

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11085 OF 2016

Yadav S/o Tukaram Khade,
Age : 68 years, Occu.: Pensioner,
R/o. Sonar Galli, Akhada Balapur,
Tq. Kalamnuri and Dist. Hingoli

.. Petitioner

VS.

1. Smt. Kashibai W/o. Gyanba Bhavare
Age – 75 years, Occu – Household,
R/o. Akhada Balapur, Tq. Kalamnuri,
Dist. Hingoli
2. Smt. Gayabai W/o Narayan Patil,
Age – 71 years, Occu. Household,
R/o. Mahur, Tq. Mahur,
Dist. Nanded .. **[DELETED]**
3. Prayagabai W/o Sadashiv Kamble,
Age – 69 years, Occu – Household,
R/o Sawaleshwar, Tq. Umarkhed,
Dist. Yeotmal .. **[DELETED]**

**– Respondents 2 and 3 deleted
as per Court's order dated 09-03-2017 .. Respondents**

Mr. V.P. Kadam, Advocate for the petitioner
Mr. U.B. Bilolikar, Advocate for the respondent no.1

CORAM : SUNIL P. DESHMUKH, J.
DATE : 28-08-2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties by consent, finally.

2. The writ petition purports to pose a challenge to order dated 08-07-2015 upon an application exhibit 5 in regular civil appeal no. 47 of 2013, whereunder the petitioner has been directed to deposit an amount of Rs.3000/- per month from the date of filing of the suit till the date of said order within two weeks.

3. Regular civil suit no. 34 of 2011 had been filed by present respondent no.1 for recovery of possession of suit property having dimensions, as referred to in the plaint.

4. Various issues have been framed pursuant to the pleadings of parties, *inter-alia*; whether respondent no.1 is owner of property, whether present petitioner had purchased property from father of respondent no.1, whether willful default has been proved and whether despite notice, present petitioner has not paid the rent, is proved by the plaintiff and whether the suit is bad for non-joinder of necessary parties, whether suit property is really required by plaintiff.

5. Suit had been decreed directing delivery of possession to plaintiff by defendants 2 and 3, under judgment and decree dated 20-08-2013. As such, the matter is taken in appeal in regular civil

appeal no. 47 of 2013 by present petitioner - defendant no.1. While the appeal is pending for hearing, an application had been moved exhibit 5 seeking stay to the decree.

6. Appellate court had framed points for determination upon hearing exhibit 5 *viz.* whether appellant has made out *prima facie* case, whether balance of convenience lies in his favour, whether appellant would suffer irreparable loss. Appellate court observed that the petitioner has *prima facie* case and also that appellant - petitioner herein would suffer irreparable loss and also found balance of convenience in his favour.

7. While deciding as aforesaid, appellate court has observed that respondent no.1 claimed that the suit house had been rented to petitioner at the rate of Rs.3000/- per month for a period of 11 months in 2005 and had continued to pay rent upto 2008 and had defaulted such payment subsequently. Whereas, it is the case of the present petitioner - defendant no.1, that the suit house had been agreed to be purchased from father of respondent no.1 - plaintiff and some earnest amount had been paid, however, as father of respondent no.1 died, the sale deed could not come through. Further, it has been referred to that respondent no.1 may not be able to lay a legitimate claim to the property. Appellate court has

albeit observed that in respect of the agreement in issue, the present petitioner has not been able to prove the agreement of sale.

8. The appellate court, however, considered that the property is situated in Balapur, Taluka Kalamnuri and it is a valuable property. Till such time, the rights of the parties are decided to the disputed property, it would be desirable that stay to execution of decree be granted but while stay is required to be granted, a blanket stay may not be possible. As such, directed to pay Rs. 3000/- per month from the date of suit.

9. Learned counsel for the petitioner submits that the issues, as had been cast before trial court, although suggest that the property has been claimed to be rented out to the petitioner by respondent no.1, yet, it cannot be said that any credible material has been led to substantiate such a claim. He submits that he has been put in possession of the property by father of respondent no.1 under an agreement of sale. There is no question of demand of rent. While notice was issued by respondent no.1 for recovery of alleged rent for the period 2008-2009, the same had been issued in 2009, which had been denied by the petitioner. In the absence of any material being placed forth, the order is unsustainable. Besides, he submits that it is a onerous condition being placed on the petitioner,

as he is a pensioner and is not possessed of means to pay the huge amount, as is directed under the impugned order.

10. On the other hand, learned counsel Mr. Bilolikar submits that a just order has been passed. It is not a case that respondent no.1 has been allowed to withdraw the amount directed to be deposited. He submits that Rs.3000/- per month is not a big amount at Akhada Balapur which is a business place. As such, by condition under impugned order, balance is sought to be struck. He, therefore, submits not to dabble with the just order passed.

11. Having heard learned counsel for the parties as aforesaid, it appears that although, the suit had been filed referring to that the property had been rented out to the present petitioner, no claim towards arrears of rent or any compensation appears to have been prayed for.

12. Further, it is being referred to by petitioner that property is a house accommodation and is not a commercial place at Akhada Balapur and further that Rs.3000/- is a huge amount and similar property would not at all fetch rent at such high rate for residential accommodation in Akhada Balapur. He further submits that petitioner is a pensioner and amount being directed to be paid, is

onerous burden being cast on the petitioner which is outside paying capacity of the petitioner.

13. Demand is for the period 2008-2009 and there is no demand for subsequent period thereafter for money had been made hitherto, nor does it appear that in the suit, plaintiff claims any monetary relief. In the circumstances, a balance can be struck by modifying order of appellate court by directing the petitioner to deposit sum of Rs.36,000/- for the period, as demanded under the notice of 2009.

14. The amount of Rs.36,000/- be deposited by petitioner within a period of four (4) weeks from the date of receipt of writ of this court with the appellate court.

15. As such clause 2(a) of the impugned order stands modified, by directing the petitioner - defendant no.1 to deposit an amount of Rs.36,000/- instead of direction of payment of rent at the rate of Rs.3000/- per month from the date of suit till the date of the order i.e. 08-07-2015.

16. The impugned order accordingly stands modified. Hearing of Regular Civil Appeal be expedited and be disposed of as

early as possible, preferably within a period of six (6) months from date of receipt of writ of this court.

17. Rule is made absolute as aforesaid.

[SUNIL P. DESHMUKH]
JUDGE

arp/