

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

WRIT PETITION NO.146 OF 2015

**Mr. Ganesh Pandurang Raut,
Age-45 years, Occu:-Service,
Residing at Asangaon, Bhandarpada,
Tal-Dahanu, Dist:-Thane .. Petitioner**

Versus

**Mr. Mahesh Subhash Raut,
Age-30 years, Occu:-Business and Agriculture,
Residing at Asangaon, Bhandarpada,
Tal-Dahanu, Dist:-Thane .. Respondent**

**Mrs. Neeta Karnik, for the Petitioner.
Mr. B. C. Ponda, for the Respondent.**

**CORAM : R.M. SAVANT, J.
DATE : 25th AUGUST, 2015**

ORAL JUDGMENT

1. Rule, with the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2. The Writ Jurisdiction of this Court is invoked against the order dated 25.09.2014 passed by the Learned District Judge-1, Palghar, by which order the application for stay pending the Appeal filed by the

Petitioner came to be rejected.

3. It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the Petitioner who is the original Defendant aggrieved by the decree passed by the Trial Court dated 01.02.2014 has filed the Appeal in question being Regular Civil Appeal No.19 of 2014. In so far as the suit is concerned, it is required to be noted that the Defendant i.e. the Petitioner herein was unrepresented at the hearing of the suit as the Advocate whom the Defendant had engaged had shifted to another town in Maharashtra of which the Defendant was not aware. In the said circumstance, the evidence of the Plaintiff i.e. the Respondent herein went uncontested as the Defendant did not cross-examine the Plaintiff. The Trial Court on the basis of the statement of the Plaintiff in his evidence that he is in possession which was not controverted by the Defendant recorded a finding that the Plaintiff is in possession and has accordingly decreed the suit and injuncted the Defendant from disturbing the possession of the Plaintiff.

4. At this stage, it is required to be noted that the Plaintiff had filed an application for interim injunction Exh.5 which application was rejected by the Trial Court by order dated 23.08.2010. In paragraph 9 of the said order, the Trial Court has specifically recorded that from the

material on record it is seen that it is not the Plaintiff but the Defendant who is in possession. The said order passed on the application for interim injunction was carried out in Appeal by the Plaintiff by filing Misc. Civil Appeal No.35 of 2010. The said Misc. Civil Appeal No.35 of 2010 dismissed by the Lower Appellate Court and in paragraphs 25 and 26 of its order the Lower Appellate Court in terms has observed that the Plaintiff is not in possession of the suit property and therefore, the question of the Defendant trying to dispossess the Plaintiff does not arise. Hence, at the interim stage the possession of the Plaintiff has been recognized by the Courts below. It is only at the hearing of the suit that since the Advocate for the Defendant did not cross-examine the Plaintiff and in view thereof the evidence of the Plaintiff went unchallenged that the finding has been recorded by the Trial Court that it is the Plaintiff who is in possession and resultantly, enjoined the Defendant from disturbing the plaintiff's possession.

5. The Defendant i.e. the Petitioner herein on acquiring the knowledge of the suit being decreed, filed the instant Appeal and since it was belated by 56 days filed an application for condonation of delay which application was allowed by the Lower Appellate Court and the delay was accordingly condoned. The Defendant thereafter applied for stay of the decree by filing the instant application Exh.5 which has been

rejected by the impugned order dated 25.09.2014. The Lower Appellate Court has rejected the said application on the ground that the Trial Court has arrived at conclusion that the Plaintiff is in possession. The Trial Court also seems to have been swayed by the fact that it is the Plaintiff who is in possession rather than the Defendant.

6. The Learned Counsel for the parties i.e. Mrs. Neeta Karnik for the Petitioner/original Plaintiff and Mr. B. C. Ponda for the Respondent /original Plaintiff sought to assert the case of their respective clients before this Court. The question that is posed is whether the Defendant is entitled to stay pending the Appeal. As indicated above, both the Courts below at the interlocutory stage have recorded a finding of fact that it is the Defendant who is in possession of the suit property and had accordingly rejected the application for temporary injunction filed by the Plaintiff. In my view, the Lower Appellate Court has erroneously proceeded on the basis that there is a finding recorded by the Trial Court that it is the Plaintiff who is in possession. The Lower Appellate Court failed to take into consideration the fact that the said finding is recorded on the basis of the evidence which has not undergone the test of cross-examination. As otherwise, at the prima-facie stage, both the Courts below have recorded a finding that it is the Defendant who is in possession. In my view, case for the grant of relief sought vide Exh.5 is made out. The

impugned order is therefore quashed and set aside. The application Exh.5 is allowed, resultantly, there would be stay of the decree passed by the Trial Court pending the hearing and final disposal of the Regular Civil Appeal No.19 of 2014. Since the Appeal lies in a narrow compass, in my view, it would be just and proper to direct the Lower Appellate Court to hear and decide the Appeal latest by 31.12.2015. The above Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs.

7. Needless to state that the Appeal would be decided on its own merits and in accordance with law. Pending the Appeal, status-quo in respect of the suit property to be maintained by both the parties.

[R.M. SAVANT, J]