

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.11991 OF 2015

Balasaheb s/o Gulabrao Salunke,
Aged 65 years, Occ. Pensioner & Agriculture,
R/o. Khadgaon, Tq. & Dist. Latur.
Now at – Flat No.102, Aseem Co-operative
houseing Society, Jayant Palkar Road,
Worli, Mumbai – 400030 = **PETITIONER**

VERSUS

- 1) Anil s/o Raosaheb Deshmukh,
Aged 55 years, Occ. Business,
R/o. Ambajogai, Dist. Beed.
Now at-Flat No.10, Ashutosh building,
Dahanukar Colony, Kotrud, Pune.
 - 2) Bapusaheb s/o Raosaheb Deshmukh
Aged 54 years, Occ. Business,
R/o Ambajogai, Dist. Beed.
Now at – 106/9, Parshuram Kutli,
Erandwane, Pune
 - 3) Balasaheb s/o Raosaheb Deshmukh,
Aged 51 years, Occ. Business,
R/o Ambajogai, Dist. Beed.
Now at 13-C, Flat No.3
Pashima Nagari, Kothrud, Pune
- = **RESPONDENTS**

Mr. S.S. Choudhary, Advocate for Petitioner;
Mr. V.V. Bhavtankar, Advocate for Respondent No.2.

CORAM : P.R.BORA, J.

DATE : 5th April, 2017.

ORAL JUDGMENT:

- 1) Heard. Rule. Rule made returnable

forthwith by consent of learned Counsel appearing for the parties.

2) Under which circumstances the execution of the decree can be stayed by invoking Order XXI Rule 29 of the Code of Civil Procedure, is the short question, to be determined in the present petition.

3) The present petitioner had filed Special Civil Suit No.57/2010 against the present respondents which has been decreed on 10th September, 2013. As per the decree so passed, the present respondents were directed to repay to the present petitioner, amount of Rs.37,94,140/- within the period of three months from the date of decree. The decree also specifies that the suit property shall be kept under the charge of Rs.37,94,140/- till recovery of the amount by the decree holder from the judgment debtors.

4) Since the order passed in the aforesaid

Special Civil Suit was not complied with, the petitioner initiated the Execution proceedings vide Regular Darkhast No.4/2015. In the said Regular Darkhast proceedings, the present respondents filed an application at Exhibit-30 invoking Order XXI Rule 29 of the Code of Civil Procedure (for short, CPC) and prayed for staying the execution proceedings till disposal of Regular Civil Suit No.73/2013.

5) It was the contention of the respondents in the aforesaid application that the petitioner has compelled his wife, who is the real sister of the respondents, to file a suit for partition and separate possession bearing Regular Civil Suit No.73/2013 in the court of Civil Judge, Junior Division, at Ambejogai. It was the further contention of the respondents that the suit property, which is the subject matter of Regular Civil Suit No.73/2013, is the same property, which has been attached for recovery of decreetal amount in Regular Darkhast No.4/2015. It was the

further contention of the respondents that the petitioner i.e. the decree holder, is deft.No.7 in the said suit and has filed an application in the said suit for his transposition as plaintiff No.2 in the said suit. In the backdrop of the aforesaid facts, invoking the provisions under Order XXI Rule 29 of the Code, the aforesaid application was filed at Exh.30 by the respondents. According to the respondents, since Regular Civil Suit No.73/2013 was pending between the petitioner/decreed holder and the Respondent -judgment debtors, the further proceedings in Regular Darkhast No.4/2015 were liable to be stayed. The application so filed was resisted by the decree holder/petitioner. However, the learned Civil Judge allowed the said application and thereby stayed the execution proceeding till disposal of the Regular Civil Suit No.73/2013 on condition that the judgment debtors shall furnish bank guarantee to the tune of decretal amount, i.e. Rs.37,94,140/- within one month from the date of the order.

6) Shri S.S.Choudhari, learned Counsel appearing for the petitioner, submitted that the impugned order is patently wrong. The learned Counsel submitted that having regard to the facts involved in the instant petition, the provisions under Order XXI Rule 29 of the Code would not apply. The learned counsel in support of his contention relied upon the judgment of the Hon'ble Apex Court in the case of Shaukat Hussain alias Ali Akram and Ors. Vs. Smt. Bhuneshwari Devi and Ors. – AIR 1973 SC 528. In view of the law laid down in the aforesaid judgment, the learned Counsel prayed for allowing the petition thereby setting aside the order dated 30th June, 2015 impugned in the present petition.

