

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.1738 OF 2019

Raju s/o Nanaji Tonge and ors.

-vs-

Latari s/o Gosai Tonge and ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri M. P. Khajanchi, Advocate for petitioners.
Shri A. P. Satpute, Advocate for respondent No.2.
Shri P. R. Karekar, Advocate for respondent No.3.

CORAM : A.S.CHANDURKAR, J.

DATE : April 16, 2019

The petitioners are aggrieved by the order passed by the executing Court on the application below Exhibit-87 thereby refusing to stay the execution proceedings till R.C.A. No.5/2018 was decided by the appellate Court.

2. The facts giving rise to the present writ petition are that one Girijabai had filed S.C.S. No.5/1992 for possession of agricultural land bearing Survey No.492/1 on the basis of title. It was her case that she had purchased the aforesaid property for a consideration of Rs.31,000/- from one Namdeo on 05/01/1990. It was her further case that one Nanaji who was the defendant No.2 was cultivating the said field. Said Nanaji had claimed entitlement to

the aforesaid property in his own rights. That suit was decreed by the trial Court on 29/02/1996 and said Girijabai was held entitled to recover possession from both the defendants. That decree was sought to be executed after which the legal heirs of Nanaji filed R.C.S. No.131/2010 for a declaration that the sale-deed dated 05/01/1990 on the basis of which Girijabai was claiming title as well as the decree passed in S.C.S. No.5/1992 was not binding upon them. The trial Court dismissed the said suit on 06/12/2017. Being aggrieved the legal heirs of has had filed R.C.A. No.5/2018 which was pending before the appellate Court. In the execution proceedings filed by Girijabai being Regular Darkhast No.14/2007 the legal heirs of Nanaji filed an objection under provisions of Order XXI Rule 97 read with Rule 99 of the Code of Civil Procedure, 1908 (for short, the Code). They also filed an application below Exhibit-87 in the said proceedings praying that the execution proceedings be stayed till R.C.A. No.5/2018 filed by them was decided. By the impugned order the trial Court has rejected the said application.

3. Shri M. P. Khajanchi, learned counsel for the petitioner by referring to the provisions of Section 10 of the Code and the issues that were framed in R.C.S. No.131/2010 sought to urge that the

adjudication of the appeal challenging the judgment of the trial Court in R.C.S. No.131/2010 would have material bearing on the decree as passed in the suit filed by Girijabai. Since the petitioners have sought a declaration that the decree passed in S.C.S.No.5/1992 was not binding upon them and the appellate Court was seized of the said appeal, the executing Court ought to have stayed adjudication of the proceedings before it. He also referred to the issues that were framed by the executing Court and submitted that by applying provisions of Section 10 of the Code, the executing Court ought to have allowed the application below Exhibit-87.

4. On the other hand Shri P. R. Karekar, learned counsel for the respondent No.3-decree holder supported the impugned order. According to him provisions of Section 10 of the Code would not be applicable to execution proceedings. Referring to the provisions of Order XXI Rules 99 and 101 of the Code it was submitted that all questions relating to right, title or interest in the suit property had to be decided in these proceedings and not by a separate suit. Since the suit filed by the respondent No.3 was decreed, she was entitled to the fruits of that decree and the provisions of Section 144 of the Code were sufficient to safeguard the interests of the

petitioners. It was thus submitted that there was no reason to interfere with the impugned order.

5. Heard the learned counsel for the parties and perused the documents filed on record. The factual aspects referred to above are not in dispute. The respondent No.3 is the decree holder and the adjudication of S.C.S.No.5/1992 is presently in her favour. The declaration sought by the petitioners in the suit filed by them is the subject matter of adjudication by the appellate Court. The learned counsel for the respondent No.3 is justified in contending that the provisions of Section 10 of the Code would not be attracted especially when the decree passed in earlier suit is sought to be executed. In the appeal filed by the petitioners pursuant to dismissal of R.C.S.No.131/2010, the petitioners are free to take such steps as are permissible in law to safeguard their interests. There is no reason to await adjudication of R.C.A. No.5/2018 and in the absence of the decree passed in R.C.S. No.5/1992 being stayed, that decree is liable to be executed. There does not appear to be any justifiable or legal reason to grant the prayer made in Exhibit-87 at the behest of the petitioners herein. The provisions of Section 144(1) of the Code are sufficient to safeguard the interest of the petitioners in case they succeed in civil suit filed by

them finally.

Thus in absence of any jurisdictional error there is no reason to interfere with the impugned order.

The Writ Petition thus stands dismissed with no order as to costs.

JUDGE