

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5288 OF 2016**

Shobha Madhumilind Shiralkar	Petitioner
Vs	
Smt. Shailaja Ramchandra Shiralkar (D/H) and Ors	.. Respondents

Mr. Uday Warunjikar i/b Mr. Akshay A. Deshmukh, Advocate for Petitioner.

Mr. Anil Borkar, Advocate for Respondent no.2

CORAM : R.G.KETKAR,J.
DATE : 04/05/2016

PC:

1. Heard Mr. Uday Warunjikar, learned counsel for the petitioner and Mr. Anil Borkar, learned counsel for respondent no.2 at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged orders dated 8.8.2012 and 1.1.2016 passed by the learned Adhoc District Judge-1, Kolhapur. By order dated 8.8.2012, the learned District Judge directed the petitioner herein to deposit the amount of royalty as per the direction of this Court from the date of taking formal possession of the suit property, i.e. 28.5.2012. The petitioner is directed to deposit the amount of royalty on or before 5th day of each month and inform the Court receiver accordingly. By order dated 1.1.2016, the learned District Judge directed the Court Receiver, i.e. Nazir of the District Court, Kolhapur to issue notice to the

petitioner calling upon her to deposit the amount of royalty for the period from 28.5.2012 till 20.11.2015, till 11th day of the month. Upon her failure, to take further steps.

3. In support of this petition, Mr. Warunjikar submitted that by order dated 17.4.2012 passed by this Court in Civil Application No. 20 of 2011 in Second Appeal No. 55 of 2011, this Court appointed Nazir of the District Court, Kolhapur as Receiver of the said property with all the powers under Order 40, Rule 1 of C.P.C. The Nazir of the District Court, Kolhapur was directed to take formal possession of house property, namely Nishigandha Bungalow, CTS No. 692-B4, 'E' Ward, Sahupuri, Second Lane, Kolhapur (for short, suit property) on 25.4.2012 on production of copy of that order by legal representatives of respondent no.1. The petitioner was allowed to continue in physical possession subject to royalty that would be fixed. The respondents therein were permitted to file appropriate application for fixing royalty of the property in question.

4. Aggrieved by that order, the petitioner preferred Special Leave Petition before the Apex Court. By order dated 19.10.2012, the Apex Court stayed the operation of the order dated 17.4.2012 passed by this Court in Civil Application No.20 of 2011 in Second Appeal No. 55 of 2011, as also stayed the order dated 26.11.2010 passed by the learned Principal District Judge Kolhapur in Regular Civil Appeal No.280 of 1999. By order dated

17.4.2015, the Apex Court maintained the order dated 17.4.2012 passed in C.A. No. 20 of 2011 in S.A. No.55 of 2011 passed by this Court and requested the High Court to dispose of Second Appeal at an early date. It appears that in the meantime, in pursuance of the order dated 17.4.2012, upon application of respondent no.2, the Court Receiver fixed the royalty of Rs.15,000/- per month. While fixing the royalty, the Court Receiver considered the valuation report submitted by respondent no.2 as also valuation report submitted by Government approved valuer Shri Sharad B. Jagdale. Whereas respondent no.2 claimed royalty at the rate of Rs.45,000/- per month, considering the valuation report submitted by the Government approved valuer Shri Jagdale recommending Rs. 20,000/- royalty, the Court Receiver fixed royalty at the rate of Rs.15,000/- per month. The Court Receiver submitted his report to the learned District Judge-1, Kolhapur. On 8.8.2012, the learned District Judge passed order directing the petitioner to deposit royalty at the rate of 15,000/- per month with effect from 28.5.2012.

5. As noted earlier, on 19.10.2012, the Apex Court stayed the order dated 17.4.2012. On 17.4.2015, the Apex Court maintained the order dated 17.4.2012 passed by this Court. It appears that the petitioner took out Civil Application No.1105 of 2015 in the pending Second Appeal No.55 of 2011, inter alia,

praying for setting aside the order dated 8.8.2012 passed by the learned Adhoc District Judge on the application dated 27.7.2012 filed by the Court Receiver and further for direction to file a detailed report pursuant to the order dated 17.4.2012 to explain as to in what manner he has fixed the royalty without taking any direction from this Court. That application was heard before the learned Single Judge of this Court on 30.9.2015. At the request of the learned counsel for the applicant, matter was adjourned for two weeks to take instructions as to within how much time the applicant will deposit royalty fixed by the Nazir of the District Court, Kolhapur as per the order dated 17.4.2012. The said application is pending as of today.

6. As the petitioner did not deposit the amount of royalty as fixed by the Court Receiver, respondent no.2 filed application on 23.11.2015 for directing the petitioner to deposit royalty at the rate of Rs.15000/- per month with effect from 28.5.2012 till 20.11.2015. By the order dated 1.1.2016, the learned District Judge directed the Court Receiver to issue notice to the petitioner calling upon her to deposit the amount of royalty for the period 28.5.2012 till 20.11.2015 till 11th day of the month upon failure, to take further steps. It is against the orders dated 8.8.2012 and 1.1.2016 passed by the learned District Judge, the present petition is instituted.

