of the present Second Appeal.

3 In the present proceeding, the respondent plaintiff filed Regular Civil Suit No. 128 of 1995 in the Court of Civil Judge, Junior Division, Saswad for partition and declaration. That suit was decreed by the Trial Court on 29.06.2005 holding that plaintiff is entitled to 1/5th share in suit property and to get the possession of the same.

4 Being aggrieved by the said decree, the applicants defendants preferred Civil Appeal No. 516 of 2005 in the Court of District Judge, Pune. That appeal was dismissed by the Appellate Court on 25.08.2010. Hence, the defendants preferred present Second Appeal.

5 This Second Appeal was admitted by this Court by order dated 22.12.2011 on the following substantial question of law:

“Whether the aspect of limitation in the present case would governed by Article 110 or Article 58 of the Limitation Act?”

6 The learned Counsel for the applicants submits that recently they received notice dated 01.07.2015 from the Revenue Department for partition of the suit property. Hence, the defendant preferred present Civil Application for stay. He submits that if stay is not granted, irreparable loss and injury will be caused to the applicants. He submits that Second Appeal is already admitted. Hence, this Hon'ble Court be pleased to stay the further proceeding in execution application filed by the respondent plaintiff. He submits that they have good chance of success in the present Second Appeal.

7 On the other hand the learned Counsel Mr. S. P. Thorat appearing on behalf of respondent plaintiff vehemently apposed the present Civil Application. He submits that though the Second Appeal was admitted by this court on 22.12.2011, the defendants failed and neglected to prefer application for stay immediately. He submits that the defendants filed the present Civil Application on 14.07.2015 i.e. after more than four years from the date of admission of Second Appeal. He submits

that the respondent plaintiff filed Regular Dharkhast No. 05 of 2006. In that, the Executing Court passed order on Exh.1 on 30.12.2013 directing the collector to take appropriate steps under Section 54 of Code of Civil Procedure, 1908 i.e. for partition of the suit property. He submits that though the said order was passed by the executing court on 30.12.2013, the applicants defendants filed the present Civil Application in the year 2015 i.e. after more than 1½ years. He submits that the applicants have not shown sufficient cause for such a long delay. He further submits that the applicants defendants not preferred any Appeal and/or proceeding challenging the order passed by the Executing Court on 30.12.2013. Hence, there is no question of passing any stay in the present Civil Application. In support of this contention, the learned Counsel for the respondent plaintiff relies on the judgment of this Court in the matter of *Annasaheb Rajaram Nagane & Ors. V/s. Rajaram Maruti Nagane & Ors. reported in 2001(3) Mh. L. J. 53*. On the basis of this submissions, the learned Counsel for the respondent plaintiff submits that there is no substance in the present Civil Application and same to be dismissed with cost.

8 I heard both the sides at length. It is to be noted that Second Appeal is already admitted by this court by order dated 22.12.2011. If the stay is not granted at this stage, nothing will survive in the Second Appeal. The objection raised by the respondent plaintiff about maintainability of the present Civil Application and the authority relied by the respondents defendants in the matter of Annasaheb Rajaram Nagane (Supra) is not applicable in the facts and circumstances of the present case. In that case, the issue was whether it is necessary for the

plaintiff to file application in the court for sending decree to the Collector for partition under Section 54 of Code of Civil Procedure, 1908. Whereas, in the present case in hand, the issue is whether this Court grant stay for execution of Judgment and Decree passed by both the courts below.

9 Considering this fact, I am satisfied that applicants defendants have made out case for allowing this Civil Application. To the effect that partition proceeding to go on except handing over the physical possession of the suit property to the respective parties.

10 Hence, following order:

a) Execution proceeding to go on except handing over the physical possession of the suit property to the respective parties till the hearing and final disposal of the Second Appeal.

b) Civil Application stands disposed of accordingly.

(K.K.TATED, J.)

CERTIFICATE

Certified to be true and correct copy of the
original signed order.