7) Shri Bhavthankar, learned Counsel for the respondents, supported the impugned order.

8) I have carefully considered the submissions advanced by the learned Counsel appearing for the respective parties. Since the

impugned order is passed under Order XXI Rule 29 of the Code, I deem it appropriate to reproduce the said provision, which reads thus, -

"29. Stay of execution pending suit between decree holder and judgment debtor.- Where a suit is pending in any court against the holder of a decree of such court or of a decree which is being executed by such court, on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided:

Provided that if the decree is one for payment of money, the court shall, if it grants stay without requiring security, record its reasons for so doing."

9) In the case of Shaukat Hussain (cited supra), one of the questions for consideration before the Hon'ble Supreme Court was, - In what

circumstances the execution of the decree can be stayed under Order XXI Rule 29 of the C.P.C." While deciding the said issue, the Hon'ble Apex Court in Para 6 of the said judgment, has held thus, -

"6. Order XXI, Civil Procedure Code deals generally with the execution of decrees and orders. That order is divided into several topics, each topic containing a number of rules. The first four topics cover rules 1 to 25 and the fifth topic, namely, stay of execution comprises 4 rules, namely, rules 26 to 29. A perusal of these rules will show that the first three rules i.e. rules 26 to 28 deal with the powers and duties of a court to which decree has been sent for execution. Under rule 26, that court can stay the execution of the decree transferred to it for execution for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction over the former for an order to stay execution or for any other order relating to the decree or execution which might have been made by the court of first instance or the appellate court. It will be seen, therefore, that under rule 26 the transferee court has a limited power to stay execution before it. Moreover, under sub-rule (2) if any property is seized by it in the course of execution, it may even order the restitution of the property pending the result of the application made by the judgment-debtor to the court of the first instance or to the appellate

court. Rule 27 says that any such restitution made under sub-rule (2) of rule 26 will not prevent the property of the judgment-debtor from being retaken in execution of the decree sent for execution. Rule 28 provides that any order of the court by which the decree was passed, in relation to the execution of such decree, shall be binding upon the court to which the decree was sent for execution. And then we have rule 29 which deals with a different situation. The rule is as follows :

" Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree-holder. That is a condition under which the court in which the suit is pending may stay the execution before it. If that was the only condition, Mr. Chagla would be right in his contention, because admittedly there was a proceeding in execution by the decree-holder against the judgment-debtor in the court of Munsif 1st Gaya and there was also a suit at the instance of the judgment-debtor against the decree holder in that court. But there is a snag in that rule. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against

the holder of a decree of such court. The words "such court" are important. "Such court" means in the context of that rule the court in which the suit is pending. In other words, the suit must be one not only pending in that court but also one against the holder of a decree of that court. That appears to be the plain meaning of the rule."

10) As has been observed by the Hon'ble Apex Court for invoking Order XXI Rule 29 of the Code, there should be simultaneously two proceedings in one court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the, instance of the judgment-debtor against the decree-holder. In the instant petition, Regular Civil Suit No.73/2013 is admittedly pending in the court other than the court wherein Regular Darkhast No.4/2015 is pending. Moreover, Regular Civil Suit No.73/2013 is not filed by the present respondents, i.e. judgment debtors in Regular Darkhast No.4/2015. Moreover it is also not in dispute that R.C.S.No. 73/2013 is not against the decree-holder of R.D.No.4/2015 and he is only a formal party to the said suit. Thus, none of the

requirements is satisfied so as to invoke the provisions under Order XXI Rule 29 of the Code. Regular Civil Suit No.73/2013 is filed by wife of the present petitioner against the present respondents seeking partition and separate possession of the ancestral property, wherein the petitioner – decree holder is a formal party.

11) The learned Civil Judge, Junior Division, while passing the impugned order, has failed in appreciating the facts, as aforesaid, and has also failed in understanding the import of the provision under Order XXI Rule 29 of the Code. The impugned order, therefore, cannot be sustained and deserves to be set aside.

12) For the reasons stated above, the impugned order is quashed and set aside. It would be however open for the present respondents to revive the prayer made by them, vide prayer clause (B), in the application submitted by them at Exh.30, since the learned Trial Court while

deciding the said application at Exh.30, has not considered the said prayer on merits.

13) Rule is made absolute in the aforesaid terms. The writ petition is disposed of accordingly.

(P.R.BORA)
JUDGE

bdv/