7. In support of this petition, Mr. Warunjikar submitted that

the order dated 17.4.2012 passed by this Court was stayed by the Apex Court by order dated 19.10.2012. The Apex Court ultimately disposed of S.L.P. only on 17.4.2015. In other words, there was no occasion for the petitioner to deposit the amount of royalty as fixed by the Court receiver on the basis of the order dated 17.4.2012 till the Apex Court disposed of S.L.P. on 17.4.2015.

8. He further submitted that the impugned orders passed by the learned District Judge are vitiated as after fixation of royalty, the Nazir could not have submitted the report before the learned District Judge as no proceedings were pending in the District Court. Nazir/Court Receiver should have submitted the report before this Court and obtained further orders of this Court. He further submitted that neither his instructing Advocate nor he was aware of the order dated 30.9.2015 passed by this Court in C.A.No1105 of 2015 in S.A. No.55 of 2011. After obtaining telephonic instructions from the petitioner, he states that the amount comes to Rs. 6,60,000/- (@ Rs.15,000/- per month from 28.5.2012 till 30.4.2016). Out of that amount, without prejudice to the rights and contentions, the petitioner will deposit Rs. One Lac in this Court within two weeks from today. He further submitted that the petitioner is a widow and her financial position does not permit her to pay royalty at the rate of Rs.15,000/- per month. For all these reasons, he submitted that the impugned

orders deserve to be set aside.

9. On the other hand, Mr. Borkar submitted that present petition is wholly misconceived. He submitted that the petitioner had filed the Civil Application in the pending Second Appeal challenging the order dated 8.8.2012 passed by the learned Adhoc District Judge. That application was heard on 30.9.2015 by this Court. At the request of the petitioner's Advocate, it was adjourned for two weeks to enable him to take instructions as to within how much time the petitioner will deposit royalty fixed by the Nazir of the District Court, Kolhapur. The petitioner has suppressed that order by not annexing the same. He invited my attention to the application dated 23.11.2015 made by the 2nd respondent before the learned District Judge and in particular paragraph 8 thereof. In paragraph 8, reference to the order dated 30.9.2015 was specifically made. In other words, the petitioner was fully aware of passing of order by this Court in Civil Application No. 1105/2015. Instead of pursuing that application, the present petition is filed challenging the order dated 8.8.2012. He further submitted that in fact in terms of paragraph 5 of the order dated 17.4.2012 passed by this Court the petitioner is allowed to remain in possession subject to payment of royalty that would be fixed. In pursuance thereof, the Nazir of the District Court, Kolhapur has fixed royalty at the rate of Rs.15000/- per month. Petitioner has not challenged fixation of royalty and,

therefore, she was under obligation to pay the royalty as fixed by the Court Receiver. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. In my opinion, the present petition is wholly misconceived and is abuse of process of court as also abuse of process of law. As noted earlier in S.A. No.55 of 2011 petitioner took out Civil Application No.1105 of 2015 challenging the very order dated 8.8.2012 passed by the learned Adhoc District Judge. In view thereof, the petitioner could not have filed the present petition challenging the order dated 8.8.2012. The petitioner cannot be allowed to prosecute two parallel remedies challenging the same order. It is also relevant to note that the said order was passed on 8.8.2012 and the present petition is instituted on 18.2.2016, that too, without disclosing the passing of the order dated 30.9.2015 passed by this Court.

11. Mr. Warunjikar submitted that the learned District Judge was not justified in passing the impugned orders as he had no jurisdiction to pass any order. As noted earlier, the order dated 8.8.2012 passed by the learned District Judge is challenged by the petitioner in Civil Application No.1105 of 2015. If that be so, she is really speaking precluded from challenging that order in

the present petition. This is more so when the petitioner has not challenged the royalty fixed by the Court receiver till date. Not only the petitioner did not challenge fixation of royalty, she also did not pay the royalty, though she is in possession of the suit property. As she is in possession of the suit property, she is under obligation to pay the royalty. In any case, after order of the Apex Court dated 17.4.2015, she is liable to pay the royalty. In view thereof, in my opinion, no case is made out for invocation of powers under Article 227 of the Constitution of India and it is a fit case for imposing exemplary costs for suppressing the material fact as also on the ground that the petition is abuse of process of court as also abuse of process of law. Hence, Petition fails and the same is dismissed by imposing costs of Rs.25,000/- to be paid to the 2nd respondent within 4 weeks from today. If costs is not paid, the same shall be recovered as land revenue from the petitioner by the Collector, Kolhapur. In case the petitioner obtains suitable order from the higher Court, she shall forthwith communicate the order to the Collector, Kolhapur.

12. Let the authenticated copy of this order be transmitted to the Collector, Kolhapur.

(R.G.KETKAR, J.)