

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3057 OF 2016

Mr. Baburao Jinnapa Sarade
And Ors.

...Petitioners

Versus

Mr. Ravsaheb Jinnappa Sarade
And Ors.

...Respondents

....

Mr. Anil Palkar, Advocate for the Petitioners.

Mr. Tejpal Ingle a/w. Nikhil Pawar, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 29th NOVEMBER, 2016

P.C.

1. Heard Mr. Anil Palkar, learned Counsel for the petitioners and Mr. Tejpal Ingle, learned Counsel for the respondents, at length.

2. Rule. Mr. Ingle waives service. Having regard to the narrow controversy raised in the Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 23.10.2015 passed by the learned District Judge-5, Sangli

below Exhibit-7 in Regular Civil Appeal No.187/2015. By that order, the learned District Judge rejected the application made by the petitioners for stay of the execution of the judgment and decree dated 24.4.2015 passed by the learned Civil Judge, Junior Division, Tasgaon in Regular Civil Suit No.141/2011. By order dated 24.4.2015, the learned trial Judge decreed the suit and directed defendant No.1 to execute reconveyance deed in favour of the plaintiffs by accepting the mortgage money of Rs.15,000/- deposited by the plaintiffs in the Court within two months from the date of the order, failing which the plaintiffs will be entitled to get it executed through the Court. The learned trial Judge directed defendant No.1 to deliver possession of the suit property to the plaintiffs on execution of reconveyance deed, failing which the plaintiffs may get it through the Court.

4. In support of this Petition, Mr.Palkar invited my attention to paragraph-6 of the impugned order and submitted that without considering the pleadings and the evidence on record, the learned Judge has concluded the issue by observing that the petitioners have no meritorious case and rejected the application for stay. He submitted by rejecting application for stay, the appeal preferred by the petitioners is rendered

infructuous. He, therefore, submitted that the impugned order deserves to be set aside thereby allowing the application Exhibit-7 filed by the petitioners.

5. On the other hand, Mr. Ingle supported the impugned order. He submitted that in pursuance of the trial Court's order and after the application for stay was rejected, reconveyance deed is executed on 9.9.2016. He further submitted that Jinnappa had mortgaged the property to defendant No.2 Ganpati Salunkhe. During the lifetime of Jinnappa, defendant No.1 Baburao, son of Jinnappa, paid Rs.15,000/- to defendant No.2. Defendant No.2 executed registered assignment deed on 22.5.2003 in favour of defendant No.1. He invited my attention to the finding recorded by the learned District Judge in paragraph-6 to the following effect :

“In that circumstances, unless and until defendant No.1 Baburao pleaded and proved in defence that the mortgage money of Rs.15,000/- refunded to the mortgagee is out of only his self and separate income, he could not keep property in his own name alone and he could not keep property in his exclusive possession.”

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the suit instituted by the plaintiffs was decreed by the trial Court on 24.4.2015. Aggrieved by that decision, the defendants preferred substantive appeal under Section 96 of C.P.C. Pending appeal, they took out application Exhibit-7 for stay of the execution of the decree. The learned trial Judge directed defendant No.1 to execute the reconveyance deed in favour of the plaintiffs by accepting the mortgaged money of Rs.15,000/-. The learned trial Judge also directed defendant No.1 to deliver possession of the suit property to the plaintiffs on execution of reconveyance deed.

7. While rejecting the application, the learned District Judge observed that unless and until defendant No.1 Baburao pleaded and proved in defence that the mortgage money of Rs.15,000/- refunded to the mortgagee is out of only his self and separate income, he could not keep property in his own name alone and he could not keep property in his exclusive possession. The learned District Judge also held that there is no merit in the appeal preferred by the petitioners.

8. In my opinion the learned District Judge was not

justified in concluding the issue at an interlocutory stage. The learned District Judge has recorded finding, extracted hereinabove, without giving opportunity to the parties to substantiate their case based on pleadings and evidence.

9. Mr. Ingle submitted that the reconveyance deed is already executed on 9.9.2016 and the decree to that extent is also executed. Mr. Palkar submits that the petitioners are in possession and they have not handed over possession. Mr. Ingle submitted that having regard to the fact that the parties are senior citizens, the learned District Judge may be directed to dispose of the appeal in a time bound manner. In view thereof, the Petition is disposed of in following terms :

[I] Impugned order dated 23.10.2015 passed by the learned District Judge below Exhibit-7 in Regular Civil Appeal No.187/2015 is set aside. Application at Exhibit-7 is partly allowed.

[II] The direction given by the learned trial Judge to defendant No.1 to give possession is stayed subject to defendant No.1 neither creating third party interest nor parting with the possession.

- [III] As the reconveyance deed is already executed in favour of the plaintiffs, they will not create third party interest during pendency of the appeal.
- [IV] Hearing of Regular Civil Appeal No.187/2015 is expedited.
- [V] The proceedings of Regular Darkhast No.25/2015 are stayed pending the appeal.
- [VI] Liberty is reserved to the parties to file application for deciding the appeal in a time bound manner. If such an application is taken out, the learned District Judge will pass appropriate order keeping in mind the fact that some of the parties are senior citizens.
- [VII] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)