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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.5629/2017

Digambar Laxman Nikam & others.
...Petitioners...

Versus

Shobha Murlidhar Paithankar
and others.
...Respondents...

.....
Shri B.R. Sontakke Patil, Advocate for petitioners.
Shri S.A. Deshmukh, Advocate for respondent no.1.
.....

CORAM: M.S. SANKLECHA, J.

DATE: 03.05.2017

ORDER :

1] This petition challenges the order dated 7.4.2016 passed by the learned Ad Hoc District Judge, Jalna. The impugned order has rejected the petitioners' interim application in a pending appeal, seeking stay of the order dated 20.7.2016 passed by the trial Court.

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2] Undisputed facts, as stated by Mr.Sontakke Patil, the learned counsel for the petitioners, are as under:-

a] In 1980, a suit was filed by respondent nos.1 & 2 as plaintiffs against respondent nos.3,4 & 5 seeking specific performance of agreement of sale of subject property entered into between them.

b] In 1982, pending the above litigation, the petitioners purchased the subject property from respondent nos.3, 4 & 5.

c] In 1990, the suit filed by respondent nos.1 & 2 for specific performance in 1980 was decreed in their favour. Consequent to which, respondent nos.1 & 2 filed execution proceedings seeking to enjoy the fruits of the decree in their favour.

d] In April, 2016, the petitioners filed an application under Order 21 Rule 97 of the Code of Civil Procedure, in the above execution proceedings, stating that they are *bona-fide* purchasers for value and their possession should not be disturbed by respondent nos.1 & 2.

e] In July, 2016, the executing Court

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dismissed the objection filed by the petitioners.

f] Being aggrieved, the petitioners filed in August, 2016, an appeal to the appellate Court i.e. District Judge, Jalna, challenging the order dated 20.7.2016 of the executing Court and *ad interim* stay of the same was also granted.

g] On 7.4.2017, the appellate Court rejected the petitioners' application for interim stay of the order dated 20.7.2016, till disposal of the petitioners' appeal.

h] Being aggrieved by the impugned order dated 7.4.2017, the petitioners have approached this Court in its supervisory jurisdiction under Article 227 of the Constitution of India.

4] The impugned order records the fact that the petitioners have purchased the suit property in the year 1982 from respondent nos.3, 4 and 5 during the pendency of the suit bearing No.178/1980 filed by respondent nos.1 and 2 against respondent nos.3, 4 & 5. On the aforesaid admitted facts, at the interim stage, the Court placed reliance in the impugned order on Order 21 Rule 102 of the Code of Civil Procedure to conclude that the

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provisions of Rules 98 and 100 of the CPC will have no application in favour of a person who has purchased the property during pending litigation. In the above view, the interim relief sought for by the petitioners was rejected by the impugned order dated 7.4.2017.

5] Learned counsel for the petitioners submits that the impugned order should have determined the petitioners' rights in terms of Order 21 Rule 101 of the Code of Civil Procedure and not dismissed the application. In support, he relies upon the decision of the Calcutta High Court in *Smt.Santilata Paul v. Nanda Kishore Mukherjee* (**AIR 1981 Calcutta 219**) and of the Supreme Court in *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal & another* (**AIR 1997 SC 856**).

6] *Prima facie*, in view of Order 21 Rule 98(2) and Rule 102 of the Code of Civil Procedure, the view in the impugned order, at the interim stage, does not call for any interference. The above Rules exclude a purchaser of suit property in pending litigation for the benefit of resisting delivery of possession to decree holder. Admittedly, in this case, the petitioners purchased the subject property at a time when it was subject of

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litigation. In the decision of the Calcutta High Court in *Smt.Santilata Paul* (supra), it was held that when a question of title is raised by the opposite party / obstructionist, the Court must decide that question before allowing the application of the decree holder for ejectment. However, the aforesaid case is completely distinguishable as it was not a case where the obstructionist had purchased the property, pending litigation, as in this case. Therefore, the aforesaid decision would have no application to the present facts. Similarly, the Apex Court in *Brahmdeo Chaudhary* (supra) observed that it is not necessary that an obstructionist / stranger in possession of a property while resisting the claim of the decree holder must first lose his possession to the decree holder and only thereafter file an application under Order 21 Rule 99 of the Code of Civil Procedure to regain possession. This decision would also have no application to the facts of the present case for the reason that obstructionist / stranger in that case was not a person who had purchased the property during pending litigation and was seeking to deprive the decree holder the benefits of a decree

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obtained by him. In fact, as pointed out by Mr.Deshmukh, learned counsel for respondent no.1, the decision of the Apex Court in *Usha Sinha v. Dina Ram & others* (2008 (5) **Mh.L.J.**, 483) prima facie answers the issue in favour of respondents. The Apex Court in the above case has observed that the doctrine of *lis pendens* prohibits a party from dealing with a property which is subject of a suit. The Court further observed that the Code takes into account the ground reality and refuses to extend an helping hand to purchasers of property in respect of which litigation is pending. In the facts of that case, the Apex Court held that the High Court was not justified in granting stay of the execution proceedings in favour of a party who had purchased the property during the pending litigation.

7] In the above view, the refusal by the impugned order to stay the order of the Executing Court in the facts of the case does not warrant any interference under Article 227 of the Constitution of India.

8] Needless to state that at this stage, I am concerned only with the interim order passed by the appellate Court. Therefore, the observations made hereinabove

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should in no manner fetter the appellate Court in deciding the appeal on merits at the final hearing.

9] Accordingly, the writ petition is dismissed. No order as to costs.

(M.S. SANKLECHA, J.)