

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 13505 OF 2018

Sarjerao Krishnarao Kadam

... Petitioner

V/s.

Uday Ramrao Thorat & Ors.

... Respondents

Mr. Tejpal Ingale I/b Mr. Nikhil Pawar for the Petitioner.
Mr. Shekhar Jagtap a/w Sairuchita Chowdhary I/b J. Shekhar & Co. for
Respondent Nos. 1 and 2.

**CORAM : M.S.SONAK, J.
DATE : 15TH APRIL, 2019**

:ORAL JUDGMENT:

1. Heard Mr. Ingale for the Petitioner and Mr. Jagtap for the Respondent.
2. Rule. Rule is made returnable forthwith with the consent and at the request of learned Counsel for the parties.
3. Challenge in this petition is to the order dated 06.12.2017 made by the Executing Court, operative portion of which reads as follows:

"ORDER

- 1 *Application is allowed.*
- 2 *The execution is hereby stayed till the hearing of second appeal bearing No. 316/2014 subject to the following*

condition:-

I) The JD shall deposit Rs.25,000/- as a security within 30 days of this order.

II) If JD failed to deposit security amount then this order will be vacate on next date of 30 days."

4. In this case, the Respondents/Judgment Debtors have instituted a Second Appeal No. 316 of 2014 before this Court impugning the Judgment and Decree of which the execution came to be applied for before the Executing Court. By order dated 12.01.2018, this Court very specifically, declined interim relief to the Respondents/Judgment Debtors.

5. Despite the aforesaid, the Executing Court, by the aforesaid impugned order has stayed the execution of the decree till the hearing of Second Appeal No. 316 of 2014 subject to certain conditions. For this purpose, the learned Executing Court has purported to rely upon the provisions in Order XXI Rule 26 and Order XXI Rule 29 of the C.P.C.

6. According to me, the impugned order is ex-facie unsustainable. Once, the Judgment Debtor applied for interim relief before this Court and such interim relief was declined by a speaking order dated 12.01.2018, there was no question of executing proceedings being stalled until the disposal of the Second Appeal. In any case, it is

possible when the impugned order was made, the said application is only pending and had not been declined by this Court. Order XXI Rule 26 contemplates grant of some reasonable time to the Judgment Debtor to seek a stay from the Appeal Court. Order XXI Rule 29 is strictly speaking inapplicable because in this case the Judgment Debtors have not instituted any separate suit.

7. In any case, taking into consideration the fact that this Court has specifically declined interim relief in the Second Appeal, the Judgment Debtor, cannot indirectly secure the same relief from the Executing Court. If this is permitted, then, the Judgment Debtors will secure indirectly, what, this Court has directly declined to them. The executing Court already exceeded jurisdiction in making the impugned order.

8. For the aforesaid reasons, the impugned order is set aside. The Respondent's application at Exhibit 41 is dismissed. The Executing Court is directed to proceed with the execution in accordance with law.

9. It is made clear that in case, Second Appeal instituted by the Judgment Debtors ultimately succeeds, the Judgment Debtors will perhaps entitled to seek restitution in terms of Section 144 of the C.P.C. If and when such occasion arises, the Executing Court can

always consider the same in accordance with law.

10. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

11. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)