

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3085 OF 2019

Shamrao Laxmanrao Sawant)
Age 72 years, Occ:Agriculture,)
r/o Nagewadi, Tal/District-Satara) ...**Applicant (Appellant)/**
Original Defendant No.1

V/s.

Waaman Laxman Sawant)
(Deceased through legal heirs))
1A. Smt.Sushila Waman Sawant)
(deceased))
)
1B. Rajendra Waman Sawant)
Age 56, Occ: Agriculture,)
Nagewadi, Taluka/District-Satara)
)
1C. Surekha Sunil Sapkal)
Age 48 years, Occ: Household,)
r/o Chandak, Taluka-Wai,)
District – Satara.)
)
1D. Smt. Anita Prakash Sawant)
Age 42 yrs, Occ :Household.)
)
1E. Kunal Prakash Sawant)
Age 23 years, Occ:Education,)
1D and 1E residing at Negewadi)
Taluka/District-Satara.)
)

- 1F.Karan Prakash Sawant)
 Age 18 years, Occ: Household)
 resident of Negewadi,)
 Taluka/District-Satara.)
)
- 1G. Chaya Chandrakant Pawar)
 Age 48 yrs, Occ : Household)
 residing at near Panchayat Samiti))
 office, Taluka-Koregaon,District-)
 Satara.)
)
- 1H. Sunita Balarama Wakhande)
 Age 44 yrs, Occ: Household)
 resident of Jarewadi,)
 Taluka-Koregaon, District-Satara.)
)
- 1J. Kumar Askash Dadaso Vichare)
 Age 18 yrs, Occ: Education,)
 C/o-Dadaso Vichare, Nandagiri,)
 Taluka-Koregaon, District-Satara.)
)
2. Sou [Sumita@Bali](#) Prakash Jagtap)
 Age 46 years, Occ: Household)
 resident of Suryawanshi Colony,)
 Daulatnagar, near Shanbag High)
 School Ground Satara, Taluka/)
 District-Satara.)
)
3. Sarjrao Arjun Sawant)
 Age 75 years, Occ: Agriculture)
 resident of Nagewadi,)
 Taluka/District-Satara.)
)
- 4.Shivaji Arjun Sawant)
 (deceased) legal heirs:)

4A. Manisha Chandrakant Mahamulkar	)
Age around 40 years, residing	)
at Mahamulkarwadi, at Post-Anewadi,	)
Taluka-Wai, District-Satara.	)
	)
4B. Ranjani Santosh Jadhav	)
(Chauhare)	)
Age about 38 years, Occ: farming	)
residing at Buhinj, Taluka-Wai	)
District-Satara.	)
	)
4C. Rajendra Shivaji Sawant	)
Age 45 yrs, residing at Nagewadi,	)
Taluka/District-Satara.	)
	)
4D. Mukund Shivaji Sawant	) Respondents/
Age 42 yrs, resident of Nagewadi,	) (Org.1A to 1J
Taluka/District-Satara	) Plaintiff
	) No.2 to 4 Org.
	) Defendants.

**Advocate Mr.Jyotishwar Bhosale a/w Advocate Pooja Yadav
i/b Expert Jurist LLP for the Petitioner.
Mr.Prabhanjan Gujar for Respondents 1-B to 1-H and 3.**

CORAM : A. M. BADAR, J.

DATE : 11TH NOVEMBER, 2019.

:JUDGMENT:

1. Rule. Heard finally.
2. This is the petition by the Appellant/original Defendant no.1 who suffered Decree of mandatory injunction directing him as well the co-defendants to remove all temporary and permanent construction erected over suit property including the area thereof under Gram Panchayat Property No.112.
3. Learned counsel appearing for the petitioner/appellant/original defendant no.1 argued that the petitioner has statutory right to file appeal challenging the Decree passed by the learned trial Court. Appeal filed by him challenging the Decree is already admitted for final hearing and as such, the learned Appellate Court ought not to have rejected his application for stay of Decree impugned in the Appeal.

4. Learned Counsel appearing for Respondents/original plaintiffs vehemently opposed this petition by contending that, encroachment is directed to be removed by mandatory injunction and the Petitioner ought to have complied with the said Decree. If he is not willing to comply the said Decree then he should be put to terms. Reliance is placed on the judgment of Supreme Court in the matter of ***Atma Ram Properties (P) Limited. Vs. Federal Motors (P) Limited, (2005)1 SCC 705.***

5. I have considered the submissions so advanced and perused the material placed on record. In a suit instituted by respondents/original plaintiffs, decree of mandatory injunction directing defendant Nos. 1 and 2 came to be passed. By the said Decree, they are directed to remove all temporary and permanent construction erected over suit property. It was contention of the Respondents/original Plaintiffs that they are having share in the suit property which is not partitioned and

Defendants have erected permanent construction on the said property and they are usurping the same.

6. Decree directing Respondents/original Defendants to remove temporary and permanent construction from the suit premises came to be challenged by the Petitioner/Defendant no.1 by filing an Appeal under Section 96 of the Civil Procedure Code. Said Appeal bearing No.95 of 2018 is reported to be admitted for final hearing. However, application for stay to the impugned Decree moved in the said Appeal filed by the Petitioner/original Defendant No.1 came to be rejected by the impugned Order dated 05.09.2018 by the learned Appellate Court with observation that the Petitioner/original Defendants as well as other Defendants have not produced any document showing their title over suit property. It is further observed that the learned trial court has held that Gram Panchayat Property No.112 is part of Gram Panchayat Property No.107.

7. Decree is for mandatory injunction directing Defendants to remove temporary and permanent structure on the suit premises. First Appeal challenging that Decree is admitted for final hearing. In this view of the matter, learned Appellate Court ought to have granted stay for preserving subject matter of this suit till disposal of First Appeal by putting the Petitioner/Appellant on same terms. In the matter of *Atma Ram* supra following are the observations of the Supreme Court.

18. That apart, it is to be noted that the appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the

successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co.(I)Ltd. Vs. Sahi Oretrans (P) Ltd.* This Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

8. In this view of the matter, the impugned order rejecting application for stay, moved by the Petitioner/original Defendant, can not be sustained. Interest of respondents/original Plaintiffs can be taken care of by directing them to deposit an

amount of Rs.1,500/- per month with lower Appellate Court, from the date of Decree till disposal of the Appeal, as the suit property is stated to be on main road in the vicinity of Satara city. Therefore, the order.

:ORDER:

- i) The Petition is allowed by making the Rule absolute.
- ii) Impugned order passed below Exhibit 7 in regular Civil Appeal No.95 of 2018, is quashed and set aside.
- iii) Application at Exhibit 7 in regular Civil Appeal No.95/2018 is allowed on condition that, the Petitioner/ original Defendant shall deposit the amount at the rate of Rs.1,500/- per month from the date of Decree and continue to deposit the amount at the said rate till disposal of Appeal, before learned lower Appellate Court.

(A. M. BADAR, J.)

