

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

909 CIVIL APPLICATION NO.4657 OF 2018
IN

SECOND APPEAL NO.121 OF 2014
[BALAJI MALLIKARJUN ADE AND ANOTHER
VERSUS

NAGAMMABAI KASHINATH ADE AND OTHERS]

WITH

Heard.

2. Second Appeals need to be admitted on following substantial question of law :-

Whether the present respondents have better title than that of their predecessor - in - title, particularly when his title was upset in Regular Civil Suit No.286 of 1983 and other connected suits on 15th July, 1988?

3. Admit.

4. Learned Counsel Mr Barde waives service of notice of admission of appeals on behalf of respondent no.1.

3. In brief, it is the contention of learned counsel for the applicants that they were not heard before passing the order dated 08.06.2017. It is submitted that though the decree passed in favour of the applicants in R.C.S. no.287/1983 attained finality and not subject matter of challenge before this Court, still vide order dated 08.06.2017, Regular Darkhast No.65/1988 has been stayed. It is submitted that the decree passed in R.C.S. No.287/1983 is not subject matter of challenge in any appeals preferred/pending before this Court. In absence of challenge to decree passed in R.C.S. No.287/1983, no relief to stay the execution of R.D. No.65/1988 could have been claimed in appeals. It is further submitted that the order dated 08.06.2017 has been passed without giving opportunity of hearing to applicants. It is further submitted that the respondent no.1 has filed objection under Order XXI Rule 97 and 99 of the Code of Civil Procedure in R.D. No.65/1988. The Executing Court has proceeded to inquire into the objection

came to be passed. Because of the order passed to stay the proceeding in R.D. No.65/1988, the Executing Court is unable to proceed with the matter. It is submitted that against the order of the Executing Court, there is a remedy by way of an appeal available for an aggrieved party. In that view, the order dated 08.06.2017 passed to stay the execution of decree in R.C.S. No.287/1983 deserves to be vacated or in alternative needs to be modified.

4. The learned counsel for the appellants have no objection to modify the order dated 08.06.2017 and to vacate stay granted to execution of decree passed in R.C.S. No.287/1983 i.e. stay to R.D. no.65/1988.

5. Learned counsel for the respondent no.1 in Second Appeal Nos.120/2014 and 121/2014 supported the order dated 0

conceded that the applicants were not heard at the time of passing order dated 08.06.2017.

6. On due consideration of submissions advanced, I am of the view that the order dated 08.06.2017 deserves to be modified. It is admitted position that the challenge raised in appeals before this Court confines to decree passed in R.C.S. No.286/1983 leading to filing of R.D. No.65/1988. The judgment and decree passed in R.C.S. No.287/1983 leading to filing of execution proceedings registered as R.D. No.66/1988 is not subject mater of challenge before this Court. In absence of challenge to decree passed in R.C.S. No.287/1983, the stay to the execution of decree arising out of said proceedings is totally unwarranted. There is no dispute that the respondent no.1 has objected the execution of judgment and decree passed in R.C.S. No.287/1983 by raising the objection under Order XXI Rule 97 of

order passed by Executing Court the party affected have a remedy by way of appeal to challenge the order. In that view, the order dated 08.06.2017 deserves to be modified. I am therefore inclined to allow the applications and pass the following order :-

ORDER

(i) The order dated 8th June, 2017 passed by this Court (Coram : N.W. Sambre, J.) is modified and clause 6 of order dated 08.06.2017 is substituted as under:-

"Pending disposal of appeals, there shall be stay to the execution of R.D. No.66/1988 arising out of decree passed in R.C.S. No.286/1983."