

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

Civil Application No. 04487 of 2019
(In Second Appeal No. 0642 of 2016)

District : Aurangabad

Yadav Gangadhar Suryawanshi,
deceased through his L.R.,

Bhimabai Wd/o. Yadav Suryawanshi,
Age : 70 years,
Occupation : Nil,
R/o. Hatnoor, Tal. Kannad,
Dist. Aurangabad.

.. Applicant
(Original
plaintiff)

versus

Raibhan s/o. Gangadhar Suryawanshi,
Age : 68 years,
Occupation : Agriculture,
R/o. Balhegaon, Tal. Vaijapur,
Dist. Aurangabad
& others.

.. Non-applicants
(No.01 -
Original
defendant
no.01/Appellant
in SA)

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*Mr. Siddharth R. Deshpande, Advocate, for the
applicant.*

*Mr. Ameet R. Vaidya, Advocate, for non-applicant
no.01 [i.e. appellant in SA].*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 02ND MAY 2019

ORAL ORDER :

01. Present application has been filed for
vacating the interim relief granted in favour of

respondent no.01 on 01-10-2016 and continued from time to time.

02. The applicant is the original plaintiff who had filed Regular Civil Suit No. 49 of 1997 for partition, possession and mesne profits, which came to be decreed on 16-09-2011. It was held that she is entitled to her share from the suit properties from present non-applicants no.01 and 02. Non-applicant no.01 had preferred Regular Civil Appeal No. 188 of 2012 before District Court, Vaijapur. It came to be dismissed on 13-01-2016. The second appeal is pending for admission.

03. It is stated that the non-applicant no.01 is not diligent in prosecuting the second appeal and is delaying the second appeal by taking disadvantage of interim relief granted by this Court. It is stated, that by order dated 01-10-2016, this Court had directed that the possession of the applicant's share should not be handed over until further orders. One C.A. No. 3208 of 2017 has been filed for bringing the legal representatives of respondent no.2D on record. Non-applicant no.01 herein was directed to serve the proposed legal representatives by private mode and file affidavit within one week. It was also stated, that on failure to serve the respondents therein, interim relief would cease to operate. Non-applicant no.01 / original appellant has not complied with this

order and has not taken any steps so that C.A. No.3208 of 2017 would proceed. Therefore, as a corollary of the order passed by this Court, the interim relief deserves to be vacated.

04. It is also contended by the applicant, that she is issueless and staying alone at village Hatnoor, Taluka Kannad, Dist. Aurangabad. She has not been provided with shelter or any means of livelihood. She is undergoing treatment by Dr. Sandip Chhallani, Orthopaedic Surgeon at Kannad. She is doing labour work and she has attained 70 years of age; she is unable to work. Under such circumstance, she prays for direction to pay the amount of Rs. 15,000/- per quarter to the applicant from the non-applicant no.01 towards mesne profits.

05. Say has been filed in the form of affidavit in reply by non-applicant no.01. It is stated that he had issued notice to proposed legal representative no.2D-1 and it has returned with remark "Refused". He has then supplied copies for service of the notices to those proposed legal representatives, as directed by this Court. It is stated that the applicant has not made out a case for vacating the interim relief.

06. Heard both sides. Both the learned Advocates have made submissions in support of their

respective contentions.

07. By order dated 1-10-2016, this Court had granted interim relief in following words :-

" So far as possession is concerned, the same may not be handed over in execution proceedings until further orders."

Thereafter, it appears that the interim relief was continued. C.A. No.03208 of 2017 was filed for bringing legal representatives of respondent no.2D on record. On 21-03-2017, this Court has passed following order :-

"01. Issue notice to proposed L.Rs. of deceased respondent no.2-D returnable on 11-04-2017.

02. Interim relief to continue.

03. In addition to service through Court process, the applicant shall serve the respondents by any legally acceptable private mode of service and file affidavit along with tangible proof to that effect within a period of one week before the returnable date. In case of failure to serve the respondents privately and file affidavit as directed before the returnable date, interim relief as has been granted and continued would cease to operate."

08. Thus, it can be seen from the above said order, that the applicant therein was directed to serve the proposed legal representatives by legally permissible private mode of service and file affidavit to that effect. Conditional order was also passed, in case of failure to serve the respondent privately and it was stated that the interim relief granted and continued would cease to operate. It appears from the affidavit in reply that the notice was given to respondent no.2D-1 only. The affidavit in reply is silent as to what was done with respondent no.2D-2. It is also not stated that any affidavit as directed by this Court in order dated 21-03-2017 was ever filed in respect of respondent no.2D-2. Under such circumstance, in fact, automatic effect of the order had already taken place. It was not necessary for the applicant to file any application as such, because it was a conditional order and that condition was never fulfilled in its entirety. However, since some partial compliance has been made, it is now required to be seen as to whether partial compliance could save the present non-applicant no.01.

09. Perusal of the order dated 21-03-2017 would make it clear that the notices were required to be served to both the proposed legal representatives. Under such circumstance, half compliance of the said

order is not permitted. Hence, case is made out to vacate the interim relief granted by this Court on 01-10-2016.

10. Accordingly, prayer "B" of the present civil application is granted. Interim relief granted by this Court by order dated 01-10-2016 is hereby vacated.

11. At this stage, the relief claimed in prayer clause "C" cannot be considered. Place the matter for hearing of the said prayer, along with C.A. No.3208 of 2017, on 19th June 2019.

(Smt. Vibha Kankanwadi)
JUDGE

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