

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

930 WRIT PETITION NO. 8174 OF 2015

ASHOK GOVIND SURYAWANSHI AND OTHERS
VERSUS
YASHWANT SOMA DHAKE AND OTHERS

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Advocate for Petitioners : V.J. Dixit, Sr. Counsel i/b. Patil Vijay Y.
Advocate for Respondents 4A to 4D : S.H. Panchal h/f. V.B. Garud
Advocate for Respondents 1, 2A to 2D : A.B. Kale h/f. A.P.
Mundhe
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CORAM : T.V. NALAWADE, J.
DATED : 2nd December, 2016.

ORDER :

1. The petition is filed to challenge the order made by the Executing Court on 3.7.2015 on Exh. 54 in Regular Darkhast No. 212/2000. By this order, the Executing Court has issued possession warrant in respect of immovable property against the judgment debtors, present petitioners under provision of Order 21, Rule 35 of Civil Procedure Code. Both the sides are heard.

2. The submissions made show that initially the property was purchased in the name of Laxman Mahajan, who was the Chief Promoter of Co-operative Housing Society. Co-operative Housing Society was not formed, but Mahajan first sold portion of 2400 Sq. Fts. to one Purshottam Laxman Wani under sale deed 27.1.1987 and then he sold remaining portion of 1500

Sq. Fts. to one Rajni Patil under sale deed dated 1.4.1987. It is the case of petitioners that under three sale deeds Wani sold the property to plaintiffs and the sale deeds were executed in 1987 and 1998. It is their case that Rajni Patil also sold the property to petitioners in 1998 and since then, they are in possession. It is their case that after obtaining necessary permission from Local Body constructions are made on this property.

3. It appears that Regular Civil Suit No. 219/1989 was filed by decree holders against the present petitioners and also the original vendor Laxman Mahajan for relief of declaration and injunction. The petitioners did not file written statement though they were served. Rajni Patil appeared in the matter and she contested the matter. The original vendor Mahajan did not contest as he had lost interest in the property as the property was sold to Wani and Rajni Patil by him. The suit was decided on 26.4.1993 and relief of declaration was given that vendor had no title to sell the property to defendants.

4. Rajni Patil filed independent proceeding to challenge the decision. Second Appeal filed by her is pending in this Court. However, this Court has not granted any relief in respect of the suit property and the execution of the decree is not stayed in the

second appeal. When the decree was given on 26.4.1993, present petitioners filed application for condonation of delay caused in filing application under Order 9, Rule 13 of Civil Procedure Code bearing No. 149/2000 before the Civil Court. This application was allowed and then the application filed under Order 9, Rule 13 of Civil Procedure Code for setting aside the said order came to be registered as Misc. Application No. 117/2007. First no interest was shown to prosecute the matter. The said application came to be dismissed on 13.1.2014. On 13.1.2014 itself for setting aside the order of dismissal for default, application was moved for the petitioners, but the application was rejected. It appears that another application was filed under provision of Order 9, Rule 9 of Civil Procedure Code as order was made on 13.1.2014 to dismiss the application filed under Order 9, Rule 13 of Civil Procedure Code. For that also, delay was caused and this application was filed along with the application for condonation of delay. The submissions made show that in May 2016, the Civil Court allowed the application filed for condonation of delay and now the proceeding which is filed for restoration of application filed under Order 9, Rule 13 is pending. However, in that proceeding no stay to the execution of decree is granted by the Civil Court.

5. As the decree was given in favour of the present respondents, they filed execution proceeding and on the aforesaid date, the possession warrant came to be issued. Learned Senior Counsel Shri. Dixit for petitioners submitted that there is the possibility of revival of application filed under Order 9, Rule 13 of Civil Procedure Code by the present petitioners and in that case, the petitioners may get some relief from Civil Court, the original court and till that time, the possession of the present petitioners can be protected. In view of the aforesaid circumstances, this Court holds that it is not desirable to stop the execution by this Court. The decree has apparently become final. Even second appeal filed by Rajni Patil is not admitted and she could not get stay to the execution of the decree given against her. Though the property of the present petitioners was purchased under different sale deeds, the fact remains that atleast as against present petitioners the decree has become final and it cannot be said that something like appeal or proceeding under Order 9, Rule 13 is pending against the said decree. In such case, it is always desirable that the Court having original jurisdiction or the Court considering substantive proceeding hears the matter and after considering the merits decides as to whether some relief in respect of decree needs to be given. In the proceeding like present one, when the decree

has become final, this Court is not expected to use the extraordinary power.

6. In the result, the petition stands dismissed. These observations are for the present purpose only and it is open to the Civil Court having original jurisdiction to consider the matter on its own merits.

[T.V. NALAWADE, J.]

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