

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.2622/2019

(NIMUBAI SITARAM DAROTE & OTHERS VERSUS VIKAS SANTOSHRAO KHEDIKAR & ANOTHER)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Shri Anand Deshpande, counsel for petitioners.
 Shri Apurv De, counsel for respondents.

CORAM : A.S. CHANDURKAR, J.

DATE : APRIL 26, 2019.

Heard finally in view of notice issued earlier.

The petitioners are aggrieved by the order dated 07.12.2018 passed by the Appellate Court rejecting the prayer made for staying the execution of the decree as passed by the trial Court during pendency of the application for condonation of delay.

The respondents are the original plaintiffs who had filed a suit for declaration and removal of encroachment said to be committed by the defendants. The said suit was decreed on 03.07.2017 and the defendants were directed to demolish the construction carried out over the plaintiffs' land. Thereafter this decree was sought to be executed. In the execution proceedings on 18.04.2018 warrant was directed to be so issued by the Executing Court. In those proceedings, the petitioners gave an undertaking on 12.06.2018 seeking time to take necessary steps for searching alternate accommodation. On that basis, the proceedings were adjourned and time of six days was granted on 12.06.2018. The petitioners thereafter filed an appeal alongwith an application for condonation of delay. The execution proceedings were stayed initially on 20.06.2018. However thereafter the Appellate Court by the impugned order vacated the order of stay and rejected the

applications below Exhibits 6 and 7 as filed. Hence, this writ petition.

Shri Anand Deshpande, learned counsel for the petitioners submitted that as the application for condonation of delay was pending with the appellate Court, the execution proceedings ought to have been stayed till that application was decided. Considering the nature of decree as passed, grave prejudice would be caused if the said execution proceedings were not stayed. As regards the undertaking given by the petitioners for grant of time, it was submitted that same would not preclude the filing of an appeal by the petitioners. It is thus submitted that by setting aside the impugned order, the execution of the decree be stayed till the application for condonation of delay is decided.

Shri Apurv De, learned counsel for the respondents opposed the aforesaid submissions. According to him after having given an undertaking before the Executing Court, it was not open for the petitioners to seek further time before the Appellate Court. That undertaking was not abided by and instead an appeal was filed alongwith the application for condonation of delay. Further the fact that such undertaking was given before the Executing Court was not disclosed by the petitioners before the Appellate Court or even in the present writ petition. On this count, the Appellate Court rightly refused to stay the execution of that decree and hence no interference with the impugned order was called for. He placed reliance on the decisions in *S.P. Chengalvaraya Naidu (Dead) by LR's Versus Jagannath (Dead) by LR's & Others* [(1994) 1 SCC 1] and submitted that the writ petition was liable to be dismissed especially when said fact was also not disclosed in the writ petition.

Heard the learned counsel for the parties and perused the documents on record. It can be seen that the suit as filed by the respondents has been decreed on 03.07.2017. In the execution proceedings, steps were taken by the respondents to execute the decree as passed. In those proceedings, the petitioners filed an application seeking time to take necessary steps below Exhibit 21. In that application, an undertaking was given that necessary arrangements would be made within a period of one month and hence time be granted. The Executing Court granted time of six days as per the order dated 12.06.2018. While passing the impugned order, it has been found by the Appellate Court that by filing application below Exhibit 21, the petitioners had sought time of one month and though the Appellate Court granted time of six days, the alleged construction had not been removed. Similarly, they had not approached the Court immediately after knowledge of the execution proceedings. On these two counts, the stay has been vacated.

The decree as passed is for removing the construction alleged to be made by the petitioners on the plaintiffs' property. The correctness of that decree has been challenged by the petitioners in the appeal which has been filed alongwith application for condonation of delay. It is a fact that by filing application below Exhibit 21, the petitioners had sought time to make alternate arrangement. At the same time, it cannot be lost sight of that by giving such undertaking for making alternate arrangements, the right to challenge the decree in question cannot be foreclosed. Reference in that regard can be made to the decision in *P.R. Deshpande Versus Maruti Balaram Haibatti* [AIR 1998 SC 2979]. Hence, merely by filing application below Exhibit 21 alongwith an undertaking cannot be a step that

would preclude the petitioners from challenging the decree of the trial Court. However, at the same time, the petitioners ought to have disclosed this fact in the said application before the Appellate Court. Said fact has not been stated before the Appellate Court or in the present writ petition. At the same time, it cannot be ignored is that the application below Exhibit 21 has been moved by the counsel for the judgment debtors. The signatures of the petitioners have not been appended thereto. Be that as it may, considering the fact that the decree is one for removal of construction as made it is found in the facts of the present case that till the application for condonation of delay is adjudicated by the Appellate Court, the execution of the impugned decree ought to remain stayed without prejudice to the rights of the parties. The same would however be subject to such final adjudication of the delay application by the Appellate Court.

In that view of the matter, the following order is passed:-

- I. The order dated 07.12.2018 passed below Exhibits 6 and 7 is set aside.
- II. The effect and operation of the judgment and decree dated 03.07.2017 passed by the trial Court in Regular Civil Suit No.1332 of 2014 is stayed till the application for condonation of delay is decided by the Appellate Court.
- III. The Appellate Court shall decide that application on its own merits after considering whether sufficient cause has been shown by the petitioners.

- IV. Any observation made in this order shall not weigh with the Appellate court while deciding the application for condonation of delay.
- V. The petitioners shall pay costs of Rupees Five Thousand to the respondents before the Appellate Court within a period of two weeks from today as the respondents were required to defend this writ petition.

With these directions and keeping the contentions as regards delay open, the Writ Petition is disposed of.

JUDGE

APTE