

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL (ST) NO.6709 OF 2017
WITH
CIVIL APPLICATION (ST) NO.6710 OF 2017

Smt. Annubai Mahitpati Gaikwad & Ors. ..Appellants.
V/s.
Krishna Daduy Sakpal & Ors. ..Respondents.

Mr.V.S.Talkute with Graham Francis for the Appellants and the Applicants.

Mr.Bhushan Walimbe for Respondent No.1.

Mr.Makrand Kale for Respondent Nos.2 to 11.

Coram : N.M.Jamdar, J.

Date : 2 May 2017

ORAL ORDER

Heard the learned counsel for the parties.

2. The Appellants have challenged the Judgment and Order dated 18 February 2017 passed by the learned District Judge,

Islampur in Regular Civil Appeal No.1/2016 and the Judgment and Order dated 4 November 2015 passed by the learned Civil Judge, Junior Division, Islampur in Regular Darkhast No. 170/2013.

2. The learned Civil Judge has rejected an application below Exhibit-34 in Regular Darkhast No.170/2013 wherein the Appellants had sought stay of the execution proceedings. The learned Civil Judge dismissed the application on the ground the decree having not been passed under Order 21 Rule 99, 100 and 101 of Code of Civil Procedure, 1908 and by a third party, it was not maintainable. In the appeal filed, the learned District Judge took a view that under the provisions of Order 21, a third party or a stranger cannot contest the execution. However, the learned District Judge held that as the order of the learned Civil Judge was not a decree and also the initial application was not under the provisions stated in the application, the appeal was not maintainable.

3. The learned counsel for the Appellants states that the Second Appeal has been incorrectly filed and it is not maintainable as it is held in the decision of the Apex Court in the case of *'Sameer Singh V/s. Abdul Rao* and sought leave to withdraw the appeal and continuation of the ad-interim order. The learned counsel for the Respondents submitted that fact that Second Appeal was not maintainable was known to the Appellants from the beginning as the decision of *Sameer Singh (supra)* was relied upon before the learned

¹ 2015(3) Mh. 1.j. 489

District Judge. He submitted that the decree of 1986 is yet not executed.

4. Be that as it may, since the Appellants states that the Second Appeal is not maintainable, it is not necessary to go further into the controversy. As far as continuation of the ad-interim order is concerned, it is strongly opposed. Even otherwise, there will be no execution proceedings for a period of some weeks in the trial Court in view of the ensuing summer vacation. Considering these facts, it is not necessary to continue the ad-interim relief.

5. It is open for the Appellants to take necessary steps as may be advised, if the Appellants chooses to do so.

6. The Second Appeal is accordingly disposed of. In view of the disposal of the Second Appeal, the Civil Application is also disposed of.

(N.M.Jamdar, J.)