

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

WRIT PETITION NO.8303 OF 2015

Laxman Nana Mali

(Since deceased through his LRS)

Prakash Laxman Mali and others

.. Petitioners

Versus

Gangadhar Sonappa Deshmane and others

.. Respondents

Mr. M. J. Jamdar, for the Petitioners.

Mr. P. J. Thorat, for the Respondents.

CORAM : R.M. SAVANT, J.

DATE : 25th AUGUST, 2015

PC.

1. The Writ Jurisdiction of this Court is invoked against the order dated 12.08.2015 passed by the Learned District Judge-I, Vaduj, by which order the application for stay of the decree passed by the Trial Court was ordered to be "filed" in view of the undertaking given by the original Plaintiffs i.e. Respondent Nos.1 to 7 to the above Petition.

2. The Petitioners are the Appellants in Regular Civil Appeal No.30 of 2015 which Appeal is filed against the decree dated 07.02.2015 passed by the Learned Joint Civil Judge, Junior Division, Vaduj which is a decree in favour of the Respondent Nos.1 to 7 who are the original

Plaintiffs. The impugned order recording that the application is “filed” is challenged on the ground that in terms of clause (4) of the decree dated 07.02.2015, the Defendant Nos.13 to 15 are directed to remove their tin shed as mentioned in para 2A of the plaint within one month of the said decree and the further direction is that they shall hand over possession of the said tin shed to the Plaintiffs and Defendant Nos.9 to 12. The order is also challenged on the ground that the Petitioners herein i.e. Appellants having filed the Appeal against the said decree the issue as regards title to the land in question is therefore the subject matter of the Appeal.

3. It is required to be noted that by the said decree dated 07.02.2015 a declaration has been issued that the Plaintiffs i.e. Respondent Nos.1 to 7 herein and the Defendant Nos.9 to 12 are the owners of the suit property mentioned in para 1 of the plaint. Hence, the Trial Court has recorded a finding as regards the title of the Plaintiffs to the land in question, though the said decree is in Appeal. In so far as the direction in clause (4) of the decree is concerned, it is a direction issued against the Defendant Nos.13 to 15 and not against the Petitioners who are Defendant Nos.1A to 1C and 2 and 4. It is also required to be noted that the relief against the tin shed was sought in view of the fact that the same was constructed by the Defendant Nos.13 to 15 during the pendency of the suit, as a result of which the suit was required to be amended to

incorporate averments regarding tin shed and also claim relief on the said basis. The Appellants seem to make a grievance as regards the execution of the said part of the decree on the ground that it is accepted by the Plaintiffs that the Defendant Nos.13 to 15 are the tenants of the Appellants i.e. Defendant Nos.1A to 1C and 2 and 4. It is required to be noted that in so far as the Defendant Nos.1A to 1C and 2 and 4 the decree holders i.e. the Plaintiffs have made a statement before the Lower Appellate Court that at present they are not executing the decree against the said Defendant Nos.1A to 1C and 2 and 4 i.e. the Appellants. How, the Appellants are aggrieved by the execution of the decree in so far as the clause (4) is concerned, therefore begs an answer. The answer is obviously not far to seek, as probably, in the guise of claiming stay of the entire decree the Appellants seek to assert their right in respect of the property in question.

4. In so far as the Appellants are concerned i.e. original Defendant Nos.1A to 1C and 2 and 4, it is required to be noted that they had filed Regular Civil Suit No.45 of 1982 claiming declaration that the land in question belongs to a Devasthan and that they had filed the suit in a representative capacity. The said suit came to be dismissed by order dated 06.02.2002 by the Trial Court. The dismissal of the said suit was carried in Appeal by the Appellants herein by filing Regular Civil Appeal

No.83 of 2002. The said Appeal came to be dismissed by the Lower Appellate Court by judgment and order dated 26.11.2010. Hence, in so far as the claim of the Appellants to the title of the suit property is concerned, the judgment of the Lower Appellate Court having not been challenged higher, the same has become final and binding and therefore, there is finding recorded by a Competent Court that the Appellants do not have title to the said property.

5. In so far as the instant suit i.e. RCS No.96 of 1982 is concerned, the same has been filed as indicated above for declaration and injunction in respect of the land in question. As indicated above, in view of the fact that the Defendant Nos.13 to 15 had pendent-lite carried out construction of putting up a tin shed in the land in question, the said suit came to be amended incorporating the averments and also incorporating the consequential prayer thereto. The said suit came to be decreed in favour of the Plaintiffs by judgment and order dated 30.06.2011. A First Appeal was filed in the District Court by the present Petitioners. The application for condonation of delay in filing the First Appeal came to be rejected, resulting in a Second Appeal being filed by the Petitioners in this Court and on an objection being raised on behalf of the present Plaintiffs, the said Second Appeal was withdrawn and a Writ Petition was filed in this Court being Writ Petition No.2971 of 2013 which came to be allowed

and the delay in filing the Appeal was condoned by this Court and the Lower Appellate Court was directed to decide the First Appeal on merits. The First Appeal was accordingly considered by the Lower Appellate Court on merits and was dismissed on 03.01.2013. Against which a Second Appeal being No.20 of 2014 was filed which came to be allowed by order dated 29.04.2014 and the matter was remanded back to the Trial Court for a de-novo consideration of the suit. However, what is significant to note is the observation made in clause (vi) of paragraph 7 of the said order, by which this Court had precluded the present Petitioners from agitating the claim of ownership once again in the present suit. On remand, the suit once again came to be decreed by judgment and order dated 07.02.2015 and in which decree vide clause (4) the direction to the Defendant Nos.13 to 15 to remove the tin shed have been issued and for possession to be handed over to the Plaintiffs. Hence, in so far as the Appellants i.e. Petitioners are concerned, in view of the fact that their claim of title to the land in question has been rejected, they are now precluded from claiming ownership to the land in question. This facts compounds the matter for the Petitioners in their pursuit of seeking stay in respect of the clause (4) of the decree passed in the Trial Court. In my view, for the reasons aforesaid and also in view of the fact that the original Plaintiffs i.e. Respondent Nos.1 to 6 herein have given an

undertaking to the Appellate Court that they would not be executing the decree against the Appellants i.e. the Petitioners herein for the present, in my view, therefore, no case for interference at the behest of the Petitioners in respect of the direction for staying the direction contained in clause (4) of the decree passed by the Trial Court is made out. The Writ Petition is accordingly dismissed.

6. Needless to state that in the event the Defendant Nos.13 to 15 file an application for stay in the Appeal that is filed by them, the same would be considered on its own merits and in accordance with law.

7. At this stage, the Learned Counsel for the Petitioners prays for stay of the decree. In the facts and circumstances of the case, the said prayer is rejected.

[R.M. SAVANT, J]