

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

Civil Application No. 11604 of 2018
(In Second Appeal No. 0771 of 2018)

District : Nanded

Shivdas s/o. Digambar Narsune,
Age : 45 years,
Occupation : Agriculture,
R/o. Barad, Taluka Mudkhed,
District Nanded.

.. Applicant
(Original
defendant
no.03)

versus

1. Prakash s/o. Shankarrao Sangewar,
Age : 39 years,
Occupation : Agriculture.

2. Sulochanabai w/o. Shankarrao
Sangewar,
Age : 57 years,
Occupation : Service.

Both R/o. Barad, Taluka Mudkhed,
District Nanded,

At present resident of
Sawargaon (P),
Taluka Mukhed, District Nanded.

.. Non-applicants
(Nos.01 & 02 -
Original
plaintiffs
&
Nos.03 & 04 -
Original
defendants
no.01 & 02)

3. Meerabai w/o. Shyamrao Nalwar,
Age : 32 years,
Occupation : Household,
R/o. Barad,
Taluka Mudkhed,
District Nanded.

4. Nandabai w/o. Shankarrao
Sangewar,
Age : 50 years,
Occupation : Household,
R/o. Barad,
Taluka Mudkhed,
District Nanded.

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Mr. V.D. Salunke, Advocate, for the applicant.

Non-applicants no.01 & 02 served (Absent).

*Mr. Ganesh P. Shinde, Advocate, for non-applicants
no.03 and 04.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 09TH JANUARY 2019

ORAL ORDER :

01. Heard learned Advocate Mr. V.D. Salune appearing for the applicant. Heard learned Advocate Mr. G.P. Shinde appearing for non-applicants no.03 and 04. None present for non-applicants no.01 and 02 though served.

02. By the present application, the applicant - original defendant no.03 is seeking stay to the judgment and decree in Regular Civil Suit No. 125 of 2006, passed by the learned Joint Civil Judge (J.D.), Nanded, on 31-07-2008.

03. The original plaintiff - present non-applicants no.01 and 02 filed Regular Civil Suit No. 125 of 2006 on 15-02-2006 before Civil Judge (Junior Division), Nanded. The said suit came to be decreed ex parte by 7th Joint Civil Judge (Junior Division), Nanded, on 31-07-2008. Present applicant, who was

the original defendant no.03, intended to challenge the said judgment and decree. However, there was delay and, therefore, he preferred application for condonation of delay bearing Misc. Application (RJE) No. 198 of 2008 before District Court, Nanded. The said application came to be dismissed in default on 16-08-2013. He had thereafter filed Misc. Civil Application No. 159 of 2013 for setting aside the order of dismissing in default his proceedings bearing Misc. Application (RJE) No. 198 of 2008. However, that application i.e. Misc. Civil Application No. 159 of 2013 was also dismissed in absence of the applicant on 21-06-2016. Thereafter again, he has filed Misc. R.J.E. No. 94 of 2016 on 19-07-2016 for setting aside the order of dismissing Misc. Civil Application No. 159 of 2013 in default.

04. The said application proceeded without say of the original plaintiffs - non-applicants no.01 and 02 therein and ex parte against original defendants no.01 and 02 / non-applicants no.03 and 04 therein. However, after hearing learned Advocate appearing for the applicant and non-applicants no.01 and 02, learned District Judge, Nanded, has rejected the said application on 21-06-2018. The said dismissal is challenged in the second appeal.

05. It is to be noted that the original plaintiffs had filed the suit for partition and

separate possession. It was contended that plaintiff no.02 was married to one Shankarrao and plaintiff no.01 is their son. Thereafter, Shankarrao had performed second marriage while his marriage with plaintiff no.01 was subsisting with defendant no.02. Defendant no.01 is the daughter of Shankarrao and defendant no.02. It was contended that the plaintiffs had prayed for partition and separate possession of the suit property in 1998. However, the request was refused and, therefore, they had filed Regular Civil Suit No. 451 of 1998 before Civil Court, Nanded. It came to be dismissed on 14-09-1999. It is also contended that during the pendency of that suit, Shankarrao had sold portion of suit property to present applicant - appellant on 23-03-1999. The suit proceeded ex parte against all the defendants and it came to be decreed by holding that plaintiffs no.01 and 02 have each 1/3rd share in the suit property. Now, substantial questions of law have been formulated by the appellant stating that when his Misc. R.J.E. No.94 of 2016 had proceeded without say of non-applicants no.01 & 02 and ex parte against other non-applicants, the said application ought to have been allowed by the learned District Judge. Vital rights of defendant no.03 were involved and they ought to have been considered properly. Applications earlier filed by the applicant came to be dismissed in default due to the absence of his advocate. There were reasons given by the applicant

for setting aside adverse orders. Taking into consideration all these aspects, definitely case is made out to grant stay to the execution of the judgment and decree passed in the Civil Suit.

06. Hence, the following order :-

(a) The application is allowed.

(b) The judgment and decree passed in Regular Civil Suit No. 125 of 2006, by Joint Civil Judge (Junior Division), Nanded, on 31-07-2008, is hereby stayed till hearing and final disposal of the Second Appeal.

(Smt. Vibha Kankanwadi)
JUDGE

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